

APR 15 3 05 PM '99

HEARINGS OFFICE



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

In the Matter of)	
)	
ISLAND RECYCLING, INC.)	PCH 99-5
)	
Petitioner,)	
vs.)	HEARINGS OFFICER'S FINDINGS
)	OF FACT, CONCLUSIONS OF
)	LAW, AND DECISION
DEPARTMENT OF FINANCE,)	
CITY & COUNTY OF HONOLULU,)	
)	
Respondent.)	
_____)	

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

I. INTRODUCTION

By a letter dated March 11, 1999 Roy K. Amemiya, Jr., Director of the Department of Finance (nka Budget and Fiscal Services) for the City & County of Honolulu, ("Respondent") transmitted to the Office of Administrative Hearings a letter dated March 9, 1999 from Craig T. Kugisaki, Esq. to Mr. Amemiya. The letter from Mr. Kugisaki, on behalf of Island Recycling, Inc., ("Petitioner") enclosed a Request for Hearing regarding Proposal No. 13026 - Lease and Haul of Recycling Roll-off Containers for the Community Recycling Program: November 1, 1998 to October 31, 2001.

On March 12, 1999, upon receipt of this transmittal, a Notice of Hearing and Prehearing Conference was filed by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs. The notice set a March 25, 1999 date for the prehearing and a March 31, 1999 date for the hearing. On March 25, 1999, the prehearing conference was held with the Petitioner

represented by Mr. Kugisaki and with the Respondent represented by Natalie S. Hiu, Esq. The conference was helpful in facilitating the exchange of certain information and the discussion of procedural issues.

On March 31, 1999, this matter came before the undersigned Hearings Officer for an administrative hearing in accordance with the provisions of Hawaii Revised Statutes ("HRS") Chapter 103D and Hawaii Administrative Rules ("HAR") Title 3, (Subchapter 11), Chapters 120 - 126. The Petitioner was represented by Mr. Kugisaki, and the Respondent was represented by Cynthia M. Nojima, Esq., as well as Ms. Hiu. Since the hearing was not completed on that date, the proceedings continued to completion on the following day, April 1, 1999. The Hearings Officer, having thereafter considered the evidence and the arguments presented by the parties in light of the entire record in this matter, hereby issues the following Findings of fact, Conclusions of Law, and Decision.

II. FINDINGS OF FACT

1. In mid 1998 the Respondent issued a **Notice To Bidders** (Proposal Document No. 13026) for competitive sealed bids "for the LEASE AND HAUL OF RECYCLING ROLL-OFF CONTAINERS FOR THE COMMUNITY RECYCLING PROGRAM for a period of thirty-six months, commencing on November 1, 1998." Included with the notice was an outline (fill in the blank) proposal letter for submissions by bidders, as well as Specifications, Special Provisions, General Instructions To Bidders, General Terms And Conditions For Goods And Services For The City And County Of Honolulu, and a blank form Agreement (for execution by the successful bidder). The Notice stated that bids would be "received up to and publicly opened at 2:00 p.m. on September 4, 1998."

2. Proposal Document No. 13026 (the "Solicitation") was designed for a continuation of the Respondent's existing community recycling program and its requirements focused primarily on: 1) the "leasing" of 100 roll-off containers to be used for the collection of recyclable materials at various public schools on Oahu; and, 2) the "hauling" of the collected recyclable materials to the Respondent's storage/reprocessing facility. The roll-off containers are large bins, somewhat resembling Matson containers, which fit on special trucks for transport and are designed to accommodate separate types of recyclable materials. (The Respondent's storage/reprocessing facility had formerly been operated under a contract with the Petitioner, but that contract was subsequently awarded to Aloha Tool & Rental., dba Honolulu Recovery System.)

3. The Solicitation called for an initial contract term of three years commencing on November 1, 1998, with an option to extend the contract for up to two years upon mutual agreement of the parties. The Specifications included, *inter alia*, the following:

¶ 4. CONTAINER DELIVERY AND STORAGE. The recycling roll-off containers shall be delivered to one hundred (100) schools and shopping centers. The Contractor shall not charge the City for the initial delivery of the recycling roll-off containers. The delivery schedule for the current sixty sites are listed below.

The City will coordinate the delivery of the roll-off containers to coincide with the removal of the roll-off containers from the previous contract. All current recycling sites are to receive the container during November 1-7, 1998. This is to insure that there is no interruption in recycling collection service to the communities. Should the contractor fail to meet this delivery schedule for any or all of the containers, the Contractor shall be assessed and shall pay liquidated damages to the City, in addition to the reimbursement of lease rent prorated for the container, the sum of fifty dollars (\$50) per day per container for the delay in providing the container.

The Special Provisions included, *inter alia*, the following:

¶ 12. VERBAL AGREEMENTS. No verbal agreement or conversation with any officer, agent, or employee of the City either before or after execution of the contract shall affect or modify any of the terms or obligations contained in the contract. Any such verbal agreement or conversation shall be considered as unofficial information and in no way binding upon the City or the Contractor.

The General Instructions To Bidders included, *inter alia*, the following:

¶ 2. SUPPLEMENTAL INSTRUCTIONS OR CHANGES. Any supplemental instructions or changes will be in the form of written addenda to this solicitation. Any addenda will be mailed, faxed, or made available for pick up by all prospective bidders, prior to the date fixed for the opening of bids. It shall be presumed that any addenda so issued have been received by a bidder and such addenda shall become a part of the bid submittal.

¶ 17. AWARD OF CONTRACT. RIGHT TO REJECT BIDS. Unless otherwise specified, in the special provisions or other sections of this solicitation, the Director will issue a written award of the contract, if an award is made, to the responsive and lowest responsible bidder on each individual item called for. The Director reserves the right to reject any or all bids, or any part thereof, or

waive any defects, when in the Director's opinion, such rejection or waiver will be in the best interest of the City.

4. Although the Solicitation was issued by Charles M. Katsuyoshi, Purchasing Division Administrator for the Department of Finance on behalf of Roy K. Amemiya, Jr., Director of Finance, handling the *solicitation process* was largely the responsibility of Purchasing Division employee Gary Nishioka and his supervisor Earl Goro. Furthermore, the anticipated post-award contract was to be administered by Steve Kelsey, Recycling Specialist with the Division of Refuse Collection and Disposal, Department of Environmental Services (subject to the approval of Frank Doyle, Head of the Division of Refuse Collection and Disposal, and Kenneth Sprague, Director of the Department of Environmental Services.)

5. A mandatory pre-bid conference was held on August 31, 1998, and was attended by the Petitioner's president, James G. Nutter, as well as by representatives of several other potential bidders/vendors - including Honolulu Disposal Service, which was then holding the contract for providing such services. During the course of discussions at this conference various questions were raised, including one from Honolulu Disposal Service about the signage to be placed on the containers. The Respondent's position was to have Mr. Kelsey (who was then on sick leave) review the question upon his return to work rather than attempt to answer it at the conference. Mr. Nishioka did indicate, however, that the Respondent would probably be willing to grant a short extension of the September 4, 1998 bid opening date in order to allow potential bidders more time to evaluate the Respondent's answer to the signage (and other) questions. Nevertheless, there was little, if any, discussion by the attendees (and no indication by the Respondent) of an extension to the November 1, 1998 contract start date - even if the bid opening date were to be extended.

6. Thereafter, by **Addendum No. 1** (to Proposal Document No. 13026) as issued on September 1, 1998, the Respondent changed the bid opening date by extending it for two weeks until September 18, 1998. The rationale for this change was to allow potential bidders more time to consider the Respondent's answers to questions raised at the pre-bid conference. The addendum also addressed certain other changes in both the Specifications and the Special Provisions of the proposal documents. In addition, by **Addendum No. 2** (to Proposal Document No. 13026) as issued on September 3, 1998, the Respondent changed the signage requirements to allow "current signage and placement locations." The rationale for this change (which appeared to be beneficial for the existing contractor) was that the proposal documents required excessive signage on the containers and that the placement of more signs with welded supports could present safety concerns to children or others who might use them to climb the containers. Finally, by **Addendum No. 3** (to Proposal Document No. 13026) as issued on September 8, 1998, the Respondent changed a sub-part of the Specifications regarding container design requirements for off-loading "dumping"

contents. This third addendum was the last one issued (to Proposal Document No. 13026) by the Respondent.

7. During the time period following the pre-bid conference - but prior to the bid opening date - Mr. Nutter, on behalf of the Petitioner, spoke with Mr. Nishioka and with Mr. Kelsey about the possibility of extending the November 1, 1998 start date for the contract. Both of them stated that an extension seemed reasonable from their perspective, and that they would be willing to work with him on securing one. *Nevertheless, the Petitioner did not seek to obtain a written extension from the Respondent through an addendum or other documentation. In addition, the possibility of extending the start date for the contract was neither raised by, nor discussed with, other potential bidders.*

8. At some point prior to the bid opening date the Petitioner submitted a proposal following the standard letter format attached to the Solicitation. The language in the letter included, *inter alia*, the following paragraph - which closely resembled language in ¶ 17 of the General Instructions To Bidders:

It is also understood and agreed that the Director of Finance reserves the right to accept or reject any or all bids, in whole or in part, and to waive any defects if such acceptance, rejection or waiver is deemed to be in the best interest of the City and County of Honolulu.

9. On Friday, September 18, 1998 the Respondent held a public opening of the three sealed bids which had been submitted in response to Proposal Document No. 13026, and noted that the bid amounts were as follows:

(Petitioner) Island Recycling, Inc.	\$2,043,132.00
(Current Contractor) Honolulu Disposal Service	\$2,691,006.00
(Third Bidder) Rolloffs Hawaii, Inc.	\$2,848,786.80

The Petitioner was pleasantly surprised to learn that it was the low bidder for the contract, and both the Petitioner and the Respondent were surprised at the substantial difference between the amount submitted as the low bid and the amounts submitted in the other two competing bids. Nevertheless, there were no substantive discussions between the Petitioner and the Respondent that day.

10. On Monday, September 21, 1998, Mr. Nutter called Mr. Kelsey to again discuss the possibility of an extension to the November 1, 1998 contract start date. Although Mr. Kelsey continued to indicate that he thought an extension would be reasonable, he also indicated that he was worried about the Petitioner's ability to perform under the contract - primarily because of what he believed to be the Petitioner's inability to secure sufficient equipment (roll-off trucks and containers). He also told Mr. Nutter that the Respondent had concerns with the Petitioner's qualifications; that the concerns would be set out in a letter from the Department of

Finance; and, that the Petitioner might want to refrain from ordering equipment from the mainland until the qualification issue was resolved.

11. It was the Respondent's practice to investigate the qualifications of low bidders after bid openings rather than attempt to investigate the qualifications of all bidders (many of whom could submit bids up to the last minute) prior to bid openings. This practice was a discretionary one which was reflected in the following language contained in the General Instructions To Bidders:

¶ 11. QUALIFICATION OF BIDDERS. Prospective bidders must be capable of performing the work for which bids are being called. Either before or after the deadline for bid submittal, the City may require a bidder to submit answers to questions regarding facilities, equipment, experience, personnel, financial status or any other factors relating to the bidder's ability to furnish satisfactorily the goods or services being solicited by the City. Any such inquiries shall be made and replied to in writing; replies shall be submitted over the signature of the person who submits the bid. Any bidder who refuses to answer such inquiries will be considered non-responsive. All answers to such questions will be handled by the City on a confidential basis and will be returned after they have served their purpose.

12. Accordingly, on September 22, 1998, as one part of the Respondent's investigation of the Petitioner's qualifications, Mr. Katsuyoshi sent a memorandum to Mr. Sprague (together with a copy of the bid abstract for Proposal Document No. 13026) in order to obtain evaluative input from the user agency. The memorandum requested that his recommendation "with explanation if other than low bid is recommended" be forwarded to Mr. Nishioka "as soon as possible."

13. On the following day, September 23, 1998, Mr. Nishioka (presumably after receiving an undated, unsigned reply from Mr. Sprague's office) sent a memo to Mr. Goro with an attached draft of a letter from Mr. Katsuyoshi to the Petitioner which requested certain documentation to substantiate its qualifications. Most of the requested documentation related to the Petitioner's experience in providing similar services, its ability to obtain adequate financing, and its capability to have the necessary men and equipment to provide the required services by November 1, 1998. The letter which was signed by Mr. Katsuyoshi on September 23, 1998 itemized eleven specific areas of inquiry and requested a reply from the Petitioner not later than October 5, 1998.

14. On October 2, 1998 the Petitioner presented Mr. Goro with a hand delivered reply to Mr. Katsuyoshi's September 23, 1998 letter, and by a follow-up letter to Mr. Goro dated October 5, 1998 the Petitioner supplied additional information on the anticipated fabrication and shipping schedules for obtaining the necessary containers from Consolidated Fabricators in California. During late

September and early October of 1998 Mr. Kelsey and Mr. Nishioka also continued to gather background information on the qualifications of the Petitioner. Mr. Kelsey was particularly concerned because the Petitioner's bid was so much below that of the other competing bidders and because he had experienced some minor problems (lapses in payments and weight audit discrepancies) with the Petitioner in the administration of other contracts.

15. Approximately one week later, on October 8, 1998, Mr. Doyle sent a memorandum to Mr. Katsuyoshi recommending that the contract for Proposal Document No. 13026 be awarded to the next lowest bidder. The basis of this recommendation rested upon assertions that the Petitioner: 1) was operating without a proper waste management permit; 2) did not have the requisite two years of experience with roll-off container services; 3) had not submitted adequate proof truck drivers' qualifications; and, 4) would not be able to meet the contract start date - even if it were to be extended for two weeks to compensate for the two week extension of the bid opening date.

16. On October 9, 1998 Mr. Nishioka prepared a memorandum to Mr. Goro recommending that the contract be awarded to the next lowest bidder (Honolulu Disposal Service) citing time restraints and the inability of the Petitioner to meet the contract start date of November 1, 1998 - or the later date of November 15, 1998 if any (post bid opening) extension were granted. Mr. Nishioka also called Mr. Nutter to say that the Department of Finance was turning down the Petitioner based upon the recommendation of the Department of Environmental Services. Later in the day Mr. Nutter followed-up on that conversation by contesting the Petitioner's purported shortcomings in a rather spirited meeting with Mr. Doyle, and as a result of this meeting Mr. Doyle said that he would be open to reassessing the Petitioner's qualifications. Accordingly, an October 9, 1998 letter signed by Mr. Katsuyoshi and notifying the Petitioner of its rejection was not sent out.

17. Soon thereafter Mr. Kelsey called Mr. Nutter and set up a meeting to reassess the Petitioner's qualifications. At an October 13, 1998 meeting Mr. Nutter and his attorney, Mr. Kugisaki, met with Mr. Doyle and Mr. Kelsey, and were able to satisfactorily address a number of their concerns. First, by pointing out that a solid waste permit was not required to perform under the requirements of the solicitation, (and that to the extent it may have been a factor in evaluating the quality of the Petitioner's past service related activities the permit had been renewed). Second, by pointing out that the Petitioner's experience extended beyond its existing contract with the City & County of Honolulu to haul away recyclable office paper (from 96 gal. collection bins), and included providing roll-off services to Coca Cola (in addition to baling services) as well as to both American Carpet and Wayne's Carpet companies. And third, by pointing out that it had supplied collateral information regarding the identity of truck drivers such that the Respondent would have been able to independently pursue questions about their qualifications.

18. By the conclusion of the October 13, 1998 meeting Mr. Doyle and Mr. Kelsey were generally convinced that the Petitioner was a qualified bidder, but still had doubts about its ability to actually meet the contract start date - or even a two week extension of that date. Accordingly, they requested that the Petitioner submit a preparation/performance timetable, as well as shop drawings of the containers it intended to have fabricated. The Petitioner complied with this request on October 15, 1998, but its timetable extended beyond mid-November and its hand drawn shop drawings were deemed unacceptable. Computer generated shop drawings which were deemed satisfactory were subsequently provided by the Petitioner on October 22, 1998.

19. Thereafter, on October 23, 1998, Mr. Doyle sent a memorandum to Mr. Katsuyoshi in which he requested that the current contract with Honolulu Disposal Service be extended on a month to month basis "until such time as Island Recycling is able to commence with the new lease and haul contract." The memorandum went on to say that "An extension of the start date to Island recycling is justified because their bid represents a savings to the city of \$700,000 over the life of the contract." It also indicated that the Petitioner was expected to be able to take over the services by the end of the year.

20. Then, on October 26, 1998, Honolulu Disposal Service, after having made inquiries of the Respondent as to the status of the solicitation and the pending award of a contract, submitted a letter to Mr. Amemiya regarding Proposal Document No. 13026 stating that it "hereby protests the possible award of the above contract to Island Recycling." The basis of the protest was a belief by Honolulu Disposal Service that the Petitioner did not have the equipment necessary to perform on the contract and would not be able to obtain such equipment "prior to the [contract] start date of November 1, 1998."

21. Shortly after an initial review of the Honolulu Disposal Service protest, Mr. Katsuyoshi called a meeting of representatives from the Department of Finance and the Department of Environmental Services to discuss an appropriate reply. The meeting also included Ms. Nojima from the Corporation Counsel's office. Despite some probably unwarranted concern about the timeliness of the protest, and some probably warranted concern about its content, the participants reached a general consensus that *an award should not be made to either the Petitioner or Honolulu Disposal Service, and that the best (or least undesirable) option would be for the Respondent to cancel the solicitation and rebid the contract.*

22. It was apparent by late October of 1998 that: 1) the Petitioner could not meet the November 1, 1998 contract start date; 2) no other bidder had been told that the contract start date might be extended for two weeks; 3) the contract start date had not been extended; 4) the grant of a post bid-opening extension to the Petitioner would constitute a material change to the terms of the Solicitation; 5) a post bid-opening extension of the contract start date (even if granted to *all existing bidders*), in lieu of resoliciting for *all potential bidders* would

likely present another basis for protest; 6) the Petitioner would still be unable to meet a November 15, 1998 contract date even if it was given such an extension; and, 7) the current contract holder (and protester), Honolulu Disposal Service, might not agree to continue providing services beyond the existing contract.

23. On October 28, 1998 Mr. Katsuyoshi sent a memorandum to Mr. Amemiya requesting his approval "to cancel the award under the subject bid proposal due to defective specifications and to resolicit bids under a new set of specifications." The defect in the specifications was referred to in the memorandum as "insufficient time allowed by the City from the opening of the bid to the commencement of the contract" which would result in only the current contractor being able to meet the November 1, 1998 contract start date, and "therefore [be] the only responsive bidder." This memorandum, which also requested approval to extend the existing contract with Honolulu Disposal Service for six months, was approved by Mr. Amemiya. (During the course of the protest and subsequent proceedings the existing contract was again extended for an additional six months.)

24. The bid specifications were not defective *as issued*, however, and the Petitioner could have begun timely performance on November 1, 1998, but for the length of time the Respondent took to investigate the qualifications of the Petitioner. The Respondent's decision to follow a cancellation/rebid option was a response to changed circumstances occasioned by an unexpectedly lengthy qualification process, complicated by the absence of any actual extension of the contract start date. The circumstances were further compounded by the Respondent's willingness to go along with an *implied* extension of the contract start date *solely* to the Petitioner - and the Petitioner's willingness to go along with this approach.

25. On October 28, 1998 Mr. Amemiya sent letters to the Petitioner and to Honolulu Disposal Service informing them that Proposal Document No. 13026 "would be canceled due to defective specifications[;]" that the Respondent would be proceeding with a new set of specifications; and, that they would be contacted when this took place. The Petitioner subsequently filed a protest with the Respondent which - after an initial denial (as well as a subsequent denial of a request for reconsideration) - was followed by the Petitioner's March 11, 1999 request for an administrative hearing.

III. CONCLUSIONS OF LAW

In seeking administrative relief, the Petitioner essentially contended that the Respondent acted unlawfully by its conduct in canceling the solicitation (Proposal Document No. 13026) after bid opening but prior to a contract award. More specifically its "Protest Issues" asked: 1) whether Island Recycling, Inc.'s bid was responsive; 2) whether the City's cancellation was supported by valid reasons

that reflected the City's best interests; and, 3) whether the cancellation was done in good faith. And, in addressing the burden of proof for administrative proceedings of this nature, Hawaii Revised Statutes ("HRS") § 103D-709(c) and Hawaii Administrative Rules ("HAR") § 3-126-56(c) state that the party initiating the proceeding (Petitioner) must establish its claim by a preponderance of the evidence. Furthermore, HRS § 103D-709(f) requires the Hearings Officer to decide if the determinations of the Respondent "were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract."

The relevant law for application to the above factual findings is primarily contained in the following statutes and rules:¹

HRS § 103D-101 Requirement of good faith. All parties involved in the negotiation, performance, or administration of state contracts shall act in good faith.

HRS § 103D-302 Competitive sealed bidding. *** (h) The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. ***

HRS § 103D-308 Cancellation of invitations for bids or requests for proposals. 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 government body which issued the invitation, request, or other solicitation, in accordance with rules adopted by the policy council. The reasons therefore shall be made part of the contract file.

HAR § 1-120-1 Purpose. The purpose of these rules is to promote economy, efficiency, and effectiveness in the procurement of goods and services, and the construction of public works for the State and counties, by:

- (1) Simplifying, clarifying, and modernizing the law governing procurement;
- (2) Requiring the continued development of procurement policies and practices;
- (3) Making the procurement laws of the State and the counties as consistent as possible;
- (4) Ensuring the fair and equitable treatment of all persons who deal with the procurement system of the State and the counties;
- (5) Providing increased economy in procurement activities

¹ The parties also cited certain caselaw which was generally distinguishable from the matter at issue in this proceeding and thus was of marginal value.

and maximizing to the fullest extent practicable the purchasing value of public funds;

(6) Fostering effective broad-based competition within the free enterprise system;

(7) Providing safeguards for the maintenance of a procurement system of quality and integrity; and

(8) Increasing public confidence in the procedures followed in public procurement.

HAR § 3-122-95 Cancellation of solicitations and rejection of offers. (a) Any invitation for bids, a request for proposals, or any other solicitation may be canceled, or a bid, proposal, or any other offer may be rejected in whole or in part as may be specified in the solicitation, in accordance with the provisions of this section.

(b) The reasons for the cancellation or rejection shall:

(1) Include but not be limited to cogent and compelling reasons why the cancellation of the solicitation or rejection of the offer is in the purchasing agency's best interest; and

(2) Be made part of the contract file.

(c) Each solicitation issued by the purchasing agency shall state that the solicitation may be canceled or offers may be rejected in whole or in part when in the best interest of the purchasing agency as provided in this subchapter.

HAR § 3-122-96 Cancellation of solicitation. (a) A solicitation shall be canceled for reasons including but not limited to the following:

(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 the 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

(G) A determination by the chief procurement

officer that a cancellation of the solicitation is in the public interest.

HAR § 3-122-108 Qualification of bidders and offerors.²

(a) Prospective bidders or offerors shall be capable of performing the work for which offers are being called. Each prospective bidder or offeror shall file a written or facsimile notice of intention to submit an offer pursuant to section 3-122-9³, subject to the following:

(b) Upon notification of the bidder's intent to submit an offer, the procurement officer shall determine whether the prospective offeror has the ability to perform the work intended. For this purpose, the procurement officer may require any prospective offeror to submit answers to questions contained in the sample questionnaire provided by the policy board.

The preponderance of the evidence in this matter did establish that the Respondent's solicitation (Proposal Document No. 13026) was not defective at the time it was issued; that the Petitioner had submitted a responsive bid; and, that the Petitioner was (ultimately) found to be a responsible bidder. (The fact that the Petitioner had submitted the lowest bid was never an issue.) On the other hand, although portions of the evidence raised some *suspicion* about the length and scope of the Respondent's investigation into the Petitioner's qualifications, the evidence was not sufficient to establish that the Respondent had caused an unjustified delay in that process. Furthermore, the contract start date was a material term of the solicitation⁴ and did not lend itself to a post bid-opening change - *especially for only one bidder and without the issuance of a written addendum.*

The procurement process is often a rather arduous one for all parties concerned, and one which - in retrospect - might have allowed for better decision making by either a Petitioner or a Respondent. Nevertheless, the evidence in this matter simply did not establish that the Respondent's conduct in canceling the solicitation was either: 1) not in the City's best interest, or 2) not done in good faith. Although the Respondent's articulation of its basis for cancellation (defective specifications) may have left more accurate language to be desired, cancellation and rebidding was a responsible and legal choice given the totality of the circumstances and the breadth of discretion available to the Director under the relevant statutes, regulations, and terms of the solicitation. The preponderance of the evidence did not establish that the Respondent's conduct was other than "in

² There was a dearth of evidence as to the Petitioner's awareness of - or either party's compliance with - this rule insofar as any "notice of intention to submit an offer" was concerned.

³ HAR § 3-122-9 is entitled (and relates to) Use of facsimiles.

⁴ The solicitation's inclusion of a provision for liquidated damages did not mean that the contract start date was any less important.

accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract."⁵

IV. DECISION

It is hereby ORDERED that, for the reasons set forth above, the Respondent may proceed with the cancellation and resolicitation of its proposal documentation for the "Lease and Haul of Recycling Roll-off Containers for the Community Recycling Program", and this matter is dismissed with each party to bear its own attorney's fees and costs.

DATED: Honolulu, Hawaii, **APR 15 1999** _____

/s/ RICHARD A. MARSHALL

Richard A. Marshall
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

⁵ HRS § 103D-709(f).