

IN THE EXECUTIVE ETHICS COMMISSION
OF THE STATE OF ILLINOIS

In re: NICK KANELLOPOLOUS) OEIG Case # 09-00911

OEIG FINAL REPORT (REDACTED)

Below is a final summary report from an Executive Inspector General. The General Assembly has directed the Commission to redact information from this report that may reveal the identity of witnesses, complainants or informants and “any other information it believes should not be made public.” 5 ILCS 430/20-52(b).

The Commission exercises this responsibility with great caution and with the goal of balancing the sometimes competing interests of increasing transparency and operating with fairness to the accused. In order to balance these interests, the Commission may redact certain information contained in this report. The redactions are made with the understanding that the subject or subjects of the investigation have had no opportunity to rebut the report’s factual allegations or legal conclusions before the Commission.

The Executive Ethics Commission (“Commission”) received a final report from the Governor’s Office of Executive Inspector General (“OEIG”) and a response from the agency in this matter. The Commission redacted the final report and mailed copies of the redacted version and responses to the Attorney General, the Governor’s Executive Inspector General and to Nick Kanellopolous at his last known address.

These recipients were given fifteen days to offer suggestions for redaction or provide a response to be made public with the report. The Commission, having reviewed all suggestions received, makes this document available pursuant to 5 ILCS 430/20-52.

FINAL REPORT

I. Initial Allegations and Subsequent Allegations

The Office of Executive Inspector General (“OEIG”) received a complaint alleging that Illinois Department of Central Management Services (“Department” or “CMS”) employee Nick Kanellopolous negotiated with a single respondent prior to awarding a lease in violation of the Procurement Code. The investigation revealed that Mr. Kanellopolous violated the Procurement Code.

II. Background and Summary

A. Applicable State Policies for Procuring Leases

“It is the purpose of [the Illinois Procurement] Code and is declared to be the policy of the State that the principles of competitive bidding and economical procurement practices shall be applicable to all purchases and contracts by or for any State agency.”¹ Specifically for the acquisition of leases for real property, the Procurement Code directs the State to obtain leases through a competitive selection process called a “request for information” process (“RFI”).²

The Illinois Procurement Code sets forth that prior to final selection, any negotiations must take place with all respondents. The Procurement Code specifically states that “[n]egotiations *shall* be entered into with *all* qualified respondents for the purpose of securing a lease that is in the best interest of the state.” It further states that “[a] written report of the negotiations shall be retained ... and shall include the reasons for the final selection.”³ Following the negotiations, the CMS leasing manager is required to recommend to the Director of CMS which proposal to accept.⁴ The Director of CMS will then “make the final award, which will be announced in the Illinois Procurement Bulletin.”⁵

The Procurement Code provides enumerated exceptions to the requirement that all leases be procured by using a RFI.⁶ One exception to the RFI process is the “renewal or extension of a lease.”⁷ Renewals and extensions are appropriate under the Code, provided that the prescribed process is followed.⁸ The State may obtain leases without utilizing a competitive selection process where those leases are “for a duration not to exceed one year that cannot be renewed.”⁹ The administrative rules state that the RFI process is not required for “[I]leases whose term is less than one year and whose term is not subject to renewal.”¹⁰

B. Bureau of Property Management Responsibilities

The Department’s Bureau of Property Management (“Bureau”) is responsible for property management functions for all agencies under the Office of the Governor. Property management functions include leasing space for agencies, authorities, boards, commissions, departments, institutions, bodies politic and all other administrative units of the executive branch of State government.¹¹ In particular, property management functions require Bureau staff to acquire space for rental from privately owned buildings when suitable government-owned space is unavailable.¹² Leases between CMS and privately owned buildings must be posted to the Illinois Procurement Bulletin to allow for Procurement Policy Board (“PPB”) review before they are executed. The PPB can reject any proposed lease.¹³ Under the Procurement Code, the State

¹ 30 ILCS 500/1-5.

² 30 ILCS 500/40-15(a).

³ 30 ILCS 500/40-20(d) (emphasis added); *See also* 44 Ill. Adm. Code §5000.231(h).

⁴ 44 Ill. Adm. Code §5000.231(i).

⁵ 44 Ill. Adm. Code §5000.231(j).

⁶ 30 ILCS 500/40-15(a).

⁷ 30 ILCS 500/40-15(b)(5).

⁸ 30 ILCS 500/40-15(b)(5).

⁹ 30 ILCS 500/40-15(b)(3).

¹⁰ 44 Ill. Adm. Code §5000.232(a)(3).

¹¹ 44 Ill. Adm. Code §5000.120.

¹² 44 Ill. Adm. Code §5000.110.

¹³ *See* 2 Ill. Adm. Code §3002.1300.

is under no obligation to execute a contract even when the award has been posted to the Illinois Procurement Bulletin and the terms have been negotiated by the parties.¹⁴

C. Deputy Director of the Bureau, Nick Kanelopolous

Nick Kanelopolous has been the Department's Deputy Director of the Bureau since November 2007. In that position, Mr. Kanelopolous is responsible for managing the day-to-day operations of the Bureau, including its property management functions. Prior to serving as Deputy Director, Mr. Kanelopolous worked at CMS as a Deputy General Counsel providing legal advice on property management issues.

D. The Illinois Criminal Justice Information Authority Lease #6105

The Illinois Criminal Justice Information Authority ("ICJIA") is a State agency that has an office in Chicago. In late 2007, in light of the fact that ICJIA was in immediate need of a new location and because time was of the essence, the State entered into a 364-day lease (Lease #6105) at 300 West Adams, Chicago, Illinois. This 364-day lease was not competitively bid through the RFI process described below. The 364-day lease term ran from March 1, 2008, through February 27, 2009. The Lease #6105 landlord was 300 West Adams, LLC, located at 300 W. Adams ("300 W. Adams"). Because Lease #6105's term was less than one year, CMS was able to award the lease without seeking bids.¹⁵ On February 28, 2009, Lease #6105 went into holdover status. Holdover status required the State to pay an increased rental rate for Lease #6105 of over \$14,000 more a month.¹⁶

E. CMS Solicitation of Bids for ICJIA (Request for Information)

In November 2008, prior to Lease #6105 going into holdover status, CMS solicited bids for a permanent ICJIA location using the RFI competitive selection process. The permanent location lease was referred to as Lease #6281. In January 2009, CMS requested Lease #6281 RFI respondents to provide their best and final offers for the November 2008 RFI. One of the respondents on Lease #6281 was 300 W. Adams. On February 6, 2009, CMS representatives met with [property manager], a representative and co-owner of 300 W. Adams—the Lease #6105 landlord and Lease #6281 respondent—to negotiate terms for the ICJIA lease. About a month later (March 3, 2009), CMS notified 300 W. Adams that its proposal (bid) for Lease #6281 had been selected. Thereafter, CMS notified all other respondents that they had not been selected. [Property manager] signed and returned Lease #6281 sometime on April 8, 2009. Per the RFI, the ICJIA lease with 300 W. Adams was to commence June 1, 2009.

CMS did not post notice of the award of Lease #6281 to the Illinois Procurement Bulletin ("Bulletin") for review by the PPB and never executed the lease. Rather, investigators learned

¹⁴ 30 ILCS 500/1-25.

¹⁵ 30 ILCS 500/40-15(b)(5).

¹⁶ The daily rent rate under the 364-day lease was \$1,599.29. The daily rent rate under the holdover provisions was \$2,073.15, or \$473.86 more per day. As a result of being in holdover, the State paid approximately \$14,000 more per month.

that sometime in June 2009,¹⁷ Mr. Kanelopolous on behalf of CMS opted to cancel the Lease #6281 award and attempted to move ICJIA to State-owned space at either the James R. Thompson Center or the Michael A. Bilandic Building.

F. CMS Terminates Lease #6105 and Cancels Lease #6281

On June 12, 2009, in light of the fact that CMS was attempting to secure State-owned space for ICJIA, CMS notified 300 W. Adams, without further explanation, that the State was terminating Lease #6105, the holdover lease, effective September 9, 2009. Mr. Kanelopolous subsequently, informed [property manager] that the State was also cancelling the award of Lease #6281 in order to move ICJIA into State-owned space.

However, even though CMS had notified 300 W. Adams that it would be terminating holdover lease #6105 on September 9, 2009, CMS did not terminate Lease #6105 on that date. Rather, prior to September 9, 2009, and on multiple occasions thereafter, CMS modified and extended the termination date for Lease #6105. In a February 11, 2010, letter, CMS sought to modify the termination date from February 28, 2010, to April 30, 2010. Thirteen days later, on February 25, 2010, 300 W. Adams notified CMS that it would not agree to extend ICJIA's holdover lease to April 30, 2010, and directed ICJIA to vacate the premises in three days or by February 28, 2010. Shortly thereafter and in an apparent attempt to keep ICJIA at 300 W. Adams, [property manager] and Mr. Kanelopolous agreed that ICJIA would move from its current seventh floor location to a second floor location at 300 W. Adams while CMS and 300 W. Adams attempted to negotiate a new lease. On March 1, 2010, five days after receiving 300 W. Adams's notice to vacate, Mr. Kanelopolous directed CMS leasing representative [employee 7] to send [property manager] a five-year lease. Mr. Kanelopolous subsequently presented the five-year lease to the PPB as a renewal of Lease #6105, the original 364-day lease executed in November 2008. At its April 8, 2010, meeting, the PPB unanimously voted to reject the renewal lease for Lease #6105.

Immediately following the PPB meeting in April 2010, CMS issued a new RFI seeking a long-term lease for ICJIA. 300 W. Adams again responded to the RFI. CMS and 300 W. Adams subsequently entered into a five-year lease to house ICJIA on the second floor. The PPB approved the lease, which was effective July 1, 2010.

III. Investigation

The OEIG investigation focused on two specific matters. First, the OEIG investigated whether Mr. Kanelopolous's conduct with regard to Lease #6281 violated the Procurement Code. In particular, investigators looked at whether by negotiating with a single respondent prior to awarding the lease, Mr. Kanelopolous violated the Procurement Code. Second, investigators looked at whether Mr. Kanelopolous's efforts to renew a 364-day lease (which had not been previously competitively bid) violated the Procurement Code. In particular, the OEIG

¹⁷ Investigators were not able to determine exactly when Mr. Kanelopolous decided to try to place ICJIA in state-owned space. However, on June 12, 2009, Mr. Kanelopolous acted on this decision by sending a notice of termination to 300 W. Adams terminating the holdover Lease #6105.

investigated whether Mr. Kanellopoulos's negotiation of a five-year "renewal" of holdover Lease #6105 was improper.

A. Investigation Related to Mr. Kanellopoulos's Improper Negotiation with a Single Respondent Prior to Awarding Lease #6281

In November 2008, CMS solicited bids for a permanent location for ICJIA using an RFI (Lease #6281). After receiving respondents' best and final offers, CMS representatives met on February 6, 2009, with [property manager] of 300 W. Adams, one of the respondents, for the purpose of negotiating terms for the ICJIA lease. This negotiation session took place before CMS notified 300 W. Adams it was the selected respondent and before or without informing any other respondents that they were not selected.

1. Interviews with [employee 1]

On February 17 and November 4, 2010, OEIG investigators interviewed [employee 1]. [Employee 1] described the standard process for soliciting and analyzing lease proposals¹⁸ as follows: (a) CMS issues an RFI; (b) proposals are submitted; (c) the assigned leasing representative determines whether the proposals are responsive; (d) the leasing representative analyzes the responsive proposals and makes a recommendation on a site selection form; (e) fiscal staff, usually [employee 2], conducts a financial analysis; (f) [Employee 1] reviews the recommendations and the site selection form; (g) [Employee 1] forwards the site selection form to Mr. Kanellopoulos and [employee 2] for approval; and (h) Mr. Kanellopoulos and [employee 2] sign the site selection form as final approval of the selection. CMS then negotiates with the selected respondent to get the most favorable terms, including cost, for the State.

[Employee 1] stated that in the case of Lease #6281, the standard process was not followed, because she was not given an opportunity to evaluate the responses and the internal selection was not documented on the site selection form. Rather, [employee 1] first learned that the State would be contracting 300 W. Adams for Lease #6281 when Mr. Kanellopoulos directed her to draft a lease containing previously negotiated terms.

2. Interview of CMS Leasing Representative [employee 3]

On September 24, 2009, OEIG investigators interviewed [employee 3], the CMS Leasing Representative assigned to Lease #6281. [Employee 3] stated that, to his knowledge, Mr. Kanellopoulos negotiated only with representatives from 300 W. Adams and not with representatives of other properties. According to [employee 3], these negotiations took place before Lease #6281 was awarded to 300 W. Adams.

3. Interviews of Bureau of Property Management [employee 2]

On March 17 and October 13, 2010, OEIG investigators interviewed [employee 2]. [Employee 2] stated that, shortly before February 5, 2009, and prior to the termination of the 364-day holdover Lease #6105 was set to expire, Mr. Kanellopoulos asked him to review RFI

¹⁸ This process was in place in Spring 2009.

responses for Lease #6281 for an independent fiscal analysis. According to [employee 2], this was the first time Mr. Kanelopolous asked him to conduct such an analysis of RFI responses. [Employee 2's] analysis revealed that the 300 W. Adams bid was the least expensive option over a five-year term while another respondent's proposal was the least expensive over a ten-year term. [Employee 2] stated that, after he conducted the initial fiscal analysis, Mr. Kanelopolous asked him to conduct a subsequent analysis to determine at what proposed rent cost would make 300 W. Adams the least expensive option over a 10-year term. [Employee 2] said he completed his analysis on February 5, 2009. [Employee 2] said he sought guidance from [employee 4] and [employee 5] about conducting such an analysis of only one respondent's RFI response.

Shortly after [employee 2] forwarded the additional analysis to Bureau managers, Mr. Kanelopolous asked [employee 2] and [employee 6] to participate, via telephone, in his in-person meeting with [property manager]. [Employee 2] stated that during this conference with [property manager], Mr. Kanelopolous asked [employee 2] about his additional analysis of a possible 10 year lease option with 300 W. Adams. [Employee 2] said he refused to give Mr. Kanelopolous the additional analysis figures over the phone because it was not based on numbers in 300 W. Adams's proposal. [Employee 2] said that he was uncomfortable with Mr. Kanelopolous's request because he had never before been asked to complete an additional analysis or to be involved in negotiations with landlords prior to the above-referenced telephone meeting with [property manager].

According to [employee 2], there was then a break in the conference call with [property manager]. During this break, Mr. Kanelopolous called [employee 2] and informed him that 300 W. Adams had been "internally selected" for the lease. [Employee 2] told OEIG investigators that after hearing this information, he was more comfortable and thus, willing to provide the additional analysis of a possible 10-year lease as part of the "negotiations effort." [Employee 2] stated that he was unfamiliar with the RFI process and if "someone in operations" told him that a lease has been accepted internally, he had "no reason to believe otherwise."

4. *Review of Documents regarding Lease #6281*

a. Email Correspondence Regarding Lease #6281

OEIG investigators reviewed email correspondence regarding Lease #6281. On February 5, 2009, Mr. Kanelopolous emailed various CMS officials to schedule an 8:45 a.m. conference call with [property manager]. At 8:50 a.m. on February 6, 2009, [employee 2] sent an email stating that his fiscal analysis was "meant to be used for further negotiation if and when 300 W. Adams was chosen in the procurement process." On February 6, 2009, at 8:57 a.m., [employee 5] sent an email to Mr. Kanelopolous and others, which stated,

Remember you are on a razor blade. You can only talk about the BAFO [best and final offer] if something is not clear, and that should be documented in writing... [] [employee 2] should not be providing margin numbers between proposal[s]. Very not appropriate. You may need another BAFO to resolve or negotiate with all proposers.

On February 11, 2009, [employee 1] wrote an email to Mr. Kanellopolous stating that she hoped to “get to [property manager’s] lease” on February 13, 2009.

b. Other correspondence regarding Lease #6281

On March 3, 2009, CMS issued award notices regarding Lease #6281 informing 300 W. Adams that its proposal had been selected and that it would be awarded the lease. The other respondents were informed that their proposals were not selected.

On July 8, 2009, counsel for 300 W. Adams sent former CMS Director [director], PPB Executive Director [executive director], and Mr. Kanellopolous a letter outlining the sequence of events regarding Lease #6281. In that letter, 300 W. Adams states, “Representatives of [300 W. Adams] then met in person with CMS representative Mr. Kanellopolous on February 6, 2009, at which meeting the terms and conditions of the Lease were finalized and agreed upon by the parties.”

5. *Interview of [employee 4]*

On April 7, 2010, OEIG investigators interviewed [employee 4]. [Employee 4] stated that he is not actively involved in the procurement process for leases, except that he must approve any transaction over \$250,000. [Employee 4] recalled that [employee 2] said he believed he was being asked to identify how a company could adjust its bid to make the proposal the cheapest option for the State. [Employee 4] stated that he advised [employee 2] that he could not provide the requested information. [Employee 4] said that the Procurement Code does not allow negotiations regarding cost until after the lease is awarded.¹⁹ According to [employee 4], if CMS negotiates with one respondent prior to the official award, all respondents must have an opportunity to offer a lower cost.

6. *Interview of [employee 5]*

On May 13, 2010, OEIG investigators interviewed [employee 5], [identifying information redacted]. [Employee 5] was one of the individuals involved in the development of the RFI requirements for Lease #6281 (the ICJIA lease). [Employee 5] said he had been invited to participate in the February 6, 2009, telephone conference with Mr. Kanellopolous and [property manager]. [Employee 5] also stated that, prior to the telephone conference between Mr. Kanellopolous and [property manager], Mr. Kanellopolous had sent email messages to him, [employee 2], and [employee 6] seeking information from [employee 2] on what cost 300 W. Adams would have to meet in order to make them the cheapest option for the State. [Employee 5] said that these email messages made him feel uncomfortable because he inferred from them that Mr. Kanellopolous was preparing to engage in negotiations with a particular respondent, which would not be permitted until after the award was made and the notice of award was sent out.

¹⁹ As stated above, the applicable provisions of the law can be found in the Procurement Code, 30 ILCS 500/40-20(d), and Administrative Rules, 44 Ill. Adm. Code §5000.231(h).

[Employee 5] said that, based on his more than 20 years experience with the RFI process, he understands that CMS is not permitted to negotiate with a single respondent until after the official award is made in writing and the notice of award is sent.²⁰ Prior to the time the notice of award and rejection letters are sent, CMS is allowed to communicate with a single respondent only to clarify the respondent's proposal. [Employee 2] stated that he informed Mr. Kanelopolous that he believed he (Mr. Kanelopolous) was improperly negotiating with a single respondent prior to the written lease award. According to [employee 5], Mr. Kanelopolous acknowledged that negotiations were not to occur prior to selection. [Employee 5] said that he reminded Mr. Kanelopolous that the selection must be made in writing prior to negotiations but that Mr. Kanelopolous did not respond.

7. *Interview of 300 W. Adams Manager [property manager]*

On January 19, 2011, OEIG investigators interviewed [property manager]. [Property manager] stated that he has been the manager and part owner of 300 W. Adams since 2007; since that time, 300 W. Adams has been a vendor of the State. Since March 2008, 300 W. Adams has leased space to ICJIA. [Property manager] has been involved in only one short-term lease with the State – Lease #6105, the ICJIA 364-day lease. [Property manager] said he was involved in preparing 300 W. Adams's responses to the RFI for Lease #6281, the long-term lease. Prior to 300 W. Adams's selection in March 2009, [property manager] had conversations with Mr. Kanelopolous and perhaps other CMS employees that were similar in nature to conversations he had with CMS regarding other leases in the past. [Property manager] stated he had no specific recollection of the discussions he had with CMS regarding Lease #6281. [Property manager] stated that, after 300 W. Adams submitted its response to the RFI, he inquired with CMS about the likelihood of 300 W. Adams receiving the lease because there were others interested in the space ICJIA occupied. Though [property manager] did not specifically recall to whom he spoke or the specific response he received, as a result of the response, [property manager] informed his business partners that 300 W. Adams and the State would "get it done." CMS awarded the lease to 300 W. Adams in March 2009, and, according to [property manager], there were no negotiations with the State following the award.

8. *Interview of CMS's Bureau of Property Management Bureau Chief Nick Kanelopolous*

On March 10, 2011, OEIG investigators interviewed Nick Kanelopolous. Mr. Kanelopolous said CMS uses the RFI process to obtain new leases or new contracts for expiring leases. Mr. Kanelopolous said that CMS must use the RFI process unless one or more of the statutory exceptions apply to the lease. He stated that CMS evaluates the proposals after it receives responses to an RFI. Mr. Kanelopolous said that CMS cannot have contact with respondents before CMS issues the notice of award other than to discuss clarifications to responses.²¹ According to Mr. Kanelopolous, even where CMS discuss clarification, respondents cannot change any "material term" of the proposals, such as the term, costs,

²⁰ As stated above, the applicable provisions of the law can be found in the Procurement Code, 30 ILCS 500/40-20(d), and Administrative Rules, 44 Ill. Adm. Code §5000.231(h).

²¹ As stated above, the applicable provisions of the law can be found in the Procurement Code, 30 ILCS 500/40-20(d), and Administrative Rules, 44 Ill. Adm. Code §5000.231(h).

location, or amount of space outlined in the proposal. After CMS selects a proposal, they negotiate with the selected respondent on costs.

Mr. Kanellopolous stated that, under the current procedure, CMS internally selects a respondent and posts the selection to the Bulletin, which, according to Mr. Kanellopolous, allows CMS to negotiate with the selected respondent. If a deal is successfully negotiated with the selected respondent, CMS awards the lease to the selected respondent, posts the final lease to the Bulletin,²² and notifies the PPB and Chief Procurement Officer. If CMS cannot successfully negotiate a deal with the selected respondent, it can select the next lowest respondent and negotiate with that respondent.

According to Mr. Kanellopolous, in late 2008/early 2009 (when Lease #6281 was negotiated), CMS did not use the selection process he outlined above. Instead, CMS negotiated with the successful respondent only after CMS had awarded the lease and posted the notice of award electronically to the Bulletin. Mr. Kanellopolous stated that when CMS negotiated with a respondent after it had already been awarded the lease, the respondent would not lower costs because the respondent felt that CMS no longer had leverage. Under the current procedure, CMS is in a better negotiating position because the lease has not yet been awarded and CMS has the option of selecting a different respondent if negotiations are unsuccessful.

Mr. Kanellopolous described Lease #6281 as “unusual” and stated that he felt pressure to get the lease done quickly because if the lease were to go into holdover status, the rent paid by the State would nearly double. Mr. Kanellopolous denied that his handling of Lease #6281 was affected by any political pressure or other undue influence other than to avoid going into holdover status. Mr. Kanellopolous said that, for reasons he could not recall, CMS did not follow its standard practice of posting the award to the Bulletin before negotiating with a single respondent. Mr. Kanellopolous stated he internally selected 300 W. Adams prior to negotiating with [property manager] but that CMS did not make the selection “public information” prior to the negotiations.

Mr. Kanellopolous stated that, prior to the negotiations with 300 W. Adams, he met with other CMS staff who agreed that 300 W. Adams was the least expensive option for a five-year term. Because Mr. Kanellopolous believed that CMS could award the RFI without notifying other respondents in an attempt to negotiate the best cost for the State, he then negotiated the lease price with 300 W. Adams in his February 6, 2009, meeting with [property manager]. Mr. Kanellopolous said that he believed his handling of Lease #6281 was permissible under the procurement rules.

Mr. Kanellopolous was shown a copy of minutes from the PPB’s September 1, 2010, meeting and given an opportunity to review them. Mr. Kanellopolous stated that the meeting minutes, to his recollection, accurately reflected his comments to the PPB. Mr. Kanellopolous agreed that CMS is required to follow the statutory and administrative requirements as they exist at any given time.

²²As stated above, the applicable provision of the law can be found in the Administrative Rules, 44 Ill. Adm. Code §5000.231(j).

9. *Minutes from the September 1, 2010, PPB meeting*

OEIG investigators reviewed the minutes from the PPB's meeting on September 1, 2010. In that meeting, PPB members asked Mr. Kanellopoulos whether CMS was seeking any changes to the administrative rules governing leasing of property. The PPB minutes reflected that Mr. Kanellopoulos identified a long-standing problem of negotiating with respondents after making an award and stated that CMS would be seeking to amend the administrative rules to allow CMS to internally select a respondent and negotiate with that respondent to get a favorable rate.²³ If CMS was unable to negotiate satisfactory terms with that respondent, it would begin negotiations with the next lowest respondent to get the best possible rate for the State. Mr. Kanellopoulos indicated to the PPB that, under the proposed rule change, CMS would only award the lease after this series of individual negotiations.

In January 2012, investigators requested from Mr. Kanellopoulos any other written proposals or communication indicating that he had sought to change the administrative rules to conform to what he had informed the PPB on September 1, 2010. As of February 27, 2012,²⁴ Mr. Kanellopoulos has not provided any evidence that he has sought, requested, or attempted to effectuate any change to the existing administrative rules.

B. Five-Year Renewal of ICJIA's 364-day Lease #6105

On March 1, 2010, after canceling Lease #6281 and not finding appropriate State space for ICJIA, Mr. Kanellopoulos directed CMS leasing representative [employee 7] to send [property manager] a five-year lease. Mr. Kanellopoulos subsequently presented the five-year lease to the PPB as a renewal of Lease #6105, the original 364-day lease executed in November 2008. As noted above, at its April 8, 2010, meeting, the PPB unanimously voted to reject the renewal lease.

1. *Review of Documents Regarding the Five-Year Lease*

OEIG investigators reviewed correspondence regarding Lease #6105. After Lease #6105 went into holdover status on February 28, 2009, the State paid approximately \$14,000 more per month²⁵ in rent to occupy the exact same space. On June 12, 2009, CMS notified 300 W. Adams of its intent to terminate Lease #6105 effective September 9, 2009. Later, CMS sought to extend the effective date of the termination to February 28, 2010, and 300 W. Adams agreed. On February 11, 2010, CMS again sought to extend the effective date of the termination to April 30, 2010. However, on February 17, 2010, 300 W. Adams indicated its unwillingness to sign the extension for Lease #6105. On February 18, 2010, 300 W. Adams offered to allow ICJIA to move to the second floor at reduced rent for a five-year term. On February 25, 2010, 300 W. Adams issued a Notice of Termination Tenancy demanding ICJIA vacate the premises by February 28, 2010. On March 1, 2010, CMS forwarded a proposed five-year renewal lease to [property manager].

²³ Which is what Mr. Kanellopoulos had done with regard to Lease #6281

²⁴ The OEIG issued this final report on February 27, 2012.

²⁵ As described more fully in footnote 16, in light of Lease #6105 going into holdover status on February 28, 2009, the State paid more per month to occupy the same exact space.

Electronic correspondence reveals that [employee 1] raised concerns to Mr. Kanelopolous that “CMS is not supposed to renew 364-day lease” and that a new lease would require an RFI or an additional 364-day lease. Mr. Kanelopolous’s response to [employee 1’s] concern was that the “not supposed to renew 364-day leases stuff is dumb too.” Veteran employee [employee 8] warned that 364-day leases “can’t be renewed.” Another Bureau of Property Management employee, [employee 9], also raised concerns with Mr. Kanelopolous. [Employee 9] questioned whether or not to renew a 364-day lease because she did not want CMS to “go thr[ough] all the trouble of approving it [and] then get rejected last minute.” Mr. Kanelopolous responded to these concerns, “I think it is ok.”

OEIG investigators also reviewed the minutes from the PPB’s April 8, 2010, meeting where Mr. Kanelopolous presented the five-year renewal of Lease #6105 for review. Mr. Kanelopolous reported to the PPB the terms of the new lease, and stated that 300 W. Adams had agreed to pay the costs associated with moving ICJIA from the seventh floor to the second floor. Mr. Kanelopolous stated to the PPB that he knew that his plan to move ICJIA to State-owned space fell through approximately four to five months before the April 2010 meeting. PPB members voiced their disappointment that CMS had not put the lease out for bid. The PPB unanimously rejected the five-year renewal lease.

2. *Interview of [property manager] Regarding the Five-Year Renewal Lease*

In his January 19, 2011, interview, [property manager] stated that after CMS had begun the process to terminate Lease #6105, he was very active trying to get the State to reconsider. [Property manager] said he spoke to anyone in State government he thought might listen, including [official 1] in the Governor’s Office, [Executive Director] of the PPB, and former CMS Director [Director]. At one point, [property manager] said he was calling Mr. Kanelopolous five times a day. When [property manager] did not get a return call, he went to Mr. Kanelopolous’s office and sat in the reception area waiting for him. [Property manager] said that finally, the State determined that they should enter into a five-year deal with 300 W. Adams. CMS presented the negotiated lease at the April 8, 2010, PPB meeting. [Property manager] was present at the meeting and was upset when the lease was rejected by the PPB for what [property manager] believed to be a lack of understanding of how leases work. Following the PPB meeting, CMS again issued an RFI to which 300 W. Adams responded and was ultimately selected.

3. *Interview of Nick Kanelopolous Regarding the Five-Year Renewal Lease*

In his March 10, 2011, interview, Mr. Kanelopolous stated that, as Deputy Director, he has the authority to determine whether to obtain a lease through renewal or RFI. Mr. Kanelopolous stated that, after CMS was unable to find State-owned space, he decided that CMS would negotiate a five-year renewal of the original lease (Lease #6105) with 300 W. Adams because it was “easier” than putting the lease out for bids. Mr. Kanelopolous said that multiple staff members, including [employee 9] and (veteran employees) [employee 1] and [employee 8], raised concerns about negotiating a renewal of a 364-day lease. Specifically, he recalls staff indicating that CMS was not allowed to renew 364-day leases and that it was not

proper to use the same lease number for the 5-year lease as the 364-day lease. Mr. Kanelopolous stated that he believed his staff was “wrong” when they told him he could not renew the initial 364-day lease and that he relied on his own interpretation of the law in his effort to renew the lease.

Investigators showed Mr. Kanelopolous copies of sections of the Procurement Code and administrative rules relating to 364-day leases.²⁶ Mr. Kanelopolous confirmed that the statute states that 364-day leases “cannot be renewed” and the administrative rules state that 364-day leases “are not subject to renewal.” Mr. Kanelopolous stated that his interpretation of these provisions is that 364-day leases cannot contain renewal clauses, but that CMS was authorized to renew or extend a 364-day lease as a new contract without going through the RFI process. Mr. Kanelopolous also recalled seeing legal opinions supporting this interpretation, although he could not specifically identify any legal opinion.

Though Mr. Kanelopolous confirmed that he directed staff to renew ICJIA’s 364-day lease with 300 W. Adams for a five-year term, he stated that CMS would never take the same approach in the future. Mr. Kanelopolous stated that he no longer believes that renewing a 364-day lease into a five-year lease is permissible. When asked, Mr. Kanelopolous was unable to point to anything that caused him to change his mind.

Mr. Kanelopolous stated to investigators that, due to changes to the law and an Office of the Comptroller decision, the State would no longer pay rent, as of July 1, 2010, on any leases that had been in holdover status for more than six months. Mr. Kanelopolous stated that, because the ICJIA lease had been in holdover since March 2009, CMS had to move quickly to get a new lease in place. Mr. Kanelopolous stated that he was trying to find some solution to the problem of ICJIA’s holdover lease. He believed he was doing the right thing getting ICJIA into a longer-term lease at a good rate.

4. *Additional Documents Obtained from Nick Kanelopolous*

Following his March 10, 2011, interview, Mr. Kanelopolous provided investigators with documents he said supported his interpretation that the statutory and administrative requirements did allow CMS to renew 364-day leases. Specifically, Mr. Kanelopolous provided investigators with a December 8, 2005, letter from [redacted], Executive Director of the PPB, to [redacted], Deputy Director of CMS’s Bureau of Property Management. In that letter, [executive director] provides PPB opinions in response to specific questions posed by CMS. [Executive director] responded affirmatively to the following question from CMS, “Does PPB opine that any lease may be renewed (with or without a renewal clause) and CMS/BoPM may negotiate new terms for the renewal term?” [Executive director’s] letter also stated,

PPB opines that CMS/BoPM may renegotiate terms in current leases even if the lease was *procured by RFI* or is part of the existing lease agreement when done as an amendment to a contract subject to the provisions of the Procurement Code and Criminal Code. The Board will consider this activity on a case-by-case basis if these leases are presented to the Board as renewals. The Board considers the

²⁶ Investigators provided Mr. Kanelopolous with copies of 30 ILCS 500/40-15 and 44 Ill. Adm. Code §500.232.

application of the statutory renewal process as one intended to retain occupancy in the State's best interest when an existing occupancy agreement is set to expire; not as a tool for renegotiation.

(emphasis added).

IV. Analysis

A. **Mr. Kanelopolous violated the Procurement Code when he improperly negotiated with a single respondent prior to lease award.**

The Illinois Procurement Code sets forth that prior to final selection, any negotiations must take place with all respondents. The Procurement Code specifically states that “[n]egotiations *shall* be entered into with *all* qualified respondents for the purpose of securing a lease that is in the best interest of the state.” It further states that “[a] written report of the negotiations shall be retained ... and shall include the reasons for the final selection. 30 ILCS 500/40-20(d) (emphasis added); *See also* 44 Ill.Adm.Code §5000.231(h). Following the negotiations, the CMS leasing manager is required to recommend to the Director of CMS which proposal to accept. 44 Ill.Adm.Code §5000.231(i). The Director of CMS will then “make the final award, which will be announced in the Illinois Procurement Bulletin.” 44 Ill.Adm.Code §5000.231(j).

All of the CMS witnesses, including Mr. Kanelopolous, stated that the Procurement Code does not allow for material negotiations with a single respondent prior to award of the lease. Mr. Kanelopolous and other CMS witnesses unanimously confirmed that, with respect to the Lease #6281, Mr. Kanelopolous, and other CMS officials, met with [property manager] to negotiate final costs of the lease on February 6, 2009, nearly a month before CMS notified the respondents of the outcome of their bids on March 3, 2009. All of the CMS witnesses stated that the only respondent with which CMS negotiated was 300 W. Adams. Not only did Mr. Kanelopolous negotiate with only one respondent prior to the award, but he asked his subordinate, [employee 2], to analyze how 300 W. Adams could adjust its bid to become the cheapest respondent. Mr. Kanelopolous did not ask for similar analyses for the other respondents, nor did he give any of the other respondents the opportunity to lower their bids.

Several of Mr. Kanelopolous's subordinate employees, including [employee 2] and [employee 5], emailed their concerns about the propriety of negotiating with 300 W. Adams prior to CMS awarding the lease. Despite these warnings, Mr. Kanelopolous proceeded with the negotiations.

In his interview with the OEIG, Mr. Kanelopolous admitted that under the administrative rules, CMS cannot negotiate with bidders before CMS issues the notice of award. Mr. Kanelopolous also informed the PPB that he was going to propose amending the administrative rules in a way that would allow him to negotiate with single respondents prior to the posting of an award. Both this admission in his interview and his statement to the PPB, clearly indicate that Mr. Kanelopolous was well aware of the requirements of the Procurement Code.

Mr. Kanellopoulos not only knew what the law required, he received multiple warnings from long-time employees that he could not negotiate with a single responder. Mr. Kanellopoulos's decision to disregard the warnings of his subordinate staff that he was "on a razor's edge," and was in danger of violating the law if he proceeded with his plan to negotiate with 300 W. Adams, was intentional. Mr. Kanellopoulos affirmatively directed [employee 2] to do additional analysis to determine what cost would make 300 W. Adams the least expensive bid over a 10-year period. Mr. Kanellopoulos asked for this additional analysis for use in his negotiations with [property manager] but did not ask for such an analysis of the other bidders. Mr. Kanellopoulos's violation of the Procurement Code was not an oversight, nor a mistake.

According to Mr. Kanellopoulos, not being able to negotiate with a single respondent before awarding that respondent the lease, puts CMS in a disadvantageous negotiating position. The Procurement Code, however, does not require that negotiations can only take place after the award is made, rather it requires that negotiations prior to an award, be done with all respondents in order to give everyone the same opportunity to present their best offer. Mr. Kanellopoulos was not restricted from negotiating with [property manager] prior to the award, as long as he afforded the other respondents the same opportunity to adjust their bid, which he did not. Furthermore, if CMS wants to attempt to negotiate after the award is made publically, and does not like the outcome, CMS is free to start the RFI process over again. While having to re-start the process may be time consuming, it is nevertheless what is required under the law.

While Mr. Kanellopoulos may have disagreed with the requirements of the Procurement Code as they existed on February 6, 2009, he was not free to ignore them. Accordingly, the allegation that Mr. Kanellopoulos improperly negotiated with 300 W. Adams before awarding Lease #6281 in violation of the Procurement Code is **FOUNDED**.

B. Mr. Kanellopoulos violated the Procurement Code when he negotiated a five-year renewal of ICJIA's 364-Day Lease #6105.

"It is the purpose of [the Illinois Procurement] Code and is declared to be the policy of the State that the principles of competitive bidding and economical procurement practices shall be applicable to all purchases and contracts by or for any State agency." 30 ILCS 500/1-5. Specifically to the acquisition of leases for real property, the Procurement Code dictates that all contracts be awarded through a competitive selection process called a "request for information" process unless a lease meets one of the enumerated exceptions. 30 ILCS 500/40-15(a).

One exception to the RFI process is the "renewal or extension of a lease." 30 ILCS 500/40-15(b)(5). Renewals and extensions are appropriate under the Code, provided that the prescribed process is followed. 30 ILCS 500/40-15(b)(5). The Procurement Code also allows the State to procure leases without an RFI "for a duration not to exceed one year that **cannot be renewed.**"²⁷ 30 ILCS 500/40-15(b)(3)(emphasis added). The administrative rules state that the RFI process is not required for "[l]eases whose term is less than one year and whose term is not subject to renewal." 44 Ill.Adm.Code §5000.232(a)(3).

²⁷ The Procurement Code does not provide a definition for renewal.

The Procurement Code does not state the purpose of the specific exceptions to the prescription that all leases be competitively bid through the RFI process. However, the Code contains an explicit and broad policy statement in favor of competitive bidding and real property article contains a specific statement that all leases, unless subject to a small number of exceptions, *will be* procured through the RFI competitive selection process. As such, any reading of the exceptions to allow the State to initially enter into a 364-day lease without any competitive selection process and then renew it indefinitely, all without ever making a landlord compete for the State's business, is incongruous to the stated purpose of the Procurement Code.

CMS and 300 W. Adams negotiated Lease #6105, the initial, 364-day ICJIA lease, without going through the RFI process as allowed by Section 40-15(b)(5) of the Procurement Code because of ICJIA time constraints. Lease #6105 went into holdover status beginning March 1, 2009, and remained in holdover status into early 2010, when Mr. Kanellopolous negotiated a five-year renewal of Lease #6105 with a proposed effective date of May 1, 2010. All witnesses interviewed by the OEIG agree that Mr. Kanellopolous's five-year renewal did not go through the RFI process.

Mr. Kanellopolous contends that, despite the Procurement Code's language that leases with a "duration of less than one year [not competitively selected through the RFI process] cannot be renewed" and the repeated warnings of his subordinates as to the impropriety of renewing the 364-day lease, 364-day leases procured without an RFI may in fact be renewed pursuant to Section 40-15(b)(5) of the Procurement Code. Mr. Kanellopolous interprets Section 40-15(b)(3) to mean only that such a lease cannot contain a so-called "renewal clause."

This interpretation is contrary to the clear language of the statute and the administrative rules and also runs contrary to the purpose of the Procurement Code. Under Mr. Kanellopolous's interpretation, the State could continue to contract with a landlord indefinitely without ever making that landlord compete for the State's business by simply entering into an initial 364-day lease and then continuously renew the lease. Had Mr. Kanellopolous been successful in getting his 5-year "renewal" past the PPB, the result would have been that the State would have contracted with 300 W. Adams for more than seven years (March 2008 to May 2015) without 300 W. Adams ever having been competitively selected for ICJIA's lease.

Moreover, nothing in the materials Mr. Kanellopolous provided to OEIG investigators supports his contention that a 364-day lease entered into without an RFI can be renewed under the Procurement Code. While the 2005 letter from the PPB states that "any lease may be renewed," that letter did not specifically address and does not appear to contemplate 364-day leases that do not go through the RFI process. In any event, an informal letter from the PPB cannot override State law and in particular the clear language of the Procurement Code.

Mr. Kanellopolous's understandable desire to get the lease out of holdover status prior to July 1, 2010, when the State would no longer pay rent on leases that had been in holdover status from more than 6 months does not excuse his failure to follow the Procurement Code. Mr. Kanellopolous knew in at least December 2009 or January 2010 that he would not be able to move ICJIA into State-owned space. Yet, Mr. Kanellopolous did not direct his staff to immediately begin the RFI process; rather, he waited until March 2010 and negotiated a five-

year renewal because, as he stated, it was “easier.” Mr. Kanellopolous’s subordinate employees warned him that 364-day leases could not be renewed and that a new lease (like the 5-year lease) had to go through the RFI process. Mr. Kanellopolous made the decision not to heed his staff’s warnings. Mr. Kanellopolous instead decided to proceed down the “easier” path, a path where he was able to negotiate new, expensive, long-term leases without the constraints of the competitive selection process prescribed in the Procurement Code.

Mr. Kanellopolous’s “easier” approach was ultimately rejected by the PPB for failing to comply with the Procurement Code, just as one employee worried might happen. However, had Mr. Kanellopolous complied with the law by putting the lease out for an RFI when he learned in mid February 2010 that 300 W. Adams would not extend their termination deadline, the State could have been in a position to potentially save up to \$30,000 in holdover rent²⁸ and realize potential additional savings of up to \$16,000 per month from a lower monthly rent due to market conditions.²⁹

While this case is an example of the PPB’s approval being an effective check on unlawful procurements, Mr. Kanellopolous’s conduct potentially cost the State thousands of dollars. Accordingly, the allegation that Mr. Kanellopolous violated the Procurement Code when he improperly attempted to renew a 364-day lease is **FOUNDED**.

V. Recommendations

Following due investigation, the OEIG issues these findings:

- **FOUNDED** – Nick Kanellopolous violated the Procurement Code when he negotiated with a single respondent prior to a lease being awarded.
- **FOUNDED** – Nick Kanellopolous violated the Procurement Code when he negotiated a 5-year renewal of a 364-day lease.

The OEIG recommends that Nick Kanellopolous be subject to discipline for his violations of the Procurement Code and administrative rules.

No further investigative action is needed, and this case is considered closed.

²⁸ The daily rent rate increased by nearly \$500 between the terms of the original 364-day lease and lease’s holdover provisions. The State paid more than \$14,000 per month in additional holdover rent. Had CMS successfully procured a lease by issuing an RFI in the middle of February (when Mr. Kanellopolous learned that 300 W. Adams was not inclined to extend the termination date) rather than in mid-April (when the PPB rejected the renewal), the State could have saved upwards of \$28,000 in those two months.

²⁹ The lease procured by RFI after the PPB rejected the renewal had a monthly rent amount of \$31,825, a cost of \$16,820 less a month than the \$48,645 monthly base rent paid under the terms of the 364-day lease.



OFFICE OF EXECUTIVE INSPECTOR GENERAL
FOR THE AGENCIES OF THE ILLINOIS GOVERNOR

32 WEST RANDOLPH STREET, SUITE 1900
CHICAGO, ILLINOIS 60601
(312) 814-5600

OEIG RESPONSE FORM

Case Number:
09-00911

Return By:
20 Days After Receipt of Report

Please check the box that applies.

- We have implemented all of the OEIG recommendations.
(Provide details regarding action taken.)

PLEASE SEE ATTACHED.

- We will implement all of the OEIG recommendations but will require additional time.
We will report to OEIG within 30 days from the original return date.
(Provide details regarding action planned / taken.)

(over)

We are implementing one or more of the OEIG recommendations, however, we plan to depart from other OEIG recommendations.

(Provide details regarding action planned / taken and any alternate plan(s).)

We do not wish to implement any of the OEIG recommendations.

(Explain in detail why and provide details of any alternate plan(s).)

Signature

Jay Brown

Print Name

Central Management Services
Print Agency and Job Title Ethics Office

3/21/2012

Date



CONFIDENTIAL

March 20, 2012

Ricardo Meza, Executive Inspector General
Office of Executive Inspector General
32 West Randolph, Suite 1900
Chicago, Illinois 60601



RE: OEIG Case No. 09-00911

Dear Executive Inspector General Meza:

We have reviewed the Office of the Executive Inspector General's Final Report regarding the above-referenced matter. Please accept this letter as CMS' response.

CMS agrees with the OEIG's recommendation of discipline and will suspend Mr. Kanellopoulos for one day, as well as provide him with corrective counseling.

Should you have any questions please contact our Ethics Officer, Jay Brown, at : ..

Sincerely yours,

Malcolm Weems
Acting Director

RECEIVED
JUN 13 2012

IN THE EXECUTIVE ETHICS COMMISSION
OF THE STATE OF ILLINOIS

EXECUTIVE
ETHICS COMMISSION

IN RE: Nick Kannelopolous)

09-00911

RESPONDENT'S SUGGESTIONS FOR REDACTION / PUBLIC RESPONSE

Please check the appropriate line and sign and date below. If no line is checked the Commission will not make your response public if the redacted report is made public.

Below is my public response. Please make this response public if the summary report is also made public; or

Below are my suggestions for redaction. I do not wish for these suggestions to be made public.

Respondent's Signature

Date

Instructions: Please write or type suggestions for redaction or a public response on the lines below. If you prefer, you may attach separate documents to this form. Return this form and any attachments to:

Illinois Executive Ethics Commission
401 S. Spring Street, Room 513 Wm. Stratton Building
Springfield, IL 62706

See attached

I. **OEIG FINDING: NICK KANELLOPOULOS VIOLATED THE PROCUREMENT CODE WHEN HE NEGOTIATED A 5-YEAR RENEWAL OF A 364-DAY LEASE**

Response: I Relied On Two Legal Opinions And An Opinion From The Procurement Policy Board When I Submitted The 5-Year Renewal To The PPB For Approval. Therefore, I Did Not Violate the Procurement Code

In 2004, CMS solicited a legal opinion from its outside legal counsel on whether the Illinois Procurement Code provides for the renewal or extension of a lease that does not contain a renewal clause ("Freeborn Memo"). The memo is unequivocal that section 500/40-15 of the Procurement Code makes no distinction between leases containing renewal clauses and leases that do not and that you can extend any lease so long as that lease is submitted to the PPB for approval. Moreover, CMS may "extend a lease without a renewal clause" (emphasis in original) so long as the requirements of the section are met. From 2004 until 2010, there were no substantive changes to the Procurement Code or the Administrative Rules that would affect the opinions in the Freeborn Memo. The OEIG's report does not mention the Freeborn Memo. The Freeborn Memo is provided as part of my response.

In December 2005, the Procurement Policy Board sent a letter to the then Deputy Director of Property Management at CMS stating that expired leases could be renewed or extended even if that lease did not contain a renewal clause ("PPB Letter"). That letter was accompanied by a legal opinion from the PPB's outside legal counsel that states that even leases that have expired may be renewed even if the lease does not have a renewal clause and that new material terms can be negotiated for the renewal period ("Sorling Memo"). The OEIG report does briefly mention the PPB Letter by opining that "an informal letter from the PPB cannot override State law and in particular the clear language of the Procurement Code." Actually, the Procurement Code expressly states that the Procurement Policy Board "shall have the authority and responsibility to review, comment upon, and recommend, consistent with this Code, rules and practices governing the procurement ... of ... real property ... leases procured by the State." The OEIG's opinion is entirely inconsistent with the Procurement Code regarding the PPB's authority. Moreover, the OEIG's report never mentions the existence of the Sorling Memo. The PPB Letter and Sorling Memo are provided as part of my response.

All the documents cited above make it clear that any lease may be extended or renewed with new material terms pursuant to section 500/40-15 of the Procurement Code. It is also clear that the key to renewing or extending the lease is submitting the lease for PPB approval. It was the only power given to the PPB anywhere in the Code to approve or reject any State contract. By relying on two legal opinions and the PPB Letter, I did not violate the Procurement Code. In fact, I followed the statutory requirements of the Code by submitting the 5-year renewal to the PPB for approval. When that lease was rejected by the PPB we took a different course of action, as we have done in numerous other circumstances where the PPB has rejected a renewal or extension of a lease.

The documents above were solicited because at that time CMS was in the middle of a crisis with its lease contracts. CMS's FY 2005 compliance audit noted that 305 of 642 CMS leases were expired. It was under the backdrop of solving this crisis that CMS and the PPB solicited the legal opinions described

above to find a solution. These opinions were used by CMS to renew or extend and the PPB to approve literally hundreds of leases. Also, there were some extreme cases where this section of the Procurement Code was used to renew or extend leases. For example, in December 1991 CMS entered into a lease for the Department of Public Aid (now DHS) on Root Street in Chicago that had a term of December 1, 1991 to November 30, 1996. The lease expired on December 1, 1996 but the agency remained in the property and never moved out continuing to pay rent on a month-to-month basis. In 2008, almost 12 years after this lease had expired CMS extended this lease starting on October 1, 2008. Moreover, material terms were renegotiated in the lease including the rent rate. The PPB unanimously approved the extension of this lease at its September 2008 meeting. Note: the PPB unanimously approved the extension of a contract that had expired 12 years before. There is no provision in section 500/40-15 or anywhere else in the Code that expressly allows this. Both CMS and the PPB relied on the above-referenced legal opinions to extend expired contracts. It is in the perspective of eliminating expired leases and my experience with extensions of leases like this that I submitted the lease in the OEIG's report to the PPB for approval.

II. OEIG FINDING: NICK KANELLOPOULOS VIOLATED THE PROCUREMENT CODE WHEN HE NEGOTIATED WITH A SINGLE RESPONDENT PRIOR TO A LEASE BEING AWARDED

Response: The Process Described In The OEIG's Report Of Selecting The Best Offer To Negotiate Directly With Is Exactly How CMS Has Handled Almost Every Lease Transaction Since The Lease In The Report And This Method Has Been Approved By The EEC, Which Publishes To The Procurement Bulletin CMS's Intent To Negotiate With One Bidder

44 Ill. Admin. Code 500.231(m) states that "[t]he State reserves the right to reject any and all proposals..." Prior to negotiating with 300 W. Adams, I rejected all other proposals as being too expensive or requiring the State to pay a penalty to move out of the building. This is confirmed by the OEIG Report where Employee 2 testifies that I told him before negotiating with 300 W. Adams that this landlord had been "internally selected". The 300 W. Adams offer was by far the cheapest over the first 5 years and did not contain a penalty to move out after the first 5 years. An analysis by Employee 2 determined that for a 5-year lease the best deal for the State would be 300 W. Adams. For a 10-year deal, the best deal would be 36 S. Wabash. However, the way the Wabash deal was structured with improvements amortized over 10 years, the State would be forced to stay there all 10 years or pay \$783,846.00 penalty to move out after 5 years. The Procurement Code allows 10-year leases, but I was well aware that the Procurement Policy Board was critical of entering into contracts for 10 years either expressly or by structuring a deal like the 36 S. Wabash offer so that the State would be forced to stay 10 years where it would not pay the \$783,846.00 to move out. (The OEIG report states that Employee 2 testified that this was the first time he had been asked to do a fiscal analysis of a lease; since then all leases have this fiscal analysis done by staff in CMS's fiscal department. Before I became Deputy Director, staff that did not have any accounting or finance backgrounds did fiscal analyses.)

For example, at the March 2005 PPB meeting, "Chairman Healy stated he would like to talk about the fact that the State has contracts going out 10 years. He stated that he is concerned that it's not

competitive. He stated that many things could happen to allow a vendor to keep a relationship for 10 years.”

In the May 2006 meeting, “Member Ed Bedore inquires on the 10 year leases being issued by CMS...Member Bedore stated that the term is too long. Normal leases are five to six years.”

In the June 2008 meeting, “Mr. Vaught stated that CMS did not mention at the last meeting that the current lease has an amortization in it that is not complete and if CMS vacates this property before the full amortization is paid in 10 years there is a penalty associated with that...Chairman Healy perceived that this amounts to a 10 year lease from its origin because of the forcible penalty...Chairman Healy stated that the State is really not getting out of the amortization...but basically in 2000 when they did the original lease on this they put the State in a box so we would have to do a 10 year lease on it. The Board certainly cannot ok for the citizens of Illinois to pay an extra million dollars because we pull out on this lease...(sic)”

I was justified in rejecting all other offers and negotiating with 300 W. Adams in this case. As Deputy Director, I have the authority to set or change policy. Moreover, since that time, it has been the policy of CMS to select one vendor to negotiate with and to only go to a second vendor if negotiations with the first fail to produce a lease. All of this is done before any lease is awarded. Since September 2010, this “selection” is published on the Procurement Bulletin by Matt Brown, the Chief Procurement Officer for General Services, who has oversight over, among other things, CMS leasing. I have provided a copy of a “selection” with my response.

The OEIG report states that “[i]n January 2012, investigators requested from Mr. Kanelopolous (sic) any other written proposals or communication indicating that he had sought to change the administrative rules to conform to what he had informed the PPB on September 1, 2010 [that CMS had drafted administrative rules that would allow it to do individual negotiations before awarding a lease]. Mr. Kanelopolous (sic) has not provided any evidence that he has sought, requested, or attempted to effectuate any change to the existing administrative rules.” Actually, my response to the OEIG was that as of the effective date of Senate Bill 51 in 2010, all procurement rulemaking authority resides with the independent Chief Procurement Officer. I have provided a copy of this email with my response. As stated above, it is the that now publishes CMS’s intent to negotiate with one bidder.

I did not violate the Procurement Code where my conduct was consistent with CMS’s Administrative Rules and is now the formal process approved by CPO.

III. FACTUAL AND LEGAL ERRORS IN THE OEIG’S REPORT

The OEIG investigated this matter for 3 years. When they interviewed me, the file that was brought to the interview looked like it weighed over 30 pounds. However, in spite of all that time and effort, the OEIG’s report makes several factual and legal errors.

A. Factual Errors

I became Acting Deputy Director in November 2008, not 2007. Therefore, what occurred in the report happened a few months after I started the job, not one year later. We had a couple of hundred leases that were expired or were going to expire by June 30, 2010, when the Comptroller would stop paying rent on any lease that was expired more than 6 months. 30 ILCS 500/40-25 (d). So I inherited this issue and was told to solve it. Again, a few months into my tenure as Deputy Director I began dealing with the lease at issue here but there were dozens of leases that needed immediate action at the same time. An indication of how difficult being Deputy Director of Property Management at CMS is consider that I was the 6th person to have the job between December 1, 2005 (the day I started at CMS) and when I became Acting Deputy Director in November 2008.

Also, my name is misspelled throughout the report. This fact by itself is not critical but it seems very careless on the OEIG's part to get basic facts wrong on a case they worked on for 3 years. Also, the factual mistakes I point out are the ones I know because they involve me and my testimony. I do not know that the OEIG got all the other facts in the report correct where I do not have knowledge about how other people testified.

B. Legal Errors

I noted above the OEIG ignoring what the Procurement Code expressly says about the PPB's authority. The OEIG also states in its report that "[t]he PPB can reject any proposed lease" and cites to 2 Ill. Adm. Code 3002.1300. This is false. The PPB does not have the authority to reject any lease. This section of the Code simply describes the procedure for the PPB to review a contract. Its decision is not binding. The only authority the PPB had to reject a lease during the relevant times in the report was pursuant to 30 ILCS 500/40-15 (b) (5).

Renewal or extension of a lease; provided that:

(i) the chief procurement officer determines in writing that the renewal or extension is in the best interest of the State; (ii) the chief procurement officer submits his or her written determination and the renewal or extension to the Board; (iii) the Board does not object in writing to the renewal or extension within 30 days after its submission; and (iv) the chief procurement officer publishes the renewal or extension in the appropriate volume of the Procurement Bulletin. (emphasis added).

This is the only category of lease—out of seven in the Procurement Code—that the PPB had the authority to reject at the time. Even today, the PPB cannot reject any lease. Also, CMS routinely used and uses all seven methods to procure leases.

I use this example to show that the OEIG, in 3 years, never figured out how to correctly interpret Procurement law. It is important to note that the OEIG did not interview (or they interviewed but did not include in the report) any testimony from any attorney about the issues contained in the report. During the relevant dates and certainly during the 3 years the OEIG investigated this matter there were times where there were 6 or 7 attorneys just at CMS who specialized in procurement.

IV. CONCLUSION

In my tenure as Deputy Director at CMS, the Bureau of Property Management eliminated all the expired leases in its portfolio through consolidation, rebid and renegotiation. We have not had any agency in an expired lease since June 3, 2010. Also, we have eliminated over \$40 million in lease costs and almost 2 million square feet of space the State used to lease—when I became Deputy Director, the State leased about 9 million square feet of space statewide. Now we lease about 7 million. One example is where we saved over \$600,000 moving IDOT out of 300 West Adams (the building at issue in this case) and into the Thompson Center. Note: we terminated the IDOT lease on January 22, 2009; the meeting with the representatives of 300 West Adams that is at issue in this case happened one month later. Also, at the end of the day, we reduced our cost of the lease at issue in this case by over \$400,000 per year. I am not saying that the transaction at issue in this case went smoothly. It clearly did not. But at no time did I or have I ever violated the Procurement Code.

PPB**STATE OF ILLINOIS
PROCUREMENT POLICY BOARD**

Terrence Healy, Chairman

Members: Michael Bass, Ed Bedore, Ricardo Morales, Carmen Triche-Colvin

December 8, 2005

Bruce Washington
Deputy Director/Bureau Chief
Bureau of Property Management
Central Management Services
719 Stratton Office Bldg.
Springfield IL 62706

Mr. Washington,

This letter is in response to your request for a formal position from the Procurement Policy Board establishing the parameters for PPB consideration of leases proposed for renewal. Renewals of State leases are authorized by Article 40 of the Procurement Code-Real Property and Capital Improvement Leases (30 ILCS 500/40). This Article specifies that the Request for Information (RFI) procurement process serve as the primary method of selection.

Section 40-15(b) enumerates 5 alternatives to the primary method of selection. One of those alternatives is that of "Renewal or extension of a lease in effect before July 1, 2002; provided that: (i) the chief procurement officer determines in writing that the renewal or extension is in the best interest of the State; (ii) the chief procurement officer submits his or her written determination and the renewal or extension to the Board; (iii) the Board does not object in writing to the renewal or extension within 30 days after its submission; and (iv) the chief procurement officer publishes the renewal or extension in the appropriate volume of the Procurement Bulletin."

You requested specifically for the Board's position on the following:

1. Does PPB opine that leases in holdover may be renewed even if the lease does not have a renewal clause?
2. Does PPB opine that any lease may be renewed (with or without a renewal clause) and CMS/BoPM may negotiate new terms for the renewal period?
3. Does PPB opine that CMS/BoPM may renegotiate terms in current leases even if the lease was procured via an RFI?
4. Does PPB opine that any term or condition contained in a lease may be renegotiated if CMS/BoPM deems that such term is not in the best interest of the State although CMS/BoPM previously accepted the terms set forth in the lessor's proposal?

In response:

1. Yes, the PPB opines that leases in holdover may be renewed even if the lease does not have a renewal clause.
2. Yes, the PPB opines that any lease may be renewed (with or without a renewal clause) and CMS/BoPM may negotiate new terms for the renewal period.
3. & 4. PPB opines that CMS/BoPM may renegotiate terms in current leases even if the lease was procured via an RFI or is part of the existing lease agreement when done as an amendment to a contract subject to the provisions of the Procurement Code and Criminal Code. The Board will consider this activity on a case-by-case basis if these leases are presented to the Board as renewals. The Board considers the application of the statutory renewal process as one intended to retain occupancy in the State's best interest when an existing occupancy agreement is set to expire; not as a tool for renegotiation.

Also, please see attached copy on the Board's legal considerations on the use of renewals and extensions. Please contact me at 785-3988 if you have any questions or concerns about this material.

Sincerely,

Matt Brown
Executive Director

attachment

SORLING

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Todd M. Turner
Attorney at Law
tturner@sorlinglaw.com

TO: Matt Brown
FROM: Todd Turner
DATE: May 18, 2004 / Revised February 21, 2005
SUBJECT: "Renewal" verse "Extension" of Leases and Hold Over

Below is an analysis of the term "renewal" and the term "extension" in the context of a contract "renewal" verse a contract "extension." This memo was originally prepared when the issue arose in the context of State leases of real estate. However, the same analysis applies to "renewals" and "extensions" of any contract, not just real estate leases.

Summary Discussion and Answer

Article 40 of the Procurement Code (30 ILCS 500/40-5 et seq) addresses real estate leases. Under the Procurement Code, the State is to procure rental space by means of "Request for Information" as set forth in 30 ILCS 500/40-20, unless one of the exceptions in section 40-15 apply. Under 40-15 a lease may be procured without the Request for Information if:

Renewal or extension of a lease in effect before July 1, 1998; provided that: (i) the chief procurement officer determines in writing that the renewal or extension is in the best interest of the State; (ii) the chief procurement officer submits his or her written determination and the renewal or extension to the Board; (iii) the Board does not object in writing to the renewal or extension within 30 days after its submission; and (iv) the chief procurement officer publishes the renewal or extension in the appropriate volume of the Procurement Bulletin.

Looking at this language, the question becomes, "what is a renewal or extension?" The statute does not define either term. Below is an analysis of the meaning of the terms as determined by Illinois judicial decisions. However, it should be noted that the judicial decisions were not construing the terms as found in section 40-15, but were looking at those terms in the context of contract language and the application of common law judicial decisions.

MAY 18, 2004

Court cases tell us that a “renewal” of a lease is the situation where the tenant has to take some action to go beyond the initial term of the lease. A renewal is considered to be a **new lease**, even though the renewal language and terms are the same as that of the original lease. An “**extension**,” however, is when the parties intend for a **lease to continue** without change, usually happening automatically without the tenant having to give any notice that it wants to extend its occupancy.

Because the Procurement Code uses both “renewal” and “extension” together in the same statute cited above, if we apply the definitions of those terms as found in case law, arguably, the result seems to be that all pre-July 1998 leases must come before the Board if the State wants to remain in the property after expiration of the initial term, regardless of whether the lease itself did or did not have language purporting to either renew or extend the lease automatically.

1) **Distinction Made Between the Terms “Renewal” and “Extension” by the Courts**

(a) **Renewal**. Many cases addressing leases and contract issues use the terms “renewal” and “extension” interchangeably and make no comment nor give any thought to the legal distinction between the two words. However, where the distinction between renewal and extension options is made by a court, an **option to renew requires the execution of a new lease, or a formal extension of the existing lease, or something equivalent to the existing lease, in order to be enforceable.¹ Thus, a renewal is a new letting of the premises. An option to renew a lease is not a present demise of the additional term but is a covenant to grant an additional term upon the condition specified.²**

(b) **Extension**. A **covenant to extend (an “extension”) is not a mere right to an additional enjoyment of the term, but is a present demise for a future term. It is part of the original lease.³ Therefore, an extension would not be considered a letting of new contract, where arguably, a renewal could be considered the making of a new contract.**

(c) **Caveat**. Remember, however, with regard to the issue of leases under the Procurement Code, both renewals and extensions (as long as they are at the State’s discretion) are expressly allowed to be part of a request for bid or proposal. 44 Ill. Adm. §1.2055(j). Therefore, in the eyes of the Procurement Code, whether the term “renewal” or the term “extension” is used, the Code treats it as the legal equivalent of what a court would say is an “extension,” (i.e., not a new lease, but a continuation of the original).

¹49 Am Jur 2d LANDLORD AND TENANT § 141.

²Hindu Incense Mfg. Co. v. MacKenzie, 403 Ill. 390 (1949).

³J.B. Stein & Company v. Robert Sandberg, 95 Ill. App. 3d 19, 25 (1981).

2) **When Lease Terms Expire but Tenant Continues to Pay as Before**

If a tenant does not surrender possession at the time a lease for a fixed term expires and the landlord does not acquiesce in the tenant's continued possession, the tenant becomes a tenant at sufferance. A tenant at sufferance has only naked possession, and has no privity with the landlord and thus no protectible property interest in continued possession of the premises. The landlord has the sole option to make an election to treat a tenant who remains in possession after a lease for a definite term expires as a hold over or trespasser. A hold over will be presumed when the tenant continues in possession after the lease expires. If the landlord acquiesces in the tenant's holding over, *the holding over creates a new lease and there is a* presumption that the term and conditions of the expired lease are the terms and conditions of the new lease created by the hold over tenancy to the extent the terms are applicable, (e.g. if the original lease provided for landlord build-out, this would not be applicable to the new lease).

Even when a hold over tenancy is not shown, the conduct of the parties can create a month-to-month tenancy. Acceptance of monthly rental payments by the landlord will generally create a month-to-month tenancy. A month-to-month tenancy is similar to a hold over tenancy in that both are governed by the terms of the original lease. The difference lies in the duration. A hold over tenancy will last **as long as the original lease term**. A month-to-month can last indefinitely, but can be terminated upon 30 days notice. One difficulty, however, is trying to predict if a court will say when there is a holdover as opposed to a non-holdover situation. Sometimes the original lease language addresses the situation by saying that continued possession after expiration will create a month-to-month tenancy. However, many times the original lease is silent on the issue, and in such a situation, it is difficult to predict when the lease will be considered a newly created lease containing the original lease provisions including a new term of the same duration as the original, or whether the court will find a month-to-month lease.

Freeborn & Peters LLP
MEMORANDUM

ATTORNEY WORK PRODUCT

To: Chad Walker
From: John Stevens and Kris Murphy
Subject: Waiver of a real property lease's requirement that intent to exercise the lease's renewal option be timely given when the State of Illinois is the lessee
Date: December 20, 2004

I. INTRODUCTION

The purpose of this memorandum is to answer three questions, all of which are based on the following hypothetical: The State of Illinois ("the State" or "the lessee") leased office space, storage space, buildings, and other facilities from various lessors ("the lessors" or "the landlords"). Some of the leases contained a renewal clause, and some did not. Those leases which did contain such a clause gave the State the option to renew the lease for another five years at the end of its original term, but required the State to notify the lessor of the State's intent to exercise its option to renew not less than 90 and not more than 120 days prior to expiration of the original lease term. All of the leases have now expired. The State did not provide the lessors with notice of its intent to exercise its respective options to renew or of its intent to renew the leases which did not contain a renewal clause. As a consequence, the leases are now in "holdover" status.¹ Nevertheless, for the purposes of this hypothetical, it is assumed that both the State and the lessors want the leases to be renewed and that the State believes that renewal of the leases is in the best interest of the State.

Thus, the three questions are, (1) "With respect to any given lease of the type described above which contains a renewal clause, can the requirement of notice of intent to renew, given within a

¹ "Under Illinois law, the termination of a lease and the surrender of the premises are different events, and a tenant who remains in possession of the premises after his lease expires or is terminated becomes a tenant at sufferance. At the sole option of the landlord, a tenant at sufferance may be evicted as a trespasser or treated as a holdover tenant, and when the landlord chooses the latter, a holdover tenancy, which is governed by the same terms of the original lease, is created." *Hoffman v. Altamore*, 352 Ill. App. 3d 246, 250, 815 N.E.2d 984 (2nd Dist. 2004).

specified period of time prior to expiration of the original lease term, be waived by the landlord and the State so that renewal of the lease can be effected in accordance with the terms of the lease?"; (2) "Does the Illinois Procurement Code have any bearing on the first question above, such that it would forbid or provide for waiver by the landlord and State of compliance with the timely notice of intent to renew requirement in the lease?"; and (3) "Does the Illinois Procurement Code have any bearing on the ability of the State to renew a lease which does not contain a renewal clause, such that it would forbid or provide for renewal of same?"

II. WAIVER OF THE TIMELY NOTICE OF INTENT TO RENEW REQUIREMENT IN A LEASE IS ALLOWED UNDER DIKEMAN v. SUNDAY CREEK COAL AND ITS PROGENY

Over one hundred years ago, the Supreme Court of Illinois addressed the question of whether a lessee who had the option to renew a lease, but did not timely notify the lessor of its intent to do so as required by the lease, could nevertheless exercise its option to renew. *Dikeman v. Sunday Creek Coal*, 184 Ill. 546, 56 N.E. 864 (1900). In *Dikeman*, the lessee, Sunday Creek Coal, leased a coal mine. The lease contained a renewal option, by means of which the lessee could renew for an additional ten years if it notified the landlord in writing of its intent to renew twenty days prior to expiration of the first lease term. An agent of the lessee was instructed by his superiors to notify Dikeman, the landlord, of Sunday Creek Coal's intent to renew, but the agent was called out of Chicago on business and did not notify Dikeman of lessee's intent until the expiration of the original lease term was less than twenty days away. Dikeman acknowledged receipt of the notice, but stated that it was too late, and refused to extend the lease. Dikeman demanded possession of the mine, and sued when Sunday Creek Coal refused to quit the premises. Sunday Creek Coal then sued Dikeman for specific performance of the option to renew, arguing in part that it had improved the mine to such

an extent that Dikeman's refusal to renew was unjust, even given lessee's negligence in failing to timely give notice.

The landlord prevailed in the trial court, but the appellate court reversed and remanded with instructions to order specific performance of the option to renew. On appeal, the Supreme Court reversed and the landlord regained possession of the mine:

Parties have a right. . .to make their own contracts, and, if they intend that time shall be of the essence of the contract, either by the express form of their agreement or because the subject-matter makes it so, a court of equity will treat it as of the essence, and hold the parties to their agreement. . . .An agreement must be complied with as made unless some stipulation is waived, or there is a just excuse for noncomplianceIn this case the only stipulation of the parties was as to time. The agreement was purely a privilege given to the lessee without any corresponding right or privilege of the lessor, and the only stipulation was that the right should be exercised at a certain time. . . .There was no fraud, accident, or mistake on account of which complainant neglected to avail itself of the option, and it assigns no explanation or excuse for the delay except the negligence of its own agent. It lost its legal right by failing to comply with the condition precedent, and we do not see how equity can relieve against mere forgetfulness.

Id. at 550-551. With regard to the hypothetical posed in the introduction to this memorandum, the most important portion of the Supreme Court's *Dikeman* opinion is its allowance that "[a]n agreement must be complied with as made *unless some stipulation is waived*, or there is a just excuse for noncompliance." While the *Dikeman* Court determined that there was no waiver which would have excused the lessee from complying with the notice requirement in that case, the Court explicitly indicated that it is possible for parties to a lease to waive such a requirement. Consequently, the requirement of notice of intent to renew, given within a specified period of time prior to expiration of the original lease term, may be waived by the landlord so that renewal of the lease can be effected in accordance with the terms of the lease.

That rule was confirmed by the Supreme Court of Illinois twenty-five years after the *Dikeman* decision, in *Fuchs v. Peterson*, 315 Ill. 370, 146 N.E. 556 (1925). In that case, Fuchs leased property

from Peterson, and the lease contained a renewal clause which gave the lessee an option to renew if he notified the landlord of his intent to do so via registered mail no later than March 1, 1923. Fuchs did not send the registered letter, but tendered a check for the first month of the renewal period. Peterson refused the check and litigation ensued.

The lessee's counsel cited *Dikeman* for the rule that the right of a lessee to renew a lease is lost unless the condition of timely notice is waived by the landlord, and testified that he had a conversation with the landlord in which he orally communicated his client's intent to renew and asked whether further notice was necessary. According to lessee's counsel, the landlord replied, "No, I guess not; no use; no further notice is necessary." *Id.* at 371-372. The landlord denied making that statement, but the jury did not believe him and found for the lessee.

On appeal, the Supreme Court affirmed judgment for the lessee:

What was the effect of the waiver? The rule has been established in this state by many decisions that a sealed executory contract cannot be modified or changed by parol agreement so as to authorize either party to sue on it. It is equally well settled that a party to a written contract *may by parol*² *waive performance of a condition which was inserted in the contract for his benefit*. A waiver of a covenant by the party for whose benefit it is inserted into a written instrument may be made by parol, and such waiver is held not to be a modification or change in the terms of the original agreement.

Id. at 375 (emphasis added)(citation omitted). See also *Peterson v. United States Building Maintenance Co., Inc.*, 96 Ill. App. 2d 398, 401, 239 N.E.2d 322 (2nd Dist. 1968)("A party to a written contract may by parol waive performance of a condition inserted in the contract for his benefit"). Thus, because the requirement of timely, written notice of intent to renew was for the landlord's benefit, the landlord's statement to lessee's counsel that "no further notice" was necessary was a waiver of the lease's notice requirement. The rule that a requirement of written notice of intent

² Black's Law Dictionary (5th ed.) defines "parol" as "[a] word; speech; hence, oral or verbal. Expressed or evidenced by speech only; as opposed to by writing or by sealed instrument."

to renew a lease is for the landlord's benefit was only recently reiterated in the case of *T.C.T. Building Partnership v. Tandy Corp.*, 323 Ill. App. 3d 114, 117, 751 N.E.2d 135 (1st Dist. 2001)("Although the option to extend the term of the lease was for the benefit of Color Tile [i.e., the lessee], the written notice requirement was for the benefit of the landlord and could, therefore, be waived by the plaintiff [i.e., the landlord]").

Neither *Dikeman* nor *Fuchs* explicitly holds that the *lessee* may also waive a lease's requirement of timely notice of intent to renew, but if, according to *Fuchs* and *T.C.T. Building Partnership*, written notice of intent to renew a lease is for the landlord's benefit and can therefore be waived by the landlord, the waiver is accomplished once the landlord says that the notice requirement is waived and the lessee's agreement or disagreement is irrelevant. Stated another way, the question of whether to waive the notice requirement is one for the landlord to decide, and the lessee can neither force the landlord to waive nor prevent the landlord from waiving.

Dikeman and *Fuchs* are both still good law, and a fair reading of those cases will allow the State to execute the lease renewal solely upon the lessor waiving timely notice of intent to renew. Under such circumstances, no "just excuse for noncompliance" is necessary. Furthermore, *Fuchs* is still the leading case on waiver in the context of a renewal option action, despite the fact that it is seventy-nine years old, because lessees seeking relief pursuant to *Dikeman* in reported opinions since *Fuchs* have relied not on waiver, but rather on the *Dikeman* court's statement that an agreement must be complied with as made "unless. . .there is a just excuse for noncompliance." See *Gold Standard Enterprises, Inc. v. United Investors Mgt. Co.*, 182 Ill. App. 3d 840, 844-846, 538 N.E.2d 636 (1st Dist. 1989)(strict compliance with lease term requiring timely written notice of intent to renew excused in the absence of waiver where secretary mailed timely notice with insufficient postage because "[e]ven in *Dikeman v. Sunday Creek Coal* our supreme court recognized that equity may

grant relief where ‘there is a just excuse for non-compliance’”); *Pepper Pot II, Inc. v. Imperial Realty Co.*, 133 Ill. App. 3d 951, 955-956, 479 N.E.2d 949 (1st Dist. 1985)(remanded for consideration of evidence relating to the principles set out in *Ceres Terminals v. Chicago* and *Linn Corp. v. LaSalle Natl. Bank*, both of which granted equitable relief pursuant to *Dikeman*); *Ceres Terminals, Inc. v. Chicago City Bank and Trust Co.*, 117 Ill. App. 3d 399, 402-406, 453 N.E.2d 735 (1st Dist. 1983)(strict compliance with lease term requiring timely written notice of intent to renew enforced in the absence of waiver because *Dikeman* teaches that a lessee has no right to equitable relief in a renewal option action unless it can establish waiver of the time provision or such hardship to invoke the court’s equitable powers, and lessee did not establish “the degree of special circumstances necessary to warrant equitable relief”); *Providence Insurance Co. v. LaSalle Natl. Bank*, 118 Ill. App. 3d 720, 723, 455 N.E.2d 238 (1st Dist. 1983)(strict performance of lease term requiring timely written notice of intent to renew excused in the absence of waiver, in accordance with *Dikeman*, where lessee timely mailed written notice and delay in receipt by lessor was not the sole result of negligence on lessee’s part); *LaSalle Natl. Bank v. Graham*, 119 Ill. App. 3d 85, 87, 456 N.E.2d 323 (5th Dist. 1983)(strict compliance with lease term requiring timely written notice of intent to renew enforced in the absence of waiver, in accordance with *Dikeman*, where lessee failed to provide the required notice and the record revealed no circumstances which would invoke the court’s equity powers); *Linn Corp. v. LaSalle Natl. Bank*, 98 Ill. App. 3d 480, 483-484, 424 N.E.2d 676 (1st Dist. 1981)(strict performance of lease term requiring timely written notice of intent to renew excused in the absence of waiver, in accordance with *Dikeman*, where lessee made substantial and extremely valuable improvements to the property, such that the “trial court could have construed the lease to mean that the [lessee] agreed to make such improvements in return for [lessor’s] promise to grant the two five-

year options to renew. . . The alleged facts do not present the kind of case in which the option to renew is merely a privilege with no corresponding right or privilege of the lessor”).

In a situation where the landlord waives the timely notice of intent to renew clause in a lease so that the State can renew the lease, the landlord is not obtaining a windfall or being unjustly enriched or otherwise receiving anything at the expense of the people of Illinois, because the renewal option being exercised was *already* in the lease, presumably as a result of arms-length negotiation and/or a competitive Request for Information (“RFI”) process between the State and the landlord. Consequently, the landlord is receiving no more than he or she already bargained for when the lease was originally negotiated. Indeed, if anyone is being “enriched” in this situation, it is the State, because the landlord’s decision to waive the notice requirements will provide the State with an opportunity it would have otherwise lost—the opportunity to renew without spending the time and money required to complete the RFI process. A given landlord would presumably not agree to waive the requirement of timely notice if he or she did not think it was in their best interest to do so, so the transaction is more akin to an even exchange rather than “enrichment” and there is certainly nothing “unjust” about it because both parties obtain something they regard as valuable.

**III. THE ILLINOIS PROCUREMENT CODE NEITHER FORBIDS NOR PROVIDES
FOR WAIVER OF COMPLIANCE WITH A LEASE’S REQUIREMENT OF TIMELY
NOTICE OF INTENT TO RENEW**

Section 500/40-25(b) of the Illinois Procurement Code (30 ILCS 500/1-1 *et seq.*), “Length of Leases--Renewal,” states that:

Leases may include a renewal option. An option to renew may be exercised only when a State purchasing officer determines in writing that renewal is in the best interest of the State and notice of the exercise of the option is published in the appropriate volume of the Procurement Bulletin at least 60 days prior to the exercise of the option.

The hypothetical set out above in the introduction to this memorandum assumes that the State has already determined that renewal of the leases in question is in its best interest and that it wishes to renew those leases. This decision must be memorialized by the State purchasing officer, published in the Procurement Bulletin and made a part of the lease file. We note that section 500/40-25(b) requires that notice of the exercise of the option be published in the Procurement Bulletin at least 60 days prior to same. This requirement can be met because the statute does not require that notice of the exercise of the option be published 60 days prior to expiration of the time allowed for exercise of the option by the leases in question. Consequently, even if the time for notice required in the leases has already expired, it appears that publication of notice of the exercise of the option will still comply with the statute so long as publication proceeds by 60 days the *actual* exercise of the option by the State, whenever that may occur.

Also, section 500/40-15 of the Illinois Procurement Code, "Method of Source Selection," states that, "[e]xcept as provided in subsections (b) and (c), all State contracts for leases of real property or capital improvements shall be awarded by a request for information process in accordance with section 40-20." Subsection 500/40-15(b)(5), as amended by Public Act 93-839, indicates that:

a request for information process need not be used in procuring any of the following leases . . . (5) Renewal or extension of a lease in effect before July 1, 2002; provided that: (i) the chief procurement officer determines in writing that the renewal or extension is in the best interest of the State; (ii) the chief procurement officer submits his or her written determination and the renewal or extension to the Board; (iii) the Board does not object in writing to the renewal or extension within 30 days after its submission; and (iv) the chief procurement officer publishes the renewal or extension in the appropriate volume of the Procurement Bulletin.

Pursuant to this amended version of subsection 500/40-15(b)(5), if the State wants to renew a lease which was in effect before July 1, 2002 *and* which contains a renewal clause, it may exercise the renewal clause without resort to the request for information process, but must nevertheless submit the

renewal to the Board and comply with the other requirements of subsection 500/40-15(b)(5)(i) through (iv). If the Board does not object in writing within thirty days, the State may proceed to publish the renewal in the Procurement Bulletin. In other words, 30 ILCS 500/40-15(b)(5)(i) through (iv) is a waiver of the competitive selection process when its requirements are met.

So sections 500/40-25 and 500/40-15 are the portions of the Illinois Procurement Code which address renewal options in the context of real property leases, and neither section either forbids or provides for waiver of compliance with a lease's requirement of timely notice of intent to exercise an option to renew. Furthermore, we conducted a search for reported Illinois cases discussing waiver of notice of intent to renew requirements in real property leases, wherein one of the parties was the State of Illinois or one of its agencies, and did not find any cases on point.

IV. THE ILLINOIS PROCUREMENT CODE PROVIDES FOR RENEWAL OR EXTENSION OF A LEASE WHICH DOES NOT CONTAIN A RENEWAL CLAUSE

Section 500/40-15 also applies to leases which do not contain renewal provisions, but which the State nevertheless wants to renew. This is so because, while section 500/40-25 specifically authorizes the inclusion of renewal options in real property leases and explains how such an option may be exercised, section 500/40-15 makes no distinction between leases containing renewal options and leases which do not, but indicates that renewal or extension of any lease in effect before July 1, 2002 may be achieved without resort to the request for information process, so long as the State submits the renewal to the Board and complies with the other requirements of subsection 500/40-15(b)(5)(i) through (iv). Thus, the State has the option to renew a lease without resort to the request for information process, *whether or not the lease contains a renewal option*, so long as the lease was entered into prior to July 1, 2002, the renewal is approved by the Procurement Policy Board and the State complies with the other requirements of subsection 500/40-15(b)(5)(i) through (iv).

From a Procurement Code standpoint, renewal under these circumstances would be perceived as creating new terms without an RFI, but in this instance the Procurement Code specifically allows for an exemption from the RFI process for the “renewal or extension” of a lease. 30 ILCS 500/40-15(b)(5). Therefore, the State is not limited solely to exercising lease *renewal* provisions, without pursuing an RFI, but may also *extend* a lease without a renewal clause, so long as the requirements of subsection 500/40-15(b)(5)(i) through (iv) are met. In either case, lease renewal or lease extension, no RFI is required.

Landlords cannot claim surprise or disadvantage if the State opts to renew or extend a lease which does not contain a renewal option because all landlords entering into leases with the State should be presumed to know the law and that a lease may be renewed or extended without an RFI, whether or not it contains a renewal clause, because that is what the Procurement Code allows. As a result, landlords should be taking into account the fact that the lease might be renewed or extended when negotiating the original rates. Furthermore, it is unclear what “claim” a landlord might have if he or she objects to renewal under these circumstances, because there is not any legal basis under the Procurement Code for such a claim and the original lease would have been negotiated at arm’s length.

In a situation where the State opts to renew or extend a lease which does not contain a renewal option, the landlord is not being unjustly enriched by creation of an option that was not part of the original RFI or otherwise receiving anything at the expense of the people of Illinois, because the Procurement Code specifically authorizes lease renewals or extensions pursuant to the conditions described above. Neither the landlord nor the State could reasonably be regarded as having been unjustly enriched when the State is doing no more than availing itself of an opportunity explicitly authorized in the Procurement Code.

V. CONCLUSION

If the lessors in the hypothetical above wish to waive the requirements in the respective leases containing renewal provisions that the State must provide notice of its intent to exercise its options to renew the leases not less than 90 and not more than 120 days prior to expiration of the original lease term, they are free to do so pursuant to *Dikeman* and may do so orally pursuant to *Fuchs*. However, if the landlord does waive the notice requirement, the State must still comply with the requirements of sections 30 ILCS 500/40-25 and, when applicable, subsection 30 ILCS 500/40-15(b)(5)(i) through (iv), in order to successfully exercise the option to renew. As noted above, the State cannot require the lessors to waive the notice requirements, but if the lessors agree to do so then the waiver is accomplished and renewal of the lease can be effected in accordance with the terms of the lease.

If a lease entered into prior to July 1, 2002 does *not* contain a renewal clause, the State and lessor may still agree to renew it, so long as the State submits the renewal to the Board and otherwise complies with the requirements of subsection 30 ILCS 500/40-15(b)(5)(i) through (iv).

Please contact John Stevens if you have any questions.

#646417

Notice



Help

Identification

Reference Number: 22022709
 Request ID:
 Date First Offered: 11/09/2011
 Title: CMS - 6450 - REQUEST FOR INFORMATION FOR LEASED SPACE - JERSEY COUNTY

Agency Reference Number: CMS - 6450
 Agency: CMS - Central Management Services
 Purchasing Agency: CMS - Central Management Services
 Purchasing Agency SPO: Gwyn R Gurgens; Kylie Leonard; Matt Brown

Status: Published

Overview

Description and Specifications:
 The Department of Central Management Services has selected an Offer from Yellow Rose Land Company, as the Offer representing the best interest of the State. CMS shall begin negotiations toward finalizing a lease with this vendor. If negotiations result in an executed lease, the Notice of Lease Award will be posted on the Illinois Procurement Bulletin. If negotiations do not result in an executed lease, CMS reserves the right to cancel this Offer and begin negotiations with another vendor.

Key Information

Notice Type: General Notice

Published: 02/10/2012
 Notice Expiration Date: 03/21/2012
 Professional & Artistic: No
 Small Business Set-Aside: No
 Does this solicitation contain a BEP or DBE requirement?: No
 Relevant Category: Facilities
 Total Amount of Award: \$0.00 (Total Dollar Value Only/Includes Any Renewal Options)
 Estimated/Actual Value Description: \$0

Bidder(s)

Number of Responding Bidders: 0
 Number of Unsuccessful Responsive Bidders: 0
 Total Number Awarded: 0

Listing of All Bidders/Offerors Considered But Not Selected:
 n/a
 Source Selection: N/A

Vendor(s) Selected for Award

No vendor information to display.

Notice Contact

Name: Kathleen Britton
 Street Address: 623 Stratton Office Building

City: Springfield
State: IL
Zip Code: 62706
Phone: 217-782-5586
Fax Number: 217-557-1036
EMail Address:

Class Code

Class Codes: S460 Real Estate/Real Property Services

Attachments

To download file(s), click on filename(s) located below. Not all Notices will have files to download.

File Attachments:

Kanellopoulos, Nick

From: Kanellopoulos, Nick
Sent: Wednesday, January 11, 2012 12:18 PM
To:
Subject: Your request
Attachments: sample - CMS Offer Evaluation Workbook- Template.xlsx; 06450 - DHS - Jerseyville Offer Evaluation Workbook.xlsx; Response to Letter.docx

As I discussed with you on the phone, on July 1, 2010, SB51 took effect. Today, all contracts, including leases must be executed by the CPO, who is employed by the Executive Ethics Commission. In addition, Matt Brown, the CPO, review and publishes our RFI's, reviews and publishes our selections, and reviews, approves and publishes our Notice of Awards.

Moreover, Rule-making authority for all contract procurement rests with the CPO. As of today, no rules have been filed with JCAR by the CPO's office.

Internally, we have updated our process to reflect the changes made by SB51. Attached you will find our current workbook (blank and an example of one).

Since we eliminated holdover leases in 2010, like the one at issue in this case, we have in almost every case competitively bid leases. There are very few exceptions to this. The attached workbook is what we use to record all procurement activity.

Let me know if I have answered your questions,

Nick

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