

TAX REVIEW COMMISSION

MINUTES OF THE FOURTH MEETING OF THE
TAX REVIEW COMMISSION
HELD AT 830 PUNCHBOWL STREET
DEPARTMENT OF LABOR & INDUSTRIAL RELATIONS ROOMS 310-313
IN THE CITY & COUNTY OF HONOLULU
STATE OF HAWAII, ON THURSDAY, SEPTEMBER 29, 2011 AT 8:30 A.M.

The members of the Tax Review Commission (TRC) met at the Department of Labor & Industrial Relations Conference Rooms, in the City and County of Honolulu, State of Hawaii, on Thursday, September 29, 2011.

Members Present: Randall Y. Iwase, Chair
Mitchell A. Imanaka, Vice-Chair
Roy K. Amemiya, Jr.
Peter S. Ho
Michael T. McEnerney
Darryl K. Nitta
Gregg M. Taketa

Staff: Donald Rousslang, Johnnel Nakamura, Titin Sakata and Sondra Kaawa

Others: Randall Nishiyama, Department of the Attorney General
Hamid Jahanmir, Department of Taxation
Suzanne Efhan, Department of Taxation
Lowell Kalapa, Tax Foundation of Hawaii
Nanea Kalani, Civil Beat.com
Tu Pham
Peter Fritz

CALL TO ORDER

TRC Chair Iwase called the meeting to order at 8:30AM.

Chair Iwase expressed regret on behalf of the TRC for the miscommunication that occurred during the meeting of September 8, 2009 and that resulted in members of the audience not being able to attend the last five minutes of the meeting. Chair Iwase stated that the TRC did not know where the members of the audience had gone. At the end of the executive session, Mr. Nishiyama looked for them, but was unable to find them. Therefore, the regular meeting proceeded. Chair Iwase apologized for the incident.

The TRC had received a request from Mr. Fritz for an alternate date for the meeting of September 29, but that was the only date that all TRC members and staff were available, so it was chosen for the meeting.

APPROVE MINUTES FROM PREVIOUS MEETING

Chair Iwase addressed the first item of business on the agenda, which was approval of the minutes from the September 8, 2011 meeting. He first addressed the minutes from the executive session and asked for any changes, comments or requests for amendments.

Mr. Amemiya noted that on page 8, in the last line before the adjournment, the word “contact” should be “contract”.

Chair Iwase then addressed the minutes of the regular session. He asked if there were any changes, comments or requests for amendments to the minutes of the regular session. No changes were suggested.

Chair Iwase asked for a motion to approve both the minutes of the executive and regular sessions of the September 8, 2011 meeting. The motion was made by Mr. Imanaka and seconded by Mr. Ho, with the edit to executive session minutes noted by Mr. Amemiya. The motion carried unanimously.

COMMUNICATION TO THE COMMISSION

The Commission received the following correspondence:

1. An article titled “Setting the Agenda for Tax Reform Demands Information,” by Lowell L. Kalapa, Tax Foundation of Hawaii;
2. A letter from Thomas H. Luten; and
3. A letter from Ray Kamikawa.

DISCUSSION AND APPROVAL OF THE NOTICE TO PROVIDERS OF PROFESSIONAL SERVICES

Chair Iwase addressed the final agenda item, discussion and approval of the notice to providers of professional services. He said the most efficient way to proceed is first approve the draft as is, then open it up for discussion and amend the draft as needed. He asked for a motion to approve the notice to providers of professional services. The motion was made by Mr. Imanaka and seconded by Mr. Nitta. Then Chair Iwase opened the item for discussion.

Mr. Taketa asked why the suggested changes he submitted were not included.

Chair Iwase asked which suggested change Mr. Taketa was referring to.

Mr. Taketa said that he suggested that the first section be deleted entirely.

Chair Iwase said that in their meeting on the issue, they tried to be mindful of what they believed was the thrust of the TRC's views from the last discussion. He said he believed that the proposed draft reflected the intent of the commission.

Mr. Taketa asked if DOTAX provided any input or made any recommendations in drafting the solicitation, since they are involved in conducting their own internal studies.

Chair Iwase said that Ms. Efhan and Mr. Rousslang were present and participated in producing the final draft of the solicitation.

Mr. Taketa asked about the second suggestion he made about specific areas for the consultant to look at, such as the question of whether a sales tax should be used to replace the GET, whether pensions should be taxed, and whether the State should have an earned income tax credit similar to that available in the federal income tax.

Chair Iwase responded that he believed the language in the notice could include some, if not most of the material that Mr. Taketa was asking about. For example, the topics to be considered by respondents include recommendations for alternative tax structures. The draft did not include specific items because it was feared that if it did, the consultant would focus on them, which was not the intent of the TRC. A broader approach to the entire tax structure would include the topics suggested by Mr. Taketa. Leaving the solicitation more general would give the consultant the opportunity to take a broader approach in looking at our tax structure.

Mr. Taketa said he realized that there are pros and cons as far as making the solicitation more general rather than more specific, but in his opinion, if the TRC specifically addresses certain issues of interest, it improves the chances that the end product would be to its liking.

Mr. Nitta said he thought that this would probably not be the last conversation the TRC members have with the selected provider. He said the TRC would meet with the consultant prior to them doing the study.

Mr. Taketa said he thought that if the TRC made the solicitation as specific as possible, it levels the playing field for all parties who might consider submitting a bid, and helps them to understand the scope of the study and the direction that the TRC wants them to go.

Chair Iwase answered that the TRC is looking at a broader approach to evaluating the entire tax structure and that if the TRC starts to get too specific, it will not have that general approach.

Mr. Imanaka said he felt that the TRC should step back from the trees so it can look at the forest and provide the prospective respondents with the opportunity to embrace that viewpoint rather than be too specific. He asked if the TRC gets specific, where does it end? There are so many questions that have to be addressed quickly. He said that when one looks at things from a policy standpoint, one wants to keep a broader perspective.

Mr. Taketa said in his follow up letter that recommendations in the TRC report will become tax measures. Mr. Taketa asked if the TRC would consider recommending any tax measures. He thinks the TRC should point the consultant in that direction or have some general idea of what types of recommendations the TRC may want to consider.

Chair Iwase said that as Mr. Imanaka pointed out, if the TRC gets responses to its solicitation and is able to find a consultant that meets the criteria and agrees with a price the TRC is comfortable with, then the TRC will undoubtedly have the opportunity to meet with the selected consultant and discuss the issues further.

Mr. Taketa suggested taking out the "cap" for the study (the budget of \$150,000). He said that although it gives a general idea of the scope of the study, the TRC will not get a lower bid if the cap is given in the solicitation. To get a more competitive bid, the cap should be taken out.

Chair Iwase said that he had asked both Ms. Eghan and Mr. Nishiyama about the cap language of "not anticipated to exceed \$150,000". He said it is standard language used in contracts. Chair Iwase asked Mr. Nishiyama to explain further.

Mr. Nishiyama explained that the anticipated line is commonly used in state contracts. It indicates the dollar amount available. Since this is a professional services solicitation, the bid amount is not the only factor used by the selection committee to pick the winning candidate. There are qualitative factors that the TRC can take into consideration whenever they pick the consultant. Price is only one consideration. He said he thinks the TRC should give a potential candidate an idea of how much money there is. For example, if there is a hard cap of X dollars, some candidates may self select and exclude themselves. If there is no dollar amount, the TRC is not being fair to the potential candidates because the TRC only has a limited amount of money. He said that the language "anticipated not to exceed \$X" is commonly used to describe the contract amount.

Mr. Imanaka asked if a person submitting a bid would normally see or read this type of language and be familiar with it.

Mr. Nishiyama replied "Yes".

Chair Iwase asked Mr. Taketa if there was anything else.

Mr. Taketa said no.

Mr. McEnerney stated that he could not support the proposed notice without two changes and two clarifications. The first change dealt with material on page 2 (which was underlined in blue), which said "if requested by the Commission, the Contractor shall make a presentation of the study to the Commission." He said he thought the presentation should be required. He also said the contractor should be required to meet with the Commission prior to the start of the work so that the TRC can discuss some of the matters that were discussed in the present meeting. The

second change had to do with the \$150,000 cap. Mr. McEnerney said he understands the reason for including the language, but he did not think the cap should be set at 100% of the TRC's budget. He said he would be more comfortable with \$100,000 so that the TRC will have some money to do additional work.

The first clarification he suggested is that it be made clear that the TRC understands that the work done by the consultant is not the only work the Commission was going to do. He wanted it made clear that the TRC would continue to meet to discuss other matters (as mentioned by Mr. Nitta), such as the matter that Mr. Ray Kamikawa brought up in his letter to the TRC, and that the TRC will continue its work as the contract is moving forward. The second clarification he asked for was in the process of selecting a contractor. The group of people making the selection (the selection committee) should include one tax practitioner familiar with tax rules statewide. He said he had no preference for who should be included and said that the person does not have to be a member of the TRC, but he thought that the selection committee should include a tax practitioner. He said he understands that the Director of Taxation appoints the selection committee, not the TRC. However, he thinks the TRC should make a recommendation to the Director.

Mr. McEnerney said the four items mentioned above must be first considered as amendments to the motion before he could approve the solicitation. Without the amendments, he absolutely could not support the motion.

Chair Iwase responded by saying that for the purpose of discussion, he didn't know if the TRC could make a hard decision on the matter. He said the TRC doesn't know where the consultant is coming from. If the consultant is coming from the mainland and if the TRC requires the consultant to meet monthly, it will increase the cost of the contract. He said the TRC had to be flexible. He acknowledged, however, that Mr. McEnerney made a good point. He suggested changing "if" to "when" before the line "requested by the TRC" (to clarify that the contractor would definitely be required to make a presentation). Second, he pointed out that the amount \$150,000 is not 100% of the TRC's budget. He said that the budget, which was provided to the TRC members earlier, would still have about \$50,000 left. He reminded the members that the TRC is operating with \$50,000 less than the previous TRC, which is why it will request an extension to 2012 and an additional budget of \$100,000. At this point, the TRC has about \$50,000 to use for (1) the staff person that the TRC intends to hire, (2) printing costs for the study, (3) the costs of preparing the minutes, and (4) travel expenses. If the TRC is not going to travel to neighbor islands, some of the money could be used for other purposes. He said he hopes that there is going to be a balance remaining to retain if necessary, the services of another consultant or perhaps a person through the Tax Department to do additional studies that the TRC may want to do. The Tax Department is going to do Appendix A and Appendix I in the report of the previous TRC. In addition, the Department will look into issues that have been pointed out to the TRC in comments by Mr. Kalapa and Mr. Kamikawa regarding the individual income tax structures which, unfortunately, cause Hawaii to tax people who are below the poverty line. Those are things that the Tax Department can do without much cost. If there is any money left or if the Legislature decides to give the TRC additional money next session, the TRC will have a small window to act because Legislative session ends in May, 2012 and the target date to

produce the TRC report is December, 2012. The TRC will have an opportunity in that timeframe to produce another report which can be more focused.

Mr. Taketa said he had another objection to the section that dealt with the requirement that the contractor do outreach. He felt the current wording was not clear as to how it relates to the scope of what the contractor is going to do. He questioned whether any input received will ever be used. He said he feels the paragraph is hanging on its own.

Chair Iwase said that the TRC will make sure that the contractor or entity is not making trips around the state as a vacation, but to gather data and input needed for the study.

Mr. Imanaka suggested in the particular clause on page 2, it should be worded to read "Please note that the successful applicant will at the discretion of the Commission be expected to conduct a program of community outreach to get input from the public".

Chair Iwase clarified that Mr. Taketa was asking why the contractor should do outreach.

Mr. Imanaka said that the modification was intended to permit the Commission to direct the consultant.

Chair Iwase emphasized the intention is to have them go out periodically and hear from the public for the purpose of the study.

Mr. McEnerney said that this is the 21st century and people don't have to come to Hawaii for meetings. He said there is video conferencing and it's done all the time. The TRC can insert a line "by video conferencing or by other electronic means." It would not be a cost burden. He said any contractor should have a direct or indirect access to video conferencing. Therefore, it should not be a problem. He also reiterated his concern that the TRC is still committing the majority of its resources to the contract. There is no reason not to reserve more money than has been reserved. He suggested reserving as much as an additional \$50,000 so that the TRC will have resources to do other studies should the legislature not grant additional funds. He said that based on his experience with contracts, if the amount is stated at \$150,000, most contractors will base their proposal on that amount. He said he was concerned that the TRC would use more of its money for the study than it can afford. He asked that the Chair address his request about having one tax practitioner on the selection committee, by recommendation to the Tax Director or other means.

Chair Iwase reminded Mr. McEnerney that he does not choose the members of the selection committee because there may be legal issues that he would defer to Mr. Nishiyama on.

Mr. Nishiyama explained that the Director of Taxation is the party responsible for deciding on members for the selection committee.

Mr. McEnerney explained that he was requesting only that the TRC make a recommendation to the Director that a tax practitioner be on the selection committee. He did not say that the TRC should appoint anyone.

Mr. Nishiyama acknowledged that the TRC can make the recommendations.

Mr. Iwase said that the TRC could take the matter up after the it acts on the contract. He asked if there was anything else to discuss.

Mr. Ho asked if the budget of the TRC is a matter of public record.

Mr. Iwase replied "Yes".

Mr. Ho said that due to the enormity of the issues facing the state, he leans towards a broader scope versus looking at specific changes in policy. Second, he said he would be comfortable reducing the contract amount or leaving it as is. The TRC has a constraint on the amount of money it has and what the TRC is really interested in is getting a quality report. The TRC should be able to get input from potential vendors on the cost and the scope of the study. Therefore, Mr. Ho would be more comfortable with leaving the scope of the study open to the market versus providing more specific guidance in the contract solicitation.

Mr. Iwase said he is inclined towards what Mr. Nishiyama said, that the TRC needs to be fair with the potential bidders since the TRC only has X amount of dollars.

Mr. Nishiyama explained the potential problem if the solicitation does not have an anticipated contract price and if there is a huge range in the costs proposed by bidders. For example, suppose someone came in with a bid of \$500,000 and another with \$150,000. Price is one consideration. However, picking a winner in that situation may be opening the TRC up to a challenge.

Mr. Ho explained that when he put contracts out in his organization, he uses deltas and variances as information. The tip generally does not end up with a contract, but it provides valuable information on what is the actual cost of a project being asked for. In this way, the request responses to the request for proposals provide guidance on what the price could potentially be.

Mr. Nitta asked if a range could that be something that the TRC could agree upon.

Chair Iwase asked the members about having a range in the anticipated contract price.

Mr. Imanaka asked if Mr. Nishiyama could elaborate on what is the nature of the potential challenge that TRC could be faced with.

Mr. Nishiyama explained that if someone comes in high, they are interviewed and qualify, and someone comes in low who also qualified; it becomes a question since the TRC only has a finite

amount of money which one would be picked. While price is one consideration, there has to be a value assigned to other factors.

Chair Iwase noted that all of them have seen challenges raised because a vendor was not selected. The other side, unfortunately, is protecting the TRC from these types of frivolous challenges. For instance, if a person bids \$125,000 and we pick someone with a bid of \$175,000, there is going to be a complaint and we see these types of complaints come out in the newspaper, and charges are made that the person was picked because he was favored or because he knew someone. So it would be better to be more objective in the guidelines. He asked if there would be a problem with setting a range of \$100,000 to \$150,000.

Mr. Nishiyama replied "No".

Chair Iwase asked the TRC if there was anything more to discuss. He suggested the following changes to the draft solicitation for the contract:

- Page 2, second paragraph, change "if" to "when" (to read: "If requested by the Commission, the Contractor shall make a presentation of the study to the Commission").
- Page 2, under "Contract Term," change the second sentence to "The contract award for the initial period will be on an hourly fee basis and is not anticipated to exceed \$100,000 to \$150,000 including tax and costs, if any."

Chair Iwase asked Mr. Nishiyama if those changes would be fine. Mr. Nishiyama said "Yes".

Chair Iwase again asked if there was anything further. Hearing none, he asked for a motion to adopt amendments to the contract. A motion was made by Mr. Imanaka and seconded by Mr. Nitta. Those in favor to adopt amendments were Chair Iwase, Mr. Imanaka, Mr. Amemiya, Mr. Ho, Mr. McEnerney and Mr. Nitta. Mr. Taketa opposed the motion.

Chair Iwase then asked for a motion to approve the amended contract. The motion was made by Mr. Imanaka and seconded by Mr. Ho. Those in favor were Chair Iwase, Mr. Imanaka, Mr. Amemiya, Mr. Ho and Mr. Nitta. Those opposed were Mr. Taketa and Mr. McEnerney.

Chair Iwase said that the TRC can make a suggestion to Director Pablo. He further asked how many people were needed for the selection committee.

Mr. Nishiyama replied that there is a minimum of three people that make up the selection committee.

Chair Iwase said he would like to request that Director Pablo include an experienced tax practitioner in his selection of the committee. He asked if that should be "a person with knowledge of the tax code".

Mr. McEnerney said "No". He wanted someone who has dealt with tax laws on a day to day basis, and someone who actually prepares tax returns. It does not have to be an accountant, it

could be an attorney that prepares tax returns. He said that there are three tax practitioners on the TRC and asked why one of them couldn't be on the selection committee.

Chair Iwase said it would be up to Director Pablo and that TRC can have only two members on the selection committee.

Chair Iwase told the members that the selection committee has ranked all candidates for an economist staff person and that Director Pablo has begun negotiations. If an agreement could be reached, the staff economist will attend the next meeting.

Chair Iwase discussed the timeline of the study. He said the target date to issue the solicitation is October 3, 2011 with November 3, 2011 being the submission due date. The anticipated contract date is December 29, 2011. Once the consultant is selected a meeting will be scheduled unless the majority of the TRC would like to meet earlier on other issues. He asked that if there is a request for a meeting prior to December 29, 2011 to inform him and Ms. Sakata so that a meeting can be scheduled.

Mr. McEnerney referred to an observation he made earlier that the TRC had more work to do beyond the study to be produced by the consultant. He said Hawaii is facing tax issues today and he believed that the TRC should continue to meet on a regular basis. He suggested obtaining input from the Tax Department on the issues that are facing Hawaii today. He did not think the TRC should simply await the consultant's work.

Chair Iwase said he did not know the schedules of the members or what they wanted to do. He was not sure what the next meeting would be about other than what Mr. Taketa had suggested. He said he is also aware that some members would like a briefing on the overall tax structure of Hawaii. He said that if that can be arranged, maybe something can be done next month.

Mr. Ho said he would appreciate a briefing on the overall tax structure of Hawaii.

Chair Iwase asked that a briefing be scheduled. He said he will be away in October, 2011; however, he believed that the sooner a briefing can be scheduled, the better. He said that if any member has an agenda item that they would like to be considered to send it to Ms. Sakata and he will make a determination for the next meeting.

Ms. Sakata said that notices will be sent to potential candidates that the TRC members think may be interested in responding to the solicitation. She asked that the members provide the contact information of the potential candidates so that we can contact them.

Mr. McEnerney asked if the TRC can be provided the names of the people on the selection committee for the economic study.

Chair Iwase said that it was a public record.

ADJOURNMENT

Meeting was adjourned at 9:13 am.