

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HUBBARD CONSTRUCTION COMPANY,)
)
 Petitioner,)
)
 vs.) CASE NO. 92-4018BID
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing in the above-styled matter was held on July 22, 1992, in Tallahassee, Florida, before Joyous D. Parrish, a designated Hearing Officer of the Division of Administrative Hearings. The parties were represented at the hearing as follows:

APPEARANCES

For Petitioner: F. Alan Cummings
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Cummings, Lawrence & Vezina, P.A.
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For Respondent: Susan P. Stephens
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State of Florida, Department
of Transportation
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STATEMENT OF THE ISSUES

The central issue in this case is whether the Department's action in posting its intent to award contract no. 18103, section/job no. 11130-3518, was fraudulent, arbitrary, illegal or dishonest.

PRELIMINARY STATEMENT

This case began on June 18, 1992, when the Department of Transportation (Department) posted the notice of its intent to award contract no. 18103, section/job no. 11130-3518, to APAC-Florida, Inc. (APAC). When Hubbard Construction Company (Hubbard or Petitioner), the apparent low bidder for the project, learned of the award, it timely filed a notice of protest and the petition which is at issue in this case.

Hubbard's challenge maintained that its bid was rejected because the Department arbitrarily determined Hubbard had not met the disadvantaged business

enterprise (DBE) participation goal for the contract and did not otherwise meet the good faith efforts requirement. Hubbard alleged that its bid did comply with the ten percent DBE goal, and that its subcontractor, CDS Trucking, has been a certified DBE since 1986. The case was forwarded to the Division of Administrative Hearings for formal proceedings on July 8, 1992.

At the hearing, Hubbard presented the testimony of the following witnesses: Wayne Evans, vice-president of Hubbard; Carlos Cantero, president of CDS Trucking; Carmen Cantero, office manager with CDS Trucking; Cathy Garner Parker, an operations management consultant II employed in the Department's disadvantaged business certification section; Russell Waldon, acting manager for the Department's minority programs office; and Kenneth N. Morefield, state highway engineer employed by the Department and chairman of the awards committee. Hubbard's exhibits numbered 1 through 14 were admitted into evidence.

The Department presented the testimony of Paul S. Newell, the Department's manager in the contracts office. The Department's exhibits numbered 1 through 8 were admitted into evidence.

The transcript of the hearing was filed with the Division of Administrative Hearings on August 10, 1992. The parties filed proposed recommended orders which have been considered in the preparation of this order. Specific rulings on the proposed findings of fact are included in the attached appendix.

FINDINGS OF FACT

Based upon the prehearing stipulation, the testimony of the witnesses, and the documentary evidence received at the hearing, the following findings of fact are made:

1. Sometime prior to May 27, 1992, the Department solicited bids for contract no. 18103, section/job no. 11130-3518 (the project).

2. The DBE goal for the project was stated at ten percent.

3. The bids for the project were opened on May 27, 1992, and six timely bids were received including one from Hubbard and one from APAC.

4. Hubbard's bid was the apparent low bid at \$1,573,558.00 when compared to APAC's bid of \$1,706,337.22. All other bids were presumably higher and are not at issue in these proceedings. All such bids were, however, deemed responsive by the Department.

5. The Department established two dates for the posting of the award for this project. One date, June 18, 1992, was twenty-two days after the letting. That calculation requires that the actual letting date (May 27, 1992) be counted as the first day. The second date, using the same approach, was specified at forty days after the letting, July 6, 1992.

6. The Department elected to post for this project on day 22, and its intent to award the contract to APAC was therefore disclosed on June 18, 1992.

7. Hubbard timely filed an initial protest to the intent to award, and subsequently timely filed its formal protest on June 29, 1992.

8. The Department rejected Hubbard's bid solely because one of its subcontractors, CDS Trucking, was not on a list of certified DBE firms on the day the bids for the contract were opened.

9. Hubbard is a highway construction contractor which bids for, and performs, highway construction projects with the Department and other public entities.

10. Hubbard is aware of public contracts that require a specified percent to be performed by DBE subcontractors. In fact, most of Hubbard's work is performed pursuant to such contracts and, as Petitioner has been in business for a number of years, it has vast experience meeting DBE goals. More important, Petitioner has never failed to meet a DBE goal. The Department is fully cognizant of Hubbard's past performance and reputation regarding compliance with DBE goals.

11. When it receives an invitation to bid on a public construction project, Hubbard contacts DBE subcontractors for quotes for the job. While these contacts may be informal, such as by telephone conversation or facsimile transmission, the subcontractor is made aware that it is being contacted for the quote in reference to the DBE goal for the proposed project.

12. In this case, Hubbard contacted CDS Trucking for a DBE subcontractor quote. Petitioner has used CDS Trucking numerous times in the past to perform services and on each such occasion CDS Trucking has been identified and accepted as a DBE.

13. CDS Trucking gave Hubbard a quote of \$30,000.00 to perform asphalt hauling services on the subject project. Taken in total with the other four DBEs who gave quotes to Hubbard, the total proposed DBE participation on Petitioner's bid was 10.65 percent. This amount exceeded the Department's stated goal for the project. Without including CDS Trucking, Hubbard's bid did not meet the 10 percent DBE goal.

14. Under the Department's policy, in order to be eligible for inclusion as a DBE, a subcontractor must be listed in a DBE directory published each month by the Department. To be included in the directory a subcontractor must be a certified DBE as determined by the Department's minority programs office, must be in the process of seeking DBE certification renewal by having applied for such renewal not later than 90 days prior to certification expiration, or be certified on the date the directory list is closed for the month. Additionally, the Department will allow a contractor to use a DBE firm that is certified subsequent to the printing of the DBE directory, if such company is certified prior to the submission of bids.

15. Under the foregoing policy, it is not unusual for the DBE directory to include numerous subcontractors who are, in fact, noncertified DBEs at the time of the bid letting or award. Consequently, a contractor using a noncertified DBE may qualify for, and receive, a contract award simply because it used a subcontractor listed in the DBE directory.

16. Conversely, the use of a subcontractor who is not included in the DBE directory but is, in fact, a certifiable DBE may result in the contractor's bid being deemed nonresponsive for not meeting the DBE goal.

17. Pertinent to this case, CDS Trucking has been identified and certified as a DBE since 1985. During that time there have been two lapses in DBE's

certification status. Both lapses were voluntary in the sense that CDS Trucking, through its own conduct, intentionally failed to renew its certification. In the first instance, the company was undergoing internal organizational changes that delayed the application process. In the second case, Mrs. Cantero, the office manager and person responsible for the recertification application, was out of the office ill for an extended period of time. During these occasions, CDS Trucking knew its certification as a DBE would be suspended until completion of the renewal applications.

18. CDS Trucking has never been denied DBE certification. The factual circumstances giving rise to CDS Trucking's initial eligibility and certification as a DBE and its current status have not changed.

19. The DBE certification held by CDS Trucking for the 1991/92 year expired on March 13, 1992.

20. On February 7, 1992, CDS Trucking filed an application for DBE recertification. Had the Department acted on that application within 90 days of its filing, CDS Trucking would have been recertified as a DBE on or before May 7, 1992.

21. At the time the application for recertification was filed, CDS Trucking had submitted all information required by law or rule as set forth on the application form. No additional information from the applicant was required by law or rule in order for the Department to act on the application.

22. Instead of processing the application within 90 days, the Department requested copies of two contracts recently executed by the applicant. The form letter issued by the Department provided: "Your application is presently under review. In order to complete this review, please submit the following additional information." (emphasis added) Such letter incorrectly suggested to CDS Trucking that if it did not furnish the information, its application would not be completed.

23. On March 24, 1992, CDS Trucking responded to the request and submitted the additional information which it thought was required to complete its application.

24. Because it had requested additional information, the Department extended the time within which to act on CDS Trucking's application for recertification. Since the Department's request for such information was made on the last possible date to make such request, the time to act on the application, under the Department's interpretation, was extended the maximum length of time. More important to this case, however, is the fact that the Department had no basis, in law or fact, to seek additional information from CDS Trucking.

25. Moreover, had CDS Trucking filed its application for recertification prior to 90 days before the expiration of its certificate, the Department would have left CDS Trucking on the DBE roster regardless of the length of time necessary to process its renewal, including any delays created by the Department's requests for additional information.

26. The Department does not have a rule that requires DBE applicants for recertification to file for renewal not later than 90 days prior to expiration of their certifications.

27. The DBE directory used for this bid letting included the names of many DBE subcontractors whose certifications had expired before April 8, 1992, the date of printing for the directory. An even larger number of DBE subcontractors whose certifications expired before May 27, 1992, were included in the DBE directory used for this bid letting. One of the DBE subcontractors used by an unsuccessful bidder on this project (whose bid the Department did not deem nonresponsive) had a certification that had expired on June 12, 1988.

28. At the time it gave Hubbard the quote for this project, CDS Trucking believed it was operating as a DBE. Since CDS Trucking had supplied all requested information to the Department and had a history of certification, no reasonable basis existed to presume CDS Trucking was not a bona fide DBE.

29. CDS Trucking, by giving a quote to Petitioner, represented itself as a DBE to Hubbard.

30. Hubbard relied on the quote from CDS Trucking and presumed it to be a DBE. As such, Hubbard further presumed it had met the DBE requirement for this project and, consequently, did not believe it needed to make an additional good faith showing.

31. Indeed, had the Department followed its applicable rules, CDS Trucking would have been certified on the date of the letting, May 27, 1992.

32. Had Hubbard known CDS Trucking was not certified on May 27, 1992, other arrangements could have been made.

33. The Department arbitrarily rejected Hubbard's bid and refused to look at the facts and extenuating circumstances regarding CDS Trucking and the Department's own failure to timely process the DBE's renewal application.

34. The fact that CDS Trucking, because of the Department's own failure to timely issue the recertification, was not certified on the date of letting is a minor irregularity in that CDS Trucking was certified on the date of the award and clearly was eligible for certification at all times. More important, the inclusion of CDS Trucking as a DBE does not convey an improper advantage on Hubbard not enjoyed by the other bidders.

35. The Department failed to consider any of the factual matters related to CDS Trucking when it determined Hubbard's bid to be nonresponsive for its alleged failure to meet the DBE project goal.

36. In fact, when the fact that CDS Trucking should have been certified by the Department on May 27, 1992 is considered, Hubbard's bid for this project did and does meet the DBE project goal.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

38. In this case Petitioner bears the burden of proof to establish that it is entitled to the bid award because the agency's decision in the proposed award is fraudulent, arbitrary, illegal or dishonest.

39. An arbitrary award is one not based upon or supported by facts or logic. In this case, the Department's disallowance of CDS Trucking is not supported by the facts or logic. Without a doubt, CDS Trucking is a DBE. The only reason Hubbard's bid was deemed nonresponsive was because it did not meet the DBE goal for the project without including CDS Trucking. The only reason CDS Trucking was not a certified DBE on the date of the letting was because the Department had not acted on the application timely. Had the Department timely and properly processed CDS Trucking's application for DBE certification renewal, the company would have been certified on the date of the letting. Had the Department considered the factual matters related to the recertification, instead of merely checking the DBE directory (which was replete with DBEs with expired certifications), Hubbard would have been deemed responsive.

40. Unfortunately, the minority business office did not follow its rules in processing the renewal for CDS Trucking. The office had no basis to support the request for additional information. The attempt to extend the deadline for acting on the application may have been a response to the time restraints and pressures of the office's work load but did not relate to a shortcoming of the application. There was not an identifiable problem in the application or file for CDS Trucking that would have precluded DBE certification renewal. It is incontrovertible that CDS Trucking has always been eligible for DBE certification.

41. Hubbard and the public (by having to pay an additional \$132,779.22 for this project) should not be prejudiced because one division of the Department failed to timely act. In making its decision to deem Hubbard nonresponsive, the Department failed to consider any factors related to CDS Trucking certification. Because it determined CDS Trucking was not certified on the day of letting, regardless of Department error, the Department deemed Hubbard's bid nonresponsive. Such result is not based in reason, logic or law.

42. Moreover, such result does nothing to assure that the integrity of the bidding process is upheld. To allow a bidder to use a noncertified DBE just because it is listed in the DBE directory is more illogical than to allow the inclusion of a bona fide DBE who, because of Department error, is not certified on the date of letting. Both the bidding process and the objectives of the DBE program could be readily circumvented by an unscrupulous bidder. In this case, a qualified, eligible DBE will be denied the opportunity this project affords if the Department's arbitrary position is allowed.

RECOMMENDATION

Based on the foregoing, it is

RECOMMENDED:

That the Department of Transportation enter a final order finding Hubbard Construction Company's bid responsive, and awarding contract no. 11130-3518 to Hubbard Construction Company.

DONE and ENTERED this 21st day of October, 1992, in Tallahassee, Leon County, Florida.

JOYOUS D. PARRISH Hearing Officer
Division of Administrative Hearings
The DeSoto Building
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of October, 1992.

APPENDIX TO CASE NO. 92-4018

RULINGS ON THE PROPOSED FINDINGS OF FACT SUBMITTED BY THE PETITIONER:

1. Paragraphs 1 through 33, 36, 38, 41, 43, 47, 48, 51, and 55 are accepted.
2. Except as specifically addressed in the foregoing findings of fact, all remaining paragraphs are rejected as hearsay, argument, presuming facts not in evidence, contrary to the weight of the evidence or misstatement of the record, irrelevant, or repetitive.

RULINGS ON THE PROPOSED FINDINGS OF FACT SUBMITTED BY THE RESPONDENT:

1. Paragraphs 1 through 5, 8, 11, 14, 15, 16, 17, 18, 19, 20, 22, 24, 29, 31, 32, 36, 38, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 57, and 59 are accepted.
2. Except as specifically addressed in the foregoing findings of fact, all remaining paragraphs are rejected as incorrect or incomplete references of fact, recitation of testimony not accepted as ultimate fact, argument, irrelevant, contrary to the weight of the total evidence, or inapplicable as a matter of law and therefore immaterial.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should 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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DISTRICT COURT OPINION
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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

HUBBARD CONSTRUCTION COMPANY,
Appellant,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

vs.

CASE NO. 93-1701
DOAH CASE NO. 92-4018BID

DEPARTMENT OF TRANSPORTATION,
Appellee.

_____ /

Opinion filed September 29, 1994.

An appeal from Department of Transportation. Ben G. Watts, Judge.

F. Alan Cummings and Mary M. Piccard of Cummings, Lawrence & Vezina, P.A.,
Tallahassee, for Appellant.

Thornton J. Williams and Gregory G. Costas of Department of Transportation,
Tallahassee, for Appellee.

PER CURIAM.

The appellant challenges a final order in which the Department of
Transportation (the department) rejected certain findings of fact and

conclusions of law of the hearing officer and thereby denied the appellant's bid protest. Because the hearing officer's recommended order was supported by competent substantial evidence and did not involve a misapplication of law, we reverse.

The appellant submitted the lowest bid for a contract to construct a highway project. The department rejected the bid as nonresponsive and notified the appellant of its intent to award the contract to the next lowest bidder. The appellant filed a timely protest, and, following a hearing, the hearing officer determined that the discrepancy in the appellant's bid was a minor irregularity that did not convey an improper advantage to the appellant. The hearing officer thus concluded that the department acted arbitrarily in rejecting the appellant's bid and recommended that the department award the bid to the appellant. The department rejected the hearing officer's findings that the discrepancy was minor and that the irregularity did not result in a competitive advantage to the appellant, and thus concluded that it had not acted arbitrarily in rejecting the appellant's bid.

Contrary to the department's position, we conclude that the record contains competent substantial evidence to support the hearing officer's findings and that the department thus erred in rejecting those findings on that basis. See, e.g., *Department of Transportation v. Groves-Watkins Constructors*, 530 So.2d 912, 913 (Fla. 1988); see also *Overstreet Paving Co. v. Department of Trans.*, 608 So.2d 851 (Fla. 2d DCA 1992); *Asphalt Pavers v. Department of Trans.*, 602 So.2d 558 (Fla. 1st DCA 1992). And the findings amply demonstrate that the department acted arbitrarily in rejecting the appellant's bid.

We accordingly reverse the final order. We remand this cause to the department for an order awarding the contract to the appellant, if the contract has not already been awarded to a competitor. If the contract has already been awarded, the appellant may seek ancillary relief pursuant to section 120.68(13)(a)2, Florida Statutes (1993), in an appropriate circuit court. See *Overstreet Paving*, 608 So.2d at 853.

ALLEN, KAHN and MICKLE, JJ., CONCUR.