

**Hawai'i Tourism Authority
Special Board Meeting**
Executive Boardroom A, Hawai'i Convention Center
Wednesday, December 7, 2022, 4:00pm

Testimony

- **Agenda Item #5.** Discussion, Recommendation, and Action on Hawai'i Destination Brand Marketing & Management Services for the United States Major Market Area contract **(CNHA Position: Defer)**
- **Agenda Item #6.** Discussion, Recommendation, and Action for Staff to Seek State Procurement Office Approval to Extend HTA Contract 21030 Island Chapter Support Services Contract Beyond December 31, 2022 **(CNHA Position: Defer)**
- **Agenda Item #9.** Discussion, Recommendation, and Action for Staff to Seek State Procurement Office Approval to Extend HTA Contract 21016 S4 Global Support Services Contract Beyond March 28, 2023 **(CNHA Position: Oppose)**
- **Agenda Item #10.** Discussion, Recommendation, and Action for Staff to Seek State Procurement Office Approval to Extend HTA Contract 17029 S21 USA Leisure Marketing Contract Beyond March 31, 2023 **(CNHA Position: Oppose)**
- **Agenda Item #11.** Discussion, Recommendation, and Action on Calendar 2023 Cycle of Kūkulu Ola, Aloha 'Āina, Community Enrichment Program, Signature Festival & Events, Native Hawaiian Festival & Events, and Ho'okipa Malihini Initiative Programs **(CNHA Position: Defer)**

The Council for Native Hawaiian Advancement (CNHA) submits testimony requesting that Agenda Items #5, #6 and #11 should be deferred because they are premature. Furthermore, CNHA opposes Agenda Items #9 and #10 and requests that they be deferred as well.

First, CNHA pursued HTA's RFP 22-01, Hawai'i Destination Brand Marketing & Management Services for the United States Major Market Area, because we were inspired the HTA's new vision for tourism, detailed in the agency's Strategic Plan 2020-2025 and its Destination Management Action Plans. We submitted a bid for RFP 22-01 to position Native Hawaiians at the forefront of this transformation of the state's chief economic driver.

CNHA followed the current RFP and overwhelmingly and fairly won the award. We approached this Procurement Process in good faith, with the aloha spirit. Unfortunately, that aloha was not reciprocated to us. The former Department of Business, Economic Development and Tourism (DBEDT) Director's unlawful rescission of our award, rendered just minutes prior to his term of office ending, is not pono.



To date, the State has still not demonstrated that RFP 22-01 nor HTA's award to CNHA was unlawful, nor did the former DBEDT Director provide a valid basis for his purported rescission of CNHA's award and cancellation of the RFP. Therefore, our position is that the rescission decision should be reversed, and that the June 21, 2022 protest of the Hawai'i Visitors and Convention Bureau (HVCB) must be addressed, which we believe would be resolved in our favor and ultimately result in the affirmation of our award. On December 1, 2022, CNHA filed a written protest against Mr. McCartney's verbal and unlawful decision to rescind the award and cancel the RFP. This protest has since been updated to reflect the December 5 written decision, and is attached to this testimony for reference.

Having said that, CNHA is still open to working with the new Governor and his DBEDT Leadership team to do what's best for our visitor industry, and the people of Hawai'i. However, we believe agenda items #5, #6 and #11 are all premature, and should be deferred at least until the next HTA meeting in two weeks to allow for discussions between all parties and the new state Administration.

Moreover, the State has failed to demonstrate that yet another non-competitive extension of the existing HVCB contract is warranted under the circumstances. Since the award, CNHA has not been allowed to provide its services to the people of Hawai'i. Meanwhile, the State has twice extended the expired contract of HVCB, thereby cutting into CNHA's properly won contract in favor of the unsuccessful bidder. Therefore, CNHA opposes Agenda Items #9 and #10, which would further extend the existing HVCB contract. These items should be deferred.

Mahalo nui for the opportunity to testify

Respectfully,

J. Kūhiō Lewis, CEO
Council for Native Hawaiian Advancement

Also attached for your reference are the following documents:

1. CNHA's formal updated protest letter (dated 12/6/22), which includes as an attachment protest letter (dated 12/1/2022)
2. CHNA's response to HVCB Protest (dated 8/6/22)
3. CNHA's response to HVCB Second Supplemental Protest (dated 9/14/22)

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VIA ELECTRONIC MAIL

PROTEST

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Re: **RFP NO. 22-01-HTA (Hawai‘i Destination Brand Marketing & Management Services for the United States Major Market Area)—Council for Native Hawaiian Advancement’s Update to Protest of Determination to Rescind Award and Cancel RFP**

Dear Gentlemen:

Pursuant to Hawai‘i Revised Statutes (“HRS”) § 103D-701, the Council for Native Hawaiian Advancement (“CNHA”) hereby updates its December 1, 2022 protest (the “**December 1 Protest**”) to incorporate a new action by now-former Department of Business, Economic Development and Tourism (“DBEDT”) Director Mike McCartney.¹

Specifically, on December 5, 2022, on the final day of his term of office, Mr. McCartney issued a written determination, apparently drafted on November 28, 2022, to cancel the above-referenced request for proposals (the “**RFP**”) and rescind the award to CNHA (the “**Award**”) of the contract arising out of the RFP (the “**Written Determination**,” attached hereto as Exhibit 1).

In the December 1 Protest (attached hereto as Exhibit 2 and incorporated in full herein), CNHA protested Mr. McCartney’s verbal disclosure that he intended to rescind the Award without issuing a written decision on a long-pending protest of the award by the Hawai‘i Visitors

¹ If the December 1 Protest is deemed to be premature or otherwise invalid, this document (including the factual discussion and arguments incorporated from the December 1 Protest) shall serve as an independent protest of the December 5 Written Determination.

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and Convention Bureau (“**HVCB**”); to cancel the RFP unilaterally with the intent that it be re-bid later; and to decline to include specific written findings that justified the cancellation, as required by the Hawai‘i Public Procurement Code (the “**Procurement Code**”) and its implementing administrative rules.

In the Written Determination, Mr. McCartney did not render a decision on, or even acknowledge, the December 1 Protest. Indeed, the header of the Written Determination’s second page indicates that it was prepared on November 28, 2022, the same day as Mr. McCartney’s verbal disclosure—three days before CNHA’s December 1 Protest.

Mr. McCartney’s Written Determination, like his November 28 verbal disclosure, is directly contrary to the Procurement Code. Any rescission of the Award and cancellation of the RFP **must** be accompanied by specific written findings that justify such an action in light of “the potentially serious adverse impact a cancellation might have on the integrity” of the public procurement system. *Phillip G. Kuchler, Inc. v. Dept. of Transportation*, PCH-2003-21, p. 10 (Mar. 18, 2004).

Mr. McCartney’s gross abdication of his responsibilities, if not reversed, will severely undermine public confidence in the fundamental fairness of the entire procurement process. CNHA therefore submits this update to its already-pending December 1 Protest, and requests that the procurement officer reverse Mr. McCartney’s unlawful rescission and cancellation, and affirm the Award to CNHA.²

CNHA protests Mr. McCartney’s actions. Based on the above, CNHA is an aggrieved offeror for the RFP pursuant to HRS § 103D-701 and Hawai‘i Administrative Rule (“**HAR**”) § 3-126-3. Due to this protest, pursuant to HRS § 103D-701(f) and HAR § 3-126-5, **all further activities related to the rescission of the Award and the cancellation of the RFP must be stayed pending resolution of this protest.**

² It is evident that HTA made the award to CNHA, as HTA made clear in its own press release announcing its decision. *See* June 2, 2022 HTA Press Release (stating that HTA “has awarded a new contract for a comprehensive range of brand management and visitor education services for the Hawaiian Islands in the United States market, as well as support services shared by Hawai‘i’s brand management teams worldwide”, and further stating that the contract “was awarded to [CNHA]”), *available at* <https://www.hawaiiourismauthority.org/media/9433/us-rfp-award-rollout-press-release.pdf>.

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I. FACTUAL AND PROCEDURAL BACKGROUND

CNHA incorporates by reference the facts stated in its December 1 Protest, and provides herein a discussion of facts since that submission.

CNHA received no formal response from DBEDT or HTA to its December 1 Protest as of the end of Mr. McCartney's term of office at 12:00 p.m. on December 5, 2022. *See* Declaration of Joseph Kūhiō Lewis ("Lewis Decl."), attached hereto as Exhibit 3, at ¶ 2.

At 3:06 p.m. on December 5, over three hours **after** Mr. McCartney's term of office ended, CNHA's CEO Mr. Lewis received the below text message from Mr. McCartney (on which HTA CEO John DeFries and HVCB CEO John Monahan were also copied):

Aloha John, Kuhio, John:

This is the only way I felt I could inform you and keep the spirit of fairness.

Also, it is in deference to the inauguration of the Green & Luke Administration.

I have not let anyone know (except the SPO, AG, HTA CPO & CEO) about my decision on the award-protest of the USA RFP. I am contacting you now after informing/briefing new Director Sadayasu @ 2:05pm.

You are next to inform - copies of my decision will be delivered to you today by email and posted on hands.

The document is intended speaks for it self [sic]...and I will not be making any further comments on at this time.

If you have any questions or concerns please contact John De Frieze [sic]. He is the point for the State and will be working with all the State parties.

May I stress please work with John Directly because he is the CEO (and has the authority as delegated by his board of directors) of agency responsible for the new procurement(s) going forward.

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Please know I appreciate all of you and your organizations very much. I am proud of how far we have all gotten to put Hawaii First. I wish we could of [sic] done more but I honestly could not seek stable path forward except to issue new RFP(s)

I am very positive and optimistic about the possibilities going forward. The multiple policy and/or path forward...are abundant and variable...they just could not be achieve with an active procurement with a protest under 103D. If we (you) all keep going forward together these legal pathways can be used to achieve what is best for Hawaii - which could very well include both of you.

New Administration, New GOV & New Director, New Senate, New House, HTA Board, HTA CEO & Staff, The Community, HVCB, CNHA, The Industry, Our Guest, The Land/Ocean/Sky.

Like I said, this is one more step of many many more ahead...it's positive and creates a clear path forward that is advantageous for the state of Hawaii...and it's my strong feeling the best way forward is together...together is more sustainable. (It's also harder).

I hope you will consider Focusing on the future not the past.

I am committed to support the New DBEDT Director & New Governor - the Speaker & House - President & Senate if wanted or needed...

I hope what I tried to do helped...I appreciate all of you for taking a risk to change the trajectory by not following the unusual path. We learned a lot to help Hawaii. It will lead us to a better place.

Mahalo. Take care...I am going to take a break and clear my mind, body and soul. I Aloha all of you. hope to see you in the future.

With all my respect and Aloha, Mike

Bcc:
DBEDT Director
SPO
AG

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HTA Board Chair
Judge Broudwick [sic]

See Lewis Decl., ¶ 3.

At 4:05 p.m. on December 5, 2022, Mr. Lewis received an e-mail from Zenaida Fisher of DBEDT attaching the Written Determination, which purported to rescind the Award and cancel the RFP:

As the Head of the Purchasing Agency for the Department of Business, Economic Development and Tourism (DBEDT), I am responsible for overseeing the process and complaint for RFP 22-01 for the Hawai'i Tourism Authority (HTA).

Given the emerging and erratic market coming out of the COVID-19 pandemic, which is not expected to be in full recovery until 2025 and the evolving needs of the community, it is clear to us that to address the needs of the current market more effectively, it is no longer in the best interest of the State and people of Hawaii to enter into one single RFP. We must have two contracts one for marketing communications and travel trade and one for destination brand management, communication, education, and community based economic development. A single contract would not only put us at a competitive disadvantage in the market but also in dealing with the community.

At the conclusion of an extended mediation lead by Judge Michael Broderwick [sic] which allowed all the competitors and HTA to speak openly and honestly and to put the needs of Hawaii first instead of their personal benefits, and on the advice and counsel of the head of the State Procurement Office and the Department of the Attorney General, the June 2022 award for RFP 22-01 to the Council for Native Hawaiian Advancement is being rescinded on my authority, and RFP22-01 is hereby cancelled. The services described in RFP 22-01 will be re-solicited in an effort to arrive at a result most advantageous to the people of Hawai'i pursuant to my responsibilities under HRS 103D.

It is my recommendation that the Chair of HTA meet with the board members and work in collaboration with Bonnie Kahakui, State Procurement Office, Cheryl Kakazu Park, Hawaii Office of Information

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Practices, the Department of the Attorney General, and the Department of Budget and Finance with the guidance and support of the legislature and Governor Green. This will not only be advantageous for Hawaii and reflect who we are and where we are going but will also better position Hawaii and our ability to remain competitive in a global tourism economy.

This decision to rescind the award and cancel the solicitation should not be considered a ruling on the protest filed by HVCB in June 2022. This decision is final and binding. I am confident that HTA through its President and CEO and board will exercise its authority to move forward and put Hawaii's best interest first to carryout 201B and put the right RFP out in the next round.

See Exh. 1 and Lewis Decl. at ¶ 4. The Written Determination does not even mention, let alone rule on, CNHA's December 1 Protest. Indeed, although the first page of the Written Determination is dated December 5, 2022, the header of the second page is dated November 28, 2022. Accordingly, it appears that the Written Determination was drafted before CNHA submitted its December 1 Protest, and that Mr. McCartney simply ignored CNHA's protest in issuing his rescission.³

II. ARGUMENT

As discussed in the December 1 Protest, Mr. McCartney's determination to rescind the Award and cancel the RFP is a flagrant violation of the Procurement Code. Despite having been alerted to the fact that his expressed intentions were impermissible under Hawai'i law, Mr. McCartney was so determined to proceed in accord with his own desires that he attempted to bind the HTA board and Mr. Sadayasu with an action taken just minutes before he left office. As these actions do not comply with Hawai'i law, they cannot stand.

³ As of the submission of this updated Protest it remains unclear what, if any, formal action Mr. McCartney may have taken to rescind the award to CNHA and cancel the RFP prior to the expiration of his term of office at 12:00 p.m. on December 5, 2022. CNHA reserves the right to submit further updates to its Protest based on any information hereinafter acquired indicating that the rescission and cancellation was not made prior to the end of Mr. McCartney's term of office.

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A. **A Solicitation Cannot Be Canceled Unless the Agency Supports the Cancellation With Specific Findings.**

The Procurement Code and its implementing rules do not allow agencies to cancel solicitations except in very specific circumstances that are inapplicable here. To start, HRS § 103D-308 provides that solicitations may be canceled, but that any such cancellation must be in accordance with the rules. *See also* HAR § 3-122-16.09 (a cancellation of a solicitation shall be pursuant to the rules); HAR § 3-122-96(c) (“[d]ocumentation on the reasons for [a pre-award] cancellation shall be made a part of the procurement file and shall be available for public inspection”).

Mr. McCartney plainly did not support his Written Determination. Instead, he halfheartedly claimed that “it is no longer in the best interest of the State and people of Hawaii to enter into one single RFP” due to “the emerging and erratic market coming out of the COVID-19 pandemic, which is not expected to be in full recovery until 2025 and the evolving needs of the community.” This confusing statement is not a finding, but simply a self-serving assertion with neither factual nor logical backing.

Indeed, Mr. McCartney’s COVID reference would support neither a pre-award nor a post-award cancellation. HTA issued the RFP in October 2021 and April 2022, long after COVID-19 became prevalent in March 2020. Mr. McCartney had no basis to assert that COVID-19 caused needed revisions to HTA’s needs, given that COVID-19 was more, not less, prevalent when the RFP was previously released.⁴

Finally, a vague nod to COVID-19 is woefully insufficient to justify the rescission of the Award and cancellation of the RFP, given “the potential adverse impact of cancellation on the competitive bidding system,” *Prometheus Construction v. University of Hawaii, Office of Procurement and Real Property Management*, PCH-2008-5, p. 7 (May 28, 2008), and the requirement of “providing for fair and equitable treatment of all persons dealing with the procurement process and maintaining the public’s confidence in the integrity of the system,” *Phillip G. Kuchler, Inc. v. Dept. of Transportation*, PCH-2003-21, p. 10 (Mar. 18, 2004). In other words, the Procurement Code establishes rules to which all parties must adhere, the agencies included. Changing the rules—or reversing the results—after-the-fact is not permitted absent far more compelling reasoning than that provided by Mr. McCartney.

⁴ *See, e.g.*, <https://www.nytimes.com/interactive/2021/us/hawaii-covid-cases.html>.

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B. Mr. McCartney's Written Determination Is Not "Final and Binding."

In his efforts to circumvent the legally mandated procurement process, Mr. McCartney incorrectly assumed that his decision to rescind the Award and cancel the RFP is a one-way door which cannot be protested or countermanded by his successors. That is flatly incorrect.⁵ As a Second Circuit judge stated last year, the Procurement Code permits bidders and offerors to ask for, and sometimes receive, orders reversing cancellations, because otherwise agencies could "cancel solicitations at will, without meaningful remedy" to bidders and offerors. *West Maui Construction v. Department of Finance, County of Maui et al.*, Civ. No. 2CCV-21-0000119 (Circuit Court of the Second Circuit, State of Hawaii, May 26, 2021) (Exhibit B to Exhibit 2, the December 1 Protest, at p. 4). Moreover, under HRS § 103D-701(a), "[a]ny actual or prospective ... offeror ... who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee" CNHA clearly is aggrieved by both Mr. McCartney's Written Determination and his November 28 verbal disclosure.

As an example, in *HI-Built, LLC v. Department of Finance*, PDH-2018-003, p. 7 (Feb. 26, 2018), Maui County canceled a solicitation due to it purportedly having included "[a]mbiguous or otherwise inadequate specifications." One of the bidders protested the cancellation, and appealed to a hearings officer after the protest was denied. *Id.* at 8-9. The hearings officer made clear that the County's cancellation was reviewable and reversible:

[A]lthough the procuring agency generally has broad discretion to cancel a solicitation, its determination that cancellation is in the best interests of the government must have a reasonable basis because of the potential adverse impact of cancellation on the competitive bidding system after the bids have been opened and the prices have been exposed. Among other things, cancellation of a solicitation means that bidders have expended labor and incurred costs in the preparation of their bids without the possibility of acceptance. Accordingly, where it is determined that the specifications contained in a solicitation do not adequately describe the government's actual minimum needs, the best interests of the government require cancellation of the solicitation. On the other hand, the fact that a solicitation is defective in some way does not justify cancellation after bid

⁵ Mr. McCartney possibly confused the *cancellation* of a solicitation with the *termination* of an executed contract. The Hawai'i Supreme in *Carl Corp. v. State, Dept. of Educ.*, 85 Hawai'i 431, 449-50, 946 P.2d 1, 19-20 (1997) recognized that a bidder's or offeror's protest rights and remedies in that context are restricted in the manner assumed by Mr. McCartney only upon the execution of the contract arising out of the solicitation.

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opening if award of the contract would meet the agency's actual minimum needs, and there is no showing of prejudice to the other bidders.

Id. at 11-12.

After analyzing the County's purported basis for the cancellation, the hearings officer determined that the County "lacked a reasonable basis to justify the cancellation of the solicitation," and therefore reversed the cancellation and ordered the County to "award the contract to the lowest responsive, responsible bidder." *Id.* at 15-16.

As another example, in *West Maui Construction v. Department of Finance, County of Maui*, PDH-2021-004 (April 14, 2021), Maui County canceled a solicitation for a construction contract based on a purported lack of funding. (See Exhibit 2 hereto at 10-11.) The low bidder protested the cancellation, and, after the County denied the protest, appealed to a Department of Commerce & Consumer Affairs hearings officer. *Id.* at 1. The hearings officer sustained the bidder's argument that the cancellation "was inconsistent with HRS Chapter 103D and its implementing rules," and awarded the bidder its bid costs. *Id.* at 18-19.

The bidder, however, did not stop there. Because the hearings officer ruled that he lacked authority to award the contract, the low bidder appealed to the Second Circuit Court. In *West Maui Construction v. Department of Finance, County of Maui et al.*, Civ. No. 2CCV-21-0000119 (Exh. B to Exh. 2 hereto), a judge for the Circuit Court of the Second Circuit held that the hearings officer did in fact have authority to award the contract to the low bidder. *Id.* at 4-5. Accordingly, the Circuit Court overturned the cancellation and ordered that the award be made to the low bidder. *Id.* at 5.

Mr. McCartney cannot simply declare, by his own *ipse dixit*, that his lawless decision is "final and binding." As with other procurement officer actions that aggrieve offerors for an RFP, Mr. McCartney's Written Determination is subject to review by the procurement officer in charge of the RFP—and, in the event of an appeal, by a DCCA hearings officer and later the Circuit Court. See HRS §§ 103D-709, -710. CNHA respectfully suggests that the process need not reach those stages. Instead, the procurement officer should grant this protest, affirm the award to CNHA, and move forward with the execution of a contract with CNHA.

III. CNHA'S PROTEST IS TIMELY

CNHA's December 1 Protest was timely submitted within five working days of the November 28, 2022 issuance of Mr. McCartney's determination to rescind the Award and cancel the RFP. This update to the December 1 Protest is timely submitted within five working days of the issuance of the Written Determination on December 5, 2022.

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IV. STAY OF PROCUREMENT PROCESS

Pursuant to HAR § 3-126-5, all activities related to the purported rescission of the award of the RFP to CNHA and the cancellation of the RFP, are stayed pending resolution of CNHA's protest.

V. RESERVATION OF RIGHTS AND ARGUMENTS

CNHA reserves its right to supplement this protest as appropriate.

Respectfully,

Jeffrey M. Osterkamp

Jeffrey M. Osterkamp
for
CADES SCHUTTE
A Limited Liability Law Partnership

Attachments: Exhibits 1 - 3

cc: Mr. Joseph Kūhiō Lewis
Andrew K. Recktenwald, Esq.

EXHIBIT “1”



**DEPARTMENT OF BUSINESS,
ECONOMIC DEVELOPMENT & TOURISM**
KA 'OIHANA HO'OMŌHALA PĀ'OIHANA, 'IMI WAIWAI
A HO'OMĀKA'IKĀ'I

DAVID Y. IGE
GOVERNOR

MIKE MCCARTNEY
DIRECTOR

SUSAN M. HIRAI
DEPUTY DIRECTOR

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December 5, 2022

Mr. Kūhiō Lewis
President & CEO
Council for Native Hawaiian Advancement
91-1270 Kinoiki Street, Building 1
Kapolei, Hawai'i 96707

**Subject: RFP 22-01 Hawai'i Tourism Destination Brand Marketing and
Management Services for the U.S. Major Market Area**

Dear Mr. Lewis:

As the Head of the Purchasing Agency for the Department of Business, Economic Development and Tourism (DBEDT), I am responsible for overseeing the process and complaint for RFP 22-01 for the Hawai'i Tourism Authority (HTA).

Given the emerging and erratic market coming out of the COVID-19 pandemic, which is not expected to be in full recovery until 2025 and the evolving needs of the community, it is clear to us that to address the needs of the current market more effectively, it is no longer in the best interest of the State and people of Hawaii to enter into one single RFP. We must have two contracts one for marketing communications and travel trade and one for destination brand management, communication, education, and community-based economic development. A single contract would not only put us at a competitive disadvantage in the market but also in dealing with the community.

At the conclusion of an extended mediation lead by Judge Michael Broderwick which allowed all the competitors and HTA to speak openly and honestly and to put the needs of Hawaii first instead of their personal benefits, and on the advice and counsel of the head of the State Procurement Office and the Department of the Attorney General, the June 2022 award for RFP 22-01 to the Council for Native Hawaiian Advancement is being rescinded on my authority, and RFP22-01 is hereby cancelled. The services described in RFP 22-01 will be re-solicited in an effort to arrive at a result most advantageous to the people of Hawai'i pursuant to my responsibilities under HRS 103D.

It is my recommendation that the Chair of HTA meet with the board members and work in collaboration with Bonnie Kahakui, State Procurement Office, Cheryl Kakazu Park, Hawaii Office of Information Practices, the Department of the Attorney General, and the Department of Budget and Finance with the guidance and support of the legislature and

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Governor Green. This will not only be advantageous for Hawaii and reflect who we are and where we are going but will also better position Hawaii and our ability to remain competitive in a global tourism economy.

This decision to rescind the award and cancel the solicitation should not be considered a ruling on the protest filed by HVCB in June 2022. This decision is final and binding. I am confident that HTA through its President and CEO and board will exercise its authority to move forward and put Hawaii's best interest first to carryout 201B and put the right RFP out in the next round.

With aloha,



Mike McCartney

cc: Governor David Ige
Governor-Elect Josh Green
Lt. Governor-Elect Sylvia Luke
Speaker Scott Saiki and Members of the House of Representatives
President Ronald Kouchi and Members of the Senate
Gregg Kinkley, Deputy Attorney General
Bonnie Kahakui, State Procurement Office
John De Fries, Hawai'i Tourism Authority
George Kam, Hawai'i Tourism Authority

EXHIBIT “2”

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PROTEST

VIA ELECTRONIC MAIL

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Re: **RFP NO. 22-01-HTA (Hawai'i Destination Brand Marketing & Management Services for the United States Major Market Area)—Council for Native Hawaiian Advancement's Protest of Determination to Rescind Award and Cancel RFP**

Dear Messrs. McCartney and Togashi:

Pursuant to Hawai'i Revised Statutes ("HRS") § 103D-701, the Council for Native Hawaiian Advancement ("CNHA") formally protests the November 28, 2022 determination by Department of Business, Economic Development and Tourism ("DBEDT") Director Mike McCartney to "stop the procurement" represented by the above-referenced RFP (the "RFP"), rescind the award to CNHA of the resulting contract, and resolicit the applicable services. Mr. McCartney's determination is directly contrary to the Hawai'i Public Procurement Code (the "Procurement Code") and its implementing administrative rules.

CNHA is the awardee of the RFP, which was issued by Hawai'i Tourism Authority ("HTA"). On November 28, 2022, during a meeting with CNHA's CEO Joseph Kūhiō Lewis and others, Mr. McCartney informed CNHA, for the first time, that he intends to rescind the award of the subject RFP to CNHA without issuing a written decision on a long-pending protest of the award by Hawai'i Visitors and Convention Bureau ("HVCB"), and to cancel the RFP unilaterally with the intent that it be re-bid later. Later on November 28, Mr. McCartney repeated these statements during a hearing of the Hawai'i State Senate Ways and Means Committee.

The Procurement Code requires Mr. McCartney, as the head of the applicable purchasing agency (“**HOPA**”), to issue a written decision upholding or denying HVCB’s pending protest, and to proceed promptly with the award of the contract to CNHA. Moreover, any rescission of the award and cancellation of the RFP **must** be accompanied by specific written findings that justify such an action in light of “the potentially serious adverse impact a cancellation might have on the integrity” of the public procurement system. *Phillip G. Kuchler, Inc. v. Dept. of Transportation*, PCH-2003-21, p. 10 (Mar. 18, 2004). Mr. McCartney’s determined course of action as stated on November 28, 2022 did not include any such findings. Mr. McCartney’s determination therefore is unlawful and must be rescinded.

Based on the above, CNHA is an aggrieved offeror for the RFP pursuant to HRS § 103D-701 and Hawai‘i Administrative Rule (“**HAR**”) § 3-126-3. Due to this protest, pursuant to HRS § 103D-701(f) and HAR § 3-126-5, **all activities related to the anticipated rescission of the award of the RFP to CNHA and the cancellation of the RFP, including the issuance of a written rescission and/or cancellation document, must be stayed pending resolution of this protest.**

I. INTRODUCTION

When CNHA submitted its offer for the RFP, it anticipated that its offer, and any disputes arising from HTA’s ultimate decision, would be handled in a pono manner, and in accordance with Hawai‘i’s Procurement Code, HRS Chapter 103D. CNHA submitted its offer and supporting documents, and was prepared to accept the results of the Evaluation Committee’s voting.

Ultimately, the results of the Evaluation Committee voting were decisive, with seven of the eight evaluators selecting CNHA’s proposal over HVCB’s in the final round of scoring. Although HVCB filed a protest (the “**Protest**”), as expected, it was clear on the face of the Protest that it lacked any merit whatsoever. CNHA anticipated the Protest would be quickly rejected by Mr. McCartney, and that the procurement would proceed in accordance with CNHA’s status as the successful offeror. Unfortunately, this has not occurred, as DBEDT has taken **over five months** to render a decision on HVCB’s Protest. Now, during a meeting on November 28, 2022, mere **days** before Mr. McCartney is scheduled to leave office on December 5, 2022, Mr. McCartney has indicated for the first time that he has determined not to rule on the Protest at all, but, rather, to rescind the award to CNHA and cancel the RFP without ruling on the Protest—a course of conduct that blatantly violates both the spirit and the letter of Hawai‘i’s Procurement Code.

CNHA has participated in the procurement process in good faith and in a manner that embodies the spirit of aloha. It has indulged Mr. McCartney’s attempts to broker a resolution to the Protest, despite the fact that the Procurement Code does not require it to do so. For its efforts, CNHA has repeatedly been disadvantaged by DBEDT’s failure to resolve HVCB’s protest

“expeditiously,” and now by its flouting of the requirement of the Procurement Code that it issue a written decision to uphold or deny the Protest. CNHA can no longer abide the process inequities that continue to occur, and accordingly submits this Protest.

II. FACTUAL AND PROCEDURAL BACKGROUND

On April 15, 2022, HTA issued the RFP.¹ Notice of HTA’s decision to award the RFP to CNHA was posted June 2, 2022. HVCB submitted its Protest of the award of the RFP to CNHA on June 21, 2022. HVCB later submitted a First Supplement to the Protest, dated July 8, 2021, and a Second Supplement to the Protest, dated August 11, 2022. CNHA has submitted written responses to each of these Protests and Supplements. As of this writing, HVCB’s Protest has been pending for **over five months**, without a written decision from Mr. McCartney granting or denying the Protest.

On November 28, 2022, Mr. Lewis attended a meeting with Mr. McCartney and others. *See* Declaration of Joseph Kūhiō Lewis (“Lewis Decl.”), attached hereto as Exhibit A, at ¶ 2. During the meeting, Mr. McCartney informed CNHA (via Mr. Lewis), for the first time, that he intends to rescind the award of the subject RFP to CNHA without issuing a written decision on the pending Protest of the award by HVCB, and to cancel the RFP unilaterally with the intent that it be re-bid later. *Id.* at ¶ 3.

Later on November 28, 2022, at a hearing of the Hawai‘i State Senate Ways and Means Committee also attended by Mr. Lewis, Mr. McCartney again stated that he had determined to rescind the award of the subject RFP to CNHA without issuing a written decision on the pending Protest of the award by HVCB, and to cancel the RFP unilaterally with the intent that it be re-bid later. Specifically, during the hearing Mr. McCartney stated, “I have determined as the HOPA that we need to stop the procurement, um, and stop the award and then issue two RFPs, that’s HTA’s kuleana, to write up the RFPs [and] come up with the scope and put that out.”² Mr. McCartney then continued: “I know that it, uh, hurts people like CNHA, they’ve been trying in good faith and um, you know, I think they were expecting and counting on the money, they want to be able to fairly compete, and so, but, I’m sorry, that’s kind of the part of the process in order for us to ensure [unintelligible].”³ Thus, in the hearing, Mr. McCartney openly acknowledged that his determination was harmful to CNHA, that CNHA had participated in good faith in the

¹ As you are both aware, HTA issued an earlier RFP, which was thereafter awarded to HVCB. CNHA filed a Protest of that award, and on December 30, 2021, DBEDT issued a letter to HVCB informing HVCB that the award was rescinded. Notably, HVCB never protested this rescission.

² *See* video recording of hearing (“Hearing Video”), available at https://www.youtube.com/watch?v=kwnX8VsgXR0&list=PLAEwDhLrRKH0m58ZJ4q_tL_QCaT-rCa5S&t=10427s, 3:03:26 to 3:03:44; *see also* Lewis Decl., ¶ 4.

³ *See* Hearing Video at 3:03:44 to 3:04:04.

procurement process, and that CNHA is being deprived by his decision of a fair opportunity to compete for the contract.

III. ARGUMENT

Mr. McCartney's determination to cancel the RFP is a flagrant violation of the Procurement Code. An agency is not permitted to simply re-start the procurement process because it objects to the results or is uncomfortable with responding to protests. Due to "the potential adverse impact of cancellation on the competitive bidding system," the agency must justify its action by showing why cancellation is in the best interests of the state, and/or that the RFP is contrary to law. *Prometheus Construction v. University of Hawaii, Office of Procurement and Real Property Management*, PCH-2008-5, p. 7 (May 28, 2008); HRS § 103D-308; HAR §§ 3-122-95 to -96; HAR §§ 3-126-35 to -38.

As an initial matter, HRS § 103D-308 permits an RFP to be cancelled "when it is in the best interests of the governmental body that issued the ... solicitation," but the cancellation must be "in accordance with rules adopted by the policy board," *i.e.* the administrative rules that implement the Procurement Code (HAR title 3, chapters 120 to 126). Moreover, "the reasons therefor shall be made part of the contract file." *Id.* Here, there is no indication that the reasons for Mr. McCartney's stated decision are in accordance with the administrative rules, or that the reasons for the cancellation are part of the contract file.

The administrative rules give agencies limited grounds to cancel solicitations. In the event of a pre-award cancellation, the agency must determine, among other things, that the services are no longer required; that the RFP's specifications were inadequate; that the offers may have been submitted in bad faith; or that cancellation is otherwise "in the public interest." HAR § 3-122-96. Mr. McCartney did not cite any of these bases in his determination, but even if he had, any such bases would not be sufficient, because, by his own admission, the award already has been made to CNHA. (HAR § 3-122-96 is specific to pre-award cancellations.)

In order to cancel a solicitation after an award, an agency must determine that the award or RFP "is in violation of law." HAR § 3-126-35. Even if a determination of unlawfulness is made, "**the preferred action is to ratify and affirm the contract**" if "the violation can be waived without prejudice to the State or other bidders or offerors." HAR § 3-126-38(a)(2) (emphasis added). Here, no determination of unlawfulness has been made, and even if it had, the "preferred action" stated by the rules requires that the award remain with CNHA given that there is no discernible prejudice to the State or HVCB from ratifying or affirming the award to CNHA.

Above all, a cancellation determination "must be consistent with the underlying purposes of the Procurement Code, including, but not limited to, the providing for fair and equitable treatment of all persons dealing with the procurement process and maintaining the public's

confidence in the integrity of the system.” *Phillip G. Kuchler, Inc. v. Dept. of Transportation*, PCH-2003-21, p. 10 (Mar. 18, 2004), citing HRS § 103D-101.

Further, as the *Phillip G. Kuchler* Hearings Officer recognized, HRS § 103D-101 requires that “[a]ll parties involved in the negotiation, performance, or administration of state contracts shall act in good faith.” PCH-2003-21, p. 10, n.2. An agency’s reckless disregard of that and other statutes is sufficient for a hearings officer to award attorneys’ fees against the agency. *CARL Corp. v. State, Dept. of Educ.*, 85 Hawai‘i 431, 451-52, 946 P.2d 1, 21-22 (1997). See HAR § 3-126-36(c) (“Specific findings showing reckless disregard of clearly applicable laws or rules must support a finding of bad faith.”).

Here, the cancellation of the RFP without a valid basis is in no way consistent with the Procurement Code’s underlying purposes, does not fairly or equitably treat CNHA (as Mr. McCartney openly admitted during the Senate hearing), is certain to shake the public’s confidence in the integrity of the system, and is simply not in good faith. Accordingly, Mr. McCartney’s rescission of the award and cancellation of the RFP should be reversed.⁴ CNHA must be permitted to proceed with the award and execute the contract documents in order to begin its services.

IV. CNHA’S PROTEST IS TIMELY

CNHA’s protest is timely submitted within five working days of the November 28, 2022 issuance of Mr. McCartney’s determination to rescind the award of the subject RFP to CNHA without issuing a written decision on the pending Protest of the award by HVCB, and to cancel the RFP unilaterally with the intent that it be re-bid later.

⁴ In case any doubt exists as to the authority of Mr. McCartney’s successor to reverse his decision, CNHA has attached the Decision and Order of Judge Kelsey T. Kawano in *West Maui Construction v. Department of Finance, County of Maui et al.*, Civ. No. 2CCV-21-0000119 (Circuit Court of the Second Circuit, State of Hawaii, May 26, 2021) (Exhibit B.) In that matter, the administrative Hearings Officer had determined that Maui County “improperly terminated [a] solicitation rather than award[ing] the contract to West Maui,” and that the County then improperly denied West Maui’s protest of that action. *Id.* at 2. West Maui won its administrative appeal, but disputed the Hearings Officer’s decision that he could only grant West Maui its solicitation costs, rather than the actual award. *Id.* The Circuit Court agreed with West Maui, and held that, “where the Hearings Officer found and concluded that West Maui should have been awarded the contract, then the appropriate remedy in the premises is an award of the contract to West Maui.” *Id.* at 4-5. Judge Kawano thus overturned the cancellation and ordered the award be made to West Maui. *Id.* at 5. For additional authority on this issue, see *HI-Built, LLC v. Department of Finance*, PDH-2018-003, p. 16 (Feb. 26, 2018), in which the Hearings Officer determined that Maui County’s cancellation of a solicitation was contrary to the Procurement Code, and thus ordered the County to “award the contract to the lowest responsive, responsible bidder[.]”

Mr. Mike McCartney
Mr. Marc Togashi
December 1, 2022
Page 6

V. STAY OF PROCUREMENT PROCESS

As noted above, pursuant to HAR § 3-126-5, all activities related to the anticipated rescission of the award of the RFP to CNHA and the cancellation of the RFP, are stayed pending resolution of CNHA's protest.

VI. RESERVATION OF RIGHTS AND ARGUMENTS

CNHA reserves its right to supplement this protest as appropriate, including, without limitation, based on any additional statements or documents hereinafter obtained outlining the basis for the contemplated rescission of the award to CNHA and cancellation of the RFP.

Respectfully,



Jeffrey M. Osterkamp

for

CADES SCHUTTE

A Limited Liability Law Partnership

Attachments: Exhibits A - B

cc: Mr. Joseph Kūhiō Lewis
Andrew K. Recktenwald, Esq.

EXHIBIT "A"

DECLARATION OF
JOSEPH KŪHIŌ LEWIS

The undersigned, Joseph Kūhiō Lewis, hereby declares as follows:

1. I am the Chief Executive Officer of the Council for Native Hawaiian Advancement (“CNHA”) and have personal knowledge of the facts contained herein.
2. On November 28, 2022, I attended a meeting with Department of Business and Economic Development Director Mike McCartney.
3. During the meeting, Mr. McCartney informed me, for the first time, that he intends to rescind the award of the subject RFP to CNHA without issuing a written decision on the pending Protest of the award by HVCB, and to cancel the RFP unilaterally with the intent that it be re-bid later.
4. Later on November 28, 2022, I attended a hearing of the Hawaii State Senate Ways and Means Committee, where Mr. McCartney again stated his intention to rescind the award of the subject RFP to CNHA without issuing a written decision on the pending Protest of the award by HVCB, and to cancel the RFP unilaterally with the intent that it be re-bid later.

I, Joseph Kūhiō Lewis, do declare under penalty of law that the foregoing is true and correct.

Signature: _____

Date: _____



12/1/2022

EXHIBIT "B"

Electronically Filed
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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

In the matter of)	CIVIL NO: 2CCV -21-0000119
)	(Agency Appeal)
WEST MAUI CONSTRUCTION,)	
)	DECISION AND ORDER REVERSING
Appellant,)	IN PART, HEARING OFFICER'S
vs.)	FINDINGS OF FACT, CONCLUSIONS
)	OF LAW AND FINAL ORDER
DEPARTMENT OF FINANCE, COUNTY)	DATED APRIL 14, 2021
OF MAUI; RICHARD A. YOUNG)	
)	Hearing Date: May 25, 2021
Appellees.)	Time: 9:30 a.m.
_____)	Judge: Hon. Kelsey T. Kawano

DECISION AND ORDER REVERSING IN PART,
HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER DATED APRIL 14, 2021

The Appellant's Application for Judicial Review of the Hearing Officer's Findings of Fact and Conclusions of Law and Final Order Dated April 14, 2021 came on for hearing on May 25, 2021. Charles W. Gall and Aaron R. Mun appeared on behalf of Appellant West Maui Construction, ("Appellant/West Maui") and Caleb P. Rowe appeared on behalf of Appellee Department of Finance, County of Maui, ("Appellee/County of Maui").

The sole issue in this appeal is whether the Hearings Officer, erred in his conclusion of law that he did not have the authority to grant West Maui its requested relief of having the contract awarded to it pursuant to the County of Maui's improperly canceled solicitation. All factual findings made by the Hearings Officer were determined in favor of Appellant, and, Appellant does not challenge on appeal any factual findings.

Judicial review of this appeal of the decision of the Hearings Officer has proceeded under applicable provisions of HRS § 103D-710(e) which provide that the court may "affirm the decision of the hearings officer issued pursuant to section 103D-709 or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if substantial rights may have been prejudiced because the administrative findings, conclusions, decisions or orders are: (1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority or jurisdiction of the chief procurement officer or head of the purchasing agency; or... (4) affected by other error of law". HRS § 103D-710(e)(1), (2) and (4). The Hearings Officer's conclusion of law is freely reviewable under subsections (1), (2), and (4). Arakaki v. State, Dept. of Accounting & Gen. Services, 87 Haw. 147, 149 (1998).

In this case, the Hearings Officer made extensive findings of fact in support of his conclusions of law that:

1. The County of Maui solicitation was properly issued;
2. West Maui was the responsible and responsive low bidder to the solicitation;
3. West Maui should have been awarded the contract;
4. It was not in the best interests of the County of Maui to terminate the solicitation;
5. The County of Maui improperly terminated the solicitation rather than award the contract to West Maui; and
6. The County of Maui's denial of West Maui's protest of having the solicitation cancelled rather than being awarded the contract was "inconsistent with HRS Chapter 103 D and its implementing rules."

Hearings officers have jurisdiction and authority to act on protested solicitations and awards in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS § 103D-701. CARL Corp. v. State, Dept. of Educ., 85 Haw. 431, 456 (1997). Under HRS § 103D-701, contracting officials are authorized, in addition any other remedies, to award a contract to settle and resolve a protest concerning the solicitation or award of a contract. This authority shall be shall be exercised in accordance with rules adopted by the policy board. Under HRS § 103D-701(c), if the protest is not resolved by mutual agreement, the procurement officer shall promptly issue a decision to uphold or deny the protest. The applicable Hawaii Administrative Rules, chapter 126, subchapter 3 is consistent with the authority of the procurement officer to award a contract to a successful protestor.

Where a protest is sustained, and the protester should have been awarded the contract, the protester is entitled to the actual costs reasonably incurred in connection with the solicitation. The award of costs is “in addition to any other relief.”

HRS § 103D-701(g). The Hearings Officer’s reference back to HRS § 103D-701(g), applicable to contracting officers, as limiting the scope of relief to an award of costs is contrary to the express language of the statute and erroneous as a matter of law. Furthermore, HRS § 103D-709(i), provides consistently with the above statutory language, as follows:

Administrative proceedings for review.

(i) The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were 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 in accordance with this chapter. (emphasis added).

This provision of the statute authorizes the hearings officer to order relief “as may be appropriate” without limitation to an award of only costs. Nor does HRS § 103D-706 bar the award of the contract by a hearings officer to the a successful protestor on administrative appeal. HRS § 103D-706 states:

If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

- (1) Canceled; or
- (2) Revised to comply with the law.

See also; HAR 3-126-37. In this case, the Hearings Officer determined that the solicitation was proper, not in violation of the law, and that the contract, would also, have been proper and lawful had it been awarded. The impropriety was in the County of Maui's cancellation of the solicitation. A narrow application of HRS § 103D-706 whereby cancellation of the solicitation is the appropriate remedy for a cancelled solicitation determined to be improper by administrative proceedings or judicial review is an absurd result. Such interpretation and application would allow the County of Maui to cancel solicitations at will, without meaningful remedy to a successful protester.

HRS § 103D-706 provides a hearings officer a choice of remedies, the selection of an appropriate remedy is a matter within the hearings officer's discretion. Such discretion must be guided by the purposes underlying the Procurement Code being: (1) provide for fair and equitable treatment of all persons dealing with the government procurement system; (2) foster broad based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency in the procurement process; and (3) increase public confidence in the integrity of the system. Arakaki v. State, 87 Haw. 147 150 (1998); In re Carl, 85 Haw. at 455-456.

In the instant case, the Hearings Officer erred as a matter of law in determining that his discretion did not encompass an award of the contract to West Maui where the Hearings Officer determined that cancellation of the solicitation was improper, not in the public's best interest, and contrary to HRS Chapter 103D. Here, where the solicitation was proper, West Maui was the responsible and responsive low bidder to the solicitation, where monies are budgeted and available, where the Hearings Officer found and concluded that West Maui should have been awarded the contract, then the appropriate remedy in the

premises is an award of the contract to West Maui.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED,

1. The portion of the Hearing Officer's Findings of Fact and Conclusions of Law and Final Order Dated April 14, 2021, limiting Appellant's relief to "costs reasonably incurred in connection with the solicitation, including the bid or proposed preparation costs, of \$9,286.47" is reversed and vacated;

2. This matter is remanded to the Hearings Officer with instructions to modify the subject Decision and Final Order and to award the disputed underlying contract to West Maui; and

3. Order the release and return of the protest bond to West Maui.

DATED: Wailuku, Hawaii, May 26, 2021.



JUDGE OF THE ABOVE ENTITLED COURT



EXHIBIT “3”

DECLARATION OF
JOSEPH KŪHIŌ LEWIS

The undersigned, Joseph Kūhiō Lewis, hereby declares as follows:

1. I am the Chief Executive Officer of the Council for Native Hawaiian Advancement (“CNHA”) and have personal knowledge of the facts contained herein.
2. CNHA received no formal response from State of Hawai‘i Department of Business, Economic Development and Tourism (“DBEDT”) or Hawai‘i Tourism Authority (“HTA”) to its December 1, 2022 Protest as of 12:00 p.m. on December 5, 2022.
3. At 3:06 p.m. on December 5, 2022, I received the below text message from outgoing DBEDT Director Mike McCartney (on which HTA CEO John DeFries and HVCB CEO John Monahan were also copied):

Aloha John, Kuhio, John:

This is the only way I felt I could inform you and keep the spirit of fairness.

Also, it is in deference to the inauguration of the Green & Luke Administration.

I have not let anyone know (except the SPO, AG, HTA CPO & CEO) about my decision on the award-protest of the USA RFP. I am contacting you now after informing/briefing new Director Sadayasu @ 2:05pm.

You are next to inform - copies of my decision will be delivered to you today by email and posted on hands.

The document is intended speaks for it self [sic]...and I will not be making any further comments on at this time.

If you have any questions or concerns please contact John De Frieze [sic]. He is the point for the State and will be working with all the State parties.

May I stress please work with John Directly because he is the CEO (and has the authority as delegated by his board of directors) of agency responsible for the new procurement(s) going forward.

Please know I appreciate all of you and your organizations very much. I am proud of how far we have all gotten to put Hawaii First. I wish we could of [sic] done more but I honestly could not seek stable path forward except to issue new RFP(s)

I am very positive and optimistic about the possibilities going forward. The multiple policy and/or path forward...are abundant

and variable...they just could not be achieve with an active procurement with a protest under 103D. If we (you) all keep going forward together these legal pathways can be used to achieve what is best for Hawaii - which could very well include both of you.

New Administration, New GOV & New Director, New Senate, New House, HTA Board, HTA CEO & Staff, The Community, HVCB, CNHA, The Industry, Our Guest, The Land/Ocean/Sky.

Like I said, this is one more step of many many more ahead...it's positive and creates a clear path forward that is advantageous for the state of Hawaii...and it's my strong feeling the best way forward is together...together is more sustainable. (It's also harder).

I hope you will consider Focusing on the future not the past.

I am committed to support the New DBEDT Director & New Governor - the Speaker & House - President & Senate if wanted or needed...

I hope what I tried to do helped...I appreciate all of you for taking a risk to change the trajectory by not following the unusual path. We learned a lot to help Hawaii. It will lead us to a better place.

Mahalo. Take care...I am going to take a break and clear my mind, body and soul. I Aloha all of you. hope to see you in the future.

With all my respect and Aloha, Mike

Bcc:
DBEDT Director
SPO
AG
HTA Board Chair
Judge Broudwick [sic]

4. At 4:05 p.m. on December 5, 2022, I received an e-mail from Zenaida Fisher of DBEDT, attaching a copy of the letter addressed to me from Mike McCartney that is attached as Exhibit 1 to CNHA's updated Protest.

I, Joseph Kūhiō Lewis, do declare under penalty of law that the foregoing is true and correct.

Signature:  _____

Date:  _____

August 6, 2022

VIA ELECTRONIC MAIL

Mike McCartney
Director
Department of Business, Economic Development and Tourism
State of Hawai‘i
250 S. Hotel Street, 5th Floor
Honolulu, Hawai‘i 96813
e-mail: mike.mccartney@hawaii.gov

Marc Togashi
Vice President, Finance
Hawai‘i Tourism Authority
1801 Kalākaua Avenue
Hawai‘i Convention Center, First Level
Honolulu, Hawai‘i 96815
e-mail: marc@gohta.net

Re: RFP NO. 22-01-HTA (Hawai‘i Destination Brand Marketing & Management Services for the United States Major Market Area)—Council for Native Hawaiian Advancement’s Response to June 21, 2022 Protest of Award by Hawai‘i Visitors & Convention Bureau

Aloha e Messrs. McCartney and Togashi,

As you are aware, the Council for Native Hawaiian Advancement (“CNHA”) is the awardee under the above-referenced Request for Proposals (the “Reissued RFP”) issued by the Hawai‘i Tourism Authority (“HTA”). The award is currently under protest by the Hawai‘i Visitors and Convention Bureau (“HVCB”), pursuant to a written Protest of Award (the “Protest”) submitted by HVCB to HTA on or about June 21, 2022. CNHA appreciates your kōkua in providing a copy of the Protest pursuant to CNHA’s written request.¹ We have reviewed HVCB’s Protest and, to aid in your disposition of the Protest, hereby submit this Response (“Response”) to you as the head of the purchasing agency to provide information regarding claims raised in HVCB’s Protest.

¹ See Hawai‘i Revised Statutes (“HRS”) § 92F-23.

I. INTRODUCTION

The Hawai‘i Public Procurement Code is steeped in the two-pronged goal of: 1) competitive fairness and 2) selecting the offeror that provides the best value to the State. The nature of competition is such that offerors may often disagree with the judgment of the committee members; however, the protest process is meant to evaluate legitimate concerns with the procurement process itself and not create a forum for offerors to attempt to substitute their self-serving opinions for that of the committee.

HVCB’s Protest, at its core, presents a wide range of unsubstantiated grievances, petty technicalities, in many cases late arguments, and biased and misguided analysis that fails to establish meaningful flaws in the State’s compliance with the Hawai‘i Public Procurement Code (Hawai‘i Revised Statutes Chapter 103D) (the “Procurement Code”), or to demonstrate that any alleged flaws warrant a rescission of the agency’s award of the contract to CNHA.

HVCB correctly identifies “arbitrary and capricious” as the necessary standard to justify a re-evaluation of the agency’s determination. Indeed, the Procurement Code’s administrative rules are clear that HTA’s determination to award the contract to CNHA “shall be final and conclusive unless clearly erroneous, arbitrary, capricious, or contrary to law.” Haw. Admin. R. (“HAR”) § 3-122-57(c). HVCB, however, fails to demonstrate that it met this exceedingly high standard. The “everything but the kitchen sink” protest approach adopted by HVCB does not elevate what are essentially biased opinions of an unsuccessful offeror to fact, and the delay has already caused substantial harm to CNHA as the successful offeror and, consequently, the State of Hawai‘i.

While CNHA bears the brunt of HVCB’s unfounded attacks, HVCB casts blame for its unsuccessful bid for the Reissued RFP on a wide variety of entities and individuals, including:

- The State of Hawai‘i Department of Business, Economic Development and Tourism (“DBEDT”)
- The Hawai‘i Tourism Authority (“HTA”)
- Representative Sylvia Luke
- Kilohana Transition Team member Ann Botticelli
- Evaluation committee member ‘Iwalani Kaho‘ohanohano

If HVCB is to be believed, these entities and persons engaged with CNHA in a far-reaching conspiracy to pre-determine the outcome of the Reissued RFP in favor of CNHA—a theory that HVCB utterly fails to support with actual evidence. Moreover, HVCB’s frivolous arguments fail to recognize that CNHA’s proposals for the two RFPs received overwhelming support from the respective scoring committees. The Initial RFP process yielded committee scoring in which a significant majority of members (five of the seven) determined in the final round of scoring that CNHA’s proposal offered a better value to the State than HVCB’s. CNHA then decisively won the Reissued RFP, with seven of eight evaluation committee members selecting CNHA’s proposal

over HVCB's in the final round of scoring. Given that HVCB convinced a mere three of 15 evaluators across two RFPs (including one who had an obvious conflict of interest) that their proposals were superior to CNHA's, HVCB's nitpicking cannot be taken seriously.

HVCB, as a 120-year incumbent, apparently is unable to accept HTA's implicit determination: that change is needed and that CNHA and its Kilohana partners are better positioned than HVCB to deliver on HTA's forward-thinking vision for the future of tourism in Hawai'i, in alignment with HTA's four pillars of Natural Resources, Hawaiian Culture, Community and Brand Marketing.²

II. BACKGROUND ON CNHA

Before addressing the substance of HVCB's arguments, CNHA takes this opportunity to remind DBEDT, HTA and HVCB of the strength and character of CNHA and its people.

Founded in 2001, CNHA is a member-based 501(c)(3) non-profit organization with over 700 members. Its mission is to enhance the cultural, economic, political, and community development of Native Hawaiians. CNHA believes this kuleana can only be accomplished by protecting our 'āina, cultivating relationships and uplifting Hawai'i, and all it's people. CNHA drives positive change in the community through a number of means:

- CNHA has administered more than \$100 million in federal emergency rental and mortgage assistance funds to help Hawai'i families remain in their homes during the pandemic. CNHA's success in helping to distribute these funds contributed to the recognition of the City and County of Honolulu and the State Department of Hawaiian Home Lands by the U.S. Treasury Department as among the top-performing programs in the nation;³
- CNHA operates a loan fund of approximately \$10 million, providing access to capital, financial education, and individualized financial counseling services for Hawai'i-based small businesses, non-profit organizations and low and moderate-income families;
- Funded by the U.S. Small Business Administration, CNHA's KūHana Business Program provides mentorship to entrepreneurs across sectors such as food services, education, and construction;

² CNHA is honored by the support it has received from many community leaders throughout this process, despite HVCB's unwarranted attacks. By way of example, but certainly not limitation, on July 10, 2022, the *Honolulu Star-Advertiser* published an op-ed by former Governors George Ariyoshi, John Waihee, and Neil Abercrombie, in which each expressed strong support both for HTA's new vision for tourism in Hawai'i and for the award of the Reissued RFP to CNHA. The op-ed is available at <https://www.staradvertiser.com/2022/07/10/editorial/island-voices/hta-has-the-right-priorities-for-hawaii/>, and is attached hereto as Exhibit A.

³ See, e.g., *Treasury Releases Additional Emergency Rental Assistance Funds to High-Performing State and Local Government Grantees*, U.S. Department of the Treasury (September 14, 2021) <https://home.treasury.gov/news/press-releases/jy0352> (attached hereto as Exhibit B).

- Funded by the State of Hawai‘i and other private donors, CNHA’s Hawaiian Trades Academy provides workforce development for economically and socially disadvantaged communities by delivering trades classes in police examination preparation, firefighting, solar, carpentry, and commercial driver’s licenses, all of which include financial empowerment instruction, Hawai‘i culture education, and job placement assistance;
- CNHA’s organizational portfolio includes a robust policy arm, which during the last Legislative session was instrumental in helping to secure \$1 billion in funding for Native Hawaiians; and
- CNHA also administers a cultural sensitivity training program in partnership with the U.S. Armed Services. This program helps educate service members and their ‘ohana about our rich and vibrant community and precious ‘āina.

Recently, from July 19-22, 2022, CNHA held its 21st Annual Native Hawaiian Convention at the Sheraton Waikīkī. The theme for the Convention, which had over 1,700 registered guests, was Huluhia—meaning transformational change or upheaval. The Convention featured panels on a wide variety of community issues, including tourism, environmental stewardship, and Hawaiian cultural issues. The Convention was widely attended by communities representing all ethnic backgrounds and diverse industry sectors. The Convention also hosted the annual Nā Hōkū Hanohano Awards, and a Super Debate with the candidates running for Governor and Lieutenant Governor. CNHA is humbled by the overwhelmingly positive reception for its Convention,⁴ and looks forward to continuing to serve as a driving force for community engagement, including in its role as the contractor under the Reissued RFP, which embodies the spirit of Huluhia.

With the record corrected, CNHA proceeds below to respond to HVCB’s specific arguments.

III. ARGUMENT

A. Significant portions of the Protest and Supplemental Protest are procedurally deficient and must be disregarded and dismissed.

As an initial matter, Hawai‘i law prohibits HTA from considering Reasons 1, 4 and 5 for HVCB’s Protest, as well as the First Supplement to the Protest, because all are untimely under HRS § 103D-701(a). Reason 1 complains that the Evaluation Committee was improperly formed, *see* Protest at pages 11-15, but as the RFP makes clear, the committee’s membership was part of the solicitation (albeit undisclosed). *See, e.g.*, RFP at § 4.04. Protests based on the content of a solicitation must be submitted “prior to the date set for the receipt of offers.” HRS § 103D-701(a).

⁴ *See, e.g., Native Hawaiian Convention ‘re-envisions’ possibilities for the future*, Honolulu Star-Advertiser (July 23, 2022), <https://www.staradvertiser.com/2022/07/23/hawaii-news/native-hawaiian-convention-re-envisions-possibilities-for-the-future/> (attached hereto as Exhibit C).

Reason 4, which is based on the purported “delay” in resoliciting the RFP, is even less timely, as HVCB would have needed to protest that issue within five days of the date when it deemed a delay to have harmed its interests. *Id.* Reason 5 reaches all the way back to “the rescission of the [earlier] award to HVCB.” Again, under HRS § 103D-701(a), HVCB was required to protest the rescission within five days of its occurrence. Finally, the First Supplement did not, as required, independently satisfy Section 103D-701(a)’s timeliness requirements.

Timeliness is an important element in the procurement process. This is due to the potential impact on the State and public services, as well as to issues of fair competition. As has been noted in State procurement manuals, offerors should not and cannot wait to determine whether they win an award before raising a concern.

1. Reason 1 of the Protest is untimely.

HRS § 103D-701(a) is clear that “no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.” As the Hawai‘i Supreme Court recognized, an agency **cannot consider** a protest filed after proposal opening if the protest is based on the content of the solicitation, because the agency’s chief procurement officer **lacks jurisdiction** over such a protest:

If a protest challenges the content of a solicitation, the statute specifies that **the protest must be submitted before the date set for the receipt of offers**. With regard to challenges to the content of the solicitation, the statute indicates the chief procurement officer would not have jurisdiction to review the protest if the protest was not submitted prior to the date set for offers to be made: “[N]o protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.”

Certified Construction, Inc. v. Crawford, 138 Hawai‘i 315, 319-20, 382 P.3d 127, 131-32 (2016) (citations omitted; emphasis added).

As a recent example, the Hearings Officer in *Securitas Security Services USA, Inc. v. Dept. of Transportation*, PDH-2021-005, p. 14 (May 13, 2021), “summarily dismissed” claims by a protesting party that the State’s request for proposals (“RFP”) contained “evaluation criteria lacking standards, guidelines and/or specificity.” In the administrative hearing, the State and the competing bidder contended that the protestor’s argument was “based on the content of the RFP,” and was “untimely under HRS § 103D-701(a) because the Protest was submitted ... after the date set for receipt of offers” *Id.* The Hearings Officer agreed, and cited HRS § 103D-701(a) for his dismissal of “any claims that the content ... of the RFP was arbitrary and capricious.” *Id.* at 14-15.

Importantly, the Procurement Code gives agencies jurisdiction to decide protests in just two areas: “a protest concerning the solicitation or [a protest concerning the] award of a contract.” HRS § 103D-701(b). Here, HVCB’s protest of the Evaluation Committee’s membership relates to the RFP—and certainly not the *award*.⁵ HTA therefore lacks jurisdiction to consider this issue.

2. Reason 4 of the Protest is untimely.

HRS § 103D-701(a) requires a protest to “be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto.” HVCB’s Reason 4 complains that it was harmed by a supposed “delay” in resoliciting the RFP. Protest at 25. Even if true, HVCB could only have preserved that issue by submitting a protest within five days of the date when it became “aggrieved” due to the delay. *Id.* It is undisputed that HVCB did not do so. The Procurement Code therefore precludes it from raising that issue now.

3. Reason 5 of the Protest is untimely.

Similarly, HTA lacks jurisdiction over Reason 5. HVCB alleges that “the rescission of the award to HVCB” and the “issuance of the [Reissued] RFP” harmed its interests. Protest at 28. Under HRS § 103D-701(a), a protest of these matters was due within five working days of their occurrence. Accordingly, HVCB’s Protests of the rescission of the award of the Initial RFP and the issuance of the Reissued RFP were due on January 7, 2022 (five working days after HVCB received notice of the rescission of the award on December 30, 2021), and on April 22, 2022 (five working days after the issuance of the Reissued RFP), respectively. HVCB lost the right to protest those issues by failing to do so at the required time.

4. The First Supplement is untimely.

The entirety of HVCB’s “First Supplement” to its Protest also was filed late. Accordingly, HTA again lacks jurisdiction over HVCB’s arguments. “To be considered, the supplemental letter [of protest] must independently meet the timeliness requirement for the filing of protests.” *GTE Hawaiian Telephone Co. v. Dept. of Finance*, PCH-98-6, p. 14 (Dec. 9, 1998). “Simply put, HAR § 3-126-3 [which reiterates the timing requirements of HRS § 103D-701(a)] contemplates and requires the timely filing of a **complete** protest.” *Id.* (emphasis in original). Permitting a protestor to supplement a protest after the deadline “would render the timeliness requirement virtually meaningless” *Id.* Another procurement matter, in recognition of the *GTE* holding, summarized the law: “a supplemental letter detailing the basis for the[] protest must independently meet the

⁵ The committee, while not disclosed in the RFP, was an integral part of the solicitation. *See* discussion of its membership at RFP §§ 1.04 & 4.04. Further, even if the committee membership were not considered part of the RFP, HTA would lack jurisdiction over the issue, because HRS § 103D-701 does not provide agencies with separate authority to determine protests concerning evaluation committee membership.

timeliness requirement for the filing of protests before it may be considered.” *Frank Coluccio Constr. Co. v. Dept. of Budget & Fiscal Services*, PCH-2002-12, p. 5 (Oct. 18, 2002).

HVCB attempts to skirt Hawai‘i procurement law by claiming that the First Supplement “is based upon information obtained and events that occurred after the Bid Protest was timely submitted on June 21, 2022.” First Supplement at 1. HVCB cannot so easily avoid the requirements of the Procurement Code. Although HAR § 3-126-3(d) implies that “[s]upporting exhibits, evidence, or documents to substantiate any claims” may be submitted after the initial protest if such evidence is “not available within the filing time,” the rule required HVCB to indicate “the expected availability date” of the additional evidence in its original Protest. HVCB did not and could not have done so, because the First Supplement is not merely an addition of new evidence—it presents new arguments and claims.

In particular, HVCB argues, for the first time in the First Supplement, that changes made to CNHA’s Kilohana transition team following the award to CNHA show that the initial proposed transition team was inadequate (an inaccurate and illogical conclusion, as discussed herein), and also violate the procurement stay. Additionally, HVCB argues that HTA’s “improper disclosure of HVCB’s proposal to CNHA at the debriefing was in violation of HRS § 103D-303,” and that, after allegedly being advised to provide a copy of CNHA’s proposal and December 2021 bid protest to HVCB, HTA unduly delayed in doing so until January 19, 2022. This latter concern was known to HVCB over six months ago and cannot be raised now.

HVCB’s failure to include these arguments and claims in the original Protest is fatal. “HAR § 3-126-3(c) mandates that protests shall include” their bases, and does not permit a “follow-up letter detail[ing] the basis for [the] protest.” *GTE*, PCH-98-6 at p. 14. HVCB cannot assert that it has the right to create new claims after-the-fact. “Such a requirement is not unreasonable particularly in light of the Procurement Code’s objective of expediting the resolution of protests for the benefit of all concerned.” *Id.*

B. The evaluation committee for the Reissued RFP was not formed in an arbitrary and capricious manner.

As discussed above, HVCB cannot challenge the composition of the evaluation committee at this stage.⁶ But even if it could, HVCB’s arguments cannot succeed, because they utterly fail to meet the necessary standard: to show that HTA acted arbitrarily and capriciously. *See Securitas*, PDH-2021-005 at p. 8. Indeed, HVCB concedes that this is the standard. *See Protest* at p. 5.

⁶ CNHA recognizes that, in its Protest of the award of the Initial RFP, it discussed Karen Hughes’ conflict of interest and position on the committee. That discussion, however, was in the context of the issue it was actually protesting—the extreme outlier score Ms. Hughes gave CNHA. Ms. Hughes’ score directly resulted in the Initial RFP being awarded to HVCB instead of CNHA—plainly a proper subject for a post-award protest.

1. There is no requirement for HTA to retain the evaluation committee from the Initial RFP.

HVCB has no substantive support whatsoever for its claims that the evaluation committee was formed in an arbitrary and capricious manner, in violation of HAR § 3-122-45.01. Crucially, HVCB’s complaints state, at most, a *preference* for certain members over others. That is not the standard. HVCB would need to show that HTA acted *arbitrarily* and *capriciously*. This it has not done and cannot do.

First, HVCB argues that maintaining the composition of the evaluation committee for the Initial RFP would have “best promoted efficiency, a fundamental tenet of the procurement process.” This argument is wholly illogical for several reasons. Firstly, as laid out in CNHA’s Protest to the award of the Initial RFP to HVCB, the evaluation committee for the Initial RFP was fundamentally flawed, in that it included Karen Hughes, a former HVCB executive and board chair,⁷ who awarded an extreme outlier score to HVCB. Far from promoting efficiency, retaining Ms. Hughes on the evaluation committee for the Reissued RFP would have created a substantial likelihood of another procedurally deficient award to HVCB—further delaying the procurement process.⁸ HTA also removed a committee member, Maka Casson-Fisher, whom HVCB alleged in its Protest was a former CNHA employee—further evidence of the fundamental fairness of the proceedings.

Furthermore, as HVCB acknowledges, the content of the Reissued RFP was fundamentally different from the Initial RFP—some changes to the composition of the evaluation committee should have therefore been anticipated. HVCB cites no authority for the proposition that, where an award under an RFP is overturned pursuant to a protest and a new, substantively different RFP is issued instead, the evaluation committee composition must remain the same. Even assuming, *arguendo*, that maintaining the prior committee’s composition would have best promoted efficiency, HVCB’s argument nevertheless fails because it confuses the standard of review applicable to the award of the Reissued RFP to CNHA. As noted above, the crux of the inquiry is whether the composition of the committee was arbitrary and capricious, not whether the composition of the committee that was ultimately assembled best promoted efficiency in the procurement process—merely one of many interests in the procurement framework.⁹

⁷ See Karen Hughes’ LinkedIn Profile, <https://www.linkedin.com/in/karen-hughes-a709866/> (last visited August 4, 2022), attached hereto as Exhibit D.

⁸ HVCB also complains that another member of the evaluation committee for the Initial RFP, Laci Goshi, was not retained on the evaluation committee for the Reissued RFP. HVCB’s arguments, if anything, establish that Ms. Goshi could have remained on the committee, not that it was arbitrary and capricious for her not to. Also, HVCB offers no evidence to show whether, and to what extent, Ms. Goshi’s exclusion from the committee may have affected the result of the Reissued RFP.

⁹ CNHA notes that *Bombardier Transp. (Holdings) USA Inc. v. Dir., Dep’t of Budget & Fiscal Servs.*, 128 Haw. 413, 422, 289 P.3d 1049, 1058 (App. 2012), cited by HVCB for the proposition that efficiency is a paramount concern in procurement process, is inapposite. The issue in that case was whether

2. The Evaluation Committee for the Reissued RFP was qualified.

HVCB also argues that the evaluation committee for the Reissued RFP was not adequately qualified. HVCB raises a number of specific concerns with the committee members' qualifications, none of which support a finding that the committee was unqualified.

First, HVCB argues the committee was not adequately qualified because it did not include hoteliers. This argument does not align with the applicable legal requirement in HAR § 3-122-45.01, which merely provides that an evaluation committee should consist of at least three government employees with “sufficient qualifications in the area of the goods, services, or construction to be procured,” and private consultants who, *inter alia*, have “sufficient knowledge to serve on the committee.” There is no support for the specific requirement proposed by HVCB that hoteliers needed to be on the evaluation committee. Indeed, given the increased emphasis on destination management embodied by the Reissued RFP, failure to include a hotelier—which reflects only one sector of the visitor industry and does not necessarily have the marketing, destination management, and brand management experience being sought—was in keeping with the spirit of the RFP. HVCB's narrow focus on determining that hotels should be the primary driver in Hawai'i's brand management may indicate a lack of understanding of the goals of this RFP as stated by HTA.

Second, HVCB argues that the evaluation committee for the Reissued RFP was not qualified because it possessed less collective experience in destination marketing than the prior committee. This argument is a bald-faced attempt by HVCB to obfuscate the actual standard applicable to evaluation committee composition. The evaluation committee is not required to be the most qualified committee possible, nor is there support for the proposition that an award is subject to collateral attack where the protesting party conceives of a hypothetical committee that, in the protesting party's view, would have been more qualified than the one ultimately selected. In fact, if this were the rule, almost all RFP determinations would be challenged by unsuccessful bidders, thereby severely undercutting the efficiency of the procurement process—which HVCB acknowledges is important.

Third, HVCB argues that the evaluation committee for the Reissued RFP was deficient because it lacked experience in destination management. However, HVCB acknowledged that committee member John Morgan has destination management experience. Furthermore, as discussed above, HVCB's argument that Ms. Hughes should have been selected for the evaluation committee for the Reissued RFP because of her alleged destination management experience is wholly illogical. As a former HVCB executive, Ms. Hughes has a manifest conflict of interest, and it would have been entirely improper to select her to serve on the evaluation committee for the

a bidder should be permitted to withdraw, after the deadline for receipt of responses, BAFOs language that was both unresponsive and conditional. Composition of the evaluation committee was not at issue in *Bombardier*.

Reissued RFP. Despite seeing no apparent conflicts between its own executive-level relationships and committee members, HVCB attempts to raise conflict concerns regarding non-executive relationships between CNHA partners (not even the applicant itself) and non-executive staff.

Fourth, HVCB argues that one of the committee members, Ms. ‘Iwalani Kaho‘ohanohano, should not have been selected to serve on the evaluation committee for the Reissued RFP because, “in and around 2018, Ms. Kaho‘ohanohano worked for Hawaiian Airlines, Corporate Communications, which division was led by Ann Botticelli until her retirement from Hawaiian Airlines in 2020. Ms. Botticelli was identified as the Executive Director to lead Kilohana, and to solidify the scope of work for principal subcontractors.” See Protest at p. 14 (internal citation omitted). This argument is wholly unpersuasive. HVCB admits that Ms. Kaho‘ohanohano’s alleged prior professional relationship with Ms. Botticelli (which appears to consist merely of working in the same department of Hawaiian Airlines at the same time as Ms. Botticelli) does not “ris[e] to the level of a conflict of [interest] per se or as a matter of law.” *Id.* Additionally, the relationship in question is not with the actual applicant, CNHA, but rather with an individual serving in a Transition Team role in a team of members.¹⁰ In any event, HVCB is improperly conflating professional relationships with executive responsibility.

Indeed, there is no evidence presented (other than the *ipse dixit* of HVCB) that Ms. Kaho‘ohanohano and Ms. Botticelli’s alleged prior professional relationship in any way influenced Ms. Kaho‘ohanohano’s decision-making with respect to the Reissued RFP. Importantly in this regard, Section 4.04 of the Reissued RFP states that “[a]ll evaluation committee members are required to sign an attestation declaring that they have no personal, business, or any other relationships that will influence their decisions in the evaluation, review, or selection process.” There is absolutely no evidence that the attestation given by Ms. Kaho‘ohanohano (signed April 8, 2022; attached hereto as Exhibit E) was inaccurate. Without any evidence to support this claim, HVCB’s accusations against Ms. Kaho‘ohanohano are wildly offensive, unsubstantiated, and inappropriate, and should be quickly and forcefully rejected.

C. The evaluation committee’s award was not clearly erroneous, arbitrary, capricious, and/or contrary to law.

HVCB’s challenge to the evaluation committee’s award utterly fails to meet the necessary standard: to show that the committee acted arbitrarily and capriciously. As summarized by the Hearings Officer in *Securitas*, PDH-2021-005 at p. 8:

The determination of the relative technical merits of offers is a matter primarily left to the procuring agency and is entitled to great weight. The agency is in the best position to determine which technical proposal best meets its needs and must bear the burden for any difficulties incurred by a

¹⁰ The Protest conveniently fails to note that Hawaiian Airlines, where Ms. Kaho‘ohanohano worked during the period in question, currently holds a seat on HVCB’s Board of Directors.

defective evaluation. The role of the Hearings Officer is therefore not to substitute his/her judgment for that of the agency. Rather, the Hearings Officer will determine whether a reasonable basis exists for the conclusions reached or whether the conclusions are instead shown to be **unreasonable, arbitrary, capricious, or contrary to law. Mere disagreement with the decision of the evaluators is insufficient** to show that the evaluation of proposals is unreasonable or the result of bias.

Id. (emphasis added).

1. CNHA is a responsible offeror.

HVCB argues that CNHA is not a responsible offeror. In support of this argument, HVCB makes assertions that are all factually incorrect, legally unsupported, or both.

a. References to use of subcontractors in CNHA’s proposal do not render CNHA non-responsible.

First, HVCB argues that CNHA’s proposal does not support a finding that CNHA is a responsible offeror because CNHA allegedly does not have sufficient marketing experience to perform the contract for the Reissued RFP, and instead would involve outside contractors in providing marketing services. HVCB cites no authority for the proposition that a bidder is not responsible if its proposal provides for subcontractors to perform parts of the services. Indeed, the Reissued RFP, on its face, specifically contemplates the use of subcontractors in performing the services. By way of example, one of the proposal evaluation criteria was “an assessment of the qualifications, experience, and specific knowledge of Offeror’s managerial team, staff, and subcontractors as it relates to the requirements of this RFP and related items.” *See* Reissued RFP at 29 (emphasis added). Furthermore, the Reissued RFP required a “list of each intended major subcontractor of \$100,000 or more expected to work on this project.” *Id.* at 22. Plainly, the Reissued RFP does not foreclose the use of subcontractors by bidders and, indeed, explicitly allows for it.¹¹

¹¹ Similarly, the fact that CNHA’s proposal contemplates HVCB employees potentially joining the Kilohana team does not render its proposal non-responsive. Despite HVCB’s mischaracterizations of CNHA’s capabilities, CNHA’s proposal identified full-time staff, an interim Executive Director, and qualified subcontractors with their own full-time staff dedicated to the project, who collectively have the capabilities of implementing the scope of work as the committee determined. The mention of CNHA being open to HVCB’s staff is an acknowledgement that, as with any incumbent that fails to be awarded a new contract, there may be qualified staff out of a job. CNHA simply wanted to ensure that there would be the ability to potentially make room for those qualified individuals, should that be in the best interests of the State, but in no way has CNHA relied upon that to demonstrate its own qualifications.

HVCB itself includes subcontractors in its proposal, including for marketing, social media, media buying, travel trade marketing, advertising, web development, public relations, and other areas of marketing support.

In addition to its subcontractors' experience and capacity, CNHA has experience in direct marketing as well. The CNHA proposal shares recent experience with its Pop-Up Mākeke that targets the US Market area, 21 years of hosting and producing CNHA's annual Native Hawaiian Convention (the largest gathering of Native Hawaiians), and the development and distribution of hundreds of advertisements, videos, and marketing campaigns featuring key policy initiatives, 'ōiwi leaders, community-based programs, civic engagement, and much more.

Nevertheless, HVCB raises various questions regarding CNHA's proposal around travel trade plans, media strategy, timing, and branding. Ultimately, each of these arguments inappropriately seeks to replace the evaluation of the committee members with HVCB's own subjective opinions. CNHA provides ample justification and explanation for the elements of its plans, and while CNHA's plans may be different from how the incumbent would choose to approach the scope of work, they are not therefore less valid. HVCB's marketing plans also suffer from flaws that are apparent to CNHA. Ultimately, the evaluation of the merits is left to the committee members and the protest inquiry is focused on the process itself. Despite this, HVCB once again is inappropriately attempting to substitute its own evaluation of the merits and scores for that of the committee. It does so apparently without an accurate account of competitor proposals nor an objective view of its own. State procurement law establishes that the protest process is not intended to allow losing bidders an opportunity to relitigate the merits of their proposal, and rather is narrowly on the procedural and procurement related process.

b. CNHA did not misrepresent the participation of Tom Kiely or Jerry Gibson in its transition team.

HVCB also argues that CNHA's proposal relies on members of CNHA's transition team who have "disavowed any agreement to serve." HVCB specifically names two persons as having disavowed any agreement to serve: Tom Kiely and Jerry Gibson. CNHA addresses HVCB's allegations as to each of these individuals in turn.

i. Tom Kiely

As an initial matter, CNHA notes that the issues raised by HVCB with respect to Mr. Kiely are wholly irrelevant to the Reissued RFP. Mr. Kiely was not named in any of CNHA's proposals or submissions relating to the Reissued RFP, and any argument by HVCB relating to Mr. Kiely should not be considered by HTA in ruling on HVCB's Protest. With that said, HVCB and Mr. Kiely have made serious misrepresentations regarding Mr. Kiely's agreement to serve as a transition team member with respect to CNHA's proposal for the Initial RFP and, as a result, CNHA takes this opportunity to correct the record.

As noted above, HTA issued the Initial RFP on or about October 5, 2021. On November 28, 2021, Frank Haas, President of Marketing Management, Inc., e-mailed Mr. Kiely to inquire as to his willingness to serve on CNHA’s transition team in the event that the Initial RFP was awarded to CNHA, stating:

I’ve been supporting a team that is in the final round of the US Marketing Contract for Hawai’i Tourism Authority. In that effort, I’ve been asked to chair a group of professionals that can provide advisory and transitional support around destination management should they be awarded the contract. I consider you a respected destination marketing expert in the field, and I would like to see whether you might be interested, if they are selected, to be a part of that team. There would be compensation for meetings to provide counseling and implementation, likely for the contract’s first 3 to 6 months.

There is no commitment until we know whether we are awarded the contract, and the form and work of this professional group will ultimately be up to the project manager. But, we would like to identify prospects for such a team that we can speak to during the oral presentation on Wednesday December 1. Please let me ([e-mail address redacted]) or Rebecca Soon ([e-mail address redacted]) know if you are interested.

(emphases added).¹² Later on November 28, 2021, Mr. Kiely responded, in pertinent part:

Thanks Frank....

I am happy to be of help to you as you might need.

Mr. Haas responded, “Terrific, Tom. Stay tuned.”

In reliance on Mr. Kiely’s affirmative response to Mr. Haas’ e-mail asking whether Mr. Kiely would be willing to be a compensated member of the transition team, and to be identified as such during CNHA’s oral presentation, CNHA included Mr. Kiely’s name as a member of CNHA’s transition team during its oral presentation on December 1, 2021, and the written responses submitted in advance on November 30, 2021.

On December 10, 2021, Mr. Haas e-mailed Mr. Kiely stating, in pertinent part:

¹² Copies of the e-mails between Mr. Haas and Mr. Kiely cited herein are attached to the Declaration of Frank Haas, Exhibit F to this Response.

The hui bidding on the HTA RFP headed by the Council for Native Hawaiian Advancement and known as the Kilohana Collective presented its capabilities as a finalist and provided follow-up to questions posed by the review committee. According to the schedule provided in the RFP, a decision should be made next week. I just wanted to keep you informed.

Mr. Kiely responded to Mr. Haas the following day, December 11, 2021, stating:

Thanks guys and look forward to
Positive movement. Aloha, Tk

Accordingly, as of no later than December 11, 2021, Mr. Kiely was aware CNHA was the bidder to whom Mr. Haas had referred in his November 28, 2021 e-mail, and still did not raise any objection to Mr. Haas, or indicate in any way that he wished to limit the scope of his involvement with CNHA's bid for the Initial RFP.

On December 11, 2021, Mr. Haas e-mailed Mr. Kiely to notify him that the Initial RFP had been awarded to HVCB, stating as follows:

The jury is in. HVCB will be awarded the contract for US Marketing and Destination Management Services. Apparently Council for Native Hawaiian Advancement/Kilohana Collaborative was a close second. Here's hoping that the whole process was open and stimulated new thinking. Thanks for your willingness to assist.

Mr. Kiely responded later that day, and again did not disavow his prior willingness to assist and, in fact, thanked Mr. Haas for including him, stating:

No surprise.... At all. I expect that everyone who bid... and lost... was told they came in second. Just the way it goes .

Thanks for including me in your consideration , Frank.

(emphasis added).

On January 27, 2022, nearly a full month after DBEDT provided notice to HVCB that it was canceling the Initial RFP, Mr. Kiely e-mailed Mr. Haas as follows:

In a light conversation with an HTA affiliated person they referenced that "you [TK] are part of the Botticelli group bidding on an HTA contract".

I corrected and said I am not affiliated with any group and this person commented that my name was in some of the materials presented for HTA consideration.

A few months ago you asked if I might “advise” from time to time a group re destination marketing and , of course, I said “sure”. What I did not agree to was the use of my name or any reference of an affiliation with any group in any official way or in any presentation for a contract award.

My request, if you can direct this request to whomever is appropriate, to remove my name and any mention of me in any materials or discussions for any and all potential contracts....whether they be aimed at government agencies or private companies.

As laid out above, Mr. Haas’s initial e-mail to Mr. Kiely stated, in no uncertain terms, that he was seeking “professionals that can provide advisory and transitional support” to CNHA “should they be awarded the contract,” that he wanted “to see whether [Mr. Kiely] might be interested ... to be a part of that team,” and that CNHA intended to “speak” about the team members “during the oral presentation on Wednesday December 1.” Mr. Kiely responded to that e-mail in the affirmative, and without qualification. Mr. Kiely’s claim that he does not know how his name came to be associated with CNHA’s proposal for the Initial RFP is utterly belied by the written evidence.¹³ That HVCB uncritically parroted Mr. Kiely’s false allegations in its Protest calls into question HVCB’s own credibility. While CNHA has honored Mr. Kiely’s request that he not be identified in any further materials, it vehemently denies the allegations by HVCB and Mr. Kiely that CNHA misrepresented Mr. Kiely’s involvement in CNHA’s transition team for the Initial RFP.

ii. Jerry Gibson

In a written submission relating to the Reissued RFP, CNHA included a note next to Jerry Gibson’s name that he was a “potential” transition team member. CNHA also confirmed in response to a written question that Mr. Gibson had agreed to be a member of the transition team for CNHA, while acknowledging his leadership with HVCB and support of their proposal. Specifically, the follow up questions and responses explained:

All members of the Transition Team included on Page 9-10 are confirmed. **We indicated (proposed) next to Mr. Gibson because we understand that he currently serves on the board of the**

¹³ Mr. Kiely has made similar false allegations against CNHA in the media, including alleging that CNHA “willfully misstated the facts” in its bid proposal and should be excluded from bidding. CNHA is considering potential legal action against Mr. Kiely for his defamatory public statements.

incumbent and surely he will be supporting that application. However, he did confirm that if CNHA were to be awarded, he would be willing to serve on the Transition Team, and he indicated that he would do all he could to support a smooth transition. We believe that however this RFP is determined, it is important that community and industry find opportunities to build bridges and work together towards a more sustainable future.

See CNHA’s response to RFP 22-01 Clarifying Questions, at 3 (emphasis added).

Mr. Gibson’s assertion that he does not know why he was identified as a potential member of the transition team is puzzling. Mr. Gibson’s inclusion in CNHA’s proposal was based on a verbal discussion at Mr. Gibson’s residence on May 14, 2022, for which CNHA’s CEO Joseph Kūhiō Lewis and Rebecca Soon, a transition team member and owner of Solutions Pacific and Ward Research, were present. As confirmed by sworn declarations by Mr. Lewis and Ms. Soon, during that discussion, Mr. Gibson confirmed that, if CNHA was selected, he would agree to serve on the transition team. *See Declaration of Joseph Kūhiō Lewis, attached hereto as Exhibit G; see also Declaration of Rebecca Soon, attached hereto as Exhibit H.*

CNHA reasonably relied upon the discussion and confirmation provided by Mr. Gibson. At worst, there was a miscommunication, not anything nearly as severe as HVCB attempts to present. Additionally, HVCB offers no argument (and no support) that, if Mr. Gibson was not listed as a potential member on the Kilohana transition team, the scoring or results would have been any different, much less significant enough to overcome the gap in scoring. CNHA’s proposal and subsequent questions specifically explained that Mr. Gibson was involved with another bidder and had agreed to be on the transition team only if CNHA was determined to be the successful offeror.

c. CNHA did not misrepresent the current and past clients of Core Group One.

HVCB also argues that CNHA is not a responsible offeror because CNHA allegedly misrepresented the current and past clients of one of its proposed subcontractors, Core Group One. This argument is based entirely on the unsworn statements of HVCB President and CEO John Monahan, who signed the protest. HVCB’s “evidence” is a series of statements that persons at the organizations listed by HVCB indicated they were not aware of their organizations having worked with Core Group One. Assuming these statements are based on discussions between those persons and HVCB personnel, these statements are plainly hearsay, and are unsupported by any sworn evidence. Moreover, given the size of the organizations at issue, statements of single individual employees at those organizations that they do not recall working with Core Group One are hardly conclusive.

Indeed, if HVCB actually investigated their unsupported allegations before making them, they would have determined that CNHA’s proposal did not, in any way, misrepresent Core Group One’s clients. The experience included in CNHA’s proposal speaks to the body of work that has been done by the entities included in the proposal. Core Group One is led by Principals Emi Anamizu and Jim Horiuchi, who purchased Ogilvy & Mather, where they were CEO and Creative Director, and formed Core Group One. Core Group One is the director successor to Ogilvy & Mather and, whether the work was done by Core Group One or Ogilvy & Mather, the experience is held by Core Group One and in many cases by Anamizu and Horiuchi themselves. Details regarding the dates of work with these entities and points of contact to confirm such experience is included in the Declaration of Emi Anamizu, attached hereto as Exhibit I.

d. CNHA is prepared to perform during the transition period.

HVCB also argues that CNHA is not a responsible offeror because it is not prepared to perform during the transition period. This is a transparent attempt by HVCB to substitute its own judgment for that of the evaluation committee, which obviously was confident in CNHA’s ability to perform under the contract, including during the transition period.

Additionally, HVCB’s concerns are unfounded. CNHA explained in detail how it intends to comply with the requirements under the contract. CNHA’s proposal contains a detailed transition plan (see pages 8-10), describing a phased approach using a combination of a transition team, dedicated CNHA staff, and contractors to ensure day one operations can be assumed by CNHA/Kilohana with no interruption to existing services. In fact, it is HVCB’s frivolous protest that has resulted in a delay in CNHA’s ability to assume its responsibilities as the contractor under the Reissued RFP and enriched HVCB through an emergency extension of its existing contract. Despite the delay caused by HVCB’s protest and HTA’s pause on any contract progress, CNHA has continued to take proactive steps to prepare for the transition, including naming Douglas Chang, General Manager of the Ritz-Carlton Residences, Waikīkī Beach, as the chair of the Kilohana transition team, and Sun Wong, Principal, CM Marketing Group and former chair of O’ahu Visitors Bureau as a transition team member. HVCB’s assertion that CNHA cannot comply with the requirements of the contract is based on pure conjecture and should be rejected.

e. HVCB’s allegation that CNHA failed to disclose HTA funds received by CNHA’s Pop-Up Makeke virtual marketplace is false and misleading.

HVCB argues that CNHA failed to disclose a \$100,000 contract between HTA and CNHA relating to CNHA’s Pop-Up Mākeke virtual marketplace in response to an inquiry in the Organizational Conflicts of Interest Disclosure & Attestation form. This is a bad faith argument by HVCB. The inquiry at issue asked “Do you or your associates have, or have you had during the last six years, any arrangements (for example, contracts and cooperative agreements) awarded, administered, or funded-wholly or partly by the HTA...which are in any way related to this solicitation.” The Pop-Up Mākeke funds were not at all related to the destination marketing and

management RFP, and accordingly CNHA’s response was truthful. It is clear from CNHA’s proposal, which mentions the Pop-Up Mākeke in multiple places, that there was no attempt to hide this information from the procuring agency.

D. CNHA’s proposal is responsive.

1. CNHA provided all required information relating to proposed Kilohana staffing.

HVCB argues that CNHA’s proposal is not responsive because, *inter alia*, CNHA did not provide an “[o]rganizational chart of proposed staffing, including position titles, names, lines of responsibility/supervision, and time allocation to the HTA account,” and instead only “identif[ied] the general areas around which Kilohana could be organized without providing position titles, names, lines of responsibility/supervision, or time allocation.” See Protest at p. 21. This allegation is patently untrue. CNHA provided names, responsibilities, and time allocation for 10 different persons who will be assigned on a 100% basis to Kilohana (see pages 14-15 of CNHA/Kilohana’s proposal). It also provided detailed information about these employees’ background and qualifications (pages 16-18). On pages 15-16, CNHA visibly provided an overview of CNHA staff who will allocate portions of their time to Kilohana. This is yet another counterfactual argument by HVCB.

2. CNHA’s proposal includes the requisite level of detail as to how the KPIs will be achieved.

HVCB also argues that CNHA’s proposal lacks specific details as to how the KPIs will be achieved. Once again, HVCB inappropriately seeks to substitute its own evaluation of the merits of the proposal for that of the selection committee’s. HVCB cites no RFP language supporting its assertion that additional specificity is required as to how CNHA will achieve the KPIs. In fact, with respect to KPIs, the RFP states that the “Brand Marketing Plan should be clear and concise in communicating initiatives and sought outcomes supporting the KPIs that have been identified in Section 2.07 [of the RFP], and that “the Destination Management Support Plan should be clear and concise in communicating initiatives and sought outcomes supporting the KPIs.” (emphases added). CNHA’s proposal clearly communicated both initiatives and sought outcomes as required by the RFP—in fact, if CNHA had added the level of specificity that HVCB apparently advocates for, HVCB likely would have complained that CNHA had run afoul of the requirement that the statements be “concise.”

3. CNHA did not fail to provide a responsive and adequate budget

HVCB complains that CNHA’s proposal was non-responsive because CNHA’s DMSP budget plans for 2022 and 2023 did not include completed “Summary of Program Budget” and “Summary of Programs” tabs. These minor omissions clearly do not make CNHA’s proposal non-

responsive, nor do they merit rescission of the award. The tabs in question are mere summary tabs, intended to distill information provided in the individual program budgets contained in later tabs. All of the information required for the committee to assess the responsiveness and viability of CNHA's DMSPs was provided by CNHA within the DMSP budget plans.

The issues raised by HVCB are minor issues of form rather than substance, and do not in any way affect the price, quantity, or quality of the services to be provided by CNHA. On its face, the RFP permits HTA to waive technical irregularities. *See* RFP at Section 3.21(f) (stating that HTA "reserves the right to waive technical irregularities (matters of form rather than substance), or insignificant mistakes that can be corrected without prejudice to other offerors and when there is no effect on price, quality, or quantity."). Waiving these minor issues with the DMSP budget plans is clearly in the best interest of the State, and HVCB's protestation that the award to CNHA should be rescinded based on these technicalities clearly ignores all of the concerns underlying the procurement code, and smacks of naked self-interest and desperation.¹⁴

4. HVCB's remaining concerns regarding the responsiveness of CNHA's proposal do not provide a basis for overturning the award

On page 22 of the Protest, HVCB includes a laundry list of alleged "shortcomings" with CNHA's proposal. None of these raise concerns with the bidding process itself. Rather, these "shortcomings" all constitute nothing more than an attempt by HVCB to substitute its own judgment for that of the evaluation committee. As already discussed, the procurement protest process is not a vehicle for unsuccessful bidders to second-guess the merits of a successful bidder's proposal. The arguments on page 22 should accordingly be rejected.

E. The scoring by the evaluation committee was not done in an arbitrary and capricious manner.

HVCB argues that the scoring for the Reissued RFP was arbitrary and capricious in violation of Sections 4.03 and 4.05 of the RFP. Section 4.05 of the Reissued RFP states that "[a] minimum score of 80 will be required to proceed to Round 2." Neither HVCB nor CNHA received a minimum score of 80 in Round 1. Accordingly, both HVCB and CNHA were permitted to proceed to Round 2. HVCB apparently argues that, instead, HVCB should have been awarded the contract.

HVCB's argument finds no support in the terms of the actual Reissued RFP, which does not state that, if no bidder scores an 80 or higher in Round 1, the contract should be awarded to the highest scorer from Round 1. The manner in which HTA chose to handle the fact that none of the

¹⁴ In a similar vein, for the DMSP Administrative budget tab, HVCB points out that CNHA provided annual but not monthly totals. The RFP does not state that a proposal that does not have a monthly administrative breakdown will be deemed non-responsive. In any event, this, like the other issue raised by HVCB with respect to the DSMP budgets, is a minor technical irregularity that has no effect on price, quality, or quantity, and that does not provide an adequate basis for overturning the award to CNHA

offerors scored an 80 or higher (i.e., by advancing both CNHA and HVCB to Round 2) was not arbitrary and, in fact, was entirely in accord with the RFP. As HVCB concedes, HTA merely had the “right” to recommend the award based on first-round proposals—not the obligation. HVCB certainly cannot show that HTA’s decision not to exercise that right was arbitrary and capricious. Indeed, HTA’s decision to follow the process envisioned by the RFP was far more reasonable and even handed than the approach advocated by HVCB (i.e., merely handing the win to HVCB, which like CNHA did not meet the minimum score to advance to Round 2).

HVCB further argues that Ms. Kaho‘ohanohano’s score should have been excluded, and games out various outlandish scenarios that could have occurred if Ms. Kaho‘ohanohano was not on the evaluation committee.¹⁵ Again, as noted above, even HVCB acknowledges that Ms. Kaho‘ohanohano does not have an actual conflict of interest and, accordingly, the hypotheticals proposed by HVCB need not be entertained.¹⁶

HVCB also erroneously argues that substantial decreases in scoring for HVCB from Round 1 to Round 2 by two committee members (Ms. Kaho‘ohanohano and Ms. Brun) suggests that these committee members did not understand that Round 2 scoring was intended to reflect overall performance. This is pure conjecture on HVCB’s part—there is no evidence to support that the difference in scores is the result of any misunderstanding or misapplication of the rules by the committee members in question.

F. HVCB was not unduly disadvantaged by the manner in which documents were released to it, nor did CNHA gain an unfair advantage.

In another iteration of a clearly untimely argument, HVCB appears to contend, without any supporting facts, that CNHA’s changes to its initial proposal with respect to the Reissued RFP were somehow improper. In its attempts to make the case for potential advantage, HVCB claims that CNHA copied the KPIs listed in the HVCB Proposal responding to the Original RFP. In actuality, CNHA took this list from the RFP itself, found in Section 2.07 on page 14, which CNHA understands to be the HTA-established KPIs of this contract. HVCB seems to miss that as an incumbent, much of the work under this contract is known externally, including through public reporting to HTA - such is the nature of incumbency.

¹⁵ In perhaps the most absurd example, HVCB substituted the Round 1 scores given by Ms. Goshi for the Initial RFP in place of the scores given by Ms. Kaho‘ohanohano in Round 1 of the Reissued RFP, arguing that, if this was done, HVCB would have scored 81.19, while CNHA would have scored 74.38, thereby handing HVCB the award in Round 1. This, of course, is pure fantasy on the part of HVCB. There is no basis in the RFP or procurement law for applying a committee member’s score from a prior RFP to a subsequent RFP to award the subsequent RFP to an unsuccessful bidder.

¹⁶ If HTA did determine to exclude Ms. Kaho‘ohanohano’s score as an outlier, a remedy requested by HVCB, CNHA would continue to have an overall higher score with an 89.14 average versus HVCB at 80.46.

Further, and perhaps more fundamentally, HVCB makes no compelling argument that CNHA’s improvement of its proposal between the Initial RFP and the Reissued RFP was somehow improper. Indeed, it seems obvious any rational and responsible bidder would seek to improve its proposal and take seriously the feedback provided during the debrief. HVCB had equal opportunity to make changes to its initial proposal—both parties had access to the Reissued RFP on the same day. HVCB acknowledges it received a copy of CNHA’s proposal on January 14, 2022, and a copy of its protest on January 17, 2022, and the Reissued RFP was issued on April 15, 2022. If HVCB failed to review CNHA’s materials in the three months between its receipt of CNHA’s materials and the date of the Reissued RFP to determine whether to incorporate elements of CNHA’s proposal into its own, that failure is wholly due to HVCB’s own negligence, rather than any unfair advantage afforded to CNHA. Additionally, any alleged advantage that could have been gained by CNHA’s access to HVCB’s materials was offset by HVCB’s own timely access to CNHA’s materials.¹⁷ Both parties were on a level playing field with respect to the Reissued RFP, and any protestations to the contrary by HVCB are entirely counterfactual and unworthy of credence.

G. HVCB’s theory that the outcome of the Reissued RFP was predetermined in CNHA’s favor lacks merit.

Perhaps the most outlandish claim made by HVCB is that the outcome of the Reissued RFP was predetermined in CNHA’s favor. To be clear, there is not a single shred of evidence to support this wildly speculative theory.¹⁸ Indeed, all the evidence is to the contrary. HVCB has been awarded this procurement for over a century, generally without any meaningful competition. The odds have always been stacked in HVCB’s favor as the incumbent. The fact that the Initial RFP was awarded to HVCB despite not receiving a majority of committee members in favor of its proposal indicates that the bidding did not unfairly disadvantage HVCB, and despite searching high and low for evidence of a vast conspiracy to suddenly and unfairly deprive HVCB of this contract, it has found absolutely none. HVCB continues to fail to recognize that the HTA and the State have simply taken a new direction for tourism. At its essence, this is a conspiracy theory in search of evidence that does not exist, and the fact that HVCB is even raising it is a sign of its growing detachment from reality.

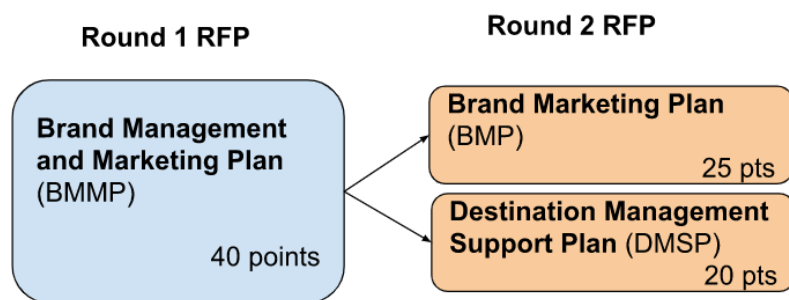
¹⁷ Notably, per HAR § 3-122-58, the proposal of an awarded bidder is open to public inspection after the posting of the award.

¹⁸ HVCB seems intent on turning this Protest process into a fishing expedition, including specifically stating that it will call witnesses to determine, *inter alia*, whether evaluation committee members were pressured during the scoring process to increase their scores for CNHA—a tacit admission that HVCB has no actual evidence of this occurring.

H. Changes to the Reissued RFP from Initial RFP did not unduly disadvantage HVCB.

HVCB claims that it was unduly disadvantaged because marketing points were decreased from the Initial RFP to the Reissued RFP. Firstly, as noted in Section III.A above, this argument goes to the content of the Reissued RFP and, accordingly, was required to be raised prior to the deadline for bids. Because this argument was not timely raised, it is time-barred and may not be considered.

In addition to the procedural deficiencies with this argument, the argument fails on its merits. HVCB, by basing its arguments on scoring criteria changes for the Brand Marketing and Destination Management Plans, is conflating the issues, if not purposefully misrepresenting them. During the Initial RFP, the Marketing and Destination Management activities were *combined* in one plan with a score of 40 points. In the Reissued RFP, the two activities were divided, with the Marketing plan (BMP) given 25 points and the plan for Destination Management (DMSP) given 20 points for a total of 45 points. The graphic below helps to illustrate the change between the two RFPs.



Thus, the marketing points did not go from “40 to 25” points as HVCB claims; rather, a combined plan was divided into two, with Marketing actually receiving more points than Destination Management.

HVCB appears to present these arguments in order to paint a picture that it was disadvantaged by the changes between the Initial RFP and the Reissued RFP; or, more nefariously, that there were inappropriate motivations which disadvantaged them. A full review of the RFPs makes it impossible to conclude that the scoring changes negatively impacted HVCB in any way; rather, most of the changes between RFPs increased emphasis towards marketing, to HVCB’s potential benefit. For example:

- An additional scope of work for Global Support Services was added including 5 additional points, a function that HVCB currently performs for HTA, consisting of traditional marketing activities such as managing the GoHawaii website, social media, and coordinating with the Island Chapters (which are owned by HVCB).

- The encouragement of multi-island itineraries, which is largely accomplished through marketing activities, was added.
- Language was added stating that “marketing should emphasize support of Hawai‘i-based businesses.”

The category of “Familiarity with Hawai‘i Brand Product,” which CNHA scored highest on in the Initial RFP, was decreased from 20 to 15 points, providing a further advantage to HVCB. In light of these facts, HVCB’s assertion that it was disadvantaged by changes between the Initial RFP and the Reissued RFP must be rejected.

I. Changes to the Kilohana transition team do not indicate that the initial Kilohana transition team was inadequate.

On June 28, 2022, CNHA issued a press release announcing that it named Douglas Chang, General Manager of the Ritz-Carlton Residences, Waikīkī Beach, as the chair of the Kilohana transition team, and Sun Wong, Principal, CM Marketing Group and former chair of O‘ahu Visitors Bureau as a transition team member. CNHA also removed Jerry Gibson as a proposed member of the Kilohana transition team. In its First Supplement, HVCB argues that these changes are a tacit admission by CNHA that the initial transition team was somehow inadequate. Not so. The initial transition team was more than adequate—as the evaluation committee clearly recognized in awarding the Reissued RFP to CNHA. The additions of Mr. Chang and Ms. Wong only serve to augment the already considerable breadth of experience and expertise already present on the Kilohana transition team, thereby providing even a greater benefit to HTA and the State. The continued growth of the transition team was not intended as a change to CNHA’s underlying proposal, but rather, is part and parcel of CNHA’s preparation for implementation of its transition plan. Nothing done by CNHA in this regard is inappropriate under HRS Chapter 103D, rather, CNHA is being a responsible party in preparing to undertake significant kuleana.

Additionally, the removal of Mr. Gibson as a proposed transition team member was reflective of, and intended to be respectful of, Mr. Gibson’s public disavowal of his prior commitment, as stated to Mr. Lewis and Ms. Soon, to serve on the transition team if CNHA was awarded the Reissued RFP. Although Mr. Gibson would have been a valuable addition to the transition team, no single member was indispensable to the transition team, which was not even a required element of the Reissued RFP. There is absolutely no evidence, nor does HVCB even argue, that the evaluation committee would have declined to award the Reissued RFP to CNHA if Mr. Gibson was not part of the transition team.

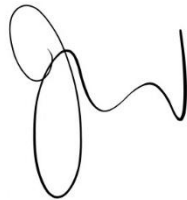
As noted *supra*, this argument from the First Supplement is untimely. It is also entirely without merit.

IV. CONCLUSION AND RELIEF REQUESTED

For the reasons discussed above, CNHA respectfully requests that the Protest be dismissed and the award of the Reissued RFP to CNHA affirmed as soon as possible. The delay resulting from this Protest has already caused harm to CNHA. Given the many procedural deficiencies in the Protest, and that HVCB as the incumbent continues to receive emergency contract extensions during this period, the delay is particularly concerning.

We appreciate your diligent work and careful consideration of this matter to date, and trust that this Response will assist in bringing this matter to a prompt conclusion. Should you require any additional information from CNHA, please do not hesitate to contact the undersigned.

Mahalo,



Joseph Kūhiō Lewis
Chief Executive Officer, CNHA

Attachments (Exhibits A to I)

cc: Andrew K. Recktenwald, Esq.
Jeffrey Osterkamp, Esq.

EXHIBIT A

Column: Hawaii Tourism Authority has the right priorities for Hawaii

By former Govs. George Ariyoshi, John Waihee and Neil Abercrombie • July 10, 2022

As former governors, we know that contractual challenges are a part of the procedural life of government. Why then might we wade into the conversation around the question of whether the Hawaii Tourism Authority should reverse its decision to give the U.S. tourism brand management contract to the Council for Native Hawaiian Advancement (CNHA) and return it to the current entity, the Hawaii Visitors and Convention Bureau?

Our interest isn't in any of the process issues, which must run their course in accordance with rules and laws. Our focus is on the important public policy questions embedded in HTA's decision, and on how the controversy is being portrayed.

Without a doubt, tourism is a critical driver of Hawaii's economy. We are also at a critical crossroads in our relationship with tourism and the visitor industry. The precipitous drop in visitors during the height of the pandemic, especially in the first year, gave all of us — from keiki to kupuna — a once-in-a-lifetime true-life experience with what it would mean to have very few tourists.

There were severe economic impacts, felt most keenly in the loss of jobs. There were also amazingly empty beaches, and no traffic jams in places like Lanikai and Kailua Beach, North Shore Oahu, and Upcountry Maui. Restaurants shuttered, and local produce otherwise consumed by visitors found its way to local markets or ceased to be grown or harvested. Fishermen couldn't get as much at the auction block, but local families could eat fish more often given the drop in price.

The composite experience gave us an opportunity for a different kind of conversation with friends and family, one that has yet to be fully aired in the public domain. How much and what kind of tourism supports the overall quality of life for the people who live in Hawaii? Is there a crossover point at which our quality of life actually decreases, even if some individuals and businesses, and institutions reap monetary benefits? Is Hawaii just a destination and our residents just a workforce, and if that is what some want should that be what we settle for?

It is against this backdrop of legitimate and healthy inquiry that HTA's choice makes timely sense. Their request for proposals was a pivot from the usual marketing and public relations, emphasizing something they call "integrated marketing and destination management services" in keeping with their new strategic plan. Destination management services means, among other things, the ways and means by which tourism is in a dignified and healthy relationship with natural resources, with the Hawaiian culture and its institutions, and with our many communities. Integrated marketing means that these efforts are blended functionally with how we portray ourselves.

Traditional marketing has its place. The hotels, airlines, and the travel industry are experienced and well-positioned to pursue that course. HTA is prioritizing the use of public dollars to emphasize who it is we are as a community, our natural resources, and Hawaiian culture. Its choice of CNHA recognizes the advantage of their deep community ties, along with visitor industry veterans who are excited to bring a fresh perspective.

Hotels, airlines and visitor industry businesses should join HTA in embracing a balanced, healthy, and thriving industry as an ideal state of affairs. Consider the alternative: a return to ever-increasing visitor numbers accompanied by ever-increasing unhappiness among locals, external costs and generic visitor experiences. The current explosion of numbers is showing we will shortly be absorbing close to 10 million visitors a year, once again.

It is more than past time to have a renewed focus on Hawaii's people and their destiny. This is a goal and commitment that locals and visitors alike should welcome and applaud.

George Ariyoshi, John Waihee and Neil Abercrombie are former governors of Hawaii.



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EXHIBIT B

U.S. DEPARTMENT OF THE TREASURY

Treasury Releases Additional Emergency Rental Assistance Funds to High-Performing State and Local Government Grantees

September 14, 2021

WASHINGTON — Today, the U.S. Department of the Treasury announced it will make the remaining more than \$13 billion in funding under the second wave of Emergency Rental Assistance (ERA2) available to the high-performing state and local government grantees.

“Treasury is happy to provide these state and local government programs with additional resources to support Americans in need of rental assistance,” said Deputy Secretary Wally Adeyemo. “We are also committed to reallocating resources to ensure assistance reaches a struggling tenants and landlords during the pandemic.”

By early February, Treasury disbursed the full \$25 billion available in the first round of ERA (ERA1) to state, local, and Tribal governments, along with \$8.6 billion in additional funds made available in early May through the second round of ERA (ERA2) under the American Rescue Plan Act of 2021. Nearly 50 grantees spent more than 70% of their ERA1 allocations by July 31st, including in some of nation’s largest metro regions that have adopted Treasury's best practices. In response to an increasing number of grantees expending their existing funds, Treasury is launching a process for high-performing grantees to draw down the remainder of their ERA2 funding. Grantees are eligible once they have substantially expended their ERA1 allocation and obligated at least 75% of the ERA2 funding that Treasury previously paid to them. Treasury has already paid out the remaining ERA2 allocations to grantees who met these criteria in recent weeks and is now launching a formal process to meet this growing demand.

The following are examples of some of the fastest distributors among state and local governments and their reported spending as of July 31st: These grantees have already or are expected to soon qualify to receive their remaining ERA2 funds.

PHILADELPHIA, PA

\$105.5 million total of all ERA allocations

- The city’s Department of Planning and Development marshalled efforts to quickly build a website, custom application, and back-end database in English and Spanish. The system cross-references data with public housing authorities and local utility companies to reduce applicants’ documentation requirements for debts owed, validates income eligibility requirements, and guards against duplication of benefits. Philadelphia’s program is also integrated directly into the city’s eviction court system. The court requires defendants to apply for the city’s ERA program before allowing the eviction to proceed. Further, all landlords who enroll in the city’s ERA program are automatically enrolled in the eviction diversion system, alerting them to the resources offered by the city to help avoid tenant evictions, such as nonprofit mediation services. Last month, a court order extended protections to also bar lockouts when an applicant has completed their ERA application.

THE ISLAND OF OAHU: CITY AND COUNTY OF HONOLULU AND DEPARTMENT OF HAWAIIAN HOME LANDS

CITY AND COUNTY OF HONOLULU

\$121 million total of all ERA allocations

DEPARTMENT OF HAWAIIAN HOME LANDS

\$2.4 million total of all ERA allocations

- On the island of Oahu, residents have access to ERA programs run by the City and County of Honolulu, and native Hawaiians also have access to programs managed by the Department of Hawaiian Home Lands, which provides assistance to native Hawaiians across the state. The nonprofit organizations running these programs have worked together to simplify the application the process and provide additional “one-on-one” and culturally competent support to meet local needs. They have also proactively engaged with other nonprofit organization providing human services resulting in more integrated continuum of care for those in need of ERA benefits. These coordinated services have supported high spend rates on ERA funds for both grantee programs run by the City and County of Honolulu and the Department of Hawaiian Home Lands.

THE CITY OF DES MOINES AND POLK COUNTY, IOWA

\$26.2 million total of all ERA allocations

- The City of Des Moines and Polk County were the first grantees to request their remaining ERA2 funds. The county and city have worked with their local governments to create a low barrier program for applicants that provides rental and utility assistance, implemented through a local community-based organization. The program has a strong relationship with the local court system to provide real-time support to those facing potential evictions. The program has also developed relationships with local refugee organizations to support program accessibility for these populations.

HOUSTON AND HARRIS COUNTY, TX

\$301.3 million total of all ERA allocations

- The city of Houston and surrounding Harris County, TX have run a highly effective and collaborative program for months. Deputy Secretary Adeyemo [visited](#) the program and met with administrators in July. Last week, Harris County Judge Lina Hidalgo joined Secretary Yellen at a [virtual event](#) hosted by the White House highlighting successful ERA programs. At the event, Judge Hidalgo outlined how the county – which dispersed 92% of ERA1 funds out by the end of July – has used a proactive diversion plan, including efforts to reach out to renters who are on the eviction docket to connect them with assistance – alongside self-attestation and a streamlined application process to distribute all its ERA1 allocation.

LEON COUNTY, FL

\$19.6 million total of all ERA allocations

- Leon County’s program administrators adopted Treasury guidance in designing their ERA application, which prioritizes simplicity. Applicants may demonstrate income eligibility through categorical eligibility – evidence of enrollment in other government benefits programs combined with self-attestation. They also created streamlined data processes with local utility companies to ensure more efficient utility payments. Further, program administrators pointed to the work of grassroots partnerships in making sure residents who most need the funds would learn about the program through culturally and linguistically relevant outreach and application support efforts.

NEW ORLEANS, LA

\$27.4 million total of all ERA allocations

- The city of New Orleans’s program serves a large percentage of small landlords, as many of the rental units in the city are small multi-family residences that the landlord also occupies. Much of their landlord engagement efforts also involve broader educational resources to address small landlord financial needs, such as foreclosure mitigation. The city has focused a lot of efforts on community awareness through neighborhood engagement events. They also are actively working with the courts to help those facing eviction receive fast tracked emergency rental assistance.

The Emergency Rental Assistance program is creating a national infrastructure for rental assistance that previously didn’t exist. Treasury recognizes this meant that many state and local governments faced a difficult task early on in building the assistance infrastructure needed to get ERA funds quickly to eligible households. However, the success of a diverse range of programs covering communities from big cities and states to remote counties show that it’s more than possible to do this effectively.

As U.S. Secretary of the Treasury, Janet L. Yellen [reiterated](#) at last week’s White House event highlighting high-performing program, while Treasury’s strong preference is for each jurisdiction to have the opportunity to use the full amount of its original ERA allocation, the department is prepared to reallocate funds from state and local programs that are not quickly dispersing funds to programs that are effectively getting funds out the door. The ERA1 statute requires Treasury to begin identifying excess funds that have not been obligated by a state or other grantee and reallocating those resources to high-performing jurisdictions that have obligated at least 65% of their original allocation. This process will make it possible for the highest-performing jurisdictions – like those who are drawing down on their full ERA2 funding – to access additional resources so they can continue serving tenants and landlords in need. Treasury will share more details on the reallocation process in the coming weeks, including the spending threshold grantees must meet to avoid having their funds reallocated to more successful programs.

[Additional information for taxpayers on the Emergency Rental Assistance program.](#)

####

EXHIBIT C

HAWAII NEWS

Native Hawaiian Convention ‘re-envisions’ possibilities for the future

By [Linsey Dower](#) • July 23, 2022

Related Photo Gallery: [Council for Native Hawaiian Advancement hosts Native Hawaiian Convention](#)

The theme for the Council for Native Hawaiian Advancement’s Native Hawaiian Convention, held this week at the Sheraton Waikiki Hotel, was huluhia, which means change or upheaval.

“It references a time in which we can look at a renewed place. It’s a time to reset and re-form,” CNHA CEO Kuhio Lewis said in an email to the Honolulu Star- Advertiser.

The group’s 21st annual convention — its first large-scale in-person gathering since the pandemic surfaced in 2020 — attracted some 1,700 attendees to discussions about issues affecting Hawaii’s communities, weighing various problems and potential solutions.

“The gathering allowed us to reassess our cultural, economic, political and community needs following the unprecedented events and challenges of the last few years, and created a space for us to re-vision the possibilities for the future of Hawaii,” Lewis said. Thursday was the last day for the registered public to attend the event, and CNHA members took part Friday in panels on intellectual property and strategic planning.

The panels open to nonmembers ranged from regenerative and mindful tourism to affordable housing and Red Hill. 2021’s water contamination crisis tied to the Navy’s underground Red Hill fuel facility sickened hundreds of military families and sparked widespread public outrage.

For Cody Pueo Pata, attending the convention was valuable for learning more about Hawaiian issues and for building pilina, or relationships. Pata, a kumu hula who works in the Maui mayor’s office assisting on Native Hawaiian topics, was the recipient of this year’s CNHA ‘Oiwi leadership award.

Another attendee, Daniel Ito, a marketing manager for Kona Brewing, said he appreciated the diverse backgrounds of panelists “not only from a tourism or hospitality background, but also sports, the business sector and the intellectual industry.”



peers and friends, so it's really been good to see that passing of the guard."

Among attendees representing an older generation was Ipo Mossman, a community liaison in the Maui mayor's office and active in Hawaii politics for more than five decades.

Mossman, who has attended many Native Hawaiian conventions, said, "To me it's a paradigm shift that we're going in this direction." He added, "I think this is the first time the community engagement has been so focused and targeted."

To Mossman the Red Hill panel effectively shed light on the seriousness of the water contamination problem. The discussion covered topics pertaining to the defueling plan in the works and efforts to monitor environmental conditions. The Red Hill facility, which funnels petroleum to ships and jets, is perched 100 feet above Oahu's drinking water aquifer.

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Melissa Waiters, a diversion specialist for the nonprofit Kinai 'Eha, and several of her co-workers attended the convention, chaperoning a group of boys they work with. Translated from Hawaiian, "Kinai 'Eha" means "to extinguish pain." The program aims to provide an alternative education option to youth as well as instill Hawaiian cultural identity and workforce training in construction and the trades, community service and leadership.

Waiters said a discussion about empowering a homeless population in Waianae — Pu'uhonua o Wai'anae — was particularly impactful to their group. The community now consists of about 250 individuals who support one another. Due to their success, they've been given permission to live on the government's property until they've completed developing land they've purchased in the back of upper Waianae Valley.

Although Waiters and the group of boys chose to wait outside of the ballroom during the panel discussion due to the large crowd, Pu'uhonua o Wai'anae's leader, Twinkle Borge, later stepped outside to speak directly to them.

"Anyone she's seen that needed something more than she did, she would give all her stuff to them," said 20-year-old Evan Goad, who was among the group of eight boys. "I feel like that's an important part, to show everybody else that they could do the same."

Being at the convention gave the boys an opportunity to learn about various current Hawaiian issues, Waiters said. And having the opportunity to speak with Borge was like talking to someone who had once been in their shoes.

"Some of (the boys) are homeless from the Waianae Coast, so that really affected them," Waiters said. "It gives them ideas for their future."



EXHIBIT D



Karen Hughes · 2nd

Project ready hospitality and tourism specialist

- Humboldt Institute Travel School
Berryville, Virginia, United States · [Contact info](#)

500+ connections



8 mutual connections: Matthew Delaney, Frank Haas, and 6 others

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Message

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About

Daughter, wife, sister, football fan. Accomplished hands on leader, mentor and collaborator with extensive and diverse experience in hospitality/ travel sales, B2B/B2B2C marketing and both online and offline distribution. Executive experience includes global hotel; regional and on property hotel, wholesale travel

Activity

850 followers

+ Follow

Karen Hughes commented on a post · 1w

Goodness gracious!!!! That is just astonishing!

1 comment

Karen Hughes commented on a post · 3w

Genevieve Materne....I sooo miss that sassy, brilliant sense of humor!!! XX



Home



My Network



Jobs

[Show all activity →](#)

Experience

Independent Consultant

Freelance

Jan 2022 - Present · 8 mos

Ready to get back to work! Mainly working on word-of-mouth projects in hospitality and tourism.

Self Employed

Hughes Hospitality Advisors · Freelance

Oct 2019 - Jan 2022 · 2 yrs 4 mos

Greater New York City Area

Sharing 40+ years of tourism and hospitality sales and marketing experience with the goal of making a positive impact on travel related



Vice President, Marketing and Product Development

Hawaii Tourism Authority

Dec 2018 - Oct 2019 · 11 mos

Honolulu

Responsible for supervising HTA's initiatives and programs to support Hawaii tourism globally, including tourism marketing strategy ...see more



Vice President, Meet Hawaii and Travel Industry Partnerships

Hawaii Visitors & Convention Bureau

Apr 2013 - Sep 2015 · 2 yrs 6 mos

Honolulu

Leading both leisure and group sales and marketing for the award winning DMO - Hawaii Visitors and Convention Bureau. Reinvented sales organization and marketing strategy to include website and training portal re-build and launch for both leisure and group. Developed new sales success measures, staffing efficiency and processes leading to exceeding targets each year.



Starwood Hotels & Resorts Worldwide, Inc.

11 yrs 3 mos

Vice President, Global Leisure Sales and Distribution

Feb 2006 - Mar 2012 · 6 yrs 2 mos

Responsible for global sales/relationship, strategy, marketing and

[...see more](#)



Home



My Network



Jobs

2001 - 2006 · 5 yrs

Responsible for strategy development, revenue management, sales/marketing initiatives in all market segments for 15 hotels in Hawaii and Tahiti. Also served as marketing chair and later elected as chair of the board - Hawaii Convention and Visitors Bureau.

Show all 7 experiences →

Education

Humboldt Institute Travel School

Trade School Diploma, Travel and Administration

Oconto Falls

Skills

Hotels



Endorsed by Bill Yetman and 2 others who are highly skilled at this



Endorsed by 5 colleagues at Starwood Hotels & Resorts Worldwide, Inc.



62 endorsements

Hospitality



Endorsed by 26 colleagues at Starwood Hotels & Resorts Worldwide, Inc.



56 endorsements

Hospitality Industry



Endorsed by 26 colleagues at Starwood Hotels & Resorts Worldwide, Inc.



37 endorsements

Show all 40 skills →



Nothing to see for now

Recommendations that Karen receives will appear here.

Interests

Companies

Groups



Hawaii Visitors & Convention Bureau

8,663 followers



Starwood Hotels & Resorts Worldwide, Inc.

495,672 followers

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David Rae

• 1st

Proud to assist the Council

Message



Jerry Sager

• 2nd

Vice President Revenue Management at Hogan Hospitality Group

Connect



Photographer, Administrative Assistant and Certified Personal Trainer

Connect



Marilyn Wills

• 3rd
Executive Leader

Message



Pattie Herman

• 2nd
VP Marketing & Product Development at Hawaii Tourism Authority

Connect

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People you may know



Chamara Silva

Management Analyst at the Mayor's Office, City and County of Honolulu | Doctoral Candidate

Connect



Cerdan Hew Len-Kekahuna

--

Connect

Travis S.

Office Manager at Neighborhood Commission Office, City and County of Honolulu

Connect



Scott Glenn

Chief Energy Officer at Hawaii State Energy Office

Connect

Marc Alexander

Executive Director at Hawaii Medical Association

Connect

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EXHIBIT E



STATE OF HAWAII
ATTESTATION
SERVING ON AN
EVALUATION, REVIEW, OR SELECTION COMMITTEE

(1.) Committee member is a:

- Governmental Employee
- Non-Governmental Employee

(2.) Purpose of committee:

- Request for Proposals** - Evaluation committee to evaluate Request for Proposals No. (3.) RFP 22-01 USA Major Market Area (Reference HAR § 3-122-45.01)

Professional Services - Review committee to review statements of qualifications and expression of interest from professional services providers to establish a list of qualified persons. (Reference HAR § 3-122-69)

Professional Services - Selection committee to evaluate the submissions of the persons on the list of qualified persons against the selection criteria. (Reference HAR § 3-122-69)

I, Iwalani Kualii Kahooohanohano, attest to the following:
 (4. Print Name)

- I have no personal, business, or any other relationship that will influence my decision in the applicable evaluation, review, or selection process.
- I agree not to disclose any information on the applicable evaluation, review, or selection process; and
- I agree that my name will become public information upon award of the contract.

Iwalani Kualii
 Kahooohanohano

(5. Signature)

Digitally signed by Iwalani Kualii
 Kahooohanohano
 Date: 2022.04.11 08:56:47 -10'00'

4/8/2022

(6. Date)

Place completed form in procurement/contract file.

EXHIBIT F

DECLARATION OF

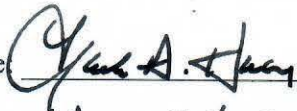
FRANK HAAS

The undersigned, Frank Haas, hereby declares as follows:

1. I am a member of the Kilohana Transition Team and have personal knowledge of the facts contained herein.
2. Attached hereto are true and correct copies of e-mails between myself and Tom Kiely from November 28, 2021 to January 27, 2022.

I, Frank Haas, do declare under penalty of law that the foregoing is true and correct.

Signature

_____

Date: August 4, 2022

From: Tom Kiely [REDACTED]
Sent: Thursday, January 27, 2022 1:23 PM
To: [REDACTED]
Subject: Request

Hi Frank...

In a light conversation with an HTA affiliated person they referenced that "you [TK] are part of the Botticelli group bidding on an HTA contract".

I corrected and said I am not affiliated with any group and this person commented that my name was in some of the materials presented for HTA consideration.

A few months ago you asked if I might "advise" from time to time a group re destination marketing and , of course, I said "sure". What I did not agree to was the use of my name or any reference of an affiliation with any group in any official way or in any presentation for a contract award.

My request, if you can direct this request to whomever is appropriate, to remove my name and any mention of me in any materials or discussions for any and all potential contracts....whether they be aimed at government agencies or private companies.

Thank you and Aloha,

Tom

Tom Kiely
m: [REDACTED]
www.ActiveTraveltv.com

From: "frank" [REDACTED]
Date: Thursday, January 27, 2022 at 9:46 AM
To: Tom Kiely [REDACTED]
Subject: Brand Committee Meeting

Aloha, Tom ... and kung hee fat choy! I "virtually" attended the HTA brand committee meeting yesterday. You're quite the diplomat! I'm encouraged that HTA paused to develop a strategy before plunging into the sports RFP. Kudos to Ben Rafter for calling for this at the last board meeting. It's a step ... and hopefully there will be a mindset supporting developing strategies as a matter of course for their initiatives.

Aloha,
Frank Haas [REDACTED]
President – Marketing Management, Inc.
[REDACTED]
[REDACTED]

From: frank [REDACTED]
Sent: Saturday, December 11, 2021 1:30 PM
To: 'Tom Kiely' [REDACTED]
Subject: RE: HTA US RFP

Anytime, Tom. Let me know if there's anything I can help out with ... I'm still writing blogs and causing the good kind of trouble.

Aloha,
Frank Haas
[REDACTED]
[REDACTED]
[REDACTED]

From: Tom Kiely [REDACTED]
Sent: Saturday, December 11, 2021 1:29 PM
To: frank [REDACTED]
Cc: 'paul casey' [REDACTED] David Preece [REDACTED]
Subject: Re: HTA US RFP

No surprise.... At all. I expect that everyone who bid... and lost... was told they came in second. Just the way it goes .

Thanks for including me in your consideration , Frank.

Aloha, Tom

Tom Kiely
[REDACTED]

From: frank [REDACTED]
Sent: Saturday, December 11, 2021 1:25:36 PM
Cc: Tom Kiely [REDACTED] 'paul casey' [REDACTED] David Preece [REDACTED]
Subject: HTA US RFP

The jury is in. HVCB will be awarded the contract for US Marketing and Destination Management Services. Apparently Council for Native Hawaiian Advancement/Kilohana Collaborative was a close second. Here's hoping that the whole process was open and stimulated new thinking. Thanks for your willingness to assist.

Aloha,
Frank Haas – [REDACTED]
President – Marketing Management, Inc.
[REDACTED]
[REDACTED]

EXHBIT

From: Tom Kiely [REDACTED]
Sent: Saturday, December 11, 2021 5:45 AM
To: David Preece [REDACTED] [frank](#) [REDACTED]
Cc: 'paul casey' [REDACTED]
Subject: Re: Update on HTA RFP

Thanks guys and look forward to
Positive movement. Aloha, Tk

Tom Kiely
[REDACTED]

From: David Preece [REDACTED]
Sent: Friday, December 10, 2021 10:36:35 AM
To: [frank](#) [REDACTED]
Cc: 'paul casey' [REDACTED] Tom Kiely [REDACTED]
Subject: Re: Update on HTA RFP

Aloha Frank. Thanks for the update and I look forward to a positive outcome. And aloha to Paul and Tom--it's been a while! Mahalo,
David

David Preece
Academic Director, Center for Hospitality & Tourism
Associate Professor, Hospitality & Tourism Management
Brigham Young University-Hawai'i
[REDACTED]
[REDACTED] | [REDACTED] hospitality.byuh.edu

From: [frank](#) [REDACTED]
Sent: Friday, December 10, 2021 10:02:54 AM
Cc: 'paul casey' [REDACTED] David Preece [REDACTED] 'Tom Kiely'
[REDACTED]
Subject: Update on HTA RFP

Aloha kākou ...

The hui bidding on the HTA RFP headed by the Council for Native Hawaiian Advancement and known as the Kilohana Collective presented its capabilities as a finalist and provided follow-up to questions posed by the review committee. According to the schedule provided in the RFP, a decision should be made next week. I just wanted to keep you informed.

Aloha,
Frank Haas [REDACTED]
President – Marketing Management, Inc.
[REDACTED]
[REDACTED]

EXHBIT

From: frank [REDACTED]
Sent: Sunday, November 28, 2021 1:40 PM
To: Tom Kiely [REDACTED] **Subject:**
Re: HTA US Contract

Terrific, Tom ... stay tuned.

Sent from my Galaxy

----- Original message -----

From: Tom Kiely [REDACTED]
Date: 11/28/21 6:36 PM (GMT-05:00)
To: [frank](#) [REDACTED]
Subject: Re: HTA US Contract



Thanks Frank....

I am happy to be of help to you as you might need.

I am traveling to mainland Dec. 3-10.

Tk

Tom Kiely
Television Events & Marketing Inc.
m: [REDACTED]
www.ActiveTraveltv.com

From: "frank" [REDACTED]
Date: Sunday, November 28, 2021 at 1:13 PM
Cc: Tom Kiely [REDACTED]
Subject: HTA US Contract

Aloha, Tom ...

I've been supporting a team that is in the final round of the US Marketing Contract for Hawai'i Tourism Authority. In that effort, I've been asked to chair a group of professionals that can provide advisory and transitional support around destination management should they be awarded the contract. I consider you a respected destination marketing expert in the field, and I would like to see whether you might be interested, if they are selected, to be a part of that team. There would be compensation for meetings to provide counseling and implementation, likely for the contract's first 3 to 6 months.

There is no commitment until we know whether we are awarded the contract, and the form and work of this professional group will ultimately be up to the project manager. But, we would like to identify prospects for such a team that we can speak to during the oral presentation on Wednesday December 1. Please let me [REDACTED] or Rebecca Soon [REDACTED] know if you are interested."

Aloha,
Frank Haas [REDACTED]
President – Marketing Management, Inc.
[REDACTED]

EXHIBIT G

DECLARATION OF
JOSEPH KŪHIŌ LEWIS

The undersigned, Joseph Kūhiō Lewis, hereby declares as follows:

1. I am the Chief Executive Officer of the Council for Native Hawaiian Advancement (“CNHA”) and have personal knowledge of the facts contained herein.
2. Jerry Gibson, Rebecca Soon, and I met at Gibson’s Kāhala residence on May 14, 2022 (the “5/14/22 Discussion”).
3. The 5/14/22 Discussion focused on experiences with Hawai‘i tourism, brainstorming about future opportunities to strengthen the relationship between community and the industry, and the synergies with CNHA’s vision.
4. During the 5/14/22 Discussion, we talked about the pending RFP. I informed Gibson that CNHA was forming a Transition Team, composed of both industry and community leaders, to support CNHA and stakeholders through a smooth transition, should CNHA be awarded the RFP. I asked Gibson whether he would be willing to serve on that team if CNHA were awarded. Gibson stated definitively that he would.

I, Joseph Kūhiō Lewis, do declare under penalty of law that the foregoing is true and correct.

Signature: /s/ Joseph Kūhiō Lewis
Joseph Kūhiō Lewis

Date: August 4, 2022

EXHIBIT H

DECLARATION OF
REBECCA J.‘I. SOON

The undersigned, Rebecca J.‘I. Soon, hereby declares as follows:

1. I am a member of the Kilohana Transition Team and have personal knowledge of the facts contained herein.
2. Jerry Gibson, Joe Kūhiō Lewis, and I met at Gibson’s Kāhala residence on May 14, 2022 (the “5/14/22 Discussion”).
3. The 5/14/22 Discussion focused on experiences with Hawai‘i tourism, brainstorming about future opportunities to strengthen the relationship between community and the industry, and the synergies with CNHA’s vision.
4. During the 5/14/22 Discussion, we talked about the pending RFP. Lewis informed Gibson that CNHA was forming a Transition Team, composed of both industry and community leaders, to support CNHA and stakeholders through a smooth transition, should CNHA be awarded the RFP. Lewis asked Gibson whether he would be willing to serve on that team if CNHA were awarded. Gibson stated definitively that he would.

I, Rebecca J.‘I. Soon, do declare under penalty of law that the foregoing is true and correct.

Signature: 

Date: 5 August 2022

EXHIBIT I

DECLARATION OF
EMI ANAMIZU
ON BEHALF OF CORE GROUP ONE

The undersigned, Emi Anamizu, hereby declares as follows:

1. I am the Chief Executive Officer of Core Group One (“CGO”), having served in that capacity since 2005, and have personal knowledge of the facts contained herein.
2. CGO was a proposed major subcontractor in the Council for Native Hawaiian Advancement’s (“CNHA”) proposal for HTA RFP No. 22-01-HTA.
3. CNHA’s proposal accurately reflects the experience and qualifications of CGO and our principals. CNHA’s proposal did not misrepresent the current and past clients that we have worked with. Any allegations to the contrary are not true.
4. Myself and my business partner Jim Horiuchi have been executives at various advertising firms in Hawai‘i for over four decades. I was an executive at Ogilvy & Mather from 1996 to 2005, before we acquired it to become CGO. CGO is the direct successor to Ogilvy & Mather.
5. CGO, Ogilvy & Mather, Jim Horiuchi, and/or myself have performed work for each of the entities questioned by HVCB in its Protest. Additional details as to each follow:

Hawai‘i Convention Center
Ogilvy & Mather Hawai‘i and Core Group One
Contacts: Joe Davis, Randy Tanaka, Susan Nakamura

O‘ahu Visitor Bureau
Ogilvy & Mather Hawai‘i
Contact: Les Enderton

Maui Visitors and Convention Bureau
Jim Horiuchi
Contact: Roger Dubin

Outrigger Hotels/Main Showroom
Ogilvy & Mather Hawai‘i and Core Group One
Contacts: Richard Kelley, Fran Kirk

Hawaiian Airlines
Ogilvy & Mather Hawai'i
Contact: Peter Jenkins

As it appears that the Protest is raising questions regarding CGO's experience in the visitor industry, CGO provides additional examples below of past CGO clients:

- DTG Operations, Inc. (Dollar Rent A Car/Thrifty)
- Hawaiian Host, Inc.
- Island Air
- King's Shops, Waikoloa Village
- Queen's Marketplace, Waikoloa Village
- Star of Honolulu Cruises & Events
- U.S.S. Missouri Memorial Association

I, Emi Anamizu, do declare under penalty of law that the foregoing is true and correct.

Signature: 

Date: August 5, 2022

September 14, 2022

VIA ELECTRONIC MAIL

Mike McCartney
Director
Department of Business, Economic Development and Tourism
State of Hawai‘i
250 S. Hotel Street, 5th Floor
Honolulu, Hawai‘i 96813
e-mail: mike.mccartney@hawaii.gov

Marc Togashi
Vice President, Finance
Hawai‘i Tourism Authority
1801 Kalākaua Avenue
Hawai‘i Convention Center, First Level
Honolulu, Hawai‘i 96815
e-mail: marc@gohta.net

Re: RFP NO. 22-01-HTA (Hawai‘i Destination Brand Marketing & Management Services for the United States Major Market Area)—Council for Native Hawaiian Advancement’s Response to August 11, 2022 Second Supplement to Protest of Award by Hawai‘i Visitors & Convention Bureau

Aloha e Messrs. McCartney and Togashi,

Thank you for providing a copy of the Hawai‘i Visitors and Convention Bureau’s (“HVCB”) Second Supplement (the “Second Supplement”) to its Protest of the award of the above-referenced Request for Proposals (the “Reissued RFP”), issued by the Hawai‘i Tourism Authority (“HTA”), to the Council for Native Hawaiian Advancement (“CNHA”), pursuant to CNHA’s request.¹ We have reviewed HVCB’s Second Supplement and, to aid in your prompt disposition of the Protest, hereby submit this Response (“Response”) to the Second Supplement on behalf of CNHA.

¹ See Hawai‘i Revised Statutes (“HRS”) § 92F-23.

I. The Arguments Raised in the Second Supplement Are Time-Barred

As with many of the arguments in HVCB’s June 21, 2022 Protest and all of its July 8, 2022 First Supplement, HVCB’s Second Supplement is untimely. Both of HVCB’s latest arguments relate to the *Initial* RFP procurement process, now long in the rearview mirror, rather than the solicitation at hand. Specifically, HVCB claims that (1) during the Initial RFP, unidentified “insider information” was allegedly shared with CNHA, thereby helping CNHA in ways that HVCB does not specify; and (2) the decision by the HOPA, Mike McCartney, not to adopt the then-procurement officer’s early draft denial of CNHA’s Protest is somehow evidence that the outcome of the procurement process was predetermined.

HVCB’s arguments are frivolous and absurd, as discussed in Sections II and III below. However, they are also untimely. HVCB is not even remotely within the statutorily required time periods for filing the latest protest supplement, yet attempts to create an argument by cherry picking old evidence that would be immediately thrown out by an administrative hearings officer or a judge. HTA should do the same.

HVCB’s tactics are very troubling. It is increasingly clear that HVCB’s strategy is to burden HTA every few weeks with a new “Supplement” that purports to expose salacious details which *do not even concern the present solicitation*. Perhaps stealing a page from Scheherazade’s *One Thousand and One Nights*, HVCB apparently hopes that it can forever forestall the resolution of this matter by submitting a never-ending series of letters for HTA to analyze, interpret and answer—each one reaching HTA’s desk before it can complete its response to the existing protest documents.

The Procurement Code obligates HTA to reject HVCB’s tactics. First, HTA “*shall* resolve any protest *as expeditiously as possible*.” HRS § 103D-701(c) (emphasis added). And even absent the requirement of a prompt resolution, HTA is *not* obligated to stay procurement activities in the event of an untimely protest. The Procurement Code’s stay provision specifically applies only to a “timely protest.” HRS § 103D-701(f).

Here, an ongoing stay is not appropriate, because arguments concerning the *Initial RFP* are untimely by any measure. HRS § 103D-701(a) commands that “a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of [the] award,” that “no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers,” and that any protest must “be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto.” Section 103D-701(a) provides only one exception: the time for protesting an award is tolled for a few days if a request for debriefing is made. *Id.*

The statute plainly leaves no room for protests concerning a solicitation that lapsed months earlier. A protest of the content of that solicitation was due before the date for submitting offers. A protest of the denial of the award was due within five days of the date of that action. And even absent the provisions concerning protests of awards and solicitation content, any protest relating to the rescission of the award of the Initial RFP was due January 7, 2022 (five working days after HVCB received notice of the rescission of the award on December 30, 2021), and a protest of the issuance of the Reissued RFP was due on April 22, 2022 (five working days after the issuance of the Reissued RFP). HVCB inexplicably failed to file a timely protest as to these issues, nor even did it raise the arguments asserted in the Second Supplement in its initial Protest of the Reissued RFP.

The fact that HVCB raises these arguments in a supplemental protest letter does not alter the timeliness analysis. It is axiomatic that a supplement to a procurement protest must independently meet the timeliness requirement. *See, e.g., GTE Hawaiian Telephone Co. v. Dept. of Finance*, PCH-98-6, p. 14 (Dec. 9, 1998) (“To be considered, the supplemental letter [of protest] must independently meet the timeliness requirement for the filing of protests.”); *Frank Coluccio Constr. Co. v. Dept. of Budget & Fiscal Services*, PCH-2002-12, p. 5 (Oct. 18, 2002) (“[A] supplemental letter detailing the basis for the[] protest must independently meet the timeliness requirement for the filing of protests before it may be considered.”). The Second Supplement, submitted over seven months after the rescission of the award of the Initial RFP to HVCB and over three months after the Reissued RFP was issued, plainly does not do so.

Nor does HVCB’s claim that its Second Supplement is based on newly acquired information change the fact that it is untimely.² A protest must be filed within the time period prescribed by HRS § 103D-701(a), and the discovery of evidence supporting a claim made after that period has expired cannot revive an otherwise untimely claim. *See Aloha Waste Systems, Inc. v. Dept. of Education*, PDH-2017-003 (Apr. 17, 2017) (holding that an unsuccessful bidder’s protest was untimely because it was not filed within five days of the announcement of the award to the successful bidder, despite the unsuccessful bidder’s assertion that it did not timely file the protest because it only learned the key fact underpinning its protest after the protest period had closed). This rule promotes efficiency in the procurement process, and a finding that HVCB’s Second Supplement is timely would call into question the finality of virtually all procurements in the State of Hawai‘i.

² HVCB does not explain in its Second Supplement why it could not have acquired the information upon which the Second Supplement is based at an earlier time. It appears HVCB simply failed to request it contemporaneously with the protest by CNHA of the Initial RFP—an omission for which HVCB is solely responsible.

II. Vague Allegations That “Insider Information” Was Shared With CNHA During The Procurement Process For The Initial RFP Do Not Support A Reversal Of The Award Of The Reissued RFP To CNHA

In addition to being untimely, the arguments in the Second Supplement fail on their merits. First, HVCB cites a December 13, 2021 e-mail in which then-procurement officer Ronald Rodriguez stated that HTA had received a request from CNHA “for an oral debriefing and airing of ‘concerns.’” *See* Second Supplement at 2. In the e-mail, Mr. Rodriguez speculated that “the questions included in the attachment indicate that some insider information was probably shared.” *Id.*

HVCB does not present a single shred of actual evidence—as it must—that “insider information” was shared with CNHA. Rather, HVCB offers only Mr. Rodriguez’s speculation, and fails to specify what information was shared with CNHA, or how this alleged information-sharing affected the outcome of CNHA’s protest of the Initial RFP. Without any substantiating facts, HVCB’s assertions that it was “unduly disadvantaged and CNHA gained an unfair advantage in the procurement process,” and that “the contract awardee had been predetermined at the outset,” are completely unsupported and, indeed, reckless.³ This baseless argument should be quickly rejected, because a protest must include “[s]upporting exhibits, *evidence*, or documents to *substantiate any claims* unless not available within the filing time in which case the expected availability date shall be indicated.” HAR § 3-126-3(d) (emphasis added). HVCB plainly failed to provide any actual evidence as needed to sustain a protest.

III. The Fact That The Then-Procurement Officer’s Initial Draft Response To CNHA’s Protest Of The Initial RFP Would Have Affirmed The Award To HVCB Is Irrelevant

HVCB’s second argument is even less logical than the first. HVCB notes that the initial draft response to CNHA’s protest of the Initial RFP, prepared by the then-procurement officer Mr. Rodriguez, would have affirmed the award to HVCB, and that, in light of this, the ultimate decision by the HOPA, Mr. McCarthy, to rescind the award to HVCB somehow indicates that “the contract awardee had been predetermined at the outset.” HVCB’s argument is nonsense. If anything, the fact that the HOPA rejected Mr. Rodriguez’s early, tentative draft and reached the opposite conclusion is evidence of a robust and fair deliberative process. HVCB cites absolutely no authority for the proposition that an agency must adopt its initial draft of a response to a protest,

³ Obviously recognizing the lack of evidence underlying its claims, HVCB once again has signaled in the Second Protest that it intends to use the DCCA hearings process to conduct a fishing expedition, stating that it will “call witnesses to testify whether there were any improprieties in the evaluation process for the Original RFP and/or the Resolicited RFP.” *See* Second Supplement at 3. This is a tacit admission that it has no evidence of such improprieties, and that it plans to engage in a gross abuse of the DCCA hearings process.

or that failure to do so is evidence of an inequitable process. HVCB's argument is not only nonsensical, but is insulting to DBEDT, HTA, and the entire procurement process.

IV. CONCLUSION

As with its initial Protest and its First Supplement, HVCB's Second Supplement consists of arguments that are unsupported by evidence or law. It remains apparent that the primary purpose of HVCB's ongoing Protest is to delay the procurement process in bad faith. HVCB will stop at nothing to accomplish this goal, including calling into question the integrity of the public servants at DBEDT and HTA without any supporting evidence. It is imperative that a decision rejecting HVCB's Protest be issued immediately. Any further delays will only encourage HVCB to level additional specious claims, thereby further eroding public trust in the procurement process. We look forward to a prompt resolution of the Protest in CNHA's favor, and to a successful partnership between CNHA and HTA moving forward.

Mahalo,



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