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This is an appeal of a denial of access to a government record under part II of the Uniform Information Practices Act (Modified) (the "UIPA"), chapter 92F, Hawaii Revised Statutes ("HRS"). Haw. Rev. Stat. § 92F-15.5. The Office of Information Practices ("OIP") is authorized to issue this ruling under section 92F-42(1).

DECISION

Requester: Lance Collins, Esq.
Agency: State Procurement Office
Date: September 9, 2009
Subject: Protests filed on Request for Proposals (APPEAL 08-5)

REQUEST FOR DECISION

Requester seeks a determination on whether the State Procurement Office ("SPO") properly denied Requester's request for disclosure of the protests alleging legal deficiencies in SPO's Request for Proposals 07-043-SW ("RFP") ("protests"), where a contract has not yet been awarded. The protests were submitted to SPO by persons interested in submitting proposals in response to the RFP ("prospective offerors").

Unless otherwise indicated, this determination is based solely upon the facts presented to OIP in Requester's letters to SPO, dated August 23 and 27, 2007, and SPO's letter, dated August 24, 2007, to Requester, copies of which were forwarded to OIP, and from OIP's *in camera* review of the protests.

QUESTION PRESENTED

Whether SPO must disclose the protests submitted by prospective offerors before the award of a contract.

BRIEF ANSWER

Under the UIPA's exception for "frustration of a legitimate government function," SPO is not required to disclose information in the protests that may identify and provide information about prospective offerors, and information that may be included in proposals that they may submit. After redaction of this information, SPO must disclose the remaining parts of the protests.

FACTS

RFP -07-043-SW is SPO's Request for Proposals to Operate, Maintain, and Manage Public, Educational and Governmental (PEG) Access Channels, Funds, Facilities, and Equipment for the State of Hawaii. The RFP was issued under section 103D-303, HRS, of the Hawaii Public Procurement Code. During the ongoing procurement process before the awarding of a contract, SPO received protests on this RFP from prospective offerors under section 103D-701, HRS. See Haw. Rev. Stat.

§ 103D-701 ("[a]ny actual or prospective bidder, offeror or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer").

SPO informed Requester that "[u]nder the competitive sealed proposal method of procurement that is at issue here, documents from the various offerors are kept confidential until award of any contract is made" and that "[t]his is done to preserve the competitive aspects of the process and to ensure the fairness of the process." Hence, SPO asserted that, before the posting of a contract award, the protests are exempt from public disclosure under section 92F-13(3), HRS, which allows government records to be kept confidential in order for the government to avoid the frustration of a legitimate government purpose. Haw. Rev. Stat. § 92F-13(3) (Supp. 1993).

DISCUSSION

The UIPA sets forth the general rule that all government records be open to public inspection unless access is closed or restricted by law, and also sets forth in section 92F-12, HRS, a list of government records, or information set forth therein, "which the Legislature declares, as a matter of public policy, shall be disclosed." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988). In pertinent part, section 92F-12(a), HRS, provides:

§ 92F-12 Disclosure required. (a) Any other provision in this chapter to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:

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- (3) Government purchasing information,
including all bid results, except to the extent
prohibited by section 92F-13;

Haw. Rev. Stat. § 92F-12(a)(3) (Supp. 2008). OIP has previously concluded that the term “except to the extent prohibited by section 92F-13” was intended by the Legislature to permit an agency to withhold government purchasing information where disclosure would result in the frustration of a legitimate government function under section 92F-13(3), HRS. OIP Op. Ltr. No. 94-26 at 7 (citations omitted).

In its *in camera* review of the protests, OIP finds that they contain information about prospective offerors and the proposals that they may submit. For the reasons set forth below, OIP believes that disclosure of such information about prospective offerors and proposals would frustrate SPO’s procurement functions.

Protests filed may, and, in this case, do include information about prospective offerors and their proposals that is the type of information that would be set forth in proposals themselves. Proposals made under section 103D-303, HRS, are required to be kept confidential upon their opening and during negotiations. Haw. Rev. Stat. § 103D-303 (d), (f) (Supp. 2008).¹ Public disclosure of the protests here would make public the same information about prospective offerors and their proposals that

¹ In pertinent part, section 103D-303, HRS, provides:

§103D-303 Competitive sealed proposals.

. . . .

(d) Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals shall be prepared in accordance with rules adopted by the policy board and shall be open for public inspection after contract award.

. . . .

(f) Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors

. . . .

Haw. Rev. Stat. § 103D-303(d), (f) (Supp. 2008) (emphases added).

SPO would be required to keep confidential prior to contract award in such proposals if they are subsequently submitted under the procurement process.

Therefore, OIP finds that disclosure of information about prospective offerors and their proposals in the protests would result in the frustration of SPO's subsequent duty to protect the same information in the proposals as required by statute. The Legislature intended that the UIPA's "frustration" exception apply to "[i]nformation that is expressly made nondisclosable or confidential under Federal or State law or protected by judicial rule." S. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988) (listing categories of government records as examples of records that may fall within in the "frustration" exception).

Further, in OIP's opinion, revealing identities of prospective offerors and other prospective proposal information prior to completion of the specific procurement process at issue would frustrate the process by (1) raising the cost of government procurements, and (2) giving a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, or both. See id.; Ka'apu v. Aloha Tower Dev. Corp., 74 Haw. 365, 384, 846 P. 2d 882 (1993) ("frustration" exception applies to development proposals before a contract is signed); OIP Op. Ltr. No. 94-2 (records identifying persons who have attended bidders' conferences, picked up bid solicitations, or submitted a notice of intent to bid or a bid itself). The UIPA's legislative history instructs that the "frustration" exception applies to government records where raised procurement costs or an unfair advantage to an offeror would likely result from public disclosure. Id. Accordingly, OIP concludes that SPO may withhold from public disclosure information in the protests that would identify prospective competitors in government purchasing and information that would reasonably be contained in proposals that may be submitted by such persons.

However, OIP does not find that the "frustration" exception, or any other exception to disclosure, applies to the remaining contents of the protests reviewed. The protests describe alleged legal deficiencies in the RFP and, in OIP's opinion, such claims constitute the very type of "government purchasing information" that the Legislature intended to be available to the public. Haw. Rev. Stat. § 92F-12(a)(3)(Supp. 2008); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); see Carl Corp. v. State Dep't of Education, 85 Haw. 431, 460 (1997) (After describing the filing of protests by aggrieved participants in government procurement to be the "most effective enforcement mechanism in the [Procurement] Code," the Supreme Court awarded attorney's fees to a successful protestor when the contract had been awarded to another vendor in bad faith).²

Where a record contains both public information and information that may be withheld, an agency is required to segregate the portion of the record that it may withhold

² Notably, SPO's own administrative rules specifically require disclosure "to any interested party" of "information submitted that bears on the substance of the protest except where information is proprietary, confidential, or otherwise permitted or required to be withheld by law or rules." Haw. Admin. R. § 3-126-6 (1995) (emphasis added).

and make the rest of the record available, to the extent that the information is “reasonably segregable.” Specifically, OIP’s administrative rules provide in relevant part:

(a) When information in a requested record is not required to be disclosed under section 92F-13, HRS, or any other law, an agency shall assess whether the information is reasonably segregable from the requested record. If the record is reasonably segregable, the agency shall:

- (1) Provide access to the portions of the record that are required to be disclosed under chapter 92F, HRS

Haw. Admin. R. §2-71-17 (a)(1) (1999) (emphasis added). OIP has previously stated, that an agency may withhold an entire record only where the record is not reasonably segregable. OIP Op. Ltr. Nos. 90-11 and 95-13.

Although information about the prospective offerors and proposals is contained throughout the protests reviewed, OIP believes that the prospective offerors’ identities and the apparent bits of proposal information can be readily detected and redacted from the protests without rendering the remaining protest information meaningless. See, e.g., OIP Op. Ltr. No. 90-11 (discussion of reasonable segregation of information in government records that is exempt from disclosure under the “frustration” exception because of the deliberative process privilege). Therefore, SPO must disclose the protests after redacting information about the prospective offerors and their prospective proposals contained therein.³

RIGHT TO BRING SUIT

By copy of this Decision to SPO, OIP hereby notifies SPO of its determination that the records be disclosed. Haw. Rev. Stat. § 92F-15.5(b) (1993) (If OIP’s decision is to disclose, OIP shall notify agency of its decision “and the agency shall make the record available.”).

OIP also notifies Requester that Requester may appeal the agency’s denial of access to the circuit court. See Haw. Rev. Stat. §§ 92F-15 and -15.5(a) (1993). This action must be brought within two years after the agency denial. If Requester prevails, the court will assess against the agency Requester’s reasonable attorney’s fees and costs incurred in the action. Haw. Rev. Stat. § 92F-15(d). If Requester decides to file a lawsuit, Requester must notify OIP in writing at the time the action is filed. Haw. Rev. Stat. § 92F-15.3 (Supp. 2008).

³ In the future, when providing instructions about the submission of protests on a request for proposal, SPO may choose to recommend that, in a protest being prepared for submission, any information identifying the submitting offeror or disclosing prospective proposal information be set forth on a cover sheet apart from the body of the protest. In this way, the body of the protest may be disclosed without redaction of exempt information identifying the offeror submitting the protest or disclosing prospective proposal information.

OFFICE OF INFORMATION PRACTICES

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