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May 9, 2003

MEMO TO: Dennis J. Schwind, Executive Assistant
Office of the Mayor

F R O M: Blaine J. Kobayashi, ^BDeputy Corporation Counsel

SUBJECT: **CONSULTANT SELECTION COMMITTEE**

This responds to your memorandum dated February 28, 2003, requesting an advisory opinion concerning whether the Consultant Selection Committee ("Committee") is required to abide by Chapter 92 of the Hawaii Revised Statutes ("Sunshine Law"). For reasons stated herein, it is this office's opinion that the Sunshine Law does not apply to the Committee.

BRIEF FACTUAL BACKGROUND

It is this office's understanding that the Committee was established by former Mayor Linda Lingle, and has been, and is chaired by the managing director. Our understanding is that the Committee was originally created to ensure that there would be a fair and objective review of the consultant selection recommendation made by a County department pursuant to the competitive sealed proposal process (commonly referred to as "RFP") set forth in the Hawaii Public Procurement Code ("Procurement Code") under Section 103D-303, Hawaii Revised Statutes ("HRS").

The Committee does not have any rules of practice and procedure. It is currently composed of the following six (6) voting members: the managing director, an executive assistant to the mayor, an executive assistant to the managing director, the finance director, the public works director, and the budget director. A deputy corporation counsel attends as a non-voting member of the Committee. The Committee requires a quorum of members (four) to meet and conduct business.

Among other things, the Committee conducts a review and discussion of the various proposals submitted to the County

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department, and either approves or disapproves (by a simple majority vote), the consultant selection recommendation of the department. Members of the public and consultants are not allowed to attend Committee meetings, and the Committee's review, discussion, and deliberations are all confidential.

After the Committee approves the recommendation, the department proceeds with award of the contract. The Committee's review process is not mandated by either federal law or the Procurement Code.

While an agenda is generated for each meeting, the Committee does not meet on a regular basis, no minutes are taken, and no public notice is provided.

LEGAL ANALYSIS

The Sunshine Law, HRS Chapter 92, requires that "[e]very meeting of all boards shall be open to the public and all persons shall be permitted to attend any meeting. . . ." HRS § 92-3. An expressly stated policy of the Sunshine Law requires that the provisions requiring open meetings be "liberally construed." HRS § 92-1. There are, however, exceptions to the requirements of the Sunshine Law.

HRS § 92-6 provides, in part, that:

(a) This part shall not apply:

(1) To the judicial branch.

(2) To adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9, or authorized by other sections of the Hawaii Revised Statutes. In the application of this subsection, boards exercising adjudicatory functions include, but are not limited to, the following:

(A) Hawaii labor relations board, chapters 89 and 377;

(B) Labor and industrial relations appeals board, chapter 371;

(C) Hawaii paroling authority, chapter 353;

(D) Civil service commission, chapter 26;

(E) Board of trustees, employees' retirement system of the State of Hawaii, chapter 88;

(F) Crime victim compensation commission, chapter 351; and

(G) State ethics commission, chapter 84.

Although HRS § 92-6 does not list procurement actions as an exception, it is this office's opinion that Sunshine Law provisions in part I of HRS Chapter 92 relating to open meetings, notice of meetings, and minutes do not apply to the Committee based on a provision in the Procurement Code. In particular, HRS § 103D-105 provides, in pertinent part:

Part I of chapter 92 [the Sunshine Law] shall not apply to discussions, deliberations, or decisions required to be conducted or made confidentially under this chapter [103D].

(Emphasis added).

The competitive sealed proposal process is set forth in HRS § 103D-303. The following provisions of HRS § 103D-303 illustrate the importance of maintaining confidentiality of the competitive sealed proposal process:

(a) Competitive sealed proposals may be utilized to procure goods, services, or construction designated in rules adopted by the procurement policy board as goods, services, or construction which are either not practicable or not advantageous to the State to procure by competitive sealed bidding. Competitive sealed proposals may also be utilized when the head of a purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State.

* * *

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

* * *

(f) . . . In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

(Emphasis added).¹

¹The Procurement Policy Board's administrative rules ("HAR") regarding the competitive sealed proposal process also contain a confidentiality provision. HAR § 3-122-53(f) states that, "[t]he contents of any proposal shall not be disclosed so as to be

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CONCLUSION

Based on the foregoing, it is this office's opinion that part I of HRS Chapter 92 does not apply to the Committee. Should you have any further questions or concerns, please contact me at my office.

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cc: Jack Kulp, Managing Director
Keith A. Regan, Director of Finance
Traci Fujita-Villarosa, Deputy Corporation Counsel
Greg King, Administrator, Purchasing Division

APPROVED FOR TRANSMITTAL:


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Corporation Counsel

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available to competing offerors during the discussion process." It is only after an award has been posted that the proposals and contract file are available for public inspection. See HAR §§ 3-122-51, 3-122-52, and 3-122-58, attached hereto.

Our opinion is limited to the facts set forth in this memorandum. Sunshine Law provisions regarding open meetings, notice of meetings, and minutes may apply if the Committee conducts, or were to conduct, meetings for purposes not described in HRS § 103D-105. Should any such meetings occur, we recommend that you seek further legal advice regarding the applicability of the Sunshine Law.

§3-122-41 Purpose. The purpose of this subchapter is to provide rules for the use of the competitive sealed proposal method of source selection when it is determined that competitive sealed bidding is neither practicable nor advantageous to the State. [Eff 12/15/95; comp 11/17/97; comp 07/25/02] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-42 Dollar thresholds for competitive sealed proposals. Procurements exceeding the threshold of section 103D-305, HRS, shall be made pursuant to this subchapter except as provided in subchapters 5, 7, 9, and 10. [Eff 12/15/95; am and comp 11/17/97; am and comp 07/25/02] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-43 When competitive sealed bidding is not practicable or advantageous. (a) Unless the nature of the procurement permits award to a low bidder who agrees by its bid to perform without condition or reservation in accordance with the purchase description, delivery or performance schedule, and all other terms and conditions of the invitation for bids, competitive sealed bidding is not practicable or advantageous.

(b) A determination may be made to use competitive sealed proposals if it is determined that competitive sealed bidding is not practicable, even though advantageous. Factors to be considered in determining whether competitive sealed bidding is not practicable include:

- (1) Whether the primary consideration in determining award may not be price;
- (2) Whether the contract needs to be other than a fixed-price type;
- (3) Whether the conditions of the goods, services or delivery conditions are unable to be sufficiently described in the invitation for bids;
- (4) Whether oral or written discussions may need to be conducted with offerors concerning technical and price aspects of their proposals;
- (5) Whether offerors may need to be afforded the opportunity to revise their proposals,

- including price; and
- (6) Whether award may need to be based upon a comparative evaluation as stated in the request for proposals of differing price, quality, and contractual factors in order to determine the most advantageous offering to the State. Quality factors include technical and performance capability and the content of the technical proposal.
- (c) A determination may be made to use competitive sealed proposals if it is determined that competitive sealed bidding is not advantageous, even though practicable. Factors to be considered in determining whether competitive sealed bidding is not advantageous include:
- (1) If prior procurements indicate that competitive sealed proposals may result in more beneficial contracts for the State; and
 - (2) Whether the factors listed in subsections 3-122-43(4) through 3-122-43(6) are desirable in conducting a procurement rather than necessary; if they are, then the factors may be used to support a determination that competitive sealed bidding is not advantageous.
- (d) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp 11/17/97; comp 07/25/02] (Auth: HRS §§103D-202, 103D-318) (Imp: HRS §§103D-303, 103D-318)

§3-122-44 REPEALED. [R 11/17/97]

§3-122-45 Determinations. (a) Pursuant to subsection 103D-303(a), HRS, the procurement policy board may approve a list of goods, services, or construction that may be procured by competitive sealed proposals without a determination by the head of the purchasing agency.

(b) The list shall be reviewed by the board biennially and issued by procurement policy board directive as an attachment to subchapter 6. Although the good, service, or construction is listed, purchasing agencies may use the competitive sealed bidding process under section 103D-302, HRS.

(c) If the procurement is not listed pursuant to

subsection (a), the head of a purchasing agency shall then determine in writing that competitive sealed proposals is a more appropriate method of contracting in that competitive sealed bidding is neither practicable nor advantageous. The determinations may be made for categories of goods, services, or construction rather than by individual procurement. Procurement of the goods, services, or construction so designated may then be made by competitive sealed proposals without making the determination that competitive sealed proposals is a more appropriate method of contracting.

(d) When it is determined that it is more practicable or advantageous to the State to procure construction by competitive sealed proposals:

- (1) A procurement officer may issue a request for proposals requesting the submission of proposals to provide construction in accordance with a design provided by the offeror; and
- (2) The request for proposals shall require that each proposal submitted contain a single price that includes both design and build.

(e) The head of the purchasing agency who made the determination may modify or revoke it at any time and the determination shall be reviewed for current applicability on the next procurement for the goods, services, or construction. The head of the purchasing agency may also request that the procurement of the goods, services, or construction by competitive sealed proposals be added to or deleted from the list in subsection (b).

(f) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 07/06/99; am and comp 07/25/02] (Auth: HRS §§103D-202, 103D-303, 103D-318) (Imp: HRS §§103D-303, 103D-318)

§3-122-46 Preparing a request for proposals. (a) The request for proposals is used to initiate a competitive sealed proposal procurement and shall include:

- (1) The specifications for the goods, services, or construction items to be procured, including a description of the performance or benefit required;
- (2) All contractual terms and conditions applicable to the procurement;

- (3) A statement as to when and in what manner prices are to be submitted;
 - (4) A statement concerning whether the proposal shall be accompanied by a proposal security pursuant to subchapter 24 or other evidence of financial responsibility;
 - (5) The term of the contract and conditions of renewal or extension, if any;
 - (6) Instructions and information to offerors, including pre-proposal conferences, the location where proposals are to be received, and the date, time and place where proposals are to be received and reviewed;
 - (7) Proposal preparation time set to provide offerors a reasonable time to prepare their proposals. A minimum of thirty calendar days between the date of last legal advertisement of the solicitation and the time and date set for receipt of proposals, unless a shorter time is deemed appropriate for a particular procurement that will allow for adequate competition as determined in writing by the procurement officer;
 - (8) The relative importance of price and other evaluation criteria; and specific evaluation criteria to be used in evaluation of proposals which may include but is not limited to:
 - (A) Technical capability and approach for meeting performance requirements;
 - (B) Competitiveness and reasonableness of price;
 - (C) Managerial capabilities; and
 - (D) Best value factors.
 - (9) A statement that discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award, but that proposals may be accepted without discussions; and
 - (10) A statement that offerors shall designate in writing those portions of the unpriced proposal that contain trade secrets or other proprietary data that are to remain confidential, subject to section 3-122-58; that the material designated as confidential shall be readily separable from the proposal in order to facilitate inspection of the nonconfidential portion of the proposal.
- (b) Public notice for goods, non-professional

services, and construction shall be given by a purchasing agency with delegated procurement authority by distributing the request for proposals in the same manner provided for distributing an invitation for bids under section 3-122-24. Public notices for professional services shall be in accordance with section 3-122-64.

(c) Pre-proposal conferences may be conducted in accordance with section 3-122-26.

(d) Prior to the public notice for a request for proposals, a determination shall be made by the procurement officer that the procurement officer or an evaluation committee selected in writing by the procurement officer shall evaluate the proposals pursuant to section 3-122-52. [Eff 12/15/95; am and comp 07/25/02] (Auth: HRS §103D-202) (Imp: HRS §103D-303, SLH 1997, Act 352, §1)

§3-122-47 REPEALED. [R 11/17/97])

§3-122-48 Amendments to request for proposals. Amendments to requests for proposals may be made by addenda in accordance with section 3-122-27 prior to submission of proposals. After submission of proposals, amendments may be made by addenda in accordance with subsection 3-122-22(g). [Eff 12/15/95; am and comp 11/17/99; am and comp 07/25/02] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-49 Modification or withdrawal of proposals. Proposals may be modified or withdrawn prior to the established due date in accordance with section 3-122-28. For the purposes of this section and section 3-122-50, the established due date is either the time and date announced for receipt of proposals or receipt of modifications to proposals, if any; or if discussions have begun, it is the time and date by which best and final offers must be submitted, provided that only priority listed offerors may submit best and final offers. [Eff 12/15/95; am and comp 11/17/97; comp 07/25/02] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-50 Late proposals, late withdrawals, and late modifications. (a) Any proposal, withdrawal

request, or modification received after the established due date as defined in section 3-122-49 at the place designated for receipt of proposals is late. They may only be considered in accordance with section 3-122-29(1).

(b) A late proposal or late modification shall be disposed of in accordance with paragraph 3-122-29(2). [Eff 12/15/95; am and comp 11/17/97; am and comp 07/25/02] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-51 Receipt and registration of proposals.

(a) Proposals and modifications shall be time-stamped upon receipt and held in a secure place by the procurement officer until the established due date. Purchasing agencies may use other methods of receipt when approved by the chief procurement officer.

- (1) Proposals and modifications shall not be opened publicly, but shall be opened in the presence of two or more state officials.
- (2) Proposals and modifications shall be shown only to members of the evaluation committee and state personnel or their designees having legitimate interest in them.

(b) After the date established for receipt of proposals, a register of proposals shall be prepared which shall include for all proposals:

- (1) The name of each offeror;
- (2) The number of modifications received, if any; and
- (3) A description sufficient to identify the good, service, or construction item offered.

(c) The register of proposal shall be open to public inspection as provided in section 3-122-58.

(d) Proposals shall be open to public inspection as provided in section 3-122-58. [Eff 12/15/95; am and comp 11/17/99; am and comp 07/25/02] (Auth: HRS §§103D-202, 103D-303) (Imp: HRS §103D-303)

§3-122-52 Evaluation of proposals.

(a) The procurement officer, or an evaluation committee selected in writing by the procurement officer shall evaluate proposals. The evaluation committee shall consist of at least three governmental employees with sufficient qualifications in the area of the goods, services, or construction to be procured. Private consultants may also serve on the committee. The contract administrator or a designee shall serve as

chairperson and the procurement officer or a designee as advisor. A copy of the document identifying any committee members and any subsequent changes thereto shall be placed in the contract file.

(b) Numerical rating systems may be used, but are not required. When used, the evaluation shall be based only on the evaluation factors set out in the request for proposals. The relative priority to be applied to each evaluation factor shall also be set out in the request for proposals. If numerical rating systems are not used, the procurement officer, or each member of the evaluation committee, as applicable, shall explain his or her ranking determination in writing which shall be placed in the procurement file. Evaluation factors not specified in the request for proposals may not be considered. The written ranking evaluations or explanations shall be available for public inspection after the contract is signed by all parties.

(c) When applicable, cost shall be an evaluation factor.

(d) The proposal with the lowest cost factor must receive the highest available rating allocated to cost. Each proposal that has a higher cost factor than the lowest must have a lower rating for cost. If a numerical rating system is used to evaluate the cost factor, the points allocated to higher-priced proposals must be equal to the lowest proposal price multiplied by the maximum points available for price, divided by the higher proposal price.

(e) An evaluation factor must be included which takes into consideration whether an offeror qualifies for any procurement preferences pursuant to chapter 3-124.

(f) A proposal from a debarred or suspended offeror shall be rejected.

(g) Evaluation meetings may be held by an evaluation committee to discuss the request for proposals, the evaluation process, the weighing of evaluation factors, and proposals received, before evaluation.

(h) Evaluations may not be based on discrimination due to the race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, handicap, or political affiliation of the offeror. [Eff 12/15/95; am and comp 07/25/02] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-53 Discussions with offerors. (a) Before

conducting discussions, a "priority list" shall be generated by the procurement officer or evaluation committee.

- (1) In order to generate a priority list, proposals shall be classified initially as acceptable, potentially acceptable, or unacceptable.
 - (2) All responsible offerors who submit acceptable or potentially acceptable proposals are eligible for the priority list.
 - (3) If numerous acceptable and potentially acceptable proposals have been submitted, the procurement officer or the evaluation committee may rank the proposals and limit the priority list to at least three responsible offerors who submitted the highest-ranked proposals.
 - (4) Those responsible offerors who are selected for the priority list are referred to as the "priority-listed offerors."
- (b) Discussions will be limited to only "priority-listed offerors" and are held to:
- (1) Promote understanding of a state agency's requirements and priority-listed offerors' proposals; and
 - (2) Facilitate arriving at a contract that will provide the best value to the State, taking into consideration the evaluation factors set forth in the request for proposals.
- The procurement officer shall establish procedures and schedules for conducting discussions and keep a record of the date, place, purpose of meetings and those attending.
- (c) Proposals may be accepted on evaluation without discussion.
- (d) Priority-listed offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals.
- (1) Any substantial oral clarification of a proposal shall be reduced to writing by the priority-listed offeror.
 - (2) If during discussions there is a need for any substantial clarification or change in the request for proposals, the request for proposals shall be amended by an addendum to incorporate the clarification or change.
- (e) Addenda to the request for proposals shall be distributed only to priority-listed offerors.
- (1) The priority-listed offerors shall be

permitted to submit new proposals or to amend those submitted.

- (2) If in the opinion of the procurement officer or the evaluation committee, a contemplated amendment will significantly change the nature of the procurement, the request for proposals shall be canceled and a new request for proposals issued.

(f) The contents of any proposal shall not be disclosed so as to be available to competing offerors during the discussion process. [Eff 12/15/95; comp 11/17/99; am and comp 07/25/02] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-54 Best and final offers. (a) The procurement officer shall establish a date and time for the priority-listed offerors to submit their best and final offers.

(b) Best and final offers shall be submitted only once; unless, the chief procurement officer or the head of a purchasing agency or a designee of either officer above the level of procurement officer determines in writing that it is in the State's best interest to conduct additional discussions or change the State's requirements and require another submission of best and final offers; otherwise, no discussion of or changes in the best and final offers shall be allowed prior to award.

(c) Priority-listed offerors shall also be informed that if they do not submit a notice of withdrawal or another best and final offer, their immediate previous offer will be construed as their best and final offer.

(d) After best and final offers are received, final evaluations will be conducted for an award pursuant to section 3-122-57. [Eff 12/15/95; am and comp 11/17/97; comp 07/25/02] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-55 Mistakes in proposals. (a) Modification or withdrawal of a proposal may be allowed as provided in section 3-122-49.

(b) A mistake discovered after award of the contract shall not be corrected.

(c) A mistake discovered before award of the contract:

- (1) When the procurement officer knows or has

- reason to conclude before award that a mistake has been made, the procurement officer shall request the offeror to confirm the proposal. If the offeror alleges mistake, the mistake may be corrected by modifying or withdrawing the proposal.
- (2) Once discussions are commenced with priority-listed offerors or after best and final offers are requested, a mistake may be corrected by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.
 - (3) If discussions are not held, or if the best and final offers have been received by the date and time due, a mistake shall be corrected to the intended correct offer whenever the mistake and the intended correct offer are clearly evident on the face of the proposal, in which event the proposal may not be withdrawn.
 - (4) If discussions are not held, or if the best and final offers have been received by the date and time due, an offeror alleging a material mistake of fact which makes a proposal nonresponsive may be permitted to withdraw the proposal if the procurement officer or the evaluation committee determines that:
 - (A) The mistake is clearly evident on the face of the proposal but the intended correct offer is not; or
 - (B) The offeror submits evidence which clearly and convincingly demonstrates that a mistake was made.
- (d) Technical irregularities that are matters of form rather than substance evident from the proposal and insignificant mistakes that have no effect on price, quality or quantity:
- (1) May be waived by the procurement officer or the evaluating committee or corrected by the offeror.
 - (2) If discussions are not held or if best and final offers have been received by the date and time due, the procurement officer may waive technical irregularities or allow an offeror to correct them if either is in the best interest of the State.
 - (3) Examples of technical irregularities include the failure of an offeror to:

- (A) Return the number of signed proposals required by the request for proposals;
- (B) Sign the proposal or provide an original signature, but only if the unsigned or photocopied proposal signature is accompanied by bid security or other material with an original signature indicating the offeror's intent to be bound to the offer; or
- (C) Acknowledge receipt of an amendment to the request for proposals, but only if it is clear from the proposal that the offeror received the amendment and intended to be bound by its terms; or the amendment involved had no effect on price, quality or quantity.

(e) The procurement officer or the evaluation committee shall prepare a written decision showing that relief was granted or denied whenever a request for correction or withdrawal of a proposal is made in accordance with this section. [Eff 12/15/95; am and comp 07/25/02] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-56 Cancellation of solicitations and rejection of proposals. Cancellation and rejection of proposals shall be pursuant to subchapter 11. [Eff 12/15/95; comp 11/17/97; comp 07/25/02] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-57 Award of contract. (a) The procurement officer shall award under competitive sealed proposals with reasonable promptness by written notice to the responsible offeror whose proposal is determined in writing to provide the best value to the State taking into consideration price and the evaluation criteria in the request for proposals. Other criteria may not be used in the evaluation. The contract file shall include the basis for selecting the successful offeror.

(b) Refer to section 103D-312, HRS, and subchapter 15 for cost or pricing data requirements.

(c) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp 11/17/97; am and comp 07/25/02] (Auth: HRS §§103D-202, 103D-318) (Imp: HRS §§103D-303, 103D-312, 103D-318)

§3-122-58 Public inspection. (a) The existing contract file, except those portions the offeror designates in writing as trade secrets or other proprietary data to be confidential subject to subsection (b), shall be available for public inspection upon posting of award pursuant to section 103D-701, HRS. The contract file shall include but not be limited to the following:

- (1) The register of proposals prepared pursuant to section 3-122-51;
- (2) A listing of all vendors to whom copies of the request for proposals were distributed;
- (3) Name of successful offeror and dollar amount of offer;
- (4) The basis on which the award was made;
- (5) A copy of the request for proposals;
- (6) A copy of the successful offeror's proposal;
- (7) A copy of all unsuccessful offeror's proposals; and
- (8) A copy of the executed contract resulting from the request for proposals.

(b) If a person requests to inspect the portions of an offeror's proposal designated as confidential pursuant to section 3-122-46-(a)(10), the inspection shall be subject to written determination by the respective attorney general or corporation counsel for confidentiality in accordance with chapter 92F, HRS.

(c) If the attorney general or corporation counsel determines in writing that the material designated as confidential is subject to disclosure, the material shall be open to public inspection unless the offeror appeals pursuant to section 92F-42(1), HRS.

(d) When a purchasing agency denies a person access to a state procurement record, the person may appeal the denial to the office of information practices in accordance with section 92F-15.5, HRS. [Eff 12/15/95; am and comp 07/25/02] (Auth: HRS §103D-202) (Imp: HRS §§92F-42, 103D-303)

§3-122-59 Waiver to competitive sealed proposal process. (a) If for a given request for proposals, there is only one responsible offeror submitting an acceptable proposal:

- (1) An award may be made to the single offerer, provided the procurement officer determines in writing that the price submitted is fair

and reasonable and that either:

- (A) Other prospective offerors had reasonable opportunity to respond; or
 - (B) There is not adequate time for resolicitation.
- (2) The offer may be rejected pursuant to subchapter 11 and new requests for proposals may be solicited if the conditions in paragraph (1) are not met.
- (3) The proposed procurement may be cancelled.
- (4) An alternative procurement method may be conducted to include, but not be limited to, direct negotiations with the sole offeror first, and then with any contractor or vendor should negotiations with the sole offeror fail, provided the procurement officer determines in writing that the need for the good, service, or construction continues, but that the price of the one offer is not fair and reasonable and that either:
- (A) There is no time for resolicitation, or
 - (B) Resolicitation would likely be futile.
- (b) If for a given request for proposals, there are no proposals received or there are no responsible offerors submitting acceptable proposals, the procurement officer may determine that it is neither practical, nor advantageous to issue a new solicitation.
- (1) When making this determination, consideration shall be given to:
- (A) Time constraints;
 - (B) Competition in the marketplace; and
 - (C) Whether the additional potential cost of preparing, soliciting, and evaluating competitive sealed proposals is expected to exceed the benefits normally associated with the solicitations.
- (2) In the event of this determination, an alternative procurement method may be selected, to include but not be limited to, direct negotiations.
- (c) Documentation of the alternative procurement method selected shall:
- (1) State the reasons for selection and length of contract period;
 - (2) Receive prior approval of the chief procurement officer or a designee; and
 - (3) Be made a part of the contract file upon award by the procurement officer. [Eff