O/a 4-27-88

IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

GROVES-WATKINS CONSTRUCTORS,

Respondent.
_____/

CASE NO. 71,081

INITIAL BRIEF OF PETITIONER DEPARTMENT OF TRANSPORTATION

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PRELIMINARY STATEMENT

The State of Florida Department of Transportation, Petitioner, will be referred to herein as the Department. Groves-Watkins Constructors, the Respondent here and appellant below, will be referred to herein as Respondent.

Citations to the record on appeal will be indicated parenthetically as "R" with the appropriate page number(s).

STATEMENT OF THE CASE

Petitioner, State of Florida Department of Transportation, received bids on May 28, 1986, for State Project Nos. 86075-3443 and 86075-3447, referred to as Package U. Package U was part of the I-595 construction project in Broward County, involving construction of an interchange to connect the Sawgrass Expressway, I-595, and Interstate 75. (R: 1423) On June 17, 1986, the Department posted notice of intent to reject all bids. Respondent filed a timely bid protest.

On November 5, 1986, a Hearing Officer from the Division of Administrative Hearings issued a Recommended Order recommending that the project be awarded to Respondent. (R: 1376-1402) The Department entered a Final Order on December 16, 1986, rejecting all bids and ordering readvertisement as soon as possible. (R: 1408-1447) On December 30, 1986, Respondent filed a Notice of Appeal with the First District Court of Appeal. (R: 1448-1449) At no point did Respondent file a motion for stay of the final order pursuant to Section 120.68(3), Fla. Stat.

On January 29, 1987, Respondent filed a petition for writ of prohibition with the First District Court of Appeal seeking to preclude the Department from proceeding with the reletting of Package U (DCA Case No. BR-410). On February 11, 1987, the First District denied the writ of prohibition.

On February 25, 1987, the Department received five bids at the reletting of Package U. Respondent did not bid at the second letting. On March 23, 1987, the Department posted notice of intent to award Package U to Harbert-Westbrook, A Joint Venture. On March 26, 1987, Respondent filed a protest to the award, which was dismissed by the Department by Final Order on March 31, 1987. The Final Order stated Respondent lacked standing

because they had not submitted a bid and the award was being made to avoid an immediate and serious danger to the public health, safety, and welfare pursuant to Section 120.53(5)(c), Fla. Stat. The contract with Harbert-Westbrook was executed on April 8, 1987, and work began April 28th.

On April 3, 1987, Respondent filed a notice of appeal from the final order awarding Package U to Harbert-Westbrook. Once again they did not file a motion for stay. (DCA Case No. BT-37) On April 13, 1987, Respondent filed a Petition For An Extraordinary Writ with the First District Court of Appeal asking for a stay of performance of Harbert-Westbrook's contract. (DCA Case No. BT-78) By order of April 24, 1987, the First District Court of Appeal denied the petition for an unspecified extraordinary writ, but ordered that it be treated as a motion to stay in the first appeal, Case No. BR-163.

Oral Argument was held May 12, 1987, and on June 11, 1987, the First District Court of Appeal rendered its opinion reversing the final order and remanding with directions that the Department award the contract to Respondent. Upon Motion for Rehearing, the court amended its opinion to say the reversal placed the parties automatically in a contractual relationship and required the Department to amend its Final Order within ten days by deleting all findings and conclusions contrary or in addition to those made by the Hearing Officer; to award the contract to Respondent; and upon failure to enter an amended order as directed, the recommended order would become the final order. This appeal ensued.

STATEMENT OF THE FACTS

On May 28, 1986, the Department received bids on State Project Nos. 86075-3443 and 86075-3447, also known as Package U. This is a federal aid project with 90% of the funding from federal funds. (R:160) Even though 15 qualified contractors took out plans and bid proposals, only three bids were received. (R:194) Respondent's low bid of $54,472,335.15 exceeded the Department's official estimate by 29%, or over $12 million.

The Department posted notice of intent to reject all bids. Respondent timely filed a bid protest, so the matter was referred to the Division of Administrative Hearings for a formal evidentiary hearing.

The invitation to bidders informed the bidders that all bids were likely to be rejected if the lowest responsive bid exceeded the engineer's estimate by more than seven percent (7%). A comparison of Respondent's bid and the estimate revealed that 106 of 153 bid items exceeded the estimate. (R:197) The three major items of discrepancy were the concrete bridge segments, embankment, and mobilization prices. The remaining items made up about 5-6% of the difference in the overall cost estimate.

Standard Department procedure in high bid situations is to have a bid review meeting among the estimators, the bidder, and the Department's local construction office. (R:193) The Department's estimators then make a report and recommendation to the Bid Awards Committee, made up of three Deputy Assistant Secretaries. (R:142) Any decision of the Awards Committee is contingent upon concurrence of the Federal Highway Administration. (R:160-161, 167) On Package U the Awards Committee decided to reject all bids because not enough bids were received and there was not enough grouping around a reasonable cost estimate to indicate a mistake in the estimate. (R:147)

In developing the official estimate, the Department uses a computer program of historical cost data from actual bids received and cost data obtained from telephone surveys. The estimating system uses a cost-base system, as well as historical data. On the original worksheet, material costs, labor costs, equipment costs, and equipment rental rates are all used. Each individual item is given a crew configuration matched with current wage rates to derive crew costs. The historical unit prices are compared with actual quotations, and a decision is made to use one or the other in calculating the job estimate. (R 228-229)

Of the 475 projects totalling $750 million in bids let by the Department over the previous fiscal year, the overall deviation between low bid and estimate was 1.2%. The low bids on the four adjacent projects to Package U ranged from 16% below the estimate to 1.4% above the estimate. (R:1303)

The official estimate for Package U was not introduced into evidence. Respondent presented testimony from one of its employees as to how he thought the Department calculated the figures used in the official estimate. Department employees testified as to how the estimate is put together, but did not explain the actual figures because of the confidentiality of the estimate. However the Hearing Officer concluded that the Department underestimated the embankment by about $6 million, the pre-cast bridge segments by about $5 million, and mobilization by $1.2 million. Without using the Department's historical cost data and using only the bid figures of Respondent, the Hearing Officer derived a revised estimate of $53.7 to $54.6 million. Finding the low bid to be within 2% of the revised estimate, the Hearing Officer found the Department's original estimate to be flawed and unreasonable. (R: 1440-1441) The final

conclusion of the Hearing Officer was that if the Department adhered to the "original, unrevised, erroneous estimate and rejects the bids,. .. such action would be arbitrary." (R: 1445)

In the Final Order the Department rejected the Hearing Officer's conclusion that the estimate was unreasonable and erroneous and several other findings of the Recommended Order. In each instance the Department included citations to the record to support the rejected findings of fact. The Final Order set forth four basic reasons for rejecting all bids. The primary reason was the high bid of Respondent which exceeded the estimate by over $12 million. Related to this was the failure of Respondent to prove the existence of sufficient funding, and in particular, the failure to show that the Federal Highway Administration would concur in the award to Respondent as a prerequisite to federal participation in the project. Third, the Department sought increased competition. The fourth reason the Recommended Order was rejected was the failure of the Hearing Officer to follow existing Department policy and his substituting a new "corrected estimate" policy for comparison with the bids. (R: 1408-1419)

SUMMARY OF THE ARGUMENT

The decision of the First District Court of Appeal has placed the Department in the position of having two contracts to build the same interchange. The Department has broad discretion to reject all bids and the exercise of that discretion should not be overturned unless there is a finding of illegality, fraud, oppression, or misconduct. There is no competent substantial evidence in the record to support such a finding. This coupled with the fact that the bids were over $12 million higher than anticipated was a sufficient factual and legal basis to reject all bids.

The appellate court has rejected the Supreme Court's standard of review for an agency's bid award decision. The appellate court has placed the burden of proof on the agency, contrary to prior decisions of this Court. The appellate court has also violated established principles of administrative law by requiring the agency to substitute its established 7% contract award criteria with the Hearing Officer's "corrected estimate" policy based only on the low bid alone without consideration of historical pricing data. The substituted policy adopted by the lower court destroys the frame of reference from which all bids are judged, allows a few suppliers to dictate the price of the contract, and destroys the discretion of the agency to reject all bids without consideration of funding problems, increased competition, or possibility of redesign. This Court has consistently held that it is a violation of principles of separation of powers for a court to dictate the policy of a state agency.

By ordering the Department to award to Respondent and to adopt the Recommended Order as the Final Order, the First District has ordered an agency to exercise its discretion in a particular manner. The order of the appellate court violates Sections 120.57(1)(b)9 and 120.68(12), Fla. Stat.,

Art. II, Section 3, Fla. Const. and Art. V., Section 4, Fla. Const. The First District cannot expand its jurisdiction beyond the constitutional role of "direct review" and violate the statutory restriction not to substitute judicial judgment for an agency's exercise of discretion.

Because Respondent failed to take affirmative action to obtain a stay of the final order pursuant to Section 120.68(3), Fla. Stat. and failed to file a bid solicitation protest to stop reletting of the project and because the district court denied a writ of prohibition to stop the reletting, the Department acted reasonably in reletting the contract and Respondent has waived the right to award of the contract. The lower court's failure to consider legal restrictions on the Department's entering into a contractual obligation concerning Federal Highway Administration approval and budget approval, also renders the court's decision fatally deficient.

ARGUMENT

In this case the Florida Department of Transportation finds itself in the unenviable position of having two contracts with different contractors to construct the same interchange, at the same place, at the same time. The decision of the First District Court of Appeal, as amended upon rehearing, states that the decision reversing the Department's final order accords Respondent the status of a successful bidder, and places the parties "in the equivalent of a contractual relationship, even in the absence of a formal, signed contract." This decision not only violates the standard of review established by this Court for public agency competitive bidding decisions, it violates the statutory scheme of the Administrative Procedures Act, it violates the principles of separation of power, contravenes traditional contract concepts of offer and acceptance, and fashions an inappropriate remedy.

POINT I

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL VIOLATES THE STANDARD OF REVIEW ESTABLISHED BY THE FLORIDA SUPREME COURT

The Florida Legislature has given the Department broad discretion to reject all bids on competitively bid construction projects:

> The department may award the proposed work to the lowest responsible bidder, or it may reject all bids and proceed to readvertise the work or otherwise perform the work.

Section 337.11(3), Fla. Stat.(1985). This Court has recognized that this language gives wide discretion to an agency and a decision based on an honest exercise of this discretion should not be overturned unless there is a finding of "illegality, fraud, oppression or misconduct." Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So.2d 505, 507 (Fla. 1982). This was consistent with Wester v. Belote, 138 So. 721 (Fla. 1931), which required a showing of fraud, corruption, or unfair dealing. This standard is also consistent with the majority position that courts will only intervene to prevent the rejection of a bid when the obvious purpose of the rejection is to defeat the object and integrity of competitive bidding. 10 McQuillin, Municipal Corporations (3d Ed.) §29.77.

The lower court says this standard should not be applied because this case arises under Section 120.53(5), Fla. Stat. However, there is nothing in Section 120.68, Fla. Stat. which would require the elimination of this standard for review of the Department's decision to reject all bids and rebid this important project.

In construing the Department's statutory discretion to award or reject bids, this Court placed a heavy burden on a challenger:

> The statute unquestionably vested in the state road department the discretion to determine who are and who are not responsible bidders, and, in the exercise of this discretion, the complainants in the court below, the appellants here, have not met the burden of showing that the discretion was exercised 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, 117 So. 89, 95 (Fla. 1928). Contrary to that decision, the First District has turned that burden around and placed it on the agency. See Baxter's Asphalt and Concrete, Inc. v. Department of Transportation, 475 So.2d 1284 (Fla. 1st DCA 1985), where the court held: "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." Id. at 1286.

Just because the APA provides a procedural mechanism for challenging an agency's decision to award or reject bids, it should not change substantive law or traditional concepts on burden of proof or the standard of appellate review, as the lower court has done.

Section 120.53(5), Fla. Stat. requires an adversely affected bidder to file a protest of the intended decision. This statutory scheme sets up a hearing to review the decision of the agency, it does not set up a scheme to hold a hearing to formulate a decision de novo, as contemplated by the lower court in its decision. Section 120.53(5)(c) contemplates that the contract award process is stayed until resolution of the protest. It does not say that the award process and decision-making process are started all over by having a hearing to make a new decision. It is clear from this statutory language that no decision-making hearing was intended by the Legislature. In addition the statute anticipates occasions when award of

the contract will proceed in emergency situations and situations which would involve the substantial loss of funding to the state. Section 337.11(3)(c), Fla. Stat. (1987).

Because of this improper frame of reference from which the lower court reviewed this decision, it reached the wrong conclusion. From an evidentiary basis, there was no finding made by the Hearing Officer that the Department's decision was based on fraud, illegality, oppression, misconduct, improper influence, or agency will instead of judgment. For this reason alone the Department's Final Order should be affirmed.

POINT II

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL VIOLATES PRINCIPLES OF SEPARATION OF POWER BY REQUIRING A POLICY CHANGE BE ADOPTED BY THE AGENCY

It is clear under Florida law, that a public agency has no obligation to award a contract to a particular bidder. Volume Services Division of Interstate United Corp. v. Canteen Corp., 369 So.2d 391 (Fla. 2d DCA 1979). Competitive bidding statutes are enacted for the protection of the public. They create a system by which goods or services required by public authorities may be acquired at the lowest possible cost. Hotel China & Glassware Company v. Board of Public Instruction, 130 So.2d 78, 81 (Fla. 1st DCA 1961). Therefore it is the Department's duty to properly exercise its discretion to protect the public purse and to assure the efficacy of the competitive bid process.

Despite the long recitation of facts in the decision and Final Order, there was really only one simple fact that should control the ultimate outcome of this case. It was undisputed that Respondent's low bid exceeded the Department's official estimate by almost $12.2 million or 29%. So the ultimate decision to award or reject all bids and readvertise the project is a policy decision. The ultimate finding of the Hearing Officer was that the Department's official estimate was wrong. The Hearing Officer reached this conclusion after recreating the estimate based on Respondent's bid alone.

The fallacy of the Hearing Officer's logic, which was adopted by the appellate court, is that it ignores the stated policy of the Department and substitutes the Hearing Officer's ideas for the policy already stated in the bid documents; it destroys the frame of reference from which all bids

are judged; it allows a few suppliers to dictate the price which the state pays; and it would always require award of a project despite other factors such as increased competition, budget limitations, federal aid, or possibility of redesign.

By requiring the Department to adopt the Recommended order in toto, the First District is first countermanding Section 120.57(1)(b)9, Fla. Stat. (1985) which allows the agency to reject the Hearing Officer's conclusions of law. Second, the First District is mandating the adoption of the Hearing Officer's "policy" of a "corrected estimate" comparison. In the Recommended Order, the Hearing Officer created his own "estimate" of the project's cost based on the low bid alone without regard to the Department's historical cost data or the two other higher bids. He then compared the low bid with the "corrected estimate" and found it to be within the award range of 7%. This was not the Department's policy which was provided to all bidder's in the bid package, and upon which it is presumed all bidders relied when submitting bids.

The invitation to bidders stated that all bids were likely to be rejected if the lowest responsive bid exceeded the engineer's estimate by more than seven per cent (7%). Respondent's bid exceeded the official estimate by $12 million or 29%.

This Court has consistently held that courts cannot dictate the rules and policy of a state agency and to do so would violate the principles of separation of powers. State ex rel. Allen v. Rose, 167 So. 21, 22 (Fla. 1936); Citizens of Florida v. Mayo, 357 So.2d 731, 733 (Fla. 1978).

If there is any doubt that the lower court has violated these principles, one need only review the comments of Judge Ervin in dissent:

> The hearing officer, however, did not base his recommended order solely upon competent,

> substantial evidence, but in effect made a policy determination requiring that DOT must recalculate its cost estimate based on the figures provided by the low bidder .... In making this recommended finding, the hearing officer substituted his policy, for that of DOT, a recommended policy, which if sustained, takes from the department the right to do its own cost estimate, based on independent data, and directs the public agency to accept the data provided by the low bidder. By taking this additional step, the DOAH hearing officer has departed from his traditional role in a 120.57(1) proceeding as factfinder and has become a policy maker.

Opinion at p. 22-23.

A very analogous case is Harney v. Durkee, 107 Cal.App.2d 570, 237 P.2d 561 (Cal. Ct. App. 1951). In that case the low bidder sought a writ of mandamus to compel the director of the department of public works to award a highway construction contract after rejection of all bids. The department was required by statute to prepare a prebid estimate, and the low bid came in 17% over the estimate. After comparing the low bid with the original estimate, the engineers concluded the estimate was too low and recommended award of the contract. Despite this advice, the director rejected all bids. The trial court entered judgment directing that a writ of mandamus be issued commanding the director to award the contract. The appellate court reversed, finding no abuse of discretion in the decision to reject all bids.

The court recognized the sound public policy reasons for having a prebid estimate: 1) it could be used to determine if money is available for the project, 2) the amount of the estimate controlled what type of advertising was required, and 3) it provided the director a yardstick by which to measure the fairness of the bids. Id. at 565-566. The court

upheld the director's exercise of discretion because of the very questions raised by the inaccurate estimate:

> When he knows that a fair and accurate estimate has been prepared by the engineers of his staff before submitting the project to bids, he can then determine whether the bid is or is not fair in comparison with that estimate. But when he has no estimate at all, or has an estimate that is admittedly erroneous in major respects, or has an estimate that has been prepared after the bids have been submitted and after his engineers have consulted the work sheets of the bidder, the director has been deprived of the very yardstick given him by law and intended to protect him and the public.

Id. at 566.

The California court concluded that had the estimate been a full, complete and accurate estimate, the director would have been acting "well within his conferred discretion" to reject all bids for the one reason that the bids were 17.47% above the estimate. The court further reasoned that since the estimate admittedly was in error in very material aspects, it was the "same as if no estimate at all had been prepared, because an erroneous estimate cannot and should not be used to measure the fairness of a bid." Id. at 566. The court said the law does not contemplate that estimates shall be prepared after examining the bids and the bidders' work sheets. The court believed "such an estimate would be valueless and such a practice would lend itself to the very abuses that the statute, by requiring prior estimates, was intended to prevent." Id. at 567.

The court summarized the policy reasons for allowing the director the discretion to reject all bids under these circumstances:

> But competitive bidding statutes are not passed for the benefit of bidders but for the benefit and protection of the public. No right exists in the lowest bidder to have his

> bid accepted where the statute confers the power to reject all bids. While it is unfortunate that all bids were rejected because the department engineers made mistakes in the original estimate, public policy requires that the director have this power and protection or grave abuses may occur.

Id. at 567-568.

The Department of Transportation likewise requires the preparation of a confidential official estimate of the cost of a job, before accepting the bids, to be used as a tool to determine the validity of the bids submitted. The Legislature has stressed the importance of the estimate by maintaining its confidentiality until the contract is actually awarded. Section 337.168, Fla. Stat. (1985).

Unlike the Durkee case, the Department's estimators in the instant case, never conceded the estimate on Package U was in error. In fact the testimony attested to the remarkable accuracy of this system over the previous year. Of the 475 projects totalling $750 million in bids let by the Department the previous fiscal year, the overall deviation between low bids and official estimate was 1.2%.

Package U is one of 23 projects in the Interstate 595 corridor. At the time of the hearing bids had been received on 12 of these projects and the data from ten of those projects was the starting point for preparing the official estimate on Package U. (R:191) The two projects immediately south of Package U were awarded at 14% and 16% below the official estimate. Package T immediately to the east was bid at 3.9% below the estimate and Package Q, the second project to the east, came in only 1.4% above the estimate. So it is obvious that the Department's estimating system gives an excellent frame of reference from which to judge the bids received.

An even greater practical danger of the system adopted by the Hearing Officer and the court, is that it could allow a very few suppliers to dictate the price of a project like this because of a shortage of certain materials. It was clear from the evidence at the hearing that the shortage of embankment material controlled a large percentage of the price of the project. Because of only one or two dirt sources available to the job, the dirt suppliers could dictate the price for this item.

If these quotes are used to establish the "corrected estimate" from which a decision is made to award or not, the agency loses the options of saying "no, we just will not pay that exorbitant price" or of rejecting bids to rework the specifications to provide the dirt to all bidders or to redesign the project to eliminate the problem all together. These are the policy decisions which must be left to the agency and must not be usurped by a hearing officer or the appellate court.

The courts have found that a decision to reject all bids based on budgetary, financial, and planning factors is based on a rational basis and should not be disturbed. Law Brothers Contracting Corp. v. O'Shea, 435 N.Y.S.2d 812 (N.Y. App. Div. 1981).

If left to stand, the decision of the First District guts the discretion given the Department in Section 337.11 to reject all bids in the appropriate situation.

POINT III

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL VIOLATES PRINCIPLES OF SEPARATION OF POWER BY REQUIRING THE AGENCY TO EXERCISE ITS DISCRETION IN A PARTICULAR MANNER

The decision of the First District has not only required the Department to exercise its discretion in a particular manner by requiring award of the contract to Respondent, it has also ordered that a contractual relationship already exists between the Department and Respondent. This order appears to violate Art. II, Section 3, Fla. Const. and Art V, Section 4, Fla. Const. Because of the separation of powers, the judicial branch does not have the authority to compel a public agency clothed with discretion to exercise that discretion in a particular manner. Graham v. Vann, 394 So.2d 180 (Fla. 1st DCA 1981).

The authority of a district court of appeal is limited to "the power of direct review of administrative action." Art. V, Section 4(b)(2), Fla. Const. The court's role of direct review is to determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings are supported by competent, substantial evidence. City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982). The role of direct review has never allowed the courts to issue a writ of mandamus to compel an agency to exercise its discretion in any particular way. State ex. rel. Allen, supra at 23. In fact, Section 120.68(12), Fla. Stat. says "the court shall not substitute its judgment for that of the agency on an issue of discretion."

The best example of this principle is the zoning cases. It has long been established that courts do not have the authority to substitute their

judgment for that of the local governing body charged with the duty of enacting zoning legislation. City of Miami Beach v. Wiesen, 86 So.2d 442 (Fla. 1956). Decisions directing the rezoning of a particular piece of property to a specific zoning classification have been overturned for violating separation of powers. City of Miami Beach v. Weiss, 217 So.2d 836 (Fla. 1969); Town of Longboat Key v. Kirstein, 352 So.2d 924 (Fla. 2d DCA 1977).

The First District relies on Section 120.68(13) as the source of power for ordering award of the contract to Respondent. If the broad powers of Section 120.68(13) so permit the appellate court to adopt a final order for an agency awarding a contract, rather than remanding for correction of the order consistent with the decision, then this statute is unconstitutional as applied in this case. Such an order violates separation of powers and goes beyond the constitutional authority of "direct review." Neither the court nor the Legislature has the power to extend the jurisdiction of the court beyond the confines of the constitutional prescription. City of Dunedin v. Bense, 90 So.2d 300, 302 (Fla. 1956). The order of the lower court has also usurped the statutory authority of the Department to reject a hearing officer's conclusions of law, since it orders the Department to amend the final order by "deleting all findings and conclusions contrary or in addition to those made by the hearing officer in the recommended order." (Emphasis added) (Opinion on Motion for Rehearing, p.6.)

Many courts have recognized the strong deference given an agency's decision in competitive bidding situations. One court held that it "has no power to direct the award of a public contract to any individual." Pozar v. Department of Transportation, 193 Cal.Rptr. 202, 203, 145 Cal.App.3d 269 (Cal. Ct. App. 1983). The Supreme Court of Connecticut has limited

judicial intervention in an agency's decision to reject all bids to those few occasions where fraud or corruption have influenced the conduct of the officials. John T. Brennan Construction Corp., Inc. v. City of Shelton, 448 A.2d 180 (Conn. 1982). The Third Circuit Court of Appeals has followed this reasoning and held that only "a showing of clear illegality" will entitle an aggrieved bidder to judicial relief. Sea-land Service, Inc. v. Brown, 600 F.2d 429 (3d Cir. 1979).

It is basic contract law that a contract does not exist until you have both an offer and acceptance. The invitation for bids does not constitute an offer of a contract, but only the solicitation or inducement to make offers, and it imposes of itself no liability. William A. Berbusse, Jr., Inc. v. North Broward Hospital District, 117 So.2d 550, 552 (Fla. 2d DCA 1960). The lower court has violated this principle because it says that the decision reversing the order of DOT and finding Respondent entitled to the contract "places the parties in the equivalent of a contractual relationship, even in the absence of a formal, signed contract." Public bid law however says that the contract does not come into existence until the agency formally transmits acceptance of the bid to the offerer. Berry v. Okaloosa County, 334 So.2d 349 (Fla. 1st DCA 1976). Once again the lower court has usurped the authority of the Department by creating a contract without the benefit of an amended order being entered by the Secretary of Transportation, the duly delegated official vested with the authority to exercise the Department's authority. The appellate court does not stand in the shoes of the Secretary.

POINT IV

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL REQUIRES THE INAPPROPRIATE AND IMPOSSIBLE RELIEF OF AWARDING A SECOND CONTRACT FOR WORK ALREADY BEGUN

There is something fundamentally unfair about the lower court's order which requires the Department to award a second contract to perform Package U. Respondent has waived its right to award of the contract in several ways. As noted in the statement of the case, Respondent failed to seek a stay of the final order pursuant to Section 120.68(3), Fla. Stat. Section 120.68(3) very clearly states that "The filing of the petition does not itself stay enforcement of the agency decision...." Under Section 120.53(5)(c), Fla. Stat. the automatic stay ends with final agency action. Had Respondent filed a motion for stay either with the Department or with the First District, the parties could have argued the merits of a stay and established appropriate conditions of a stay which would have prevented this critical project from being relet.

When the Department announced its plans to readvertise the project, Respondent first filed a motion to expedite the appeal, informing the court of the reletting in late February and asking the court to expedite its ruling on the merits. However oral argument was not scheduled until May 13, 1987.

On January 29, 1987, Respondent filed for a writ of prohibition, asking the First District to stop the receipt of bids by the Department on February 25, 1987. On February 11, 1987, the First District denied the petition. The court could have treated the petition as a motion for a stay, but elected not to. With no motion for stay having been filed and the court having denied the writ which would have stopped the reletting,

the Department reasonably proceeded to accept bids and award the project. In fact the First District never entered any stay or similar order during the entire legal proceedings.

Respondent could also have filed a bid solicitation protest before bids were received the second time, which would have created an automatic stay under Section 120.53(5)(c) and Fla. Admin. Code Rule 14-25.04(1). The purpose of the bid solicitation protest is to save expense to the bidders in order to assure fair competition and to allow the agency to correct or clarify plans and specifications. The failure to file a bid solicitation protest constitutes a waiver of chapter 120 proceedings. See Section 120.53(5); Capeletti Brothers Inc. v. Department of Transportation, 499 So.2d 855 (Fla. 1st DCA 1986).

Respondent did not bid at the second letting, but attempted to file a protest. At this point the protest was too late. The Department dismissed the protest for lack of standing, based on Westinghouse Electric Corp. v. Jacksonville Transportation Authority, 491 So.2d 1238 (Fla. 1st DCA 1986), and made an emergency award because of safety and the critical nature of the project. On April 3, 1987, Respondent filed a second appeal. It was not until Respondent filed a petition for extraordinary writ after filing the second appeal and after award of the project to Harbert-Westbrook, that the First District said it would consider the petition as a motion for stay in the original appeal. By this point the second contractor was already at work.

It was incumbent on Respondent to take affirmative action to maintain the status quo to obtain the relief of award of the contract. Two cases are illustrative of the importance of availing oneself of the legal mechanisms available to maintain the status quo. In both Westinghouse

Electric v. Grand River Dam Authority, 720 P.2d 713 (Okla. 1986) and J.R. Francis Construction Co. v. Pima County, 1 Ariz. App. 429, 403 P.2d 934 (Ariz. App. 1965) the appellate courts found the issue of award of the contract to be moot because a stay was not obtained. In Westinghouse Electric, supra, the Oklahoma Supreme Court held:

> We are in total agreement with the Arizona court's analysis. If a person seeking injunctive relief does not take advantage of the procedures available to maintain the status quo, and the conduct which is sought to be prevented is thus permitted to take place, we cannot provide any relief. WEC did nothing to stop GRDA or BBC from completing Contract 2-R while this appeal was pending. As a result, the contract has been substantially completed. When an act which is sought to be enjoined has already been performed, or can never be performed, the appeal is moot.

Westinghouse Electric, supra at p. 721. Also see Tri-State Construction Co. v. City of Seattle, 14 Wash. App. 476, 543 P.2d 353 (Wash. Ct. App. 1975); Sims Varner & Associates, Inc. v. Blanchard, 794 F.2d 1123 (6th Cir. 1986).

The remedy fashioned by the court is inappropriate given the failure of Respondent to maintain the status quo through a statutory stay or stay requested under the appellate rules. This does not mean that the Department considers itself immune from an appellate review had the evidence shown a violation of the Liberty County standards. The reviewing court certainly could fashion some alternative remedy, such as reimbursement of all bid costs.

The propriety of the appellate court's determination that a contract already exists also must be questioned in light of the statutory framework which places certain prerequisites to be met before a valid contract can be

made. 23 U.S.C. §112(d) prohibits award of a federal aid construction contract without the appropriate approval.

> No contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, shall be entered into by any State highway department or local subdivision of the State without compliance with the provisions of this section, and without the prior concurrence of the Secretary in award thereof. (Emphasis added)

There is no evidence that the Federal Highway Administration would concur in award of this contract, especially in light of the fact the job is under construction by another contractor.

There is also a Florida statutory limitation on the Department's incurring a contractual liability:

> The department , during any fiscal year, shall not expend money, incur any liability, or enter into any contract which, by its terms, involves the expenditure of money in excess of the amounts budgeted as available for expenditure during such fiscal year. Any contract, verbal or written, made in violation of this subsection, is null and void, and no money may be paid on such contract. The department shall require a statement from the comptroller of the department that funds are available prior to entering into any such contract or other binding committment of funds.

Section 339.135(8)(a), Fla. Stat. (1985). The only evidence in the record before the appellate court was that the bid of Respondent exceeded the budget estimate by more than $12 million. This does not provide either a factual or legal basis for award of the contract. If the court wants to stand in the shoes of the Secretary, it should be bound by the same legal dress code.

CONCLUSION

Based on the foregoing argument and authority, the decision of the First District Court of Appeal should be quashed and the Final Order of the Florida Department of Transportation should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 10th day of February, 1988 to DAVID S. DEE, ESQUIRE, First Florida Bank Building, Post Office Drawer 190, Tallahassee, Florida 32302.

ROBERT I. SCANLAN