

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NORTH FLORIDA CONSTRUCTION,)
)
 Petitioner,)
)
 vs.) CASE NO. 94-2353BID
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent,)
 and)
)
 PRO-STEEL BUILDERS, INC.,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER

Pursuant to written notice a formal hearing was held in this case before Larry J. Sartin, a duly designated Hearing Officer of the Division of Administrative Hearings, on May 12, 1994, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Tommy Strickland, pro se
North Florida Construction, Inc.
Post Office Box 129
Clarksville, Florida 32430

For Respondent: Thomas H. Duffy
Assistant General Counsel
Department of Transportation
Haydon Burns Building
605 Suwannee Street, Mail Station 58
Tallahassee, Florida 32399-0458

For Intervenor: Stephen J. Kubik, Esquire
155 Office Plaza Drive
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether the Respondent acted fraudulently, arbitrarily, illegally or dishonestly in proposing to award a contract for State Project No. 99003-3501 to the Intervenor.

PRELIMINARY STATEMENT

After review of bids submitted to the Respondent in response to an Invitation to Bid issued by the Respondent, the Respondent proposed to award a contract for the project to the Intervenor. By letter dated April 5, 1994, the Petitioner challenged the Respondent's proposed award and requested a formal administrative hearing.

By letter dated April 28, 1994, the Respondent requested assignment of a Hearing Officer of the Division of Administrative Hearings to this matter. The request was designated case number 94-2353BID and was assigned to the undersigned.

The final hearing was scheduled for May 12, 1994, by Notice of Hearing entered May 3, 1994.

On May 3, 1994, a Motion to Intervene was filed by Pro-Steel Buildings, Inc. The motion was granted without objection at the commencement of the final hearing.

At the final hearing the Petitioner presented the testimony of Eddie Gallon, Sr., and Thomas Strickland. No exhibits were offered by the Petitioner.

The Respondent presented the testimony of Mike Melvin. Three exhibits were offered by the Respondent and were accepted into evidence.

The Intervenor presented the testimony of Jacqueline Watts, Thomas Trapane and Stephen Warren. The Intervenor offered four exhibits which were accepted into evidence.

One "joint exhibit" was offered and accepted into evidence.

A transcript of the final hearing was filed May 18, 1994. The parties agreed to file proposed recommended orders on or before May 31, 1994. All of the parties filed proposed recommended orders.

A ruling on each proposed finding of fact contained in the proposed orders filed by the parties has been made either directly or indirectly in this Recommended Order, or the proposed finding of fact has been accepted or rejected in the Appendix which is attached hereto.

FINDINGS OF FACT

A. The Parties.

1. The Respondent, the Department of Transportation (hereinafter referred to as the "Department"), is an agency of the State of Florida. The Department sought bidders for a construction project by invitation to bid.

2. The Petitioner, North Florida Construction, Inc. (hereinafter referred to as "North Florida"), submitted a bid on the Department's construction project.

3. The Intervenor, Pro-Steel Buildings, Inc. (hereinafter referred to as "Pro-Steel"), also submitted a bid on the Department's construction project.

B. The Subject Invitation to Bid.

4. The Department issued an Invitation to Bid for State Project Number 99003-3501 (hereinafter referred to as the "ITB").

5. The ITB solicited bids on a construction contract for the relocation of the Department's maintenance yard facility in Tallahassee, Florida.

6. The ITB required that each prime contractor either subcontract at least 25 percent of the total contract price to a Certified Minority Business Enterprises (hereinafter referred to as a "CMBE"), or show a good-faith effort to meet the 25 percent goal. Pages 78-81, Joint Exhibit 1.

7. Included in the Instructions to Bidders, at Section B-14, are instructions concerning "Listing of Subcontractors." Page 15, Joint Exhibit 1. Section B-14 of the ITB provides:

In order that the Owner may be assured that only qualified and competent subcontractors will be employed on the project, each Bidder shall submit in triplicate with his proposal a list of the subcontractors who will perform the work for each Division of the Specifications utilizing the "List of Subcontractors" form enclosed as Exhibit 5. The Bidder shall have determined to his own complete satisfaction that a listed subcontractor has been successfully engaged in this particular type of business for a reasonable length of time, has successfully completed installations comparable to that which is required by this Agreement and is qualified both technically and financially to perform that pertinent phase of this work for which he is listed. . . .

Any bidder who lists a subcontractor not certified and/or registered by the State to perform the work of his trade if, such certification or registration is required for the trade by Florida Laws, will be rejected as non-responsive.

No change shall be made in the list of subcontractors, before or after the award of a contract, unless agreed to in writing by the Owner. [Emphasis added].

8. Exhibit 5, List of Subcontractors, provides, in part, the following:

THE UNDERSIGNED, HEREINAFTER CALLED "BIDDER", LISTS BELOW THE NAME OF EACH SUBCONTRACTOR WHO WILL PERFORM THE PHASES OF THE WORK INDICATED. FAILURE OF THE BIDDER TO SUPPLY SUFFICIENT INFORMATION TO ALLOW VERIFICATION OF THE CORPORATE, AND DISCIPLINE LICENSE STATUS OF THE SUBCONTRACTOR MAY DEEM THE BID AS BEING NON-RESPONSIVE.

Page 55, Joint Exhibit 1. Exhibit 5 was required to be completed and submitted with all bids pursuant to Section B-14 of the ITB.

9. From the technical specifications for Heating, Ventilation and Air Conditioning work (hereinafter referred to as "HVAC"), for the project at issue, it could be inferred that two 30-ton air conditioning units were required.

C. The Bids Submitted by Pro-Steel and North Florida.

10. Bids on the ITB were submitted and opened on March 24, 1994.

11. North Florida submitted a bid in response to the ITB:

a. On the envelope containing the sealed bid of North Florida, North Florida requested that \$14,000.00 be deducted from its proposed contract price.

b. North Florida submitted a bid of \$2,997,007.00. North Florida was the apparent second low bidder.

c. North Florida listed Gallon & Sons as the subcontractor responsible for HVAC work.

d. North Florida also listed Gallon & Sons as a CMBE. Gallon & Sons was listed on Exhibit 5, the Minority Business Enterprise Utilization Summary, submitted with North Florida's bid.

e. North Florida proposed to install two 30-ton air conditioning units.

12. Pro-Steel also submitted a bid in response to the ITB.

13. Pro-Steel submitted a bid of \$2,993,000.00. Pro-Steel was the apparent low bidder.

14. Pro-Steel listed "Watts Mechanical" as the subcontractor responsible for the HVAC work required by the ITB.

15. Pro-Steel also listed Watts as one of two CMBE subcontractors. "Watts Mechanical" was listed on Exhibit 5, the Minority Business Enterprise Utilization Summary, submitted with Pro-Steel's bid.

16. Pro-Steel's bid submittal proposed the installation of two 30-ton air conditioning units.

D. The Department's Decision.

17. It is the policy of the Department to waive minor irregularities in bid submittals.

18. Irregularities with North Florida's bid were correctly determined to be minor by the Department and were waived.

19. The bid tabulation sheet and the bids indicated that Pro-Steel submitted the lowest, responsive bid. The Department proposed to award the contract under the ITB to Pro-Steel.

20. Without Watts as a CMBE, Pro-Steel would not meet the 25 percent CMBE participation goal of the ITB.

21. The Department's project manager for the ITB determined that Watts was a CMBE in evaluating the bid submittals.

E. Qualification of CMBE's to Perform Work Proposed.

22. Gallon & Sons was at all times relevant to this proceeding, registered as a CMBE in heating and air conditioning.

23. Eddie Gallon, Sr., was at all times relevant to this proceeding, the registered qualified agent for Gallon & Sons. Mr. Gallon holds a Class A license in heating and air conditioning.

24. The stock of Watts Mechanical, Inc. (hereinafter referred to as "Watts"), is owned 100 percent by Jacqueline Watts. Ms. Watts is also the President of Watts.

25. Ms. Watts held and still holds a Class B HVAC license from the Department of Business and Professional Regulation. Ms. Watts was registered with the Department of Business and Professional Regulation as the qualifying agent for Watts.

26. Watts was registered with the Department of Management Services as a CMBE under the category of heating and air conditioning contractors.

27. On January 1, 1994, Watts acquired the assets of Energy Systems of Tallahassee (hereinafter referred to as "Energy Systems"). Energy Systems was then owned by Thomas Trapane.

28. As of January 1, 1994, it was intended that Watts be renamed "Watts Mechanical and Energy Systems, Inc."

29. Mr. Trapane held and still holds a Class A HVAC license from the Department of Business and Professional Regulation.

30. Mr. Trapane was registered with the Department of Business and Professional Regulation as the qualifying agent for Energy Systems.

31. As of January 1, 1994, Mr. Trapane became an employee of Watts.

32. As of March 24, 1994, when bids were submitted on the ITB:

a. Watts had not filed an amendment to its Articles of Incorporation reflecting the change in name to Watts Mechanical and Energy Systems, Inc. (hereinafter referred to as "Watts Mechanical and Energy"). The amendment was not filed until April 26, 1994.

b. Mr. Trapane had not registered with the Department of Business and Professional Regulation as the qualifying agent for Watts or Watts Mechanical and Energy. It was not until May 2, 1994, that the Department of Business and Professional Regulation issued a letter indicating that Mr. Trapane was a secondary qualifying agent for Watts Mechanical and Energy.

c. Watts had not notified the Department of Management Services of its name change with regard to its CMBE certification.

33. Based upon the foregoing, at the date of the submittal of bids and the proposed award of contract pursuant to the ITB, Watts did not hold the license required in order for it to complete the work Pro-Steel had represented to the Department Watts would perform.

F. Substitution of Subcontractors.

34. It is the policy of the Department to allow contractors to substitute subcontractors for good cause if proper documentation is submitted. The evidence, however, failed to prove the Department's policy concerning substitution of subcontractors applies in this matter.

35. The evidence also failed to prove that the Department's policy concerning substitution of contractors allows the Department to accept as meeting part of the CMBE requirement of the ITB a CMBE that was not qualified to perform the required work as of the date of bid award.

G. Alternative Proposals.

36. The ITB allows substitutions for specified systems or products contained in the ITB. Page 28, Joint Exhibit 1.

37. Substitutions, however, must be requested of the Architect-Engineer and written approval from the Architect-Engineer must be obtained. Substitutions must be submitted within 45 days after award of the contract.

38. No substitutions were submitted by Pro-Steel or Watts at the time of bid submittal.

39. As of the date of the final hearing of this case, Watts had decided to suggest that the configuration of the HVAC of the project be changed in a manner that would not require a Class A license for the work to be performed. The evidence failed to prove that the Department was aware of this proposal at the time of its initial decision.

CONCLUSIONS OF LAW

A. Jurisdiction.

40. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding. Section 120.53(5), Florida Statutes (1993).

B. Burden of Proof.

41. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue of the proceeding. *Antel v. Department of Professional Regulation*, 522 So.2d 1056 (Fla. 5th DCA 1988); *Department of Transportation v. J.W.C. Co., Inc.*, 396 So.2d 778 (Fla. 1st DCA 1981); and *Balino v. Department of Health and Rehabilitative Services*, 348 So.2d 249 (Fla. 1st DCA 1977).

42. In this proceeding it is North Florida that is asserting the affirmative and, therefore, has the ultimate burden of proof.

C. The Department's Proposed Award to Pro-Steel is Arbitrary.

43. There is not dispute about the fact that Watts did not hold a license to complete the HVAC work called for in the ITB as of the date of the proposed award of contract in this case. Section 489.113, Florida Statutes, requires that, in order for a person (including a corporation) to perform air conditioning contracting, that person must hold required the necessary air conditioning contracting license. To perform the work required in this matter required a Class A license.

44. At the time of the bid submittal and proposed award in this case, no person holding a Class A license had registered with the Department of Business and Professional Regulation as the qualifying agent for Watts. Watts, therefore, was not qualified to perform the work for which it's name was submitted by Pro-Steel at the time of bid submittal and award.

45. The issue which must be decided is whether this irregularity in Pro-Steel's submitted bid constituted a minor irregularity that could be waived by the Department.

46. Not all irregularities in bids or deviations from an invitation to bid are material. *Tropabest Foods, Inc. v. Department of General Services*, 493 So.2d 50 (Fla. 1st DCA). See also Rule 60A-1.002(13), Florida Administrative Code. A deviation from an invitation to bid "is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." *Tropabest Foods* at 52.

47. In determining whether the deviation from the ITB in this case is material, North Florida was required to prove that the Department acted fraudulently, arbitrarily, illegally or dishonestly in deciding to award the contract to the apparent low bidder, Pro-Steel. See *Overstreet Paving Company v. Department of Transportation*, 608 So.2d 851 (Fla. 2d DCA 1992), citing *Department of Transportation v. Groves-Watkins Construction, Co.*, 530 So.2d 912 (Fla. 1988).

48. The Department and Pro-Steel argue, in part, that in light of the fact that Watts Mechanical and Engineer, held all necessary licenses and qualifications as of the date of the final hearing, that Pro-Steel did not gain any competitive advantage. Therefore, it is argued, the Department did not act fraudulently, arbitrarily, illegally or dishonestly. This argument must be rejected.

49. Pursuant to the clear terms of the ITB, the Department was required at the time of bid submittal to reject Pro-Steel's submittal.

50. Section B-14 provides that the names of subcontractors are to be included, after determining that each listed subcontractor is "qualified both technically and financially to perform that pertinent phase of this work for which he is listed", so that the Department:

. . . may be assured that only qualified and competent subcontractors will be employed on the project, [Emphasis added].

51. The ITB contemplates that these assurances are to be given at the time of bid submittal.

52. Section B-14 goes on to also unequivocally require rejection of a bidder who lists a subcontractor that is not "registered by the State to perform the work specified:

Any bidder who lists a subcontractor not certified and/or registered by the State to perform the work of his trade if, such certification or registration is required for the trade by Florida Laws, will be rejected as non-responsive. [Emphasis added].

This requirement of the ITB is not discretionary.

53. Based upon the terms of the ITB itself, the Department eliminated its discretion to treat as a minor irregularity the requirement that subcontractors listed in bids be registered by the State of Florida to perform the work specified and informed all bidders that any bid which failed to list a registered subcontractor "[would] be rejected as non-responsive."

54. To ignore these provisions of the ITB is arbitrary.

55. The irregularity in Pro-Steel's bid may have given Pro-Steel a substantial advantage over the other bidders in this case. In effect Pro-Steel was allowed to submit the name of a subcontractor necessary to meet the CMBE requirement of the ITB which was not qualified at the time of bid submittal to perform the work specified but which took steps after bid submittal to become qualified. There may have been other potential bidders who would have submitted bids had they known that subcontractors included on their bid could become qualified after submittal of the bid but were dissuaded by the terms of Section B-14 of the ITB.

56. The language contained in Exhibit 5, quoted in finding of fact 8, gives the Department discretion to reject a bid as non-responsive with regard to subcontractors, but only if a bidder fails to "supply sufficient information to allow verification of the corporate, and discipline license status of the subcontractor" The evidence failed to prove that the irregularity with Pro-Steel's bid involved such a failure. The irregularity here goes beyond the failure to supply information. The irregularity here involves the failure of a subcontractor, at the date of bid award, to qualify for the work it was to perform. That irregularity could not have been rectified at the time of bid submittal with additional information from Pro-Steel.

57. The Department's argument concerning its ability to allow the substitution of subcontractors or substituted proposals must be rejected. The crucial point of time in this matter is the time of bid submittal and the proposed award of contract. The winning bidder must be responsive and the apparent winner at that time based upon the bid submittal at that time. For the Department to take into account what may happen in the future in making that determination would give bidders an unfair advantage. It would not, therefore, be appropriate to take into account these potential corrective steps as a result of this proceeding.

58. At the time of bid submittal and proposed award of contract, Pro-Steel was not responsive and the Department's proposed decision to award the contract to Pro-Steel is arbitrary.

RECOMMENDATION

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

RECOMMENDED that the Department of Transportation enter a Final Order declaring the bid submitted by Pro-Steel Builders, Inc., to be non-responsive.

DONE AND ENTERED this 13th day of June, 1994, in Tallahassee, Florida.

LARRY J. SARTIN
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 13th day of June, 1994

APPENDIX

Case Number 94-2353BID

The parties have submitted proposed findings of fact. It has been noted below which proposed findings of fact have been generally accepted and the paragraph number(s) in the Recommended Order where they have been accepted, if any. Those proposed findings of fact which have been rejected and the reason for their rejection have also been noted.

North Florida's Proposed Findings of Fact

- 1 Accepted in 2 and hereby accepted.
- 2 Accepted in 1.
- 3 Accepted in 3 and hereby accepted.
- 4 Accepted in 4 and 10.
- 5 Accepted in 10-11 and 13.
- 6 Accepted in 6-8.
- 7 Accepted in 14.
- 8 Accepted in 15.
- 9 Accepted in 7.
- 10 Accepted in 25 and 32.
- 11 Conclusion of law.
- 12 Accepted in 9.
- 13 Conclusion of law.
- 14 See 27 and 32.
- 15 Accepted in 32.
- 16 Accepted in 15.
- 17 Accepted in 20.
- 18 Accepted in 7-8.
- 19 See 33.

The Department's Proposed Findings of Fact

- 1 Accepted in 4.
- 2 Accepted in 2-3 and 11-12.
- 3 Accepted in 6.
- 4 Accepted in 10-11.
- 5 Accepted in 11 and 13.
- 6 Accepted in 11 and 15.
- 7 See 26, 28 and 32. Watts Mechanical, Inc. was a CMBE at the time of bid submittal. Watts Mechanical & Energy Systems, Inc., did not exist at the time of bid submittal.
- 8 Accepted in 22.
- 9 Accepted in 9.
- 9 Accepted in 24.
- 10-11 Accepted in 25.
- 12 Accepted in 31.
- 13 Accepted in 29.
- 14 Accepted in 32.
- 15 Accepted in 23.
- 16 Hereby accepted.
- 17 Accepted in 20.
- 18 Accepted in 21.
- 19 Accepted in 36. But see 37-38.
- 20 Not relevant.
- 21 See 7.
- 22 Accepted in 8.
- 23 See 36-38.
- 24 Not relevant.
- 25 Accepted in 17.

Pro-Steel's Proposed Findings of Fact

- 1 Accepted in 4.
- 2 Accepted in 7-8
- 3 Accepted in 8.
- 4 Not supported by the weight of the evidence.
- 5 Accepted in 34. See 35.
- 6 Accepted in 17.
- 7 Accepted in 2-3, 10-11 and 18-19.
- 8 Accepted in 14.
- 9 Accepted in 9 and 36.
- 10 See 25-26. But see 32.
- 11 Accepted in 27, 29 and 31. The last sentence is not relevant.
- 12 Accepted in 32.
- 13 Not supported by the weight of the evidence.
- 14 See 34-35.
- 15 See 36-39

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
=====

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION

NORTH FLORIDA CONSTRUCTION, INC.,

Petitioner,

vs.

DOAH CASE NO.: 94-2353BID
DOT CASE NO.: 94-0158 DEPARTMENT OF

TRANSPORTATION,

Respondent,
and

PRO-STEEL BUILDINGS, INC.,

Intervenor.
_____ /

FINAL ORDER

This matter was heard pursuant to written notice before Larry J. Sartin, a duly designated Hearing Officer of the Division of Administrative Hearings on May 12, 1994, in Tallahassee, Florida. Appearances for the parties were as follows:

For Petitioner: Tommy Strickland, pro se
North Florida Construction, Inc.
Post Office Box 129
Clarksville, Florida 32430

For Respondent: Thomas H. Duffy
Assistant General Counsel
Department of Transportation
605 Suwannee Street, Mail Station 58
Tallahassee, Florida 32399-0458

For Intervenor: Stephen J. Kubik
155 Office Plaza Drive
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether the Respondent, DEPARTMENT OF TRANSPORTATION (hereinafter DEPARTMENT), acted fraudulently, arbitrarily, illegally or dishonestly in proposing to award a contract for State Project No. 99003-3501 to Intervenor, PRO-STEEL BUILDINGS, INC., (hereinafter PRO-STEEL) for relocation of the District Three Tallahassee Maintenance Yard.

BACKGROUND

Pursuant to a protest of the DEPARTMENT'S intent to award the contract for State Project No. 99003-3501 to PRO-STEEL, timely filed by Petitioner, NORTH FLORIDA CONSTRUCTION, INC. (hereinafter NORTH FLORIDA), the matter was referred to the Division of Administrative Hearings for assignment of a hearing officer. A hearing was scheduled and held on May 12, 1994, at which time PRO-STEEL'S Motion to Intervene was granted.

NORTH FLORIDA offered no exhibits into evidence and presented the testimony of two witnesses: Eddie Gallon, Sr. and Thomas Strickland. The DEPARTMENT presented the testimony of Mike Melvin and offered and entered into evidence three exhibits. PRO-STEEL offered and entered into evidence four exhibits and presented the testimony of three witnesses: Jacqueline Watts, Thomas Trapane, and Stephen Warren.

The Hearing Officer entered his Recommended Order on June 13, 1994, and Exceptions to the Recommended Order were filed by both the DEPARTMENT and PRO-STEEL.

Rulings On Exceptions

References to the Transcript in this proceeding will be denoted by the page and line numbers as (Tr. p. __, l. __). The DEPARTMENT'S exceptions are addressed as follows:

Exception 1 is rejected as legal argument, not going to factual determinations made by the Hearing Officer and are addressed in the Conclusions of Law below.

Exception 2 is rejected as legal argument, not going to factual determinations made by the Hearing Officer and are generally addressed in the Conclusions of Law below.

Exception 3 is rejected as legal argument, not going to factual determinations made by the Hearing Officer and are generally addressed in the Conclusions of Law below.

Exception 4 is rejected as legal argument, not going to factual determinations made by the Hearing Officer and are generally addressed in the Conclusions of Law below.

PRO-STEEL'S exceptions are addressed as follows:

Exception 1 is accepted to the extent that the Hearing Officer incorrectly referred to Exhibit 20 to the Department of Transportation Specifications for Tallahassee Maintenance Yard Relocation State Project No. 99003-3501 (PP. 77-82 of Joint Exhibit 1) as Exhibit 5 to those specifications.

Exception 2 is accepted for the reason noted in the preceding paragraph.

Exception 3 is rejected. The Hearing Officer's Finding of Fact No. 20 is supported by competent substantial evidence and PRO-STEEL cites not contrary record evidence. Moreover, this exception is more in the nature of legal argument which is addressed generally in the Conclusions of Law below.

Exception 4 is rejected. The Hearing Officer's Finding of Fact No. 33 is supported by competent substantial evidence and PRO-STEEL cites no contrary record evidence in its exception. Moreover, this exception is more in the nature of legal argument which is addressed generally in the Conclusions of Law below.

Exception 5 is accepted to the extent that the DEPARTMENT'S evidence did not distinguish this contract from others concerning substitution of subcontractors. (Tr. p. 106, l. 11-19). However, that testimony dealt with substitution after award of a contract for good cause such as an inability to perform. The DEPARTMENT'S testimony did not address the policy of substitution of subcontractors under circumstances such as those at issue here were the bid documents contain a provision such as that found in paragraph B-14 of the project specifications. (Joint Exhibit #1, p. 15)

Exception 6 is rejected. The Hearing Officer's Finding of Fact No. 35 is supported by competent substantial evidence and PRO-STEEL cites no contrary

record evidence in its exception. Moreover, this exception is in the nature of legal argument which is addressed generally in the Conclusions of Law below.

Exception 7 is rejected for the reason noted in the preceding paragraph.

Exception 8 is rejected as legal argument which will be generally addressed in the Conclusions of Law below.

Exception 9 is rejected as legal argument which will be generally addressed in the Conclusions of Law below. However, NORTH FLORIDA'S use of Exhibit 5 to the Specifications (Joint Exhibit #1) in support of its position is misplaced. Any discretion left to the DEPARTMENT in Exhibit 5 to Joint Exhibit 1 has only to do with the DEPARTMENT'S ability to verify information supplied by the bidder on its subcontractors. It has nothing to do with the provisions of paragraph B-14 relating to the required state licensure of subcontractors.

Exception 10 is rejected for the same reasons set out in paragraph 9 above.

Exception 11 is rejected for the same reasons set out in paragraph 9 above.

Exception 12 is rejected as legal argument which is more generally addressed in the Conclusions of Law below. The analysis as to whether waiver of a particular bid requirement affords a bidder a competitive advantage is not at issue until there is first a determination that the bid requirement is not material. In this instance the DEPARTMENT through the terms of its Invitation to Bid determined the materiality of this requirement up front when it advised bidders that bids would be rejected as non-responsive where the subcontractor listed does not possess the requisite state licensure to do the denoted work.

Exception 13 is rejected for the reasons set out in paragraph 9 above.

Exception 14 is rejected as legal argument generally addressed in the Conclusions of Law below. Moreover, the DEPARTMENT'S past practices and policies cannot take precedence over the clear language of the Invitation to Bid.

Exception 15 is rejected as legal argument more generally addressed in the Conclusions of Law below. The specific language of the Invitation to Bid rather than any ruling the Hearing Officer in this matter has removed discretion from the DEPARTMENT to waive the exact licensure requirement or to allow PRO-STEEL to complete the ministerial act of upgrading its licensure with the Department of Business and Professional Regulation. This ruling in no way abrogates existing case law which allows broad discretion in the public body engaged in competitive acquisition of goods and services where that body does not by the terms of the bid documents specifically limit that broad discretion.

FINDINGS OF FACT

The Hearing Officer's Findings of Fact are found to be correct and supported by competent substantial evidence except for Finding of Fact 11. d, which was addressed above in PRO-STEEL'S first exception. Finding of Fact 11. d is amended to correctly reflect the appropriate reference to Exhibit 20 to Joint Exhibit 1 rather than Exhibit 5 as pointed out by PRO-STEEL.

It is also noted that there was no finding by the Hearing Officer that the employees of the DEPARTMENT acted fraudulently, illegally or dishonestly.

Nothing in the record appears to support such a finding and in fact no such contention has been made.

CONCLUSIONS OF LAW

1. The DEPARTMENT has jurisdiction over the subject matter of the parties to this proceeding pursuant to Chapters 287 and 120, Florida Statutes.

2. Based on the foregoing Findings of Fact and a review of the record in its entirety, the Hearing Officer's Conclusions of Law are found to be correct and are adopted and incorporated herein. Under different facts the result might be different. However, in this case the clear language of the Invitation to Bid requires that the bid submitted by PRO- STEEL be declared nonresponsive pursuant to paragraph B-14 of Joint Exhibit 1.

ORDER

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

ORDERED that the bid protest submitted by PRO-STEEL is hereby declared not responsive.

DONE AND ORDERED this 12th day of September, 1994.

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

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(D), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

COPIES FURNISHED:

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