STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| MIDWEST INDUSTRIAL PAINTING OF FLORIDA, INC., Petitioner, vs. DEPARTMENT OF TRANSPORTATION, Respondent, and CONE CONSTRUCTORS, INC., Intervenor-Respondent. | ) | CASE NO. 87-3599B1D |

RECOMMENDED ORDER

Pursuant to notice, the above matter was heard before the Division of Administrative Hearings by its duly designated Hearing Officer, Donald R. Alexander, on August 31, 1987 in Tallahassee, Florida.

APPEARANCES

For Petitioner: Mark A. Linsky, Esquire
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For Respondent: James W. Anderson, Esquire
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For Intervenor Respondent: John A. Radey, Esquire
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BACKGROUND

On August 3, 1987, respondent, Department of Transportation (DOT), issued proposed agency action advising all bidders on State Job Number 90030-3539 that intervenor-respondent, Cone Constructors, Inc. (CCI), had submitted the lowest and most responsive bid, and would be awarded the contract on the project. Thereafter, petitioner, Midwest Industrial Painting of Florida, Inc. (Midwest), timely filed its notice of protest. A formal protest was later filed on August 12, 1987. In its protest petitioner generally alleged that a certificate of qualification authorizing the contractor to perform bridge painting was required as a prerequisite to filing a bid, and that DOT had awarded the contract to the apparent low bidder even though that bidder did not possess a certificate of

qualification. Petitioner contends this action was erroneous, and asks that it be awarded the bid as well as attorney fees and costs.

The matter was referred to the Division of Administrative Hearings by DOT on August 18, 1987, with a request that a hearing officer be assigned to conduct a hearing. By notice of hearing dated August 19, 1987, a final hearing was scheduled for August 31, 1987 in Tallahassee, Florida.

On August 26, 1987 intervenor-respondent, Cone Constructors, Inc., filed a petition to intervene. This petition was granted at the conclusion of a telephonic motion hearing held on August 28, 1987.

At final hearing petitioner presented the testimony of William F. Ventry, Robert D. Buser, Murray Yates, John Fikaris, Charles Goodman, J. Ted Barefield and Louis Songer and offered petitioner's exhibits 1-4 which were received in evidence. Intervenor-respondent presented the testimony of Michael L. Cone and offered intervenor's exhibits 1-4. Only exhibits 1 and 2 were received in evidence. In addition, the parties stipulated into evidence joint exhibits 1-9. Petitioner's ore tenus motion at final hearing to strike the protest of CCI was denied.

This Recommended Order has been prepared without the benefit of a transcript of hearing. Proposed findings of fact and conclusions of law were filed by the parties on September 10, 1987. A ruling on each proposed finding of fact has been made in the Appendix attached to this Recommended Order.

The issue herein is whether respondent was correct in awarding the bid on State Job No. 90030-3539 to Cone Constructors, Inc., and if not, what action should be taken by the agency.

Based upon all of the evidence, the following findings of fact are determined:

## FINDINGS OF FACT

### A. Introduction

1. On an undisclosed date, respondent, Department of Transportation (DOT), gave notice to qualified and interested contracting firms that it was accepting bids from firms interested in providing various services on State Job No. 90030-3539. Such bids were due on or before June 24, 1987. In general terms, the project required the successful bidder to perform various maintenance services on the Old Seven Mile Bridge between Pigeon Key and Knight Key just southwest of Marathon in Monroe County, Florida. The parties have stipulated that the project involves the following classes of work:

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| Bridge painting | 82 percent |
| Restoration of spalled areas | 6 percent |
| Miscellaneous concrete and steel | 9 percent |
| Maintenance of traffic | 3 percent |

2. In response to this offer, three contractors submitted timely bids. These included petitioner, Midwest Industrial Painting of Florida, Inc. (Midwest), intervenor-respondent, Cone Constructors, Inc. (CCI), and J. D. Abrams, Inc. Their respective bids were $1,746,390, $1,122,000 and $2,149,345. The parties have stipulated that the bids of both CCI and Midwest are below the DOT budget estimate and preliminary estimate for the project.

3. On August 3, 1987 DOT posted its intent to award the project to CCI, which submitted the lowest dollar bid. Thereafter, petitioner timely filed a protest challenging the award of the contract to CCI. In its formal protest, Midwest contended that CCI was ineligible to submit a bid since it was not prequalified by DOT to perform bridge painting, a service required for this job. The filing of the protest prompted the instant proceeding.

B. The Project

4. The Old Seven Mile Bridge, once a vital link in the Florida Keys highway network, was replaced in the early 1980s with a new Seven Mile Bridge. Since its replacement, the old bridge has had very little, if any, traffic and is no longer in service as a state highway. Indeed, its center span has been removed, and it is used primarily as two fishing piers by avid anglers and for access to Pigeon Key where a University of Miami research facility is located.

5. The legislature recently mandated that the old bridge be turned over to the Department of Natural Resources (DNR). So that DNR receives the bridge in good condition, DOT intends to perform all necessary maintenance and rehabilitation prior to its turnover. The project has been identified as State Job 90030-3539. The job includes painting the exposed structural steel, doing "corrective measures" to portions of the structural members, and other miscellaneous work. The project will be funded wholly with state funds, and is not considered a critical job.

6. Although at hearing DOT personnel considered the structural work to be the most important aspect of the project, and the painting to be incidental, DOT did not prepare the bid specifications in this manner. Rather, it elected to prepare the specifications listing bridge painting as normal work. By categorizing the work in this manner, DOT did not contravene any statute, rule or standard. Had DOT categorized painting as "specialty" or incidental work on the project, painting would have been considered an incidental aspect of the job, and bidders would not have to be prequalified in bridge painting. However, DOT did not assert its specifications were in "error," or that this might serve as a ground to reject all bids. Indeed, there is no evidence that any bidder was confused or had any doubt as to the services required under the contract.

C. Prequalification Requirements

7. DOT requires that, on projects exceeding a cost of $250,000, bidders obtain a certificate of qualification setting forth the areas (classes) in which they are qualified to perform work. This is commonly known as prequalification. One of these classes of competency is bridge painting, which constituted approximately 82 percent of the work to be done on Old Seven Mile Bridge. The parties have stipulated that CCI's certificate of qualification did not include bridge painting as an area in which it had been qualified. Despite several post-June 24 requests by DOT to furnish additional information, CCI had not yet supplied such data at the time of hearing as would enable it to qualify. On the other hand, Midwest was conditionally qualified in this area, but, because of certain DOT reservations, its certificate was due to expire on June 15, 1987. However, Midwest requested a Section 120.57(1) hearing to contest this expiration date, and Midwest has, with DOT's acquiescence, continued to use its certificate for bidding purposes until an adjudication of the claim is made.

8. Without a certificate of qualification, DOT rules provide that a contractor not be given bid documents that would enable it to submit a bid.

Further, DOT witnesses confirmed that no bidder has ever been authorized to become prequalified after it had submitted a bid, nor has a nonqualified bidder been awarded a contract. The agency does have a "policy" of allowing contractors who are qualified in the major work class of minor bridge work (but who are not qualified in bridge painting) to receive bid documents on certain major projects. Even so, this policy, however applied in the past, has never been used on a project such as this, and DOT officials confirmed that this was the first time bid documents had been erroneously sent to a nonqualified bidder.

D. DOT's Reaction to the Bids

9. Through "inadvertence" or "error," DOT furnished bid documents to CCI. Thereafter, CCI, Midwest and a third contractor submitted bid proposals. When the bids were opened, DOT discovered that the lowest dollar bidder (CCI) had not been prequalified on bridge painting. The bids were then routed to the DOT technical review committee, a five person committee that reviews projects where the bids do not conform with award criteria. This committee made no recommendation and was "uncommitted." The matter was then reviewed by the DOT awards committee which unanimously recommended that the contract be awarded to CCI even though it had not prequalified on one segment of the work.

10. In proposing that the contract be awarded to CCI, DOT acknowledges that this is not its normal practice. Indeed, it concedes that this is probably the first occasion that it has proposed to award a contract to a nonqualified bidder. However, it considers the project "unique" in the sense that the bridge will be turned over to DNR immediately after the work is completed. In addition, by using CCI, it can save around $624,000 in state funds which can be used to claim almost another $6 million in matching federal funds for other state work. Finally, DOT is fully satisfied that CCI is capable of performing the work on the project, particularly since it considers the structural repairs the most important aspect of the job. If CCI's bid is rejected, DOT's preference is to reject all bids and relet the project.

11. The agency's nonrule policy is that, for projects valued at more than $250,000, a contract will be awarded if the lowest bid is no more than seven percent above DOT's estimate of the project's value. In this case, both CCI and Midwest submitted bids below DOT's budget and preliminary estimates.

E. The Bidders

12. Midwest, which is located in Tarpon Springs, Florida, has been in the bridge painting business for many years, and has worked on DOT projects since 1974. This is the first occasion the firm has filed a protest. The firm is capable of performing the required work. Although its certificate of qualification was supposed to expire on June 15, or before the June 24 bid opening day, Midwest challenged this action and the certificate continues to be used for bidding purposes.

13. The apparent low bidder (CCI) is located in Tampa, Florida and has been engaged in a number of DOT projects since it was formed approximately five years ago. It is now working on three other DOT bridge projects. The firm was prequalified in the bridge painting class in 1983 and 1984, but for some reason, allowed its qualification to lapse. Its present certificate is valid until April 30, 1988 and qualifies CCI to bid on several types of major bridge projects. CCI stands by its bid proposal, and is fully confident the work can be done for $600,000 less than proposed by Midwest. The firm has access to the necessary equipment and manpower to perform the job.

## CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties thereto pursuant to Subsection 120.57(1), Florida Statutes (Supp. 1986).

15. On bid projects such as this, Subsection 337.11(3)(a), Florida Statutes (1987), vests in DOT the following discretion:

> (a) The department may award the proposed work to the lowest responsible bidder, or it may reject all bids and proceed to readvertise the work or otherwise perform the work.

Also relevant is Subsection 337.14(1), Florida Statutes (1987) which reads in pertinent part:

> (1) Any person desiring to bid for the performance of any construction contract in excess of $250,000 which the department proposes to let must first be certified by the department as qualified pursuant to this section and rules of the department. (Emphasis added)

To implement the latter statute, DOT has promulgated Chapter 14- 22, Florida Administrative Code, which sets forth the procedure for contractors to obtain a certificate of qualification.

16. In their post-hearing filings, the parties have suggested that several different results be reached. On the one hand, petitioner contends that DOT's action in awarding the bid to CCI, an unqualified bidder, was erroneous, and that DOT is now obliged to award the contract to Midwest, the next lowest bidder. Conversely, both the agency and CCI contend that the project is "unique" from other state jobs, that the circumstances herein warrant a deviation from the normal agency practice of rejecting a bid from a non-prequalified bidder, that CCI is qualified to perform the work even though a certificate of qualification has not been formally obtained, and that the state can save over $600,000 plus matching federal funds by utilizing CCI. In the alternative, they urge that all bids be rejected, and that the project be relet. CCI also contends that Midwest (a) is not qualified to submit a bid because its certificate expired on June 15, 1987 and (b) has no standing to bring this action since it was not certified, and even if it was, it failed to post a bond as required by Subsection 337.11(3)(d), Florida Statutes (1987). Finally, CCI contends that the bid specifications contained an error, and that, by virtue of certain state action, the agency is now estopped from taking away its contract.

17. Before addressing the parties' arguments, several broad principles regarding the bidding process should be noted. First, the challenging party carries the burden of demonstrating that the agency's action was arbitrary and capricious, or was otherwise improper. Cf. Capeletti Brothers, Inc. v. State, Department of General Services, 432 So.2d 1359, 1363-64 (Fla. 1st DCA 1983)(no error in requiring challenging party to bear burden of proving agency action incorrect). To do this, the challenger must show that the agency was not "proceeding rationally within the bounds of discretion," Couch Construction Co.,

Inc. v. Department of Transportation, 361 So.2d 172, 175 (Fla. 1st DCA 1978), and that the agency's decision was not based on facts which reasonably support its decision. Mayes Printing Company v. Flowers, 154 So.2d 859, 864 (Fla. 1st DCA 1963). At the same time, it is well-established that the agency is accorded "wide discretion in soliciting and accepting bids for public improvement, and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree." Liberty County v. Baxter's Asphalt and Concrete, Inc., 421 So.2d 505, 507 (Fla. 1982). Even so, this discretion is not unlimited, and must be exercised in a fair and evenhanded manner. Groves-Watkins Constructors v. State, Department of Transportation, 12 FLW 1465 (Fla. 1st DCA June 11, 1987) reh. denied 12 FLW 1869 (Fla. 1st DCA August 4, 1987). Finally, a bidder cannot be permitted to change its bid after the bids have been opened, except to cure minor irregularities Harry Pepper & Associates, Inc. v. The City of Cape Coral, 352 So.2d 1190.1192 (Fla. 2nd DCA 1977). Where a bidder submits a bid containing a "material variance," the bid is unacceptable. Robinson Electrical Co., Inc. v. Dade County, 417 So.2d 1032, 1034 (Fla. 3rd DCA 1982).

18. In the case at bar, both the general law [s. 337.14(1), F.S.] and agency rules promulgated thereunder (Chapter 14-22) explicitly require that a bidder be prequalified in all relevant classes of work before it can submit a bid. Since CCI was not prequalified to perform bridge painting, a major component of the contract, it was ineligible to submit a bid. Therefore, CCI was not a qualified or responsible bidder, and its bid should have been rejected. Robinson Electrical Co., supra; E. M. Watkins & Company, Inc. v. Board of Regents, 414 So.2d 583 (Fla. 1st DCA 1982). In addition, CCI could not qualify after the bids were submitted since this would give CCI an unfair advantage over those who had to prequalify. See, for example, City of Opa-Locka v. Trustees of the Plumbing Industry Promotion Fund, 193 So.2d 29, 32 (Fla. 3rd DCA 1966). Notwithstanding CCI's nonconforming bid, DOT and CCI argue that because of the "unique" nature of the project, and the intended savings, DOT had the discretion to award CCI the contract. But, by failing to honor applicable statutes and rules, which clearly held CCI unqualified to bid, DOT acted in an arbitrary and capricious manner. Further, by simply characterizing the project as unique, DOT did not have a sufficient factual basis to reasonably support its decision to ignore the clear language in Subsection 337.14(1), Florida Statutes (1987). Moreover, by failing to give advance notice to other vendors that the project was "unique," and that prequalification requirements might be waived, DOT allowed the bidding process to become tainted, and ultimately gave preferential treatment to CCI to the detriment of others. Therefore, it is concluded the agency acted arbitrarily and capriciously in awarding the contract to CCI.

19. With the case in this posture, the parties still disagree as to the proper action to be taken by DOT. Petitioner contends that DOT's only alternative is to award the contract to Midwest, the next lowest and most responsive bidder, particularly since its bid was below DOT's budget estimate for the project. Conversely, DOT and CCI contend that the agency may now reject all bids and relet the project, relying principally upon Subsection 337.11(3)(a), Florida Statutes (1987), which provides that "the department may award the proposed work to the lowest responsible bidder, or it may reject all bids and readvertise the work." (e.s.) CCI, but not DOT, also suggests that the specifications contained an error, thereby requiring the reletting of the project. The issue, then, is whether DOT may initially award a contract to an obviously unqualified bidder, and if such action is challenged in a de novo hearing, to then have the right to reject all bids and relet the contract.

20. In Groves-Watkins, supra, the court cautioned that DOT does not have unbridled discretion to reject any and all bids with or without cause. The reason for this is that rejection of all bids "then becomes a means of allowing a favored bidder another chance to submit a low bid." Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc., 354 So.2d 446, 450 (Fla. 1st DCA 1978). Here DOT's preference to reject all bids is ostensibly premised on the hope that the new Successful bidder will submit a bid comparable in amount to CCI's first bid, or a $624,000 savings over Midwest's proposal. The testimony also supports an inference that the bid specifications may be restructured so that painting will be classified as specialty work, thereby allowing CCI to rebid without having to prequalify in that class. However, in light of DOT's nonrule policy that a vendor shall be awarded a contract if its bid proposal is not seven percent above DOT's budget estimate, and there being no compelling reason to deviate from this policy, the contract should be awarded to Midwest. 1/ Moreover, by reletting the bid, it would give the favored bidder an opportunity to qualify, or allow DOT to restructure the specifications so that CCI might not have to prequalify. This is precisely the type of action which the courts have sought to prevent. Wood-Hopkins, 354 So.2d at 450. Therefore, the contract on State Job 90030-3539 should be awarded to Midwest, the lowest responsive bidder on the project.

21. The contention by CCI that Midwest is not qualified to bid on the project is rejected. Since Midwest has sought review of DOT's action to withdraw its certification as of June 15, 1987, the withdrawal of the certification is not effective until Section 120.57(1) proceedings have been concluded. See Subsection 120.60(6), F.S. (1985).

22. Intervenor also contends petitioner lacks standing to bring this action for two reasons. It first points out that Subsection 337.11(3)(d), Florida Statutes (1987), requires a person to be certified on a project in order to file a protest. But, as noted above, Midwest's certification remains valid pending its administrative appeal of DOT's conditional rating. Secondly, by post-hearing argument, CCI points out for the first time that Midwest failed to prove at hearing that it posted a bond with DOT prior to filing its protest as required by Subsection 337.11(3)(d), Florida Statutes (1987). However, this matter was not raised in the pretrial stipulation or at final hearing. Accordingly, the issue is deemed to have been waived. Further, it is not essential to a resolution of the merits of this case.

23. CCI next contends the bid specifications contained an "error" in that bridge painting was classified as normal work, and not an incidental aspect of the job. However, there is no evidence that the parties misunderstand the specifications, Capeletti Brothers, Inc. v. State Department of General Services, 432 So.2d 1359, 1363 (Fla. 1st DCA 1983), or that DOT's classification of painting as regular work violated any DOT standard, rule or statute. Rather, DOT had the choice to categorize painting as either regular or incidental work, and chose the former. The argument is accordingly rejected.

24. Finally, CCI contends the doctrine of estoppel applies, and that DOT is estopped from awarding the contract to Midwest. It posits, inter alia, that by giving bid documents to CCI, DOT made a representation, which CCI relied upon, that CCI was qualified to bid on the project. However, an error by DOT officials in initially issuing the bid documents cannot be used to apply estoppel against the state. Greenhut Construction Company, Inc. v. Henry A. Knott, Inc., 247 So.2d 517, 524 (Fla. 1st DCA 1971)(state cannot be estopped by the unauthorized acts or representations of its officers); Cf. Austin v. Austin, 350 So.2d 102, 105 (Fla. 1st DCA 1977) cert. denied, 357 So.2d 184 (Fla.

1978)(administrative officers of state cannot estop the state through mistaken statements of the law). CCI also contends that DOT's long-standing policy is to allow contractors qualified in major bridge work (but not qualified in bridge painting) to receive bid documents involving painting work. But, this argument is irrelevant since the "policy" applies only to major projects (unlike this) and has never been used to justify awarding a contract to a nonqualified bidder on this type of project.

## RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that a Final Order be entered rejecting the bid of Cone Constructors, Inc. on the ground it was unqualified and non-responsive, and instead awarding the contract on State Job 90030-3539 to Midwest Industrial Painting of Florida, Inc., which submitted the lowest responsive bid.

DONE AND ORDERED this 15th day of September, 1987, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Hearing Officer
Division of Administrative Hearings
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Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of September, 1987.

## ENDNOTE

1/ CCI's contention that Midwest is unqualified because of a DOT delinquency determination on another job is rejected. This factor played no role whatever in DOT's decision to use CCI rather than Midwest.

## APPENDIX TO RECOMMENDED ORDER, CASE NO. 87-3338BID

Petitioner: *

20. Covered in finding of fact 1.
21. Covered in finding of fact 8.
22. Covered in finding of fact 8.
23. Rejected as unnecessary.
24. Rejected as unnecessary.
25. Rejected as unnecessary.
26. Rejected as unnecessary.
27. Covered in finding of fact 13.
28. Covered in finding of fact 13.
29. Rejected as being unnecessary.
30. Covered in finding of fact 9.

31. Covered in finding of fact 9.
32. Covered in finding of fact 11.
33. Rejected as being unnecessary.
34. Rejected as irrelevant.
35. Rejected as irrelevant.
36. Rejected as irrelevant.
37. Rejected as irrelevant.
38. Covered in finding of fact 7.
39. Rejected as being unnecessary.
40. Rejected as irrelevant.

* Proposed findings 1-19 are a recitation of stipulated facts, a list of exhibits admitted into evidence, and the names of witnesses who testified at final hearing. These matters are covered in background and in numerous findings.

41. Rejected as irrelevant.
42. Rejected as irrelevant.
43. Rejected as irrelevant.
44. Covered in finding of fact 7.
45. Covered in finding of fact 7.
46. Covered in finding of fact 7.
47. Covered in finding of fact 7.

Respondent:

1. Covered in numerous findings.
2. Covered in finding of fact 13.
3. Covered in finding of fact 13.
4. Covered in finding of fact 13.
5. Rejected as being unsupported by the evidence.
6. Rejected Since the undersigned has concluded, as a matter of law, that the agency's action was arbitrary and capricious.

Intervenor: *

1. Covered in finding of fact 7.
2. Rejected as unnecessary to the resolution of issues.
3. Covered in findings of fact 1 and 2.

1. Covered in finding of fact 5.
2. Covered in finding of fact 4.
3. Covered in finding of fact 2.

* Intervenor submitted alternative sets of proposed findings, hence the duplicative numbers.

4. Covered in finding of fact 3.
5. Covered in finding of fact 10.
6. Covered in background.
7. Rejected as irrelevant to the resolution of issues.
8. Covered in background and finding of fact 3.
9. Covered in finding of fact 8.
10. Partially used in findings of facts 1 and 6. The remainder is rejected as being contrary to the evidence. Specifically, DOT did not award the bid to CCI because, once it opened the bids, it discovered it had made an "error in failing to classify the painting work . . . as specialty work." Further, DOT

has never contended it wishes to relet the project because the specifications contain an error.

11. Rejected as being irrelevant since the parties have stipulated bridge painting constitutes 82 percent of the work.

12. Covered in finding of fact 6.

13.-15. Rejected as irrelevant since the doctrine of estoppel does not apply.

16. Rejected as being both unnecessary and irrelevant.

17. Covered in finding of fact 13.

18. Covered in finding of fact 7.

19. Rejected as irrelevant to a resolution of the issues.

20. Covered in finding of fact 13.

21. Covered in finding of fact 13.

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION

MIDWEST INDUSTRIAL PAINTING
OF FLORIDA, INC.,

Petitioner,

vs. CASE NO. 87-3599BID

FLORIDA DEPARTMENT OF
TRANSPORTATION,

Respondent,
and

CONE CONSTRUCTORS, INC.,

Intervenor.
_____/

FINAL ORDER

The record in this proceeding has been reviewed along with the Recommended Order of the Hearing Officer, copy attached. Respondent, Florida Department of Transportation (hereinafter referred to as "FDOT") and Intervenor, Cone Constructors, Inc. (hereinafter "Cone"), have filed exceptions to the Recommended Order which are considered and addressed in this Order. Petitioner, Midwest Industrial Painting of Florida, Inc., shall be referred to hereinafter as "Midwest".

The Recommended Order is considered correct in fact and is considered correct in law with the exception of ITB reliance upon Groves-Watkins Constructors v. State, Department of Transportation, 12 F.L.W. 1465 (Fla. 1st DCA June 11, 1987), reh. denied, 12 F.L.W. 1869 (Fla. 1st DCA August 4, 1987), pet. for rev. pending, No. 71,081. Groves-Watkins involved a contract bid dispute giving rise to the issue of whether the original low bidder on a highway construction project was entitled to award of a contract for the project where FDOT, after receipt of the initial bids, rejected all bids as excessive and directed that the project be rebid. Unlike the case at bar, the lowest bid in Groves-Watkins was sole 29 percent over the bid estimate. Here, however, the dispute centered upon FDOT's allegedly erroneous award of the contract to the apparent low bidder who did not possess the appropriate certificate of qualification. Accordingly, Groves-Watkins is readily distinguishable from, and therefore wholly inapposite to, the instant case. The Recommended Order, with this exception, is incorporated as part of this Final Order.

On September 28, 1987, FDOT filed Exceptions to the Recommended Order. The first exception seeks to avoid the operation of the prequalification requirement on the basis of the contention that the contract in issue is really a

maintenance contract as opposed to a construction contract. This line of argument was not timely raised at the hearing and is deemed waived. Moreover, since Rule 14-22.003(2)(g), Fla. Admin. Code provides for prequalification of contractors wishing to perform incidental classes of work such as bridge painting, FDOT's exception is rejected as contrary to the letter and spirit of the rule.

By stipulation the parties agreed that bridge painting constituted 82 percent of the work. The Hearing Officer found that the specifications listed bridge painting as normal work; found that prequalification in the area of bridge painting was required; and found that waiver of prequalification had never been used on a project of this type. Therefore the first exception is without merit.

FDOT's second exception pertains to interpretation of 337.14(5), Fla. Stat., in terms of permissive as opposed to mandatory language. This exception is rejected because Rules 14-22.002, 14-22.003, and 14-22.008, Fla. Admin. Code, read in pari materia clearly require prequalification in "bridge painting" for purposes of bidding on the instant contract. Rule 14-22.008(1) clearly states:

> Proposal documents for a specific project shall be issued only to a prospective bidder who has been issued a qualification certificate covering one or more classes of work which, in the aggregate, comprises 50 percent or more of the total value of normal work included in the proposal documents.

FDOT's final exception is rejected because it has already been covered in the amendment to the Hearing Officer's Conclusions of Law regarding his reliance upon Groves-Watkins, supra.

Cone filed ITB exceptions to the Recommended Order on September 25, 1987. Cone's exceptions going to the Hearing Officer's Findings of Fact and rejection of Cone's proposed factual findings are rejected in their entirety due to Cone's failure to provide a transcript of the hearing in this cause, which necessarily precludes conducting the review necessary to effect a substitution of Cone's findings for those of the Hearing Officer. Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987). Since it is the Hearing Officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence and reach ultimate findings of fact based on competent, substantial evidence; FDOT is in no position in this case to address the disputes Cone has raised with the Hearing Officer's Findings of Fact and ultimate factual conclusions. See Heifetz v. Department of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985).

Additionally, Cone's argument concerning ITB proposed finding going to the absence of a bid protest bond is entirely devoid of merit, since the Hearing Officer found that this issue was waived by Cone's failure to raise the issue by pretrial stipulation or by evidence at the final hearing and because FDOT's records indicate that a bond was filed on August 13, 1987. FDOT would not have forwarded the matter to DOAH if the protest had not been perfected by the filing of a protest bond.

Each of Cone's exceptions concerning FDOT's exercise of discretion have been addressed by the Hearing Officer and have been rejected or distinguished. The concern with award to Midwest and the added cost is addressed herein with regard to the 7 percent award policy. Cone's contention in ITB third exception that FDOT had a policy of allowing contractors qualified in minor bridge to bid on painting contracts was rejected by the Hearing Officer. The Hearing Officer concluded this policy "has never been used on a project such as this. See Page 7 of the Recommended Order.

The arguments concerning errors in the bid documents, estoppel, Midwest's qualifications, and FDOT's error in providing bid documents to Cone are thoroughly addressed by the Hearing Officer in the Recommended Order.

Finally, Cone's "exceptions" to the Hearing Officer's Conclusions of Law, viewed in their actual light, are really nothing more than proposed fact findings "thinly disguised as conclusions of law." Cf. South Fla. Water Management Dist. v. Caluwe, 459 So.2d 390, 395 (Fla. 4th DCA 1984). Consequently, they too must be rejected due to the absence of the transcript and the concomitant inability of the Department to conduct the requisite record review. Florida Dept. of Corrections v. Bradley, supra.

It is clear from the Hearing Officer's Recommended Order, Section 337.14(1), Fla. Stat., and FDOT's rules that prequalification is required to bid on a bridge painting contract which exceeds $250,000.00. Cone was not prequalified in the area of bridge painting, so Cone's bid must be rejected as nonresponsive. The remaining bids must then be viewed as if Cone's bid were never submitted.

As found by the Hearing Officer, it is FDOT's nonrule policy to award a project if the lowest bid is no more than seven percent above FDOT's estimate of the project's cost. The parties stipulated that Midwest Industrial Painting of Florida, Inc. submitted a bid below the FDOT budget estimate and preliminary estimate for the project. Applying FDOT's nonrule policy to the facts in this case requires the acceptance of Midwest's bid.

Though Cone attempts to provide a basis in ITB exceptions for the rejection of all bids through ITB argument concerning the discretion of FDOT to award or reject bid, FDOT is cognizant of the requirements of Section 120.68(12), Fla. Stat. (1985). Section 120.68(12) requires the reversal of a final order if the agency exercises ITB discretion inconsistent with an agency rule or inconsistent with an officially stated agency policy or prior agency practice. To award the contract to Cone in violation of the prequalification statute and rules or to reject all bids in violation of the 7 percent award criteria would be an abuse of discretion and provide the appearance of favoritism, whether intended or not.

ACCORDINGLY, IT IS ORDERED, that the bid of Cone Constructors, Inc. is rejected and the contract for State Job No. 90030-3539 is AWARDED to Midwest Industrial Painting of Florida, Inc.

DONE AND ORDERED this 4th day of December, 1987, at Tallahassee, Florida.

_____

KAYE N. HENDERSON, P.E.
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

Judicial review of agency final order may be pursued in accordance with Section 120.68, Florida Statutes, and Florida Rules of Appellate Procedure 9.030(b)(1)(c) and 9.110. To initiate an appeal, a Notice of Appeal must be filed with the Department's Clerk of Agency Proceedings, Haydon Burns Building, 605 Suwannee Street, Mail Station 58, Tallahassee, Florida 32399-0458, and with the appropriate District Court of Appeal within 30 days of the filing of this Final Order with the Department's Clerk of Agency Proceedings. The Notice of Appeal filed with the District Court of Appeal should be accompanied by the filing fee specified in Section 35.22(3), Florida Statutes.

Copies furnished to:

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