STATE OF ILLINOIS
DEPARTMENT OF TRANSPORTATION

IN THE MATTER OF:	)	
	)	
Chester Bross Construction Company	)	**11-S-003**
	)	
Respondents	)	

FINDINGS AND RECOMMENDATIONS TO THE CHIEF PROCUREMENT OFFICER

On June 8, 2011 IDOT Secretary Gary Hannig and IDOT Chief Procurement Officer Bill Grunloh issued a Notice of Suspension and Interim Suspension to Respondent Chester Bross, Inc. (hereinafter "Bross" or "Respondent"). Thereafter, on August 2, 2011 IDOT Acting Secretary Ann Schneider and Chief Procurement Officer Bill Grunloh issued an "Amended Notice of Suspension and continuing Interim Suspension" which reiterated the charges in the original suspension and added Count II. The charges against Bross relate to an IDOT project in Adams County, specifically referred to as project #72 D 14. Respondent is charged with five violations. Count I first charges that Bross violated the "Responsible Bidder" requirements contained in 30 ILCS 500/30-22(6) in that it failed to provide evidence that it participated in applicable apprentice and training programs approved by and registered with the United States Department of Labor's Bureau of Apprenticeship and Training for the trade of Laborer. Second, it is charged with violation of Section 6.520 of the procurement regulations [44 Ill. Adm. Code 6.520] by making a material false statement with respect to the project in question by failing to include the trade of "Laborer" on an IDOT-required certification ["State Required Ethical Standards Governing Contract Procurement: Assurances, Certifications and Disclosures,"] specifically by representing in Part III (K) ("Apprenticeship and Training Certification") that it would not utlilize the trade of "Laborer" on the project when in fact the trade of Laborer was utilized on the project. Third, in response to a query from IDOT as a result of a protest, it again denied that laborers would be utilized on the project when it did in fact utilize laborers on the project. Fourth, IDOT charged that Respondent's actions constitute "theft" under 720 ILCS 5/16-1 and 720 ILCS 5/33E-14, and /or 5/17-24, thereby violating Section 6.520 (a) of the regulations which outline causes for suspension or disbarment. [44 Ill. Adm. Code 6.520(a).] In reviewing both the transcript of proceedings and the briefs submitted thereafter, however, it appears that IDOT has abandoned its allegation that the Respondent's actions constitute theft. Count II of the Amended Notice added a fifth charge, that Bross made a material false statement with respect to its participation in USDOL approved apprentice and training programs with respect to the trade or craft of Heavy Equipment Operator. Specifically, Bross was charged with falsely claiming to have participated in an apprenticeship and training program for Heavy Equipment Operator. IDOT charges that Bross failed to produce specific evidence requested by IDOT to demonstrate that it had met the requirements set forth by the program sponsor as set forth in its catalog, and the U.S. Department of Labor as set forth in the Code of Federal Regulations.

Respondent was represented by the law firm of SmithAmundsen. Because legal counsel also represented two other contractors who were the subjects of Notices of Suspension, and there appeared to be significant overlap of the factual and legal issues involved, by agreement of the parties a consolidated hearing was held. The hearing began on August 25, 2011, and took the better part of seven days, finally concluding on October 14, 2011. The parties requested closing arguments be made by written brief, and a briefing schedule was set. Following numerous extensions of the briefing schedule agreed to at the request of the parties, the final post-hearing brief was filed on January 30, 2012.

Present at the Hearing, in addition to witnesses called by the parties, were IDOT Deputy Chief Counsel Lance Jones and Assistant Chief Counsel Philip McQuillan, representing the Department, and Robert Anderson, Special Assistant to the Chief Counsel, on behalf of the Department. Appearing at the Hearing on behalf of Chester Bross, Inc. were Jeffrey Risch and Jonathan Hoag of the law firm of SmithAmundsen, along with Mr. Mark Bross, Chief Financial Officer of Chester Bross, Inc.

LAW

It is the policy of the Illinois Department of Transportation to conduct business with contractors of responsible business integrity and honesty:

> In order to protect the public interest in the solicitation, execution and performance of contracts or subcontracts administered by the Department, it is the policy of the Department to conduct business only with contractors or subcontractors of responsible business integrity and honesty. Suspension is a discretionary action imposed in accordance with this Part to serve the public interest and to implement this policy. It may be imposed only for the causes and in accordance with the procedures set forth in this Subpart. [44 Ill. Adm. Code 6.500]

At the center of this proceeding is a provision of the Illinois Procurement Code which is commonly referred to as the "Responsible Bidder" provision. It provides, in relevant part:

> 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 subcontractors must participate in applicable apprenticeship and training programs approved by and registered with the United States Department of Labor Bureau of Apprenticeship and Training. [30 ILCS 500/30-22]

The Procurement Code gives the Chief Procurement Officer authority to promulgate rules governing its various provisions, which appear in Title 44, Subtitle A, Part 6 of the Illinois

Administrative Code.[1] Among them are rules to govern suspension of contractors. Of particular note, Section 6.510 provides:

> The CPO (Chief Procurement Officer) 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; * * * * [44 Ill. Adm. Code 6.510]

The grounds for suspension or debarment are set forth in 44 Ill. Adm. Code 6.520, and provide in portions relevant to this proceeding:

> A contractor or subcontractor may be suspended or debarred from participation due to acts or omissions that indicate that the contractor or subcontractor lacks integrity and honesty in the conduct of business or the performance of contracts. Acts or omissions that indicate the lack of business integrity and honesty include but are not limited to:
>
> a) fraud, bribery, embezzlement, theft, collusion, conspiracy, anti-competitive activity or other misconduct and offenses prohibited by law whether or not any such misconduct or offense is in connection with a Department contract or subcontract or any contract or subcontract requiring Department approval;
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> * * * *
>
> 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;
>
> d) making a material false statement, representation, claim or report respecting the character, quality, quantity, or cost of any work performed or materials furnished in connection with a contract or subcontract administered or supervised by the Department;

[1] The rules governing contract procurement, including suspension of contracts, were originally contained in Part 660 of title 44 of the Illinois Administrative Code, authorized and promulgated by the Department of Transportation. During the pendency of these proceedings the statutory provisions transferred oversight of the procurement process to the Chief Procurement Officer, and the rules were transferred to Part 6 of Title 44. The references herein are to Part 6.

As noted above, Respondent was charged under subsections 6.520(a), (c) and (d).

The regulations governing suspension of contractors and subcontractors also establish the standard of proof to be applied following the hearing provided for by Section 6.620 [44 Ill. Adm. Code 6.620]:

> "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. Adm. Code 6.690(a)]

The regulations provide further guidance on assessing adequate evidence:

> 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. Adm. Code 6.690]

FACTS

Most of the facts that are relevant to this case are uncontested. Respondent Chester Bross Construction, Inc. is a contractor which bids on various road work contracts, including some issued by or under the authority and supervision of the Illinois Department of Transportation. As to the state bid or supervised projects, Bross is subject to certain laws and regulations, in particular the "Responsible Bidder" provisions of the Illinois Procurement Code (30 ILCS 500/30-22(6)) and related provisions of the Illinois Administrative Code. Bross was the successful bidder on IDOT Contract #72 D 14, an IDOT project in Adams County, Illinois.[2]

Among the prerequisites for bidding on IDOT projects is submission of certain documentation, including certification that a bidder meets the Responsible Bidder requirements. In a document titled "Required Ethical Standards Governing Contract Procurement: Assurances, Certifications and Disclosures," Bross specifically represented in Part III (K) ("Apprenticeship and Training Certification") it was a member of Associates Builders and Contractors of Illinois (ABCIL), and attached a certification from the USDOL Office of Apprenticeship showing the ABCIL is registered for the trades of Carpenter, Electrician, Heavy Equipment Operator, Painter and Plumber. Also submitted at the same time was a letter from ABCIL verifying that Bross is a member in good standing, that ABCIL offers apprenticeship programs certified by the UDSOL, and a letter on Chest Bross letterhead indicating that "in accordance with the provisions of Section 30-22 of the Illinois Procurement Code" Bross is a member of ABCIL. The letter also states "(i)n order to comply with requirements for applicable apprenticeship programs, we

[2] There is evidence in the record of two Adams County projects. #72D14 is an IDOT project and the subject of this proceeding. A second Adams County Project, referred to in the record as #93503, is a federal project. Although evidence was introduced about this project, the project itself is not the subject of this proceeding. References herein to "the Adams County project" are meant to refer to IDOT project #72D14 unless otherwise indicated.

currently have employees pre-registered for the next apprenticeship programs for the following crafts: Heavy Equipment Operator I. . . " Later testimony indicated that this was not true. The certification submitted by Bross did not include the trade of "Laborer." By the express terms of the aforesaid document, "(i)n addition to all other remedies provided by law, failure to comply with any assurance, failure to make any disclosure or the making of a false certification shall be grounds for the chief procurement officer to void the contract, or subcontract, and may result in the suspension or debarment of the bidder or subcontractor." It further provides: "(t)he certifications hereinafter made by the bidder are each a material representation of fact upon which reliance is placed should the Department enter into the contract with the bidder."

Subsequently, Bross was awarded the contract for Adams County project #72 D 14. Thereafter, IDOT received two protests as to the projects, including the Adams County project. One protest was with respect to the craft of "Laborers" and the other with respect to the craft of "Operating Engineer."

In keeping with IDOT procedures, Bross was notified of the protest and asked to respond. Attorney Jeffrey Ritsch responded to the protests by letter dated July 2, 2010. The response with respect to the protest regarding Laborers stated that Bross would not be using Laborers on the projects protested. As to the craft of "Operating Engineer," counsel took the position that based on various published documents, prior communications and experiences that participation can be established by possession of a Certificate of Registration issued by the USDOL to a program sponsor when participating as a part of a group, and submitting proof of membership in the group. Mr. Risch pointed out that documentation of membership in ABCIL had previously been supplied, along with the USDOL certification of ABCILs registration in apprenticeship and training programs for the several crafts, including that of Operating Engineers. In keeping with IDOT procedure, the representations in Risch's July 2, 2010 letter were taken at face value and IDOT notified the protestor that the protests were denied.

Thereafter, the IDOT Chief Counsel requested that a number of contractors, including Chester Bross, be audited to substantiate their compliance with the Responsible Bidder provisions. The audit consisted of a review of five projects Bross had been awarded. Two of the projects were federal projects, to which the Responsible Bidder requirements do not apply. Three of the projects were IDOT projects, including Adams County project #72 D 14

The audit found that on the Adams County project #72 D 14, the certified payroll submitted to the Illinois Department of Labor to show compliance with the Illinois Prevailing Wage Act showed, for the payroll date ending August 28, 2010, three individuals were listed as "Laborers" and paid at the Laborer's prevailing wage rate for Adams County. That, apparently, was the only time for this project that any employees were listed as "Laborers." In responding to that particular audit finding, Respondent contends that the listing of the three employees as "Laborers" was simply a clerical error, which was later corrected.

The audit also found that the "Equal Employment Workforce Analysis" form submitted by Bross for the two federally assisted projects—to which Responsible Bidder does not apply—showed Bross used eight laborers for one of the projects, and nine laborers for the other.

However, as to the three state projects Bross performed—all projects to which Responsible Bidder does apply—the workforce projection forms show that no laborers would be used.

The evidence also showed—and in fact, Bross admits--that Bross, at all times relevant to this proceeding, had no individual employees who were registered with, enrolled in or had completed the ABCIL apprenticeship course for Heavy Equipment Operators.

Counsel for Respondent elicited a multitude of additional facts which are for the most part irrelevant to the decisive issues in the case, and which I will therefore not regurgitate except as may be necessary to analyze a particular legal theory advanced by Respondent.

ANALYSIS

The Burden of Proof

Before evaluating the evidence, it is important to determine the extent of the Department's burden in providing facts to justify the suspension imposed. As noted in the "Law" section above, the regulations provide, in two separate sections, that the applicable standard of proof is "adequate evidence." Section 6.510 deals with the initial (i.e., pre-hearing) determination by the CPO, and Section 6.690(a) sets forth the same standard to be applied following the hearing provided for by Section 6.620:

> 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. Adm. Code 6.690(a)] [Emphasis added]

There is no definition of "adequate evidence" in the Illinois Procurement Code or in pertinent state regulations. At the conclusion of the hearing, counsel for both parties were specifically asked to provide guidance to the interpretation of the "adequate evidence" standard. Counsel for IDOT suggested that the adequate evidence standard of proof is borrowed from federal procurement regulations. Respondent strenuously objected to the IDOT characterization, pointing out several places where the federal procurement process is different from the Illinois process. While some of the Respondent's observations as to differences between the federal provisions and the state provisions are obviously correct, it is nonetheless readily apparent from a review of the cases cited and an examination of the statutes and regulations cited in them, that Illinois has borrowed the "adequate evidence" standard from the federal procurement structure. The Respondent's claim that "no such support exists" for the IDOT claim that the Illinois Procurement Regulations borrowed the "adequate evidence standard" from the federal procurement is patently erroneous. Thus, an examination of the federal provisions is instructive in interpreting the state regulations.

The federal procurement provisions use the term "adequate evidence" in several sections of the Code of Federal Regulations (CFR) governing procurement. "Adequate evidence" is

defined in those sections as "information sufficient to support the reasonable belief that a particular act or omission has occurred."[3]

Horne Bros., Inc. v. Laird, 463 F.2d 1268, C.A. D.C. 1972, appears to be the leading case to characterize what constitutes "adequate evidence." While the facts in *Horne* are substantially different than those in the present case, and therefore the case itself is of no practical use as precedent, *Horne* does provide some guidance to that Court's view of the meaning of "adequate evidence."

> "While the initial thrust of a suspension may be likened to an ex parte temporary restraining order, the continuance of the suspension beyond a thirty day period is more fairly likened to a preliminary injunction after notice, maintainable only on the showing of adequate evidence that is not self-determined"[4] 463 F.2d at 1272

The *Horne* court specifically noted the guidance provided by the Armed Service Procurement Regulations (ASPR Section 1.605)

> * * * * Section 1.605 provides, in part, * * * (i)n assessing evidence, consideration should 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 which may be drawn from the existence or absence of affirmative facts. This assessment should include an examination of basic documents such as contracts, inspection reports, and correspondence." 463 F.2d at 1279

While it may at first blush seem like a stretch to rely on an ostensibly unrelated federal purchasing provision to assist in interpretation of a phrase in the Illinois regulations, the analysis comes full circle when it is noted that this ASPR section has been adopted verbatim into the Department's regulations which outline factors the Chief Procurement Officer must use in determining what suspension actions should be taken. See: 44 Ill. Adm. Code 6.690 (b).

While Respondent spent several paragraphs in its brief assailing the Department's reference to the federal scheme to assist in determining the meaning of "adequate evidence," it is disappointing that Respondent offered no guidance of its own as to the meaning of the phrase. Rather than offering its view as to the meaning of "adequate evidence" counsel for Respondent tilts at windmills, arguing that the suspension and debarment provisions of federal law are different than those of Illinois (a rather obvious difference). Rather than addressing the issue—the meaning of "adequate evidence"—Respondent's counsel refers to vague "accepted and basic legal norms." The case cited by Bross to support its argument, *Gonzales v. Freeman*, 334 F.2d 570, explains the "legal norms" which Bross apparently seeks to invoke: "administrative

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[3] See, for example: 13 CFR 124.305 (d) (1), 48 C.F.R. 2.101 (2), 41 C.F.R. § 105-68.900 and 48 C.F.R. 2.101 (2).

[4] Under the federal scheme, an immediate suspension may be imposed for only 30 days (akin to what Illinois calls an "Interim Suspension" where there is no opportunity for a hearing), after which a hearing must be held if requested. In the case before us for consideration, we are dealing with a "suspension" that takes place after Notice and an opportunity for hearing.

regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made." (334 F.2d at 578). Bross fails to note that all of these "legal norms" were afforded to it during the suspension process. Inexplicably, then, Bross concludes that "adequate evidence" is "akin with the preponderance of the evidence standard." In interpreting the phrase "adequate evidence" we can safely assume that if a "preponderance of the evidence" standard was intended, the regulations would have said precisely that.

While nothing discussed above gives a clear-cut definition of "adequate evidence," the regulations and cases reviewed lead to the conclusion that the burden of showing "adequate evidence" is not a high threshold. While the Department bears the burden of proof, it is by no means a heavy burden, and one which appears to be less than the more familiar "preponderance of the evidence" standard which Respondent would prefer to use.

As it applies to this case, what the standard of proof means is that the Department has the burden of proof to establish the essential elements of its case with information sufficient to support the reasonable belief that that Bross submitted documents that it would not be using laborers on the project in question, and that it did use laborers on the project, and that it claimed that Chester Bross participated in apprenticeship and training program for the trade of Operating Engineer when in fact did not.

The Department's Case

In evaluating the record, it appears that the core issues of fact are undisputed. Adams County project #72 D 14 was an IDOT project, and as such subject to the Responsible Bidder provisions of the Illinois Procurement Code. Bross bid on the project, submitted a certification that no Laborers would be utilized on the project, and in response to a protest stated once again that no Laborers would be utilized. It submitted certified payrolls to the Illinois Department of Labor, one (and only one) of which classified three employees as "laborers." With respect to one federal project being performed nearby, it certified that eight of the 27 employees working on the project were laborers; as to another nearby federal project it certified that nine of 18 employees on the project were laborers. Among those certified as laborers on the federal projects were some of the same individuals who had been certified as laborers to the Illinois Department of Labor on the Adams County project for the August 20, 2010 payroll.

The record further reflects that Bross claims it "participated" in an apprenticeship program for the trade of Heavy Equipment Operator through its membership in ABCIL which had received certification from the USDOL of registration of apprenticeship programs for Heavy Equipment Operator. Bross further alleged in a letter dated June 10, 2010 that it had employees pre-registered for the next apprenticeship program for Heavy Equipment Operator, but failed to provide any evidence, as requested in discovery as to Count I, of ever having had any employee actually enrolled in much less having completed a training program for Heavy Equipment Operator. Testimony of ABCIL president Alicia Martin as well as admission of Respondents CFO Mark Bross, confirms that at all times relevant to this proceeding, Bross had no individual

employees who were registered with, enrolled in or had completed the ABCIL apprenticeship course for Heavy Equipment Operators.

In those unrefuted facts, Department has more-than-adequately sustained its burden of proof in producing facts which establish a *prima facie* case that Respondent violated the "Responsible Bidder" provisions of the Procurement Act and the applicable regulations.

The question remaining for determination, then, is whether Respondent has presented any of its own facts to contradict or offset the facts presented by the Department, and/or whether it has presented any legal arguments which call into question the suspension issued.

The Chester Bross Case

The facts produced by the Department via the certified payroll for the period ending July 2, 2010 show three individuals certified to the Illinois Department of Labor as "laborers." Respondent insists that this was simply a clerical error, and produced evidence that the error was discovered and corrected shortly after it was made. The Department does not accept Bross' explanation, instead taking the position that Bross' certification of the three individuals was indeed an error, but only to the extent that it inadvertently told the truth with respect to the work done by the individuals in question rather than covering up the fact that the workers were performing laborers work contrary to its previous statements to the Department.

Bross produced Respondent's Exhibit 21-B which purports to show that it corrected the "improper" classification within a few weeks after the original certified payroll was submitted, rather than after Bross had received the Notice of Suspension on June 8, 2011. The Department notes, however, that the "Statement of Compliance" which is part of Exhibit 21-B bears a date of 06/09/11—one day following the date of the Notice of Suspension. Mark Bross, Respondent's CFO, testified that the date was generated by computer and represents the date the documents were printed rather than the date they were created. On cross-examination, however, he admitted that the handwritten "See Attached" and two circles on the Statement of Compliance were added after it was printed off—i.e., 6/9/11 or after. That seemingly innocent admission is damaging to Bross' position because it admits that the document was altered. Having admitted to altering the document once lends credibility to the Department's position that perhaps other portions of the document were also altered to fit the Respondent's purposes. Exhibit 21-B does, however, include a copy of a check dated 9/17/10, along with supporting documentation which seems to demonstrate that employee Alan Waelder—one of those originally certified to IDOL as a laborer—was paid an extra amount due him because of the improper classification. However, no such evidence is produced for the other two individuals. Of all the documentation presented, the Waelder check is the only piece of evidence that could not have been manufactured at or about the time of the Notice of Suspension.

The above evidence suggests Bross could be telling the truth, or could have manufactured the evidence of "correction" after the Notice of Suspension. However, whether the "correction" was made within days of the original certification, or only after the Notice of Suspension was issued, is not determinative of the larger issue of whether the three individuals were or were not laborers. As the Department notes, the "mistake" made by Bross—whether immediately after the

payroll was first certified or later—may have been "accidentally" telling the truth. That being the case, and given the standard of proof set forth in the regulations, I must conclude that the Department has produced "information sufficient to support the reasonable belief" that Respondent's certification to the IDOL that the three employees were laborers was the honest statement, and that subsequent attempts to "correct" the "mistake" were simply efforts to cover-up the Respondent's prior misrepresentations to the Department.

The Department's case is further bolstered by the evidence produced via the audit of Bross. Specifically, the audit found that on the two federal projects that were reviewed—projects that are not subject to Responsible Bidder provisions of the Procurement Code--laborers were used extensively. On Adams County project #72 D 69, eight of the 26 employees shown on the "Equal Opportunity Workforce Analysis" sheet were listed *by Bross* as laborers. Thirty-one percent of the employees and 33 percent of the hours spent on the project were done by employees classified as laborers. On the other federal project nine of 18 employees—50%--were classified *by Bross* as laborers. Moreover, among those certified as laborers on the federal projects were the same individuals who had been certified as laborers to the Illinois Department of Labor on the Adams County project. And yet on the projects which were subject to Responsible Bidder requirements, out of 67 workers on the three projects, none were classified as laborers.

The regulations [44 Ill. Adm. Code 6.690] provide that in assessing adequate evidence the Department will give consideration to ". . . inferences that may be drawn from the existence or absence of affirmative facts." It is hard to imagine any more reasonable deduction from the comparison of the reports of the federal and state projects than Respondent knowingly and purposefully misclassified employees on the state projects, and more particularly on the Adams County project which is the basis of the charges in this case. Further, Respondent failed to offer any explanation about the project in question which would cast doubt on the Departments allegations and reasonable inferences that work being done on the site was the work of Laborers. Was their some difference between the two nearby federal projects that would explain why 17 Laborers were required on those projects, when NO laborers were required on the Adams County project or the other two state projects reviewed in the audit? These are questions the answers to which might have cast some misgivings the Department's facts. The Respondent failed to address them, and in doing so, under the directive of Section 6.690 raises an inference that it has no such facts with which to challenge the Departments case.

To the extent that the testimony of Mark Bross conflicts with the above, I find that it lacks credibility.

"Participation"

Respondent spends a great deal of time addressing the meaning of "participation." The meaning of "participation" is central to discussion of Count II, which alleges that Bross made a material false statement in claiming it participated in a USDOL approved apprentice and training programs with respect to the trade or craft of Heavy Equipment Operator. The meaning of "participation" also arises in the allegation that Bross violated the "Responsible Bidder"

requirements in that it failed to provide evidence that it "participated" in applicable apprentice and training programs for the trade of Laborer.

Bross first argues the Department's interpretation of "participating" in an applicable apprenticeship program is invalid because it was never promulgated in accordance with the Illinois Administrative Procedure Act, which requires that agency rules be promulgated pursuant to that Act. It defines "rule" as "each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy (5 ILCS 100/1-70). Clearly, the Department has not promulgated a rule to define "participation."

The Department cites *Sparks and Wiewel Construction Company v. Martin*, 620 N.E.2d 533, 250 Ill. App. 3d 955 (4th Dist. 1993), holding that "not all statements of agency policy must be announced by means of published rules. When an administrative agency interprets statutory language as it applies to a particular set of facts" alternative methods of announcing agency policies are acceptable. As the lengthy recitation of the various interpretations as set forth in Respondent's post-hearing brief suggests, the Department has no hard and fast "rule" for determining what constitutes "participation." Rather, it appears to interpret the statutory language as it applies to a particular set of facts, an approach specifically condoned by *Sparks*. The Department points out (and *Sparks* supports) it has a responsibility to enforce the statute—in this case the Procurement Code's Responsible Bidder provision--and it cannot be limited in that responsibility by artificial restrictions. *Sparks* makes it clear that not all agency interpretations of statutory language require rulemaking to implement.

With respect to the Count I, Respondent suggests that even if it had laborers working on the Adams County project, it would still be in compliance with the Responsible Bidder requirements through its participation in ABCIL's approved apprenticeship and training program for Operator, inasmuch as traffic safety and control is part of the Operator apprenticeship training. This argument fails for a number of reasons. First, the specific type of Laborer's work engaged in by Bross has never been identified. The charges that Bross used laborers on the Adams County project flow from the certified payroll *submitted by Bross* certifying the use of three laborers and the inferences drawn from the fact that approximately one-third of the workforce on two nearby federal road projects were *certified by Bross* as laborers. Thus, no specific type of laborers work was identified. Therefore identification of "traffic safety and control" (while clearly laborer's work, but not the only work appropriately classified as laborer's work) doesn't paint the entire picture. More importantly, just because a particular apprenticeship program includes training in a specific area of work does not mean that the particular type of work is an essential or core function of that particular trade or craft. As an employee of the State of Illinois I am required to undergo annual training in ethics. That does not mean, however, that I am an Ethics Officer. If the position that Bross proposes were to be accepted, the training program for every trade or craft could include a minimum exposure to various parts of other trades duties and thereby qualify that training under the Responsible Bidder provisions of the Procurement Code. Such an interpretation is not reasonable nor would it be in accordance with the obvious purpose of the Responsible Bidder provisions.

With respect to Count II, Respondent makes several arguments that attempt to draw attention to the trees while ignoring the forest. The essential undisputed fact is that Bross admittedly had, at all times relevant to this matter, no employee registered for, enrolled, engaged

in or having completed the apprenticeship program for Heavy Equipment Operator. It attempts to excuse this fact by suggesting that somehow its membership in ABCIL, combined with the fact that ABCIL has a USDOL approved apprenticeship training program for Heavy Equipment Operator, constitutes "participation." It goes through great pains in an attempt to establish that that very position has been taken by the Department. In doing so, it confuses evidence of compliance with actual compliance. Thus, the Department initially accepted Bross' assertion, set forth in its response to the protests, that it participated in the Heavy Equipment Operator apprenticeship training through its membership in ABCIL. The Department's policy was to accept a contractor's response to "show" compliance (i.e., as evidence of compliance), but nowhere did the Department suggest that mere membership actually constitutes compliance. If the Department were to take such a position, it would not comply with the statute. This can be likened to the IRS, which accepts certain documentation as evidence of compliance with tax laws. That acceptance (and with it, perhaps, a tax refund for example) does not bar the IRS from further investigating to find out whether the submitted documents may have been falsified. Likewise, the initial acceptance of Bross' response to the protest does not estop the Department from further investigation to determine the truthfulness of the contractor's statement. To adopt such an interpretation would completely emasculate the Responsible Bidder requirements of the Procurement Code. It would mean that organizations could set up sham programs, qualify by having a minimum number of apprentices in each program (which apparently would be one per year), and thereafter accept dues for membership from any contractor who wanted to qualify as "participating" under the Responsible Bidder requirements without having any employees actually take part in apprenticeship training.

Bross next argues that the protest policy created by IDOT is unlawful in that the protest which resulted in Bross' response that it would not use laborers on the Adams County project was not in conformity with the regulations governing protests, and that to the extent that the protest in question represented a separate procedure it was invalid. The provision cited by Respondent is found in 44 Ill. Adm. Code 6.390 et seq. However, as explained by the Chief Counsel in her testimony, and as evident by even a cursory reading of the regulations cited, it is apparent that the "protest" provided for in Section 6.390 et seq. is not the same "protest" referred to in the facts in the instant case. Specifically, Section 6.390 unambiguously states "(t)he procedures of this Subpart F will govern the resolution of protests received by the CPO *from an interested party* concerning a contract solicitation." [Emphasis added] [44 Ill. Adm. Code 6.390] As Respondent points out, the protest that is a part of the record in this case was not "received by the CPO from an interested party."

The fundamental reason for rejecting Respondent's argument that the protest procedure in this case is invalid because it was not promulgated in accordance with the Illinois Administrative Procedure Act (5 ILCS 5/100 et seq.), is that Respondent's objection to the protest is untimely. Had Respondent wished to contest the validity of the protest, it should have done so upon receipt of the request from the Department for a response to the protest. Instead, Respondent submitted a response—a response that was not, as it turns out, truthful. In the final analysis it was not the protest that caused the Respondent's current difficulty, it was the response.

As to whether the protest policy in question is invalid, as noted with respect to the definition of "participate" above, the Department relies on *Sparks and Wiewel Construction Company v. Martin*, 620 N.E.2d 533, 250 Ill. App. 3d 955 (4th Dist. 1993), holding that "(n)ot all statements of agency policy must be announced by means of published rules." The Court held that when an administrative agency interprets statutory language as it applies to a particular set of facts, alternative methods of announcing agency policies are acceptable. As the Department points out (and the *Sparks* case supports) the Department has a responsibility to enforce the statute—in this case the Procurement Code's Responsible Bidder provision--and it cannot be limited in that statutory responsibility by artificial or arbitrary restrictions on where it obtains information that suggests violations.

Respondent next asserts that the Department's enforcement of the Responsible Bidder provisions of the Illinois Procurement Code unfairly and unlawfully favors certain organized labor unions. I find the "facts" proffered by Respondent that it claims establish a bias on the part of the Department with regard to certain organized labor organizations unconvincing. Respondent offers arguments about arborists and teamsters without offering a clue how those situations apply to the current case. Bross finds fault with the Department for failing to offer a defense for its actions with respect to teamsters and arborists, but fails to recognize the fact that the Department has no obligation to explain its actions in other cases. Bross fails to suggest how the alleged favoritism changes the facts established in the record that that Bross submitted documents that it would not be using laborers on the project in question, and that it did utilize laborers on the project, and that it claimed that Chester Bross participated in apprenticeship and training program for the trade of Operating Engineer when in fact did not.

Respondent next claims that IDOT denied Bross fundamental Due Process rights in refusing to allow it to call Chief Procurement Officer Bill Grunloh as a witness. The argument fails for a number of reasons. First, Respondent has failed to identify a right sought to be protected by the allegedly deficient due process. Due process is not a right in and of itself; it is a concept that applies (if at all) before life, liberty or property can be taken away. It is well-settled that there is no property right in receiving public contracts. *Polyvend v. Puckorius*, 77 Ill. 2d 287, 395 N.E. 2d 1376 (1979). Fundamentally, then, Bross had no right to due process. Secondly, the offer of proof made by Respondent at the request of the Hearing Officer fails to demonstrate any facts that would be material or relevant to the determinative issues in this case.[5] Even if Respondent did have some right to call Mr. Grunloh as a witness, it would not have the right to elicit immaterial and irrelevant testimony. Third, Respondent's complaint that it was not allowed to call two individuals from the Illinois Department of Labor fails on its face. Bross argues that the individuals would be called to explain the requirements of the Illinois Prevailing Wage Act as part of its defense to the charges against it. The requirements of the IPWA are a matter of law, not a matter of fact. Thus, Respondent has identified no "facts" which could be established with the testimony of the IDOL witnesses. Unless the gentlemen sought to be called were lawyers (which Respondent has not suggested) and were to be called as expert witnesses (which

[5] The discussion of the Respondents desire to call Mr. Grunloh as a witness begins on page 947 of the transcript with Respondents request to call then-acting Secretary Schneider. Counsel stated that the same offer of proof as made in the case of Ms. Schneider would apply to Mr. Grunloh. The offer of proof (as to Secretary Schneider) is set forth beginning on page 948 of the transcript, and in effect incorporated by reference as to CPO Grunloh and Road Oil, on page 959.

Respondent has not suggested), their testimony would be irrelevant and inadmissable. As noted above, there is no right to elicit irrelevant and immaterial testimony.

A thorough evaluation of the facts leads inescapably to the conclusion that the Department has established its case on "information sufficient to support the reasonable belief that a particular act or omission has occurred" – i.e., adequate evidence.

PENALTY

Under the terms of the Procurement Code [30 ILCS 500/50-65] and regulations [44 Ill. Adm. Code 6.550] a contractor may be suspended for up to 10 years. The Notice of Suspension did not determine a specific length for the suspension, but the Department, in its closing brief, suggested a suspension of "up to 5 years." The length of suspension is completely at the discretion of the chief procurement officer, subject only to the admonition that it be commensurate with the seriousness of the cause or causes for the suspension.

There is little doubt, in my opinion, as to the facts of this case, nor to the responsibility of Respondent for the violations. Clearly it was Chester Bross' responsibility under the applicable law to understand the requirements and to comply with them, and it did not fulfill that responsibility. Instead, it decided to attempt to circumvent the requirements of the statute.

I recommend a suspension of five years, commencing on June 8, 2011—the date of the initial suspension.

CONCLUSION

After a painstaking review of the testimony, exhibits, applicable law and arguments of counsel, it is my recommendation that the Chief Procurement Officer find as follows:

1. Respondent Chester Bross, Inc. was the successful bidder on Adams County project #72 D 14.

2. Adams County project #72 D 14 is a state project bid by the Illinois Department of Transportation and as such bidders were subject to the "Responsible Bidder" provisions of the Illinois Procurement Code, and the rules and regulations adopted thereunder.

3. With its bid for the said project Respondent submitted a "State Required Ethical Standards Governing Contract Procurement: Assurances, Certifications and Disclosures."

4. Respondent represented in Part III (K) ("Apprenticeship and Training Certification") of the said document that it was a participant in certain specified apprenticeship and training programs, including an apprenticeship and training program for the trade or craft of "Operating Engineers," as a member of the Associated Builders and Contractors, Illinois

Chapter, which offers apprenticeship training programs certified by the United States Department of Labor.

5. Respondent did not indicate in its submission that it would use the trade or craft of "Laborer" on the project, and submitted no "Certification of Apprenticeship Program" certifying that Associated Builders and Contractors, Illinois Chapter participation by Respondent in an apprenticeship or training program for the trade of "Laborer."

6. Under the terms of the State Required Ethical Standards Governing Contract Procurement: Assurances, Certifications and Disclosures submitted by Respondent all requirements of the document constitute a material part of the Respondent's contract, and Respondent is responsible for making a complete report and must make certain that each type of work or craft job category that will be utilized on the project is accounted for and listed.

7. By submission of the "State Required Ethical Standards Governing Contract Procurement: Assurances, Certifications and Disclosures" for Adams County project #72 D 14, Respondent's failure to include the trade of "Laborer" certified that it would not use the trade of "Laborer" on the project.

8. In response to a request from the Department notifying it of a protest filed on Adams County project 72D14, Respondent again represented to the Department that it would not use the trade of "laborer" on the project.

9. Chester Bross Construction Company certified to the Illinois Department of Labor pursuant to the Illinois Prevailing Wage Act (820 ICLS 130 et seq.) that for the pay period ending August 28, 2010 three of its employees were "Laborers" and were paid the prevailing wage as "laborers."

10. Respondent performed two federal road projects in the vicinity of Adams County project #72 D 14 in which it certified that 17 of 24 employees performing the road work were classified as laborers.

11. Contrary to the certification and assertions of Respondent in the "Apprenticeship or Training Program Certification" and in its response to the protest, one or more employees of Chester Bross Construction Company on Adams County project 72D14 was a "laborers."

12. The failure of Chester Bross Construction Company to certify that it participated in apprenticeship and training programs for the trade of "laborer" on Adams County project #72 D 14 violates the Illinois Procurement Code "Responsible Bidder" requirement (30 ILCS 500/30-22(6)).

13. The certification of Chester Bross Construction Company in the "State Required Ethical Standards Governing Contract Procurement: Assurances, Certifications and Disclosures."

that it would not use the trade of "laborer" on Adams County project #72 D 14 when it did in fact utilize laborers on the project constitutes:

i. "a fraud on the Department and local agencies" and "misconduct prohibited by law" in violation of Section 6.520(a) of the Rules for Contract Procurement of the Chief Procurement Officer of the Department of Transportation;

ii. a material violation of a procurement procedure and a material false statement in connection with a procurement procedure, in violation of Section 6.520(c) of the Rules for Contract Procurement of the Chief Procurement Officer of the Department of Transportation; and

iii. the making of a material false statement or representation respecting the character of work performed in connection with a contract administered or supervised by the Department, in violation Section 6.520(d) of the Rules for Contract Procurement of the Chief Procurement Officer of the Department of Transportation.

14. The Respondent's statement, in response to the Department's inquiry regarding a protest filed against the awarding of the contract to Chester Bross Construction Company, that laborers would not be used on Adams County project #72 D 14 when it did use laborers on the project constitutes

i. "a fraud on the Department and local agencies" and "misconduct prohibited by law" in violation of Section 6.520(a) of the Rules for Contract Procurement of the Chief Procurement Officer of the Department of Transportation;

ii. a material violation of a procurement procedure and a material false statement in connection with a procurement procedure, in violation of Section 6.520(c) of the Rules for Contract Procurement of the Chief Procurement Officer of the Department of Transportation; and

iii. the making of a material false statement or representation respecting the character of work performed in connection with a contract administered or supervised by the Department, in violation Section 6.520(d) of the Rules for Contract Procurement of the Chief Procurement Officer of the Department of Transportation.

15. The Respondent certified in its "State Required Ethical Standards Governing Contract Procurement: Assurances, Certifications and Disclosures" for Adams County project #72 D 14 that it participated in a USDOL approved apprenticeship training program with respect to the trade or craft of Heavy Equipment Operator.

16. Contrary to the certification as set forth in paragraph 15 above, at all times relevant to this matter, Chester Bross Construction Company had no employee registered for, enrolled, engaged in or having completed an applicable apprenticeship and training program approved by and registered with the United States Department of Labor's Bureau of Apprenticeship and Training.

17. Mere membership in an organization which has an apprenticeship training program approved by and registered with the United States Department of Labor's Bureau of Apprenticeship and Training does not constitute "participation" under the Responsible Bidder Provisions of the Illinois Procurement Code.

18. Respondent's misrepresentations as to its actual participation in applicable apprenticeship and training programs approved by and registered with the United States Department of Labor's Bureau of Apprenticeship and Training, constitutes a material misrepresentation made to the Department.

19. Pursuant to Section 6.520(d) of the Rules for Contract Procurement of the Chief Procurement Officer of the Department of Transportation the above findings indicate that Respondent lacks integrity and honesty in the conduct of business or the performance of contracts.

20. Legal challenges proffered by Respondent are without legal and/or factual basis.

21. Under the terms of Section 6.550 of the Rules for Contract Procurement of the Chief Procurement Officer of the Department, the term of a suspension imposed by the CPO will be for a period, commensurate with the seriousness of the cause or causes, of up to 10 years. Chester Bross Construction Company is hereby suspended for a period of 5 years, commencing on the date of the original Notice of Suspension issued herein.

I am transmitting a copy of these Findings and Recommendations to Respondent Chester Bross Construction Company, and notifying it that it may have the right, under the provisions of the Illinois Administrative Procedure Act, 5 ILCS 100/10-45, to file exceptions and to submit a brief, and if it is interested in doing so it should contact you for further directions.

Respectfully submitted,

Thomas R. Wetzler

Thomas R. Wetzler
Hearing Officer

June 15, 2012