



DEPARTMENT OF THE CORPORATION COUNSEL

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June 16, 2003

MEMO TO: Ken Fukuoka, Director
Office of Council Services

F R O M: Moana M. Ramaya, Deputy Corporation Counsel

SUBJECT: **Release of RFP documents**

On November 18, 2002, Wayne Boteilho requested an opinion on the following issue:

Determine and advise which RFP documents submitted by Out of the Sea Media Arts should be released pursuant to § 3-122-58 of the State Procurement Code and H.R.S. § 92F-12.

In October 2002, the Office of Council Services ("Council Services") for the County of Maui solicited bids for video production, broadcast and distribution. Bid proposals were submitted by two companies: Akaku and Out of the Sea Media Arts (hereinafter "Media Arts"). The contract was awarded to Akaku.

On November 12, 2002, Sean McLaughlin requested a copy of the proposal submitted by Media Arts. In its Letter of Transmittal, Media Arts designated portions of their proposal confidential. Pursuant to § 3-122-58 of the State Procurement Code, their proposal was forwarded to Corporation Counsel for review and written determination. In relevant part, § 3-122-58 of the State Procurement Code provides that:

(b) If a person requests to inspect the portions of an offeror's proposal designated as confidential . . . the inspection shall be subject to written determination by the respective . . . corporation counsel for confidentiality in accordance with chapter 92F, H.R.S.

(c) If . . . corporation counsel determines in writing that the material designated as confidential is subject to disclosure, the material shall be open to public inspection unless the offeror appeals pursuant to section 92F-41(1), H.R.S.

The following portions of Media Arts' proposal were designated confidential: Statement of Qualifications, Letters of Reference, Methodology and Procedures, and Pricing for Services.¹

Media Arts' proposal is a government record as defined in H.R.S. § 92F-3.² See also Kaapu v. Aloha Tower Development Corp., 74 Haw. 365 (1993).

As a general rule, "[g]overnment purchasing information including all bid results . . . ," shall be available for public inspection and duplication, ". . . except to the extent prohibited by section 92F-13." H.R.S. §§ 92F-12(a) and (a)(3).

H.R.S. § 92F-13 provides exceptions to the disclosure requirement contained in H.R.S. § 92F-12. The only exception to disclosure potentially applicable to the case at hand is the frustration of legitimate government function exception under H.R.S. § 92F-13(3).³

The legislative history behind the frustration of legitimate government function exception explains that the exception was meant to protect "trade secrets" or "confidential commercial and financial information" and "proprietary information" if disclosure would frustrate a legitimate government function. OIP Op. Ltrs. No. 90-15 and 97-4, citing Kaapu v. Aloha Tower Development Corp., 74 Haw. 365, 388-89 (1993), citing S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093-95 (1988).

¹See Media Arts' Letter of Transmittal dated October 12, 2002.

²"'Government record' means information maintained by an agency in written, auditory, visual, electronic, or other physical form.'" H.R.S. 92F-3.

³Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function. H.R.S. § 92F-13(3).

The determination of whether commercial or financial information is confidential is made by reviewing federal case law under the federal Freedom of Information Act ("FOIA"). OIP Op. Ltr. 97-4. Federal courts have held that commercial and financial information should be considered confidential if disclosure would likely:

(1) . . . impair the Government's ability to obtain necessary information in the future;
or

(2) cause substantial harm to the competitive position of the person from whom the information was obtained.⁴

OIP Op. Ltr. 97-4 citing National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

Disclosure of unit or component prices contained in a bid proposal would not result in competitive harm to bidders or deter companies from conducting business with the government. As such, disclosure of such information would not result in the frustration of a legitimate government function. OIP Op. Ltr. 90-15, see also Acumenics Research & Technology, Inc. v. Dept. of Justice, 843 F.2d 800, 808 (4th Cir. 1988), Racal-Milgo Gov't. Systems, Inc. v. Small Business Administration, 559 F. Supp. 4, 6 (D.D.C. 1981).

On the other hand, information that reveals pricing mechanisms are exempt from disclosure under FOIA as "commercial or financial information obtained from a person and privileged or confidential." OIP Op. Ltr. 97-4, citing Gulf & Western Industries, Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979); SMS Data Products Group, Inc. v. United States Dept. of the Air Force, WL 201031 (D.D.C. 1989) ("information about a competitor's pricing strategy would be invaluable in preparing a [competitor] company's own bid").

Based on the above-cited OIP Opinion Letters and case law, the following should be released:

1. Media Arts' Statement of Qualifications. There is no

⁴§ 92F-3 defines "person" as, ". . . an individual, corporation, government, or governmental subdivision or agency . . ."

exemption protecting this information from disclosure.

2. Letters of References. H.R.S. § 92F-13(1) does not require disclosure of information that would constitute a, "...clearly unwarranted invasion of privacy." As an example of what would constitute a clearly unwarranted invasion of privacy, H.R.S. § 92F-14(b)(8) lists personal recommendations. However, H.R.S. § 92F-14(b) states that the examples contained in that section are applicable to "individuals." H.R.S. § 92F-3 defines an "individual" as a, "natural person." Based on that definition, the letters of reference contained in Media Arts' proposal would not be protected from disclosure.

3. Methodology & Procedure.

a. Video Coverage. Media Arts' video coverage section contains general information primarily addressing the minimum scope of services detailed in the County's Request for Proposals. See Request for Proposals for Video Production, section III. No information that would be construed as confidential is contained in this section, nor is any pricing information included. As such, there is no applicable provision preventing disclosure.

b. Meeting Transcripts, Live Captions, Delayed Captions. Each of the aforementioned subsections detail general descriptions of how Media Arts intends to deliver its product. No information that could be construed as confidential is contained in these segments, nor are pricing mechanisms included in any of these segments. In the absence of such information, there is no applicable provision preventing disclosure of these sections.

c. Proposed Pricing for Services. Media Arts' price list provides hourly fees and travel expenses for various services. No pricing mechanism is contained in the price list. As such, this information is similar to that of a unit bid as discussed above. The release of this information would not allow a competitor to determine the bidder's profit margin and, therefore, would not cause the bidder competitive harm.

Further supporting the release of the above-listed information is the Governor's Committee Report 114 (1987), as cited in OIP Op. Ltr. 90-15 which notes, ". . . reduced privacy concerns as to the disclosure of government purchasing information."

Section 3-122-58, Hawaii Administrative Rules, pertaining

Ken Fukuoka
June 16, 2003
Page 5

generally to procurement source selection and contract formation, provides Media Arts with an opportunity to appeal this determination pursuant to § 92F-42(1). In view of this right of appeal, we recommend that Media Arts be provided written prior notice of any decision by your office to release the documents requested by Mr. McLaughlin. We are not aware of any required minimum period of time for such prior notice; however, we suggest that some reasonable period be afforded so as to allow Media Arts reasonable opportunity to file an appeal as provided for pursuant to § 92F-42(1) and § 3-122-58. If no protest is made within that time, the proposal should be released.

If you have any questions or inquiries, please do not hesitate to contact me.

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APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel