STATE OF ILLINOIS
DEPARTMENT OF TRANSPORTATION

IN THE MATTER OF:	)	
	)	
Glenn McCann Company	)	**11-S-001**
	)	
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 Glenn McCann Company (hereinafter "McCann" or "Respondent"). The charges against McCann relate to various road work contracts issued by or under the authority and supervision of the Illinois Department of Transportation ("IDOT"). Specifically, the charges relate to projects which can be categorized in three groups: the Kendall County Projects (09-5000-00-GM, 09-03000-00-GM, and 09-1000-00-GM), the Grundy County projects (10-16000-00-GM, 10-00000-00-GM, 10-06000-00-GM, 10-13000-00-GM, and 10-15000-00-GM), and the Village of Kinsman project (09-00000-00-GM).

On August 2, 2011 IDOT Acting-Secretary Anne Schneider and IDOT Chief Procurement Officer Bill Grunloh issued an Amended Notice of Suspension and continuing Interim Suspension which reiterated the charges in the original Notice and added Count II, alleging that Respondent made material representations when it certified participation in USDOL Bureau of Apprenticeship and Training approved programs for Asphalt Paving Operator and Heavy Truck Driver. In the Department's Closing Argument, confirmed in its Rebuttal Argument, IDOT concedes that McCann did participate in a USDOL Approved Apprenticeship Program for Asphalt Paving Operator and Heavy Truck Drivers. Count II is, therefore, stricken.

The remaining Count I charges Glenn McCann Company with four violations. First, it is charged that McCann violated the "Responsible Bidder" requirements contained in 30 ILCS 500/30-22(6) in that, with respect to nine specified road projects, 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" in its "Apprenticeship or Training Program Certification" when in fact the trade of Laborer was used on the project. Third, in response to a query from IDOT, it denied that any laborers would be utilized on the project when one or more of its workers did in fact perform work belonging to the trade or classification of "Laborer." Finally, IDOT charged that Respondent's actions constitute "theft" under 720 ILCS

5/16-1 and 720 ILCS 5/33E-14, 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 it's allegation that the Respondent's actions constitute theft.

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 Glenn McCann Company were Jeffrey Risch and Jonathan Hoag of the law firm of SmithAmundsen, along with Larry McCann, President of Glenn McCann Company

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;
> * * * *
>
> 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;
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> 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, McCann 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 also provide guidance for 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 McCann is a contractor which bids on various road work contracts issued by or under the authority and/or supervision of the Illinois Department of Transportation ("IDOT"). As such, it 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. McCann was the successful bidder on a number of a local road projects financed with Motor Vehicle Tax ("MFT") funds, and supervised by IDOT. The projects involved can be categorized in three groups: the Kendall County Projects (09-5000-00-GM, 09-03000-00-GM, and 09-1000-00-GM), the Grundy County projects (10-16000-00-GM, 10-00000-00-GM, 10-06000-00-GM, 10-13000-00-GM, and 10-15000-00-GM), and the Village of Kinsman project (09-00000-00-GM).

Among the prerequisites for bidding on MFT projects is submission of certain documentation indicating that a bidder meets the Responsible Bidder requirements. Among the documents required is an "Apprenticeship or Training Program Certification." McCann submitted the certification form with the bids, indicating that the only types of work or craft that would be used on the projects were "Asphalt Paving Operator" and "Heavy Truck Driver." By the terms of the document, "(t)he requirements of this certification and disclosure are a material part of the contract. . . " Also, "(t)he 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 is accounted for and listed." The work or craft of "laborer" was not indicated on any of the

forms, nor was any evidence produced that McCann participated in any way in an apprenticeship or training program for laborers for the projects in question.[2]

Subsequently, McCann was awarded the contracts for the Kendall County, Grundy County and Village of Kinsman projects. Thereafter, IDOT received protests as to each project, which requested that McCann be deemed ineligible to be awarded the contracts.

In keeping with IDOT procedures, in each case Respondent was notified of the protest and asked to respond. McCann responded, in each case indicating that it would not be using laborers, and submitting proof of a USDOL approved apprenticeship program for "Asphalt Paving Operator" and "Heavy Truck Driver" which it would be using. At that point IDOT took McCann's representation at face value and notified the protestor that the protests were denied.

Thereafter, the IDOT Chief Counsel requested that a number of contractors, including McCann, be audited to substantiate their compliance with the Responsible Bidder provisions. The audit consisted of reviewing certified payrolls submitted by McCann to the Illinois Department of Labor to show compliance with the Prevailing Wage Act (820 ICLS 130 et seq.). According to the audit, certified payrolls submitted to Department of Labor show several individuals classified by McCann as "laborer." By reference to the applicable prevailing wage guidelines, it also showed that the individuals classified as "laborers" were in fact paid in accordance with the prevailing wage guidelines as laborers.

Counsel for Respondent elicited a multitude of additional facts, most of which are irrelevant to the decisive issues in the case, and which I will therefore not reiterate 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 useful to determine the extent of the Department's burden in providing facts to justify the suspension imposed. As noted, the regulations provide that the applicable standard of proof is "adequate evidence."

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 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

[2] At one time McCann did participate in a apprenticeship and training program for laborers, and had submitted certifications for prior projects that it participated in applicable apprenticeship and training programs for laborers. Subsequently, that apprenticeship program for laborers was decertified.

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).

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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.

While Respondent spent numerous 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 real 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 apparent difference). Rather than addressing the issue—the meaning of "adequate evidence"—Respondent's counsel refers to mostly vague and undefined "accepted and basic legal norms." Interestingly, the case cited by McCann to support its argument, *Gonzales v. Freeman*, 334 F.2d 570, explained the "legal norms" which McCann apparently seeks to invoke: "administrative 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). McCann does not—and cannot—point to any of these "accepted and basic legal norms" of which it was deprived. Inexplicably, then, McCann concludes that "adequate evidence" is "akin with the preponderance of the evidence standard." In interpreting the phrase "adequate evidence" we must assume that if a "preponderance of the evidence" was intended, the regulations would have said precisely that.

While nothing discussed above gives a precise definition of "adequate evidence," clearly 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 clearly appears to be less than the more familiar "preponderance of the evidence" standard.

As it applies to this case, what the standard of proof means is that IDOT has the burden of proof to establish its case with information sufficient to support the reasonable belief that Glenn McCann Company submitted documents asserting it would not utilize laborers on the project in question, and that it did in fact utilize one or more laborers on the project.

The Department's Case

In evaluating the record, it appears that most of the salient issues of fact are undisputed. Respondent bid on the projects, which are all projects that involved MFT funds. In each case Respondent submitted a certification that no laborers would be utilized on the project, and in response to the protests stated that no laborers would be used. It submitted certified payrolls to the Illinois Department of Labor, under oath, which classified several employees as "laborers." Those facts stand unrefuted. That alone, in my judgment, constitutes "adequate evidence" that McCann is guilty of the charges alleged in the Notice of Suspension and Interim Suspension.

Apart from certification under oath to IDOL that several of its employees were laborers, the record further supports the conclusion that work assigned to the classification of "laborer" was being performed by employees of McCann. For example, the Department's "McCann Exhibit No. 20" includes a letter dated June 15, 2011 from Larry McCann to IDOT Chief Counsel Ellen Schanzle-Haskins, responding to the Notice of Suspension. In it, Mr. McCann states: "(b)y listing our people as a laborer, our employees are paid *for the classification of job in which they did.*" [Emphasis added]. The testimony of Mr. McCann, also makes it clear that

Respondent's employees were doing laborers work. He testified that the work done by the employees who were certified to IDOL as "laborers" was flagging and traffic control. Moreover, he admitted on cross-examination that he had previously listed "laborers" on the IDOT certification when McCann was a member of Associated Builders and Contractors (ABC) and had an apprenticeship and training program for laborers, but that he could no longer put "construction craft of laborer" on the IDOT certification because the ABC's program had been decertified.

> "Q: (by Mr. Jones): Okay. You couldn't put construction craft of laborer after that because ABC's construction laborer program was decertified?"
>
> A: I clarified that earlier, yes.
>
> Q: Okay. And that's why you quit putting laborers down on your certification?
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> A: Correct.
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> (See Transcript at page 733)

The Department has more-than-adequately sustained its burden of proof in producing facts sufficient to support the reasonable belief that Glenn McCann Company submitted documents asserting it would not be using laborers on the projects in question, and that it did, by its own admissions, utilize laborers on the projects. The Department has established a *prima facie* case that Respondent violated the "Responsible Bidder" provisions of the Procurement Act and the applicable regulations.

McCann Legal Arguments

In spite of its failure to offer facts in rebuttal to the Department's *prima facie* case, Respondent does offer several legal arguments in an attempt to undercut the Department's case.

McCann first argues that IDOT's attempt to apply the Illinois Procurement Code to the local road projects is outside of IDOT's authority and fails as a matter of law. In support of this argument it cites *Court Street Steak House, Inc.* 163 Ill. 2d 159, 643 N.E. 2d 781 (Ill. S.Ct. 1994). *Court Street Steak House* does not provide support for Respondents position, however. It is distinguishable in too many ways to be helpful. First, as a purely technical legal matter, the courts language regarding the applicability of the Illinois Purchasing Act is *dicta*, and therefore while persuasive, is not binding. The holding of the Court was that the county's attempt to invoke the Illinois Purchasing Act as authorizing its action was waived for failure to raise it earlier in the proceeding. Further analysis by the Court with respect to the applicability of the Purchasing Act was not part of the holding, and therefore *dicta*. Further, as the Department points out, the case had nothing to do with highway construction. Rather, it dealt with a contract to provide food service to a local jail. In the instant situation, the projects in question—unlike the food service to be provided in *Court Street Steakhouse*--were financed with (state) Motor Fuel Tax funds. Third, to the extent the then-existing law has been amended and – perhaps more

importantly – since the Procurement Code and the regulations presumably validly promulgated[5] thereunder require compliance with the Responsible Bidder provisions on both state projects and MFT-funded projects, the "persuasive" language in *Court Street Steak House* is outdated and no longer effective. The current state of the law is set forth in the Procurement Code and in the regulations.

Respondent next argues that the protest policy created by IDOT is unlawful in that the protest which resulted in McCann's response that it would not utilize laborers on the projects 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, 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 "The 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."

As to whether 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.), 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 proper. 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 responsibility by artificial or arbitrary restrictions on where it obtains information that suggests violations.

There is a more basic reason for rejecting Respondent's argument on this issue, however. Respondent's objection to the protests is untimely. Had Respondent wished to contest the validity of the protests, it should have done so upon receipt of the request from the Department for a response to the protests. Instead, Respondent submitted a response to each protest—responses that were not, as it turns out, truthful. In the final analysis it was not the protest, or any published or unpublished policy that caused the Respondent's current difficulty, it was that Respondent made material false statements with respect to the character of its work on the projects.

Respondent next 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

[5] Respondent has not argued that the Chief Procurement Officer lacked statutory authority to promulgate the rules in question.

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 again cites *Sparks and Wiewel Construction Company v. Martin*, 620 N.E.2d 533, 250 Ill. App. 3d 955 (4th Dist. 1993), which holds that "(w)hen an administrative agency interprets statutory language as it applies to a particular set of facts" alternative methods of announcing agency policies are adequate. As the recitation of the various explanations set forth in Respondent's post-hearing brief suggests, the Department appears to have 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*. Again, *Sparks* supports the Department's position that it has a responsibility to enforce the statute. Nowhere, in fact, does the Illinois Administrative Procedure Act suggest that rules must be promulgated to address every conceivable situation which may require the Department to interpret a statute. *Sparks* makes it clear that not all agency interpretations of statutory language require rulemaking to implement.

McCann 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 fail to support its claim of bias on the part of the Department with regard to certain organized labor organizations. Respondent offers arguments about arborists and teamsters without offering a clue how those situations apply to the current case. McCann finds fault with the Department for failing to offer a defense for its actions with respect to teamsters and arborists, but fails to recognize that the Department has no obligation to explain its actions in other cases. McCann fails to suggest how the alleged favoritism changes the facts established in the record that (a) it represented in its original bid documents that no laborers would be used on the projects, (b) it denied in response to the protests that laborers would be utilized on the projects, and (c) it stated under oath to the Illinois Department of Labor that some of its employees were performing laborers work.

Respondent claims that IDOT denied McCann its fundamental Due Process rights in refusing to allow it to call Chief Procurement Officer Bill Grunloh and then-acting Secretary of Transportation Anne Schneider as witnesses. 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) to deprivation of life, liberty or property. 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, Respondent 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.[6] Even if Respondent did have some right to call Ms. Schneider and Mr. Grunloh as witnesses, it would not have the right to elicit immaterial and irrelevant testimony. Third, Respondent's complaint that it was not allowed to call two

[6] 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.

individuals from the Illinois Department of Labor fails on its face. McCann 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 Respondent has not suggested), their testimony would be irrelevant and inadmissable. As noted above, there is no right to elicit irrelevant and immaterial testimony.

McCann next complains that the Department misinterpreted and misapplied prevailing wage law. It is unquestioned that McCann certified *under oath* to the IDOL that some of its workers performed work that McCann itself classified as work of laborers. It now argues that the Department cannot use the IDOL's designation of "laborer" under the Prevailing Wage Act as evidence that the McCann's workers were performing the work of "laborer" under the Illinois Procurement Code. According to McCann, "(t)he fatal flaw in IDOT's analysis is that it uses information provided under one law (i.e., the Illinois Prevailing Wage Act) and attempts to use that information to 'prove' issues under a separate and distinct law (i.e., the Illinois Procurement Code)." Notably, however, McCann never suggests any way in which "laborer" could or should be interpreted differently under the two laws. Respondent never offers its own definition of "laborer" nor does it point to any specific, generally accepted definition adopted by any other governmental unit or private organization other than IDOL. Yet it finds fault with IDOT for relying on IDOL's classification of "laborer" because it claims that by doing so IDOT in effect adopts a definition dictated by labor unions. Moreover, through all of its argument, it never suggests how IDOT is supposed to apply the Responsible Bidder provisions in the absence of some understanding of what work is laborer's work.

The obvious question presented, then, is "if a 'laborer' under the Prevailing Wage Act is not a 'laborer' under the Illinois Procurement Code, then what is a 'laborer' under the Procurement Code?" IDOT Chief Counsel Ellen Schanzle-Haskins testified that IDOT does not inject itself into union jurisdictional work disputes when enforcing the apprenticeship and training standards of the Illinois Procurement Code. Also, apparently IDOL does not have a specific definition of "laborer." See: *Illinois Landscape Contractors Association v. Department of Labor*, 272 Ill. App. 3d 912 at 916. The work of laborer is apparently like the celebrated observation of U.S. Supreme Court Justice Potter Stewart, who in referring to a definition of "pornography" said "I could never succeed in intelligibly [defining it]. . . but I know it when I see it." *Jacobellis v. Ohio*. 378 U.S. 184 at 197 (1964) (concurring opinion).

The testimony of Respondent's President, Larry McCann, makes it clear that he recognizes laborers work when he sees it, and that his employees were doing laborers work and that he knew they were doing laborers work. He admitted on cross-examination that he had previously listed "laborers" on the IDOT certification when McCann was a member of Associated Builders and Contractors (ABC) and had an apprenticeship and training program for laborers, but that he could no longer put "construction craft of laborer" on the IDOT certification because the ABC's program had been decertified.

"Q: (by Mr. Jones): Okay. You couldn't put construction craft of laborer after that because ABC's construction laborer program was decertified?"

A: I clarified that earlier, yes.

Q: Okay. And that's why you quit putting laborers down on your certification?

A: Correct.

(See Transcript at page 733)

Mr. McCann testified that IDOL advised him to classify the work of traffic control and flagging as laborers work, and that IDOL considered traffic control laborers work. This understanding was confirmed in testimony of McCann employee Lisa Raymond. Mr. As noted above, Larry McCann sent a letter to IDOT Chief Counsel Ellen Schanzle-Haskins, in which he stated: "(b)y listing our people as a laborer, our employees are paid *for the classification of job in which they did.*" [Emphasis added]. (See McCann Exhibit #20, page 2). The testimony of Mr. McCann also makes it clear that Respondent's employees were doing laborers work. He testified that the work done by the employees who were certified to IDOL as "laborers" was flagging and traffic control.

Mr. McCann does not suggest, nor is there any indication in the record, that the actual work being done by McCann employees had changed from the previous work done for and certified to IDOT as "laborers" work. The only thing that has changed, apparently, is that McCann no longer was participating in a laborers apprenticeship and training program approved by and registered with the United States Department of Labor Bureau of Apprenticeship and Training.

In addition, the Department's Consolidated Exhibit #105 sets forth the U.S. Department of Labor's directive as to what a construction craft laborer's apprenticeship program should include. It makes clear that some of the work which, according to Mr. McCann was being performed by McCann's employees—specifically traffic control and flagging--is indeed considered work of laborers.

The essential fact remains that it was not the Illinois Department of Transportation, nor the Illinois Department of Labor, which stated *under oath* that "laborers" were utilized on the projects—it was McCann.

Respondent further suggests that even if it had laborers working on the projects in question, it would still be in compliance with the Responsible Bidder requirements through its participation in its other approved apprenticeship and training programs. Putting aside the fact that McCann denied that laborers would be used on the projects in its responses to the protests, the position it now takes is without merit. McCann points to its participation in USDOL approved apprenticeship training programs for "Asphalt Paving Operator" and "Heavy Truck Driver," arguing that traffic safety and control is part of the apprenticeship training for both.

Respondent's Exhibit 101, page 808-811 sets forth McCann's apprentice training program for Asphalt Paving Operator and Heavy Truck Driver, and indeed training is included in those programs for setting up traffic control, setting up proper traffic control signs, and posting warning signs. However, just because a particular apprenticeship program includes training in a specific type of work does not mean that the particular type of work is either a major or key function of that particular trade or craft. In the case of the Asphalt Paving Machine Operator, the traffic control comprises about 3% of the total training. For Heavy Truck Driver, it appears that the entire training outline may not be included in the Exhibits, but the time devoted to traffic control training appears to be the same or perhaps even less than Asphalt Paving Machine Operator. Incidental training in work considered laborer's work cannot reasonably be said to qualify the trainee as a laborer. As an employee of the State of Illinois I am required to undergo annual training in ethics which typically takes about one hour. That does not mean, however, that I am trained as an Ethics Officer. The training outline for laborer requires 23% to 25% of the laborer's training to be in confined space safety, flagging, signing, and traffic safety awareness. [See Department Consolidated Exhibit #105]. If the position that McCann proposes were to be accepted, the training program for every trade or craft could include a nominal exposure to various elements 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.

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 Glenn McCann Company's responsibility under the applicable law to understand the requirements and to comply with them, and it did not fulfill that responsibility.

Given the circumstances cited above, I recommend a suspension of five years, commencing on the date of the initial suspension.

CONCLUSION

After a thorough 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 Glenn McCann Company was the successful bidder on Kendall County Projects 09-5000-00-GM, 09-03000-00-GM, and 09-1000-00-GM, Grundy County projects 10-16000-00-GM, 10-00000-00-GM, 10-06000-00-GM, 10-13000-00-GM, and 10-15000-00-GM, and Village of Kinsman project (09-00000-00-GM).

2. The listed projects were paid for, in whole or in part, by Motor Fuel Tax funds and as such were subject to the "Responsible Bidder" provisions of the Illinois Procurement Code, and the rules and regulations adopted thereunder.

3. For the said projects Respondent submitted "Apprenticeship or Training Program Certifications" which certified that Respondent was a participant in apprenticeship and training programs for "Asphalt Paving Operator" and "Truck Driver, Heavy." The Respondent did not indicate in the certifications that it would use the trade or craft of "Laborer" on the projects, and submitted no "Apprenticeship or Training Program Certification" certifying participation by Respondent in an apprenticeship or training program for the trade of laborer.

4. McCann did not participate in an applicable apprenticeship and training program approved and registered with the United States Department of Labor Bureau of Apprenticeship and Training for the trade of Laborer.

5. Under the terms of the "Apprenticeship or Training Program Certification" signed and submitted to IDOT by Glenn McCann Company, 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. In submission of the "Apprenticeship or Training Program Certification" for the specified projects including only the type of work or craft of "Asphalt Paving Operator" and "Heavy Truck Driver" but not the trade of "Laborer," Respondent in fact certified that it would not utilize the trade of "laborer" on the projects.

6. In response to requests from the Department notifying it of protests filed on various of the projects, Respondent represented to the Department that it would not be utilizing the trade of "laborer" on the projects.

7. McCann certified to the Illinois Department of Labor, under oath, pursuant to the Illinois Prevailing Wage Act (820 ICLS 130 et seq.) that some of its employees who worked on the projects were "laborers" and were paid the prevailing wage as a "laborer."

8. Contrary to the certification and assertions of Respondent in the "Apprenticeship or Training Program Certifications" and in its response to the protests, one or more employees of Glenn McCann Company did, in fact, perform the duties of "laborer" on the specified projects.

9. The failure of Glenn McCann Company to certify that it participated in apprenticeship and training programs for the trade of "laborer" on the specified projects violates the Illinois Procurement Code "Responsible Bidder" requirement (30 ILCS 500/30-22(6)).

10. The certification of Glenn McCann Company in the "Apprenticeship or Training Program Certifications" that it would not use the trade of "laborer" on the specified projects when it did in fact utilize the trade of "laborer" 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 of Section 6.520(d) of the Rules for Contract Procurement of the Chief Procurement Officer of the Department of Transportation.

11. The Respondent's statements, in response to IDOT's inquires regarding protests filed against the awarding of the contracts to Glenn McCann Company that laborers would not be used on the specified projects when it did in fact use laborers on the projects 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.

12. 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.

13. Legal challenges proffered by Respondent, relating to the Department's authority, alleged lack of compliance with the Illinois Administrative Procedure Act, alleged unlawful favoritism of certain labor organizations, failure to provide Respondent with due process of law, and misinterpretation and misapplication of the Prevailing Wage Act, are without legal or factual basis.

14. 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. Road Oil, Inc. 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 Glenn McCann 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

July 5, 2012