

**BOARD OF WATER SUPPLY
CITY AND COUNTY OF HONOLULU
REQUEST FOR EXEMPTION FROM
CHAPTER 103D**

DATE: February 13, 2009

TO: Paul Kikuchi
Chief Financial Officer

VIA: Procurement Office

FROM: Jan Gouveia
Chief Legal Counsel



RE: REQUEST FOR EXEMPTION FROM CHAPTER 103D for the selection and award of a contract for granular activated carbon

Pursuant to Section 103D-102(b)(4)(L), Hawaii Revised Statutes (HRS) and Subchapter 9, Chapter 3-120 of the Hawaii Administrative Rules (HAR), I am recommending that an exemption be granted from the provisions of Chapter 103D, HRS, for Jacobi Carbons, Inc. ("Jacobi") to provide 2.5 million pounds of granular activated carbon ("GAC") to the Board of Water Supply, City and County of Honolulu ("BWS").

Vendor Name & address: Jacobi Carbons, Inc.

Amount of the contract: \$3,125,000.00

Term of the contract: Not to exceed 3 years

Prior exemption contract numbers: none

A. Background:

This exemption request arises out of a dispute between Jacobi and the BWS. The parties have come to an agreement to settle their dispute, which

involves Jacobi providing granular activated carbon ("GAC") to the BWS at a set price. As such, an exemption from the requirements of HRS Chapter 103D is required before the settlement can be finalized. The background to the dispute and the terms of the proposed settlement between the parties is as follows.

Prior to February of 2006, the BWS issued a solicitation for sealed bids for the provision of GAC for use as a water filtration, entitled "Job 06-30, Furnishing, Delivery, and Off-Loading of Granular Activated Carbon." On February 28, 2006, Jacobi, a carbon supplier based in Philadelphia, was selected as the lowest bidder on a competitive sealed bid basis pursuant to Section 103D-302, HRS.

On April 10, 2006, the BWS and Jacobi entered into a three-year contract (the "Contract") valued at \$697,500.00, under which Jacobi was required to supply the BWS with a yearly maximum of one thousand two hundred and fifty (1250) 1000-pound sacks of GAC at a rate of \$0.558 per pound. After subsequently having delivered three (3) orders of GAC pursuant to the Contract without incident, the BWS placed a fourth order on June 30, 2006 (Order #204328) with an agreed-upon delivery date of August 24, 2006 ("Order No. 204328").

Jacobi asserted that it was unable to deliver GAC consistent with the terms of the Contract because of a price increase caused by the imposition of a tariff imposed by the United States Trade Commission. Specifically, the tariff had been imposed upon GAC manufactured in China. As Jacobi manufactured its GAC in China, Jacobi asserted that the imposition of the tariff entitled Jacobi to a Contract price adjustment. The BWS disagreed with Jacobi's position.

As such, on August 30, 2006, Clifford Lum, then the Manager and Chief Engineer and Chief Procurement Officer of the BWS ("Manager"), sent a letter to Jacobi that found Jacobi in default of Order No. 204328 and gave Jacobi ten (10) days to cure the default and advised Jacobi that the BWS would be imposing liquidated damages if Jacobi did not cure within ten (10) days. On August 31, 2006, the BWS submitted to Jacobi another order ("Order No. 204301") for an additional 120,000 pounds of GAC pursuant to the Contract at the contract price of \$0.558 per pound for the Mililani Wells I site. However, on September 1, 2006, Jacobi sent a letter in response to Order No. 204301 which stated that Jacobi would only accept Order No. 204301 if the BWS agreed to a new price of \$0.66 per pound and that this was the last order that Jacobi could process, and that any future delivery would need to be pursuant to a price adjustments based upon the higher cost realized by Jacobi based upon the imposition of the tariff.

By way of its letter dated November 22, 2006, the Manager issued a final decision and order as to the issue of Jacobi's performance ("Final Decision"), which provided in relevant part:

The above sets forth the final decision of the procurement officer. This decision may be appealed by initiating judicial action pursuant to section 103D-711, HRS. If you decide to initiate judicial action, you must file your complaint within six months of the date that you receive this decision. A copy of the complaint to initiate judicial action shall be furnished to the procurement office from whose decision the complaint is taken. The notice shall indicate that a judicial action pursuant to section 103D-711, HRS, is intended, reference the decision from which the complaint is being taken, and identify the contract involved.

Pursuant to Section 36 of the Contract, the Final Decision was issued by the Manager who found Jacobi in default in a number of specifics.

Following the issuance of the Final Decision, Jacobi timely filed a complaint seeking judicial review ("Jacobi Complaint"). The BWS filed a counterclaim based upon the Final Decision. In regard to the Jacobi Complaint, the BWS had taken the position that the Jacobi Complaint was untimely according to the Hawaii Revised Statutes, Section 103D. Jacobi contested the BWS' position and put forth its own arguments asserting that the BWS had misled Jacobi and breached the Contract.

The parties sought mediation of this dispute before the nationally-recognized mediator, Randall Wulff in Oakland, which mediation was unsuccessful. Thereafter, the mediator proposed that the parties seek resolution by way of a settlement wherein the BWS would receive GAC in lieu of monetary damages on the basis that it appeared to the mediator that Jacobi had insufficient assets to fight the litigation and to pay any judgment of substance. Jacobi submitted financial statements to the BWS to support its assertion to the mediator that Jacobi was unable to pay a significant judgment.

After a two-day negotiation session in Hawaii, the parties were able to reach a settlement on their claims. Under the settlement, the parties agreed that Jacobi would provide 2.5 million pounds of GAC to the BWS at a rate of \$1.25 per pound, which is a price that is significantly less than the current market rate of approximately \$1.70 per pound. In addition, Jacobi was required to reimburse the BWS for attorneys' fees and costs expended in the litigation of the dispute.

By way of the settlement agreement, Jacobi has warranted to the BWS that the \$1.25 per pound price represents an amount by which Jacobi will not

realize any profit on the sale of GAC to the BWS. To that end, the settlement agreement gives the BWS the ability to audit Jacobi to confirm that Jacobi is not making any profit on its sale of GAC to the BWS. In addition, the settlement agreement gives the BWS the ability to seek liquidated damages against Jacobi in an amount up to \$2.6 million if Jacobi defaults on the settlement agreement.

The BWS believes that the settlement agreement adequately and fairly settles the dispute between the BWS and Jacobi. However, the settlement agreement is contingent upon the satisfaction of all requirements necessary for an exemption to be granted for this transaction pursuant to HRS Section 103D-102. As such, based on the above, the BWS seeks an exemption to allow Jacobi to provide the aforementioned GAC to the BWS.

B. Describe how procurement by competitive means is neither practicable nor advantageous to the Board of Water Supply (BWS)

Procurement by competitive means is neither practicable nor advantageous to the BWS for the following reasons. First, the GAC purchase from Jacobi will allow the BWS to resolve its dispute with Jacobi. A settlement allows the BWS to avoid the uncertainty of a lawsuit. In addition, under the settlement agreement, the BWS is also able to recover all of its attorneys' fees and costs expended in this dispute.

Second, the GAC purchase is at a rate that is significantly lower than the market price for GAC. Thus, the BWS will realize a cost savings of approximately \$.45 per pound (\$1.25 per pound settlement price vs. approximate \$1.70 per pound market price) on the purchase of the GAC. As Jacobi is obligated under the settlement agreement to provide 2.5 million pounds of GAC

to the BWS, the approximate cost savings is \$1,125,000.00 (\$.45 per pound in savings x 2.5 million pounds).

Third, Jacobi has represented that it will not make any profit on the sale of GAC to the BWS. The BWS has the ability to audit Jacobi to confirm this fact. Should Jacobi breach the settlement agreement by including a profit in its price, or for any other reason, the BWS has the ability to collect up to \$2.6 million in liquidated damages from Jacobi.

In summary, the settlement agreement between the BWS and Jacobi gives the BWS the opportunity to realize a significant cost savings on a product that is essential to the operations of the BWS. Although the per pound price of GAC being charged by Jacobi under the settlement agreement is higher than the Contract per pound price, the BWS recognizes that market conditions have changed such that a re-bid would not allow the BWS to realize a lower price than what is currently being offered by Jacobi.

Accordingly, I recommend your approval to exempt the award of a contract for the provision of granular activated Carbon by Jacobi Carbons, Inc. from the provisions of Chapter 103D, HRS. The application of this exemption will be limited to these facts and circumstances and may not be used as precedence to award any other contracts.

I certify that the information provided above is to the best of my knowledge, true, correct.


Requestor

2/13/09
Date


Division Head

2/13/09
Date

Direct Questions to: Jan Gouveia

Phone: (808) 748-5171

Date of Public Notice posting: February 13, 2009

APPROVED AS RECOMMENDED / NOT APPROVED



PAUL KIKUCHI
CHIEF FINANCIAL OFFICER

2/24/09
Date

APPROVED AS TO AVAILABILITY OF FUNDS



FINANCE

2/13/09
Date

REVIEWED AS TO PROCUREMENT FORM



KATHRYN KANEMORI
PROCUREMENT & SPECIFICATIONS
OFFICER

2/13/09
Date

**BOARD OF WATER SUPPLY
CITY AND COUNTY OF HONOLULU**

February 13, 2009
(Date Notice Posted)

**NOTICE OF REQUEST FOR EXEMPTION FROM CHAPTER 103D HAWAII REVISED
STATUTES**

The Manager and Chief Engineer is reviewing a request for exemption from Chapter 103D, Hawaii Revised Statutes to obtain granular activated carbon.

The award shall be made to:

Name of Vendor: Jacobi Carbons, Inc.
Address of Vendor: 1518 Walnut Street, 18th floor
Philadelphia, Pennsylvania 19102
Cost: \$ 3,125,000.00
Term of Contract: Not to exceed three (3) years

Direct any inquiries to: Kathryn Kanemori
Address: Board of Water Supply
Procurement Office
630 S. Beretania St., Rm. 201
Honolulu, HI 96843
Telephone No.: (808) 748-5078
Fax Telephone No.: (808) 550-9193

Submit written objection(s) to this Notice of Intent to Issue An Exemption from Chapter 103D, HRS within seven (7) calendar days from the date this notice was posted to:

Chief Financial Officer
Board of Water Supply
630 S. Beretania St.
Honolulu, HI 96843
Telephone No. (808) 748-5078

103D Exemption Reference No.: BWS 09-03