2014 IL App (4th) 130979-U

NO. 4-13-0979

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 28, 2014
Carla Bender
4th District Appellate
Court, IL

R.L. BRINK CORPORATION,	)	Appeal from
Plaintiff-Appellant and Cross-Appellee,	)	Circuit Court of
v.	)	Adams County
ANN L. SCHNEIDER, Secretary of the Illinois Department of Transportation; BILL GRUNLOH, Chief Procurement Officer of the Illinois Department of Transportation; and THE ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	No. 12CH115
Defendants-Appellees and Cross-Appellants.	)	Honorable Thomas J. Ortbal, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the Illinois Department of Transportation's two-year suspension of the plaintiff's ability to participate on road construction projects managed by the Department, concluding that the Department's determination that the plaintiff made material misrepresentations on previous bids was not clearly erroneous.

¶ 2 In December 2012, defendant, Bill Grunloh, acting as the Chief Procurement Officer (CPO) for codefendant, the Illinois Department of Transportation (Department), issued a final determination of suspension, which prohibited plaintiff, R.L. Brink Corporation (Brink), from participating on any contracts awarded by or requiring approval or concurrence from the Department for two years. Brink appeals, raising several claims that challenge the Department's suspension. The Department purports to cross-appeal, requesting guidance on whether sovereign immunity precluded the issuance of an injunction that prohibited certain enforcement measures.

¶ 3 We reject Brink's first argument that the Department erred by finding that it made a materially false statement in violation of the responsible bidder provision of section 30-22(6) of the Illinois Procurement Code (Procurement Code) (30 ILCS 500/30-22(6) (West 2012)). We conclude that the evidence presented at the administrative hearing showed that Brink failed to certify that its employees would be performing specific trade work.

¶ 4 We also reject Brink's argument that the "adequate evidence" standard of section 6.510 of Title 44 of the Illinois Administrative Code (44 Ill. Adm. Code 6.510, amended at 35 Ill. Reg. 16518 (eff. Sept. 30, 2011)) is unconstitutionally vague in violation of due process. In reviewing that provision and the clarifying guidance provided by section 6.690(b) of Title 44 of the Administrative Code (44 Ill. Adm. Code 6.690(b), amended at 35 Ill. Reg. 16518 (eff. Sept. 30, 2011)), we conclude that section 6.510 of Title 44 of the Administrative Code provides sufficiently clear guidance to the Department in its enforcement role and also apprises the public of the prohibited conduct.

¶ 5 In addition, we find that the Department did not engage in unlawful rulemaking in violation of the Illinois Administrative Procedure Act (Procedure Act) (5 ILCS 100/1-1 to 1-45 (West 2012)) because the contract language at issue was exempt under the plain language of the Procurement Code.

¶ 6 As to the Department's argument regarding a contractual agreement between Brink and the City of Quincy, we decline to reach the merits because doing so would result in an advisory order.

¶ 7 Accordingly, we affirm the Department's two-year suspension and dismiss the Department's cross-appeal.

¶ 8 I. BACKGROUND

¶ 9 A. The Contractual Relationship Between the Parties

¶ 10 Brink, an Illinois corporation, is a nonunion general contractor that generates a substantial portion of its income working on State road construction projects. The issues presented in this appeal involve the following State road construction projects in which Brink submitted a bid and was later awarded the project as the lowest bidder: (1) Brown County project 72C37; (2) Hancock County project 72E05; (3) Adams County project 11-00009-SM; and (4) 2012 Motor Fuels Tax (MFT) Asphalt Maintenance Program, section 12-00000-00-GM, City of Quincy (hereinafter, the Quincy contract).

¶ 11 To properly offer a bid on a State-funded road construction project, Brink must satisfy many requirements. One such requirement is provided by section 30-22(6) of article 30 of the Procurement Code (30 ILCS 500/30-22(6) (West 2012)). That provision, which is commonly referred to as "the responsible bidder provision," states, as follows:

> "Construction contracts; responsible bidder requirements. To be considered a responsible bidder on a construction project 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's subcontractors must participate in applicable apprenticeship training programs approved by and registered with the United States Department of Labor's

> [(USDOL's)] Bureau of Apprenticeship and Training." 30 ILCS 500/30-22(6) (West 2012).

¶ 12 In accord with the responsible bidder provision of the Procurement Code, the Department mandates that all bids for State-funded road construction projects contain a certification. Section K of that certification, states, as follows:

> "In accordance with the provisions of section 30-22(6) of the *** Procurement Code, the bidder certifies that it is a participant, either as an individual or as part of a group program, in the approved apprenticeship and training programs applicable to each type of work or craft that the bidder will perform with its own forces. The bidder further certifies for work that will be performed by subcontract that each of its subcontractors submitted for approval either (a) is, at the time of such bid, participating in an approved, applicable apprenticeship and training program; or (b) will, prior to the commencement of performance of work pursuant to this contract, begin participation in an approved apprenticeship and training program applicable to the work of the subcontract. The Department, at any time before or after award, may require the production of a copy of each applicable Certificate of Registration issued by the [USDOL] evidencing such participation by the contractor and any or all of its subcontractors. Applicable apprenticeship and training programs are those that have been approved and registered with the [USDOL]. The bidder shall list in the space below, the official

> name of the program sponsor holding the Certificate of Registration for all types of work or crafts in which the bidder is a participant and that will be performed with the bidder's forces. Types of work or craft work that will be subcontracted shall be included and listed as subcontracted work. The list shall also indicate any type of work or craft category that does not have an applicable apprenticeship or training program. *The 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 as reported on the Construction Employee Workforce Projection []Form *** and returned with the bid is accounted for and listed.*
>
> * * *
>
> The requirements of this certification and disclosure are a material part of the contract, and the contractor shall require this certification provision to be included in all approved subcontracts." (Emphasis in original.)

¶ 13 B. The Department's Notice of Suspension

¶ 14 On August 22, 2012, Grunloh, acting as the CPO for the Department, sent Brink a "Notice of Suspension and Interim Suspension," prohibiting Brink from "participating on any contract awarded by or requiring approval or concurrence [from] the Department" for 120 days. The Department claimed that Brink made material misrepresentations on its respective bid for the Brown County, Hancock County, and Adams County projects, intending to circumvent the responsible bidder provision of the Procurement Code.

¶ 15 C. Brink's Motions for Injunctive Relief

¶ 16 Five days after the Department sent its suspension notice, Brink filed an emergency motion for a temporary restraining order (TRO), requesting that the trial court (1) enjoin the Department from enforcing the suspension and (2) prohibit the Department from rescinding its award of the Adams County project and Quincy contract to Brink, so that Brink could begin work. On September 4, 2012, the court granted Brink's TRO motion. Shortly thereafter, Brink filed a second motion for an emergency TRO.

¶ 17 At a September 2012 hearing on the second emergency TRO, Brink alleged that with regard to the Quincy contract—a road maintenance project the City of Quincy awarded to Brink—the Department refused to approve disbursement of the MFT funding the city relied upon, citing an unresolved union protest regarding Brink's compliance with the responsible bidder provision of the Procurement Code. Brink claimed that the Department's refusal effectively halted the project. In its prayer for relief, Brink requested, in pertinent part, that the trial court order the Department to authorize disbursement of the funding, which would allow the project to proceed. In response, the Department argued that sovereign immunity barred the court from entering an injunction directing the State to take specific action or prohibiting the State from taking a specific action that would result in controlling the actions of the State or subjecting it to liability. The court ordered the Department to neither directly nor indirectly enforce its interim suspension against Brink, later clarifying that the Department could not use the interim suspension as a basis to deny authorizing the Quincy contract but could do so on other unrelated grounds, about which the court did not elaborate.

¶ 18 Later in September 2012, Brink moved for a preliminary injunction. On October 1, 2012, the trial court entered an order, finding that (1) Brink had a property interest in the

Quincy contract that was subject to due-process protections; (2) critical timeliness concerns existed for Brink and the City of Quincy regarding performance of the Quincy contract; (3) Brink would suffer irreparable harm if it did not proceed with the Quincy contract; and (4) under the unique circumstances presented, the Department's administrative review process would not satisfy Brink's due-process protections. Based on these findings, the court enjoined the Department from enforcing its August 2012 suspension against Brink, which the court specifically noted did not apply to the Department's administrative review process. The court also took under advisement whether Brink was required to exhaust its administrative remedies under Title 44 of the Administrative Code (44 Ill. Adm. Code 6.10 to 6.975, amended at 37 Ill. Reg. 19098 (eff. Nov. 15, 2013)).

¶ 19 On October 10, 2012, the trial court entered an "order on reserved issues on motion for preliminary injunction." In its order, the court rejected Brink's request that the court directly adjudicate the Department's allegations regarding whether Brink made any material misrepresentations warranting suspension. The court found that the Department's administrative review process was "facially adequate" and should continue to permit Brink the opportunity to challenge the Department's suspension. In so finding, the court distinguished the Department's administrative review process and Brink's property interest in the Quincy contract, "finding that the suspension of the letting of that contract by the City of Quincy, without prior notice and opportunity to be heard, was contrary to due-process protections under the facts presented." Accordingly, the court denied Brink's request to bypass the Department's administrative review process but reaffirmed its October 1, 2012, order, which enjoined the Department from enforcing—either directly or indirectly—its August 2012 interim suspension as to the Quincy contract.

¶ 20 The Department appealed, and this court dismissed the appeal as moot. *R.L.*

Brink Corp. v. Grunloh, 2013 IL App (4th) 120933-U, ¶ 8. In so concluding, we declined the Department's urging to invoke the public-interest exception to the mootness doctrine and consider its claims, stating, as follows:

> "This case involves a factually unique situation that was later adjudicated through the appropriate administrative proceeding. If public officials require guidance on the issues this case presents, that guidance could arise from an appeal from a final administrative adjudication. Issuing an advisory opinion is unnecessary under these circumstances." *R.L. Brink Corp.*, 2013 IL App (4th) 120933-U, ¶ 11.

¶ 21 D. The Hearing on the Department's Notice of Suspension

¶ 22 In October 2012, a hearing officer conducted an evidentiary hearing to consider Brink's challenge to the Department's suspension. The hearing officer framed the basis underlying the Department's suspension as follows: "Brink engaged in 'acts of omissions that indicate that the contractor or subcontractor lacks integrity and honesty in the conduct of business or the performance of contracts' pursuant to [section 6.520 of Title 44 of the Administrative Code (44 Ill. Adm. Code 6.520, amended at 37 Ill. Reg. 16518 (eff. Sept. 30, 2011))] in relation to Brink's compliance with the responsible bidder provision [of section 30-22(6) of Article 30 of the Procurement Code]."

¶ 23 Section 6.520 of Title 44 of the Administrative Code provides, as follows:

> "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:
>
> * * *
>
> c) materially violating any rule or procurement procedure or making a material false statement in connection with any rules or procurement procedure of the Department[.]" 44 Ill. Adm. Code 6.520, amended at 37 Ill. Reg. 16518 (eff. Sept. 30, 2011).

Based on the evidence presented, which we briefly summarize, the hearing officer concluded that "Brink made material false statements, representations, omissions, claims or reports in its documentation," on the Brown and Hancock County projects, which violated the responsible bidder provisions of the Procurement Code.

¶ 24 1. *The Hearing Officer's Findings of Fact*

¶ 25 a. The Brown County Road Construction Projects

¶ 26 In January and June 2010, Brink was awarded (1) federally funded road construction project 72B60 and (2) the aforementioned State-funded Brown County project, respectively. Both construction projects involved roads that were located adjacent to one another. Because project 72B60 was federally funded, the responsible bidder provisions of the Procurement Code did not apply. However, because the Brown County project was State-funded, Brink was required to submit the Department's certification with its bid offer.

¶ 27 In section K of its certification, Brink did not list that it or any of its subcontrac-

tors intended to use the trade of "laborer" for the Brown County project. Instead, Brink's handwritten section K certification listed that it would be employing "operators," and that its subcontractors would be employing "stripers" and "ironworkers." However, also included in Brink's bid was another document concerning workforce projections in which Brink estimated two laborers would be employed on the Brown County project.

¶ 28 In June 2010, the Department informed Brink that it had received a union protest regarding the trade of laborer on the Brown County project. In its response to the protest, Brink attached the Department certification it submitted with its initial Brown County project bid. Section K of that certification contained a typewritten statement, indicating that Brink intended to employ personnel as operators, and that its subcontractors would be employing stripers, ironworkers, operators, and laborers. Brink enclosed the appropriate certificate of registration, showing that the subcontractors at issue participated in the apprenticeship and training program for the laborer trade. Relying on Brink's response, the Department denied the protest and permitted Brink to complete the project.

¶ 29 The hearing officer found that the certification Brink submitted in response to the protest was not the same certification submitted with its original proposed bid for the Brown County project. In addition, the hearing officer noted that in August 2012, Brink filed a verified pleading in which it made the following statement:

> "[Brink] does have persons doing some laboring work, but elects to pay them the much higher wage of an operating engineer classification and [Brink] has an operating engineer enrolled in the USDOL's Certified Apprenticeship Program."

The hearing officer also noted that evidence in the form of logs and pictures, provided by union

monitors, showed that three Brink employees performed work consistent with the trade of laborer on both the federally funded 72B60 project and the Brown County project. On the certified payroll transcripts Brink submitted for the federal project, Brink classified the work performed by the three employees at issue as laborers.

¶ 30 b. The Hancock County Road Construction Project

¶ 31 In June 2011, the Department awarded Brink the Hancock County project. In its section K certification for that project, Brink reported that it would perform work in the operator, carpenter, and cement mason trades, and its subcontractors would employ stripers, operators, laborers, and cement masons. Later that month, the Department informed Brink about a union protest regarding laborers on the project. Shortly thereafter, Brink responded by (1) including the Department certification Brink submitted with its original bid and (2) explaining that "the craft of laborer will not be utilized on this project." In section K of its attached certification, Brink reported that its employees would perform work in the operator, carpenter, and cement mason trades, and its subcontractors would employ stripers. Relying on Brink's representations, the Department denied the protest, which allowed Brink to complete the project.

¶ 32 The hearing officer determined that (1) the certification Brink submitted in response to the protest was not the same certification submitted with its original proposed bid for the Hancock County project and (2) logs and photos provided by union monitors showed that Brink employees performed work that was consistent with the laborer trade.

¶ 33 c. The Adams County Road Construction Project

¶ 34 Similar to the Brown and Hancock County projects, the hearing officer determined that on the Adams County project, (1) Brink did not disclose that it intended to use the laborer trade and (2) evidence and testimony provided showed that Brink employees performed

at least some work that could be classified under the laborer trade. However, because the testimony and other evidence presented at the hearing showed that the amount of laborer's work Brink performed at the Brown and Hancock County projects "was considerably more substantial" than on the Adams County project, the hearing officer did not consider the Adams County project when making recommendations to the Department.

¶ 35 d. Other Pertinent Findings

¶ 36 The hearing officer also found that (1) all Brink employees received in-house training, which included instruction from a certified flagging trainer, as well as other jobsite safety training; (2) Brink participated in USDOL approved apprenticeship and training programs for the trades of operating engineer, carpenters, and cement masons; and (3) Brink did not have a USDOL approved apprenticeship and training programs for the laborer trade but did have such a certification in the past.

¶ 37 2. *The Hearing Officer's Analysis*

¶ 38 Prior to addressing Brink's concerns, the hearing officer specifically noted the following two issues, which were undisputed: (1) at the completion of the Brown and Hancock County projects, Brink had not participated in a laborer apprenticeship training program approved by and registered with the USDOL's Bureau of Apprenticeship and Training and (2) Brink admitted that its employees performed laborer work on the aforementioned projects.

¶ 39 After disposing of several arguments Brink raised concerning the meaning of certain contractual terms and the protest procedures the Department employed, the hearing officer summarized that Brink's underlying claim concerned whether the responsible bidder provision and the Department's enforcement thereof violated Brink's constitutional rights. Noting that he lacked the authority to question the constitutionality of a statute, the hearing officer presumed the

validity of the responsible bidder provision of the Procurement Code as applied to Brink's suspension hearing.

¶ 40 3. *The Hearing Officer's Conclusions of Law and Recommendation*

¶ 41 As previously stated, based on the evidence presented, the hearing officer concluded that on the Brown and Hancock County road construction projects, Brink made materially false statements that violated the responsible bidder provision of the Procurement Code, which constituted acts or omissions indicating a lack of integrity and honesty.

¶ 42 After reviewing previous suspensions based on false section K certifications, the hearing officer recommended that Brink be suspended for a period of not more than two years.

¶ 43 E. The Department's Final Determination of Suspension

¶ 44 In December 2012, the Department issued a final determination of suspension, which adopted the hearing officer's findings of fact and conclusions of law. As a result, the Department suspended Brink from participating on any contracts awarded by or requiring approval or concurrence from the Department until December 2014.

¶ 45 F. Brink's Petition for a Common-Law Writ of *Certiorari*

¶ 46 In January 2013, Brink filed a motion for summary judgment, requesting reversal of the Department's decision and attorney fees. Following argument at a March 2013 hearing, the circuit court informed the parties that it would consider Brink's summary judgment motion as a petition for common-law writ of *certiorari*. In July 2013, the circuit court entered a written order, affirming the Department's suspension.

¶ 47 Brink appeals, raising numerous arguments that challenge the Department's two-year suspension. The Department cross-appeals, requesting reversal of the circuit court's October 1, 2012, order, which enjoined the Department from enforcing—either directly or indirect-

ly—its August 2012 interim suspension as to the Quincy contract.

¶ 48 II. ANALYSIS

¶ 49 A. A Common Law Writ of *Certiorari* and the Standard of Review

¶ 50 "A common law writ of *certiorari* is a general method for obtaining circuit court review of administrative actions when the act conferring power on the agency does not expressly adopt the Administrative Review Law [(735 ILCS 5/3-101 to 3-113 (West 2012))] and provides for no other form of review." *Hanrahan v. Williams*, 174 Ill. 2d 268, 272, 673 N.E.2d 251, 254 (1996); see also *Outcom, Inc. v. Illinois Department of Transportation*, 233 Ill. 2d 324, 333, 909 N.E.2d 806, 811 (2009) (If the enabling statute does not adopt the Administrative Review Law, a common law writ of *certiorari* survives as an available method of review.). "The standards of review under a common law writ of *certiorari* are essentially the same as those under the Administrative Review Law." *Hanrahan*, 174 Ill. 2d at 272, 673 N.E.2d at 253-54.

¶ 51 In reviewing a final decision under the Administrative Review Law, this court reviews the administrative agency's decision and not the circuit court's determination. *Bolger v. Department of Children and Family Services*, 399 Ill. App. 3d 437, 448, 926 N.E.2d 416, 426 (2010). "The deference given to an agency's decision depends upon whether the question is one of fact, one of law, or a mixed question of fact and law." *American Federation of State, County & Municipal Employees (AFSCME), Council 31 v. Illinois Labor Relations Board, State Panel*, 2014 IL App (1st) 123426, ¶ 35, ___ N.E.2d ___.

¶ 52 "An administrative agency's findings and conclusions on questions of fact are deemed to be *prima facie* true and correct" and "a reviewing court is limited to ascertaining whether such findings of fact are against the manifest weight of the evidence." *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204, 692 N.E.2d 295, 302 (1998). "An

administrative agency's factual determinations are contrary to the manifest weight of the evidence where the opposite conclusion is clearly evident." *Id.*

¶ 53 In contrast, an administrative agency's decision on a question of law—such as the agency's interpretation of a statute—is not binding on a reviewing court. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210, 886 N.E.2d 1011, 1018 (2008). We review *de novo* an agency's decision on a question of law. *520 South Michigan Avenue Associates v. Department of Employment Security*, 404 Ill. App. 3d 304, 312, 935 N.E.2d 612, 620 (2010).

¶ 54 A mixed question of law and fact concerns the legal effect of a given set of facts, which requires a reviewing court to determine whether the established facts satisfy applicable legal rules. *Comprehensive Community Solutions, Inc. v. Rockford School District No. 205*, 216 Ill. 2d 455, 472, 837 N.E.2d 1, 11 (2005). An agency's conclusion on a mixed question of law and fact is reviewed for clear error. *Id.* "Thus, when the decision of an administrative agency presents a mixed question of law and fact, the agency decision will be deemed clearly erroneous only where the reviewing court, on the entire record, is left with the definite and firm conviction that a mistake has been committed." (Internal quotations omitted.) *Id.*

¶ 55 B. Brink's Challenges to the Department's Suspension

¶ 56 1. *The Focus of this Court's Consideration*

¶ 57 Prior to addressing the merits of Brink's arguments challenging the Department's two-year suspension, we note that in its brief to this court, Brink couches several of its claims in terms of the circuit court's determination. For example, Brink claims that the court erred by (1) misinterpreting and misapplying the responsible bidder provision of the Procurement Code, (2) finding that a misrepresentation occurred, (3) improperly deferring to the Department's interpre-

tation on issues of law, and (4) finding that the Employee Retirement Income Security Act of 1974 did not preempt the contractual provision at issue. However, we decline to address these specific claims because, as we have previously noted, our review pertains solely to the Department's final administrative decision, which suspended Brink from participating on any contracts awarded by or requiring approval or concurrence from the Department until December 2014. See *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531, 870 N.E.2d 273, 292 (2006).

¶ 58 2. *Brink's Responsible Bidder Claim*

¶ 59 Brink argues that the Department erred by finding that Brink made a materially false statement that violated the responsible bidder provision of section 30-22(6) of the Procurement Code. We disagree.

¶ 60 Brink's argument is premised on the following sentence of the Department's section K certification:

> "In accordance with the provisions of section 30-22(6) of the *** Procurement Code, the bidder certifies that it is a participant, either as an individual or as part of a group program, in the approved apprenticeship and training programs applicable *to each type of work or craft* that the bidder will perform with its own forces." (Emphasis added.)

¶ 61 Brink notes that section 30-22(6) of the Procurement Code does not contain the phrase "to each type of work or craft." Brink contends that the Department's section K certification impermissibly expanded the scope of the responsible bidder provision of the Procurement Code. Essentially, Brink's overarching position is that if a proposed project requires, for exam-

ple, the use of several operating engineers—all of whom are also required to perform duties normally associated with the laborer trade—Brink should be able to submit a bid listing only its participation in the applicable USDOL operating engineer apprenticeship and training program to satisfy the responsible bidder provision of the Procurement Code. We reject Brink's interpretation.

¶ 62 Section 30-22(6) of the Procurement Code, which we have earlier quoted, states that in order to be considered a responsible bidder on any State-funded construction project, the "bidder and all the bidder's subcontractors must participate in *applicable* apprenticeship training programs approved by and registered with the [USDOL's] Bureau of Apprenticeship and Training." (Emphasis added.) 30 ILCS 500/30-22(6) (West 2012). Under Brink's interpretation, an individual contractor would be able to determine subjectively the applicable apprenticeship and training program to comply with the responsible bidder provision. However, the plain language of section 30-22(6) of the Procurement Code provides for an objective standard—that is, the applicable apprenticeship training programs approved by and registered with the USDOL.

¶ 63 We conclude that under the plain meaning of the responsible bidder provision of the Procurement Code, if the USDOL has an approved and registered apprenticeship and training program for the type of work or craft a contractor or subcontractor identifies will be performed on the proposed project, then the entity actually performing the work or craft must also participate in that specific USDOL apprenticeship and training program. As written, the Department's section K certification, which requires contractors to identify participation in an approved apprenticeship and training programs applicable to each type of work or craft contemplated, comports with the legislative intent of the responsible bidder provision of the Procurement Code.

¶ 64 Further, the Department based its conclusions that Brink made a materially false

statement on evidence concerning two bids on separate State-funded road construction projects. On the first bid, Brink certified that it would be employing "operators," and that its subcontractors would be employing "stripers" and "ironworkers." After the Department received a protest on that project, Brink submitted a different certification claiming that its subcontractors would be employing stripers, ironworkers, operators, and laborers. On the second bid, Brink certified that it would perform work in the operator, carpenter, and cement mason trades, and its subcontractors would employ stripers, operators, laborers, and cement masons. After a protest was filed on that project, Brink explained that it would not be employing laborers on the project. We note that absent from either of Brink's responses to the Department is the aforementioned interpretation Brink now raises to this court.

¶ 65 In this case, the undisputed evidence reveals that Brink (1) employed personnel who—along with other assigned duties—performed work normally associated with the laborer trade, (2) did not participate in a USDOL apprenticeship and training program for laborers, and (3) failed to disclose either of the two aforementioned conditions in the Department's section K certification in the bid proposals at issue. Accordingly, after considering the entire record, we conclude that the Department's determination that Brink made a materially false statement in violation of the responsible bidder provision of the Procurement Code was not clearly erroneous.

¶ 66 3. *Brink's Due-Process Claim*

¶ 67 Brink argues that the trial court erred by finding that the "adequate evidence" standard of section 6.510 of Title 44 of the Administrative Code (44 Ill. Adm. Code 6.510, amended at 35 Ill. Reg. 16518 (eff. Sept. 30, 2011)) does not violate due process. We disagree.

¶ 68 Section 6.510 of Title 44 of the Administrative Code provides, as follows:

"The CPO may suspend a contractor or subcontractor from

> participation on any contract or subcontract awarded by or requiring approval or concurrence of the Department upon a determination by the CPO based upon *adequate evidence* that the contractor or subcontractor has engaged in conduct proscribed by Section 6.520 of this Subpart." (Emphasis added.) 44 Ill. Adm. Code 6.510, amended at 35 Ill. Reg. 16518 (eff. Sept. 30, 2011).

¶ 69 In its July 2013 "analysis, opinion, and order," in which the trial court considered Brink's common law writ of *certiorari*, the court noted that Brink argued that the phrase "adequate evidence" was arbitrary and undefined, which rendered section 6.510 of Title 44 of the Administrative Code "unconstitutional and vague." The court rejected Brink's claim, finding that the standard "obviously implies some objective criteria to support a decision as distinct from a decision that is purely arbitrary or based primarily on conjecture, speculation[,] or mere whim."

¶ 70 A vagueness challenge is a due process challenge that focuses on the specificity of the administrative regulation or statute. *Ownse v. Department of Human Rights*, 403 Ill. App. 3d 899, 927, 936 N.E.2d 623, 647 (2010). "A law or regulation is impermissibly vague and violates due process if it leaves the regulated community unsure of what conduct is prohibited or fails to provide adequate guidelines to the administrative body charged with its enforcement." *Granite City Division of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 163, 613 N.E.2d 719, 725 (1993). An administrative regulation is not unconstitutionally vague when a person of ordinary intelligence can readily ascertain its meaning. *Vuagniaux v. Department of Professional Regulation*, 208 Ill. 2d 173, 192, 802 N.E.2d 1156, 1168 (2003). "This court has a duty to affirm the constitutionality and validity of administrative regulations if it can reasonably be done, and if their construction is doubtful, any doubts will be resolved in favor of

the validity of the law or rule challenged." *Granite City Division of National Steel Co.*, 155 Ill. 2d at 164-65, 613 N.E.2d at 726.

¶ 71 In its brief to this court, Brink acknowledges that section 6.690(b) of Title 44 of the Administrative Code, provides, as follows:

> "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(b), amended at 35 Ill. Reg. 16518 (eff. Sept. 30, 2011).

Despite this guidance, Brink contends that (1) section 6.690(b) of Title 44 of the Administrative Code provides only what a hearing officer can consider without defining the phrase, "adequate evidence" and (2) the circuit court did not define the phrase "objective criteria." We conclude, however, that Brink's vagueness claim fails.

¶ 72 The phrase "adequate evidence" as that term appears in section 6.510 of Title 44 of the Administrative Code and further defined by section 6.690(b) of Title 44 of the Administrative Code clearly provides sufficient guidance to the Department in its enforcement role and apprises the public of the prohibited conduct. Accordingly, we reject Brink's claim to the contrary.

¶ 73 In so concluding, we note that in arguing that the phrase "adequate evidence" was unconstitutionally vague, Brink also claimed that the hearing officer erred by refusing to (1) order the Department to call specific witnesses and (2) consider evidence regarding other suspen-

sion hearings. The circuit court refused to consider the merits of Brink's claim, finding that Brink failed to make a record, by an offer of proof or otherwise, as to the relevance of the evidence Brink sought to introduce.

¶ 74 Any party offering evidence at an administrative hearing that the hearing officer rules inadmissible " 'shall be permitted to make an offer of proof upon motion made at the hearing.' " *Kankakee County Board of Review v. Property Tax Appeal Board*, 316 Ill. App. 3d 148, 155, 735 N.E.2d 1011, 1016 (2000) (quoting Ill. Adm. Code 1910.90(f)(3), amended at 38 Ill. Reg. 19171 (eff. Oct. 1, 2014). "[T]he offer of proof is the key to preserving error" because it discloses "the nature of the evidence offered to the trial judge and opposing counsel and to the reviewing court in order that it may determine whether the exclusion of evidence was erroneous." *Kankakee County Board of Review*, 316 Ill. App. 3d at 155, 735 N.E.2d at 1016. "Absent an adequate offer of proof, the issue is unreviewable on appeal." *Guski v. Raja*, 409 Ill. App. 3d 686, 695, 949 N.E.2d 695, 704 (2011).

¶ 75 Because the record shows that Brink failed to preserve its evidentiary claim by making an offer of proof, we decline to consider it.

¶ 76 4. *Brink's Claim Regarding the Procedure Act*

¶ 77 Brink argues that the trial court erred by finding that the Department did not engage in unlawful rulemaking in violation of the Procedure Act. Essentially, Brink contends that the Department violated the Procedure Act by adopting section K—specifically, the phrase, "to each type of work or craft"—in its bid certification. We disagree.

¶ 78 Section 5-25(a) of the Procurement Code provides, as follows:

> "A chief procurement officer authorized to make procurements under this code shall have the authority to promulgate rules to carry

out that authority. ***

All rules shall be promulgated in accordance with the *** Procedure Act. Contractual provisions, specifications, and procurement descriptions are not rules and not subject to the *** Procedure Act." 30 ILCS 500/5-25(a) (West 2012).

¶ 79 Section 1-70 of the Procedure Act defines a rule, as follows:

" 'Rule' means each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency[.]" 5 ILCS 100/1-70 (West 2012).

¶ 80 In support of its argument, Brink relies on *Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169, 470 N.E.2d 1029 (1984), for the proposition that the contractual exception of section 5-25 of the Procurement Code does not apply to this case. However, *Senn Park Nursing Center* does not provide Brink any support.

¶ 81 The issue before the supreme court in *Senn Park Nursing Center* concerned whether an agency's unilateral amendment of Medicaid reimbursement rates was a rule subject to the specific adoption procedures mandated by the Procedure Act. *Senn Park Nursing Center*, 104 Ill. 2d at 177, 470 N.E.2d at 1033-34. In concluding that it was, the supreme court agreed with the appellate court's analysis that the contract exception to the Procedure Act did not apply because that provision operates only when a contract is clearly and directly involved. *Senn Park Nursing Center*, 104 Ill. 2d at 179-80, 470 N.E.2d at 1034-35. See also *Senn Park Nursing Cen-*

ter v. Miller, 118 Ill. App. 3d 504, 511, 455 N.E.2d 153, 158-59 (1983).

¶ 82 In this case, the Department's section K certification was clearly part of a bid contract that outlined the specifications and proposed requirements of the road construction project at issue, which all prospective bidders were required to certify and proffer as part of their competitive bid. As such, the section K certification was exempt under the plain language of section 5-25(a) of the Procurement Code.

¶ 83 Moreover, as we have previously concluded, the Department's section K certification, which requires contractors to identify participation in approved apprenticeship and training programs applicable to each type of work or craft contemplated, comported with the legislative intent of the responsible bidder provision of the Procurement Code. Thus, the rulemaking provision of the Procedure Act does not apply. See *Stutzke v. Illinois Commerce Comm'n*, 242 Ill. App. 3d 315, 319, 610 N.E.2d 724, 727 (1993) ("[W]hen an administrative agency interprets statutory language as it applies to a particular set of facts, the rulemaking procedure of the Procedure Act is not invoked.").

¶ 84 Accordingly, we reject Brink's argument that the Department engaged in unlawful rulemaking in violation of the Procedure Act.

¶ 85 III. The Department's Cross-Appeal

¶ 86 The Department's argument concerns the propriety of the circuit court's October 2012 order, which enjoined the Department from enforcing—either directly or indirectly—its August 2012 interim suspension as to the Quincy contract. Specifically, the Department—acknowledging that the issue they now raise is moot—nonetheless requests this court to address the merits of its claim to provide "guidance on the issue of whether sovereign immunity precluded the issuance of an injunction requiring the Department to approve the Quincy contract."

However, the Department is essentially asking us to provide an advisory order to guide future litigation, which we decline to do. See *In re Alfred H.H.*, 233 Ill. 2d 345, 360, 910 N.E.2d 74, 83 (2009) ("[W]e do not *** 'review cases merely to set precedent or guide future litigation.' "); see also *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2014 IL App (1st) 132011, ¶ 12, ___ N.E.2d ___ (quoting *Schweickart v. Powers*, 245 Ill. App. 3d 281, 287-88, 613 N.E.2d 403, 408 (1993) ("Where a decision reached on the merits would render wholly ineffective relief to the prevailing party, the court, in effect has rendered an advisory opinion.").

¶ 87 IV. CONCLUSION

¶ 88 For the reasons stated, we affirm the Department's two-year suspension and dismiss the Department's cross-appeal.

¶ 89 Affirmed in part and dismissed in part.