Rec 4-27-88

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, Petitioner, vs. GROVES-WATKINS CONSTRUCTORS, Respondent.	)	CASE NO. 71,081

pl

ANSWER BRIEF OF GROVES-WATKINS CONSTRUCTORS

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PREFACE

Groves-Watkins Constructors (Groves) was the appellant before the First District Court of Appeal and is the respondent in this proceeding. The Florida Department of Transportation (DOT) was the appellee before the First District and is the petitioner in this proceeding.

Citations to the record on appeal will be shown in this brief as "R ___", with the appropriate page number inserted in the blank. Citations to the transcript of the formal administrative hearing shall be shown as "T ___", with the appropriate page number from the transcript inserted in the blank. Citations to the Hearing Officer's Recommended Order shall be shown as "R.O. at ___", with the appropriate page number from the recommended order inserted in the blank.

All underlining in this brief has been added for emphasis, unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Respondent, Groves-Watkins Constructors, disagrees with the statement of the facts and case contained in Petitioner's, Department of Transportation (DOT), Initial Brief because the statement is incomplete and misleading. Groves presents the following supplemental statement to provide a more accurate picture of the issues involved in this case.

Groves-Watkins Constructors (Groves) is a joint venture comprised of two large engineering and construction companies, S. J. Groves, Inc. and Watkins Company, which formed a joint venture for the purpose of pooling their resources and talents to bid on certain DOT projects, including a project known as "Package U". (T 31-33). Package U involves the construction of a complex highway interchange at the intersection of the Sawgrass Expressway, Interstate 595, and Interstate 75 in the western portion of Broward County, Florida. The bid specifications indicate that the project is extremely large and will take at least three years to complete. (R 1291, 258). The project consists of roadways, a substantial amount of embankment or earthwork (2,840,000 cubic yards), and many bridges. Some of the bridges will be built by using traditional I-beam construction techniques. Six of the bridges will be built by using a more innovative technique with pre-cast concrete segments. (T 32, 47).

Six construction companies were involved in the bidding on Package U. (T 43). These six companies operated as three joint ventures and submitted a total of three bids. (T 43). When DOT opened the bids on May 28, 1986, Groves' bid of approximately $54.47 million was the lowest. (T 157, 158; R 258-61).

However, DOT rejected all bids. A hand-written notation on DOT's bid tabulation indicated that all three bids were rejected because, in DOT's opinion, the bids were too high. (R 258-61; T 157, 158). DOT officials confirmed, and the Hearing Officer found, that DOT's estimate for Package U was approximately $41.5 million, or approximately $12 million less than Groves' bid. (T 146, 149; R.O. at 4). No evidence contrary to this finding was presented by DOT. Groves filed a timely formal protest and a petition for a formal administrative hearing pursuant to Sections 120.53(5) and 120.57(1), Florida Statutes. (R 1305-07).

A formal evidentiary hearing was conducted by a Hearing Officer of the Division of Administrative Hearings on August 29, 1986. In his detailed recommended order containing 20 pages of factual findings, the Hearing Officer found that DOT rejected Groves' bid solely because DOT believed the bid was too high. (R.O. at 3). He stated that the fundamental issue in this proceeding was whether DOT's proposed decision to reject Groves' bid was arbitrary and capricious. He found that DOT's action was arbitrary, because there was no competent, substantial evidence of record to support or justify DOT's proposed action. In his findings of fact, the Hearing Officer specifically stated:

> The Department [DOT] offered no evidence in support of its rejection of the bid [by Groves] except for its erroneous analysis of the difference between the bid price and its original estimate. It [DOT] did not introduce any proof to establish that a rebid of the package would result in more competition between bidders or significantly lower bid price. Since there is no evidence that such an advantage would occur if the project were rebid, a decision to rebid the project instead of award it to the lowest bidder of three pre-qualified bidders would be an unfounded and arbitrary decision. If the Department rebid

> the package, the Petitioner [Groves] would have to spend an additional $40,000 to $150,000 to prepare for the new bid and the Petitioner would also suffer a detriment as a result because its competitors would have some advantage in knowing Groves' best prices on the elements of the project. Additionally, Groves would be required to keep its employees, equipment, and bonding capacity committed to this project on reserve while the rebidding process was accomplished, thus diminishing its ability to successfully bid on other projects until a decision was made on the rebidding. It has thus been established that the Department's original estimate was flawed and unreasonable in the circumstances and that that bid submitted by Groves was a responsive, reasonable bid and, without dispute, is the lowest bid submitted. (R.O. at 21)

This finding was also quoted by the First District Court of Appeal in support of its decision in this case. See Groves-Watkins Constructors v. State, Department of Transportation, 511 So.2d 323, 327 (Fla. 1st DCA 1987).

The Hearing Officer made extensive and detailed findings of fact to support his conclusion about these ultimate facts. He found that:

> In summary, it has been established that DOT underestimated the value of Package U in the following manner: (1) embankment was underestimated by about $6 million. (2) The pre-cast bridge segment portion of the job was underestimated by about $5 million. (3) The cost of mobilization was underestimated by at least $1.2 million. Therefore, the total DOT estimate of a reasonable and appropriate price for this project is at least $12.2 million too low. If the Department's estimate of $41.5 to $42.4 million was corrected by adding this $12.2 million, then the total revised estimate for Package U would be $53.7 to $54.6 million. Groves bid $54.4 million which bid would be no more than 1.3 percent higher than DOT's thus corrected estimate. If the DOT corrected estimate were a total of $54.6 million, it would actually be 3/10 of a percent higher than Groves' bid. Obviously, if the "seven percent policy" of the

> Department were applied to that corrected estimate, the Department would be required to reward the contract to Groves. (R.O. at 20-21)

See also Groves v. DOT, 511 So.2d at 327.

DOT rejected all of the bids on Package U because, in DOT's opinion, the bids were too high in comparison to DOT's estimate and thus fell outside of DOT's "seven percent" policy. (R.O. at 3, 4). DOT's non-rule policy is that, for projects valued at more than $250,000, a contract will be automatically awarded without further review if the lowest bid is no more than seven percent above DOT's estimate of the project's value. (T 136, 154, 156, 163). If the lowest bid is more than seven percent above the DOT estimate, DOT may or may not award the contract. In this case, Groves' bid was within 1.3 percent of a reasonable estimate and, therefore, DOT's policy mandates that the contract should have been awarded to Groves. (R.O. at 20, 21).

As indicated above, the Hearing Officer found that there were three major portions of the project which accounted for most of the discrepancy between the DOT estimate and Groves' bid. Those major items were the pre-cast concrete bridge segments, embankment material (i.e., earthen fill), and "mobilization" costs (i.e., the costs of preparing for and starting construction). (R.O. at 4-5). Although DOT has experience in estimating these costs in standard road and bridge projects, the Hearing Officer found that DOT's estimate in this case was fundamentally flawed because of the specific and unique factors affecting this project.

Package U requires the construction of 6 bridges with pre-cast concrete segments. (T 32, 47; R 508-1210). The difficulty

and complexity of segmental bridge construction can vary greatly depending upon a variety of factors. (T 51, 52, 55, 58). Package U involves an extremely complex and difficult series of bridges. (T 55, 58, 59, 188). The project requires the construction of 3 different levels of bridges above heavy highway traffic. (T 55, 188). The bridges curve, sometimes radically, in both the horizontal and vertical planes. There are many variations in the dimensions, numbers, thicknesses, and curvatures of the segments. (T 54, 55). On a scale of 1 to 10, with the number 10 indicating the most difficult bridge to construct, the bridge work on Package U would rate at least a "9." (R.O. at 13; T 55).

With regard to the cost of the pre-cast bridge segments, the Hearing Officer found that DOT

> has had very little experience with segmented bridge construction since it is a relatively new innovation in the bridge construction industry. This is especially the case with regard to the complex-curved, segmented bridge construction involved in the case at bar. (R.O. at 6).

By comparison, the Hearing Officer found that:

> The Petitioner [Groves] is especially, and somewhat uniquely, experienced of contracting companies in this country, in the design, construction, estimating and bidding involving segmented, pre-cast concrete bridges. (R.O. at 6).

These findings were supported by evidence such as that showing S.J. Groves, Inc. to be the largest bridge building company in the country. (T 46, 47, 99; R.O. at 6). The reliability and accuracy of Groves' bid concerning pre-cast concrete bridges was thus well-supported under these special circumstances.

Groves and Watkins independently prepared estimates,

compared their two estimates, and then jointly refined them into a single bid submitted to DOT. (T 39-40). They also visited the construction site for Package U and investigated other construction projects in the area. (T 101-03). They interviewed contractors, materialmen, laborers and others who were knowledgeable about local working conditions. They invested approximately 2100 man-hours and approximately $150,000 worth of time and expense in the preparation of their bid. (R.O. at 5; T 40, 42).

Groves' bid price for the bridge segments was based on actual quotes that Groves received from local materialmen, suppliers, and subcontractors immediately prior to the submission of Groves' bid. (R.O. at 14; T 41, 42, 63, 64). These quotes were evaluated in light of the historical data and experience that Groves had accumulated through its extensive work on other segmental bridge projects. (R.O. at 14).

After considering the evidence which demonstrated the accuracy and reasonableness of Groves' bid, the Hearing Officer found that:

> [T]he Department did not offer competent, substantial evidence which could controvert the reasonableness or correctness of the total price on the bridge segment portion of the [Groves] bid. (R.O. at 15)
>
> . . . .
>
> The evidence does not clearly reveal the specific manner in which DOT formulated its estimate for the bridge segment portion of this project other than its reliance upon historical pricing information for other bridge-interchange construction projects. That reliance on historical price data, or at least the data replied upon, was shown to be inappropriate for the bridge construction involved in this proceeding. Package U

> involves a complex segmental bridge which is a unique type of construction and design and of which there are few comparable examples thus far in Florida. . . . The complexities of casting and erecting so many differently configured segments [in Package U] causes substantial increase in manufacturing costs and erection time and difficulty, all of which renders the project substantially more expensive and significantly dissimilar to those projects relied upon by the Department for its historic cost and price examples. (R.O. at 16-17).

See also Groves v. DOT, 511 So.2d at 326.

The Hearing Officer also noted that DOT had "grossly underestimated" the cost of "Package M," another highway interchange project located in Broward County. (R.O. at 19). The Hearing Officer found that Package M was "essentially identical" to Package U. (R.O. at 17). Package M was "the only other project identified at the hearing that involved complex segmental bridge construction." Id. DOT's failure to prepare an accurate estimate on an identical project was further proof of the unreasonableness of DOT's estimates prepared for projects involving complex construction techniques.[1]

Groves conducted a major investigation before it established the embankment material cost in the bid price for Package U. (T 101, 102). The cost of embankment material was verified by a

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[1] Ironically, DOT also rebid Package M after increasing its original estimate on the project by approximately 22%. (T 249-51). On rebid, the lowest bid was still 20% above DOT's revised estimate. Nevertheless, DOT awarded the contract. (R.O. at 18; R 1369-70). Thus, DOT's original estimate was more than 40% below the bid it finally accepted. DOT's weak effort in its Brief to support the general reliability of its estimating procedures ignores the record evidence that DOT grossly underestimated the only two similar projects [Projects U & M] involving complex bridge construction. The other projects cited by DOT were all dissimilar. (R.O. at 16-17).

significant amount of field work and historical data. Among other things, Groves contacted 12 borrow pit owners and 8 subcontractors for information about the cost of the fill material and hauling. (R.O. at 8-9; T 102, 112). Groves then obtained actual quotes immediately before it submitted its bid. (T 41, 42). To further enhance the competitiveness of its bid, Groves even reduced its bid price for embankment materials by $1,000,060. (R.O. at 10; T 110, 115, 116).

In spite of Groves' efforts to make its bid as competitive as possible, DOT's estimate for embankment material was still $6 million less than Groves' bid. (T 75, 219). However, the Hearing Officer found that the DOT "estimate was not proven to be based upon competent data." (R.O. at 11). DOT relied on historical data about other projects, but

> DOT's evidence did not establish that these projects used as comparable examples in preparing its estimate for the embankment portion of this project were substantially similar in terms of the type of embankment work involved, as well as the location and price of fill dirt, so as to constitute a comparable situation for estimating purposes to that involved in Package U. (R.O. at 11).

DOT's estimate was based upon information that was outdated by at least two months and perhaps as much as one and a half years. (R.O. at 11).

Groves' bid was based upon actual quotes that Groves received from suppliers and haulers only one or two days before the bid was submitted. These quotes were

> the best information about existing market price conditions for fill dirt extant in this record and were shown to establish an actual price at which the materials could be purchased, as opposed to an estimate [by DOT] which itself was shown to be based upon dated

> information in terms of dirt prices. (R.O. at 11-12).

Accordingly, the Hearing Officer found that:

> [I]t has been established that Groves' bid price for the embankment portion of the job is reasonable. The DOT estimate for embankment construction is approximately $6 million below that of the Petitioner. It is not based on accurate, current information and is erroneous. (R.O. at 12).

The third major discrepancy between DOT's estimate and Groves' bid involved the cost of mobilization. Groves bid $5 million for mobilization. The bid included $1.2 million for a casting yard that is necessary for manufacturing bridge segments. (T 71-73). Groves demonstrated that $1.2 million is a reasonable price for this part of the mobilization cost. (R.O. at 19-20). The price of the casting yard is based upon and consistent with Groves' experience in manufacturing bridge segments at construction sites all over the country. (T 72, 73).

> No evidence was offered to establish that [the casting yard] was either not necessary or that the price bid for that portion of the project was not an appropriate price. . . . Since the Department failed to refute the necessity and appropriateness of a pre-casting yard in the mobilization stage of this job, nor refuted the bid price of $1.2 million for that aspect of the project, it has been demonstrated that the Department's estimate of mobilization expenses is at least $1.2 million too low. (R.O. at 20).

The evidence showed that DOT completely failed to include the cost of a casting yard in its estimate. (T 76, 247). The Hearing Officer found that DOT's "total deletion of any allowance for the cost of building the bridge segment casting yard" accounted for "a substantial portion of the mobilization prices in dispute." (R.O. at 18).

In light of his factual findings, the Hearing Officer concluded that DOT's estimate of the total price of Package U was not accurate or reasonable. (R.O. at 20, 21). If DOT's estimate were revised to account for the three major errors in the estimate, the estimate would be within 1.3 percent of Groves' bid. Consequently, the Hearing Officer found that the Department would not be justified in rejecting Groves' bid on the basis of its seven percent non-rule policy. (R.O. at 24). In summary, the Hearing Officer concluded that

> the Department has failed to present competent, substantial evidence to support its preliminary agency action of rejecting all bids and rebidding the project based upon its original flawed estimate. Given the above Findings of Fact and preponderant evidence of record, if the Department adheres to its original, unrevised, erroneous estimate and rejects the bids, given its failure to consider proven germane factors attributable to that geographical area, the type of complex bridge structures involved, the traffic burdens to be contended with and the essentially identical project from which a more appropriate comparison of pricing could have been obtained, such action would be arbitrary. There has simply been no competent, substantial evidence to establish a factual basis upon which the Department is justified in rejecting the Petitioner's bid. Such a rejection in the face of the evidence adduced supportive of the above findings of fact would constitute an arbitrary act. Mayes Printing Company vs. J. A. Flowers, 154 So.2d 859 (Fla. 1st DCA 1963). Accordingly, given the above Findings of Facts and evidence of record, the Petitioner is entitled to award of the contract on the subject project. (R.O. at 25)

In spite of the Hearing Officer's findings of fact, DOT entered a final order on December 16, 1986, which rejected Groves' bid. (R 1408-47). In its final order, DOT reweighed the evidence, "supplemented" some of the Hearing Officer's findings

of fact, and flagrantly rejected many other findings. In its final order, DOT argued that the Hearing Officer's findings of fact did not include some of the assertions that DOT now wishes to interject into this case. DOT also raised a variety of new legal and factual issues that were never presented to the Hearing Officer and which had no support in the evidence of record.

On December 30, 1986, Groves appealed DOT's order to the First District Court of Appeal. Groves also took action to preserve its rights on appeal. On January 13, 1987, Groves sought and on January 20, 1987, was granted an expedited appeal by the First District. On January 29, 1987, Groves filed a petition for writ of prohibition with the First District to prevent DOT from soliciting bids and awarding the contract until its appeal could be completed. See Groves v. DOT, 511 So.2d at 335 n.1.

In a further effort to protect its position, on March 26, 1987, pursuant to Section 120.53(5)(b), Florida Statutes, Groves filed a notice of intent to protest DOT's rebid of the project while this case was pending. DOT summarily dismissed Groves' notice of protest. DOT did not provide a hearing to resolve Groves' protest. DOT did not give Groves an opportunity to demonstrate its standing in that related case. Indeed, DOT did not even give Groves a chance to file a petition to formally protest DOT's action of rebidding. The appeal of this related matter is now pending before the First District Court. Id.

Further, on April 13, 1987, Groves filed a petition for an extraordinary writ to prevent DOT from awarding the contract after rebid. Even though both of Groves' petitions seeking to

stay DOT's rebidding and awarding of the contract were denied, the First District Court of Appeal elected to treat the latter petition as a motion for stay in this case. Id.

On appeal, the District Court held that the Hearing Officer's findings of fact must prevail because they were supported by competent, substantial evidence. Since his findings were supported by such evidence, DOT committed reversible error by rejecting the Hearing Officer's findings and reweighing the evidence. Id. The District Court also concluded that the accuracy and reasonableness of a construction estimate was not a determination infused with policy considerations, but was a factual issue susceptible of ordinary proof. Id. at 328. All judges, including the dissent, recognized that there was competent, substantial evidence to support the Hearing Officer's findings.

The District Court found that "the only evidence offered by DOT in support of its rejection of the bid was the difference between the bid price and DOT's estimate." Id. at 330. The District Court rejected DOT's attempts to inject new issues into its final order since those issues were not raised before the Hearing Officer and there was no evidence of record to support DOT's allegations. Id. at 330. For these reasons, the District Court rejected DOT's allegations about budgetary issues, changed conditions, and the effect of redesigning the project. Further, regarding another issue DOT attempts to raise, the Hearing Officer had found that DOT failed to "introduce any proof to establish that a rebid of the package would result in more competition." (R.O. at 21).

The District Court also rejected DOT's contention that a different standard applied to DOT under the Administrative Procedure Act (APA), and that it could reject the Hearing Officer's findings and reach its own factual finding unless fraud, corruption, or unfair dealing was shown. The District Court held that DOT was not immune from Chapter 120, and must accept, pursuant to Section 120.57(1)(b)9., the factual findings of the Hearing Officer which concluded that the DOT's action was arbitrary, because such findings were based on competent, substantial evidence. Id. at 328, 329.

The District Court noted that there was no record evidence before it regarding the purported rebidding, letting, and undertaking of the contract by another party. Finding that DOT had, nevertheless, proceeded at its own peril in rebidding the contract while it knew this case was pending, and in the face of an adverse Hearing Officer's Recommended Order, the District Court determined that the contract should be awarded to Groves. The District Court relied, in part, on the relief provisions in Section 120.68(13)(a), Florida Statutes. Id. at 334-35.

DOT petitioned this Court for review based on conflict of decisions, and this Court granted such review. See Article V, Section 3(b)(3), Florida Constitution.

SUMMARY OF ARGUMENT

This case concerns fundamental principles of the APA, and requires their straightforward application. A public agency which is subject to the competitive bidding procedures within the APA cannot simply ignore the factual findings of a Hearing Officer arising from a bid protest brought under these procedures. In this case, DOT acted arbitrarily and capriciously in rejecting Groves' low bid, because DOT's sole basis for the rejection, the discrepancy between DOT's estimate and Groves' bid, was irrational. The Hearing Officer properly concluded that DOT could not rationally reject Groves' low bid by comparing it to a flawed and unreasonable estimate. Under the APA, DOT cannot ignore this finding.

DOT argues that a special standard applies to it because of its statutory discretion regarding public contract awards, and that this discretion may not be challenged in the absence of fraud or misconduct. This position ignores the settled caselaw which requires public entities to award contracts on a rational, non-arbitrary basis. DOT's position also ignores the explicit requirements of the APA which mandate a factual basis, supported by a record, to uphold an agency's exercise of its discretion.

Principles of separation of powers are not violated either by the APA requirement that the Hearing Officer's findings of fact be accepted by DOT if supported by competent, substantial evidence, or by the District Court order awarding the contract to Groves. The determination of the reasonableness of a cost estimate is a factual issue, devoid of policy considerations, and is well within the purview of the Hearing Officer's responsiblity

to act as fact-finder. Further, the District Court has the statutory authority to remedy DOT's abuse of discretion, based on the Hearing Officer's findings, by ordering the award of the contract, which, but for DOT's illegal conduct, would have gone to the lowest bidder, Groves.

The remedy of contract award is appropriate since this is the exact remedy contemplated under the bidding laws. DOT's resistance of Groves' efforts to stay the rebidding and letting of the contract cannot become a basis for asserting that Groves has waived this remedy. DOT's assertion that two contracts will arise is pure speculation and is not based on any record evidence before this Court.

Public policy demands that the remedy of contract award be available to a frustrated low bidder, so that bidders will challenge arbitrary agency awards. Encouraging such challenges by providing adequate remedies ensures that the public purpose of awarding the contract to the lowest, responsible bidder will be vigorously protected.

I.

UNDER THE APA, DOT CANNOT REWEIGH THE EVIDENCE AND REJECT THE HEARING OFFICER'S FINDINGS OF FACT WHICH ARE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE

> "Again an agency of the state has entered an order purporting to affect the substantial rights of a party without complying with Section 120.57, Florida Statutes (1977). . . . Again it is the Department of Transportation . . . . Again we reverse." Capeletti Brothers, Inc. v. Department of Transportation, 362 So.2d 346, 347 (Fla. 1st DCA 1978).

DOT's primary argument is that the standards of the Administrative Procedure Act (APA), Chapter 120, Florida Statutes, do not apply to DOT. In particular, DOT stubbornly argues in the face of overwhelming authority to the contrary that the administrative hearing procedures under Chapter 120 "do not set up a scheme to hold a hearing to formulate a decision de novo", and that the hearing officer merely reviews the decision of the agency. (DOT Brief at 10). DOT does not cite any cases in support of its novel proposition, which has been succinctly rejected in the bellwether case of McDonald v. Department of Banking & Finance, 346 So.2d 569 (Fla. 1st DCA 1975):

> Section 120.57 proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily.

Id. at 584. See also Couch Construction Co. v. Department of Transportation, 361 So.2d 172, 176 (Fla. 1st DCA 1978).

DOT, thus, begins its argument with a fundamental misunderstanding of the APA. Based on this misunderstanding, DOT asserts in this case that it can substitute its judgment on disputed factual issues for the findings of the hearing officer,

and cannot be challenged in this action unless illegality, fraud, oppression, or misconduct are shown. DOT essentially argues that it may act arbitrarily and unreasonably in rejecting public bids, so long as the elements of fraud or misconduct do not exist. In short, DOT seeks virtual judicial exemption from the APA.

Section 120.57, Florida Statutes (1985), applies in all proceedings in which the substantial interests of a party are determined by an agency. Section 120.57(1)(b)9., Florida Statutes (1985), provides:

> The agency may adopt the [hearing officer's] recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order, but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

This subsection has been repeatedly interpreted and applied by the courts. In Heifetz v. Department of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985), the court again carefully warned agencies about substituting their judgment for a hearing officer's findings:

> Despite a multitude of cases repeatedly delineating the different responsibilities of hearing officers and agencies in deciding factual issues, we too often find ourselves reviewing final agency orders in which findings of fact made by a hearing officer are rejected because the agency's view of the evidence differs from the hearing officer's view, even though the record contains competent, substantial evidence to support the hearing officer's findings.

The court proceeded to explain in detail the different

responsibilities of the agency and the hearing officer:

> Section 120.57(1)(b)9, Florida Statutes (1983), mandates that an agency accept the factual determinations of a hearing officer unless those findings of fact are not based upon "competent substantial evidence". . . .
>
> Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact. McDonald v. Department of Banking & Finance, 346 So.2d 569 (Fla. 1st DCA 1977). It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. State Beverage Department v. Ernal, Inc., 115 So.2d 566 (Fla. 3d DCA 1959). If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.

Heifetz, 475 So.2d at 1281.

In the case at bar, DOT flagrantly violated the provisions of Section 120.57(1)(b)9. by reweighing the evidence, rejecting various findings of fact made by the Hearing Officer, and substituting its own allegations to suit its own ends. Faced with an unfavorable order that correctly identified deficiencies in DOT's estimating process, DOT simply dispensed with the APA process. See Howard Johnson Co. v. Kilpatrick, 501 So.2d 59, 60 (Fla. 1st DCA 1987); Tuveson v. Florida Governor's Council, Inc., 495 So.2d 790 (Fla. 1st DCA 1986), rev. denied, 504 So.2d 767 (Fla. 1987).

Pointedly, DOT does not assert that the Hearing Officer's factual findings were not supported by competent, substantial evidence. This would be a difficult position since all judges in the First District Court opinion recognized that such evidence existed. Rather, DOT attempts to support its overt rejection of these findings by creating a different administrative standard for bid protest proceedings, now authorized and governed under Section 120.53(5), Florida Statutes.

DOT bases the argument for its unique standard on an incomplete reading of Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So.2d 505 (Fla. 1982), and Willis v. Hathaway, 95 Fla. 608, 117 So. 89 (1928). First, DOT overlooks that neither of these cases addresses bid procedures under the APA. DOT further ignores that Willis prohibits an agency from rejecting a bid based on "ignorance", "lack of inquiry", or "arbitrary will". 117 So. at 95. Even under this early bid protest case, an agency could not arbitrarily exercise its will, as DOT has done here by proceeding with no rational or factual basis to support its actions. DOT, through lack of diligent inquiry and in ignorance of reliable data, arbitrarily exercised its will by rejecting Groves' bid. Thus, DOT violated even the fundamental doctrines of Willis.

The argument advanced by DOT also fails to acknowledge that the APA bid procedures have significantly altered the procedures by which an agency's initial determination to reject bids is reviewed. No longer is the agency's initial decision a final decision, subject only to judicial review for arbitrariness. Cf. Mayes Printing Co. v. Flowers, 154 So.2d 859 (Fla. 1st DCA

1963). No longer is there a presumption that an agency's initial decision is correct. See Department of Transportation v. J.W.C. Co., 396 So.2d 778, 789 (Fla. 1st DCA 1981). Now, the agency must accept a hearing officer's findings in formulating its final decision if those findings are supported by competent, substantial evidence. The agency is no longer the fact finder and does not resolve disputed factual issues.

The instant case is analogous to Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc., 354 So.2d 446 (Fla. 1st DCA 1978), in which the district court recognized that a public agency (the Jacksonville Electric Authority [JEA]) could not act arbitrarily when deciding whether to award a public contract.

> [T]he law does require that where discretion is vested in a public agency with respect to letting public contracts on a competitive basis, the discretion may not be exercised arbitrarily or capriciously but must be based upon facts reasonably tending to support the conclusions reached by such agency.

Id. at 450, quoting City of Pensacola v. Kirby, 47 So.2d 533 (Fla. 1950). The district court also stated that the JEA, like other public bodies, does not have unlimited discretion to arbitrarily reject bids.

> Nor do we accept Appellants' contentions that JEA has unbridled discretion to reject any and all bids "with or without" cause. Such action, as with all other discretionary functions of public entities, is subject to the requirement that its exercise be not arbitrary, unreasonable or capricious. Without these limitations, the purpose of competitive bidding is circumvented. Rejection of all bidders then becomes a means of allowing a favored bidder another chance to submit a low bid.

Id. at 450. The district court overturned the JEA's decision, even though there was no proof of fraud or corruption.

Wood-Hopkins instructs us that DOT, like the JEA, does not have unbridled discretion to reject bids without cause. It also establishes that a decision which is not based upon facts is arbitrary and will be overturned, even outside of the APA, without proof of fraud or corruption. Finally, it demonstrates that the district court has the authority to instruct an agency to award a contract where the agency's refusal to award the contract was unreasonable. This is shown because the district court in Wood-Hopkins upheld the award of the contract to the frustrated low bidder.

The Wood-Hopkins case is consistent with well-established Florida law. In Couch Construction Co. v. Department of Transportation, 361 So.2d 172 (Fla. 1st DCA 1978), the court addressed another situation where DOT had rejected all bids. Although the court acknowledged that DOT had the discretion to reject all bids, it limited the agency's exercise of this discretion.

> In making such a determination, the Department cannot act arbitrarily. The Administrative Procedure Act requires that the Department's decision be by a final order that takes account of countervailing evidence and argument. When, as here, there are no rules which define the circumstances in which the Department will reject all bids and readvertise, the Department's order in Section 120.57 proceedings must provide visible proof that the Department is proceeding rationally within the bounds of its discretion and not arbitrarily.

Id. at 175. Similarly, in Mayes Printing Co. v. Flowers, 154 So.2d 859, 864 (Fla. 1st DCA 1963), the court recognized that:

> Public officers have a discretion in the awarding of contracts, yet that discretion may not be exercised arbitrarily or capriciously . . . . However, if the award is made to one

> other than to the lowest bidder, it must be based upon facts which reasonably support the conclusion.

More recently, in Baxter's Asphalt & Concrete, Inc. v. Department of Transportation, 475 So.2d 1284 (Fla. 1st DCA 1985), the court stated:

> The statutory grant of discretion in awarding contracts to responsible bidders places a heavy burden on DOT to show it did not act arbitrarily or capriciously and that its actions are based upon facts reasonably tending to support the actions.

Id. at 1286-87. See also Capeletti Brothers, Inc. v. Department of General Services, 432 So.2d 1359, 1363 (Fla. 1st DCA 1983) (an award of a contract may be overturned if shown to be arbitrary).

The case on which DOT relies most heavily to support its special standard, Liberty County, is also inapplicable to the factual situation now before this Court. The issue in Liberty County was whether the county could reasonably determine that a defect in a bid was minor, and waive that defect. The present case does not involve an agency's ability to waive a defect. Rather, this case concerns whether, consistent with the APA, DOT can reject a hearing officer's factual findings which are supported by competent, substantial evidence.

Moreover, DOT's misreading of Liberty County would require the Court to overturn 60 years of jurisprudence which holds that agencies cannot act arbitrarily in awarding public contracts. Since 1928 this Court has recognized that an agency's exercise of discretion in the bidding process will be overturned if it is based "on a misconception of law or in ignorance, through lack of inquiry, or was the result of arbitrary will or improper influence or in violation of law." Willis v. Hathaway, 95 Fla.

608, 118 So. 89, 95 (1928). Again in 1950, this Court in City of Pensacola v. Kirby, 47 So.2d at 536, held that agencies must award public contracts based upon factually supported decisions, and could not act arbitrarily. These fundamental principles have been consistently applied by the district courts. See, e.g., Capelletti Brothers, Inc. v. State, Department of General Services, 432 So.2d 1359, 1363 (Fla. 1st DCA 1983); Marriott Corp. v. Metropolitan Dade County, 383 So.2d 662, 667-8 (Fla. 3d DCA 1980); Mayes Printing Co. v. Flowers, 154 So.2d at 864.

DOT, in effect, argues that it could utilize any irrational method of awarding contracts so long as the method (such as drawing straws) was conducted in good faith and without fraud. Under DOT's reading of Liberty County, an honest lunatic could arbitrarily award contracts by using a totally whimsical method and the public would have no remedy.

Willis and its progeny make it clear that an agency cannot support an exercise of its discretion under Liberty County by asserting it merely acted arbitrarily and capriciously. If such a standard applied, the provisions of Chapter 120 would have no meaning. Substantially affected persons could not help an agency reach correct decisions or change an agency's mind. See Capelletti Brothers, 432 So.2d at 1363. The purposes of the competitive bidding process would be circumvented. See Wood-Hopkins, 354 So.2d at 450; Marriott Corp., 386 So.2d at 665.

Here, the Hearing Officer's findings of fact conclusively established that DOT's decision was unreasonable, yet DOT arbitrarily clings to its unsupportable position. Now that the Hearing Officer has ruled, there is no question about whether

DOT's decision "may appear erroneous." Liberty County, 421 So.2d at 507. It is erroneous and arbitrary. There is no room for disagreement between reasonable people because, pursuant to Section 120.57(1), Groves has clearly proven that DOT's decision is not supported by the facts.

The public policy implications of DOT's argument are extremely disturbing. If DOT is not accountable for its carelessness in preparing estimates, and is only accountable for willful or fraudulent acts, DOT has no legal motivation to prepare accurate estimates based on reliable data. DOT's approach would gladly tolerate and ultimately encourage inaccurate estimates and subvert the entire competitive bidding process. Excessive estimates would result in over-priced contracts being accepted. Unduly low estimates would lead to needless rebidding in which a higher bid may ultimately be accepted. If bids are chosen in comparison to an irrational base line, irrational and detrimental choices will result. As a consequence, the public will not be protected from whimsical decisions.[2]

In it Brief, DOT tries to raise new issues that were not raised in the proceedings below. For example, DOT failed to present competent or credible evidence to show that the concurrence of the Federal Highway Administration was required in this case. Nor did DOT present evidence on the applicability of any federal statute, including the one now cited in its Brief

[2]DOT's reading of Liberty County is so untenable that it cannot possibly create conflict with the decision in the case under review. Therefore, Groves submits that jurisdiction was improvidently granted, and the case should be dismissed due to the lack of any direct and genuine conflict of decisions.

before this Court. Although DOT's witness stated that federal concurrence is required "in some cases", he never testified that it was required in this case. (R 167). Moreover, DOT introduced no evidence to suggest that federal concurrence would be affected if DOT awarded the contract to Groves. See Groves v. DOT, 511 So.2d at 330.

More fundamentally, DOT never properly raised these issues at the hearing or in its proposed order. DOT cannot raise issues on appeal that were not properly raised before the Hearing Officer. See Rudloe v. Florida Department of Environmental Regulation, 12 F.L.W. 2900 (Fla. 1st DCA Dec. 17, 1987). In Thorn v. Florida Real Estate Commission, 146 So.2d 907 (Fla. 2d DCA 1962), the court did not permit an agency to base its decision on its own records which were not introduced at hearing, because all parties were not apprised of this evidence and given a chance to explain, test, or refute it. This violated due process.

If DOT intended to raise these issues as defenses, the burden was upon DOT to do so. Department of Transportation v. J.W.C. Co., 396 So.2d at 789. Groves did not have the burden of proving matters that were not disputed and not related to DOT's sole reason for rejecting Groves' bid, i.e. the bid was too high. (R 162, 261). Moreover, the Hearing Officer and District Court specifically found that DOT's sole reason for rejecting Groves bid was because it was too high in comparison to DOT's estimate. R.O. at 21; Groves v. DOT, 511 So.2d at 330.

In Florida Department of Transportation v. J.W.C. Co., the court instructed DOT that it could not force a hearing officer or

another agency to accept new evidence after the conclusion of a formal administrative hearing. In Henderson Signs v. Florida Department of Transportation, 397 So.2d 769 (Fla. 1st DCA 1981), the court instructed DOT that it could not unilaterally "reopen" a hearing and accept new evidence, after the hearing officer issued a recommended order. In the case at bar, DOT tried a third approach. Here, DOT did not even attempt to place new evidence in the record. DOT just raised its new legal and factual issues in its final order (and now in its Brief), without a hearing, without discovery, and without rebuttal. DOT's action in this case, like its actions in J.W.C. and Henderson Signs, is improper, because it violates basic principles of due process.

Similarly, DOT utterly failed to demonstrate with competent or credible testimony that there would be increased competition or lower bid prices if Package U were subject to a rebidding. (R.O. at 21). DOT now speculates about these subjects, but DOT failed to introduce any competent, substantial evidence or call any witness who could testify from personal knowledge about these subjects. Without such proof, DOT's theories are totally unsubstantiated. These efforts at raising collateral issues, unsupported by record evidence (including the issue of DOT's rebidding and letting of the contract), were properly rejected by the First District Court in this case. See Groves v. DOT, 511 So.2d at 330, 335.

II.

SEPARATION OF POWERS IS NOT IMPLICATED BECAUSE THE FACTUAL ISSUES UNDERLYING THE REASONABLENESS OF DOT'S ESTIMATE ARE SUBJECT TO ORDINARY PROOF AND ARE NOT INFUSED WITH POLICY CONSIDERATIONS.

One of the principal purposes of the bidding statutes, protection of the public, is inevitably undermined by permitting any agency to arbitrarily affect the awarding of public contracts by rejecting a low bid which would otherwise be acceptable but for the agency's inaccurate and unreasonable estimate. DOT's attempt to couch its arbitrary action in terms of policy must be rejected because otherwise this would grant DOT an unfettered means of destroying the true competitiveness fostered by the public bidding laws. See Wood-Hopkins, 354 So.2d at 450.

Examination of DOT's "policy" argument within the ambit of administrative jurisprudence also reveals the weakness of this position. DOT's thrust is that its decision to reject all bids is always a "policy" decision, regardless of the lack of any supportable, factual basis for its rejection. But this argument ignores the obvious factual nature of determining the reasonableness of DOT's estimate, which concerns only the costs of materials and services.

Both the Hearing Officer and the First District Court found that the reasonableness and accuracy of DOT's estimate was subject to ordinary means of proof. Indeed, the reasonable cost of an item or a service is quintessentially a factual determination, completely devoid of policy considerations. The District Court reasoned that policy considerations were absent in determining the accuracy of DOT's estimate:

> DOT has failed to demonstrate that the factual issues in this case are matters of opinion which are infused with policy considerations within the ambit of its expertise. Compare Hammond v. Department of Transportation, 493 So.2d 33, 35 (Fla. 1st DCA 1986). DOT did not claim special expertise in arriving at prices for embankment material or pre-cast concrete bridge segments. In fact, in its final order, DOT recognizes that contractors submitting the low bid will, in one sense, always have the best and most current cost information since they have the beneficial position of bargaining with subcontractors and receiving up to the minute price quotes. Since the determination of this case does not involve factual issues infused with policy considerations, the general rule--that the hearing officer's findings of fact must prevail if supported by competent, substantial evidence--must be applied.

Groves v. DOT, 511 So.2d at 328. DOT's assertion to the contrary is, therefore, patently unsupportable.

DOT's reliance on an older California case, Charles Harney, Inc. v. Durkee, 107 Cal. App. 2d 570, 237 P.2d 561 (Cal. Dist. Ct. App. 1951), was also properly rejected by the First District Court. The District Court noted that DOT had failed to appreciate that the California case did not involve a statutory bid procedure under Florida's APA, but instead concerned a "writ of mandate". Groves v. DOT, 511 So.2d at 329. Moreover, the California appellate court on review simply found no "abuse of discretion" by the agency in rejecting bids. In contrast, in this case the District Court found a clear abuse of discretion. The District Court added that Durkee had "no precedential significance" since it concerned a writ of mandamus which, in Florida, could not be used to correct even an abuse of discretion, but only to enforce ministerial duties. Id. Further, it is apparent that in California an underlying policy

forbids correction of estimates, while in Florida DOT has a practice of correcting its estimates if the bids are inconsistent. Under DOT policy and practice, DOT may reject all bids which exceed the estimate by more than seven percent if, upon post-bid review, the estimate still appears reasonable. (R.O. at 4). See also infra note 3.

DOT, in an effort to demonstrate policy implications, tries to inject issues into this appeal which either were not raised below or which DOT failed to support with any competent evidence. The ancillary issues of budget limitations, federal aid, and redesign were not raised below. It is well-established that DOT cannot raise these issues for the first time on appeal, see Dober v. Worrell, 401 So.2d 1322 (Fla. 1981), and that this Court's review should be limited to the record before it. See Bryant v. Kuhn, 73 So.2d 675 (Fla. 1954). For these reasons, the District Court properly rejected DOT's arguments concerning these new issues. Groves v. DOT, 511 So.2d at 330. Further, DOT failed to offer any competent evidence to support its argument regarding the potential of increased competition if the project were rebid. (R.O. at 21).

Administrative agencies must provide procedural due process to those persons who are substantially affected by agency decisions. Thorn v. Florida Real Estate Commission; Jonas v. Florida Real Estate Commission, 123 So.2d 264 (Fla. 3d DCA 1960). A substantially affected person has a statutory right under Section 120.57(1) to a formal administrative hearing at which he can challenge the grounds for the agency's proposed decision. Parties to administrative hearings must be given a

short and plain statement of the matters asserted by the agency. §120.57(1)(b)2.d., Fla. Stat. (1985) "All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, . . ." §120.57(1)(b)4, Fla. Stat. If the case is referred to the Division of Administrative Hearings, the parties have a right to present their evidence and arguments to a hearing officer for his objective, independent evaluation.

To prevent arbitrary agency action, it is imperative that the agency disclose the basis for its decision and present competent, substantial evidence to support that decision. Florida Cities Water Co. v. Florida Public Service Commission, 384 So.2d 1280 (Fla. 1980); McDonald v. Department of Banking & Finance. An agency may not base its decision on facts which were not disclosed at the hearing and which the opposing party had no opportunity to refute.

> Administrative officers, boards or commissions, who are required to make a determination upon or after a hearing, in the exercise of a judicial or quasi-judicial function, cannot act on their own information. All parties to such a hearing must be fully appraised of the evidence submitted or to be considered, and nothing can be treated as evidence which is not introduced as such, for there is no hearing where a party cannot know what evidence is offered or considered and is not given an opportunity to test, explain or refute. It is improper for such an officer, agency or commission to base its decision or findings upon facts gathered from its own records without introducing the records into evidence.

Thorn v. Florida Real Estate Commission, 146 So.2d at 910; see also Purvis v. Department of Professional Regulation, 461 So.2d 134, 137 (Fla. 1st DCA 1984). By raising issues for the first

time and by raising issues which have no record support, DOT violates these rules of procedural due process. This Court, as the District Court, should reject such unfair and improper tactics by DOT.

Contrary to DOT's argument, the Hearing Officer diligently followed DOT's established policies. First, the Hearing Officer, as does DOT, scrutinized the estimate to determine if it had a reasonable basis. The Hearing Officer found that, after bids are opened, "the DOT will reexamine its estimate to determine whether it is inaccurate. . . ." (R.O. at 4). The procedure of reevaluating estimates after bids are opened is the same procedure used by DOT in such cases as Winko-Matic Signal Co. v. DOT, DOAH No. 84-2250. (R 1348).[3] Finding the estimate inaccurate in several aspects, the Hearing Officer next determined that a reasonable estimate would bring Groves' bid within the seven percent range. Finally, the Hearing Officer applied DOT's non-rule policy that requires awarding of the contract to the low bidder within this seven percent range.

Groves justifiably expects that DOT's policy of reevaluating estimates as done in Winko-Matic and its seven percent policy will be fairly applied to Groves' bid. Since Groves' bid is the lowest bid and is within seven percent of a reasonable estimate,

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[3] In Winko-Matic Signal Co. v. DOT, DOT also rejected all bids because they were too high in comparison to DOT's estimate. After opening the bids, DOT revised its estimate, bringing the estimate to within 3% of the low bidder, Winko-Matic. The Hearing Officer concluded that DOT could not then reject the low bid due to DOT's "seven percent" non-rule policy, and ordered the award of the contract to the low bidder. DOT accepted this recommended order and awarded the contract to Winko-Matic.

the non-rule policy dictates automatic acceptance. DOT cannot blindly reject the low bid based on its unreasonable estimate and then claim it fairly applied its seven percent policy.

Florida courts have consistently ruled that an agency cannot deviate from its prior practice without establishing a factual justification for such deviation. Persons affected by agency decisions have a right to rely on agency precedents. They are entitled to consistent results based on similar facts. University Community Hospital v. Department of Health & Rehabilitative Services, 472 So.2d 756, 758 (Fla. 2d DCA 1985), rev. denied, 482 So.2d 347 (Fla. 1986); Amos v. Department of Health & Rehabilitative Services, 444 So.2d 43, 47 (Fla. 1st DCA 1983); North Miami General Hospital, Inc. v. Office of Community Medical Facilities, 355 So.2d 1272, 1278 (Fla. 1st DCA 1978).

The Hearing Officer in the instant case followed DOT's precedents and concluded that Groves was entitled to an award of the contract for Package U. DOT presented no evidence at the final hearing to justify any deviation from its policy or its prior practices. See supra note 3. DOT's argument on appeal, however, would unjustifiably deviate from DOT's prior practice, without any basis in the record, and thus would violate the provisions of Section 120.68(12)(c), Florida Statutes, as well as the Florida and United States Constitutions.

In closing its argument on this issue, DOT conjectures that following the APA procedures will result in a few suppliers controlling prices. First, this is unsupported speculation. Second, contrary to DOT's assertion, there is no record evidence, and none is cited, to suggest that a shortage of embankment

material dictated the prices. Further, the issue of redesign, which DOT again mentions, was not raised below.

Finally, DOT's speculation that it will lose the ability to eliminate a project is completely unfounded. The District Court's decision in this case does not limit DOT's ability to raise valid reasons for rejecting a bid. Although DOT now attempts to raise a variety of issues to defend its decision in this case, DOT never argued and never introduced any evidence at the administrative hearing to support those arguments. For example, DOT never argued that it could not afford to build Package U. To the contrary, DOT has always shown every intention of proceeding with this project.

The precedential value of this case is extremely limited. This case hinges on its facts, not on any principle of law. The critical and controlling fact is that DOT only gave one reason for rejecting Groves' bid. The evidence did not support DOT's position on that one issue. Consequently, the Court's decision in this case will not limit DOT's ability to raise any valid issues to support DOT's decisions in future cases.

III.

THE JUDICIARY HAS THE AUTHORITY TO CORRECT AN AGENCY'S ABUSE OF DISCRETION AND TO ORDER THE AGENCY TO COMPLY WITH THE LAW, WITHOUT ENCROACHING ON EXECUTIVE POWERS

Under the provisions of the APA, the reviewing court is expressly granted the authority to correct an agency's abuse of discretion. The First District Court directly confronted DOT's argument that the court lacks such power, and properly rejected it:

> The department asserts that the reviewing court has no authority to correct the decision of an agency as to which the agency has discretion, arguing that by doing so, the court has, in effect, usurped powers reserved to the executive branch. We disagree.

511 So.2d at 334. The District Court then explained the bases for its authority to review and remedy an abuse of agency discretion:

> This court's broad power to review proceedings arising under Chapter 120, the Administrative Procedure Act, and to order remedial action is legislatively based, as appears from the plain reading of section 120.68(11), (13)(a), Florida Statutes:
>
> > (11) If the agency's action depends on facts determined pursuant to subsection (6), the court shall set aside, modify, or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility.
> >
> > . . . .
> >
> > (13)(a) The decision of the reviewing court may be mandatory, prohibitory, or declaratory in form; and it shall provide whatever relief is appropriate irrespective of the original form of the petition. The court may:
> >
> > (1) order agency action required by law,

> order agency exercise of discretion when required by law, set aside agency action, remand the case for further agency proceedings, or decide the rights, privileges, obligations, requirements or procedures at issue between the parties; and
>
> (2) order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.

Id. The District Court concluded by rejecting DOT's premise that DOT's exercise of discretion was immune from judicial review under the APA:

> The department's apparent assumption that it possesses powers to act in the matters at hand in its sole discretion, immune from the processes of law as found in Chapter 120, including judicial review and intervention as necessary to implement decisions arrived at via that process, is contrary to the explicit language of the statutes and the case law of the courts of this state interpreting the same.

Id.

In this case the evidence demonstrated that but for DOT's arbitrary decision to reject all bids, Groves' bid would have been accepted. The District Court recognized that the appropriate remedy for DOT's illegal action required the award of the contract to Groves. Likewise, this Court should reject DOT's position that it may exercise its discretion with impunity, free from the review and remedial constraints of the courts.

The source of DOT's authority and discretion regarding bidding for public contracts is entirely statutory, as DOT itself recognizes. (DOT Brief at 19). This discretion to reject bids, which DOT so jealously guards, is codified in a statutory grant. See §337.11(3), Fla. Stat. (1985). Surely, DOT must recognize that such a statutory grant may be circumscribed either

by judicial limitations or further legislative enactments. The APA, as applied to bid procedures by Section 120.53(5), is just such a limitation on DOT's statutory authority to reject all bids.[4] The legislature certainly can limit DOT's statutory authority by enacting another statutory scheme. DOT's discretion must now be exercised within the APA framework and is subject to judicial reversal for failure to follow those procedures. See 120.68, Fla. Stat. By any stretch of the imagination, this statutory requirement does not offend principles of separation of powers by encroaching on executive powers. See generally State ex rel. Watson v. Caldwell, 156 Fla. 618, 23 So.2d 855 (1946).

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[4] The District Court did not usurp DOT's discretion to reject conclusions of law by ordering it to accept the Hearing Officer's order. The district court allowed DOT either to correct its final order or to adopt the Hearing Officer's order. Moreover, given the 20 pages of factual finding in favor of Groves, the legal conclusions were well-established and necessarily followed. In light of the Hearing Officer's findings of fact, reaching any other legal conclusions would necessarily have been an abuse of DOT's discretion.

IV.

THE REMEDY OF AWARDING THE CONTRACT TO GROVES HAS NOT BEEN WAIVED AND IS PROPER

Groves, a disappointed bidder, established that DOT acted arbitrarily and capriciously in rejecting its low bid because the sole basis for that rejection, the discrepancy between DOT's estimate and Groves' bid, had no rational, factual basis. Instead, DOT's estimate was shown to be flawed and unreasonable because it was not based on accurate or reliable data. The Hearing Officer concluded that DOT could not rationally reject Groves' low bid because the yardstick against which it was measured was fundamentally unreasonable. Both the Hearing Officer and the District Court concluded that the contract should fairly be awarded to Groves, because, but for DOT's wrongful conduct, the contract would otherwise have been awarded to Groves. Thus, this case does no more than to apply basic APA principles to an agency, and does not raise the policy considerations concerning agency discretion advanced by DOT.

Notwithstanding its arbitrary rejection of Groves' bid, DOT now argues that a frustrated bidder, such as Groves, who has been unable to stop DOT from rebidding a contract, has waived the remedy of contract award. In essence, DOT argues that even where a clear violation of the public bidding law has been shown through DOT's arbitrary refusal to accept a bid, the disappointed bidder, who has been unsuccessful in preventing a rebid of the project while its appeals were pending, cannot be awarded the contract because of waiver.

DOT asserts that because it decided to proceed with

rebidding and letting of the contract in the face of the adverse Hearing Officer's findings and while the matter was under consideration at the First District, Groves has somehow waived its remedy of having the contract awarded to it. DOT asserts this position of waiver in spite of DOT's having caused this entire situation by deciding to proceed with rebidding even though it clearly had underestimated this project as well as another similar project, and even though it wrongfully rejected the Hearing Officer's findings of fact. Further, DOT continued to proceed with its rebidding and letting in the face of Groves' appeal and, ultimately, in the face of the adverse District Court ruling. DOT asserts waiver even though DOT created its own problem by proceeding in a calculated manner at its own peril.

DOT ignores that Groves filed two, separate petitions with the First District Court in an attempt to stop DOT's rebidding and letting of the contract. DOT resisted all of Groves' efforts to stay its actions. DOT now insists that Groves could have done even more by filing a motion under Section 120.68(3), Florida Statutes. However, a stay of DOT's final order in this proceeding would not necessarily have prevented a rebid of the project in another, separate bid proceeding. Therefore, Groves logically sought more appropriate and comprehensive stays under petitions for prohibition and extraordinary writ, which would have halted the rebidding and letting of the contract during Groves' appeal.

DOT also claims that Groves should have filed a bid solicitation protest. However, this type of bid protest deals only with challenges to the bid solicitation itself (e.g., the

bid specifications), not the awarding or letting of the contract. See Capeletti Brothers, Inc. v. Department of Transportation, 499 So.2d 855, 857 (Fla. 1st DCA 1986). Groves had no interest in challenging the solicitation of bids. Rather, it was the awarding and letting through a second proceeding while Groves' appeal was pending which Groves sought to stop.[5] Again, when Groves sought to file a notice of protest to the second bid proceeding, DOT resisted this effort to stay its proceeding by preemptorily dismissing the notice, despite the clear effects (certainly as now argued by DOT) that this rebid proceeding would have on Groves.[6] DOT afforded Groves no hearing, no opportunity to file a petition protesting the rebid, and no opportunity to establish standing. Now, DOT boldy argues that Groves has waived its remedy of contract award.

DOT merely seeks to exploit the judiciary's natural reluctance to grant preliminary relief which prevents an agency from proceeding with the bidding process, when this initial relief is based on a challenge which has not been heard on the merits. When DOT presented this same argument to the First District, the court stated:

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[5] It made little sense for Groves to bid in the second bid proceeding and spend $150,000 preparing a new bid when Groves had already been awarded the contract by the Hearing Officer. Further, Groves had no reason to rebid since DOT had already demonstrated it would not award the contract to Groves. Also, Groves was at an unfair disadvantage since other bidders now knew its lowest price for each of the items of its bid. (R.O. at 21).

[6] In dismissing Groves' challenge to the rebidding procedures, DOT asserted that Groves lacked standing to protest the rebid of Project U. This position conflicts remarkably with DOT's position here that Groves' remedy of contract award is now waived because of this very rebidding process in which Groves purportedly had no standing. The classic "Catch-22"!

> Significantly, at no time during this litigation, either before the hearing officer or in this court, has DOT filed a motion to dismiss or suggestion of mootness requesting remand for the purpose of a hearing for the presentation of evidence as to any factual matters bearing upon the availability of the relief sought by G-W [Groves]. From the file of a related case . . ., it affirmatively appears that DOT eschewed recourse to a further administrative hearing, subsequent to the initial hearing which resulted in a decision adverse to DOT, by denying G-W's standing to challenge the award of a contract to another contractor on rebidding.

511 So.2d at 335. The District Court further noted that the agency could find no solace in the court's refusal to prevent the rebidding:

> The department also urges that the propriety of its actions in proceeding with the rebidding of the project is enhanced by the fact that it has never been specifically ordered to cease and desist. Again we disagree. We are of the view that an agency, as any other litigant, proceeds at its peril when its authority to act has been challenged and is presently under review.

Id. The court concluded by pointing out that the ancillary relief provisions of Section 120.68(13)(a)2., Florida Statutes, provided a basis for fashioning relief even if the contract had been awarded. See also Baxter's Asphalt & Concrete, Inc. v. Department of Transportation, 475 So.2d 1284, 1286 (Fla. 1st DCA 1985) (under the ancillary relief provisions of Chapter 120, replacement of initiating contractor with successfully protesting contractor viewed as feasible remedy, even though no stay filed).

The District Court's remedy comports with several other Florida cases which have awarded the contract to the successfully protesting bidder. In Wood-Hopkins, the appellate court affirmed the trial court's award of the contract to the disappointed, low

bidder. In Marriott Corp. v. Metropolitan Dade County, 383 So.2d 662 (Fla. 3d DCA 1980), the Third District Court reversed the county's award of a public contract for abuse of discretion, invalidated the existing award which had not been the subject of a stay, and awarded the contract to the frustrated low bidder. Likewise, in Robinson Electrical Co. v. Dade County, 417 So.2d 1032 (Fla. 3d DCA 1982), the county advised the court during oral argument that the disputed construction contract had been rebid and awarded to another bidding firm. The court expressed its "surprise at this unfortunate complication", but rejected the county's claim of mootness, id. at 1034 n.1, and ordered award of the contract to the low bidder, in spite of the county's having proceeded with the rebidding and letting of the contract.

DOT's second objection to awarding the contract to Groves is that this purportedly creates "two contracts" for the same project. This issue is not properly before this Court, because there is no record evidence regarding the letting and undertaking of the project. The function of this Court is to review the decision of the District Court on the record that was before the lower court. See Altchiler v. State, Department of Professional Regulation, 442 So.2d 349 (Fla. 1st DCA 1983). The judgement of the District Court and the remedy it awarded come to this Court with a presumption of correctness. When an appellant has failed to create a record which demonstrates reversible error, the lower court must be affirmed. See Belflower v. Risher, 227 So.2d 702 (Fla. 4th DCA 1969). Moreover, because the issue of remedy was not asserted by DOT as a basis for creating conflict with any specific case, it is even less appropriate for the Court to

address the matter. See Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982).

DOT's attempt to inject non-record matters into this appeal and then to speculate on the possible consequences of these matters should be rejected.

> We are governed, not by what might be shown, but what is in fact shown by the record now before this court.

Silver Star Citizens' Committee v. City Council of Orlando, 194 So.2d 681, 682 (Fla. 4th DCA 1967). The evidentiary record was created at the administrative hearing, and remained the same at the District Court. DOT made no effort to supplement the record upon which the District Court was obliged to render its decision. If the record were constantly changing, there would be no finality to cases because the facts would constantly be shifting. DOT cannot offer an unsubstantiated continuum of changing factual circumstances for a reviewing court's consideration. Cases must be decided on the record as it exists. Rook v. Rook, 469 So.2d 172 (Fla. 5th DCA 1985).

DOT's speculation about the consequences of a theoretical contract, which is not part of this record, leads to rampant guesswork. Because the "other" contract is not before the Court, it is impossible to know, for example, whether that contract provided for the contingency of an award to Groves. One might just as easily conjecture that the contract does contain an exculpatory clause in DOT's favor, as would have been prudent in light of Groves' ongoing challenge. But the point is that cases must not be decided on such abstract bases, but rather within the strict confines of the hard record. On that record which was

before the District Court, the decision to award the contract to Groves is clearly proper and appropriate. Matters offered outside the record to challenge that determination are irrelevant and cannot form the basis of overturning the considered decision of the District Court.[7]

Turning to the equities and policies involved in awarding the contract to Groves, there can be little dispute that awarding the contract to the frustrated bidder will more fully and forcefully encourage DOT's compliance with the bidding laws. Because the bidding laws receive better protection by awarding the contract to the entitled bidder, the public purposes of these laws are better preserved:

> [Bidding laws] originated, perhaps, in distrust of public officers whose duty it is to make public contracts, but they also serve the purpose of affording to the business men and taxpayers of the counties and other governmental subdivisions affected by them a fair opportunity to participate in the benefits flowing from such contracts, which are nowadays amongst the most important items of the present day business world.
>
> In so far as they thus serve the object of protecting the public against collusive contracts and prevent favoritism toward contractors by public officials and tend to secure fair competition upon equal terms to all bidders, they remove temptation on the part of public officers to seek private gain at the taxpayers' expense, are of highly remedial character, and should receive a construction always which will fully effectuate and advance their true intent and purpose and which will avoid the likelihood of

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[7] DOT cites out-of-state cases which deal with the unavailability of injunctive relief after the object of the injunction has been accomplished. These cases are inapposite. The case under review does not involve injunctive relief but rather relief fashioned under the broad remedial provisions of the APA.

same being circumvented, evaded, or defeated.

Wester v. Belote, 103 Fla. 976, 138 So. 721, 724 (1931). Part of the object of bidding laws is to secure fair competition among bidders, allowing them a fair opportunity to participate in public contracts. This fair competition, in turn, protects the public by ensuring that the contract is let on the most economical terms practicable.

Restricting the remedy of a frustrated bidder because of an agency's actions in rebidding and letting a contract would serve to defeat the vigorous enforcement of the bidding laws. These laws represent a public policy which seeks to ensure the rational award of public contracts. The disappointed bidder would have no incentive to challenge the agency's action through a costly bid protest. Because the bid protest procedure would not be pursued by a disappointed bidder who may not be able to obtain an award of the contract due to the agency's actions, the public purposes would be disserved by lack of enforcement of these procedures whenever an agency decided to rebid and let the contract. The entire bidding procedure would, thus, be rendered illusory, and the intent of rationally awarding public contracts would be undermined.

Furthermore, an agency, such as DOT, would have little incentive to strictly abide by the bidding procedures, because it would be unlikely that the agency's action would ever be challenged by a bidder. The number of bidders, and consequently the range of choice, available to an awarding agency may well be drastically reduced if prospective bidders were to assume that the agency would not abide by the bidding laws in making its

award. Indeed, it is doubtful that most contractors would bid at all knowing the deck was stacked against them, because DOT need not play by the rules of the game and there would be no meaningful recourse if DOT did not.

Public agencies must be accountable for violations of the public bidding laws if the competitive bidding system is to work. The entire bid protest proceeding within Chapter 120 reflects the Legislature's recognition that DOT cannot be the sole and unaccountable arbiter of who receives public contracts. DOT's urging this Court to assign the protection of this public interest entirely to the benign auspices of DOT subverts the legislative mandate that a viable system be established which checks DOT's authority. The APA is the means by which such an agency's discretion is controlled and ensures that the benefits of public contracts are fairly dispensed so that the most economical, practical bid is accepted on the public's behalf.

DOT also argues that principles of bidding laws do not allow awarding of a contract to a frustrated bidder because no contract exists until DOT accepts a bid. This position merely begs the question. Under DOT's scheme, once DOT decided to reject a bid, that decision would then become immune from any remedial action awarding the contract under the bidding procedures of Chapter 120. The intent of the bidding laws is, however, to the contrary, as they provide for an automatic stay during the protest of a bid award (at least through the agency's order), and clearly contemplate that a successfully protesting bidder should be awarded the contract. See § 120.53(5)(c), Fla. Stat. The statutory automatic stay of the contract award would make no

sense unless the agency was to award the contract based on the outcome of the administrative hearing process.[8]

For the bidding laws to be effectively enforced, frustrated low bidders must be encouraged to challenge an agency's arbitrary bid awards, thereby vindicating the public's interest in procuring economical public contracts and promoting the integrity of the bidding process. DOT's proposal of limiting the remedies of a successful, protesting bidder based on DOT's own actions would eviserate the bidding laws by removing all incentive to enforce the public purpose of these laws: ensuring the award of the contract to the lowest, responsible bidder. To allow this would encourage DOT to thwart bid protests by rapidly rebidding and letting contracts even while its decision were being challenged. DOT would then be empowered to manipulate the entire bidding process, free of all practical means for reviewing and reversing this agency's decisions. The bidding laws would offer no practical relief and would become illusory. Procuring DOT's adherence to the law would become impossible.

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[8] Under DOT's scheme for remedies, DOT could almost always thwart the award of a contract to the low bidder by awarding the project to a high bidder, and then entering a final order disregarding the hearing officer's findings in favor of the low bidder. If the low bidder could not stop the letting and initial work on the project during appeal, DOT could achieve its goal of awarding the contract to the high bidder by asserting waiver, in spite of the low bidder "prevailing" on appeal.

CONCLUSION

This case requires only the straightforward application of basic APA principles. Based on the evidence of record, the Hearing Officer found and the District Court agreed that DOT had arbitrarily rejected Groves' bid for Package U. Now, DOT must accept the Hearing Officer's finding and abide by fundamental APA standards in awarding this public contract, just as any other agency must when exercising its discretion.

The bidding laws are designed to protect the public by ensuring fair competition among bidders, with the result that the most economical public contract is procured. DOT's proposal to exempt itself from review, except for cases involving fraud, would allow DOT to whimsically reject low bids and subvert the entire competitive bidding process. DOT's misreading of Liberty County would overturn at least 60 years of caselaw. Furthermore, DOT's efforts to restrict the remedy of a successfully protesting bidder based on DOT's own actions would remove the incentive of disappointed bidders to contest an agency's arbitrary action in awarding a public contract. If the public bidding laws are to have any practical significance, DOT's proposals must be rejected, and the decision of the District Court should be affirmed.

Respectfully submitted this 7th day of March, 1988.

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CERTIFICATE OF SERVICE

I hereby certify that the original and seven copies of the foregoing Answer Brief have been furnished by hand-delivery to the Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and a copy by hand delivery to Robert I. Scanlan, Appellate Attorney, Department of Transportation, Haydon Burns Building, MS 58, 605 Suwanne Street, Tallahassee, Florida 32399-0458 this 7th day of March, 1988.

Attorney