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April 22, 1997

Mr. Alan S. Hayashi
Executive Director
Convention Center Authority
Davies Pacific Center
841 Bishop Street, Suite 2222
Honolulu, Hawaii 96813

Attention: Winfred K.T. Pong, Deputy Attorney General

Dear Mr. Hayashi:

Re: Nordic/PCL's Subcontracts for the Convention Center

This is in response to a request by Winfred K.T. Pong, Deputy Attorney General, for an advisory opinion from the Office of Information Practices ("OIP") regarding the disclosure of the costs set forth in the above-referenced subcontracts. You have asked the OIP for the limited purpose of responding to the issue presented, to assume *arguendo* that these subcontracts are "government records" under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

ISSUE PRESENTED

Whether, under the UIPA, the costs set forth in the subcontracts between the State's Design/Build Contractor for the Hawaii Convention Center, Nordic/PCL, and its subcontractors must be made available for public inspection and copying.

BRIEF ANSWER

No. In the facts presented, Nordic/PCL's subcontracts set forth the actual, specific costs that Nordic/PCL will incur for work performed by its subcontractors.

Disclosure of all of these amounts will substantially reveal Nordic/PCL's profit margin between its subcontracting costs and the bid amount payable by the State and would likely put Nordic/PCL at a disadvantage to its future competitors. Because the OIP finds that the disclosure of the subcontract costs would likely cause substantial competitive harm to Nordic/PCL, the OIP concludes that this information constitutes confidential commercial and financial information that is not required to be disclosed under the UIPA's public disclosure exception for "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (1993).

FACTS

In 1994, the Convention Center Authority ("CCA") selected the design/build proposal of Nordic /PCL and entered into a contract with Nordic/PCL for the construction of the Convention Center. In accordance with the CCA's Request for Proposals to Design/Build a Convention Center Facility in Honolulu, Oahu, Hawaii, dated March 4, 1994 ("RFP"), Nordic/PCL, as the Convention Center's design/build contractor, is solely responsible for management, design and construction of the Convention Center, including the hiring and supervision of all subcontractors. See "Going up, paying out—Convention Center a godsend for contractors," The Honolulu Advertiser C-2 (March 11, 1996).

In October, 1996, The Honolulu Advertiser requested the CCA to disclose the names of all contractors and subcontractors hired to build the Hawaii Convention Center, including the contract value and services provided. The CCA provided a list of Convention Center subcontractors but did not disclose the costs set forth in the subcontracts. In April, 1997, The Honolulu Advertiser filed a civil action against the CCA to require the disclosure of this information. On behalf of the CCA, Deputy Attorney General Winfred Pong requested this advisory opinion from the OIP. The subcontracts were not provided to the OIP for its review. As noted in the opinion request, Nordic/PCL asserts that the subcontract costs are confidential commercial and business information and, therefore, are not disclosable.

DISCUSSION

I. INTRODUCTION

The UIPA sets forth "affirmative agency disclosure responsibilities" as follows:

> **§92F-11 Affirmative agency disclosure responsibilities.** (a) All government records are open to public inspection unless access is restricted or closed by law.
>
> (b) Except as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours. . . .

Haw. Rev. Stat. § 92F-11(a), (b) (1993); see Kaapu v. Aloha Tower Development Corporation, 74 Haw. 365, 386 (1993).

The OIP was not asked to address the issue of whether the subcontracts are "government records" under the UIPA. For the limited purpose of providing this advisory opinion, however, the OIP will assume *arguendo* that the subcontracts, including the costs set forth therein, are "government records." Hence, the OIP's opinion will be limited to determining whether the costs set forth in the subcontracts fall within any of the UIPA's exceptions to the affirmative agency disclosure responsibilities.[1]

Section 92F-13, Hawaii Revised Statutes, sets forth the UIPA's exceptions to required disclosure. For reasons described below, the OIP finds that the following UIPA exception is relevant to the facts which you have presented for review.

> **§92F-13 Government records; exceptions to general rule.** This part shall not require disclosure of:
>
> . . . .
>
> (3) Government records that, by their nature,

[1]It may be argued that Nordic/PCL's subcontracts follow, although indirectly, from the State's purchase of Nordic/PCL's services to design and build the Convention Center. Thus, the subcontracts may arguably constitute "[g]overnment purchasing information", of which the UIPA expressly requires public disclosure "except to the extent prohibited by section 92F-13." Haw. Rev. Stat. § 92F-12(a)(3) (Supp. 1996) (emphasis added). Thus, whether or not the subcontracts are considered to be "government purchasing information" will not affect the OIP's conclusion concerning disclosure as the OIP must, in either case, still examine whether any of the UIPA exceptions to required disclosure in section 92F-13, Hawaii Revised Statutes, apply. See, e.g., OIP Op. Ltr. No. 94-18 at 13 (Sept. 20, 1994).

> (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function; . . . .

Haw. Rev. Stat. § 92F-13(3) (1993); see Kaapu, 74 Haw. at 386.

The Senate Government Operations Committee of the 1988 Hawaii Legislature provided some guidance in the interpretation of this UIPA exception and declared the following legislative intent:

> A new [s]ection . . . is added to create four categorical exceptions to the general rule [of public access]. Rather than list specific records in the statute, at the risk of being over- or under-inclusive, your Committee prefers to categorize and rely on the developing common law. The common law is ideally suited to the task of balancing competing interest[s] in the gray areas and unanticipated cases, under the guidance of the legislative policy. *To assist the Judiciary in understanding the legislative intent, the following examples are provided.* [Emphasis added.]
>
> . . . .
>
> *(b) Frustration of legitimate government function.* The following are *examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function.* [Emphasis added.]
>
> . . . .
>
> (3) Information which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency . . . ;

. . . .

(6) Proprietary information, such as research methods, records and data, computer programs and software and other types of information owned by an agency or entrusted to it;

(7) Trade secrets or confidential commercial and financial information . . . .

Kaapu, 74 Haw. at 388-89, citing S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093-5 (1988) (emphasis set forth in italics in original, emphasis set forth with underscoring is added). As the request for an OIP opinion notes, Nordic/PCL asserts that the costs set forth in its subcontracts constitute confidential commercial and business information. Consequently, the OIP must analyze whether these costs constitute confidential commercial and financial information that is protected under the UIPA's "frustration of a legitimate government function" exception.

II. CONFIDENTIAL COMMERCIAL AND BUSINESS INFORMATION

In OIP Opinion Letter No. 89-5 (Nov. 20, 1989), the OIP analyzed the meaning of the term "confidential commercial and financial information," which is one of the examples of information that may be protected from public disclosure under the UIPA's "frustration of a legitimate government function" exception. See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093-5 (1988). As to whether commercial or financial information is "confidential," the OIP has referred to federal case law which applied an exemption from disclosure for "commercial or financial information obtained from a person and privileged or confidential" under the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4). Id. ("[t]he common law is ideally suited to the task of balancing competing interest[s] in the gray areas and unanticipated cases, under the guidance of the legislative policy"); see, e.g., OIP Op. Ltr. No. 90-3 (Jan. 18, 1990); OIP Op. Ltr. No. 91-14 (August 28, 1991); OIP Op. Ltr. No. 94-17 (Sept. 12, 1994).

As discussed in past OIP opinions, the federal courts have found that commercial and financial information is "confidential" if its 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. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

The State's ability to obtain subcontract information is governed by the terms of the contract between the State and its general contractor. As the OIP has been asked to assume *arguendo* that the subcontracts are government records (and therefore are documents subject to the UIPA), the issue of whether the State can obtain this information from contractors in the future is not relevant to this analysis because the terms of the contract would govern. However, in light of relevant federal case law, the OIP believes that disclosing the subcontract costs would likely cause substantial competitive harm to Nordic/PCL and, in turn, frustrate the State's procurement functions.

Specifically, federal courts have consistently held that information revealing a contractor's actual costs or pricing mechanism is exempt from disclosure under FOIA as "commercial or financial information obtained from a person and privileged or confidential." Thus, the federal courts have affirmed that agencies may withhold from disclosure of "actual costs for units produced," "actual scrap rates," "break-even point calculations," and "actual cost data." Gulf & Western Industries, Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979); see also Braintree Electric Light Dep't v. Dep't of Energy, 494 F. Supp. 287 (D.D.C. 1980) (costs of goods sold and purchase agreements of fuel wholesaler); SMS Data Products Group, Inc. v. United States Dep't of the Air Force, WL 201031 (D.D.C. 1989) (Air Force contractor's pricing strategies); see generally National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 672 (D.C. Cir. 1976) (detailed financial information about park concessionaires protected under FOIA exemption).

The federal courts have found that the disclosure of such costs or pricing information would allow a contractor's competitors to estimate, and undercut, the contractor's bids, and that the likely harm to the contractor's competitive standing would be substantial. Gulf & Western Industries, Inc., 615 F.2d at 530; see also Braintree Electric Light Dep't, 494 F. Supp at 290; SMS Data Products Group, 1989 WL 201031 at 4 ("information about a competitor's pricing strategy would be invaluable in preparing a [competitor] company's own bid"). By comparison, the Ninth Circuit United States Court of Appeals found no substantial harm would occur by the disclosure of data that is limited to the percentage and total dollar amount of work that a government contractor subcontracts to small disadvantaged businesses in compliance with federal Small Business Act requirements. The court held:

> Here, by contrast, data on the percentage and dollar amount of work subcontracted out to SBD's on each defense contract tells competitors nothing of, *inter alia*, the object of the contract or subcontracts, the unit prices charged by the subcontractors, and the profit or productivity rates of either the contractor or subcontractors. The data at issue therefore would provide little if any help to competitors attempting to estimate and undercut the contractors' bids.

GC Micro Corporation v. Defense Logistics Agency, 33 F.3d 1109, 1115 (9th Cir. 1994) (emphasis added).

The OIP has been advised that Nordic/PCL's subcontracts set forth the actual, specific costs to Nordic/PCL for work performed by its subcontractors. Disclosure of these amounts will substantially reveal Nordic/PCL's profit margin between its subcontracting costs and its bid amount payable by the State. Thus, the OIP believes that Nordic/PCL's subcontract costs must be characterized as confidential commercial and financial information under the same analysis used by the federal courts for the contractor's cost and pricing information in the FOIA cases.

In assessing whether the disclosure of subcontract costs would frustrate a legitimate government function, we look at the Hawaii Supreme Court's analysis of this UIPA exception in Kaapu, 74 Haw. 365 (1993). In Kaapu, the Hawaii Supreme Court recognized the risk to government's ability to negotiate in the procurement process when it found that disclosure of development proposals before final negotiation of a lease would frustrate a legitimate government function. The court stated:

> Public disclosure of development proposals—involving proprietary and other confidential information, such as trade secrets and confidential commercial and financial data—prior to final negotiation of a long-term lease could foreseeably give an unfair competitive advantage to other developers in the event negotiations were to break down. Concern over this risk could cause developers to offer up deliberately vague plans or decline to submit development proposals altogether. The likely

> result would be fewer submissions and an increase in the cost of government procurements.

Kaapu, 74 Haw. at 389.

Notably, the record at issue in Kaapu was the development proposal submitted to the State, which directly relates to the contract between the State and the chosen contractor and would ultimately be made public—the only question in Kaapu was when disclosure of the proposal would be required. In contrast, in the facts presented to the OIP, Nordic/PCL's subcontract costs are not directly connected to the State's contract with Nordic/PCL because the State's contract is for one lump sum payment to Nordic/PCL irrespective of Nordic/PCL's subcontract costs. However, Kaapu is instructive in our analysis of how the State's procurement functions may be frustrated by the disclosure of information.

Notably, Nordic/PCL's subcontract costs are distinguishable from unit price information in a lump sum bid to the State that the OIP found to be public information under the UIPA. See OIP Op. Ltr. No. 90-15 (April 9, 1990). Component unit prices in a lump sum bid, for which a government contract is awarded, set forth the corresponding amounts of compensation to be paid by government for particular tasks to be performed by the selected bidder. See id., citing Acumenics Research & Technology, Inc. v. Dep't of Justice, 843 F.2d 800, 808 (4th Cir. 1988). Disclosing component unit prices in a contract award would not directly reveal confidential proprietary information, such as a company's overhead, profit rates, or multiplier. OIP Op. Ltr. No. 90-15 (April 9. 1990). In the facts presented, the State pays one lump sum to Nordic/PCL for a finished product–a convention center. See "Going up, paying out–Convention Center a godsend for contractors," The Honolulu Advertiser C-1 (March 11, 1996). In contrast to the lump sum paid to Nordic/PCL by the State under their contract, the subcontract costs paid by Nordic/PCL to its subcontractors (1) are not directly related to the contract award, but (2) does reveal information about Nordic/PCL's actual costs and profit margin.

The OIP believes that the routine disclosure of the subcontract costs would automatically expose to competitors a State contractor's amounts of cost and profit. The OIP finds that, if subcontract costs were routinely disclosed in cases such as this one, bidders' concerns over the disclosure of profits and the risk of substantive competitive harm as a result of that disclosure are likely to impair the State's ability to favorably negotiate contracts in the procurement process. For example,

the number of bids submitted to the State may be reduced, or bidders may provide vague or inflated cost estimates in their proposals. See, e.g., Kaapu, at 74 Haw. at 389.

Thus, in our opinion, disclosure of subcontract costs would frustrate the State's procurement functions. Consequently, the OIP concludes that, under the facts presented here, the subcontract costs are "confidential commercial or financial information" that are not required to be disclosed under the UIPA's "frustration of a legitimate government function" exception.

III. TRADE SECRETS

Under the UIPA's "frustration of a legitimate government function" exception, agencies are not required to disclose information that is a "trade secret." See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988). Under the Uniform Trade Secrets Act, the term "trade secret" is defined as follows:

> "Trade secret" means information, including a formula, pattern, compilation, program device, method, technique, or process that :
>
> (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Haw. Rev. Stat. § 482B-2 (1993).

In order for information to constitute a "trade secret," it must be shown that the holder of this information made "efforts that are reasonable under the circumstances to maintain its secrecy." The OIP has not been presented with factual evidence concerning Nordic/PCL's efforts to maintain the secrecy of its subcontract costs. Consequently, until the OIP is provided with a statement of facts to facilitate its analysis, the OIP will not address the issue of whether this

information would constitute a "trade secret" under the UIPA's "frustration of a government function" exception.

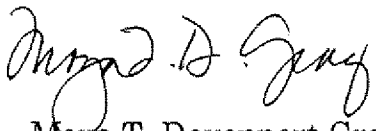
CONCLUSION

The OIP concludes that Nordic/PCL's subcontract costs constitute confidential commercial and financial information that, if disclosed, would frustrate the State's procurement functions. Consequently, under section 92F-13(3), Hawaii Revised Statutes, the UIPA does not require that this information be made available for public inspection or copying.

Very truly yours,

Lorna L. Aratani
Staff Attorney

APPROVED:



Moya T. Davenport Gray
Director

LLA:sc
c: Winfred K.T. Pong
Deputy Attorney General