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

In the Matter of	)	PCH-2003-21
	)	
PHILLIP G. KUCHLER, INC.,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND DECISION
vs.	)	
	)	
STATE OF HAWAI'I, DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent,	)	
	)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

I. INTRODUCTION

On or about July 16, 2003, Phillip G. Kuchler, Inc.("Petitioner"), filed a request for hearing to contest Respondent Department of Transportation, State of Hawai'i's ("Respondent") denial of Petitioner's protest in connection with Respondent's Project No. HAR-PM-03-01. The matter was thereafter set for hearing on August 5, 2003 and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties. On July 23, 2003, a pre-hearing conference was held during which the parties requested that the hearing be rescheduled to August 27 and 28, 2003. By the subsequent agreement of the parties, the hearing was rescheduled to commence on November 6, 2003.

On November 3, 2003, Petitioner filed a motion in limine to exclude Respondent's Exhibit 2 and all related testimony concerning the lack of available funds and budget limitations, from admissibility into evidence at the hearing. On November 4, 2003, Respondent filed a motion to quash subpoena duces tecum and for a protective order. On November 6, 2003, both motions came on for hearing. After considering the motions, memoranda and attached exhibits in light of the records herein, the Hearings Officer granted

Respondent's motion to quash subpoena duces tecum and denied the motion for a protective order. Petitioner's motion in limine was denied without prejudice.

The matter came on for hearing before the undersigned Hearings Officer on November 6, 2003 in accordance with the provisions of Hawaii Revised Statutes ("HRS") Chapter 103D. Petitioner was represented by Dennis W. King, Esq.; Respondent was represented by Wayne A. Matsuura, Esq. The hearing continued on November 7 and 14, 2003 and was concluded on December 29, 2003.

At the conclusion of the hearing, the Hearings Officer directed the parties to submit written closing arguments. Accordingly, on January 16, 2004, Petitioner filed its closing arguments and on January 26, 2004, Respondent filed its closing arguments. A reply memorandum was filed by Petitioner on January 30, 2004.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. On or about January 15, 2003, Respondent advertised a Notice to Bidders to solicit bids to furnish property management and revocable permitting services for the real property known as Kapalama Military Reservation ("KMR"), Project No. HAR-PM-03-1 ("Project"). Bids were due on or before the bid opening date of February 13, 2003.

2. The solicitation required that bidders submit bids on two items. Bidders were first required to bid on the fee they would charge Respondent to manage the KMR property. This property management fee would be calculated by multiplying $3.6 million (the estimated annual gross rental income for the KMR property) by the fee percentage bid by the respective bidder.

3. The second item that bidders were required to bid on was for commissions to be paid to the contractor for the issuance of new revocable permits for the KMR property. Bidders were required to state the number of months rent it proposed to charge Respondent as commissions for locating new tenants for the KMR property. According to the solicitation, the Project would be awarded to the responsive responsible bidder that submits a lowest bid for the property management fee. In the event of a tie,

the solicitation provided that the contract would be awarded to the bidder submitting the bid with the lowest commission.

4. The commission fee component of the bid provided as follows: "Commission for New Revocable Permits issued [# of month(s) rent] (e.g. 1 month, ½ month, etc.)".

5. The two previous management contracts on the KMR property contained fixed commission fee components of one month. As such, the commission fee component of the prior two contracts had not been bid out.

6. At the time the Project bid specifications were finalized, Respondent estimated paying up to $50,000 per year in commission fees for the KMR property. This sum represented Respondent's estimate of annual commissions for the KMR property rather than a budget limitation.

7. The "Notice to Bidders" in the solicitation provides in relevant part that: "The State reserves the right to reject any or all proposals . . . for the best interest of the public."

8. The bid proposal form of the solicitation contained a letter that each bidder was required to sign. The letter stated in relevant part (on page PF-2) that: "It is understood that the Director of Transportation reserves the right to reject any or all bids . . . when in the Director's opinion such rejection . . . will be for the best interest of the public." The form of letter was signed by Petitioner.

9. The bid proposal form in the solicitation also contained a note (on page PF-4) that: "[t]he State reserves the right to reject any and all bids . . . for the best interest of the public."

10. Bids for the Project were opened on February 13, 2003.

11. Petitioner submitted the apparent low bid of $23,400 per year (.65% of 3.6 million dollars) as its proposed property management fee.

12. The apparent second lowest bidder was C.B. Richard Ellis Hawaii, Inc. ("Ellis"). Ellis submitted a management fee bid totaling $30,240.

13. In addition to the bids submitted by Petitioner and Ellis, there were three other bids. Coldwell Banker Commercial Pacific Properties ("Coldwell Banker") submitted a management fee bid in the amount of $59,400; PM Realty Group submitted a

management fee bid in the amount of $45,000, and Chaney, Brooks & Company, Inc. ("Chaney"), submitted a management fee bid in the amount of $153,000.

14. Petitioner's bid also proposed a commission fee of 4 months rent; Ellis's bid proposed a commission fee of 2 months rent; while Coldwell Banker, PM Realty Group and Chaney each proposed to charge a commission equivalent to 1 month rent.

15. Upon closer examination of the bids, Respondent discovered that Ellis had inserted ".0084%" (of 3.6 million dollars) in the space provided for the bidder's proposed fee percentage in calculating its proposed management fee of $30,240. The instructions in the solicitation for this entry provided that bidders should "carry percentage no more than two decimal points."

16. Pursuant to this instruction and past practice, Respondent rounded Ellis' fee percentage entry to .01% and corrected the extension price from $30,240 to $360.

17. Sometime between February 13 and February 19, 2003, a representative of Respondent called Ellis and informed Ellis that there was a mistake in its bid since .0084% multiplied by 3.6 million dollars did not equal $30,240.

18. On or about February 19, 2003, Ellis sent a letter to Respondent stating that the "proposed fee for management services was stated incorrectly in the percentage fee section but correctly in computing the whole dollar annual fee." Ellis clarified that "[t]he fee properly stated is: 0.84% (0.0084) which equates to $30,240 annually." In prior and subsequent telephone calls, Ellis made clear to Respondent that it did not make an error with respect to the $30,240 annual management fee which it had intended to bid.

19. In or about March 2003, Respondent revised the bid tabulations and placed Ellis into the position of low bidder by revising its percentage fee to .01% and changing its proposed annual property management fee to $360.

20. On or about March 20, 2003, Respondent prepared a memorandum recommending that the contract be rejected for the reason that "Harbors has insufficient funds for the Commission amount for the low bidder. Project will be readvertised."

21. On March 25, 2003, Respondent sent letters to each bidder. The letter stated:

> We regret to inform you that, due to insufficient funds, all bids for the subject project have been rejected. The Department has determined that a reassessment of the bid specifications is necessary in order to adhere to the funds available for this project.
>
> We thank you for submitting a bid with us and apologize for any inconvenience this action may cause. We will readvertise this project in the near future.

22. By letter dated April 4, 2003, Petitioner protested Respondent's rejection of bids and changing of Ellis' proposed management fee.

23. By letter dated July 9, 2003, Respondent denied Petitioner's April 4, 2003 protest.

24. On July 16, 2003, Petitioner filed the instant request for administrative review.

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 Hawaii 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).

Petitioner first charges that Respondent should not have changed Ellis' total bid amount for its proposed management fee from $30,240 to $360, an amount that was never intended by the bidder. More specifically, Petitioner contends that because the .0084% figure set forth in Ellis' bid was an obvious error under Hawaii Administrative

Rule ("HAR") §3-122-31(c), Respondent should have corrected it to 0.84% and maintained the total bid amount of $30,240.

> HAR §3-122-31(c) states in relevant part:
>
> (c) Corrections to bids after opening but prior to award may be made under the following conditions:
>
> (1) If the mistake is attributable to an arithmetical error, the procurement officer shall so correct the mistake. *In case of error in extension of bid price, unit price shall govern.*
>
> (2) If the mistake is a minor informality which shall not affect price, quantity, quality, delivery, or contractual conditions, the procurement officer may waive the informalities or allow the bidder to request correction by submitting proof of evidentiary value which demonstrates that a mistake was made. The procurement officer shall prepare a written approval or denial in response to this request. Examples of mistakes include:
>
> (A) Typographical errors;
> (B) Transposition errors;
> (C) Failure of a bidder to sign the bid or provide an original signature, but only if the unsigned bid or photocopy is accompanied by other material indicating the bidder's intent to be bound.
>
> (3) If the mistake is not allowable under paragraphs (1) and (2), but is an obvious mistake that if allowed to be corrected or waived is in the best interest of the government agency or for the fair treatment of other bidders, and the chief procurement officer or the head of the purchasing agency concurs with this determination, the procurement officer shall correct or waive the mistake.

This Office has previously addressed the application of HAR §§3-122-31(c)(1) and (c)(3) to correct a discrepancy between a unit price and its extension. In *Jas. W. Glover, Ltd. v. Board of Water Supply (August 7, 2001)*, Jas. W. Glover, Ltd. ("Glover"), the apparent second lowest bidder, protested the Board of Water Supply's decision to permit the apparent low bidder to correct the unit price for an item in its bid to conform to its extension amount. On appeal to this Office, Glover argued that where there is a discrepancy between a unit price and the extended price, both the bid documents and HAR §3-122-31(c)(1) set the

intended price as the unit price. The City argued that correction of the unit price was permissible under HAR §3-122-31(c)(3) as an "obvious mistake."

The Hearings Officer concluded that:

> where a discrepancy exists between the a stated unit price and the stated extended price in a bid, correction pursuant to a provision in the IFB giving precedence to unit prices over extended prices is permitted *provided* that the application of the provision leads to a reasonable result that is not in conflict with the Code or its implementing rules, including HAR §3-122-31(c)(3) (footnote omitted). Moreover, since the mistake and the intended bid must be evident on the face of the bid documents, extrinsic evidence may not be considered. However, the procurement officer may consider the other bids submitted and rely on his or her own experience and common sense (footnote omitted). By contrast, where the intended bid cannot be determined from the bid documents alone, a mistake is not correctable as an obvious mistake. (emphasis in original).
>
> Here, the stated unit price of $400.00 is substantially higher than the other bid prices for this item. In fact, extending the bid on the basis of the unit price bid would result in an extended bid about six times greater than the second highest bid for the item (footnote omitted). Additionally, the extended total for this item of $30,000.00, when added to the other extended totals in the bid equaled the price RCI bid as its total bid price. On the other hand, the intended unit price of $40.00 is consistent with RCI's and the other bidders' prices which range from $1.00 to $65.50, and can easily be determined by dividing the extended total price of $30,000.00 for the line item by 750. Furthermore, a logical explanation for the discrepancy-that RCI had inadvertently inserted an extra zero in its unit price could be discerned from the face of the bid. Based on these considerations, the Hearings Officer concludes that the mistake in the unit price for Item No. 23 and its intended bid were obvious from the face of the bid (footnote omitted) and susceptible to only one reasonable interpretation. (footnote omitted).

The *Glover* holding was more recently applied in *Site Engineering, Inc. v. DOT, PCH-2003-12 (September 15, 2003).* There, the Department of Transportation ("DOT") had construed the unit price for one of the items in the petitioner's bid as $25,700, which was substantially higher than the other bid prices for that item and 257 times greater than the DOT's estimate for that item ($100). As a result, the Hearings Officer noted that extending the bid on the basis of that unit price resulted in an extended bid almost 92 times

greater than the second highest bid for the item. On the other hand, the extended total of $31,868, when added to the other extended totals in the bid, equaled the petitioner's total bid price. Moreover, the unit price of $257 was easily determined by dividing the extended total price of $31,868 by 124 units. Furthermore, according to the Hearings Officer, a logical explanation for the discrepancy - that the petitioner had inadvertently placed the decimal two places too far to the right - could be discerned from the face of the bid. Consequently, the Hearings Officer concluded that the mistake in the unit price and its intended bid were obvious from the face of the bid and susceptible to only one reasonable interpretation:

> Thus, *Glover* made clear that even if precedence is given to unit prices by a provision in the solicitation or HAR §3-122-31(c)(1), an obviously erroneous unit price can nevertheless be corrected to correspond to its extended total price where the corrected unit price is the only reasonable interpretation of the bid. That is, the correction of an obvious mistake is permitted if the mistake involves either an apparent clerical mistake such as the obvious misplacement of a decimal point, or the existence of the mistake and the intended price are apparent from the face of the bid.

Site Engineering, supra.

The teachings of *Glover* and *Site Engineering* dictate that an obviously erroneous unit price can be corrected to correspond to its extended total price where the corrected unit price is the only reasonable interpretation of the bid. In this case, Respondent, consistent with its practice prior to the issuance of the *Site Engineering* decision, automatically corrected the extension amount in Ellis' bid to $360. This amount was considerably less than the corresponding amounts in the other bids. On the other hand, the unit percentage of 0.84% was easily determined by dividing $30,240 by 3.6 million dollars. Furthermore, a logical explanation for the discrepancy - that the petitioner had inadvertently placed the decimal two places too far to the left - could be discerned from the face of the bid. Consequently, the Hearings Officer concludes that the mistake in the unit percentage in Ellis' bid and its intended bid were obvious from the face of the bid. Accordingly, Respondent's correction of Ellis' bid amount for management fees to $360 was contrary to HRS Chapter 103D ("Procurement Code"). However, the inquiry does not end here because Respondent subsequently canceled the solicitation pursuant to HRS §103D-308. As such, the Hearings Officer must next determine whether the cancellation was consistent with the Procurement Code.

The cancellation of solicitations is governed by HRS §103D-308[1] which states:

> An invitation for bids, a request for proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, *when it is in the best interests of the governmental body* which issued the invitation, request, or other solicitation, in accordance with rules adopted by the policy board. The reasons therefore shall be made part of the contract file.

(Emphasis added).

The foregoing provision reflects a policy of giving precedence to the government's ability to cancel a solicitation over a bidder's interest in having the solicitation go forward where the government's "best interests" would be served. Toward that end, HAR §3-122-96(a)(2) provides in pertinent part:

> Cancellation of solicitation. (a) A solicitation may be cancelled for reasons including but not limited to the following:
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> * * * *
>
> (2) Cancellation after opening but prior to award:
>
> (A) The goods, services, or construction being procured are no longer required;
> (B) Ambiguous or otherwise inadequate specifications were part of the solicitation;
> (C) The solicitation did not provide for consideration of all factors of significance to the agency;
> (D) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
> (E) All otherwise acceptable offers received are at clearly unreasonable prices;
> (F) There is reason to believe that the offers may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith; or

[1] HAR §3-122-95 states that a "solicitation may be cancelled, or an offer rejected in whole or in part pursuant to section 103D-308, HRS."

(G) A determination by the chief procurement officer or a designee that a cancellation is in the public interest.

* * * *

In promulgating the foregoing section, the Procurement Policy Board ("Board") presumably was cognizant of the potentially serious adverse impact a cancellation might have on the integrity of the competitive sealed bidding system once bids are revealed. Among other things, the cancellation of a solicitation after bid opening tends to discourage competition because it results in making all bidders' prices and competitive positions public without an award. With that in mind, the Board identified certain specific circumstances in HAR §3-122-96 (a)(2) where the cancellation of a solicitation *may* be in the best interests of the agency and therefore justified, even after bid opening. Such a determination, however, must be consistent with the underlying purposes of the Procurement Code, including, but not limited to, the providing for fair and equitable treatment of all persons dealing with the procurement process and maintaining the public's confidence in the integrity of the system.[2]

On or about March 25, 2003, Respondent notified Petitioner and Ellis that "[a]ll Bids rejected due to insufficient funds" and informed them that "due to insufficient funds, all bids for the subject project had been rejected." On July 9, 2003, Respondent denied Petitioner's April 4, 2003 protest and stood by its "previous determination to cancel the solicitation due to insufficient funds to cover any of the commission fees proposed by the two lowest bidders, Philip G. Kuchler, Inc. . . ., and CB Richard Ellis, Hawaii, Inc. . ." Petitioner nevertheless contends that Respondent had sufficient funds to cover Petitioner's potential commissions. Respondent, on the other hand, explained that its claim of "insufficient funds" was based on the possibility that it could end up paying more than it received in rent:

> In response to your letter dated April 4, 2003, the Department of Transportation ("DOT") hereby stands by its previous determination to cancel the solicitation due to insufficient funds to cover any of the commission fees proposed by the two lowest bidders, Phillip G. Kuchler, Inc. ("Kuchler"), and CB Richard Ellis, Hawaii, Inc.

[2] HRS §103D-101 also requires that "[a]ll parties involved in the negotiation, performance, or administration of state contracts shall act in good faith."

("CB"). The DOT plans to reassess the bid specifications and re-bid the Project. The Project is being canceled pursuant to the State's authority under section 103D-308, Hawaii Revised Statutes ("HRS"), and sections 3- 122-95 and 3-122-96, Hawaii Administrative Rules ("HAR').

The bidders were afforded an opportunity to propose commission fees, which was intended to provide an incentive for the successful bidder to rent out as much space as possible within the Project area (by either obtaining a new tenant or having an existing tenant take on additional space). The commission fee was solicited on the basis of the monthly rent payable for the space rented. This fee would be paid separate from the monthly management fee proposed in the bid. As an example, if the property manager proposed a commission fee of one-half month's rent, the property manager would receive one-half month's rent payable by the tenant for the new space rented out.

Your client's commission fee proposal, however, was four months rent. The maximum commission fee that the DOT could afford to cover is one month's rent for the space rented out. The reason is that the minimum time period a tenant could occupy new space within the Project area is thirty (30) days. The State would consequently be assured of receiving at least one month's rent, which would be sufficient to cover the maximum commission fee. The DOT concluded that it is in the State's best interest not to enter into a contract containing an uncertain, open-ended obligation such as the payment of a commission fee greater than one month's rent for rented space.

The property in the Project area is generally rented on a month-to-month basis under a revocable permit, which is terminable upon 30 days notice by either party. Because of the possibility that a new tenant may rent space for only one month, the DOT cannot agree to pay a commission fee equal to four (or more) months rent. There is no assurance that the DOT will collect sufficient rent from the Project area to cover the required commission fees.

The DOT cannot commit to pay any amounts that are potentially beyond its ability to pay. State law does not permit the State to enter into a procurement contract, such as the project contract, without the required certification from the State Comptroller that there are sufficient state

> funds to cover the State's obligations under the contract. Given this, the DOT believes it would not be productive to engage in discussions with the lowest responsible bidder to attempt to bring the Project costs within the funds available for the Project. In any case, because of the higher than anticipated bid proposals, and the possibility that the DOT will not have sufficient funds to cover the commission fees, the DOT has decided to pursue having the Project area managed by State employees.
>
> In conclusion, we have determined that it is in the State's best interest to cancel the Project. The State cannot promise to fully pay the proposed commission fees if the State has no assurance that sufficient rental monies will be collected from the Project area to cover such an obligation. The DOT simply cannot enter into a contract that it cannot afford. Consequently, the bid protest submitted by Kuchler is moot, as the Project will be canceled, and is therefore denied.

* * * *

Under HAR §3-122-96(a)(2)(D), cancellation of a solicitation may be proper where "[p]rices exceed available funds and it would not be appropriate to adjust quantities to come within available funds." Petitioner presented ample evidence to establish that its potential commissions would not, in all likelihood, be excessive and that in any event, Respondent would have had sufficient funds from various sources to cover the commissions that would be generated from the KMR property. Respondent does not appear to dispute this contention directly. Instead, Respondent explains that its claim of insufficient funds was based upon its $50,000 *estimate* for rental commissions and the concern that Respondent *might* be forced to pay Petitioner commissions in excess of that estimate. On this record, the Hearings Officer concludes that Petitioner has proven by a preponderance of the evidence that the commissions Petitioner would have been entitled to in conjunction with its management of the KMR property would not have exceeded available funds.[3]

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[3] Petitioner also contends that even if its bid exceeded available funds, Respondent should have attempted to negotiate an adjustment to the bid price pursuant to HRS §103D-302(f). This alternative argument, however, need not be addressed given the Hearings Officer's conclusion. Nevertheless, the Hearings Officer notes that that section authorizes contracting officials to negotiate an adjustment of the bid price where (1) "*all* bids exceed available funds" and (2) "time or economic considerations preclude resolicitation of work of a reduced scope." There was no evidence

Respondent also contends that the cancellation was in its best interests for the additional reasons that the specifications were inadequate and the solicitation did not provide for consideration of all factors of significance to the agency, pursuant to HAR §§3-122-96(a)(2)(B) and (C), respectively. At the outset, Petitioner complains that none of these reasons was advanced by Respondent when it decided to cancel the solicitation and deny Petitioner's protest. Therefore, Petitioner argues that Respondent should be precluded from "changing" its reasons for the cancellation.

Although Respondent's July 9, 2003 denial referred to "insufficient funds" as the reason for the cancellation, the letter also explained, in detail, the circumstances underlying that claim and its cancellation of the solicitation:

> In response to your letter dated April 4, 2003, the Department of Transportation ("DOT") hereby stands by its previous determination to cancel the solicitation due to insufficient funds to cover any of the commission fees proposed by the two lowest bidders, Phillip G. Kuchler, Inc. ("Kuchler"), and CB Richard Ellis, Hawaii, Inc. ("CB"). *The DOT plans to reassess the bid specifications* and re-bid the Project. *The Project is being canceled pursuant to the State's authority under section 103D-308, Hawaii Revised Statutes ("HRS"), and sections 3- 122-95 and 3-122-96, Hawaii Administrative Rules ("HAR").*
>
> The bidders were afforded an opportunity to propose commission fees, which was intended to provide an incentive for the successful bidder to rent out as much space as possible within the Project area (by either obtaining a new tenant or having an existing tenant take on additional space). *The commission fee was solicited on the basis of the monthly rent payable for the space rented.* This fee would be paid separate from the monthly management fee proposed in the bid. As an example, if the property manager proposed a commission fee of one-half month's rent, the property manager would receive one-half month's rent payable by the tenant for the new space rented out.
>
> Your client's commission fee proposal, however, was four months rent. *The maximum commission fee that the DOT could afford to cover is one month's rent for the space*

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that the bids submitted by Coldwell Banker, PM Realty Group and Chaney exceeded available funds or that economic considerations precluded resolicitation of the work. HRS §103D-302(h) is therefore inapplicable here.

rented out. The reason is that the minimum time period a tenant could occupy new space within the Project area is thirty (30) days. The State would consequently be assured of receiving at least one month's rent, which would be sufficient to cover the maximum commission fee. The DOT concluded that it is in the State's best interest not to enter into a contract containing an uncertain, open-ended obligation such as the payment of a commission fee greater than one month's rent for rented space.

The property in the Project area is generally rented on a month-to-month basis under a revocable permit, which is terminable upon 30 days notice by either party. Because of the possibility that a new tenant may rent space for only one month, the DOT cannot agree to pay a commission fee equal to four (or more) months rent. There is no assurance that the DOT will collect sufficient rent from the Project area to cover the required commission fees.

Among other things, Respondent's letter clearly expressed its concern over the possibility of having to pay a leasing commission equivalent to 4 months rent when the tenant might occupy the premises for only one month. The letter also referred to Respondent's plans to "reassess the bid specifications." All of these considerations lead the Hearings Officer to conclude that Respondent provided Petitioner with sufficient notice of the actual circumstances leading to the cancellation of the solicitation. And because those circumstances serve as the basis for Respondent's reliance on HAR §§3-122-96(a)(2)(B), (C) and (D), there appears to be no legitimate grounds to preclude Respondent from relying on those subsections.[4]

Pursuant to HAR §3-122-96(a)(2)(B), inadequate specifications may justify canceling a solicitation. Specifications are inadequate when they do not state the government's actual minimum needs. Here, it was clear on this record that the specifications did provide for Respondent's actual minimum needs: a contractor to (1)

[4] Interestingly, the Comptroller General has stated that a contracting agency's initial reliance on an improper reason for canceling a solicitation is not significant if the record establishes that another proper basis for the cancellation exists. *Peterson-Nunez Joint Venture, B-258788, Feb. 13, 1995.* Partial justification for this position may be found in the fact that in general, the cancellation or rejection of all bids treats all bidders equally. This is in contrast to instances where an agency treats certain bidders differently, such as the rejection of a bidder as nonresponsive.

manage and (2) solicit tenants for, the KMR property. Respondent therefore cannot rely on this reason to justify its decision to cancel the solicitation.

Respondent also cites HAR §3-122-96(a)(2)(C) as authority to cancel the solicitation. According to that section, the cancellation may be justified where "the solicitation did not provide for consideration of all factors of significance to the agency." In this regard, Respondent alleges that cancellation was proper because the solicitation, as written, did not provide for the consideration of a one-month cap on the commissions payable to the contractor - a consideration that was necessary to avoid the possibility of obligating Respondent to pay more in commissions than it received in rent. Petitioner takes issue with this and asserts that this reason was merely a pretext to avoid awarding the contract to Petitioner in favor of Ellis. Indeed, cancellation under this subsection would only be appropriate where the solicitation failed to provide for consideration of all factors *of significance to the agency*. Included among those factors, of course, is the government's interest in avoiding favoritism and corruption in the bidding process.

The record before the Hearings Officer, however, does not substantiate Petitioner's allegations of favoritism. According to the evidence, Respondent's actions in changing Ellis' bid was consistent with its practice in addressing discrepancies between unit prices and the corresponding extension amounts prior to the issuance of this Office's decision in *Site Engineering*. Moreover, the Hearings Officer found the testimony of Jamie Ho, the contracting officer who made the decision to cancel the solicitation, to be credible. Among other things, Ms. Ho testified that the reason for concluding that there were insufficient funds was that "[the commissions] would exceed our potential income[5] and put the state in a bad situation," [6] and "that we may be possibly entering into an agreement to pay a commission without possibly recouping that cost." Ms. Ho also

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[5] This was in reference to the possibility that Respondent might be forced to pay Petitioner commissions equivalent to four months rent when the tenant could vacate the premises after only 30 days.

[6] Although the evidence suggested that the actual commissions that Petitioner would have been entitled to would not have been excessive in light of the low turnover rate at the KMR property, the decision as to whether to take that risk or not is a matter best left to the discretion of the contracting officials unless Petitioner demonstrates favoritism, corruption or bad faith on Respondent's part.

testified that upon bid opening and after examining the bids, "I was shocked that the commissions were so high . . ."[7] Indeed, this concern of putting the state "in a bad situation" was and remains as the basis for Respondent's claims of insufficient funds and inadequate specifications. Based on all of these considerations, the Hearings Officer finds and concludes that this concern was a significant factor to Respondent and that the solicitation, as written, did not provide for consideration of that factor. The cancellation of the solicitation is therefore appropriate and permissible for this reason.

IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer hereby affirms Respondent's denial of Petitioner's April 4, 2003 protest and orders each party to bear its own attorney's fees, costs, and expenses.

Dated at Honolulu, Hawaii: MAR 18 2004

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

[7] The fact that Respondent included examples of one month or less in the bid form buttresses its claim that it did not anticipate that the bids as to the commissions would not exceed one month.