

OFFICE OF THE MAYOR
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL
MAYOR

EMBER LEE SHINN
MANAGING DIRECTOR
GEORGETTE T. DEEMER
DEPUTY MANAGING DIRECTOR

May 9, 2013

The Honorable Ann Kobayashi, Chair
and Members of the Committee on Budget
Honolulu City Council
530 South King Street, Room 202
Honolulu, Hawaii 96813

Dear Chair Kobayashi:

SUBJECT: Bill 11, Proposed CD2; Bill 12, Proposed CD2

This is to request that the proposed CD2 for Bills 11 and 12 delete any provisions which specify that the funds designated be encumbered by a certain date or require the use of a specific procurement process.

Bill 11

A number of grants in aid proposed by Councilmembers specify that the funds must be encumbered by a specific date. Those provisions over reach into the powers of the executive branch to allot funds as appropriate and within its discretion. We expect the operating budget for FY2014 to be challenging because of numerous demands on the general fund which we anticipate will arise after the budget is enacted. We expect the demands on the general fund for FY2015 to be even more challenging. In the absence of new revenue sources, we must rely on existing revenues to pay for operating expenses. It is critical that the administration be able to save where it can in order to shift funds to pay for expenses that are necessary to maintain essential and core services. We ask the Council to give itself the flexibility to make adjustments in FY2014 should it be necessary to open up the budget or to allow general funds not used for essential services to lapse in order to provide the resources for FY2015.

Bill 12

Similarly, projects added by Councilmembers to the Capital Improvement budget contain language specifying that funds must be encumbered by a certain date and that a certain procurement process be used. Again, this type of provision over reaches into the powers of the executive branch to allot funds as appropriate and to procure construction contracts consistent with the State Procurement Code.

A copy of a legal analysis addressing the points above is attached for your review. Your consideration of this request is appreciated.

Very truly yours,

A handwritten signature in black ink, appearing to read "E. Shinn".

Ember Lee Shinn
Managing Director

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CITY CLERK
C & C OF HONOLULU
2013 MAY -9 AM 8:52

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
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KIRK CALDWELL
MAYOR



DONNA Y. L. LEONG
CORPORATION COUNSEL

May 9, 2013

MEMORANDUM

TO: THE HONORABLE KIRK CALDWELL, MAYOR

FROM: AMY R. KONDO, DEPUTY CORPORATION COUNSEL

SUBJECT: BILL 11 (2013), CD1 RELATING TO THE EXECUTIVE OPERATING BUDGET AND PROGRAM FOR THE FISCAL YEAR JULY 1, 2013 TO JUNE 30, 2014

This memorandum is issued in response to your recent request for an opinion regarding certain legal issues relating to Bill 11 (2013) CD1, Relating to the Executive Operating Budget and Program for the Fiscal Year July 1, 2013 to June 30, 2014 which passed second reading by the City Council on April 17, 2013 and is presently scheduled for further hearing before the Budget Committee on May 9, 2013.

I. Provisos Regarding Encumbering of Grant Funds or Current Expense Appropriations

We note that there are several proposed amendments for a CD2 version of Bill 11 that provide deadlines for encumbering grant funds and current expense funds appropriated to the Department of Community Services ("DCS"). These provisos are included on pages 6 and 12 for grant funds and on pages 10 and 14 for current expense appropriations in Council Chair Ernest Martin's proposed CD2 amendments. For example, on page 6 of the proposed CD2 amendments, the proviso for the appropriation to the Office of Special Projects is proposed to read in part:

At least \$3,500,000 out of current expenses shall be appropriated for various grants to private non-profit and/or community based organizations in the following amounts and shall be encumbered by no later than September 1, 2013. However, in the event that the department determines that these organizations are incapable of providing the services specified below the department may issue a Request for Proposal for these purposes, but under no circumstances shall these funds shall be appropriated no later than December 1, 2013....

We have identified a legal issue regarding the imposition of deadlines on the encumbering of these appropriations which involve a violation of the well-established doctrine of separation of powers between the legislative and executive branches of our City government.

II. Charter Violation of Separation of Powers

The proviso language which imposes encumbrance deadlines on grant awards and current expense appropriations infringes upon the principle of separation of powers inherent in the Revised Charter of the City and County of Honolulu 1973 (2000 Edition) ("RCH" or "Charter") and conflicts with the specific Charter authority of the executive branch for the implementation of an enacted budget ordinance. The Charter establishes a definite separation of power in our City governance between the legislative branch represented by the Council and the executive branch headed by the Mayor. Each branch is coordinate with the other and neither may exercise the power vested in the other. The recognition of our Charter scheme of separation of powers is articulated in City Council v. Fasi, 52 Haw. 3, 467 P.2d 575 (1970).

In the Fasi case, the Court held that a City Council resolution requiring the director of finance to offer the Queen's Surf property at a public auction as a restaurant and night club concession, was not binding upon the directors of the departments of finance and parks and recreation because the resolution provided for an exercise of power inconsistent with the principle of separation of powers. The Court referred to the Charter duties of the finance director to award concessions and the duties of the parks director to plan, design, control, maintain and operate all City parks and recreational grounds, facilities and programs.

The Hawaii Supreme Court stated in Fasi as follows, at 52 Haw. 5:

The charter has as its basic scheme a clear and definite separation of the legislative power and the executive power of the city and county, vesting the former in the legislative branch represented by the council and the latter in the executive branch headed by the mayor. Under the separation of powers so provided, each branch is coordinate with the other, and neither may exercise the power vested in the other.

Here, the prescribing of encumbrance deadlines on grant awards and current expense appropriations in the proposed budget provisos infringes upon the Charter duties of the DCS Director as set forth in RCH Chapter 3, Department of Community Services, to develop and administer projects, programs and plans of action for human resources, human services and housing programs. It is also inconsistent with RCH Section 9-106,

The Honorable Kirk Caldwell
May 9, 2013
Page 3

Administration and Enforcement of the Budget Ordinances, Subsection 9-106.2(a), which provides that executive agencies “authorized to make expenditures under the executive operating budget ordinance may proceed without other authority from the council to incur obligations or make expenditures for proper purpose to the extent that the moneys are available.” Accordingly, we recommend that the proposed proviso language specifying encumbrance deadlines for these grant and current expense appropriations be deleted.

III. Clarification of Further Proviso Language

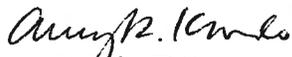
We also note that the proviso language on page 6, referred to above, provides that in the event that DCS determines that the listed grantees are incapable of providing the specified services, DCS may issue a Request for Proposal for these purposes, but “under no circumstances shall these funds be appropriated no later than December 1, 2013....” There is similar language on page 12 for the current expense appropriation for Community Based Development. The term “appropriated” in these provisos is not appropriate since no further appropriations can be made after adoption of the budget without a supplemental budget ordinance. Perhaps the term “encumbered” or “awarded” was intended instead. If so, however, for the reasons stated above, our analysis would similarly be that such a deadline should be deleted. Additionally, the second “shall” and the second “no” in those sentences which appear in the phrases, “but under no circumstances shall these funds shall be appropriated no later than December 1, 2013,” appear to be unnecessary.

IV. Conclusion

Based on the Charter principle of separation of powers, we recommend that the proposed budget proviso amendments which impose deadlines for encumbrance of the grant funds and current expense appropriations to DCS, not be adopted.

Should you have any questions regarding this matter, please contact the undersigned.

Very truly yours,


AMY R. KONDO
Deputy Corporation Counsel

APPROVED:


DONNA Y. L. LEONG
Corporation Counsel

ARK:li

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KIRK CALDWELL
MAYOR



DONNA Y. L. LEONG
CORPORATION COUNSEL

May 9, 2013

MEMORANDUM

TO: THE HONORABLE KIRK CALDWELL, MAYOR

FROM: AMY R. KONDO, DEPUTY CORPORATION COUNSEL

SUBJECT: BILL 12 (2013), CD1 RELATING TO THE EXECUTIVE CAPITAL BUDGET AND PROGRAM FOR THE FISCAL YEAR JULY 1, 2013 TO JUNE 30, 2014

This memorandum is issued in response to your recent request for an opinion regarding certain legal issues relating to Bill 12 (2013) CD1, Relating to the Executive Capital Budget and Program for the Fiscal Year July 1, 2013 to June 30, 2014 which passed second reading by the City Council on April 17, 2013 and is presently scheduled for further hearing before the Budget Committee on May 9, 2013.

I. Haleiwa Regional Park Canoe Halau

We note that an amendment to Bill 12, CD1 is proposed on page 7 of Council Chair Ernest Martin's proposed CD2 amendments regarding the appropriation for the plan, design and construction of a canoe halau at Haleiwa Regional Park. In part, the proposed amendment adds language specifying that the appropriation is for a design-build contract. We have identified a legal issue regarding the requirement that the appropriation be expended through the design-build method of contracting.

II. Procurement Code Requirements

The Hawaii Public Procurement Code ("Procurement Code") set forth in Hawaii Revised Statutes ("HRS"), Chapter 103D, provides that it is the duty of the Chief Procurement Officer ("CPO") to prepare and issue specifications for the procurement of government contracts. HRS Section 103D-203, Chief procurement officers, designates the respective finance directors of the several counties of the State, as the CPO for each respective county. Thus, the City's Director of Budget and Fiscal Services serves as the City's CPO, and pursuant to HRS Section 103D-402, Duties of the chief procurement

The Honorable Kirk Caldwell
May 9, 2013
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officer, has the responsibility to “prepare, issue, revise, maintain, and monitor the use of specifications for goods, services, and construction required by” the City.

Based upon the statutory authority of the City’s CPO to prepare and issue specifications for the City’s construction contracts, it is inappropriate for Council’s proposed amendment to specify the particular method of procurement as “design-build.” Under the applicable Hawaii Administrative Rule Section 3-122-11, the CPO may obtain the assistance of the using agency to prepare the specifications and determine the method of solicitation, which agency in this case would likely be the Department of Design and Construction and/or the Department of Parks and Recreation.

This analysis is consistent with the letter issued on July 15, 2008 by the State Procurement Office (“SPO”) to Councilmember Gary Okino in response to the Councilmember’s inquiry to the SPO on a similar issue prompted by the Council’s enactment of Ord. No. 07-001 and then-pending Reso. No. 08-51. *See* Misc. Comm 1544 (2008) attached hereto. In his letter, the SPO Administrator Aaron Fujioka determined that the City’s legislative branch cannot impose a requirement that the City’s executive branch obtain the City Council’s prior review and approval of the contract specifications for the City’s mass transit project, before the executive branch can issue a solicitation for the project. The City Council has no authority under the Procurement Code to impose such requirements since the CPO cannot delegate the CPO’s executive branch authority beyond the executive branch to the legislative branch.

Thus, it would similarly not be within the Council’s authority to require that the specifications for the construction contract for the Haleiwa Regional Park canoe halau include design-build as the particular method of procurement. Accordingly, we recommend that the language, “pursuant to design-build contract” be deleted from the proposed proviso.

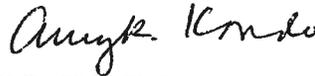
III. Conclusion

Based on the provisions of the Procurement Code which vests statutory authority in the City’s CPO to prepare and issue specifications for procurement of the City’s construction contracts, we recommend that the proposed budget proviso amendment language which specifies the design-build method for the Haleiwa Regional Park canoe halau, not be adopted.

The Honorable Kirk Caldwell
May 9, 2013
Page 3

Should you have any questions regarding this matter, please contact the undersigned.

Very truly yours,



AMY R. KONDO
Deputy Corporation Counsel

APPROVED:



DONNA Y. L. LEONG
Corporation Counsel

ARK:li

Attachment

LINDA LINGLE
GOVERNOR

AARON S. FUJIOKA
ADMINISTRATOR



STATE OF HAWAII
STATE PROCUREMENT OFFICE
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PROCUREMENT POLICY BOARD
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LESLIE S. CHENEY
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KEITH T. MATSUMOTO
RUSS K. SAITO
PAMELA A. TORRES

July 15, 2008

SPO 09-0011

The Honorable Gary H. Okino
Councilmember
City Council
City & County of Honolulu
Honolulu, Hawaii 96813-3066

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CITY CLERK
HONOLULU, HAWAII

Dear Councilmember Okino:

Upon review of your July 2, 2008 memo, the State Procurement Office's (SPO) reply is in the negative. The following statutory references are included as the basis for this determination:

- HRS §103D-203 specifies the 20 chief procurement officers (CPO) for their respective jurisdictions;
- HRS §103D-205 details the authority and duties of each CPO for their respective jurisdictions;
- HRS §103D-207 centralization of procurement authority resides with each CPO; all rights, powers, duties, and authority relating to the procurement of goods, services, and construction, are transferred to the respective CPOs;
- HRS § 103D-208 authorizes the CPO to delegate the CPO's authority to any department, agency, or official within their respective jurisdiction; and
- HRS §103D-402 authorizes each CPO to prepare and issue the use of specifications.

The CPO for each jurisdiction is ultimately responsible for all aspects of the procurements of the CPO's respective jurisdiction, and any written delegation of procurement authority is a deliberative process to ensure designees are fully cognizant of their responsibilities.

Based on the assumptions of your July 2, 2008 memo that for purposes of this question: (1) the powers and duties for contracting for the City's mass transit project rests with the Executive Branch of the City and County of Honolulu; and (2) the City Department of Transportation is the "using agency" for the project as defined in HRS § 103D-104; and the above statutory references, the SPO's determination is as follows. The CPO of the Executive Branch of the City cannot delegate her authority for the mass transit project to the Legislative Branch of the City because the Legislative Branch is not within the Executive Branch CPO's jurisdiction. And without any such written delegation of authority from the Executive Branch CPO to the

MISC. COM. 1544

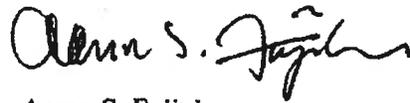
The Honorable Gary H. Okino
July 15, 2008
Page 2 of 2

SPO 09-0011

Legislative Branch CPO, the Legislative Branch cannot intrude in the Executive Branch's procurement of the mass transit project, including, by imposing the requirement that the Executive Branch obtain the City Council's prior review and approval of the contract specifications for the mass transit project, before the Executive Branch can issue a solicitation for the project. Accordingly, the City Council has no authority under the State Procurement Code to impose such requirements.

Should you have any further concerns on this matter, please call me at 587-4700.

Sincerely,

A handwritten signature in black ink, appearing to read "Aaron S. Fujioka". The signature is fluid and cursive, with the first name "Aaron" being the most prominent.

Aaron S. Fujioka