

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANGLIN CONSTRUCTION CO.,)
)
 Petitioner,)
)
vs.)
)
FLORIDA BOARD OF REGENTS,)
) CASE NO. 90-2652BID
 Respondent.)
)
and)
)
CHARLES R. PERRY)
CONSTRUCTION, INC.)
)
 Intervenor.)
_____)

RECOMMENDED ORDER

The final hearing in the above-styled matter was heard pursuant to notice by Stephen F. Dean, assigned Hearing Officer of the Division of Administrative Hearings, on May 15, 1990, in Tallahassee, Florida.

APPEARANCES

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FOR RESPONDENT: Jane Mostoller, Esquire
Assistant General Counsel
Board of Regents
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FOR INTERVENOR: William B. Watson, III, Esquire
Watson, Folds, Steadham,
Christmann, Brashear, Tovkach
& Walker
P.O. Box 1070
Gainesville, Florida 32602

STATEMENT OF THE ISSUES

The issues for determination in this proceeding are: (1) whether the Respondent properly rejected the lowest bid because the bid did not comply with the requirements set forth in the Project Manual, and (2) whether the Respondent properly awarded the bid to the second lowest bidder.

PRELIMINARY STATEMENT

The Petitioner timely requested a formal administrative hearing, pursuant to Section 120.57, Florida Statutes. On May 8, 1990, a prehearing conference was held by telephone. At the commencement of the conference, Charles R. Perry Construction, Inc. moved to intervene in the bid protest. The motion to intervene was granted. The Respondent filed an interim report with the Hearing Officer on May 11, 1990 indicating that all parties had agreed to the filing of a stipulation as to the facts and to the filing of joint exhibits and to the filing of proposed recommended orders and that Petitioner was withdrawing his request for a formal administrative hearing. Appendix "A" attached hereto and by reference made a part hereof sets forth those findings which were adopted and those which were rejected and why. A stipulation of facts, restated as the first ten findings of fact, and a stipulation as to the joint exhibits, Appendix "B," were signed by all parties and duly filed with the Division of Administrative Hearings pursuant to the Hearing Officer's Order dated May 17, 1990. References to the joint exhibits filed by Petitioner, Respondent and Intervenor are shown by the abbreviation "Jt. Ex." followed by the number of the exhibit cited.

FINDINGS OF FACT

Findings Based Upon Stipulation of All Parties

1. The Respondent, Florida Board of Regents, issued a Call For Bids, as published in Vol. 16, No. 7, February 16, 1990, issue of the Florida Administrative Weekly, for project number BR-183, Life Safety and Fire Code Corrective Work, J. Hillis Miller Health Center, University of Florida., Gainesville, Florida.

2. Sealed bids were received on March 15, 1990, at which time they were publicly opened and read aloud.

3. Petitioner, Anglin Construction Co. (hereinafter referred to as "Anglin"), submitted the lowest monetary bid for the project; and Charles R. Perry (hereinafter referred to as "Perry") submitted the second lowest monetary bid on the project.

4. By letter dated March 19, 1990, the University of Florida notified Anglin that its bid proposal, submitted on March 15, 1990, had been found to be in non-compliance with the Project Manual and rejected by the University of Florida. The specific reason for non-compliance was that Anglin's advertisement for Minority Business Enterprise ("MBE") participation, as part of its demonstration of good-faith effort, did not appear in the media at least seven (7) days prior to bid opening.

5. On March 23, 1990, the contract for this project was awarded to Perry by the Chancellor of the Florida Board of Regents.

6. By letter dated March 26, 1990, Anglin filed a notice of protest in regard to the award of this contract to Perry. Anglin timely filed a formal bid protest in regard to this action, which was received by the Florida Board of Regents on April 4, 1990.

7. A representative from Anglin and Perry attended the required pre-solicitation/pre-bid meeting scheduled for March 1, 1990 for this project. Mr. Larry Ellis, Minority Purchasing Coordinator, University of Florida, was present at the pre-solicitation/pre-bid meeting and distributed a handbook entitled "Minority Business Enterprise Requirements for Major and Minor Construction Projects Survival Handbook" to those in attendance.

8. Anglin and Perry obtained or examined the Project Manual for BR-183.

9. By letter dated March 6, 1990, Anglin requested the Gainesville Sun newspaper to run an advertisement for seven (7) consecutive days to solicit bids from qualified MBE/WBE companies for BR-183. The advertisement in the Gainesville Sun was initially published in the March 9, 1990 edition and ran consecutively through the March 15, 1990 edition.

10. The Project Manual, at page L-2 of L-13 pages, Special Conditions section, paragraph 1.7.2.2, provides that advertisements for minority business enterprises must run or be published on a date at least seven (7) days prior to the bid opening.

Findings Based Upon Documentary Evidence

11. The Call for Bids provided that at least fifteen percent (15%) of the project contracted amount be expended with minority business enterprises certified by the Department of General Services and if fifteen percent (15%) were not obtainable, the State University System would recognize good-faith efforts by the bidder (Jt. Ex. 1).

12. The Call for Bids (Jt. Ex. 1) provided that all bidders must be qualified at the time of their bid proposal in accordance with the Instructions to Bidders, Article B-2. The Instructions to Bidders, Article B-2, at page 9 of the Project Manual (Jt. Ex. 2) provided, in pertinent part, that in order to be eligible to submit a Bid Proposal, a bidder must meet any special requirements set forth in the Special Conditions section of the Project Manual.

13. The Project Manual, Special Conditions, paragraph 1.1 at page L-1 sets forth the MBE requirements. Paragraph 1.1.2 provides that evidence of good-faith efforts will be required to be submitted to the University Planning Office within two working days after the opening of the bids. Paragraph 1.1.2 further provides that incomplete evidence which does not fully support the good-faith effort requirements shall constitute cause for determining the bid to be non-responsive.

14. Subparagraph 1.7.2.2 of the Special Conditions section in the Project Manual at page L-2 (Jt. Ex. 2) provides that a contractor, as part of meeting the good-faith efforts for this project, should advertise to inform MBEs of contracting and subcontracting opportunities, through minority focus media, through a trade association, or one local newspaper with a minimum circulation of 25,000. Subparagraph 1.7.2.3 provides for required documentation and provides for a copy of the advertisement run by the media and the date thereof.

15. The copy of the tear sheet from The Gainesville Sun for Anglin regarding BR-183 and the affidavit from the Gainesville Sun reflect that Anglin's advertisement ran or was published beginning March 9, 1990, which was six (6) days prior to bid opening, through March 15, 1990 (Jt. Ex. 9 at section 1- 7.2). Anglin's advertisement did not run in the Gainesville Sun seven (7) days prior to the bid opening (Jt. Ex. 9 at section 1-7.2, and Jt. Ex. 8).

16. The Respondent interprets paragraph 1.7.2.2 to require that advertising through minority focus media, through a trade association or one local newspaper with a minimum circulation of 25,000 to be run on at least one day, seven (7) days prior to the day the bids are opened. Anglin ran an otherwise qualifying advertisement for seven (7) consecutive days, the seventh of which was the day the bids were opened.

17. Anglin sent letters to fourteen (14) minority businesses qualified for participation in state contracts inviting participation and providing information about the program. These letters indicated that Anglin would subdivide work to assist in their participation and invited them to inspect the drawings. Anglin sent followup letters to the same fourteen (14) minority businesses.

18. Anglin apparently divided portions of the electrical work between two minority businesses and included their estimates totaling \$288,000.00 in the bid which is at issue (see Jt. Ex. 9 at section 1-7.7).

19. A representative of Anglin, Dennis Ramsey, attended the pre-solicitation/pre-bid meeting on March 1, 1990 (Jt. Ex. 4). One of the purposes of the pre-solicitation/pre-bid meeting is to invite MBEs to attend to become familiar with the project specifications and to become acquainted with contractors interested in bidding the project.

20. The Project Manual, Instructions to Bidders, B-23 at page 16 (Jt. Ex. 2) provides that the contract award will be awarded by the Respondent for projects of \$500,000.00 or more, to the lowest qualified bidder, provided it is in the best interest of the Respondent to accept it. The award of the contract is subject to the provisions of Section 287.0945, Florida Statutes, and the demonstration of "good-faith effort" by any bidder whose Bid Proposal proposes less than fifteen percent (15%) participation in the contract by MBEs. The contract award will be made to the bidder who submits the lowest responsive aggregate bid within the pre-established construction budget.

21. Sealed bids for BR-183 were opened on March 15, 1990 (Jt. Ex. 1). Anglin's bid of \$1,768,400.00 was the lowest monetary bid (Jt. Ex. 5). Perry was the second lowest monetary bidder (Jt. Ex. 5).

22. Anglin submitted its bid proposal (Jt. Ex. 6) and documentation of good-faith efforts for BR-183 (Jt. Ex. 9).

23. Anglin was notified by letter dated March 19, 1990 that its bid proposal had been found to be in noncompliance with the requirements of the Project Manual and was, therefore, rejected. The specific reason for Anglin's noncompliance was that the advertisement for MBE participation did not appear in the media at least seven (7) days prior to the day the bids were opened (Jt. Ex. 10).

24. By letter dated March 19, 1990, the Project Manager from the architectural and planning firm responsible for BR-183 recommended to Respondent that the contract be awarded to Perry (Jt. Ex. 11). By letter dated March 20, 1990, the University of Florida recommended to the Director of Capital Programs for Respondent that Perry be awarded the contract for BR-183 for the base bid and alternates #1 through #5 in the amount of \$1,789,400.00 (Jt. Ex. 12).

25. The Respondent awarded the contract to Perry on March 23, 1990 (Jt. Ex. 14).

26. The MBE award to electricians of \$288,000.00 is 16.29% of the \$1,768,400.00 Anglin bid.

CONCLUSIONS OF LAW

27. Section 287.0945, Florida Statutes, was enacted to provide the maximum practicable opportunity for increased participation by the largest number of minority businesses in the state procurement system.

28. The Minority Business Enterprise Assistance Office (MBEAO) was created to assist minority business enterprises in becoming suppliers of commodities and services to state government. See Section 287.0945(2), supra.

29. The thrust of this program is for agencies to procure fifteen percent (15%) of goods and services from minority businesses. Agencies are expected to make a good-faith effort to comply with the fifteen percent (15%) goal. Pursuant to Section 287.0945(3)(a), supra, the agencies' "good-faith effort" is assessed by whether the agencies:

a) Scheduled presolicitation or prebid meetings for the purpose of informing minority businesses of contracting and subcontracting opportunities;

b) Provided interested minority businesses with adequate information about the plans, specifications, and requirements of contracts or the availability of jobs;

c) Used services and resources of available minority community organizations; minority contracts' groups; local, state, and federal minority business assistances offices; and other organizations that provide assistance in recruiting and placing minority businesses; and

d) Provided written notice to a reasonable number of minority business enterprises that their interest in contracting with the agency was being solicited in sufficient time to allow the minority business enterprises to participate effectively (emphasis supplied).

30. The MBEAO was authorized to adopt rules to determine what constitutes a contractor's "good-faith effort" for purposes of assessing compliance with contractual requirements relating to the acquisition of services or commodities from minority businesses. Pursuant to Section 287.0945(3)(b), supra, the factors to be considered shall include, but not be limited to:

a) Whether the contractor attended any agency scheduled presolicitation or prebid meetings to inform minority businesses of contracting opportunities;

b) Whether the contractor advertised contracting opportunities in general circulation, trade association, or minority-focus media;

c) Whether the contractor provided written notice in sufficient time to a reasonable number of specific minority businesses soliciting their interest in the contract;

d) Whether the contractor followed up on the initial solicitations mentioned above to determine with certainty if minority businesses were interested;

e) Whether the contractor selected portions of the work to be performed by minority businesses in order to increase the likelihood of meeting the minority business enterprise goals, including, breaking down contracts into economically feasible units to facilitate minority business enterprise participation;

f) Whether the contractor provided interested minority businesses with adequate information about the plans, specifications, and requirements of the contract or jobs;

g) Whether the contractor negotiated in good faith with interested minority business enterprises or persons and did not reject minority businesses without sound cause;

h) Whether the contractor effectively used the services of available minority community organizations; contractor's groups, etc. to provide assistance in recruitment.

31. The Board of Regents is required to make a good-faith effort to meet in the fifteen percent (15%) MBE participation. Pursuant to the statutory requirements, the Board of Regents has prepared special conditions for bid specifications. Paragraph 1.7.2.2 of the Special Conditions of the Bid provide:

Advertise through minority focus media, through a trade association, or one local newspaper with a minimum circulation of 25,000. . . Such advertisements must run or be published on a date at least seven days prior to the bid opening.

32. Anglin strictly complied with all of the factors, except that it failed to advertise at least one day, seven days prior to the day the bids were opened. Anglin advertised for seven consecutive days, the seventh of which was the day the bids were opened. The statute's only reference to a time limit is the general requirement to solicit minority participation by written notice "in sufficient time to allow the minority business enterprises to participate effectively." See Section 287.0945(3)(b)3, supra. The MBEAO and the Board of Regents have not adopted a rule on how time is to be computed. Clearly, Anglin complied with all of the other special conditions; but more importantly, Anglin obtained 16.29% MBE participation. Only when the objective is not obtained is there a necessity to look at the bidder's good-faith efforts.

33. Assuming the failure to publish seven (7) days prior to the bid were relevant, the Board of Regents has the authority to waive any minor irregularity in an otherwise valid bid. See Rule 6C-14.021(5), Florida Administrative Code. Although the discretion may not be exercised arbitrarily or capriciously, a public agency is vested with discretion with respect to letting public contracts on a competitive basis. Its decision must be based upon facts reasonably tending to support the conclusions reached by the agency. See *City of Pensacola v. Kirby*, 47 So. 2d 533 (Fla. 1950)

34. Although the issue here is disqualification of a bidder, it is based upon the bidder's submissions and is, therefore, subjected to the same reasonableness test. A bid containing a material variance is unacceptable. A deviation is material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition. *Tropabest Foods, Inc. v. State of Florida, Dept. of General Services*, 493 So. 2d 50 (Fla. 1st DCA 1986). Clearly no advantage accrued to Anglin by advertising for seven consecutive days; however, the disqualification of Anglin begs the question of "good-faith effort" and minority business participation.

35. The Board of Regents disqualified Anglin solely for the failure to follow one portion of the advertising requirements to show good faith. There is nothing in this record which indicates that the Board of Regents considered that Anglin had more than fifteen percent (15%) MBE participation, or considered the relative minority participation between Anglin and the successful bidder as a means of determining good-faith effort. The record reflects that Anglin placed \$288,000.00 of the \$1,768,400.00 bid with minority contractors. The record is silent with regard to Perry's effort. It would be ironic to place the contract with the second highest bidder, have the project cost more money, and have less minority participation with the successful bidder because of disqualification over "good-faith effort" to insure MBE participation.

36. As a measure of "good-faith effort" in the area of minority business participation, if exceeding the 15% goal does not obviate the need to show good faith, it certainly is excellent evidence of a good-faith effort. Only if the conduct of the bidder and the level of minority participation clearly indicated that the bidder had obtained advantage by precluding minority participation should the bidder be disqualified as the Board of Regents has done in this instance.

37. The discretion vested in a public agency with respect to letting contracts on a competitive basis must be based upon facts reasonably tending to support the conclusion reached by the agency. *City of Pensacola v. Kirby*, supra. In this case, there is little connection between the conclusion that the Petitioner did not show good faith and the facts.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is therefore,

RECOMMENDED that the Board of Regents award the contract to Anglin.

DONE AND ENTERED this 18th day of July, 1990, in Tallahassee, Leon County, Florida.

STEPHEN F. DEAN
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of July, 1990.

APPENDIX "A" TO RECOMMENDED ORDER
IN CASE NO. 90-2652BID

Anglin and Perry's proposed findings of fact were adopted as paragraphs 1 through 10 of this Recommended Order.

The Board of Regents' proposed findings of fact, which duplicated the stipulation, were adopted as paragraphs 1 through 10 of this Recommended Order, and otherwise ruled upon as follows:

1. Adopted as paragraph 11.
2. Adopted as paragraph 12.
3. Adopted as paragraph 20.
4. Rejected as a conclusion of law.
5. Rejected as a conclusion of law.
6. Adopted as paragraph 19.
7. Adopted as paragraph 13.
8. Adopted as paragraph 14.
9. Rejected as a conclusion of law.
10. Adopted as paragraph 21.
11. Adopted as paragraph 22.
12. Adopted as paragraph 15.
13. Adopted as paragraph 23.
14. Adopted as paragraph 24.
15. Adopted as paragraph 25.

COPIES FURNISHED:

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANGLIN CONSTRUCTION CO.,

Petitioner,

vs.

Case No. 90-2652BID

FLORIDA BOARD OF REGENTS,

Respondent,

CHARLES R. PERRY CONSTRUCTION, INC.,

Intervenor

_____ /

FINAL ORDER

This Order is entered by the Florida Board of Regents, pursuant to Chapter 120, Florida Statutes, following a review of the entire record in this case and of the Recommended Order entered by Stephen F. Dean, Hearing Officer, Division of Administrative Hearings, on July 18, 1990. The Intervenor in this cause, Charles R. Perry Construction, Inc., filed exceptions to the above referenced Recommended Order on July 30, 1990. A copy of the Recommended Order is attached hereto.

STATEMENT OF THE ISSUES

The issues for determination in this cause are: (1) whether the Respondent properly rejected the lowest bid because the bid did not comply with the requirements set forth in the Project Manual, and (2) whether the Respondent properly awarded the bid to the second lowest bidder.

BACKGROUND

The Petitioner timely requested a formal administrative hearing, pursuant to Section 120.57, Florida Statutes. On May 8, 1990, a prehearing conference was held by telephone. At the of the conference, Charles R. Perry Construction, Inc. moved to intervene in the bid protest. The motion to intervene was granted. The Respondent filed an interim report wit the Hearing Officer on May 11, 1990 indicating that all parties had agreed to the filing of a stipulation as to the facts and to the filing of joint exhibits and to the filing of proposed recommended orders and that Petitioner was withdrawing his request for a formal administrative hearing. Accordingly, a formal administrative hearing was not held, and proposed recommended orders were timely filed by all parties. Appendix "A" attached to the recommended order and by reference made a part thereof sets forth those findings which were adopted by the hearing officer and those which were rejected and why. A stipulation of facts restated as the first

ten findings of fact in the recommended order, and a stipulation as to the joint exhibits, Appendix "B" of the recommended order, were signed by all parties and duly filed with the Division of Administrative Hearings pursuant to the Hearing Officer's Order dated May 17, 1990. Reference to the joint exhibits filed by Petitioner, Respondent and Intervenor are shown by the abbreviation "Jt. Ex." followed by the number of the exhibit cited. A motion to correct the hearing officer's recommended order was filed by Intervenor, Charles R. Perry Construction, Inc., on July 30, 1990, and was withdrawn by Intervenor on September 6, 1990.

RULINGS ON EXCEPTIONS

1. Intervenor, Charles R. Perry Construction, Inc., excepts to paragraph 18 of the findings of fact in the recommended order wherein the hearing officer found that:

18. Anglin apparently divided portions of the electrical work between two minority businesses and included their estimates totalling \$288,000.00 in the bid which is at issue (see Jt. Ex 9 at section 1-7.7)

Intervenor asserts that, in fact, Anglin did not divide portions of the electrical work between two minority businesses and that there is no evidence to support the hearing officer's finding. After a complete review of the record, the Board of Regents finds that there is no competent and substantial evidence to support the hearing officer's finding and therefore, grants Intervenor's Exception Number 1. The Project Manual (Jt. Ex. 2) at B-15 on page 13 of 104 pages, provides that each bidder shall submit with the bid proposal a full and proper list of the subcontractors who will perform the work for each division of the specifications as indicated on the required List of Subcontractors Form contained in the bid specifications (Jt. Ex. 2 at page 21 of 104 pages). If the bidder is using Minority Business Enterprise (MBE) subcontractors certified by the Florida Department of General Services (DGS), then it must identify the name of the MBE on the List of Subcontractors Form, which is submitted with the bid proposal on the day of bid opening. (Jt. Ex. 2 at B-15 on page 13 of 104 pages, and Jt. Ex. 6 and 7). If the bidder lists an MBE on the Subcontractors Form, the bidder is also required to identify on such Form the trade services to be performed by the MBE and the dollar value of the MBE award. (Jt. Ex. 2 at page 21 of 104 pages). The bidder must ascertain that a listed MBE is certified by DGS to perform the services for which it is listed (Jt. Ex. 2 at B-15 on page 13 of 104 pages).

The record reflects that the List of Subcontractors Form (Jt. Ex. 7) included with Anglin's bid proposal (Jt. Ex. 6) lists one subcontractor for "electrical" work. The section on the Form provided to list minority subcontractors certified by DGS is not filled out and is blank, the section regarding trade service to be performed by the MBE subcontractor is not filled out and is blank, and the section provided to identify the dollar value of the MBE award is also not filled out and is blank.

The only mention of \$288,000.00 in the record can be found at Jt. Ex. 9, at 1-7.7. The Call For Bids (Jt. Ex. 1) provides that at least fifteen percent of the project contracted amount should be expended with MBEs certified by DGS, as set forth under the Florida Small and Minority Business Assistance Act, Chapter 287, Florida Statutes. If fifteen percent were not obtainable with MBEs certified by DGS, then the State University System would recognize good faith

efforts by the Bidder. Anglin chose to submit good faith efforts, and as part of its good faith efforts submitted a bid quotation from a company, Mid State, for \$288,000.00 to perform electrical work (Jt. Ex. 9, at 1-7.7). However, there is no competent, substantial evidence in the record to support the finding by the hearing officer that this particular subcontractor, Mid State, was a "minority business" because the record is devoid of any competent, substantial evidence to indicate that Mid State was an MBE, certified by DGS and qualified to do the electrical work on this construction contract, as required by the bid specifications. In fact, on the List of Subcontractors Form submitted by Anglin, Mid State is identified as a subcontractor only, and there is no indication on such Form or elsewhere in the record to indicate that Mid State is a DGS certified Minority Business Enterprise. (Jt. Ex. 7). Nor is there any competent, substantial evidence to support the hearing officer's finding that the electrical work was divided between two "minority businesses" for \$288,000.00. The record reflects that there were no DGS certified MBE subcontractors identified to perform work for the Bidder, Anglin. (Jt. Ex. 6 and 7).

2. Intervenor excepts to paragraph 26 of the findings of fact of the recommended order, wherein the hearing officer found:

"The MBE award to electricians of \$288,000.00 is 16.29% of the \$1,768,400.00 Anglin bid."

Intervenor maintains that, in fact, there was no MBE award to electricians of \$288,000.00 and that Anglin's electrical award went to a contractor that is not a minority business enterprise. After a complete review of the record, the Board of Regents finds that the hearing officer's finding of fact was not based on competent, substantial evidence, and grants the exception of the Intervenor.

The record is absent of any evidence which would show that the company Anglin chose to perform the electrical work for the project was a certified minority business enterprise (MBE). In fact, the company listed as a subcontractor to perform the electrical work on Anglin's List of Subcontractors Form (Jt. Ex. 7) is not listed on the required Form as a DGS certified MBE qualified to perform the work on this project. (See also Jt. Ex. 2, page 21 of 104 pages.) Accordingly, there is no competent, substantial evidence to support a finding that "the BE award to electricians of \$288,000.00 is 16.29% of the \$1,768,400 Anglin bid" as determined by the hearing officer.

3. Intervenor excepts to the Conclusions of Law on page 11 of the recommended order, wherein the hearing officer concluded that "but more importantly, Anglin obtained 16.29% MBE participation." Intervenor states that Anglin did not obtain 16.29% MBE participation and that nothing in the record reflected that Anglin had any MBE participation. After a complete review of the record, the Board of Regents finds that the hearing officer's conclusion of law is not supported by competent, substantial evidence, and therefore grants the Intervenor's exception. The record reflects that Anglin did not have any DGS certified MBE participation, and instead submitted its good faith efforts for review as provided for in the Call For Bids (Jt. Ex. 1) and the Project Manual specifications (Jt. Ex. 2 B-25 page 171 of 104 pages and Jt. Ex. 2, Special Conditions, Article 1, page L-1 of L-13 pages) one day after bid opening. (Jt. Ex. 8 and Jt. Ex. 9, page 1.) Therefore, the record does not contain any competent substantial evidence that Anglin obtained 16.29% MBE participation for this project.

4. Intervenor excepts to the Conclusion of Law, the last paragraph of page 12 of the recommended order, wherein the hearing officer found ". . . The record reflects that Anglin placed \$288,000.00 of the \$1,768,400.00 bid with minority contractors."

Intervenor maintains that the record does not reflect that Anglin placed \$288,000.00 of its bid with minority contractors. To the contrary, provides Intervenor, the record reflects that Anglin's electrical bid was with a contractor who is not a minority contractor. After a complete review of the record, it is the Board of Regents's conclusion that the hearing officer's conclusion was not based on competent, substantial evidence, and thus, the Board of Regents grants the Intervenor's exception. Anglin's required List of Subcontractors Form does not list an electrical award to a qualified, DGS certified MBE, or a dollar amount of the award to a DGS certified MBE subcontractor. (Jt. Ex. 2, Jt. Ex. 7.)

FINDING OF FACT

1. The Respondent, Board of Regents, hereby adopts and incorporates by reference the findings of fact set forth in paragraphs 1 through 17, and 19 through 25 of the hearing officer's recommended order.

2. Paragraph 18 of the findings of fact of the recommended order is rejected by the Board of Regents, because after a complete review of the record, it was found to not be based upon competent, substantial evidence. The Project Manual (Jt. Ex. 2) at B-15 on page 13 of 104 pages, provides that each bidder shall submit with the bid proposal a full and proper list of the subcontractors who will perform the work for each diision of the specifications as indicated on the required List of Subcontractors Form contained in the bid specifications (Jt. Ex. 2 at page 21 of 104 pages). If the bidder is using Minority Business Enterprise subcontractors certified by the Florida Department of General Services, then it must identify the name of the MBE on the List of Subcontractors Form, which is" submitted with the bid proposal on the day of bid opening. (Jt. Ex. 2 at B-15 on page 13 of 104 pages, and Jt. Ex. 6 and 7). If the bidder lists an MBE on the Subcontractors Form, the bidder is also required to identify on such Form the trade services to performed by the MBE and the dollar value of the MBE award. (Jt. Ex. 2 at page 21 of 104 pages). The bidder must ascertain that a listed MBE is certified by DGS to perform the services for which it is listed (Jt. Ex. 2 at B-15 on page 13 of 104 pages).

The record reflects that the List of Subcontractors Form (Jt. Ex. 7) included with Anglin's bid proposal (Jt. Ex. 6) lists one subcontractor for "electrical" work. The section on the form provided to list minority subcontractors certified by DGS is not filled out and is blank, the section regarding trade service to be performed by the MBE subcontractor is not filled out and is blank, and the section provided to identify the dollar value of the MBE award is also not filled out and is blank.

The only mention of \$288,000.00 in the record can be found at Jt. Ex. 9, at 1-7.7. The Call For Bids (Jt. Ex. 1) provides that at least fifteen percent of the project contracted amount should be expended with MBEs certified by DGS, as set forth under the Florida Small and Minority Business Assistance Act, Chapter 287, Florida Statutes. If fifteen percent were not obtainable with MBEs certified by DGS, then the State University System would recognize good faith efforts by the Bidder. Anglin chose to submit good faith efforts, and as part of its good faith efforts provided a bid quotation from a company, Mid State, for \$288,000.00 to perform electrical work (Jt. Ex. 9, at. 1-7.7). However,

there is no competent, substantial evidence in the record to support the finding by the hearing officer that this particular subcontractor, Mid State, was a "minority business" because the record is devoid of any competent, substantial evidence to indicate that Mid State was an MBE, certified by DGS and qualified to do the electrical work on this construction contract, as required by the bid specifications. In fact, on the List of Subcontractors Form submitted by Anglin, Mid State is identified as a subcontractor only, and there is no indication on such Form or elsewhere in the record to indicate that Mid State is a DGS certified Minority Business Enterprise. (Jt. Ex. 7). Nor is there any competent, substantial evidence to support the hearing officer's finding that the electrical work was divided between two "minority businesses" for \$288,000.00. The record reflects that there were no DGS certified subcontractor MBEs identified to perform work for the Bidder, Anglin. (Jt. Ex. 6 and 7).

3. Paragraph 26 of the findings of fact of the recommended order is rejected by the Board of Regents, because after a complete review of the record, it was found to be unsupported by competent, substantial evidence.

The record is absent of any evidence which would show that the company Anglin chose to perform the electrical work for the project was a certified minority business enterprise (MBE). In fact, the company listed as a subcontractor to perform the electrical work on Anglin's List of Subcontractors Form (Jt. Ex. 7) is not listed on the required Form as a DGS certified MBE qualified to perform the work on this project. (See also Jt. Ex. 2, page 21 of 104 pages.) Accordingly, there is no competent, substantial evidence to support a finding that "the MBE award to electricians of \$288,000.00 is 16.29% of the \$1,768,400 Anglin bid" as determined by the hearing officer.

CONCLUSIONS OF LAW

The Board of Regents sets forth the following conclusions of law. To the extent the conclusions of law in the hearing officer's recommended order are not set forth in this final order, they are rejected or modified.

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

2. Section 240.209(3)(o), Florida Statutes, provides in pertinent part, that the Board of Regents shall adopt rules to administer a program for the maintenance and construction of facilities in the State University System.

3. The Florida Board of Regents promulgated Rule 6C-14.021(5), F.A.C. which provides in pertinent part:

(5) All projects will be publicly bid in accordance with the provisions in the project specifications. Except for informalities which may be waived by the Chancellor or designee, or by the university president or designee for Minor Projects, a bid which is incomplete or not in conformance with the requirements of the specifications shall be determined to be non-responsive and shall be rejected. Award of contract will be made to the firm determined to be responsible and qualified in accordance with these rules which submits the lowest priced proposal for the work except

that if it is in the best interest of the State, any bids may be" rejected, or all bids may be rejected and the project may be bid again. (e.s.)

4. Additionally, the Florida Board of Regents promulgated Rule 6C-14.025 (1) and (3), F.A.C., which provides:

(1) The Chancellor shall develop a plan to implement the Florida Small and Minority Business Assistance Act of 1985. Each university president shall be responsible for implementation of the Plan.

(3) Factors which shall be considered in determining whether a contractor has made "good faith efforts" to use the services or commodities of a minority business enterprise are set forth in Paragraph 287.0945(3.)(b), F.S.

5. Section 287.0945(1) and (3)(b), F.S., provide in pertinent part:

(1) The Legislature finds that the lack of minority participation in the economy as a whole is reflected in state contracting for the purchases of commodities and services and in construction contracts. The purpose and intent of this section is to provide the maximum practicable opportunity for increased participation by the largest number of minority business enterprises in the state procurement system. This purpose will be accomplished by encouraging the full use of the largest number of existing minority business enterprises and the entry of new and diversified minority business enterprises into the marketplace. (e.s.).

(3) (b)...Factors which shall be considered by the Minority Business Enterprise Assistance Office in determining whether a contractor has made good faith efforts shall include, but not be limited to: (e.s.)

1. Whether the contractor attended any presolicitation or prebid meetings that were scheduled by the agency to inform minority business enterprises of contracting and subcontracting opportunities

2. Whether the contractor advertised in general circulation, trade association, and/or minority-focus media concerning the subcontracting opportunities;

3. Whether the contractor provided written notice to a reasonable number of specific minority business enterprises that their interest in the contract was being solicited in sufficient time to allow the minority business enterprises to participate effectively; (e.s.)

4. Whether the contractor followed up initial solicitations of interest by contacting minority business enterprises or minority persons to determine with certainty whether the minority business enterprises or minority persons were interested;

5. Whether the contractor selected portions of the work to be performed by minority business enterprises in order to increase the likelihood of meeting the minority business enterprise goals, including where

appropriate, breaking down contracts into economically feasible units to facilitate minority business enterprise participation;

6. Whether the contractor provided interested minority business enterprises or minority persons with adequate information about the plans, specifications and requirements of the contract or the availability of jobs;

7. Whether the contractor negotiated in good faith with interested minority business enterprises or minority persons, not rejecting minority business enterprises or minority persons as unqualified without sound reasons based on a thorough investigation of their capabilities; and

8. Whether the contractor effectively used the services of available minority community organizations; minority contractors' groups; local, state, and federal minority business assistance offices; and other organizations that provide assistance in the recruitment and placement of minority business enterprises or minority persons.

6. The burden of proof is upon the unsuccessful party to establish that it is entitled to the award of the contract. *Florida Department of Transportation v. J.W.C. Co., Inc.*, 396 So.2d 778 (Fla. 1st DCA 1981). The challenging party has the burden to establish that the agency's award resulted from illegality, fraud, oppression, or misconduct and was not the result of a fair, full and honest exercise of the agency's discretion. *Liberty County v. Baxter's Asphalt and Concrete Inc.*, 421 So.2d 505 (Fla. 1982); *Bay Plaza I v. Dept. of Health and Rehabilitative Services*, 11 FALR 2854 (April 11, 1989).

7. An agency has broad discretion in soliciting and accepting bids and a decision based on the honest exercise of its discretion may not be overturned by a court even if reasonable people may disagree with the outcome. *C.H. Barco Contracting Co. v. Department of Transportation*, 483 So.2d 796 (Fla. 1st DCA 1986); *Liberty County v. Baxter's Asphalt and Concrete Inc.*, 421 So.2d 505 (Fla. 1982). The standard of review exercised by the judiciary is set out in *Culpepper v. Moore*, 40 So.2d 366 (Fla. 1949) as follows:

...while the discretion vested in a public agency in respect to letting public contracts may not be exercised arbitrarily or capriciously,....its judgment must be bottomed upon facts reasonably tending to support its conclusions, no mandatory obligation is imposed upon such an agency to consider the "lowest responsible bid" in every case, to the exclusion of all other pertinent factors which may well support a reasonable decision to award the contract to a contractor filing a higher bid. So long as such a public agency acts in good faith, even though they may reach a conclusion of facts upon which reasonable men may differ, the courts will not generally interfere with their judgment, even though the decision reached may appear to some persons to be erroneous.

8. The Administrative Procedures Act provides the procedural mechanism for challenging an agency's decision to award or reject bids. "[T]he scope of the inquiry is limited to whether the purpose of competition bidding has been subverted. In short, the hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly." Department of Transportation v. Groves-Watkins, 530 So.2d 912, 914 (Fla. 1988).

9. It is well established that the responsiveness of a bid is determined as of the time the bids are made public. Palm Beach Group, Inc. v. Department of Insurance and Treasurer, 10 FALR 5627, 5634 (Fla. Dept. of Insurance, 1988); Harry Pepper & Associates v. City of Cape Coral, 352 So.2d 1190 (Fla. 2nd DCA 1977)

10. The Board of Regents, in the good faith exercise of its discretion, determined that Petitioner's bid was as submitted. Petitioner failed to meet the good faith effort requirement of advertising a notice concerning subcontracting opportunities for this project at least seven days prior to bid opening. (e.s.) Instead, Petitioner's ad began running only six days prior to bid opening, in contravention of the Instructions to Bidders and the Special Conditions section of the Project Manual.

11. Pursuant to Rule 6C-14.025(1), F.A.C., the Respondent developed a plan to implement the Florida Small and Minority Business Assistance Act of 1985 (as codified in Chapter 287, F.S.). The Special Conditions section of the Project Manual (Jt. Ex. 2 at page L-1 of L-13 pages) for the major construction project sets out the good faith effort requirements contained in Chapter 287, as well as the implementation of such statutes required by the State University System, and the documentation required by the Respondent for satisfying the eight (8) statutory factors of good faith efforts.

In short, a contractor is required to attend the pre-solicitation/pre-bid meeting scheduled by the agency to inform MBEs of contracting and subcontracting opportunities; advertise a notice concerning the project and opportunities for MBE participation at least seven days prior to bid opening; provide written notice to solicit specific MBEs insufficient time to allow MBEs to participate effectively (see 1.7.3. .1 of the Special Conditions at p. L-2 of the Project Manual (Jt. Ex. 2)); make no less than one written follow-up per initial contact of an MBE; provide interested MBEs with adequate information about the plans, specifications, and requirements of the contract on the availability of jobs; document, as applicable, why MBE's prices were not used in preparing the contractor's bid; and submit copies of information sent to minority organizations, as specified in Section 287.0945) F.S., at least one week prior to the bid date for the project. All of these requirements were placed in Respondent's MBE plan to "provide the maximum practicable opportunity for increased participation by the largest number of minority business enterprises in the state procurement system," as set forth by the Florida legislature in Section 287.0945(1), F.S. To shorten the time, as Petitioner, within which MBEs have to observe an advertisement soliciting MBE participation in a major state construction project, to shorten the time interested MBEs have to, respond to the advertisement which involves meeting with the contractor, visiting the job site, reviewing plans and specifications, and creating a competitive bid for the work required, is to circumvent the intent of the Florida Small Business minority Act of 1985, which is to provide maximum opportunity for increased participation by the largest number of minority business enterprises.

Further, by Petitioner failing to advertise the opportunity for MBE participation at least (e.s.) seven days prior to the bid opening, qualified MBEs may have been discouraged, due to the time constraint, from responding at all to the Petitioner's advertisement. Therefore, Petitioner might have fewer written follow-up contacts with MBEs, fewer meetings with MBEs, and fewer bids from interested MBEs to review and evaluate, which could result in providing the contractor with additional time to prepare his competitive bid, providing a potential advantage over other bidders who advertised at least seven days prior to the bid opening to further the goal of maximum MBE participation in the project. E.M. Watkins & Company, Inc. v. Board of Regents, 414 So.2d 583 (1 DC) 1982) at p. 587. In C.H. Barco Contracting Company v. State Dept. of Transportation, 483 So.2d 796 (Fla. 1 DCA 1986), the District Court upheld DOT's decision to reject Barco's bid because it failed to meet the Department's minority participation goals. Instead of soliciting all Disadvantaged Business Enterprises (DBE), Barco selectively solicited DBEs, thereby allowing it to conceivably solicit only those DBEs that may produce quotes higher than non-DBEs, enabling Barco to avoid DOT's DBE goal. Likewise, Petitioner should have properly advertised to MBEs as required by Respondent's Special Conditions, to provide optimum opportunity for all qualified MBEs attracted to the project to fully participate and prepare their bids, given sufficient time by the Petitioner.

12. The Board of Regents should protect the integrity of the bidding process, and not allow the consideration of bids which are not responsive, for competitiveness and confidence in the bidding process will be undermined if bidders cannot rely on the bid specifications in submitting their bids. Tropabest Foods v. Dept. of General Services, 493 So.2d 50 (Fla. 1st DCA 1986).

13. It is within the discretion of the Board of Regents whether or not to reserve the right to grant a waiver of bid irregularities. Liberty City v. Baxter's Asphalt and Concrete, Inc., supra. Even when an agency reserves the right to waive bid irregularities, it is within the agency's discretion to determine whether or not waiver is appropriate. Id.

14. Rule 6C-14.021(5), F.A.C. provides that the Chancellor may waive "informalities" (e.s.) in a bid. The word, "informality" is defined in 43 C.J.S. at p. 714, to mean:

the quality or state of being informal; lack of, regular, prescribed or customary form, want of customary legal form, informality's the antithesis of formality and regularity, and its distinguishing feature is that it does not affect essence and substance.

The failure to provide prospective MBE participants with sufficient required time within which to respond to Petitioner's advertisement is not a mere informality. This defect in meeting the good faith efforts requirement is not merely a deviation from customary form; but instead, is a defect that goes directly to the essence and substance of the Respondent's MBE plan, as mandated by the Florida legislature.

15. A bid which contains a material variance is unacceptable. Tropabest Foods, Inc. v. Dept. of General Services, 493 So.2d 50 (Fla. 1st DCA 1986). The failure to advertise for MBE participation at least 7 (seven) days prior to bid opening is a material variance in the bid and should not be waived.

16. An agency may not waive a material variance in c bid. Robinson Electrical Co., Inc. v. Dade County, 417 So.2d 1032 (Fla. 3rd DCA 1982); Harry Pepper and Associates v. (City of Cape Coral, supra.

17. In Robinson Electrical Co., Inc. v. Dade County, 417 So.2d 1032, 1034, the court quoted with approval the following from 10 McQuillan, Municipal Corporations, 529-65 (3d Ed. rev. 1981):

In determining whether a specific noncompliance constitutes a substantial and hence nonwaivable irregularity, the courts have applied two criteria first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

18. The application of the above criteria establishes that the failure of Petitioner to advertise for MBE participation at least 7 (seven) days prior to bid opening, and the resultant failure of Petitioner to fully comply with the good faith efforts in meeting the MBE requirements is a material irregularity, and thus, the Respondent may not waive the deficiency. The waiver of petitioner's bid deficiency would undermine the integrity of the bidding process by rewarding a bidder who failed to satisfy the requirements for a valid bid. Such a waiver would send a message to future bidders that the bidding requirements are not mandatory but merely directory. Thus Petitioners's bid deficiency is material and Board may not waive the deficiency.

CONCLUSION

The Hearing Officer's Conclusion in the Recommended Order is rejected based upon the foregoing Findings of Fact and Conclusions of Law, and the following is adopted:

ORDERED that Petitioner's bid for project BR-183 was properly rejected by the Respondent, and that the Board of Regents may proceed with its award of the contract to the Intervenor, Charles R. Perry Construction, Co., Inc.

This FINAL ORDER constitutes final agency action and ,!an order under Chapter 120 of the Florida Statutes. Petitioner and Intervenor may obtain judicial review of this Final Order in the District Court of Appeal, in accordance with Section 120.68, F.S., and the Florida Rules of Appellate Procedure. Commencement of an appeal may be made by filing a Notice of Appeal with the Office of the Corporate Secretary of the Board of Regents and a copy of that Notice, together with the filing fee prescribed by law, with the Clerk of the Court, within 30 days after this order is dated as being filed in the Office of the Corporate Secretary.

THIS FINAL ORDER entered this 18th day of September, 1990.

BY: _____
Charles B. Reed
Chancellor
State University System of Florida