

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LYNNE'S PIPE & SUPPLY,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 96-4668
)	
DEPARTMENT OF TRANSPORTATION,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a Section 120.569/57(1) hearing was conducted in this case on February 19, 1997, by telephone conference call before Stuart M. Lerner, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lynne Bohnsack, President
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705 Hibiscus Lane
Vero Beach, Florida 32963

For Respondent: Murray M. Wadsworth, Jr.
Assistant General Counsel
Department of Transportation
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STATEMENT OF THE ISSUE

Whether Petitioner is entitled to certification as a

Disadvantaged Business Enterprise pursuant to Section 339.0805, Florida Statutes, and Rule Chapter 14-78, Florida Administrative Code?

PRELIMINARY STATEMENT

By letter addressed to Lynne Bohnsack, Petitioner's president, dated August 23, 1996, the Department of Transportation (Department) advised Petitioner of its intent to deny Petitioner's application for Disadvantaged Business Enterprise certification (as a supplier of concrete pipe) on the following grounds:

(1) Your firm does not appear to be a regular dealer as required by Rule 14-78.005(7)(g) and Rule 14-78.002(15), Florida Administrative Code (F.A.C.). . . .

(2) Your firm does not appear to be a "small business concern" as required by Rule 14-78.005(7)(a), F.A.C. . . .

(3) You, the qualifying owner of this firm, do not appear to possess the technical expertise, specialized knowledge, training, education or experience to make decisions in critical areas of operation for a firm which specializes in pipe supply as required by Rule 14-78.005(7)(e), F.A.C. . . .

By letter dated September 6, 1996, Petitioner requested a "formal hearing pursuant to Chapter 120, Florida Statutes," on the Department's proposed action. On October 1, 1996, the matter was referred to the Division of Administrative Hearings for the

assignment of an Administrative Law Judge to conduct the hearing Petitioner had requested.

The final hearing in this case was originally scheduled for December 16, 1996, but was thrice continued. The hearing was ultimately held, as noted above, on February 19, 1997. A total of seven witnesses testified at the hearing: Lynne Bohnsack, Thomas Valdes, James DeForest, Al Doll and Dennis Hill, testifying on behalf of Petitioner; and Howard Jemison, the Department's DBE Certification Manager, and John Goodeman, a Certification Consultant with the Department, testifying on behalf of the Department. In addition to the testimony of these seven witnesses, a total of 18 exhibits (Petitioner's Exhibits 1 through 7) and (Respondent's Exhibits A through K) were offered and received into evidence

At the conclusion of the evidentiary portion of the hearing, the undersigned, on the record, advised the parties of their right to file proposed recommended orders and established a deadline (20 days from the date of the Division of Administrative Hearings' receipt of the transcript of the hearing) for the filing of such proposed recommended orders.

The transcript of the hearing was filed on March 7, 1997. The Department and Petitioner filed their proposed recommended orders on March 25, 1997, and March 27, 1997, respectively.

These post-hearing submittals have been carefully considered by the undersigned..

FINDINGS OF FACT

1. Lynne Bohnsack is the president and sole owner of Lynne's Pipe and Supply (Lynne's).

2. Bohnsack is a woman and a citizen of the United States.

3. She formed Lynne's with the intention of it becoming a supplier of concrete pipe.

4. She did so upon the advice of her brother, Dennis Hill.

5. Unlike Hill, Bohnsack had no prior experience in the concrete pipe supply business at the time she established Lynne's.¹

6. She has since learned about the business through discussions she has had with both Hill and James DeForest, an acquaintance who has been in the highway construction business for over 40 years.

7. Hill has not only provided Bohnsack with information concerning the concrete pipe supply business, he is now also employed by Lynne's as an estimator working on a commission (33% of profit) basis

8. Al Doll is another individual currently affiliated with Lynne's. He is its vice president in charge of customer relations.

9. Doll, however, has thus far not had the opportunity, in his capacity as Lynne's vice president, to deal with any customers because Lynne's has not had any.

10. Lynne's has yet to sell any concrete pipe (although it has recently attempted, albeit unsuccessfully, to do so by "bid[ding] on some jobs"), nor has it made any payments to employees or paid any taxes

11. Lynne's, which operates out of Bohnsack's residence in Vero Beach, does not maintain an inventory of concrete pipe.

12. It has entered into a lease agreement with Pan American Engineering, Hill's former employer, to rent space to store concrete pipe, but it has never used the storage area which is the subject of the lease for any purpose, nor has it made any payments under the lease.

CONCLUSIONS OF LAW

13. The Department is authorized to certify disadvantaged business enterprises pursuant to Section 339.0805(1)(c), Florida Statutes, which provides as follows:

The [D]epartment shall certify a socially and economically disadvantaged business enterprise, which certification shall be valid for 12 months, or as prescribed by 49 C.F.R. part 23. The [D]epartment's initial application for certification for a socially and economically disadvantaged business enterprise shall require sufficient information to determine eligibility as a small business concern owned and controlled by a socially and economically disadvantaged individual. For recertification of a

disadvantaged business enterprise, the [D]epartment may accept an affidavit, which meets [D]epartment criteria as to form and content, certifying that the business remains qualified for certification in accordance with program requirements. A firm which does not fulfill the [D]epartment's criteria for certification shall not be considered a disadvantaged business enterprise. An applicant who is denied certification may not reapply within 6 months after issuance of the denial letter or the final order. The application and financial information required by this section are confidential and exempt from s. 119.07(1).

14. The "[D]epartment's criteria for certification" are found in Rule Chapter 14-78, Florida Administrative Code.

15. Rule 14-78.002, Florida Administrative Code, provides definitions of various words and phrases used in Rule Chapter 14-78, Florida Administrative Code.

16. Subsection (2) of Rule 14-78.002, Florida Administrative Code, defines "business concern" or "concern" as follows:

(a) A business concern eligible for assistance as a small business is a business entity organized for profit, with a place of business located in the United States and which makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, materials and/or labor.

(b) Such business entity may be in the legal form of an individual proprietorship, partnership, corporation, joint venture, association, trust or a cooperative, except that where the form is a joint venture there can be no more than 49 percent participation

by foreign business entities in the joint venture.

17. Subsection (9) of Rule 14-78.002, Florida Administrative Code, defines "disadvantaged business enterprise" as "a small business concern organized for profit:"

(a) Which is at least 51 percent owned by one or more disadvantaged individuals, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more disadvantaged individuals; and

(b) Whose management and daily business operations are controlled by one or more of the disadvantaged individuals who own it.

18. Subsection (15) of Rule 14-78.002, Florida Administrative Code, defines "regular dealer" as follows:

[A] "Regular Dealer" means a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products does not need to keep such products in stock, if the dealer owns or operates the appropriate distribution facility.² Brokers and packagers shall not be regarded as manufacturers or regular dealers within the meaning of these rules.

19. Subsection (18) of Rule 14-78.002, Florida Administrative Code, defines "socially and economically

disadvantaged individuals." It provides, in pertinent part as follows:

"Socially and Economically Disadvantaged Individuals" means those individuals:

(a) Who are citizens of the United States . . . and who are women. . . . Individuals in the following groups are presumed to be disadvantaged; however, this presumption is rebuttable: . . .

6. Women.

20. Subsection (20) of Rule 14-78.002, Florida Administrative Code, defines "critical areas of operation" as follows:

The "Critical Areas of Operation" are those areas required for production and delivery of the primary product or service of the firm and may include, at a minimum, estimating, bidding, and field supervision. The areas of administration and financial management are not critical areas of operation unless they constitute the firm's primary product or service.

21. Rule 14-78.005, Florida Administrative Code, sets forth the "Standards for Certification of DBE's." It provides, in pertinent part, as follows:

(7) [A] firm seeking certification and recertification as a DBE shall meet the following standards. A firm which does not fulfill all of the Department's criteria for certification shall not be considered a Disadvantaged Business Enterprise.

(a) The firm must be a small business concern. . . .

(e) [T]o be certified under this rule chapter, the DBE shall be one in which the disadvantaged owner shall also possess the power to direct or cause the direction of the management, policies, and operations of the firm and to make day-to-day as well as major business decisions concerning the firm's management, policy, and operation. . . .

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

4. The disadvantaged owners shall have managerial and technical expertise in the form of knowledge, training, education and/or experience required to make decisions in the critical areas of operation. The level of expertise required must be such that the disadvantaged owners possess the specialized knowledge, attributes, and skills necessary to critically evaluate and independently utilize information supplied to the disadvantaged owner by its subordinates. Administrative and managerial expertise will not suffice as a substitute for technical expertise. In determining the applicant's eligibility, the Department will review the prior employment and educational backgrounds of the disadvantaged owners, the professional skills, training and/or licenses required for the given industry, the previous and existing managerial relationship between and among all owners, especially those who are familiarly related, and the timing and purpose of management changes. . . .

(g) Disadvantaged owners seeking certification as a supplier of products which

are required for DBE contracts, must be a regular dealer as defined in Rule 14-78.002.

22. In determining whether an applicant is eligible for certification as a Disadvantaged Business Enterprise, the Department must examine the certification application in light of the standards set forth in Rule Chapter 14-78, Florida Administrative Code. See State v. Jenkins, 469 So.2d 733, 734 (Fla. 1985)("agency rules and regulations, duly promulgated under the authority of law, have the effect of law"); Buffa v. Singletary, 652 So.2d 885, 886 (Fla. 1st DCA 1995)("[a]n agency must comply with its own rules"); Decarion v. Martinez, 537 So.2d 1083, 1084 (Fla. 1st 1989)("[u]ntil amended or abrogated, an agency must honor its rules").

23. An applicant for certification as a Disadvantaged Business Enterprise whose application is preliminarily denied by the Department is entitled to notice of the grounds for the proposed denial of its application and to an opportunity to have a Section 120.569/57 hearing on the Department's proposed action. See Section 120.60(3), Fla. Stat.

24. At the Section 120.569/57 hearing, the applicant has the burden of proving by a preponderance of the evidence that it is entitled to the certification it has requested. See Department of Banking and Finance v. Osborne Stern and Company, 670 So.2d 932, 934 (Fla. 1996); Pershing Industries, Inc., v.

Department of Banking and Finance, 591 So.2d 991, 994 (Fla. 1st DCA 1991); Cordes v. Department of Environmental Regulation, 582 So.2d 652, 654 (Fla. 1st DCA 1991); Department of Transportation v. J.W.C. Co., 396 So.2d 778, 787 (Fla. 1st DCA 1981); Department of Health and Rehabilitative Services v. Career Service Commission, 289 So.2d 412, 414-15 (Fla. 4th DCA 1974).

25. In the instant case, Lynne's has not met its burden of proof.

26. It appears from the record that Lynne's is not a "small business concern," as required by Rule 14-78.005(7)(a), Florida Administrative Code, inasmuch as it is not making a "significant contribution to the U.S. economy."

27. It further appears from the record that Lynne's is not a "regular dealer," as required by Rule 14-78.005(7)(g), Florida Administrative Code, inasmuch as it does not own, operate or maintain a store, warehouse, or other establishment in which it maintains an inventory of concrete pipe that is regularly sold to the public in the usual course of business.

28. Because Lynne's is neither a "small business concern" nor a "regular dealer," as those terms are defined in Chapter 14-78, Florida Administrative Code, it "does not fulfill the [D]epartment's criteria for certification . . . as a [D]isadvantaged [B]usiness [E]nterprise" that are applicable to

suppliers of concrete pipe and its application for such certification should therefore be denied.³

RECOMMENDATION

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

RECOMMENDED that the Department issue a final order denying Petitioner's application for certification as a Disadvantaged Business Enterprise

DONE AND ENTERED IN Tallahassee, Leon County, Florida, this 9th day of April, 1997.

STUART M. LERNER

Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of April, 1997.

ENDNOTES

¹ Before starting Lynne's, Bohnsack had held a marketing position with a manufacturer of telephone equipment, managed apartment complexes, worked in an art gallery, and tended bar.

² Unlike steel, cement, gravel, stone and petroleum products, concrete pipe is not sold in bulk.

³ Whether Lynne's application for certification should be denied for the additional reason that, as alleged in the Department's notice of intent to deny the application, Bohnsack, its owner, does not have the "technical expertise, specialized knowledge,

training, education or experience to make decisions in critical areas of operation for a firm which specializes in pipe supply as required by Rule 14-78.005(7)(e), F.A.C.," is a question that the undersigned need not, and therefore will not, answer in this Recommended Order.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of 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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