

D-7

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

September 9, 2011

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PSF No.: 09od-108

OAHU

Amend Prior Board Action of March 11, 2010. Item D-15, Sale of Concession by Sealed Bids for Beach Services at Duke Kahanamoku Beach, Waikiki, Honolulu, Oahu, TMK (1) 2-3-037:portion of 021

BACKGROUND:

On March 11, 2010, under agenda item D-15, the Board authorized the sale of a beach activities concession contract at Duke Kahanamoku Beach by sealed bids.¹ A copy of the approved submittal is attached as **Exhibit 1**.

The Department issued a solicitation for applications and sealed bids on June 28, 2010. The solicitation document included a copy of the concession contract. The Department opened the two (2) qualified bids on August 10, 2010. However, before the concession contract was awarded, the Department discovered a discrepancy between the solicitation document and the concession contract attached to the solicitation document. The solicitation document included an escalation clause that provided for the monthly concession fee to be increased by ten percent (10%) every five years. The concession contract, however, inadvertently did not contain the escalation clause. Unless the contract was amended to include the escalation clause, the monthly concession fee arguably would remain unchanged throughout the term of the concession contract.

The Department was initially advised that according to State v. Kahua Ranch, Ltd., 47 Haw. 28, 384 P.2d 581 (1963), because the specific form and content of the concession contract was attached to the solicitation document, the contract could not simply be amended by adding the escalation clause without first obtaining the unanimous consent from the two (2) qualified applicants/bidders.

By letter dated September 2, 2010, the Department informed the two (2) qualified bidders that in order for the solicitation to move forward, both bidders must agree that the concession contract

¹ The Board authorized the sale of the beach activities concession contract since the existing concession contract with Hilton Hawaiian Village, LLC was scheduled to expire on May 31, 2010.

be modified to incorporate the 10% increase in the monthly concession fee every five years. The bidders were also informed that if both bidders did not agree, the Department would cancel the solicitation. The high bidder agreed with the proposed modification, but the low bidder did not. Accordingly, by letter to the bidders dated September 15, 2010, the Department canceled the solicitation.

After canceling the solicitation as noted above, the Department met with the two (2) qualified bidders to discuss issues related to making the solicitation package more attractive to bidders who do not necessarily own real property abutting Duke Kahanamoku Beach (the concession area).² Overnight storage of equipment was brought up as an issue for bidder/concession operators who do not own real property abutting or near the concession area where they can easily store equipment overnight. As such, after much discussion and thought, staff is recommending certain changes to the solicitation package, which include minor modifications to the areas covered by the concession contract (including modifying the areas where the concessionaire shall be permitted to conduct commercial operations and allowing the concessionaire to store its equipment overnight in mobile storage units) and certain other housekeeping matters.

The high bidder of the solicitation was Star-Beachboys, Inc. ("SBI") at \$35,100 per month, with the understanding that the concession fee would increase by 10% every five (5) years. At the request of SBI's counsel, Mr. Earl Anzai, a meeting was held sometime in December 2010 with the new Chairperson William Aila and staff from the Land Division. On January 4, 2011, Chairperson Aila sent a letter to Hilton Hawaiian Village ("HHV") and SBI stating in part:

"... after much consideration and thought and in consultation with the Department of the Attorney General, our Department has decided to reconsider its prior cancellation of the solicitation of the Duke Kahanamoku Beach Concession. The Department has decided to award the concession contract to Star-Beachboys, Inc. which submitted the highest base bid of \$35,100 per month. The concession contract will be modified to include the requirement of a 10% escalation of concession payments after the 5th and 10th anniversary dates of the 15-year concession contract which was clearly contained in the solicitation document, the Notice to Bidders ... " (**Exhibit "2a"**)

HHV filed suit shortly thereafter. The parties filed their respective motions for summary judgment (**Exhibits "2b" and "2c"**) and a Court hearing was held on or around July 13, 2011. Staff understands that the Court questioned whether the State had the authority to change its prior decision (without an express reservation of the same in the written solicitation package) to cancel the solicitation, and proceed with awarding the concession to the highest bidder. In any event, staff understands that the Court ruled that the State's latest award of the concession contract to SBI was invalid, and the State ought to redo the

² One of the qualified bidders was the Hilton Hawaiian Village, LLC, which is an abutting property owner; the other qualified bidder is not an abutting property owner.

solicitation over again.

Proposed Changes

Areas Covered by the Concession Contract:

The concession contract previously approved by the Board encompassed a total of 1,070 square feet, which consisted of three separate areas within Duke Kahanamoku Beach. These three areas were: (1) a 144 square foot "Concession Stand Area"; (2) a 30 square foot "Surfboard Rack Area"; and (3) an 896 square foot "Storage Area", all of which are shown on the map attached in **Exhibit 3**.

Staff is recommending (1) the Concession Stand Area and Surfboard Rack Area be combined and minimally enlarged into a single "Concession Area" to provide a more usable area for the concessionaire to conduct commercial operations; (2) amend the uses permitted within the Storage Area and rename the area to the "Temporary Daytime Work Area". Staff's recommended changes are described in detail below.

Concession Area:

Staff recommends the 144 square foot "Concession Stand Area" and 30 square foot Surfboard Rack Area be consolidated (and increased slightly in size) into a single 196 square foot area (14' x 14') to be called the "Concession Area".³ The concessionaire will be allowed to conduct commercial operations and to display its beach activities equipment in the Concession Area. Staff believes this consolidation will provide the concessionaire a more centralized operating area and will provide the public with more usable beach area. The location of the new Concession Area is generally shown on **Exhibit 4**.

Temporary Daytime Work Area:

The concession contract previously approved by the Board included an 896 square foot "Storage Area" on the beach, and allowed the concessionaire to use that area to display and store its equipment both during and after the operating hours, i.e., overnight.

Staff recommends the new concession contract limit the concessionaire's use of this area to displaying and temporarily storing its rental equipment only during operating hours. To more accurately reflect the uses permitted in this area, staff recommends the area be renamed the "Temporary Daytime Work Area".

Mobile Storage Units

Since the concessionaire will no longer be allowed to store its equipment on the beach overnight, staff recommends the Board authorize the Department to set aside up to two (2) parking stalls in the adjacent Ala Wai Small Boat Harbor paid parking area managed

³ The consolidated Concession Area would be 22 square feet larger than the combined area of the original Concession Stand Area (144 sq ft) and Surfboard Rack Area (30 sq ft).

by the Department's Division of Boating and Ocean Recreation (DOBOR) for the concessionaire to park mobile storage unit(s). This would allow the concessionaire, should it choose to do so, to store its equipment and inventory during non-operating hours in mobile storage units and park those storage units in the two parking stalls. If the concessionaire elects to do so, the concessionaire may obtain monthly parking permits for up to two (2) parking stalls to park its mobile storage units. The concessionaire shall pay, at its own expense, the applicable monthly parking permit fee and shall be subject to all applicable parking restrictions, e.g., the mobile storage units shall only be parked within stalls that are available to paid parking patrons; the paid parking stalls are unassigned and cannot be reserved; no commercial activities shall be conducted at or from the parking stalls; and the mobile storage units shall not be parked in any area that is closed to parking at night.

The concessionaire shall be allowed to temporarily park the mobile storage units at an available location near the groin or sand area when it opens and closes for business each day while it actively loads and unloads its equipment. At all other times, the mobile storage units shall be parked in the two parking stalls in accordance with the monthly parking permit(s).

Bidding Process:

The Board's March 11, 2010 approval provided that the "applications will be brought to the Board to determine the successful bidder". However, the sealed bid process set forth in HRS Chapter 102 provides that the bid shall be awarded to the highest responsible bidder. Therefore, it is not necessary for the applications to be brought to the Board to determine the successful bidder, and staff recommends the Board delete this requirement.

Authority to Cancel the Bidding Process

Staff recommends that the Board authorize the Chairperson to: (a) cancel the solicitation at any time, including after bids have been opened; and (b) reconsider any prior decision made during the solicitation process (including but not limited to reconsidering a prior decision to cancel the solicitation); if such cancellation or reconsideration is in the best interest of the State as determined by the Chairperson.

Temporary Month-to-Month Permit:

The prior concession contract to Hilton Hawaiian Village, LLC ("Hilton") expired on May 31, 2010. The Board's March 11, 2010 approval provided that if the new concession contract was not issued before June 1, 2010, a temporary month-to-month holdover permit may be issued to allow Hilton to continue to operate the beach concession under the same terms and conditions of the expired concession contract until the new concession contract is issued.⁴

⁴ The Board's approval also clarified that a new permit document would not need to be executed or issued.

The concession fee under the expired concession contract to Hilton was \$18,109 per month, while the upset concession fee for the new contract is \$31,000.00 per month. In light of the unanticipated delay in issuing the new concession contract, staff recommends the Board increase the concession fee for the temporary month-to-month holdover permit to Hilton to \$31,000.00 per month effective September 1, 2011 until the new concession contract is issued.

RECOMMENDATION: Subject to the above, that the Board:

1. Amend its prior Board action of March 11, 2010, under agenda item D-15 by:
 - A. Renaming the "Concession Stand Area" to the "Concession Area" in the concession contract and map, and increasing the area from 144 square feet to 196 square feet;
 - B. Deleting the 30 square feet "Surfboard Rack Area" from the concession contract and map;
 - C. Renaming the "Storage Area" in the concession contract and map to the "Temporary Daytime Work Area".
 - D. Revising the concession contract to provide that:
 - i. The Temporary Daytime Work Area shall only be used by the concessionaire during operating hours from 6:00 am to 8:00 pm, and only for temporary display and storage of the concessionaire's equipment and inventory.
 - ii. The concessionaire shall remove all its equipment, supplies, inventory, and other belongings from the Temporary Daytime Work Area before 8:00 pm daily.
 - E. Deleting the requirement that applications be brought to the Board for determination of the successful bidder.
 - F. Authorizing the Department to set aside up to two parking stalls in the adjacent Ala Wai Small Boat Harbor parking area for 24-hour parking of mobile storage units used by the concessionaire, subject to the following:
 - i. The concessionaire shall pay for the monthly parking permit(s) for the mobile storage unit(s);
 - ii. The concessionaire shall be subject to all applicable restrictions under the monthly parking permit(s), including but not limited to the following:

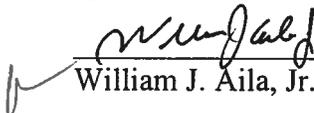
- a. The mobile storage unit(s) shall only be parking within stall(s) available to paid parking patrons;
 - b. The paid parking stalls are unassigned and cannot be reserved;
 - c. No commercial activity shall be conducted at the parking stall(s);
 - d. The mobile storage unit(s) shall not be parked in any area that is closed to parking at night.
- iii. The mobile storage unit(s) shall only be allowed near the groin or sand area while the equipment is actively being loaded or unloaded.
- G. Authorize the Chairperson to: (a) cancel the solicitation at any time, including after bids have been opened; and (b) reconsider any prior decision made during the solicitation process (including but not limited to reconsidering a prior decision to cancel the solicitation); if such cancellation or reconsideration is in the best interest of the State as determined by the Chairperson.
- H. Amending Recommendation No. 3 to increase the monthly concession fee for the month-to-month holdover permit to Hilton Hawaiian Village, LLC to \$31,000.00 per month, effective September 1, 2011 until the new concession contract is issued.
2. All other terms and conditions listed in its March 11, 2010 approved submittal shall remain in full force and effect.

Respectfully Submitted,



Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

March 11, 2010

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PSF No.: 09od-108

Oahu

Sale of Concession by Sealed Bids for Beach Services at Duke Kahanamoku Beach, Waikiki, Honolulu, Oahu, Tax Map Key: (1) 2-3-037:021

REQUEST:

Sale of concession contract by sealed bid for beach services purposes.

LEGAL REFERENCE:

Section 171-56 and Chapter 102, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands situated at Duke Kahanamoku Beach, Waikiki, Honolulu, Oahu, identified by Tax Map Key: (1) 2-3-037:021, as shown on the attached map labeled Exhibit A.

AREA:

Concession Stand	144 square feet	
Surfboard Rack	30 square feet	
<u>Storage Area</u>	<u>896 square feet</u>	
Total:	1,070 square feet	as shown on Exhibit B.

ZONING:

State Land Use District:	Urban
City & County of Honolulu CZO:	Public Precinct

TRUST LAND STATUS:

Section 5(a) lands of the Hawaii Admission Act
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: No.

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
March 11, 2010

CURRENT USE STATUS:

Encumbered Duke Kahanamoku Beach Concession Contract, Hilton Hawaiian Village, LLC, (HHV), concessionaire. Contract expires on May 31, 2010.

CONCESSION:

SCOPE OF CONCESSION:

The right to operate beach services concession including rental of beach and water sport items and provision of instruction as determined by the Chairperson.

CONTRACT TERM:

Fifteen (15) years.

COMMENCEMENT DATE:

To be determined by the Chairperson.

UPSET BID FOR MONTHLY CONCESSION FEE:

To be determined by appraisal subject to review and approval by the Chairperson.

METHOD OF PAYMENT:

Quarterly payments, in advance.

CONCESSION FEE REOPENING

The monthly concession fee shall increase by 10% every five (5) years.

SECURITY DEPOSIT:

Twice the monthly concession fee.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

The activities of the proposed concession contract merely change the manner of which the subject State land is disposed. It involves no expansion of the activities. In accordance with the "Division of Land Management's Environmental Impact Statement Exemption List", approved by the Environmental Council and dated April 28, 1986, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1 that states "Operation, repairs, or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no

expansion or change of use beyond that previously existing."

REMARKS

The current beach concession contract was sold to C & K Beach Services, Inc. commencing on June 1, 2005 for a term of five (5) years, through sealed bid process. Pursuant to the bankruptcy proceeding petitioned by C & K beach Services, Inc. around 2006, the U.S. Bankruptcy Court entered an order allowing HHV assume the beach concession contract. In view of the forthcoming expiration date of the contract, today's request is to seek the Board's authorization to issue a new concession contract.

While the basic terms are provided in the above, staff is recommending the Chairperson be authorized to prescribe the terms and conditions of the request for bids and the contract document.

Term

The current concession contract is the first one processed by the Division, which is for a term of five (5) years. Staff believes a longer term will attract more interested parties to the bidding process. Therefore, staff proposes a 15-year term for the new contract.

Area

There are no changes to the area under the new contract as provided above. However, the concessionaire is required to clean the Duke Kahanamoku Beach as detailed below.

Scope of Concession

The scope of concession will generally follow the items allowed under the current contract including rental of ocean recreation equipment, beach umbrella, lounge chairs, sale of suntan products, provision of sailing and surfing lesson. Further, retail of foods and beverages are not allowed.

Regular Clean-up of Duke Kahanamoku Beach

Other than the current contract, Duke Kahanamoku Beach is considered as unencumbered land under the management jurisdiction of the Land Division. Due to the limited resources, the Division's maintenance crew has not scheduled the beach in its regular maintenance schedule. On the other hand, staff notes that most of the customers of the concession are utilizing the said beach. Staff believes regular clean-up of the beach will provide a clean and safe environment for the customers as well as local residents. Therefore, staff suggests making as a requirement for the interested parties to submit a proposal including the method and frequency of the beach clean-up as part of the bid package.

Business Plan

Applicants shall provide a business plan which shall include, but not limited to, information about marketing and pricing strategy, training of employee, and anticipated revenue.

Bidding Processes:

Chapter 102-2(a) and 171-56, HRS, stipulates any concession contract shall be disposed by sealed bid. Other than the maximum term of the contract is limited to 15 years, there are no other mandatory terms and conditions for the contract in the statutes. Staff believes that other criteria, including the business plan, financial ability are of equal importance to the selection process and should be included in the bid packet.

For the proposed contract, interested parties will be asked to provide information and material pursuant to the terms and conditions of the bid packet as prescribed by the Chairperson. Applications will be brought to the Board to determine the successful bidder.

Staff has solicited comments from other agencies about the issuance of a new concession contract. Division of Aquatic Resources, State Historic Preservation Division, and Department of Hawaiian Home Lands do not have any objection/comment.

Department of Parks and Recreation of the City raised concern about complaints regarding unauthorized beach activities on City's lands, and request any new concession contract be monitored toward compliance issues. The subject location is not close to any City's lands. However, standard condition requiring the concessionaire comply with all applicable federal, state, and county laws, rules, ordinances will be included in the contract document.

Division of Boating and Ocean Recreation requests the proceeds from the proposed be transferred to Boating Special Fund. Staff notes that this issue shall be discussed at the staff level. Overall, DOBOR does not raise objection to the issuance of anew contract.

Department of Health, Office of Conservation and coastal Lands, Department of Planning and Permitting, department of Enterprises Services, and the Office of Hawaiian Affairs have not responded as of the suspense date.

Further, staff recommends the Board authorize the issuance of a revocable permit to HHV commencing from June 1, 2010 to the issuance of the new concession contract. The revocable permit shall be subject to the same terms and conditions of the current concession contract. Staff does not anticipate the effective period of said revocable permit will be long. Therefore, there will be no new revocable permit document issued.

RECOMMENDATION: That the Board:

1. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.
2. Authorize the sale of a concession contract by sealed bid within the subject area for beach services purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:

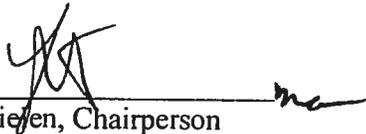
- a. The Chairperson shall be authorized to prescribe the terms and conditions of the request for sealed bids;
 - b. The standard terms and conditions of the most current concession contract form, as may be amended from time to time;
 - c. Review and approval by the Department of the Attorney General; and
 - d. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
3. In the event that the new concession contract is not issued before June 1, 2010, authorize Hilton Hawaiian Village, LLC, continue to utilize the subject area on a month-to-month basis, and further subject to the terms and conditions of the current Duke Kanahamoku Beach Concession Contract until the issuance of the new concession contract.

Respectfully Submitted,

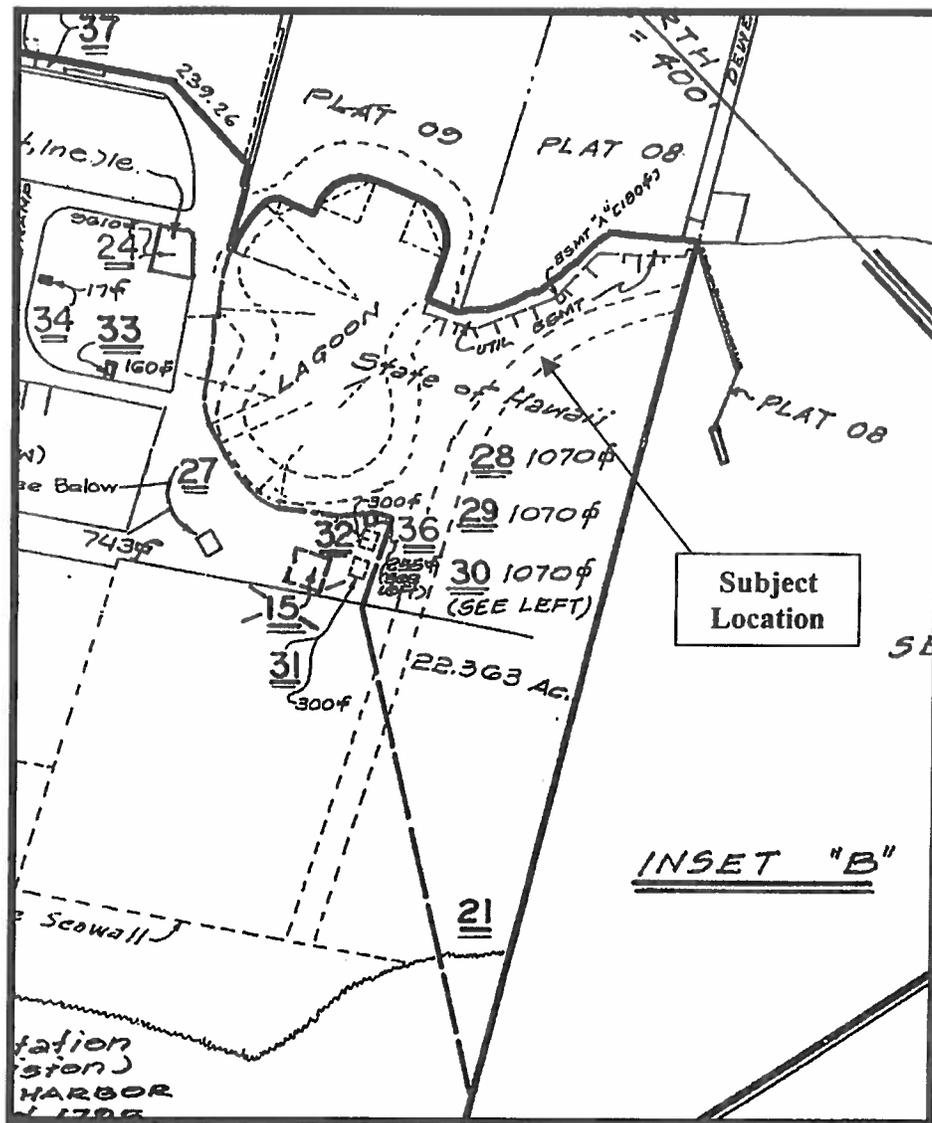


Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:



Laura H. Thiesen, Chairperson



TMK (1) 2-3-037:portion of 021

EXHIBIT A

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

January 4, 2011

WILLIAM J. AILA, JR.
INTERIM CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAULUKUKUI
FIRST DEPUTY

WILLIAM M. TAM
INTERIM DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAIHOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Ref: 09od-108

(VIA FAX, CERTIFIED, RETURN RECEIPT REQUESTED AND REGULAR MAIL)

7003 0500 0003 2596 2466

7003 0500 0003 2596 2473

Mr. Gerald C. Gibson
Area Vice President and Managing Director
Hilton Hawaiian Village, LLC
2005 Kalia Road
Honolulu, Hawaii 96815

Mr. Anthony Rutledge
Mr. Aaron Rutledge
Star-Beachboys, Inc.
1088 Kahili Place
Kailua, Hawaii 96734

Subject: Solicitation for the Duke Kahanamoku Beach Concession Contract

Dear Messrs. Gibson, Rutledge and Rutledge:

After discussing the matter with each of the bidders' counsel, and after much consideration and thought and in consultation with the Department of the Attorney General, our Department has decided to reconsider its prior cancellation of the solicitation of the Duke Kahanamoku Beach Concession.¹ The Department has decided to award the concession contract to Star-Beachboys, Inc. which submitted the highest base bid of \$35,100 per month. The concession contract will be modified to include the requirement of a 10% escalation of concession payments after the 5th and 10th anniversary dates of the 15-year concession contract which was clearly contained in the solicitation document, the Notice to Bidders.

Should you have any questions or comments, you may contact Russell Tsuji of the Land Division at 587-0422. Thank you for your continued patience, time and consideration on this matter.

Very truly yours,

William J. Aila, Jr.
Interim Chairperson

¹ Chairperson's letter dated September 15, 2010 addressed to Mr. Gerald Gibson of Hilton Hawaiian Village, and Messrs. Anthony and Aaron Rutledge of Star-Beachboys.

EXHIBIT "2a"

STARN • O'TOOLE • MARCUS & FISHER
A Law Corporation

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733 Bishop Street, Suite 1900
Pacific Guardian Center, Makai Tower
Honolulu, Hawaii 96813
Telephone: (808) 537-6100

Attorneys for Plaintiff
HILTON HAWAIIAN VILLAGE LLC

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

2011 MAY 23 PM 4: 13

F. OTAKE
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

HILTON HAWAIIAN VILLAGE LLC,
a Hawaii limited liability company,

Plaintiff,

vs.

STAR-BEACHBOYS, INC., a Hawaii
corporation; STATE OF HAWAII,
DEPARTMENT OF LAND AND
NATURAL RESOURCES; WILLIAM J.
AILA, JR., in his capacity as Interim
Chairperson; and
DOES 1-20,

Defendants.

CIVIL NO. 11-1-0158-01 RAN
(Declaratory and Injunctive Relief)

**PLAINTIFF HILTON HAWAIIAN
VILLAGE LLC'S MOTION FOR
SUMMARY JUDGMENT; MEMORANDUM
IN SUPPORT; EXHIBIT A; CERTIFICATE OF
SERVICE**

HEARING:

DATE:

JUL 13 2011

TIME:

8:30A

JUDGE: The Honorable Rhonda A. Nishimura

Trial: No Trial Date

LAND/IRRIG. DIV.
DEPARTMENT OF
ATTORNEY GENERAL
2011 MAY 23 P 4: 25

**PLAINTIFF HILTON HAWAIIAN VILLAGE LLC'S
MOTION FOR SUMMARY JUDGMENT**

Plaintiff HILTON HAWAIIAN VILLAGE LLC ("Hilton") moves this Honorable Court
for summary judgment in its favor on both counts contained in the Complaint, filed January 21,

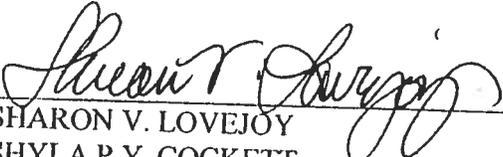
2011. Summary judgment is proper on Hilton's claims for declaratory and injunctive relief because:

- (1) Defendant STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES ("*DLNR*")'s purported award of a concession contract for the Duke Kahanamoku Beach ("*Concession Contract*") to Defendant STAR-BEACHBOYS, INC. ("*SBI*") is based on a solicitation and sealed bid package that was defective, thereby affecting the validity and equality of the bid process, and failing to fulfill the purpose of the public bid process contained in Hawaii Revised Statutes ("*HRS*") Chapter 102;
- (2) Any award of the Concession Contract pursuant to the prior solicitation and sealed bid package is void under HRS Chapter 102 due to the defects;
- (3) An award of the Concession Contract would further violate HRS Chapter 102 because:
 - a. The DLNR cancelled the solicitation for the Concession Contract and rejected all bids due to the defects;
 - b. The DLNR found its cancellation and rejection to be in the best interest of the public and the State of Hawai'i;
 - c. Any contract awarded pursuant to a rejected bid is *per se* void under HRS §102-15. Awarding a contract after bids have been rejected is in direct violation of HRS Chapter 102's plain language, which requires a new solicitation once all bids are rejected; and
 - d. The DLNR's later attempt to revive the cancellation of the solicitation and rejection of bids and to subsequently award the concession contract to SBI, was invalid as beyond the power and authority of the DLNR; and
- (4) Any purported award of the Concession Contract without a new solicitation and bid process is improper because, in deciding to reverse course and to award the Concession Contract to SBI, the DLNR engaged in impermissible *ex parte* communications with bidder SBI—without notice to Plaintiff and the opportunity to participate.

All parties in this case have stipulated to the facts underlying this dispute. Applying the law to the stipulated facts, it is clear that summary judgment should be granted to Hilton. There is no material issue of fact; Hilton is entitled to judgment as a matter of law. The DLNR should be required to properly re-solicit bids based on a new and corrected bid package before a concession contract for the Duke Kahanamoku Beach is awarded.

This Motion is made pursuant to Hawaii Rules of Civil Procedure, Rules 56, 57, and 65 and is based upon the records and files in this case, the Memorandum in Support of this Motion, and the declarations and exhibits submitted herewith.

DATED: Honolulu, Hawaii May 23, 2011.


SHARON V. LOVEJOY
SHYLA P.Y. COCKETT

Attorneys for Plaintiff
HILTON HAWAIIAN VILLAGE, LLC

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HILTON HAWAIIAN VILLAGE LLC,
a Hawaii limited liability company,

Plaintiff,

vs.

STAR-BEACHBOYS, INC., a Hawaii
corporation; STATE OF HAWAII,
DEPARTMENT OF LAND AND NATURAL
RESOURCES; WILLIAM J. AILA, JR., in his
capacity as Interim Chairperson; and
DOES 1-20,

Defendants.

CIVIL NO. 11-1-0158-01 RAN
(Declaratory and Injunctive Relief)

MEMORANDUM IN SUPPORT OF
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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

This case is about the competitive public sealed bid process undertaken by the STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES (“*DLNR*”) to lease a portion of the Duke Kahanamoku Beach for the operation of a beach concession under Hawaii Revised Statutes (“*HRS*”) Chapter 102. Statutory competitive bidding requirements are enacted for the benefit of the public to invite competition; to prevent favoritism, fraud, and collusion; and to secure the best price, and in the case of leases of public lands, the highest price.

Here, the DLNR announced that it is awarding a concession contract for the Duke Kahanamoku Beach (“*Concession Contract*”) to Defendant STAR-BEACHBOYS, INC. (“*SBI*”). This Court is asked to decide whether the DLNR can properly award the Concession Contract *after* the DLNR (1) determined there was a defect in the solicitation and bid package; (2) determined that as a result of the defect “it was in the best interest of the State and the public to reject all bids and cancel the solicitation,” and did in fact cancel the solicitation and reject all bids (the “*Decision*”); and (3) engaged in back room, *ex parte* communications with Defendant SBI after the cancellation and rejection, in which SBI urged the new DLNR Chairperson to reverse the Decision. Plaintiff HILTON HAWAIIAN VILLAGE LLC (“*Hilton*”) submits the answer is “No.” Awarding the Concession Contract under these circumstances based on the defective solicitation and sealed bid package directly contravenes HRS Chapter 102, and the policy behind statutory competitive bidding.

The DLNR cannot award the Concession Contract until it properly solicits bids based on a new and corrected bid package because:

- (1) The DLNR’s purported award of the Concession Contract to SBI is based on a solicitation and bid package that was flawed, affecting the validity of, and the equality that is supposed to be inherent in the public bid process contained in HRS Chapter 102;
- (2) Any award of the Concession Contract pursuant to the prior flawed solicitation and bid package is void under HRS Chapter 102, which requires a new solicitation once all bids are rejected;
- (3) An award of the Concession Contract would further violate HRS Chapter 102 because:
 - a. The DLNR rejected all bids and cancelled the solicitation for the Concession Contract due to flaws in the solicitation and bid package;

- b. The DLNR found that rejection of the bids and cancellation of the solicitation were in the best interest of the public and the State of Hawai'i;
 - c. The DLNR's later attempt to revive the cancellation of the solicitation and rejection of bids and to subsequently award the Concession Contract to SBI, was invalid as beyond the power and authority of the DLNR; and
- (4) Any purported award of the Concession Contract to SBI is improper because, in deciding to reverse course and to award the Concession Contract to SBI, the DLNR and SBI engaged in improper communications with one bidder—without notice to the other or the opportunity to participate—which is contrary to the policy behind a competitive sealed bid process.

Therefore, summary judgment should be entered in favor of Hilton and against the Defendants on the Complaint. Specifically, summary judgment is appropriate for a declaratory order that the DLNR's purported "award" of a Concession Contract to Defendant SBI is void and the DLNR must re-solicit the Concession Contract in compliance with HRS § 102-2 before it can award the Concession Contract, and for an injunction preventing the Defendants from entering into the Concession Contract until the requirements of HRS Chapter 102 are met with a new and proper solicitation and bids.

II. UNDISPUTED FACTS¹

A. The DLNR Solicited Bids for the Duke Kahanamoku Beach Concession Contract.

1. The Notice to Bidders.

In the Spring of 2010, the Board of the DLNR authorized the DLNR to lease a portion of the Duke Kahanamoku Beach on Waikiki for the operation of a beach concession for the rental of ocean recreation equipment, beach umbrellas, lounge chairs, providing surf lessons, and the like. *Board Submittal, Exh. A-1; Minutes, Exh. A-2*. As a result, the DLNR caused a "Notice to Bidders" to be published on June 29, 30, and July 1, 2010 (the "*Solicitation*"). *Notice, Exh. A-3*. The DLNR explained in the Solicitation that "the [DLNR] intends to offer by sealed bid a concession contract for beach services at Duke Kahanamoku Beach . . . the concessionaire will be permitted to operate

¹ The Parties have entered into a Stipulation regarding the facts underlying this dispute, which is attached as Exhibit A, with agreed upon documents attached thereto as Exhibits 1 through 16. The documents will be referenced by reference to Exhibit A, and to the attachment (e.g., Exh. A-11 will be the stipulation of facts, exhibit 11). The facts in the Stipulation are incorporated herein by reference.

the beach concession on certain lands identified as a portion of Tax Map Key Number: (1) 2-3-037:021.” *Id.* The Notice included the following reservation of rights:

DLNR reserves the right to amend, modify, or *cancel* this Request for Scaled Bids, *re-advertise a new request, reject any and all responses in whole or in part*, require amendments or modifications to the responses, or waive any requirement in this request, with no liability whatsoever, when it is in the best interest of the State or DLNR. DLNR also reserves the right to amend or supplement requirements and materials, in writing, *at any time prior to the sealed bid submission deadline.*

Id. (emphasis added) (the above quoted reservation is referred to herein as the “*Reservation of Right*”).

The Solicitation referred potential bidders to a “Concession Contract Bid Package and Instructions” (“*Bid Package*”).

2. The Bid Package.

The DLNR’s Bid Package included (1) a copy of the Solicitation, (2) a section entitled General Information and Instructions, (3) a section entitled Bidder Qualifications, (4) a section entitled Sealed Bids, (5) a section entitled Concession Contract, (6) a section entitled Other Terms and Conditions, and (7) numerous attachments, including the Concession Contract to be executed by the successful bidder. *Bid Package, Exh. A-4.* The Bid Package explained that the Board of Land and Natural Resources “at its meeting on March 11, 2010 (as Agenda Item D-15) authorized² the disposition of the concession contract by sealed bid pursuant to section 171-56 and Chapter 102 of the Hawaii Revised Statutes, as amended.” *Id.* at p. 1 (General Information and Instructions).

Section II.6 of the Bid Package, entitled “Clean-up of Duke Kahanamoku Beach,” referenced the Concession Contract that was included in the Bid Package:

Concession contract requires the concessionaire clean the Duke Kahanamoku Beach once daily before the operation of the concession commences. The applicant shall describe how it plan to comply it the requirement, including, but not limited to the number of employees and type of equipment to be used . . . *Applicant is encouraged to review the contract at Attachment 8 for specific conditions.*

² In approving the DLNR’s request for a concession contract for the Duke Kahanamoku Beach, the Board adopted several of the DLNR’s staff’s recommendations including, but not limited to: (1) a requirement that the monthly concession fee shall increase by 10% every five (5) years; and (2) a requirement that interested parties submit a proposal including the method and frequency of the beach clean-up as part of the bid package. *Stipulation, Exh. A at ¶ B.2, Minutes Exh. A-1.*

Id. at p. 6 (emphasis added).

Section IV of the Bid Package, entitled "Concession Contract," informed potential bidders that "the successful bidder will enter into a concession contract substantially similar to Attachment 8 and will be responsible for performing all of the terms and conditions of the contract." *Id.* at p.10. It also provided that the "monthly concession fee shall increase by 10% every five (5) years" (the "**Escalation Provision**"). *Id.*

Attachment 8 to the Bid Package, on the other hand, which is the form of the Concession Contract, makes no mention of the Escalation Provision. Instead it provides in relevant part:

a. Monthly Concession Fee

The monthly concession fee shall be \$ _____ during the term of his Concession Contract.

b. Frequency of Payments

The Concessionaire shall pay the concession fee to the State, in advance, without notice or demand, on a quarterly basis. The quarterly concession fee payment, which shall be equal to three monthly payments, shall be \$ _____ during the term of this Concession Contract. The first quarterly payment shall be due upon commencement of this contract. Subsequent payments shall be due on the first day of every third month thereafter.

Id. at Attachment 8 at pp.8-9.

The Reservation of Right language was also in the Solicitation. *Bid Package, Exh. A-4* at pp.2 and 11.

3. **The Amended Notice.**

Due to several inconsistencies in the Solicitation, the DLNR published an Addendum to the Solicitation—the Notice to Bidders ("**Addendum**")—from July 9 through July 11, 2010. *Stipulation, Exh. A*, at ¶ B.4. The Addendum included the following amendments to the Solicitation:

(1) The concessionaire shall clean the Duke Kahanamoku Beach by appropriate cleaning machine. Manual cleaning is only allowed in the event the cleaning machine is not able to be used. Condition 3.f of the contract **attached as Attachment 8 in the Bid Package shall prevail** over other sections pertaining to the cleaning requirement in the same Bid Package.

...

(3) The concession contract is intended to allow the concessionaire to conduct commercial business on Duke Kahanamoku Beach. It is not intended to provide exclusive use of the beach for use of beach rental equipment. Similar beach

activities including, but not limited to, use of beach umbrellas and lounge chairs, rented from vendors operating from adjacent private properties will still be allowed. *Addendum, Exh. A-5*. The application deadline for sealed bids was extended to July 21, 2010. *Id.* (emphasis added).

In response to the Solicitation, as amended and the Bid Package, the DLNR received two sealed bids for the Concession Contract: one from Hilton and one from Defendant SBI. *Stipulation, Exh. A* at ¶ B.5. The sealed bids were opened on August 10, 2010. *Id.* at ¶ B.6. Hilton bid \$34,000 per month as payment for the lease (*Id.* at ¶ B7), and Defendant SBI bid \$35,100 per month. *Id.* at ¶ B.8; *see also* Exh. A-6,7.

B. The DLNR Recognized the Defect Between the Terms of the Bid Package and the Concession Contract, and Sought a Waiver from the Two Bidders.

On September 2, 2010, the DLNR sent a letter to the bidders – Hilton and SBI – informing them of “a discrepancy between the [S]olicitation document called the Notice to Bidders and the beach Concession Contract included with the [amended] bid pack[age].” *September 2, 2010 Letter, Exh. A-8*. The DLNR explained that Section IV of the Solicitation contained in the Bid Package provided for an escalation clause that required a monthly concession fee increase by 10% every five (5) years. *Id.* The Escalation Provision, however, was not clearly articulated in the concession contract, included as Attachment 8 to the Bid Package. *Id., compare Bid Package, Exh. A-4* at p. 10 with *Attachment 8 to Exh. A-4* at p. 8.

The September 2, 2010 Letter further provided:

At the present time, in order to go forward with this solicitation, you *both must agree* that the concession Contract be modified or otherwise reformed to clearly state that the concession fee would increase by 10% every five (5) years. In the event we do not receive *unanimous* agreement from both of you within ten (10) calendar days from the date of receipt of this letter, this Department *intends to cancel the solicitation*.

Id. (emphasis added). Hilton did not agree. *Stipulation, Exh. A* at ¶B.11.

C. The DLNR Rejected All Submitted Bids and Cancelled the Solicitation.

As it said it would do in its September 2, 2010 Letter, on September 15, 2010, the DLNR rejected all bids, and cancelled the Solicitation (the “*Cancellation Letter*”). *Cancellation Letter, Exh. A-9*. The DLNR explained:

Due to lack of unanimous consent to the proposed modification or reformation of the Concession Contract, and for the reasons set forth in our letter dated September 2, 2010, we believe *it is in the best interest of the State and the public to reject all*

bids and *cancel* the solicitation; and therefore, *we hereby cancel the Request for Sealed Bids for Duke Kahanamoku Beach Concession* dated June 29, 30 and July 1, 2010 as amended on July 9,10, and 11, 2010.

We encourage you to visit our website . . . for any *future solicitation* for the Duke Kahanamoku Beach Concession Contract.

Id. (emphasis added). Given the defects in the Solicitation, this was the correct action by the DLNR.

D. The DLNR Reconfirmed the Cancellation of the Solicitation and Initially Rejected Defendant SBI's Request for Reconsideration.

On September 23, 2010, Defendant SBI's counsel sent a letter to the then Chairperson of the DLNR, Laura Thielen, requesting that the DLNR go ahead and award the Concession Contract to SBI, and stating the "belief that the current dispute should not, and need not, go beyond [Chairperson Thielen's] office." *Stipulation, Exh. A* at ¶ B.13; 9/23/10 Letter, Exh. A-10. Neither the DLNR nor SBI provided Hilton with a copy of the Letter or its contents. *Id.* at ¶ B.14.

On October 19, 2010, Chairperson Thielen responded to Defendant SBI's request for reconsideration, and copied Hilton's counsel. Ms. Thielen reiterated that the Solicitation *had been cancelled*. 10/19/10 Letter, Exh. A-11, The DLNR explained:

Because the specific *form and content of the concession contract was attached to the solicitation document*, the concession contract could not simply be modified (or reformed) to reflect the solicitation document without first obtaining the approval from all qualified applicants/bidders. *State v. Kahua Ranch, Ltd.*, 47 Haw. 28, 384 P.2d 581 (1963)[.]

Id. (emphasis added, citation in original).

E. The Parties Met and Discussed the Terms of a New Solicitation.

On October 10, 2010, at the request and invitation of the DLNR (including then Chairperson Laura Thielen), Hilton and counsel for Hilton met with the principals of Defendant SBI and with several members of the DLNR (including Ms. Thielen). *Stipulation, Exh. A* at ¶¶ B.17-18. At the beginning of the meeting, Ms. Thielen made clear that reconsideration of the cancellation and rejection of the bids was not going to be discussed at the meeting. *Id.* at ¶ B.19. Discussions were instead held on the DLNR formulating a *new* bid solicitation for the Duke Kahanamoku Beach concession. *Id.* at ¶ B.20. No other topics were discussed, and no definitive conclusions were reached. *Id.*

F. The DLNR Reconsidered Its Cancellation of the Solicitation and Rejection of All Bids at SBI's Request, and Based on Ex Parte Communications With SBI.

On November 9, 2010, and unknown to Hilton, Defendant SBI's counsel wrote to Chairperson Thielen, and again requested the DLNR to award the Concession Contract to SBI. The fact that the DLNR had already cancelled the Solicitation and had rejected all bids was not addressed. *November 9th, 2010 Letter, Exh. A-12*. Again, neither SBI nor the DLNR copied Hilton on the letter, and Hilton was not otherwise made aware of the contents. *Stipulation, Exh. A* at ¶ B.22.

On December 6, 2010, the new and current DLNR Chairperson William J. Aila, Jr. replaced Ms. Thielen as the chairperson of the DLNR. *Id.* at ¶ B.23.

Shortly thereafter, on December 28, 2010, and again unknown to Hilton, counsel for Defendant SBI met with new Chairperson Aila and other DLNR representatives regarding the Concession Contract. *Id.* at ¶ B.24. Hilton was not told there would be a December 28 meeting, and didn't learn that it took place until two days later on December 30, 2010. Clearly, Hilton was not in attendance. *Id.* at ¶ B.25. In fact, even though the meeting was with an attorney for a bidder, not even counsel for the DLNR was present at the meeting. *Id.* As a result of this secret meeting with the new DLNR Chairperson, the DLNR suddenly reversed its position.

On December 30, 2010, Ivan Lui Kwan, counsel for Hilton, received a call from Russell Tsuji of the DLNR. Mr. Tsuji told Hilton (Mr. Lui Kwan) for the first time that (1) the December 28 meeting took place without Hilton; and (2) the DLNR would be awarding the Concession Contract to SBI. *Id.* at ¶ B.26. The December 30, 2010 conversation was the only conversation between any representative of Hilton and any representative of the DLNR regarding the DLNR changing course on cancellation of the solicitation and rejection the bids. *Id.* at ¶ B.24.

G. The DLNR Purported to Reinstate the Cancelled Solicitation, Accept SBI's Rejected Bid, and Award the Concession Contract to Defendant SBI.

On January 4, 2011, after privately meeting with SBI's representatives, Chairperson Aila gave formal notice to Hilton of the DLNR's abrupt reversal of course. He sent a letter informing Hilton and Defendant SBI that the DLNR "reconsidered" its prior Decision to reject all bids and cancel the Solicitation, and was and would be awarding the Concession Contract to Defendant SBI, with different terms from the contract that was attached as Attachment 8 to the Bid Package (the "*Reconsideration Letter*"). *Reconsideration Letter, Exh. A-13*. Mr. Aila's Reconsideration Letter contained a statement that the DLNR had discussed "the matter with each of the bidder's counsel."

Id. To be clear, however, neither Mr. Aila nor anyone else at the DCCA discussed the merits of this change of course with Hilton or Hilton's counsel before the decision was made. Hilton and its counsel *were not* informed or made aware of any discussions to be held with Defendant SBI's counsel, the DLNR and/or the Department of the Attorney General regarding a reconsideration of the DLNR's prior Decision. *Stipulation, Exh. A* at ¶¶ B.25 and B.27. Hilton *was not invited* to participate, and *did not participate*, in any discussions with Defendant SBI, its counsel, the DLNR or the Department of the Attorney General regarding the DLNR's reversal of its prior Decision. *Id.* at ¶¶ B.24-25. In fact, Hilton's counsel was first made aware of the DLNR's reversal of its prior Decision *only after* that decision was made. *Id.* at ¶¶ B.26-27.

III. STANDARD FOR GRANTING SUMMARY JUDGMENT

In *Dairy Road Partners v. Island Ins. Co. Ltd.*, 92 Hawai'i 398, 411, 992 P.2d 93, 106 (2000), the Hawaii Supreme Court explained that:

[s]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . "A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." *Hulsman v. Hemmeter Dev. Corp.*, 65 Haw. 58, 61, 647 P.2d 713, 716 (1982) (citations omitted).

The party moving for summary judgment may discharge its burden by "demonstrating that[,] if the case went to trial[,] there would be no competent evidence to support a judgment" in favor of the non-moving party. *Exotics Hawaii-Kona, Inc. v. E.I. Du Pont De Nemours & Co.*, 116 Hawai'i 277, 301 (2007) (internal quotations and citations omitted); *see also Wagatsuma v. Patch*, 10 Haw. App. 547, 561 (1994).

To defend a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." HRCF Rule 56(e). Thus, "a party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, nor is the party entitled to a trial on the basis of a hope that the party can produce some evidence at that time." *Meridian Mortgage, Inc. v. First Hawaiian Bank*, 109 Hawai'i 35, 43, 122 P.3d 1133, 1141 (Haw. Ct. App. 2005) (internal quotations and brackets omitted).

IV. ARGUMENT

A. Any Contract Awarded Pursuant to the Solicitation is Void Because the Solicitation was Fundamentally Flawed.

The Concession Contract cannot be awarded based on the Solicitation, because the defects caused by the ambiguities in its terms did not afford potential bidders an equal basis from which to bid. The Solicitation was defective, as admitted by the DLNR. As such, the possibility exists that potential bidders considered different terms in determining whether to bid. Therefore, under Hawaii law, the award is void and this Court should require that a new solicitation be issued.

1. Irregularities in the Bidding Process Invalidate Any Contracts Awarded in Accordance with that Process.

The rule in Hawaii has long been “that any irregularity in the bidding process which permits or contributes to bidders submitting bids on different terms or with unequal information *invalidates the bidding and any contract awarded thereon.*” *Brewer Env’t. Indus. Inc. v. A.A.T. Chem., Inc.*, 73 Haw. 344, 348, 832 P.2d 276, 278 (1992) (emphasis added); *Lucus v. American-Hawaiian Eng’g & Constr. Co.*, 16 Haw. 80, *5 (Haw. Terr. 1904) (holding that irregularities “tended to prevent competition and to defeat the law requiring the call for tenders”).³

In *Lucus*, several latent ambiguities with regard to specifications contained in a public bid notice was deemed sufficient to raise an element of uncertainty. *Id.* at *7. As a result, the court held that the contract awarded was void because a “valid contract could not be based upon the faulty specifications.” *Id.* at *5. Where ambiguities exist in the specifications, such ambiguities “tend to prevent competition and to defeat the law requiring the call for tenders.” *Id.* The “fact that the business is in such shape that divergent bids *might be made, whether actually made or not*, should be controlling in considering the validity of the transaction.” *Id.* at *6 (emphasis added).

Similarly, the *Brewer* court, relying on *Lucus*, held that a contract awarded where the bidders did not rely on the same information in preparing their bids was “void and illegal.” *Brewer*, 73 Haw. at 350, 832 P.2d at 280. The *Brewer* court explained that “genuine competition can only result when parties are bidding against each other for precisely the same thing on precisely the same footing.” *Id.* at 348, 832 P.2d at 278. The “*mere possibility*” of “*any* irregularity in the bidding process which *permits or contributes to bidders submitting bids on different terms or*

³ The policies underlying competitive sealed bidding for procurement contracts are equally applicable to concession contracts under HRS Chapter 102 because legislative history reveals that the sealed bidding procedures under HRS § 102-2 are based upon the State’s procurement laws.

unequal information invalidates the bidding and any contract awarded thereon.” *Id.* (emphasis added). “Where contract specifications are *indefinite or misleading* as to prevent real competition between the bidders, no valid contract can exist.” *Id.* (citing *Wilson v. Lord Young Eng’g Co.*, 21 Haw. 87 (1912))(emphasis added).

2. The Solicitation Contained an Irregularity.

The Solicitation contained an ambiguity that was “indefinite or misleading” and permitted potential bidders to consider different terms, preventing the purpose behind the competitive sealed bid process—“real competition between bidders.” The Solicitation included an Escalation Provision that provided “the monthly concession fee shall increase by 10% every five (5) years.” *Bid Package, Exh. A-4* at p.10. It also expressly informed bidders that they would be required to “enter into a concession contract *substantially similar to Attachment 8* and will be responsible for performing all of the terms and conditions of the contract.” *Id.* at p.10. The section regarding the monthly concession fees contained in Attachment 8, however, did not include any reference to an Escalation Provision. *Id.* at Attachment 8 at pp.8-9.

3. The DLNR Admitted the Solicitation Was Flawed, and Properly Determined that the Flaw Could Not Be Corrected Without the Approval of All Bidders.

In its September 2, 2010 Letter, the DLNR admitted that the Solicitation contained a material ambiguity, and sought Defendant SBI and Hilton’s consent to modify the Concession Contract. *September 2nd Letter, Exh. A-8* (explaining “there is a discrepancy between the solicitation document called the Notice to Bidders and the beach Concession Contract included with the bid package”). As a result, on September 15, 2010 the DLNR cancelled the Solicitation and rejected all bids. *September 15th Letter, Exh. A-9*.

The DLNR knew the flaw was material—“there was a discrepancy between the solicitation document and the concession contract with respect to the automatic concession fee escalation clause.” *See October 19th Letter, Exh. A-11*. “[T]he specific form and content of the concession contract [which did not contain the escalation clause] *was attached to the solicitation document . . .*” *Id.*

In *State v. Kahua Ranch, Ltd.* 47 Haw. 28, 384 P.2d 581 (1963)—on which the DLNR relied in originally denying SBI’s request that the Concession Contract be awarded despite a flaw in the Solicitation—the court was asked to determine whether the trial court erred in allowing the awarding agency to modify a lease for land due to a mistake contained in the original public bid

notice. *Id.* 47 Haw. at 33, 384 P.2d at 585. In finding that the trial court did err, and that the lease could not be modified, the *Kahua Ranch* court explained that a contract “let pursuant to statute at public auction” cannot be modified after the bidding occurs because “statutory provisions of Hawaii *forbid* any agreement between the State and a prospective bidder . . . *inconsistent with the terms of the notice of sale as published.*” *Id.* 47 Haw. at 37, 384 P.2d at 586 (emphasis added). The court further explained:

Under a statutory sale of a lease of public lands at public auction, bids are made in reliance on the terms and conditions specifically expressed in the published notice of sale. Reformation would create a lease different from that which was offered at public auction. . . . *It would destroy the element of certainty in public competitive transactions and contravene the mandatory requirements of the statutes.* . . . In order to attain competitive bidding in its true sense, proposal for bids must be invited under circumstances which afford a fair and reasonable opportunity for competition. Consequently it is essential that the bidders, so far as possible, be put on terms of perfect equity, so that they may bid on substantially the same proposition, and on the same terms.

Id. at 36-38, 384 P.2d at 587. As a result, “any such agreement contrary to the terms of the published notice of sale would be illegal and unenforceable[,]” otherwise “the statutory requirements become meaningless.” *Id.*, 384 P.2d at 587.

4. The Flaw in the Solicitation Renders Any Award Void.

Under *Lucus*, *Brewer*, and *Kahua Ranch*, the DLNR properly cancelled the Solicitation and rejected the bids. The flaws rendered the Solicitation subject to more than one reasonable interpretation, negatively affecting the integrity of the public bid process. For example, one potential bidder could have relied on the Solicitation’s statement that a successful bidder would be required to enter into a contract “substantially similar” to Attachment 8.⁴ Another potential bidder could have relied on the Escalation Provision contained in the Solicitation, providing for escalation of lease rents. The inconsistency in these terms would “permit or contribute to bidders submitting bids *on different terms or with unequal information*,” and therefore, under the progeny of *Lucus*,

⁴ It would have been reasonable to rely on the provisions contained in Attachment 8, as opposed to the Solicitation, given the following: (1) the Amended Notice expressly provided that with respect to any inconsistency between the Solicitation and Attachment 8, Attachment 8 “shall prevail” over other sections (Addendum, Exh. 5) (with respect to the beach cleaning provisions); and (2) the Solicitation referred bidders to Attachment 8 for “specific conditions” (Bid Package, Exh. 4 at p.6 ¶ 6) (also with respect to beach cleaning provisions); and (3) the Solicitation expressly provided that “the successful bidder will enter into a concession contract substantially similar to Attachment 8.” *Id.* at p.10.

the conflict “invalidates the bidding and any contract awarded thereon.” It is not necessary to prove an actual affect on potential bidders—the mere possibility is sufficient. Accordingly, Hilton’s motion should be granted because any contract awarded pursuant to the Solicitation would be void.

B. The Plain Language of HRS Chapter 102 Requires a New Solicitation Once All Bids Are Rejected, and Renders Void Any Contractual Agreement Awarded in Violation of HRS Chapter 102.

The award of the Concession Contract to Defendant SBI will violate the plain language of HRS §§ 102-2, 102-4 , and 102-9, and is *per se* void under HRS § 102-15. That section provides that “any contract awarded or executed in violation of sections 102-1 to 102-12 shall be void.” Under the plain language of HRS Chapter 102, a new solicitation is required once all bids are rejected. HRS § 102-2 prohibits the letting of a concession space *except* “after public notice.”⁵ (emphasis added.). Once the bids are received and opened, HRS § 102-9 commands that if “the highest and best bid or any other bid *is rejected*, . . . the officer may, in the officer's discretion, award the contract to the next highest and best *remaining* responsible bidder.” *Id.* (emphasis added). Here there are no remaining bidders, as all bids have been rejected.

Interpreting a similar statute, the Louisiana Supreme Court held that “the only alternative that a public board has under the statute is to reject any and all bids and readvertise for the same.” *Sternberg v. Bd. of Comm’r of Tangipahoa Drainage Dist.*, 105 So. 372 (La. 1925) (discussing Section 2 of Louisiana Act 249⁶). In that case, the controlling statute similarly mandated an award to the lowest bidder, but reserved to the awarding agency the right to reject any and all bids. *Id.* at 373. Interpreting that statute, the Louisiana court explained:

Notwithstanding the right to reject, the bid must be awarded in competition to the lowest possible bidder, if awarded at all. Clearly an award made to a bidder, *after all bids have been rejected* . . . is illegal and wholly unauthorized[.]

⁵ HRS § 102-2 provides in pertinent part: “no concession or concession space shall be leased, let, licensed, rented out, or otherwise disposed of either by contract, lease, license, permit or any other arrangement, except under contract let *after public notice for sealed bids* in the manner provided by law.” (emphasis added.).

⁶ Section 2 of Act 249 provided: “drainage and other public boards ‘shall meet at the time and place set and in open session shall receive, open and read all bids and *shall then and there award said bids to the lowest possible bidder*, provided they *shall have the right to reject any and all bids* and proposals and readvertise for same.” (emphasis added.).

Id. (emphasis added).

Here, the DLNR properly “rejected all bids” having found “it is in the best interest of the State and the public to reject all bids.”⁷ *November 15th 2010 Letter, Exh. A-9*. As a result there were no remaining “responsible bidders” to whom the Concession Contract could be awarded as allowed by the plain language of HRS § 102-9. Thus, to award the contract, the DLNR is required to initiate a new bidding process. *See*, HRS §§ 102-2, 102-4. In other words, once the DLNR rejected *all* of the bids, the DLNR must start the process over before it can enter into a lease for the concession space. *See Marshall Constr. Co., Ltd. v. Bigelow*, 29 Haw. 641 *2 (Haw. Ter. 1927) (where bids were requested a second time after all bids from the first request were rejected).

Therefore, under the plain language of HRS § 102-15, the DLNR’s purported award of the Concession Contract to Defendant SBI is void because it violates HRS § 102-2, and the DLNR must issue a new solicitation.

C. The DLNR’s Revival of a Cancelled Solicitation and Rejected Bid Exceeds Its Authority Under HRS Chapter 102 and Is Invalid.

The DLNR lacked the authority to revive the cancelled Solicitation and the rejected bids. It is well established that “an administrative agency can only wield powers expressly or implicitly granted to it by statute[.]” *Kewalo Ocean Activities v. Ching*, 124 Hawaii 313, 323, 243 P.3d 273, 283 (Haw. App. 2010) (citations omitted).

The primary duty of the courts in interpreting statutes is to ascertain and give effect to the intention of the legislature which, in the absence of a clearly contrary expression is conclusively

⁷ There is no question that the DLNR had the ability to reject, and properly rejected, all bids and to cancel the solicitation. The New Jersey superior court explained that the rejection of bids is proper when “the right to do so has been reserved” and there is “confusion or ambiguity created by the specifications prepared by the [awarding agency].” *A & D Constr. Co., Inc. v. City of Vineland*, 418 A.2d 1319 (N.J. Super 1980) (citations omitted) (hereinafter “*A&D*”); *see also D.J. Talley & Son, Inc. v. New Orleans*, 303 So.2d 195 (4th Cir. 1974) (where uncertainties in the bid specifications gave rise to disputes and the *possibility of litigation*, the rejection of all bid was appropriate); *Bielec Wrecking Lumbar Co. v. McMorran*, 251 N.Y.S.2d 331 (N.Y. 1964) (holding a rejection was proper because it was based on consideration of potential litigation resulting from confusion and inconsistency in the specifications).

Here, HRS § 102-5 provides in pertinent part that “the officer calling for bids may reject any and all bids . . . when in the public officer’s opinion such rejection . . . will be for the best interest of the public.” The DLNR determined that it was in the “best interest of the State and the public to reject all bids and cancel the solicitation” because an ambiguity existed in the Bid Package that had been prepared by the DLNR. Given the inconsistency between the Solicitation and the form of the Concession Contract, the DLNR faced the possibility of litigation.

obtained from the language of the statute itself. See *Kaiama v. Aguilar*, 67 Haw. 549, 554, 696 P.2d 839, 842 (1985). Under the plain language of HRS Chapter 102, the DLNR lacked the power to award the Concession Contract to Defendant SBI. HRS Chapter 102 authorizes the DLNR to reject any and all bids (HRS § 102-5 (1984)), to waive any defects contained in the bids (*Id.*), and to modify, under certain circumstances not applicable here, the contract terms (HRS § 102-10 (1965)).⁸ None of these sections, however, confer upon the DLNR the authority to revive the cancelled Solicitation, and/or to revive the rejected bids.

While “an administrative agency’s authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted” (*Kaleikini*, 124 Hawaii at 33, 237 P.3d at 1099), the power to reconsider and/or revive cancelled solicitations and rejected bids is not an implied power necessary to carry out the power to solicit bids. In fact, the power to reconsider and/or revive is directly contrary to the powers expressly granted. As explained *supra*, once all of the bids submitted pursuant to a particular solicitation are rejected, the plain language of the statute *requires* the awarding agency re-solicit bids to be in compliance with HRS § 102-2. Accordingly, the attempt to revive the cancelled Solicitation and the rejected bids is invalid.

D. The DLNR Did Not Reserve to Itself the Right to Reconsider Its Decision, Revive the Canceled Solicitations, or Revive the Rejected Bid.

The DLNR may only reserve powers to itself that are within those powers conferred to it under HRS Chapter 102. As discussed above, HRS Chapter 102 did not confer the power to revive the Solicitation and the bids. Assuming for argument sake, however, that the DLNR could reserve such powers, the DLNR failed to do so under the Reservation of Rights.

Under the Solicitation, the DLNR reserved to itself only the “right to amend, modify, or *cancel*⁹ th[e] Request for Sealed Bids, *re-advertise a new request, reject* any and all responses in whole or in part, require amendments or modification to the responses, or waive any requirement in this request.” Notice of Solicitation, Exh. 3 and Bid Package Exh. 4 at pp. 2 and 11. The DLNR further reserved to itself the right to “amend or supplement requirements and materials, in writing,

⁸ HRS § 102-10 allows a contract to be modified, after it has been executed, when (1) “there has been a reduction of fifteen percent or more in the volume of business of the concessionaire for a period of sixty days or more” or (2) construction work conducted on or contiguous to the public property upon which the concession is located. HRS § 102-10 (1963). HRS § 102-10 is inapplicable to this case.

⁹ The Notice to Bidders contained in the Bid Package also provides “the DLNR may cancel the Request for the Request for Sealed Bids.” Bid Package, Exh. 4 at p. 9.

at any time prior to the scaled bid submission deadline.” *Id.* The DLNR, however, did *not* reserve to itself the right to reconsider and/or revive bids it already rejected, did *not* reserve to itself the right to reconsider and/or revive a Solicitation previously cancelled, and did *not* reserve to itself the right to award the Concession Contract to a party based on a rejected bid for a cancelled Solicitation, before or *after the submission deadline* and based on an irregular Solicitation. Therefore, the DLNR cannot award the Concession Contract to Defendant SBI.

E. Courts in Other Jurisdictions Have Held it is Improper to Revive a Rejected Bid and Award a Contract Pursuant Thereto.

While Hawaii courts have not yet addressed this particular issue, courts in other jurisdictions have held that it is improper to award a contract to a bidder whose bid has already been rejected. *See, Sternberg*, 105 So. 372 (holding that where a bid has been rejected, the only way to proceed is to re-solicit new bids); *see also A & D*, 418 A.2d 1322 (explaining “once rejected, the bids were no longer valid and could not be reconsidered”).

In *Sternberg*, the defendant agency sought bids on a drainage project that included four separate contracts. For reasons not discussed in the opinion, the defendant rejected all bids and returned deposit checks to the bidders. *Sternberg*, 105 So. at 373. Shortly thereafter, and upon request from two different bidders (to whom the contracts were ultimately awarded), the board decided to reconsider the rejected bids. *Id.* at 374. The board noted that one bidder had improperly included costs associated with contract 4, in his submissions for contracts 1 and 2, and in reconsidering the rejected bids, the board altered the bid submissions to not include those portions that “were not required nor contemplated by the plans and specifications.” *Id.* The board cited its “reserved” right “to reject any and all bids and to waive any informality in the bids received” as justification for its reconsideration of rejected bids, alteration thereto, and subsequent award. *Id.* The Louisiana court, however, held “a public board cannot *be permitted to reconsider bids after they have been once rejected.*” *Id.* at 375. (emphasis added). Such an award is invalid because it is “not submitted to public competition, as required by the statute” and is “in the nature of a new bid and a private contract between [the awarding agency] and the [winning bidder].” *Id.* at 373. Similar to *Lucus* and *Brewer*, the *Sternberg* court explained:

It is well settled that ‘the basis of the bidding and the contract entered into should be the same, for otherwise the very object and purpose of the law in calling for competitive bidding might be thwarted. ‘To require the bids upon one basis and award the contract upon another would, in practical effect, be an abandonment of all bids.

Id. The “only legal course to be pursued in such case is to readvertise for bids to be awarded in competition to the lowest possible bidder.” *Id.* at 375.

Similarly, in *A & D*, 418 A.2d 1320, the New Jersey court held that it was improper for the city council to revive a bid previously rejected. In that case, the city advertised and requested competitive bids for a sidewalk project. *Id.* The bid package contained detailed instructions plus “addenda” that further explained the project, similar to the Bid Package here that contained Attachment 8. *Id.* The city council received five (5) bids; however, due to confusion created by the “addenda” the council rejected the submitted bids and sought new bids. *Id.* After receiving new bids, the city reversed course, revived a bid previously rejected, and awarded the contract to that bidder. *Id.* Relying on the public policy that underlies competitive bidding statutes, the court held the award was void because “once rejected, the bids were no longer valid and could not be considered.” The court explained that New Jersey courts adopted this approach as a “prophylactic measure” bearing in mind the purposes of the act – “to guard against favoritism, improvidence, extravagance and corruption.” *Id.* at 1321. The court further explained that “in this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposefully left that way.” *Id.*

Similar to *Sternberg* and as discussed above, the DLNR did not have the authority to revive the rejected bids. The only legal course to be pursued pursuant to HRS Chapter 102 is a new solicitation for the Concession Contract. As in *Sternberg* and *A&D*, this Court should bear in mind the public policy behind Hawaii’s competitive bidding statutes, elucidated in *Lucus* and *Brewer* (discussed *infra*), and hold that any purported award to Defendant SBI is void.

F. Considering the Issue Under Contract Principles Leads to the Same Result

The solicitation and resulting bids can also be considered under the principles of contract law. Under basic contract principles of offer and acceptance, it was improper for the DLNR to accept a bid after it had rejected all bids. Here, the Solicitation is in the nature of an invitation to bid on the concession contract, and the resulting bids from SBI and Hilton were offers to enter into a lease for the concession. See 64 Am. Jur. 2d Public Works and Contracts § 43 (“The advertisement is nothing more than a solicitation of bids or proposals . . . ; the contractor’s bid is the offer to contract.”). Both offers terminated or lapsed when the DLNR expressly rejected the offers by its letter dated September 15, 2010. See 1 Williston on Contracts § 5:3 (4th ed.) (“When an offer has been rejected, it ceases to exist . . .”). The DLNR’s power of acceptance was also

terminated by its rejection of the bids. See Restatement (Second) of Contracts § 36 (1981) (“An offeree’s power of acceptance may be terminated by . . . rejection . . .”).

Necessarily, therefore, the DLNR did not have the power to accept SBI’s bid after it expressly rejected SBI’s bid, unless SBI renewed its offer. Under HRS § 102-2, it is improper for the DLNR to accept such an offer because the DLNR may only accept offers in the form of “sealed bids” after “public notice.” HRS § 102-2. Since the DLNR rejected all the offers and terminated its power of acceptance, the DLNR must re-solicit bids to comply with HRS § 102-2.

G. It Would Be Inequitable to Allow the DLNR to Award the Concession Contract to SBI, When the DLNR’s Decision Was Made Based on *Ex Parte* Communications With SBI’s Counsel, and Without Notice to Hilton—Conduct that Opens the Door to Favoritism and Fraud.

The DLNR decided to reverse its Decision and award the Concession Contract to SBI, modifying the terms of the contract. This reversal took place *after* SBI’s meeting, *ex parte*, with new Chairperson Aila. Reversing course and allowing the award of the Concession Contract under these circumstances would thwart the underlying purpose of HRS Chapter 102 – to guard against favoritism, corruption, extravagance and improvidence (*Lucus*, 16 Haw. 80 at *6)— by placing Hilton on uneven footing relative to SBI, and would sanction the appearance of impropriety, and of favoritism.

The communications between the DLNR and SBI raise, at a minimum, an appearance of impropriety. The parallel statute, HRS Chapter 103D concerning procurement, which involves the competitive bidding process, suggests that the parties involved in the bid process, including the State, must avoid even the *appearance of impropriety* and act in good faith. HRS § 103D-101 provides:

(b) Any actual or prospective bidder, offeror, [contractor], or business taking part in the conduct of public procurement, shall act in good faith to practice purchasing ethics, and when applicable display business integrity as a responsible offeror through the public procurement process, including but not limited to the following:

- (1) avoiding the intent and *appearance of unethical behavior* or business practices;
- (2) refraining from any activity that *would create the appearance of impropriety or conflicts of personal interest* and the interest of the state or countries.

(4) ensuring that all persons are afforded an equal opportunity to compete in a fair and open environment.

(c) All parties involved in the negotiation, performance, or administration of state contracts *shall act in good faith*.

HRS § 103D-101 (emphasis added).

In this case, the communications between the DLNR and Defendant SBI would, in the procurement context, violate this statute, and illustrates a lack of respect for the fairness and integrity of the process. The DLNR, under the guidance of Ms. Thielen, invited *both* Hilton and Defendant SBI to discuss the possible re-solicitation of the Concession Contract in October. *Stipulation, Exh. A* at ¶ B.17. The same courtesy, however, was *not* extended in December when the issue of reconsideration was address by newly appointed Chairperson Aila. *Stipulation, Exh. A* at ¶¶ B.23-26. While the Defendants conceivably could have believed they were proceeding in good faith, their actions, at a minimum, raise the appearance of impropriety. This defect can only be properly addressed by the issuance of a new solicitation.¹⁰

Defendants' *ex parte* communications resulted in the conversion of Defendant SBI's previously rejected bid into a new, acceptable bid upon which the Concession Contract was purportedly awarded. This clearly undermines the purpose and intent of HRS Chapter 102 and the necessity of HRS §102-2's public notice requirement, and rendered HRS § 102-15 meaningless. Requiring the DLNR to re-solicit the Concession Contract pursuant to HRS § 102-2 will "leave the door tightly closed" and ensure that "genuine competition" results where all potential bidders consider "precisely the same thing on precisely the same footing."

¹⁰ In *Brewer*, the court held invalid a public contract that had been awarded where the bidder engaged in *ex parte* communications with the awarding agency. *Brewer*, 73 Haw. at 350, 832 P.2d at 280. Although the court recognized there was no "inside" information provided, the court explained that "the *mere possibility* that inside information could be provided and could be used to give an advantage to one bidder rendered the bidding process and any contract awarded thereon invalid and void." *Id.* at 348, 832 P.2d at 278 (emphasis added).

V. **CONCLUSION**

For the reasons set forth above, Hilton respectfully requests that summary judgment be granted in its favor.

DATED: Honolulu, Hawaii: May 23, 2011.



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LAND DIVISION

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HILTON HAWAIIAN VILLAGE LLC, a
Hawaii limited liability company,

Plaintiff,

vs.

STAR-BEACHBOYS, INC., a Hawaii
corporation; STATE OF HAWAII,
DEPARTMENT OF LAND AND
NATURAL RESOURCES; WILLIAM J.
AILA, JR., in his capacity as Interim
Chairperson, and DOES 1-20,

Defendants.

) CIVIL NO. 11-1-0158-01 (RAN)
) (Declaratory and Injunctive Relief)
)
) DEFENDANT STAR-BEACHBOYS,
) INC.'S MOTION FOR SUMMARY
) JUDGMENT ON THE COMPLAINT;
) MEMORANDUM IN SUPPORT OF
) MOTION; DECLARATION OF
) ANTHONY A. RUTLEDGE, SR.; NOTICE
) OF HEARING AND CERTIFICATE OF
) SERVICE
)
) Hearing: JUL 13 2011
) Date:
) Time: 8:30 A.M.
) Judge: Honorable Rhonda A. Nishimura
) No Trial Date Set
)

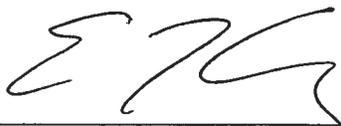
**STAR-BEACHBOYS, INC.'S MOTION FOR SUMMARY JUDGMENT
ON THE COMPLAINT**

Defendant Star-Beachboys, Inc.'s ("Defendant") by and through its undersigned
counsel, hereby move for entry of an order granting summary judgment in Defendant's favor and
against Plaintiff Hilton Hawaiian Village, on all counts of Plaintiff's Complaint filed on January

21, 2011. There are no genuine issues of material fact and Defendant is entitled to judgment in its favor as a matter of law.

Defendant brings this Motion pursuant to Rule 56 of the Hawaii Rules of Civil Procedure. The Motion is supported by the memorandum, declaration attached hereto, and by the records, files and pleadings in this case.

DATED: Honolulu, Hawaii, May 19, 2011.



MICHAEL JAY GREEN
EARL I. ANZAI
Attorneys for Defendant

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HILTON HAWAIIAN VILLAGE LLC, a Hawaii limited liability company,	)	CIVIL NO. 11-1-0158-01 (RAN)
	)	(Declaratory and Injunctive Relief)
)	
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
	)	MOTION
vs.)	
)	
STAR-BEACHBOYS, INC., a Hawaii corporation; STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES; WILLIAM J. AILA, JR., in his capacity as Interim Chairperson, and DOES 1-20,)	
)	
Defendants.)	
)	
)	
)	
)	
)	

**MEMORANDUM IN SUPPORT OF DEFENDANT STAR-BEACHBOYS, INC.’S
MOTION FOR SUMMARY JUDGMENT ON THE COMPLAINT**

Defendant Star-Beachboys, Inc. (“Star-Beachboys”) requests judgment be entered in their favor and against Plaintiff because Star-Beachboys was the successful bidder. Further, the omission of an escalation clause, highlighted in the Bid Notice but not present in the sample contract, is immaterial and did not affect the integrity of the bid process. Thus, Hilton has no grounds to challenge the bid process.

I. INTRODUCTION

Hilton and Star-Beachboys were the only bidders for the Duke Kahanamoku Beach Concession Contract. One of the terms for the concession was an escalation clause providing the monthly concession fee would be increased by 10% every 5 years of the 15 year term. A **sample**

concession contract was attached to the bid package as Attachment 8 and bidders were notified the concession contract would be substantially similar. Ex* 4, p 10.

Nowhere does Hilton provide any legal basis for challenging the award of the concession contract. Nothing in Chapter 102 of the Hawaii Revised Statutes gives a losing bidder such as Hilton an “opportunity to participate” in communications between the winning bidder and the DLNR **after** bids are opened.

Hilton has never asserted it was unaware of the 10% escalation clause. Hilton never questioned the omission of the escalation clause in the sample contract. Nor has Hilton asserted it was prejudiced by the absence of the 10% clause in the sample contract. Hilton has never posited how the insertion of the 10% clause in the concession contract would benefit Star-Beachboys or how it would disadvantage Hilton. Nevertheless, Hilton filed the Complaint.

III. BACKGROUND

The escalation clause was specified in the “Sale of Concession by Sealed Bid...” Dated March 11, 2010. Ex 1. It was reiterated in the Concession Contract Bid Package and Instructions of the “Request For Sealed Bids”. Ex 4.

a. The Concession Contract Bid Package And Instructions

The Concession Contract Bid Package And Instructions specifically admonishes “Each applicant is responsible for reading and understanding all of the terms and conditions of the entire concession contract prior to submitting an Application.” Ex 4, p 10.

The Notice of Intent To Bid and Qualification Questionnaire also required bidders to declare “it has thoroughly examined and understands all of the terms, conditions and

*All references to exhibits or facts are in the Stipulation of Facts and Exhibits 1-17.

requirements of the Duke Kahanamoku Beach Concession Request For Sealed Bids and the Concession Contract included in the Request for Sealed Bids.” Ex 4. (Attachment 2, at v., to the Concession Contract Bid Package And Instructions). The Bid Proposal contains similar language regarding thorough examination and understanding of the terms, conditions and requirements.

Ex 4. Attachment 3.

b. The 10% Escalation Clause

Directly after discussing the concession fee the 10% escalation clause is prominently set forth:

“Concession Fee Reopening. The monthly concession fee shall increase by 10% every five (5) years.”

Ex 4, p 10.

c. The Sample Contract

The Concession Contract Bid Package and Instructions (at Section IV, Concession Contract) also states “The successful bidder will enter into a concession contract substantially similar to Attachment 8” Ex 4. That sample contract is a boilerplate document containing various blank spaces meant to be filled in when the contract is executed. For example, the very first page states:

This Concession Contract made this ____ day of _____, 2010, by and between the State of Hawaii, by its Board of Land and Natural Resources, hereinafter referred to as the “State,” and SALE BY SEALED BID, whose principal place of business and mailing address is _____, hereinafter referred to as the “Concessionaire.” Concession Contract at p. 1.

Similarly, on page 8 of Attachment 8, four more blank spaces meant to be filled in when the final contract is executed are present:

4. TERM

The term of this Concession Contract shall be for fifteen (15) years, commencing on _____, 2010, and terminating on _____, 2025.

5. MONTHLY CONCESSION FEE

a. Monthly Concession Fee

The monthly concession fee shall be \$ _____ during the term of this Concession Contract.

b. Frequency of Payments

The Concessionaire shall pay the concession fee the State, in advance, without notice or demand, on a quarterly basis. The quarterly concession fee payment, which shall be equal to three monthly payments, shall be \$ _____ during the term of this Concession Contract. The first quarterly payment shall be due upon commencement of this contract.

Id. at p. 8.

Furthermore, Attachment 8 also contains areas reserved for other contract terms:

9. RESERVED

10. RESERVED

11. RESERVED

Id. at p. 9.

The missing terms, blank spaces, and reserved spaces in it clearly show that Attachment 8 is not the finalized version the winning bidder would be required to sign. In any case, Hilton never questioned the omission of the escalation clause in the sample contract. Nor can Hilton logically claim it relied on the sample contract to prepare its bid.

d. The Award

The Request For Sealed Bids specifically provided the concession contract “shall be awarded to the qualified bidder that submits the highest bid....” (Emphasis added). Bids were opened, and Star-Beachboys had submitted the highest bid. Ex 4, p 8.

It was later determined by the State of Hawaii Department of Land and Natural Resources (“DLNR”) that: 1) the Notice to Bidders provides for an escalation clause that clearly states the monthly concession fee shall increase by 10% every five (5) years; 2) the 10% escalation clause was not “clearly articulated” in the concession contract attached to the bid package. Ex 8. DLNR would not issue the concession contract without the consent of both bidders. Id. Unsurprisingly, Hilton refused to consent. Ex 9.

On January 4, 2011, the DLNR announced it had reconsidered the cancellation:

After discussing the matter with each of the bidder’s counsel, and after much consideration and thought and in consultation with the Department of the Attorney General, our Department has decided to reconsider its prior cancellation of the solicitation of the Duke Kahanamoku Beach Concession. The Department has decided to award the concession contract to Star-Beachboys which submitted the highest base bid of \$35,100 per month. The concession contract will be modified to include the requirement of a 10% escalation of concession payments after the 5th and 10th anniversary dates of the 15 year concession contract which was clearly contained in the solicitation document, the Notice to Bidders.

Ex 13.

III. STANDARD OF REVIEW

Summary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances. State v. Zimring, 52 Haw. 472, 475, 479 P.2d 202, 204 (1970), *reh'g denied*, 52 Haw. 526, 479 P.2d 202 (1971).

The movant must show there is no genuine issue of material fact and it is entitled to judgment as a matter of law. HRCP Rule 56. A court reviewing a motion for summary judgment must view “all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.” Beamer v. Nishiki, 66 Haw. 572, 578, 670 P.2d 1264 (1983).

IV. ARGUMENT

Factually, there is no dispute Star-Beachboys was the high bidder. Further, there is no dispute the Request for Sealed Bids specified the 10% escalation clause. Even more compelling is the inescapable conclusion that Hilton cannot logically complain that they would have increased their losing bid had they known the rents would be escalated by 10% every 5 years!

The law is equally unsupportive of Hilton. The “prime object” of statutory provisions regulating the bidding process is to insure there is “[a] fair competition among the bidders.” Lucas v. American-Hawaiian Eng’g & Constr. Co., 16 Haw. 80, 832 P.2d 276 (1992). Genuine competition occurs when “parties are bidding against each other for precisely the same thing and on precisely the same footing.” Id. at 80. A contract should only be invalidated when the specifications are “*indefinite or misleading* as to prevent *real competition* between the bidders.” Brewer Env’tl. Indus. Inc. v. A.A.T. Chemical, Inc., 73 Haw. 344, 348, 832 P.2d 276 (1992) (citing Wilson v. Lord Young Eng’g Co., 21 Haw. 87, 89 (1912)). (Emphasis added). The question for the court is “whether the bidding procedure was inherently defective” as to render the resulting contract invalid. Federal Electric Corp. v. Fasi, 56 Haw. 57, 60, 527 P.2d 1284, 1287 (1974).

1. The 10% Escalation Clause Was Clearly Articulated In The Bid Package, Therefore Putting Both Bidders On “Precisely The Same Footing” In The Bidding Process.

Star-Beachboys and Hilton received the same Concession Contract and Bid Package that *clearly* articulated the 10% escalation clause. *See* Ex 4, p. 10. Because the 10% escalation clause was clearly articulated, no “indefinite” or “misleading” specification existed that put the bidders on unequal footing. *See* Brewer, 73 Haw. at 348.

2. The 10% Escalation Clause Was Clear And Made Competitive Bidding Possible.

Hilton has not and reasonably cannot claim it did not understand the import of the 10% escalation clause. Thus, the clause cannot be an indefinite provision which would render the bid process defective.

In Lucas, the Territory of Hawaii requested bids for removing an existing structure and constructing Brewer's Wharf and Shed. The wharf platforms, or "piles" were to be removed, but the Department of Public Works reserved "the right to use, in the new structure, any of the old piles that may be suitable." Lucas, 16 Haw. at 83. This specification did not say what percentage of the new work old piles could be used, rendering "definite and exact bidding impossible." Id. at 89. The court concluded this specification was "too indefinite to be the basis for competitive bids" because it was "impossible...to see how any intending bidder could intelligently provide" a definite bid when the bidder faced "conditions purely speculative." Id. at 88-89. The indefinite provision rendered the contract "fatally defective." Id. at 92.

Unlike the situation in Lucas, the 10% escalation clause was included in the Bid Package and was clear and definite in nature. The specifics of the concession bid were definitely "decided in advance" and each bidder, having the 10% escalation clause "within reach," was able to "bid intelligently" on the concession contract. Id. at 90 (Provisions require "information to be put within the reach of bidders as will enable them to bid intelligently and...enable the official having charge of the proposed work to know whose bid is the lowest.").

3. Hilton Suffered No Prejudice Due To The Absence Of The 10% Escalation Clause In The Sample Contract

Hilton cannot claim it was unaware of the 10% escalation clause. Thus, the absence of it in the sample contract is irrelevant and immaterial. On the other hand, its absence in the awarded contract would prejudice Hilton but that is not the case here.

The inclusion of the 10% clause in the contract to be awarded gives no benefit to Star Beachboys. Thus, the absence of the 10% escalation clause in the sample contract did not result in prejudice to Hilton.

4. Star-Beachboys Received No Unequal Information Prior To The Closing Of The Bids.

The winning bidder must receive unequal information **before** the closing of bids in order to form the basis for an appeal by the losing bidder. In Brewer, 73 Haw. at 348, the City issued a Notice to Bidders soliciting sealed tenders for the furnishing and delivery of liquid chlorine for water and wastewater treatment for an 18-month period. Id. at 346. Brewer Environmental Industries (BEI) submitted a timely bid for the contract. Id. Another bidder, A.A.T. Chemical, Inc. (AAT) requested an extension of the bidding deadline because the quantity stipulated in the bid document needed “clarification as to the number of one-ton cylinders that are most likely going to be required during the contract period.” Id. Clarification was sought because the number of one-ton cylinders required directly affected the bid price. Id. AAT was instructed to obtain the specific information from the Sand Island sewage treatment plant, and after obtaining the information, AAT concluded that fewer one-ton cylinders would be required than the quantity estimated in the contract specifications. Id. at 346-37. Although various BEI representatives contacted the City and inquired about the reason for the bidding extension, “no

specific, additional information modifying the contract specifications” was provided to BEI. Id. at 347. AAT, the low bidder, was awarded the contract. Id.

The Hawaii Supreme Court concluded AAT had “acquired **additional material** information...modifying the contract specifications” **before** the bids were sealed. Id. at 349. The City’s failure “to act in good faith, the City’s provision of additional information, which in effect altered the contractually specified quantity, destroyed the requisite equal competitive footing of the bidders and invalidated the bidding process.” Id. at 351.

Here, the bidding process ended on July 21, 2010, the application deadline for bidders. Ex 4, Addendum. During the bidding process, both Star-Beachboys and Hilton received *exactly* the same bidding packages that contained the 10% escalation clause. Star-Beachboys did not receive additional information that Hilton was not privy to, nor was there even the mere “possibility” that inside information was provided to Star-Beachboys, during the bidding process (*i.e.*, before the bids were sealed and given to DLNR). See Brewer, 73 Haw. at 348-49. Star-Beachboys was given no unfair advantage in the bidding process, and therefore Hilton cannot even show “at a minimum...that there was some *genuine impropriety* in the bidding process itself.” Mathiowetz Construction Comp. v. Minn. Dep’t of Transportation, 137 F. Supp. 2d 1144, 1149 n.6 (2001). (Emphasis added).

5. The Harmless Omission Of The Escalation Clause From The Sample Contract Does Not Render The Entire Bidding Process And The Contract Award Void.

Obviously, the contract attached to the Request For Sealed Bids was only a boiler plate *representation* of the contract the successful bidder would enter, not the *exact* contract the successful bidder would be required to sign. More importantly, both parties knew of the 10% escalation clause. It was *clearly* articulated in the Bid Package on the page listing the “pertinent

terms and conditions” of the concession contract: “*Concession Fee Reopening*. The monthly concession fee shall increase by 10% every five (5) years.” Ex 4, p 10.

Indeed, every bidder was required to certify in the “Notice of Intent to Bid and Qualification Questionnaire” that said applicant “thoroughly” examined and understood “all of the terms, conditions, and requirements of the Duke Kahanamoku Beach Concession Request for Sealed Bids and the Concession Contract included in the Request for Sealed Bids and agrees to comply with all such terms, conditions, and requirements.” Ex 4, Attachment 2. Bidders were required to sign this page and certify that all terms, including the 10% escalation clause, were clearly understood. Not surprisingly, Hilton did not express any form of confusion about the 10% escalation clause during the bidding process. Nor does it dare claim it now! Clearly, both parties submitted bids with full knowledge of the 10% escalation clause.

6. DLNR Mistakenly Decided The Discrepancy Required Unanimous Consent.

DLNR originally claimed their desire to insert the escalation clause into the concession contract needed to be modified or reformed to clearly state that the concession fee would increase by 10% every two (2) years and that required the consent of both bidders. Ex 8. The letter also indicated the Department intended to cancel the solicitation if unanimous consent was not reached:

At the present time, in order to go forward with this solicitation, you both must agree that the concession Contract be modified or otherwise reformed to clearly state that the concession fee would increase by 10% every five (5) years. In the event we do not receive unanimous agreement from both of you with ten (10) calendar days from the date of receipt of this letter, this Department intends to cancel the solicitation.

Ex 8.

Because the escalation clause was not a new term and was known to both bidders before bidding it did not change the requisite equal footing between the bidders. Furthermore, there

was no need to require consent of the losing bidder to a known term which, if inserted into the sample contract would be more onerous rather than beneficial to the winning bidder.

Nevertheless, DLNR sought but did not receive Hilton's consent. On September 15, 2010, the DLNR informed the parties that:

Due to lack of unanimous consent to the proposed modification or reformation of the Concession Contract, and for the reasons set forth in our letter dated September 2, 2010, we believe it is in the best interest of the State and the public to reject all bids and cancel the solicitation; and therefore, we hereby cancel the Request for Sealed Bids for Duke Kahanamoku Beach Concession dated June 29, 30, and July 1, 2010, as amended on July 9, 10, and 11, 2010.

Ex 9.

The cancellation was in direct conflict with the term in Request For Sealed Bids which provided the concession contract **shall** be awarded to the qualified bidder that submits the highest bid". (Emphasis added). Ex 4, p 8.

7. DLNR Has The Inherent Power To Revive A Cancelled Solicitation And Award The Concession Contract To The High Bidder.

Courts have "recognized that contracting officers are 'entitled to exercise discretion upon a broad range of issues confronting them' in the procurement process." United Payors & United Providers Health Ins., Inc., v. United States, 55 Fed. Cl. 323 (2003). The "well-established" rule is that "decisions of administrative agencies acting within the realm of their expertise are accorded a presumption of validity". Therefore, Hilton "carries a heavy burden of convincing the court that the decision is *unjust* and *unreasonable* in its consequences." Morgan v. Planning Dep't, 104 Haw. 173, 179, 86 P.3d 982, 988 (2004); *see also* Ka Paakai O KaAina v. Land Use Comm'n, 94 Haw. 31, 40, 7 P.3d 1068, 1077 (2000); Korean Buddhist Dae Won Sa Temple of Hawai'i v. Sullivan, 87 Haw. 217, 229, 953 P.2d 1315, 1327 (1998).

On January 4, 2011, the DLNR issued a letter to Star-Beachboys and Hilton stating that DLNR had reconsidered the cancellation of the solicitation:

After discussing the matter with each of the bidders' counsel, and after much consideration and thought and in consultation with the Department of the Attorney General, our Department has decided to reconsider its prior cancellation of the solicitation of the Duke Kahanamoku Beach Concession. The Department has decided to award the concession contract to Star-Beachboys, Inc. which submitted the highest bid of \$35,100 per month.

Ex 13.

Chapter 102 is devoid of any provision prohibiting the DLNR from reconsidering a cancelled solicitation. In fact, Chapter 102 is silent on the issue of whether the DLNR can reconsider a cancelled solicitation and subsequently award a contract to the highest responsible bidder. *See generally* HRS Chapter 102. However, a statutory basis is not necessary for an administrative body to initiate reconsideration of its prior final quasi-judicial decisions. *See Morgan at 182. In Morgan*, the Hawaii Supreme Court reasoned that administrative bodies possess the inherent power of reconsideration because “it is well established that an administrative agency’s authority includes those implied power that are reasonably necessary to carry out the powers expressly granted.” *Id.* at 184. Implied powers are important because “as a practical matter, the legislature [cannot] foresee all the problems incidental to . . . carrying out . . . the duties and responsibilities of the [agency.]” *Id.* DLNR’s inherent power to revive the bid is consistent with the underlying purposes of Chapter 102.

Although the legislative history of Chapter 102 is sparse - what is available clearly indicates that the purpose of the bill was “to make the bidding procedure required for public contracts as provided by Chapter 9 of the Revised Laws of Hawaii 1955...generally applicable” to the concession bidding process. H. Stand. Comm. Rep. No. 619, in 1959 House Journal, at 806. The other main reason for implementing Chapter 102 was to “require any territorial or

county agency granting a concession or letting out space to do so only to the highest responsible competitive bidder.” S. Stand. Comm. Rep. No. 962, in 1959 Senate Journal, at 953. The clear purposes of Chapter 102 are to provide a process through which concession contracts are granted and to insure that, through this process, the highest responsible bidder is granted the concession contract. The DLNR’s decision to revive the solicitation was consistent with the purposes of the act because the actions of DLNR ensured that, through a fair bidding process, the highest responsible bidder (Star-Beachboys) was correctly awarded the concession contract.

8. Ex Parte Communications, Especially Those After Bids Are Closed, Are Neither Improper Or Material.

There is no legal or even equitable proscription against ex-parte communications even during the bid process. Rather, any inquiry into such communication depends on whether they affect the competitive bidding process. *See e.g., Brewer*. In *Brewer* there were ex parte communications **before** the close of bidding between the bidders and the City but the mere fact of these communications was not even worthy of comment by the Supreme Court. Instead, the Court rightly focused on whether there was additional **material** information which modified or altered contract specifications. *Brewer* at 349.

The smokescreen of ex parte communication is further dissipated by the Supreme Court’s treatment of it in *Federal Electric Corp. v Fasi*, 56 Haw. 57, 63. There, ex parte communications or meetings *after* bids were opened but subject to further review were, on that basis alone, not even worthy of comment. In *Federal Electric Corp* bids were submitted by Federal Electric Corp. (“Federal”) and by Motorola for a contract to upgrade the City and County of Honolulu’s police department communication system. *Id.* at 58. After the bids were opened, the City asked for and received clarification of the information contained in the proposals of both bidders. Every indication is that such communications were *ex parte*. Subsequently, the City requested

Federal to answer 19 questions which Federal did. The City even called a meeting with Federal, the low bidder, “to pose several questions to Federal relative to its proposal.” Id. at 63.

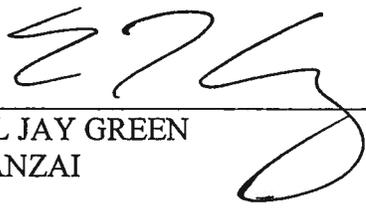
Instructively, there is no indication that Motorola or their counsel were invited to participate in this meeting. Id. The Supreme Court took issue with the meeting, not because it was conducted “ex-parte,” but because the meeting was no “real attempt to engage in any meaningful discussion with Federal regarding its proposal.” Id. It is clear from Federal Electric Corporation that discussions, regarding bids, conducted even after bids are opened are not improper.

After bids are closed and the winning bidder is determined, as here, there is even less reason to question on ex parte communications between the winning bidder and the DLNR. Further, after the bids were unsealed by the DLNR, both Hilton and Star-Beachboys, and/or their counsel had ex-parte communications with the DLNR and the Attorney General. Additionally, nothing that could have been communicated by any of the parties in an ex parte communication could change the fact that Star-Beachboys was the winning bidder and Hilton was the losing bidder.

IV. CONCLUSION

For the foregoing reasons, Star-Beachboys respectfully requests the Court grant summary judgment in its favor and against Hilton on all counts of the Complaint.

DATED: Honolulu, Hawaii, May 19, 2011.



MICHAEL JAY GREEN
EARL I. ANZAI

Attorneys for Defendant
STAR-BEACHBOYS, INC.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HILTON HAWAIIAN VILLAGE LLC, a Hawaii limited liability company,	)	CIVIL NO. 11-1-0158-01 (RAN)
	)	(Declaratory and Injunctive Relief)
)	
Plaintiff,)	
	)	DECLARATION OF
vs.	)	ANTHONY A. RUTLEDGE, SR.
)	
STAR-BEACHBOYS, INC., a Hawaii corporation; STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES; WILLIAM J. AILA, JR., in his capacity as Interim Chairperson, and DOES 1-20,)	
)	
)	
Defendants.)	
)	

DECLARATION OF ANTHONY A. RUTLEDGE, SR.

ANTHONY A. RUTLEDGE, SR. declares under penalty of law the following is true and correct:

1. I am the President of Star-Beachboys, Inc.
2. On or about, October 20, 2010, I, along with my son, Aaron, attended a meeting at the DLNR with DLNR personnel and people from Hilton.
3. At the beginning of the meeting I told all parties in attendance Star-Beachboys believed the action taken by DLNR of not awarding the concession contract because Hilton would not consent was wrong. Further, I indicated that Star-Beachboys would not participate further unless it was understood that Star-Beachboys would continue to protest and maintain their rights to have the decision reconsidered.
3. Laura Thielen stated she understood our position and said that reconsideration was not going to be discussed at this meeting.

This declaration is filed pursuant to Circuit Court Rule 7(g), I declare under penalty of law that the foregoing is true and correct.

Executed on February 28, 2011.


ANTHONY A. RUTLEDGE, SR.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HILTON HAWAIIAN VILLAGE LLC, a	)	CIVIL NO. 11-1-0158-01 (RAN)
Hawaii limited liability company,	)	(Declaratory and Injunctive Relief)
)	
Plaintiff,	)	NOTICE OF HEARING AND
	)	CERTIFICATE OF SERVICE
vs.)	
)	
STAR-BEACHBOYS, INC., a Hawaii	)	Judge: Honorable Rhonda A. Nishimura
corporation; STATE OF HAWAII,	)	No Trial Date Set
DEPARTMENT OF LAND AND)	
NATURAL RESOURCES; WILLIAM J.)	
AILA, JR., in his capacity as Interim)	
Chairperson, and DOES 1-20,)	
)	
Defendants.)	
)	
)	

NOTICE OF HEARING

TO: SHARON V. LOVEJOY, ESQ. (Hand Delivery)
 SHYLA P. Y. COCKET, ESQ.
 733 Bishop Street, Suite 1900
 Pacific Guardian Center, Makai Tower
 Honolulu, Hawaii 96813

Attorneys for Plaintiff
 HILTON HAWAIIAN VILLAGE LLC

WILLIAM J. AILA, JR. (Hand Delivery)
 Kalanimoku Building
 1151 Punchbowl Street
 Honolulu, Hawaii 96813

In his capacity as Chair for Defendant
 STATE OF HAWAII,
 DEPARTMENT OF LAND AND
 NATURAL RESOURCES

NOTICE IS HEREBY GIVEN that Defendant Star-Beachboys, Inc.'s Motion for Summary Judgment will be heard before the Honorable Rhonda A. Nishimura, in her courtroom, located at Kaahumanu Hale, 777 Punchbowl Street, Honolulu, Hawaii on JUL 13 2011 at 8:30 A.m. or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawaii, May 19, 2011.



MICHAEL JAY GREEN
EARL I. ANZAI
Attorneys for Defendant
STAR-BEACHBOYS, INC.

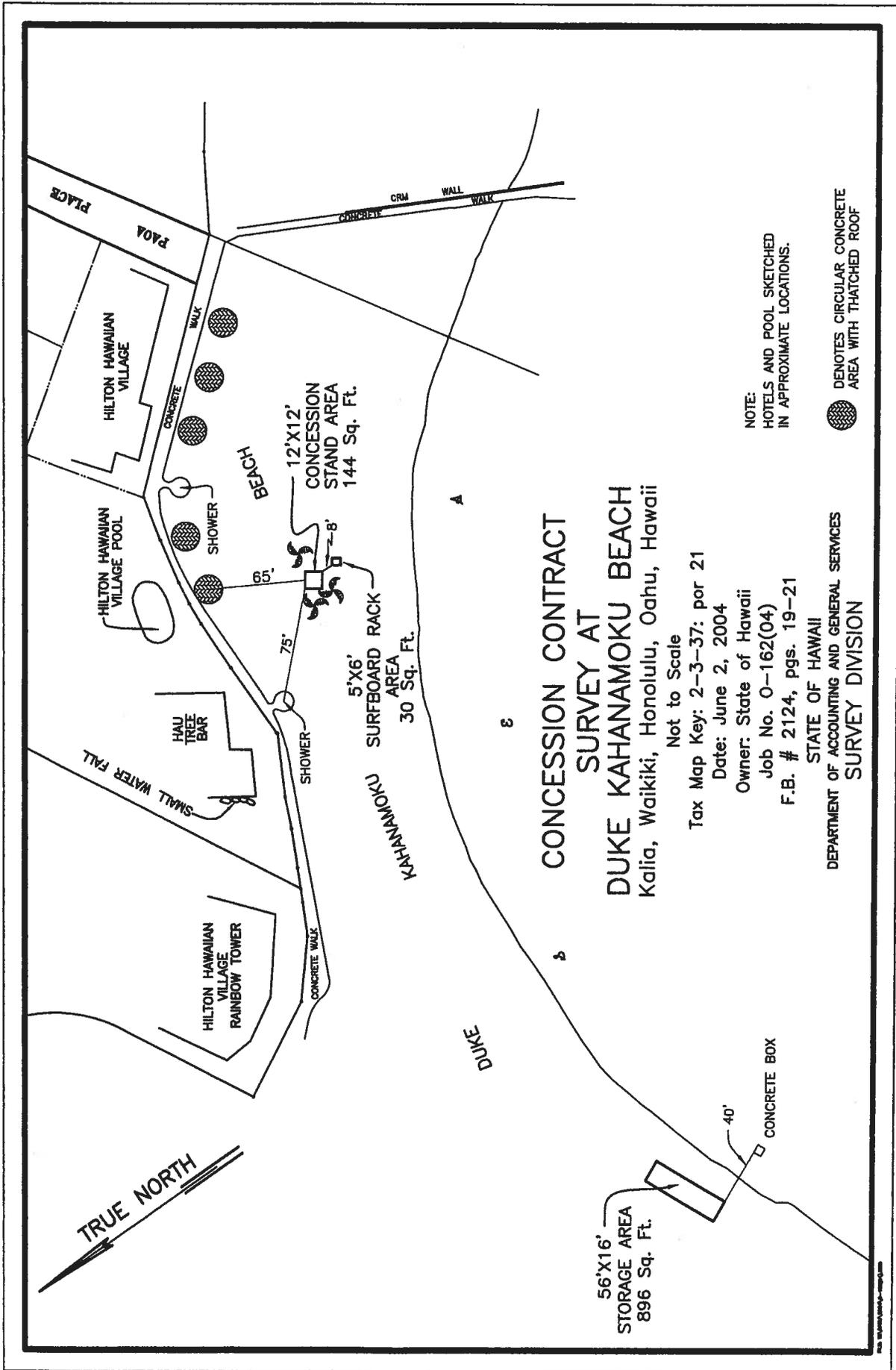
CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document will be duly served after filing, on the parties identified above.

DATED: Honolulu, Hawaii, May 19, 2011.



MICHAEL JAY GREEN
EARL I. ANZAI
Attorneys for Defendant
STAR-BEACHBOYS, INC.



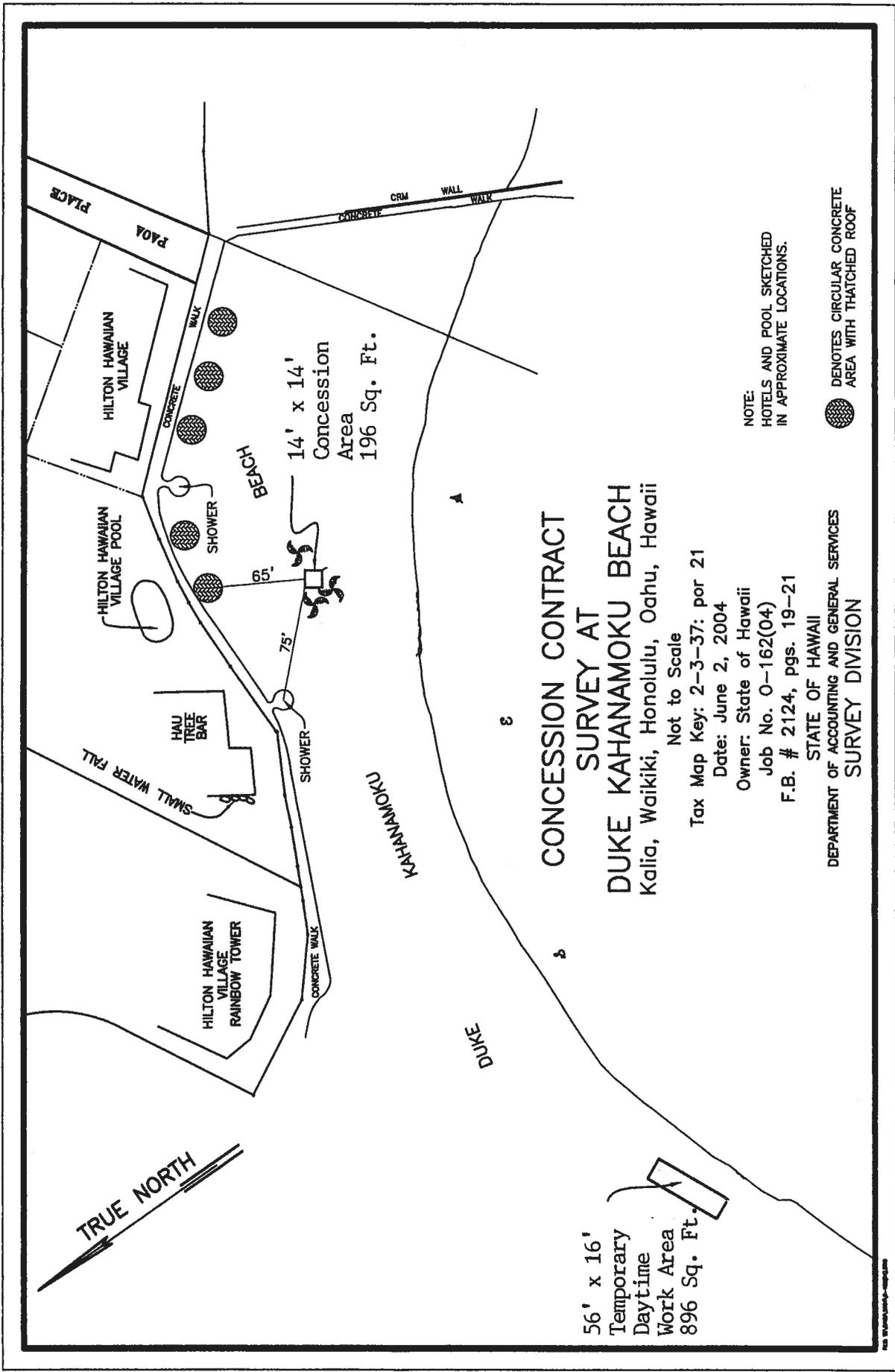
**CONCESSION CONTRACT
SURVEY AT
DUKE KAHANAMOKU BEACH**
Kaliia, Waikiki, Honolulu, Oahu, Hawaii

Not to Scale
 Tax Map Key: 2-3-37: por 21
 Date: June 2, 2004
 Owner: State of Hawaii
 Job No. O-162(04)
 F.B. # 2124, pgs. 19-21

STATE OF HAWAII
 DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
 SURVEY DIVISION

NOTE:
 HOTELS AND POOL SKETCHED
 IN APPROXIMATE LOCATIONS.

● DENOTES CIRCULAR CONCRETE
 AREA WITH THATCHED ROOF



**CONCESSION CONTRACT
SURVEY AT
DUKE KAHANAMOKU BEACH**
Kalia, Waikiki, Honolulu, Oahu, Hawaii

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NOTE:
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● DENOTES CIRCULAR CONCRETE
AREA WITH THATCHED ROOF

TRUE NORTH

56' x 16'
Temporary
Daytime
Work Area
896 Sq. Ft.

14' x 14'
Concession
Area
196 Sq. Ft.