

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TRI-D, INC.,)
)
 Petitioner,)
)
 vs.) CASE NO. 90-5511
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A hearing was held in this case in Sarasota, Florida on March 14, 1991, before Arnold H. Pollock, a Hearing Officer with the Division of Administrative Hearings.

APPEARANCES

For the Petitioner: Charles J. Bartlett, Esquire
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For the Respondent: Harry R. Bishop, Esquire
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STATEMENT OF THE ISSUES

The issue for consideration in this matter is whether Petitioner, Tri-D, Inc., should be certified as a Disadvantaged Business Enterprise, (DBE), pursuant to Rule 14-78, F.A.C..

PRELIMINARY STATEMENT

By letter dated August 10, 1990, Juanita Moore, Manager of the Department of Transportation's, (Department), Bureau of Minority Programs advised Mrs. Nancy Ann Burton, Chairman of the Board of Tri-D, Inc., that her firm's application for certification as a DBE had been denied. Thereafter, on August 24, 1990, Charles J. Bartlett, Esquire, counsel for Tri-D, requested a formal hearing under Section 120.57(1), Florida Statutes, for his client, and by letter dated August 28, 1990, the file was forwarded to the Division of Administrative Hearings for appointment of a Hearing Officer. On September 17, 1990, counsel for the Department, on behalf of both parties, replied to the Initial Order, suggesting the hearing be held in Sarasota, and by Notice of Hearing dated September 28, 1990, the undersigned set the case for hearing in that location on

December 11, 1990. However, consistent with the parties' Joint Motion For Continuance, the hearing was postponed until March 14, 1991 at which time it was held as scheduled.

At the hearing, Petitioner presented the testimony of Rick B. Arnold, a sales representative; Lou DeMarco, Jr., Vice President and shareholder of Petitioner corporation; Donald W. Burton, founder and President and shareholder of the corporation; Philip Light, Vice President of a land development corporation; and Nancy Ann Burton, Chairman of the Board, Treasurer, and majority shareholder of Tri-D. Petitioner also introduced Petitioner's Exhibits 1 through 5.

Respondent presented the testimony of Howard G. Knight, operations and management consultant with the Department, and Russell A. Waldon, Assistant General Counsel of the Department of Transportation. Respondent also introduced Respondent's Exhibits A through C.

A transcript was provided. Both parties submitted Proposed Findings of Fact which have been ruled upon in the Appendix to this Recommended Order, and Petitioner submitted, in addition, written argument which has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to the matters concerned herein, the Respondent, Department of Transportation, was the state agency responsible for the construction and maintenance of state highways in Florida and for the certification of disadvantaged and minority business enterprises to do business with it. Petitioner, Tri-D, Inc., is a heavy construction firm whose primary business involves the installation of water, sewer and storm pipes, including conduits for all underground utilities, doing business in the State of Florida.

2. Tri-D, Inc., was organized and incorporated by Donald Burton in 1979. Mr. Burton was the sole owner and President until 1982 at which time his wife, Nancy Ann, became the Secretary/Treasurer of the corporation. In 1985, Lou DeMarco was hired as Vice President.

3. In 1986, Mrs. Burton and Mr. DeMarco each purchased 10 shares of corporation stock. In doing so, each became a one-third owner of the corporation.

4. In March, 1990, Mrs. Burton purchased an additional 20 shares of corporate stock, which has a par value of \$10.00 per share, for \$200.00. When this was done, fifty total shares were outstanding, of which Mrs. Burton owned sixty percent. Mr. Burton and Mr. DeMarco each owned twenty percent of the corporate shares. At the time Mrs. Burton became the sixty percent shareholder, she was also made Chairman of the Board of the corporation. Mr. Burton remains President, and Mr. DeMarco, Vice President. There have been no other changes in the corporate structure since that time. All three shareholders receive the same salary, \$600.00 per week.

5. The decision to make Mrs. Burton the majority shareholder came about as a result of the desire to facilitate Tri-D's qualification as a DBE. One month after her purchase of the controlling interest in the corporation, Tri-D applied for certification as a DBE and after investigation by the Department, the application was denied on the basis that Mrs. Burton did not exercise the requisite control of the firm.

6. Mr. Burton holds a state license in Florida as a registered underground utility contractor, the license under which Tri-D, Inc. does business. He has held that registration for approximately 6 or 7 years. It is not the type of registration which requires a competency examination.

7. Mr. Burton founded the company in 1979 and has been the President from that time on. He cannot remember whether he was sole stockholder at the time or not, but does recall that even in 1979, his wife was significantly involved with the business. Before she started with Tri-D, she had her own catering company, but when Tri-D started out, it grew with a speed beyond his expectations, and he was not able to handle it alone. As a result, Mrs. Burton gave up her own company in order to devote full time to the affairs of Tri-D.

8. Mrs. Burton did the things he was unable to handle from the time the company was started up to approximately 1985. At that point, she started taking control of the entire business because he had to devote his time to field operations. Because of the loss that Tri-D suffered as a result of a job that they were working on at that time, in which the original contractor was dismissed and Tri-D was required to finish up under the sole direction of Mrs. Burton, Mr. Burton has been very unhappy with the entire industry since, and his involvement with the company from a management standpoint has decreased radically. He is now getting into other investments and has other financial interests. He is a Director of the Southern Utilities Contractor Board, and he sits on the Board of the Florida Contractor's Association and on the National Utilities Contractors Board, as well as the National Wetlands Committee and the National Safety Committee of that Board. These various interests take up a substantial portion of his time, and were it not for Mrs. Burton being able to run the company, he would not be able to serve on them.

9. Mr. Burton sees the division of responsibilities at Tri-D as calling for Mr. DeMarco to handle the financial aspects and him, Burton, to handle field operations. Mrs. Burton actually brings it all together, coordinating the efforts of finance with those of operations, and making the ultimate decisions on anything that goes on. He has retained the title of President primarily because he could see no reason to change it. There are a lot of people who do not care to deal with women and because he retains the title of President, he can deal with them when they refuse to talk to his wife. He contends, however, that Mrs. Burton makes all decisions, not only on questions of finance, but also on questions of bids and contract letting, and she has final decision authority as to whether or not to take a contract or bid on one. Once that decision has been made by Mrs. Burton, then the financial aspects are controlled, to a degree, by Mr. DeMarco, and the operational concerns by Mr. Burton. Purchases by the company are approved by Mrs. Burton, as is the hiring and firing of employees, though the actual implementation of the decision might be left to someone else. Several years ago, Mrs. Burton was offered the title of President, to go with the realities of her responsibilities, but she declined it.

10. When Mrs. Burton purchased the additional shares in the company which brought her ownership up to 60%, she paid only the \$10.00 per share par value. At that time, for the additional minimum investment, she acquired a 60% ownership in all corporation tangible assets and good will which had been developed over the years since the company was founded. Mr. Burton justifies this on the basis that at the time, though she paid only par value, the corporation owed her a great deal of money representing sums she had loaned the company over the years. She estimates this at somewhat in excess of

\$100,000.00, much of which she inherited from her mother and grandmother. Mr. Burton cannot say where these loans are reflected in the company books, and Mrs. Burton indicates she has, somewhere, notes for only a portion thereof. Nonetheless, there is no evidence to contradict these assertions, and they are accepted. Item 32 on the application form shows a total of \$68,108.00 owed by the company to Mrs. Burton.

11. The Department's consultant, Mr. Knight, took the position that the fact that all three principals earn the same salary, \$31,500.00 per year, (\$600.00 per week), indicates that Mrs. Burton is not really the controlling owner since the relationship between salary and responsibility is one of the indicators for DBE qualification. However, Mr. Burton feels that the salary an individual makes need not necessarily be commensurate with that person's ownership in the corporation or, for that matter, with their responsibility. Mrs. Burton relates that up until a few years ago, she was not earning as much as her husband or Mr. DeMarco. However, because of the money she had invested in the company, and because of the fact that over the years she kept gaining more and more control of the business and assuming more and more responsibility, she felt she was entitled to make at least as much as everyone else was making. No dividend is paid at the end of each year. Any surplus is plowed back into the business.

12. Mr. Burton's field supervision amounts primarily to his driving around to the various jobs to oversee that the employees are working and to check with the job superintendent to insure that things are being done properly. If something needs to be taken care of, he works it out with the superintendent and makes sure that that individual has the information he needs to keep the job going. Though both Burtons are not usually in the field, at the same job, at the same time, there have been frequent occasions when he has been on a job site and she has shown up. When she is on the job in the field, she does exactly what he does - facilitate the completion of the job. In any event, if the field superintendent needs to call about the failure of supplies or equipment to get to the job site timely, he calls the main office where the message is delivered to Mrs. Burton who takes the necessary action to resolve the problem.

13. With respect to authority, Mrs. Burton leaves little doubt as to her opinion as to who controls the business. As she succinctly put it,

There is no doubt that I am the boss. There is no doubt. I mean, I've been the boss in our family. I'm the boss in Tri-D. I'll tell you the honest truth. I've got two boys; they both work for me. One goes to college part time and the other one works for me, and he goes to Mom for all decisions. He did when we were at home and he does now.

14. She admits that sometimes Mr. Burton is not entirely happy with the decisions she makes. In fact, on one occasion, "He did a few flips" about a decision she'd made, but her decision was not changed.

15. Mrs. Burton also admits she cannot be everywhere at all times, and she cannot do everything that needs to be done. As a result, she has delegated some of her responsibilities to others to implement, but the ultimate policy making and the overall conceptual decision making is done by her. Though her husband feels he has responsibility for field supervision, in reality she does not believe that during the last year he has been on the job that much. When he

gets there he causes problems because he is angry as a result of his disenchantment with the industry, and blows up and takes off. As a result, she encourages him not to go out on the jobs.

16. The field superintendents, she claims, primarily report to her. She has a radio in her office which allows her to stay in constant contact with the field superintendent on each of the jobs. In addition, she goes out to the jobs - not as much as she would like, but when it is necessary, and she claims she is on every job, one way or another, two or three times a week. It does not matter, however, whether she is physically present on site or not. Through the radio, she can be reached at any time. Mrs. Burton has qualified people whom she has put in charge of each of the company's jobs, but when the time comes for someone to "crack the whip" with the employees, she does it.

17. Mr. DeMarco's function is primarily financial, yet periodically she sees things he has done which she has to "whack him every now and then" for. She's not particularly happy with the way he pays the bills, and he comes to her to collect from the more recalcitrant clients. In short, he manages the routine financial aspects of the firm, but when it comes to big checks, subcontractors, or the important matters, she makes those decisions.

18. She admits she does not always sign all contracts entered into by Tri-D. On occasion, other employees, primarily Mr. Zeigler, have signed contracts, but they are not supposed to do so without her prior approval. On the rare occasion that her policy has been violated, she was furious, and as she stated, "I kinda beat him up a little bit." For the most part, however, if Mr. Zeigler wants something, needs something, or really has to have a financial question answered, he will come to her for help.

19. All major purchases must be approved by and cleared through her, and she is the company's primary liaison with the Gulf Coast Builders Exchange, an industry association which serves as a clearing house for contractors in the area and through which much of the company's business is derived. In 1982, through her efforts, the company was enrolled in the Exchange, and since that time, the company's membership has been in her name. No independent evidence was presented by the Department to rebut or contradict any of the above.

20. Mr. DeMarco's expertise is primarily in the field of accounting and finance, and his relationship with Tri-D is limited to that area. He does not get involved in field operations, and participates in the management of the company only to a limited degree. It is his understanding that company practice dictates that decisions be made by Mrs. Burton after they are discussed to some degree among Mrs. Burton, Mr. Burton and him. He is satisfied that Mrs. Burton has the final word, however.

21. Mr. DeMarco signs checks for the company, occasionally, but two signatures are required on company checks. In almost every case, Nancy Burton is one of the two signatories. In regard to payroll, however, the other signatory could well be the payroll clerk. Also, on occasion, he signs construction contracts for the company, but both Mr. and Mrs. Burton have independent authority to do that as well. If anyone else were to sign a contract for the company, it would have to be authorized first by Mrs. Burton.

22. Routine operating practice provides that when a contract comes in, it is first given to Mrs. Burton to look at and then is sent to the estimating department to be evaluated against the bid to be sure it is consistent with the bid submitted. If there are any comments to be made, they are discussed among

the parties, and then the contract is ultimately referred back to Mrs. Burton who can either elect to sign it or authorize someone else to do so. However, she is the final authority as to whether it is signed at all or not.

23. Mrs. Burton is also the individual who selects the lawyers and accountants used by Tri-D in its routine operations. Mr. Burton's role with the company is primarily in the field. His expertise is more in the area of mechanics and his involvement in the actual management of the company as regards financial management and contract administration is virtually nil.

24. According to Mr. DeMarco, even before the change in proportionate ownership in 1990, since his association with the firm in 1985, there really has been no change in operation. Mrs. Burton has always made all the ultimate decisions for the company. Even in the area of his expertise, financial matters, he does not have the authority to independently sign contracts without first securing approval from Mrs. Burton. Though he recently signed for the company on a \$200,000 loan, it was discussed with Mrs. Burton before hand and it constituted, in fact, only the renewal of an existing loan and not the initiation of a new loan resulting in increased company debt.

25. Rick Arnold, a sales representative for Barnie's Pumps, a company which sells equipment to contractors, including Tri-D, has dealt with Tri-D for the past 10 years and makes contact with company management about once a month. He first met Mr. Burton at a job site in 1981. His acquaintance with Mrs. Burton came about somewhat later, but he has known her for approximately 8 years. Unless he is called by Tri-D, he generally just periodically goes to one of the work sites and meets with either Mrs. Burton or Mr. Zeigler, the estimator. He has found Mrs. Burton to be knowledgeable concerning the industry in which Tri-D operates, and though his relationship with the company relates only to his product, what he sees in Tri-D's office when he is there indicates to him that Mrs. Burton is responsible for handling the entire scope of the business. When they speak, she seems familiar with the subject matter and understands the information he has to impart.

26. Based on his observation of the Tri-D operation over a 10 year period, he has concluded that Mr. Burton's role in the operation of the corporation has diminished considerably from what it used to be. He is comfortable with the decisions he gets from Mrs. Burton and does not feel, after having talked with her, that he has to find Mr. Burton or anyone else to confirm what she has decided. He believes that the impetus for Tri-D's preference to do business with him and his concern comes from Mrs. Burton.

27. Philip Light, Vice President of Luehring Land Development, who has been in the construction industry for approximately 25 years, has had business contacts with Tri-D since early in 1989. He recalls several substantial projects where Luehring was general contractor to Tri-D on projects. In each case, the relationship between the two corporations was formed through a bid process where Tri-D was awarded a subcontract. In all cases, Mr. Light's counterpart at Tri-D was either Mr. or Mrs. Burton. To his recollection, he would deal with Mrs. Burton approximately 60% of the time. Much of his relationship with Mr. Burton was related to field problems, though he also dealt with Mrs. Burton in the field.

28. As a result of his dealings with her, he believes without question that she is knowledgeable in all phases of the industry in which they both operate. On one occasion where a dispute developed on a project in which they were both involved, his negotiations during the litigation which resulted in the

settlement of that dispute was always with Mrs. Burton, and no one else from Tri-D was involved in the settlement discussions. Based on his observations as an outsider, but one who deals with Tri-D on a frequent basis on bidding, contracting, pricing and billing, he is satisfied that Mrs. Burton is the prime and controlling individual in the operations of that concern. He is also satisfied that both technically and administratively, she is fully aware of the responsibilities of the job and exercises supervision and control in both areas.

29. After Tri-D submitted its application for certification as a DBE, in accordance with Department rule, the file was assigned to Howard Knight who conducted the required investigation and on-site interview of Tri-D's operation, and prepared a summary of his findings for the certification committee within DOT.

30. In the on-site interview, conducted after advance notification, the consultant looks primarily at certain key functions of the minority program including ownership, management and control. He tries to determine if the minority owner of the firm owns 51% of the company, and whether that 51% is in stock and equipment or expertise and background. The Department does not question Mrs. Burton's majority ownership of the corporation. He also looks at whether or not the minority owner in fact has control of the company - whether or not that person acts independently of other people involved in the company operations, ownership or management. He looks at who is signing the documents and papers of the corporation and the checks, who is supervising, and who is hiring and firing. One criteria established by the federal government, as well as the state, is that the minority majority owner act independently of others.

31. Those steps were followed in Mr. Knight's survey of Tri-D which took place on June 27, 1990. During the interview, he worked primarily with Mrs. Burton, but also contacted some individuals from outside the company who had business relationships with Tri-D in an effort to determine with whom in the company they dealt. Some of these people dealt with Mrs. Burton exclusively, and some with others. For the most part, however, Mrs. Burton was accepted as at least an equal to her husband in business matters. It does not appear that Mr. Knight interviewed anyone in the company except Mrs. Burton.

32. Mr. Knight had some reservations regarding Mrs. Burton's control of the company. In his opinion, it appeared there was not sufficient control as called for by federal and state regulations. He perceived a lack of independence in her control of the corporation. In making that determination, he looked at several indicators which, to him, showed she acted either with her husband, with Mr. DeMarco, or with some other person in the firm, and in Mr. Knight's opinion, few of the actions she took were independent of someone else.

33. In support of that conclusions, Mr. Knight referred to the application and the on-site review check list accomplished at the time of the interview, which was filled out either by or in conjunction with the applicant, and in which certain questions were answered which led him to conclude Mrs. Burton did not act independently. Paragraphs 18 - 20 of the application, which ask for the names and titles of the individuals who perform certain managerial functions for the firm, provide spaces for two names as to each area. With only one exception, that dealing with the supervision of field operations, Mrs. Burton was one of the two individuals identified. The other was either Mr. DeMarco, Mr. Burton or Mr. Zeigler. This shows that while one of those three might perform some tasks, with the one exception, Mrs. Burton could perform all of them. This appears to be some substantial evidence of overall supervision and control. Nonetheless, because of the fact that Mrs. Burton's name was not

usually listed alone, all of the above established, in Mr. Knight's mind, that Mrs. Burton does not act independently of others in her management of the organization. In fact, the only thing he could see that she does by herself is hire and terminate employees. Only the question, "Who establishes policy procedures?" is answered utilizing Mrs. Burton's name alone.

34. Other factors which Mr. Knight felt indicated a lack of control by the minority party were what he perceived to be Mrs. Burton's lack of expertise and licenses to run the business, and he questions whether or not she can do so without the assistance of Mr. DeMarco from the financial side, and that of Mr. Burton and Mr. Zeigler from the operational standpoint. All of the business licenses of the firm are in Mr. Burton's name.

35. Comparing the resumes of Mr. and Mrs. Burton, and those of the other people in the company, led Mr. Knight to the conclusion that all those other than Mrs. Burton had more experience and expertise in the construction business. Further, Mr. Knight rejects Mrs. Burton's contention that her husband is not particularly involved in the business, finding instead that he is quite involved because he signs a lot of business documentation, repairs equipment, is out seeking jobs for the company, and serves on numerous boards and councils directly relating to the construction industry. He feels the company history, indicating that it was started by Mr. Burton, added to by Mr. DeMarco, and finally turned over to Mrs. Burton only recently supports his position. He also considers the company officer structure to indicate a lack of control in Mrs. Burton. The President of the company is, in his opinion, normally the one who makes decisions and runs the daily business of the company.

36. Mr. Knight also investigated the financial structure of the company relating to who signs and makes the loans, how the majority ownership was transferred to Mrs. Burton, and what she gave in return for that majority ownership. He was unable to develop much relevant information regarding the consideration paid for the stock above and beyond par value. With regard to the authority to sign loans, however, Mr. Knight felt it significant that Mr. DeMarco was the only signatory to a major loan to the company. He felt a loan of this size would ordinarily be signed for by the controlling owner of the corporation, and the fact that DeMarco did it and not Mrs. Burton was, to him, significant. This, however, is the renewal loan, the signature for which had been fully discussed with and coordinated on by Mrs. Burton.

37. Mr. Knight's summary was submitted to the Department's Certification Committee, whose function it is to recommend on any particular file whether or not the applicant should be certified as a DBE. The committee does not consider the report of the consultant to be a recommendation by itself. In fact, the consultants are instructed not to make recommendations to the committee, but to compile facts which are summarized for the committee and used by it in its independent determination of whether or not a recommendation for certification should be made to the Director. In the instant case, the committee recommended against certification of Tri-D.

38. The certification committee meets on a weekly basis and considers anywhere from 7 to 16 applications at any time. Three of the four committee members are voting members. Before the committee meets as a collegiate body, the individual files are circulated among the members for review, and by the time the members meet as a body to discuss and recommend, they should be familiar with the aspects of each application and be prepared to discuss it.

39. In the instant case, the committee accepted the fact that Mrs. Burton, the minority party, is, in fact the majority owner. They saw, however, a major problem regarding the day to day control of the corporation. It was clear to Mr. Waldon, in his review of the file and of Mr. Knight's report, that Mrs. Burton did not exercise the requisite day to day control of the company. That determination was based on his evaluation of some eight or nine factors listed on Schedule A of the application form, and includes such items as equipment purchases, hiring and firing, and the like. In almost all of those categories, according to Mr. Waldon, Mrs. Burton was listed as either the secondary person in authority or had no authority at all in a particular category. This latter claim is clearly contradicted by the evidence of record. Only in one area was she not listed as an actor.

40. Mr. Waldon admits that the review by the certification committee was based entirely on the documents contained in the file, and it was on the basis of those documents, the financial papers, the signatures on leases and loan papers, and those items which are contained in the documentation file, which led the committee to the conclusion that there was insufficient evidence to show Mrs. Burton exercised the requisite day to day control that one would expect from the chief managing officer of a corporation.

41. One of the primary indicators that the committee relied upon in reaching its conclusion was the fact that Mrs. Burton did not have the title of President of the corporation. Further, on the notarized application form, filled out by Mrs. Burton, she indicated she did not play a leading role in most of the categories looked at in determining whether or not she had day to day control of the entity. Again, this is merely the committee's interpretation of the answer.

42. When the committee reviews an application, it looks primarily at the applicant. While no one aspect of a file will control, each of the various aspects and documents in the file contributes to the overall picture generated in the collective minds of the committee as to whether or not the applicant meets the criteria for certification as a DBE. In this case, based purely on the documentation contained in the file, one piece of which was Mr. Knight's summary and evaluation, it appeared to the committee that both Mr. Burton and Mr. DeMarco had more authority, both individually and together, than did Mrs. Burton. It is important to note here that no member of the committee talked with Mrs. Burton or visited the site, nor did they talk with anyone else associated with the industry or with the corporation. They relied exclusively on the impressions gained by Mr. Knight and the documents submitted.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. Section 120.57(1), Florida Statutes.

44. In the instant case the Petitioner, Tri-D, Inc., has applied to the Department for certification as a DBE and sought a hearing based on the Department's denial of that application. As Petitioner, it has the burden of proof to establish its entitlement to certification by a preponderance of the evidence. *Florida Department of Transportation v. J.W.C. Co., Inc.*, 396 So.2d 778 (Fla. 1st DCA 1981).

45. The criteria by which applicants for disadvantaged business enterprise status are evaluated by the Department are set forth in the Department's Rule 14-78, F.A.C.. In general, the rule provides that to successfully obtain certification, the minority applicant must be able to establish that his operation is not only owned by a minority individual, but that that minority individual exercises fundamental control over the business operation and shares in not only the profits but the risks of the operation as well. While some functions can be delegated to a non-minority individual, the ultimate control and knowledge must not only be, but also appear to be, in the hands of the minority owner.

46. In the instant case, the Department does not dispute the fact that Mrs. Burton, the minority qualifier, is a 60% owner of the corporation for which the application was submitted. That half of the equation has been satisfied. The Department does, however, question whether the applicant satisfies, and has concluded that it has not met, the other portion of the equation which requires the minority owner to exercise ultimate control over the entity's operation.

47. The Department claims that Mrs. Burton's additional purchase of the controlling ownership in Tri-D, Inc. for no more than the stock's par value, especially in light of the fact that applicant admits that the additional sale was primarily to facilitate qualification for DBE status, was not a bona fide transfer of more than technical ownership. The Department contends that Petitioner has failed to establish, by a preponderance of the evidence, that Mrs. Burton exercises that degree of ultimate control over the organization's operations to qualify it for DBE status.

48. Not only does the Department question the consideration paid for Mrs. Burton's stock, it also questions the fact that she does not hold the title of President, but is merely the Chairman of the Board. In this regard, the Department apparently overlooks the fact that the Chairman is elected by the shareholders and is superior in rank and authority to the President who is an employee of the corporation, though he or she may also be a shareholder. Further, though not here described, often, while the President is also the Chief Operating Officer, the Chairman of the Board is also known as the Chief Executive Officer. The use of the term, "executive", clearly imports a degree of superiority and control over one who is merely in charge of operations.

49. The Department further relies on the application form submitted by the Petitioner which lists at least one co-actor with Mrs. Burton in each of the evaluation criteria listed on the form, claiming that since it is "obvious" that Mrs. Burton shares the function with the other person there listed, she cannot, therefore, exercise that requisite degree of ultimate control to qualify her organization. The Department appears to overlook, however, the fact that the form was designed by it and provides spaces for two or more individuals. It would seem, therefore, that the drafter of the form envisioned the possibility that two or more people might exercise responsibility for the accomplishment of any given task. In that regard, it is patently unfair to provide space for more than one name and then use the fact that both spaces are utilized against the applicant who forthrightly describes the exercise of that function.

50. The Department relies as an additional basis for disapproval on the fact that Mrs. Burton, reportedly in control of the operation, draws the same salary as each of the other owners. It claims this is not a common business practice, though it presented no evidence to that effect, and also disregards the substantial investment in the corporation made by her through her unrepaid loans over the years out of funds she inherited from her mother and grandmother.

In any case, the failure to take more in salary by virtue of her position does not in any way reflect upon her exercise of managerial and operation control over the affairs of the corporation. No dividends are paid and all profits are reinvested.

51. The Department contends that "it is still the business connections and professional associations of Mr. Burton which are the key to the success of Tri-D." The testimony, however, clearly indicates that while Mr. Burton continues to serve on the various professional boards and councils relevant to the construction business, it was Mrs. Burton who was the driving force behind the business' affiliation with the Gulf Coast Builders Exchange which serves as a clearing house for contractors in the area and through which information on many of the jobs on which Tri-D bids is secured.

52. The evidence also indicates that over the past several years, Mr. Burton's involvement in the activities of the corporation have diminished significantly. Those outsiders who testified at the hearing tended to indicate that their primary contact now in the areas of purchasing and subcontracting are with Mrs. Burton. The interview form prepared by Mr. Knight, which he utilized in the preparation of his evaluation summary and on which he noted the results of his outside contacts, also indicates that Mrs. Burton is contacted as much, if not more, than Mr. Burton. The notable exception is the one company listed thereon which clearly indicated its desire not to deal with women. Considering the purpose behind the legislation encouraging DBE enterprise, reliance on a non-compliant organization to support a denial of certification would appear to be inconsistent with the spirit and intent of the DBE program.

53. There is no doubt the Department's rule requires that the DBE be an "independent business entity", and that the ownership and control exercised by the disadvantaged individual must be "real, substantial, and continuing and go beyond mere pro forma ownership." (Rule 14-78.0057)(c), F.A.C.) It also requires that the disadvantaged owner have the power to direct management policies and operations and to make day to day as well as major business decisions concerning those areas. (Rule 14-78.005(7)(e), F.A.C.) In that regard, that provision suggests that in determining whether that criteria is met, the Department may look to the degree of control exercised by the non-disadvantaged individuals to determine whether those operatives exercise a "disproportionate" degree of operation, or whether there is any requirement which prevents the disadvantaged owner from making decisions without the concurrence of a non-disadvantaged owner.

54. Here the evidence shows that the situation is exactly the opposite. On balance, the evidence conclusively demonstrates that Mrs. Burton is the individual who has the ultimate responsibility for running the day to day business activities of the corporation, and the Department's claim that she approves the work of others "only in her capacity of office manager" flies in the face of substantial evidence to the contrary and is spurious. To be sure, she delegates certain tasks to others, and it may well also be true that she does not have the technical competence to carry out each and every aspect of every function within the company. Nonetheless, the evidence clearly shows that she, more than any other person associated with the company, retains the majority if not the totality of the ultimate management authority within the company. More than that, it is clear that for an individual without technical training, she has, over the years, developed a sufficient degree of expertise in the technical requirements of the organization's operations that she can and does, to a substantial degree, supervise and oversee field operations.

55. Even were this not the case, and field operations were left to the director of operations, Mr. Burton, the fact is that she is ultimately responsible for and controls not only the day to day operations, but also the policy making and long-range planning. This indicates her overall stewardship of the corporate function, and that conclusions is not offset by the fact that she may, as a good executive should, delegate certain of her responsibilities to subordinates who, it is clear, report to her and do not act other than within the authority delegated to them by the disadvantaged owner.

56. No matter what criteria are applied, when the live testimony of the several witnesses for Petitioner is weighed against the almost single point analysis by Mr. Knight and the documentary review by the committee, it cannot be otherwise concluded than that Petitioner has carried its burden of proof and established, by a preponderance of the evidence, that Tri-D, Inc. is controlled and operated by Mrs. Burton, the disadvantaged owner.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is, therefore:

RECOMMENDED that Tri-D, Inc. be certified as a disadvantaged business enterprise, (woman owned).

RECOMMENDED this 7th day of May, 1991, in Tallahassee, Florida.

ARNOLD H. POLLOCK, 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 7th day of May, 1991.

APPENDIX TO RECOMMENDED ORDER

The following constitutes my specific rulings pursuant to Section 120.59(2), Florida Statutes, on all of the Proposed Findings of Fact submitted by the parties to this case.

FOR THE PETITIONER:

1. - 5. Accepted and incorporated herein.

FOR THE RESPONDENT:

1. - 4. Accepted and incorporated herein.
5. Accepted to mean her experience is not as extensive as his.
6. First sentence rejected as unproven. Second and third sentences accepted. Fourth sentence accepted and incorporated herein with the additional finding that the loan was a renewal of a loan and was with Mrs. Burton's approval.

7. Accepted except for the finding that all current business was obtained by Mr. Burton (See testimony regarding contacts obtained through Gulf Coast Builders Exchange.)

8. Accepted and incorporated herein except that Mrs. Burton indicated that she had, over the years, invested in the business considerable sums she had inherited.

9. & 10. Accepted and incorporated herein.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the agency which will issue the Final Order in this case concerning its rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency which will issue the Final Order in this case.