

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE MURPHY CONSTRUCTION CO.,)
)
 Petitioner,)
)
vs.) CASE NO. 91-0848BID
)
DEPARTMENT OF TRANSPORTATION,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

On February 19, 1991, a formal administrative hearing was held in this case in Tallahassee, Florida, before J. Lawrence Johnston, Hearing Officer, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Randy Cropp
 Project Manager
 The Murphy Construction Co.
 1615 Clare Avenue
 West Palm Beach, Florida 33402

For Respondent: Paul J. Martin, Esquire
 Assistant General Counsel
 Department of Transportation
 605 Suwannee Street, MS-58
 Tallahassee, Florida 32399-0458

STATEMENT OF THE ISSUE

The issue in this case is whether the Respondent, the Department of Transportation (DOT), should award State Project No. 89030-3528 to The Cone Corporation, notwithstanding the bid protest filed by the Petitioner, The Murphy Construction Co., alleging that its bid was responsive and lower than The Cone Corporation's bid or, in the alternative, if its bid was nonresponsive, that The Cone Corporation's bid also was nonresponsive, and that the project should be re-bid. 1/

PRELIMINARY STATEMENT

The Petitioner, The Murphy Construction Co., and three others bid on State Project No. 89030-3528 in Martin County. Upon the opening of the bids on or about December 5, 1990, the Petitioner was the apparent second low bidder.

The bid of the Tom Quinn Company, Inc., the apparent low bidder, was reviewed by the DOT's Good Faith Efforts Committee of the DOT's Minority Programs Office for compliance with the project's Disadvantaged Business Enterprise (DBE) goals and was found to be nonresponsive. The Tom Quinn Company

did not meet the project's ten percent DBE participation goal and did not explain its efforts to meet the goal.

The Good Faith Efforts Committee then reviewed the bid of the Petitioner, as apparent second low bidder, and also found the Petitioner's goal to be nonresponsive as not meeting the DBE goal. The Petitioner's bid alleged DBE participation in the amount of 10.75% of the total bid, but the Good Faith Efforts Committee rejected \$26,571 worth of alleged DBE participation as not meeting pertinent bidding requirements. Without the \$26,571, the level of DBE participation in the Petitioner's bid dropped to 8.16%.

The Good Faith Efforts Committee then reviewed the next bid, the bid of The Cone Corporation, which was \$57,450 higher than the Petitioner's and which proposed 10.01% DBE participation. The Good Faith Efforts Committee found The Cone Corporation's bid to be responsive.

The findings and recommendations of the Good Faith Efforts Committee were submitted to the DOT's Technical Review Committee. The Technical Review Committee concurred with the Good Faith Efforts Committee that the apparent low bid and the apparent second low bid were nonresponsive and that the project should be awarded to The Cone Corporation.

On December 5, 1990, the findings and recommendations of the Technical Review Committee were submitted to the DOT's Contract Awards Committee. On December 21, 1990, the Awards Committee met and concurred with the Good Faith Efforts Committee and the Technical Review Committee that the apparent low bid and the apparent second low bid were nonresponsive but disagreed that the project should be awarded to The Cone Corporation, instead recommending that the DOT reject all bids and re-bid the project due to the low number of responsive bidders and low level of competitive bidding.

The Secretary of the DOT rejected the recommendation of the Awards Committee, instead concurring with Technical Review Committee, and caused to be issued, on January 17, 1991, notice of the DOT's intention to award the contract on the project to The Cone Corporation. The Petitioner timely filed its bid protest. No other bidder protested.

On or about February 6, 1991, the DOT referred the Petitioner's bid protest to the Division of Administrative Hearings. Final hearing was scheduled and held on February 19, 1991. The Petitioner appeared through its Project Manager, Randy Cropp, who gave testimony, elicited the testimony of three DOT employees, and had three exhibits introduced in evidence. In its case, the DOT recalled one of the DOT employees to testify and had four exhibits introduced in evidence.

Neither party ordered the preparation of a transcript of the final hearing. The Petitioner submitted written final argument, and the DOT submitted a proposed recommended order. Explicit rulings on the proposed findings of fact contained in the parties' submissions may be found in the attached Appendix to Recommended Order, Case No. 91-0848BID.

FINDINGS OF FACT

1. State Project No. 89030-3528 (the project) is for work on SR Bridge No. 890941 over Warner Creek in Martin County. The DOT solicited bids for the work and established December 5, 1990, as the deadline for submission of bids.

2. The DOT established, as its Disadvantaged Business Enterprise (DBE) goal for the project, a goal of ten percent participation by DBEs.

3. The Petitioner, The Murphy Construction Co., submitted a bid for the work in the amount of \$1,026,222.96. It was the apparent second lowest bid. The Tom Quinn Company, Inc., was the apparent low bidder, at \$846,216.87, but it did not meet the ten percent DBE goal and did not demonstrate good faith efforts to achieve the goal. The next lowest bidder, after the Petitioner, was The Cone Corporation's bid of \$1,083,672.95. There was one other bidder.

4. The Petitioner asserted that \$110,360, or 10.75%, of the work would be done by DBEs. The Petitioner alleged in its bid that \$26,571 worth of DBE work would be done by Advance Barricades & Signing, Inc. (Advance Barricades). The Petitioner's DBE Utilization Form for Advance Barricades & Signing, Inc., identified the DBE by name but left blank the parts of the form designated "Item No." and "Description (note if item qualifies for SUPPLIER)".

5. As a matter of agency policy, the DOT has required that the portion of the form designated as "Description (note if item qualifies for SUPPLIER)" be completed. A description of the work to be performed by the DBE has been considered essential. The DOT has required the description of the work to be performed by the DBE because: first, the DOT interprets the applicable rules to require it; and, second, because the purpose of the rule and policy is to enable the DOT's Minority Programs Office to monitor the performance of the contract to be sure that the representation as to DBE participation is carried out--i.e., not only that the representation as to the percentage of DBE work is met but also that the DBE does the work the contractor represents that the DBE will do. Monitoring is significant because it can prevent the bidder, if successful, from trying to take advantage of the DBE by asking the DBE to do work that the DBE is not prepared or equipped to do or by asking the DBE to do more work for the money than contemplated by the DBE at the time of the bid. It also can insure that bidders will not, in essence, pay a DBE for doing nothing.

6. Although the Petitioner's DBE Utilization Form gave the name of the DBE, it did not purport to describe the work the DBE was going to do. Although listing the name Advance Barricades and Signing, Inc., identified some of the work Advance Barricades does, it did not identify all of the work Advance Barricades does and, more importantly, did not identify the work the Petitioner was proposing that Advance Barricades was to do on the project in question. The DOT could have assumed what work Advance Barricades would do for the Petitioner, but it could not effectively monitor based on the assumption.

7. Sometimes a DBE subcontractor will complete and sign the DBE Utilization Form for the bidder. Sometimes, the DBE will telephone the bidder with its price, and the bidder will complete the form. In the latter case, if the form is completed, the DOT Good Faith Efforts Committee will, as a matter of policy, telephone the DBE to confirm the information. In this case, Advance Barricades provided the Petitioner with a written price for the work, but the Petitioner itself prepared and submitted a form for inclusion in its bid on the project and did not include Advance Barricades's written price. Because the Petitioner left blank the parts of the form designated "Item No." and "Description (note if item qualifies for SUPPLIER)", the Good Faith Efforts Committee did not telephone Advance Barricades to confirm or supplement the information submitted by the Petitioner with its bid.

8. The Cone Corporation's bid also included the representation that Advance Barricades would be doing work on the job that would qualify towards the DBE goal. Under the part of the form designated "Description (note if item qualifies for SUPPLIER)," The Cone Corporation stated, "SEE ATTACHED." Attached to the form was a proposal from Advance Barricades giving specific item numbers and descriptions of temporary barricades and signing, advance warning arrow panels, flashing lights, temporary pavement markings, and special detour signing to be furnished at a price of \$20,805.45. In this case, The Cone Corporation's bid included a copy of the Advance Barricades proposal, which provided an adequate description, including item numbers, of the work Advance Barricades would do for The Cone Corporation.

9. Despite the reasons for the DOT policy described in the preceding finding, the DOT has slipped into a practice of not requiring that the portion of the DBE Utilization Form designated "Item No." be completed. In addition, one-word generalizations--such as "pipe" or "trucking"--in the part of the form designated "Description (note if item qualifies for SUPPLIER)" are accepted by the DOT even though they may be insufficient to enable the DOT's Minority Programs Office to determine what kind of pipe or trucking is meant. Indeed, the DOT would have accepted description "barricades and signing" in the Petitioner's case. But these descriptions are inadequate to serve the purpose of the rule that the DBE work be described in the bid documents. For example, the word "pipe," without item numbers, does not identify the type or quantity of pipe to be provided. Indeed, the DOT's DBE Utilization Form gives evidence that more of a description initially was contemplated by the DOT. The form provides a space designated "Item No." In addition, the part of the form provided for the description of the DBE work also states: "(note if item qualifies for SUPPLIER)." (Emphasis added.) The form infers that the description will include the item number. Otherwise, it would be very difficult, and in some cases impossible, for the Minority Programs Office to effectively monitor the progress of construction.

10. In this case, The Cone Corporation's bid included a copy of the Advance Barricades proposal, which provided an adequate description, including item numbers, of the work Advance Barricades would do for The Cone Corporation. But its DBE Utilization Form for H.S. Thompson described \$85,702 worth of DBE work as "concrete, rebar and pipe." Under the column marked "Item No.," The Cone Corporation put, "various." If H.S. Thompson were going to do all of the "concrete, rebar and pipe" on the project, it would have been doing more like \$540,000 worth of work for The Cone Corporation. Like the Petitioner's DBE Utilization Form for Advance Barricades, the H.S. Thompson form was inadequate to serve the monitoring purposes of the DOT's policy.

11. The DOT now is in the process of considering whether to amend its rules, perhaps to provide that all proposed DBE participation be confirmed by telephone in order to avoid outcomes like the one its Good Faith Efforts Committee, Technical Review Committee, and Contract Awards Committee recommended in this case--the rejection of a bid as nonresponsive in favor of a higher bid that proposes a smaller percentage of DBE participation.

CONCLUSIONS OF LAW

A. Pertinent Statute and Rule.

12. Section 339.0805, Fla. Stat. (1989), provides in pertinent part:

(1)(a) Except to the extent that the head of the department determines otherwise, not less than 10 percent of the amounts expended from the State Transportation Trust Fund shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by the Surface Transportation and Uniform Relocation Assistance Act of 1987.

(b) In fulfilling this mandate, the department shall utilize every means available to it, including, but not limited to, goals and set-asides for competitive bidding and contracting only by, between, and among those firms which are certified by the department as socially and economically disadvantaged business enterprises and which are prequalified as may be appropriate. It is the policy of the state to meaningfully assist socially and economically disadvantaged business enterprises through a program that will provide for the development of skills through business management training, as well as financial assistance in the form of bond guarantees, to primarily remedy the effects of past economic disparity. Such competitive bids may be the result of joint ventures between small business concerns which are owned and controlled by socially and economically disadvantaged individuals and other subcontractors.

* * *

(5) The department shall promulgate rules for implementing the directives contained in this Section.

13. F.A.C. Rule 14-78.003 provides in pertinent part:

(2) To implement its DBE goal program the Department may:

* * *

(b) establish contract goals on each contract with subcontracting opportunities for certified DBEs.

1. In setting contract goals, the Department shall consider the following factors:

- a. the type of work required by the contract to be let;
- b. the subcontracting opportunities in the contract to be let;

2. For contracts with an estimated total dollar amount of \$1,000,000 or less, the contract goals shall not exceed 50 percent of the identified potential for DBE participation.

For contracts with an estimated total dollar amount of \$1,000,000, the contract goals shall not exceed 75 percent of the identified potential for DBE participation.

3. For all contracts for which DBE contract goals have been established, each bidder shall meet or exceed or demonstrate that it could not meet, despite its good faith efforts, the contract goals set by the Department. The DBE participation information shall be submitted with the contractor's bid proposal. Award of the contract shall be conditioned upon the bid proposal and upon satisfaction of the contract goals or, if the goals are not met, upon demonstrating that good faith efforts were made to meet the goals. Failure to satisfy these requirements shall result in a contractor's bid being deemed nonresponsive and the bid being rejected.

a. The contractor's bid submission shall include the following information:

i. The current names, telephone numbers, and addresses of certified DBE firms that will participate in the contract;

ii. A description of the work each named DBE firm will perform;

iii. The dollar amount of participation by each named DBE firm;

iv. Any documentation required by the contract or applicable rules as evidence of DBE participation.

v. If the DBE goal is not met, sufficient information to demonstrate that the contractor made good faith efforts to meet the goals.

B. Nature of 120.53(5) Bid Protests.

14. The nature of bid protests under Section 120.53(5), Fla. Stat. (1989), was explained in *Capeletti Bros., Inc., v. Dept. of General Services*, 432 So. 2d 1359, 1363-1364 (Fla. 1st DCA 1983), it was held:

Capeletti also contends that the hearing officer erred in not imposing upon Bergeron the burden at hearing to prove that DGS' previously announced intention to reject all bids was arbitrary, capricious and unreasonable. Capeletti misconceives the purpose of the s. 120.57 hearing. The rejection of the bids never became final agency action. As we have previously held, APA hearing requirements are designed to give affected parties an opportunity to change the agency's mind. *Couch Const. Co. v. Department of Transp.*, 361 So. 2d 172, 176 (Fla. 1st DCA 1978); *McDonald v. Department of Banking and Finance*, 346 So. 2d 569, 584 (Fla. 1st DCA 1979 [sic]).

"Section 120.57 proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily."
McDonald, supra at 584.

This explanation is consistent with other conventional expressions of the nature of proceedings before DOAH hearing officers under Section 120.57(1), Fla. Stat. (1989).

15. At the same time, the law has been equally clear that the appellate standard of review of final agency decisions to award a competitive bid requires that the courts defer to the agency's decision, except in limited circumstances, and not substitute its judgment for that of the agency. See generally *Liberty County v. Baxter's Asphalt and Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982); *Couch Constr. Co., Inc. v. Dept. of Transp.*, 361 So. 2d 172, 175 (Fla. 1st DCA 1978); *Systems Dev. Corp. v. Dept. of Health, etc.*, 423 So. 2d 433, 434 (Fla. 1st DCA 1982).

16. In *Dept. of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912 (Fla. 1988), a case involving an agency's decision to reject all bids, the Court held:

Thus, although the APA provides the procedural mechanism for challenging an agency's decision to award or reject all bids, the scope of the inquiry is limited to whether the purpose of competitive bidding has been subverted. In short, the hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly.

Id. at 914. The Court did not explain the conflict between its decision and the First District's decision in *Capeletti*, supra.

17. Although the *Groves-Watkins* case involved an agency's decision to reject all bids, the language of the Court's opinion might suggest that the Court also was saying a case involving an announced agency intention to award a bid, as in this case, should be treated like cases involving announced agency intention to reject all bids. However, it is concluded that what the Court may have been saying regarding cases involving announced agency intention to award a bid was dicta that went beyond the precise holding in the case.

C. Waiver of Irregularities.

18. "[A]lthough a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. It is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition. . . . [T]he purpose of competitive bidding is to secure the lowest possible responsible offer and minor irregularities can be waived in effectuating this purpose." *Tropabest Foods, Inc., v. Dept. of General Services*, 493 So. 2d 50, 52 (Fla. 1st DCA 1986).

D. The Irregularities in the Petitioner's Bid.

19. Under the particular facts of this case, the Petitioner's bid was irregular in that the Petitioner's DBE Utilization Form had no information in the space designated "Description (note if item qualifies for SUPPLIER)."

20. The irregularity in the Petitioner's bid was material for two reasons: first, the irregularity was a violation of DOT rules which provide on their face that a violation will result in a bid being nonresponsive, and the DOT interprets the rule to mean what it says; second, by requiring a description of the work, the DOT's Minority Programs Office is able to monitor construction to determine whether the DBE does the work the bidder represents that the DBE will do. Monitoring is significant because it can prevent the bidder, if successful, from trying to take advantage of the DBE by asking the DBE to do work that the DBE is not prepared or equipped to do or by asking the DBE to do more work for the money than contemplated by the DBE at the time of the bid. It also can insure that bidders will not, in essence, pay a DBE for doing nothing.

21. It was not good enough for the Petitioner to have given the name of the DBE, as required by the rule. The rule also required the Petitioner to describe the work the DBE was going to do. Although listing the name Advance Barricades and Signing, Inc., identified some of the work Advance Barricades does, it did not identify all of the work Advance Barricades does and, more importantly, did not identify the work the Petitioner was proposing that Advance Barricades was to do on the project in question. The DOT could have assume what work Advance Barricades would do for the Petitioner, but it could not effectively monitor based on the assumption.

E. The Cone Corporation's Bid.

22. The DOT has slipped into the practice of accepting, without accompanying item numbers, general and vague descriptions of the DBE work being proposed. One word descriptions such as "pipe" and "trucking" have been accepted. But these descriptions are inadequate to serve the purpose of the rule that the DBE work be described in the bid documents. For example, the word "pipe," without item numbers, does not identify the type or quantity of pipe to be provided. Indeed, the DOT's DBE Utilization Form gives evidence that more of a description was contemplated by the rule. The form provides a space designated "Item No." In addition, the part of the form provided for the description of the DBE work also states: "(note if item qualifies for SUPPLIER)." (Emphasis added.) The form infers that the description will include the item number. Otherwise, it would be very difficult, and in some cases impossible, for the Minority Programs Office to effectively monitor the progress of construction, as the rule is intended to enable it to do.

23. In this case, The Cone Corporation's bid included a copy of the Advance Barricades proposal, which provided an adequate description, including item numbers, of the work Advance Barricades would do for The Cone Corporation. But its DBE Utilization Form for H.S. Thompson described the work as "concrete, rebar and pipe." Under the column marked "Item No.," The Cone Corporation put, "various." Like the Petitioner's DBE Utilization Form for Advance Barricades, this was inadequate to serve the monitoring purposes of the rule, and The Cone Corporation's bid also should have been rejected as nonresponsive for not providing the description of the work called for in the rule and form.

F. The Petitioner's Standing.

24. The DOT contends that, because the Petitioner's bid was nonresponsive, it does not have standing to protest in the alternative that all bids should be rejected. It could be argued that the decision in *Westinghouse Electric Corp. v. Jacksonville Transp. Auth.*, 491 So. 2d 1238 (Fla. 1st DCA 1986), supports this contention. But the fact in *Westinghouse* are distinguishable from the facts of this case.

25. In *Westinghouse*, the petitioner's "bid" was a "ruse, namely a box weighted with papers marked 'Price Proposal' on the outside," through the use of which "Westinghouse effectively enticed [its competitor] into submitting its best, good faith, bonded bid." *Id.* at 1241. The Court stated: "This 'sandbagging,' if permitted, would erode the integrity of the public bidding process." *Id.*

26. In this case, in contrast, the Petitioner alleges initially that its bid is the lowest responsive bid. While the Petitioner's initial position is rejected, the Petitioner submitted a good faith bid that was nonresponsive for essentially the same reason The Cone Corporation's bid is determined to be nonresponsive. Under these circumstances, it is concluded that the Petitioner has standing to complain, in the alternative, that The Cone Corporation's bid also is nonresponsive and that all bids should be rejected and the project re-bid.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Respondent, the Department of Transportation, enter a final order rejecting all bids on State Project No. 46090-3511.

RECOMMENDED this 12th day of March, 1991, in Tallahassee, Florida.

J. LAWRENCE JOHNSTON
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 12th day of
March, 1991.

ENDNOTES

1/ The DOT contends that, if the Petitioner's bid is nonresponsive, it has no standing to raise, in the alternative, the issue whether the DOT should reject all bids. This contention is rejected. See Conclusions of Law.

APPENDIX TO RECOMMENDED ORDER

To comply with the requirements of Section 120.59(2), Fla. Stat. (1989), the following rulings are made on the parties' proposed findings of fact:

Petitioner's Proposed Findings of Fact.

(The Petitioner's post-hearing submission was not in the form of a proposed recommended order and did not contain proposed findings of fact identified as such. However, the submission does contain proposed findings of fact, and an attempt will be made to rule on the proposed findings of fact by treating each unnumbered paragraph of the submission as a separate proposed finding of fact and by consecutively numbering each paragraph after the colon for purposes of this Recommended Order.)

1. Second half of the last sentence, rejected as not proven. The rest is rejected in part as argument, but otherwise accepted and incorporated to the extent not subordinate or unnecessary.

2. Accepted and incorporated to the extent not subordinate or unnecessary.

3. Last sentence, rejected as contrary to facts found and not proven. The DOT has slipped into the practice of accepting inadequate descriptions, but it is found and concluded that the DOT rule and policy contemplate that item numbers should be included to make the descriptions adequate. Otherwise, accepted and incorporated to the extent not subordinate or unnecessary. However, although "pipe" does not necessarily identify the item number or the type of pipe, it does serve to narrow the possible work to be given to the DBE to some kind of pipe.

4. Although the Thompson form may have been illegible, at least in part, to some people, rejected as not proven that it was objectively illegible or that the DOT admitted that it was illegible. Otherwise, accepted and incorporated.

5. Last sentence, rejected in part as conclusion of law in that the DOT's first obligation is to follow the applicable statutes and rules. Otherwise, accepted and incorporated to the extent not subordinate or unnecessary.

6. Last sentence, in that it proposes that the two situations are the same, rejected as not proven and as contrary to the greater weight of the evidence, and in that it proposes that the bid was not "materially affected," rejected in part as conclusion of law and in part as not proven and as contrary to the greater weight of the evidence. Otherwise, accepted but subordinate and unnecessary.

7.-8. Accepted and incorporated.

9.-10. Accepted and subordinate to facts found.

11. Rejected in large part as argument. The issue in this case is compliance with the rules, as interpreted by the DOT.

12. The facts are accepted and incorporated to the extent not subordinate or unnecessary. The argument is rejected.

Respondent's Proposed Findings of Fact.

1.-3. Accepted and incorporated to the extent not subordinate or unnecessary.

4. Rejected as conclusion of law and unnecessary.

5. First sentence, rejected as conclusion of law and unnecessary. Second sentence, accepted and incorporated.

6. Accepted and incorporated.

7. Accepted but subordinate and unnecessary. (Covered in the Preliminary Statement.)

8. Accepted and incorporated. However, based on the Findings of Fact and Conclusions of Law, it is recommended that the DOT reject all bids.

COPIES FURNISHED:

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE MURPHY CONSTRUCTION CO.

Petitioner,

vs.

CASE NO. 91-0848BID

DEPARTMENT OF TRANSPORTATION

Respondent.

_____ /

FINAL ORDER

Pursuant to Notice, these matters came to be heard on February 19, 1991, in Tallahassee, Florida, before J. Lawrence Johnston, Hearing Officer, Division of Administrative Hearings. This Order is entered by the Secretary of the Department of Transportation, pursuant to Section 120.59, Florida Statutes, following a review of the record and Recommended Order entered in this cause by the Hearing Officer.

The parties were represented at hearing as follows:

Petitioner: Mr. Randy Cropp, Project Manager
The Murphy Construction Co.
1615 Clare Avenue
West Palm Beach, Florida 33402;

Respondent: Paul J. Martin, Esquire
Assistant General Counsel
Florida Departments of Transportation
605 Suwannee Street, MS-58
Tallahassee, Florida 32399-0458;

The Department herein adopts the Findings of Fact made by the hearing officer as stated in his Recommended Order dated March 12, 1991, except as specifically noted below. In making reference to various portions of the record in this case, the letter P refers to page number of the transcript, and the letter L refers to a line number on that page.

1. The hearing officer's Recommended factual findings Nos. 1-5 are adopted herein by the Department.

6. The hearing officer's recommended Finding of Fact No. 6 is adopted in part. The last sentence is rejected as not being based on competent substantial evidence. (P 45, L 10-12) The Department could not assume what type of work Advanced Barricades, Inc. would do simply by its name, because Advanced Barricades performs work other than barricade work. (P 57, L 19- 25; P 58, L 1.)

7. The hearing officer's Recommended Findings of Fact Nos. 7 and 8 are adopted herein.

8. One word descriptions of the proposed work are acceptable and sufficient to enable the minority programs office to monitor contract compliance by prime contractors. (P 49, L 22-25; P 50, L 1, L 19-25; P 51, L 1; P 75, L 8-10, 25; P 76, L 1-25; P 77 L 1-8.)

9. The hearing officer's Recommended Finding of Fact No. 10 is adopted in part. The last sentence is rejected as not being based on competent substantial evidence. (See record citations in No. 9 above.)

10. Recommended Finding of Fact No. 11 is adopted.

CONCLUSIONS OF LAW

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

2. Section 339.0805, Florida Statutes (1989), provides in part:

(1)(a) Except to the extent that the head of the department determines otherwise, not less than 10 percent of the amounts expended from the State Transportation Trust Fund shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by the Surface Transportation and Uniform Relocation Assistance Act of 1987.

(b) In fulfilling this mandate, the department shall utilize every means available to it, including, but not limited to, goals and set-asides for competitive bidding and contracting only by, between, and among those firms which are certified by the department as socially and economically disadvantaged business enterprises and which are prequalified as may be appropriate. It is the policy of the state to meaningfully assist socially and economically disadvantaged business enterprises through a program that will provide for the development of skills through business management training, as well as financial assistance in the form of bond guarantees, to primarily remedy the effects of past economic disparity. Such competitive bids may be the result of joint ventures between small business concerns which are owned and

controlled by socially and economically disadvantaged individuals and other subcontractors.

* * *

(5) The Department shall promulgate rules for implementing the directives contained in this Section.

3. Rule 14-78.003, F.A.C., provides in pertinent part:

(2) To implement its DBE goal program the Department may:

* * *

(b) establish contract goals on each contract with subcontracting opportunities for certified DBEs.

1. In setting contract goals, the Department shall consider the following factors:

a. The type of work required by the contract to be let;

b. The subcontracting opportunities in the contract to be let;

2. For contracts with an estimated total dollar amount of \$1,000,000 or less, the contract goals shall not exceed 50 percent of the identified potential for DBE participation. For contracts with an estimated total dollar amount of \$1,000,000, the contract goals shall not exceed 75 percent of the identified potential for DBE participation.

3. For all contracts for which DBE contract goals have been established, each bidder shall meet or exceed or demonstrate that it could not meet, despite its good faith efforts, the contract goals set by the Department. The DBE participation information shall be submitted with the contractor's bid proposal. Award of the contract shall be conditioned upon submission of the DBE participation information with the bid proposal and upon satisfaction of the contract goals or, if the goals are not met, upon demonstrating that good faith efforts were made to meet the goals. Failure to satisfy these requirements shall result in a contractor's bid being deemed nonresponsive and the bid being rejected.

a. The contractor's bid submission shall include the following information:

i. The current names, telephone numbers, and addresses of certified DBE firms that will participate in the contract;

ii. A description of the work each named DBE firm will perform;

iii. The dollar amount of participation by each named DBE firm;

iv. Any documentation required by the contract or applicable rules as evidence of DBE participation.

v. If the DBE goal is not met,
sufficient information to demonstrate that
the contractor made good faith efforts to
meet the goals.

4. The clear language of the rule cited supra mandates that a bid submission include evidence that the DBE goal is met, or evidence of good-faith effort to meet the goal; failure to include such evidence will cause the bid to be rejected. Murphy failed to include the description of the work which Advanced Barricades would perform on the project. Without the participation level of Advanced Barricades in its bid, Murphy's proposal did not meet the 10% goal requirement of the project. The Department was required as a matter of law to reject Murphy's bid because it did not conform with bid specifications in a material respect, and was non-responsive. C. H. Barco Contracting Company v. State of Florida Department of Transportation, 483 So.2d 796 (Fla. 1st DCA 1986). Because the defect in Murphy's bid affected the dollar amount of the bid, it was material, as it gave Murphy an advantage not enjoyed by other bidders. Harry Pepper & Associates v. City of Cape Coral, 352 So.2d 1190 (Fla. 2d DCA 1978).

5. Murphy's bid was non-responsive and as such was a non-bid. Murphy does not have standing to challenge the responsiveness of Cone Corporation's bid. Westinghouse Electric Corporation v. Jacksonville Transportation Authority, 491 So.2d 1238 (Fla. 1st DCA 1986).

6. The scope of inquiry in a bid protest is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly in rejecting a bid. Department of Transportation v. Groves-Watkins Constructors, 530 So.2d 912, (Fla. 1988). The Department followed its published rule 14-78.003 and therefore did not act fraudulently, arbitrarily, illegally or dishonestly in determining Murphy's bid non-responsive.

ORDER

Upon consideration of the Findings of Fact and the Conclusions of Law reached

IT IS ORDERED, that the State of Florida, Department of Transportation dismiss the bid protest filed herein by Petitioner, Murphy Construction Company. It is further ordered that Cone Corporation, as the lowest responsive bidder, is hereby awarded State Project No. 89030-3528.

DONE AND ORDERED this __10th__ day of May, 1991, in Tallahassee, Leon County, Florida.

BEN G. WATTS, P.E.
SECRETARY
Florida Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

RIGHT TO APPEAL

This Order constitutes final agency action and may be appealed by Petitioner pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure, by filing a Notice of Appeal conforming to the requirements of Rule 9.110(d), Florida Rules of Appellate Procedure, both with the appropriate district court of appeal accompanied by the appropriate filing fee, and with the Department's Clerk of Agency Proceedings, Haydon Burns Building, 605 Suwannee Street, M.S. 58, Tallahassee, Florida 32399-0458, within thirty (30) days of rendition of this Order.

Copies furnished to:

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Hearing Officer
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