



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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

In the Matter of

MAUI KUPONO BUILDERS, LLC,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION,
STATE OF HAWAII,

Respondent.

PDH-2019-006

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

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

I. INTRODUCTION

On November 8, 2019, Petitioner MAUI KUPONO BUILDERS, LLC ("Petitioner"), filed a Petition for Administrative Review and Hearing Relief ("Petition"), seeking review of Respondent DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII's ("Respondent", "State of Hawaii", or "Department of Transportation") denial of Petitioner's protest in connection with Respondent's Invitation for Bids designated as Federal Aid Project No. STP-0300(158). Respondent filed its Response to Petitioner's request on November 14, 2019.

A Notice of Hearing and Pre-Hearing conference was issued on November 14, 2019 and duly served on the parties. A prehearing conference was conducted on November 15, 2019 before the undersigned Hearings Officer. At the prehearing conference, the hearing was rescheduled from November 22, 2019 to December 4 and 5, 2019, over Respondent's objection. Respondent's motion for summary judgment was scheduled to be heard on November 22, 2019.

A hearing on Respondent's motion for summary judgment was conducted on November 22, 2019. Anna H. Oshiro, Esquire, appeared on behalf of Petitioner. Patsy M. Takemura, Esquire and Fawn Y. Yamada, Esquire appeared on behalf of Respondent. After having heard the argument of counsel and having considered the memoranda, exhibits, and declarations attached thereto, along with the records and files in this matter, Respondent's motion for summary judgment was denied.

An administrative hearing was conducted before the undersigned Hearings Officer on December 4, 2019. Petitioner was represented by Anna H. Oshiro, Esquire, and Loren A. Seehase, Esquire. Respondent was represented by Patsy M. Takemura, Esquire, and Fawn Y. Yamada, Esquire. Petitioner called two witnesses: Kevin Yamabayashi, Petitioner's Director of Estimating and Outer Island Operations, and Erik Rhineland, Petitioner's General Manager. Respondent called two witnesses: Jon M. Young, the Executive Director of Hawai'i Asphalt Paving Industry, and Edwin Sniffen, the Deputy Director of the Department of Transportation, State of Hawai'i, Highways Division.

At the conclusion of the hearing, the parties were directed to submit written closing arguments by December 6, 2019. Petitioner and Respondent filed their Closing Arguments on December 6, 2019.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. On or about July 12, 2019, Respondent issued an Invitation for Bids, designated as Federal Aid Project No. STP-0300(158) and entitled, "SEALED BIDS for: INSTALLATION OF PAVEMENT PRESERVATION STRATEGIES AND SURFACE TREATMENTS AT VARIOUS LOCATIONS" ("IFB").

2. The IFB was issued to retain a contractor to provide "pavement reconstruction, cold planing, crack sealing and resurfacing on the island of Oahu on an "as-needed" basis ("Project"). The term of the Project was for one year, but the IFB also provided that the Project could be extended for up to two one-year extensions.

3. Specifications for the Project were made available online.

4. Section 406 of the specifications for the IFB required the use of Stone Matrix

Asphalt ("SMA") Pavement.

5. Section 406.02 of the specifications, entitled, "Materials", describes the required materials comprising the SMA to be used in the Project as: (A) "Performance Graded (PG) Binder", designated as PG64E-22¹; (B) "Aggregates", made by "crushing and screening hard tough, durable stone of uniform quality"; . . . (E) "Mineral Filler", conforming to AASHTO² M17 and "composed of rock dust or crushed limestone"; and (F) "Stabilizer", described as a cellulose fiber stabilizer³.

6. Erick Rhinelander, Petitioner's General Manager, testified that SMA is comprised of at least four separate and distinct components: a course mix aggregate, a mineral filler, a polymer modified asphalt binder, and a cellulose stabilizer.

7. The use of polymer modified asphalt binder and cellulose fiber in SMA increases resistance to rutting⁴ and fatigue cracking of the paved asphalt.

8. SMA is impermeable and has high frictional resistance, which provides improved safety to the motoring public when travelling on wet pavements.

9. SMA results in lower traffic noise, which may lower costs associated with noise barriers in high-traffic areas.

10. SMA is recommended by the Federal Highway Administration ("FHA"). The SMA specification in the IFB was approved for advertising by the FHA.

11. SMA has been used in the United States since the 1960s. It is also used in Germany.

12. SMA was used to pave a portion of the Moanalua Freeway in 2004. The portion paved with SMA has not required repair or preventative maintenance since it was paved and is in better condition than any of the roads surrounding the area.

13. SMA has a twenty-five to thirty-year life span. Roads paved with the standard asphalt mix have a life span of twelve to thirteen years.

14. Respondent is able to utilize capital improvement program funding for projects with a life span of at least twenty years. Because SMA has an extended life span, Respondent is able to utilize capital improvement program funding for the Project.

¹ Also referred to as polymer modified asphalt binder.

² American Association of State Highway and Transportation Officials

³ The specifications also state that "fibers other than cellulose fiber that are equal or better may be used if requested to and accepted by the Engineer."

⁴ A rut is a longitudinal surface depression in the wheel path.

15. SMA costs between \$500-\$550 per cubic yard compared to \$300 per cubic yard for conventional asphalt mixes.

16. SMA requires less maintenance and repair than standard mix asphalt. Using SMA will result in less road repair and maintenance, which in turn will result in less inconvenience to drivers, less danger to road repair workers, fewer road hazards caused by potholes and other road deterioration, less damage to vehicles travelling on the roads, and less claims against the State of Hawai'i for damage caused to vehicles as a result of deteriorating roadways.

17. SMA is a superior asphalt paving product, as compared to conventional asphalt mixes.

18. The use of SMA will assist the State of Hawai'i in maintaining the State's roadways within the parameters of the federal asset management plan, and in ensuring continued access to approximately \$185,000,000 in federal funding for Hawai'i's roadways.

19. Bids for the IFB were due on or before 2:00 p.m. on August 22, 2019.

20. A pre-bid meeting was conducted on July 31, 2019. Kevin Yamabayashi, Petitioner's Director of Estimating and Outer Island Operations, attended the pre-bid meeting on behalf of Petitioner. Mr. Yamabayashi did not raise any concerns regarding the availability of the SMA or any of its components at the pre-bid meeting. No other attendees of the pre-bid meeting raised any concerns at the meeting regarding the availability of SMA materials.

21. Mr. Yamabayashi emailed Respondent a total of 28 questions regarding the specifications in the IFB on August 5, 2019, August 8, 2019, and August 16, 2019. None of the questions referred to the availability of the mineral filler.

22. Addendum 1 to the IFB was issued on August 15, 2019.

23. Addendum 2 to the IFB was issued on August 22, 2019. The Addendum stayed the procurement process.

24. On August 20, 2019, Petitioner filed a protest with Respondent over specifications in the IFB.⁵ The protest stated, in relevant part,

The project is bid based on specifications and materials that are proprietary to only one bidder, thus creating a (sic) uneven playing field. After discussions with Ameron and Hawaiian cement, there are no aggregates available on Oahu that will meet the SMA aggregate specifications except for Grace Pacific's quarry. Grace

⁵ The protest letter included two other protest items which were not included in the request for administrative review and are not at issue in this matter.

Pacific is also a paving contractor who intends to bid on the project as evidenced by their attendance at the pre-bid meeting. Since the SMA bid items are a significant portion of the bid and Grace Pacific is the only quarry that can make the material and owns the only asphalt supplier of PG64E-22, they could price the aggregate/asphalt to make every paving contractor non-competitive. Additionally, since the nature of this maintenance project dictates that the contractor will not know the actual quantity and scope of work, there is no way for any paving contractor other than Grace Pacific to bid on the SMA bid items with material from off the island of Oahu.

25. Petitioner did not protest the mineral filler specification in its August 20, 2019 protest.

26. Petitioner did not protest the specification requiring use of SMA for the Project in its protest dated August 20, 2019. Petitioner does not object to the use of SMA.

27. By letter dated August 21, 2019, Asphalt Hawai'i offered Petitioner binder grade PG76-22, meeting the specifications in the IFB, for \$775 per short ton plus 0.5% tax. The price was valid for the first year of the contract only. The letter was addressed to "Asphalt Hawai'i customers".

28. Asphalt Hawai'i is a trade name of GLP Asphalt, LLC ("GLP"). GLP is an asphalt terminal, according to its registration with the Department of Commerce and Consumer Affairs. Grace Pacific, LLC ("Grace Pacific") and Jas W. Glover Holding Company, Ltd. ("Glover") are members of GLP.

29. Grace Pacific and Glover are competitors and have bid against each other on projects in the past.

30. By letter dated November 1, 2019, Respondent denied the protest. The denial letter cited the following reasons for the denial:

There are three other local quarries that can produce the aggregate for SMA. Currently, there are three quarries on Oahu – Ameron Quarry, Hawaiian Cement Quarry, and Grace Pacific quarry. Also, there are outside sources (Mainland States and Foreign Countries) where aggregate can be purchased that meets HDOT's SMA specification requirements.

For polymer modified asphalt binder, there are various producers around the world that can supply polymer modified binder for SMA.

Grace Pacific could also price the aggregate/asphalt and provide it at a fair market price since if they are not the winning bidder in the case, this would also provide customers in their aggregate/asphalt business. The above statement that Grace Pacific could price the aggregate/asphalt to be non-competitive is mere speculation without any supportive facts or documentation.

The SMA specification was approved for advertising by the Federal Highway Administration and the project was advertised with the specifications. There was a pre-bid meeting held on July 31, 2019 where there were no concerns or questions about Grace Pacific being the sole producer of SMA that was addressed by Maui Kupono or any other potential bidders attending the meeting.

31. On November 8, 2019, Petitioner filed the instant Petition for administrative review ("Petition").

32. Petitioner challenged the mineral filler specification for the first time in the Petition. The Petition states,

[t]he SMA requires aggregate that needs to be combined with a mineral filler in order to meet the project specifications. While there are other quarries that can produce aggregate for the SMA, this aggregate mix alone would not meet the requirements of the specifications, because it would not include the mineral filler that is also specified. ... Grace Pacific alone produces the mineral filler to be added to the aggregate to meet specifications, ...⁶

33. Petitioner did not raise any issue regarding the potential length of the Project in either the protest dated August 20, 2019 or in any of the emails sent from Mr. Yamabayashi to Respondent on August 5, 2019, August 8, 2019, and August 16, 2019. The issue was neither raised in the Petition nor at the prehearing conference conducted on November 15, 2019.

34. Petitioner did not protest the length of the Project, including but not limited to the two potential one-year extensions, in the August 20, 2019 protest.

35. At no time prior to its protest did Petitioner contact Glover to determine the availability of any component of the SMA product for the Project because Glover is Petitioner's competitor.

36. Prior to submitting the protest, Petitioner was informed by Matthew Mooney of Road and Highway Builders that Road and Highway Builders was unable to provide Petitioner the

⁶ See Petition at 4.

polymer modified asphalt binder for the Project.

37. Prior to submitting the protest, Petitioner did not make any inquiries into the possibility of obtaining the polymer modified asphalt binder component of the SMA from sources outside the State of Hawai'i.

38. Grace Pacific, Glover, and Road and Highway Builders are all local companies that can produce SMA.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

A. Jurisdiction of Hearings Officer

A cornerstone of HRS Chapter 103D and its implementing rules is to "promote economy, efficiency, and effectiveness in the procurement of goods and services." *See* HAR § 3-120-1.⁷ This office has emphasized that, "the expeditious processing of protests through an efficient and effective procurement system" which minimizes "the disruption to procurements and contract performance" is imperative. Furthermore, "[t]hose considerations also support the notion that government is entitled to know, with some degree of certainty, when cases may be brought and when they may not. The accomplishment of these objectives requires strict adherence to time constraints for the initiation and prosecution of protests". *GTE Hawaiian Telephone Co., Inc. v.*

⁷ HAR §3-120-1 states:

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

- (1) Simplifying, clarifying, and modernizing the law governing procurement;
- (2) Requiring the continue development of procurement policies and practices;
- (3) Making the procurement laws of the State and counties as consistent as possible;
- (4) Ensuring the fair and equitable treatment of all persons who deal with the procurement system of the State and counties;
- (5) Providing increased economy in procurement activities and maximizing to the fullest extent practicable the purchasing value of public funds;
- (6) Fostering effective broad-based competition within the free enterprise system;
- (7) Providing safeguards for the maintenance of a procurement system of quality and integrity; and
- (8) Increasing public confidence in the procedures followed in public procurement.

County of Maui, PCH 98-6 (December 9, 1998). Proper notice of disputed issues allows the government to remedy the purported defect in a timely manner, potentially avoiding the need for an administrative hearing, thereby ensuring the “expeditious processing of protests” and minimizing “disruption to procurements and contract performance”.

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review the determinations of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§103D-310, 103D-701 or 103D-702, *de novo*. In doing so, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997).

Consistent with the considerations discussed above, the Hearings Officer’s jurisdiction is not unlimited. In reviewing the procurement officer’s determinations, the Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §103D-709(h). “In other words, the Hearings Officer can only make a decision about the “determinations” of the chief procurement officer, and the chief procurement officer can only make “determinations” about complaints brought before that officer. The statute literally leaves no room for the Hearings Officer to make decisions about matters that were not previously the subject of a determination by the chief procurement officer.” *Kiewit Infrastructure West Co., v. Dept. of Transportation and Goodfellow Bros., Inc. v. Dept. of Transportation and Hawaiian Dredging Construction, Co.*, PCX-2011-2/PCX-2011-3 (June 6, 2011).

This office has consistently held that the Hearings Officer’s scope of review is limited to the issues raised in the protest and the response to the protest. *Akal Security, Inc. v. Dept. of Transportation*, PCH-2004-10 (August 23, 2004); *Access Media Services, Inc. v. Hawai’i State Legislature*, PDH-2018-001 (February 13, 2018); *Access Service Corp. v. City and County of Honolulu et al.*, PCX-2009-3 (November 16, 2009). Accordingly, an issue raised for the first time in the request for administrative review and/or during an administrative hearing fails to give the procuring agency timely notice of the disputed issue(s) and is therefore not properly before the Hearings Officer. At minimum, a protest must place the procuring agency on notice of the filing of a protest. Such notice is obviously necessary before the agency can take steps to resolve the protest or issue a decision upholding or denying the protest. Additionally, adequate notice of a

protest is a prerequisite to the application of the stay. *Frank Coluccio Construction Company v. City & County of Honolulu, et al.*, PCH-2002-12 (October 18, 2002).

Moreover, in order to expedite the resolution of protests, HAR §3-126-3(d) requires “*at a minimum*”, that protests include “[a] statement of reasons for the protest;” and “supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time in which case the expected availability date shall be indicated.” (Emphasis added). “The government . . . is not required to assume or speculate as to the basis for a protest. Rather, HAR §3-126-3(d) mandates that protest shall include that information. Such a requirement is not unreasonable particularly in light of the Procurement Code’s objective of expediting the resolution of protests for the benefit of all concerned.” *GTE Hawaiian Telephone Co., Inc. v. County of Maui*, PCH 98-6 (December 9, 1998)(footnote omitted).

In this matter, Petitioner’s protest listed three protest items. Items number 2 and 3 were not raised in the Petition and will therefore not be addressed here. The first protest item identified in the letter was:

The project is bid based on specifications and materials that are proprietary to only one bidder, thus creating a (sic) uneven playing field. After discussions with Ameron and Hawaiian cement, there are no **aggregates** available on Oahu that will meet the **SMA aggregate specifications** except for Grace Pacific’s quarry. Grace Pacific is also a paving contractor who intends to bid on the project as evidenced by their attendance at the pre-bid meeting. Since the SMA bid items are a significant portion of the bid and Grace Pacific is the only quarry that can make the material and owns the only asphalt supplier of **PG64E-22**, they could price the aggregate/asphalt to make every paving contractor non-competitive. Additionally, since the nature of this maintenance project dictates that the contractor will not know the actual quantity and scope of work, there is no way for any paving contractor other than Grace Pacific to bid on the SMA bid items with material from off the island of Oahu. (Emphasis added).

Respondent’s denial dated November 1, 2019, responded to the protest as follows:

There are three other local quarries that can produce the aggregate for SMA. Currently, there are three quarries on Oahu – Ameron Quarry, Hawaiian Cement Quarry, and Grace Pacific quarry. Also, there are outside sources (Mainland States and Foreign Countries) where aggregate can be purchased that meets HDOT’s SMA specification requirements.

For polymer modified asphalt binder, there are various producers around the world that can supply polymer modified binder for SMA.

Grace Pacific could also price the aggregate/asphalt and provide it at a fair market price since if they are not the winning bidder in the case, this would also provide customers in their aggregate/asphalt business. The above statement that Grace Pacific could price the aggregate/asphalt to be non-competitive is mere speculation without any supportive facts or documentation.

The SMA specification was approved for advertising by the Federal Highway Administration and the project was advertised with the specifications. There was a pre-bid meeting held on July 31, 2019 where there were no concerns or questions about Grace Pacific being the sole producer of SMA that was addressed by Maui Kuponu or any other potential bidders attending the meeting.

In the Petition and at the hearing, Petitioner challenged the IFB specification requiring the inclusion of the mineral filler. Section 406.02(E) of the specifications describes the mineral filler which “shall conform to AASHTO M 17 and shall be rock dust or crushed limestone...”

Reviewing the protest and the response, the Hearings Officer finds no reference to the mineral filler. The protest instead is limited to a challenge of the “aggregate” and polymer modified binder identified as PG64E-22. As a result, Respondent’s denial only addressed the availability of those components. Nor did Petitioner raise any issue regarding the availability of any component of the SMA at the pre-bid meeting on July 31, 2019. And although Petitioner emailed Respondent three times subsequent to the pre-bid meeting and submitted 28 detailed issues regarding the specifications of the IFB, the availability of the mineral filler was never raised. The availability of the required aggregate and binder raised in Petitioner’s email dated August 16, 2019 was identical to the issue raised in the protest.

It is undisputed that “aggregate” and “mineral filler” are separate and distinct components of the SMA. Indeed, the specifications provide that the SMA is comprised of “Performance Graded (PG) Binder”; “Aggregate”; “Mineral Filler”; and “Stabilizer”. “Aggregate” and “Mineral Filler” are identified as two separate components.⁸ Additionally, both Mr. Yamabayashi, the

⁸ Mr. Rhineland, Petitioner’s General Manager, also testified that SMA is composed of a coarse aggregate mix; mineral filler; polymer modified asphalt binder; and cellulose fiber stabilizer, establishing that Petitioner also understood that aggregate and mineral filler are two distinct and separate components of SMA.

author of Petitioner's protest, and Mr. Rhinlander, Petitioner's General Manager, acknowledged in their testimonies that that "aggregate" and "mineral filler" were two separate components of the SMA. Despite this distinction, the protest only challenged the availability of the "aggregate".

The first time Petitioner raised a challenge to the availability of the mineral filler was in the Petition. However, the Petition itself distinguishes the "aggregate" and "mineral filler" as two separate, distinct components of the SMA. The Petition states,

[t]he SMA requires *aggregate that needs to be combined with a mineral filler* in order to meet the project specifications. While there are other quarries that can produce aggregate for the SMA, this aggregate mix alone would not meet the requirements of the specifications, because it would not include the mineral filler that is also specified. ... Grace Pacific alone produces the mineral filler to be added to the aggregate to meet specifications, ...⁹

On this record, the Hearings Officer finds that Petitioner's protest did not give Respondent notice of a challenge to the mineral filler component of the SMA. Respondent's response to the protest also does not address the availability of the mineral filler, while it does address the availability of "aggregate" and the PG64E-22 binder. Accordingly, the issue over the availability of the mineral filler is not properly before the Hearings Officer.

Similarly, at the hearing and in its written Closing Argument, Petitioner raises, for the first time, an issue with respect to the length of the contract. The IFB and subject contract is for a period of one year with the option to extend the contract for two additional one-year periods. Accordingly, the Hearings Officer lacks jurisdiction over this issue as well.

On the other hand, the Hearings Officer finds that the protest adequately raised the issue of the availability of the PG64E-22 binder. Moreover, Respondent was clearly aware of this issue as Respondent provided a direct response on that issue in its denial of the protest. Accordingly, the Hearings Officer does have jurisdiction to determine whether Respondent's denial of Petitioner's protest of the PG64E-22 binder specification was improper.

B. Petitioner failed to prove by a preponderance of the evidence that the specification regarding PG64E-22 is unduly restrictive.

Petitioner has the burden of proof as well as the burden of persuasion in this matter. The degree or quantum of proof shall be a preponderance of the evidence. HRS §103D-709(c).

⁹ See Petition at 4. (Emphasis added).

HRS §103D-405, entitled “**Maximum practicable competition**”, states in relevant part:

(a) All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the State’s needs, and shall not be unduly restrictive.

Additionally, Hawai’i Administrative Rules (“HAR”) §§3-122-10 and 3-122-13 provide in part:

§3-122-10 Purpose. A specification is the basis for procuring a good, service, or construction item adequate and suitable for the State’s needs in a cost effective manner. . . . All specifications shall seek to promote overall competition, shall not be unduly restrictive, and provide a fair and equal opportunity for every supplier that is able to meet the State’s needs. In developing specifications, unique requirements should be avoided.

§3-122-13 Development of specifications. (a) A specification should provide for the following:

- (1) Identify minimum requirements;
- (2) Allow for competition;

* * * *

The foregoing provisions require that specifications be written in such a manner as to balance the minimum needs of the State against the goal of obtaining *maximum practicable competition*. This office has held that, “a specification may be restrictive as long as it is not unduly so and the preclusion of one or more potential bidders from a particular competition does not render a specification unduly restrictive if the specification is *reasonably related to the minimum needs of the agency*. Moreover, the drafting of specifications to reflect the minimum needs of the agency is a matter primarily left to the discretion of the procurement officials. Generally, these officials are most familiar with the conditions under which similar services have been procured in the past and are in the best position to know the government’s needs. Consequently, a protestor who challenges a specification as unduly restrictive of competition has a heavy burden to establish that the restriction is unreasonable.” *John B. Hinton, dba H.B.H. v. DLNR; PCH-2005-3 (June 21, 2005)(emphasis in original)*.

At the outset, there is little doubt that the SMA specified in the solicitation meets Respondent’s minimum needs. Edwin Sniffen, the Deputy Director of Highways, Department of

Transportation, testified that SMA was chosen for the Project because of its proven history of durability, both in Hawai'i and across the United States and in Germany. Mr. Sniffen stated that a portion of the Moanalua Freeway was paved with SMA fifteen years ago and that portion of the freeway has remained in good condition, not requiring ANY repair, for the current duration of the road.

Roads paved with standard asphalt mixes have a life cycle of twelve to thirteen years, while roads paved with SMA have a life cycle of twenty-five to thirty years. During the life cycle of SMA roads, less maintenance and repair is needed as well. As such, although the cost to pave with SMA is higher than standard asphalt mixes, the overall cost of the road paved with SMA, including repair and maintenance over the life of the road, justifies the higher upfront cost. Better roadways lessen damage to vehicles and accidents caused by motorists trying to avoid hazardous road conditions. Mr. Sniffen testified that less road maintenance and repair on highly trafficked roadways would lessen inconvenience to travelers, damage to vehicles, and potential injury to repair crews, as well as claims against the State of Hawai'i for damages to individuals and property resulting from deteriorating roads and repair or maintenance work. Additionally, because SMA has a life cycle of at least 25 years, the State of Hawai'i is able to utilize capital improvement funds for the Project, which are only available for projects with a life cycle of at least twenty years. Having roads that are durable and relatively maintenance free will allow the State of Hawai'i to comply with the federally mandated asset management plan, ensuring continued access to approximately \$185,000,000 in federal funding for Hawai'i's roadways.

Throughout the proceedings in this matter, Petitioner's witnesses and counsel have repeatedly stated that Petitioner does not object to the use of SMA. Petitioner agrees that SMA is a superior paving product. Additionally, Petitioner introduced no evidence that the use of SMA, including the use of PG64E-22, fails to meet the minimum needs of the agency. Accordingly, the Hearings Officer finds that Petitioner has failed to prove by a preponderance of the evidence that the specification regarding PG64E-22 does not meet the minimum needs of the Department of Transportation. Having arrived at this conclusion, the Hearings Officer will address the question whether the requirement for PG64E-22 in the specification was reasonably related to the specification calling for the Project to be done with the SMA product.

It is undisputed that the PG64E-22 polymer modified asphalt binder is necessary to increase the resistance to rutting and fatigue cracking of the paved asphalt. Instead, Petitioner argues that

the polymer modified asphalt binder is only available locally from one source, Asphalt Hawai'i, which is owned by a potential bidder on the Project. Petitioner argues that this alleged limited availability makes the specification unduly restrictive.

Respondent, on the other hand, argues that the specification is not unduly restrictive as there are three known local companies that can provide the SMA, which includes PG64E-22 as a component part. Respondent also noted in its denial of the protest that the product is available outside the state. Respondent further contends that the specification requiring the use of SMA, including PG64E-22, is reasonably related to its minimum needs in meeting its obligation to provide a durable, cost-effective asphalt paving product for state roadways. The Hearings Officer agrees with Respondent for the following reasons.

In support of its argument that the specification regarding PG64E-22 is unduly restrictive, Petitioner argues that only Asphalt Hawai'i can supply the product locally. Asphalt Hawai'i provided Petitioner with a quote on the polymer modified asphalt binder that was good for one year. However, Petitioner did not present any evidence that the cost of obtaining the product from other sources would be unreasonable.

Additionally, according to the evidence, Petitioner did not investigate the possibility of acquiring the polymer modified asphalt binder from sources outside the State. Although Petitioner argued that obtaining materials outside the State is more costly, Petitioner provided no evidence of the cost of obtaining the polymer modified asphalt binder from without the State. Moreover, Petitioner admitted that it has and does obtain materials from sources outside the State when necessary.

Asphalt Hawai'i is a supplier, not a paving contractor. Asphalt Hawai'i is a trade name of GLP, Asphalt, LLC ("GLP"), an asphalt terminal. Grace Pacific, LLC ("Grace Pacific") and Jas W. Glover Holding Company, Ltd. ("Glover") are members of GLP. Petitioner argues that because Grace Pacific "owns" Asphalt Hawaii, Grace Pacific will have an unfair advantage to obtain the polymer modified asphalt binder from Asphalt Hawai'i, the only local source. However, Petitioner's witnesses admitted that Asphalt Hawai'i, Grace Pacific and Glover are all separate business entities, and Grace Pacific and Glover routinely bid competitively against each other on projects. Thus, the mere fact that the companies are related does not, standing alone, establish that Grace Pacific will have an unfair advantage in this matter. Other than asserting a relationship between the companies, Petitioner did not offer any evidence that Grace Pacific has or will have

an unfair advantage in obtaining PG64E-22 from Asphalt Hawai'i. Petitioner did not offer any evidence of what price Grace Pacific will pay Asphalt Hawai'i for PG64E-22, assuming Grace Pacific will purchase the product from Asphalt Hawai'i. Further, Petitioner did not offer any persuasive evidence that Grace Pacific bid or will bid on the Project, except to offer that Grace Pacific attended the pre-bid meeting on July 31, 2019.

Respondent points out that, prior to issuing the IFB, it confirmed that at least three local companies could provide the SMA product. Mr. Young, the Executive Director of HAPI testified that Grace Pacific, Glover and Road and Highway Builders could provide SMA. Respondent also stated in its denial that the polymer modified asphalt binder could be purchased from sources "around the world". Petitioner admittedly did not speak to Glover about supplying the polymer modified asphalt binder because Glover is their competitor. Petitioner did not submit any evidence to rebut Mr. Young's testimony regarding the ability or willingness of Grace Pacific, Glover and Road and Highway Builders to provide SMA.

It is undisputed that three local companies are able to provide the SMA required by the specifications. As stated in HAR §3-122-10, "all specifications shall seek to promote overall competition, shall not be unduly restrictive, and provide a fair and equal opportunity for *every supplier that is able to meet the State's needs.*" (Emphasis added). The fact that one or more bidders find themselves at a competitive disadvantage does not render the protested specification "unduly restrictive", nor make the perceived disadvantage unfair. On the contrary, any advantage enjoyed by Grace Pacific may be due to their own foresight and efforts to establish a competitive edge over its competition by investing in and making readily available a superior product. On this record, the Hearings Officer finds that Petitioner has failed to prove by a preponderance of the evidence that the specification regarding PG64E-22 is unduly restrictive.

IV. DECISION AND ORDER

On this record and for the foregoing reasons, the Hearings Officer finds that Petitioner has failed to prove by a preponderance of the evidence that the specification regarding PG64E-22 is unreasonable and unduly restrictive. The Hearings Officer further finds and concludes that the Hearings Officer lacks jurisdiction over the other issues raised in this appeal.

Based on the foregoing findings and conclusions, the Hearings Officer orders as follows:

1. Respondent's denial of the protest in this matter is affirmed;
2. Each party shall bear its own attorney's fees, costs, and expenses; and

3. Petitioner's cash protest bond shall be deposited into the general fund pursuant to HRS §103D-709(e).

DATED: Honolulu, Hawai'i, DEC 23 2019.

A handwritten signature in black ink, appearing to read "Denise P. Balanay", written over a horizontal line.

DENISE P. BALANAY
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs