



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of)	PDH-2017-005
)	
HAWAIIAN OCEAN'S WAIKIKI, INC.,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
)	AND FINAL ORDER GRANTING
vs.)	PETITIONER'S MOTION TO
)	DISMISS ADMINISTRATIVE
DEPARTMENT OF BUDGET AND)	HEARING FOR WANT OF
FISCAL SERVICES, CITY AND)	JURISDICTION
COUNTY OF HONOLULU,)	
)	
Respondent.)	
_____)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND FINAL ORDER GRANTING PETITIONER'S
MOTION TO DISMISS ADMINISTRATIVE HEARING FOR WANT OF JURISDICTION

I. INTRODUCTION

On August 21, 2017, Hawaiian Ocean's Waikiki, Inc. ("Petitioner") filed a request for an administrative hearing to contest Respondent Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") August 14, 2017 denial of Petitioner's May 25, 2017 protest. The protest concerned Respondent's Solicitation No. RFP-DES-905119. ("RFP"). The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On August 29, 2017, Petitioner filed a motion to dismiss administrative hearing for want of jurisdiction, a motion to eliminate or reduce the bond, and a motion to

compel the production of relevant financial information. On the same date, Respondent filed a motion to dismiss. On August 31, 2017, Petitioner filed its memorandum in opposition to Respondent's motion to dismiss and Respondent filed its memoranda in opposition to each of Petitioner's motions.

The motions came on for hearing before the undersigned Hearings Officer on September 1, 2017. Kirk M. Neste, Esq. and Keith Y. Yamada, Esq. appearing on behalf of Petitioner; Ryan H. Ota, Esq. and Jessica Y. K. Wong, Esq. appearing on behalf of Respondent.

Having reviewed the motions and having considered the argument of counsel, along with the memoranda, declaration and exhibits attached thereto, together with the records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. On or about April 25, 2016, Respondent issued an RFP regarding "Beach Services for Kuhio Beach Services Stand #1 or Kuhio Beach Services Stand #2 for a Five (5) Year Period".

2. The RFP, among other things, included a schedule of events, general and special instructions to offerors, the evaluation criteria, a sample contract, and Appendices A thru F. The Appendices included: Appendix A-Scope of Work; Appendix B-Term/Schedule of Work; Appendix C-Pricing/Certifications; Appendix D-Special Provisions; Appendix E-General Terms and Conditions; and Appendix F-Contractor's Proposal.

3. Pursuant to the terms of the RFP, proposals were initially due by May 27, 2016. The deadline was changed to June 13, 2016 by Addendum No. 1 which was issued on May 18, 2016, and subsequently, to June 17, 2016 by Addendum No. 2, issued on May 27, 2016.

4. The Scope of Work for the Solicitation was set forth in Appendix A ("Scope of Work"):

* * * *

B. TECHNICAL/PERFORMANCE REQUIREMENTS

1. Scope of Services

(1.1) The Contractor shall operate and manage Beach Services at Kuhio Beach at only one (1) of the following locations:

Beach Services Stand #1 and one subsidiary (subsidiary hereinafter referred as Subsidiary #1)

OR

Beach Services Stand #2 and one subsidiary, (subsidiary hereinafter referred as Subsidiary #2)

* * * *

5. The Scope of Work also described the privileges the successful offerors would be granted under the RFP and the premises upon which the beach stands were located:

* * * *

Included in this *privilege* is the right to rent surfboards, paddleboards, boogie boards, beach umbrellas, beach chairs and beach mats; provide canoe rides, surfing lessons, photographs of patrons (with patron permission while patron is utilizing specific beach services, secure mini storage lockers and other ocean activities as approved in writing by the Officer in Charge (hereinafter referred to as "OIC") and applicable government agencies. Note: Access to ocean sport areas for surfing, paddle boarding and canoe rides must be in accordance to restrictions and allowances from the Department of Land and Natural Resources.

* * * *

1.4) Description of Physical Premises

The locations and boundaries of the beach stands (hereinafter referred to as "Premises") as shown on the site maps are as follows:

Attachment A-1 Beach Services Stand #1 and Subsidiary #1

Attachment A-2 Beach Services Stand #2 and Subsidiary #2

The main Beach Services Stand #1 & Stand #2 and their subsidiaries are located on Kuhio Beach-TMK-1-2-6-001-015. (Note: All dimensions are deemed approximate).

* * * *

(Emphasis added).

6. The beach services called for by the RFP were essentially the same services required by previous concession contracts for Kuhio Beach Stands #1 and #2¹.

7. Respondent's previous solicitations to operate Kuhio Beach Stand #1 and #2 were issued under HRS Chapter 102 as "concessions".

8. Pursuant to the terms of the RFP, the evaluation of the bids was based on the following criteria: Business Qualifications in Relations to Ocean Sports, Business Development Plan, Management and Employee Knowledge in Ocean Recreation and Customer Service, Community Participation, and Offer Percentage as Specified in Appendix C: Pricing/Certification.

9. Appendix C of the RFP entitled, Pricing/Certifications, required offerors to submit the percentage of gross sales it was offering Respondent for each stand.

10. The sample contract, among other terms, provided:

* * * *

2. The CONTRACTOR shall furnish all services, labor, goods, materials, supplies, equipment and other incidentals (City owned equipment excluded) reasonably necessary for the successful completion of the work contemplated under Appendix A: Scope of Work and this Agreement.

3. The CONTRACTOR agrees to pay the CITY in accordance with the payments schedule and provisions, all as set forth in Appendix C: Pricing/Certification, Appendix D: Special Provisions and Appendix E: General Terms and Conditions. CONTRACTOR shall not pass through any taxes to the City.

¹ According to the parties, the only difference was that the RFP added the ability of the contractor to rent mini storage lockers.

* * * *

11. The RFP required a monthly fee guarantee from the offerors of no less than \$25,000 for Beach Services Stand #1 and no less than \$35,000 for Beach Services Stand #2, and specified in Appendix A that:

Monthly Percentage Fee

The Contractor shall pay the proposed percentage of the total gross revenue for the month as specified in Appendix C: Pricing/Certifications **OR** the minimum monthly fee as specified Appendix A: Scope of Work, Paragraph 2, Fee Payments, whichever is greater.

12. The RFP did not contemplate the expenditure of public funds by Respondent. Rather, the RFP required the offerors awarded the contract to pay a fee to Respondent for the exclusive right to provide specified beach-related services at Kuhio Beach Services Stand #1 and Kuhio Beach Services Stand #2. Both beach stands are located on property under the jurisdiction of Respondent.

13. Addendum No. 2 to the RFP contained responses to a number of requests for clarification. Response #8a stated: "Section 1.2 of the General Instructions to Offerors is applicable to this solicitation because the solicitation for Beach Services for Kuhio Beach Services Stand #1 or Kuhio Beach Services Stand #2 is being conducted under HRS 103D-303 Competitive sealed proposals."

14. Petitioner submitted proposals for both Kuhio Beach Services Stand #1 and Kuhio Beach Services Stand #2 in response to the RFP.

15. On April 20, 2017, Respondent awarded the contract for Kuhio Beach Services Stand #2 to Dive Oahu, Inc. and Kuhio Beach Services Stand #1 to Star Beach Boys, Inc. Pursuant to the RFP, offerors were limited to one beach stand contract.

16. On May 25, 2017, Petitioner protested the awards of the contracts for Kuhio Beach Services Stand #1 and Kuhio Beach Services Stand #2.

17. By letter dated August 14, 2017, Respondent denied Petitioner's protest. In denying the protest, Respondent stated, among other things:

* * * *

Nevertheless, HRS Chapter 102 is inapplicable because the beach services RFP was procured as a management services contract under HRS Chapter 103D and not as a concession contract under HRS Chapter 102 where the responsible bidder with highest price governs. This procurement was conducted pursuant to HRS Chapter 103D because the City determined that there were other factors besides price that should be considered when making award. The factors include:

- 1) The primary consideration in determining the award is not price.
- 2) The contract needs to be other than a fixed price type.
- 3) The specifications for the goods, services, or construction, or delivery requirements cannot be sufficiently described in the invitation for bids.
- 4) Offerors may need to be afforded the opportunity to revise their proposal, including price.
- 5) Award may need to be based upon 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 City. Quality factors include technical and performance capability and the content of the technical proposal.
- 6) Prior procurements indicate that competitive sealed proposals may result in more beneficial contracts for the City.

HAR §3-122-43 provides a variety of factors to consider when determining whether or not competitive sealed bidding is practicable, and the City reviewed and considered the factors listed above to aid in its determination to conduct the procurement using the

competitive sealed proposals process. The competitive sealed proposals method enabled the City to consider elements such as marketing and business plans, financial capability, staff education and training, and community participation, in addition to price, that the City would not have been able to consider in the competitive sealed bidding process.

Use of the competitive sealed proposals process also permitted the City to provide the offerors flexibility in determining their approach to providing services because the process allowed the City to specify the required basic minimum specifications and allow the offerors to describe the services they would offer, even those above and beyond those required at minimum. Further, unlike competitive sealed bids, competitive sealed proposals allow for discussions and the opportunity for revisions, and the City wanted the flexibility to conduct discussions and allow for revisions to proposals, if needed or warranted. The competitive sealed proposal process was desired also because it permits the selection of the most advantageous offeror, rather than selection just based on price.

* * * *

18. Petitioner filed the present request for administrative review with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, on August 21, 2017, along with a cash bond in the sum of \$10,000.00.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review the determinations of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§103D-310, 103D-701 or 103D-702, *de novo*. In doing so, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests

under HRS §103D-701. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997). And in reviewing the contracting officer's determinations, the Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §103D-709(f).

In bringing this motion, Petitioner contends that because this dispute involves the solicitation of concession contracts governed by HRS Chapter 102 rather than procurement contracts, HRS Chapter 103D ("Procurement Code" or "Code") is inapplicable and therefore, the Hearings Officer lacks jurisdiction over this matter. Respondent, on the other hand, argues that although this solicitation does not involve the expenditure of public funds and seeks to award contracts for beach "concessions" as defined by HRS §102-1, the contracts were nevertheless properly solicited under HRS Chapter 103D.

The salient facts are not in dispute. On April 25, 2016, Respondent issued an RFP pursuant to HRS §103D-303, seeking proposals for "Beach Services for Kuhio Beach Services Stand #1 or Kuhio Beach Services Stand #2 for a Five (5) Year Period". The RFP does not involve nor contemplate the expenditure of public funds by Respondent but rather, requires the offerors awarded the contracts to pay a monthly fee to Respondent for the exclusive right to provide beach related services at Kuhio Beach Services Stand #1 and Kuhio Beach Services Stand #2. Both beach stands are located on property under Respondent's jurisdiction. In response to the RFP, Petitioner submitted proposals for both Kuhio Beach Services Stand #1 and Kuhio Beach Services Stand #2. However, on April 20, 2017, Respondent awarded the contracts for Kuhio Beach Services Stands #1 and #2 to two other offerors.

HRS §103D-102 provides in relevant part:

(a) 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.

HRS §103D-104 defines "Procurement" as "buying, purchasing, renting, leasing, or otherwise acquiring good, service, or construction." In addition, this Office has repeatedly and consistently held that public contracts that do not involve the expenditure of public funds are not subject to the requirements of HRS Chapter 103D. *In Re Waikiki Windriders/Hawaiian Ocean's Waikiki, PCH-2002-9 (7/26/2002)(affirmed by Circuit Court 12/2/2002); In Re Elite Transportation Company, Inc., PCH-96-2 (5/21/1996); In Re Roberts Tours and Transportation, Inc., PCH-2011-3 (9/2/2011).*

On the other hand, concessions on public property are governed by HRS Chapter 102. HRS §102-1(1) defines "concession" as the grant to a person of the privilege to "[c]onduct operations involving the sale of goods, wares, merchandise, or services to the general public including but not limited to food and beverage establishments, retail stores, motor vehicle rental operations under chapter 437D, advertising, and communications and telecommunication services, in or on buildings or land under the jurisdiction of any government agency."

In *In Re Elite Transportation Company, Inc., supra*, the Hearings Officer addressed the question whether the solicitation involved the procurement of any good, service or construction and was consequently subject to HRS Chapter 103D. There, the protestor asserted that the purpose of the solicitation was to acquire the contractor's management service for taxicab operations at the airport. The City on the other hand, contended that the purpose of the solicitation was not to acquire or obtain any good or service, but rather, to grant a concession which consisted of the privilege of operating a taxicab service to serve the public on public property. In determining that the solicitation was a concession contract pursuant to HRS Chapter 102 and therefore not subject to HRS Chapter 103D, the Hearings Officer reasoned:

[T]he successful contractor who was granted the privilege to operate the taxicab management service on the Honolulu

International Airport premises became obligated to pay Respondent an amount calculated upon the gross receipts of taxicab trip fees from all taxicab trips originating from the airport, assessed at the rate of \$1.25 for each trip dispatched in response to a customer's request for taxicab service. It is apparent from the foregoing that the purpose of [the solicitation] was to grant a privilege for a consideration and not to acquire management services per se. The management services that the contractor would perform would be incidental to the contractor's conduct of its business of the retail selling of taxicab services to the general public and to conduct such business in a manner that met the high standard of services required by the terms of [the solicitation].

Respondent's expenditure of funds to acquire goods, services or construction in discharging its obligations under [the solicitation] did not require that the funds expended be paid to the taxicab service contractor. Contrary to Petitioner's assertion, the logical and reasonable interpretation of the terms and conditions of the contract would be that the provisions contemplated Respondent's expenditure of funds to acquire such goods, services and construction to be accomplished by entering into separate ancillary procurement contracts processed pursuant to the provisions of the Procurement Code.

* * * *

In summary, the Hearings Officer concludes that [the solicitation], relating to the operation of taxicab services at the Honolulu International Airport was not a contract for the procurement of good, service or construction that would be subject to the provisions of the Procurement Code, but, was, instead a contract to grant a concession and was governed by the provisions of HRS Chapter 102. Consequently, the Hearings Officer further concludes that since the provisions of the Procurement Code were inapplicable to the subject request for proposal a hearings officer designated pursuant to provisions of the Procurement Code, had no jurisdiction to review

Petitioner's protest of [the solicitation], a request for proposal concerning a contract to grant a concession. Accordingly, Respondent's motion to dismiss for lack of jurisdiction by the Hearings Officer should be granted.

* * * *

At the outset, Respondent readily acknowledges that the subject contracts involve the granting of a privilege to conduct operations involving the sale of services on land controlled by Respondent. Indeed, the Scope of Work specifically provides that "[i]ncluded in this *privilege* is the right to rent surfboards, paddleboards, boogie boards, beach umbrellas, beach chairs, . . ." Nevertheless, Respondent argues that HRS Chapter 103D governs this solicitation because Respondent properly elected to award the contracts by competitive sealed proposals under HRS §103D-303 as "management services" contracts rather than by competitive bidding as would have been required under HRS Chapter 102. Respondent's preference to "opt-in" to HRS Chapter 103D, however, does not provide a legal basis to for doing so². Additionally, Respondent points to the language in HRS §103D-102 that this "chapter shall apply to all procurement contracts made by governmental bodies whether the consideration is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance . . .", as authority for the application of HRS Chapter 103D to revenue-generating concession contracts like the ones involved here. This argument, however, was addressed and rejected in *Waikiki Windriders/Hawaiian Ocean's Waikiki*. In that case, the Hearings Officer noted that upon its enactment in 1993, HRS §103D-102 provided that the Procurement Code would "apply to every expenditure of public funds irrespective of their source by a governmental body . . . under any contract . . .". In 1995, however, HRS §103D-102 was amended to the present version which essentially replaced "every expenditure of public funds irrespective of their source" with the language "[t]his chapter shall apply to all procurement contracts made by governmental bodies whether the consideration for the contract is cash, revenues,

² Respondent goes to great lengths to point out that the solicitation by competitive sealed proposals under HRS §103D-303 provides greater flexibility to consider other factors in addition to prices and was therefore deemed to be the best approach. While this determination may be understandable under the circumstances, it does not provide a legal basis to "opt-in" to the Procurement Code. The question here is whether these contracts constitute "procurement" contracts subject to HRS Chapter 103D or "concession" contracts which are governed exclusively by HRS Chapter 102.

realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance . . ." The legislative history, however, gave no indication that the Legislature sought to expand the application of the Code to cases other than those involving the expenditure of public funds. Rather, according to the underlying history, the purpose of the Bill (H.B. 1834) was merely to "clarify and streamline the provision [of the Code] to achieve the objective of cost-effectiveness and accountability which prompted its adoption." *Standing Committee Report No. 811, 1995; House Journal*. Thus, the language in HRS §103D-102(a) upon which the petitioner in the *Waikiki Windriders/Hawaiian Ocean's Waikiki* relied ("consideration for the contract . . . which the State receives or is owed"), and upon which Respondent now relies, was merely intended to clarify and refine the prior language ("every expenditure of funds irrespective of their source") by specifying the various sources of the funds expended by the procuring agency (cash, revenues, realizations, etc.) as consideration for the procurement contract and not to expand the application of the Code to include concession contracts³. Under those circumstances, the Hearings Officer in *Waikiki Windriders/Hawaiian Ocean's Waikiki* concluded that "the Code was originally applicable to and continues to be applicable to procurement contracts made by governmental bodies that involve the expenditure of public funds as consideration irrespective of whether those funds consist of cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance." (emphasis in original). On appeal, the Hearings Officer's determination that HRS Chapter 102 applied and that the solicitation was therefore not subject to HRS Chapter 103D was affirmed by the Circuit Court. In *In Re Stoneridge Recoveries, LLC, PCH-2003-5 (June 26, 2003)*, the Hearings Officer again held that a contract that did not contemplate the expenditure of public funds by the City in connection with the awarding of Oahu tow zones was not subject to HRS Chapter 103D. In reversing the Hearings Officer's decision, the Court explained that its decision in the *Waikiki Windriders/Hawaiian Ocean's Waikiki* case was "based on the fact that the contract involved was a concession contract, and thus governed by Chapter 102, HRS, rather than by the

³ HRS §103D-102(a) also states 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." This is another indication that the reference to cash, revenues, etc. describe the sources of the funds expended by the procuring agency as consideration for the procurement contract.

Procurement Code (Chapter 103D, HRS). The Court states: that HRS Chapter 102 applies here." The Court then went on to distinguish its decisions in the *Waikiki Windriders/Hawaiian Ocean's Waikiki* and *Stoneridge Recoveries* cases by pointing out that "[t]he instant case does not involve a concession contract. Stoneridge is not leasing or using any City property. Stoneridge maintains its own facilities and provides services using its own vehicles and storage facilities." Thus, according to the Court's rulings, because the beach concessions contracts involved in the *Waikiki Windriders/Hawaiian Ocean's Waikiki* case called for operating concessions on City property, unlike the contracts in the *Stoneridge* case, they constituted concession contracts subject to HRS Chapter 102 rather than HRS Chapter 103D.

Likewise, in this case, the undisputed facts clearly establish that the contracts at issue here grant a privilege to the successful offerors to conduct operations involving the sale of services to the general public on land under Respondent's jurisdiction, and are therefore subject to HRS Chapter 102 rather than HRS Chapter 103D. Respondent's characterization of the contracts as "management services" contracts and its stated preference for awarding the contracts by competitive sealed proposals rather than by competitive bids does nothing to change the fact that those contracts are "concessions" as defined by HRS §102-1⁴.

Moreover, it is clear from a reading of the applicable statutes that HRS Chapter 103D was not intended to supplement HRS Chapter 102. For one thing, nothing in HRS Chapters 103D or Chapter 102 expressly authorizes Respondent to opt-in to the provisions of HRS Chapter 103D even though the solicitation concerns a "concession". As pointed out in *Waikiki Windriders/Hawaiian Ocean's Waikiki, supra*, there is no provision in HRS Chapter 103D that authorizes the application of HRS Chapter 102 to procurements as

⁴ As the Hearings Officer noted in *In Re Elite Transportation Company, Inc., supra*, "It is apparent from the foregoing that the purpose of [the solicitation] was to grant a privilege for a consideration and not to acquire management services per se. The management services that the contractor would perform would be incidental to the contractor's conduct of its business of the retail selling of taxicab services to the general public and to conduct such business in a manner that met the high standard of services required by the terms of [the solicitation]".

HRS §103D-111⁵ does for the provisions of HRS Chapter 103 (which concerns the expenditure of public funds). The absence of such a provision not only reflects an intent against the application of HRS Chapter 103D to concession contracts but also, raises the problem as to which conflicting provision would control if both HRS Chapters 103D and 102 were made applicable to procurements. Furthermore, the very fact that HRS Chapter 102 *does not* provide for competitive sealed proposals as a method of awarding concession contracts is further evidence of an intent to award such contracts only by competitive sealed bidding⁶. As such, any ruling that allows Respondent to solicit concession contracts under HRS §103D would circumvent the intent underlying HRS Chapter 102. The Circuit Court's analysis in the *Waikiki Windriders/Hawaiian Ocean's Waikiki* and *Stoneridge Recoveries* cases lends further support to the conclusion that HRS Chapters 102 and 103D are mutually exclusive and not intended to apply concurrently.

Here, the undisputed facts establish, and Respondent candidly admits, that the RFP seeks to grant a privilege to conduct operations involving beach-related services on land controlled by Respondent *to wit*, Kuhio Beach, in consideration of a fee in the form of the higher of a monthly base rent or rent based upon a percentage of sales from the operation. Indeed, Respondent acknowledges that this solicitation could have been made under HRS Chapter 102 but that it chose instead to proceed under HRS Chapter 103D to take advantage of the greater flexibility afforded by the Procurement Code for soliciting contractors. Additionally, nothing in the solicitation contemplates, let alone obligates, Respondent to expend public funds as consideration for the contemplated beach concession stands, and further, Respondent does not point to, and the Hearings Officer cannot find, any authority allowing Respondent to conduct the solicitation under HRS Chapter 103D even though the

⁵ HRS §103D-111 provides:

Applicability of chapter 103.

Any provisions of chapter 103 not inconsistent with this chapter shall apply to the procurement of all goods, services, and construction under this chapter.

⁶ Of course, if the Legislature desired to have the provisions of HRS Chapter 103D apply to concession contracts, it could have done so by, for instance, referencing HRS Chapter 102 in HRS §103D-111. It has not done so and the Hearings Officer lacks the authority to establish a rule contrary to the policy previously established by the Legislature.

solicitation is unequivocally a "concession" under HRS §102-1⁷. For all these reasons, the Hearings Officer concludes that the RFP is not subject to HRS Chapter 103D and the Hearings Officer therefore lacks jurisdiction over this matter⁸.

IV. ORDER

Based upon the foregoing findings and conclusions, the Hearings Officer orders as follows:

1. Petitioner's Motion to Dismiss Administrative Hearing for Want of Jurisdiction is granted and Petitioner's request for administrative review is hereby dismissed;
2. Respondent's Motion to Dismiss as well as Petitioner's Motions to Eliminate or Reduce the \$10,000 Bond and to Compel Production of Relevant Financial Information are based upon an application of HRS Chapter 103D and are therefore rendered moot;
3. The parties shall bear their own attorneys' fees and costs incurred in this matter; and
4. Petitioner's cash bond shall be returned upon the filing of a declaration by Petitioner attesting that the time to appeal has lapsed and that no appeal has been timely filed. In the event of a timely application for judicial review of the decision herein, the disposition of the bond shall be subject to determination by the Circuit Court.

DATED at Honolulu, Hawaii: OCT - 3 2017



CRAIG H. UYEHARA
Senior Hearings Officer
Department of Commerce
and Consumer Affairs

⁷ Although Respondent's rationale for opting-into HRS Chapter 103D may be sound, this is not a situation where the ends can justify the means.

⁸ The Hearings Officer is mindful that administrative agencies are tribunals of limited jurisdiction and only have adjudicatory jurisdiction conferred on them by statute. Their jurisdiction is dependent entirely on the validity and the terms of the statutes reposing power in them. *2 Am Jur 2d Administrative Law, §275 (2nd Edition)*.