

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OPUS SOUTH CORPORATION,)
)
 Petitioner,)
)
 vs.) CASE NO. 93-2740BID
)
 BOARD OF REGENTS,)
)
 and)
)
 GREENHUT CONSTRUCTION COMPANY, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Hearing Officer of the Division of Administrative Hearings, on June 4, 1993, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue presented is whether Petitioner is the lowest, responsive bidder on Board of Regents' Project BR-787.

PRELIMINARY STATEMENT

Upon notification from Respondent Board of Regents that it intended to reject the bid of Petitioner Opus South Corporation and award the bid to Intervenor Greenhut Construction Company, Inc., Petitioner timely filed its notice of protest and formal protest to that intended bid award. This cause was thereafter transferred to the Division of Administrative Hearings for a formal proceeding regarding the Board's intended award. Petitioner presented the testimony of Joseph Dusek, Ed Hewes, and Patricia Jackson. The Intervenor presented the testimony of Leonard Monks. Additionally, Joint Exhibits numbered 1-13, Petitioner's Exhibits numbered 1-6, Respondent's Exhibit numbered 1, and Intervenor's Exhibits numbered 1-5 were admitted in evidence. All parties submitted post-hearing proposed findings of fact in the form of proposed recommended orders. A specific ruling on each proposed finding of fact can be found in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. A Call for Bids was issued by the Respondent Board of Regents (hereinafter "Board") for Project BR-787 for the expansion and renovation of the University of West Florida Library.

2. The Call for Bids provides that at least 15 percent of the project contract amount must be expended with Minority Business Enterprises (hereinafter "MBEs") certified by the Department of General Services (now known as the Department of Management Services) as set forth under the Florida Small and Minority Business Assistance Act, Chapter 287, Florida Statutes. That document further provides that if the 15 percent minority participation is not obtained, the Board would require the apparent low bidder to provide evidence of its good faith efforts to meet that goal. Lastly, that document advises potential bidders to review the requirements for MBE participation in the Special Conditions in order to schedule the necessary tasks to accomplish such good faith efforts.

3. The Project Manual, Volumes 1 and 2, contains the bidding requirements, including the general and special conditions, specifying the good faith effort requirements applicable to all bidders.

4. The Project Manual, Instructions to Bidders, provides that the award of the contract is subject to the demonstration of good faith efforts by any bidder whose bid proposes less than 15 percent participation in the contract by MBEs. The required good faith effort to be demonstrated is set forth in the Special Conditions. That section further provides that the contract will be awarded by the Board to the lowest qualified and responsible bidder, provided the bid is reasonable and is in the best interest of the Board to accept it.

5. The Project Manual, Special Conditions, provides that if the bid does not contain the required 15 percent participation by certified MBEs, then the apparent low bidder will be required to provide evidence of good faith efforts within two working days after the opening of bids. It further provides that incomplete evidence not fully supporting 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 Board may, at its option, seek supplementary evidence not submitted by the bidder.

6. Special Conditions 1.7.1 through 1.7.8 of the Project Manual contain eight factors relating to the bidders' obligations to make and document a good faith effort to meet the MBE goal. The factors listed to be considered by the Board are an almost verbatim recitation of the eight factors listed in Section 287.0945(3)(b), Florida Statutes.

7. Leonard Monks, Chair of the University of West Florida's MBE Advisory Committee conducted a pre-bid/pre-solicitation meeting for Project BR-787 on December 7, 1992. Among other things, he discussed the MBE participation program and handed out a packet of materials to those in attendance at the pre-bid meeting. That packet included a General Instructions sheet regarding the University's MBE Advisory Committee and the requirement that the MBEs utilized must be certified. That Instruction sheet further advised that a listing of all known certified sources was available from the University's Purchasing Office, the office of which Monks was the Director.

8. Attached to that General Instructions sheet were a sample checklist to be used by the University's MBE Advisory Committee in evaluating a bidder's good faith efforts and a separate multi-page document entitled Florida Department of Management Services Certified Minority Business Enterprises. In response to a question from one of the attendees, the potential bidders were informed that the list referenced in the General Instructions was the same list provided in the packet distributed at the meeting.

9. Both Joseph Dusek and Ed Hewes attended the pre-bid/pre-solicitation meeting on behalf of Petitioner Opus South Corporation (hereinafter "Opus"). Both of them understood that the list handed out during that meeting contained both the certified MBEs and the community and minority organizations which they were expected to contact. Their review of that list revealed not only MBEs, some of whom were known to them to be MBEs, but also businesses whose names suggested they were minority organizations. For example, the list contained a business called Minority Business Consultants & Contractors, Inc., and a business called Minority Specialty Services, Inc. When they reviewed the list in more detail after this dispute arose, they realized that those businesses with names sounding like minority business assistance organizations were simply MBEs.

10. After the meeting, Dusek and Hewes divided between them the work to be performed in submitting a bid for the project. Dusek took primary responsibility for preparing Opus' estimate of the cost involved, and Hewes took primary responsibility for MBE compliance and good faith effort documentation. Opus did not contact Monk's office for any additional information subsequent to the pre-bid meeting and prior to the time of bid opening since Opus did not know that Monk's office had additional information it had not provided to Opus.

11. In addition to placing a newspaper ad and taking other steps to comply with the good faith effort requirement, Opus sent initial letters to all of the businesses on the list provided to it at the pre-bid conference. That initial solicitation letter was sent by Opus to 72 certified MBEs.

12. As a result of that initial letter, Opus received bids, indications of interest, and advice from several of those businesses that the businesses were not interested in bidding the project. When Opus sent its follow-up solicitation letter, it did not send a follow-up letter to 3 of the 72 businesses which had specifically advised Opus they were not interested in bidding the project. Accordingly, Opus only sent follow-up solicitation letters to 69 certified MBEs.

13. As a result of Opus' erroneous assumption that the list of certified MBEs provided at the pre-bid conference also included minority community organizations, Opus did not send copies of the information provided to certified MBEs to any minority community organizations providing assistance to MBEs.

14. On December 22, 1992, Opus, Intervenor Greenhut Construction Company, Inc. (hereinafter "Greenhut"), and 6 other contractors submitted bids on Project BR-787. All eight bids for BR-787 came in below the Board's budget for the project. None of the eight bids submitted for the project contained any MBE involvement.

15. Opus was the apparent low bidder. Opus' bid was \$5,959,100, and the next lowest bid was from Greenhut, in the amount of \$6,010,000.

16. Since the bid submitted by Opus did not contain the required certified MBE participation of 15 percent, the Board requested Opus to submit documentation to demonstrate its good faith effort in obtaining MBE participation. Opus submitted its initial good faith documentation package on December 23, 1992, and later supplemented that good faith effort package with additional documentation.

17. Paragraph 1.7 of the Special Conditions of the bid documents sets out the good faith requirements for the project and itemizes the requirements of the Board as to what documentation would provide evidence of satisfaction of the eight factors to be considered in evaluating the good faith efforts of a bidder. Subparagraphs 1.7.4 and 1.7.8 cite to the specific statutory factors and provide as follows:

1.7.4 Statute 287.0945(3)(b)4

.1 STATUTORY REQUIREMENTS: 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;

.2 IMPLEMENTATION REQUIRED BY THE STATE UNIVERSITY SYSTEM: 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.

.3 DOCUMENTATION REQUIRED: Copy of letters, telegrams, and/or meeting notes required as evidence.

* * *

1.7.8 Statute 287.0945(3)(b)8:

.1 STATUTORY REQUIREMENTS: 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.

.2 IMPLEMENTATION REQUIRED BY STATE UNIVERSITY SYSTEM:
Did the Bidder send copies of the information provided under Subparagraphs 1.7.2 and 1.7.3 to the organizations, groups, and offices listed in 1.7.8.1.

.3 DOCUMENTATION REQUIRED: Copies of information sent to such organizations, groups, and offices, at least one week prior to bid date required as evidence.

18. Opus' transmittal letter of its good faith efforts package outlines the documentation being submitted. The letter does not mention any contact with minority community or business assistance organizations. Monks, the Chair of the University's MBE Advisory Committee, contacted Hewes and inquired about the absence of documentation for organization contact. Hewes advised Monks that minority organizations had been contacted based on the fact that Opus had contacted every organization on the list given it by Monks. Monks then advised Hewes that there were other organizations that were supposed to be contacted that were not on that list but rather were on a different list that had been available in his office but that had not been provided to all of the bidders at the pre-bid meeting. The list, however, had been provided to some of the other bidders who had specifically called and asked for it prior to submission of the bids. The existence of that separate list was not disclosed to all of the bidders who attended the pre-bid meeting.

19. Monks sent to Opus by FAX transmission the list which had been given to only some of the bidders. That list contains the names of nine "area advertisers," a category not relevant to this proceeding since Opus did place an advertisement as part of its good faith efforts. The list also contains eight names under the heading "area business and community organizations." Included within those eight are the Dodge Reports, the Northwest Florida Chapter of the Associated General Contractors of America, and the Small Business Development Center.

20. The Small Business Development Center is an entity which is part of the University of West Florida. "Pete" Singletary is the Director of the University of West Florida's Small Business Development Center. He attended the pre-bid meeting and therefore knew who the bidders were who attended that meeting and knew of the opportunity for certified MBEs to participate in the bid for the project. He is also on the University's MBE Advisory Committee. Accordingly, the Small Business Development Center was aware that bids were being solicited for the library expansion/renovation project.

21. Upon receiving a copy of the second list, by letter dated December 29, 1992, Hewes advised Monks that Opus had in fact contacted Dodge Reports and enclosed a copy of the documentation reflecting that to be true. Hewes also advised Monks that contact had been made with Associated General Contractors. In fact, Joseph Dusek of Opus is the vice president and sits on the board of directors of that organization. Written notice was not, however, submitted to that organization by Opus.

22. The University's MBE Advisory Committee met on December 30, 1992, and reviewed Opus' good faith efforts documentation. The Committee members used a checklist which was not a part of the bid documents but which had been provided at the pre-bid meeting. In essence, the checklist contains a synopsis of the eight factors to be considered, as set forth by statute and in Special Condition 1.7, and a yes/no column to be marked. The checklist itself required that all questions be marked "yes" in order to declare the apparent low bidder responsive, a requirement not found in the statute.

23. The three members of the Advisory Committee checked the yes columns for the items on the checklist except one. The seventh item on the checklist provides as follows: "Did the apparent low bidder provide copies of information to minority committee organizations and to minority contractor groups at least one week prior to bid opening." Each of the committee members answered that question, not by checking yes or no for that item, but rather by commenting that although Opus had not contacted minority organizations, Opus had in substance made a good faith effort because Opus had contacted every available MBE directly.

24. By memoranda dated January 4 and January 12, 1993, the University of West Florida informed the Board's Office of Capital Programs of its determination that Opus had made the necessary good faith effort to obtain MBE participation and recommended that the contract be awarded to Opus. In making its recommendation, the University explained that the Advisory Committee had no difficulty determining that Opus had made a good faith effort but did have difficulty conforming that determination to the check list which it was required to use. The University further explained as follows:

The obvious intent of Item 7, "Did the apparent low bidder provide copies of information to minority community organizations and to minority contractor groups at least one week prior to bid opening," is to reach those certified (S)MBE firms that may be interested and may need assistance in bidding the project. It is but one more method of reaching the individual (S)MBE firms.

Opus South wrote to each of the certified (S)MBE firms listed in a packet handed out to all potential bidders at the pre-bid conference indicating not only those (S)MBE firms in the region but also those elsewhere in the state (i.e., Tampa, Ocala) who had indicated an interest and capability to do work statewide. If, after being contacted they needed assistance, which one could assume they would, in turn and on their own, they could seek out such minority community organizations, minority contractor groups, small business development centers, and other such organizations.

In addition to corresponding with all (S)MBE firms, Opus South subsequently verified to the University's committee by their letter dated December 29, that contact was made with the AGC (Associated General Contractors of America) via F. W. Dodge's Office here in Pensacola.

NOTE: It was the opinion of some members of the committee that on Item 4.A., wherein it asked "Did the apparent low bidder provide a reasonable number of letters to show that MBEs were solicited from the available trade areas listed in the DGS MBE Directory," if the contractor was "marginal" in his show of numbers, then Item 7 would be one way to further substantiate his claim. If, however, on Item 4.A., the contractor contacted directly all such certified (S)MBEs having indicated an interest, the instructions should/could read: Item 7 need not apply.

In consideration of the above reasoning, and with the full review of the very pertinent comments by the individual committee members (clarifying their respective checkmarks), we find no reasonable evidence nor cause to reject said submittal and thus find it to be in compliance.

Opus was notified in writing as to the University's recommendation that the contract should be awarded to Opus.

25. Patricia Jackson, the Board's administrator responsible for contract awards, reviewed the Committee's recommendation. She rejected the recommendation of the Committee based on the Board's unwritten policy that unless each member of the Committee checks "yes" for each item on the checklist, the Board will not accept a finding that a bidder is in compliance with all requirements. She further determined that Opus' bid should be rejected because, in her opinion, the Committee had not reached a consensus. That opinion can only be based on a misunderstanding of the meaning of the word "consensus" because each of the Committee members were in agreement as to the proper interpretation of Special Condition 1.7.8 and were in agreement that the contract should be awarded to Opus.

26. Jackson notified the Committee that Opus did not meet Special Condition 1.7.8 and directed the Advisory Committee to meet again. As a result, the Committee agreed to reject Opus' bid as directed by Jackson, reviewed the bid and good faith efforts of Greenhut, and recommended that the contract be awarded to Greenhut.

27. In directing the Advisory Committee to reconvene and reject Opus' bid in compliance with Jackson's instructions, John Jarvis, the project manager and Director of the University's Facilities Planning and Management, explained the Board's staff's decision as follows:

Attached, for your information, action and files, is the subject response/ruling dated January 21, 1993, by the Office of Capital Programs (OCP) as regards the findings of the UWF Minority Business Enterprise Advisory Committee recommendation; i.e., that the consensus-recommendation of said committee was that the contractor was in-compliance. This was not acceptable at the Board staff level, on the grounds that the submittal does not comply with the subparagraph 1.7.8 of the project manual special conditions (see copy of excerpt attached) as regards question 7 of the checklist.

With this ruling, this is to request you, as the university minority business officer, officially notify (I assume in writing) the apparent low bidder that good faith effort requirements are not in compliance with contract documents (see attached excerpt copy of standard practice 00-0000-3-04-01, page 4 of 5, addressing good faith effort determination. See the standard practice cited for special requirements: express mail (return receipt requested), submittal deadlines, and such.

Note: you have been copied all other pertinent correspondence and submittals to Tallahassee. This writer and Mr. Martin have exerted much time and effort in the questioning of the "verbatim" reading of the CMBE good faith effort compliance checklist versus a 'commonsense' approach and methodology. And, although it has proved to be to no avail on this project the Board offices are looking at the entire CMBE process. We will see changes forthcoming. In the meantime, this ruling stands, and we must proceed to the next step.

28. Subsequently, Jackson again reviewed the bid of Opus and determined that Opus had not sent follow-up letters to three of the certified MBEs initially contacted. Jackson determined that Opus' bid should have also been rejected for failure to send the three follow-up letters. However, the Board's unwritten interpretation of the condition relating to follow-up letters is that if an MBE responds to an initial contact by informing the contractor that the MBE does not wish to participate in the project, the Board does not require a follow-up letter. There is no requirement that the MBE express its lack of interest in writing, and there is no requirement that the contractor document the MBE's expression of no interest. The only MBEs to whom Opus did not send follow-up letters were those which had informed Opus they did not wish to participate in the contract. Accordingly, under the Board's unwritten interpretation of Special Condition 1.7.4, Opus was in compliance with that Condition.

29. Greenhut, the next apparent low bidder, submitted its good faith efforts documentation for review. Greenhut's good faith efforts submittal was found to be in compliance with all requirements, and Greenhut was determined to be the lowest responsive bidder. Greenhut was awarded the contract for the project by the Chancellor of the Board on April 2, 1993.

30. Greenhut's good faith efforts documentation revealed that Greenhut had contacted fewer certified MBEs than had Opus. Greenhut, however, had contacted several community and minority organizations.

31. When Jackson, from the Board's staff, reviewed the good faith efforts documentation submitted by Greenhut, she determined that Greenhut had complied with the requirement to contact minority and community organizations for the sole reason that Greenhut had contacted the University of West Florida's Small Business Development Center. She determined that not only did the other minority and community organizations contacted by Greenhut not qualify as organizations that render the type of minority assistance contemplated by the

statute and the Project Manual, but also that the only organization which she would approve as a qualifying organization was the Small Business Development Center.

32. Since the only organization which the Board's staff would approve as qualifying to meet Special Condition 1.7.8 was the Small Business Development Center, then, in fact, Opus' bid was rejected due to Opus' failure to contact the Small Business Development Center, which is part of the University of West Florida and whose director is on the University's MBE Advisory Committee and who attended the pre-bid meeting in person. Accordingly, the rejection was for failing to notify one specific entity which had full knowledge of the bid solicitation. In other words, Opus' bid was rejected for failing to notify the University itself.

33. Although notification to minority organizations may well be a material condition in most situations, where, as here, the only organization which qualifies is the University, the condition cannot be considered material. Since notifying the University as to the contents of documents given to the bidders by the University would be a futile and senseless act, a condition requiring that cannot logically be considered a material condition. It is a technicality only since performing it is not likely to increase MBE participation.

34. There were several MBEs who contacted the Small Business Development Center regarding the bid solicitation for Project BR-787. Opus had contacted each one of those MBEs directly. Accordingly, had Opus contacted the Center, it would only have made contact with the same MBEs through a different route. Opus received no economic advantage by not sending a letter to the Small Business Development Center advising it that Opus intended to bid on the project, a fact the Center already knew.

35. The Board determined that the failure of Opus to send a letter to the Small Business Development Center was a material, non-waiveable irregularity which rendered Opus' bid non-responsive. The Board reached this conclusion not because it affected the amount of MBE participation or provided Opus an economic advantage over the other bidders. Rather, the Board determined the irregularity was material because it deviated from the Board's interpretation of Section 287.0945, Florida Statutes. The Board took this position even though it recognizes that the statute does not mandate bid rejection in such circumstances.

36. No explanation has been offered for the University's failure to provide the second list--the list containing the names of several organizations including the Small Business Development Center--to all bidders. Withholding the list from the bidders who attended the pre-bid meeting did not promote the purposes of the MBE program. Moreover, the provision of that list to some of the bidders without providing the list to all of the bidders subverted the competitive bidding process by giving some of the bidders an unfair advantage over the others.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the parties hereto and the subject matter hereof. Section 120.57(1), Florida Statutes.

38. Opus, like the other seven bidders, included no MBE participation in its bid. Therefore, it was necessary for Opus to submit documentation to show that it had engaged in good faith efforts to secure MBE participation. It was then incumbent upon, first, the Advisory Committee and, second, the Board to make a good faith determination as to the sufficiency of Opus' good faith efforts. The Advisory Committee did so; the Board did not.

39. Section 287.0945(3)(b), Florida Statutes, enumerates the factors to be considered in determining whether a contractor has made good faith efforts. The statute does not specify that all of the eight criteria must be met; rather, the statute requires that the eight criteria be considered as factors in evaluating good faith efforts. The statute itself does not mandate rejection of a bid that fails to meet any criterion; rather, the statute contemplates an evaluation of the efforts made in relation to the particular project being considered. Although the Board's position is that it has no discretion in interpreting the statute, the statute does not contain language which suggests an absence of discretion. Because of its belief that it possess no discretion, the Board has determined that all of the statutory criteria are material and non-waiveable, even under the facts of this case. Such an approach is arbitrary.

40. The Advisory Committee in good faith evaluated the documentation submitted by Opus. In correspondence to the Board, the Committee indicated that it had no problem determining that Opus had engaged in good faith efforts; the problem the Committee had was trying to fit those efforts into the form the Committee was required to use. The Committee reached a consensus that Opus' bid was responsive and recommended the award to Opus. The Committee later recommended the award to Greenhut only because the Board's staff advised the Committee that the Committee was not permitted to reach the recommendation which it had reached. The Board's insistence on Opus complying with the form rather than evaluating the substance of Opus' good faith efforts is arbitrary.

41. The Board's staff determined that Opus had failed to meet Special Condition 1.7.4 in that Opus failed to send follow-up letters to three certified MBEs to whom Opus had sent initial solicitation letters. Opus sent follow-up letters to all certified MBEs to whom it had sent the initial letter but for those MBEs which had advised Opus they were not interested. The Board's representative testified that it was acceptable to not send follow-up letters to MBEs who had advised Opus they were not interested. Accordingly, Opus did meet Special Condition 1.7.4. Rejecting Opus' bid on that basis was arbitrary.

42. As to Special Condition 1.7.8, it is the Board's position that Opus failed to contact any minority organizations. Opus admits that it did not. Prior to submitting its bid, Opus, in good faith, thought that it had contacted such entities. It was wrong. The record reveals, however, that had Opus done so, such contact would not have been acceptable to the Board's staff since there was only one entity which the Board's staff considered qualified as such an organization--the University's own Small Business Development Center. Under the Board's interpretation, a bidder receiving bid documents from the University was required to then notify the University that those bid documents existed. The Board's position is irrational and, therefore, arbitrary.

43. Although the failure to contact community and minority organizations may well be a material defect in many situations, the failure to contact in this case can only be a minor or technical irregularity, not a material one, since the Board's staff would only approve one organization which was part of the entity letting the bid. Material irregularities are those which, if waived, would provide the contractor with a palpable economic or competitive advantage

not enjoyed by the other bidders or which would deprive the government of its assurance that the contract will be entered into and performed in accordance with the Invitation to Bid. *Tropabest Foods, Inc. v. Department of General Services*, 493 So.2d 50 (Fla. 1st Dist. 1986); *Robinson Electrical Co. v. Dade County*, 417 So.2d 1032 (Fla. 3rd Dist. 1982). Opus received no competitive advantage by failing to send the letter to the Small Business Development Center and the substance of the contract has not been affected thereby. Under the facts of this case, Opus' failure to send the letter is not a material defect in its bid. Accordingly, Opus was the lowest responsive bidder on the project in question.

44. Even if the Board's position that the Small Business Development Center at the University was required to be notified of the existence of the bidding opportunity, although the director of that Center attended the pre-bid meeting, were reasonable, some bidders were given an advantage in the bidding process because they were given a list containing the name of the Center while other bidders were not provided with that list. When the University provided that list of organizations to some of the bidders without providing it to others, the entire purpose of the competitive bidding process was subverted.

45. The Board's representative acknowledged that it was unfair to provide some bidders with a list identifying the Small Business Development Center without providing that list to all the bidders. Accordingly, by the Board's own admission, the bidders were not treated equally and fairly. The primary concern in public bidding is the integrity of the competitive bidding process. *Moore v. Dept. of Health and Rehabilitative Services*, 596 So.2d 759 (Fla. 1st Dist. 1992). The integrity of the bidding process is violated when some bidders are provided information which is withheld from others.

46. A decision is arbitrary when it is not supported by facts or logic or is despotic. *Agrico Chemical Co. v. Dept. of Environmental Regulation*, 365 So.2d 759, 763 (Fla. 1st Dist. 1978). The Board's decision to reject the bid of Opus is not supported by facts or logic and is, therefore, arbitrary.

RECOMMENDATION

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

RECOMMENDED that a Final Order be entered awarding Contract No. BR-787 to Petitioner Opus South Corporation.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 29th day of July 1993.

LINDA M. RIGOT
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 29th day of July, 1993.

APPENDIX TO THE RECOMMENDED ORDER IN CASE NO. 93-2740BID

1. Petitioner's proposed findings of fact numbered 1-7, 9-37, and 41-43 have been adopted either verbatim or in substance in this Recommended Order.

2. Petitioner's proposed finding of fact numbered 8 has been rejected as not being supported by the weight of the evidence in this cause.

3. Petitioner's proposed findings of fact numbered 38, 39, and 44 have been rejected as being unnecessary for determination of the issues herein.

4. Petitioner's proposed finding of fact numbered 40 has been rejected as not constituting a finding of fact but rather as constituting argument of counsel, conclusions of law, or recitation of the testimony.

5. Respondent's proposed findings of fact numbered 1-3, 5, 9, 11-15, 17-26, 30-33, 35, 36, 40 and 44 have been adopted either verbatim or in substance in this Recommended Order.

6. Respondent's proposed findings of fact numbered 16, 28, 29, 47, and 48 have been rejected as not supported by the weight of the evidence in this cause.

7. Respondent's proposed findings of fact numbered 4, 6-8, 10, 38, 39, and 45 have been rejected as being unnecessary for determination of the issues herein.

8. Respondent's proposed findings of fact numbered 27, 34, 37, and 46 have been rejected as not constituting a finding of fact but rather as constituting argument of counsel, conclusions of law, or recitation of the testimony.

9. Respondent's proposed findings of fact numbered 41-43 have been rejected as being irrelevant to the issues herein.

10. Intervenor's proposed findings of fact numbered 1-5, 9-15, and 17-26 have been adopted either verbatim or in substance in this Recommended Order.

11. Intervenor's proposed finding of fact numbered 28 was not supported by the weight of the evidence in this cause.

12. Intervenor's proposed findings of fact numbered 6-8 and 16 have been rejected as being unnecessary to the issues involved herein.

13. Intervenor's proposed finding of fact numbered 27 has been rejected as not constituting a finding of fact but rather as constituting argument of counsel, conclusions of law, or recitation of the testimony.

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.

=====
AGENCY FINAL ORDER
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARING

OPUS SOUTH CORPORATION,

Petitioner,

vs.

CASE NO. 93-2740BID

STATE OF FLORIDA BOARD OF REGENTS,

Respondent,

and

GREENHUT CONSTRUCTION,

Intervenor.

_____ /

FINAL ORDER

The Florida Board of Regents, having received the Recommended Order (reproduced herein) entered in this case by Linda M. Rigot, Hearing Officer, Division of Administrative Hearings, dated July 29, 1993, hereby adopts the findings of fact, conclusions of law, and recommendation contained in the Recommended Order. Greenhut Construction, Intervenor in this bid protest, filed exceptions to the Recommended Order which are addressed below.

RULINGS ON INTERVENOR'S EXCEPTIONS

1. Intervenor excepts to Finding of Fact number 22 in the Recommended Order from the Hearing Officer. Upon a complete review of the record, it is determined that the Hearing Officer's finding was based upon competent and substantial evidence. The Hearing Officer found that while the checklist and the Special Conditions required compliance with all eight good faith factors to be responsive, Section 287.0945(3)(b), F.S. required consideration of all eight good faith factors. The Hearing Officer did not ignore the checklist or the bidding requirements in the Special Conditions. The Hearing Officer found that Opus' noncompliance with the minority assistance organization requirement was a technicality that should have been waived under the particular facts of this case. Finding of Fact number 22 is supported by the record. Intervenor's exception is rejected.

2. Intervenor excepts to Finding of Fact no. 23. Upon a complete review of the record, it is determined that the Hearing Officer's finding was based on competent, substantial evidence. The question of available minority business enterprises ("MBE") was considered by the university advisory committee and the Board. Neither entity took issue with the number of MBE contacted by Opus for this project. The introduction by Greenhut of the DMS/MBE directory did not preclude the inference that the MBEs contacted by Opus were those available as determined by the Advisory Committee. It is the Hearing Officer's function to consider all of the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. *Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277 (Fla. 1st DCA 1985). The Hearing Officer's finding is supported by the record. The Intervenor's exception is rejected.

3. Intervenor excepts to Finding of Fact number 32 of the Recommended Order. The exception is rejected because the finding is supported by competent, substantial evidence in the record. Intervenor now disputes Ms. Jackson's testimony regarding minority assistance organizations. Ms. Jackson testified that while the organizations contacted by Greenhut did provide some assistance, only the contacted Small Business Development Center ("SBDC") located at the University of West Florida, provided the level of assistance that she would recognize as satisfying the criteria for the minority assistance organization factor in regard to this construction project. Accordingly, the Hearing Officer's finding in regard to the SBDC is supported by the record. Under the *Heifetz* decision, an agency may not substitute inferences for those of the hearing officer even if the record would support conflicting findings. Additionally, Greenhut never disputed or rebutted Ms. Jackson's testimony at the hearing or in its proposed recommended order. The Intervenor's exception is rejected.

4. Intervenor excepts to Finding of Fact number 33. Upon a complete review of the entire record, it is determined that the finding is based upon competent, substantial evidence. In regard to this exception, Greenhut again argues that Ms. Jackson's position on the minority assistance organization requirement for this project was erroneous. Greenhut did not raise this as an issue at any stage of the bid protest process. The Hearing Officer's finding is consistent with the record, and she is authorized to weigh the evidence presented and judge credibility of the witnesses. The Hearing Officer found the organization contact requirement was a technicality under the particular circumstances of this case. The exception is rejected.

5. Intervenor excepts to Finding of Fact number 35. However, after a full review of the record, it is determined that the Hearing Officer's finding is based on competent, substantial evidence. The finding regarding the Board's conclusion is a permissible inference by the Hearing Officer, even though some other finding might also have been supportable. The exception is rejected.

6. Intervenor excepts to Finding of Fact number 36. In Finding of Fact number 36, the Hearing Officer found that the "second [UWF] list" which contained the names of organizations, including the SBDC, had been provided to some but not all of the contractors. Unrebutted evidence was presented that Opus did not receive the list. The record does not establish, as now argued by Greenhut in this exception, that Greenhut did not receive the second list. No evidence was presented with respect to whether Greenhut received the list. Mr. Hewes testimony regarding the second list was not objected to or disputed at the hearing. The Hearing Officer made a finding based on competent, substantial evidence. The exception is rejected.

CONCLUSIONS OF LAW

1. The Intervenor excepts to conclusion of law number 38. The Hearing Officer's conclusion was not erroneous, and is supported by the record. The Hearing Officer states the deficiencies in the Board's review based upon the record. Intervenor's exception to this conclusion of law is based its own version of facts and rejects Ms. Jackson's testimony at the hearing. The Board cannot substitute its judgment for that of the hearing officer, unless it is not supported by competent, substantial evidence. The record supports the hearing officer's conclusion based on the facts. Intervenor's exception is rejected.

2. Intervenor excepts to conclusion of law no. 39. After a review of the record, it is determined that the conclusion is not erroneous and is supported by the record in this case. The Hearing Officer made a finding as to the good faith effort special conditions and the statute based on competent, substantial evidence; and it was permissible to conclude that under the facts of this case, the Board's decision was arbitrary. The exception is rejected.

3. Greenhut excepts to conclusion of law no. 40. Greenhut's exception incorrectly asserts factual findings for those of the Hearing Officer which are supported by competent, substantial evidence. The Hearing Officer's finding of fact numbers 23 and 24 establish the reasons for the committee's actions and explains the inferences drawn by the Hearing Officer. The record supports the hearing officer's conclusion. The exception is rejected.

4. Intervenor excepts to conclusion of law-numbers 42 and 43 as erroneous because the conclusions rely upon an erroneous and unsupported opinion of one staff person of the Board. After a review of the record, it is determined that conclusions of law numbers 42 and 43 are Supported by the record of this case and based on competent, substantial evidence. Greenhut never disputed Ms. Jackson's testimony regarding organization or presented a proposed fact that her testimony was inaccurate. Ms. Jackson testified that while all the organizations that Greenhut contacted provided some assistance, only the SBDC located at UWF provided the degree of assistance that the specifications required. It was Permissible for the Hearing Officer to base her findings and conclusions on Ms. Jackson's testimony and other evidence presented in this case. Accordingly, Intervenor's exceptions are rejected.

5. Intervenor excepts to conclusion of law number 44 as not based upon competent, substantial evidence. However, the Hearing Officer's conclusion is properly supported by the record. The record does not establish that Greenhut did not have the second list. Mr. Hewes's testimony regarding the second list was not objected to or refuted by Greenhut. Therefore, it was permissible for the Hearing Officer to reach conclusion number 44. Intervenor's exception is rejected.

6. Intervenor excepts to conclusion of law numbers 45 and 46 as not based upon competent, substantial evidence. The record does not reveal that Greenhut did not have the second list. The record, instead, shows that Opus thought it had contacted minority organizations if it contacted the minority businesses on the university listing. Opus was unaware that another list of community organizations was available and provided to other bidders. That list was important to the issue, since Opus was rejected by the Board for failure to contact any minority organizations. Accordingly, it was permissible for the Hearing Officer to conclude that the bidders were not treated equally or fairly, and that the Board decision was, in this particular instance arbitrary. Therefore, Intervenor's exception is rejected.

This FINAL ORDER constitutes final agency action and an Order under Chapter 120 of the Florida Statutes. The parties may obtain judicial review of this Final Order in the District Court of Appeal, in accordance with Section 120.68, F.S., and the Florida Rules of Appellate Procedure. Commencement of an appeal may be made by filing a Notice of Appeal with the Office of the Corporate Secretary of the Board of Regents and a copy of that Notice, together with the filing fee prescribed by law, with the Clerk of the Court, within 30 days after this order is dated as being filed in the Office of the Corporate Secretary.

This FINAL ORDER entered this day of September, 1993.

BY: _____
Charles B. Reed
Chancellor
State University System of Florida

This FINAL ORDER was filed in the Office of Corporate Secretary on this 21st day of September, 1993.

BY: _____
Mary-Anne Bestbebreurtje
Corporate Secretary