O/a 4-27-88

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

CASE NO. 71,081

GROVES-WATKINS CONSTRUCTORS,

Respondent.
_____/

FILED
SID J. WHITE
MAR 29 1988
CLERK, SUPREME COURT
By _____
Deputy Clerk

REPLY BRIEF OF PETITIONER
DEPARTMENT OF TRANSPORTATION

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SUMMARY OF THE ARGUMENT

The Department agrees that principles of the Administrative Procedures Act (APA) should be applied in this case. Following these principles, the Department has properly rejected the Hearing Officer's findings of fact by stating with particularity where the findings are not supported by the evidence. A review of the record proves the rejections were proper. The Final Order should be reviewed under Section 120.68(10), Fla. Stat. because issues in this case are necessarily infused with policy issues. Since the findings of the Department are supported by competent substantial evidence, the Final Order should be affirmed.

The record reveals that the issues of funding and Federal Highway Administration concurrence were raised at the hearing, contrary to the assertions of Respondent. The Hearing Officer erroneously rejected the testimony related to issue of federal concurrence as irrelevant.

Respondent failed to meet its burden of proving all statutory prerequisites for the award and creation of a legally binding contract had been met. Therefore, the Department acted within its statutory APA authority to take official notice of the applicable statutes and apply them to the facts in the Final Order.

This Court has set forth the standard of judicial review for the appellate court to follow in reviewing the agency's exercise of discretion under Section 120.68(12), Fla. Stat. Even so, the lower court violated Section 120.68(12) by

substituting its judgment for that of the Department on an issue of discretion.

Had Respondent followed the procedures of the APA and sought a stay of the Final Order pursuant to Section 120.68(3), a proper supersedeas could have been set as a condition for delaying the reletting of the project. Under prior cases of the First District Court of Appeal, the Respondent had to take appropriate action to maintain the status quo in order to preserve its right to award of the contract.

ARGUMENT

STANDARD OF REVIEW

The exercise of an agency's discretion to accept a bid or to reject all bids within the framework of a bid protest proceeding is expressed in its final order, which is subject to judicial review. It is true that the Department argues that bid protest proceedings are a special creature of the Administrative Procedures Act which require different treatment from the standard Section 120.57(1) proceeding. This special treatment is evident from the statutory scheme in Section 120.53(5), Fla. Stat., which creates an extraordinary procedural scheme for bid protests, unlike other administrative proceedings which are not singled out for special statutory handling.This special statutory scheme has not changed the review standards for the exercise of discretion expressed in the Final Order. Many of the phantom arguments which Respondent asserts were made by the Department will not be found in the Department's Initial Brief. Respondent first argues that the Department asserts that it can

substitute its judgment on disputed factual issues for the findings of the Hearing Officer. It is true that the Department rejected certain findings of fact, including the finding that the estimate was erroneous and unreasonable. This is exactly what Section 120.57(1)(b)9., Fla. Stat. allows an agency to do, so long as the entire record is reviewed and the final order states with particularity where the Hearing Officer's findings of fact are not supported by the evidence. The Final Order under review contains six pages of explanation for rejecting the Hearing Officer's findings that the estimate was erroneous and unreasonable. Each factual finding is referenced to the record to illustrate how it is not supported by the evidence.

Respondent also argues that the Department has not asserted that the Hearing Officer's findings of fact were not supported by competent substantial evidence. If not expressly reiterated in the Initial Brief, a review of the final order will quickly reflect at least ten references to findings of fact being rejected as speculative, conjectural or not supported by competent substantial evidence. The Final Order under review in this case has detailed when the Recommended Order is not supported by the evidence.

The Hearing Officer's erroneous conclusions were accepted by the District Court despite the evidence to the contrary. For instance, the District Court says, "In response, DOT simply introduced evidence that it arrived at its estimate by retrieving historical data from its computer." Groves-Watkins Constructors v. State Department of Transportation, 511 So.2d 323, 329 (Fla. 1st DCA 1987). This is not what was shown by the

evidence. The testimony was that suppliers were contacted to determine material costs and haul and freight costs in addition to looking at the historical data. The Hearing Officer himself inquired if the historical data was the only data analyzed, and was told, no, both the supplier quotes and historical prices are compared. (R-227-228) (Excerpts from the transcript detailing the estimating process are included in the Appendix, p.1-14). In fact, Respondent's witness confirmed that the Department's personnel were well aware of the embankment suppliers' quotes: "They seemed very well informed as to who was going to quote down there and were very knowledgeable about the various subcontractors and material suppliers." (R-77).

The Final Order also rejects the Hearing Officer's findings concerning the embankment prices. The Hearing Officer rejected the Department's cost data because the historical dirt prices on the jobs in the I-595 corridor used in formulating the estimate could not be explained by the witnesses in terms of the location of the borrow in relation to the job and the haul distances required. The Hearing Officer specifically ignored the testimony that the dirt quotes on the I-595 projects stayed in the range of $4.86/c.yd. as bid for the dirt on Package Q, one project to the east of Package U. (R-211)

Instead, the Hearing Officer concludes that the dirt prices on Package M, a project 15 miles to the east, corroborates Respondent's bid price. This finding was properly rejected by the Department for the same reason the Hearing Officer rejected the Department's prices. There was no evidence of the location and price of the fill dirt utilized on Package M by the low

bidder, there was no evidence of the amount of travel involved in hauling the material from the borrow site (it was at least 15 miles from Respondent's borrow sources on U), and there was no evidence of the amount of traffic and time difficulties involved in the haul. There being no competent evidence to support this part of the findings on embankment prices, this one analysis falls, so in turn his conclusion that the estimate was erroneous falls.

Respondent next counters that the "reasonable cost of an item or a service is quintessentially a factual determination, completely devoid of policy considerations." If this were true, why is there a $12 million discrepancy between the Department's opinion and Respondent's opinion of the job cost and a $9 million difference between Respondent's bid and the high bid? Which "fact determination" is correct? These are nothing more than opinions or best guesstimates of what will happen on a very complex construction project over a period of three years with any number of possible permutations of problems or unanticipated happenings. Even if the prices bid prove to be be higher than anticipated, there is nothing in Section 337.11, Fla. Stat. which requires those high prices be accepted, without the opportunity to submit them to the competitive marketplace a second time.

Respondent must argue that the ultimate decision to reject all bids is devoid of policy implications to avoid the conundrum created by the APA. Section 120.57(1)(b)9 says the agency cannot overturn the hearing officer's findings of fact without first determining they are not supported by the evidence. The

standard of review however says the court cannot set aside the final order unless a finding is made that the agency's action depends on facts not supported by competent substantial evidence in the record. Section 120.68(10), Fla. Stat. This means the final order must be reviewed for record support, not the recommended order. Since the issues of the estimated cost of a project, the method by which bids received should be analyzed, and the ultimate policy decision to reject all bids or award are essentially matters of opinion which necessarily are infused by policy considerations for which the Department has special statutory responsibility, the exercise of discretion is judged giving more weight to the Department's findings and less weight to the hearing officer's findings. See McDonald v. Department of Banking and Finance, 346 So.2d 569, 579 (Fla. 1st DCA 1977). Therefore, Section 120.68(10), Fla. Stat. controls the appellate court's review role.

Next Respondent argues that issues are being raised which were not raised in the proceedings below. Respondent argues that the Department did not testify that concurrence of the Federal Highway Administration was required in this case. There is only one piece of evidence needed to show that FHWA concurrence is needed under federal law--federal funding on the project. It is undisputed that 90% of the funding for this project is federal funding. (R-160) The statement in Respondent's brief that the Department's witness "never testified that it (concurrence) was required in this case," is very misleading. Maybe the witness did not say concurrence "was required," but he certainly said that concurrence was sought on this project from FHWA for DOT's

decision to reject the bids as being too high. (R-160) He also said the Department received a response. When the Department's witness was asked if Federal Highway concurred in the bid rejection, Respondent posed the objection that the answer was irrelevant, and it was sustained. So it is very hard to see how Respondent can argue to this Court that there was no proof that FHWA concurrence was necessary on this project. Any lack of proof resulted from Respondent's objection and the erroneous ruling of the Hearing Officer.

There are at least three statutory prerequisites for the advertisement, receipt of bids, award, and funding of a federally funded project. The plans, specification, and estimates must be approved by FHWA as authorization of federal funds (23 U.S.C. 106) as explained at the hearing (R-170); FHWA must concur in the award (23 U.S.C. 112); and the Department's comptroller must certify that sufficient funds are available (Section 339.135, Fla. Stat.). Respondent argues that these were defenses that the Department had the burden to prove. Yet even under the APA the party asserting the affirmative of an issue bears the burden of proof. Balino v. Dept. of Health & Rehabilitative Services, 348 So.2d 349, 350 (Fla. 1st DCA 1977). As the protesting party, Respondent had the burden of showing that all statutory requisites for a legal and binding contract had been met. The Department was certainly within its authority in taking official notice of applicable statutes in setting out conclusions of law in the final order.

Respondent's argument concerning the applicability of Florida Department of Transportation v. J.W.C. Co., 396 So.2d

778 (Fla. 1st DCA 1981) and Henderson Signs v. Florida Department of Transportation, 397 So.2d 769 (Fla. 1st DCA 1981) shows the dilemma facing an agency under the decisions of the First District at the time of the Final Order. As argued by Respondent, these cases prohibited the Department from remanding the case to the Hearing Officer to consider the critical issue of funding and FHWA concurrence, which he considered irrelevant at the hearing.

Since the Final Order was entered in this case, the First District has reversed itself and allowed remand for further testimony in this same situation:

> But the remand in this case was a consequence of DER's performance of its express statutory right to "modify the conclusions of law," which modification is not appealed. That action necessitated factual findings on an issue which the hearing officer had initially disregarded as irrelevant. Conceding that agency powers are only those conferred by the statute, DER's clear obligation was to enter a coherent final order upon the application within all applicable constraints of law. Remand was dictated in the circumstances.

Miller v. State Dept. of Environmental Regulation, 504 So.2d 1325, 1327, (Fla. 1st DCA 1987). See also Inverness Convalescent Center v. Dept. of Health and Rehabilitative Services, 512 So.2d 1011 (Fla. 1st DCA 1987).

The issue of funding and concurrence was raised at the hearing, it was rejected by the Hearing Officer as irrelevant, and the Department was within it statutory right to include these considerations in the conclusions of law in the Final Order. Since the funding issue was critical for the proof of a valid and

binding contract, at a minimum, the lower court should have reversed and remanded for further proceedings under the Miller decision.

It is clear that the Department did not dispense with the APA process, nor argue that it can act arbitrarily as Respondent alleges. It is the Final Order which has expressed the Department's exercise of discretion. This Court set forth the standard of judicial review for the exercise of that discretion in 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). Respondent first attempts to distinguish these cases by saying they are not bid protest cases under the APA. However these cases explain the limitations on the agency's exercise of discretion and Respondent has given no legitimate reason to reject this standard.

Respondent appears to concede that there was no evidence of illegality, fraud, oppression, or misconduct, Liberty County, supra at 507, but argues the final order evinces a showing of "arbitrary will" required by the Willis decision. The Department submits however, that even if the findings of fact of the hearing officer are utilized, there is no showing of arbitrary will. The one factual finding that the estimate is in error does not equate to arbitrariness. Each of these criteria require some impropriety on the part of the agency, not just disagreement with the decision.

The testimony reflected that additional analysis must be made when there is a large discrepancy between the low bid and estimate. The Deputy Assistant Secretary testified that the number of bids is considered, the spread of the bids is

considered, and it is hoped that two or three bids will be grouped around the low bid to validate the low bid. He concluded in this case there were not enough bids and not close enough grouping of the bids. (R-147) The Hearing Officer also ignored this testimony. The Final Order sets out the Department's reasons for rejecting all bids, which cannot be considered an expression of will without reason.

DOT has not made the phantom argument that it can arbitrarily exercise its will as an "honest lunatic" with just any irrational method of awarding contracts that it desires. In fact, the evidence in this case clearly shows that this hyperbole was unwarranted. Respondent argues that the Department's approach to estimating "would gladly tolerate and ultimately encourage inaccurate estimates and subvert the entire competitive bidding process." (P. 20) Certainly a system which reviewed 475 projects in one year, totalling almost $750 million in bids, and reflected only a 1.2% deviation between the low bid and official estimate can neither be labeled inaccurate nor the work of an "honest lunatic."

SEPARATION OF POWERS

The Department's argument that the decision violates principles of separation of power is based on its handling of policy issues at two levels. The first level involves utilization of the estimate to arrive at a decision on what to do with the bids. This is where the Hearing Officer inserted his own policy for that of the Department as explained in the Initial Brief. The

second level encompasses the ultimate decision to award or reject based on the analysis of the bids.

The Deputy Assistant Secretary for the Department testified that the bidding showed "not as many bids as we would like and not enough grouping around a reasonable estimate to indicate to us that we had made a mistake." (R-147) He stated that if there had been six or seven bids with two or three within the range of the low bid it would validate the low bid. (R-147) The evidence reflected that 15 bidders had taken out the bid proposals and only three bids were received. The evidence reflected that on Package M only one bid was received at the initial letting, but seven bids were received at the second letting, indicating additional competition resulting in a lower price. This evidence alone should be enough to sustain the Department's exercise of discretion.

Respondent relies heavily on the case of Wood-Hopkins Contracting Co. v. J. Au & Son, Inc., 354 So.2d 446 (Fla. 1st DCA 1978). This is interesting, since Respondent argues the California case cited by the Department has no precedential value because it involves a writ of mandamus and a party could not obtain the discretionary award of a contract by mandamus. This however is exactly what happened in Wood-Hopkins. A writ of mandamus was issued by the trial court ordering the JEA to award the project to a particular bidder. The Department submits that case also violates the principles of separation of power.

Respondent argues finally that rejection of all bids in a case of a 29% deviation between the low bid and estimate was a departure from prior practice. The evidence also does not support

this statement. The Department's estimator testified "that when a project comes in that exceeds the estimate by 20 or 25 percent, we very seldom have those awarded. When we have that much deviation, there is generally something very wrong with the process." (R-193)

The Department must not be deprived of its right to rebid a project under these circumstances. These circumstances demonstrate neither illegality, fraud, oppression, misconduct, unfair dealing, ignorance, improper influence, nor an exercise of arbitrary will. Only if these criteria are violated may the order be remanded to the agency. Section 120.68(12), Fla. Stat. says the appellate court shall not substitute its judgment for that of the agency on an issue of discretion. The district court has violated this limitation.

WAIVER OF RELIEF

In Respondent's response to the Department's argument concerning waiver of the relief of award of the contract, there is resounding silence concerning the "straightforward application of basic APA principles." The reason is clear. Respondent failed to avail itself of the two APA remedies available in a bid protest situation like this--a Section 120.68(3), Fla. Stat. stay and a bid solicitation protest to stay further bidding of the contract under Section 120.53(5), Fla. Stat.

Respondent's reasoning for not requesting a stay rings rather hollow: "a stay of DOT's final order in this proceeding would not necessarily have prevented a rebid of the project in another, separate proceeding." (AB-38) A stay of the Final Order which dismissed the protest and ordered readvertisement would have stopped the Department from rebidding the job until the stay was

lifted. The unspoken reason for not seeking a stay seems rather obvious. Respondent wanted to avoid posting a supersedeas bond as contemplated by Section 120.68(3), Fla. Stat.

Respondent first argues that the Department exploited the judiciary's natural reluctance to grant preliminary relief. Nothing could be farther from the truth. The statutory scheme anticipates such a stay and the First District has granted stays in bid protest proceedings upon appropriate motion. These stays were conditioned upon the filing of an appropriate supersedeas bond.

One good example is C.H. Barco Contracting Company v. State Department of Transportation, 483 So.2d 796 (Fla. 1st DCA 1986), a bid protest case. There the court granted the motion for stay; remanded to the Department for an order setting a supersedeas bond; and then approved the Department's final order setting supersedeas in the amount of $620,573. (See orders of the First District Court of Appeal in Appendix p. 15-17)

Respondent next reasserts the lower court's reasoning that the Department should have filed a motion to dismiss for mootness. It is hard to understand the lower court's statement since just such a motion has been previously rejected by the court in Baxter's Asphalt & Concrete, Inc. v. Department of Transportation, 475 So.2d 1284 (Fla. 1st DCA 1985):

> Before we considered the merits of this case Solomon moved to dismiss the appeal as moot. It urged that Baxter's failure to seek a stay or supersedeas precluded any practical relief since the contract was already being executed.... We denied Solomon's motion upon Baxter's response that under the ancillary relief provision of Section 120.68(13)(a)2, Florida Statutes (1983)

> it sought replacement of Solomon as prime contractor or, alternatively, damages for DOT's violation of the competitive bidding statute. DOT again raises the mootness issue in its brief but, based on the denial of Solomon's motion, we do not reconsider it here.

Id. at 1286.

It is also interesting that Respondent argues that Wood-Hopkins, supra, supports its position on the waiver issue, since the controlling factor in granting the relief sought in that case was that the protesting bidder got the circuit court to stay reletting of the contract and preserved the status quo before the final hearing was held. Id. at 448. In Wood-Hopkins, the court emphasized that protesting bidders must take appropriate action to maintain the status quo before the agency proceeds or the "rejected bidder may then be limited to his remedy at law for damages." Id. at 448. Neither of the other cases relied upon by Respondent involve the statutory bid protest scheme which provides for an automatic stay until entry of a final order which must be revived by the appropriate motion for stay and supersedeas.

Finally Respondent argues that there is nothing in the record to show the reletting. This might well explain why Respondent sought relief by filing independent actions in lieu of the statutory stay set forth in Section 120.68, which would have been made part of the record. Had a stay been sought by appropriate motion, the parties could have addressed the issues of the propriety of a stay, as well as the amount of a bond.

However to argue that the reletting is not a part of the record, ignores the fact that Respondent informed the court of the reletting in its Motion To Expedite. The motion informed the

court the project would be relet and awarded in February 1987, gave the court an agreed upon briefing schedule which had all briefs submitted before the reletting, and stressed the importance of the project to the court. (Copy attached in Appendix p. 18-20) However, the court failed to set oral argument until May.

In short, the First District Court has ignored its own warnings concerning the requirement that a protesting bidder seek appropriate relief to maintain the status quo in order to be entitled to award of the contract.

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 28th day of March, 1988, to DAVID S. DEE, ESQUIRE, First Florida Bank Building, Post Office Drawer 190, Tallahassee, Florida 32302, and to DEBORAH BOVARNICK MASTIN, Assistant County Attorney, Metro-Dade Center, Suite 2810, 111 N.W. First Street, Miami, Florida 33128-1993.

Robert I. Scanlan

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