

**STATE OF ILLINOIS  
DEPARTMENT OF TRANSPORTATION**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>R.L. Brink, Corp.</b>	)	<b>2012-S-06</b>
	)	
<b>Respondent.</b>	)	

**HEARING OFFICER RECOMMENDATION**

On August 22, 2012, Chief Procurement Officer Bill Grunloh (CPO) issued a Notice of Suspension and Interim Suspension against R.L. Brink, Corp. (Brink). The underlying allegation forming the basis for the Suspension is that Brink engaged in "acts or omissions that indicate that the contractor or subcontractor lacks integrity and honesty in the conduct of business or the performance of contracts" pursuant to 44 Ill. Admin. Code 6.520 in relation to Brink's compliance with the Responsible Bidder Provision, 30 ILCS 500/20-22(6). Brink, through its attorneys Niew Legal Partners, P.C., timely filed a request for a hearing following receipt of the Notice of Suspension. Brink also instituted proceedings in Adams County Circuit Court at that time. On September 5, 2012, the Interim Suspension imposed on Brink was stayed based on a temporary restraining order entered in the Circuit Court. The Interim Suspension has not been in effect from September 5 through the date of this recommendation.

The Suspension Hearing in this matter was held on October 29 and October 31, 2012. The Illinois Department of Transportation (IDOT) was represented by Lance Jones, IDOT Deputy Chief Counsel, and Phillip McQuillan, IDOT Assistant Chief Counsel. Also present on behalf of the Department was Bruce Harmening, Special Assistant to the Chief Counsel. Appearing on behalf of Brink was Stanley Niew of Niew Legal Partners, P.C.

**I. Law**

The CPO is granted the express authority to suspend a contractor from participation on contracts requiring approval of IDOT:

The CPO may suspend a contractor or subcontractor from participation on any contract or subcontract awarded by or requiring approval or concurrence of the Department upon a determination by the CPO based upon adequate evidence that the contractor or subcontractor has engaged in conduct proscribed by Section 6.520 of this Subpart. This determination may be predicated on evidence developed by means of an investigation conducted by the CPO and procurement compliance monitors and the record of any hearing requested and conducted pursuant to this Subpart; by review of the public record containing a criminal conviction, a civil judgment, or an admission under oath of conduct evidencing proscribed conduct including a plea of nolo contendere; or the findings and decisions made in accordance with law by another public agency, or another appointed CPO, that the contractor or subcontractor has engaged in conduct proscribed by Section 6.520 of this Subpart. 44. Ill. Admin. Code 6.510.

Based on the record as a whole and an adequate evidence standard of proof, the CPO will determine the suspension action to be taken. 44 Ill. Admin. Code 6.690(a). The rules give the following additional guidance:

In assessing adequate evidence, consideration will be given to how much credible information is available, its reasonableness in view of surrounding circumstances, corroboration or lack thereof as to important allegations, and inferences that may be drawn from the existence or absence of affirmative facts. This assessment will include an examination of basic documents such as contracts, inspection reports, and correspondence. 44 Ill. Admin. Code 6.690(b).

A contractor may be suspended for "acts or omissions that indicate that the contractor or subcontractor lacks integrity and honesty in the conduct of business or the performance of contracts." 44 Ill. Admin. Code 6.520. These include but are not limited to:

c) materially violating any rule or procurement procedure or making a material false statement in connection with any rules or procurement procedures of the Department. 44. Ill. Admin. Code 6.520(c).

## **II. Findings of Fact**

1. Section 30-22 (6) of the Illinois Procurement Code (Responsible Bidder Provision) provides as follows:

To be considered a responsible bidder on a construction contract for purposes of this Code, a bidder must comply with all of the following requirements and must present satisfactory evidence of that compliance to the appropriate construction agency:

- (6) The bidder and all bidder's subcontractors must participate in applicable apprenticeship and training programs approved by and registered with the United States Department of Labor's Bureau of Apprenticeship and Training
2. IDOT requires all construction vendors that bid on state let construction projects to prepare and return certifications with each bid.
3. Similarly, to bid on a County Let construction project utilizing state funds, the Department requires each bidder to prepare and return with the bid an Apprenticeship and Training Program Certification.
4. Section K of the certifications submitted with all state let construction bids states, in its entirety:

In accordance with the provisions of Section 30-22 (6) of the Illinois Procurement Code, the bidder certifies that it is a participant, either as an individual or as part of a group program, in the approved apprenticeship and training programs applicable to each type of work or craft that the bidder will perform with its own forces. The bidder further certifies for work that will be performed by subcontract that each of its subcontractors submitted for approval either (a) is, at the time of such bid, participating in an approved, applicable apprenticeship and training program; or (b) will, prior to commencement of performance of work pursuant to this contract begin participation in an approved apprenticeship and training program applicable to the work of the subcontract. The Department, at any time before or after award, may require the production of a copy of each applicable Certificate of Registration issued by the United States Department of Labor evidencing such participation by the contractor and any or all of its

subcontractors. Applicable apprenticeship and training programs are those that have been approved and registered with the United States Department of Labor. The bidder shall list in the space below, the official name of the program sponsor holding the Certificate of Registration for all types of work or crafts in which the bidder is a participant and that will be performed with the bidder's forces. Types of work or craft work that will be subcontracted shall be included and listed as subcontracted work. The list shall also indicate any type of work or craft category that does not have an applicable apprenticeship or training program. **The bidder is responsible for making a complete report and shall make certain that each type of work or craft job category that will be utilized on the project as reported on the Construction Employee Workforce Projection (Form BC-1256) and returned with the bid is accounted for and listed.**

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The requirements of this certification and disclosure are a material part of the contract, and the contractor shall require this certification provision to be included in all subcontracts. In order to fulfill this requirement, it shall not be necessary that an applicable program sponsor be currently taking or that it will take applications for apprenticeship, training or employment during the performance of the work of this contract.

5. Brink was the low bidder on a January 15, 2010 Illinois Department of Transportation letting, item #200 (Brown County). Specifically, Brink was the low bidder on the following project/contract: 72B60. The project was federally funded, and therefore, the responsible bidder provisions were not applicable. Brink was also the low bidder on a June 11, 2010 Illinois Department of Transportation letting, item #212 (Brown County). Specifically, Brink was the low bidder on the following project/contract: 72C37. Project 72C37 was state funded, and therefore, the responsible bidder provisions described above applied.
6. Brink's bid documents on project 72C37, specifically, the Item K certification, did not certify and disclose that Brink or Brink's subcontractors intended to use the Trade of Laborer for this construction project or that Brink participated in an apprenticeship or training program for the Trade of Laborer. The following handwritten language appears under paragraph K of Brink's bid documents:

*"R.L. Brink Corp.- Operators"*  
*"Subcontractors - Stripers, Ironworkers"*
7. Also included in the bid documents on project 72C37 was a Department form BC 1256 (Workforce projection). Brink indicated on the form that a total of 2 Laborers would be utilized on project 72C37. The form instructs the signer to list persons "employed directly by the undersigned bidder as well as the projection of numbers of persons to be employed by subcontractors."
8. Projects 72B60 and 72C37 were similar in terms of the work to be completed, the time frame of the work and the location of the work. Both were located in and around Mt. Sterling, Illinois, Pop. 1900. Project 72B60 is described as primarily Rt. 24 running East/Vest from a point near the East side of the city to a point near the West side of the city. Project 72C37 is described as Rts. 107/99 running North/South from a point connecting with Rt. 24 in the city to a point just south of the city. The two projects were located directly adjacent to each other.
9. The Department received a protest letter on project 72C37 and notified Brink on July 22, 2010 that a protest was received.

10. Brink's response provided no information or supporting documentation in regarding its participation in an apprenticeship and training program for the trade of laborer. The response letter submitted by Brink on June 30, 2010 contained the following language:

"Your letter also requests information concerning the specific trade of laborer. We have enclosed a copy of the Apprenticeship and Training Program Certification of the Bid Proposal which we filed for this project. On this form we listed the trade of laborer as subcontracted work. The subcontractors for this work are Clevenger Contractors, Inc. and Gardenscape Contractors, Inc. We have enclosed copies of the Certificates of Registration being utilized by both of these subcontractors for the craft of laborer."

11. Attached to and as part of the June 30<sup>th</sup> communication was an Apprenticeship and Training Certification (Item K) that Brink purported to have been taken from the bid documents for project 72C37 with the following Typewritten verbiage:

"Program sponsor: R.L. Brink Corporation, Quincy, Illinois:  
Types of work: Operator  
Subcontracted work: Stripper, Ironworker, Operator, Laborer"

12. The Certification form sent to the Department on June 30<sup>th</sup> was not the same form sent to the Department in conjunction with Brink's bid on the project.
13. The Department denied the protest based on Brink's June 30<sup>th</sup> communication, and Brink was allowed to complete project 72C37.
14. The International Union of Operating Engineers Local 965 monitored projects 72C37 and 72B60, keeping monitor logs and taking photographs.
15. Brink employees, including Yadira Abarca, Kelly Sherman, and Josh Calvert, did perform work that would be classified under the trade of Laborer on both project 72C37 and 72B60.
16. Brink classified employees, including Abarca (20 of 20 days), Sherman (10 of 14 days), and Calvert (34 of 34 days), as Laborers on the Certified Payroll Transcripts submitted in conjunction with federal project 72B60.
17. Brink employees performed work on state project 72C37 that would fall under the classification of Laborer<sup>1</sup>, and, would have been classified as such on the project if not for the apprenticeship and training requirements.
18. Brink was also the low bidder on a June 17, 2011 Illinois Department of Transportation letting, item #242 (Hancock County). Specifically, Brink was the low bidder on the following Project/Contract: 72E05. The project was state funded and the Responsible Bidder provisions applied.

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<sup>1</sup> See Department's Exhibit 34, Par. 23 (Verified Complaint filed by Brink in Adams County) for admission that Brink employees perform laborer's work on State projects but are paid as operating engineers.

19. Brink's bid documents on project 72E05, specifically the Apprenticeship or Training Program Certification (Item K), did not certify and disclose that Brink intended to use the Trade of Laborer through its own employees for this construction project or that Brink participated in an apprenticeship or training program for the Trade of Laborer. The following handwritten language appears under Item K in Brink's bid documents:

"Program Sponsor- R.L. Brink Corp."

"Trades- Operators, Carpenters, Cement Masons"

"Subcontractors - Stripers, Operators, Laborers, Cement Masons"

20. The Department received a protest on project 72E05 for the trade of laborer and notified Brink that documentation supporting Brink's compliance was required.
21. Brink responded to the Department's request with a letter dated June 29, 2011 without including information or supporting documentation for the trade of laborer, and the letter included the following language:

"We have enclosed a copy of the Apprenticeship and Training Certification of the Bid Proposal which we filed for this project. Please note that the craft of laborer will not be utilized on this project."

22. Attached to Brink's June 29<sup>th</sup> letter was an Apprenticeship and Training Certification that Brink purported to have been submitted with its bid with the following typewritten language:

"R.L. Brink Corp- Operators, Carpenters, Cement Masons"

"Subcontractors- Stripers"

23. The certification submitted with the June 29<sup>th</sup> letter was not the same document as the certification submitted with Brink's bid on project 72E05.
24. Based on Brink's June 29<sup>th</sup> correspondence, the Department denied the protest and Brink was allowed to complete project 72E05.
25. The International Union of Operating Engineers Local 965 monitored project 72E05, keeping monitor logs and taking photographs.
26. Brink employees conducted work that would be classified as Laborer on project 72E05.
27. Brink was also the low bidder on a March 29, 2011 Adams County letting. Specifically, Brink was the low bidder on the following Project: 10-16138-00-SM.
28. Brink's bid documents on Project 10-16138-00-SM, specifically the Apprenticeship and Training Program Certification (BLR12325)<sup>2</sup> did not certify and disclose that Brink intended to use the Trade of Laborer through its own employees for this construction project or that Brink participated in an apprenticeship or training program for the Trade of Laborer.

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<sup>2</sup> This form is required by IDOT in order for municipalities to obtain IDOT approval to award contracts paid through the use of Motor Fuel Tax Funds.

29. The International Union of Operating Engineers Local 965 monitored project 10-16138-00-SM, keeping monitor logs and taking photographs.
30. Brink employees performed at least some work that could be classified as laborer's work on project 10-16138-00-SM.
31. Certified Transcript Payroll and EEO Workforce Analysis supplied by Brink on project 10-16138-00-SM show no employees were classified as laborer on the project.
32. The Department did not instruct Local 965 to monitor these projects, nor did it have advance knowledge of the monitoring.
33. The International Union of Operating Engineers Local 965 (Local 965) monitors or attempts to monitor every Brink job for the purpose of filing protests in an effort to influence Brink to organize/sign a collective bargaining agreement.
34. All Brink job site employees receive training, including flagging training from Julie Brink, a certified flagging trainer, and other job site safety training as part of its core curriculum.
35. Brink has a USDOL approved apprenticeship and training programs for the trades of operating engineer, carpenters, and cement masons.
36. Brink does not currently have or participate in a USDOL approved apprenticeship and training program for the trade of laborer.
37. Brink participated in a USDOL approved apprenticeship and training program for the trade of laborer in the past, but the program Brink participated in no longer exists.
38. Brink pays its employees at a higher rate when they are classified as operating engineers than when they are classified as laborers.
39. The Department does not claim any misrepresentations on the part of Brink in relation to the quality of Brink's work on the projects referenced in this recommendation.

### **III. Analysis/Brink's Argument**

Brink does not dispute the two determinative facts as to whether or not it complied with the Illinois Procurement Code's Responsible Bidder Provision. Brink admits that it did not, at the time of the completion of the IDOT let projects that are the subject of the Notice of Suspension, have or participate in a USDOL approved training program for the trade of laborer, and Brink admits that its employees did perform laborer's work on these projects.<sup>3</sup> Brink submitted certifications in conjunction with its bid on project 72C37 that omitted laborers from work categories to be utilized, then, when later questioned by IDOT about the omission of

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<sup>3</sup> Testimony and other evidence at the hearing established that the amount of laborer's work performed on State projects 72C37 and 72E05 was considerably more substantial than on Adams County project 10-16138-00-SM. Considering this, my recommendation is based on the 2 state projects.

laborers, submitted different certifications that stated subcontractors would be performing the laborer's work on that project. Brink submitted certifications with its bid on project 72E05 stating subcontractors would perform laborer's work then, when later questioned by IDOT about the use of laborers, submitted different certifications omitting laborers and an affirmative statement that laborers would not be utilized. None of the four separate certifications indicated that Brink's employees would perform laborer's work, so the fact that Brink admits to its employees performing laborer's work means all four certifications contain misrepresentations.

Brink argues that the submission of false certifications, though a misrepresentation, is not "material." Brink argues that "RLB's response to a request with respect to bid protests did not exactly match the craft trade classification as recited in the bid documents. (Brink Comptroller Richard) Lentz credibly testified that when he prepared the responses to IDOT's second inquiry as to the protest, RLB did not have the original contract (nor copies) so RLB used its best recollection as to what RLB stated in the bid documents. This does not rise to a 'material' false statement." This argument might be persuasive if the issue was simply that the certifications did not match. However, Brink submitted four certifications related to the two projects without ever stating laborer's work would be performed by Brink employees. The certifications require contractors to make complete report of all job categories to be utilized on the project, and the certifications explicitly state, "the requirements of this certification and disclosure are a material part of the contract." The fact (uncontroverted by Brink) that Brink employees performed laborer's work means each of the four certifications are a false statement, and each relates to a material part of the contract.

Brink also makes an entirely unconvincing argument regarding the word "applicable" in the Responsible Bidder Provision. Brink states, "IDOT's theory is simple but plainly wrong and contrary to plain reading of 30 ILSC500/30-22(6), which states:

(6) The bidder and all bidder's subcontractors must participate in *applicable* apprenticeship and training programs approved by and registered with the United States Department of Labor's Bureau of Apprenticeship and Training. (Emphasis Supplied)

'Applicable' can only be read as meaning application to the USDOL approved programs of the bidding contractor." Under Brink's "plain reading," a bidder that does not have (or participate in)<sup>4</sup> any USDOL approved apprenticeship and training programs would not be required to participate in any USDOL approved apprenticeship and training programs in order to satisfy the Responsible Bidder Provision. Adhering to this reading would produce an absurd result.

Brink also made several arguments related to the protest procedures followed by IDOT in relation to the projects that are the subject of this recommendation. Brink argues that various protest procedures were not followed (timeliness of receipt of protests, etc.) and, as a result, the Notice of Suspension against Brink should be rescinded. This argument is facially flawed. Protests are the proper avenue for a party to object to a procurement action (solicitation, award of contract, etc.) immediately following the action. Receipt of a protest stays award of contracts until the protest is resolved, so timeframes and other procedural requirements are necessary. Suspension of a vendor, on the other hand, is a procurement action that is separate and distinct from a protest. Suspensions deal with "acts or omissions that indicate that the contractor or subcontractor lacks integrity and honesty in the conduct of business or the performance of

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<sup>4</sup> I am not sure if Brink is distinguishing Bidder sponsored programs from those the bidder participates in or not, but the analysis is the same in any event.

contracts.” 44 Ill. Admin. Code 6.520. While, as in this case, false statements contained in documentation provided by a vendor in conjunction with the protest can result in the issuance of a Notice of Suspension, so too could an infinite number of other acts or omissions. Furthermore, the majority of conceivable acts or omissions giving rise to a suspension would likely occur during the performance of the contract and could not possibly occur within the allotted protest timelines (e.g., the performance of laborer’s work by Brink employees that rendered Brink’s certifications false).

Brink filed several motions in advance of the suspension hearing. Brink filed a motion to admit the transcripts from proceedings in Adams County Circuit Court on September 26 and 28, 2012, as well as transcripts from suspension hearings of other road contractors that dealt with the Responsible Bidder Provision. Brink also filed a 22 count motion for summary finding seeking dismissal of the Notice of Suspension in advance of the hearing. Review of the transcripts Brink sought to have admitted, the arguments contained in the motion of summary finding<sup>5</sup>, and the testimony and other evidence put forth by Brink at the hearing made clear that Brink’s real defense to the suspension lies in the contention that the Responsible Bidder Provision and/or IDOT’s enforcement thereof violates Brink’s constitutional rights.

“To be sure, an administrative agency lacks the authority to declare a statute unconstitutional, or even to question its validity.” *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 214 (2008). However, the Court in *Cinkus* also advised, “that a party in an administrative proceeding should assert a constitutional challenge on the record before the administrative tribunal, because administrative review is confined to the evidence offered before the agency. Such a practice avoids piecemeal litigation and, more importantly, allows opposing parties a full opportunity to refute the constitutional challenge.” *Id.* As a result of this generally recognized principle, the record contains hearsay<sup>6</sup> evidence that was not relevant to the underlying merits of the suspension the was heard for the purpose of allowing Brink to develop a complete record.

The concluding paragraph in Brink’s Memorandum in Opposition of Suspension, filed in lieu of oral closing argument, summarizes the crux of Brink’s position in layman’s terms:

IDOT simply refuses to recognize that RLB is different than the union contractors, that RLB is not bound to the craft lines described by the union representative and that other union contractors perform work in a similar fashion to RLB, that RLB does train its employees in all aspects of construction work and RLB pays its operating engineers craft persons who may perform what was described as laborers’ work above the prevailing wage. To allow IDOT to succeed in this matter is tantamount to permitting IDOT to tell open shop contractors how to run their construction operations.

Again, the Responsible Bidder Provision and the rules governing the suspension hearing are presumed valid for the purposes of the suspension hearing and this recommendation. There is no distinction between union contractors and open shop contractors contained in the Responsible Bidder Provision. Brink classifies employees doing flagging and other work commonly classified as laborers’ work on federally funded and local, non-Motor Fuel Tax funded

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<sup>5</sup> Many of these arguments mirrored arguments raised in the verified complaint Brink filed in Adams County.

<sup>6</sup> While contained in the record, little (or in most cases) no weight was afforded to most of the hearsay admitted at the hearing. Of particular note are statements in the testimony by Ronald Brink attributed mystery to IDOT employees statements and the General Assembly “legislating Brink out of business.” These statements are obviously extreme examples of self-serving hearsay and, in hindsight, should have been stricken.



jobs and pays them as such. Brink's craft lines appear to only blur when Brink is required to comply with the Responsible Bidder Provision.

While Brink has established that it is not as easy for Brink and other open shop contractors to comply with the provision as it once was, that fact is irrelevant to the determination of whether or not Brink did in fact make material misrepresentations regarding its Responsible Bidder compliance. The Responsible Bidder provision was duly enacted by the Illinois General Assembly, and IDOT must treat it as such.

#### **IV. Conclusions of Law**

1. Brink made material false statements, representations, omissions, claims or reports in its documentation submittals on (state) Projects 72C37 and 72E05 in support of its compliance with the responsible bidder provisions of the Illinois Procurement Code (30 ILCS 500/30-22), and in doing so, did materially violate the Responsible Bidder provisions of the Illinois Procurement Code and bring into question the eligibility of Brink as the apparent low bidder for the above projects.
2. Brink's submission of false certification documents constitutes the making of a material false statement in connection with any rules or procurement procedures of the Department;
3. Brink's submission of material false certifications on projects 72C37 and 72E05 constitutes "acts or omissions that indicate that the contractor or subcontractor lacks integrity and honesty in the conduct of business or the performance of contracts." 44 Ill. Admin. Code 6.520.

#### **V. Recommendation**

Brink has, in my mind, conclusively displayed that complying with the Responsible Bidder Provision is less burdensome for Illinois union contractors than it is for Illinois open shop contractors. Brink has also shown that Local 965 monitors Brink's job sites for the express purpose of protesting awards made by IDOT in favor of Brink with the goal of preventing Brink from getting these awards unless Brink signs with the union. Unfortunately for Brink, these facts cannot be viewed as justification for the commission of "acts or omissions that indicate that the contractor or subcontractor lacks integrity and honesty in the conduct of business or the performance of contracts."

The stated purpose behind the General Assembly's enactment of the apprenticeship and training requirement at issue is to ensure worker safety on road construction job sites. As such, I do feel that the evidence relating to the training provided by Brink to all of its workers, though not part of a USDOL approved apprenticeship and training program, and the fact that there was no evidence indicating or suggesting that Brink employees performed laborers work in an unsafe manner may be relevant to the CPO in determining the final length of suspension.<sup>7</sup>

A review of prior suspensions based on false Responsible Bidder certifications shows that two years appears to be the standard length of post-hearing suspension in these instances.

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<sup>7</sup> See testimony of Julie Brink and Respondent's Exhibit 47.

I certainly do not find any aggravating factors present in this record that would justify a suspension exceeding two years.

Therefore, pursuant to the findings of fact and conclusions of law stated herein, it is my recommendation that Brink be suspended for a period of not more than two years.



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Adam Alstott  
Hearing Officer

November 30, 2012