STATE OF ILLINOIS
DEPARTMENT OF TRANSPORTATION

IN THE MATTER OF:	)	
	)	
Road Oil, Inc.	)	**11-S-002**
	)	
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 Road Oil, Inc. (hereinafter "Road Oil" or "Respondent"). The charges against Road Oil relate to a General Maintenance project in LaSalle County, specifically known as Project No. 10-26000-10-GM. Respondent is charged with four violations. First, it is charged that Road Oil 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" 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 used 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.[1] 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.

[1] Following conclusion of the hearings and submission of the post-hearing briefs, SmithAmundsen, Risch and Hoag were granted leave to withdraw. As of the date of these recommendations, Respondent has not replaced its former attorneys although it has been advised of its right to do so.

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 Road Oil, Inc. were Jeffrey Risch and Jonathan Hoag of the law firm of SmithAmundsen, along with Mr. Jerry Liebhart, President of Road Oil, 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.[2] 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

[2] 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.

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;
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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;

As noted above, Road Oil 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 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 Road Oil, Inc. is a contractor which bids on various road work contracts issued by or under the authority and 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. Road Oil, Inc. was the successful bidder on Lake County Project No. 10-26000-10-GM, a local road project financed with Motor Vehicle Tax ("MFT") funds, and supervised by IDOT.

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." Road Oil submitted the certification form with the bid, indicating that the only type of work or craft that would be used on the projects was "Heavy Equipment Operators." 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 the form, nor was any evidence produced that Road Oil participated in any way in an apprenticeship or training program for Laborers.

Subsequently, Road Oil was awarded the contract for the LaSalle County project. Thereafter, IDOT received a protest as to the project, which requested that Road Oil be deemed ineligible to be awarded the contracts because (1) it does not participate in applicable apprenticeship and training programs approved and registered with the U.S. Department of Labor's Bureau of Apprenticeship and Training for the trade of Laborer, and (2) the use of Laborers is necessary to perform work on the bid items.

In keeping with IDOT procedures, Road Oil was notified of the protest and asked to respond. Ms. Cindy Novak of Road Oil responded, indicating that Road Oil would not be using Laborers, and submitting proof of a USDOL approved apprenticeship program for Operating Engineers which it would be using. At that point IDOT took Ms. Novak's representation at face value and notified the protestor that the protest was denied.

Thereafter, the IDOT Chief Counsel requested that a number of contractors, including Road Oil, be audited to substantiate their compliance with the Responsible Bidder provisions. The audit consisted of reviewing certified payrolls submitted by Road Oil 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 and signed by Mr. Jerry Liebhart, owner and President of Road Oil, show two individuals classified 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. In addition to the certified payrolls, IDOT introduced a number of photographs which show Road Oil employees performing work including setting-up signs, holding flags, and brooming. The testimony made it clear, however, that the photographs in question were not taken at the job site of the project in question.

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 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 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]

[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).

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 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 Road Oil to support its argument, *Gonzales v. Freeman*, 334 F.2d 570, explained the "legal norms" which Road Oil 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

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[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.

based upon the record so made." (334 F.2d at 578). Road Oil does not—and cannot—point to any of these "accepted and basic legal norms" of which it was deprived. Inexplicably, then, Road Oil 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 Road Oil 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 issues of fact are undisputed. Respondent bid on the LaSalle County project, which is a project that involved MFT funds, submitted a certification that no Laborers would be utilized on the project, in response to a protest stated once again that no Laborers would be used. It submitted certified payrolls to the Illinois Department of Labor, under oath, which classified employees as "Laborers." Those facts stand unrefuted. Apart from the fact that Road Oil certified two of its employees to the Illinois Department of Labor as Laborers and paid them the prevailing wage of Laborers—which standing alone, in my judgment, constitutes "adequate evidence" that Road Oil is guilty of the charges alleged in the Notice of Suspension and Interim Suspension--the record more than adequately supports the conclusion that work assigned to the classification of "Laborer" was being performed by at least one employee of Road Oil.

It is apparent from the record, both in testimony and exhibits, that the work of flagging and traffic control—work that the record clearly established was being performed by at least Road Oil employee John Biaggi--is work belonging to the trade of "Laborer." Consolidated Exhibit 105, issued by the USDOL, Employment and Training Administration, Office of Apprenticeship, lists the skills that "should be mastered by all Construction Craft Laborers"—i.e., that are Laborers work. Among the items listed are "flagging, signing, and traffic safety awareness." In addition, the prevailing wage table (Exhibit 5 within Joint Exhibit 2) explains the skilled classification Laborer "shall encompass the following types of work. . . flagging. . . " In addition to the documentation, testimony from witnesses for the other two Respondents in this consolidated hearing also makes it clear that traffic control, flagging and erecting barricades is all considered work of Laborers.[5] For example, Larry McCann, witness for Glenn McCann, testified that he was told by IDOL that he was to pay the prevailing wage rate for Laborer for flagging and barricades. Ms. Lisa Raymond, who filled out the Glenn McCann certified

[5] The testimony elicited by counsel from the other two Respondents in this consolidated are part of the record in all three of the consolidated cases, and are therefore, to the extent relevant, admissible as to all Respondents

transcript payrolls submitted to IDOL, testified as to her understanding that the type of work of Laborer might include a number of duties, including things like flagging. Mr. Mark Bross of Respondent Chester Bross testified that his company's classification of general labor would include doing traffic control, cleaning up, sweeping, and highway traffic control.

Testimony of Ms. Cindy Novak of Road Oil indicated that John Biaggi, who certified to the Illinois Department of Labor as a Laborer, was hired "primarily as a pick-up truck driver but also for traffic safety." In testifying about a conversation she had with Ron Ward of the IDOL, Novak said that the person in question needed to be paid the Laborers wage, a higher wage, "because they just didn't drive the pickup truck, they were moving signs."

The Department, via the certified payroll for the period ending July 2, 2010, also shows Kegan Feeney certified as a Flagger. Road Oil office manager Cindy Novak testified that Ms. Feeney was an office employee sent to the job site specifically to videotape picketing by the Laborer's Union. According to Ms. Novak, she was told that Feeney "was at the end of a road and stopped a few cars" and Novak therefore gave her the benefit of the doubt and paid her the higher "Laborers" rate even though she was not sent to the job site to do any construction work. Ms. Novak's testimony first of all bolsters the position that traffic control is indeed Laborers work. As to Ms. Feeney, I accept this explanation and concede that 2.5 hours of work[6] which apparently included a few minutes of traffic control may not be sufficient, by itself, to invoke a requirement that Ms. Feeney be trained as a Laborer. Even so, Road Oil is left with the certification of John Biaggi[7] as a Laborer for which it offers no adequate explanation.

The Department has more-than-adequately sustained its burden of proof in producing facts sufficient to support the reasonable belief that Road Oil submitted documents asserting it would not be using any Laborers on the project in question, and that it did in fact use at least one Laborer on the project. It has established a *prima facie* case that Respondent violated the "Responsible Bidder" provisions of the Procurement Act and the applicable regulations.

An assessment of the relevant facts as directed by the guidelines set forth in Section 6.690 further reinforces the Department's case. Section 6.690 [44 Ill. Adm Code 6.690] provides that in assessing adequate evidence the Department will give consideration to "corroboration or lack thereof as to important allegations, and inferences that may be drawn from the existence or absence of affirmative facts." The Respondent never seriously challenged the factual basis upon which the Department bases its case. Once the Department established its *prima facie* case, the fact that the Respondent failed to produce any evidence which would seriously challenge the Department's facts effectively corroborates the Departments facts. The evidence demonstrates that one or more Road Oil employees was performing the work of Laborer. Yet Respondent failed to offer any evidence as to exactly what Biaggi's duties were if they were not that of a Laborer. The testimony establishes that Biaggi was at one time an Operating Engineer apprentice, but never completed the training. He was not, therefore, an Operating Engineer. What did he do, if not the work of a Laborer? The Respondent's failure to offer any factual evidence to contradict the Department's position that employees certified to the IDOL were in fact

[6] The Certified Transcript of Payroll shows a total of 2.5 hours for Ms. Feeney as "Flagger."
[7] Respondent notes that the audit contains misspellings of employees' names. It makes no claims, that the misspellings affect the essential elements of either the charges or the proof to support them.

performing the duties of Laborer is a lack of corroboration for the Respondents position that the employees were not in fact Laborers, and under Section 6.690 is appropriate to consider is assessing the presence or lack of adequate evidence.

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. Obviously the work involved some traffic control. Was the traffic control a constant throughout the work day, or was it intermittent? What about other Laborers jobs listed in the USDOL Office of Apprenticeship documents? Did anyone perform those jobs? Who did the clean-up on the job? Who did the brooming? These are all questions the answers to which might have cast some doubt 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.

Road Oil 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.

Road Oil argues that IDOT's attempt to apply the Illinois Procurement Code to the LaSalle county project 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 certainly not binding. The holding of the Court was that the county's argument that the Illinois Purchasing Act was controlling was waived for failure to raise it earlier in the proceeding. As the Department points out, the case also had nothing to do with highway construction. Third, to the extent the then-existing law has been amended and – perhaps more importantly – since the Procurement Code and the regulations validly promulgated 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.

Road Oil next argues that the protest policy created by IDOT is unlawful in that the protest which resulted in Road Oil's response that it would not utilize Laborers on the LaSalle 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, 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 has correctly cited *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 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, or any published or unpublished policy that caused the Respondent's current difficulty, it was that Respondent made a material false statement with respect to the character of its work on the project

Road Oil then argues the Department's rule for "participating" in an applicable apprenticeship program was never published. Again, the *Sparks* case is clear that not all agency interpretations of statutory language require rulemaking to implement. What the *Sparks* court said is similarly applicable here: ". . . the Department did not engage in rulemaking but merely interpreted the statutory language. . . and applied it to a particular set of facts." More fundamentally, Road Oil fails to point out how the Department's alleged failure to define "participation" is relevant to its position. Clearly no matter what definition one might apply to the term "participation" Road Oil cannot reasonably be said to have "participated" in a Laborers apprenticeship program.

Road Oil 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 completely 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. Road Oil 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. Road Oil fails to suggest how the alleged favoritism changes the facts established in the record that (a) it stated under oath to the Illinois Department of Labor that one of its employees was a Laborer, (b) it denied in response to the protest that any Laborers would be utilized on the project, and (c) one or more of its employees was in fact performing Laborers work.

Road Oil next claims that IDOT denied Road Oil its 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) 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 invitation of the Hearing Officer fails to demonstrate any facts that would be material or relevant to the determinative issues in this case. 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. Road Oil 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 inadmissible. As noted above, there is no right to elicit irrelevant and immaterial testimony.

Road Oil next complains that the Department misinterpreted and misapplied prevailing wage law. It is unquestioned that Road Oil certified under oath to the IDOL that two of its workers were Laborers. It now argues that the Department cannot use the IDOL's definition of "Laborer" under the Prevailing Wage Act as evidence that the worker(s) in question was performing the work of "Laborer" under the Illinois Procurement Code. According to Road Oil, "(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)."

The obvious question that presents itself, 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?" Road Oil takes the position that Responsible Bidder provision is satisfied by its participation in Local 150's approved apprenticeship and training program for Operator, in as much as traffic safety and control (which testimony shows Biaggi was doing) is part of the Operator apprenticeship training. That argument fails for a number of reasons. First, although Road Oil goes through great pains to make the point that training for Operating Engineers includes some training in traffic safety and control, the evidence is clear from Ms. Novak's testimony that Biaggi was not and apparently never has been an Operating Engineer. At one time he was enrolled in the apprenticeship training program, but failed to finish it. There is no evidence that Biaggi ever had the traffic safety and control training of Local 150's program, or any traffic safety and control training. Further, 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 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 Road Oil 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 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.

Road Oil complains that the Department improperly attempts to make new allegations against Road Oil. To the extent the Department's arguments could possibly be interpreted as "new allegations" since the Notice was not amended to add these "new allegations" they would not be a valid basis on which to base an additional finding. However, I interpret the argument of the Department with regard to Road Oil employee John Biaggi not being a member of Operating Engineers Local 150 to suggest that he was doing the work of Laborer and not that of an Operating Engineer. To that extent, the argument buttresses IDOT's adequate evidence that Biaggi was in fact performing work of a Laborer.

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.

In evaluating the facts, I note that Road Oil is not a new company whose inexperience might lend some credence to misunderstanding between the work of Laborers as opposed to work of Operators. The testimony shows, in fact, that for prior projects Road Oil used Laborers via subcontract, and in fact Road Oil's response to the Department's inquiry following the protest that it "will not be using any subcontractor in LaSalle County" reinforces that information. Testimony of Ms. Novak was that one employee was sent to the job site specifically to take video of picketers from the Laborers union. Road Oil had previous occasion to address the issue of whether its employees were performing work appropriately classified as that of "Laborers." Clearly this was not a mistake – the decision to omit the trade or craft of Laborer from the "Apprenticeship or Training Program Certification" was intentional. Likewise, the decision to respond to the Department's protest letter that Laborers would not be used on the project was intentional and knowing. Accordingly, I cannot suggest that the "benefit of the doubt" be given to Road Oil that this was a misunderstanding or an inadvertent oversight.

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 Road Oil'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 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 Road Oil, Inc. was the successful bidder on Lake County Project No. 10-26000-10-GM.

2. Lake County Project No. 10-26000-10-GM was paid for, in whole or in part, by Motor Fuel Tax funds and as such was subject to the "Responsible Bidder" provisions of the Illinois Procurement Code, and the rules and regulations adopted thereunder.

3. For the said project Respondent submitted an "Apprenticeship or Training Program Certification" which certified that Respondent was a participant in apprenticeship and training programs for "operating engineers" as a signatory to Local 150 – Operating Engineers Union. The Respondent did not indicate in it's certification that it would use the trade or craft of "Laborer" on the project, and submitted no "Apprenticeship or Training Program Certification" certifying participation by Respondent in an apprenticeship or training program for the trade of "Laborer."

4. Under the terms of the "Apprenticeship or Training Program Certification" signed by Road Oil, Inc., 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 Lake County Project No. 10-26000-10-GM including only the type of work or craft of "Heavy Equipment Operators" but not the trade of "Laborer" Respondent in fact certified that it would not utilize the trade of "Laborer" on the project.

5. In response to a request from the Department notifying it of a protest filed on Lake County Project No. 10-26000-10-GM, Respondent represented to the Department that it would not be utilizing the trade of "Laborer" on the project.

6. Road Oil, Inc. certified to the Illinois Department of Labor pursuant to the Illinois Prevailing Wage Act (820 ICLS 130 et seq.) that one or more of its employees was a "Laborer" and was paid the prevailing wage as a "Laborer."

7. 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 Road Oil Inc. did, in fact, perform the duties of "Laborer" on Lake County Project No. 10-26000-10-GM.

8. The failure of Road Oil, Inc. to certify that it participated in apprenticeship and training programs for the trade of "Laborer" on Lake County Project No. 10-26000-10-GM violates the Illinois Procurement Code "Responsible Bidder" requirement (30 ILCS 500/30-22(6)).

9. The certification of Road Oil, Inc. in the "Apprenticeship or Training Program Certification" that it would not use the trade of "Laborer" on Lake County Project No. 10-26000-10-GM when it did in fact use 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.

10. The Respondent's statement, in response to IDOT's inquiry regarding a protest filed against the awarding of the contract to Road Oil, Inc., that Laborers would not be used on Lake County Project No. 10-26000-10-GM when it did in fact use one or more 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.

11. 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.

12. 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, and failure to provide due process of law, and all additional legal and factual arguments are without legal basis.

13. 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 Road Oil, Inc., 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 7, 2012