



**STATE PROCUREMENT OFFICE  
NOTICE OF REQUEST FOR EXEMPTION  
FROM HRS CHAPTER 103D**

12 SEP -4 P11:27

STATE PROCUREMENT OFFICE  
STATE OF HAWAII

**TO:** Chief Procurement Officer

**FROM:** DBEDT/Natural Energy Laboratory of Hawaii Authority  
*Name of Requesting Department*

Pursuant to HRS § 103D-102(b)(4) and HAR chapter 3-120, the Department requests a procurement exemption for the following:

1. Describe the goods, services or construction:  
Professional arbitration appraisal services to determine fair market rental rates in accordance with NELHA sublease clause entitled "Determination of rental fees and percentage rental upon reopening of the annual rental" (see attached) for Destiny Deep Sea Water LLC. When the NELHA appraiser and tenant appraiser are not able to reach agreement on the fair market value of a tenant property for the purposes of setting rental rates, the sublease clause requires that a third appraiser be appointed jointly by the NELHA appraiser and the tenant appraiser to act as arbitrator and determine the final rental amount. The tenant and NELHA appraisers have 7 days to appoint a third appraiser. NELHA will be responsible for paying half of the cost, while tenant pays for the other half.

2. Vendor/Contractor/Service Provider:	To be determined.	3. Amount of Request: \$ 8,000.00
4. Term of Contract From: 9/24/2012 To: 3/15/2012	5. Prior SPO-007, Procurement Exemption (PE): N/A	

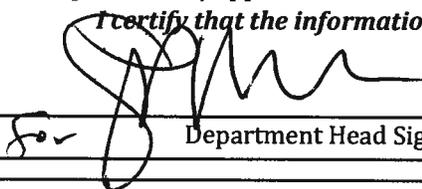
6. Explain in detail, why it is not practicable or not advantageous for the department to procure by competitive means:  
The State does not make the appointment yet will be paying for a portion of the services. The State has a contractual obligation to follow the procedure outlined in the sublease clause (see attached).

7. Explain in detail, the process that will be or was utilized in selecting the vendor/contractor/service provider:  
The arbitrator appraiser is appointed pursuant to the sublease clause. The arbitrator appraiser will be appointed jointly by the NELHA appraiser and the tenant appraiser. An estimate of the hourly rate and time required to perform services shall be obtained from the appointed appraiser. The estimates shall be compared to previous projects similar in nature and scope. NELHA's Executive Director shall ensure that estimates are reasonable before approving the procurement (NELHA shall pay for half of the cost of the arbitrator services; the other half of the cost shall be born by the tenant).

8. Identify the primary individual(s) who is knowledgeable about this request, who will conduct and manage this process, and has 1) completed mandatory training; and 2) who may contact for follow up inquiry, if any.  
 (Type over "example" and delete cells not used.)

Name of Department Personnel	Division/Agency	Phone Number	e-mail address
Laurence Sombardier	DBEDT/NELHA	808-327-9585 X244	laurences@nelha.org

*All requirements/approvals and internal controls for this expenditure is the responsibility of the department.  
 I certify that the information provided above is, to the best of my knowledge, true and correct.*



Department Head Signature

8/31/12

Date

**For Chief Procurement Officer Use Only**

Date Notice Posted:

9/5/12

Submit written objection to this notice to issue an exempt contract within seven calendar days or as otherwise allowed from date notice posted to:

[state.procurement.office@hawaii.gov](mailto:state.procurement.office@hawaii.gov)

Chief Procurement Officer (CPO) Comments:

This approval is for the solicitation process only. HRS section 103D-310(c) and HAR section 3-122-112, shall apply. The selected vendor is required to be compliant on the Hawaii Compliance Express and award is required to be posted on the Awards Reporting System.

If there are any questions, please contact Kevin Takaesu at 586-0568, or [kevin.s.takaesu@hawaii.gov](mailto:kevin.s.takaesu@hawaii.gov).

Approved

Disapproved

No Action Required

  
 Chief Procurement Officer Signature      9/11/2012      Date

(35%) of above ground improvements made by the Sublessee to the subleased premises during the first FIVE (5) years of the sublease term. The offset shall only be credited against the amount by which the Percentage Rent exceeds the fixed monthly rental fee defined above. Offsets may be applied at Sublessee's discretion over the initial five year period, but no offsets shall be taken against Percentage Rent after the fifth (5th) year of the sublease term, i.e. after December 31, 2003.

Sublessee shall, within ninety (90) days of the end of each calendar year during the first five years of the sublease term, submit to Sublessor documentation of all capital investments which are to be applied as offsets against the percentage rent due for the preceding year.

For purposes of this offset provision, "land improvements" shall mean all expenditures by Sublessee for site improvements which have been constructed prior to the sixth (6th) year of the sublease term, including grading, contouring, road construction, paving, fill materials, landscaping, utility installation and seawater and deep well pipeline installation, and "above ground improvements" shall mean all expenditures by Sublessee for initial construction, alterations, additions or improvements to any buildings, equipment or structures which have been constructed prior to the sixth (6th) year of the sublease term, and "capital investments" shall mean the sum of land improvements plus above ground improvements.

2. Reopening of monthly rental fees. The minimum monthly rental fees and the percentage rental reserved shall be reopened and redetermined as of the day following the expiration of the tenth (10th) year and twentieth (20th) year of the sublease term.

3. Determination of rental fees and percentage rental upon reopening of the annual rental.

(a) The rental fees for any ensuing period shall be the fair market rental at the time of reopening. "Fair market rental" is defined as the rent for the subleased premises as determined under Section 171-17, Hawaii Revised Statutes. Except as provided herein, the provisions in Hawaii Revised Statutes, Chapter 658, shall be followed. At least six (6) months prior to the time of reopening, the fair market rental shall be determined by an appraiser whose services shall be contracted for by Sublessor, and the Sublessee shall be promptly notified by certified mail, return receipt requested of the fair market rental as determined by Sublessor's appraiser; provided, that should the Sublessee fail to notify Sublessor in writing within thirty (30) days after receipt thereof that Sublessee disagrees with the fair market rental as determined by Sublessor's appraiser and that Sublessee has appointed its own appraiser to prepare an independent appraisal report, then the fair market rental as determined by Sublessor's appraiser shall be deemed to have been accepted by Sublessee and shall be the fair market rental as of the date of the reopening. If Sublessee has notified Sublessor and appointed its appraiser as stated hereinabove, Sublessee's appraiser shall complete its appraisal and the two appraisers shall then exchange their reports within forty-five (45) days from the date of the Sublessee's appointment of the appraiser.

The two appraisers shall review each other's reports and make every effort to resolve whatever differences they may have. However, should differences still exist fourteen (14) days after

the exchange, the two appraisers shall within seven (7) days thereafter appoint a third appraiser who shall also prepare an independent appraisal report based on the review of the two appraisal reports prepared and any other data. Copies thereof shall be furnished to the first two appraisers within forty-five (45) days of the appointment. Within twenty (20) days after receiving the third appraisal report, all three shall meet and determine the fair market rental in issue. The fair market rental as determined by a majority of the appraisers shall be final and binding upon both Sublessor and Sublessee, subject to vacation, modification or correction in accordance with the provisions of Sections 658-8 and 658-9, Hawaii Revised Statutes. Each party shall pay for its own appraiser and the cost of the services of the third appraiser shall be borne equally by the Sublessor and the Sublessee. All appraisal reports shall become part of the public record of the Sublessor.

In the event the appraisers are unable to determine the fair market rental before the reopening date, or by the foregoing prescribed time, whichever is later, the Sublessee shall pay the fair market rental as determined by the Sublessor's appraiser and the rental paid by Sublessee shall then be subject to retroactive adjustments as appropriate to reflect the fair market rental determined as set forth hereinabove. However, Sublessee or Sublessee's appraiser's failure to comply with the procedures set forth above shall constitute a waiver of Sublessee's right to contest the new rent, and the Sublessee shall pay the rent as determined by Sublessor's appraiser without any retroactive adjustments. Alternatively, Sublessor may treat this failure as a breach of this sublease and terminate the sublease accordingly.

(b) The percentage rent for any ensuing period shall be determined by negotiations between the Sublessor and Sublessee at the time of reopening.

#### 4. Business records.

The Sublessee shall:

(a) Prepare and keep for a period for at least five (5) years, all pertinent original sales records including serially numbered sales slips and all other sales records whatsoever which would normally be examined by an independent accountant pursuant to accepted auditing standards in performing an audit of the Sublessee's sales and gross sales.

(b) Submit to the Sublessor on or before the ninetieth (90th) day following the end of each calendar year at the place fixed for the payment of rent, a statement certified as correct by the Sublessee or by a person duly authorized by the Sublessee, which sets forth in accurate detail the amount of gross sales during the preceding calendar year, duly verified by an independent certified public accountant. These statements shall be prepared in compliance with Generally Accepted Accounting Principles (GAAP).

Without prejudice to any remedies provided in this sublease for Sublessee's default, if the Sublessee shall fail to promptly furnish any calendar year report or certified public accountant's annual verification report, the Sublessor may have the report prepared on Sublessee's behalf by an

**§658A-1 Definitions.** In this chapter:

"Arbitration organization" means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.

"Arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

"Court" means any district or circuit court of competent jurisdiction in this State, unless otherwise indicated. In cases involving arbitration subject to chapter 89, chapter 377, or the National Labor Relations Act, "court" means the circuit court of the appropriate judicial circuit.

"Knowledge" means actual knowledge.

"Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

"Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. [L 2001, c 265, pt of §1; am L 2006, c 72, §2]

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