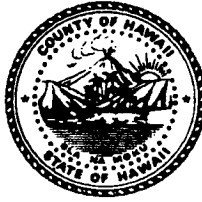


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January 31, 2007

Mr. Milton D. Pavao, Manager
Department of Water Supply
345 Kekūanaō‘a Street, Suite 20
Hilo, Hawai‘i 96720

*Re: Information Regarding Offeror’s Response to RFPs that
Can Be Disclosed to the Board for Award Purposes
Our File No. Wrk 07-14077*

Dear Milton:

This letter is in response to a request for a legal opinion regarding what information regarding the responses to a Request for Proposals can be disclosed to the Water Board at a Water Board meeting.

The Water Board is the body that “awards” contracts upon the Department of Water Supply’s (“DWS”) recommendation. This has been a long-standing practice which arises out of the requirement in Chapter 54 of the Hawai‘i Revised Statutes (“H.R.S.”) and the County Charter that all contracts are executed in the name of the Board, that the Board determines the character and type of all construction, additions, extensions, increases, and betterments to the waterworks and water system, and that the Water Board manages, controls and operates the waterworks of the County of Hawai‘i.

At the Water Board meeting on January 23, 2007, a Request for Proposals was brought to the Water Board for award. Because of the restrictions in the Hawai‘i Administrative Rules (“H.A.R.”), the monetary amount of the contract was not included in the information that was given to the Water Board. However, the Water Board was uncomfortable awarding a contract without knowing what the dollar amount of the contract would be. Fortunately, federal grant monies were going to be used for this project and because the offeror’s proposal was within the amount of grant money available, the Water Board was able to approve the award based on the

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DWS's representation that the offeror's proposal was not going to exceed the available federal grant money.

However, because there will be other Requests for Proposals that will be submitted to the Water Board for award in the future, the DWS requested some guidance on how to balance the request by the Water Board for more information and the H.A.R. and H.R.S. restraints on divulging information prior to award. This letter is intended to outline the procedure that should be used in these circumstances.

Pursuant to H.R.S. §103D-303(d), proposals submitted in response to a Request for Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. Pursuant to H.R.S. §103D-303(f), revisions to a proposal may be permitted after submissions and prior to award for purposes of obtaining best and final offers. In conducting these discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

Pursuant to H.A.R. §3-122-57, after the award is made, the award shall be posted for five working days. Pursuant to H.A.R. §3-122-58, the contract file, which includes a copy of all of the proposals, shall be available for public inspection upon posting of the award.

Based on the practice of the DWS/Water Board and the H.R.S. and H.A.R., it is possible that the Water Board could choose not to award the contract to the offeror that was selected by the selection committee, demand that the Chief Procurement Officer (i.e., the manager) conduct additional discussions or change the requirements by an addendum which would be distributed to priority listed offerors, and require another submission of best and final offers pursuant to H.A.R. §3-122-54. The Water Board may also cancel the solicitation pursuant to H.R.S. §103D-308 when it is in the best interest of the DWS/Water Board to do so and for other reasons detailed in H.A.R. §3-122, subchapter 11.

Because it is possible that the negotiations on a best and final offer take place after the DWS initially requests the Water Board award to a particular offeror, it is essential that the information in the offers be kept confidential until after the award is made by the Water Board, as required by H.R.S. §103D-303(d) and (f).

For this reason, when requesting that the Water Board award a contract which was negotiated pursuant to the Request for Proposal process, the DWS should, as a matter of course, agendaize an executive session pursuant to H.R.S. §92-5(a)(8) (to deliberate or make a decision upon a matter that requires the consideration of information that must be kept confidential pursuant to a state law) in conjunction with the agendaized request for the award. All confidential information can then be discussed during the executive session, and the Water Board can then vote on whether or not to award the contract based on the information provided to it in executive session once moving out of executive session.

I did call the State Procurement Office, and they also recommended that discussions of the proposals prior to award take place in a closed session of a meeting of the Water Board.

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January 31, 2007
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I hope this provides you with some guidance of how to deal with these matters in the future. If you have any further questions, please do not hesitate to contact me.

Sincerely,



Katherine A. Garson
Deputy Corporation Counsel

KAG:mc

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