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HEARINGS OFFICE

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

In the Matter of

ALPHA, INC.,

Petitioner,

vs.

COUNTY OF MAUI, DEPARTMENT
OF FINANCE,

Respondent,

and

GOODFELLOW BROS. LLC,

Intervenor.

PDH-2024-003

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

Administrative Hearings Officer:
Rodney K.F. Ching

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

I. INTRODUCTION

On July 1, 2024, Alpha, Inc., ("Petitioner" or "Alpha"), filed a *Request for Administrative Hearing* ("Petition") to contest the County of Maui, Department of Finance's ("Respondent" or "County") *Protest Response* ("Protest Denial") dated June 24, 2024, which denied Alpha's *Protest* ("Protest") dated April 19, 2024. The Office of Administrative Hearings ("OAH") designated the matter as Docket No. PDH-2024-003 and issued a Notice of Hearing and Prehearing Conference.

On July 9, 2024, Respondent filed its *Respondent County of Maui, Department of Finance, Responsive Statement* (“Responsive Statement”). On July 8, 2024, Goodfellow Bros. LLC (“Intervenor” or “Goodfellow”) filed its *Motion to Intervene*.

On July 10, 2024, a prehearing conference was held in this matter. Abigail M. Holden, Esq. and Brian W. Tilker, Esq. appeared on behalf of Alpha. Kenton S. Werk, Esq. appeared on behalf of the County. Craig K. Shikuma, Esq., Stephen G.K. Kaneshiro, Esq., and Spencer J. Lau, Esq. appeared on behalf of Goodfellow.

There being no objection by Alpha or the County, Goodfellow’s Motion to Intervene was GRANTED.

At the prehearing conference, the parties agreed that there are no issues as to the *timeliness* of the filing of the Petition, or the *sufficiency* of the Bond and Filing Fee. Alpha and Goodfellow¹ agreed that Act 162, effective July 3, 2024, *is applicable* to the Bond posted in this matter. The County took *no position* on the applicability of Act 162. The parties agreed that the Hearings Officer need not determine whether Alpha is responsible for more than 50% of the contract price (Item No. 5 of Alpha’s Protest). The parties agreed that although a Notice of Intent to Award has been issued, there is no signed contract. Thus, the applicable *remedy section*, if Alpha prevails, is *Pre-Award*.

On July 12, 2024: Goodfellow filed its *Motion to Dismiss Alpha’s Request for Administrative Hearing, or in the alternative, for Summary Judgment*. (“Goodfellow’s Motion to Dismiss or for SJ”); Alpha filed its *Motion for Summary Judgment* (“Alpha’s MSJ”); and the County filed its *Joinder in Goodfellow’s Motion to Dismiss Alpha’s Request for Administrative Hearing, or in the alternative, for Summary Judgment*. (“County’s Joinder”).

On July 17, 2024: Alpha filed its Memorandum in Opposition Goodfellow’s Motion to Dismiss or for SJ; Goodfellow filed its Memorandum in Opposition to Alpha’s MSJ; and the County filed its Joinder in Goodfellow’s Memorandum in Opposition to Alpha’s MSJ.

On July 22, 2024, July 23, 2024, and August 1, 2024, this matter came on for hearing before the undersigned Hearings Officer in accordance with the provisions of Hawaii

¹ By email dated July 11, 2024, Goodfellow noted that at the prehearing, “Intervenor did not take any position on the applicability of Act 162 to this proceeding.”

Revised Statutes (“HRS”) Chapters 91, 92 and 103D, and Hawaii Administrative Rules (“HAR”) Title 16 Chapter 201, Title 6 Chapter 22, and Title 16 Chapter 77. Abigail M. Holden, Esq. and Brian W. Tilker, Esq. appeared on behalf of Alpha. Kenton S. Werk, Esq. appeared on behalf of the County. Craig K. Shikuma, Esq., Lyle S. Hosoda, Esq., Stephen G.K. Kaneshiro, Esq., and Spencer J. Lau, Esq. appeared on behalf of Goodfellow. A court reporter was also present.² Alpha’s MSJ and Goodfellow’s Motion to Dismiss or for SJ were heard and DENIED.

Joint Exhibits J-1 through J-15 were admitted into evidence. Alpha’s Exhibit P-1 was admitted into evidence. Goodfellow’s Exhibits I-1 through I-9, and I-17 through I-22 were admitted into evidence. Goodfellow’s Exhibit I-10 was withdrawn. Goodfellow’s Exhibits I-11 through I-16 were denied admissibility on the grounds of lack of relevancy. Goodfellow’s Exhibits I-23 through I-27, *offered on August 1, 2024*, were denied admissibility on the grounds of *untimeliness*, and lack of relevancy.

The Hearings Officer took administrative notice of the records and files in this matter. Sandra Duvauchelle, Greg Sado, Jared Masuda, Albert Hahn, Lief Sjostrand, and Teddy Barbosa testified.

On August 5, 2024, Goodfellow filed their *closing brief* in which the County joined. Although Alpha’s *closing written statement* was timely received by OAH on August 5, 2024, at 4:24 p.m., it wasn’t filed until August 6, 2024.

Having heard the evidence and arguments of counsel, and having considered the motions and memoranda, along with the declarations and exhibits attached thereto and memoranda in opposition thereto and the records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. In November 2023, the County of Maui, Department of Environmental Management issued an invitation for bids (“IFB” or “Solicitation”) for Job No. WW14-06 – Kanapali Resort R-1 Water Distribution System Expansion (“Project”). See Exhibit J-1.
2. The Project involves the construction of “...approximately 4800 linear feet (LF) of 12-inch recycled waterline and approximately 1900 LF of 8-inch recycled

² The parties agreed that a court reporter would attend the hearing(s) and prepare the official record of this matter at the parties’ expense.

waterline; recycled water laterals; recycled water fire hydrant laterals; associated fittings, valves, and appurtenances; associated **sitework, excavation and backfill**, as well as the **restoration of existing improvements** and all other **incidental work** necessary to complete the project.” See Exhibit J-1 page 10 (emphasis added).

3. Item No. 12 of the Solicitation Bidding Schedule included entries for Qty.³ and Unit Price:

<u>Item No.</u>	<u>Qty.</u>	<u>Unit</u>	<u>Description</u>	<u>Unit Price</u>	<u>Total Price</u>
12.	1	LS	Archaeological Services	Lump Sum	\$ _____

See Exhibit J-1 page 29 (emphasis added).

4. Addendum 2 *modified* Item No. 12 of the Solicitation Bidding Schedule and included, among other things, a *blank line* for “Qty.” of Days and “Unit Price”.

<u>Item No.</u>	<u>Qty.</u>	<u>Unit</u>	<u>Description</u>	<u>Unit Price</u>	<u>Total Price</u>
12.	_____	Days	Archaeological Services	\$ _____	\$ _____

See Exhibit J-2 page 548 (emphasis added to highlight modifications). Addendum 2 also expanded the Description of Archaeological Services to include “...observation or monitoring of trenching and excavation portions of the construction activities **for the entire recycled waterline alignment by an archaeologist.**” *Id* (emphasis added).

5. Section 1.14 of the Solicitation, Instructions to Bidders, provides that: “Bidders with apprenticeship programs that are registered with the State of Hawaii Department of Labor and Industrial Relations may apply for a preference of 5% for projects in which the County of Maui estimates that the project will be \$250,000 or more.” See Exhibit J-1 page 20.

6. On March 10, 2024, Greg Sado, COO of Alpha, sent an email to Sandra Duvauchelle, Vice-President of Lehua Builders, requesting Lehua Builders help on this Project *due to the amount of guys Alpha had committed to the Lahaina Fire clean up*. Alpha was going to provide the *equipment and fuel*. The email also included a link to the Project documents:

Hi Sandy per our discussion please see attached link to the kaanapali R1 project. **Due to the amount of guys I have committed to the lahaina fire cleanup** I could really use your help on this one and it would allow me to qualify for the

³ The Hearings Officer makes a reasonable inference that “Qty.” is “quantity” abbreviated.

apprenticeship credit. Like we discussed, **I will provide the equipment and fuel**, we can discuss more on Tuesday at our weekly meeting...

See Exhibit P-1 page 1 (emphasis added).

7. On April 1, 2024, Ms. Duvauchelle sent Lehua Builders' Kaanapali Proposal to Mr. Sado. See Exhibit P-1 page 1 and Exhibit I-1.

8. On April 2, 2024, Alpha submitted its Proposal⁴ in the amount of **\$16,337,250.00** which, after application of the 5% reduction for *Apprenticeship Program Credit*, resulted in a \$15,520,387.50 *Amount for Comparison of Bid*. See Exhibit J-3 page 564.

9. Alpha's Proposal included an entry of **100 days** of archaeological services. See Exhibit J-3 page 563 (emphasis added).

10. Alpha's Proposal included a list of Proposed Subcontractors which included a hand-written entry for "Lehua Builders" who would be performing "**sitework and general labor**." See Exhibit J-3 page 569 (emphasis added).

11. "**Sitework**" as described in Part B, Division 2 of the Solicitation includes, among other things:

Water pollution, erosion, sediment and dust control.

Demolition, abandonment and removal.

Controlled low strength material (CLSM) for utilities and structures.

Earthwork and structural excavation and backfill.

Trench excavation and backfill.

See Exhibit J-1 page 5 (emphasis added).

12. Alpha's Proposal included a *Certification of Bidder's Participation in Approved Apprenticeship Program Under Act 17* (Form 1) for *carpentry*. See Exhibit J-3 page 575.

13. On April 2, 2024, Goodfellow submitted its Proposal in the amount of **\$17,086,000.00**⁵ which, after application of the 5% reduction for *Apprenticeship Program*

⁴ The terms "Proposal" and "Bid" are used interchangeably herein.

⁵ The difference between Goodfellow's Proposal (\$17,086,000.00) and Alpha's Proposal (\$16,337,250.00) is **\$748,750.00**.

Credit, resulted in a \$16,231,700.00 *Amount for Comparison of Bid*. See Exhibit J-4 page 592.

14. Goodfellow's Proposal did *not* contain an entry for the *quantity of days* for Archaeological Services to monitor the Project. See Exhibit J-4 page 591.

15. Goodfellow's Proposal contained six (6) Form 1s:

1. Construction equipment operator, heavy duty repairmen & welder, truck operator & driver, paving equipment operator;
2. Construction craft laborer;
3. **Carpentry**;
4. Stone mason;
5. Cement finisher; and
6. Bricklayer mason.

See Exhibit J-4 pages 581 to 586 (emphasis added).

16. On April 2, 2024, at 2:00 PM, the Bids were opened. Alpha was declared to be the *lowest* of the three (3) bidders. See Exhibit I-19.

17. On April 9, 2024, Goodfellow submitted a protest to the County asserting, among other things, that: "Alpha does not meet the requirements for the bid preference because it does not have a registered apprenticeship program for every trade it will/must employ to construct Project, and its submission reflects that." See Exhibit J-5 page 608 ("Goodfellow's Protest").

18. On April 12, 2024, the County notified Alpha that it (Alpha) does not meet the apprenticeship preference requirements of HRS 103-55.6 because Alpha submitted one Form 1 Certificate which included *just carpentry*:

Pursuant to HRS 103-55.6, in order to qualify for the credit, bidders shall furnish written proof of being a party to a registered apprenticeship agreement for each apprenticeable trade the bidder will employ to construct the public works. Alpha submitted one Form 1 Certificate which included **just carpentry**.

See Exhibit J-6 page 729 (emphasis added).

As a result, Alpha was declared to be the *second lowest bidder*.

As such, Alpha's Amount for Comparison of Bid is \$16,337,250, resulting in being the **second lowest bidder**.

See Exhibit J-6 page 729 (“County Notice”) (emphasis added).

19. On April 19, 2024, Alpha filed its Protest, responding to the claims asserted in Goodfellow’s Protest, and challenging the County’s determination that it (Alpha) did not qualify for the *apprenticeship credit*. Alpha asserted, among other things, that *carpenters are required for the Project and the other trades mentioned by Goodfellow are either unnecessary or covered by Alpha and named subcontractors*:

It is essential to assess the actual trades required for the job and determine if a carpenter is necessary. Because there are structural drawings involved, a carpenter is needed to perform the structural work. **As such Alpha qualifies for the apprenticeship credit and could utilize skilled carpenters for concrete finishing, as this falls within their expertise and carpenter is a higher-paying trade.** (see exhibit 4) It appears that there were numerous assumptions made in an eagerness to disqualify Alpha from utilizing the apprenticeship credit. However, Alpha has presented concrete evidence to support our claims, demonstrating the **need for carpenters and asserting that the other trades mentioned by GBI are either unnecessary or covered by Alpha and named subcontractors.**

See Exhibit J-7 page 733 (emphasis added).

20. Alpha’s Protest responded to the five (5) points raised by Goodfellow regarding the *apprenticeship credit*⁶ issue, in summary fashion, as follows:

1. **Carpenters:** Carpenters play a crucial role in this project. Hawaiian Dredging has also acknowledged the need for carpenters and has submitted Form 1 accordingly.⁷
2. **Stone masons and bricklayer masons:** There is no requirement for stone masons or bricklayers on this project, as the project plans distinctly lack any indication or need for such work. Hawaiian Dredging did not include stone masonry or bricklaying as an apprenticeable trade in their bid.
3. **Repairman/welder:** A heavy-duty repairman is not required for this project, as Alpha has no intention of employing one. If any equipment repairs or maintenance are necessary, Alpha has the option to transport the equipment offsite. Based on the highlighted notes in the structural sheets, no field welding is permitted.

⁶ The terms “apprenticeship credit” and “apprenticeship preference” are used interchangeably herein.

⁷ Goodfellow’s Proposal *also* includes a Form 1 for *carpentry*. See Exhibit J-4 page 583.

4. Operators, drivers, and construction craft labor: Subcontractor Lehua Builders meets this requirement and we have provided their proposal as evidence. Lehua Builders specializes in sitework grading, utility installation, equipment mobilization, and aggregate delivery. Alpha has specifically named Lehua Builders for sitework and general labor, ensuring that this subcontractor fulfills the necessary apprenticeship requirements. It is important to note that, subcontractors do not have to be a party to an apprenticeship agreement for the offeror to obtain the preference.

5. Alpha is responsible for more than 50% of the contract price. All of Alpha's subcontractor proposals add up to less than 50% of the proposal price. Alpha can and will utilize skilled carpenters for concrete finishing and other work as this falls within their expertise and carpenter is a higher paying skill.

See Exhibit J-7 pages 730 to 733 (emphasis added).

Alpha's Protest also asserted that Goodfellow's Bid is *non-responsive* and should not be considered for the award because: "They have neglected to indicate the number of days of archaeological monitoring required to complete the project, as outlined in Addendum 2..." See Exhibit J-7 page 734.

Alpha's Protest also included a copy of Lehua Builders' Proposal dated 4/1/2024. See Exhibit J-7 page 776.

21. Lehua Builders' Proposal states, among other things, that for **\$2,760,000.00** [plus 10% profit] they (Lehua) *will provide operators, labors, equipment mobilization and rock delivery*, and further noted that Lehua Builders will provide *labor and operators for the site work, utility installation including main line ELB⁸, lateral ELB, concrete structure ex and backfill and grading restoration to complete the project per plan and specs:*

**SITE WORK & GENERAL LABOR
OPERATORS, LABORS [sp], EQUIPMENT MOBILIZATION
AND ROCK DELIVERY**

**NOTES: HEAVY EQUIPMENT TO BE PROVIDED BY ALPHA
INC INCLUDING FUEL. ROCK PURCHASE TO BE**

⁸ Excavation Laying Backfill

PROVIDED BY ALPHA INC. ALL MATERIALS TO BE PROVIDED BY ALPHA INC INCLUDING CONSUMABLES. EQUIPMENT DELIVERY AND MATERIAL DELIVERY TO BE PROVIDED BY LEHUA BUILDERS AND IS INCLUDED IN THE PRICE ABOVE. EXCLUDES LANDSCAPING LABOR, CONCRETE WORK, SHORING OF EXCAVATIONS, PAVEMENT RESTORATION, TRAFFIC CONTROL, PROTECTIVE COATING, COMPACTION TESTING, INSPECTION FEES, PERMIT FEES, ROCK BREAKING, DEWATERING EQUIPMENT TO BE PROVIDED BY ALPHA, OFFICE TRAILER, STRIPPING, CAMERA OF LINE, REBAR WORK. **LEHUA BUILDERS WILL PROVIDE LABOR AND OPERATORS FOR SITE WORK, UTILITY INSTALLATION INCLUDING MAIN LINE ELB, LATERAL ELB, CONCRETE STRUCTURE EX AND BACKFILL AND GRADING RESTORATION TO COMPLETE THE PROJECT PER PLAN AND SPECS.**

See Exhibit J-7 page 776 (emphasis added).

22. Alpha's Protest also included a copy of Comptroller's Memorandum No. 2022-20, which states, among other things:

(2) Subcontractors do not have to be a party to an apprenticeship agreement for the offeror to obtain the preference.

* * *

(4) If an offeror's employee is multi-skilled and will be performing work in more than one trade on the subject project, the offeror need only be a party to the apprenticeship agreement for the trade that is the highest paying of the trades to be performed on the project by that multi-skilled employee.

See Exhibit J-7 page 742 ("Comptroller's Memo") (emphasis added).

23. On June 24, 2024, the County *denied* Alpha's Protest albeit, agreeing with several of Alpha's arguments. In its denial, the County could not accept that *Lehua Builders is being subcontracted to provide all of the operating engineer and laborer work for Alpha's bid*, and therefore, *Alpha would have to be a party to an apprenticeship agreement for operating engineers*, in order to qualify for the apprenticeship credit. The County responded to Alpha's Protest, in summary fashion, as follows:

1. **Carpenters:** The County agrees that there is **carpentry work involved with this project**. That was never a point of contention. It is the County's determination that carpentry represents only a **nominal** share of the Scope of Work.

2. **Heavy-duty repairman, welder, stone masons or bricklayer masons:** The County also agrees that a heavy-duty repairman, welder, stone mason or bricklayer mason are not necessarily required for this Project.

3. **Operators, drivers, and laborers:** [T]he County disagrees that Lehua Builders would be able to provide **all of the manpower hours** required for this project as it relates to the *operator and labor* work for the **amount stated in their proposal**. The County conservatively estimates **thousands of operating engineer and labor man-hours** are required for this work.

* * *

Due to the vague work descriptions and various exclusions related to operator engineer and laborer work, the **County cannot accept that Lehua Builders is being subcontracted to provide all of the operating engineer and laborer work for Alpha's bid**. ...[L]ogical interpretation is that Alpha plans to have carpenters complete both the carpentry work along with a portion of the operating engineer and laborer work.

The Wage Rate Schedule lists carpenter at a prevailing wage total of \$80.99 and an equipment operator, at lowest level, at \$85.29. * * * Alpha would still fail to meet this section as its carpenters would be performing operating engineering work. To properly claim that that they would be multi-skilled workers, **Alpha would have needed to be a party to apprenticeship agreement for operating engineers**.

4. **Alpha is responsible for more than 50% of the contract price.** County reserves the right to make that determination should its determination to disqualify Alpha's apprenticeship credit be reversed on appeal.

5. **Goodfellow's Bid is *not* non-responsive.** [T]he lack of writing in 100 days is not fatal, and **Goodfellow will still be held to the price they listed regardless of the number of days it takes for archaeological services**.

See Exhibit J-8 pages 871 to 873 (emphasis added).

24. On July 1, 2024, Alpha filed the instant Petition.

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 AND BURDEN OF PROOF

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review and determine *de novo* any request from any *bidder*, offeror, contractor, or governmental body *aggrieved* by a *determination* 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. 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, and shall order such relief as may be appropriate. See §HRS 103D-709(h).

The Hearings Officer concludes that Alpha is an *aggrieved bidder* as a result of the County's *determinations* that: 1) "...Alpha's apprenticeship credit preference does not meet the requirements of HRS 103-55.6 and therefore will not qualify for the preference...resulting in being the second lowest bidder." See Exhibit J-6; and 2) Goodfellow's Bid is responsive. See Exhibit J-8. Accordingly, the Hearings Officer has *jurisdiction* to hear this Petition.

Alpha has the burden of proof, including the burden of producing evidence and the burden of persuasion. The degree of proof shall be a *preponderance* of the evidence. See HRS §103D-709(c).

B. COUNTY'S DETERMINATIONS

There are essentially two (2) County *determinations* for *de novo* review by this Hearings Officer:

1. That Alpha failed to meet the requirements of HRS §103-55.6 by not having a registered apprenticeship agreement for each apprenticeable trade it will employ to construct the Project; and
2. That Goodfellow's bid is responsive.

C. ISSUES

The first issue is whether Alpha's Bid met the requirements of HRS §103-55.6 having only submitted one Form 1 for *carpentry*. Sub-issues include: What apprenticeable trades are *required* for this Project?; and 2) Did the County err in not accepting that *Lehua Builders* is being *subcontracted* to provide *all* of the operating engineer and laborer work for Alpha's Bid?

The second issue is whether Goodfellow's Bid was responsive. The more specific issue is whether Goodfellow's omission of the quantity of days for archaeological services is a *material* omission thereby rendering its Bid *nonresponsive*.

D. GOODFELLOW'S MOTION TO DISMISS

On July 12, 2024, Goodfellow filed its *Motion to Dismiss Alpha's Request for Administrative Hearing, or in the alternative, for Summary Judgment*, in which the County joined. For organizational purposes, Goodfellow's Motion is divided into two (2) parts: 1) Goodfellow's Motion to *Dismiss* (this section); and 2) Goodfellow's Motion for *Summary Judgment* (see section E below).

In its Motion to *Dismiss*, Goodfellow asserts that under HRS §103D-709(d)(2), Petitioner lacks *standing* to bring the Petition because it does not concern a "matter that is at [sic] equal to no less than 10% of the estimated value of the contract." See Goodfellow's Motion to *Dismiss* at page 1 of Memorandum in Support of Motion. In support of its position, Goodfellow asserts that: 1) the *matter of concern* for Petitioner's bid is whether the *5% apprenticeship preference* applies; and 2) Petitioner's protest regarding the responsiveness of Goodfellow's bid is *nominal*, and should not be aggregated.

Alpha asserts that its Petition contests: 1) the County's wrongful disqualification of its (Alpha's) Bid for failure to comply with HRS §103-55.6 because it was based on the *false assertions* in Goodfellow's Protest; that carpenters are required for the Project; and the other trades mentioned by Goodfellow are either unnecessary or covered by Alpha and named subcontractors, especially *Lehua Builders*; and 2) the County's determination that Goodfellow's bid is responsive. See Alpha's Memorandum in Opposition Goodfellow's Motion to Dismiss or for SJ.

At first glance, Goodfellow's position that the 5% apprenticeship preference does not meet the 10% minimum amount in controversy appears reasonable. IF this was the *only* challenge it *might* be a closer call.

However, in its opposition memorandum, Alpha cites to *Greenpath v. Dept. of Finance*, PDH -2014-002 (March 20, 2014)⁹ for the proposition that Alpha's challenge to the *responsiveness* of Goodfellow's Bid is a *direct challenge to the entire proposal*, and that is an "all or nothing" matter of concern that exceeds the ten percent jurisdictional minimum. See also, *Nan, Inc v. HART*, PDH-2015-004 (May 28, 2015)¹⁰ (holding that a petitioner can "aggregate" its claims, even if factually unrelated, in order to meet the minimum jurisdictional amount.) Alpha also asserts that the Protest Denial centers around whether the scope of work described in *Lehua Builders' subcontract* includes all operators required for this Project, thus the *matter of concern* is the *value of Lehua Builders' subcontract*, to wit: \$2.7M¹¹, which is in excess of 10% of the estimated value of the contract, \$1.6M.

The Hearings Officer is persuaded by Alpha's position on the issue of *standing* to bring the *Petition* and DENIES Goodfellow's Motion to *Dismiss* for failure to meet the minimum 10% amount in controversy. The Hearings Officer concludes that: 1) in this case, the 5% apprenticeship preference is an "all or nothing" matter of concern affecting the entire Bid since it changed Alpha's position from lowest bidder to second lowest bidder; 2) the more specific *matter of concern* is the value of Lehua Builders' line item Bid - \$2.7M – which *stands alone* in meeting the *10% minimum amount in controversy*, and can also be aggregated; and 3) Alpha's Protest that Goodfellow's Bid is *nonresponsive* - for failure to list

⁹ ***Jurisdiction; determination of matter of concern; challenge to entire proposal***; The claim that the offer form makes the proposal both conditional and non-responsive is a challenge to the entire proposal. Thus the "matter" of "concern" is one of "all or nothing." Similarly, a challenge asserting there has been a submission of two prices goes to the very heart of the entire proposal. *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al.*, PDH-2014-002 (March 20, 2014).

¹⁰ ***Minimum amount in controversy; "matter"***; A protestor is entitled to aggregate claims, even if factually unrelated, in order to meet the minimum jurisdictional amount. The word "matter" when used in the singular in HRS §103D-709(d) can refer to multiple claims by one party that makes up one "matter." The language of the 2012 amendments to the Procurement Code is the primary evidence of the Legislature's intent, and that language supports accumulation or aggregation of claims as long as the total exceeds the minimum jurisdictional amount. *Nan, Inc. v. HART, PDH-2015-004 (May 28, 2015)*.

¹¹ The Hearings Officer notes that \$2.7M is the line-item pricing for "operators, laborers, equipment mobilization and rock delivery". Lehua Builders' total Contract Price is \$3,259,684.56. See Exhibit J-7 page 776.

a line item entry for quantity of days for archeological services - is also an “all or nothing” matter of concern affecting the entire Bid, and can be aggregated.

This case is distinguishable from *Mei Corp.*¹², wherein OAH held that the failure to list a less-than-1% subcontractor rendered the bid *nonresponsive*. Here, the County did *not* reject Alpha’s Bid *at the time of opening* based on *nonresponsiveness* for failure to list a less-than-1% subcontractor or for any *nonresponsive* reason. The *Road Builders*¹³ case cited by Goodfellow states that “preference claims do *not* go to bid responsiveness.” See Goodfellow’s Motion to Dismiss pages 6-7. The Hearings Officer makes a *reasonable inference* that Alpha’s Bid was *responsive* to the Solicitation *at the time of bid opening*. Both Alpha and Goodfellow claimed the *apprenticeship preference* in their respective Bids. By comparison, Alpha was the *lowest responsive bidder* at the time of bid opening. It wasn’t until *after* Goodfellow’s Protest, that the County determined that Alpha’s Bid did *not* qualify for the 5% *apprenticeship preference*, resulting in Alpha being the *second* lowest bidder. In the instant case, the issue of whether Alpha qualified for the *apprenticeship preference* determines whether Alpha should have been awarded the contract. The matter of concern¹⁴ is “all or nothing”.

Responsiveness of Goodfellow’s Bid, aggregation of claims

Goodfellow’s assertion - that the protest regarding its Bid should *not* be aggregated with Petitioner’s claims - is not persuasive. Both bidders are for the *same* Solicitation. Goodfellow lodged a protest against Alpha regarding the *apprenticeship preference*, which was, apparently, *sustained* by the County at the protest level. Alpha lodged a protest against Goodfellow regarding the *responsiveness* of Goodfellow’s Bid, which was *denied* by the County at the protest level. Administrative economy requires that *all claims* regarding the subject Solicitation be heard at the same time.

¹² ***Jurisdiction; determination of matter of concern;*** Protester failed to list a subcontractor on its bid rendering the bid nonresponsive. The matter of concern was the value of the subcontractor’s work. Where Protestor stated that the value of the missing subcontractor’s work was less than 1% of the total amount of the bid, the matter of concern was not equal to no less than 10% of the estimated value of the contract. Therefore, the Hearings Officer did not have jurisdiction in the matter. *Mei Corporation v. Dept. of Budget and Fiscal Services, City and County of Honolulu and C C Engineering & Construction Inc., PDH-2019-004 (September 27, 2019).*

¹³ *Road Builders v City and County of Honolulu, et. al PCY-2012-013 (April 27, 2012).*

¹⁴ “matter of concern” and “amount in controversy” are used interchangeably herein.

Goodfellow's assertion - that Alpha cannot aggregate Goodfellow's blank line for *quantity of days* of Archaeological Services because the blank item is "worth zero" - is also not persuasive. Goodfellow's assertion - that Bid Item No. 12 (\$160,000 for Archaeological Services), even if aggregated with the 5% apprenticeship preference is still less than 10% - while mathematically correct, is also not persuasive. Goodfellow's assertion that - a dismissal of the responsiveness claim also results in failure to meet the 10% requirement - is also not persuasive. As noted above, the Hearings Officer concludes that the *matter of concern* is the value of Lehua's Bid - \$2.7 M – which *stands alone* in meeting the *10% minimum amount in controversy*, and can also be aggregated. The responsiveness of Goodfellow's Bid is also an "all or nothing" issue and also "stands alone" in meeting the *standing* requirement.

Accordingly, the Hearings Officer concludes that Alpha has *standing* has to file the *Petition*. Goodfellow's *Motion to Dismiss* for lack of *standing* for failing to meet the minimum 10% amount in controversy is DENIED.

E. GOODFELLOW'S MOTION FOR SUMMARY JUDGMENT

On July 12, 2024, Goodfellow filed its Motion to *Dismiss* Alpha's Request for Administrative Hearing, or in the alternative, for *Summary Judgment*, in which the County joined. The Motion to *Dismiss* is addressed in Section D, above, and is incorporated by reference herein. Goodfellow also asserts that *summary judgment* should be granted in its favor because the omitted number days for Archeological Services *does not* affect price, quantity, quality or delivery.

Alpha asserts that the omitted number days for Archeological Services *does* affect price, *quantity* or delivery thereby rendering Goodfellow's Bid *nonresponsive*.

Summary judgment is appropriate if the record herein shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence, and all reasonable inferences from the evidence, must be viewed in the light most favorable to the non-moving party. See, *Nan, Inc. vs. DOT, SOH and Hawaiian Dredging Construction Company, Inc.*, PDH 2015-006 (Sept. 4, 2015), citing *Koga Engineering & Construction, Inc. v. State*, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010).

“Bare allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact[.]” *Reed v. City & County of Honolulu*, 76 Haw. 219, 25, 873 P.2d 98, 104 (1994).

The standard to be applied in determining the “responsiveness” of a bid is whether a bidder has promised in the precise manner requested by the government with respect to price, *quantity*, quality, and delivery.¹⁵ Addendum No. 2, *required* bidders to enter the *quantity* of days it would provide for archaeological monitoring. See Exhibit J-3.¹⁶ Goodfellow’s Bid left Item No. 12 *blank*. See Exhibit J-4 page 591. Alpha’s Bid provided an estimate of 100 days on its Item No. 12. See Exhibit J-3 page 563.

These facts viewed in the light most favorable to Alpha warrant DENIAL of Goodfellow’s Motion for Summary Judgment.

F. ALPHA’S MOTION FOR SUMMARY JUDGMENT

On July 12, 2024, Petitioner filed its Motion for Summary Judgment on two (2) bases:

1. The County incorrectly determined that Alpha failed to meet the requirements of HRS §103-55.6; and
2. The County incorrectly determined that Goodfellow’s Bid was responsive.

As noted above, summary judgment is appropriate if the record herein shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence, and all reasonable inferences from the evidence, must be viewed in the light most favorable to the non-moving party. See, *Nan, Inc. vs. DOT, SOH and Hawaiian Dredging Construction Company, Inc.*, PDH 2015-006 (Sept. 4, 2015), citing

¹⁵ ***Responsiveness; standard;*** The standard to be applied in determining the “responsiveness” of a bid is whether a bidder has promised in the precise manner requested by the government with respect to price, quantity, quality, and delivery. If this standard is satisfied, the bidder is effectively obligated to perform the exact thing called for in the solicitation. *Starcom Builders, Inc. v. Board of Water Supply; PCH-2003-18 (October 18, 2003); MAT Hawaii, Inc. v. Michael R. Hansen, Acting Director of Budget and Fiscal Services, and City and County of Honolulu, PCX-2010-7 (Nov. 9, 2010).*

¹⁶ In the interest of consistency and efficiency, the Hearings Officer is referring to the *Hearings* exhibits for purposes of the *Motions*.

Koga Engineering & Construction, Inc. v. State, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010). “Bare allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact[.]” *Reed v. City & County of Honolulu*, 76 Haw. 219, 25, 873 P.2d 98, 104 (1994).

HRS §103-55.6 apprenticeship preference

HRS §103-55.6 provides that in order to claim the five percent apprenticeship preference, *at the time of submission* of a competitive sealed bid, the bidder *shall furnish written proof of being a party to a registered apprenticeship agreement for each apprenticeable trade the bidder will employ to construct the public works.*

§103-55.6 Public works construction; apprenticeship agreement. (a) A governmental body, as defined in section 103D-104, that enters into a public works contract under this chapter having an estimated value of not less than \$250,000, shall decrease the bid amount of a bidder by **five per cent** if the bidder is a party to an apprenticeship agreement registered with the department of labor and industrial **relations for each apprenticeable trade the bidder will employ to construct the public works**, and in conformance with chapter 372. The lowest total bid, taking the **preference** into consideration, shall be awarded the contract unless the solicitation provides for additional award criteria. The contract amount awarded, however, shall be the amount of the price offered, exclusive of the preference.

* * *

(c) **At the time of submission of a competitive sealed bid or a competitive sealed proposal by a bidder, the bidder shall furnish written proof of being a party to a registered apprenticeship agreement for each apprenticeable trade the bidder will employ to construct the public works.** . . This subsection shall be deemed to be incorporated into a public works contract.

See HRS §103-55.6.

In its Bid, Alpha submitted only one Form 1¹⁷ for *carpentry*. On the other hand, Goodfellow submitted six (6) Form 1s for: 1) Construction Equipment Operator, Heavy Duty Repairman & Welder, Truck Operator & Driver, Paving Equipment Operator; 2) Construction Craft Laborer; 3) Carpenter; 4) Stone Mason; 5) Cement Finisher; and

¹⁷ Certification of participation in apprenticeship program.

6) Bricklayer Mason. See Exhibit J-4 pages 581 to 586. These facts viewed in the light most favorable to Goodfellow warrant DENIAL of Alpha's Motion for Summary Judgment.

The Hearings Officer concludes that there are genuine issues of material fact, including but not limited to: 1) What apprenticeable trades are required for this Project; 2) Does the scope of work described in Lehua Builders' subcontract cover **all** of the operators and laborers work for this Project?; 3) Does Alpha's list of subcontractors include all other apprenticeable trades required for this project?; and 4) What facts establish that Alpha *has or has not* complied with the requirements of HRS §103-55.6 regarding having a registered apprenticeship agreement for each apprenticeable trade *that it will employ* to construct the Project.

Responsiveness of Goodfellow's Bid

Notwithstanding Goodfellow left the Qty. line of Line Item No. 12 blank, they (Goodfellow) did enter a Unit Price of \$160,000 and a Total Price of \$160,000 for Archeological Services. See Exhibit J-4 page 591. The County determined that Goodfellow's failure to enter the *number of days* for archaeological monitoring was *not fatal*, because it was a *lump sum* bid item, and that Goodfellow would still be held to perform the services in accordance with the Contract for the *stated price* regardless of the amount of days it takes for Archeological Services.

These facts viewed in the light most favorable to Goodfellow warrant DENIAL of Alpha's Motion for Summary Judgment.

G. MERITS

ALPHA HAS PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT THE COUNTY ERRED IN ITS DETERMINATION – THAT ALPHA FAILED TO MEET THE REQUIREMENTS OF HRS §103-55.6 BY NOT HAVING A REGISTERED APPRENTICESHIP AGREEMENT FOR EACH APPRENTICEABLE TRADE IT WILL EMPLOY TO CONSTRUCT THE PROJECT.

HRS §103-55.6 provides that in order to claim the five (5) percent apprenticeship preference, *at the time of submission* of a competitive sealed bid, the bidder *shall furnish written proof of being a party to a registered apprenticeship agreement for each apprenticeable trade the bidder will employ to construct the public works.*

§103-55.6 Public works construction; apprenticeship agreement. (a) A governmental body, as defined in section 103D-104, that enters into a public works contract under this chapter having an estimated value of not less than \$250,000, **shall decrease the bid amount of a bidder by five per cent if the bidder is a party to an apprenticeship agreement** registered with the department of labor and industrial relations **for each apprenticeable trade the bidder will employ to construct the public works**, and in conformance with chapter 372. The lowest total bid, taking the **preference** into consideration, shall be awarded the contract unless the solicitation provides for additional award criteria. The contract amount awarded, however, shall be the amount of the price offered, exclusive of the preference.

* * *

(c) **At the time of submission of a competitive sealed bid or a competitive sealed proposal by a bidder, the bidder shall furnish written proof of being a party to a registered apprenticeship agreement for each apprenticeable trade the bidder will employ to construct the public works.** . . This subsection shall be deemed to be incorporated into a public works contract.

See HRS §103-55.6 (emphasis added).

Apprenticeable trades required for this Project.

Alpha submitted one (1) Form 1 for *carpentry* with its Proposal. See Exhibit J-3 page 575. Goodfellow submitted six (6) Form 1s for: *equipment operator, construction craft laborer, carpenter, stone mason, cement finisher, and bricklayer mason*. See Exhibit J-4 pages 581 to 586. Hawaiian Dredging, the third bidder, submitted four (4) Form 1s for: *equipment operator, cement finisher, carpenter, and construction craft laborer*. See Exhibit J-7 pages 752 to 755.

At hearing, Mr. Sado testified that Alpha *intended* to employ four (4) apprenticeable trades for this Project: carpenters, concrete cement finishers, operators and laborers. Tr. 168:21-22.¹⁸ Consistent therewith, Mr. Hahn testified that there are four (4) apprenticeable trades required for this Project, to wit: carpenter, laborer, operator and mason.¹⁹ Tr. 435:14-16. The Hearings Officer finds and concludes that there are four (4)

¹⁸ Volumes I and II of the Transcript have continuous numbering and will be referred to as Tr. page:line(s) without distinguishing between Volumes I and II. Volume III starts with page 1 and will be referred to as Tr. Vol III page:line(s).

¹⁹ Cement finishers are a sub classification of masonry.

apprenticeable trades required for this Project: *carpenters, cement finishers, operators and laborers.*

On April 2, 2024, at the time of bid opening, Alpha had only submitted one (1) Form 1 with its Bid. According to Mr. Hahn, *before* receiving Goodfellow’s Protest, the County had “finished evaluating the bids” and was “ready to award to Alpha” and “preparing to award to Alpha.” Tr. 437:18-23. The Hearings Officer concludes that Alpha’s Bid was *responsive* at the time of bid opening.

On April 9, 2024, Goodfellow lodged its Protest with the County. Goodfellow’s Protest was NOT provided to Alpha for response prior to issuance of the County Notice – informing Alpha that Alpha’s apprenticeship preference was denied.

Apparently, the County agreed with Goodfellow’s Protest, and on April 12, 2024, the County issued its County Notice – informing Alpha that Alpha’s apprenticeship preference was denied. The County Notice did *not* specify what trades were required for the Project, but simply denied Alpha the 5% apprenticeship preference because Alpha only submitted one (1) Form 1 which included just *carpentry*. See Exhibit J-6.

After receiving the County Notice, Alpha requested, and apparently received, a copy of the Goodfellow Protest.

On April 19, 2024, Alpha lodged its Protest with the County. Alpha’s Protest included a copy of Lehua Builders’ Proposal. Alpha’s Protest explained in detail how they (Alpha) meet the requirements for the apprenticeship preference. Alpha’s Protest, in response to the points raised in Goodfellow’s Protest, explained that Goodfellow erred in its assessment of what trades were required for the Project:

1. **Carpenters:** Carpenters play a crucial role in this project. Hawaiian Dredging has also acknowledged the need for carpenters and has submitted Form 1 accordingly.
2. **Stone masons and bricklayer masons:** There is no requirement for stone masons or bricklayers on this project, as the project plans distinctly lack any indication or need for such work. Hawaiian Dredging did not include stone masonry or bricklaying as an apprenticeable trade in their bid.
3. **Repairman/welder:** A heavy-duty repairman is not required for this project, as Alpha has no intention of employing one. If any equipment repairs or maintenance are necessary, Alpha has the

option to transport the equipment offsite. Based on the highlighted notes in the structural sheets, no field welding is permitted.

4. Operators, drivers, and construction craft labor: Subcontractor Lehua Builders meets this requirement and we have provided their proposal as evidence. Lehua Builders specializes in sitework grading, utility installation, equipment mobilization, and aggregate delivery. Alpha has specifically named Lehua Builders for sitework and general labor, ensuring that this subcontractor fulfills the necessary apprenticeship requirements. It is important to note that subcontractors do not have to be a party to an apprenticeship agreement for the offeror to obtain the preference.

5. Alpha is responsible for more than 50% of the contract price. All of Alpha's subcontractor proposals add up to less than 50% of the proposal price. Alpha can and will utilize [multi]skilled carpenters for concrete finishing and other work as this falls within their expertise and carpenter is a higher paying skill.

See Exhibit J-7 pages 730 to 733 (emphasis added).

Alpha's Protest also alleged that Goodfellow's Bid was non-responsive. Unlike Goodfellow's Protest, which was *not provided* to Alpha for response, the County *did provide* a copy of Alpha's Protest to Goodfellow for response.

On June 24, 2024, the County issued its Protest Denial. In its Protest Denial, the County *partially* agreed with Alpha, and conceded that *carpenters are required for the Project and that a heavy-duty repairman, welder, stone mason or bricklayer mason are not necessarily required for this Project:*

The County agrees that there is carpentry work involved with this project. That was never a point of contention. It is the County's determination that carpentry represents only a **nominal** share of the Scope of Work. **The County also agrees that a heavy-duty repairman, welder, stone mason or bricklayer mason are not necessarily required for this project.**

See Exhibit J-8 (emphasis added).

Accordingly, the Hearings Officer concludes that, contrary to Goodfellow's Protest, Alpha need *not* submit a Form 1 for *heavy-duty repairman, welder, stone mason or bricklayer mason* in order to qualify for the apprenticeship preference.

In its Protest Denial, the County *reserved* the right to determine whether the value of Lehua Builders' work is less than 50% of Alpha's total bid.

The County has not yet made a determination as to the total work to be performed by Lehua Builders as it relates to Alpha's total bid price, but **reserves** the right to do so should its decision to disqualify Alpha's apprenticeship credit be reversed on appeal.

See Exhibit J-8 page 872 (emphasis added).

Accordingly, and as agreed by the parties at the prehearing, this Hearings Officer *need not determine* whether the value of Lehua Builders' work is less than 50% of Alpha's total bid.

In its Protest Denial, the County did *not* address Alpha's assertion that Alpha will utilize its *multi-skilled carpenters*, a higher-paying trade, *for concrete finishing and other work*, thus *waiving* that basis for the protest denial. Assuming *arguendo* that the County has *not* waived this basis, the Hearings Officer concludes that Alpha *can* indeed utilize its *multi-skilled carpenters*, a higher-paying trade, *for concrete finishing and other work* pursuant to the Comptroller's Memo which states in relevant part as follows:

(4) If an offeror's employee is multi-skilled and will be performing work in more than one trade on the subject project, the offeror need only be a party to the apprenticeship agreement for the trade that is the highest paying of the trades to be performed on the project by that multi-skilled employee.

See Exhibit J-11 page 886 (emphasis added) (multi-skilled employee exception).

Accordingly, the Hearings Officer concludes that Alpha *need not* submit a Form 1 for *concrete finishing* in order to qualify for the apprenticeship preference.

Thus, the **only remaining issue** is whether Alpha was required to submit a Form 1 for *equipment operator*²⁰, a higher-paying trade than *carpenters*, in order to qualify for the HRS §103-55.6 apprenticeship preference. According to Mr. Hahn, it boils down to whether or not Lehua Builders was providing *all the operating work*. Tr. 427:9-14. According to Mr. Hahn this is a "black and white" issue. Operators are required for this Project. Alpha did not submit a Form 1 for operators. Tr. 440:2. The Hearings officer finds and concludes that this *might* have been a "black and white" issue at the time of the County

²⁰ The terms "equipment operator", "operator" and "operating engineer" are used interchangeably herein.

Notice, but this changed when Alpha lodged its Protest and *included a copy of Lehua Builders Proposal* and Comptroller's Memo.

In its Protest, Alpha asserts, among other things, that it need not submit a Form 1 for operators because its *subcontractor*, Lehua Builders, meets the requirement for *operators, drivers, and construction craft labor*. As pointed out by Alpha, pursuant to the Comptroller's Memo, *subcontractors do not have to be a party to an apprenticeship agreement for the offeror to obtain the preference*:

(2) Subcontractors do not have to be a party to an apprenticeship agreement for the offeror to obtain the preference.

See Exhibit J-11 page 886 (emphasis added) (subcontractor exception).

According to Alpha, Lehua Builders specializes in sitework grading, utility installation, equipment mobilization, and aggregate delivery. *Alpha's Protest included a copy of Lehua Builders' Proposal*. See Exhibit J-7 page 776. Bidders are *not* required to attach a copy of their subcontractors' proposals with their Bid. Tr. 428:4-8.

Alpha's Protest also included a *detailed* explanation, with exhibits, of why Goodfellow's Protest was "simply untrue." See Exhibit J-7.

HRS §103D-701 gives the chief procurement officer the *authority to resolve protested solicitations* and awards, which by necessity includes the *authority to investigate* the protestor's claims. After receiving Alpha's (detailed) Protest, *including a copy of Lehua Builders' subcontract*, the County could have simply contacted Lehua Builders to get clarification on whether *Lehua Builders is being subcontracted to provide all of the operating engineer and laborer work for Alpha's bid*. This matter should/could have been resolved at the *protest* stage saving the taxpayers **\$748,750.00**.²¹ According to Mr. Masuda, the County could have contacted Lehua Builders to see if their Proposal included **all** operator work. Tr. 428:19-25. There was nothing preventing the County from calling Lehua Builders. Tr. 429:1-2.

Instead - and notwithstanding the County made several concessions to Alpha regarding what apprenticeable trades were required (*contrary to Goodfellow's Protest claims*) - in its Protest Denial the County *maintained its denial* of Alpha's apprenticeship

preference because of: 1) the *vague work descriptions*; and 2) *various exclusions, related to operator engineer and laborer work* stated in the “Notes” section of Lehua Builders subcontract. Without checking with Lehua Builders or Alpha, the County came to a *reasonable and logical interpretation* that Alpha plans to have its *carpenters* complete both carpentry work *and a portion of the operator engineer and laborer work*.

Due to the vague work descriptions and various exclusions related to operator engineer and laborer work, the County cannot accept that Lehua Builders is being subcontracted to provide all of the operating engineer and laborer work for Alpha’s bid based on their proposal. Therefore, it is a reasonable and logical interpretation is that Alpha plans to have carpenters complete both the carpentry work along with a portion of the operating engineer and laborer work required to construct all of the bid items.

See Exhibit J-8 page 872 (emphasis added).

Lehua Builders’ work descriptions are not vague.

The specific issue is whether Lehua Builders is being subcontracted to provide *all* of the operating engineer and laborer work for Alpha’s bid. A plain reading of Lehua Builders’ Proposal is that for \$2,760,000.00 [plus 10% profit] they (Lehua Builders) will provide: *operators, labors [sp], equipment mobilization and rock delivery* for the *site work*:

**SITE WORK & GENERAL LABOR
OPERATORS, LABORS [sp], EQUIPMENT MOBILIZATION
AND ROCK DELIVERY**

See Exhibit J-7 page 776 (emphasis added).

The “Notes” section of Lehua Builders Proposal explains that *equipment delivery and material (rock) delivery* is included in the \$2,760,000.00 price.

NOTES: HEAVY EQUIPMENT TO BE PROVIDED BY ALPHA INC INCLUDING FUEL. ROCK PURCHASE TO BE PROVIDED BY ALPHA INC. ALL MATERIALS TO BE PROVIDED BY ALPHA INC INCLUDING CONSUMABLES. EQUIPMENT DELIVERY AND MATERIAL DELIVERY TO BE PROVIDED BY LEHUA BUILDERS AND IS INCLUDED IN THE PRICE ABOVE.

See Exhibit J-7 page 776 (emphasis added).

²¹ The difference between Goodfellow’s Proposal (\$17,086,000.00) and Alpha’s Proposal (\$16,337,250.00) is **\$748,750.00**.

The “Notes” section further explains that *Lehua Builders will provide labor and operators for site work, utility installation including main line ELB²², lateral ELB, concrete structure excavation and backfill and grading restoration to complete the project per plan and specs.*

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*** * ***

LEHUA BUILDERS WILL PROVIDE LABOR AND OPERATORS FOR SITE WORK, UTILITY INSTALLATION INCLUDING MAIN LINE ELB, LATERAL ELB, CONCRETE STRUCTURE EX AND BACKFILL AND GRADING RESTORATION TO COMPLETE THE PROJECT PER PLAN AND SPECS.

See Exhibit J-7 page 776 (emphasis added).

The Hearings Officer finds that all witnesses were credible. The Hearings Officer especially credits the testimony of Sandra Duvauchelle, Vice-President of Lehua Builders, who prepared Lehua Builders’ Proposal. Ms. Duvauchelle holds a State of Hawaii ABC general contractors license since 2012 which has never been suspended or revoked for any reason. Tr. 55:16-25. According to Ms. Duvauchelle, she is extremely good friends and has been a part of the Goodfellow family for over 30 years. Lehua Builders’ Proposal was simply a bid to keep her guys busy. Tr. 108:11-19. Ms. Duvauchelle’s relationship with both Alpha and Goodfellow is really important to her and she “hate[s] being here in the middle.” Tr. 139:3-4.

According to Ms. Duvauchelle, Greg (Sado) reached out and gave her the opportunity to provide a sub bid on this Project. Tr. 56:22-24. At that time, Ms. Duvauchelle was looking for work for her crew. Tr. 62:22-23. According to Mr. Sado, when this IFB came out, Alpha’s smaller equipment and operators/laborers were being utilized in the Lahaina Fire cleanup, but Alpha’s bigger equipment was available. In conversation with Ms. Duvauchelle, she wanted a little bit of work to build her backlog up. Tr. 163:8-22. This

²² Excavation, Laying, Backfill

is memorialized in the March 10, 2024 email from Mr. Sado to Ms. Duvauchelle. See Exhibit P-1 page 1. The plan was for Alpha to provide the equipment, including fuel and servicing (grease). Tr. 126:25 to 127:19. Lehua Builders would arrange to have the equipment delivered from Alpha's base yard to the work site. Alpha was going to provide rock and all materials including consumables. Alpha would provide the carpenters who would also do the concrete finishing work. Tr. 169:6-25. Lehua Builders would provide *all* of the equipment operators and laborers to complete the Project. Tr. 193:10-13. Alpha's carpenters will *not* perform any equipment operator work on the Project. Tr. 186:3-7.

According to Mr. Sado, Ms. Duvauchelle inquired about whether they would be *competitive* with her number. Mr. Sado responded that even with the 10% markup for profit on Lehua Builders' Proposal, the 5% apprenticeship preference on Alpha's Bid would still make it lower than if he had not used Lehua Builders. Tr. 271:23 to 272:14.

In its Protest Denial the County *disagreed* that Lehua Builders would be able to provide *all* of the *manpower hours* for operator and laborer work, which the County conservatively estimated to be *thousands* of hours:

[T]he County disagrees that Lehua Builders would be able to provide all of the manpower hours required for this project as it relates to the operator and labor work for the amount stated in their proposal. The County conservatively estimates thousands of operating engineer and labor man-hours are required for this work.

See Exhibit J-8 page 872 (emphasis added).

Lehua Builders' Proposal provides for *all* of the operator and laborer hours for this Project

According to Ms. Duvauchelle, she and Mr. Sado sat in her office and worked on an excel spreadsheet for this Project. See Exhibit I-22. They discussed the *scope of work* and *man-hours required* for this Project in order to come up with her Proposal. Tr. 76:20-24. It was Ms. Duvauchelle's understanding the Lehua Builders was going to provide *all of the operators and laborers* for the Project for \$2,760,000 [plus 10% profit]. Tr. 124:1-10. Ms. Duvauchelle didn't expect Alpha to be doing any of the labor or have any of the equipment operators for this Project. Tr. 143:22-25. Mr. Sado testified that Alpha's carpenters were not going to do any operator work on this Project. Tr. 186:3-5.

Lehua Builders Proposal did indeed provide for *thousands* of operating engineer and labor *man-hours* required for this Project. To be precise, Lehua Builders Proposal provided for **22,340²³** *man-hours* for two (2) crews of equipment operators and laborers (working at the same time). See Tr. 135:10-11 and Exhibit I-22. Mr. Sado testified that he felt that Lehua Builders had allocated sufficient hours to cover the operators and laborers on the project. Tr. 198:1-7 and Tr. 298:1-12. By way of comparison, Goodfellow's Bid provided for **25,864** total MHS (man hours) for Operator Foreman (3,766), Equipment Operator (9,114), Labor Foreman (2,589), and Laborers I (10,395). See Exhibit. I-21. The difference is **3,524** man-hours or 13.6 % of Goodfellow's man-hour total. The Hearings Officer does not find this to be a significant amount in view of the fact that Alpha would be providing *carpentry* and *concrete finishing* work including lag shoring, pouring concrete and finishing. Also, Alpha's six (6) other subcontractors would be providing: 1) Protective Coating; 2) Reinforcing Steel; 3) CCTV; 4) Landscaping; 5) Asphalt Paving; and 6) Striping. According to Ms. Duvauchelle, if they underestimate a job, they would still finish the job. Tr. 123:10-16. If they enter into a bad contract, they "lose money". Tr. 123:2-5. According to Mr. Hahn, even though Lehua Builders' Proposal *excludes* rock breaking, if there is rock breaking, Lehua Builders could submit a "change order". Tr. Vol. III 39:6-12 and 63:16-19.

Ms. Duvauchelle prepared the Lehua Builders Proposal and provided it to Mr. Sado on April 1, 2024. See Exhibit P-1 and I-1. Ms. Duvauchelle was aware of the County's denial of Mr. Sado's protest. The County did *not* contact Lehua Builders regarding its subcontract for this Project. Tr. 142:7-15. Had the County done so, Ms. Duvauchelle would have provided them with the information in her spreadsheet, **22,340** total manpower hours for **all operator and laborer** work for this Project. Tr. 142:7-15, See Exhibit I-22.

Ms. Duvauchelle explained that Lehua's Proposal includes "Site Mobilization" which includes "anything to do with hauling, the operator, unloading the equipment, saw cutting the asphalt..." Tr. 79:19-21. Lehua Builders Proposal contains separate line-item prices for Site Setup - \$25,000.00; Project Management - \$33,000.00 and Temp Facilities - \$12,000. See Exhibit J-7 page 776. Alpha will *pay* for the aggregate, for backfill material, but Lehua was going to pay and control the trucks that deliver it. Tr. 80:7-9.

²³ 2680 x 5 = 13,400 plus 2980 x 3 = 8,940, 13,400 + 8,940 = 22,340.

Lehua Builders has done probably four (4) other projects with Alpha using this exact same method. Alpha provided all the heavy equipment. Lehua Builders provided labor and operating support. Tr. 81:10-18. According to Ms. Duvauchelle, *any* of Lehua Builders' operators could operate *any* of the equipment that's needed and required for this Project. Tr. 90:2-9. Lehua Builders will provide the operator to break rock for an additional charge (change order). Tr. 96:9-16.

According to Ms. Duvauchelle, "completing the job per plans and specs" means "from the **beginning of the job to the end of the job**, till you achieve all of your finals and you close everything up and the job is complete." Tr. 137:6-12 (emphasis added).

The Hearings Officer concludes that there is nothing *vague* about Lehua Builders Proposal. The Hearings Officer concludes that the County erred in its "reasonable and logical" interpretation that Alpha "plans to have carpenters complete both the carpentry work along with a *portion* of the operating engineer and laborer work."

Lehua Builders' "various exclusions" do not warrant denial of Alpha's apprenticeship preference

In its Protest Denial, the County also stated, among other things:

Due to the vague work descriptions and various exclusions related to operator engineer and laborer work, the County cannot accept that Lehua Builders is being subcontracted to provide all of the operating engineer and laborer for Alpha's bid.

See Exhibit J-8 page 872 (emphasis added).

This County *determination* is also in error. The "Notes" section of Lehua Builders' Proposal *excludes landscaping labor, concrete work, shoring of excavations, pavement restoration, traffic control, protective coating, compaction testing, inspection fees permit fees, rock breaking, dewatering equipment to be provided by Alpha, office trailer, stripping, camera of line, rebar work:*

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LABOR, CONCRETE WORK, SHORING OF EXCAVATIONS, PAVEMENT RESTORATION, TRAFFIC CONTROL, PROTECTIVE COATING, COMPACTION TESTING, INSPECTION FEES, PERMIT FEES, ROCK BREAKING, DEWATERING EQUIPMENT TO BE PROVIDED BY ALPHA, OFFICE TRAILER, STRIPPING, CAMERA OF LINE, REBAR WORK. LEHUA BUILDERS WILL PROVIDE LABOR AND OPERATORS FOR SITE WORK, UTILITY INSTALLATION INCLUDING MAIN LINE ELB, LATERAL ELB, CONCRETE STRUCTURE EX AND BACKFILL AND GRADING RESTORATION TO COMPLETE THE PROJECT PER PLAN AND SPECS.

See Exhibit J-7 page 776 (emphasis added).

The Hearings Officer finds that the “various exclusions” are *consistent* with the description of work that Alpha was performing, to wit: carpentry and concrete work including shoring of excavations; and/or responsible for, to wit: traffic control, inspection fees, permit fees, rock breaking, and dewatering equipment, office trailer; **and/or** the work that Alpha’s other six (6) subcontractors were going to perform, to wit: 1) Coating Works Hawaii - Protective Coating; 2) Simmons Steel - Reinforcing Steel; 3) Pural Water Specialty - CCTV; 4) Kihei Gardens & Landscaping - Landscaping; 5) Maui Kupono Builders - Asphalt Paving; and 6) Tom Iwamasa Painting CO - Striping. See Exhibit J-3 page 569.

What this case comes down to is the fact that Alpha and Goodfellow had different “means and methods” to complete this Project. The Solicitation did not specify what means, methods or trades were required to complete this Project. According to Mr. Masuda, *each bidder may determine the means and methods of how to best complete the project.* See Tr. 358:1-10. According to Mr. Hahn a particular *bidder may decide to use more carpenters than another.* Tr. 448:25-449:8

According to Mr. Sado, Alpha chose to use its own *carpenters* for the structural forming that’s required for any cast-in-place retaining wall or cast-in-place PRV vaults constructed on site, and all the excavation shoring (lag shoring) that’s needed for the deep excavation of the trenches.²⁴ Tr. 169:6-12. According to Mr. Sado, it is important for Alpha’s *carpenters* to remain on-site to inspect the integrity of the shoring for safety reasons. Tr. 186:8 to 187:12. Alpha also chose to use its own *carpenters* to do *concrete finishing*

²⁴ This case is distinguishable from HWI v. DHHL, PDH-2021-013 (Dec. 27, 2021) where this Hearings Officer found and concluded that *carpenters were not required* for the project.

including reinforced concrete jackets, as well as the horizontal reaction blocks and the vertical reaction blocks. They'd form it. Bring the steel guys in. Tie the steel. Alpha's *carpenters* would pour the cement and then strip the forms. Tr. 169:13-20. Alpha chose to sub out the *operators and laborers* work to Lehua Builders, and specialty work to the six (6) specialty contractors. Goodfellow chose to use its own *carpenters, concrete finishers, operators and laborers*, and sub out the specialty work to six (6) specialty contractors.

The Hearings Officer finds and concludes that, as stated in Alpha's Protest, Alpha can use its own multiskilled *carpenters* to perform *concrete finishing and other work* (multiskilled worker exception), all other trades that Alpha will employ for this Project are covered by Alpha's named subcontractors *including Lehua Builders* (subcontractor exception), and Alpha's Form 1 for *carpentry* qualifies Alpha for the apprenticeship preference. The Comptroller's Memo (Exhibit J-11) does not limit a bidder to using only one (1) of the exceptions to having an apprenticeship agreement for every trade it will employ for the project. Furthermore, there are built-in safeguards preventing a bidder from misapplying the apprenticeship preference. According to Mr. Sado there would be "dire consequences" to Alpha for submitting certified payroll for an apprenticeable trade other than *carpenters*, including: not getting paid and not being able to bid on future public procurement projects. Tr. 208:1-9. See also Exhibit J-11 pages 889-890 Section 6. Accordingly, the Hearings Officer concludes that Alpha has proven by a preponderance of the evidence that the County erred in its determination – that Alpha failed to meet the requirements of HRS §103-55.6 by not having a registered apprenticeship agreement for each apprenticeable trade it will employ to construct the project. The County's decision to disqualify Alpha's apprenticeship credit is REVERSED.

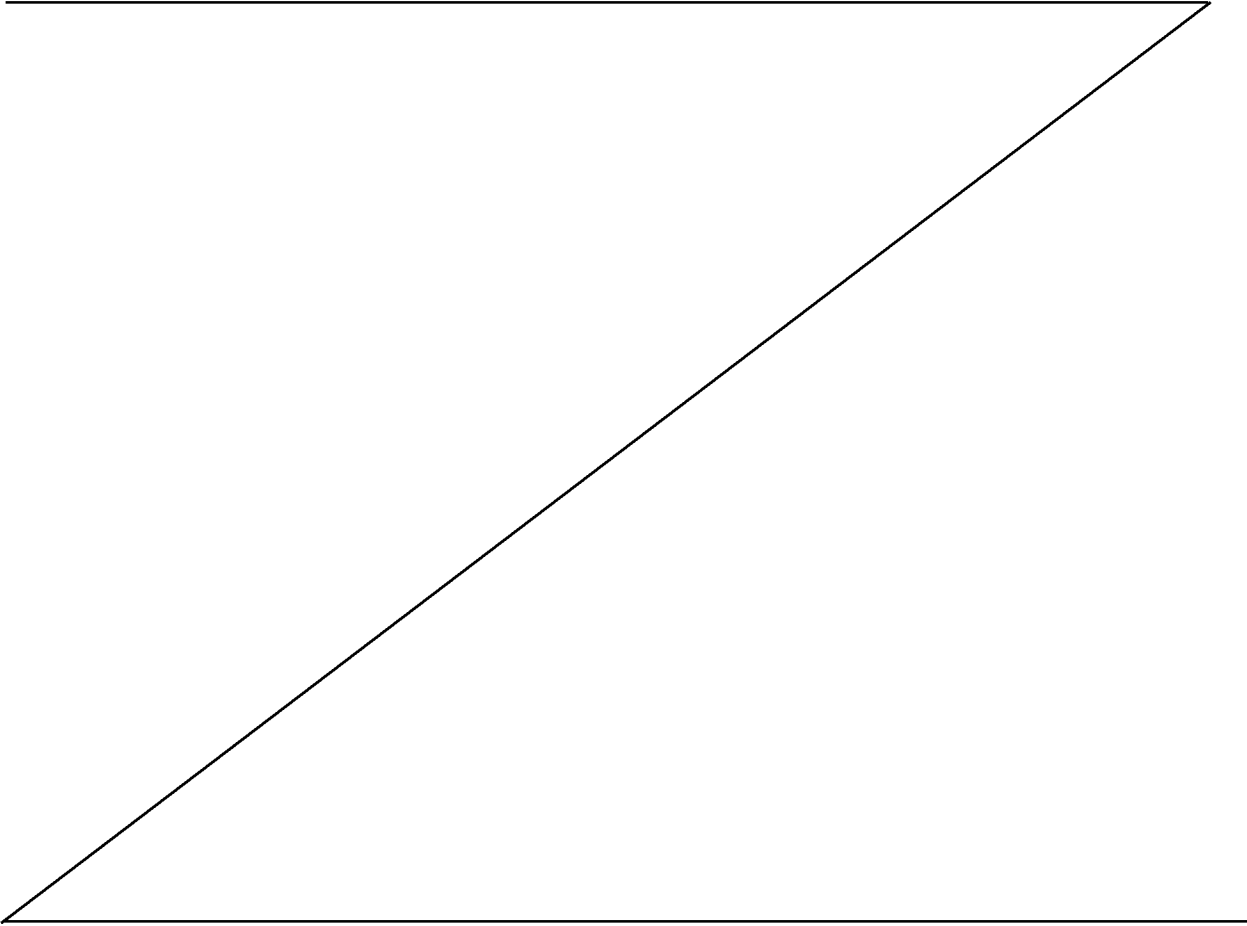
ALPHA HAS NOT PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT THE COUNTY ERRED IN ITS DETERMINATION – THAT GOODFELLOW'S BID WAS RESPONSIVE

In its Protest, Alpha asserts that Goodfellow's Bid was non-responsive because it failed to state the number of days of archaeological monitoring.

In its Protest Denial Letter, the County asserts that even if the number of days of archaeological monitoring is blank, Goodfellow will still be held to the price they listed *regardless of the number of days it takes for archaeological services*.

The Hearings Officer is persuaded by County’s position on this issue. The Hearings Officer is not sure *why* the County changed Item No. 12 of the Bidding Schedule to require the *quantity* of days for archaeological services. Nevertheless, the County’s determination is correct that Goodfellow provided a *lump sum Total Price* of \$160,000 for archaeological services in its Bidding Schedule. See Exhibit J-4 page 591 (emphasis added). Addendum No. 2 also states that payment for archaeological services “...shall be at the **total price** bid for the item as provided in the Bidding Schedule.” See Exhibit J-2 page 552 (emphasis added).

Accordingly, the Hearings Officer concludes that Alpha has *not* proven by a preponderance of the evidence that the County erred in its determination – that Goodfellow’s Bid is responsive.



IV. DECISION

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

1. Goodfellow’s Motion to Dismiss or in the alternative for Summary Judgment, joined by the County, is DENIED.
2. Alpha’s Motion for Summary Judgment is DENIED.
3. Alpha’s Petition is GRANTED, in part, and DENIED, in part.
4. The County’s determination that Alpha’s Bid did not qualify for the apprenticeship preference is REVERSED.
5. The County’s determination that Goodfellow’s Bid is responsive is AFFIRMED.
6. Pursuant to HRS §103D-706, the proposed award of the contract to Goodfellow is CANCELLED.
7. Each party shall bear its own attorneys’ fees and costs; and
8. Alpha’s Protest Bond shall be returned to Alpha.

DATED: Honolulu, Hawaii, August 14, 2024.



RODNEY K.F. CHING
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

Hearings Officer’s Findings of Fact, Conclusions of Law, and Decision; *In Re Alpha, Inc. v. County of Maui, Department of Finance, and Goodfellow Bros. LLC, PDH-2024-003.*