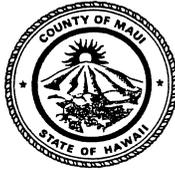


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September 2, 2004

OFFICE OF THE
CORPORATION COUNSEL

04 SEP -7 P2:55

RECEIVED

MEMO TO: Charmaine Tavares, Chair
Energy and Economic Development Committee

FROM: Traci Fujita Villarosa *TJV*
First Deputy Corporation Counsel

SUBJECT: Authorizing Acceptance of Marween Yagin's Design as the
County Logo for Use in the Maui County Business
Resource Center and County Store (EED-16)

Purpose of this memorandum.

The purpose of this memorandum is to provide legal advice regarding the applicability of chapter 103D, Hawaii Revised Statutes ("HRS"), ("Hawaii Public Procurement Code"), to the County logo designed for use in the Maui County Store located in the Maui Mall.

Background.

It is our understanding that the County logo design was selected from entries submitted pursuant to a contest sponsored by the Office of Economic Development. The Office of Economic Development Coordinator has informed this Department that Ms. Marween Yagin's design was selected and that she was awarded a \$150.00 prize.

Analysis and discussion.

A. The Hawaii Public Procurement Code.

Section 103D-102(a), HRS, states:

This chapter shall apply to all **procurement contracts** made by governmental bodies whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance; provided that nothing

in this chapter or rules adopted hereunder shall prevent any governmental body from complying with the terms and conditions of any other grant, gift, bequest, or cooperative agreement.¹ (Emphasis added.)

In view of Section 103D-102(a), HRS, we now analyze whether the logo contest gave rise to a "contract" and, if so, whether it constituted a "procurement" for purposes of the Hawaii Public Procurement Code.

B. The County logo contest and the submission of entries gave rise to a contract.

"A contract is an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law."² Moreover, "[i]t is a fundamental principle of law that there must be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract."³

With regard to the County logo contest, the mutual assent necessary for the formation of a contract can be found in County's offer of a prize for the performance of a specified act and the acceptance of that offer by Ms. Yagin's submission of her logo design entry. County's offer is of a type characterized as an offer for a unilateral contract.⁴

As observed in a treatise on contracts:

The offer by one party of specified compensation for the performance of a certain act as a proposition to all persons who may accept and comply with its conditions constitutes a promise by the offeror. The performance of that act is the consideration for the promise. The result is an enforceable contract.⁵

¹ Section 103D-102(a), HRS.

² Black's Law Dictionary 318 (7th ed. 1999).

³ Honolulu Rapid Transit Co. v. Paschoal, 449 P.2d 123 (1968).

⁴ A unilateral contract is defined as a "contract in which only one party makes a promise or undertakes a performance." Black's Law Dictionary 326 (7th ed. 1999).

⁵ 14 Williston on Contracts § 1666 (3rd ed. 1972).

Therefore, the County logo contest constituted an offer for a unilateral contract that became binding when competitors accepted the offer by submitting contest entries.⁶

C. The logo design contest was not a procurement.

Section 103D-104, HRS, defines procurement as follows:

"Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any good, service, or construction. The term also includes all functions that pertain to the obtaining of any good, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration.

The Hawaii Public Procurement Code does not specifically state that it applies to contests or competitions.

In Lucas v. United States, 25 Cl. Ct. 298 (1992), the United States Claims Court addressed whether a design contest constituted a procurement under applicable federal law.⁷ In Lucas, a federal commission, the American Battle Monuments Commission, sponsored a competition for the design of a Korean War Veterans Memorial.⁸ Plaintiffs submitted a design for the memorial and won first place.⁹ In working with an architectural and engineering firm for design and implementation of the memorial the federal government decided to alter plaintiffs' original design.¹⁰ Plaintiffs filed an action for breach of contract alleging that the federal government was obligated to use plaintiffs' original design.¹¹

The Claims Court found that "a contract was formed between the

⁶ See Lucas v. United States, 25 Cl. Ct. 298, 303-304 (1992).

⁷The federal Claims Court has jurisdiction over all claims filed against the federal government.

⁸ Lucas v. United States, 25 Cl. Ct. 298 (1992).

⁹ Id. at 301.

¹⁰ Id. at 302.

¹¹ Id.

agencies sponsoring the competition and each of the competitors when the competitors accepted the offer embodied in the design competition by submitting entries."¹² However, on the issue of whether the contract was a procurement, the Court held that "competing in a contest and winning the same may well serve to create a contract, but such a contract does not constitute a procurement covered by the CDA [Contracts Dispute Act]."¹³ In reaching this decision, the Court considered plaintiffs' argument that a design competition contract is not subject to the CDA because "policy considerations relating to cost and competition are not involved" and that "there is a lack of a buyer-seller relationship."¹⁴ The Court noted that the contract was in the nature of a design competition, and not a call for services.¹⁵

Like the contract at issue in Lucas, the County logo contest was a design competition, not a call for services that constituted a procurement. The logo contest did not involve a traditional buyer-seller relationship. The \$150 prize was to be awarded to the winning design regardless of who created the design. Further, it is arguable that it would not have been advantageous or in the County's best interest to bid out the design services. Professional design services would in all likelihood have cost the County much more than \$150, and conventional procurement procedures would have excluded community involvement in the creation of a County logo.

D. Even assuming, arguendo, that the contest was a procurement, the contest did not violate the Hawaii Public Procurement Code.

Even assuming, arguendo, that the logo design contest was a procurement subject to chapter 103D, HRS, the procurement would be considered a small purchase.¹⁶ The State of Hawaii's guidelines for small purchases state that "[e]xpenditures with an estimated total cost that is less than \$5,000 shall be by procedures established by

¹² Id. at 304.

¹³ Id.

¹⁴ Id. at 306.

¹⁵ Id. at 307.

¹⁶ A small purchase is a procurement of less than \$25,000. Section 103D-305, HRS.

Ms. Charmaine Tavares
September 2, 2004
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each chief procurement officer."¹⁷ Pursuant to a memorandum from County's Purchasing Agent regarding small purchase thresholds for goods and services, the procurement of goods or services costing between \$0.01 and \$999.99 does not require multiple quotations, although quotations are recommended if time permits.¹⁸

Therefore, even assuming, arguendo, that the County logo design contest was a procurement subject to chapter 103D, HRS, (a characterization that, as discussed above, we do not believe is appropriate), the logo contest did not violate the Hawaii Public Procurement Code.

cc: Lynn Araki-Regan, Economic Development Coordinator
Kalbert Young, Director of Finance

Approved for Transmittal:



Brian T. Moto
Corporation Counsel

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¹⁷ Procurement Directive No. 2002-04, attached hereto as Exhibit "A".

¹⁸ Memorandum dated February 9, 2003 from Greg King, Purchasing Agent, through Keith A. Regan, Director of Finance, to Department Heads, attached hereto as Exhibit "B".

November 1, 2002

PROCUREMENT DIRECTIVE NO. 2002-04

TO: All Chief Procurement Officers
All Executive Department Heads

FROM: Aaron S. Fujioka, Administrator
State Procurement Office

SUBJECT: Guidelines for Small Purchase Procurements

Procurement Directive No. 2001-01, dated February 27, 2001 is rescinded and replaced by this Directive No. 2002-04, effective December 1, 2002.

A small purchase is a procurement for goods, services, or construction, of less than the dollar limit of §103D-305, HRS, currently \$25,000, pursuant to the following:

- ◆ §103D-305, HRS, Small Purchase.
- ◆ Subchapter 8, chapter 3-122, HAR, Small Purchase.
- ◆ §3-131-2, HAR, Parceling.

The small purchase procurement process allows purchasing agencies the flexibility to obtain goods, services, and construction expeditiously, without having to follow a competitive sealed process. However, small purchase procedures do require competitive price quotes, and a determination of best value to make an award, except in the case of construction where the award is made to the low offeror.

Small purchases shall not be parceled by dividing the purchase of same, like, or related items of goods, services, or construction into several purchases of smaller quantities during any twelve-month period, to evade the competitive sealed process. Section 3-131-2, HAR, addresses parceling, how to determine whether a competitive sealed process is required, and if consolidation of requirements is appropriate.

The agency's term of contract must be determined before deciding to use small purchase procedures. In the following examples small purchases are allowable:

- Example 1: Term of contract is 1 year and the contract amount is within the small purchase threshold.
- Example 2: Term of contract is 1 year with 2 options to extend, and the total contract amount for the 3-year contract term is within the small purchase threshold.
- Example 3: Term of contract is for a multi-term period, pursuant to §3-122-149, HAR, and the total contract amount for the entire multi-term period is within the small purchase threshold.

However, should the total contract amount in the examples above exceed the small purchase threshold, then the procurement must follow a competitive sealed process.

GUIDELINES FOR SMALL PURCHASES

Conditions for use. Expenditures less than \$25,000 for goods, services, or construction, shall be made in accordance with the following procedures below. Expenditures made pursuant to these procedures do not require public notice or public bid openings. Contracts for professional services of less than \$25,000 may be procured pursuant to this directive or subchapter 7, HAR. Unless otherwise exempt, purchasing agencies delegated small purchase authority shall also comply with state procurement office price lists or other chief procurement officer price lists, where applicable.

Small purchases shall not be parceled by dividing the purchase of same, like, or related items of goods, services, or construction into several purchases of smaller quantities, so as to evade the statutory competitive bidding requirements. For additional details, refer to chapter 3-131, HAR.

Preferences pursuant to chapter 3-124, HAR, shall not apply to small purchases.

Goods and Services

Expenditures with an estimated total cost that is at least \$15,000 but less than \$25,000:

- (1) Insofar as it is practical and based on the agency's specifications, adequate and reasonable competition of no less than three written quotations shall be solicited; and
- (2) Considering all factors, including but not limited to quality, warranty and delivery, award shall be made to the vendor with the most advantageous quotation.

Expenditures with an estimated total cost that is at least \$5,000 but less than \$15,000:

- (1) Insofar as it is practical and based on the agency's specifications, adequate and reasonable competition of no less than three quotations shall be solicited; and
- (2) Considering all factors, including but not limited to quality, warranty and delivery, award shall be made to the vendor with the most advantageous quotation.

Expenditures with an estimated total cost that is less than \$5,000 shall be by procedures established by each chief procurement officer.

Construction

Expenditures with an estimated total cost that is at least \$15,000 but less than \$25,000:

- (1) Insofar as it is practical and based on the agency's specifications, adequate and reasonable competition of no less than three written quotations shall be solicited; and
- (2) Award shall be made to the vendor submitting the lowest quotation.

Expenditures with an estimated total cost that is at least \$5,000 but less than \$15,000:

- (1) Insofar as it is practical and based on the agency's specifications, adequate and reasonable competition of no less than three quotations shall be solicited; and
- (2) Award shall be made to the vendor submitting the lowest quotation.

Expenditures with an estimated total cost that is less than \$5,000 shall be by procedures established by each chief procurement officer.

Procurement File

All quotations received shall be recorded and placed in a procurement file. When three quotations are required but are not obtained, e.g., insufficient sources, sole sources, emergencies, the reason shall be recorded and placed in the procurement file. The file shall also include a written justification when award is made to other than the vendor submitting the lowest quotation.

Should you have any questions, please contact me at (808) 587-4700 or your staff may contact Justin Fo at (808) 586-0577 or Ruth Yamaguchi at (808) 586-0567. Thank you.

February 9, 2003

Memo To: Department Heads
Thru: Keith A. Regan, Director of Finance
From: Greg King, Central Purchasing Agent
Subject: Small Purchase Thresholds

The following is a reminder of our small purchasing requirements for goods, services and construction:

Goods and Services

\$0.01 - \$999.99 - Multiple quotations are not required, but are recommended if time permits.

\$1,000.00 - \$4,999.99 - A minimum of 3 verbal quotations are required.

\$5,000.00 - \$24,999.99. - A minimum of 3 written quotations are required.

\$25,000.00+ - Procurement must be advertised through the Competitive Sealed Bid or Competitive Sealed Proposal process, unless it qualifies as an emergency or sole source procurement as determined by the Director of Finance

Construction

\$0.01 - \$4,999.99 - Multiple quotations are not required, but are recommended if time permits.

\$5,000.00 - \$24,999.99 - A minimum of 3 written quotations are required.

\$25,000.00+ - Procurement must be advertised through the Competitive Sealed Bid or Competitive Sealed Proposal process, unless it qualifies as an emergency or sole source procurement as determined by the Director of Finance.

Where multiple quotations are required but are not available, the department is responsible for documenting why the additional quotes were not obtainable (e.g. sole source supplier) on the requisition form.

Please be reminded that small purchases shall not be parceled by dividing the purchase of same, like, or related items of goods, services or construction into several purchases of small quantities during any twelve-month period, so as to evade the statutory competitive source selection requirements. Also, vehicles, computers, and other planned or budgeted equipment

will continue to be combined into large advertised purchases so we can benefit from any economies of scale.

Thank you for your cooperation. If you have any questions, please call Greg King at 270-7488.