

RECEIVED
CITY CLERK
C & C OF HONOLULU

DEPARTMENT OF TRANSPORTATION SERVICES
CITY AND COUNTY OF HONOLULU

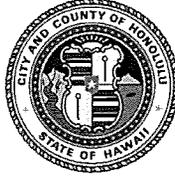
Item 2
Bill 9

650 SOUTH KING STREET, 3RD FLOOR
HONOLULU, HAWAII 96813

Phone: (808) 768-8305 • Fax: (808) 768-4730 • Internet: www.honolulu.gov

2013 APR -2 AM 9:30

KIRK CALDWELL
MAYOR



MICHAEL D. FORMBY
DIRECTOR

MARK N. GARRITY, AICP
DEPUTY DIRECTOR

March 27, 2013

The Honorable Breene Harimoto, Chair
and Members of the Committee on Transportation
Honolulu City Council
530 South King Street, Room 202
Honolulu, Hawaii 96813

RECEIVED
2013 MAR 21 P 1:58
CITY COUNCIL
HONOLULU, HAWAII

Dear Chair Harimoto and Councilmembers:

SUBJECT: Bill 9, Relating To The Transit Management
Services Contractor

The Department of Transportation Services (DTS) appreciates the opportunity to provide written comments on Bill 9, which requires DTS to “contract with a private, nonprofit corporation pursuant to Article 8 to manage, operate, and maintain the city bus system and the city special transit service on behalf of the city.” Award of the transit management services contract “shall be conducted in accordance with the Hawaii public procurement code, Chapter 103D, Hawaii Revised Statutes, as amended, and the administrative rules adopted hereunder.” The contract shall be for a fixed period not less than five (5) years or more than seven (7) years.

History of Bus Management, Operations and Maintenance

By way of history, upon information and belief, as far back as 1970, MTL, Inc., a private corporation with stock held by top management, served as the contractor to operate City and County of Honolulu (City) buses. Per an Interim Agreement dated February 25, 1971, MTL was to provide public bus service for the City. The agreement required MTL to manage and operate all of the buses owned or leased by the City. The City retained the right to develop service specifications as necessary to accommodate the public’s need for an efficient transit system. Via an agreement dated March 15, 1974 between the City, MTL, the Teamsters and Allied Workers Local 996, the parties agreed to Section 13(c) labor protections necessary for the City to receive Federal financial assistance.

In April 1975, the Hawaii Government Employees Association (HGEA) filed a Petition with the Hawaii Public Employment Relations Board (HPERB) to include MTL employees within the certification establishing HGEA as the exclusive bargaining representative of MTL. The United Public Workers (UPW) intervened in the proceedings contending certain MTL employees were governmental employees under UPW certification. The City, MTL and the Teamsters opposed the petition. In 1976, the Teamsters filed a petition before the NLRB seeking certification at the national level. The NLRB dismissed the petition noting that MTL was an

instrumentality of the City and exempt from the provisions of the NLRB. Subsequently, in November 1977, the HPERB ruled that although MTL was an instrumentality of the City and its employees were employed by the City in the operation of a public bus system, MTL employees were not "public employees" within the meaning of HRS Chapter 89. The HPERB dismissed the petition filed by the HGEA and UPW.

HGEA and UPW appealed to the Circuit Court of the First Circuit. The issue before the Court was whether MTL employees were "public employees" within the meaning of the Hawaii Public Employment Relations Act, Chapter 89, HRS. In interpreting Chapter 89, the Court held that the purpose and Legislative intent of Chapter 89 was to improve the condition of public workers through collective bargaining rights they had been previously denied. Recognizing that MTL employees already enjoyed collective bargaining rights and the benefits received by MTL employees were greater than those received by public workers under Chapter 89, the Circuit Court affirmed the HPERB decision in December 1981.

In the mid-1980's, MTL was involved in several high profile public corruption cases leading to indictments of management personnel. In the late 1980's, MTL was found by the Urban Mass Transportation Administration (UMTA), the predecessor of the Federal Transit Administration (FTA), to be a private company subject to competitive bidding requirements. The City was required to bid the MTL contract. Meanwhile, the UMTA decertified the City from receipt of federal funds, finding MTL was not an instrumentality of the City and the City was obliged to have procured the MTL contract competitively, which it had not.

In July 1989, the City put out a bid for the operation of the City buses. In November 1989, MTL Management Corporation submitted a bid to operate the City buses. The bid included six management positions at a cost of approximately \$1 million per year and a contract was awarded to MTL Management Corporation by the City.

In November 1990, voters approved a Charter Amendment providing for a Public Transit Authority (PTA) to be responsible for bus operations. In November 1990, Bill 91-27 was introduced and provided for the creation of the PTA. Per the Bill, the PTA was empowered to orchestrate the creation of a nonprofit firm that would be an independent contractor and instrumentality of the City. The Bill also provided that the "bus services management contractor" would have a Board of Directors with new Directors subject to approval of the City. According to the Ordinance, the new firm would have no purpose except operation of TheBus under contract to the City. Further, the firm's corporate bylaws were required to have provisions mandated by the City and the firm had to assume and honor the collective bargaining agreement with the Teamsters.

The objective of Bill 91-27 appears to have been to create an instrumentality governed by a Board of Directors subject to the City's control with whom the City could negotiate for management services of the bus system. In many ways, the firm's Board would actually function similar to a Commission in that the City would effectively control the Board, unlike the predecessor MTL which operated under the auspices of a private Board.

On April 30, 1991, Ordinance 91-27 passed and the City asked the UMTA to recognize the City Charter Amendment creating the PTA to administer and operate the City's bus system. The City also requested the UMTA reinstate the City's eligibility to receive federal funds.

On June 4, 1991, the UMTA advised the City that “[a]s a result of the City’s decision to perform bus management services through its own wholly owned and controlled instrumentality rather than through a third party contract, the Public Transit Authority’s contract with its corporation is not subject to competitive procurement requirements.” The UMTA also noted that its interest in the change in local administration of the City’s bus service stemmed from their “obligation as a Federal grantor agency to ensure that the grantee – here, the City and County of Honolulu – retains sufficient authority under State and local law to comply with all applicable Federal statutes and regulations, and take remedial actions in instances of non-compliance. In particular, in its capacity as a Federal grant recipient, the City must be able to certify its ability to carry out capital, planning, training, demonstration, and/or operating assistance projects by lease, contract, or otherwise.” The UMTA noted that under Ordinance 91-27, the PTA had to enter into a memorandum of agreement with the Director of the DTS which enabled DTS to “monitor the PTA’s compliance with Federal requirements and all terms of UMTA grant agreements.” Further, the UMTA recognized that DTS could take the necessary action to ensure such compliance. Based on the preceding, the UMTA found that the City would once again be eligible for Federal financial assistance once the memorandum of agreement with DTS was executed.

On December 16, 1991, Oahu Transit Services (OTS), a private nonprofit corporation, was formed to contract with the City through DTS to operate the bus system. Per Ordinance 91-27, OTS was considered an instrumentality of the City. Pursuant to this arrangement, the City remains eligible for Federal assistance. The City also affirmed and agreed to arrangements required by the Federal Secretary of Labor pursuant to Section 13(c).

OTS commenced operations on January 1, 1992. On April 1, 1992, the NLRB certified the Teamsters as the exclusive union for OTS. On April 8, 1992, the City, OTS and Teamsters reaffirmed Section 13(c).

In August 1992, the IRS recognized OTS as an instrumentality of the City and provided OTS an exemption from taxes and the need to file Federal tax returns.

In February 1992, the Pension Benefit Guaranty Corporation (PBGC) found that OTS was a governmental instrumentality and refunded PBGC premiums.

In October 1995, the State of Hawaii Attorney General found that OTS would be treated as an instrumentality of the City and was exempt from payment of payroll taxes for unemployment premiums. Premiums were refunded to the City.

In November 1996, voters approved a Charter amendment to abolish the PTA.

In November 1996, a new Ordinance 97-2 was approved by City Council and public transit was put back under DTS. The Ordinance also required OTS to run the Handi-van service and reaffirmed that OTS was an instrumentality of the City.

In 2003, OTS was found to be an instrumentality of the City and Federal FUTA contributions dating back to 1992 were refunded to the City.

Current Relationship Between DTS and OTS

The current relationship between OTS and the City stems from a Management and Operations Agreement executed in 1997, which provided for two Executive Personnel (employees) in return for an annual management fee of \$365,000.00 plus start up costs and reasonable reimbursable expenses.

There have been five (5) amendments to the Management and Operating Agreement since 1997, with the most recent fifth amendment executed in 2010. Per the amendments, OTS, through its agreement with DTS, remains limited to two Executive Personnel (employees) with a management fee of \$117,130 per quarter until such time as a new management agreement is executed.

Given the preceding history, while DTS understands the preference of Bill 9 to compete the contract for the management, operation and maintenance of the City bus system, it also recognizes that since 1991 the City's decision to perform bus management services through its own wholly owned and controlled instrumentality, the PTA and, more recently, DTS, the City has not been subject to competitive procurement requirements. Under this scenario, the FTA has recognized that its obligation as a Federal grantor agency to ensure that the grantee, the City and County of Honolulu, retains sufficient authority under State and local law to comply with all applicable Federal statutes and regulations, and take remedial actions in instances of non-compliance, has been met. For example, it is the City's responsibility to certify its ability to carry out capital, planning, training, demonstration, and/or operating assistance projects by lease, contract, or otherwise. The FTA also recognizes that DTS can take the necessary actions to ensure OTS' compliance with federal regulations. Based on these understandings, the FTA continues to find the City eligible for Federal financial assistance.

If the City were to compete the contract for the management, operation and maintenance of the City bus system, it would have to do so cognizant of the numerous federal requirements currently satisfied by DTS through its management agreement with OTS, as the City would not want to jeopardize its receipt of federal funds. The City should also understand that per the nature of the current management agreement in existence since 1997, the City contracts through DTS for two employees, who in turn stand up the organization necessary to manage the bus and paratransit systems as nonprofit operations for the City. In other words, if it is the City's desire to compete something different than the current contract for two employees, the City would need to draft a significantly different and foreseeably more complex Request for Proposal (RFP) which would itemize City bus and paratransit assets, fixed, real and personal. Simply putting the existing contract between DTS and OTS out for competitive bid will not guarantee cost savings to the City, as the largest component of current operations are collectively bargained for salaries.

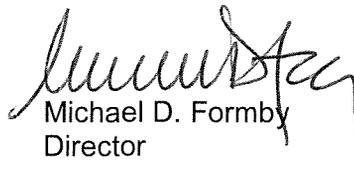
Finally, with the formation of the Honolulu Authority for Rapid Transit (HART) and the voters' commitment to rail, DTS is actively working with OTS management personnel to facilitate intermodal operations between rail and TheBus/Handi-van. Conceptually, through a deliberative process which is just now commencing, DTS will be studying and looking at eliminating operational and administrative redundancies between the two systems, marrying routes and fare structures, the end-result of which may be the management, operation and maintenance of the bus and the paratransit system joining the rail system under one authority.

The Honorable Breene Harimoto, Chair
March 27, 2013
Page 5

If this transition, aimed at reducing costs, eliminating redundancies and maximizing efficiencies, appears feasible and in the best interests of the City and its taxpaying residents, it is envisioned it would occur shortly prior to the opening of Phase I of the rail line, or calendar year 2017. Thus, given DTS' desire to study and recommend a management structure/organization that can best operate a multimodal rail-bus system that is cost-efficient, streamlined and operationally sound, competing the interim management, operation and maintenance of the bus system prior to this envisioned transition may not be in the best interest of the City.

The above information and considerations are provided in furtherance of informed discussions and DTS appreciates the opportunity to provide written testimony.

Very truly yours,



Michael D. Formby
Director

APPROVED:



Ember Lee Shinn
Managing Director