

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DIVERSIFIED MANAGEMENT AND )  
CONSTRUCTION, INC., )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 00-4248BID  
 )  
DEPARTMENT OF TRANSPORTATION, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on October 30, 2000, in Tampa, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John J. Agliano, Esquire  
C. David Harper, Esquire  
Annis, Mitchell, Cockey,  
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For Respondent: Brian A. Crumbaker, Esquire  
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STATEMENT OF THE ISSUE

The issue presented for decision in this case is whether Respondent, the Florida Department of Transportation (the "Department"), improperly dismissed the formal written protest of

Petitioner, Diversified Management and Construction, Inc. ("Diversified"), on the ground that it was not filed within 10 days of the filing of Diversified's notice of intent to protest.

PRELIMINARY STATEMENT

On August 2, 2000, the Department opened bid proposals submitted in response to RFP-DOT-00/01-33005-R/W (the "RFP"), a request for written proposals from contractors to conduct asbestos surveys and perform related tasks in facilities owned by the Department in District III. The Department posted its bid tabulation on August 8, 2000, announcing its intent to award the contract to Preferred Building Solutions, Inc. In response to the proposal tabulation, Diversified timely filed a notice of intent to protest and a protest bond with the Department's agency clerk via facsimile on August 11, 2000. Diversified filed its formal written protest on August 25, 2000, four days after the filing deadline established by Section 120.57(3), Florida Statutes. On September 6, 2000, the Department dismissed the formal written protest and provided Diversified 21 days to file any evidence it wished the Department to consider regarding the untimely filing of its formal protest. On September 27, 2000, Diversified filed its response to the order of dismissal and an amended petition. On October 16, 2000, the Department referred the matter to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct a formal

administrative hearing on the issue of the propriety of the dismissal of the formal written protest.

At the final hearing, Diversified presented the testimony of John Jazesf, its president. Diversified's Exhibits numbered 1 through 7 were admitted into evidence. The Department presented the testimony of James C. Myers, the Department's agency clerk. The Department offered no exhibits.

A Transcript of the final hearing was filed with the Division of Administrative Hearings on November 9, 2000. The parties stipulated that the Proposed Recommended Orders would be filed no later than five working days after the filing of the Transcript. Both parties timely filed Proposed Recommended Orders on November 17, 2000.

#### FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following findings of fact are made:

1. In response to the RFP, seven contractors submitted proposals by the deadline of 5 p.m. on August 1, 2000.
2. On August 2, 2000, the bid opening was conducted by Betty Wilson, the Department's deputy district manager, and was witnessed by Department employees Scott Walters and Jerry Obert.
3. At 2 p.m. on August 8, 2000, the Department posted the proposal tabulation, indicating the Department's intent to award the contract to Preferred Building Solutions, Inc. The proposal

tabulation indicated that Diversified was ranked third out of the seven proposers.

4. The proposal tabulation contained the following notice, as required by Section 120.57(3), Florida Statutes:

Failure to file a protest within the time prescribed in Section 120.57(3), Florida Statutes, shall constitute a waiver of proceedings under Chapter 120, Florida Statutes.

5. On August 8, 2000, after the proposal tabulation was posted, John Jazesf, the president of Diversified, contacted the Department by telephone and requested copies of several of the proposals via facsimile transmission. The Department declined to fax the proposals to Mr. Jazesf because they were too voluminous, but offered to make them available for review at the Department's Tallahassee office.

6. On the afternoon of August 8, Mr. Jazesf also contacted John Agliano, an attorney. He told Mr. Agliano that he was thinking about filing a protest, but would not know until he went to Tallahassee and reviewed the proposals. Mr. Jazesf testified that he did not discuss protest time lines or any other specifics with Mr. Agliano.

7. On August 9, 2000, Mr. Jazesf traveled from Tampa to Tallahassee and reviewed the proposals. He also discussed the proposed contract award with several Department officials.

8. On August 10, 2000, Mr. Jazesf spoke by telephone from Tampa with James C. Myers, the Department's agency clerk. Mr. Jazesf testified that their conversation lasted between 20 and 30 minutes. They discussed the requirements for filing the notice of protest, whether a third ranked proposer had standing to protest, and whether documents could be filed with the Department via facsimile transmission.

9. Mr. Jazesf testified that he told Mr. Myers that Diversified would file its formal written protest, either "two weeks from Friday" or on August 25, 2000. On the date of the conversation, "two weeks from Friday" was August 25, 2000. Mr. Myers testified that he could not recall the details of this conversation. Mr. Jazesf acknowledged that Mr. Myers did not respond to his statement as to when the formal written protest would be filed.

10. As the agency clerk, Mr. Myers is responsible for date stamping all documents addressed to the Clerk of Agency Proceedings. He is not authorized to provide legal advice to potential protesters, or to make judgments as to whether documents are timely filed.

11. On August 11, 2000, Diversified filed its notice of protest and faxed a copy of its protest bond to the Department. There is no dispute between the parties that the notice of protest was timely filed or that a faxed copy of the bond was acceptable.

12. The August 11, 2000, filing of the notice of protest established a deadline of August 21, 2000, for the filing of the formal written protest, pursuant to the ten-day filing requirement of Section 120.57(3), Florida Statutes.

13. Between August 11 and August 21, 2000, neither the Department nor Mr. Jazesf, or anyone else on behalf of Diversified, contacted each other concerning the formal written protest. Diversified failed to file its formal written protest on Monday, August 21, 2000.

14. On his own, Mr. Jazesf attempted to calendar the appropriate date for filing its formal written protest. He reviewed several state statutes and municipal ordinances to confirm in his mind that the "10 day" rule meant ten working days, rather than ten calendar days. Mr. Jazesf specifically reviewed Section 120.57, Florida Statutes; Rule 28-110.005, Florida Administrative Code; Section 1.18 of the RFP; the Bid Tabulation Sheet; federal regulations providing for a ten working-day notification requirement for asbestos stripping; and, Section 108.4.3, Southern Building Code (1997), expressly providing a 30 calendar-day notice of appeal deadline. Mr. Jazesf testified that his review led him to conclude that August 25, 2000, ten working days after filing the notice of protest, was the deadline for filing the formal written protest.

15. Mr. Jazesf testified that he also relied on the silence of Mr. Myers in response to his statement that Diversified intended to file its formal written protest on August 25, 2000.

16. On August 22, 2000, one day after the statutory deadline to file its formal written protest, Mr. Jazesf faxed a memo to Mr. Myers indicating that the formal written protest would be filed by August 25, 2000. Again, Mr. Myers did not respond.

17. Diversified did not retain legal counsel in connection with the bid protest on or before August 21, 2000.

18. Diversified filed its formal written protest on August 25, 2000, four days after the statutory deadline, and ten working days after the filing of the notice of protest.

#### CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Section 120.57(1) and (3), Florida Statutes.

20. Section 120.57(3)(f), Florida Statutes, provides in pertinent part:

In a competitive procurement protest, other than a rejection of all bids, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. . . .

21. "A capricious action is one taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic." Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). The inquiry to be made in determining whether an agency has acted in an arbitrary or capricious manner involves consideration of "whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." Adam Smith Enterprises v. Department of Environmental Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

22. As the party protesting the proposed agency action, Diversified has the burden of proof. State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998); Section 120.57(3)(f), Florida Statutes ("Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action."). Because there is no statute providing otherwise, the findings of fact in this proceeding "shall be based upon a preponderance of the evidence." Section 120.57(1)(h), Florida Statutes.

23. This is a de novo proceeding, which the Court in State Contracting described as follows: "The judge may receive evidence, as with any formal hearing under section 120.57(1), but



the object of the proceeding is to evaluate the action taken by the agency." 709 So. 2d at 609. The Court cites Intercontinental Properties, Inc. v. State Department of Health and Rehabilitative Services, 606 So. 2d 380, 386 (Fla. 3d DCA 1992) for the definition of a de novo hearing in bid protest proceedings. A de novo proceeding

simply means that there was an evidentiary hearing during which each party had a full and fair opportunity to develop an evidentiary record for administrative review purposes. It does not mean, . . . that the hearing officer [now administrative law judge] sits as a substitute for the Department and makes a determination whether to award the bid de novo. Instead, the hearing officer sits in a review capacity, and must determine whether the bid review criteria set forth in [Liberty County v. Baxter's Asphalt and Concrete, Inc., 421 So. 2d 505 (Fla. 1982)] have been satisfied.

24. Section 120.57(3)(b), Florida Statutes, provides, in relevant part:

Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the bid tabulation or after receipt of the notice of the agency decision or intended decision and shall file a formal written protest within 10 days after filing the notice of protest. . . . Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter. The formal written protest shall state with particularity the facts and law upon which the protest is based. Saturdays, Sundays, and legal holidays shall be excluded in the computation of the 72-hour time periods provided by this paragraph.

25. Diversified contends that the ten-day deadline for filing a formal written protest is impermissibly vague. It argues that the statute can reasonably be interpreted to require filing within ten calendar days or within ten working days, and that it would be inequitable to penalize Diversified for choosing a reasonable interpretation that happens to differ from that of the Department.

26. In support of its argument, Diversified cites Bell Atlantic Business Systems Services, Inc. v. Florida Department of Labor and Employment Security, 677 So. 2d 989 (Fla. 1st DCA 1996). In Bell Atlantic, the court reversed the agency's dismissal of petitioner's bid protest as untimely where it was filed 27 minutes after the expiration of the 72-hour period as measured from the time of posting. Diversified states that the court accepted the petitioner's argument that Section 120.53(5), Florida Statutes (the statutory predecessor to the notice provision set forth above) could be interpreted to compute the 72-hour period from the time of posting or from the time the notice of decision was actually received, and that neither interpretation was preferred. Diversified concludes that Bell Atlantic stands for the proposition that "a legal fiction of implied notice of posting cannot be used to deny access to administrative remedies," and that this proposition should operate here to reinstate its protest.

27. Diversified's reliance on Bell Atlantic is misplaced. The statute at issue in Bell Atlantic, like the current Section 120.57(3), Florida Statutes, provided alternative computations for the 72-hour period. The period may be counted from posting, or from the time notice is received. The choice of alternatives is made by the agency, not the bidders; however, the agency must make the point of entry clear to the bidders from the start. The Bell Atlantic court was not concerned with statutory ambiguities, but with ambiguities in the agency's actions. The agency stated a posting date in its RFP, changed that date twice by addendum, then posted the bid tabulation on yet another date without apparent notice to the bidders. The agency's last communication with bidders prior to posting indicated that it would fax a copy of the bid tabulation to the bidders at the time of posting. Bell Atlantic, 677 So. 2d at 990. The petitioner claimed that it did not receive actual notice of the posting until nearly two days after it occurred. Id. at 991. The court held that the agency's dismissal of the protest depended on disputed facts concerning the petitioner's receipt of notice, and that the protest could not be dismissed on that basis without affording the petitioner a hearing to challenge its basis. Id. at 992.

28. In the instant case, there are no disputed facts as to when Diversified received notice, or as to the event triggering the running of the clock toward the statutory deadline. Here,

the only issue in dispute is the legal interpretation of Section 120.57(3), Florida Statutes. Bell Atlantic is inapposite.

29. Diversified also relies on Judge Zehmer's dissent in Environmental Resource Associates of Florida, Inc. v. Department of General Services, 624 So. 2d 330, 332 (Fla. 1st DCA 1993), for the proposition that failure to timely file a petition creates only a rebuttable presumption of waiver. The majority opinion, however, ruled that extraordinary circumstances did not exist to warrant the application of the equitable tolling doctrine. Judge Barfield in the majority opinion succinctly stated, "There is nothing extraordinary in the failure to timely file in this case. Quite to the contrary, the problem in this case is the too ordinary occurrence of a party's attorney failing to meet a filing deadline." Id. at 331.

30. The fact that Diversified declined to retain counsel until the time for filing its protest had passed does not create "extraordinary circumstances" to warrant the application of equitable principles to enlarge the time for filing.

31. Further militating against the application of equitable enlargement is the fact that the Department did nothing to mislead or lull Diversified into inaction. Diversified conceded that Mr. Myers made no representations to Mr. Jazesf regarding the statutory filing requirements. Diversified established only that Mr. Myers did not respond to the statement made by Mr. Jazesf regarding his intent to file the formal written

protest on August 25, 2000, or to the subsequent facsimile from Diversified expressing the same intent. Diversified did not establish that Mr. Myers had a duty to inform Mr. Jazesf of the filing deadlines. Informal and imprecise oral communications, or lack thereof, are insufficient to overcome the effect of prior formal notice where the posted tabulation explicitly advised that failure to comply with the express statutory time requirements for protests would constitute a waiver of Chapter 120 proceedings. See Xerox Corporation v. Department of Professional Regulation, 489 So. 2d 1230, 1231 (Fla. 1st DCA 1986).

32. Diversified also argues that when Section 120.57(3), Florida Statutes, is construed in pari materia with closely related statutes and rules, it must be concluded that Diversified's petition was timely filed. Diversified points to the express exclusion of weekends and holidays from the 72-hour period set forth in Section 120.57(3) itself, as well as Rule 1.090(a), Florida Rules of Civil Procedure and Rule 28-1.06.103, Florida Administrative Code, both of which expressly exclude weekends and holidays from the computation of time periods of less than seven days.

33. Review of the cited statutes and rules indicates that where the exclusion of weekends and holidays is intended, it is expressly stated, leading to the contrary conclusion that there is no such exclusion for the ten-day period at issue in this case. Section 120.57(3) in particular dictates this conclusion.

It sets forth both the 72-hour notice of intent and the ten-day formal written protest requirements, but excludes weekends and holidays only from the former.

34. It is concluded that Section 120.57(3), Florida Statutes, is not ambiguous. It requires that a formal written protest be filed within ten days of the notice of intent to protest, and does not exclude weekends and holidays from the computation of the time period. Diversified failed to establish facts sufficient to warrant the application of equitable principles to enlarge the unambiguous time line for the filing of its formal written protest.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is recommended that the Department of Transportation enter a final order dismissing the protest filed by Diversified Management and Construction, Inc. for failure to file the formal written protest within ten days of filing its notice of protest.

DONE AND ENTERED this 5th day of December, 2000, in Tallahassee, Leon County, Florida.

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LAWRENCE P. STEVENSON  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of December, 2000.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.