2024 IL App (3d) 220261-U

Order filed January 11, 2024

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2023

D. CONSTRUCTION, INC.,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-22-0261
	)	Circuit No. 20-MR-2467
	)	
ILLINOIS DEPARTMENT OF TRANSPORTATION, OMER OSMAN, as Acting Secretary of Transportation, and RONALD BROWN, as an agent of the Bureau of Small Enterprises of the Illinois Department of Transportation,	)	
	)	Honorable
	)	John C. Anderson,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE BRENNAN delivered the judgment of the court.
Presiding Justice McDade and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the agency's decision that plaintiff did not make good faith efforts to allocate the requisite portion of the work in a highway construction project to disadvantaged business enterprises.

¶ 2 A reconsideration officer for defendants-appellants, the Illinois Department of Transportation (IDOT), determined following an informal evidentiary hearing that plaintiff-

appellee, D. Construction, Inc., failed to demonstrate good-faith efforts to meet the regulatory requirements set forth in its contract that a certain percentage of the highway construction project be performed by disadvantaged business enterprises (DBEs). On judicial review, the circuit court determined that IDOT's failure to provide a transcript of the hearing, as it determined was required by the Administrative Review Act (735 ILCS 5/3-101 et seq. (West 2020)) and the contested-case provision of the Administrative Procedure Act (5 ILCS 100/10-35(b) (West 2020)), effectively resulted in a default judgment against the agency. The circuit court held in the alternative that, even if an effective default judgment was not warranted, the documentary evidence did not support the agency's decision. Accordingly, the circuit court reversed the agency's decision.

¶ 3 IDOT appeals, arguing that neither the Administrative Review Act nor the contested-case provision of the Administrative Procedure Act applied to its proceedings and that, even without the transcripts and crediting D. Construction with the testimony it pled the transcripts would have contained, the evidence supported the officer's decision.

¶ 4 For the reasons that follow, we agree with IDOT's argument that the absence of transcripts did not warrant reversal and the evidence supported the officer's decision that D. Construction did not meet DBE goals because a certain DBE did not perform a commercially useful function in supplying steel. Additionally, the evidence supported that D. Construction did not make good faith efforts to meet DBE goals, despite its failure to do so. Agency decision affirmed. Circuit Court judgment reversed.

¶ 5 I. BACKGROUND

¶ 6 In exchange for receiving federal funds toward the completion of highway construction projects, IDOT is required to abide by—and monitor its prime contractors' compliance with—federal regulatory requirements concerning DBEs. 49 C.F.R. §§ 26.37(a), 26.3(a), 26.21(a), (c).

While IDOT is permitted to monitor its prime contractor's DBE compliance in conjunction with a closeout review, 49 C.F.R. § 26.37(b), the prime contractor must document its own good faith efforts to meet DBE goals and be prepared to submit said documentation within seven days of IDOT's request (49 C.F.R. §26.53(g)). DBEs are businesses that are at least 51% owned by individuals who are both socially and economically disadvantaged due to racial, ethnic, or cultural prejudice. 49 C.F.R. § 26.5.

¶ 7 The instant case involves one such highway construction project and D. Construction's alleged failure, as the prime contractor, to meet the project's DBE goals. The following information is drawn from the administrative record, which includes approximately 220 pages of documentary evidence.

¶ 8 On January 30, 2015, D. Construction submitted its bid in competition to be the prime contractor in a highway construction project. It attached to its bid a DBE utilization plan that demonstrated that it planned to subcontract 25% of the work to DBEs. The bid amount was $8,900,713. The amount designated to DBEs was $2,225,214, exceeding the 25% threshold by approximately $50. The document, signed by representatives of D. Construction between January 30, 2015, and February 27, 2015, provided that "the requirements of 49 CFR Part 26 apply to this contract."

¶ 9 The January 30, 2015, document set forth, *inter alia*, that CBD Fabrication and Supply would perform $465,775 in work. Attached DBE participation statements delineated that CBD would *supply* $690,000 in structural steel, *supply* $31,766 in other items such as pile points, and *manufacture* $32,716 in strip steel and slider plates. D. Construction would receive 60% credit toward the DBE goal for supply contracts and 100% credit toward the DBE goal for manufacturing

contracts, thereby reaching the $465,775 total. The participation statements, signed by representatives of both D. Construction and CBD, provided:

> "The undersigned certify that the information included herein is true and correct, and that *the DBE firm listed below has agreed to perform a commercially useful function* in the work of the contract item(s) listed above ***. The undersigned further understand that *no changes to this statement can be made without prior approval from [IDOT's] Bureau of Small Business Enterprises* and that complete and accurate information regarding actual work performed on this project and the payment therefore must be provided to [IDOT]." (Emphases added.)

¶ 10 On March 11, 2015, IDOT notified D. Construction in a written letter that its DBE plan had been approved. The letter further advised that modification of the plan required IDOT's prior approval.

¶ 11 On March 16, 2015, IDOT notified D. Construction in a written letter that its $8,900,713 bid amount was the low bid and that it would be awarded the contract. Work could begin following execution of the contract.[1]

¶ 12 On April 8, 2015, D. Construction subcontracted with CBD to supply structural steel. CBD agreed with D. Construction to purchase the structural steel from Veritas.

¶ 13 On January 19, 2016, February 12, 2016, and March 15, 2016, D. Construction transferred funds totaling $690,000 to CBD. After CBD received the first transfer, consisting of $310,000, CBD paid that $310,000 to Veritas to purchase structural steel for the project. However, after

[1] The actual, completed contract is not in the administrative record.

receiving the second and third transfers, CBD did not make any payments to Veritas to purchase structural steel for the project.

¶ 14 Between May 10, 2016, and May 18, 2016, D. Construction (project manager Mark Cox) and CBD (president Dina Columbo-Gay) communicated in a series of e-mails regarding CBD's failure to pay Veritas the remaining $380,000. D. Construction informed CBD that, unless it could show proof of payment to Veritas within two days, D. Construction would move ahead to meet with IDOT and CBD to discuss CBD's lack of payment. CBD sent several e-mails of apology, asking for more time to meet with accountants and lenders. On May 18, 2016, CBD advised that it would "understand" if D. Construction "work[ed] with Conklin" to arrange delivery.[2]

¶ 15 A. The November 28, 2016, IDOT Memo

¶ 16 In 2016, IDOT began to investigate CBD due to its alleged failure to perform commercially useful functions involving numerous contracts. IDOT generated a memo, dated November 28, 2016, with specific attention to the instant contract with D. Construction. The memo stated that it was "To: File: D. Construction (D) (Prime Contractor): CBD Fabrication and Supply, Inc. (CBD) (Sub-Contractor)."

¶ 17 The memo recounted that, on October 6, 2016, IDOT field analyst Jaime Doolin met with D. Construction project manager Steve Wahl. Wahl informed Doolin as follows regarding CBD's subcontract to *supply* structural steel. Wahl told CBD to use Veritas after receiving quotes from other manufacturers, because Veritas had the lowest bid. Veritas later informed D. Construction that CBD had "not paid for the remaining steel and it would not be delivered until payment was

[2] The parties do not further identify Conklin.

received." D. Construction communicated with Dina [Columbo]-Gay without success. In June 2016, D. Construction paid Veritas the remaining monies owed to Veritas to prevent project delays.

¶ 18 Wahl also informed Doolin as follows regarding CBD's subcontract to *manufacture* strip steel and slider plates. In April 2016, after an e-mail prompt, D. Construction received the manufactured strip steel and slider plates from CBD. Doolin requested proof of receipt and payment but Wahl never provided it, even after two subsequent e-mail requests.

¶ 19 On October 14, 2016, Doolin spoke with Veritas sales manager Evan Fromm. Other than the original purchase order from CBD, "Veritas did not have any contact with CBD during the procurement of the steel." Veritas had not worked with CBD before. D. Construction contacted Veritas directly asking Veritas for a quote for steel including shipping cost. Veritas returned its quote to D. Construction. Veritas arranged for shipping from their facility to the jobsite. Fromm opined to Doolin: "CBD was used as a pass through."

¶ 20 In the memo, Doolin issued the following conclusion and recommendation:

"CONCLUSION

1. CBD Fabrication was not performing a Commercially Useful Function for the committed pay items of structural steel supply; and D Construction and CBD have not provided any evidence that a CUF was performed on this contract for the manufacturing of strip steel and slider according to 49 CFR 26.55(c)(1).

2. CBD did not negotiate prices or arrange shipping with the manufacturer Veritas and has not changed business practices since the first goal credit removal in 2015.

3. D Construction initially requested a quote from Veritas for these pay items and not CBD. D Construction instructed CBD to use Veritas.

RECOMMENDATION

1. Goal credit for the committed amount of $465,776 be removed due to not performing a Commercially Useful Function on the committed pay items.

2. CBD be removed from the DBE program due to a continual non-compliance based on the DBE federal regulations of the work categories of Supplier: Structural Steel Fabrication (226A) and Supplier: Miscellaneous Steel Fabrication (226B). Previous non-compliant CUF's include contracts 63866, 60R63, 60M61, 63785, and 76G09.

3. D Construction not be granted a waiver based on obtaining quotes directly from manufactures and directing CBD which manufacturer to use, resulting in the DBE acting as an extra participant in accordance to 49 CFR 26.55(c)(2)."

¶ 21 B. Closing Out the Project and IDOT's

Preliminary Determination of a DBE Shortfall

¶ 22 On July 3, 2018, D. Construction completed the project and IDOT found all work to be satisfactory. Between June 2, 2019, and January 4, 2020, e-mail correspondence between IDOT and D. Construction, as well as internal IDOT e-mails and memoranda, documented both parties' attempt to close out the project. For example, on June 2, 2019, IDOT wrote to D. Construction that it would "need the partial waivers for CBD" to close out the project. On June 13, 2019, D. Construction replied: "The cancelled checks are all that we have for CBD ***. There are no waivers. We have been able to close out contracts in the past with the cancelled checks." On October 17, 2019, an internal IDOT e-mail noted that an IDOT representative spoke with a D. Construction representative, who claimed that D. Construction "never received notice of [a] CUF review." The e-mail further noted that there was a DBE deficiency on the project, so D. Construction would need to submit a waiver. On October 23, 2019, IDOT wrote to D. Construction again asking if it planned to submit a waiver letter. On November 7, 2019, D. Construction wrote

IDOT, asking for a status on the closeout. It was under the impression, based on its last conversation with IDOT, that it would be receiving a letter detailing the "issues" IDOT was having with the closeout. D. Construction reiterated that, after checking with Rob Male (the manager of DBE procurement) and Steve Wahl (project manager), "[n]obody in our office has ever received any communication regarding this job and the DBE goal." IDOT responded that day that it was waiting on a revised "SBE 2028" form from "the district" detailing its recommendation. Further, "[u]pon receipt of the revised DBE final documentation from the district, SBE will proceed with the review for a Good Faith Efforts Determination."

¶ 23 On August 14, 2020, IDOT notified D. Construction in a written letter of its "preliminary determination" that D. Construction obtained 17.93% DBE participation, falling short of its 25% goal. The dollar amount of the shortfall was $629,062. IDOT explained that an internal investigation uncovered that the deficiency was due to two DBE subcontractors (subsequently identified as CBD and Electrical Resource Management (ERM))[3] not performing commercially useful functions. As such, IDOT removed the "goal credit" previously allocated to those two DBE subcontractors.

¶ 24 The August 14, 2020, letter instructed: "You have five (5) working days from receipt of this letter to request a Reconsideration Hearing in writing ***. *Please be prepared to discuss/provide documentation in ·support of your Good Faith Efforts*. NOTE: The decision rendered by the Reconsideration Officer is administratively final." (Emphasis added.)

[3] The parties do not address ERM in their appellate briefs and do not parse which portion of the $629,000 shortfall was due to ERM's failure to perform a commercially useful function, as opposed to CBD's failure to perform a commercially useful function.

¶ 25 On August 21, 2020, D. Construction requested a reconsideration hearing. It also requested a copy of the investigation report so that it could see where IDOT determined there was a shortfall. On August 24, 2020, per D. Construction's request, IDOT provided D. Construction with a copy of the November 28, 2016, memo, which had concluded that CBD did not perform a commercially useful function.

¶ 26 C. D. Construction's September 8, 2020,

Position Statement and Supporting Documents

¶ 27 On September 8, 2020, D. Construction provided IDOT with a four-page, single-spaced written document summarizing its "response/stance regarding [its] Good Faith Effort" (position statement). In a timeline format, D. Construction set forth, *inter alia*: (1) on January 30, 2015, it submitted a bid that included a DBE Utilization plan; (2) on March 30, 2015, it received the executed contract from IDOT; (3) On April 8, 2015, it submitted its purchase order to CBD; (4) in January and February 2016, D. Construction transferred funds to CBD, including a $310,000 and $300,000 payment; (5) on February 22, 2016, CBD paid $310,000 to Veritas (which D. Construction had provided to CBD); (6) On March 15, 2016, Veritas began calling D. Construction asking for the "second half of the money"; (7) On May 13, 2016, D. Construction (Steve Wahl and Mark Cox) met with IDOT and asked IDOT for assistance "regarding CBD not paying their supplier (Veritas) for money already paid to CBD by D Construction;" CBD was invited to the meeting but did not attend and nothing was resolved; (8) On June 17, 2016, D. Construction was "forced" to pay Veritas in order to get material released, even though D. Construction had already paid CBD the "entire amount"; and (9) On April 17, 2019, D. Construction submitted its final DBE payment forms to IDOT, and e-mail correspondence regarding CBD payments and credit ensued.

¶ 28 D. Construction did not account for any activity between June 17, 2016, and April 17, 2019. It does not expressly deny that the interim October 2016 meetings referenced in the November 28, 2016, IDOT memo took place. It asserted, however, that it did not receive the November 28, 2016, IDOT memo until August 24, 2020.

¶ 29 D. Construction concluded:

> "In regard to the above timeline, we would like to point out that up until 10/1/2019, D Construction had no idea that there was an issue with Electric Resource Management (ERM). ***.
>
> In addition, per the above timeline as related to CBD, we would like to point out that up until 8/24/2020, there was never once any mention of any issue with CBD and a Commercially Useful Function. ***.
>
> *As for support information regarding a Good Faith Effort, we really don't have any*. Since we had no knowledge of any issues until well after the Project was completed and already in closeout process in Springfield, there was not an opportunity for us to make a Good Faith Effort." (Emphasis added.)

¶ 30 D. Reconsideration Hearing

¶ 31 On September 15, 2020, IDOT conducted the reconsideration hearing. As set forth in the written decision, it afforded D. Construction the following procedure. D. Construction was given the opportunity to offer testimony, evidence, and argument as it chose. D. Construction had the burden to show good faith efforts to meet the DBE goal. D. Construction called the following individuals to "speak" on its behalf: president Kenneth Sandeno and project managers Steve Wahl, Mark Cox, Rob Male, and Laurie Pierard. IDOT chose Ronald Brown, from the Bureau of Small Business Enterprises, to speak on its behalf. Both sides submitted documentary evidence. Strict

rules of evidence did not apply and "spokespersons" were allowed to freely present the case, including hearsay testimony and other evidence that would not have been permitted in more formal proceedings. The reconsideration officer had not taken part in the preliminary determination that there had not been good faith efforts.

¶ 32 The parties agree that the September 15, 2020, procedure closely mirrored those set forth in federal regulation 49 C.F.R. §26.53(d), which allows an otherwise successful bidder to challenge IDOT's DBE and good-faith-efforts assessment *prior* to IDOT's contract award. Further, the parties agree that the September 15, 2020, procedure afforded greater access than required by section 49 C.F.R. §26.53(g), which sets forth the *post*-award procedure concerning the prime contractor's compliance with DBE goals and good faith efforts. Section §26.53(g) provides that, in the circumstance that a DBE subcontractor fails to perform its work, the contractor must document its good faith efforts to find another DBE subcontractor to perform the work and be prepared to submit said documentation upon request:

> "When a DBE subcontractor *** fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement. *The good faith efforts shall be documented by the contractor*. If the recipient requests documentation under this provision, the contractor shall submit the documentation within 7 days, which may be extended for an additional 7 days if necessary at the request of the contractor, and the recipient shall provide a written

determination to the contractor stating whether or not good faith efforts have been demonstrated." (Emphasis added.) 49 C.F.R. § 26.53(g).

¶ 33 In the written decision, the hearing officer recounted IDOT's position in a manner near verbatim to that set forth in the IDOT's November 28, 2016, memo. He recounted D. Construction's position in a manner that closely mirrored the points set forth in D. Construction's September 8, 2020, position statement and noted that D. Construction stressed two points through its evidence and testimony: (1) IDOT did not notify D. Construction during the project that CBD was not performing a commercially useful function such that D. Construction would not receive DBE credit; and (2) CBD failed to perform and IDOT was unable help D. Construction pursue legal remedy.

¶ 34 The hearing officer then found: (1) "[t]hat D. Construction failed to meet the DBE goal for this contract cannot be disputed"; (2) D. Construction did not establish that it made good faith efforts despite failing to meet the DBE goal; and (3) D. Construction was nevertheless entitled to a "mitigation" of the "consequences" for its failure to meet the DBE goal.

¶ 35 Regarding good faith efforts (finding two), the hearing officer rejected D. Construction's argument that IDOT did not notify D. Construction prior to auditing that CBD and ERM were not performing commercially useful functions such that D. Construction would not receive DBE credit. The officer explained:

> "The onus under the law to make Good Faith Efforts to reach the DBE goal on a project is placed on the successful bidding contractor. IDOT has no duty to track the DBE dollars spent and analyze the [commercially useful functions] of DBE contracts unless a problem arises after the project is complete and it is reviewing the final documentation. D. Construction is not a novice company in dealing with IDOT and DBE goals, and it was

incumbent on [D. Construction] to make certain that its DBE's were performing [commercially useful functions].

***

While D. Construction argued it had no idea CBD was not performing a [commercially useful function], it presented no evidence supporting that notion. The record clearly established CBD did not negotiate prices or arrange shipping for the materials in question. The initial quote request to Veritas was made by CBD. [However], D. Construction directed CBD which manufacturer to contact for a quote. The evidence establishes D. Construction treated CBD as a pass-through, and therefore should not have expected or relied upon future DBE goal credit for CBD's participation."

¶ 36 The hearing officer noted in the alternative that, even accepting for the purposes of argument that CBD's conduct alone motivated D. Construction to sidestep CBD and treat it as a pass-through participant, D. Construction should have asked IDOT for assistance in securing additional or substitute DBE participation to replace CBD.

¶ 37 Regarding mitigation (finding three), the hearing officer *accepted* D. Construction's argument that it should be granted some leniency due to CBD's non-performance. The officer noted:

"When determining the consequences of [the finding that D. Construction did not make good faith efforts], IDOT must take into account the fact CBD took $300,000.00 from D. Construction to purchase materials and failed either to do so or return the money.

The DBE goal deficiency is shown to be $629,062.34. It was unrefuted during the hearing D. Construction contributed $300,000.00 to the DBE subcontractor CBD for which it did not receive credit. Given that CBD in essence absconded with D. Construction funds

dedicated for DBE participation (and therefore credit), that $300,000.00 should be considered in D. Construction's favor when determining the impact of this finding."

The hearing officer clarified in a footnote that the exact amount CBD "took for materials it did not provide" could be determined in a post-hearing communication with IDOT officials.

¶ 38 The hearing officer instructed: "This decision is administratively final and subject to review. Pursuant to the Illinois Administrative Procedure Act, 5 ILCS 100/10-50(b), there are no requirements to file a motion for or otherwise request reconsideration."

¶ 39 E. Complaint for Administrative Review

¶ 40 On November 2, 2019, D. Construction filed a complaint for administrative review. Rather than arguing that it met the DBE goal, it instead argued that the hearing officer incorrectly concluded that D. Construction failed to make good faith efforts. It wrote that IDOT "penalize[ed]" D. Construction for "the conduct of what turned out to be an unreliable subcontractor."

¶ 41 D. Construction recounted that it won the bid to complete IDOT's highway project and that it subcontracted with CBD, which IDOT had approved as a DBE. It further recounted the facts set forth in the administrative record, adding with supporting documentation that, on June 29, 2018, in a separate lawsuit, D. Construction obtained a judgment against CBD for $380,000. This represented the amount that D. Construction transferred to CBD that CBD failed to pay to Veritas. D. Construction argued that the hearing officer incorrectly concluded that it failed to make good faith efforts to meet the DBE goal, reiterating the arguments it had raised below.

¶ 42 On March 3, 2021, IDOT answered the complaint for administrative review, attaching a certified copy of the administrative record. The record included all of the documentary evidence considered by the rehearing officer but did not include transcripts of the hearing.

¶ 43 On September 24, 2021, D. Construction moved for judgment on the pleadings, arguing that IDOT's failure to answer the complaint with an administrative record that included transcripts, as required by Administrative Review Law (735 ILCS 5/3-108(b) (West 2020) ("the administrative agency shall file an answer which shall consist of an original or a certified copy of the entire record of proceedings under review, including such evidence as may have been heard by it and the findings and decisions made by it")) and the contested-case provisions of the Administrative Procedure Act 5 ILCS 100-10-35 (b) (West 2020) ("[o]ral proceedings or any part thereof shall be recorded stenographically or by other means that will adequately insure the preservation of the testimony or oral proceedings and shall be transcribed on the request of any party")), warranted a default judgment. In the alternative, D. Construction likened its case to *Miles v. Housing Authority of Cook County*, 2015 IL App (1st) 141292, ¶ 23, which held that, although the agency was not required to follow the strictures of Administrative Review Law in the particular case before it, the administrative record was so incomplete as to preclude meaningful judicial review.

¶ 44 D. Construction summarized the content of the missing testimony as follows. Mark Cox (D. Construction) testified

> "regarding the steps taken by D. Construction from the bid date, the execution date, and during the DBE submittal process to meet its DBE goals on the project; the review and approval of these DBE subcontractors and material suppliers and their scope of work by IDOT; and the actions taken by D. Construction that complied with IDOT's protocol. [D. Construction] utilized IDOT approved DBE suppliers and contractors for the DBE goals; that the subcontractors CBD and ERM were pre-approved by IDOT that IDOT approved the specific scope and function of these subcontractors in the DBE Utilization Plan submitted by D. Construction; that D. Construction acted in good-faith throughout the

performance of the work, including meeting with IDOT and seeking IDOT's direction and assistance when CBD stole the $380,000.00 that D. Construction had advanced to CBD for its purchase of the steel needed for the project; that D. Construction paid out-of-pocket for the steel in order to keep the project moving forward, with IDOT's knowledge and approval at the time; and that at no time did IDOT indicate that CBD or any DBE supplier on the project was not performing a commercially useful function."

¶ 45 Steve Wahl (D. Construction) testified that

"even if IDOT had notified D. Construction of a potential issue with the DBEs at the time of the stage 2 delivery of the steel beams—which IDOT did not do—there was no possible way for D. Construction to employ replacement DBEs in order to reach the DBE goal because all of the remaining work was already subcontracted, and mostly to DBEs."

Wahl testified to 10 such remaining work items.

¶ 46 Ronald Brown (IDOT) "said nothing." Phillipe Victor (IDOT)

"merely agreed that D. Construction had correctly followed IDOT's processes, just as Mark Cox had testified, including calling for the meeting with IDOT when CBD failed to pay for the steel, which meeting resulted in no help from IDOT. He did not call into question or rebut any of the testimony by D. Construction's witnesses."

¶ 47 On November 24, 2021, IDOT responded that a default judgment was not the appropriate remedy for its failure to record and transcribe the hearing. Instead, it sought a remand for completion of the record. In support of its position it cited, *inter alia*, *Figueroa v. Doherty*, 303 Ill. App. 3d 46, 51 (1999) (remand was the proper remedy where the claimant did not receive a fair hearing *and* the record was insufficient to review the agency's decision). (IDOT also moved for a remand in a separate motion on October 27, 2021, making the same argument).

¶ 48 On January 22, 2012, the circuit court granted D. Construction's motion for judgment on the pleadings and denied IDOT's motion to remand. The court determined that, pursuant to Administrative Review Law and the contested-case provisions of the Administrative Procedure Act, IDOT was required to file the record of proceedings, including a transcript of the testimony it heard at the hearing. The court further determined that

> "remanding this case to the agency cannot cure this deficiency because no recording or other record of the Hearing exists from which IDOT could produce a transcript of the Hearing. Remanding this case for a 'do-over' hearing so that IDOT can keep the record of proceedings of a second hearing that it failed to keep in the original Hearing, as proposed by IDOT, would work a substantial injustice on D. Construction."

¶ 49 The circuit court then provided an alternative basis for its ruling, noting that: "[p]erhaps it would be more accurate to say that the Court finds in favor of D. Construction on its complaint for administrative review because there is no adequate basis in the record to affirm." It explained that, due to the missing transcript, it could not properly review the administrative decision.

¶ 50 The circuit court reversed the agency decision. It denied IDOT's motion to reconsider, and this appeal followed.

¶ 51 II. ANALYSIS

¶ 52 IDOT argues that the decision of its reconsideration officer should stand, because, *inter alia*, the evidence in the record supports the officer's decision. IDOT contends that its failure to provide a transcript of the proceedings does not warrant a reversal, because Administrative Review Law and the contested-case provisions of the Administrative Procedure Act that require transcripts did not apply to its proceedings. For the reasons that follow, we agree with IDOT.

¶ 53 A. Jurisdiction

¶ 54 We first address our jurisdiction to review the IDOT reconsideration officer's decision. Here, D. Construction sought judicial review under Administrative Review Law. However, as both parties now agree, the Administrative Review Law did not apply to the proceedings before the reconsideration officer. This is because the court's authority to review the final decision of an administrative agency according to Administrative Review Law is restricted to those instances where the act creating or conferring power on the agency expressly adopts Administrative Review Law. 735 ILCS 5/3-102 (West 2020). The Department of Transportation Act does not expressly adopt Administrative Review Law. 20 ILCS 2705/2705-1 *et seq*. (West 2020); *Applegate v. State of Illinois Department of Transportation*, 335 Ill. App. 3d 1056, 1061 (2002).

¶ 55 Rather, writs of *certiorari* are the proper procedure for judicial review when judicial review is not available under Administrative Review Law. *City of Kankakee v. Department of Revenue*, 2013 IL App (3d) 120599, ¶ 14. This is so even when a complaint for judicial review mistakenly asserts jurisdiction under Administrative Review Law, and Administrative Review Law is later determined not to apply. *Id.* A writ of *certiorari* provides the court with subject matter jurisdiction to review an agency's exercise of a quasi-judicial power, as when the agency has adjudicated facts and individual rights. *Applegate*, 335 Ill. App. 3d at 1061. Moreover, a party seeking judicial review of an agency's decision by a writ of *certiorari* is not barred by the doctrine of sovereign immunity from pursuing its claim. *Id.* (citing *Moline Tool Co. v. Department of Revenue*, 410 Ill. 35, 38 (1951) (judicial review of an agency decision, as opposed to an original action against the State, does not encroach upon the doctrine of sovereign immunity)); see also *City of Springfield v. Allphin*, 74 Ill. 2d 117, 125-26 (1978) (noting that, although the procedure in *Moline* was conducted pursuant to Administrative Review Law, "[*Moline's*] applicability was not confined to such cases").

¶ 56 B. Standard of Review

¶ 57 When reviewing the decision of an administrative agency, this court reviews the agency's decision, not that of the circuit court. *Edwards v. Addison Fire Protection District Firefighter's Pension Fund*, 2013 IL App (2d) 121262, ¶ 31. Whether our review is under the Administrative Review Law or a writ of *certiorari*, the standard of review depends on whether the issue is one of law, one of fact, or a mixed question of law and fact. *Beggs v. Board of Education of Murphysboro Community Unit School District No. 186*, 2016 IL 120236, ¶ 50; *Applegate*, 335 Ill. App. 3d at 1061 (standard of review under Administrative Review Law and writ of *certiorari* is the same). Questions of law are reviewed *de novo*. *Beggs*, 2016 IL 120236, ¶50. An agency's factual determinations are considered *prima facie* true and are not to be reversed unless they are against the manifest weight of the evidence. *Id.* A finding is against the manifest weight of the evidence if the opposite conclusion is clearly evident. *Id.* Mixed questions of law and fact are not to be reversed unless they are clearly erroneous. *Id.* "An administrative decision is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Id*. (quoting *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 393 (2001)).

¶ 58 Of the three standards of review, manifest-weight review is the most deferential. *AFM Messenger*, 198 Ill. 2d at 392. If there is anything in the record that fairly supports the decision of the agency, the decision must be sustained. *Gumma v. White*, 345 Ill. App. 3d 610, 615 (2003). Still, the appellate court has a duty to review the entire administrative record, *Derringer v. Civil Service Commission*, 66 Ill. 2d 239, 241 (1978), and the agency's decision must be just and reasonable considering all evidence presented. *Soto v. Board of Fire & Police Commissioners of the City of St. Charles*, 2013 IL App (2d) 120677, ¶ 22.

¶ 59 At various points in their briefs, the parties argue that either the clearly-erroneous or the manifest-weight standard of review should apply to the question of D. Construction's good faith efforts to meet the DBE goal. D. Construction, which seeks reversal of the agency's decision, advocates for the highly deferential manifest-weight review. D. Construction seeks to overcome the deference afforded under that standard of review by noting deficiencies in the administrative record, namely, the absence of transcripts. Although we apply the manifest-weight standard, our decision would be the same under either standard.

¶ 60 C. The Absence of Transcripts Does not Warrant an Automatic Reversal

¶ 61 Contrary to the circuit court's ruling, Administrative Review Law and the contested-case provisions of the Administrative Procedure Act that require transcripts did not apply to the reconsideration hearing in this case. We have already explained why Administrative Review Law did not apply. See *supra* ¶ 54.

¶ 62 Turning to the contested-case provision of the Administrative Procedure Act, the Act provides that, in a contested case:

> "(b) Oral proceedings or any part thereof *shall* be recorded stenographically or by other means that will adequately [e]nsure the preservation of the testimony or oral proceedings and shall be transcribed on the request of any party." (Emphasis added.) 5 ILCS 100/10-35(b) (West 2020).

The Act defines a contested case as "an adjudicatory proceeding *** in which the individual legal rights, duties, or privileges of a party *are required by law to be determined by an agency only after an opportunity for a hearing*." (Emphasis added) 5 ILCS 100/1-30 (West 2020). Accordingly, "[t]he contested[-]cases provisions are not implicated where the ultimate decision on whether to

hold a hearing is left to the discretion of the agency." *Borg-Warner Corp. v. Mauzy*, 100 Ill. App. 3d 862, 866 (1981). Such is the case here.

¶ 63 Section 26.37 generally requires that IDOT's DBE program has "appropriate mechanisms to ensure compliance" with DBE goals. 49 C.F.R. § 26.37(a). IDOT must monitor the projects to ensure that the work pledged to be performed by DBE companies is actually performed by DBE companies. *Id.* §26.37(b). However, this monitoring may be performed in conjunction with a closeout review. *Id*. Subsections 26.53(d) and 26.53(g) more specifically address DBE monitoring procedure prior to and after awarding a contract, respectively. *Id*. §§ 26.53(d), (g). Subsection 26.53(d), which concerns procedure *prior* to the awarding of the contract, requires that an apparent successful bidder be given the opportunity to be heard, including an in-person hearing and the chance to submit documentary evidence. *Id*. § 26.53(d). In contrast, subsection 26.53(g), which concerns procedure *after* awarding the contract, requires only that the prime contractor be prepared to submit documentation if a failure to meet DBE goals is called into question and that IDOT return a written explanation for its decision to the contractor. *Id*. § 26.53(g). This case concerns the procedure afforded by IDOT after it had awarded the contract to D. Construction and therefore implicates subsection 26.53(g). See *id*. By allowing D. Construction to submit documentation and providing it with a written explanation for its decision, IDOT met the procedural *requirements* set forth in section 26.53(g). See *id.* That it exercised its *discretion* to conduct a hearing as allowed for in the broad terms of subsection 26.37(b) and mirroring that set forth in subsection 26.53(d), including an informal evidentiary hearing, did not otherwise implicate the contested-case provisions of the Administrative Procedure Act requiring a recording and transcription of the hearing. See *Borg-Warner*, 100 Ill. App. 3d at 866.

¶ 64 Therefore, IDOT's failure to submit transcripts of the reconsideration hearing did not warrant the effective default judgment granted by the circuit court here. Instead, the question is whether the record is sufficient to allow for meaningful judicial review and whether the record supports the agency's decision. We disagree with the circuit court's alternative analysis in this regard and determine that the record indeed supports the agency's decision.

¶ 65 D. Construction points to *Miles*, 2015 IL App (1st) 141292, as illustrative of an agency's duty to provide a record sufficient to conduct a meaningful judicial review following an informal evidentiary hearing. While we agree that *Miles* is instructive, it ultimately does not support D. Construction's position that the record in the instant case was insufficient to conduct a meaningful judicial review or to support the agency's decision.

¶ 66 In *Miles*, the hearing officer terminated the petitioner's rent-assistance housing voucher following an informal hearing. *Id.* ¶ 1. The officer found that the county housing authority had proved that the petitioner violated the rules of the voucher program because a member of her household, her son, had committed violent criminal activity. *Id.* On judicial review, the trial and appellate courts determined that the record was insufficient to sustain the housing authority's decision. *Id.* ¶ 3.

¶ 67 The appellate court began its analysis with the applicable regulations and an assessment of the record. *Id.* ¶ 22. The case was subject to judicial review through a writ of *certiorari*, rather than Administrative Review Law. *Id.* ¶ 24. The regulations guiding the informal hearing did not require that it be transcribed or recorded. *Id.* ¶ 26. Hearsay evidence was generally admissible. *Id.* ¶ 37. Still, it had been the housing authority's burden to show that the petitioner had violated the terms of the voucher program. *Id.* ¶ 50. The applicable regulations provided that, while hearsay evidence was admissible, it could not be used as the *sole* basis for the hearing officer's

decision. *Id.* ¶ 37. Moreover, while the housing authority was not required to transcribe and record the hearing, it was required to submit a sufficiently complete record of the proceedings so that the court could "perform its task of ensuring that the administrative body complied with due process and supported its decision with competent evidence." *Id.* ¶ 24. The court noted that it would resolve all doubts arising from the incompleteness of the record against the housing authority. *Id.* ¶ 22.

¶ 68 The court determined that, against the agency's own regulations, evidence supporting that the son was a "household member" and participated in "violent criminal activity" consisted solely of unreliable hearsay. *Id.* ¶¶ 36-37. As to the son's address, neither the arrest report nor the police e-mail chain concerning the arrest documented the source of its information. *Id.* ¶ 42. In contrast, the record contained the affidavit of an individual, which the hearing officer failed to reference, who averred that the son lived with him and not the petitioner. *Id.* ¶ 51. As to the "violent criminal activity," the arrest report provided no details of the incident and, while the e-mail chain elaborated about drug activity between the petitioner's household and another household, it again was silent as to the source of the information. *Id.* ¶¶ 41-44. The court rejected the housing authority's argument that the petitioner never denied that her son was a household member and that he had committed violent criminal activity. *Id.* ¶ 35. The hearing officer did not "find" that the petitioner denied or admitted anything. *Id.* Similarly, neither transcripts nor a bystander's report documented whether the petitioner denied or admitted anything. *Id.* The court construed these gaps in the record against the housing authority, and it determined that the evidence did not support the hearing officer's decision to terminate the petitioner from the voucher program. *Id.* ¶ 51.

¶ 69 While D. Construction likens the instant case to *Miles*, the differences predominate. In *Miles*, it was the agency's burden to prove that the petitioner violated the rules of the voucher

program. In the instant case, it was D. Construction's burden to prove that it made good faith efforts to meet the DBE goal, despite its failure to do so. In *Miles*, the documentary record was incomplete, such as an arrest report that referred to a missing field report that may or may not have set forth the details of the charged offense. *Id.* ¶ 10. The instant case involves a complete documentary record, consisting of over 220 pages. It was D. Construction's duty to document and present evidence of its good faith efforts (see 49 C.F.R. 26.53(g)); shortcomings in the documentary evidence are to be weighed against D. Construction, not IDOT. In *Miles*, the source of the hearsay evidence was not documented and/or was anonymous, rendering it unreliable. *Miles*, 2015 IL App (1st) 141292, ¶ 40. In the instant case, the source of the hearsay information was known (Veritas), unbiased, and corroborated. For example, Veritas informed IDOT that it had next to no interaction with CBD and it arranged for shipping to the construction site itself. D. Construction agrees that it instructed CBD to use Veritas and that it gave CBD the funds that it intended for CBD to then give to Veritas. Veritas's opinion that CBD was a pass-through company, though not dispositive, is entirely buttressed by demonstrable facts undisputed by D. Construction.

¶ 70 D. The Evidence Supports the Agency's Decision

¶ 71 We now address in greater detail the documentary evidence supporting the agency's determination of the facts, as measured against the regulations guiding the parties' conduct. Preliminarily, we disagree with D. Construction's statement in its brief that the agency did not make findings of fact adequate to facilitate judicial review. As apparent from the portions of its decision that we have quoted, *supra* ¶¶ 35-37, the agency simply placed several of its factual determinations in the portion of its decision labeled "analysis." See *Morgan v. Department of*

Financial & Professional Regulation, 388 Ill. App. 3d 633, 656 (2009) (the agency's decision should be read as a whole when determining whether the agency made sufficient findings of fact).

¶ 72 We first address evidence supporting the agency's decision that D. Construction did not meet the DBE goal, because CBD did not perform a commercially useful function. D. Construction's opening bidding documents set forth that the federal regulations, "Part 26," applied to its bid and any ensuing contract. Those regulations provide in part that "expenditures for a DBE subcontractor may not be counted toward the DBE goal if the subcontractor is not performing a commercially useful function." 49 C.F.R. § 26.55(c). Section 26.55(c)(1), in turn defines a commercially useful function as follows:

> "(1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities *by actually performing, managing, and supervising the work involved*. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, *for negotiating price, determining quality and quantity*, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.
>
> (2) A DBE *does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction*, contract, or project through which *funds are passed in order to obtain the appearance of DBE participation*. In determining whether a

DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate." (Emphases added.) 49 C.F.R. § 26.55 (c)(1)(2).

¶ 73 D. Construction does not dispute the key facts underlying the agency's determination that CBD did not perform a commercially useful function and was merely an extra participant, including that: (1) D. Construction, not CBD, negotiated with Veritas; (2) D. Construction instructed CBD to use Veritas; and (3) D. Construction provided CBD with funds, which it instructed CBD to pay to Veritas. Moreover, the missing testimony that D. Construction details in its complaint for administrative review and motion for judgment on the pleadings does nothing to undermine the statements made by Veritas that (1) other than the initial purchase order, Veritas had no contact with CBD during the procurement of steel; (2) Veritas, not CBD, arranged shipping from Veritas to the job site.

¶ 74 These key facts support that CBD did not perform a commercially useful function. That CBD had no contact with Veritas during the procurement of steel other than the initial purchase order also shows that it did not satisfy the section 26.55(c)(1) requirement that the DBE "negotiate" or "actually perform and manage" the work necessary to supply steel. That Veritas arranged shipping again shows that CBD did not manage the work of supplying the steel. See *id.* Finally, that D. Construction provided CBD the funds, which it instructed CBD to pay to Veritas shows that CBD did not "pay for the material itself." See *id.* This evidence supports the agency's determination that CBD was merely an "extra participant" through which "funds were passed" to

maintain the appearance of DBE participation. See *id*. Certainly, we cannot say that the opposite conclusion is clearly apparent.[4]

¶ 75 We next address evidence supporting the agency's decision that D. Construction did not establish good faith efforts to meet the DBE goal. Critically, D. Construction conceded heading into the hearing that it did not plan to present evidence of good faith efforts, explaining in its September 8, 2020, position letter, "As for support information regarding a Good Faith Effort, we don't really have any." Instead of arguing that it made good faith efforts, D. Construction essentially argued before the reconsideration officer that it should have been excused from making good faith efforts. D. Construction points to missing testimony, including testimony from Mark Cox and Steve Wahl, that IDOT never informed D. Construction that CBD was not performing a commercially useful function during the performance of the project when there was still time to act differently. It notes that, when CBD failed to pay Veritas, it sought help from IDOT.

¶ 76 This missing testimony does not preclude a meaningful review, because documentary evidence, including assertions contained in D. Construction's e-mail exchanges, elsewhere establishes D. Construction's position that it did not know until the auditing process that IDOT

[4] At oral argument, D. Construction generally challenged IDOT's commercially useful function determination, noting that it paid CBD "considerably more" for the supply of steel than it expected CBD to pass on to Veritas (the documents in the record indicate the difference to be $690,000 versus $616,000). D. Construction also argued that CBD's manufacturing, as opposed to supply, of steel slider plates constituted a commercially useful function. These arguments are forfeited. Ill. S. Ct. Rule 341(h) (7) (points not argued in the brief may not be raised at oral argument). In any event, we observe that the excess payment to CBD for the supply of steel does not support that CBD performed a commercially useful function rather than served a pass-through. We further observe that CBD's manufacturing bid was $32,716, approximately 5% of the alleged $629,000 DBE shortfall.

believed that CBD did not perform a commercially useful function and that D. Construction sought help from IDOT.

¶ 77 More to the point, the rehearing officer appeared to *accept* for the purposes of argument that IDOT never informed D. Construction that CBD was not performing a commercially useful function. Instead, the rehearing officer determined that "IDOT has no duty to track the DBE dollars spent and analyze the [commercially useful functions] ***. D. Construction is not a novice company in dealing with IDOT and DBE goals, and *it was incumbent on [D. Construction] to make certain that its DBE's were performing [commercially useful functions*]." (Emphasis added.)

¶ 78 Not only does D. Construction fail to substantively dispute the correctness of the agency's position, but the regulations and the documentary evidence support both the correctness and the fairness of the agency's decision. The post-award regulations provide that it is the *contractor's* duty to document its good faith efforts and be prepared to submit the documentation upon request. 49 C.F.R. § 26.53(g). D. Construction's bidding documentation acknowledged an awareness that the contract would require DBEs to perform commercially useful functions. The January 30, 2015, bid and supporting DBE utilization plan, which D. Construction representatives signed, provided that "the requirements of 49 CFR Part 26 [will] apply to this contract." The attached DBE participation statements, which D. Construction and CBD representatives signed, provided that "[t]he DBE firm listed below has agreed to perform a commercially useful function."

¶ 79 Neither do we find compelling D. Construction's argument that the agency's decision unfairly penalized it for CBD's wrongdoing, particularly when, according to D. Construction, IDOT contemporaneously "knew and approved" that D. Construction directly paid Veritas the second half of the funds to keep the project moving forward. This argument seems to ignore that the rehearing officer *did* credit D. Construction's claim that CBD was a wrongdoer and granted D.

Construction leniency for the consequences of its failure to make good faith efforts to meet the DBE goal. In any event, CBD's failure to transfer the funds to Veritas such that D. Construction paid duplicate funds directly to Veritas to ensure the completion of the project is not what rendered CBD a pass-through company; rather, the series of events that followed brought to IDOT's attention that CBD was not performing a commercially useful function from the beginning.

¶ 80 Given our determination, we do not address IDOT's alternative arguments, including that its determination of good faith efforts constituted an unreviewable act of discretion.

¶ 81 III. CONCLUSION

¶ 82 The decision of the agency is affirmed and the judgment of the circuit court of Will County is reversed.

¶ 83 Agency decision affirmed. Circuit court judgment reversed.