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HEARINGS OFFICE



OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

In the Matter of	)	PCH-94-1
	)	
WHEELABRATOR CLEAN WATER	)	FINDINGS OF FACT,
SYSTEMS, INC., aka BIO GRO	)	CONCLUSIONS OF LAW
SYSTEMS,	)	AND DECISION;
	)	APPENDICES A - D
Petitioner,	)	
	)	
vs.	)	
	)	
CITY AND COUNTY OF HONOLULU,	)	
DEPARTMENT OF FINANCE,	)	
PURCHASING DIVISION;	)	
DEPARTMENT OF WASTEWATER	)	
MANAGEMENT	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
N-VIRO INTERNATIONAL	)	
CORPORATION,	)	
	)	
Intervenor.	)	

**FINDINGS OF FACT,**  
**CONCLUSIONS OF LAW AND DECISION**

**HAWAII PUBLIC PROCUREMENT CODE – *Legislative purpose.*** The purpose of the Hawaii Procurement Code, Hawaii Revised Statutes Chapter 103D, was to: 1) provide for fair and equitable treatment of all persons dealing with the government procurement system; 2) foster broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency in the procurement process; and 3) increase public confidence in the integrity of the system.

**PUBLIC PROCUREMENT – competitive bid process and bid specifications.** Genuine competition can only result where parties are bidding against each other for precisely the same thing and on precisely the same footing. *Lucas v. Amer. Haw. E. & C. Co.*, 16 Haw. 80 (1912); *Brewer Environmental Industries, Inc. v. A.A.T. Chemical Inc., et al.*, 73 Haw. 344, 832 P.2d 276 (1992).

**PUBLIC PROCUREMENT STATUTES – generally – purpose.** The object of bidding statutes is to prevent favoritism, corruption, extravagance and improvidence in the awarding of all public contracts. *Lucas v. Amer. Haw. E. & C. Co.*, 16 Haw. 80 (1912).

**PUBLIC PROCUREMENT – substantial changes to bid proposals.** To permit a substantial change in a proposal after the other bids have been opened and made public, would be contrary to public policy, and would tend to open the door to fraudulent and corrupt practices. *Foster v. Honolulu Construction & Draying Co. Ltd.*, 21 Haw. 689 (1913).

## I. CHRONOLOGY OF CASE

By letter dated July 26, 1994, Perry W. Confalone, attorney for Wheelabrator Clean Water Systems, Inc., also known as Bio Gro (hereinafter “Bio Gro”), submitted a request to the City and County of Honolulu, for a hearing to contest the disqualification of Bio Gro’s bid to construct and maintain a beneficial sludge reuse project for the City and County of Honolulu, State of Hawaii. Bio Gro’s request for a hearing was made pursuant to Hawaii Revised Statutes (hereinafter “HRS”) §103D-709, *et seq.*, and Hawaii Administrative Rules (hereinafter “Rules”) §3-126-42 *et seq.*

On July 29, 1994, Glen S. Nonaka, Acting Director of Finance, City and County of Honolulu, transmitted Bio Gro’s request for a hearing, to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii.

The matter was set for hearing, and the Notice of Hearing and Pre-hearing Conference was duly served on the parties.

On August 2, 1994, N-Viro International Corporation (hereinafter “N-Viro”), by and through its attorneys Kale Feldman and Ernest H. Nomura, filed a Motion to Intervene in the above-captioned proceedings.

On August 5, 1994, the parties filed a Stipulation Regarding N-Viro International Corporation’s Intervention.

On August 5, 1994, Bio Gro, by and through its attorneys Perry W. Confalone and A. Scott Leithead, filed a Motion to Stay Further Action on Contract Award Pending

Adjudication of Administrative Proceedings. Bio Gro's motion was scheduled for hearing and the parties notified of the date and time of the hearing on Bio Gro's motion.

On August 8, 1994, N-Viro, by and through its attorneys Kale Feldman and Ernest H. Nomura, filed its response to Bio Gro's Motion to Stay Further Proceedings.

On August 8, 1994, the pre-hearing conference was conducted in the present case. Bio Gro was represented by its attorney Perry W. Confalone. The City and County of Honolulu, Department of Finance, Purchasing Division, and Department of Wastewater Management (hereinafter "City") was represented by its attorney Cheryl K. Okuma-Sepe. N-Viro was represented by its attorneys Kale Feldman and Ernest H. Nomura.

On August 9, 1994, Bio Gro's attorney Perry W. Confalone filed Bio Gro's statement of issues.

On August 11, 1994, the City, by and through its attorneys Ronald B. Mun, Cheryl K. Okuma-Sepe, and Chris A. Diebling, filed its Memorandum in Opposition to Bio Gro's Motion to Stay Further Proceedings.

On August 11, 1994, N-Viro, by and through its attorneys Kale Feldman and Ernest H. Nomura, filed its Supplemental Memorandum in Opposition to Bio Gro's Motion to Stay.

On August 12, 1994, the City, by and through its attorneys Ronald B. Mun, Cheryl K. Okuma-Sepe, and Chris A. Diebling, filed its Written Response.

On August 12, 1994, N-Viro, by and through its attorneys Kale Feldman and Ernest H. Nomura, filed its Pre-hearing Statement and Response to Bio Gro's Statement of Issues.

On August 12, 1994, Bio Gro, by and through its attorneys Perry W. Confalone and A. Scott Leithead, filed its Reply Memorandum in Opposition to the City's Memorandum in Opposition to Bio Gro's Motion to Stay, as well as Bio Gro's Reply Memorandum in Opposition to N-Viro's Memorandum in Opposition to Bio Gro's Motion to Stay.

On August 15, 1994, Bio Gro, by and through its attorneys Perry W. Confalone and A. Scott Leithead, filed its Motion Requesting Order Prohibiting Copying and For Return of Proprietary Documents.

On August 15, 1994, the hearing in the above-captioned matter was convened by the undersigned Hearings Officer pursuant to HRS Chapter 91 and §103D-709. Sue Rodgers, Bio Gro's Project Developer, Western Region, appeared on behalf of Bio Gro, and Bio Gro

was represented by its attorney Perry W. Confalone. James Honke, Chief of the Division of Engineering and Construction, Wastewater Management Department, City and County of Honolulu, appeared on behalf of the City. The City was represented by its attorneys Cheryl K. Okuma-Sepe, and Chris A. Diebling. David Dickson, Western Region Vice President of N-Viro, appeared on behalf of N-Viro, and N-Viro was represented by its attorneys Kale Feldman and Ernest H. Nomura.

The hearing continued on August 16, and 17, 1994, and concluded on August 18, 1994.

On September 22, 1994, the parties filed their respective post-hearing memoranda and their proposed findings of fact, conclusions of law, and final orders.

Having reviewed and considered the evidence and arguments presented at the hearing, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and decision pursuant to HRS §103D-709.

## **II. FINDINGS OF FACT**

### **A. THE CITY'S WASTEWATER PROCESSING REQUIREMENTS**

1. In September 1993, the City was faced with the possibility that its Honouliuli Wastewater Treatment Plant would be required to provide secondary treatment. Although the City had previously obtained a waiver permit exempting the Honouliuli Wastewater Treatment Plant from the requirements of secondary treatment, that permit will expire in 1996. If the City is unable to renew this permit, the Honouliuli Wastewater Treatment Plant will be required to provide secondary treatment, and this requirement in turn, will increase the production of sludge solids. (City's Proposed Findings of Fact Nos. I A 8 and 9).

2. The City has also obtained a waiver permit exempting the Sand Island Wastewater Treatment Plant from the requirements of secondary treatment, and that permit expires in 1995. If the City is unable to obtain a renewal of this permit, the Sand Island Wastewater Treatment Plant will be required to provide secondary treatment, which will consequently increase the production of sludge solids. (City's Proposed Findings of Fact No. I A 10, modified).

3. The City's Waianae Wastewater Treatment Plant which will provide secondary treatment, is in the process of being completed. (City's Proposed Findings of Fact No. I A 11).

4. The City's Honouliuli Wastewater Treatment Plant will provide facilities for secondary treatment for 13 million gallons a day of wastewater and this bid is currently being prepared. (City's Proposed Findings of Fact No. I A 12).

5. The City has estimated that the secondary treatment process will approximately double the production of sludge. Therefore, if the Sand Island plant production were doubled, that would amount to an estimated 30 tons of sludge per day, and if Honouliuli Plant's production were doubled, that would amount to an estimated 20 tons of sludge per day. (City's Proposed Findings of Fact No. I A 13, modified).

6. Sometime prior to September 27, 1993, the City was the subject of an enforcement action taken by the United States Department of Justice on behalf of the United States Environmental Protection Agency (hereinafter "EPA"), for alleged violations of the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, HRS Chapter 342D, and the conditions and limitations of the National Pollutant Discharge Elimination System permits. Exhibit N-14. (N-Viro's Proposed Findings of Fact No. 6, modified).

7. Sometime prior to the commencement of the present proceedings, the parties involved in the EPA legal action, began settlement discussions that culminated in a proposed Consent Decree. The EPA's proposed Consent Decree if accepted by all of the parties and by the United States District Court for the District of Hawaii, will require the City to comply with a deadline to construct a facility which can begin to handle sludge by December 31, 1995. (City's Proposed Findings of Fact No. II A 1).

8. The proposed Consent Decree had not been lodged or approved by the court at the conclusion of the administrative hearing on this matter. (City's Proposed Findings of Fact No. II A 2).

#### **B. THE CITY'S IFB FOR THE SLUDGE REUSE PROJECT**

9. On or about September 27, 1993, the City issued an Invitation for Bids (hereinafter "IFB") in connection with the proposed Honolulu Beneficial Sludge Reuse Facility for the City and County of Honolulu (hereinafter "the project" or "the facility").

10. The City's IFB indicated that bids needed to provide for the furnishing of all necessary labor, equipment, materials, tools, supplies, accessories, appurtenances to finance, design, engineer, construct, test, operate, and maintain for ten (10) years a beneficial sludge reuse facility having a minimum capacity to process 50 tons of dry sewage sludge solids per day (hereinafter "dtpd") into a marketable product, and to dispose of the product through beneficial reuse.<sup>1</sup> The processing requirements were set forth in sections 1.1, 2.2, and 4.4.1 of the IFB; section 5.5 of the Construction Contract (which was part of the IFB); and numerical paragraph 1 of the Price Proposal. (City's Proposed Findings of Fact No. I A 2, and N-Viro's Proposed Findings of Fact Nos. 4 and 7, modified).

11. Section 2.2 of the City's IFB also required all bidders to be responsible for all costs associated with on-site and off-site improvements related to the proposed facility. (N-Viro's Proposed Findings of Fact No. 8).

12. The City anticipated that daily sewage sludge output could increase to 50 dtpd or more during the ten year term of the contract. Consequently, the City was seeking bids for a facility which had the capacity to process 50 dtpd, from the first day of operations, throughout the 10 year duration of the contract. (Bio Gro's Proposed Findings of Fact No. 3, modified).

13. Mr. James Honke, Chief of the Division of Engineering and Construction for the City, was the principal drafter of the bid solicitation documents. Mr. Honke anticipated that the proposed facility would receive approximately 30 dtpd during its initial period of operations. The current total daily sewage sludge output of the island of Oahu is approximately 30 dtpd. (Bio Gro's Proposed Findings of Fact No. 2, modified).

14. The City's bid solicitation documents initially distributed by the City included the Invitation For Bid (IFB), and the documents entitled "Pricing Proposal," "Construction Contract," and "Operating and Maintenance Contract" (Appendices "A," "B," and "C" to the IFB). The Pricing Proposal, Construction Contract, and Operating and Maintenance Contract were all incorporated by reference in the IFB, and were intended to supplement and further

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<sup>1</sup> As noted in Findings of Fact No. 5, if secondary treatment of sewage becomes necessary, the City's Sand Island plant production would amount to an estimated 30 tons of sludge per day and the Honouliuli Plant's production would amount to an estimated 20 tons of sludge per day.

define the City's requirements for the construction and operation of the proposed facility. (Bio Gro's Proposed Findings of Fact No. 4, modified).

15. The IFB Pricing Proposal documents consisted of a form "offer" to be submitted by the contractor. The contractor was to fill in the appropriate blanks in the proposal, and submit the proposal as its formal bid. The first paragraph of the proposal form states that the contractor agrees to finance and furnish all equipment, accessories, structures, labor, etc. "necessary to design, construct, shakedown, and test a beneficial sludge reuse facility with a minimum throughput capacity of fifty (50) tons dry sewage sludge solids per day (dtpd)." (Bio Gro's Proposed Findings of Fact No. 5, modified).

16. In order to provide all bidders an equal opportunity for this project, the IFB provided that "[t]he basis for determining the low bid shall be the lowest average net present value of the discounted cash flow for disposal over a ten (10) year period." The basis for determining the lowest average net present value was provided in the pricing proposal provided in Appendix A attached to the IFB. The sludge quantity on which the bids were to be based for the determination of the lowest bid was 30 dtpd of sludge over the course of a ten year period of operations. The Pricing Proposal stated, on page 3:

Our bid and the costs in this Proposal, including the Exhibits I, II, and III, are based on a dewatered sludge quantity of thirty four thousand two hundred (34,200) tons per year which is based on the following:

1. An estimated annual average of the daily quantity of dry solids of thirty (30) tons per day which for 365 days per year amounts to ten thousand nine hundred fifty (10,950) tons dry solids per year. . .

The Pricing Proposal also stated on the same page that "[i]t is further understood that the 30 TPD of sludge is an estimated annual average of the present daily dry sewage solids produced at the City's wastewater treatment plants." (City's Proposed Findings of Fact No. I A 4, and Bio Gro's Proposed Findings of Fact Nos. 6 and 7, modified).

17. The IFB provided that the facility could be located on any site secured by the bidder and that all costs associated with off-site and on-site improvements shall be the responsibility of the bidder. (City's Proposed Findings of Fact No. I A 6).

18. The IFB required that the facility shall be sized to be capable of processing a minimum of 50 dtpd, and that the facility had to be expandable to process 60 dtpd. (City's Proposed Findings of Fact No. I A 7).

19. The IFB required that all prospective bidders submit information with their notice of intention to bid in order to allow the evaluation of the qualifications of the bidders and their proposed proven technological processes. Only those bidders whose technical proposals were deemed qualified, would be invited to submit price bid proposals. (City's Proposed Findings of Fact No. I A 3).

20. The project was submitted for public procurement in conjunction with the proposed EPA Consent Decree. (N-Viro's Proposed Findings of Fact No. 6, modified).

21. The IFB instructed all interested bidders that the "IFB may be revised by addenda and all interpretations, clarifications, changes, etc., relative to the IFB will be effected by addenda to be issued by the Director of Finance." IFB, section 3.2.3 at III-2 -III-3. (N-Viro's Proposed Findings of Fact No. 13).

22. Under the City's two-step procurement, technical qualifications and proposals were submitted on January 13, 1994. The bidders were then allowed to cure deficient technical qualifications and proposals, with the City accepting or rejecting the bidders' revised technical qualifications and proposals on or about April 13, 1994. (N-Viro's Proposed Findings of Fact No. 14).

### **C. BIO GRO'S BID FOR THE SLUDGE REUSE PROJECT**

23. Ms. Sue Rodgers, Bio Gro's Project Developer, Western Region, was in charge of coordinating and producing Bio Gro's bid. After reading the IFB documents, Ms. Rodgers understood that the City wanted a facility constructed or "sized" to be capable of processing up to 50 dtpd, but that the proposed facility would actually receive approximately 30 to 36 dtpd during the initial period of operations. (Bio Gro's Proposed Findings of Fact No. 8, modified).

24. Ms. Rodgers believed that the City's requirements regarding the facility's capacity were based primarily on the language in the bid documents indicating that the City anticipated that only 30 dtpd would initially be delivered to the facility. Ms. Rodgers believed that although the facility eventually needed to be capable of processing 50 dtpd on a sustained

basis, Ms. Rodgers did not believe that the bid solicitation documents required that the contractor immediately equip the facility and supply the labor and associated supplies and materials necessary to process 50 dtpd on a sustained basis from the first day of the contract. (Bio Gro's Proposed Findings of Fact No. 9, modified).

25. Ms. Rodgers' belief that the City did not expect to deliver 50 dtpd during the initial period of the contract was supported by an inquiry she made to the City, which requested the total current sludge production of the City. The figures provided by the City response to Ms. Rodgers' inquiry, showed an anticipated sludge production of 30 dtpd at the startup date of the facility. (Bio Gro's Exhibit No. 24). (Bio Gro's Proposed Findings of Fact No. 10).

26. Mr. Gary Carraux, Bio Gro's Director of Construction Services, was responsible for calculating the construction costs of the project. Mr. Carraux testified that his interpretation of the bid solicitation documents was the same as Ms. Rodgers, in regards to: a) the IFB requirements for the initial processing capacity of the proposed facility, and b) the amounts of sludge that would actually be provided for processing as of the time the facility began operating. (Bio Gro's Proposed Findings of Fact No. 11, modified).

27. Additionally, Mr. Carraux believed that under the documents incorporated in the IFB, Bio Gro would be responsible for the on-site improvements, and for the cost of constructing a road to connect Bio Gro's facility to the City and County road or State highway. Mr. Carraux did not check with the State or City departments of transportation to check for other traffic or construction requirements that might be imposed for the site selected by Bio Gro.

28. From the time Bio Gro received the IFB, to the time Bio Gro submitted its price proposal, Bio Gro had ample opportunity to review the IFB and to seek clarifications from the City, if necessary, regarding the IFB specifications and requirements. (N-Viro's Proposed Findings of Fact No. 9, modified).

29. Bio Gro requested additional information from the City regarding questions that Bio Gro had concerning the IFB. The City responded in writing to all of Bio Gro's questions and clarifications. Exhibits N-15, N-16, and N-19. (N-Viro's Proposed Findings of Fact No. 10, modified).

30. The IFB unequivocally warned all bidders that “[p]ricing proposals containing exceptions, qualifications or amendments shall be rejected.” IFB at section 3.4 at III-6. In December 1993, prior to the opening of the bids, Ms. Rodgers sought clarification regarding exceptions, qualifications or amendments to the IFB:

The last sentence in this section states that “Pricing proposals containing exceptions, qualifications or amendments shall be rejected”. Is this policy firm? Will all exceptions, qualifications, or amendments be rejected?

Exhibit N-15. (N-Viro’s Proposed Findings of Fact Nos. 27 and 28, modified).

31. The City responded to Ms. Rodgers’ December 1993 request for clarification by way of a letter dated December 23, 1993, which stated in relevant part:

It is a City regulation that any price proposal which has exceptions, qualifications, or amendments is considered a “non-responsive” bid and is rejected. . . .

Exhibit N-16. (N-Viro’s Proposed Findings of Fact No. 29).

32. Bio Gro did not ask any questions or seek clarification on either of the two requirements that are the subject of this protest: (1) the requirement that the proposed facility be capable of processing 50 dtpd, and (2) the requirement that the contractor be responsible for the cost of all off-site improvements. (N-Viro’s Proposed Findings of Fact No. 11, modified).

33. The City’s requirement of a 50 dtpd processing facility, and the requirement that the contractor to be responsible for all off site improvements costs, were not changed by the City throughout the bidding procedure and process. (N-Viro’s Proposed Findings of Fact No. 12, modified).

34. According to Bio Gro’s technical proposal, Bio Gro proposed to construct a facility with 25 bays, with each bay capable of processing 2 dtpd of sewage sludge. Because Bio Gro proposed to construct a facility with 25 bays, the City concluded that Bio Gro’s system would be able to meet the 50 dtpd requirement. (N-Viro’s Proposed Findings of Fact No. 17).

35. Bio Gro’s price proposal was submitted to the City on or about June 16, 1994. Bio Gro’s price bid was accompanied by a letter dated June 16, 1994, signed by Ms. Sue

Rodgers, as Bio Gro's authorized representative. Ms. Rodgers' June 16, 1994 letter stated in relevant part as follows:

The CITY has requested an IPS composting facility designed to process up to 50 dry tons per day (dtpd) with a guaranteed production of only 30 dtpd over a contract term of 10 years. *The facility offered will be designed and constructed with 25 bays (necessary for processing 50 dtpd) and will be equipped with blowers, mixers, and agitators for processing 30-36 dtpd.*

As the biosolids production increases to meet the 50 dtpd capacity, *additional equipment will be added. The response time for adding additional equipment will range from 1 to 4 months.* Under this option the CITY will benefit from the cost savings associated with not purchasing equipment which will remain idle. As requested in the Invitation for Bid an additional 5 bays may be added in the future to meet projected production of up to 60 dtpd.

\* \* \* \*

Bio Gro will be responsible for all on site improvements *but does not assume responsibility for any improvements to State or County roads.*

Bio Gro had submitted comments on and requested changes to the proposed contract terms in our March 24 submittal to the CITY. For the most part we were pleased with the CITY's response to our comments, in particular the willingness of the CITY to extend the permitting time beyond 6 months if delays occur which are beyond our control. However, our bid is being submitted based upon our interpretation of the following:

Construction Contract Section 9.10 LIABILITY OF CITY FOR ITS EVENTS OF DEFAULT. Bio Gro would like to go on the record stating that we do not agree with the CITY's position on the definition of unrecoverable expenses and 'direct damages' in the event of Default by the CITY. Bio Gro reserves the right to seek to include lost profits as part of our direct damages claim before the Independent Third Party in the event the CITY defaults.

Exhibit N-4 [emphasis added]. (N-Viro's Proposed Findings of Fact No. 21). A true and accurate copy of Ms. Rodgers' June 16, 1994 letter is attached hereto as Appendix A, and by this reference incorporated herein.

36. Because Bio Gro's system of processing sludge was modular, two of their 25 bays could be tested, with each bay processing two tons per day; the remaining 23 bays were

assumed by the City to be the same as the two bays which are tested. Provided that all bays were similarly equipped, the City determined that the remaining 23 bays would be able to meet the 50 dtpd processing requirements. After reviewing Bio Gro's proposed method of testing, the City approved Bio Gro's technical proposal and price proposal. (City's Proposed Findings of Fact Nos. I B 1 and 2, modified).

37. The City also approved N-Viro's technical proposal and on or about June 15, 1994, N-Viro's price proposal was submitted to the City. Exhibit N-3. (N-Viro's Proposed Findings of Fact No. 19).

38. Price bids were opened on June 17, 1994. (N-Viro's Proposed Findings of Fact No. 20).

39. Using the methodology provided in the IFB to determine the low bid, the City determined that Bio Gro was determined to be the lowest bidder quoting \$74/ton to process sludge. The next highest bidder was N-Viro Corporation, quoting \$81/ton. (City's Proposed Findings of Fact No. I A 5).

#### **D. THE DISQUALIFICATION OF BIO GRO'S BID**

40. By letter dated June 24, 1994, Mr. David R. Dickson, on behalf of N-Viro, informed Mr. Russell Miyake, Director of Finance for the City, that in Mr. Dickson's opinion, Bio Gro's bid should be rejected and the project awarded to N-Viro as the lowest responsive bidder. A true and accurate copy of Mr. Dickson's June 24, 1994 letter is attached hereto as Appendix B, and by this reference incorporated herein.

41. The City had always intended that the proposed facility be equipped with sufficient labor, equipment, and supplies and materials to process 50 dtpd from the beginning of operations, and throughout the course of the contract. Mr. Honke testified that after reading Ms. Rodgers' letter, he interpreted Ms. Rodgers' statements as qualifications or exceptions to the bid solicitation documents. (Bio Gro's Proposed Findings of Fact No. 20, modified).

42. By letter dated June 30, 1994, Mr. Miyake, on behalf of the City, informed Ms. Rodgers that Bio Gro's price proposal had been rejected because it contained "qualifications and takes exception to the project specifications." Exhibit N-7 (Bio Gro Exhibit 16). The City's rejection letter stated:

We regret to inform you that after considerable evaluation of your bid we have determined that it contains qualifications and takes exception to the project specifications. In accordance with Section 3.4 (page III-6) of the Invitation for Bids which states "Pricing proposals containing exceptions, qualifications or amendments shall be rejected.", we are therefore rejecting your bid.

We are compelled to take this action because accepting the bid with the qualifications and exceptions would give you an unfair advantage over the other bidders. N-Viro International Corporation has been determined to be the lowest responsible bidder.

Exhibit N-7. (N-Viro's Proposed Findings of Fact No. 30, modified).

43. On or about July 6, 1994, representatives of Bio Gro met with the City regarding the City's rejection of their bid.

44. By letter dated July 8, 1994, Bio Gro's attorney Perry W. Confalone, tendered Bio Gro's protest of the City's rejection of Bio Gro's bid pursuant to HRS Section 103D-701, as agreed to by Bio Gro and the City pursuant to HRS Section 103D-102. Mr. Confalone also requested an administrative review by the City's Chief Procurement Officer pursuant to HRS Chapter 103D. (N-Viro's Proposed Findings of Fact No. 31, modified).

45. Bio Gro submitted a letter dated July 12, 1994, addressing each grounds for the City's rejection of Bio Gro's bid proposal as nonresponsive. (City's Proposed Findings of Fact No. I C 9).

46. By letter dated July 18, 1994, Mr. Glen S. Nonaka, Acting Director of Finance for the City, informed Bio Gro that after considering Bio Gro's substantive response to the City's concerns, the City had decided to reaffirm the disqualification of Bio Gro's bid, because Bio Gro's bid was not responsive to the 50 dtpd requirement and the off-site improvement costs requirement. (City's Proposed Findings of Fact No. I C 10, and N-Viro's Proposed Findings of Fact No. 32, modified). A true and accurate copy of Mr. Nonaka's July 18, 1994 letter is attached hereto as Appendix C, and by this reference incorporated herein.

47. The two reasons asserted by the City for disqualifying Bio Gro's bid, related to Ms. Rodgers' letter dated June 16, 1994, which accompanied Bio Gro's bid proposal. The first reason asserted by the City and County relates to the following language in Ms. Rodgers' June 16, 1994 letter:

The CITY has requested an IPS composting facility designed to process up to 50 dry tons per day (dtpd) with a guaranteed production of only 30 dtpd over a contract term of 10 years. The facility offered will be designed and constructed with 25 bays (necessary for processing 50 dtpd) and will be equipped with blowers, mixers, and agitators for processing 30-36 dtpd.

As the biosolids production increases to meet the 50 dtpd capacity, additional equipment will be added. The response time for adding additional equipment will range from 1 to 4 months. Under this option the CITY will benefit from the cost savings associated with not purchasing equipment which will remain idle. As requested in the Invitation for Bid and additional 5 bays may be added in the future to meet projected production of up to 60 dtpd.

After reading Ms. Rodgers' letter, the City understood that Bio Gro was proposing a facility which was only capable of processing 30 - 36 dtpd at the beginning of operations. (Bio Gro's Proposed Findings of Fact Nos. 17, 18 and 19, modified).

48. Ms. Rodgers testified that the reference in her cover letter to a facility "equipped with blowers, mixers, and agitators for processing 30-36 dtpd" was only intended to clarify Bio Gro's interpretation of the bid requirements, and was not intended to be a qualification or exception. (Bio Gro's Proposed Findings of Fact No. 21).

49. To process 30-36 dry tons of sludge per day, Bio Gro would have used 15 of the 25 concrete bays in its facility. The 30-36 dtpd would be processed through the 15 bays on a 21 day cycle, utilizing the equipment on an eight-hour basis. (Bio Gro's Proposed Findings of Fact No. 22, modified).

50. On the other hand, Bio Gro's proposed facility was also capable of processing 50 dtpd from its onset. Bio Gro's proposed facility could have processed 50 dtpd using the equipment normally used to process 30 to 36 dtpd by accelerating the sludge through the bays on a 14 day cycle, using the additional ten bays to further "cure" the sludge for the remaining seven days, and operating the equipment for longer hours. (Bio Gro's Proposed Findings of Fact No. 22, modified).

51. However, the equipment that was to be initially installed at Bio Gro's proposed facility was not designed to process 50 dtpd on a *sustained or prolonged basis*, although the equipment could be used for longer operational hours for at least four months without causing irreparable damage to the equipment. Bio Gro therefore intended to add additional processing

equipment as the City's sludge delivery increased over time, and the installation of the additional equipment would have taken between one to four months. (Bio Gro's Proposed Findings of Fact No. 22 [misnumbered], modified).

52. Mr. Carraux testified that Bio Gro had budgeted for additional equipment in its bid proposal for the purpose of buying additional equipment to process 50 dtpd on a sustained basis. However, the preponderance of the evidence established that if Bio Gro had capitalized the costs of all of the equipment required for a facility capable of processing 50 dtpd on a sustained basis from the first day of operations throughout the duration of the contract, Bio Gro's price bid would have been higher than the bid that Bio Gro submitted. (N-Viro's Proposed Findings of Fact No. 23, modified).

53. The City's second asserted reason for deeming the bid nonresponsive was the statement in Ms. Rodgers' cover letter that "Bio Gro will be responsible for all on site improvements but does not assume responsibility for any improvements to State or County roads." Mr. Honke testified that he believed this statement by Ms. Rodgers conflicted with the statement, in the Invitation For Bid, Section 2.1, that "[a]ll costs associated with off-site and on-site improvements shall be the responsibility of the Contractor." (Bio Gro's Proposed Findings of Fact Nos. 24 and 25, modified).

54. Mr. Carraux testified that Bio Gro was initially concerned by the language in the IFB holding the contractor liable for all costs associated with off-site and on-site improvements. However, Bio Gro's concern abated after it reviewed the more specific references to off-site and on-site costs in the Construction Contract and Pricing Proposal. (Bio Gro's Proposed Findings of Fact No. 26).

55. Although the IFB did not specifically define "off-site" and "on-site" costs, Article IV of the Construction Contract contained a section entitled "OFF-SITE SERVICES AND UTILITIES" which stated in relevant part:

**Section 4.3 OFF-SITE SERVICES AND UTILITIES.** To the extent not otherwise provided by utility companies or agencies, the Contractor shall provide for installation of off-site services and utilities, both temporary and permanent, necessary for the construction, operation and/or maintenance of the Facility. All such work shall be in accordance with the requirements of local authorities and agencies and utility companies.

(Bio Gro's Proposed Findings of Fact No. 27).

56. Article IV of the Construction Contract also specified the bidder's responsibility for roads at the site:

Section 4.5 ROADS AND PARKING FACILITIES AT THE SITE. The Contractor shall provide all roads within the Site as may be required for the construction, operation and maintenance of the Facility. The contractor shall provide for on-site parking facilities in conformance with the Land Use Ordinance of the City and County of Honolulu for all personnel to be employed at the Facility and no less than five (5) visitor parking stalls.

(Bio Gro's Proposed Findings of Fact No. 28).

57. Exhibit I of the Pricing Proposal also contained references to off-site and on-site costs: "on-site costs" were listed as a fire protection system, a water system, and a power system; and "off-site costs" were listed as landscaping, grading and roads, and foundation and soil testing. (Bio Gro's Proposed Findings of Fact No. 29).

58. Mr. Carraux interpreted the terms "on-site" and "off-site" improvements in the IFB by referring to the more specific descriptions of on-site and off-site costs in the Construction Contract and Pricing Proposal. Thus, Mr. Carraux understood the bid solicitation to hold the contractor liable for the "on-site improvements" related to a fire protection system, water system, and power system, and for the "off-site improvements" related to services and utilities. (Bio Gro's Proposed Findings of Fact No. 30).

59. Mr. Carraux's interpretation of the terms "on-site" and "off-site" was also guided by the provisions of the Construction Contract that set forth an order of precedence in interpreting the bid solicitation documents. Section 2.2 of the Construction Contract provided that in the event of conflicting provisions within the documents, the Construction Contract and associated exhibits would govern, followed by the Pricing Proposal, followed by the Qualifications and Proposal. (Bio Gro's Proposed Findings of Fact No. 31).

60. On the other hand, as far as the City was concerned, the City expected the successful bidder to be responsible for *all* on-site and off-site improvements associated with facility operations throughout the contract term, irrespective of whether those improvements were known and required at the time the bid was submitted. (Bio Gro's Proposed Findings of Fact No. 32, modified).

**E. THE CITY'S AWARD OF CONTRACT TO N-VIRO**

61. After reviewing the IFB specifications and conditions, N-Viro understood that the City's bid requirements for the proposed facility included financing, designing, engineering, constructing, testing, and operating/maintaining a facility capable of processing 50 dtpd of sewage sludge on a sustained basis from the first day of operations throughout the duration of the contract. N-Viro's proposed facility did not require any additional equipment to process 50 dtpd on a sustained basis. (N-Viro's Proposed Findings of Fact No. 24, modified).

62. N-Viro's price bid was affected by designing its proposed facility to meet the 50 dtpd of sewage sludge requirement in the IFB. N-Viro's bid would have been lower if N-Viro had been allowed to submit a bid for a facility that was designed to process only 30 to 36 dtpd on a sustained basis, since the facility would have been smaller and require less equipment. (N-Viro's Proposed Findings of Fact No. 24, modified).

63. As to N-Viro's understanding of its responsibilities for on-site and off-site improvements, N-Viro interpreted "off-site improvements" in the introductory language of the IFB as requiring the contractor to be responsible for all off-site improvements known by the contractor at the time the pricing proposal is submitted, including improvements to County or State roads, and traffic studies. On the other hand, N-Viro also was of the understanding that unforeseen off-site improvements would be subject to adjustments in the contract price. (Bio Gro's Proposed Findings of Fact No. 32).

64. N-Viro considered various sites for its proposed facility (including the area selected by Bio Gro), before N-Viro finally selected the Campbell Industrial Park site. N-Viro's site selection was based in part upon the number of on-site and off-site improvements that N-Viro would be required to make, as well as improvements that did not have to be made because of the existing infrastructure at the Campbell Industrial Park site. Consequently, N-Viro's price bid reflected that N-Viro would comply with the IFB requirements regarding N-Viro's responsibility for all on-site and off-site improvements costs, which in turn affected N-Viro's price bid. (N-Viro's Proposed Findings of Fact No. 26, modified).

65. The facility that was proposed by N-Viro was designed to process 36 dtpd during normal working hours, but the facility would be capable of processing 50 dtpd if the facility was operated longer than 8 hours per day. Although N-Viro, like Bio Gro, did not anticipate receiving 50 dtpd at the start of operations, all of N-Viro's equipment costs were capitalized in N-Viro's bid. (Bio Gro's Proposed Findings of Fact No. 23, modified).

66. As a result of the disqualification of Bio Gro's bid, the City's chief procurement officer concluded, after due consultation with appropriate City personnel, that in light of the proposed EPA consent decree, the conditional award of the public procurement contract for the project was necessary to protect the substantial interests of the City and the public. (N-Viro's Proposed Findings of Fact No. 33 and 34, and City's Proposed Findings of Fact No. II A 7, modified).

67. Consequently, on or about July 27, 1994, the City made a conditional award of the contract to N-Viro, as the lowest responsible and responsive bidder, pursuant to the Rules and Regulations of the City's Finance Director, Part XXXIII, Section 3.1, and HRS §103D-701(f). (N-Viro's Proposed Findings of Fact No. 33 and 34, and City's Proposed Findings of Fact No. II A 7, modified). A true and accurate copy of Mr. Nonaka's July 27, 1994 letter is attached hereto as Appendix D, and by this reference incorporated herein.

68. The preponderance of the evidence presented at the hearing established that N-Viro did not make any political contributions to any candidate for political office that motivated the City to award the contract for the project to N-Viro. (N-Viro's Proposed Findings of Fact No. 35, modified).

69. There was no evidence presented to establish that the City had any improper motives or motivation regarding its award of the contract for the project to N-Viro. (N-Viro's Proposed Findings of Fact No. 36, modified).

#### **F. THE EPA'S PROPOSED CONSENT DECREE WITH THE CITY**

70. The City invoked the Force Majeure clause in the proposed Consent Decree by submitting in good faith its notice to EPA that the City be excused from violations for failure to meet the December 31, 1995 deadline. (City's Proposed Findings of Fact No. II A 3).

71. Under the Force Majeure clause, any extension from the deadline provided in the Consent Decree required EPA approval. (City's Proposed Findings of Fact No. II A 4).

72. As of the conclusion of the hearing on this matter, EPA had not responded to the City's notice to invoke Force Majeure. (City's Proposed Findings of Fact No. II A 5).

73. That EPA is aware that a bid protest has been filed in this matter by Bio Gro. (City's Proposed Findings of Fact No. II A 6).

### **III. CONCLUSIONS OF LAW**

The issues in the present case are: 1) whether the City properly rejected Bio Gro's bid because of Bio Gro's statement that the facility would be designed, constructed and equipped to process 30 - 36 dtpd, instead of 50 dtpd; and 2) whether the City properly rejected Bio Gro's bid because of Bio Gro's statement that they only assumed responsibility for on-site costs, not for State or County road costs.

#### **A. APPLICABLE PUBLIC PROCUREMENT LAW**

In determining the applicable law regarding the public procurement process, the Hearings Officer generally agrees with the authorities set forth by N-Viro in its proposed Conclusions of Law.

First, the purpose of HRS Chapter 103D as reflected in its legislative history is:

The purpose of this bill is to revise, strengthen, and clarify Hawaii's laws governing procurement of goods and services and construction of public works.

Specifically, the bill establishes a new comprehensive code that will:

- (1) Provide for fair and equitable treatment of all persons dealing with the government procurement system;
- (2) Foster broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency in the procurement process; and
- (3) Increase public confidence in the integrity of the system.

Standing Committee Report No. S8-93, 1993 SENATE JOURNAL, at 39.

Turning now to the present case, the provisions of HRS § 103D-302 state in relevant part:

§ 103D-302 **Competitive sealed bidding.** (a) . . . Award [of contracts] is based on the criteria set forth in the invitation for bids.

...

(d) Bids shall be opened publicly in the presence of one or more witnesses, at the time and place designated in the invitation for bids. The amount of each bid and other relevant information specified by rule, together with the name of each bidder, shall be recorded. The record and each bid shall be open to public inspection.

(e) Bids shall be unconditionally accepted without alteration or correction, except as authorized in this chapter or by rules adopted by the policy office.

(f) Bids shall be evaluated based on the requirements set forth in the invitation for bids. These requirements may include criteria to determine acceptability such as inspection, testing, quality, work-manship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.

(g) Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of invitations for bids, awards, or contracts based on such bid mistakes, shall be permitted in accordance with rules adopted by the policy office. After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the public or to fair competition shall be permitted. Except as otherwise provided by rule, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the chief procurement officer or head of a purchasing agency,

(h) The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. In the event all bids exceed available funds as certified by the appropriate fiscal officer, the head of the purchasing agency responsible for the procurement in question is authorized in situations where time or economic considerations preclude resolicitation of work of a reduced scope to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsible and responsive bidder, in order to bring the bid within the amount of available funds.

(i) When it is not practicable to initially prepare a purchase description to support an award based on price, an invitation for bids, which requests the submission of unpriced offers to be followed by an invitation for bids limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation, may be used. If a multi-step sealed bidding process is used, the notice and the invitation for bids shall describe each step to be used in soliciting, evaluating, and selecting unpriced offers.

Additionally, from a historical perspective the fundamental principals of the public procurement process were set forth by the Supreme Court of Hawaii in *Lucas v. Amer. Haw. E. & C. Co.*, 16 Haw. 80 (1912), in which the Court stated:

Genuine competition can only result when parties are bidding against each other for precisely the same thing and on the same footing. . .

The object of all such statutory provisions [bidding statutes] is to prevent favoritism, corruption, extravagance and improvidence in the awarding of all public contracts. [Citation omitted].

A fair competition among the bidders is the prime object of such statutory provisions, and anything which tends to impair this illegal. [Citation omitted]. Such a provision requires such information to be within the reach of bidders as will enable to bid intelligently and will enable the official having charge of the proposed work to know whose bid is the lowest. The character of the work and the materials of which it shall be composed must be decided in advance.

16 Haw. at 90. See also, *Brewer Environmental Indus., Inc. v. A.A.T. Chemical, Inc.*, 73 Haw. 344, 832 P.2d 276 (1992).

After reviewing the parties' proposed conclusions of law and the authorities cited therein, the Hearings Officer adopts the following conclusions of law as proposed by N-Viro:

a. Compliance with the material terms of bid specifications is mandatory. HRS §103D-302. (N-Viro's Proposed Conclusions of Law No. 3, modified);

b. A material deviation in a bid from the invitation to bid, requires rejection when the bidder so qualifies or conditions the bid that the legal effect is altered, or so words the offer that the bidder will gain an unfair advantage over other competing bidders. *McBride & Wachtel, supra*, at 10-247. (N-Viro's Proposed Conclusions of Law No. 5, modified);

c. A "material deviation" from the call for tenders requires rejection where price, quantity, or quality is affected. The contracting officer has no authority or power to waive a "material deviation." *Toyo Menka Kaisha, Ltd. v. United States*, 597 F.2d 1371 (Ct. Cl. 1979). (N-Viro's Proposed Conclusions of Law No. 6);

d. Responsiveness is determined by reference to bids when they are opened and not by reference to subsequent changes or clarifications to a bid. HRS §103D-302(g); *R. Nash & J. Cibinic, FEDERAL PROCUREMENT LAW* 260, 261 (3d ed. 1977); *Toyo Menka Kaisha, Ltd. v. United States*, 597

F.2d 1371 (Ct. Cl. 1979); *Application of Glen Truck Sales Services, Inc.*, 220 N.Y.S.2d 939 (N.Y. Sup. Ct. 1961); *Land Construction Co. v. Snohomish County*, 698 P.2d 1120 (Wash. App. Ct. 1985). (N-Viro's Proposed Conclusions of Law No. 7, modified);

e. A bidder should not be given the opportunity to clarify the bidder's position after bid opening and prior to acceptance, because it gives the bidder "two bites at the apple" and a competitive advantage over other bidders. *McBride & Wachtel, supra*, at 10-252 (1994). (N-Viro's Proposed Conclusions of Law No. 8, modified);

f. A bid that is ambiguous such that the intended bid price cannot be discerned is non-responsive and must be rejected. *Foster v. Honolulu Construction and Draying*, 21 Haw. 689 (1913); *McBride & Wachtel, supra*, at 10-254 (1994); *Appeal of Packard Instr. Co.*, Docket No. 1272 (Md. State Bd. of Contract App. March 17, 1986). (N-Viro's Proposed Conclusions of Law No. 9).

g. A bid that contains a provision by the bidder to decrease or eliminate his legal liability or to increase that of the government, is not a responsive bid and must be rejected. *McBride & Wachtel, supra*, at 10-264; *Williamsburg Steel Co.*, 76-1 C.P.D. 40 (1976). (N-Viro's Proposed Conclusions of Law No. 10).

#### **B. THE IFB MINIMUM PROCESSING REQUIREMENT OF 50 DTPD**

The Hearings Officer concludes that the preponderance of the evidence established that the IFB specifications were clear and unambiguous regarding the City's minimum requirement that any proposed facility had to be capable of processing a minimum of fifty (50) tons of dry sewage sludge solids per day, as of the first day of operations, on a sustained basis over the course of the 10-year contract. (N-Viro's Proposed Conclusions of Law No. 11, modified). The 50 dtpd minimum capacity requirement set forth in the IFB was a material term of the call for tenders. (N-Viro's Proposed Conclusions of Law No. 12).

As to the facility that Bio Gro proposed to construct, the preponderance of the evidence established that the proposed facility was primarily designed to treat 30 to 36 dtpd on a sustained basis, but could treat up to 50 dtpd for a period of approximately 4 months, before requiring the installation of additional equipment. As clearly stated in Ms. Rodgers' transmittal letter of June 16, 1994:

. . . The facility offered will be designed and constructed with 25 bays (necessary for processing 50 dtpd) and will be equipped with blowers, mixers, and agitators for processing 30-36 dtpd.

As the biosolids production increases to meet the 50 dtpd capacity, additional equipment will be added. The response time for adding additional equipment will range from 1 to 4 months. Under this option the CITY will benefit from the cost savings associated with not purchasing equipment which will remain idle. As requested in the Invitation for Bid an additional 5 bays may be added in the future to meet projected production of up to 60 dtpd.

The additional equipment that would be required to allow the Bio Gro proposed facility to process 50 dtpd on a sustained basis from its first day of operations, was not capitalized in Bio Gro's bid proposal.

Moreover, contrary to Ms. Rodgers' understanding, the City did not request an IPS composting facility "designed to process up to 50 dtpd (dtpd) with a guaranteed production of only 30 dtpd over a contract term of 10 years," but rather a facility having **a minimum capacity to process 50 tons of dry sewage sludge solids per day.**

Therefore, the Hearings Officer concludes that as a matter of law, Bio Gro made exceptions, qualifications, and/or conditions in its price proposal regarding the 50 dtpd requirement, that significantly altered to its sole benefit the project risks, which placed N-Viro and other bidders at a competitive disadvantage. (N-Viro's Proposed Conclusions of Law No. 13, modified).

If the City had allowed Bio Gro to unilaterally modify the requirement that the proposed facility be able to process 50 dtpd of sewage sludge on a sustained basis from the first day of operations, the City would have given Bio Gro a competitive advantage not enjoyed by other bidders. (N-Viro's Proposed Conclusions of Law No. 14, modified).

Therefore, the Hearings Officer concludes that Bio Gro failed to submit a responsive and compliant bid with respect to the City's requirement that the proposed facility be capable of processing a minimum of 50 dtpd of sewage sludge. (N-Viro's Proposed Conclusions of Law Nos. 15 and 16, modified).

Accordingly, the Hearings Officer concludes that as a matter of law, the City properly rejected Bio Gro's bid. (N-Viro's Proposed Conclusions of Law No. 17).

**C. ON-SITE AND OFF-SITE IMPROVEMENTS COSTS**

Because the City's IFB allowed the bidders to select their own sites for their proposed facilities, in order to make the bidding process fair, the City required bidders to be responsible for all on-site and off-site improvements costs. The City's specifications were clear and unambiguous regarding the requirement that all on-site and off-site improvements costs would be the responsibility of the contractor. (N-Viro's Proposed Conclusions of Law No. 18, modified). Additionally, the responsibility for off-site improvements costs set forth in the IFB was a material term of the call for tenders. (N-Viro's Proposed Conclusions of Law No. 19).

As to Bio Gro's bid proposal, Bio Gro specifically declined to accept responsibility for any improvement to State or County roads as clearly stated in Ms. Rodgers' transmittal letter of June 16, 1994:

*Bio Gro will be responsible for all on site improvements but does not assume responsibility for any improvements to State or County roads.*

Furthermore, Mr. Carraux in his testimony at the hearing, reiterated Bio Gro's position that it would not accept responsibility for any improvement to State or Country roads, even though such improvements might be required as a condition of the operation of the proposed facility.

In construing Ms. Rodgers' June 16, 1994 transmittal letter, the Hearings Officer must conclude that Bio Gro made exceptions, qualifications, and/or conditions in its price proposal regarding the off-site improvements costs requirement, that significantly altered to Bio Gro's sole benefit the project risks, which placed N-Viro and other bidders at a competitive disadvantage. (N-Viro's Proposed Conclusions of Law No. 20, modified).

If the City had allowed Bio Gro to unilaterally modify the off-site improvements costs requirement, Bio Gro would have had a competitive advantage not enjoyed by other bidders. (N-Viro's Proposed Conclusions of Law No. 21, modified).

Therefore, the Hearings Officer concludes that as a matter of law, that the City properly rejected Bio Gro's bid because Bio Gro failed to submit a responsive and compliant bid, and because Bio Gro did not accept responsibility to pay the cost of all off-site

improvements in connection with its facility construction. (N-Viro's Proposed Conclusions of Law Nos. 22, 23, and 24, modified).

**D. THE CITY'S AWARD TO N-VIRO**

The preponderance of the evidence established that N-Viro's bid proposal met all IFB requirements, including: 1) the proposed N-Viro facility had been designed to be capable of processing 50 dtpd on a sustained basis, from the first day of operations, throughout the term of the contract, and 2) N-Viro's bid proposal accepted responsibility for all on-site and off-site improvement related to the facility.

Furthermore, the City's chief procurement officer, after consultation with the heads of the affected agencies, made a written determination that the award of the contract to N-Viro without delay, was necessary to protect substantial interest of the City.

Accordingly, the Hearings Officer concludes that as a matter of law, the City complied with HRS §103D-701(f), and properly awarded the contract for the project to N-Viro, the lowest responsive and responsible bidder. (N-Viro's Proposed Conclusions of Law No. 28).

**E. BIO GRO'S "CLARIFICATIONS" AND UNILATERAL MISTAKE**

In the course of the present proceedings, Bio Gro asserted that Ms. Rodgers' transmittal letter of June 16, 1994, was a "clarification" of Bio Gro's bid, and was not intended to be construed as exceptions, qualifications or amendments to Bio Gro's actual bid proposal.

However, the preponderance of the evidence presented by the parties established that Ms. Rodgers' transmittal letter of June 16, 1994, was an accurate reflection of the responsibilities that Bio Gro perceived it had under the terms of its bid:

- a) although Bio Gro's facility could process up to 50 dtpd for up to four months using the equipment initially installed, Bio Gro's proposed facility was not designed to process 50 dtpd on a sustained basis from day one of the contract; and
- b) Bio Gro did not intend to pay for any off-site improvements other than costs related to connecting the facility with the State or City road.

The Hearings Officer therefore concludes that despite Bio Gro's assertions to the contrary, Ms. Rodgers' letter of June 16, 1994, was intended to be considered part of Bio Gro's proposal, and indeed modified the terms of Bio Gro's proposal.

Even if Bio Gro's assertions that Ms. Rodgers' letter was a mistake and should have been disregarded by the City, the result would be a further legal issue of mistake. The Supreme Court of Hawaii in *Foster v. Honolulu Construction & Draying Co. Ltd.*, 21 Haw. 689 (1913), stated:

. . . Reading into a proposal new or additional terms is quite a different proposition from that of construing a contract. This distinction as between a mere proposal and a contract clearly distinguishes the authorities cited by counsel upon this question from the case at bar. To permit a substantial change in a proposal of the character in question, after the other bids have been opened and made public, would be contrary to public policy, and would tend to open the door to fraudulent and corrupt practices.

The proposal, however viewed, presents a question of doubt and uncertainty as to the bidder's intention. Doubt or uncertainty is incompatible with agreement. To result in a contract, the offer must be certain. No contract can be founded upon uncertainty; and if a contract could not be founded upon the proposal in question because of its uncertainty. . . , it follows that the proposal was properly rejected. If the proposal, either as to the unit bid, or as to the total bid, is not what the complainants intended, obviously, an acceptance of it in that form would not satisfy the law as to the essential elements of a contract. [Citation omitted]. Such a proposal and acceptance thereof would be lacking in mutuality. It would be a mutual mistake.

21 Haw. at 694.

Therefore, given the contents of Ms. Rodgers' letter, as well as the subsequent explanations provided to the City and the evidence presented at the hearing, the Hearings Officer concludes that the City properly construed Ms. Rodgers' letter in *pari materia* with Bio Gro's bid proposal.

The Hearings Officer further concludes that as a matter of law, Ms. Rodgers' letter of June 16, 1994, even if meant to be a "clarification" instead of a statement of exceptions, qualifications, and/or conditions, reflected at least two unilateral mistakes on the part of Bio Gro: 1) that the facility did not need to be able to process 50 dtpd on a sustained basis over the course of the contract, and 2) that Bio Gro did not have to be responsible for all off-site

improvements. The evidence was abundantly clear that the City's intentions were the opposite of Bio Gro's understandings as to these two issues.

While the Hearings Officer recognizes that Ms. Rodgers' letter was a reflection of Bio Gro's desire to be as candid and explicit as it could be in regards to clarifying its bid, at the point where Bio Gro's "clarifications" were not accepted at face value by the City, such clarifications became unilateral modifications to the IFB specifications.

As pointed out by the City and N-Viro during the course of the hearing, if the City had accepted Bio Gro's bid as modified by Ms. Rodgers' letter, then Bio Gro would have had several advantages over the other bidders:

- a) Bio Gro would have been able to construct its facility to primarily process 30 - 36 dtpd, and with less equipment required at startup, Bio Gro would have been able to submit a lower bid price;
- b) Bio Gro would have had a four-month window in which to have the additional equipment installed to bring the processing capacity of Bio Gro's facility up to 50 dtpd on a sustained basis, instead of being required to have such capabilities as of the date of startup;
- c) During the four-month window that Bio Gro would be allowed to install any additional equipment, the City could not seek damages under the terms of the contract; and
- d) By disclaiming responsibility for off-site improvements that were related or associated with its facility, Bio Gro would be able to reduce its costs further, and shift the liability for off-site improvements to the City.

In the final analysis, even without Ms. Rodgers' letter, if Bio Gro's actual position regarding the IFB was consistent with the contents of Ms. Rodgers' letter, then the City and Bio Gro could not have reached an agreement of terms, since both parties had different expectations and understandings of the IFB requirements.

#### **IV. DECISION**

Based on the foregoing, it is hereby **ORDERED THAT:**

1. The City's disqualification and rejection of Bio Gro's price proposal is affirmed;

2. Bio Gro's Motion to Stay Further Action on Contract Award Pending Adjudication of Administrative Proceeding, filed on August 5, 1994, is denied;
3. The City's award to N-Viro is affirmed;
4. The City may proceed with the public procurement for the Honolulu Beneficial Sludge Reuse project with N-Viro as the lowest responsible and responsive bidder; and
5. All parties to bear their own respective attorneys' fees, costs, and expenses.

DATED: Honolulu, Hawaii, November 4, 1994.

  
\_\_\_\_\_  
RODNEY A. MAILE  
Senior Hearing Officer  
Office of Administrative Hearings  
Department of Commerce  
and Consumer Affairs  
State of Hawaii



June 16, 1994

Finance Director  
Department of Finance  
Division of Purchasing  
City Hall  
Honolulu, HI 96813

Subject: Honolulu Beneficial Sludge Reuse Project Invitation to Submit Bids

Dear Sir or Madam:

Bio Gro is pleased to submit a Pricing Proposal in response to the City and County of Honolulu's Invitation to Bid for the financing, design, engineering, construction, testing and operation/maintenance of a beneficial sludge reuse facility. Enclosed are the official Pricing Forms, the Bid Bond and Exhibit E, the bid Specifications.

After thorough review of the biosolids management needs of the City and County of Honolulu (CITY), Bio Gro is providing pricing for three (3) IPS composting facility options. Each facility is designed to provide maximum environmental and economical benefits. The following is a summary of the three options:

#### BASE BID

The CITY has requested an IPS composting facility designed to process up to 50 dry tons per day (dtpd) with a guaranteed production of only 30 dtpd over a contract term of 10 years. The facility offered will be designed and constructed with 25 bays (necessary for processing 50 dtpd) and will be equipped with blowers, mixers, and agitators for processing 30-36 dtpd.

As the biosolids production increases to meet the 50 dtpd capacity, additional equipment will be added. The response time for adding additional equipment will range from 1 to 4 months. Under this option the CITY will benefit from the cost savings associated with not purchasing equipment which will remain idle. As requested in the Invitation for Bid an additional 5 bays may be added in the future to meet projected production of up to 60 dtpd.

#### Appendix A



### **BASE BID - OPTION I**

The first option Bio Gro is offering to the CITY is identical to the Base Bid with additional cost savings associated with entering into a 20 year versus 10 year agreement. This facility would be designed and constructed for 50 dtpd with equipment in place to handle the current 30 dtpd production. Expansion capabilities for this facility are identical to those for the Base Bid.

### **ALTERNATIVE BID - OPTION II**

As a means of additional cost savings for the CITY, Bio Gro is offering constructing and operating a facility designed to handle the current production of biosolids of 30 dtpd. This facility will contain 15 bays, constructed and fully equipped to handle current daily production. Should future expansion of this facility be necessary to meet the 50-60 dtpd production, 10 to 15 additional bays can be added within approximately 6-9 months.

Bio Gro has chosen to lease agricultural land owned by Campbell Estates for this project. This site is off of Kunia Road and was described in our Qualifications and Proposal Submittal dated January 12, 1994. Due to the site's remote location and the relatively low rainfall on this part of the island, we were able to reduce costs to the CITY by eliminating the need for enclosed storage. The buffer to residentially zoned property is more than double that required by the CITY in the bid specifications. Bio Gro will be responsible for all on site improvements but does not assume responsibility for any improvements to State or County roads.

Bio Gro had submitted comments on and requested changes to the proposed contract terms in our March 24 submittal to the CITY. For the most part we were pleased with the CITY's response to our comments, in particular the willingness of the CITY to extend the permitting time beyond 6 months if delays occur which are beyond our control. However, our bid is being submitted based upon our interpretation of the following:

Construction Contract Section 9.10 LIABILITY OF CITY FOR ITS EVENTS OF DEFAULT. Bio Gro would like to go on record stating that we do not agree with the CITY's position on the definition of unrecoverable expenses and 'direct damages' in the event of Default by the CITY. Bio Gro reserves the right to seek to include lost profits as part of our direct damages claim before the Independent Third Party in the event the CITY defaults.

Addendum No. 5, Item No. 1 To the effect that the CITY will not act arbitrarily or unreasonably in determining whether the bidder has been diligent in the pursuit of permits (and thus unfairly putting our bid bond in jeopardy). Bio Gro intends to diligently pursue all necessary permits and the site according to the time table shown in Figure I.

Director of Finance  
June 16, 1994  
Page 3

Addendum No. 4, Item No. 3 To the effect that, pursuant to revised paragraphs 3.5 and 3.6, the contracts will not be tendered for execution until final award, such that the responsible low bidder's bid bond will not be put in jeopardy unless final award is made (after all permits have been obtained or after the CITY reasonably determines that the bidder is not pursuing such permits with diligence), the contracts are tendered and the bidder fails or neglects to execute such contracts and provide performance bonding, insurance documentation and permit documentation.

In short, as we understand from the letter from Kenneth M. Rappolt dated June 8, 1994, if the CITY reasonably concludes that the responsible low bidder has made a diligent effort to obtain all permits and secure a site, but is unable to do so due to factors beyond it's control, the bid bond would not be forfeited.

The bid specifications in Exhibit E should explain the details of the proposed Base Bid and Options. Should the CITY be interested in Alternative Bid - Option II, specifications would be forwarded as soon as possible. We would be happy to meet with the CITY to provide clarification on the pricing and specifications. Should you have any questions please contact me at my San Jose office (408) 451-8405 or in Irvine (714) 476-4080. We thank you for this opportunity and look forward to hearing from you.

Sincerely,



Sue Rodgers  
Project Development  
Wheelabrator Clean Water Systems Inc.  
Bio Gro Division

cc: Mark Taylor  
Tom Troeschel



## N-Viro International Corporation

### VIA FACSIMILE AND FEDERAL EXPRESS

June 24, 1994

Mr. Russell Miyake  
City And County Of Honolulu  
City Hall  
Honolulu, HI 96813

**RE: HONOLULU BENEFICIAL SLUDGE REUSE PROJECT -  
SELECTION OF N-VIRO INTERNATIONAL CORP. AS LOWEST  
RESPONSIVE BIDDER**

Dear Mr. Miyake:

N-Viro International Corporation has obtained and reviewed the Pricing Proposal documents submitted June 17, 1994 by all bidders on the Beneficial Sludge Reuse Project. Based on this review, we have concluded that N-Viro International is the lowest responsive bidder. We therefore request that the City reject as non-responsive the bid submitted by the Bio Gro division of Wheelabrator Clean Water Systems, Inc. and select N-Viro International as the lowest responsive bidder. The reasons for deeming the Wheelabrator bid non-responsive are set forth below.

1. **The Bio Gro bid should be rejected as non-responsive because the proposed facility will not provide the Guaranteed Capacity as required in the Invitation for Bids and in the Construction Contract.**

The capacity requirements specified in the Invitation for Bids (IFB) dated September 27, 1993 are unequivocal. Section 2.2 of the IFB clearly requires that the facility be capable of processing 50 dtpd: "The facility shall be sized to be capable of processing a minimum of fifty (50) tons of dry sewage solids per day (TPD)." Section 4.4.1.a (Project Specifications) of the IFB states "The system shall be capable of processing dewatered sludge at a rate such that the throughput in terms of dry sludge solids shall be not less than fifty (50) tons of dry sewage sludge solids per day."

The Construction Contract is also clear on the capacity requirement. Article I states "'Guaranteed Capacity' shall mean a minimum throughput capacity of fifty (50) tons of Sludge per day..." Section 5.5 (Design and Capacity) specifies: "In designing the Facility, the Contractor shall ensure that the Facility shall meet the Guaranteed Capacity requirement." Article 7 unambiguously requires the Contractor to demonstrate facility performance at the 50 dtpd capacity.

According to the description of the Bio Gro "Base Bid" and the specifications in Exhibit E of the Bio Gro submittal, the facility as built will have the capability of processing only 30-36 dry tons per day (dtpd). Facility performance at the required 50 dtpd capacity will require additional equipment not included in the Bio Gro bid price. The facility Bio Gro proposes will not have the required 50 dtpd capacity, and it clearly will not be able to meet the performance test requirements of Article 7 of the Construction Contract.

Western Division

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2. **The Bio Gro bid should be rejected as non-responsive because it does not include all costs associated with off-site and on-site improvements.**

Section 2.1 of the IFB requires that "All costs associated with off-site and on-site improvements shall be the responsibility of the Contractor." Section 3.4 of the IFB states: "Submission of a pricing proposal by a bidder shall mean that the bidder has included in its pricing proposal all costs necessary to fulfill the requirements of the two contracts." Section 4.3 (Off-Site Services and Utilities) of the Construction Contract specifies: "To the extent not otherwise provided by utility companies or agencies, the Contractor shall provide for installation of off-site services and utilities, both temporary and permanent, necessary for the construction, operation and/or maintenance of the Facility."

Page 2 of Bio Gro's pricing proposal transmittal letter says that "Bio Gro will be responsible for all on site improvements but does not assume responsibility for any improvements to State or County roads." N-Viro International and GMP Associates have investigated the feasibility of siting a facility in the Kunia area proposed by Bio Gro. Information we have received indicates that the cost of road improvements to handle increased truck traffic on Kunia Road could be very substantial. Regardless of the magnitude of these costs, failure to include them in the bid price makes the Bio Gro proposal non-responsive.

3. **The Bio Gro bid should be rejected because their failure to provide the required capacity and to include all costs as outlined in 1. and 2. above constitute significant qualifications, exceptions, or amendments to the specifications of the IFB and the Construction Contract.**

Section 3.4 (p. III-6) of the IFB states: "Pricing proposals containing exceptions, qualifications, or amendments shall be rejected." (emphasis added). Bio Gro's proposal to provide a facility capable of processing only 30-36 dtpd clearly represents an exception to the City's specifications, as does their proposal to impose significant facility-related off-site costs on the City.

4. **The Bio Gro bid should be rejected because it takes significant exception to key terms of the Construction Contract.**

Page 2 of the Bio Gro pricing proposal transmittal letter presents an "interpretation" of Section 9.10 of the Construction Contract which amounts to an exception. The language of the contract does not intend the inclusion of "lost profits" as direct damages, as they cannot be documented as expenses incurred or committed to date on the contract. This qualification of the Bio Gro proposal therefore amounts to a contract exception, and the proposal should be rejected in accordance with Section 3.4 of the IFB as quoted in 3. above.

N-Viro International Corporation's bid is responsive to the City's IFB and the requirements of the Construction and Operation Contracts in all respects. Our proposal contains no qualifications, exceptions, or amendments. N-Viro is therefore the lowest responsive bidder on this project.

Mr. Russell Miyake  
June 24, 1994  
Page 3

N-Viro International is committed to providing cost-effective sludge beneficial reuse services, and we look forward to the possibility of serving the City and County of Honolulu.

We are available at the City's convenience to answer your questions or to discuss any aspect of our proposed program.

Sincerely yours,



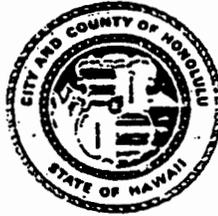
David R. Dickson  
N-Viro International Corporation

cc: Mr. Kenneth Rappolt, Department of Wastewater Management  
Mr. James Honke, Department of Wastewater Management

DEPARTMENT OF FINANCE  
CITY AND COUNTY OF HONOLULU

HONOLULU, HAWAII 96813

EMY HARRIS  
MAYOR



RUSSELL W. MIYAKE  
DIRECTOR

GLEN S. NONAKA  
DEPUTY DIRECTOR

July 18, 1994

Mr. Perry W. Confalone  
Attorney for Bio Gro Systems  
Torkildson, Katz, Jossem, Fonseca,  
Jaffe, Moore, & Hetherington  
700 Bishop Street, 15th Floor  
Honolulu, Hawaii 96814-4187

Subject: Protest of Bid Disqualification Regarding  
Honolulu Beneficial Sludge Reuse Project

Dear Mr. Confalone:

We have reviewed your substantive response to the City's concerns regarding Bio Gro Systems' (Bio Gro) bid and have determined that our disqualification of the bid stands.

Although I am vested with some discretion in determining the lowest responsible bidder, it is important that the bidding process which is designed to encourage competitive bidding be intact. If the City were to accept Bio Gro's argument, the City would have given Bio Gro an advantage over the other bidders. In effect, Bio Gro's argument would have the City modify or alter the bid specifications. This is clearly contrary to law. Brewer Environmental Industries vs. A.A.T. Chemical, 73 Haw. 344 (1992) (Any irregularity in the bidding process which permits or contributes to bidders submitting bids on different terms or with unequal information invalidates the bidding and any contract awarded thereon. Genuine competition can only result when parties are bidding against each other for precisely the same thing and on precisely the same footing.) Regarding Federal Electric Corp. v. Fasi, 56 Haw. 57 (1974), it is our opinion that the conditions between that case and this are significantly different and that those findings are not applicable in this instance.

Appendix C

Protest of Bid Disqualification  
July 19, 1994  
Page 2

We differ with your opinion that the bid specifications are not clear. Under the Project Specifications on page IV-11 of the Invitation for Bids (IFB) Subparagraph 4.4.1.a states "The system shall be capable of processing dewatered sludge at a rate such that the throughput in terms of dry sludge solids shall be not less than fifty (50) tons of dry sludge solids per day." Bio

Gro's cover letter clearly and unambiguously states that "The facility...will be equipped with blowers, mixers, and agitators for processing 30-36 dtpd."

The corrected proposal that Bio Gro submitted in response to the IFB did not indicate that the equipment would be installed in phases on an as needed basis. If that was the intent, it should have been so stated.

Bio Gro's argument would speculate that the other bidders did not intend to fully comply with the requirements of the solicitation.

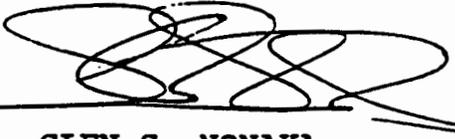
We see no basis for Bio Gro's speculation because the other bids did not include any exceptions or qualifications. In other words the other bidders bid on the contract as stated in the IFB.

The requirement of the IFB was for the bidders to include costs of on-site and off-site improvements. The explanation that Bio Gro interpreted on-site improvements as including improvements associated with roads and other infrastructure directly associated with the project is contradicted by the cited Exhibit I of the pricing proposal. We note that in this exhibit the off-site costs include costs of water system and power system improvements. If these are costs which are not directly associated with the Facility, we find it strange that Bio Gro included them in its pricing.

Protest of Bid Disqualification  
July 19, 1994  
Page 3

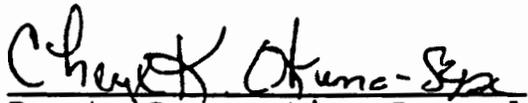
We hereby inform you that the City agrees to your request to invoke Chapter 103D, Hawaii Revised Statutes as amended, to attempt to resolve this dispute.

Sincerely,



GLEN S. NONAKA  
Acting Director of Finance

CONCUR:

  
Cheryl Okuma-Sya  
Deputy Corporation Counsel

GSN:ck

cc: Department of Wastewater Management  
Purchasing Division

DEPARTMENT OF FINANCE  
**CITY AND COUNTY OF HONOLULU**  
 HONOLULU, HAWAII 96813



JEREMY HARRIS  
 MAYOR

RUSSELL W. MIYAKE  
 DIRECTOR

GLEN S. NONAKA  
 DEPUTY DIRECTOR

July 27, 1994

N-VIRO International Corp.  
 1939 Harrison St., Suite 205  
 Oakland, CA 94612-3532

Wheelabrator Clean Water Systems, Inc.  
 Bio Gro Systems  
 19600 Fairchild, Suite 240  
 Irvine, CA 92715

GENTLEMEN:

Subject: Honolulu Beneficial Sludge Reuse Project

The City has rejected the low bid by Bio Gro Systems and will be awarding the contract for the sludge reuse project to the next lowest bidder, N-Viro International Corporation. The basis for the City's decision, pursuant to the Rules and Regulations of the Finance Director section 3.1 and the Hawaii Revised Statutes section 103D-701(f), is explained below.

The sludge reuse project is required pursuant to a federal Consent Decree as a result of enforcement action taken by the U.S. Environmental Protection Agency ("EPA"). In order to address the alleged violations of the federal Clean Water Act, the City has agreed with the U.S. Department of Justice, EPA and the State of Hawaii Department of Health ("DOH") to undertake certain projects. The failure to meet these project requirements could subject the City to further enforcement action and citizen lawsuits which would result in penalties. The Consent Decree sets forth the deadlines for the sludge reuse project as follows:

- a. Two and a half dry tons of municipal sludge per day by December 31, 1995.
- b. An additional two and half dry tons of municipal sludge per day by December 31, 1996; and
- c. At least ten dry tons of municipal sludge per day from January 1, 1998 until December 31, 2005.

Honolulu Sludge Reuse Project  
July 27, 1994  
Page 2

The Consent Decree which has been approved by the City is expected to be filed in federal court the early part of August 1994 for court approval. Pursuant to the requirements of the Consent Decree the City has notified EPA and the U.S. Department of Justice of the protest in this case and its effect in terms of meeting the deadlines set forth in the Consent Decree. The City is obligated under the Consent Decree to adopt all reasonable measures to avoid or minimize any violation. To date, neither EPA or the U.S. Department of Justice have indicated whether the City will be excused from compliance with the Consent Decree as a result of any delay caused by the protest.

It is the City's position that the procurement of this project is urgent and that performance will be unduly delayed by the failure to make the award promptly and this will cause undue harm to the City to the extent it would have legal consequences for the City. Therefore, awarding of the contract without delay is necessary to protect the substantial interest of the City.

Sincerely,

  
GLEN S NONAKA

Acting Director of Finance

GSN:ck

cc: Department of Wastewater Management  
Purchasing Division