

*The Office of Information Practices (OIP) is charged with the administration of Hawaii's open records law, the Uniform Information Practices Act (Modified), chapter 92F, HRS (the UIPA), and Hawaii's open meetings law, part I of chapter 92, HRS (the Sunshine Law).*

## OIP Opinion

### UIPA *Protests Filed on RFPs*

OIP was asked whether the State Procurement Office (SPO) properly denied a request for disclosure of protests alleging legal deficiencies in a Request for Proposals (RFP) where a contract had not yet been awarded.



The protests were submitted to SPO by persons interested in submitting proposals in response to the RFP (prospective offerors). OIP

thus opined on whether SPO must disclose the protests submitted by prospective offerors before contract award.

OIP found that under the UIPA's exception for "frustration of a legitimate government function," SPO is not required to disclose information in the protests that may identify and provide information about prospective offerors and information that may be included in their proposals because the Procurement Code makes information about and from prospective offerors confidential prior to award of the final contract. After redaction of this information, SPO must disclose the remaining parts of the protests. [OIP Op. Ltr. No. 09-02]

## OpenPoint: Procurement Records



*OpenPoint provides guidance on UIPA and Sunshine Law concepts that frequently arise.*

This OpenPoint provides an overview of disclosure of government procurement records under the UIPA.

The Legislature clearly intended that the public must, as a matter of public policy, be given access to government purchasing information. See HRS 92F-12(a)(3); OIP Op. Ltr. No. 94-18. Indeed, where records or information concern the expenditure of public monies, the public's interest in disclosure is at its highest.

The UIPA, however, also acknowledges the balance between the public's right to know and the government's need to protect information during the initial stages of a competitive process in order to protect the integrity and purpose of that process.

Thus, access to government purchasing information may be withheld to the extent allowed by the exceptions to disclosure in HRS § 92F-13. The two exceptions most commonly used to withhold information are HRS §§ 92F-13(3) and -13(4).

HRS § 92F-13(4) is the UIPA's exception for information made confidential by law or court order. It thus allows an agency to withhold information protected from public disclosure under the Hawaii Public Procurement Code. Specifically, the Code protects information in sealed bids and sealed proposals until the time set by statute for public disclosure.

HRS § 92F-13(3), the UIPA's "frustration" exception, allows withholding of (1) "[i]nformation 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" and (2) trade secrets, proprietary information, and other confidential commercial and financial information.

Thus, this exception allows an agency to withhold information where confidentiality is necessary to the competitive selection process, under the Code as well as for exempt procurements, or to protect confidential business information.

Applying these exceptions, commonly requested procurement information should be disclosed as follows.

### *Competitive Sealed Bids under HRS § 103D-302*

Competitive sealed bids under HRS § 103D-302 become public upon their official public opening at the time and

See *OpenPoint*, p. 2

**OpenPoint (cont. from p. 1)**

place designated in the invitation for bids. HRS § 103D-302(d). Thus, prior to official public opening, bids may not be disclosed. *Id.*; HRS §§ 92F-13(3) and -13(4).



OIP has opined that, prior to the bids' official public opening, an agency may withhold information that would identify potential or actual bidders. Disclosure of this information, which could be contained in the bids themselves, would frustrate a legitimate government function by jeopardizing the integrity and purpose of the sealed bidding process. HRS § 92F-13(3).

An agency may accordingly withhold information that would identify persons who have: (1) picked up or received bid solicitations; (2) attended a bidders' conference; or (3) submitted a bid or a notice of intent to bid. OIP Op. Ltr. No. 94-26.

**Competitive Sealed Proposals under HRS § 103D-303**

For competitive sealed proposals under HRS § 103D-303, the Code specifies when certain information is public.

Proposals, as well as information derived from those proposals, may not be disclosed during the negotiation stages, and therefore an agency must withhold this information upon receipt and during negotiation. HRS §§ 103D-303(d) and -303(f); HRS §§ 92F-13(3) and -13(4).

Consistent with these provisions, OIP opined in OIP Op. Ltr. 09-02 that information in protests to an RFP that would identify prospective offerors and reveal information that might be in their proposals may be withheld to avoid frustration of the competitive sealed proposal process, but that the remaining information in the protests must be disclosed.

Upon *award* of a contract, a register of proposals must be prepared with information set by rule, and is public. HRS § 103D-303(d).

The proposals, successful or unsuccessful, may be withheld until after final *execution* of the contract because until that point, negotiations with the person awarded the contract could break down or other factors could occur that would require the submission of new proposals. *See generally* OIP Op. Ltr. No. 89-15 (release of development proposal information prior to execution of agreement could give unfair advantage to other developers if final negotiations with selected developer breaks down); *Ka'apu v. Aloha Tower Dev. Corp.*, 74 Haw. 365 (1993)

(consistent with OIP Op. Ltr. No. 89-15, court held that "frustration" exception allowed agency to withhold access to development proposal until agency's execution of contract with selected developer).

**Exempt Procurements**

For purchases of goods or services exempt from the Code, bids and proposals may also be withheld under the frustration exception until a final contract is executed. *See* OIP Op. Ltr. No. 89-15; *Ka'apu*.

Other records revealing information in those bids or proposals may also be withheld prior to a final agreement if disclosure would frustrate the competitive procurement process. *See* OIP Op. Ltr. No. 94-18 (scoring sheets for convention center development may be withheld during negotiation period with developers because disclosure could raise the cost of government procurement or give an unfair advantage to competitors).

**Confidential Business Information**

Proprietary information, trade secrets, and confidential commercial and financial information contained in procurement records may be withheld. HRS § 92F-13(3). *See* OIP Op. Ltr. No. 90-2.

However, the agency has the burden to show that information withheld would reveal proprietary information, trade secrets, or confidential commercial and financial information whose disclosure would frustrate the procurement process. *See* OIP Op. Ltr. No. 90-15 (no frustration caused by disclosure of unit or component prices in lump sum bids); OIP Op. Ltr. No. 91-16 (no frustration from disclosure of details of contract negotiation that resulted in contract amendment).

For assistance in determining what information might properly be withheld to meet its burden of proof, the agency may ask persons submitting bids or proposals to identify information believed to be proprietary, a trade secret, or confidential commercial and financial information, and to provide justification for application of the "frustration" exception. 📄

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