

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 2120

METCALFE & SONS INVESTMENTS, INC.

VERSUS

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF NATURAL  
RESOURCES



Judgment Rendered: DEC 14 2011

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APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT  
IN AND FOR THE PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA  
DOCKET NUMBER C585574, DIVISION "25"

THE HONORABLE WILSON FIELDS, JUDGE

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BEFORE: WHIPPLE, PETTIGREW, McDONALD, McCLENDON, AND HUGHES, JJ.

*Whipple, J. dissents & assigns reasons.*

*McCleendon, J. concurs and assigns reasons.*

**McDONALD, J.**

The State of Louisiana through the Department of Natural Resources (DNR) appeals a judgment of the Nineteenth Judicial District Court, reversing an administrative decision of the Chief Procurement Officer of the State Department of Purchasing and appealed to and affirmed by the Commissioner of Administration, in favor of the State and against the plaintiff, Metcalfe & Sons Investments, Inc. For the following reasons, we reverse the judgment of the district court.

**FACTS AND PROCEDURAL BACKGROUND**

In the immediate aftermath of Hurricane Gustav, on approximately September 4, 2008, the State of Louisiana commenced an emergency program to buy 400 portable generators to aid in the state's recovery effort. To meet a portion of its needs, the State contracted with the plaintiff in this matter, Generator Supercenter, (the trade name of Metcalfe & Sons Investments, hereinafter referred to as Metcalfe). On September 5, 2008, at approximately 10:46 p.m., the State, through the Office of Coastal Restoration and Management, a division of the Department of Natural Resources (DNR), issued purchase order number 3369865 for 68 generators and 15 delivery trucks at a cost of \$3,182,240.00 to be paid to Metcalfe. This contract required Metcalfe to deliver the generators within two days of the receipt of the purchase order, or approximately by 10:46 p.m. on September 7, 2008, to the National Guard Base at Carville, Louisiana. When the generators were not delivered by 10:46 p.m. on September 7, 2008, DNR cancelled the contract with Metcalfe.<sup>1</sup>

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<sup>1</sup> On September 6, 2008, a change order had been submitted and approved that allowed 50 kW generators to be substituted for the 56 kW generators. It is Metcalfe's position that this change order was a "writing" that affected an extension of time for delivery of the generators until September 8, 2008.

Metcalfe filed a formal complaint with the Director of State Purchasing, which was denied. When the initial complaint was denied, Metcalfe appealed to the Commissioner of the Division of Administration. The Commissioner also denied the request for relief, and Metcalfe timely filed a "Petition for Judicial Review of an Administrative Decision." The District Court reversed the decision of the Commissioner and remanded the matter to the State Purchasing Director for the taking of evidence on the issue of damages sustained by Metcalfe in the breach of contract, and to set a scheduling order giving time limitations for the parties to present evidence and for the Director to present a written decision. Alleging that the "Petition for Judicial Review of an Administrative Decision" included additional facts that were not presented to the Director and the Commissioner, the DNR filed a motion to strike these allegations of the petition. The judgment also denied this motion to strike.

From this judgment, the DNR has appealed citing two assignments of error (with subparts):

1. Did the trial court err in finding that the Louisiana Department of Natural Resources, Office of Coastal Restoration breached its contract with Metcalfe & Sons Investments, Inc., d/b/a Generator Supercenter?
2. Did the trial court err in proceeding to the merits of the Petition for Judicial Review without adequate notice to the parties when the hearings scheduled were to argue Appellant's Motion to [S]trike and Appellee's Motion to Set for Oral Argument?

### **DISCUSSION**

The first issue before us is whether the judgment is a final, appealable judgment. A writ panel previously considered this issue and referred it to the panel considering the appeal. Judicial review of an administrative hearing decision is performed in accordance with the procedures of the Louisiana Administrative Procedure Act, LSA-R.S. 49:964(G), which provides that the reviewing court can affirm or remand the case, or reverse or modify the decision. In this case, the

district court attempted to both reverse and remand; however, there is no specific provision for a reversal and remand. Nevertheless, the important operative language used in the judgment states “[T]he decision of the Commissioner of Administration be and is hereby REVERSED.” It is our opinion that this is a final judgment and the appeal is proper.

Having determined that the appeal is proper, we now address the two motions to supplement the record filed by the appellant. DNR suggests that the transcript of the August 16, 2010 hearing, the district court’s written reasons for judgment, the administrative record and a letter from Metcalfe’s counsel objecting to the form and substance of the proposed district court judgment were not included in the appellate record. After considering the requests, the motions to supplement the record are granted except as to the request for written reasons.<sup>2</sup>

Next, we consider DNR’s contention that it was error for the district court to conduct the hearing on the merits of the Petition for Judicial Review since the parties were not given adequate notice. DNR complains that the hearing was scheduled on its Motion to Strike and Metcalfe’s motion to set for oral argument, not the merits of this matter. The hearing on DNR’s motion to strike and Metcalfe’s motion to set for oral argument was scheduled for August 16, 2010; after hearing these issues, the court inquired about the merits of the petition. At the hearing, the following colloquy between the court and DNR’s counsel took place:

The Court: What about on the main petition?

Ms. Bowers: Yes, your honor, I can take that up now also.

Not only did the DNR make no objection to proceeding on the merits, it agreed to do so, advising the trial court that it was ready to argue the case. Having agreed to include the arguments on the merits at the hearing and not indicating that they

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<sup>2</sup> Even though requested, there does not appear to have been any written reasons for the judgment.

would be prejudiced in any way, we see no basis for a complaint now. Thus, we find no merit to this assignment of error.

We now consider DNR's contention that the district court erred in finding DNR breached the contract with Metcalfe. Judicial review of the administrative decision in this matter<sup>3</sup> is governed by LSA-R.S. 49:964, the Administrative Procedures Act (APA), which provides, in pertinent part, as follows:

G. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (6) Not supported or sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

Any one of the six bases listed in the statute is sufficient to modify or reverse an agency determination. *Doc's Clinic, APMC v. State, ex rel. Dept. Of Health and Hospitals*, 07-0480 (La. App. 1 Cir. 11/2/07), 984 So.2d 711, 718, *writ denied*, 07-2302 (La. 2/15/08), 974 So.2d 665. The APA further specifies that judicial review shall be conducted by the court without a jury and shall be confined

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<sup>3</sup> The Louisiana Procurement Code, LSA-R.S. 39:1591, et seq., governs the law regarding procurement contracts. Louisiana Revised Statute 39:1691 provides that the Nineteenth Judicial District Court shall have exclusive venue over contract disputes, and Louisiana Revised Statute 39:1692 provides that any action shall be commenced within fourteen days after receipt of the decision of the commissioner of administration.

to the record. LSA-R.S. 49:964(F). When reviewing an administrative final decision, the district court functions as an appellate court. *Wild v. State, Department of Health and Hospitals*, 08-1056 (La. App. 1 Cir. 12/23/08), 7 So.3d 1, 4. An aggrieved party may obtain a review of any final judgment of the district court by appeal to the appropriate court of appeal. LSA-R.S. 49:965. On review of the district court's judgment, no deference is owed by the court of appeal to the factual findings or legal conclusions of the district court, just as no deference is owed by the Louisiana Supreme Court to factual findings or legal conclusions of the court of appeal. *Doc's Clinic, APMC*, 984 So.2d at 718-719. Consequently, this court will conduct its own independent review of the record and apply the standards of review set forth in LSA-R.S. 49:964(G).

DNR maintains that Metcalfe breached the contract to provide the generators in two regards - first, they were a day late in making an initial delivery, and secondly, that they failed to deliver the generators that were ordered. The original contract was for delivery of sixty-eight generators: twenty-three 56 kW generators, one 68 kW generator, forty-four 144 kW generators, a transport truck and wiring. The purchase order was dated September 5, 2008, at 10:46 p.m. and provided for delivery within two days after receipt of order (ARO), which would be no later than 10:46 p.m. on September 7, 2008. The next day, September 6, 2008, Metcalfe requested the order be changed to substitute twenty-three 50 kW generators for the twenty-three 56 kW generators. This request was approved. No deliveries were made on September 7, 2008.

Metcalfe suggests that the substitution of the twenty-three 50 kW generators was a change order, and, therefore, the delivery date was extended to September 8, 2008. The record establishes that all parties were aware that this contract involved an emergency situation and time was of the essence. We see no reason to assume the change order, even if it did extend the deadline on delivery of the twenty-three

generators, had any effect on the other forty-five generators. Furthermore, DNR argues that the September 6 substitution was not a valid change because the request was not made in writing as required. Both arguments have some validity, and the issue is subject to either interpretation. A finding that the substitution provided two days ARO (until September 8, 2008) is not arbitrary. Conversely, the Commissioner's decision that it did not provide an extension is also not arbitrary. Thus, a decision favoring either side cannot be arbitrary and capricious.

More importantly, even if the substitution were found to provide for an extension of the contract delivery date, the facts still indicate Metcalfe was in breach of the contract. After the substitution was made the order provided for 68 generators as follows:

Twenty-three (23) 50 kW generators

One (1) 68 kW generator

Forty-four (44) 144 kW generators

However, on September 8, 2008, at 10:30 p.m. Metcalfe's truck arrived with sixteen (16) 60 kV generators. There is some disagreement about where the trucks with the remaining generators were located and when they might have arrived. But, the important fact is that **no** 60 kV generators were ordered<sup>4</sup>. These sixteen generators did not appear to be in compliance. And there were only 16, not 23 generators, which the contract required. The decision that Metcalfe was in breach of the contract is based on and supported by the facts in the record.

For these reasons, the decision of the district court is reversed and we reinstate the decision of the Commissioner of Administration. Costs are assessed against the appellee, Metcalfe and Sons Investments, Inc.

**REVERSED.**

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<sup>4</sup> In its brief, Metcalfe suggests that the 16 generators that were delivered were 60 kV in capacity rather than 50kW, and a 60 kV generator is exactly the same as a 50 kW generator. We see no evidence of this. Even if it is true, the guard charged with receiving the ordered items could not reasonably be expected to know this.

**METCALFE & SONS  
INVESTMENTS, INC.**

**VERSUS**


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RESOURCES**

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**NUMBER 2010 CA 2120**

 **Whipple, J., dissenting.**

I disagree with the majority's opinion in the above captioned matter. At the outset, I am not convinced that the judgment before us is a final judgment or a partial final judgment subject to an immediate appeal. In my view, the "Order" before us is, at best, an interlocutory order, which remands the matter to the administrative agency that first heard the dispute with instructions to take additional evidence. The order does not conclusively resolve the dispute between Metcalf and the DNR on the merits and it does not award damages to either party. The order does not dismiss any party from the litigation or decide any particular claim. Furthermore, the order was not properly designated as an immediately appealable final judgment by the district court.

Nonetheless, even if we were to assume that this matter is before us as a proper appeal, I also do not agree the majority's resolution of the first assignment of error. In my view, the majority's conclusion that Metcalf breached the contract with the DNR is not supported by the facts set forth herein. I would affirm the findings and determinations of the district court.

Moreover, I would also grant DNR's motion to supplement the record in its entirety, with the District Court's Written Reasons, if any such Written Reasons exist. If no Written Reasons exist, then there is nothing to supplement and no harm occurs.

Thus, for the reasons set forth above, I respectfully dissent and would await a final judgment on the merits after the remand ordered by the district court.



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**McCLENDON, J., concurs and assigns reasons.**

Based on the facts presented in the record, it is clear that all of the terms of the contract were not fulfilled. Therefore, I concur with the result reached by the majority.