

*** NOT FOR PUBLICATION ***

NO. 26897

IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of

PHILLIP G. KUCHLER, INC., Petitioner-Appellant-Appellant,

vs.

STATE OF HAWAII, DEPARTMENT OF TRANSPORTATION
Respondent-Appellee-Appellee.

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

2005 OCT 25 AM 9:00

FILED

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 04-1-0571)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.;
with Acoba, J., Concurring Separately)

Petitioner-appellant-appellant Phillip G. Kuchler, Inc. (Kuchler) appeals from the first circuit court's September 17, 2004 final judgment¹ affirming the March 18, 2004 Findings of Fact, Conclusions of Law and Decision of the Hearings Officer, Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawai'i (Hearings Officer) affirming the July 9, 2003 denial by respondent-appellee-appellee State of Hawai'i, Department of Transportation (DOT) of Kuchler's April 4, 2003 bid protest of DOT's decision to cancel its solicitation of contract bids for the management of real property known as Kapalama Military Reservation (KMR), Project No. HAR-PM-03-1. On appeal, Kuchler contends that the circuit court erred when it

¹ The Honorable Sabrina S. McKenna presided over this matter.

affirmed the Hearings Officer's: (1) erroneous "conclusion that DOT had unfettered discretion to cancel the solicitation unless Kuchler demonstrated favoritism, corruption or bad faith on DOT's part"; (2) clearly erroneous finding that "the solicitation was validly cancelled on the ground that it 'did not provide for consideration of a factor of significance to the agency' (i.e., a one-month cap or limit on leasing commissions)"; (3) erroneous conclusion that DOT provided adequate notice of its true reasons for cancelling the solicitation; and (4) clearly erroneous finding that "DOT's actions in cancelling the solicitation were not tainted by favoritism and bad faith."

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issues raised, we hold:

- (1) An agency does not abuse its discretion where it complies with applicable law. See, e.g., West Alabama Quality of Life Coalition v. U.S. Federal Highway Admin., 302 F. Supp.2d 672, 682 (S.D. Tex. 2004) (holding that where an agency complies with applicable law, its decision "cannot be classified as arbitrary, capricious, or an abuse of discretion"). In the instant case, DOT complied with applicable law in cancelling the bid solicitation because the cancellation was permissible under Hawai'i

Administrative Rules (HAR) implementing provisions of the Hawai'i Procurement Code governing cancellation of bid solicitations. See Hawai'i Revised Statutes (HRS) § 103D-308 (Supp. 1997) ("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."); HAR § 3-122-96(a)(2)(C) (1997) (a solicitation may be cancelled if it "did not provide for consideration of all factors of significance to the agency");

- (2) The Hearings Officer's finding that the solicitation did not provide for consideration of a factor of significance to DOT -- a one-month cap on commission fees -- is not clearly erroneous because it is supported by substantial evidence, including the credible testimony of DOT's contracting officer. See Leslie v. Estate of Tavares, 91 Hawai'i 394, 399, 984 P.2d 1220, 1225 (1999) (appellate court's scope of review under the clearly erroneous standard is limited to (1) determining whether there is substantial

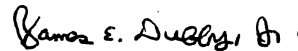
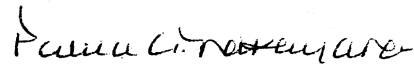
evidence in the record to support the ruling; and (2) if there is such evidence, determining whether the record nevertheless leaves the court with the definite and firm conviction that a mistake has been made); In re Doe, 95 Hawai'i 183, 196-7, 20 P.3d 616, 629-30 (2001) (testimony of one credible witness may constitute substantial evidence);

- (3) DOT provided adequate notice of its reasons for cancelling the solicitation because it provided Kuchler notice of the actual circumstances and facts leading to the cancellation of the solicitation. See HRS § 103D-308 ("reasons [for cancellation of a solicitation] shall be made part of the contract file"); HAR § 3-122-96(b)(2) (requiring a "brief explanation of the reason(s) for cancellation");
- (4) The Hearings Officer's finding that DOT did not act in bad faith or with favoritism is not clearly erroneous inasmuch as there is sufficient evidence in the record, including the credible testimony of DOT's contracting officer, to support the finding that DOT cancelled the solicitation in good faith (i.e., because it was concerned that without a one-month cap on commission fees it risked paying more in commissions than it would

recoup in rent). See Leslie, 91 Hawai'i at 399, 984 P.2d at 1225. Therefore,

IT IS HEREBY ORDERED that the circuit court's September 17, 2004 final judgment is affirmed.

DATED: Honolulu, Hawai'i, October 25, 2005.



I concur in the result.



On the briefs:

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