

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHNSON CONTROLS, INC.,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 93-4272BID
)	
FLORIDA DEPARTMENT OF MANAGEMENT)	
SERVICES,)	
)	
Respondent,)	
and)	
)	
LANDIS & GYR POWERS, INC.,)	
)	
Intervenor.)	
_____)	

RECOMMENDED ORDER OF DISMISSAL

This is a bid protest proceeding which was initiated by the filing of a petition seeking to have State Project Number GSFM- 91014035 awarded to the Petitioner. Following a formal evidentiary hearing the Petitioner filed a document titled Petitioner's Notice Of Voluntary Withdrawal. The notice includes the following language: "After reviewing its options related to continuation of the process, JCI [the Petitioner] has decided to voluntarily withdraw its petition and respectfully requests that no further action on this case be taken."

In view of the voluntary withdrawal of the petition, it would serve no useful purpose for the Hearing Officer to make findings of fact and conclusions of law with respect to the merits of the relief sought in the now withdrawn petition. In view of the withdrawal of the petition, the only action that remains to be taken by the Department of Management Services with regard to the relief sought in the original petition is the entry of a final order dismissing the petition. 1/

There is also pending in this case a Joint Motion For Reimbursement Of Fees And Costs. That motion is addressed and disposed of in a separate Final Order issued simultaneously with this Recommended Order.

RECOMMENDATION

For the reasons set forth above, it is RECOMMENDED that the Department of Management Services issue a Final Order in this case dismissing the petition filed by Johnson Controls, Inc.

DONE AND ENTERED this 11th day of January, 1994, in Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of January, 1994.

ENDNOTE

1/ Although it is arguable that once a petition has been voluntarily withdrawn or voluntarily dismissed there is no need for final agency action, in view of the emphasis the courts have placed on providing parties with a clear point of entry, it appears to be the better course to also provide parties with a clear point of exit.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

STATE OF FLORIDA
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Petitioner,)
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vs.) CASE NO. 93-4272BID
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LANDIS & GYR POWERS, INC.,)
)
Intervenor.)
_____)

FINAL ORDER

This is a proceeding pursuant to Section 120.57(1)(b)5, Florida Statutes, pending before Michael M. Parrish, a Hearing Officer of the Division of Administrative Hearings, in which the Respondent and the Intervenor seek the entry of an order requiring the Petitioner to pay their reasonable costs and attorney's fees on the basis of allegations that the petition in this case was filed for an improper purpose. Appearances for the parties were as follows:

APPEARANCES

For Petitioner: Jackie Ferber, Esq.
Mail Code X75
Johnson Controls, Inc.
5757 North Greenbay Avenue
Milwaukee, Wisconsin 53209

For Respondent: Joan Van Arsdall, Esquire
Wayne Mitchell, Esquire
Department of Management Services
Office of the General Counsel
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Tallahassee, Florida 32399-0950

For Intervenor: C. Alan Lawson, Esq.
Steel Hector & Davis
215 S. Monroe Street, #601
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STATEMENT OF THE ISSUES

The issues before the Hearing Officer are whether, pursuant to Section 120.57(1)(b)5, Florida Statutes, the Petitioner should be ordered to pay reasonable costs and attorney's fees to the Respondent and the Intervenor and, if so, the determination of the amounts of such costs and attorney's fees.

PRELIMINARY STATEMENT

The genesis of this proceeding was a bid protest proceeding which was initiated by the filing of a petition seeking to have State Project Number GSFM-91014035 awarded to the Petitioner. Following a formal evidentiary hearing on the merits of the petition, but prior to the submission of proposed recommended orders, on September 8, 1993, the Petitioner filed a document titled Petitioner's Notice Of Voluntary Withdrawal. The effect of that withdrawal was a voluntary withdrawal of the petition in the underlying bid protest proceeding. 1/ On September 9, 1993, the Respondent and the Intervenor filed a Joint Motion For Reimbursement Of Fees And Costs. The motion asserts entitlement to an award of attorney's fees and costs pursuant to Section 120.57(1)(b)5, Florida Statutes, on the basis of allegations that the Petitioner filed the original petition in the bid protest proceeding for an improper purpose. The motion was accompanied by detailed itemizations of the costs and attorney's fees claimed, as well as by a memorandum in support of the motion. On September 17, 1993, the Respondent filed a Motion For Official Recognition Of Supplemental Authority and a Supplement To Joint Motion For Reimbursement Of Fees And Costs. The supplement itemizes additional costs incurred by the Respondent.

On September 17, 1993, the transcript of the proceedings at the formal hearing on the bid protest proceeding was also filed with the Hearing Officer.

On September 20, 1993, the Petitioner filed Petitioner's Brief In Opposition To Joint Motion For Reimbursement Of Fees And Costs. The Petitioner's brief raises and argues several factual and legal issues in opposition to an award of costs and attorney's fees. On September 23, 1993, the Petitioner filed Petitioner's Brief In Response To Respondent's Motion For Official Recognition Of Supplemental Authority. This brief contains argument addressed to the Respondent's motion seeking official recognition of supplemental authority.

On November 2, 1993, the Hearing Officer conducted a status conference by telephone conference call in which counsel for all parties participated. During the course of the status conference, counsel for the Petitioner stipulated that the Petitioner did not dispute the reasonableness of the amounts of the costs and attorney's fees claimed by the Respondent and the Intervenor; the only

dispute being the issue of entitlement. Accordingly, all parties agreed that there was no need for an evidentiary hearing concerning the amounts of the subject costs and attorney's fees.

Counsel for all parties also agreed that the issue of whether the Respondent and Intervenor are entitled to awards of costs and attorney's fees should be decided on the basis of the existing record of the bid protest proceeding and counsel for all parties waived any further evidentiary hearing on the issue of entitlement. Counsel for all parties also waived the presentation of oral argument and waived the filing of any further briefs, memorandums, or proposed findings and conclusions.

The findings of fact which follow are all based on the pleadings and other documents filed in the bid protest proceeding and on the evidence presented during the formal hearing.

FINDINGS OF FACT

1. The bid protest proceeding which underlies this proceeding pursuant to Section 120.57(1)(b)5, Florida Statutes, was initiated by the filing of a document titled "Petition For Informal Hearing." The primary thesis of that document is an assertion that, for reasons stated in the document, State Project Number GSFM-91014035 should be awarded to the Petitioner, rather than to the Intervenor. The petition itself is not signed. However, the petition was accompanied by a letter addressed to the Department of Management Services. The text of the accompanying letter was as follows:

Enclosed is our Petition in accordance with the referenced Contract Documents and in accordance with the State of Florida, Department of Management Services procedures. Our "NOTICE OF PROTEST" was filed by registered mail on July 6, 1993.

2. The above-quoted letter was written on the stationery of the Petitioner and was signed on behalf of the Petitioner by Richard J. Luten. Beneath Mr. Luten's signature is the typed title "Official Contact."

3. Among other things, at pages 7 and 8 the petition purports to describe how the software cost was derived in the Petitioner's response to the Request For Quotations. The description at pages 7 and 8 of the petition is, for the most part, false. In reality, the software cost in the Petitioner's response to the Request For Quotations was derived by a completely different process. 2/

4. If the Petitioner had been able to prove the false allegations at pages 7 and 8 of its bid protest petition, it is arguable that the Petitioner might have been able to prevail on its bid protest. However, without the false allegations, the Petitioner did not have a viable basis for its bid protest and could not have prevailed. 3/

5. Richard Luten was the primary author of the Petitioner's response to the Request For Quotations. Mr. Luten calculated most of the costs that were included in that response. Specifically, Mr. Luten calculated the costs for software that were included in that response.

6. Although Richard Luten was not the primary author of the text of the Petitioner's bid protest petition, he assisted in the preparation of the petition and read the petition before it was filed. During the preparation of the bid protest petition, Mr. Luten specifically discussed the derivation of the software costs with the primary author of the petition and provided the information that was used to prepare pages 7 and 8 of the petition.

7. During the formal hearing on the bid challenge petition, Richard Luten eventually admitted that the information on pages 7 and 8 of the petition was false. 4/ The primary author of the bid protest petition also eventually made the same admission. 5/

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57(1)(b)5, Florida Statutes.

9. Section 120.57(1)(b)5, Florida Statutes, reads as follows:

5. All pleadings, motions, or other papers filed in the proceeding must be signed by a party, the party's attorney, or the party's qualified representative. The signature of a party, a party's attorney, or a party's qualified representative constitutes a certificate that he has read the pleading, motion, or other paper and that, to the best of his knowledge, information, and belief formed after reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the hearing officer, upon motion or his own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

10. In Florida Administrative Practice, Fourth Edition (1993), Robert T. Benton, II, addresses the construction and application of Section 120.57(1)(b)5, Florida Statutes, at Chapter 13, Sections 13.12 through 13.16. His comments include the following:

Sanctions for papers filed for improper purposes may be imposed against government and private parties alike and may require reimbursement of fees and costs incurred by any injured party. F.S. 120.57(1)(b)5. Only a hearing officer has authority to make awards under this statute. Chipola Basin

Protective Group, Inc. v. State, Dept. of Environmental Regulation, 11 FALR 467 (DER 1988). An order awarding costs and fees under F.S. 120.57(1)(b)5, whether denominated interlocutory or final, initially is reviewable only in the district court of appeal.

The statutory examples of improper purpose are "to harass or to cause unnecessary delay of for frivolous purpose or needless increase in the cost of litigation." F.S. 120.57(1)(b)5. Fed.R.Civ.P. 11 was a model of sorts for F.S. 120.57(1)(b)5, but there are differences, as pointed out in Mercedes Lighting & Electrical Supply, Inc. v. State, Dept. of General Services, 560 So.2d 272 (Fla. 1st DCA 1990). *** Eschewing a good faith-bad faith subjective test, see Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194 (7th Cir. 1985), the court [in Mercedes Lighting] concluded that a finding of improper purpose could not stand "if a reasonably clear legal justification can be shown for the filing of the paper." 560 So.2d at 278.

The use of an objective standard creates a requirement to make reasonable inquiry regarding pertinent facts and applicable law. In the absence of "direct evidence of the party's and counsel's state of mind, we must examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim." Pelletier v. Zweifel, 921 F.2d 1465, 1515 (11th Cir. 1991). [Other citations omitted.]

An administrative complaint found not to be supported by a permissible interpretation of applicable statutes and rules was held to have been filed for an "improper purpose," despite "an absence of frivolousness," in Good Samaritan Hospital v. Dept. of Health & Rehabilitative Services, 582 So.722, 723 (Fla. 4th DCA 1991). On the other hand, in Cubic Western Data v. Dept. of Transportation (No. 89-6926BID, DOAH, Jan. 25, 1990), the hearing officer found no improper purpose in a bid protest filed by a bidder who had earlier agreed with the department's determination that its bid was nonresponsive.

Parties, attorneys, and qualified representatives all may be subject to sanctions, in appropriate cases. Neither a party, counsel, nor a qualified representative can escape liability simply by

taking a dismissal, or withdrawing a request for hearing under Fla. Admin. Code Rule 60Q-2.036, in response to an F.S. 120.57(1)(b)5 motion. The Corporation of the President of the Church of Jesus Christ of Latter Day Saints v. St. Johns River Water Management District, 13 FALR 1014 (DOAH 1991). See Cooter & Gell v. Hartmarx, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).

11. An objective view of the facts in this case leads inescapably to a conclusion that the bid protest petition filed by the Petitioner was filed for an improper purpose within the meaning of Section 120.57(1)(b)5, Florida Statutes. The evidence at the formal hearing showed that, if the truth were told, the Petitioner did not have any factually or legally sufficient basis upon which to protest the bid award to the Intervenor. The Petitioner tried to overcome that hurdle by writing something other than the truth when it prepared its bid protest petition. The employee of the Petitioner who signed the letter submitting the petition knew the truth. That same employee also knew that some of the material information in the bid protest petition was untrue. The act of intentionally submitting a bid protest petition containing material information known to be untrue is a classic example of the type of improper conduct Section 120.57(1)(b)5, Florida Statutes, is designed to discourage. Accordingly, the relief sought by the Respondent and the Intervenor should be granted.

12. In reaching this conclusion I have not overlooked the Petitioner's argument that because the actual petition was unsigned, there can be no violation of Section 120.57(1)(b)5, Florida Statutes. As noted in the findings of fact, the cover letter which was submitted with the petition was signed by an employee of the Petitioner, Mr. Luten. In view of the statutory requirement that all pleadings must be signed, the most reasonable interpretation is that the Petitioner intended for the Petition to be incorporated by reference into the signed letter and thereby comply with the statutory signature requirement. But even without reaching the question of whether the unsigned petition was incorporated by reference into the signed letter, the signed letter was filed along with the petition and the purpose of the signed letter was to transmit the petition for filing. Therefore, even if it is concluded that the petition is not incorporated into the signed letter, the signed letter itself constitutes a "paper" filed in a proceeding for an improper purpose.

13. With regard to the Petitioner's argument that a mere "factual misstatement" cannot be the foundation for liability under Section 120.57(1)(b)5, Florida Statutes, it is sufficient to note that this is not a case involving mere "factual misstatements." Rather, it is a case in which the Petitioner made material statements that were known to be false at the time they were filed.

14. With regard to the Petitioner's argument that it was legally justified in filing its petition, it is sufficient to note that the evidence at the formal hearing showed otherwise. The Petitioner neither alleged nor offered proof of any legitimate factual or legal basis for its bid challenge. There is no legal justification for knowingly filing a petition that has no legitimate legal or factual basis.

15. The Petitioner has also argued that the Intervenor should not be entitled to an award of cost and attorney's fees because the intervenor was not a necessary party to the bid protest proceeding and voluntarily made itself a

party to the proceeding. Upon consideration of the record in this case, it was reasonable for the Intervenor to participate in the litigation to protect its substantial interests. Absent the bid protest petition, such participation would not have been necessary.

16. As mentioned in the findings of fact, the Petitioner does not dispute the reasonableness of the amounts claimed as reasonable costs and attorney's fees by the Respondent and the Intervenor. There being no dispute in that regard, the amounts claimed are accepted as reasonable. 6/

17. On the basis of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS ORDERED:

That as a sanction for the Petitioner's violation of Section 120.57(1)(b)5, Florida Statutes, by signing and filing a paper for an improper purpose, the Petitioner is hereby ORDERED to pay to the

Respondent and to the Intervenor their reasonable costs and attorneys fees in the following amounts, such payment to be made by no later than 30 days from the date of this order:

(1) To the Respondent, Department of Management Services, attorney's fees in the amount of \$19,550.00 and costs in the amount of \$2,964.63, constituting a total amount of \$22,514.63.

(2) To the Intervenor, Landis Gyr Powers, Inc., attorney's fees in the amount of \$22,507.50 and costs in the amount of \$3,304.25, constituting a total amount of \$25,811.75.

DONE AND ORDERED this 11th day of January, 1994, at Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
904/488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of January, 1994.

ENDNOTES

1/ By separate Recommended Order issued today, it is recommended that the Department of Management Services issue a Final Order dismissing the withdrawn petition.

2/ Compare the language at pages 7 and 8 of the bid protest petition with the process described by Mr. Luten in his testimony at page 153 of the transcript.

3/ If the Petitioner had alleged the truth at pages 7 and 8 of its bid challenge petition, it is most unlikely that the petition would have survived a prehearing motion for summary disposition.

4/ See pages 144, 147, 151-53 of the transcript of the formal hearing.

5/ See the testimony of Terry Davies at page 203 of the transcript of the formal hearing.

6/ I have not included in the award to the Intervenor the amount described in the Intervenor's documentation as fees for additional time its attorney anticipates will be spend on this matter. Accordingly, the attorney fee award to the Intervenor is \$540.00 less than the amount claimed.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.