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January 18, 2013

MEMORANDUM

TO: Aaron S. Fujioka
Chief Procurement Officer

THROUGH: David M. Louie *DL*
Attorney General *DL*

THROUGH: Donna H. Kalama *DK*
Supervising Deputy Attorney General

FROM: Laura Y. Kim *LK*
Deputy Attorney General

SUBJECT: Request for Approval to Exempt Hiring of Special Deputy Attorney
General Services from HRS Chapter 103D

We respectfully request an exemption from the Hawaii Procurement Code for the purpose of selecting and hiring special deputy attorneys general services to represent the State of Hawaii, Department of Transportation (DOT) in a threatened criminal case by the United States Department of Justice (DOJ).

On December 20, 2012, the DOJ notified the DOT of a multi-year investigation of DOT lights that are allegedly causing unlawful take of protected bird, turtle and moth species under the Migratory Bird Treaty Act (MBTA) and the Endangered Species Act (ESA). Although counsel for DOJ stated that the investigation is statewide, the priority is on Oahu where DOJ claims a considerable number of wedge-tailed shearwaters, which are protected by the MBTA, have been supposedly injured by DOT lights. DOJ stated that the DOT has the option of either entering into a plea agreement with the United States or face a criminal trial. DOJ wants to schedule a follow-up meeting in January 2013.

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The MBTA is a complex statute, the violation of which results in criminal penalties, including imprisonment and the imposition of substantial fines. In 2010, the DOJ successfully prosecuted the County of Kauai and the Kauai Island Utility Coop for violating the MBTA. The prosecutions resulted in plea agreements and both defendants being placed under federal probation.

We have completed interviews with several individuals from established national and local law firms using recommendations from the National Association of Attorneys General. Final selection was based on depth and scope of experience and expertise with MBTA and negotiations and trial experience with or against the DOJ, the candidate's proposed strategy, and proposed fees. The selected law firm, Bingham McCutchen LLP, has proposed a flat fee of \$28,000 to conduct legal research on the constitutional defenses available to the State and to meet with the DOJ prior to indictment. If the DOJ should file an indictment or seek civil penalties, Bingham proposes a blended rate of \$695/hour for a team of up to six attorneys, as needed. The Department of the Attorney General would monitor the levels of attorneys necessary to make sure that overall fees are reasonable. The DOT is able to initially fund the contract at \$150,000, with the understanding that should there be an indictment and the case proceed to trial additional funding will be necessary and the contract amended accordingly.

Time is of the essence. The DOT just learned of the potential indictments in December 2012. It is imperative that the DOT have counsel available to advise and strategize and assist in negotiations and discussions with DOJ before any indictments are issued. The type of legal expertise required is unique, as few attorneys in the nation have experience with the MBTA. The Attorney General does not develop a list to procure the services of criminal defense attorneys under 103D-304, HRS, as generally the State is immune from criminal liability. Further, the next meeting with DOJ that could result in negotiations or criminal indictments are imminent making publication of a notice for statements of qualifications and expressions of interest from attorneys for this narrow subject matter expertise impracticable and not in the State's best interest.

Please direct questions to Laura Y. Kim at 587-2992. Thank you.

Attachments