Office of the Public Auditor
Commonwealth of the Northern Mariana Islands
World Wide Web Site: http://opacnmi.com
2nd Floor J. E. Tenorio Building, Chalan Pale Arnold
Gualo Rai, Saipan, MP 96950

Mailing Address:
P.O. Box 1399
Saipan, MP 96950

E-mail Address:
mail@opacnmi.com

Phone: (670) 234-6481
Fax: (670) 234-7812

IN RE REQUEST FOR RECONSIDERATION OF OPA APPEAL DECISION BP-A021 FILED BY THE WACKENHUT CORPORATION	)	IFB-MVA-002 DECISION ON REQUEST FOR RECONSIDERATION No. BP-A021.1

SUMMARY

The Wackenhut Corporation (TWC) requests reconsideration of our decision, *In re All Around Security Services, Inc.* (AASI), BP-A021, April 5, 2000, granting in part the appeal filed by AASI from the denial of its protest by the Director of Division of Procurement & Supply (P&S). We *deny* the reconsideration request.

Our earlier decision directed the termination of TWC's contract and the re-solicitation of Marianas Visitors Authority's (MVA) security service needs. OPA concluded that the P&S Director violated CNMI Procurement Regulations (CNMI-PR) Section 3-102(9) in awarding the contract to a non-responsive bidder. TWC's reconsideration request contends that: (1) OPA erred in its application of the legal standard on bid responsiveness; (2) the three items lacking from its bid are not material Invitation for Bid (IFB) requirements; and (3) its bid signified an intent to be bound.

TWC's reconsideration arguments (1) have not persuaded us that our appeal decision contained errors of fact or law, (2) fail to present information not previously considered, and (3) are lacking in merit to warrant reversal or modification of our decision. We find nothing in TWC's arguments to convince us that its bid is an unequivocal offer to perform all material terms and conditions of the solicitation. OPA affirms its recommendation to terminate TWC's contract under CNMI-PR Section 5-103(2)(a)(ii), and to issue a new solicitation for this procurement. Upon termination of its contract, TWC would be entitled to payment for actual expenses incurred and reasonable profits prior to termination.

BACKGROUND

TWC filed with the Office of the Public Auditor (OPA) on April 19, 2000 a request for reconsideration of OPA's April 5, 2000 appeal decision. That decision granted in part the

appeal of AASI from the denial of its protest by the P&S Director pertaining to Invitation for Bids no. IFB-MVA-002. This IFB was a solicitation of proposals for one-year security services at three selected tourist sites on Saipan. OPA has jurisdiction of this reconsideration request as provided in Section 5-102(9) of the CNMI-PR.

OPA's Appeal Decision

In its April 5, 2000 appeal decision, OPA granted in part AASI's appeal by directing that TWC's contract be terminated under CNMI-PR Section 5-103(2)(ii), and that new bids be solicited for MVA's security services requirements. OPA stated that the effective date of this termination should be upon the commencement of the new contract. OPA's review showed that the P&S Director violated Section 3-102(9) when he awarded the contract to TWC despite its failure to supply essential requirements of the solicitation at bid opening.

TWC's Reconsideration Request

TWC filed a timely reconsideration request with OPA on April 19, 2000. The reconsideration request contends that: (1) OPA erred in its application of the legal standard on bid responsiveness, (2) the three lacking items of information referred to in the decision were not material terms and conditions of the IFB, and (3) TWC's bid signified an intent to be bound even without a signature. TWC asserts that it is in the CNMI's best interest to ratify and affirm its current contract. In the alternative, TWC states that it should be compensated not only for actual expenses incurred but also with reasonable profits. Details of these arguments follow:

I. Legal Standard on Bid Responsiveness

According to TWC, the appropriate legal standard for determining bid responsiveness, based on U.S. General Accounting Office (GAO) guidelines, is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the solicitation, so that upon acceptance the contractor will be bound to perform in accordance with all the IFB's material terms and conditions. TWC argues that OPA erred when it applied a very different standard based on CNMI-PR Section 3-102(7) [Bid Rejection]. It states that OPA "emasculates" the test for responsiveness in concluding that TWC's bid was not responsive because it did not address specific IFB requirements that were indispensably necessary to accomplish the purpose of the procurement, including the acceptability of the bids for such purpose.

TWC asserts that OPA failed to correctly apply the standard set forth in Sections 3-102(9) and 1-201(18). TWC contends that its bid was an unconditional offer to perform, and that OPA "incorrectly applied the standard in holding that TWC did not submit a 'responsive bid' under CNMI-PR §3-102(9)." TWC explains that when it submitted an annual cost for each site, it made an offer to perform security services such that upon acceptance by MVA of its bid, it "would be bound to provide security services for all three sites : (1) for one year; (2) from 7:30 a.m. to 4:30 p.m., for a total of nine hours per day; (3) from Monday through Sunday,

including holidays; (4) the security company to ensure that a one hour lunch is covered by a relief person; and (5) at a cost of $16,0511.04[sic] per site; as per IFB-MVA-002's material terms and conditions."

II. Material Terms and Conditions of the Solicitation

TWC stated that material terms of a solicitation are those that affect the price, quality, quantity, or delivery of goods or services offered. Aside from its contention that OPA was incorrect in its application of legal standards, TWC also argues that the three items of information lacking (i.e., annual rate per security officer per site, schedule of security officers, and assigned personnel) are not material IFB terms and conditions. In its reconsideration request, TWC presented the following arguments for each item:

a. Annual Rate per Security Officer per Site

TWC states that it provided this information through the annual cost of security per site. TWC argues that the cost of security is the same regardless of whether one or more security officers are used, and its bid included the cost of providing security guards during lunch breaks, days off, vacations, etc.

In addition, TWC disputes OPA's statement that at least three guards were necessary for the required security service, claiming that such comment is unsupported by any evidence. TWC explains that the IFB requirement to provide lunch coverage by a security officer is to ensure that the site will not be left unattended during the security guard's lunch. Although the IFB required "lunch coverage by a security officer," TWC claims that the IFB did not ask for a specific number of security officers per site. It argues that it is conceivable that the guard on duty at lunch will also be the one on duty on the regular guard's day off, and thus only two guards may be required. TWC states that it is unreasonable for OPA to add or modify terms of the IFB or impose vague interpretations of terms set forth in the IFB when there is no evidence to support such action, citing *In re: Hafadai Beach Hotel Extension*, 4 N.M.I. 37 (1993).

b. Schedule of Security Officers

Although TWC does not dispute OPA's finding that it failed to provide the schedule of security officers, it argues that MVA could evaluate the bid even without this schedule as demonstrated by the acceptance of its bid. TWC contends that a solicitation requirement is not material if the government does not need the information in order to evaluate bids or the information otherwise does not have an impact on the bidder's promise to perform as specified. [*Booth & Associates*, B-277477.2, at page 5]. According to TWC, it demonstrated that it would be bound to provide security services according to the material terms of the IFB by submitting the cost at which it would provide the security services.

In addition, TWC states that this requirement pertained to TWC's capability to perform the contract requirements, a responsibility element which could be obtained even after the bid submission, citing CNMI-PR §3-301(2).

c. Assigned Personnel and Manpower Back-up

TWC argues that knowing the names of the security personnel and the manpower backup is not related to TWC's promise to perform. It explains that the names of security personnel and backup are subject to change and regardless of who these persons are, TWC would still be bound to perform. While acknowledging that assigned personnel may be relevant in determining the actual number of security personnel to be used, TWC states that the actual number of personnel is not an item required in the IFB. TWC claims that this information, too, is more of a responsibility element which could be obtained sometime before award.

III. Absence of a Signature on TWC's Bid

TWC argues that the GAO decision (*SWR, Inc.*, B-278415, December 17, 1997) cited by OPA is inapplicable because it was based on the Federal Acquisition Regulations (FAR) which have specific provisions requiring the bidder to sign the bid, citing 48 CFR 52.214-12, 52.214-18 and 14.405. TWC claims that the CNMI-PR do not have comparable provisions, and therefore a signed bid is not mandatory for making a binding offer in the CNMI.

In addition, TWC claims that its bid would still be responsive notwithstanding the *SWR* case because an unsigned bid must also lack some other material indication of the bidder's intention to be bound before it could be rejected. TWC states that there is nothing in its bid to indicate that it did not intend to be bound.

In a related argument, TWC stresses that it was bound to perform [even without a signature] because by law a bidder for a public contract cannot, in the absence of special circumstances, either withdraw his bid or proposal, citing *64 Am. Jur. 2d Public Works and Contracts* §83 (1972). Thus, according to TWC, "OPA's conclusion that TWC's bid was not responsive because it was not an offer to perform, without exception, is unfounded."

TWC's Arguments Against the Remedy Provided in OPA's Decision

In its reconsideration request, TWC also contends that the ratification and affirmation of its contract is in the government's best interest because: (1) it would instill [public] confidence that once the Government awards a contract it will be fulfilled; doing otherwise will create an impression that a government contract is subject to termination "upon the addition of terms not previously contained in the solicitation"; and (2) termination of TWC's contract, as directed in OPA's decision, will increase the expense to MVA in paying reasonable costs incurred as well as profits to TWC, plus the cost of obtaining a new contract.

TWC claims that OPA, in its decision, awarded compensation only for actual expenses incurred. Should OPA deny this reconsideration, TWC emphasizes that it must also be awarded a reasonable profit under the contract, not merely the actual expenses incurred.

ANALYSIS

Our analysis of each of TWC's points reveals no basis for reconsidering our earlier decision on AASI's appeal because TWC's arguments (1) have not persuaded us that our appeal decision contained errors of fact or law[1], (2) fail to present information not previously considered, and (3) are lacking in merit and therefore do not warrant reversal or modification of our decision. Following are OPA's comments on the issues and arguments presented in TWC's reconsideration request:

I. Legal Standard on Bid Responsiveness

TWC alleges that OPA erred in applying "the appropriate GAO standard" on bid responsiveness. The GAO standard referred to by TWC, also cited in OPA's decision, is the guideline provided in *Booth & Associates*, cited earlier. According to this GAO standard, "...the test for responsiveness is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the solicitation, so that upon acceptance the contractor will be bound to perform *in accordance with all the IFB's material terms and conditions*...." [Emphasis added]. TWC misses the substance of the entire GAO criteria. A complete reading of this standard clearly shows that for a bid to be deemed responsive, it must be an unequivocal offer to perform *all* the material terms and conditions of the IFB. This is consistent with the definition of "responsive" in CNMI-PR Section 1-201(17) which provides that in reference to a bidder, responsive means "a person who has submitted a bid which conforms *in all material respects* to the invitation for bids." [Emphasis added].

Appellant stresses that its bid was an unconditional offer to perform because it contained the annual cost for each site. However, the mere submission of the annual security cost for each site does not make an offer unequivocal, especially in this case where the intention to be bound by material solicitation terms, other than price, was not clearly specified in TWC's bid. The IFB for this solicitation had established the material terms and conditions which were not

[1] While TWC also alleges that our decision contained errors of law, it has provided insufficient detail to allow us to rule on this issue. CNMI-PR Section 5-102(9)(a) [Request for Reconsideration] provides, among other requirements, that the request for reconsideration shall contain a *detailed* statement of the factual or legal grounds. Also TWC, without providing legal authority or factual details, states that: "...the question OPA should have decided was: Did TWC submit a bid 'which ***conformed*** in all material respects to the invitation for bids?' It did not. Instead, the OPA interpreted §1-201(18) and 3-102(9) to require 'that a bidder should be ***responsive*** to all the material terms of the invitation for bids in order to be awarded a contract.' Appeal at 7. However, this formulation is incorrect. 'Responsive' should not be substituted for the term 'conform'." [Emphasis in original]. Without supporting legal authority or factual details, we are unable to consider TWC's argument that our decision contained errors of law.

limited to price alone. We find nothing in its bid to convince us that TWC was making an unequivocal offer to perform all material terms and conditions set forth in this solicitation.

As discussed at length in the decision, all the bidders failed to supply material solicitation requirements at bid opening, thus making their bids (including TWC's) not responsive. TWC's reconsideration arguments have not persuaded us that the three required items of information which were lacking in TWC's original bid submission do not affect the bidder's unequivocal offer to perform. We do not see how it can be concluded that a bid is an unequivocal offer to perform the material terms of the IFB, such as provision of daily security for a one year period from 7:30 am to 4:30 pm with a relief covering lunch, without the submission of any of the three required items of information relevant to this material IFB requirement.

TWC claims that the proper authority for bid responsiveness are Sections 3-102(9) and 1-201(18)[2] of the CNMI-PR. There is no disagreement on this point as both the "Recommended Remedy" and "Decision" parts of our appeal decision cited a violation of Section 3-102(9) in the area of bid responsiveness. The definition of responsiveness in the CNMI-PR in Section 1-201(18) uses the phrase "conforms in all *material respects* to the invitation for bids." [Emphasis added]. GAO's test for bid responsiveness is similar as it refers to "an unequivocal offer to perform, without exception, the exact thing called for in the IFB, in total conformance with *the material terms* of the solicitation." [Emphasis added]. As mentioned above, responsiveness to (unequivocal offer to perform) the material terms of the IFB hinged on the submission of the three required documents which were lacking in TWC's bid. It follows, therefore, that failure to submit these three required documents rendered TWC's bid non-responsive.

TWC also claims that OPA erred when it applied CNMI-PR §3-102(7). This provision includes as a basis for bid rejection the failure of a bidder to conform to essential requirements. As stated in the decision, the CNMI-PR lack a definition or guidelines for determining material solicitation requirements, and use different terminologies when referring to bid requirements by also using the term "essential requirements" in Section 3-102(7) [Bid Rejection]. Nevertheless, we have determined that compared with the definition of "essential," the term "material" carries with it a lesser degree of necessity or importance. Therefore, to qualify as an essential requirement, a specification must of necessity also qualify as a material requirement for purposes of determining bid responsiveness.

We disagree with TWC's claim that adopting CNMI-PR Section 3-102(7) "emasculated" or weakened the test of responsiveness because this section clearly presents principles consistent with Section 3-102(9). Although these two sections use different terminologies, both apply the basic principle that award should be made only to a bid meeting specified requirements

[2] CNMI-PR Section 1-201(18) defines "Services," rather than "Responsive" which is defined in the prior subsection, 1-201(17). However, based on the correct sequence of the section numbers, the definition of "Responsive" should properly be numbered as 1-201(18) as TWC did in this case.

which are either material [under §3-102(9)] or essential [under §3-102(7)]. Section 3-102(7) was not the overriding factor in our appeal decision. The decision granted in part the appeal because of a violation of Section 3-102(9) - the particular section quoted by TWC as the proper basis for determining bid responsiveness. Section 3-102(7) was used only to prove the point that the three items lacking in TWC's bid are material solicitation requirements. By qualifying as essential requirements under Section 3-102(7), the three items lacking in TWC's bid are unquestionably material requirements since the latter carry a lesser degree of necessity or importance. TWC fails to convince us that this approach is not a proper basis for establishing "the material requirements" in an area where the CNMI-PR provide no specific guidance.

II. Material Terms and Conditions of the Solicitation

In relation to the above argument, TWC contends that the three pieces of information lacking are not material IFB terms and conditions. It has presented several arguments to support its position, among which are: (1) the information lacking in TWC's bid does not affect price, quality, quantity and delivery of goods or services; and (2) OPA confused the material terms and conditions that pertain to TWC's promise to perform with TWC's capability to provide the security services. We now discuss the specific points raised to determine if TWC's arguments provide a sufficient basis to reconsider our conclusion in the appeal decision.

a. Annual Rate per Security Officer per Site

TWC argues that it provided this particular information in the form of annual cost of security per site. It finds no difference between the required information and the information it submitted, explaining that the cost is the same regardless of whether one or more security officers were to be assigned. TWC explains that the cost already includes provision for an additional reliever guard for lunch breaks, days off and vacation.

TWC seems to argue that it met the solicitation requirement for a reliever guard during lunch breaks, day off and vacation by explaining that the cost submitted includes a provision for these additional costs. However, conformance with a requirement should be evident in the bid as submitted, not merely asserted later after the bids have been opened. As stated in the decision, responsiveness must be ascertained from the bid documents themselves and not from explanations after the bids have been opened. [*In re appeal of All Around Security, Inc.*, BP-A021, April 5, 2000, Page 9]. Bidders must prepare their bids in such a way as to clearly represent their full intention to be bound by the IFB's material requirements.

In addition, TWC finds unreasonable OPA's comment that three guards are necessary for the security service. We believe the issue of whether two or three guards should be assigned to each location is of little importance. The important point is that there should be more than one guard assigned to one location on a given day because another person should cover the lunch break at the least. We recognize that the solicitation requires only

one reliever guard for lunch breaks, and whether this same guard would be the one to relieve on the main guard's day off is at the discretion of the security company, depending on how it schedules its security personnel. Our statement in the decision that at least three guards would have to be assigned at each site was merely a possible scheduling arrangement, and was meant to emphasize that submission of an annual cost per site alone was not adequate proof of a bidder's promise to perform a material IFB condition, especially without the other two requirements which TWC also failed to submit.

b. Schedule of Security Officers

TWC cited a GAO decision which holds that a solicitation requirement is not material if the government does not need the information in order to evaluate bids or the information otherwise does not have an impact on the bidder's promise to perform as specified. The GAO guideline referred to by TWC was also cited in OPA's appeal decision although taken from a different case, *In the matter of American Spare Parts, Inc.*, B-224745, January 2, 1987. Similarly, in this decision, GAO set the following two instances when a solicitation requirement could be considered not material: (1) if the government does not need the information in order to evaluate the bids, or (2) if the information does not have an impact on the bidder's promise to perform as specified. The requirement to submit a schedule of security officers does not meet either standard.

TWC contends that MVA could evaluate its bid even without a schedule, as demonstrated by the acceptance of its bid. TWC seems to miss that MVA's acceptance of TWC's bid was flawed resulting in a violation of CNMI-PR Section 3-102(9)(a) - particularly the requirement that award of a contract be made only to a *responsive* bidder. Accordingly, MVA's flawed acceptance cannot be a valid basis to prove that the Government does not need the information lacking for its bid evaluation. Under CNMI-PR Section 3-102(6), bids are to be evaluated based on the IFB requirements which may include criteria as are necessary "to reasonably permit a determination of the acceptability of the bid for the purpose intended." TWC's reconsideration request does not persuade us that the schedule of security officers is not an essential requirement to accomplish the purpose of the solicitation.

TWC also claims that its failure to submit this requirement did not impact its promise to perform as specified. We reiterate that GAO has held that solicitation requirements for information relating to the product to be furnished involve bid responsiveness, while those relating to a bidder's capability and experience pertain to the bidder's responsibility. [*Beta Construction Company*, B-274511, December 13, 1996]. The schedule of security officers certainly pertains to the product (services in this case) to be furnished and therefore impacts the responsiveness of the bid. Nothing in TWC's bid showed that it promised to deliver the security service required by the terms of the IFB. Without providing at least the schedule of security officers, we believe that it cannot be determined whether the bidder's offer to perform satisfies the required level of service called for in the solicitation. It would be futile to accept an "offer to perform" without certainty as to

what exactly is being promised by the bidder. Even TWC seems to agree on this point by stating that material IFB terms are not limited to the contract price alone, but also include those terms that affect the quantity or delivery of goods or services offered.

c. Assigned Personnel and Manpower Back-up

TWC claims that identifying by name the security personnel and the manpower back-up is not related to TWC's promise to perform. While admitting that the requirement of assigned personnel is relevant in determining the actual number of security personnel to be used, TWC argues that the actual number of personnel is not an item required in the IFB. In addition, TWC states that this is more of a responsibility item because it involves whether the company is capable of performing the contract requirements, and as such, could be obtained even after bid opening.

IFB Requirement no. 4 specifically required bidders to "indicate the names of persons to be assigned and other manpower back-up," and those names clearly were not submitted by TWC. The requirement is needed so the Government may evaluate whether TWC intends to provide services in accordance with the terms of the IFB. For instance, the actual number of security personnel assigned and manpower back-up is needed for determining whether the bidder promises to provide the needed reliever guard during lunch break as well as continuous daily service from 7:30 am to 4:30 pm. Accordingly, we cannot agree with TWC that this is a responsibility item.

III. Absence of a Signature on TWC's Bid

The primary basis for OPA's decision was our finding of non-responsiveness for failure to submit material (not to mention essential) solicitation requirements. Since we have already determined that TWC was non-responsive for failure to submit material IFB requirements, we need not address this issue. Nonetheless, the following comments are provided as guidance for future procurement.

TWC claims that a GAO case cited by OPA, *SWR, Inc.*, is inapplicable because a signed bid is not a mandatory requirement to make a binding offer in the CNMI. Appellant argues that the CNMI-PR, unlike the FAR, do not have provisions requiring bids to be signed.

We disagree with TWC's conclusion. A reasonable reading of the GAO holding in *SWR, Inc.* shows that rejection of the unsigned bid was not because of the FAR provision requiring bids to be signed, but because the bid was found to be non-responsive. That ruling states:

"An offer which is **not signed** and lacks some other material indication of the offeror's intention to be bound generally must be rejected since the government's acceptance of

the offer would **not** result in a binding contract *without resort to confirming the offeror's intention to be bound*[3]." [Bold emphasis in original, italics added].

This GAO statement supports the very essence of competition in sealed bidding procedures, and the proper determination of responsiveness and responsibility in sealed bids. Under the sealed bidding method, the responsiveness of a bid is determined based only on the documents submitted before bid opening and not from clarifications provided by the bidder after the bids have been opened. It is not proper to consider a bidder's submission of a material or essential requirement after the bids have been opened. In the *SWR, Inc.* case, GAO decided to reject the bid which had been found: (1) unsigned; and (2) lacking a material indication of the offeror's intention to be bound - because no binding contract could result without subsequent confirmation of the offeror's intention to be bound.

If GAO's overriding consideration in rejecting the bid was the FAR provision requiring bids to be signed, then it would have cited the FAR violation in the decision. Rather, GAO emphasized in the *SWR, Inc.* case the importance of expressing the offeror's intention to be bound *at the time of bid opening*, either by signing the bid or by putting in the bid some other material indication of intent to be bound. TWC's bid likewise showed no other material indication to be bound. As noted in the decision, to be considered unequivocal a bid should either: (1) contain a material indication of the bidder's intention to be bound; or (2) be signed by the bidder.

TWC's Arguments Against the Remedy Provided in OPA's Decision

TWC raises two points in justifying a ratification and affirmation of its contract as being in the Government's best interest. First, TWC claims that public confidence would be enhanced by general awareness that once the Government awards a contract it will be fulfilled. TWC states that keeping the current remedy will create an impression that government contracts are subject to termination "upon the addition of terms not previously contained in the solicitation." Second, TWC claims that the termination of the contract will increase the cost to MVA. In the alternative, TWC states that if OPA denies its request, it should be awarded not only actual expenses incurred but also reasonable profits under the contract. According to TWC, OPA's decision made no award of reasonable profits.

We recommended the termination of TWC's contract because we found that a violation of CNMI-PR Section 3-102(9) had occurred. TWC's allegation that government contracts are subject to termination "upon the addition of terms not previously contained in the solicitation" is baseless and unfounded. TWC cites neither relevant facts nor specific instances to support its claim.

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[3] The solicitation in this case stated that the agency intended to make an award without discussions, a format similar to competitive sealed bidding.

We stand on our conclusion that maintaining confidence in the integrity of the CNMI government procurement system outweighs *any possible benefit* in continuing with TWC's contract. TWC claims that it will be less costly if it is allowed to continue with its contract. However, we see no reason to alter our finding that it would not be difficult to implement the remedy set forth in our decision. We do not see how the cost of implementing this remedy would be significant considering that this is a simple service contract. In our judgment, any additional costs incurred in such remedy would not be so substantial as to warrant reconsideration of the remedy.

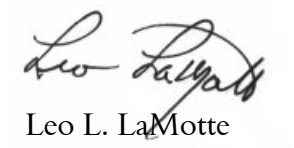
As regards TWC's request for award of reasonable profits, we find the request unnecessary. Our decision specifically cited CNMI-PR 5-103(2)(a)(ii) which allows the person who was awarded the contract compensation for actual expenses reasonably incurred *plus reasonable profits prior to contract termination*. We emphasize that only two available remedies are provided under CNMI-PR 5-103(2)(a) [Remedies after an award where the person awarded the contract has not acted in bad faith]: either (1) contract ratification, or (2) termination.

As called for in CNMI-PR 5-103(2)(a)(ii), upon termination of its contract, TWC would be entitled to payment for actual expenses incurred and reasonable profits.

DECISION

Under the CNMI-PR, to obtain reconsideration of an appeal decision, the requesting party is required to present a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. As set forth above, TWC's arguments (1) have not persuaded us that our appeal decision contained errors of fact or law, (2) fail to present information not previously considered, and (3) are lacking in merit and therefore do not warrant reversal or modification of our decision. We therefore affirm the findings of fact presented in our appeal decision, as well as our conclusions based thereon.

This request for reconsideration is denied in its entirety.



Leo L. LaMotte
Public Auditor, CNMI

June 13, 2000