

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CENTEX-ROONEY CONSTRUCTION COMPANY, )  
)  
Petitioner, )  
)  
vs. ) CASE NO. 92-2272BID  
)  
FLORIDA BOARD OF REGENTS, )  
)  
Respondent, )  
and )  
)  
STATE PAVING CORPORATION, )  
)  
Intervenor. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

This case was heard pursuant to Notice by Stephen F. Dean designated Hearing Officer of the Division of Administrative Hearings on April 27, 1992, in Tallahassee, Florida.

APPEARANCES

For Petitioner: James E. Glass, Esquire  
6161 Blue Lagoon Dr., Suite 350  
Miami, FL 33126

For Respondent: Jane Mostoller, Esquire  
325 W. Gaines St., Suite 1522  
Tallahassee, FL 32399-1950

For Intervenor: J. Victor Barrios, Esquire  
1026 Ease Park Avenue  
Tallahassee, FL 32301

PRELIMINARY STATEMENT

This proceeding was initiated by the filing of a formal bid protest dated March 19, 1992, by the Petitioner. The Petitioner alleged that it properly demonstrated all good faith effort requirements set forth in the project manual for BR-658 and that its bid was wrongfully rejected by Respondent. Petitioner timely requested a formal administrative hearing, pursuant to Section 120.57, Florida Statutes. A Petition to Intervene, filed by State Paving Corporation was granted. Pursuant to a prehearing order, dated April 10, 1992, the Petitioner and Respondent entered into a prehearing stipulation filed on April 24, 1992, as to the nature of the controversy, statement of position, exhibit list, witnesses, factual admissions, issues of fact and law to be determined, and an estimate of hearing time. The Intervenor filed a response to the prehearing stipulation on April 24, 1992. Pursuant to notice, this cause came to be heard on April 27, 1992, in Tallahassee, Florida, before Stephen F. Dean, a duly designated hearing officer of the Division of Administrative Hearings.

Petitioner called Mr. David Hamlin, Estimator with Centex-Rooney, as a witness. Respondent called Mr. Charles Federico, Director of Facilities Planning, Florida Atlantic University, and Ms. Patricia Jackson, MBE Coordinator for Capital Programs, Florida Board of Regents. References to the stipulated joint exhibits are shown by the abbreviation "Jt. Ex." followed by the number of the exhibit cited. References to the transcript of the hearing are shown by the abbreviation "R" followed by the page number cited. The parties submitted proposed findings in the form of proposed recommended orders which were read and considered. Appendix A states which of the proposed findings were adopted, and which were rejected and why.

#### STATEMENT OF THE ISSUE

Whether the Respondent properly rejected the Petitioner's bid for Board of Regents (BOR) project 658 because it did not comply with the good faith effort requirements of the General and Special Conditions of the project's specifications?

#### FINDINGS OF FACT

1. Call for Bids was issued by the Respondent, Florida Board of Regents, for Board of Regents ("BOR") project numbered 658, Southeast Campus Building - Davie at Broward Community College Central Campus, in Florida Administrative Weekly. (Stipulated).

2. The Project Manual is the volume assembled which includes the bidding requirements, sample forms, and Conditions of the Contract and Specifications (Jt. Ex. 1 at pp. 8 of 106 pages).

3. The Call for Bids (Jt. Ex. 2) provided that at least fifteen (15) percent of the project contracted amount will be expended with minority business enterprises (MBE) certified by the Department of General Services as set forth under the Florida Small and Minority Business Act, Chapter 287, Florida Statutes. If fifteen percent were not obtainable, the State University System would recognize good faith efforts by the bidder (Jt. Ex. 2).

4. The Call for Bids (Jt. Ex. 2) provided that the bidder be advised to review the Good Faith Efforts requirements in the Special Conditions section of the Project Manual immediately, in order to schedule the necessary tasks to accomplish Good Faith Efforts.

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

6. The Project Manual, Instructions to Bidders, B-23 at page 16 (Jt. Ex. 1) provides that the contract will be awarded by the Respondent for projects of \$500,000 or more, to the lowest qualified and responsible bidder, provided the bid is reasonable and it is in the best interest of the Respondent to accept it. The award of the contract is subject to the demonstration of "good faith effort" by any bidder whose Bid Proposal proposes less than fifteen (15) percent participation in the contract by MBEs (Minority Business Enterprise). Demonstrated "good faith effort" is set forth in the Special Conditions. The contract award will be made to that responsible bidder submitting the low responsive aggregate bid within the preestablished construction budget.

7. The Project Manual, Instructions to Bidders, B-25 at page 17, (Jt. Ex. 1) provides that the Florida Small and Minority Business Act, Chapter 287, Florida Statutes requires the involvement of minority business enterprises in the construction program. The Respondent/Owner has adopted a program for the involvement of minority business enterprises in the construction program. The application of that program is set forth in the Special Conditions of the Project Manual.

8. The Project Manual, Instructions to Bidders, B-26 at page 17 (Jt. Ex. 1) provides that bidders shall be thoroughly familiar with the Special Conditions and their requirements.

9. The Project Manual, Instructions to Bidders, B-26, at page 15 provides that falsification of any entry made on a bidder's proposal will be deemed a material irregularity and will be grounds for rejection.

10. The Project Manual, Special Conditions, Article 1, subparagraph 1.1.1, at page I-1 of I-26 pages, (Jt. Ex. 1), provides that the SUS has established a Construction Minority Business Enterprise Program in compliance with the Florida Small and Minority Business Assistance Act, Chapter 287, Florida Statutes. The expenditure of at least fifteen (15) percent of the Base Bid with certified MBEs is a requirement of this contract, unless Good Faith Effort, as identified in paragraph 1.7 can be demonstrated by the Bidder. MBEs not certified by Department of General Services will be deleted from the calculation of the required participation of MBEs, and evidence of Good Faith Effort in lieu thereof will be required as identified in subparagraph 1.1.2 and paragraph 1-7 of these Special Conditions.

11. The Project Manual Special Conditions, Article I, subparagraph 1.1.2 at page I-2 of I-26 pages, (Jt. Ex. 1), provides that evidence of good faith efforts will be required as specified by the Respondent/Owner within two working days after the opening of bids. Incomplete evidence which does not fully support each of the eight requirements of paragraph 1.7 of the Special Conditions shall constitute cause for determining the bid to be unresponsive, except that the owner may, at its option but not as a duty, seek supplementary evidence not submitted by the Bidder.

12. The Project Manual Special Conditions, Article 1, paragraph 1.6 at page I-3 of I-26 pages, (Jt. Ex. 1) states that MBE's participating in the State University System Minority Construction Program must be certified as a MBE by the Florida Department of General Services (hereinafter referred to as DGS) at the time of bid submittal. Certification identifies and limits the Specialty Area of business the MBE can perform and still qualify as a certified MBE. Therefore, the trade service listed on the Proposal for each of the MBEs must be within the scope of the Specialty Area. The bidder is required to ascertain that a listed MBE is certified by the DGS in the appropriate specialty area to perform the services for which it is listed. (Jt. Ex. 1, B-15, at p. 13).

13. On January 17, 1992, Petitioner, Centex-Rooney Consturction Company, Intervenor, State Paving Corporation, and ten other bidders submitted bids on BOR Construction Project No. BR-658.

14. After review of the bids and preparation of the bid tabulatio it was announced by FAU that Centex-Rooney was the apparent low bidder, but that Centex-Rooney had failed to meet the fifteen percent (15%) MBE participation

requirement, and therefore, would be required to submit evidence of Good Faith Efforts within two days.

15. The bid submitted by Centex-Rooney listed four (4) subcontractors which Centex-Rooney represented as DGS certified MBE firms, for a total of \$867,000 which was 9.56% of the base bid of \$9,067,000. (Stipulated).

16. Since the bid submitted by Centex-Rooney was less than fifteen (15) percent required participation in the contract by MBEs, the University Planning Office requested that Centex-Rooney submit documentation to demonstrate "good faith effort" as set forth in the Special Conditions of the Project Manual. (Stipulated).

17. Centex-Rooney timely submitted its good faith documentation on January 22, 1992. (Stipulated).

18. The Board of Regents with representatives of Centex-Rooney on February 25, 1992 to give Petitioner an opportunity to clarify and submit any additional good faith evidence in support of its bid. After reviewing the additional evidence, the Respondent contended that Centex-Rooney was in non-compliance with paragraphs 1.1.1 and 1.6.1 of the Special Conditions of the Project Manual, requiring at least 15% participation by MBEs at the time of bid opening, and at least one good faith effort criteria, paragraph 1.7.4, Special Conditions of the Project Manual. (Stipulated).

19. Centex-Rooney was informed of the Board of Regents decision to reject its bid for non-compliance with Respondent's MBE requirements, and on March 6, 1992, the Chancellor of the Florida Board of Regents awarded the contract to State Paving Corporation. (Stipulated).

^ The Board notified by letter dated March 6, 1992, all bidders of its award of contract for BR-658 project to the next lowest responsive bidder, State Paving Corporation. (Stipulated).

20. Petitioner timely filed a Notice of Intent to Protest on March 10, 1992. (Stipulated).

21. On March 19, 1992, Petitioner timely filed its Petition for Formal Written Protest for BR-658. (Stipulated).

22. A representative from Centex-Rooney attended the pre-bid/pre-solicitation meeting. (Jt. Ex. 10, R-115, 116). The minority business enterprise program was discussed and the Board of Regents' requirements for good faith efforts were reviewed. (R-116, 117, 131).

23. Centex-Rooney submitted its bid proposal on January 17, 1992. (Jt. Ex. 13). On page 2, paragraph c., of the bid proposed form submitted by Centex-Rooney, it provides that expenditure with minority business enterprises shall be consistent with the requirements of Article 1. of the Special Conditions, Minority Business Enterprise Requirements.

24. Centex-Rooney listed four subcontractors on its List of Subcontractors and MBE participation form as DGS certified MBEs for a total of 9.56% participation (Jt. Ex. 13, Jt. Ex. 31). The List of Subcontractors form is an integral part of the proposal (Jt. Ex. 13, List of Subcontractors Form page 1) and it is required of all bidders that MBEs must be certified at the time of bid opening for bona fide participation. (Jt. Ex. 1, page I-3 of I-26 pages, R-163, 174).

25. Two of the four subcontractors listed by Centex-Rooney, Quality Concrete and S&S Roofing, were not DGS certified MBEs at the time of bid submittal. (R-19, 150, 163, 164, 174). Therefore, the two non-DGS certified subcontractors were deleted from the calculation of the required participation of MBEs, so that the total DGS certified MBE participation of Centex-Rooney at the time of bid submittal was 5%. (Jt. Ex. 1, Spec. Conditions 1.1.1, page I-1, Jt. Ex. 13, R-19, 150, 163-4, 174). Therefore, Centex-Rooney was required to show a good faith effort to engage MBE's. See Paragraph 16 above.

26. Ms. Patricia Jackson, MBE Coordinator for Respondent, testified that requiring the DGS certified MBEs to be named at the time of bid opening makes the contract bidding procedures consistent, and eliminates any unfair price differentials between contractors. (R-151).

27. Centex-Rooney was pressed for time in responding to the bid. It called a large number of the MBEs listed the documentation provided, and wrote letters to those subcontractors who expressed an interest and to other subcontractors.

28. Mr. Charles Federico was chairman of the MBE advisory committee at Florida Atlantic University (Jt. Ex. 6, R-115). The committee reviewed the good faith efforts submitted by Petitioner (Jt. Ex. 6, 25, R-115, 140).

29. The good faith effort submittal to FAU from Centex-Rooney contained nine sections (Jt. Ex. 25) with the following consecutive headings: Pre-Bid Meeting Attendance, Advertisements for MBE Participation, Solicitation Letter to Minority Businesses, Follow-Up Contacts to Minority Businesses, Selected Items (or portions) of Work for Minority Businesses, Specific Project Bidding Information made available to Minority Businesses, Utilization of Minority Businesses in Bid, Solicitation of Available Minority Organizations to Recruit Minority Businesses, and a Table of Contents.

30. Under the third heading in Centex-Rooney's good faith efforts, Solicitation Letters to Minority Businesses, Petitioner provided 55 form letters in his submittal to FAU and a bulletin. The text of each form letter provided the following:

Centex-Rooney is bidding as general contractor on the Southeast Campus Building for FAU and BCC, Central Campus, Davie, FL and invites your firm to submit a quotation for the materials and/or labor on any portion of said project which falls within your scope of work. Please review the attached notices with respect to pertinent information pertaining to the bid. If your firm will be unable to submit a bid on the project, please state your reasons on the enclosed unavailability certificate form, sign and return to the Office of C-R. By doing this, it will help maintain an active MBE directory at Centex-Rooney and continue to indulge you on our bid list. Centex-Rooney encourages that participation of MBE contractors will be more than happy to answer your questions regarding this project.

32. Under the section heading, Follow-up Contracts to Minority Businesses, for Petitioner's good faith submittal to FAU Petitioner included a 14 page log gridded with subcontractor/ vendor names, telephone numbers, MBE designation, will bid, bid submitted, low bid, date contacted and remark sections.

33. The FAU MBE advisory committee found Petitioner in non-compliance with 1.7.3, 1.7.4, 1.7.7 and 1.7.8 of the Special Conditions section of the Project Manual that contains the good faith efforts requirements of Respondent. (Jt. Ex. 6, Jt. Ex. 12). The committee based its findings on the Special Conditions section of the Project Manual. (R-119).

34. The committee found non-compliance with 1.7.3 because the 55 form letters submitted by Petitioner were dated January 9, 1992. The committee determined that a letter dated January 9 was too late to give MBEs time to respond to the January 17 bid opening date. (R.121).

35. In regard to 1.7.4, the committee found the Petitioner in non-compliance because no follow-up letters, telegrams, or meetings notes were provided in the good faith documentation. (R-122, 124).

36. Mr. Federico testified that the committee found non-compliance with 1.7.7 of the Good Faith Effort requirements (R-125, 126) and 1.7.8. (R-126, 127).

37. The advisory committee determination was sent to the Vice-President of Administration and Finance at FAU, Ms. Marie McDemmond. (R-128).

38. The University President recommended award of the contract to Centex-Rooney. (Jt. Ex. 2, R-129). The University President is not authorized to award Board of Regents contracts. The Board of Regents awards contracts for projects of \$500,000 or more. (Jt. Ex. 1, B-23, at page 16).

39. Centex-Rooney could not utilize the two additional subcontractors, Kings Plumbing and Eagle Electric Distributors, because they were not listed on the Subcontractor/MBE form submitted by Centex-Rooney at the time of bid opening. (R-129, 130, 131). The University reconsidered its recommendation (Jt. Ex. 29), and subsequently recommended State Paving for award. (Jt. Ex. 32).

40. The Handbook distributed by FAU at the pre-bid/pre-solicitation meeting contains a disclaimer which states that it is not intended to replace or supplement any information in the Project Manual or conditions for contract award (R-31, 132).

41. State Paving met and exceeded the 15% MBE participation requirements for BR-65 (Jt. Ex. 14, R-20). Centex-Rooney's bid plus three alternatives was \$9,590,000, and State Paving's bid plus three alternates was 9,592,500, so that the two bidders were \$2,500 apart. (Jt. Ex. 7).

42. At least seven of the twelve bidders on BR-658 met the 15% MBE participation goal (R-19).

43. The FAU committee has reviewed many bids and has had several that met good faith efforts and several where the low bidders had met 15% MBE goal. (R-117, 142).

44. Ms. Jackson received a telephone call from Centex-Rooney regarding the FAU advisory committee's determination of non-compliance. (R-149). Ms. Jackson contacted Mr. Federico and reviewed the bid proposal and good faith efforts of Centex-Rooney on behalf of the Board of Regents. (R-148, 149).

45. Ms. Jackson reviewed Centex-Rooney's good faith efforts as submitted to FAU and found non-compliance with 1.7.4 of the Special Conditions in the Project Manual for BR-658. (R-149).

46. The Special Conditions of the Project Manual at page I-5 for 1.7.4, provide that the State University System requires that a bidder shall make no less than one written follow-up contact per initial contact. In the event a positive response is obtained, the Bidder shall request, in writing, a meeting between the MBE and Bidder's staff.

47. The documentation required in the Special Conditions for 1.7.4 are copies of letters, telegrams and/or meeting notes. Ms. Jackson testified that the telephone log submitted by Centex-Rooney to document compliance with 1.7.4 did not meet the Special Conditions requirements because it was not a letter nor a telegram or a meeting note. (R-149). Nor did the telephone log reflect one written follow-up per initial contact as required by the University implementation of 1.7.4 in the Special Conditions (R-149, 157).

48. Ms. Jackson contacted Centex-Rooney by phone and informed it of her finding that Centex-Rooney's reversal of the telephone calls and letters did not conform to the requirements of 1.7.4. (R-152). Thereafter, a meeting was arranged between Ms. Jackson and other BOR staff to provide Centex-Rooney an opportunity to provide supplemental evidence of good faith effort. (R-152).

49. The Special Conditions section, at I-2, paragraph 1.1.2 provides that incomplete evidence which does not fully support each of the eight requirements of Paragraph 1.7 (good faith requirements) shall constitute cause for determining the bid to be unresponsive, except that the Owner may, at its option but not as a duty, seek supplementary evidence not submitted by the bidder. (R-152).

50. Centex-Rooney supplemented its submittal with 55 form letters dated January 24, 1992. These form letters were not considered satisfactory by Respondent as a written follow-up to each initial contact or to meet any other requirements in 1.7.4 because the letters were dated after the date of the bid opening. (Jt. Ex. 27, R-157, 158).

51. Pursuant to Centex-Rooney's request at the February 25, 1992 meeting, Ms. Jackson again reviewed the company's documentation of its good faith efforts, evaluating the January 9, 1992 letters originally submitted as documentation for 1.7.4, as documentation for 1.7.3, and evaluating the telephone log, originally submitted as documentation of follow-up contact for 1.7.4 as initial solicitation documentation for 1.7.3. (R-153, 154).

52. Considering Centex-Rooney's efforts in their best light, it was still determined by BOR that Centex-Rooney was not in compliance with 1.7.4. because there was no initial written contact and no written follow-up for each positive response. The telephone log is deemed to be analogous to meeting notes; however, the documentation viewed most favorably for Petitioner does not meet the written requirements of the Special Conditions which cannot be waived. (R-157, 160, 161, 162, 163, 171).

53. Two spread sheets were provided to BOR as supplemental documentation (Jt. Ex. 26). The Summary (Jt. Ex. 37) and other spread sheets (Jt. Ex. 36) were not provided to FAU by Centex-Rooney nor to Respondent in its subsequent review or as part of its option to permit supplementary documentation for good faith compliance. (R-55, 70, 71).

54. Petitioner did not obtain the 15% MBE participation for BR 658. Petitioner did not meet the MBE requirements contained in 1.1.1 of the Special Conditions. (Jt. Ex. 1, page I-1).

55. Two of the MBEs listed by Petitioner with its bid proposal were not certified by DGS at the time of bid submittal. Petitioner did not meet the MBE requirements contained in 1.6.1. (Jt. Ex. 2, I-3).

57. The telephone log submitted by Petitioner was insufficient as required documentation. Petitioner did not meet the good faith efforts requirement set out in 1.7.4 of the Special Conditions (Jt. Ex. 2, page I-4). (R-175, Jt. Ex. 28, 29).

58. The telephone log, as presented by Centex-Rooney was not a copy of a letter, a telegram or a meeting note. The telephone contact did not constitute a written follow-up contact per initial contact as required by the Special Conditions, nor did it suffice as a request in writing for a meeting between the MBE and bidder's staff if a positive response was obtained from an MBE. (R-149, 157).

59. Conversely, as proposed by Petitioner, the telephone contact was not acceptable under the terms of the Special Conditions as an initial notice under 1.7.3 because the contact was not by letter as required. Also, there was not a letter for each initial telephone contact, and the January 9 letters did not request meetings with those MBEs who responded positively, nor did the letters provide evidence of any meeting notes. (R-157, 160, 161, 162, 163, 171).

#### CONCLUSIONS OF LAW

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

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

62. The Florida Board of Regents promulgated Rule 6C-14.021(5), Florida Administrative Code, which provides:

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



qualified in accordance with these rules which submits the lowest priced proposal for the work except that it is in the best interest of the State, any bids may be rejected, or all bids may be rejected and the project may be bid again. (e.s.)

63. Additionally, the Florida Board of Regents promulgated Rule 6C-14.025(1), (2), (3), and (4), Florida Administrative Code, which provides:

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

(2) The State University System shall use only the Department of General Services list of certified minority business enterprises in the construction program.

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

(4) Any individual who falsely represents any entity as a Minority Business Enterprise or who does not fulfill the contractual obligations is subject to be penalized as provided in Section 287.094, F.S. . . .

64. Section 287.0945(1) and (3)(b), Florida Statutes, provide in pertinent part:

(1) The Legislature finds that there is evidence of a systematic pattern of past and continuing racial discrimination against minority business enterprises and a disparity in the availability and use of minority business enterprises in the state procurement system. It is determined to be a compelling state interest to rectify such discrimination and disparity. Based upon statistical data profiling this discrimination, the Legislature has enacted race-conscious and gender-conscious remedial programs to ensure minority participation in the economic life of the state, in state contracts for the purchase of commodities and services, and in construction contracts. The purpose and intent of this section is to increase participation by minority business enterprises in the state procurement system. This purpose will be accomplished by encouraging the use of minority business enterprises and the entry of new and diversified minority business enterprises into

the marketplace.

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

1. Whether the contractor attended any presolicitation or prebid meetings that were scheduled by the agency to inform minority business enterprises of contracting and subcontracting opportunities;
2. Whether the contractor advertised in general circulation, trade association, and/or minority-focus media concerning the subcontracting opportunities; (e.s.)
3. Whether the contractor provided written notice to a reasonable number of specific minority business enterprises that their interest in the contract was being solicited in sufficient time to allow the minority business enterprises to participate effectively;
4. Whether the contractor followed up initial solicitations of interest by contacting minority business enterprises or minority persons to determine with certainty whether the minority business enterprises or minority persons were interested;
5. Whether the contractor selected portions of the work to be performed by minority business enterprises in order to increase the likelihood of meeting the minority business enterprise procurement goals, including, where appropriate, breaking down contracts into economically feasible units to facilitate minority business enterprise participation;
6. Whether the contractor provided interested minority business enterprises or minority persons with adequate information about the plans, specifications, and requirements of the contract or the availability of jobs;
7. Whether the contractor negotiated in good faith with interested minority business enterprises or minority persons, not rejecting minority business enterprises or minority persons as unqualified without sound reasons based on a thorough investigation of their capabilities; and
8. Whether the contractor effectively used the services of available minority community organizations; minority contractors' groups; local, state, and federal minority business assistance offices; and other organizations that provide assistance in the recruitment and placement of minority business

enterprises or minority persons.

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

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

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

67. The Administrative Procedures Act provides the procedural mechanism for challenging an agency's decision to award or reject bids. "[T]he scope of the inquiry is limited to whether the purpose of competition bidding has been subverted. In short, the hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly." *Department of Transportation v. Groves-Watkins*, 530 So.2d 912, 914 (Fla. 1988). See also *Scientific Games, Inc. v. Dittler Bros.*, 586 So.2d 1128 (Fla. 1 DCA 1991).

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

69. The Board of Regents, in the good faith exercise of its discretion determined that Petitioner's bid was not responsive as submitted. The Board of Regents required that at least fifteen percent of the project contracted amount

be expended with minority business enterprises certified by the Florida Department of General Services as set forth under Chapter 287, Florida Statutes. Centex-Rooney submitted four subcontractors as DGS certified; (for a total of 9.56% participation at the time of its bid submittal) however, two of the four were in fact, not certified by DGS at the time of bid opening as required by Respondent's bidding documents. Thus, Petitioner's MBE participation was only 5% at the time of bid opening. Respondent's administrative rules and the bidding requirements serve to notify the bidders that they must utilize DGS certified MBE's in proposals and that it is the bidder's responsibility to ascertain that a listed MBE is certified by the DGS in the appropriate Specialty Area to perform the services for which it is enlisted. However, even if the disqualified subcontractors were included, Centex-Rooney would have had only 9.5% MBE participation. Petitioner failed to meet the 15% goal for the BR-658 project, failed to ascertain that its listed MBE's were properly certified by DGS at the time of bid submittal.

70. Although the Petitioner represented to FAU, that it had obtained MBE participation from two additional subcontractors not listed on its MBE participation at the time of bid opening, and its MBE participation would be 15.2%, the bidding documents clearly provide that MBE's must be listed with the bid proposal at the time of bid opening. Otherwise, the competitive process could be undermined.<sup>1</sup> See *E.M. Watkins Company v. Board of Regents*, 414 So.2d 583 (Fla. 1 DCA 1982). Therefore, Respondent properly rejected Petitioner as unresponsive in regard to 1.1.1 and 1.6.1 of the Special Conditions of the Project Manual.

71. Because Centex-Rooney did not meet the 15% MBE requirement, it was required to show it had made a good faith effort. Respondent reviewed Petitioner's good faith efforts and found them in non-compliance with at least one factor, specifically 1.7.4 of the Special Conditions section of the Project Manual. Section 1.7.4, supra, requires that bidders shall make no less than one written follow-up contact per initial contact. In the event a positive response is obtained, the Bidder shall request, in writing, a meeting between the MBE and the Bidder's staff. Documentation required to demonstrate compliance with 1.7.4. includes copies of letters, telegrams and/or meeting notes. Petitioner submitted a telephone log to evidence compliance with 1.7.4, and the Respondent found it insufficient to satisfy the requirements of 1.7.4. Clearly, the telephone log is not a copy of a letter or a telegram, nor does it evidence a written contact. The telephone log does not evidence that when a positive response was received, the Bidder requested, in writing, a meeting with the MBE.

72. The only letters submitted in Petitioner's initial good faith effort documentation were presented as letters of solicitation to satisfy the requirements of 1.7.3 of the Special Conditions. These January 9, letters do not serve to satisfy any of the requirements for 1.7.4. As initial letters, they are late having been sent January 9 for the January 16 bid opening. As follow up letters, they clearly state that they are letters of invitation to bid on the upcoming BR-658 project. They do not indicate whether a positive response was received from the subcontractor, nor do they in any way evidence a request for a meeting, nor do they memorialize a meeting between the Petitioner and the interested MBE.

73. Section of 1.7 of the Special Conditions plainly states which documentation used to satisfy one particular requirement may also be used to satisfy the requirements in another area, such as 1.7.5, 1.7.6. There is no such allowance provided for section 1.7.3 and 1.7.4. Accordingly, Respondent

properly and reasonably determined that Petitioner was unresponsive to the requirements of 1.7.3 and 1.7.4 in establishing its good faith efforts for this project.

74. Pursuant to Rule 6C-14.025(1), Florida Administrative Code, the Respondent developed a plan to implement the Florida Small and Minority Business Assistance Act of 1985 (as codified in Chapter 287, Florida Statutes). The Special Conditions section of the Project Manual for the major construction project sets out the good faith effort requirements contained in Chapter 287, as well as the implementation of such statutes required by the State University System, and the documentation required by the Respondent for satisfying the eight statutory factors of good faith efforts. All of these requirements were placed in Respondent's MBE plan to increase participation by minority business enterprises in the state procurement system. See *Anglin Construction Co. v. Florida Board of Regents and Charles R. Perry Construction*, DOAH Case No. 90-2652BID, September 19, 1990.

75. Section 287.0945(3)(b), Florida Statutes, clearly provides the factors that shall be considered by an agency in determining whether a contractor has made good faith efforts, which shall include, but not be limited to, in subparagraph (3)(b)4, whether the contractor followed up initial solicitations of interest by contacting minority business enterprises or minority persons to determine with certainty whether the minority business enterprises or minority persons were interested. The Respondent's implementation of subparagraph (3)(b)4 requires that the bidder shall make no less than one written follow-up contact per initial contact. In the event a positive response is obtained, the Bidder shall request, in writing a meeting between MBE and the Bidder's staff. Copies of letters, telegrams and/or meeting notes are required to demonstrate compliance with 287.0945(3)(b)4 as implemented.

76. The Board of Regents interprets Section 287.0945(3)(b), Florida Statutes, to require that the contractor "shall" meet all eight criteria provided in the statute, as implemented by Respondent, before considering other relevant factors that may support good faith efforts. The use of the word "shall" in a statute, according to its normal usage, has a mandatory connotation. *Florida Tallow Corp. v. Bryan*, 237 So.2d 308 (Fla. 4 DCA 1970). A statute is to be taken, construed and applied in the form enacted. *Blount v. State*, 102 Fla. 1100, 138 So. 2 (Fla. 1931). A construction placed on a statute by the state officer or body charged with the responsibility for its enforcement is persuasive. *Volusia Jai-Alai, Inc. v. McKay*, 90 So.2d 334 (Fla. 1956). An administrative construction of a statute is entitled to great weight and will not be overturned except for the most cogent reasons, and unless clearly erroneous, unreasonable, or in conflict with some provision of the state constitution or the plain intent of the statute. *McKinney v. State*, 83 So.2d 875 (Fla. 1955). The Respondent's interpretation of Section 287.0945 should be given great weight, because its interpretation of the mandatory application of the eight statutory factors is reasonable, consistent with the plain intent of the statute, and not in conflict with any constitutional provisions.

77. The Respondent reviewed Petitioner's good faith efforts and found that it had completely failed to meet the follow-up requirements as published in the bid documents. For the Respondent to excuse this deficiency would be contrary to the mandatory requirements of Section 287.0945(3)(b), Florida Statutes. To accept Centex-Rooney's good faith effort presentation as sufficient would be contrary to the legislative intent of the statute and would represent to other bidders that Respondent is not serious about its fifteen (15) percent MBE participation requirement, its acceptance of good faith efforts, or its role in

assuring equal treatment among competitive bidders. See *Dooley & Mack Constructors, Inc. v. Board of Regents and Norwood Industrial Const.*, DOAH Case No. 91-2703BID, August 19, 1991. Section 287.0945(3)(b) does not provide that an agency may totally disregard non-compliance of a mandated statutory factor because a particular bidder, such as Petitioner, did satisfy some of the other factors which are considered in determining good faith effort. If the Legislature had intended agencies to be able to disregard compliance with the statutory criteria, it could have easily so provided. It did not.

78. Petitioner only had 5% DGS certified MBE participation at the time of bid opening. State Paving exceeded the 15% goal. A significant number of the other bidders for the project were able to document 15% participation at the time of bid opening. Follow-ups to initial contacts and meetings with interested MBEs are an integral part of encouraging participation of MBEs in state construction projects. By failing to comply with all the requirements to establish good faith efforts, the Petitioner may have enjoyed an advantage in its bid preparation over other qualified bidders who made the effort and took the time needed to locate and commit eligible MBEs to work on this project.

79. The statutory requirements and implementation by Respondent are a material part of showing good faith effort to meet the MBE goal required for BR-658. Accordingly, a failure to comply with 1.7.4, and 1.1.1 and 1.6.1 of the Special Conditions for this project constitutes a material variance in Petitioner's bid.

80. The Board of Regents should protect the integrity of the bidding process, and not allow the consideration of bids which are not responsive, for competitiveness and confidence in the bidding process will be undermined if bidders cannot rely on the bid specifications in submitting their bids. *E.M. Watkins & Company Inc. v. Board of Regents*, 414 So.2d 583 (Fla. 1st DCA 1982).

81. It is within the discretion of the Board of Regents whether or not to reserve the right to grant a waiver of minor bid irregularities. *Liberty City v. Baxter's Asphalt and Concrete, Inc.*, supra. Even when an agency reserves the right to waive minor bid irregularities, it is within the agency's discretion to determine whether or not a waiver is appropriate. *Id.* Failure to comply with Special Condition 1.7.4 is not a minor irregularity.

82. A bid which contains a material variance is unacceptable. *Tropabest Foods, Inc. v. Dept. of General Services*, 493 So.2d 50 (Fla. 1st DCA 1986).

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

84. The failure of Petitioner to comply with 1.1.1 and 1.6.1, and 1.7.4 of the good faith effort requirements is a material irregularity, and thus, the Respondent may not waive the deficiency. To do otherwise is unlawful and undermines the integrity of the bidding process by rewarding a bidder who failed to satisfy the requirements for a valid bid and send a message to future bidders that the bidding requirements are not mandatory but merely directory.

85. The Respondent did not act unlawfully, arbitrarily or capriciously in rejecting Petitioner's bid as unresponsive.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is,

RECOMMENDED:

That Centex-Rooney's bid for project BR-658 was properly rejected by the Respondent, and that the Board of Regents may proceed with its award of the contract to the Intervenor, State Paving.

DONE and ENTERED this \_\_\_\_\_ day of May, 1992, in Tallahassee, 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 \_\_\_\_ day of May, 1992.

APPENDIX  
CASE NO. 92-2272BID

Board of Regent's proposed findings were read and considered. The findings of the BOR were adopted except for Paragraph 22 which was deemed a conclusion of law.

State Pavings' proposed findings were read and considered. The following list indicated which findings were adopted, and which were rejected and why:

- 1 through 3. Adopted.
4. Was not specifically adopted, but is correct and is subsumed in other findings.
5. Subsumed in other findings. Rejected that Centex-Rooney "freely admits" their bid failed to meet 15% requirement, a contrary to the evidence.
6. Subsumed Paragraphs 32, 33 and 34.
7. Subsumed Paragraphs 44, 45, 46 and 47.
8. Subsumed Paragraph 50.
9. Subsumed Paragraph 29 re documentation. Comments re Mr. Hamlin are argument and rejected.
10. Rejected in part a restatement of statutes and law, and subsumed in other findings. Adopted that Centex-Rooney complied with 1.7.1, 1.7.2, and failed to comply with 1.7.3 and 1.7.4. Centex-Rooney did comply with 1.7.5 and 1.7.6 and 1.7.8. To the extent that the evidence in this case did not show Centex-Rooney's good faith efforts, 1.7.7 was not proven.
11. Rejected as argument.
12. Subsumed Paragraph 35.
13. Subsumed Paragraphs 39 and 41.

14. Rejected as argument.
15. Subsumed in Paragraphs 55, 56 and 57.
16. Rejected as conclusion of law.

The Petitioner's proposed findings were read and considered. The following list which of the findings were adopted, and which were rejected and why.

Paragraphs

- 1 through 11. Adopted.
12. Adopted, Paragraph 23.
13. True; adopted in part in Paragraph and in Paragraphs 23 and 28.
- 14 and 15. Rejected as irrelevant.
16. True, subsumed in Paragraph 28.
17. Subsumed in Paragraphs 32 and 46.
18. True, but irrelevant. There was no allegation that Centex-Rooney failed to advertise.
19. Subsumed in Paragraphs 28 and 33.
20. Subsumed in Paragraphs 32, 48 and 52.
21. True but irrelevant because Centex-Rooney had fewer than 15%.
22. True but irrelevant.
23. Subsumed in various paragraphs.
24. Subsumed in Paragraphs 28, 32, 33, 34 and 35.
25. True subsumed in Paragraphs 36 and 37.
26. Subsumed in Paragraphs 44, 46, 47, 50 and 51.
27. Irrelevant because it does not establish compliance with 1.7.3 and 1.7.4.
28. BOR properly rejected this evidence which was presented after the bid opening.

Copies furnished:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS:

ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. 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.