STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES E. BURKETT AND ASSOCIATES, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 92-0896
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
	)	

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 July 15, 1992, in Daytona Beach, Florida.

APPEARANCES

FOR PETITIONER: Theodore E. Mack, Esquire
Cobb, Cole, and Bell
131 North Gadsden Street
Tallahassee, Florida 32301

FOR RESPONDENT: Pamela S. Leslie, Esquire
Pamela A. Arthur, Esquire
Department of Transportation
605 Suwannee Street, MS #58
Tallahassee, Florida 32399-0458

PRELIMINARY STATEMENT

The Petitioner, Charles E. Burkett and Associates, Inc. (hereafter Burkett), is an applicant for a Disadvantaged Business Enterprise (DBE) certificate to provide professional engineering services under contract to the Florida Department of Transportation (DOT). The DOT denied the Petitioner's application for DBE certification because it asserted that the disadvantaged owner did not control the day to day operations of the business because she lacked the expertise in critical areas of operation of the business. This determination was based upon amendments to Rule 14-78-005,(7),(e),2, 8, and 9, Florida Administrative Code, adopted in June of 1991.

The Petitioner, having been notified that its application for DBE status had been denied, filed petitions challenging the Department's rule cited above, and the Department's decision denying its application. The cases were heard together, and at the hearing, the Petitioner called no witnesses. The Respondent presented the testimony of one witness, Ms. Juanita Moore, Manager of the Department's Contracts Administration Office and former Manager of the Department's Minority Programs Office. Petitioner presented two exhibits into evidence, and Respondent presented three exhibits into evidence.

Following the hearing, both parties submitted proposed findings which were read and considered. The Final Order sustaining the validity of the Department's rule was issued earlier. Thereafter, the parties were permitted to supplement their post hearing pleadings in this case. The supplemental findings were read and considered. Appendix A states which of these findings were adopted, and which were rejected and why.

FINDINGS OF FACT

1. The DOT, as a state agency, is charged with developing a DBE program for contractors dealing with the Department.

2. Burkett is a Florida corporation whose sole stockholder is a white female American. She meets the criteria of a socially and economically disadvantaged individual. Burkett applied for certification as a DBE on July 12, 1991, and was denied by the Department on October 1, 1991.

3. Burkett submitted additional information and made changes to its internal organization to better conform to the Department's requirements; however, the Department has denied Burkett DBE status on the basis of the owner's alleged lack of expertise in the critical areas of the firm's operation, to wit; she does not possess education or training in engineering.

4. The DOT interprets "critical areas of operation" to mean the technical area in which the DBE certification is being sought. Management limited to the day-to-day normal business operations is not considered to be a "critical area of operations."

5. Evidence of expertise is dependent upon the nature of the business; however, the DOT expects to see education or experience on the part of the disadvantaged owner in the technical area of operations of the business.

6. The DOT denied the Petitioner because the disadvantaged owner did not possess engineering experience or education.

7. The disadvantaged owner is the widow of the founder of the business who died of a form of multiple sclerosis. As her husband lost the ability to direct the operations of the company, the owner assumed more and more responsibility for the day to day operations of the company. Professional engineers were hired to handle the technical aspects of the business; however, she clearly directed the hiring and firing of engineering staff. In this regard, her son and son-in-law, who are both trained engineers, came into the business. Her son-in-law left when the owner limited his participation in the business. Her son remains in the business as head of the engineering operation; however, she actively participates in the assessment of projects and preparation and presentation of bids. She is in overall control of the company, and, although she does not make direct assignments of tasks to engineers and draftsman, she does oversee their work. She has pointed out to her son draftsmen who are under utilized, and given directions to assign the men more work and terminate them.

8. The owner does not have any formal engineering training or experience in technical engineering work.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter, and this order is entered pursuant to Section 120.57, Florida Statutes.

10. Section 339.0805(1),(c), Florida Statutes, provides:

> (c) The department shall certify a socially and economically disadvantaged business enterprise[s]. . . .

11. Section 334.044,(2), Florida Statutes, provides that the Department is authorized to adopted rules for the conduct of its business operations and the implementation of any provision of law for which the Department is responsible. Pursuant to that authority the Department enacted Rule 14-78-005,(7),(e),8., Florida Administrative Code, which provides:

> The minority owners shall have managerial and technical capability, knowledge, training, education or experience required to made decisions in the critical areas of operation.

12. The Department also promulgated Rule 14-78.005, (7),(e),2., supra, which provides that the minority owner's knowledge of the particular business, background, involvement in the business on a day-to-day basis, expertise, involvement by the non-minority owners, employees or non-minority employees, other full or part-time employment by the minority applicant and the size of the applicant's business be considered. Rule 14-78.005, (7),(e),9., supra, provides that minority owners shall display independence and initiative in seeking, and negotiating contracts, accepting and rejecting bids and in conducting all major aspects of the business; and in those instances in which the minority owners do not directly negotiate contracts, but claim to approve or reject bids and agreement, the minority owners shall demonstrate that they have the knowledge and expertise to independently make contractual decisions.

13. The Department cites in its brief Whitworth-Borta, Inc. v. Jim Burnley, No. G87-176CAS, 1988 WL 242625 (W.D. Mich June 28, 1988), in which the court, faced with facts very similar to those presented and application of a rule very similar to the Respondent's rule, stated:

> The Court's review of the Department's decision is confined by a limited standard of review. In the face of the present challenge, the decision must be sustained unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.
>
> * * *
>
> At we noted in National Steel Corp. v. Gorsuch, 700 F.2d 314, 321 (6th Cir. 1983), it is not necessary that the agency's construction of the statute be the only permissible one. Rather, its construction "must be upheld unless that view is plainly unreasonable.
>
> * * *

> While this Court may well have reached a different conclusion had it reviewed the Whitworth-Borta application in the first instance, it cannot be said that the Department's decision is arbitrary, capricious or an abuse of discretion.
>
> Nor does the court believe the Department exceeded its authority by considering Mr. Whitworth's lack of engineering expertise in determining the extent of his business control. The term "control" is of necessity indefinite and flexible, enabling the Department to exercise reasonably broad discretion in assessing the facts and circumstances of each application.
>
> * * *
>
> In sum, it appears the department applied the MBE certification eligibility standards reasonably in concluding Whitworth-Borta had not carried its burden of proof that it is "controlled" by Mr. Whitworth.

13. To summarize the instant facts, the Department of Transportation is designated to administer the DBE program relating to highway construction within the state. DOT is authorized to promulgate rules regarding all the programs which it administers. It has adopted the series of rules which implement the Florida statute requiring that the disadvantaged owner control the business seeking DBE certification by explicating "control," as used in the statute, to mean having the requisite knowledge, experience, and education to understand and participate in the technical operations of the business.

14. Although it appears that the term "control," as used in the Section 337.139 and 339.0805, Florida Statutes, relates to insuring that the applicant is really owned by a disadvantaged individual and not a non-disadvantaged individual hiding behind a wife or daughter to whom a majority share of the business has been transferred, the Department's rule extending "control" to include more than administrative/managerial functions is reasonable to implement the mandate to provide economic assistance to DBE's in harmony with the Department's interest that qualified businesses and individuals are attracted to engage in the technically oriented businesses related to building its roads, bridges and similar structures. Because a reasonable basis exists for the rule, the rule was determined to be valid in the companion case.

15. Applying that rule to the facts surrounding the owner's activities in the company, the owner does not have the expertise and technical capability, knowledge, training, education or experience to in critical areas of operation.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department of Transportation deny the Petitioner's request for Disadvantaged Business Enterprise (DBE) status.

DONE AND ENTERED this 17th day of November, 1992, in Tallahassee, Leon County, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of November, 1992.

Appendix A to Recommended Order 92-896

The parties submitted supplemental proposed findings which were read and considered. The following states which findings were adopted and which were rejected and why.

Petitioner' Proposed Findings:

Paragraph 1	True, but rejected in favor of discussion of son-in-law's leaving business.
Paragraph 2	Irrelevant.
Paragraph 3	True; but rejected in favor of Para 5 in RO.

Respondent's Proposed Findings:

Paragraph 1-3	Rejected as argument, and conclusions of law.
Paragraph 4,5	Irrelevant.
Paragraph 6	Irrelevant. The Department based its determination on the owner's lack of education and experience and not lack of participation.
Paragraph 7	Irrelevant. She was afforded the opportunity to present her case at the hearing.

COPIES FURNISHED:

Theodore E. Mack, Esquire
Cobb, Cole, and Bell
131 North Gadsden Street
Tallahassee, FL 32301

Pamela S. Leslie, Esquire
Pamela A. Arthur, Esquire
Department of Transportation
605 Suwannee Street, MS # 58
Tallahassee, FL 32399-0458

Ben G. Watts, Secretary
Department of Transportation
Haydon Burns Building, M.S.-58
605 Suwannee Street
Tallahassee, FL 32399-0458

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 contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

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AGENCY REMAND

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STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION

CHARLES E. BURKETT AND
ASSOCIATES, INC.,

Petitioner,

DOAH CASE NO. 92-0896
DOT CASE NO. 92-0679

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

ORDER GRANTING MOTION FOR REMAND TO
DIVISION OF ADMINISTRATIVE HEARINGS

Having reviewed Respondent's Motion for Remand, having considered the applicable facts and law, and having been fully advised in the premises, Respondent's Motion for Remand is hereby granted. This matter is returned to the Division of Administrative Hearings for specific rulings on the proposed findings of fact submitted to the hearing officer by both Charles E. Burkett and Associates, Inc., and the Department of Transportation, on September 4, 1992.

DONE AND ORDERED this 6th day of January, 1993.

_____
Ben G. Watts, P.E.
Secretary, Department of Transportation

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ORDER ACCEPTING REMAND AND RULING ON PROPOSED FINDINGS
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES E. BURKETT AND ASSOCIATES, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 92-0896
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
_____	)	

ORDER ACCEPTING REMAND AND
RULING ON PROPOSED FINDINGS

On January 8, 1992, the Department filed an Order Granting Motion for Remand in this case to permit the Hearing Officer to rule on proposed findings which were overlooked when the Recommended Order was entered. THEREFORE, the remand is accepted and the following rulings on the proposed findings made:

Petitioner's Findings	Recommended Order
Para 1-10	Subsumed in Para 1
Para 11-13	Subsumed in Para 2,3
Para 14-17	Subsumed in Para 4
Para 18	Irrelevant
Para 19,20	Subsumed in Para 4,5
Para 21-37 and 39-65	Subsumed in Para 7
Para 38	Para 8

Respondent's Findings	Recommended Order
Para 1-4	Subsumed in Para 1,2
Para 5	Irrelevant
Para 6-8	Subsumed in Para 3
Para 9	Subsumed in Para 8
Para 10-40	Subsumed in Para 7
Para 41-43	Irrelevant
Para 44-49	Argument

DONE AND ORDERED this 14th day of January, 1993, 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 14th day of January, 1993.

COPIES FURNISHED:

Ted Mack
Cobb, Cole and Bell
131 North Gadsden Street
Tallahassee, Florida 32301

Pamela S. Leslie
Deputy General Counsel
Department of Transportation
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES E. BURKETT AND
ASSOCIATES, INC.,

Petitioner,

vs.

CASE NO. 92-0896
DOT CASE NO. 92-0679

DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

FINAL ORDER

A hearing was held in the ease in Daytona Beach, Florida on July 15, 1992 before Stephen F. Dean, a Hearing Officer with the Division of Administrative Hearings. The hearing reconvened in Tallahassee, Florida on July 16,1992.

APPEARANCES

For the Petitioner: Theodore E. Mack
Cobb, Cole, and Bell
131 North (Gadsden Street
Tallahassee, Florida 32301

For the Respondent: Pamela S. Leslie, Deputy General Counsel
Pamela A. Arthur, 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 Petitioner has the technical expertise necessary to make decisions in the critical areas of operation of the business as required by Florida Administrative Code Rule 14-78.005 (7)(e).

PRELIMINARY MATTERS

The Petitioner, Charles E. Burkett and Associates, Inc., (Burkett) by application dated July 12, 1991, applied to Respondent, Department of Transportation, (Department) for certification as a Disadvantaged Business Enterprise (DBE). On October 1, 1991 the Department informed Burkett that the Department intended to deny its application for DBE certification. Burkett filed a petition challenging Fla. Adm. Code Rule 14-78.005 (7)(e) and a separate petition requesting an administrative hearing on the denial of its application for DBE certification. The cases were heard on the same day. At the formal hearing on denial of Burkett's application for DBE status, Burkett presented the testimony of Carol Burkett, Chief Executive Officer and sole shareholder of the firm, Curtis Burkett, president of the firm, and Juanita Moore, Manager of the Department's Contract Administration Office and former Manager of the Department's Minority Programs Office. Burkett had admitted into evidence three exhibits. The Department called two witnesses, Juanita Moore and Tom Kayser, pre- qualification Engineer and member of the DBE Certification Review Committee for the Department. The Department had admitted into evidence two exhibits.

Burkett and the Department filed Proposed Recommended Orders and, at the request of the Hearing Officer, filed supplemental findings. The Hearing Officer issued a Recommended Order on November 17, 1992. The Department filed exceptions to the Hearing Officer's Recommended Order. Burkett filed a response to the Department's exceptions. On January 8, 1992 the Department remanded this cause to the Division of Administrative Hearings for specific rulings on the proposed findings initially filed by Burkett and the Department. On January 14, 1993 the Hearing Officer signed the Order Accepting Remand and Ruling on Proposed Findings, after which the Department filed additional exceptions and Burkett filed a response thereto.

The record in this proceeding and the Recommended Order have been reviewed. The exceptions flied by the Department are addressed below. References to the hearing transcript will be noted by page and line number. (Tr. P. _____, L. _____)

The Department filed an exception to Finding of Fact No. 6 stating that there is a lack of competent substantial evidence to the extent that the Finding does not indicate that the Petitioner's lack of engineering experience or education was the basis for denying Burkett certification as a DBE. The Hearing Officer's Finding of Fact No. 6 is supported by competent substantial evidence. Consequently, the Department's exception thereto is rejected.

The Department filed an exception to specified parts of Finding of Fact No. 7. With respect to the last part of the third sentence in Finding of Fact No. 7, the record reflects that Carol Burkett is involved in the hiring and firing of all staff. This would, by implication, include the engineering staff. The Hearing Officer's Finding of Fact No. 7 is supported by competent substantial evidence and as such may not be disregarded. Accordingly, the Department's exception to this portion of Finding of Fact No. 7 is rejected. Manasota 88. Inc. v. Tremor, 545 So.2d 439 (Fla. 2d DCA 1989).

The Department also filed an exception to the seventh sentence of Finding of Fact No. 7 which states that Carol Burkett is in overall control of the company, and although she does not make direct assignments of tasks to engineers and draftsmen, she does oversee their work. The seventh sentence of Finding of Fact No. 7 must he read in pari materia with Finding of Fact No. 8. The latter Finding states that the owner does not have any formal engineering training or experience in technical engineering work. When these Findings are read together, it is clear that Carol Burkett's overall control of the company relates to oversight of the work of engineers and draftsmen in a purely administrative rather than technical sense. Based on the record evidence in this case, it is obvious that in Finding of Fact No. 7, the Hearing Officer used the term overall "control" in a generic rather than regulatory sense. As C.E.O. and sole shareholder, Carol Burkett exercises administrative control of the company, but clearly, does not have the technical expertise to exercise operational control of the business within the meaning of the applicable rule. When read in this manner, Finding of Fact No. 7 is supported by competent substantial evidence. (Tr. P. 24, L. 17-23; Tr. P. 31, L. 1-13; Tr, P. 34, L. 1-10; Tr. P. 36, L.-4; Tr. P. 38, L. 13-23; Tr. P. 39, L.-3; Tr. P. 50, L. 19-22; Tr. P. 54, L. 8-11; Tr. P. 67, L. 15-20; Tr. P. 69, L. 14-25; Tr. P. 70, L. 1-2; Tr. P. 76, L. 3-8 and L. 15-25; Tr. P. 77, L. 1-5) Consequently, the Department's exception thereto is rejected.

The Department also flied an exception to the Hearing Officer's ruling that paragraphs 41-43 of Respondent's Proposed Recommended Order were irrelevant. According to Section 90.401, Florida Statutes (1991), relevant evidence is evidence tending to prove or disprove a material fact. Section 90.402, Florida Statutes (1991), further provides that all relevant evidence is admissible. The issue involved in this case is whether a person with no engineering experience or education has the technical expertise to control the day-to-day operations of the business as required by Fla. Adm. Code Rule 14-78.005 (7)(e). The Hearing Officer and opposing counsel accepted Mr. Kayser as an expert in the field of civil engineering. (Tr. P. 107, L. 19-23). The Hearing Officer acknowledged that Mr. Kayser's testimony was relevant and thus allowed him to respond to a question going to the ultimate issue in this case. (Tr. P. 113, L. 8-25; Tr. P. 114, L. 1-25). Although the Hearing Officer has discretion to reject proposed findings, if they are deemed to be subordinate, cumulative, immaterial, or

unnecessary, it is improper to reject as irrelevant a finding which tends to prove a material fact. Thus, the Hearing Officer's subsequent ruling that the particular findings setting forth Mr. Kayser's testimony as irrelevant is inappropriate. Notwithstanding the Hearing Officer's erroneous ruling with respect to paragraphs 41-43 of Respondent's Proposed Recommended Order, a contrary ruling would not alter the decision in this case. Therefore, the Department's exception is rejected.

FINDINGS OF FACT

The Findings of Fact by the Hearing Officer set forth in the Recommended Order are considered correct and are incorporated in this Final Order except as specifically noted above.

CONCLUSIONS OF LAW

Burkett must prove by a preponderance of the evidence that it is entitled to certification as a Disadvantaged Business Enterprise (DBE) under the applicable statutes and rules administered by the Department. See e.g., Florida Department of Transportation vs. J.W.C. Co. Inc., 396 So.2d 778 (Fla. 1st DCA 1981).

The United States Department of Transportation has promulgated 49 CFR Part 23, to implement Federal Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) and to provide guidelines for state "recipients" who receive federal highway funds. STURAA Section 106(c)(4), in defining DBEs, states: "The Secretary shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection." 1/ This criteria is contained in 49 C.F.R. Part 23.

The Department is the state agency in Florida charged with developing and implementing DBE program related to highway construction within the state. Section 339.0805(c), Florida Statutes, requires that the Department certify small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by STURAA. (Pub. Law 1OO- 17), 23 U.S.C. 101, et. seq.. The Department is authorized to adopt rules for the conduct of its business operations and the implementation of any provision of law for which the Department is responsible. Section 334.004(2), Florida Statutes. Pursuant to that authority, the Department enacted Fla. Adm. Code Rule 14-78-005(7)(e)8, as amended 6-24-91, which provides in pertinent part that:

> The minority owners shall have managerial and technical capability, knowledge, training, education or experience required to make decisions in the critical areas of operation.

The Department also promulgated Fla. Adm. Code Rule 14-78.005(7)(e)2, as amended 6-24-91, which provides the following:

> In assessing the power of the minority owner to direct or cause the direction of the firm, the Department will look past stock ownership and consider the minority applicant's ownership interest, knowledge of the particular business, background, involvement in the business on a day-to-day basis, expertise, involvement by-the non-minority

> owners, employees or non-employees, other full or part-time employment by the minority applicant and the size of the applicant's business.

Fla. Adm. Code, Rule 14-78.005 (7)(e)9, provides that minority owners shall display independence and initiative in seeking, and negotiating contracts, accepting and rejecting bids and in conducting all major aspects of the business; and in those instances in which the minority owners do not directly negotiate contracts, but claim to approve or reject bids and agreement, the minority owners shall demonstrate that they have the knowledge and expertise to independently make contractual decisions.

The federal and state statutes and regulations governing the DBE program use similar language. In such instances, the state statute will take the same construction in the courts of Florida as its prototype has been given in federal courts so long as such construction is harmonious with the spirit and policy of Florida's statutes. Gentele v. Department of Professional Regulation, 513 So.2d 672, 673 (Fla. 1st DCA, 1987).

An examination of applicable federal regulations and state rules reflects that the language is almost identical. For example, Fla. Adm. Code Rule 14-78.002(3) defines a DBE exactly as that term is defined in 49 C.F.R. 23.62, i.e., as a small business concern: (a) "[w]hich is at least fifty one percent (51%) owned by one or more socially and economically disadvantaged individuals; and, (b) [w]hose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it." (Emphasis added). Thus, DBE status is not merely a mater of ownership; it is equally a matter of control, which is a separate and distinct issue. Ownership without control will disqualify a firm from obtaining DBE certification.

There are other instances of similar language in federal regulations and state rules. Another such example is 49 CFR 23.53(a)(2) which provides in pertinent part the following:

> An eligible minority business enterprise under this part shall be an independent business. The ownership and control by minorities or women shall be real, substantial, and continuing and shall go beyond the pro forma ownership of the firm as reflected in its ownership documents....

Fla. Adm. Code Rule 14-78.005(7)(c)1 closely tracks this language.

The USDOT has interpreted this language to mean that the owner's control must be "real, substantial and continuing" as "imputing some technical knowledge to the owner." Car-Mar Construction Corporation vs. Skinner, 777 F. Supp. 50, 55 (D.D.C 1991).

Furthermore, 49 CFR 23.53(a)(3) provides in pertinent part:

> The minority or women owners shall also possess the power to direct or cause the direction of the management and policies of

> the firm and to make the day-to-day as well as major decisions on matters of management, policy, and operations....

Again, this language closely tracks the language Fla. Admin. Code Rule 1478.005(7)(e).

This provision has been interpreted by the USDOT as requiring the female owner to "possess the power" to control the firm and "requiring the female owner to possess the attributes and skills necessary to exercise control over the business... ." Lane and Clark Mechanical Contractors Inc. v. Burnley, No. 88-4524, 1990 WL 50509, 6 (E.D. Pa. April 19, 1990). Without some technical expertise in the delivery of the principle activity of the firm's operations, the minority owner would be unable to control the day-to-day as well as major decisions on matters of management, policy and operations, as required by 49 CFR 23.53(a)(3). Car-Mar citing Whitworth-Borta. Inc. v. Burnley, No. G87-176 slip op. at 7, 1988 WL 242625 (E.D. Mich. June 28, 1988)(Bell, R.,J.). Rather, without such expertise the minority owner would be "wholly reliant upon the expertise and judgment of [non-minorities] for the supervision, development and submission of the firm's product." Whitworth-Borta, Inc., supra at 7. Such an owner would also be "unable to judge the competence of her employees and would be unable to gauge the viability of projects." Car-Mar, 777 F. Supp. 50, at 55.

The USDOT has clearly established that administrative and managerial expertise will not act as a substitute for technical expertise. Whitworth-Borta Inc., supra. at 7. The USDOT's determination that an owner lacked sufficient technical expertise to control the day-to-day operations has been upheld. Car-Mar citing Lane and Clark, 777 F. Supp. at 55. The court further found that the USDOT interpretation "reflects the realistic assessment that, in a technical field a qualified manager will necessarily possess certain specialized knowledge of the field."

In further defining this concept of "control," the USDOT has required the minority owner to have expertise in the critical operations of the firm's business and to independently make the basic decisions in daily operations. For the agency to require some technical knowledge is not inconsistent with the applicable regulations. Id. at 55. The level of "expertise" required must be such that the minority owner, although not required to personally perform each and every function of the firm, be able to critically evaluate and independently utilize information supplied to her by subordinates. Reflective of this position, the USDOT has stated that:

> ... owners can - and often, they must - rely on the judgments of managers and other staff members.... What is important, however, is that the owners have sufficient background and expertise at the present time with respect to delegated aspects of the business to be able to intelligently use and critically evaluate information prescribed by managers and other staff members in making decisions concerning the daily operational activities of the business.

As in this case even where the qualifying minority is the 100% owner of the firm, certification will be denied if the necessary technical expertise is held by a non-minority. Id. at 55 and 56.

It is obvious from the foregoing that the USDOT has differentiated "control" from "ownership," both of which under 49 CFR 23 (a)(2) must be "real, substantial, and continuing and go beyond pro forma ownership." Thus, one can have "real" ownership, as Mrs. Burkett does, without having "real" control, especially in terms of day-to-day decision making. The USDOT also distinguishes between the type of overall control that accompanies 100% ownership, such as replacing personnel at will, setting overall policy for the firm, and having final veto power on decisions, on the one hand, and making basic decisions regarding daily operations affecting the output of the primary product, on the other. The USDOT requires both types of control and the latter can only be exercised if the owner has enough knowledge to independently make decisions even where such decisions are reached through critically evaluating and independently utilizing recommendations from subordinates. Without such knowledge, the owner would be in the position of "rubber stamping" decisions of subordinates; these subordinates would be exercising the real day-to-day decision-making control in the delivery of the firm's primary product.

The USDOT's interpretation that 49 CFR 23.53(a)(3) requires the owner to have technical expertise has been held to be reasonable and reflective of a common sense approach to firms operating in technical fields". Whitworth-Borta, Inc., supra at 7.

The Department has interpreted Fla. Adm. Code Rule 14-78.005 (7)(e) 2, 8, and 9 to require that the owner of a business operating in a technical field have a requisite level of technical expertise to control the day-to-day and major decisions of the firm. The Department interprets its rules to require the owner of a business applying for DBE certification to possess the expertise in the technical operations of the business as well as in the administrative/managerial function typically associated with ownership. This interpretation is consistent with the interpretation given to similar federal regulations by the USDOT.

> The United States Supreme Court has stated:
>
> When faced with a problem of statutory construction, [a] Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration....When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.... [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414....

Udall v. Taliman, 380 U.S. 1, 16-17 (1965)(Emphasis added). See also Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 81 L.Fd.2d 694, 104 S.Ct. 2778. Under Udall, the interpretation of the USDOT is controlting.

In this instant case, the Department has interpreted its rules in a manner that is consistent with the construction given to similar federal regulations by the USDOT and upheld by federal district courts. Such an interpretation by the Department is reasonable given the similarity of the federal and state

regulations. Gentele, 513 So.2d at 673. Also, the Department's interpretation of the applicable DBE rules is supported by Fla. Adm. Rule 14-78.005(9) which provides that "[d]ecision-making rationale as well as specific U.S. Department of Transportation denials will be considered by the Department in its certification and recertification process." As the agency charged with establishing a DBE program and promulgating rules pursuant to implement the program, the Department's interpretation of its rules is entitled to great weight and should not be overturned unless clearly erroneous or unreasonable. 49 Fla. Jur.2d Statutes 163

Burkett does not have the expertise, technical capability, knowledge, training, education or experience in the firm's critical area of operation. Based on the Department's interpretation of the applicable rules, Burkett does not meet the eligibility requirements for certification as a DBR.

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law and a full review of the record, it is

ORDERED that Burkett's petition for certification as a Disadvantaged Business Enterprise is hereby denied.

DONE and ORDERED this 15th day of March, 1993.

_____

BEN G. WATTS, P.E.
Secretary
Florida Department of Transportation
605 Suwannee Street
Tallahassee, Florida 32399

ENDNOTE

1/ Section 2 of STURAA defines "Secretary" as the Secretary of Transportation.

Copies furnished:

Pamela S. Leslie
Pamela Arthur
Florida Department of Transportation
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

Thcodore E. Mack
Cobb, Cole, and Bell
131 North Gadsden Street
Tallahassee, Florida 32301

Stephen F. Dean
Division of Administrative Hearings
1230 Apa1achee Parkway
The DeSoto Building
Tallahassee, Florida 32399-1550

NOTICE OF 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, TALLALLASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

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AMENDED AGENCY FINAL ORDER

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES E. BURKETT AND
ASSOCIATES, INC.,

Petitioner,

vs.

CASE NO. 92-0896
DOT CASE NO. 92-0679

DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

AMENDED FINAL ORDER

The Final Order in the above referenced matter was filed on March 15, 1993. Due to a scrivener's error, the Final Order inadvertently stated the Division of Administrative Hearings was the agency issuing the Final Order. Accordingly, the Final Order is being amended to correctly identify the Department of Transportation as the agency issuing the Final Order.

A hearing was held in the case in Daytona Beach, Florida on July 15, 1992 before Stephen F. Dean, a Hearing Officer with the Division of Administrative Hearings. The hearing reconvened in Tallahassee, Florida on July 16, 1992.

APPEARANCES

For the Petitioner: Theodore E. Mack
Cobb, Cole, and Bell
131 North Gadsden Street
Tallahassee, Florida 32301

For the Respondent: Pamela S. Leslie
Deputy General Counsel
Pamela A. Arthur

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 Petitioner has the technical expertise necessary to make decisions in the critical areas of operation of the business as required by Florida Administrative Code Rule 14-78.005 (7)(e).

PRELIMINARY MATTERS

The Petitioner, Charles E. Burkett and Associates, Inc., (Burkett) by application dated July 12, 1991, applied to Respondent, Department of Transportation, (Department) for certification as a Disadvantaged Business Enterprise (DBE). On October 1, 1991 the Department informed Burkett that the Department intended to deny its application for DBE certification. Burkett flied a petition challenging Fla. Adm. Code Rule 14-78.005 (7)(e) and a separate petition requesting an administrative hearing on the denial of its application for DBE certification. The cases were heard on the same day. At the formal hearing on denial of Burkett's application for DBE status, Burkett presented the testimony of Carol Burkett, Chief Executive Officer and sole shareholder of the firm, Curtis Burkett, president of the firm, and Juanita Moore, Manager of the Department's Contract Administration Office and former Manager of the Department's Minority Programs Office. Burkett had admitted into evidence three exhibits. The Department called two witnesses, Juanita Moore and Tom Kayser, prequalification Engineer and member of the DBE Certification Review Committee for the Department. The Department had admitted into evidence two exhibits.

Burkett and the Department filed Proposed Recommended Orders and, at the request of the Hearing Officer, filed supplemental findings. The Hearing Officer issued a Recommended Order on November 17, 1992. The Department filed exceptions to the Hearing Officer's Recommended Order. Burkett filed a response to the Department's exceptions. On January 8, 1992 the Department remanded this cause to the Division of Administrative Hearings for specific rulings on the proposed findings initially filed by Burkett and the Department. On January 14, 1993 the Hearing Officer signed the Order Accepting Remand and Ruling on Proposed Findings, after which the Department filed additional exceptions and Burkett filed a response thereto.

The record in this proceeding and the Recommended Order have been reviewed. The exceptions filed by the Department are addressed below. References to the hearing transcript will be noted by page and line number. (Tr. P. _____, L. _____)

The Department filed an exception to Finding of Fact No. 6 stating that there is a lack of competent substantial evidence to the extent that the Finding does not indicate that the Petitioner's lack of engineering experience or education was the basis for denying Burkett certification as a DBE. The Hearing Officer's Finding of Fact No. 6 is supported by competent substantial evidence. Consequently, the Department's exception thereto is rejected.

The Department filed an exception to specified parts of Finding of Fact No. 7. With respect to the last part of the third sentence in Finding of Fact No. 7, the record reflects that Carol Burkett is involved in the hiring and firing of all staff. This would, by implication, include the engineering staff. The

Hearing Officer's Finding of Fact No. 7 is supported by competent substantial evidence and as such may not be disregarded. Accordingly, the Department's exception to this portion of Finding of Fact No. 7 is rejected. Manasota 88. Inc. v. Tremor, 545 So.2d 439 (Fla. 2d DCA 1989).

The Department also filed an exception to the seventh sentence of Finding of Fact No. 7 which states that Carol Burkett is in overall control of the company, and although she does not make direct assignments of tasks to engineers and draftsmen, she does oversee their work. The seventh sentence of Finding of Fact No. 7 must be read in pari materia with Finding of Fact No. 8. The latter Finding states that the owner does not have any formal engineering training or experience in technical engineering work. When these Findings are read together, it is clear that Carol Burkett's overall control of the company relates to oversight of the work of engineers and draftsmen in a purely administrative rather than technical sense. Based on the record evidence in this case, it is obvious that in Finding of Fact No. 7, the Hearing Officer used the term overall "control" in a generic rather than regulatory sense. As C.E.O. and sole shareholder, Carol Burkett exercises administrative control of the company, but clearly, does not have the technical expertise to exercise operational control of the business within the meaning of the applicable rule. When read in this manner, Finding of Fact No. 7 is supported by competent substantial evidence. (Tr. P. 24, L. 17-23; Tr. P. 31, L. 1-13; Tr, P. 34, L. 1-10; Tr. P. 36, L.-4; Tr. P. 38, L. 13-23; Tr. P. 39, L.-3; Tr. P. 50, L. 19-22; Tr. P. 54, L. 8-11; Tr. P. 67, L. 15-20; Tr. P. 69, L. 14-25; Tr. P. 70, L. 1-2; Tr. P. 76, L. 3-8 and L. 15-25; Tr. P. 77, L. 1-5) Consequently, the Department's exception thereto is rejected.

The Department also filed an exception to the Hearing Officer's ruling that paragraphs 41-43 of Respondent's Proposed Recommended Order were irrelevant. According to Section 90.401, Florida Statutes (1991), relevant evidence is evidence tending to prove or disprove a material fact. Section 90.402, Florida Statutes (1991), further provides that all relevant evidence is admissible. The issue involved in this case is whether a person with no engineering experience or education has the technical expertise to control the day-to-day operations of the business as required by Fla. Adm. Code Rule 14-78.005 (7)(e). The Hearing Officer and opposing counsel accepted Mr. Kayser as an expert in the field of civil engineering. (Tr. P. 107, L. 19-23). The Hearing Officer acknowledged that Mr. Kayser's testimony was relevant and thus allowed him to respond to a question going to the ultimate issue in this case. (Tr. P. 113, L. 8-25; Tr. P. 114, L. 1-25). Although the Hearing Officer has discretion to reject proposed findings, if they are deemed to be subordinate, cumulative, immaterial, or unnecessary, it is improper to reject as irrelevant a finding which tends to prove a material fact. Thus, the Hearing Officer's subsequent ruling that the particular findings setting forth Mr. Kayser's testimony as irrelevant is inappropriate. Notwithstanding the Hearing Officer's erroneous ruling with respect to paragraphs 41-43 of Respondent's Proposed Recommended Order, a contrary ruling would not alter the decision in this case. Therefore, the Department's exception is rejected.

FINDINGS OF FACT

The Findings of Fact by the Hearing Officer set forth in the Recommended Order are considered correct and are incorporated in this Final Order except as specifically noted above.

CONCLUSIONS OF LAW

Burkett must prove by a preponderance of the evidence that it is entitled to certification as a Disadvantaged Business Enterprise (DBE) under the applicable statutes and rules administered by the Department. See e.g., Florida Department of Transportation vs. J.W.C. Co. Inc., 396 So.2d 778 (Fla. 1st DCA 1981).

The United States Department of Transportation has promulgated 49 CFR Part 23, to implement Federal Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) and to provide guidelines for state "recipients' who receive federal highway funds. STURAA Section 106(c)(4), in defining DBEs, states: "The Secretary shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection. 1/ This criteria is contained in 49 C.F.R. Part 23.

The Department is the state agency in Florida charged with developing and implementing DBE program related to highway construction within the state. Section 339.0805(c), Florida Statutes, requires that the Department certify small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by STURAA. (Pub. Law 100- 17), 23 U.S.C. 101, et. seq.. The Department is authorized to adopt rules for the conduct of its business operations and the implementation of any provision of law for which the Department is responsible. Section 334.004(2), Florida Statutes. Pursuant to that authority, the Department enacted Fla. Adm. Code Rule 14-78-005(7)(e)8, as amended 6-24-91, which provides in pertinent part that:

> The minority owners shall have managerial and technical capability, knowledge, training, education or experience required to make decisions in the critical areas of operation.

The Department also promulgated Fla. Adm. Code Rule 14-78.005(7)(e)2, as amended 6-24-91, which provides the following:

> In assessing the power of the minority owner to direct or cause the direction of the firm, the Department will look past stock ownership and consider the minority applicant's ownership interest, knowledge of the particular business, background, involvement in the business on a day-to-day basis, expertise, involvement by the non-minority owners, employees or non-employees, other full or part-time employment by the minority applicant and the size of the applicant's business.

Fla. Adm. Code, Rule 14-78.005 (7)(e)9, provides that minority owners shall display independence and initiative in seeking, and negotiating contracts, accepting and rejecting bids and in conducting all major aspects of the business; and in those instances in which the minority owners do not directly negotiate contracts, but claim to approve or reject bids and agreement, the minority owners shall demonstrate that they have the knowledge and expertise to independently make contractual decisions.

The federal and state statutes and regulations governing the DBE program use similar language. In such instances, the state statute will take the same construction in the courts of Florida as its prototype has been given in federal courts so long as such construction is harmonious with the spirit and policy of Florida's statutes. Gentele v. Department of Professional Regulation, 513 So.2d 672, 673 (Fla. 1st DCA, 1987).

An examination of applicable federal regulations and state rules reflects that the language is almost identical. For example, Fla. Adm. Code Rule 14-78.002(3) defines a DBE exactly as that term is defined in 49 C.F.R. 23.62, i.e., as a small business concern: (a) [w]hich is at least fifty one percent (51 percent) owned by one or more socially and economically disadvantaged individuals; and, (b) [w]hose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it." (Emphasis added). Thus, DBE status is not merely a matter of ownership; it is equally a matter of control, which is a separate and distinct issue. Ownership without control will disqualify a firm from obtaining DBE certification.

There are other instances of similar language in federal regulations and state rules. Another such example is 49 CFR 23.53(a)(2) which provides in pertinent part the following:

> An eligible minority business enterprise under this part shall be an independent business. The ownership and control by minorities or women shall be real, substantial, and continuing and shall go beyond the pro forma ownership of the firm as reflected in its ownership documents....

Fla. Adm. Code Rule 14-78.005(7)(c)1 closely tracks this language.

The USDOT has interpreted this language to mean that the owner's control must be "real, substantial and continuing" as "imputing some technical knowledge to the owner." Car-Mar Construction Corporation vs. Skinner, 777 F. Supp. 50, 55 (D.D.C 1991).

Furthermore, 49 CFR 23.53(a)(3) provides in pertinent part:

> The minority or women owners shall also possess the power to direct or cause the direction of the management and policies of the firm and to make the day-to-day as well as major decisions on matters of management, policy, and operations....

Again, this language closely tracks the language Fla. Admin. Code Rule 14-78.005(7)(e).

This provision has been interpreted by the USDOT as requiring the female owner to "possess the power" to control the firm and "requiring the female owner to possess the attributes and skills necessary to exercise control over the business... ." Lane and Clark Mechanical Contractors. Inc. v. Burnley, No. 88-4524, 1990 WL 50509, 6 (E.D. Pa. April 19, 1990). Without some technical expertise in the delivery of the principle activity of the firm's operations, the minority owner would be unable to control the day-to-day as well as major

decisions on matters of management, policy and operations, as required by 49 CFR 23.53(a)(3). Car-Mar citing Whitworth-Borta. Inc. v. Burnley, No. G87-176 slip op. at 7, 1988 WL 242625 (E.D. Mich. June 28, 1988)(Bell, R.,J.). Rather, without such expertise the minority owner would be "wholly reliant upon the expertise and judgment of [non-minorities] for the supervision, development and submission of the firm's product." Whitworth-Borta, Inc., & supra at 7. Such an owner would also be "unable to judge the competence of her employees and would be unable to gauge the viability of projects." Car-Mar, 777 F. Supp. 50, at 55.

The US DOT has clearly established that administrative and managerial expertise will not act as a substitute for technical expertise. Whitworth-Borta. Inc., supra. at 7. The USDOT's determination that an owner lacked sufficient technical expertise to control the day-to-day operations has been upheld. Car-Mar citing Lane and Clark, 777 F. Supp. at 55. The court further found that the USDOT interpretation "reflects the realistic assessment that, in a technical field a qualified manager will necessarily possess certain specialized knowledge of the field."

In further defining this concept of "control," the USDOT has required the minority owner to have expertise in the critical operations of the firm's business and to independently make the basic decisions in daily operations. For the agency to require some technical knowledge is not inconsistent with the applicable regulations. Id. at 55. The level of "expertise" required must be such that the minority owner, although not required to personally perform each and every function of the firm, be able to critically evaluate and independently utilize information supplied to her by subordinates. Reflective of this position, the USDOT has stated that:

> ...owners can - and often, they must - rely on the judgments of managers and other staff members.... What is important, however, is that the owners have sufficient background and expertise at the present time with respect to delegated aspects of the business to be able to intelligently use and critically evaluate information prescribed by managers and other staff members in making decisions concerning the daily operational activities of the business.

As in this case even where the qualifying minority is the 100 percent owner of the firm, certification will be denied if the necessary technical expertise is held by a non-minority. Id. at 55 and 56.

It is obvious from the foregoing that the USDOT has differentiated "control" from "ownership," both of which under 49 CFR 23 (a)(2) must be "real, substantial, and continuing and go beyond pro forma ownership." Thus, one can have "real" ownership, as Mrs. Burkett does, without having "real" control, especially in terms of day-to-day decision making. The USDOT also distinguishes between the type of overall control that accompanies 100 percent ownership, such as replacing personnel at will, setting overall policy for the firm, and having final veto power on decisions, on the one hand, and making basic decisions regarding daily operations affecting the output of the primary product, on the other. The USDOT requires both types of control and the latter can only be exercised if the owner has enough knowledge to independently make decisions even where such decisions are reached through critically evaluating

and independently utilizing recommendations from subordinates. Without such knowledge, the owner would be in the position of "rubber stamping" decisions of subordinates; these subordinates would be exercising the real day-to-day decision-making control in the delivery of the firm's primary product.

The USDOT's interpretation that 49 CFR 23.53(a)(3) requires the owner to have technical expertise has been held to be reasonable and reflective of a "common sense approach to firms operating in technical fields". Whitworth-Borta. Inc., supra at 7.

The Department has interpreted Fla. Adm. Code Rule 14-78.005 (7)(e)2, 8, and 9 to require that the owner of a business operating in a technical field have a requisite level of technical expertise to control the day-to-day and major decisions of the firm. The Department interprets its rules to require the owner of a business applying for DBE certification to possess the expertise in the technical operations of the business as well as in the administrative/managerial function typically associated with ownership. This interpretation is consistent with the interpretation given to similar federal regulations by the USDOT.

The United States Supreme Court has stated:

> When faced with a problem of statutory construction, [a] Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration...When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order... . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414....

Udall v. Tallman, 380 U.S. 1, 16-17 (1965)(Emphasis added). See also Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 81 L.Ed.2d 694, 104 S.Ct. 2778. Under Udall, the interpretation of the USDOT is controlling.

In this instant case, the Department has interpreted its rules in a manner that is consistent with the construction given to similar federal regulations by the USDOT and upheld by federal district courts. Such an interpretation by the Department is reasonable given the similarity of the federal and state regulations. Gentele, 513 So.2d at 673. Also, the Department's interpretation of the applicable DBE rules is supported by Fla. Adm. Rule 14-78.005(9) which provides that "[d]ecision-making rationale as well as specific U.S. Department of Transportation denials will be considered by the Department in its certification and recertification process." As the agency charged with establishing a DBE program and promulgating rules pursuant to implement the program, the Department's interpretation of its rules is entitled to great weight and should not be overturned unless clearly erroneous or unreasonable. 49 Fla. Jur.2d Statutes 163.

Burkett does not have the expertise, technical capability, knowledge, training, education or experience in the firm's critical area of operation.

Based on the Department's interpretation of the applicable rules, Burkett does not meet the eligibility requirements for certification as a DBE.

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law and a full review of the record, it is

ORDERED that Burkett's petition for certification as a Disadvantaged Business Enterprise is hereby denied.

DONE and ORDERED this 8th day of April, 1993.

_____

BEN G. WATTS, P.E.
Secretary
Florida Department of Transportation
605 Suwannee Street
Tallahassee, Florida 32399

ENDNOTE

1/ Section 2 of STURAA defines "Secretary" as the Secretary of Transportation.

COPIES FURNISHED:

Pamela S. Leslie
Pamela Arthur
Florida Department of Transportation
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

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