



OFFICE OF ELECTIONS

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To: Contract File

From: Kevin B. Cronin
Chief Election

Re: Voting System Procurement for 2010 Elections and Beyond
Waiver of any Requirements for the Provision of Cost or Pricing Data
and any Subsequent Analysis

This memorandum presents the waiver by the chief election officer (chief election officer or CEO) as the head of the purchasing agency Office of Elections (HOPA) of any cost or price analysis arising from the impending request for proposal for a new voting equipment and counting system for the 2010 elections and beyond (RFP).

The chief election officer is the HOPA for purposes of the procurement code and its administrative rules. The chief election officer is the administrator of the Office of Elections (OE) that is administratively attached to the Department of Accounting and General Services (DAGS). HRS § 11-1.5. The term "head of the purchasing agency" means the head of any agency with delegated procurement authority. HAR § 3-120-2 (Definitions). By statute, most administratively attached agencies are required to obtain from the head of the department to which they are administratively attached the approval for a procurement. HRS § 26-35(a)(5) (Administrative supervision of boards and commissions). An agency attached to DAGS normally would consider the comptroller to be the "head of the purchasing agency." Although attached to DAGS, however, OE is not subject to such requirement for approval from the comptroller because it is expressly exempt from HRS § 26-35(a)(1), (4), and (5), and it shall "purchase all supplies equipment, or furniture without the approval of the comptroller." HRS § 11-1.55 (Exemptions). Thus under these circumstances, the "head of the purchasing agency" for OE procurements is the chief election officer.

As the HOPA, the CEO has the authority to waive any requirements for cost or pricing data in the solicitation or award of any contract and in any corresponding cost or price analysis. Pursuant to such authority, I hereby waive any such requirement for any cost or price analysis to the extent such analysis may be interpreted to arise from the RFP for the 2010 elections and beyond.

I find that a cost or price analysis for the RFP is not appropriate and conclude such an analysis is waived in this proceeding. The Office of Elections does not require cost or pricing data beyond what the RFP specifically requests to obtain a fair and reasonable price for the state of Hawaii (State). The RFP specifically asks for "pricing data" in the form of the overall price of the proposals and the unit price for the ballots, voting machines, and various other components of an offeror's proposal. In addition, a cap on the overall proposal price of \$6,100,000 has been established, a price consistent with the average price of prior State voting system contracts and the average cost of regular elections since the Help America Vote Act of 2002 became law. I believe the RFP will generate adequate competition that would be evidenced by several Offerors submitting proposals. I believe any of these reasons alone, or taken as a whole, are good and sufficient basis to determine that additional "cost data" or "pricing data" is/are not required for this RFP.

My rationale for my finding and conclusion that a cost or price analysis is not appropriate and is waived follows with an explanation of what is required under the law to determine the best value for the State.

I. *BEST VALUE*

It is undisputed that a contract resulting from a request for proposal is awardable to the offeror whose proposal provides the best value to the state of Hawaii (State) taking into consideration price and the evaluation criteria in the RFP. HAR § 3-122-57(a) (Award of contract). The term "best value" is understood to be the most advantageous offer determined by "evaluating and comparing all relevant criteria in addition to price so that the offer meeting the overall combination that best serves the State is selected." HAR § 3-122-1 (Definitions). In making this "best value" determination, the contracting officer is informed to "[r]efer to section 103D-312, HRS and subchapter 15 for cost or pricing data requirements," to the extent those requirements are applicable to the procurement. HAR § 3-122-57(b).

There are, however, various exceptions to the requirement for the cost or price data provision. In fact, most procurements do not require cost or price data. Instead, the nature of the procurement and the dollar amounts involved dictate whether the data is required. Regardless whether HAR § 103D-312 and its implementing rules apply or do not apply, if a proposal is clearly unreasonable, the proposal must be rejected as a clearly unreasonable proposal cannot constitute the "best value." HAR § 3-122-97 (Rejection of offer). Ultimately the State's contract award is considered to "be final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law." HAR § 3-122-57(c).

For the RFP, the State takes the position the administrative rules provide an exemption from the cost or price data provision and corresponding analysis because of either the existence of adequate competition or the grant by the HOPA of a waiver from the requirement for such analysis. I believe adequate competition will exist in this

procurement in the form of several offerors responding to the RFP with proposals. Alternatively, I grant a waiver from such analysis.

A. Introduction

Fundamental and critical to a procurement is an understanding of the differences between cost data and price data and cost analysis and price analysis, if applicable, to the underlying procurement. Cost data is generally more difficult to obtain as opposed to pricing data. In addition, there is a significant difference between the levels of detail required for a cost analysis as opposed to a price analysis. The reference to "cost and pricing data requirement in [Subchapter 15] applies to contracts *when either cost or pricing data or both are required to be submitted* pursuant to section 3-122-123." HAR § 3-122-121 (Scope and application) (italics supplied).

B. Cost Data and Price Data

Only cost data or only pricing data or sometimes both cost and pricing data may be required for a procurement. "Cost data" is defined as "mean[ing] information concerning the actual or estimated cost of labor, material, overhead, and other cost elements which have been actually incurred or which are expected to be incurred by the contractor in performing the contract." HAR § 3-120-2. This compares with "price data" specifically defined as:

... mean[ing] factual information concerning prices, including profit, for goods, services, or construction substantially similar to those being procured. *In this definition, "prices" refers to offered or proposed selling prices, historical selling prices, and current selling prices of such items.* This definition refers to data relevant to both the general contractor and subcontract prices.

HAR § 3-120-2 (Definitions) (italics supplied).

A "cost analysis" involves the actual amounts a vendor incurs for its costs. Specifically such analysis involves:

the verification of cost or pricing data and can be used to evaluate a variety of things such as (1) specific elements of cost, (2) necessity of certain costs, (3) reasonableness of necessary costs, (4) reasonableness of allowances for contingencies, (5) basis for allocation of indirect costs, (6) the appropriateness of the allocation of particular indirect costs to the contract, and (7) *the reasonableness of the total cost or price.*

HAR § 3-122-128 (Cost analysis techniques) (italics supplied).

In contrast to a cost analysis, a price analysis is focused solely on the reasonableness of the price.

§3-122-129 Price analysis techniques. (a) Price analysis is used to determine if a price is reasonable and acceptable. It involves an evaluation of the prices for the same or similar items or services. Examples of price analysis criteria include but are not limited to:

- (1) Price submissions of prospective bidders or offerors in the current procurement;*
 - (2) Prior price quotations and contract prices charged by the bidder, offeror, or contractor;*
 - (3) Prices published in catalogues or price lists;*
 - (4) Prices available on the open market; and*
 - (5) In-house estimates of cost.*
- (b) In making the analysis, consideration must be given to any differing terms and conditions.*

HAR § 3-122-129 (Price analysis techniques) (italics supplied).

C. Cost or Pricing Data Only Required under Limited Circumstances

The administrative rules reflect essentially a policy against the obtaining of "cost and pricing data" unless "price reasonableness" cannot be determined otherwise. For example, cost or pricing data is not required for invitation for bid (IFB) contracts, procurements for professional services, small purchases, emergency procurements, and any RFP procurements for less than \$100,000. Even when initially it appears that cost or pricing data may be required, such as with a request for proposal for a contract over \$100,000, the scope of the exceptions to the provision of such information is extensive and assumes that adequate competition or the market place will generate reasonable prices. The rules even provide that a waiver to any such requirement can be granted by the head of the purchasing agency. Finally, even if no exception is granted and cost or pricing data is required, if the offeror refuses to supply the required data, the head of the purchasing agency still has the authority to enter into the contract with the offeror. HAR §§ 3-122-123(1) (Requirement for cost or pricing data), 3-122-124(a)(1) & (c) (Exceptions to the requirement for cost or pricing data), and 3-122-125 (Submission of cost or pricing data and certification).

IFBs, professional services contracts, small purchases, emergency procurements, and proposal requests for \$100,000 or less easily make up a significant, if not substantial portion of the monies expended by the State. Clearly the rules do not assume that such procurements will be unreasonable in terms of price, despite the non-provision of cost or pricing data. Additionally, the rules clearly do not assume that a procurement for over \$100,000, in which there is no provision for cost or pricing data, will result in unreasonable prices as long as there is evidence of adequate competition, of the role of the free market place, or of an exemption granted by the head of the purchasing agency.

Why not still require "cost and pricing data," despite there being a sufficient basis to determine that price reasonableness can be found without it is what some might ask. The answer to the position to require "cost and pricing data" implicates negative consequences. One negative implication is that requiring such data runs counter to the procurement code policy's purpose of promoting "economy, efficiency, and effectiveness in the procurement of goods and services." HAR § 3-120-1 (Purpose). Similarly, as stated by the federal government on substantially the same point, to *"require unnecessarily the submission of cost or pricing data, . . . leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional contractor and Government resources."* Federal Acquisition Regulations (FAR) § 15.402(a)(3) (italics supplied).

For comparison purposes, the FAR is notably very similar to the Hawaii Procurement Code and, as such, should be considered persuasive authority. Specifically, the FAR provides that "[t]he contracting officer must obtain cost or pricing data only if the contracting officer concludes that none of the exceptions in 15.403-1(b) applies. However, if the contracting officer has sufficient information available to determine price reasonableness, then the contracting officer should consider requesting a waiver under the exception at 15.403-1(b)(4)." FAR § 15.403-4(a)(1) (Requiring cost or pricing data - 10 USC § 2306a and 41 USC § 254b).

The FAR exceptions to requiring cost or pricing data are similar to the Hawaii Procurement Code's exceptions. FAR exceptions include if (1) the procurement is for less than \$650,000, (2) there is adequate competition, (3) prices are already set by law or regulation, (4) a commercial item is being purchased, or (5) a waiver is granted. FAR §§ 15-403-1(b) (Prohibition on obtaining cost or pricing data- 10 USC § 2306a and 41 USC § 254b) & 15-403-4(a)(1) (Requiring cost or pricing data - 10 USC § 2306a and 41 USC § 254b).

The FAR articulates its pricing policy, in part, by stating "[i]n establishing the reasonableness of the offered prices, the contracting officer must not obtain more information than is necessary." For those procurements in which cost or pricing data is not required by FAR § 15.403-4(b), the FAR clearly establishes an order of preference in deciding what, if any, additional information is necessary to determine the reasonableness

of the proposed prices. First, no additional information is generally required if the price is based on adequate competition. Second, in order of preference, is the requesting of "information other than cost or pricing data" such as establishes catalog or market prices or previous contract prices. Third, and finally in order of preference, cost or pricing data could be requested. FAR § 15.402 (Pricing Policy).

The federal regulations, however, clearly state that "[t]he contracting officer should use every means available to ascertain whether a fair and reasonable price can be determined before requesting cost or pricing data." In addition, it states that "*[c]ontracting officers must not require unnecessarily the submission of cost or pricing data, because it leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional contractor and Government resources.*" FAR § 15.402(a)(3) (italics supplied).

The Hawaii and federal procurement regulations raise several questions. First, would "cost data" or "pricing data" normally be required for this type of procurement? Second, if so, do any exceptions to the requirement apply, and last, if no exception applies, what type of analysis and supporting data is required? These questions and their answers are considered and discussed here.

1. Would Cost or Pricing Data Normally be Required for this Type of Procurement?

In the present case based on the historical cost of voting system contracts, no dispute exists that a contract exceeding \$100,000 is likely to issue as a result of the RFP competitive sealed process. Cost data or pricing data would normally be required unless there is an exception to require such data.

2. If so, Do any Exceptions to the Data Requirement Apply?

a. Adequate Price Competition.

The law provides adequate price competition "means at least two responsible offerors independently compete for a contract to be awarded to the offeror submitting the lowest evaluated price." HAR § 3-122-124(a)(1). The FAR defines adequate competition as:

- (1) Adequate price competition. A price is based on adequate price competition if –
 - (i) Two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement and if –

(A) Award will be made to the offeror whose proposal represents the best value (see 2.101) where price is a substantial factor in source selection; and

(B) There is no finding that the price of the otherwise successful offeror is unreasonable. Any finding that the price is unreasonable must be supported by a statement of the facts and approved at a level above the contracting officer;

FAR § 15-403-1(c)(1).

In the present case, I reasonably expect at least two and as many as several Offerors to submit proposals. Likewise, no dispute reasonably exists that price is a substantial factor in source selection because price is specifically and expressly recognized. The RFP caps the proposals at \$6,100,000 for the contract for the 2010 elections, a price consistent with the average price of voting systems used during the state's regular elections recently as described below.

b. Waiver.

When the chief procurement officer or the head of purchasing authority determines in writing to waive the applicable requirements for submission of cost or pricing data in a particular pricing action under HAR §§ 3-122-123(1) or 3-122-123(2) and the reasons for the waiver are stated in the determination, a copy of the determination shall be kept in the contract file and made available to the public upon request. HAR § 3-122-124(c) (Exceptions to the requirement for cost or pricing data).

In this case, as the HOPA for purposes of the procurement code and its administrative rules, the CEO has the authority to waive any requirements for the provision of cost or price data in the solicitation or award any contract. HRS §§ 11-1.5 and 11-1.55. The CEO's decision to waive any such requirement arises from the fact the RFP requests no cost or price data to evaluate the Offerors' proposals to determine the best value for the State because such data is not needed. The reasons are that the average cost of voting equipment for the regular elections since 2004 has averaged about \$5.8 million or so; the price for the RFP contract is capped at \$6,100,000, and the competition among Offerors will more likely than not generate market-based appropriate contract prices.

3. *If No Exception, What Supporting Data and Analysis is Required?*

Assuming for the sake of argument that no exception applies to a request for proposal, the critical question to be asked in deciding whether to ask for cost data as opposed to price data relates to the purpose for the data. Specifically, is a cost or a price

analysis intended? The answer is the procurement officer determines the need for a cost or price analysis, taking into consideration the purpose or type of contract that the solicitation seeks.

The law provides for and authorizes "any type of contract that will promote the State's best interests." HRS § 103D-313 (Types of Contracts). Such contracts are identified and developed in detail in the administrative rules. HAR, Subchapter 16 (Types of Contracts) to HAR § 3-122 (Source Selection and Contract Formation). If the purpose is to determine solely reasonableness of price, such as in a fixed price contract, then only "pricing data and a "price analysis" is required. HAR § 3-122-136. If, however, the contract is a cost-reimbursement contract under HAR § 3-122-137, a cost-incentive contract under HAR § 3-122-138, or a similar contract in which compensation to the offeror is directly related to the fluctuating costs of the offeror, then the provision of "cost data" and a "cost analysis" that can apply to investigate and scrutinize various matters may be appropriate.¹

A review of the RFP in the light of the category types clearly shows that the RFP is seeking a firm-fixed price contract. A firm-fixed price contract provides:

a price that is not subject to adjustment due to variations in the contractor's cost of performing the work specified in the contract. It should be used whenever prices which are fair and reasonable to the purchasing agency can be established at the outset. The bases upon which firm fixed prices may be established include: (1) *Adequate price competition in the contract*; (2) *Comparison of prices in similar prior procurement in which prices were fair and reasonable*; (3) Establishment of realistic costs of performance by utilizing available cost or price data and identifying certainties in contract performance; or (4) Use of other adequate means to establish a firm price.

HAR § 3-122-136(b) (italics supplied).

In further support of the premise that cost data and a cost analysis are not required for a firm fixed price contract. the statutes and administrative rule provide ample evidence. For example, for all contracts, *except firm fixed price contracts*, the procurement officer must confirm that "[t]he proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated." HRS § 103D-314(1) (Approval of accounting system). Likewise, "[t]he purchasing agency shall be entitled to audit the

¹ By statute cost principle rules are required to be adopted by the procurement policy board "to determine the allowability of incurred costs for the purpose reimbursing costs under contract provisions which provide for the reimbursement of costs." HRS § 103D-601 (Cost principles rules required). The adopted rules are found in chapter 3-123 (Cost Principles). Because the present RFP does not recognize and provide for the reimbursement of costs, the statute and implementing rules do not apply to the RFP and thus establishes no basis to find cost data is and would be required for the RFP.

books and records of a contractor or subcontractor under any negotiated contract or subcontract *other than a fixed-price contract* to the extent such books and records relate to the performance of such contract or subcontract." HRS § 103D-317(b) (Right to audit records) (italics supplied). Clearly the provision of cost data and a subsequent cost analysis based on that data is not required for a firm fixed price contract. From this it follows logically that a firm-fixed price contract in terms of the reasonableness of price can be satisfied by adequate competition, or simply a "comparison of prices in similar prior procurement in which prices were fair and reasonable," as opposed to a more burdensome provision of cost data or the conducting of cost analysis.

Also, there is a general policy discussed below against the unnecessary provision of cost or pricing data because it runs counter to the procurement code policy purpose of promoting "economy, efficiency, and effectiveness in the procurement of goods and services." HAR § 3-120-1 (Purpose). Similarly, as stated by the federal government, to "require unnecessarily the submission of cost or pricing data, . . . leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional contractor and Government resources." FAR § 15.402(a)(3). Additionally, the FAR provides:

[t]he contracting officer must obtain cost or pricing data only if the contracting officer concludes that none of the exceptions in 15.403-1(b) applies. However, if the contracting officer has sufficient information available to determine price reasonableness, then the contracting officer should consider requesting a waiver under the exception at 15.403-1(b)(4).

FAR § 15.403-4(a)(1) (Requiring cost or pricing data).

In the present case, as the procurement officer, I have the discretion to simply obtain "prices in similar prior procurements in which prices were fair and reasonable." In other words, only a price analysis with supporting pricing data. The Office of Elections already has this information in the form of the prices for each of the State's election system contracts for the regular 2000, 2002, 2004, 2006, and 2008 elections and in the form of the pricing data it will obtain from the vendors who respond to the RFP, which will include the overall proposal price and unit prices for ballots, voting machines, and other components of the RFP.

Notably cost data and a cost analysis is more detailed and invasive than straightforward price data. The seeking of cost data generally generates confidentiality issues and disputes arising from vendors' claims of sensitive and proprietary cost data to shield from competitors. This also discourages vendors from submitting proposals due to concerns about the risks of competitors learning such information. These issues highlight the various issues raised, *supra*, about the policy issues against the requiring of cost data.

In comparison, "price data" is objective information in which there are no disputes or confidentiality issues.²

II. *CONCLUSION*

In the present case, therefore, as HOPA for the RFP, I conclude no reasonable basis exists to justify obtaining cost or price data to perform a cost or price analysis when it is sufficient to utilize the price data requested in the RFP, to be obtained from any Offeror, and the public information regarding historical contract prices for voting systems used in the state's elections since 2000 to determine price reasonableness and best value for the State. Accordingly, for the reasons above, as HOPA, I hereby waive any requirement for any cost or price analysis to the extent such analysis may be interpreted to apply to the RFP for this voting system procurement for the 2010 elections and beyond.

² The term "price data" is defined as "mean[ing] factual information concerning prices, including profit, for goods, services, or construction substantially similar to those being procured. In this definition, "prices" refers to offered or proposed selling prices, historical selling prices, and current selling prices of such items. This definition refers to data relevant to both the general contractor and subcontract prices." HAR § 3-120-2 (Definitions).