IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

GROVES-WATKINS CONSTRUCTORS,

Respondent.

CASE NO. 71,081

JURISDICTIONAL BRIEF OF PETITIONER FLORIDA DEPARTMENT OF TRANSPORTATION

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PRELIMINARY STATEMENT

The Petitioner, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, will be referred to herein as the "Department," and the Respondent, GROVES-WATKINS CONSTRUCTORS, will be referred to herein as "Respondent."

STATEMENT OF THE CASE AND FACTS

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. This was a federal aid project with 90% of the cost covered with federal funds. (R:160) The bid documents informed prospective 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%). (R:1298-1300) Even though fifteen qualified contractors took out plans and bid proposals, only three bids were received. (R:194) Respondent's low bid of $54,472,335.12 exceeded the Department's estimate by at least $12 million or 29%. (R:151) A comparison of the low bid and estimate revealed that 106 of 153 bid items exceeded the Department's estimate. (R:197) The Department posted notice of intent to reject all bids.

Respondent filed a bid protest which stopped the contract award process until entry of a final order. A formal evidentiary hearing was conducted by a Hearing Officer of the Division of Administrative Hearings on August 29, 1986. The Hearing Officer's Recommended Order found that the low bid exceeded the Department's official estimate by at least $12 million. However, in the order the Hearing Officer created a "corrected estimate" based solely on Respondent's bid and based on only three of the 153 bid items. He calculated that the official estimate should have been $12.2 million higher. Based

on this new "corrected estimate," the Hearing Officer concluded that Respondent's bid was actually lower than the "corrected estimate" and within the 7% award criteria. His final conclusion was that if the Department adhered to the official estimate and rejected all bids, the Department would be acting arbitrarily. (R:1376-1402)

The Department's Final Order rejected the finding that the estimate was erroneous or unreasonable; rejected the Hearing Officer's "corrected estimate" policy and reaffirmed the 7% policy; found that Respondent failed to meet its burden of proving bad faith, ill will, prejudice, or failure to follow normal procedures on the part of the Department; and held that Respondent failed to show the requisite funding was available or that Federal Highway Administration concurrence was obtained to assure the availability of federal funds. The Final Order concluded by rejecting all bids and allowing readvertisement of the project as soon as possible.

Respondent filed its notice of appeal, but never filed a motion for stay of the order as authorized by Section 120.68(3), Fla. Stat. (1985). Under Section 120.68(3), the filing of a petition does not itself stay enforcement of the agency decision. During the pendency of the appeal and before oral argument was held, the plans were revised and the project was relet and awarded to another contractor. After the award, the Respondent filed a petition for extraordinary writ to prevent execution of the contract. The petition was denied by the First District, but

the court said the petition would be treated as a motion for stay of the original order of rejection. The court, however, never ruled on the motion. The First District Court of Appeal has now reversed the Final Order and remanded the case to the Department with directions to enter another order awarding the original project to Respondent within 10 days of mandate or the Recommended Order shall automatically become the Department's final order.

SUMMARY OF ARGUMENT

The opinion of the district court of appeal conflicts with prior decisions of this Court. The opinion specifically rejects this Court's decision in Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So.2d 505 (Fla. 1982). The appellate court refused to recognize the standard of review for agency competitive bid decisions set in Liberty County, supra. The lower court decision has mandated that the Department adopt the "corrected estimate" policy of the hearing officer, rather than follow the standard award criteria. This is in direct conflict with previous decisions of this Court which hold that courts cannot dictate rules and policy to a state agency, and to do so is in violation of principles of separation of powers. The lower court decision also ignored previous decisions of the Supreme Court which hold that the judiciary cannot order an executive agency to exercise its discretion in a particular manner.

The lower court's decision affects all state constitutional and state officers which must acquire goods or award contracts by competitive bidding and are subject to bid protests. Not only does it allow the hearing officer to create new agency policy, but it greatly restricts the exercise of discretion by a state officer or agency to reject bids because of unexpectedly high bids or budgetary limitations. It will allow the low bidders to dictate the prices to be paid and restrict the agency's ability to reject bids based on historical bid prices or estimated job cost.

ARGUMENT

POINT I

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL CONFLICTS WITH PRIOR DECISIONS OF THE FLORIDA SUPREME COURT

In its decision, the First District Court of Appeal specifically rejected this Court's decision in Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So.2d 505 (Fla. 1982), which is the controlling precedent in setting the standard of judicial review for an agency's exercise of discretion in a competitive bid situation. It is clear that this is the standard of review which should have been applied, since Section 337.11(3), Fla. Stat. (1985) gives the Department broad discretion to reject all bids in a situation such as this where the lowest bid is $12 million higher than expected. Section 337.11(3) states:

> 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.

This statement of discretion is very similar to Section 336.44(5), Fla. Stat. (1979) which was construed in Liberty County, Id. at 506. The Liberty County decision is consistent with the Supreme Court's holding in Willis v. Hathaway, 117 So. 89 (Fla. 1928) which initially construed the statute authorizing the State Road Department to reject all bids. The standard in Willis, Id. at 95 is whether the protestor 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."

As Judge Ervin said in his dissent: "The present case should have involved only one disputed factual issue: whether DOT's decision in rejecting all bids was in compliance with the Liberty County v. Baxter's Asphalt & Concrete, Inc. standard." See Opinion at p.25. Judge Ervin points out that the Hearing Officer made no finding of "illegality, fraud, oppression, or misconduct" as required by this Court in Liberty County, Id. at 507. In fact Judge Ervin confirmed there was no factual basis for such a finding.

The rejection of the Liberty County principles by the majority reflects a clear and express conflict between the two decisions and supplies a sufficient basis for this Court to exercise its discretion to grant conflict review. Ford Motor

Company v. Kikis, 401 So.2d 1341 (Fla. 1981).

However, the lower court has gone even farther in its opinion to express principles concerning competitive bidding which are incongruous with principles previously established by this Court. The lower court says that it has "no legal basis ... for rendering a judgment that any beneficial changes (to the bid) could not just have easily have been made within the framework of the contract that should have been awarded to G-W." Opinion at page 15. This statement presupposes that the Department has the ability to negotiate changes in a bid after it is submitted.

In 1931 this Court established the very basic principle of competitive bidding that the plans and specifications must be reasonably definite before bids are received and an agency or public officer is "without power to make exceptions, releases, and modifications in the contract after it is let." Wester v. Belote, 138 So. 721 (Fla. 1931). By ignoring this principle, the district court majority has wrongfully rationalized away the Department's discretion to reject all bids, rework the plans to reduce cost, and rebid the project. The reasoning in the opinion once again is in express conflict with an opinion of this Court.

However, there is an even more basic conflict between the First District's decision and prior decisions of this Court. By requiring the Department to adopt the Recommended Order as the Final Order, 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. This "corrected estimate" was based on the low bid alone, without regard to the Department's historical cost data. He then compared this "corrected estimate" with the low bid and found the bid to be within the award range of 7%. This was not the policy expressed in the bid documents which informed all prospective bidders that the bids would be compared with the official estimate prepared prior to the letting and all bids exceeding the estimate by 7% would likely be rejected.

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 majority has violated these principles, one need only review the comments of the 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 pg. 22-23.

In addition, by ordering the Department to exercise its discretion in a specific manner to award this project to Respondent, the lower court has violated the separation of power principles set forth in Rose, supra.

It is clear that the potential precedent-setting nature of this case, if allowed to stand in express and direct conflict with the principles already enunciated by this Court, cries out for this Court to exercise its discretion to accept this case for review. See Ansin v. Thurston, 101 So.2d 808 (Fla. 1958).

POINT II

THE DECISION OF THE FIRST DISTRICT EXPRESSLY AFFECTS A CLASS OF STATE OR CONSTITUTIONAL OFFICERS

All state agencies, counties, school boards, constitutional officers, boards, or commissions which must acquire commodities or build public construction projects by competitive bid and fall under the bid protest procedures of Section 120.53(5), Fla. Stat., (1985) are affected by this decision. Judge Ervin says this case "will establish a precedent for disappointed bidders to seek specific performance of a nonexistent contract, on evidence showing merely an erroneous exercise of discretion." Opinion at p. 25.

First, the appellate court has rejected the Liberty County standard for judicial review of an agency's exercise of its discretion to award or reject all bids. Second, the decision

allows an administrative hearing officer to create agency policy. As Judge Ervin says, "The policy of the hearing officer turns the competitive bidding process on its head, making it a process for the benefit of the contractor doing the bidding, instead of for the benefit of the public." Opinion at p. 24.

Third, the decision greatly limits the ability of the public officer to exercise discretion to reject bids or to revise plans when in receipt of higher than expected bids. By adopting the recommended order as the final order, the lower court has required award of the contract without proof of availability of funds or the concurrence of Federal Highway Administration for federal fund participation. The lower court is saying DOT is bound by the low bid because it made an error in its estimate. The Department has to accept the bid despite the fact it is much higher than the historical pricing data. This allows the bidders to dictate the price the state officer pays, and eliminates the option not to buy or to revise the plans to reduce cost. This has very serious consequences for all state and constitutional officers which acquire goods by competitive bid. These far-reaching consequences meet the test of Spradley v. State, 293 So.2d 697 (Fla. 1974), so this Court should exercise its discretion and accept jurisdiction for review.

CONCLUSION

The cases cited previously show a clear and express conflict between the First District's decision and previous

decisions of this Court. In addition, the decision has a far-reaching impact on the competitive bidding process in Florida for state and constitutional officers who must acquire goods and services by competitive bids.

In addition to the legal reasons this Court should accept jurisdiction, there are some very practical questions which need to be answered by the consideration of this case on its merits. Has the creation of the bid protest process by the Florida Administrative Procedures Act changed the basic judicial role in review of an agency's exercise of discretion in rejecting all bids in a competitive bid situation? When a protesting bidder files an appeal from an agency's order but foregoes a motion for stay required by Section 120.68 and the agency changes the plans, proceeds with reletting or award of the contract, and construction begins; can the appellate court order the agency to award the original contract to the protestor and require displacement of the contractor performing the work after the reletting, or is some other relief more appropriate? Has the First District Court by its recent decisions displaced the agency's discretion with that of a hearing officer's discretion?

For all of the reasons stated above, this Court should accept jurisdiction of this case pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iii)(iv).

Respectfully submitted,

Robert I. Scanlan

ROBERT I. SCANLAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 14th day of September, 1987, to David S. Dee, Esquire, First Florida Bank Building, P. O. Drawer 190, Tallahassee, Florida 32302.

Robert I. Scanlan

ROBERT I. SCANLAN