

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

M & J CONSTRUCTION COMPANY )  
OF PINELLAS COUNTY, INC., )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 94-6917BID  
 )  
DEPARTMENT OF TRANSPORTATION, )  
 )  
Respondent. )  
and )  
 )  
MAYO CONTRACTING, INC., )  
 )  
Intervenor. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Mary Clark, held a formal hearing in the above-styled case on December 23, 1994, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Michael Boutzoukas, Esquire  
Post Office Box 2731  
Dunedin, Florida 34697-2731

For Respondent: Thomas H. Duffy, Esquire  
Haydon Burns Building, Mail Station 58  
605 Suwannee Street  
Tallahassee, Florida 32399-0450

For Intervenor: Mary M. Piccard, Esquire  
Post Office Box 589  
1004 DeSoto Park Drive  
Tallahassee, Florida 32302-0589

STATEMENT OF THE ISSUES

In their joint prehearing statement adopted and filed at the hearing on December 23rd, the parties provided this concise description of the controversy:

This proceeding is limited to the issue of whether Petitioner, M & J Construction Co. of Pinellas County, Inc. (M & J) should be excused from filing a bid protest outside the statutory

period permitting such filings because of a verbal change in the posting date allegedly made by a Department of Transportation (FDOT) employee.

Petitioner maintains that it should be excused from not filing its notice of protest within 72 hours of the posting of the intended award because a representative of the FDOT made a representation that the intended award would not be posted until a date at least 30 days after the actual posting; therefore, equity requires that its protest be allowed.

Respondent and the Intervenor maintain that the bidding documents made clear that the award would be posted on October 20, 1994 or November 7, 1994, and that no change in this posting date would be made except in writing. As no written change was filed, Petitioner was still on notice that the intended award would be posted on October 20, 1994 or November 7, 1994. FDOT denies that Michael Schafenacker made a verbal representation otherwise.

In addition, in a supplement to the prehearing statement, Intervenor contends that Petitioner failed to file a formal protest within 10 days, even if somehow its late notice of protest was excusable. Moreover, Intervenor contends, any actions of the agency, Florida Department of Transportation, cannot operate to waive Mayo's right to the contract.

#### PRELIMINARY STATEMENT

This case was referred to the Division of Administrative Hearings after Petitioner filed its notice of protest and request for opportunity to protest with regard to a contract awarded on October 20, 1994. The hearing was scheduled immediately within the deadlines provided in Section 120.53(5), F.S. Without objection, the petition to intervene by Mayo Contracting, Inc. was granted on December 22, 1994.

In support of its position, Petitioner presented the testimony of Michael Schafenacher, an agency employee; Frank Leone, an employee of M & J; and James Boutzoukas, vice-president of M & J. No other witnesses were presented. Joint exhibits #1-7 were received in evidence, as was also Intervenor's exhibit #1.

Proposed orders, with proposed findings of fact, were submitted by the parties. Those have been considered, and specific rulings on each proposed finding of fact are found in the attached appendix.

On January 13, 1995 Intervenor filed a motion for attorney's fees and request for hearing. Because the relief being sought is not the proper subject of this recommended order, a separate order is being entered as to the section 120.57(1)(b)5., F.S. motion only, and the recommended order is issued without delay.

## FINDINGS OF FACT

1. Petitioner, M & J Construction Company of Pinellas County, Inc. (M & J) is a contractor prequalified to bid on FDOT construction projects in excess of \$250,000.

2. Mayo Contracting, Inc. (Mayo) is a contractor prequalified to bid on FDOT construction projects in excess of \$250,000.

3. Bid solicitation notices for state project no. 75280-3416 were mailed out to prospective bidders, including M & J, on August 26, 1994; and bid packages were mailed to firms requesting them on September 26, 1994. M & J received a bid package. On September 28, 1994, bids were submitted for a bridge repair contract in Orange County.

4. Mayo submitted the lowest bid for the contract in the amount of \$426,860.75 which was \$54,060.05 lower than the second low bidder. M & J submitted the third lowest bid for the contract in the amount of \$499,103.40. (Exhibit 5)

5. The bid documents included the following notice which is printed in two different places in the bid package; once in double spaced bold capital letters, and once in standard size font.

UNLESS OTHERWISE NOTIFIED IN WRITING, RETURN RECEIPT, THE SUMMARY OF BIDS FOR THIS PROJECT WILL BE POSTED WITH THE CLERK OF AGENCY PROCEEDINGS, FLORIDA DEPARTMENT OF TRANSPORTATION, 605 SUWANEE STREET, ROOM 562, TALLAHASSEE, FLORIDA 32399-0458, ON OCTOBER 20, 1994 OR NOVEMBER 7, 1994. BY CALLING THE CLERK OF AGENCY PROCEEDINGS, FLORIDA DEPARTMENT OF TRANSPORTATION, (904) 488-6212, DURING EACH POSTING PERIOD, INFORMATION CONCERNING THE POSTED PROJECTS CAN BE OBTAINED. INTERESTED PARTIES THAT HAVE A COMPUTER AND A MODEM CAN ACCESS INFORMATION FROM THE CONTRACTS ADMINISTRATION ELECTRONIC BULLETIN BOARD CONCERNING PROJECTS WHICH WERE POSTED WITH THE CLERK OF AGENCY PROCEEDINGS DURING EACH POSTING PERIOD BY DIALING (904) 922-4158 OR 922-4159. POSTING WILL PROVIDE NOTICE OF THE DEPARTMENT'S INTENT TO AWARD A CONTRACT OR TO REJECT ALL BIDS. THE DEPARTMENT'S NOTICE OF INTENT REGARDING THIS PROJECT WILL BE POSTED ON ONLY ONE OF THE ALTERNATE POSTING DATES. BIDDERS ARE SOLELY RESPONSIBLE FOR TIMELY MONITORING OR OTHERWISE VERIFYING ON WHICH OF THE SPECIFIED ALTERNATE POSTING DATES THE POSTING OF AWARD OR REJECTION OF ALL BIDS ACTUALLY OCCURS. (Exhibits 1 and 2).

This notice is included in all FDOT bid packages.

6. M & J has been bidding for FDOT contracts for seven years and submits approximately 40 bids to FDOT per year. M & J admits it did not heed the notices in the bid documents advising bidders that (1) the posting dates identified in the bid documents would not be changed unless written notice was provided, and (2) that the bidders are solely responsible for monitoring the posting dates. Mr. Boutzoukas and Mr. Leone said they were aware that the bid

documents contained information regarding posting but they did not made any special note of the time frames nor did they double check after Mr. Leone's conversation with an FDOT employee.

7. The day after the bid was submitted, M & J personnel became concerned about some alleged irregularities in the bid specifications or the bidding process. Mr. Leone called the FDOT contract office to find out the posting date. He is not certain of the identity of the person with whom he spoke, but he believes that it was Michael Schafenacher because of his "distinct, eloquent voice". The FDOT staff person, according to Mr. Leone, told him the posting was November 17 or December 5, 1994.

8. This information was in conflict with the printed information in the bid package described in paragraph 5, above. No one at M & J bothered to look at the dates in the bid package, either before or after the telephone call to FDOT. Instead, Mr. Leone put the November 17/December 5 dates on the office chalkboard and continued with his investigation of the alleged irregularities, as directed by Mr. Boutzoukas.

9. On October 20, 1994, consistent with the requirements of Section 120.53, F.S. and as provided in the notices in the bid packages, FDOT posted the notice of intent to award the contract to Mayo.

10. On or about November 4, 1994, during the course of collecting data on the project, Mr. Boutzoukas realized that posting must have already occurred. He told Mr. Leone to call FDOT again and they then learned that the posting had occurred on October 20.

11. Michael Schafenacher has worked in the FDOT contracts administration office for nine years. He maintains the critical dates chart for various projects and is involved in the pre- and post-bidding process. He and at least four or five other staff respond to numerous telephone inquiries each day regarding dates and the posting process. He remembers the early November call from M & J but nothing sooner, and he does not believe that he would have given erroneous dates from the critical dates chart. The chart reflects the same dates for the project as stated in the bid packages.

12. FDOT keeps track of its contracts by the "letting" date, that is, the month in which bids are opened for a particular project. The project at issue, No. 75280-3416, was in the September letting. Mr. Schafenacker keeps his critical dates chart taped to his desk for easy reference. With or without the letting date, Mr. Schafenacher can quickly and easily find dates in response to telephone inquiries. If Mr. Schafenacher had given the wrong dates and had been told that the dates were inconsistent with the bidding documents, he would have investigated further to resolve the discrepancy.

13. FDOT did not change the dates for the award of the project at issue; if it had, M & J and the other bidders would have received written notice.

14. When there was no timely protest after the October 20 letting, FDOT awarded the contract to Mayo on or about October 26, 1994.

15. As soon as it found out on November 4th that the bid was let, M & J filed its notice of protest by FAX on November 4, 1994. It did not follow up this notice with a formal protest, but rather filed a document called "Request for Opportunity to Protest More than Ten Days after the Post of the Intent to

Award Bid, on or about November 30, 1994, after discussions with FDOT's legal staff. At no time did M & J file a protest bond.

16. M & J's reliance on erroneous verbal information by an unidentified FDOT employee was unreasonable since M & J had the proper information readily in hand and ignored it. M & J waived its right to protest the bid award when it failed to timely file notice of the protest, a proper protest bond or a formal protest.

#### CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to sections 120.53 and 120.57, F.S.

18. Section 120.53(5), F.S. describes the procedures for resolution of protests arising from the contracts bidding process. The statute requires this notice be provided by the agency:

Failure to file a protest within the time prescribed in Section 120.53(5), Florida Statutes shall constitute a waiver of proceedings under chapter 120, Florida Statutes.

Persons adversely affected by an agency decision or intended decision have 72 hours from the bid posting to file a notice of protest and ten days thereafter to file a formal written protest. The same requirement is found in FDOT rule 14-25.024(2), F.A.C.

19. M & J missed both deadlines, but argues that it was misled by erroneous oral information by an FDOT employer regarding the posting date. M & J argues that it is entitled to equitable tolling of the deadlines.

20. In *Machules v. Department of Administration*, 523 So.2d 1132, 1134 (Fla. 1988) the Florida Supreme Court describes equitable tolling as a

. . . type of equitable modification which 'focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant'. [citations omitted]  
. . . [E]quitable tolling, unlike estoppel, does not require active deception or employer misconduct, but focuses rather on the employee with a reasonably prudent regard for his rights.

(emphasis added)

21. M & J's admitted failure to consider the information plainly provided in the bid documents was neither excusable ignorance nor prudent regard and the *Machules* protective mantle is unavailable.

22. The doctrine of estoppel does not apply either. In *Xerox Corp. v. Florida Department of Professional Regulation*, 489 So.2d 1230 (Fla. 1st DCA 1986) a disappointed bidder ignored formal notice of section 120.53(5) procedures and relied instead on some oral representations by agency staff that no decision had been made on the award. The court rejected the bidder's claim that it had not waived the right to protest. See also, *Fidelity & Casualty Company of New York v. Northeast Drywall Company*, 487 So.2d 42 (Fla. 1st DCA

1986). The case cited by M & J, Northrop & Northrop v. State Department of Corrections, 528 So.2d 1249 (Fla. 1st DCA 1988) is readily distinguishable since the Department of Corrections in that case failed to provide notice in the manner prescribed by section 120.53(5), F.S.

23. M & J's failure to protest within the period prescribed by statute and agency rule constituted waiver of its right to the formal administrative hearing on the alleged improprieties of the bid in the project at issue. Cone Corporation v. State Department of Transportation, 556 So.2d 530 (Fla. 2d DCA 1990).

#### RECOMMENDATION

Based on the foregoing, it is hereby

#### RECOMMENDED:

That the Florida Department of Transportation enter its final order denying the bid protest of M & J.

DONE AND ENTERED this 24th day of January, 1995, in Tallahassee, Florida.

---

MARY CLARK  
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 24th day of January, 1995.

#### APPENDIX

The following constitute specific rulings on the findings of fact proposed by the parties.

#### Petitioner's Proposed Findings

M & J filed a memorandum and a four paragraph order. The findings proposed in that order are rejected as unsupported by the weight of evidence. However, the finding proposed in paragraph 3 is adopted to the extent that it establishes that M & J filed a notice as soon as it learned from FDOT that the bid was let on October 20.

#### Respondent's Proposed Findings

1. Adopted in paragraph 3.
- 2.-4. Adopted in paragraph 5.
5. Adopted in paragraph 3.
6. Adopted in paragraph 5.
7. Rejected as unnecessary.

8. Adopted in paragraph 1.
9. Adopted in paragraph 6.
- 10.-11. Rejected as unnecessary.
- 12.-13. Adopted in substance in paragraph 6.
14. Adopted in paragraph 3.
- 15.-16. Adopted in substance in paragraph 7.
17. Adopted in paragraph 11.
- 18.-20. Adopted in paragraph 12.
21. Adopted in paragraph 11.
22. Rejected as unnecessary.
23. Adopted in paragraph 12.
24. Adopted in paragraph 13.
25. Adopted in substance in paragraph 16.
- 26.-27. Adopted in paragraph 14.
- 28.-29. Adopted in paragraph 15.
30. Adopted in paragraph 14.
31. Adopted in paragraph 15.
32. Adopted in paragraph 16.

#### Intervenor's Proposed Findings

- 1.-7. Adopted in paragraphs 1-6.
8. Adopted in paragraph 7.
9. Adopted in paragraph 9.
10. Adopted in paragraph 14.
- 11.-12. Adopted in paragraph 15.

#### COPIES FURNISHED:

Michael E. Boutzoukas, Esquire  
Post Office Box 2731  
Dunedin, Florida 34697-2731

Thomas H. Duffy, Esquire  
Department of Transportation  
605 Suwannee Street  
Tallahassee, Florida 32399-0450

Mary M. Piccard, Esquire  
Post Office Box 589  
1004 DeSoto Park Drive  
Tallahassee, Florida 32302-0589

Ben G. Watts, Secretary  
ATTN: Deidre Grubbs  
Department of Transportation  
Haydon Burns Building, MS 58  
605 Suwannee Street  
Tallahassee, Florida 32399-0450

Thornton J. Williams, General Counsel  
Department of Transportation  
562 Haydon Burns Building  
Tallahassee, Florida 32399-0450

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  
DIVISION OF ADMINISTRATIVE HEARINGS

|                               |   |                     |
|-------------------------------|---|---------------------|
| M & J CONSTRUCTION COMPANY    | ) |                     |
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| Respondent.                   | ) |                     |
| and                           | ) |                     |
|                               | ) |                     |
| MAYO CONTRACTING, INC.,       | ) |                     |
|                               | ) |                     |
| Intervenor.                   | ) |                     |
| _____                         | ) |                     |

ORDER ON MOTION FOR ATTORNEY'S FEES

On January 13, 1995, Intervenor, Mayo Contracting, Inc. (Mayo) filed its motion for attorney's fees and request for hearing.

Basis for the motion is section 120.57(1)(b) 5, F.S. which provides:

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 a, 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 increases 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. (Emphasis added).



There is a complete body of case law available for application to the above section. Patterned after Rule 11, Federal Rules of Civil Procedure, section 120.57(1)(b)5 F.S. may be interpreted in part by resort to the abundant federal cases analyzing that rule. *Mercedes Lighting and Electrical Supply, Inc. v. State Department of General Services*, 560 So.2d 272 (Fla. 1st DCA 1990).

Nothing in the text of section 120.57(1)(b)5, F.S. mandates an evidentiary hearing. The imposition of sanctions pursuant to Rule 11 does not require an evidentiary hearing. *International Shipping v. Hydra Offshore, Inc.*, 875 F.2d 600 (1st Cir. 1988). An evidentiary hearing is unnecessary, and whether or to what extent an additional hearing is required will vary depending on the nature of the case. *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987). Wide discretion is vested in the trial judge as to whether to grant sanctions, as the trial judge, by virtue of his close contact with the parties, is best able to determine the propriety of such sanctions. *Norton Tire Co. v. Tire Kingdom, Inc.*, 856 F.2d 1533 (11th Cir. 1988).

. . . In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Advisory Committee Notes,  
1983 Amendments to Rule 11.

Extraordinary circumstances have not been raised in Mayo's request. The underlying facts stated in the motion are already a matter of record in the instant proceeding.

Having served as hearing officer, the undersigned is intimately familiar with the conduct of this administrative litigation by the parties and with the record. *Krueger v. School District of Fernando County*, 544 So.2d 311 (Fla. 5th DCA 1989), cited by Mayo, involved remand for an evidentiary hearing on a motion for \$42,000 in attorney's fees. The authority for the motion is not mentioned in the opinion, but apparently the request was made several times during the proceeding after which the hearing officer recommended reinstatement of the teacher but ignored the request for fees. The case is readily distinguishable.

The 1983 amendments to Rule 11 eliminated the former "good-faith, bad-faith" standard in favor of a more objective and more stringent standard, "reasonableness under the circumstances". *Mercedes*, p.276; *Rodgers v. Lincoln Towing Services, Inc.*, 771 F.2d 194 (7th Cir. 1985). The court is to avoid hindsight and resolve all doubts in favor of the signer. Rule 11 is violated only where it is patently clear that a claimant has absolutely no chance of success. *Oliveri v. Thompson*, 803 F.2d 1265 (2nd Cir. 1986), citing *Eastway Construction Corp. v. New York* 762 F.2d (2nd Cir. 1985)

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was

submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper, whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Advisory Committee notes,  
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Other objective examples of improper purposes are ". . . excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings, or obdurate resistance out of proportion to the amounts or issues at stake." Schwarzer, "Sanctions Under the New Federal Rule 11 - A Closer Look" 104 F.R.D. 181, 195-197, cited in Mercedes, supra, p.278.

These objective standards allow the avoidance of unseemly or sensitive inquiry into attorney and client subjective intent or privileged communications in assessing the propriety of sanctions.

The record and circumstances in this proceeding do not support an award of fees pursuant to section 120.57(1)(b)5. There has been very little delay from October until January, and that delay was occasioned by Petitioner's and the agency's apparent uncertainty regarding the procedure for addressing a protest that was untimely on its face but which was late based on allegedly erroneous information. The litigation proceeded promptly; Petitioner Mayo presented competent credible witnesses and a claim that was colorable, but deemed, at this stage, to be non-prevailing.

The motion for attorney's fees is DENIED.

DONE and ORDERED this 24th day of January, 1995, in Tallahassee, Leon County, Florida.

---

MARY CLARK  
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 24th day of January, 1995.

COPIES FURNISHED:

Mary M. Piccard, Esquire  
Post Office Box 589  
1004 DeSoto Park Drive  
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Thomas H. Duffy, Esquire  
Department of Transportation  
605 Suwannee Street  
Tallahassee, Florida 32399-0450

Michael E. Boutzoukas, Esquire  
Post Office Box 2731  
Dunedin, Florida 34697-2731

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.

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CORRECTED RECOMMENDED  
ORDER  
(PURSUANT TO RULE 60Q-2.032(2), FAC)

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Mary Clark, held a formal hearing in the above-styled case on December 23, 1994, in Tallahassee, Florida.

#### APPEARANCES

For Petitioner: Michael Boutzoukas, Esquire  
Post Office Box 2731  
Dunedin, Florida 34697-2731

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CONCERNING THE POSTED PROJECTS CAN BE OBTAINED. INTERESTED PARTIES THAT HAVE A COMPUTER AND A MODEM CAN ACCESS INFORMATION FROM THE CONTRACTS ADMINISTRATION ELECTRONIC BULLETIN BOARD CONCERNING PROJECTS WHICH WERE POSTED WITH THE CLERK OF AGENCY PROCEEDINGS DURING EACH POSTING PERIOD BY DIALING (904) 922-4158 OR 922-4159. POSTING WILL PROVIDE NOTICE OF THE DEPARTMENT'S INTENT TO AWARD A CONTRACT OR TO REJECT ALL BIDS. THE DEPARTMENT'S NOTICE OF INTENT REGARDING THIS PROJECT WILL BE POSTED ON ONLY ONE OF THE ALTERNATE POSTING DATES. BIDDERS ARE SOLELY RESPONSIBLE FOR TIMELY MONITORING OR OTHERWISE VERIFYING ON WHICH OF THE SPECIFIED ALTERNATE POSTING DATES THE POSTING OF AWARD OR REJECTION OF ALL BIDS ACTUALLY OCCURS. (Exhibits 1 and 2).

This notice is included in all FDOT bid packages.

6. M & J has been bidding for FDOT contracts for seven years and submits approximately 40 bids to FDOT per year. M & J admits it did not heed the notices in the bid documents advising bidders that (1) the posting dates identified in the bid documents would not be changed unless written notice was provided, and (2) that the bidders are solely responsible for monitoring the posting dates. Mr. Boutzoukas and Mr. Leone said they were aware that the bid documents contained information regarding posting but they did not make any special note of the time frames nor did they double check after Mr. Leone's conversation with an FDOT employee.

7. The day after the bid was submitted, M & J personnel became concerned about some alleged irregularities in the bid specifications or the bidding process. Mr. Leone called the FDOT contract office to find out the posting date. He is not certain of the identity of the person with whom he spoke, but he believes that it was Michael Schafenacher because of his "distinct, eloquent voice". The FDOT staff person, according to Mr. Leone, told him the posting was November 17 or December 5, 1994.

8. This information was in conflict with the printed information in the bid package described in paragraph 5, above. No one at M & J bothered to look at the dates in the bid package, either before or after the telephone call to FDOT. Instead, Mr. Leone put the November 17/December 5 dates on the office chalkboard and continued with his investigation of the alleged irregularities, as directed by Mr. Boutzoukas.

9. On October 20, 1994, consistent with the requirements of Section 120.53, F.S. and as provided in the notices in the bid packages, FDOT posted the notice of intent to award the contract to Mayo.

10. On or about November 4, 1994, during the course of collecting data on the project, Mr. Boutzoukas realized that posting must have already occurred. He told Mr. Leone to call FDOT again and they then learned that the posting had occurred on October 20.

11. Michael Schafenacher has worked in the FDOT contracts administration office for nine years. He maintains the critical dates chart for various projects and is involved in the pre- and post-bidding process. He and at least four or five other staff respond to numerous telephone inquiries each day regarding dates and the posting process. He remembers the early November call

from M & J but nothing sooner, and he does not believe that he would have given erroneous dates from the critical dates chart. The chart reflects the same dates for the project as stated in the bid packages.

12. FDOT keeps track of its contracts by the "letting" date, that is, the month in which bids are opened for a particular project. The project at issue, No. 75280-3416, was in the September letting. Mr. Schafenacker keeps his critical dates chart taped to his desk for easy reference. With or without the letting date, Mr. Schafenacker can quickly and easily find dates in response to telephone inquiries. If Mr. Schafenacker had given the wrong dates and had been told that the dates were inconsistent with the bidding documents, he would have investigated further to resolve the discrepancy.

13. FDOT did not change the dates for the award of the project at issue; if it had, M & J and the other bidders would have received written notice.

14. When there was no timely protest after the October 20 letting, FDOT awarded the contract to Mayo on or about October 26, 1994.

15. As soon as it found out on November 4th that the bid was let, M & J filed its notice of protest by FAX on November 4, 1994. It did not follow up this notice with a formal protest, but rather filed a document called "Request for Opportunity to Protest More than Ten Days after the Post of the Intent to Award Bid, on or about November 30, 1994, after discussions with FDOT's legal staff. At no time did M & J file a protest bond.

16. M & J's reliance on erroneous verbal information by an unidentified FDOT employee, assuming such occurred, was unreasonable since M & J had the proper information readily in hand and ignored it. M & J waived its right to protest the bid award when it failed to timely file notice of the protest, a proper protest bond or a formal protest.

#### CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to sections 120.53 and 120.57, F.S.

18. Section 120.53(5), F.S. describes the procedures for resolution of protests arising from the contracts bidding process. The statute requires this notice be provided by the agency:

Failure to file a protest within the time prescribed in Section 120.53(5), Florida Statutes shall constitute a waiver of proceedings under chapter 120, Florida Statutes.

Persons adversely affected by an agency decision or intended decision have 72 hours from the bid posting to file a notice of protest and ten days thereafter to file a formal written protest. The same requirement is found in FDOT rule 14-25.024(2), F.A.C.

19. M & J missed both deadlines, but argues that it was misled by erroneous oral information by an FDOT employer regarding the posting date. M & J argues that it is entitled to equitable tolling of the deadlines.

20. In *Machules v. Department of Administration*, 523 So.2d 1132, 1134 (Fla. 1988) the Florida Supreme Court describes equitable tolling as a

. . . type of equitable modification which 'focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant'. [citations omitted] . . . [E]quitable tolling, unlike estoppel, does not require active deception or employer misconduct, but focuses rather on the employee with a reasonably prudent regard for his rights.

(emphasis added)

21. M & J's admitted failure to consider the information plainly provided in the bid documents was neither excusable ignorance nor prudent regard and the Machules protective mantle is unavailable.

22. The doctrine of estoppel does not apply either. In *Xerox Corp. v. Florida Department of Professional Regulation*, 489 So.2d 1230 (Fla. 1st DCA 1986) a disappointed bidder ignored formal notice of section 120.53(5) procedures and relied instead on some oral representations by agency staff that no decision had been made on the award. The court rejected the bidder's claim that it had not waived the right to protest. See also, *Fidelity & Casualty Company of New York v. Northeast Drywall Company*, 487 So.2d 42 (Fla. 1st DCA 1986). The case cited by M & J, *Northrop & Northrop v. State Department of Corrections*, 528 So.2d 1249 (Fla. 1st DCA 1988) is readily distinguishable since the Department of Corrections in that case failed to provide notice in the manner prescribed by section 120.53(5), F.S.

23. M & J's failure to protest within the period prescribed by statute and agency rule constituted waiver of its right to the formal administrative hearing on the alleged improprieties of the bid in the project at issue. *Cone Corporation v. State Department of Transportation*, 556 So.2d 530 (Fla. 2d DCA 1990). Moreover, M & J's failure to file a formal written protest within ten days of its notice of protest also constitutes a waiver of any right it may have had to review the agency's award. *Xerox Corp. vs. Florida Department of Professional Regulations*, supra.

#### RECOMMENDATION

Based on the foregoing, it is hereby

RECOMMENDED:

That the Florida Department of Transportation enter its final order denying the bid protest of M & J.

DONE AND ENTERED this 25th day of January, 1995, in Tallahassee, Florida.

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MARY CLARK  
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 25th day of January, 1995.

#### APPENDIX

The following constitute specific rulings on the findings of fact proposed by the parties.

#### Petitioner's Proposed Findings

M & J filed a memorandum and a four paragraph order. The findings proposed in that order are rejected as unsupported by the weight of evidence. However, the finding proposed in paragraph 3 is adopted to the extent that it establishes that M & J filed a notice as soon as it learned from FDOT that the bid was let on October 20.

#### Respondent's Proposed Findings

1. Adopted in paragraph 3.
- 2.-4. Adopted in paragraph 5.
5. Adopted in paragraph 3.
6. Adopted in paragraph 5.
7. Rejected as unnecessary.
8. Adopted in paragraph 1.
9. Adopted in paragraph 6.
- 10.-11. Rejected as unnecessary.
- 12.-13. Adopted in substance in paragraph 6.
14. Adopted in paragraph 3.
- 15.-16. Adopted in substance in paragraph 7.
17. Adopted in paragraph 11.
- 18.-20. Adopted in paragraph 12.
21. Adopted in paragraph 11.
22. Rejected as unnecessary.
23. Adopted in paragraph 12.
24. Adopted in paragraph 13.
25. Adopted in substance in paragraph 16.
- 26.-27. Adopted in paragraph 14.
- 28.-29. Adopted in paragraph 15.
30. Adopted in paragraph 14.
31. Adopted in paragraph 15.
32. Adopted in paragraph 16.

#### Intervenor's Proposed Findings

- 1.-7. Adopted in paragraphs 1-6.
8. Adopted in paragraph 7.
9. Adopted in paragraph 9.
10. Adopted in paragraph 14.
- 11.-12. Adopted in paragraph 15.

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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.