



eFiled 2024 Aug 05 p 12:31

HEARINGS OFFICE

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

In the Matter of

PROMETHEUS CONSTRUCTION,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION,
STATE OF HAWAII,

Respondent.

PDH-2024-004

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

Administrative Hearings Officer:
Natalia T. Chan

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

I. INTRODUCTION

On July 3, 2024, Prometheus Construction ("Petitioner" or "Prometheus") filed a request for administrative review ("Request") to contest the Department of Transportation, State of Hawaii's ("Respondent" or "HDOT") June 20, 2024, reconsideration decision affirming its April 5, 2024, "initial good faith efforts determination" that Prometheus did not meet the goal of 1% participation by a disadvantaged business enterprise ("DBE") and did not make adequate good faith efforts ("GFE") to do so, in connection with the Interstate Route H-2 Panakauahi Culvert Rehabilitation, Federal-Aid Project No. NH-H2-1(035) ("Project"). Petitioner posted a \$151,749.98 bond and a \$1,000.00 nonrefundable filing fee.

A notice of prehearing conference and hearing was served on the parties.

On July 8, 2024, Respondent filed Respondent's Response to Petitioner's Request for Administrative Review Filed July 3, 2024.

On July 9, 2024, a prehearing conference was held telephonically.

On July 12, 2024, Petitioner filed Petitioner Prometheus Construction's Motion to Exclude as Evidence in This Proceeding the "Rejected" Nonresponsive Bid Proposals of Mocon

Corporation and Triton Marine Construction Corp. (“Motion to Exclude”). Also on July 12, 2024, Respondent filed Respondent State of Hawai‘i Department of Transportation’s Motion to Dismiss, or in the Alternative for Summary Judgment (“MTD/MSJ”).

On July 15, 2024, Petitioner filed Petitioner Prometheus Construction’s Memorandum in Opposition to Respondent State of Hawai‘i Department of Transportation’s Motion to Dismiss, or in the Alternative for Summary Judgment (“Petitioner’s Opposition to MTD/MSJ”). Also on July 15, 2024, Respondent filed Respondent’s Memorandum in Opposition to Petitioner’s Motion to Exclude Filed July 12, 2024 (“Respondent’s Opposition to Motion to Exclude”).

On July 16, 2024, Petitioner filed Petitioner Prometheus Construction’s Reply Memorandum Re Petitioner’s Motion to Exclude as Evidence in this Proceeding the “Rejected” Nonresponsive Bid Proposals of Mocon Corporation and Triton Marine Construction Corp. (“Petitioner’s Reply to Motion to Exclude”). Also on July 16, 2024, Respondent filed Respondent’s Reply Memorandum in Support of Motion to Dismiss, or in the Alternative for Summary Judgment, Filed on July 12, 2024 (“Respondent’s Reply to MTD/MSJ”).

On July 17, 2024, the undersigned Hearings Officer denied both Petitioner’s Motion to Exclude and Respondent’s MTD/MSJ and informed the parties by email that the evidentiary hearing would proceed and the Hearings Officer’s Findings of Fact, Conclusions of Law, and Decision would explain the basis for denial.

On July 19, 2024, this matter came on for hearing pursuant to Hawaii Revised Statutes (“HRS”) chapters 91, 92, and 103D and Hawaii Administrative Rules (“HAR”) title 3, chapter 126. Neal K. Aoki, Esq., appeared on behalf of Petitioner, with Clifford Tillotson and Govi Tillotson present as Prometheus’s representatives. Deputy Attorneys General (“DAsG”) Yvonne R. Shinmura and Jose A. Vega appeared on behalf of Respondent, with Curtis Motoyama present as HDOT’s representative.

Joint Exhibits J-1 through J-9 and Respondent’s Exhibits R-1 through R-8 were admitted into evidence. Petitioner’s Exhibits 1 through 12 were admitted into evidence, over Respondent’s objection to the admission of Exhibit 9. The Hearings Officer took administrative notice of the records and files in this matter.

The following individuals testified on behalf of Petitioner: Clifford Tillotson, Principal of Prometheus; Troy Ogasawara, President/Principal of Geotech Solutions, Inc. (“Geotech”); and Peter Gooding, Assistant Project Manager of Prometheus.

The hearing was furthered to July 22, 2024, at 9:00 A.M.

On July 22, 2024, Respondent filed Respondent State of Hawai'i Department of Transportation's Motion to Continue Proceedings Commenced on July 19, 2024, to July 26, 2024 ("Motion to Continue"). Also on July 22, 2024, a status conference was held virtually to set a date for the furthered hearing. Following the status conference, Respondent's Motion to Continue was granted in part and, with respect to its requested hearing date of July 26, 2024, denied in part. For good cause shown and by mutual agreement of the parties, the hearing was continued to July 29, 2024, at 8:00 A.M., by videoconference.

On July 29, 2024, this matter came on for the final day of hearing. Neal K. Aoki, Esq., appeared on behalf of Petitioner, with Clifford Tillotson and Govi Tillotson present as Prometheus's representatives. DAsG Yvonne R. Shinmura and Jose A. Vega appeared on behalf of Respondent, with Curtis Motoyama present as HDOT's representative.

After Petitioner rested its case, Respondent orally moved for a directed verdict under HAR § 3-126-51(a), on the basis that Petitioner did not meet its burden under HAR § 3-126-56(c) and did not present evidence showing that HDOT's June 20, 2024, reconsideration decision was "arbitrary, capricious, or unreasonable." The Hearings Officer denied this motion.

Curtis Motoyama, HDOT's Office of Civil Rights Coordinator and reconsideration official for the Project, and Evan Kimoto, Project Manager for the Project, testified on behalf of Respondent.

The Hearings Officer directed the parties to file either closing arguments or proposed findings of fact, conclusions of law, and decision by 3:00 P.M. on July 31, 2024, and the parties did so.

Having considered the motions and all papers filed in support thereof and in opposition thereto, the evidence and arguments of counsel, and the exhibits, records, and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and decision.

II. FINDINGS OF FACT¹

1. On December 4, 2023, HDOT posted an invitation for bids ("IFB") and specifications for the Project, whose "scope of work consists of repair of existing culvert crossings at Mileposts 1.2 and 1.4 on Interstate Route H-2 on the island of Oahu; maintenance and removal of temporary erosion control measures; and traffic control." (Ex. J-1 at SOH000002.)

¹ If any of the findings of fact are deemed conclusions of law, the Hearings Officer adopts those facts as conclusions of law.

2. Title 49 Code of Federal Regulations Part 26 (“49 C.F.R. Part 26”), entitled “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,” applies to the Project. (*Id.* at SOH000004.)

3. Bidders were directed to “read and be familiar with the DBE Requirements, which establishes the program requirements pursuant to [49 C.F.R. Part 26]” and which were included in the Project specifications. (*Id.* at SOH000004 and SOH000011-25.)

4. Section V, ¶ C of the DBE Requirements required bidders to submit the following to Mr. Kimoto by 4:30 P.M. on January 8, 2024 (*i.e.*, five days after bid opening on January 3, 2024): DBE Confirmation and Commitment Agreement; and DBE Contract Goal Verification and Good Faith Efforts (GFE) Documentation for Construction, which included a Summary of GFEs (collectively, “DBE/GFE Documentation”). (*Id.* at SOH000013.) Failure to provide the DBE/GFE Documentation would be cause for bid rejection. (*Id.*)

5. The Project had a goal of 1% DBE participation. (Ex. J-3 at 001.)

6. HDOT opened the bids on January 3, 2024, and received three bid proposals: \$14,423,000.00 from Mocon Corporation (“Mocon”); \$14,768,209.00 from Triton Marine Construction Corp. (“Triton Marine”); and \$15,174,998.00 from Prometheus. (Ex. J-9 at SOH000379.)

7. On January 8, 2024, Prometheus filed a bid protest, which stayed further procurement activities on the Project. (*Id.* at SOH000378 and SOH000385.)

8. Also on January 8, 2024, Prometheus submitted the following to HDOT (collectively, “January 8, 2024, DBE/GFE Documentation”):

- DBE Contract Goal Verification and GFE Documentation for Construction, which identified 0.63% DBE participation from DBE Geotech and which included a Summary of GFEs;
- DBE Confirmation and Commitment Agreement, which listed a \$6,171.97 total commitment amount from Geotech for \$5,367.96 of BMP items (209.0200) and \$804.01 of hydro-mulch seeding (641.0100);
- January 2, 2024, estimate from Geotech totaling \$6,202.83 after tax;² and

² Mr. Ogasawara testified that Geotech prepared its \$6,202.83 estimate based on the Project’s plans and specifications, which did not provide sufficient information for Geotech to provide a complete and accurate estimate on the type and quantity of materials needed for the Project’s access roads and tunnel water diversions. If quantity is unknown, Geotech will typically prepare an estimate with unit prices and single unit quantities.

- Reinforcing steel estimates: \$493,160.00 from DBE Aloha Steel Corp. (“Aloha Steel”); \$320,914.00 from non-DBE CMC Rebar; \$488,374.00 from non-DBE Harris Rebar South Pacific Inc. (“Harris Rebar”); and \$842,757.00 from non-DBE Simmons Steel Corporation.

(Ex. J-6.)

9. In its Summary of GFEs, Prometheus answered questions regarding whether it took any actions³ demonstrating GFEs (“Appendix A actions”) and answered question 2C, “Explain your GFE if any, to take appropriate steps to follow up with interested DBEs in a timely manner to facilitate participation by DBEs in this project,” as follows:

Multiple DBEs were inquired with and two were successfully reached; Geotech Solutions, an erosion control contractor, and Aloha Steel, a reinforcing material provider.

Geotech Solutions price for initial BMPs is acceptable as provided on 1/2/24, the day before the bid. Furthermore, Geotech Solutions will provide all BMP and finishing materials for the two access roads, the tunnel water diversions, and BMP refreshing and replacement as this two-year project progresses. These items are on the plans but not clear enough for Geotech Solutions to estimate as much of it is means and methods and up to the contractor to work out with their respective teams. We will be working closely with Geotech Solutions as we progress on the project and the design aspects become clearer. While the quote shows \$6,171.97, Prometheus Construction estimates the material budget to be spent with Geotech Solutions for these undefined items at \$150,000.00+.

Aloha Steel provided pricing 1/3/24 at 9AM a few hours before the bid was due. The pricing from this contractor was approximately 54% higher than the next available option.

(*Id.* at SOH000328.)

10. Mr. Tillotson testified that Prometheus’s answer to question 2C represented, *inter alia*, its commitment as of January 8, 2024, to purchase a minimum of \$150,000 of materials from Geotech. This ballpark estimate was based on Mr. Tillotson’s experience in erosion control and Prometheus’s prior work with Geotech on other projects.

³ These actions are listed in 49 C.F.R. Part 26, Appendix A (“Appendix A”) and § VIII, ¶ D of the DBE Requirements.

11. Mr. Tillotson confirmed the veracity of Prometheus's answer to question 2C, testifying that constructing the two access roads was a "major item" of the Project and that the Project's plans and specifications did not include any soil compaction analysis, slope analysis, or rights-of-way survey, all of which were needed to design the access roads for concrete trucks to safely reach the culverts for repair and rehabilitation.

12. On March 19, 2024, HDOT denied in part and sustained in part Prometheus's bid protest. (Ex. J-9 at SOH000378.) HDOT stated it would be rejecting the proposals of Mocon and Triton Marine as nonresponsive and irregular. (*Id.* at SOH000385.) HDOT would subsequently evaluate Prometheus "as the remaining bidder, to determine if it is the lowest responsive and responsible bidder for contract award." (*Id.*)

13. Mr. Tillotson testified that upon learning that it was the remaining bidder, Prometheus proceeded to analyze the soil compaction and slopes, survey the rights-of-way, and draw the access roads of the Project site.⁴ Prometheus submitted the site data to Tensor to prepare a report on the type of materials suitable for construction of the access roads. The Tensor report and access roads design drawing were given to Geotech to prepare its April 11, 2024, revised estimate.

14. On April 5, 2024, HDOT determined that Prometheus "did not meet the DBE goal of 1% and did not satisfy the GFE criteria" for the Project ("Initial Decision"). (Ex. J-7.) However, the Initial Decision did not explain the basis for HDOT's determination and only reproduced the questions regarding Appendix A actions and Prometheus's answers from its Summary of GFEs. (*Id.*)

15. On April 8, 2024, Prometheus requested reconsideration. (Ex. 7.)

16. As part of the reconsideration, Prometheus was given "the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate GFE to do so" and "the opportunity to meet in person with the reconsideration official to discuss the issue of whether it met the goal or made adequate GFE to do so." (Ex. J-8 at SOH000348.) Mr. Motoyama likewise testified that as reconsideration official, he invited Prometheus to bring additional documentation to the reconsideration proceeding.

17. On May 30, 2024, Messrs. Tillotson and Gooding met with Mr. Motoyama for the reconsideration proceeding and resubmitted Prometheus's January 8, 2024, DBE/GFE

⁴ Mr. Kimoto testified that testing soil compaction, surveying rights-of-way, and preparing topographical drawings for the Project would have taken one to three months and cost HDOT tens of thousands of dollars.

Documentation. They also submitted the following (collectively, “May 30, 2024, DBE/GFE Documentation”):

- DBE Contract Goal Verification and GFE Documentation for Construction, which identified 1.8%⁵ DBE participation from DBE Geotech, “TBD” trucking pricing from DBE Aloha Trucking, and “TBD” traffic control pricing from DBE Aloha Roadway Services;
- April 11, 2024, revised estimate from Geotech totaling \$275,094.69;⁶
- DBE Goal Calculations worksheet indicating 1.18% DBE participation from Geotech;
- DBE Contact Log;
- Access roads design drawing; and
- Tensar report.

(*Id.*; Ex. 5; Ex. 6 at 009-043; Ex. 8.)

18. Messrs. Tillotson and Gooding testified about what they explained to Mr. Motoyama at the reconsideration proceeding:

- Per its Summary of GFEs in its January 8, 2024, DBE/GFE Documentation, Prometheus committed to purchasing \$150,000+ of materials from Geotech. However, due to insufficient information in the Project’s plans and specifications, Prometheus did not know the type and quantity of materials needed to construct the access roads and tunnel water diversions for the Project.
- Upon learning that it was the remaining bidder, Prometheus obtained the necessary site condition data, access roads design drawing, and Tensar report for Geotech to prepare a complete and accurate revised estimate of \$275,094.69.
- Prometheus would exceed the 1% DBE participation goal with Geotech’s revised estimate alone.
- Prometheus would be using non-DBE CMC Rebar to furnish the reinforcing steel for the Project. To provide a competitive bid, Prometheus could not use DBE Aloha Steel, whose estimate was 54% higher than CMC Rebar’s.

⁵ Mr. Gooding testified that 1.8% was a typographical error and that Prometheus had 1.18% DBE participation, as calculated in Prometheus’s DBE Goal Calculations worksheet.

⁶ Mr. Ogasawara testified that Geotech’s revised estimate arose after Prometheus realized it was the remaining bidder and contacted Geotech to discuss site-access problems. After receiving the Tensar report and conferring with Prometheus on the type and quantity of materials, Geotech prepared a revised estimate on April 11, 2024, that included materials to overcome site-specific problems in constructing the access roads, such as tunnel water diversions, a Tensar geogrid to stabilize the roads, and matting to re-vegetate the slope and reduce soil loss.

- Prometheus used HDOT’s certified DBE directory to identify DBEs capable of performing the areas Prometheus targeted for DBE participation (*i.e.*, erosion control, reinforcing steel, trucking, and traffic control).
- Per its DBE Contact Log, Prometheus contacted Aloha Trucking and Aloha Roadway Services before bid submission. Although these DBEs could not provide estimates until the access roads were designed, they provided verbal commitments to provide services for the Project. Prometheus also contacted Geotech before bid submission to discuss the scope of work and possible expansion of products and needs depending on roadway design.

19. Mr. Motoyama testified that he considered the following in his reconsideration:

- Initial Decision;
- December 13, 2023, pre-bid meeting notes listing Prometheus’s attendance;
- January 8, 2024, DBE/GFE Documentation;⁷ and
- DBE Contact Log.

20. According to Mr. Motoyama, the “federal regulation” and DBE Requirements for this design-bid-build project⁸ required Prometheus to submit DBE/GFE Documentation to HDOT by January 8, 2024, and prohibited him from considering documentation of GFEs performed after January 8, 2024. Consequently, aside from the DBE Contact Log, Mr. Motoyama did not consider the rest of Prometheus’s May 30, 2024, DBE/GFE Documentation, which included Geotech’s April 11, 2024, revised estimate. Mr. Motoyama testified that he considered the DBE Contact Log because it included calls made before January 8, 2024.

21. Mr. Motoyama acknowledged that had he considered the DBE Contract Goal Verification and GFE Documentation for Construction submitted as part of the May 30, 2024, DBE/GFE Documentation, the total of Geotech’s bid items would equal an amount sufficient to meet the 1% DBE participation goal. He also noted that the \$14,017,000.00 sum of all work items, less mobilization, force account items, and allowance items, was incorrect to the extent the \$14,017,000.00 should be reduced by \$20,000, due to an error.

⁷ Mr. Motoyama testified that he read Prometheus’s statement in its Summary of GFEs that it would be purchasing \$150,000+ of materials from Geotech; however, he needed to see documentation of Prometheus performing GFEs as of January 8, 2024.

⁸ Mr. Kimoto likewise testified that this was a design-bid-build project, even though contractors had some leeway in constructing the Project’s access roads.

22. On June 26, 2024, HDOT issued a letter dated June 20, 2024 (“Reconsideration Decision”), affirming its Initial Decision. (Ex. J-8.) As the reconsideration official, Mr. Motoyama “reviewed all previously submitted documents, oral and written arguments, and other evidence presented during the reconsideration proceeding, in making the decision.” (*Id.* at SOH000347.)

23. Regarding Prometheus’s failure to meet the 1% DBE participation goal, the Reconsideration Decision stated:

HDOT set a DBE project goal of 1.0 percent for this project. **Based on Prometheus’s DBE Confirmation and Commitment Agreement and DBE Contract Goal Verification and Good Faith Efforts (GFE) Documentation for Construction dated January 8, 2024**, HDOT found that Prometheus’s bid of fifteen million one hundred seventy-four thousand nine hundred ninety-eight dollars and zero cents (\$15,174,998.00) included of eight hundred four dollars and one cent (**\$804.01**)⁹ of work to be subcontracted to a DBE supplier, or 0.0 percent of DBE participation. Prometheus’s bid fell one hundred thirty-nine thousand four hundred eighty-seven dollars and fifty-nine cents (\$139,487.59), or 1.0 percent short of the DBE project goal.

(*Id.*, emphasis added.)

On January 2, 2024, Prometheus received a quote from Geotech Solutions by email and contacted Geotech Solutions by phone to discuss the scope of work and possible expansion of products and needs depending on roadway design. **On April 11, 2024, Prometheus received a revised quote from Geotech Solutions based on updated design.** [Citation to DBE Contact Log.] **During the administrative reconsideration meeting, Prometheus explained that they could meet the DBE project goal with the revised quote from Geotech Solutions.**

(*Id.* at SOH000350, emphasis added.)

If Prometheus accepted the higher quote from DBE Aloha Steel, Prometheus would have had sufficient DBE participation to meet the 1.0 percent DBE project goal.

⁹ Mr. Motoyama testified that only \$804.01 of hydro-mulch seeding (641.0100) counted toward the 1% DBE participation goal, because \$5,367.96 of additional water pollution, dust, and erosion control (209.0200) was a force account item, per the proposal schedule in Addendum No. 1 to the IFB. (Ex. J-3 at 005-006; Ex. J-6 at SOH000324.) Force account items are not counted toward DBE participation. (Ex. J-1 at SOH000260.)

(*Id.* at SOH000352.)

24. The Reconsideration Decision analyzed whether Prometheus took any Appendix A actions and indicated that Prometheus did not demonstrate actions #2, #5, #6, and #10. (*Id.* at SOH000348-354.)

25. Appendix A action #2 considers whether the bidder: solicited DBEs by attending pre-bid meetings, advertising, or providing written notice; solicited DBEs as early in the procurement as practicable; gave sufficient time for DBEs to inquire about the project and respond to the solicitation; and followed up with interested DBEs to facilitate their participation in the project. 49 C.F.R. Pt. 26, App. A, § IV, ¶ A; *see also* DBE Requirements, § VIII, ¶ D. Based on Prometheus's Summary of GFES, explanations at the reconsideration proceeding, DBE Contact Log, and December 13, 2023, pre-bid meeting notes, Mr. Motoyama determined that Prometheus: attended the pre-bid meeting but neither advertised nor attended business matchmaking events; solicited DBE hydro-mulch seeding material suppliers but not installers; solicited DBEs eight or more days after soliciting a non-DBE (*i.e.*, Harris Rebar); gave most DBEs six working days to respond to the solicitation, except for Aloha Steel, which had two working days; and did not follow up with Geotech or Aloha Steel. (Ex. J-8 at 000348-350.) However, Mr. Motoyama acknowledged that Prometheus's December 22, 2023, call to Geotech to request a quote and January 2, 2024, call to Geotech discussing scope of work and possible expansion of products and needs depending on roadway design did constitute follow up with Geotech.

26. Appendix A action #5 considers whether the bidder negotiated in good faith with interested DBEs. 49 C.F.R. Pt. 26, App. A, § IV, ¶ D(1); *see also* DBE Requirements, § VIII, ¶ D. Based on Prometheus's Summary of GFES, Mr. Motoyama determined that Prometheus did not negotiate in good faith with Aloha Steel. (Ex. J-8 at SOH000351.) However, Mr. Motoyama acknowledged that Prometheus's offer to allow Aloha Steel to either furnish or install the steel, instead of performing both, constituted a good faith negotiation.

27. Appendix A action #6 considers whether the bidder solely relied on price in determining whether to use DBEs, unless the price difference between a DBE and non-DBE is "excessive or unreasonable." 49 C.F.R. Pt. 26, App. A, § IV, ¶ D(2); *see also* DBE Requirements, § VIII, ¶ D. Based on Prometheus's Summary of GFES and explanations at the reconsideration proceeding, Mr. Motoyama determined that Prometheus relied solely upon price in choosing non-DBE CMC Rebar instead of DBE Aloha Steel and that Aloha Steel's

estimate was “not excessive or unreasonable relative to the total size of the project and non-DBE quotes.” (Ex. J-8 at SOH000351-352.) However, Mr. Motoyama acknowledged that he was not aware of any legal authority that provides for the comparison of a DBE’s estimate to the “total size of the project” to determine whether that estimate is excessive or unreasonable.

28. Appendix A action #10 considers whether the bidder used the services of available minority/women community organizations, business groups, contractors’ groups, and business assistance offices. 49 C.F.R. Pt. 26, App. A, § IV, ¶ H; *see also* DBE Requirements, § VIII, ¶ D. Based on Prometheus’s Summary of GFEs, Mr. Motoyama determined that Prometheus did not use these services. (Ex. J-8 at SOH000353.)

29. The Reconsideration Decision also compared other bidders’ DBE participation percentages with Prometheus’s,¹⁰ noting that Mocon had 2.4% DBE participation, Triton Marine had 1.2% DBE participation, and their average was 1.8%. (*Id.* at SOH000354.) The Reconsideration Decision noted that Mocon and Triton Marine exceeded the 1% DBE participation goal, whereas Prometheus’s 0.0% DBE participation neither met nor exceeded the 1.8% average DBE participation of the other two bidders. (*Id.*)

30. Mr. Motoyama testified that although HDOT rejected the proposals of Mocon and Triton Marine as nonresponsive and irregular, the “federal regulation” and § VIII, ¶ C of the DBE Requirements required him to compare the DBE/GFE Documentation of these disqualified bidders with Prometheus’s to analyze the adequacy of Prometheus’s GFEs.

31. On June 26, 2024, Prometheus submitted a Uniform Information Practices Act (“UIPA”) request to HDOT for copies of Mocon and Triton Marine’s DBE/GFE Documentation. (Resp.’s Opp. to Mot. to Exclude, Ex. “E”.)

32. On July 2, 2024, HDOT provided redacted copies of the requested DBE/GFE Documentation to Prometheus. (Mot. to Exclude, Ex. “3”.)

¹⁰ At the hearing, the parties identified the review of other bidders’ performance in meeting the contract goal as “action #12.” Because this is set forth in § V of Appendix A, the Hearings Officer considers this separately from the list of Appendix A actions in § IV, ¶¶ A-H. The review of other bidders’ performance considers whether other bidders met the goal and whether the apparent successful bidder could have met the goal with additional efforts. 49 C.F.R. Pt. 26, App. A, § V. An apparent successful bidder that fell short of meeting the goal might have made GFEs if it met or exceeded the average DBE participation of other bidders. *Id.*

III. CONCLUSIONS OF LAW¹¹

A. The Hearings Officer denies Respondent's MTD/MSJ because Respondent moves to dismiss under an improper legal standard and genuine issues of material fact exist in this case.

Respondent moves to dismiss Petitioner's Request under HAR § 3-126-67, which provides for dismissal of requests for hearings. Subsection (a) concerns voluntary dismissals by a petitioner and does not apply here. Subsection (b) states that except for voluntary dismissals, a request for hearing is dismissed only upon motion and an order granting that motion. Subsection (c) provides, in pertinent part:

The hearings officer may, upon the motion of any party, or sua sponte, issue a notice of proposed dismissal to any person requesting a hearing, based on:

- (1) The failure of the person requesting the hearing to prosecute or otherwise pursue the person's request for hearing within one year from the filing of the request, excluding periods of delay caused by a party other than the person requesting the hearing; or
- (2) The failure of the person requesting the hearing to comply with this chapter or any order of the hearings officer.

HAR § 3-126-67(c). Because Respondent has not shown that Petitioner failed to prosecute or failed to comply with HAR title 3, chapter 126 or an administrative order, the Hearings Officer denies Respondent's MTD/MSJ.

Respondent alternatively moves for summary judgment under Hawaii Rules of Civil Procedure Rule 56, which requires the granting of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." H.R.C.P. Rule 56(c). "[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." *Hunt v. Chang*, 594 P.2d 118, 124 (Haw. 1979) (citations omitted). The evidence and inferences drawn therefrom must be "viewed in the light most favorable to the nonmoving party." *Heatherly v. Hilton Hawaiian Village Joint Venture*, 893 P.2d 779, 786 (Haw. 1995) (citation omitted). "Bare allegations or factually

¹¹ If any of the conclusions of law are deemed findings of fact, the Hearings Officer adopts those conclusions as findings of fact.

unsupported conclusions are insufficient to raise a genuine issue of material fact[.]” *Reed v. City and County of Honolulu*, 873 P.2d 98, 104 (Haw. 1994) (citations omitted).

In this case, there are genuine issues of material fact that do not entitle Respondent to judgment as a matter of law. Respondent asserts certain “undisputed material facts” in its MTD/MSJ and encloses Mr. Motoyama’s declaration that the Initial Decision and Reconsideration Decision attached to the MTD/MSJ are true and correct copies. Although this declaration authenticates the copies, it does not prove the validity or correctness of the matters discussed therein.

The Reconsideration Decision, which affirmed the Initial Decision, explained that Prometheus had 0.0% of DBE participation and failed to take certain Appendix A actions. Petitioner argues the contrary: it met the 1% DBE participation goal and made adequate GFEs, as shown in its January 8, 2024, DBE/GFE Documentation, which stated its commitment to purchase \$150,000+ of materials from Geotech, and its May 30, 2024, DBE/GFE Documentation, which provided a “complete and accurate proposal of \$275,094.69” from Geotech after Prometheus obtained “the information and data needed for the design and construction of the access roads.” (Pet.’s Opp. to MTD/MSJ at 8.) Both parties dispute salient facts that are material because proving them will establish or refute whether Prometheus met the 1% DBE participation goal and/or made adequate GFEs. Drawing all inferences in the light most favorable to Petitioner as the nonmoving party, these disputed material facts present genuine issues for hearing, and Respondent is not entitled to judgment as a matter of law.

For the foregoing reasons, Respondent’s MTD/MSJ is DENIED.¹²

B. The Hearings Officer denies Petitioner’s Motion to Exclude because: (1) Mocon’s and Triton Marine’s bid proposals, including DBE/GFE Documentation, are relevant to this proceeding and thus may be received as evidence; and (2) the Hearings Officer has no jurisdiction to order HDOT to provide unredacted copies of the same.

Petitioner moves to exclude as evidence from this proceeding the bid proposals, including DBE/GFE Documentation, of Mocon and Triton Marine. Should the proposals be introduced as evidence, Petitioner alternatively moves for a ruling requiring HDOT to produce unredacted copies of the same.

¹² Section III, ¶ E of this decision addresses any merits argued in the papers filed in support of and in opposition to the MTD/MSJ.

1. Because HDOT considered Mocon’s and Triton Marine’s proposals in analyzing the adequacy of Prometheus’s GFEs, these proposals are relevant, admissible evidence in this proceeding.

On March 19, 2024, HDOT determined that it would be rejecting the proposals of Mocon and Triton Marine as nonresponsive and irregular. Petitioner argues that under *Access Media Services, Inc. v. Hawaii State Legislature*, PDH-2019-001 (Feb. 4, 2019), these rejected proposals were not entitled to further consideration and thus should not have been compared with Prometheus’s proposal to determine whether Prometheus made adequate GFEs.

In *Access Media*, the legislature issued a request for proposal (“RFP”) that stated: “Failure to meet the minimum mandatory requirements (‘no pass’) shall be grounds for deeming the proposal nonresponsive to the RFP and rejection of the proposal. Only those proposals meeting the mandatory requirements (‘pass’) of Phase 1 shall be considered in Phase 2.” *Id.* at 22. The legislature rejected Access Media’s proposal as nonresponsive because it was missing a subsection the RFP deemed as mandatory. *Id.* at 24. The legislature issued a “no pass” determination on the proposal, which “did not make it past Phase 1.” *Id.* The hearings officer upheld this determination, ruling that because the proposal was deemed nonresponsive and rejected in Phase 1 “for failure to follow the RFP,” it “was not entitled to further consideration” in Phase 2 for contract award. *Id.* at 26.

The instant case is distinguishable from *Access Media*, which involved an RFP pursuant to HRS § 103D-303. Mocon’s and Triton Marine’s proposals were rejected as nonresponsive and irregular in response to an IFB pursuant to HRS § 103D-302. Although these proposals were not eligible for contract award, they could nevertheless be used “as a comparative tool in evaluating other bids” and “to assess the adequacy of GFE of other bidders.” (Resp.’s Opp. to Mot. to Exclude at 4-5.) Indeed, Appendix A states, in pertinent part:

In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. **At a minimum, you must review the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal.** If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.

49 C.F.R. Pt. 26, App. A, § V (emphasis added). Accordingly, HDOT was required to review the performance of Mocon and Triton in meeting the 1% DBE participation goal.

Moreover, the hearings officer has the power, in conducting a hearing, without limitation, “. . . to receive relevant evidence, and to exclude evidence which is admissible under the rules of evidence, and accordingly may restrict lines of questioning or testimony[.]” HAR § 3-126-52(6). Because the Reconsideration Decision states that HDOT considered Mocon’s and Triton Marine’s proposals in analyzing whether Prometheus made adequate GFEs, their proposals are relevant to this proceeding and therefore may be received as evidence, subject to the appropriate weight.

Petitioner contends that HDOT’s comparison of Mocon’s and Triton Marine’s proposals to Prometheus’s was improper procedure that violates HRS § 103D-709(f) and counters the purpose of HRS chapter 103D. HRS § 103D-709(f) requires a party initiating a request for administrative review to pay a nonrefundable filing fee. Assuming Petitioner meant to cite to HRS § 103D-709(i), which relates to the hearings officer’s authority, instead of subsection (f), HDOT’s consideration of Mocon’s and Triton Marine’s proposals in determining whether Prometheus made adequate GFEs is “in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation” and not contrary to HRS chapter 103D because Appendix A requires HDOT to review the performance of other bidders. If Mocon’s and Triton Marine’s proposals are inaccurate, unreliable, or invalid, as Petitioner suggests, and if “one can only speculate on the interpretation and application of such documentation” in its redacted form, the Hearings Officer has discretion to assign minimal or no weight to that evidence in determining whether Prometheus made adequate GFEs. (Mot. to Exclude at 5.)

Respondent argues that HAR § 3-126-59 bars Petitioner from raising the claim that the reconsideration official improperly considered Mocon’s and Triton Marine’s proposals in determining whether Prometheus made adequate GFEs, as Petitioner did not raise this claim in its Request. “Any person entitled to request an administrative hearing under this subchapter shall file a written request for hearing which shall state plainly and precisely the facts and circumstances of the person’s grievance, the laws and rules involved, and the relief sought by the person requesting an administrative hearing.” HAR § 3-126-59. The Request satisfied this notice pleading requirement by setting forth the bases for administrative review and enclosing

the Reconsideration Decision, which discussed the proposals of Mocon and Triton Marine and thereby put Respondent on notice that Petitioner could raise this issue.

2. The Hearings Officer has no jurisdiction to order HDOT to provide unredacted copies of Mocon’s and Triton Marine’s proposals.

In response to Prometheus’s UIPA request, HDOT produced redacted copies of Mocon’s and Triton Marine’s DBE documentation. Petitioner contends that if this documentation is allowed to be introduced as evidence, the Hearings Officer should require HDOT to produce unredacted copies of the same. Petitioner argues that HRS chapter 92F does not govern the disclosure or redaction of the information requested because Prometheus’s UIPA request was “not that of a general member of the public, but that of the lowest responsible bidder in the Project” (Mot. to Exclude at 4.)

An individual denied access to a government record may appeal that denial by: (1) appealing to the State Office of Information Practices; and/or (2) bringing a legal action against the agency in circuit court within two years of the agency’s denial of access. HRS §§ 92F-15, -15.3, and -15.5. *See Securitas Sec. Servs. v. Dept. of Transp., State of Hawai‘i*, PDH-2021-005 (May 13, 2021) (whether HDOT complied with UIPA request is moot because hearings officer has no jurisdiction over UIPA disputes). Thus, the Hearings Officer has no jurisdiction to order HDOT to produce unredacted copies of Mocon’s and Triton Marine’s proposals.

Finally, to the extent Petitioner requested HDOT’s production before the hearing of these unredacted proposals, the Hearings Officer has no power to compel pre-hearing discovery in procurement proceedings. HAR § 3-126-63(3) provides for only the production of exhibits to be introduced at the hearing.

For the foregoing reasons, Petitioner’s Motion to Exclude is DENIED.

C. HRS chapter 103D governs jurisdiction and burden of proof in this matter.

The hearings officer has jurisdiction to review determinations made pursuant to HRS § 103D-701 *de novo*. HRS § 103D-709(a). Therefore, the hearings officer has jurisdiction and 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 of Hawaii, Dept. of Educ.*, 946 P.2d 1, 26 (Haw. 1997). The hearings officer must decide whether the determination was “in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract and shall order such relief as may be appropriate.” HRS § 103D-709(i).

Petitioner has the burden of proof, including the burden of producing evidence and the burden of persuasion, by a preponderance of the evidence. HRS § 103D-709(c); HAR § 3-126-56(c). Accordingly, to prevail, Petitioner must prove by a preponderance of the evidence that HDOT's Reconsideration Decision affirming that Prometheus did not meet the 1% DBE participation goal and did not make adequate GFEs was not in accordance with the Constitution, statutes, rules, and terms and conditions of the solicitation.

D. 49 C.F.R. § 26.53 and Appendix A apply to the Project.

49 C.F.R. § 26.53 governs the GFE procedures HDOT must follow in federally assisted projects with contract goals. HDOT set a 1% DBE participation goal for its Project, so bidders had to document that they either: (1) obtained enough DBE participation to meet the 1% goal; or (2) made adequate GFEs to meet that goal, even if they did not succeed in obtaining enough DBE participation to do so. *See* 49 C.F.R. § 26.53(a). To demonstrate adequate GFEs, "the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of [49 C.F.R. Part 26] which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful." 49 C.F.R. Pt. 26, App. A, § I. HDOT must review the bid "to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate [GFEs]" and "to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made, based on [Appendix A]." *Id.* at § II. Appendix A provides a non-mandatory, non-exclusive, and non-exhaustive list of actions HDOT should consider when analyzing a bidder's GFEs. *Id.* at § IV. The Appendix A actions include: soliciting the interest of DBEs at pre-bid meetings; advertising and/or written notices; breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces; providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract; negotiating in good faith with interested DBEs; not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities; making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance; making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services; and effectively using the services of available minority/women community organizations, contractors' groups, and government business

assistance offices. *Id.* Appendix A also requires HDOT to review the performance of other bidders in meeting the contract goal. *Id.* at § V.

E. HDOT erred in not considering all of Prometheus’s May 30, 2024, DBE/GFE Documentation in making its Reconsideration Decision, as required by 49 C.F.R. § 26.53(d)(1) and § IX, ¶¶ C and D of the DBE Requirements.

HDOT’s Reconsideration Decision affirmed the Initial Decision that Prometheus did not meet the 1% DBE participation goal and did not make adequate GFEs. The Reconsideration Decision stated that the “reconsideration official reviewed all previously submitted documents, oral and written arguments, and other evidence presented during the reconsideration proceeding, in making the decision.” Notwithstanding this statement, Mr. Motoyama did not consider the May 30, 2024, DBE/GFE Documentation submitted by Prometheus at the reconsideration proceeding, aside from the DBE Contact Log. Mr. Motoyama also did not give much weight to Prometheus’s statement in its Summary of GFEs that it would be purchasing \$150,000+ of materials from Geotech, on the basis that he was legally unable to consider documentation of GFEs performed after January 8, 2024.

Respondent contends that under 49 C.F.R. § 26.53(b)(3), Prometheus was required to submit evidence that it met the 1% DBE participation goal or made adequate GFEs as of January 8, 2024. “Since there was no written confirmation of more than \$6,171.97 by GeoTech on January 8, 2024, the Local Reconsideration Decision complied with the law by only considering that amount,” and Mr. Motoyama was “not allowed to take into consideration” Geotech’s April 11, 2024, revised estimate when determining whether Prometheus met the 1% DBE participation goal. (Resp.’s Reply to MTD/MSJ at 5-6.)

HDOT has discretion to require the bidder to present the information required by paragraph (b)(2)¹³ of this section for HDOT’s initial determination:

- (A) Under sealed bid procedures, as a matter of responsiveness,
- or with initial proposals, under contract negotiation procedures;
- or

¹³ Bidders must submit, “at the time provided in paragraph (b)(3) of this section,” the following information to HDOT: the names and addresses of DBEs that will participate in the contract; a description of the work each DBE will perform on the contract; the dollar amount of the participation of each DBE participating; written documentation of the bidder’s commitment to use a DBE whose participation is submitted to meet a contract goal; written confirmation from each listed DBE that it is participating in the contract in the kind and amount of work provided in the prime contractor’s commitment; and, if the contract goal is not met, evidence of GFEs in accordance with Appendix A. 49 C.F.R. § 26.53(b)(2)(i)-(vi); *see also* DBE Requirements, § V.

(B) No later than 7 days after bid opening as a matter of responsibility. The 7 days shall be reduced to 5 days beginning January 1, 2017.

49 C.F.R. § 26.53(b)(3)(i).

For the Project, HDOT required bidders to submit their DBE/GFE Documentation by January 8, 2024, (*i.e.*, five days after bid opening) in accordance with 49 C.F.R. § 26.53(b)(3)(i)(B) and § V, ¶ C of the DBE Requirements. Prometheus complied with that requirement by timely submitting its January 8, 2024, DBE/GFE Documentation, which included its Summary of GFEs representing, *inter alia*, that: Geotech would be providing materials for the two access roads, tunnel water diversions, and BMP refreshing and replacement; the Project's plans and specifications were not clear enough for Geotech to provide an accurate estimate as of January 8, 2024; and Prometheus would be purchasing \$150,000+ of materials from Geotech.

Respondent erroneously extends the reach of 49 C.F.R. § 26.53(b)(3)(i)(B) and § V, ¶ C of the DBE Requirements by requiring Prometheus, as part of its reconsideration, to submit evidence that it met the 1% DBE participation goal and/or made adequate GFEs as of January 8, 2024. The deadline in 49 C.F.R. § 26.53(b)(3)(i)(B) and § V, ¶ C of the DBE Requirements applies to HDOT's initial review of DBE/GFE Documentation and does not apply to administrative reconsideration, which is governed by 49 C.F.R. § 26.53(d) and § IX of the DBE Requirements.

If HDOT determines the apparent successful bidder has "failed to meet the requirements of paragraph (a) of this section," it must give the bidder an opportunity for reconsideration by a reconsideration official who had no role in the initial determination. 49 C.F.R. § 26.53(d)(2); *see also* DBE Requirements, § IX, ¶ B. As part of the reconsideration, the bidder "must have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate [GFEs] to do so," and to meet in person with the reconsideration official to discuss that issue. 49 C.F.R. § 26.53(d)(1) and (d)(3); *see also* DBE Requirements, § IX, ¶ C. Section IX, ¶ D of the DBE Requirements clarifies that the reconsideration official must consider "all previously submitted documents, oral and written arguments, and other evidence presented in the reconsideration, in making the decision." HDOT must issue a written reconsideration decision "explaining the basis for

finding that the bidder did or did not meet the goal or make adequate [GFEs] to do so.” 49 C.F.R. § 26.53(d)(4); *see also* DBE Requirements, § IX, ¶ E.

It is well-settled that “where the statute’s language is plain and unambiguous, the court’s only duty is to give effect to its plain and obvious meaning.” *Kaiser Found. Health Plan, Inc. v. Dep’t of Labor and Indus. Relations*, 762 P.2d 796, 801 (Haw. 1988) (citation omitted); *see also Sandy Beach Def. Fund v. City Council of City and County of Honolulu*, 773 P.2d 250, 256 (Haw. 1989). A plain reading of 49 C.F.R. § 26.53(d)(1), as clarified by § IX, ¶¶ C and D of the DBE Requirements, requires the reconsideration official to consider the bidder’s written documentation or argument, and specifically, all previously submitted documents, oral and written arguments, **and other evidence presented in the reconsideration**, in making the reconsideration decision. “Other evidence presented in the reconsideration” is expressly stated and cannot be interpreted to mean “other evidence of meeting the contract goal or making adequate GFEs as of the deadline set forth in 49 C.F.R. § 26.53(b)(3)(i)(B) and § V, ¶ C of the DBE Requirements.” Therefore, Mr. Motoyama was required to consider Prometheus’s January 8, 2024, DBE/GFE Documentation, May 30, 2024, DBE/GFE Documentation, and explanations presented at the reconsideration proceeding, in making the Reconsideration Decision. HDOT erred by not considering all of Prometheus’s May 30, 2024, DBE/GFE Documentation, which verifies what Prometheus previously disclosed in its January 8, 2024, DBE/GFE Documentation.

Respondent further asserts that because the Project was design-bid-build (*i.e.*, procured as an IFB under HRS § 103D-302), Prometheus did not fall within any exception to submit additional DBE/GFE Documentation of GFEs performed after January 8, 2024. (Resp.’s Reply to MTD/MSJ at 5-6.)

49 C.F.R. § 26.53(b)(3)(ii) provides an exception to the 49 C.F.R. § 26.53(b)(3)(i) deadline regarding submission of DBE/GFE Documentation for HDOT’s initial determination. In a negotiated procurement, the bidder “may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph (b)(2) of this section before the final selection for the contract is made by [HDOT].”¹⁴ 49 C.F.R. § 26.53(b)(3)(ii). Respondent erroneously applies

¹⁴ The version of 49 C.F.R. § 26.53(b)(3)(ii) that was effective when the Initial Decision was issued stated that “in a negotiated procurement, including a design-build procurement,” the bidder “may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph (b)(2) of this section before the final selection for the contract is

49 C.F.R. § 26.53(b)(3)(ii) to the process of reconsideration. Again, 49 C.F.R. § 26.53(d) and § IX of the DBE Requirements govern reconsideration. Neither subsection (d) nor § IX identify any exceptions to a bidder's opportunity to provide written documentation or argument, and specifically, all previously submitted documents, oral and written arguments, and other evidence presented in the reconsideration, concerning whether it met the contract goal or made adequate GFEs. Therefore, the Project need not be a negotiated procurement or design-build (*i.e.*, procured as an RFP under HRS § 103D-303) for Mr. Motoyama to consider all of Prometheus's May 30, 2024, DBE/GFE Documentation, including Geotech's revised estimate, as required by 49 C.F.R. § 26.53(d)(1) and § IX, ¶¶ C and D of the DBE Requirements.

Finally, with respect to returning the cash or protest bond, Petitioner's Request was not frivolous or made in bad faith.

IV. DECISION

Based upon the foregoing findings of fact and conclusions of law, the Hearings Officer hereby DENIES Respondent's MTD/MSJ and DENIES Petitioner's Motion to Exclude. The Hearings Officer hereby REMANDS this matter to HDOT and directs HDOT to consider all of Prometheus's May 30, 2024, DBE/GFE Documentation in determining the technical merits of whether Prometheus met the 1% DBE participation goal and, if it did not, whether it made adequate GFEs to do so. After making this reconsideration determination, Respondent may proceed with awarding the contract in accordance with applicable law.

made by [HDOT].” The version of 49 C.F.R. § 26.53(b)(3)(ii) that was effective when the Reconsideration Decision was issued stated that “in a negotiated procurement, such as a procurement for professional services,” the bidder “may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph (b)(2) of this section before the final selection for the contract is made by [HDOT]. This paragraph (b)(3)(ii) does not apply to a design-build procurement, which must follow the provisions in paragraph (e) of this section.”

Pursuant to HRS § 103D-709(e), the Office of Administrative Hearings shall return the bond to Petitioner, and the parties shall bear their own attorney's fees and costs in this matter.

DATED: Honolulu, Hawaii, August 5, 2024.



NATALIA T. CHAN
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs