

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PRECISION TRAFFIC COUNTING,)
INC., d/b/a BUCKHOLZ TRAFFIC,)
)
Petitioner,)
)
vs.) Case No. 99-4544
)
DEPARTMENT OF TRANSPORTATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, in Jacksonville, Florida, on February 28 and 29, 2000.

APPEARANCES

For Petitioner: M. Lee Fagan, Esquire
3030 Hartley Road, Suite 105
Jacksonville, Florida 32257

and

Robert Aguilar, Esquire
Smith, Metcalf, Aguilar & Sieron, P.A.
Post Office Box 855
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For Respondent: Brian F. McGrail, Esquire
Brian A. Crumbaker, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent may revoke the Petitioner's qualification to bid on Florida Department of Transportation contracts for which pre-qualification is required for one year because of events and correspondence described in a Notice of Intent from Respondent dated October 6, 1999.

PRELIMINARY STATEMENT

On October 6, 1999, Respondent, the Department of Transportation, issued a Notice of Intent to Revoke Qualification to Ms. Burita Allen, President of Petitioner, Precision Traffic Counting, d/b/a Buckholz Traffic. On October 22, 1999, Petitioner timely filed a Request for Formal Hearing challenging the Notice of Intent to Revoke Qualification.

Petitioner's Request for Hearing was filed by Respondent with the Division of Administrative Hearings on October 27, 1999. The Request was designated Case No. 99-4544 and was assigned to the undersigned. The final hearing was scheduled for February 28 through March 1, 2000, by Notice of Hearing entered November 24, 1999.

At the formal hearing it was recognized that Respondent had the burden of proof in this case. At the suggestion of the undersigned and with the agreement of the parties, the style of the case has not be modified to reflect this fact.

At the formal hearing Respondent presented the testimony of ten witnesses and offered 15 exhibits. Respondent's exhibits, numbered 1, and 3 through 14, were admitted into evidence. Respondent's Exhibit number 23 was rejected. Petitioner presented the testimony of one witness and offered 11 exhibits. The exhibits, numbered 1 through 5, 9, and 14 through 18, were accepted into evidence.

A transcript of the hearing was ordered. The Transcript was filed March 29, 2000. Proposed orders were, therefore, required to be filed on or before April 10, 2000. Both parties timely filed Proposed Recommended Orders. The Proposed Recommended Orders filed by the parties have been fully considered in entering this Recommended Order.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, Precision Traffic Counting Inc., d/b/a Buckholz Traffic (hereinafter referred to as "Buckholz Traffic"), is a Florida Corporation with its office located in Jacksonville, Duval County, Florida.

2. Buckholz Traffic is engaged in the business of, among other things, installing traffic signals and signs, and related construction work.

3. Burita Allen is the President and sole stockholder of Buckholz Traffic. Ms. Allen runs the day-to-day operations of Buckholz Traffic.

4. Buckholz Traffic is certified by the Department of Transportation to bid and perform on construction contracts in excess of \$250,000.00. Buckholz Traffic has been working with the Department of Transportation since 1966.

5. Respondent, Department of Transportation (hereinafter referred to as the "Department"), is an agency of the State of Florida. The Department is charged with the authority to, among other things, award construction contracts and issued certificates of qualification to bid on Department contracts pursuant to Section 337.14, Florida Statutes.

B. Jeffrey Buckholz.

6. Jeffrey Buckholz holds a Florida Professional Engineering license. Mr. Buckholz is also licensed as an electrician in Florida.

7. Mr. Buckholz is an employee and principal of J.W. Buckholz Traffic Engineering (hereinafter referred to as "Buckholz Traffic Engineering"). Buckholz Traffic Engineering is located in Jacksonville.

8. In his capacity with Buckholz Traffic Engineering, Mr. Buckholz has performed engineering services for the Department and has provided training to Department employees.

9. Mr. Buckholz is not technically an employee, officer, or stockholder of Buckholz Traffic. Nor has Mr. Buckholz received any compensation directly from Buckholz Traffic.

10. Despite the lack of formal relations with Buckholz Traffic, Mr. Buckholz has performed services for Buckholz Traffic and has held himself as representing Buckholz Traffic. These actions have been taken with full knowledge and approval of Buckholz Traffic. For example, Mr. Buckholz has used his electrician's license to pull electrical permits required by Buckholz Traffic to perform work Buckholz Traffic was responsible for.

11. Mr. Buckholz also served as project manager on projects for Buckholz Traffic, including the projects described, infra.

12. Finally, Mr. Buckholz has allowed Buckholz Traffic to utilize his name in an effort to utilize trade recognition of his name.

13. Based upon Mr. Buckholz' actions, as described, infra, and Mr. Buckholz' testimony at hearing, Mr. Buckholz has evidenced an inability to control anger and to act in a non-aggressive, non-threatening manner. Mr. Buckholz, due to his arrogance, has a difficult time following the directions of others and does not react responsibly to anyone who he believes is questioning his decisions.

C. The Haines Street Project.

14. The Department awarded a contract for work on the Haines Street Expressway (hereinafter referred to as the "Haines Street Project"). The Haines Street Expressway is located in Jacksonville, Duval County, Florida. Duval County is located in the Department's District 2.

15. The Standard Specifications for Road and Bridge Construction, 1996 Edition (hereinafter referred to as the "Standard Specifications"), applied to all work on the Haines Street Project.

16. Standard Specification 8-5 provides the following:

8-5 Qualifications of Contractor's
Personnel.

. . . .

Whenever the Engineer shall determine that any person employed by the Contractor is incompetent, unfaithful, intemperate, disorderly or insubordinate, such person shall, upon notice, be discharged from work and shall not again be employed on it except with the written consent of the Engineer. Should the Contractor fail to remove such person or persons the Engineer may withhold all estimates which are or may become due, or may suspend the work until such orders are complied with. . . .

This provision of the Standard Specifications provides absolute authority in the Department to require that contractors discharge persons employed by the contractor under the circumstances specified.

17. The prime contractor on the Haines Street Project was Hubbard Construction Company (hereinafter referred to as "Hubbard"). Kevin Oswendel acted as the Project Manager for Hubbard on the Haines Street Project.

18. Buckholz Traffic was one of the subcontractors on the Haines Street Project. Buckholz Traffic's obligations as subcontractor included the sale and installation of large signs to be suspended over the Haines Street Expressway. Mr. Buckholz acted as Project Manager for Buckholz Traffic on the Haines Street Project.

19. The Department's Resident Engineer for the Haines Street Project was David Sadler. The Department's Project Manager for the Haines Street Project was Carrie Stanbridge, a Florida licensed Professional Engineer. Ms. Stanbridge was responsible for project implementation, project oversight, project construction in accordance with the contract specifications, Special Conditions, and the Standard Specifications. Ed Lavant was an Inspector for the Department on the Haines Street Project.

20. On or about November 4, 1998, work scheduled for the Haines Street Project included the inspection of signs. The unloading of beams and trusses for the signs had been scheduled for November 3, 1998, but the manufacturer of the beams and trusses was not able to meet the scheduled delivery time.

21. Any activity on the Haines Street Project which may disrupt traffic was required to be performed consistent with a Maintenance of Traffic Plan (hereinafter referred to as the "MOT"). The MOT for the Haines Street Project originally prepared by Hubbard had been modified prior to November 4, 1998, by Mr. Buckholz. In particular, Mr. Buckholz had revised the times in the MOT when traffic could be disrupted. The revised MOT was in effect on November 4, 1998. The MOT provided that there would be no disruption of traffic between 3:15 p.m. and 6:30 p.m.

22. There were no anticipated lane closures at the project site after November 3, 1998, until midnight on November 5, 1998. The scheduled unloading of beams and trusses on November 3, 1998, was, however, delayed and the first delivery truck arrived on November 4, 1998. The truck arrived prior to 3:15 p.m. with heavy steel support beams and trusses to be used for signs on the Haines Street Project by Buckholz Traffic. Mr. Buckholz was present during the delivery.

23. The subcontractor responsible for traffic control on the Haines Street Project was Acme Barricades. Although Acme Barricades did not know that MOT would be required on November 4, 1998, Acme Barricades was able to perform the required MOT for the lane closure required for the truck to be offloaded. Because of inadequate notice of the arrival of the truck,

however, special arrangements had to be made to provide the MOT devices used.

24. Buckholz Traffic also expected a second delivery truck later on November 4, 1998. Therefore, Mr. Buckholz stayed at the site to await the second truck so that he could supervise its unloading. All of the MOT devices that had been used for the first truck, however, had been removed from the site. Mr. Buckholz had informed Mr. Oswendel that there was no need for Acme Barricades to return later in the day for the second truck.

25. Mr. Lavant was aware that there were no MOT devices available at the site and that it was approaching 3:15 p.m., the cutoff time for lane closures provided in the MOT that Mr. Buckholz had prepared for Hubbard. Therefore, Mr. Lavant approached Mr. Buckholz and informed him that he would not be allowed to offload the second truck after 3:15 p.m. because of the disruption to traffic the offloading would cause by the lane closure that would be required by the MOT.

26. Mr. Buckholz informed Mr. Lavant that he intended to offload the second truck by parking the eighteen-wheel delivery truck and an eighteen-wheel boom truck to be used to lift the beams and trusses side-by-side on an on ramp which leads from the Haines Street Expressway to the Hart Bridge. Mr. Buckholz told Mr. Lavant that he intended to divert traffic entering the

on ramp around the trucks on a paved area between the ramp and the through-traffic lanes that continued beyond the on ramp. This area is referred to as a "gore area." The gore area is marked by "chevrons" and there is an attenuator at the end of the gore area. The gore area Mr. Buckholz intended to use was not normally used for traffic but was intended as a buffer between the on ramp and the through-traffic lanes on the Haines Street Highway.

27. While it might have been possible to offload the second truck without directly blocking the through-traffic lanes that continued past the on ramp, there still would have been disruption to the traffic using those lanes and Mr. Lavant had the authority to insist on proper MOT compliance. There would also have been disruption of traffic using the on ramp, which was only 14 feet wide. The potential disruption of traffic during the peak traffic rush hour caused a reasonable concern about the safety of the unloading of the truck as proposed by Mr. Buckholz.

28. Mr. Lavant decided that Mr. Buckholz' plan for unloading the truck, which was anticipated to occur during the peak traffic rush hour, would disrupt traffic flow and would not be safe. This was a determination which the Department, and not Mr. Buckholz, had the authority to make.

29. Mr. Buckholz' plan was also inconsistent with the MOT, which he had prepared for approval by the Department, because it would effectively close lanes during the prohibited period between 3:15 p.m. and 6:30 p.m. and the safety devices contemplated by the MOT were not available at the time that Mr. Buckholz indicated he intended to offload the truck. The MOT devices required included an arrow board closing the on ramp lane, an off-duty law enforcement officer, and traffic cones.

30. When Mr. Lavant informed Mr. Buckholz that he could not offload the truck when it arrived because his offload plan was inconsistent with the MOT, Mr. Buckholz informed Mr. Lavant that he was not going to close any traffic lane and, therefore, the offloading of the truck would not be inconsistent with the MOT. Mr. Buckholz insisted that he intended to offload the truck despite Mr. Lavant's directive to the contrary.

31. Mr. Buckholz became more and more confrontational and belligerent with Mr. Lavant and insisted that Mr. Lavant could not stop him from offloading the second truck. It became apparent to Mr. Lavant that Mr. Buckholz did not intend to follow his direction.

32. Mr. Lavant realized that Mr. Buckholz intended to offload the truck when it arrived regardless of his instructions. Therefore, Mr. Lavant telephoned Ms. Stanbridge, the Project Engineer, and requested that she come to the site.

33. Ms. Stanbridge discussed the matter with Mr. Buckholz and informed him that he would not be allowed to offload the truck in the manner he indicated he planned to follow. Mr. Buckholz was no more cooperative with Ms. Stanbridge than he had been with Mr. Lavant. Mr. Buckholz continued to insist that he was not going to block any traffic lane and, therefore, he intended to offload the truck when it arrived. Mr. Buckholz was belligerent and uncooperative with Ms. Stanbridge.

34. Ms. Stanbridge felt physically threatened by Mr. Buckholz. Due to Mr. Buckholz' behavior and his refusal to comply with Ms. Stanbridge's instructions, Ms. Stanbridge telephoned Mr. Sadler, the Resident Engineer, and requested that he come to the site. He agreed.

35. Mr. Sadler spoke with Ms. Stanbridge and Mr. Lavant when he arrived at the site. He then discussed the matter with Mr. Buckholz. Mr. Buckholz told Mr. Sadler that he planned to place the two trucks on the on ramp and offload the beams and trusses when they arrived. Mr. Sadler informed Mr. Buckholz that he would not be allowed to offload the truck because of the disruption to traffic Mr. Buckholz' planned activity would cause. Mr. Buckholz continued to be uncooperative and belligerent toward Mr. Sadler.

36. Due to Mr. Buckholz' continued insubordination, Mr. Sadler told Mr. Buckholz that he intended to telephone law

enforcement. Mr. Buckholz became enraged, "got into Mr. Sadler's face," and began yelling at him.

37. Mr. Sadler telephoned law enforcement and also telephoned Mr. Oswendel, Hubbard's Project Manager. Two law enforcement officers arrived first. After Mr. Sadler informed the law enforcement officers of the situation, they informed Mr. Buckholz that the Department was in charge of the roads and, therefore, they would support the Department's decision not to allow Mr. Buckholz to place trucks on the on ramp.

38. Mr. Oswendel arrived between 4:00 p.m. and 4:30 p.m. Mr. Oswendel attempted to discuss the matter with Mr. Buckholz and explained to Mr. Buckholz that he was required to follow the directions of the Department's employees. The discussion quickly turned into a loud confrontation.

39. After having unsuccessfully argued his position with three Department employees, law enforcement, and Mr. Oswendel, Mr. Buckholz became enraged at Mr. Oswendel. Mr. Buckholz threatened Mr. Oswendel with physical violence and suggested that they go behind a building and resolve the matter by fighting. Although Mr. Oswendel was also angry, Mr. Oswendel refused Mr. Buckholz' unprofessional and uncivilized offer.

40. Mr. Oswendel instructed Mr. Buckholz that he was not to offload the truck in the manner that he had informed the Department he intended to use. He then informed Mr. Sadler that

he had instructed Mr. Buckholz not to perform any more work at the site that day. Mr. Oswendel then left the site.

41. Mr. Buckholz remained at the site after Mr. Oswendel had left. Mr. Buckholz did not take any action to indicate that he intended to leave the site or that he would follow Mr. Oswendel's direction not to perform any more work at the site that day.

42. The second delivery truck finally arrived approximately 7:00 p.m. Mr. Buckholz again requested that he be allowed to unload the truck from the on ramp. When again told that he could not use the on ramp, Mr. Buckholz requested and was given permission to offload the truck from a side street which ran next to the on ramp.

43. While it was reasonable for Mr. Buckholz to initially contend that he should be allowed to offload the second truck from the on ramp, it was apparent that the Department had properly rejected his plan. Even having been told by three Department employees, Hubbard's Project Manager, and law enforcement that he could not use the on ramp to offload the second truck, Mr. Buckholz continued to insist that he be allowed to do so.

44. Mr. Buckholz has insisted that he reasonably believed that he could offload the second truck safely and consistently with the MOT and, therefore, had followed Department directives.

This assertion is rejected because it is not supported by the evidence in this case. The evidence proved that it was Mr. Buckholz' ego which was the real cause of Mr. Buckholz' refusal to comply. Even if Mr. Buckholz had proved that he reasonably believed that he could offload the second truck safely and consistently with the MOT, his continued failure to accept the directive of Department employees with authority to refuse to allow offloading from the on ramp was not reasonable.

45. By letter dated November 10, 1998, Henry Haggerty, the Department's District Construction Engineer, advised Hubbard that Mr. Buckholz would not be allowed back on the project site in any capacity. This directive was consistent with the Department's authority under Standard Specification 8-5. The letter indicated that Buckholz Traffic's failure to comply with the Department's direction would "result in further contractual action."

46. By letter dated November 10, 1998, Hubbard forwarded a copy of Mr. Haggerty's letter to Mr. Buckholz and ordered Mr. Buckholz to "conduct [himself] accordingly."

47. Mr. Oswendel also sent a letter to Buckholz Traffic addressing Mr. Buckholz' unprofessional and uncivil behavior of November 4, 1998. Mr. Oswendel explained his understanding of the MOT requirements for the Haines Street Project and why Mr. Buckholz' actions had been inconsistent with those

requirements. Mr. Oswendel informed Mr. Buckholz of the following: "I must insist that you develop a professional approach and civil demeanor toward Hubbard Construction, the FDOT, and anyone associated with the contract. Your actions yesterday were completely unacceptable."

48. No action was taken by Buckholz Traffic to correct Mr. Buckholz' problem controlling his temper following the November 4, 1998, incident on the Haines Street Project. Nor was Mr. Buckholz disciplined in any manner by Buckholz Traffic for his actions on November 4, 1998. Mr. Buckholz did not, however, return to the project site.

D. The Baymeadows/Hampton Glen Project.

49. The Department awarded a contract for the installation of mast-arm signals and curb cut ramps for wheelchair access in a project referred to as the Baymeadows/Hampton Glen project (hereinafter referred to as the "Baymeadows Project"). Baymeadows and Hampton Glen are located in Jacksonville.

50. The Standard Specifications governed all work on the Baymeadows Project, including Standard Specification 8-5.

51. The prime contractor on the Baymeadows Project was Buckholz Traffic. Mr. Buckholz was designated and acted as Project Manager for Buckholz Traffic on the Baymeadows Project, although Ms. Allen also communicated with the Department

concerning the project. A subcontractor was engaged by Buckholz Traffic to perform the curb cut work on the project.

52. The Department's Resident Engineer for the Baymeadows Project was David Sadler. The Department's Project Manager for the Baymeadows Project was Stephanie Maxwell, a Florida licensed Professional Engineer. Ms. Maxwell was responsible for project implementation, project oversight, project construction in accordance with the contract specifications, Special Conditions, and the Standard Specifications.

53. Mr. Lavant and David Schweppe were Inspectors for the Department on the Baymeadows Project. Mr. Schweppe had been employed by the Department only since August 1998.

54. During the Spring of 1999 Mr. Lavant informed Ms. Maxwell that curb cuts on the project were not in compliance with contract specifications. Ms. Maxwell informed Buckholz Traffic in a letter dated April 20, 1999, that the construction of the curb cuts was not in compliance with the Roadway and Traffic Design Standards. Ms. Maxwell informed Buckholz Traffic that the curb cuts would have to be replaced.

55. Ms. Allen responded to Ms. Maxwell's letter by letter dated May 1, 1999. Ms. Allen informed the Department that "[Buckholz Traffic had] no intention of removing and reinstalling the curb cuts without appropriate compensation and additional contract time." Such demands are required to be made

after a contract is completed, not as a condition for contract fulfillment.

56. Following receipt of Ms. Allen's letter, Ms. Maxwell arranged a meeting with Mr. Buckholz to discuss the curb cuts. The meeting was scheduled for May 28, 1999.

57. Ms. Maxwell and Mr. Schweppe went to the project site on May 28, 1999, for the scheduled meeting. Mr. Buckholz was already there waiting for them.

58. Ms. Maxwell, Mr. Schweppe, and Mr. Buckholz went to two of the defective curb cuts and Ms. Maxwell explained to Mr. Buckholz why the curb cuts were insufficient. At some point, Mr. Buckholz stated that the inspection of the curb cuts was the worst inspection job he had ever seen. Mr. Schweppe responded by saying that the construction job was the worst that he had ever seen.

59. Mr. Buckholz, who does not take any criticism lightly, especially from anyone that he considers "inferior" to himself, became very upset about Mr. Schweppe's comment about the construction of the curb cuts. Mr. Buckholz got very close to Mr. Schweppe and began yelling and cursing at him. Mr. Buckholz was physically threatening and attempted to provide a physical altercation with Mr. Schweppe. Neither Mr. Schweppe nor Ms. Maxwell responded in kind to Mr. Buckholz.

60. While the comments by Mr. Buckholz concerning the Department's inspection and the comments by Mr. Schweppe concerning the construction by the subcontractor that performed the curb cut work were unnecessary, Mr. Buckholz' response was in no way justified or professional.

61. Ms. Maxwell attempted to get the discussion back on track by moving to a third curb cut. She crossed the street to the sidewalk to the location of the third curb cut. Mr. Schweppe followed.

62. Mr. Buckholz followed Mr. Schweppe continuing to yell, curse, threaten, and attempting to provoke Mr. Schweppe. When Mr. Buckholz reached the sidewalk, he continued to walk away from the curb cut and the road down into a swale or ditch next to the sidewalk. Mr. Buckholz told Mr. Schweppe to come down into the ditch so he could "whip his ass." Mr. Buckholz continued to challenge Mr. Schweppe. At some point Mr. Schweppe did respond to Mr. Buckholz by telling him that "there is plenty of room right here," in reference to where Mr. Schweppe was standing.

63. After it became apparent to Mr. Buckholz that Mr. Schweppe was not going to come to him, he returned to where Ms. Maxwell and Mr. Schweppe were standing waiting for him. As soon as he got to Mr. Schweppe, Mr. Buckholz struck Mr. Schweppe two times in the face with his fist without warning,

provocation, or any justification. Nothing that Mr. Schweppe had done gave Mr. Buckholz even the slightest cause to strike Mr. Schweppe.

64. Mr. Buckholz simply struck Mr. Schweppe because he had lost total control of himself and believed that resolving a confrontation by resorting to physical violence was acceptable conduct. Even at the formal hearing of this case, Mr. Buckholz continued to express his belief that such conduct is an acceptable way to resolve differences.

65. After being "sucker" punched by Mr. Buckholz, Mr. Schweppe grabbed Mr. Buckholz in an effort to prevent him from any further attack. Mr. Schweppe was able to wrestle Mr. Buckholz to the ground, where he held him until he thought Mr. Buckholz was calming down. At no time did Mr. Schweppe strike Mr. Buckholz.

66. After Mr. Schweppe received assurances from Mr. Buckholz that he had calmed down, Mr. Schweppe let Mr. Buckholz up. Mr. Schweppe had Mr. Buckholz pinned face down by his neck. When Mr. Schweppe released Mr. Buckholz, he did not push his face into the dirt. Mr. Schweppe and Ms. Maxwell immediately crossed the street to return to Ms. Maxwell's automobile so that she could telephone the police. Mr. Buckholz followed them and attempted to attack Mr. Schweppe again, but Ms. Maxwell attempted to stand in his way. When she did,

Mr. Buckholz grabbed Ms. Maxwell by her arms and shoved her aside.

67. Mr. Buckholz continued to yell, curse, and threaten Mr. Schweppe, who had turned to face him.

68. Ms. Maxwell, who was reasonably concerned about her safety and that of Mr. Schweppe, telephoned law enforcement. Mr. Schweppe filed a complaint against Mr. Buckholz and he was eventually arrested. Mr. Schweppe suffered serious injuries to his face which required medical attention as a result of Mr. Buckholz' attack.

69. Following the May 28, 1999, assault on Mr. Schweppe, the Department sent a letter dated June 1, 1999, to Ms. Allen informing her that "Mr. Jeffery Buckholz was no longer allowed to be present at the job site in any capacity. Failure on the part of Buckholz Traffic to comply with this directive will result in additional actions under the contract." This letter was from Greg Xanders, the State Construction Engineer for the Department.

70. Mr. Xanders' letter of June 1, 1999, and the directive therein, was authorized by, and consistent with, Standard Specification 8-5.

71. Buckholz Traffic was also directed to provide proof that Mr. Buckholz would no longer be a threat to Department employees before Mr. Buckholz was allowed to return to any

Department project job site. In light of Mr. Buckholz' actions, this request was reasonable.

E. Buckholz Traffic's Response to the Department's June 1, 1999, Directive.

72. Ms. Allen responded to the Department's June 1, 1999, letter on behalf of Buckholz Traffic by letter dated June 6, 1999. Ms. Allen's response was as arrogant and unreasonable as the conduct of Mr. Buckholz that precipitated the June 1, 1999, letter. Based upon a reading of Ms. Allen's June 6, 1999, letter as a whole, Buckholz Traffic essentially told the Department it intended to take no action with regard to correcting Mr. Buckholz' conduct. Instead of indicating any concern over Mr. Buckholz' inappropriate conduct, Ms. Allen stated, in part, the following:

We fully intend on completing this and other FDOT assignments using the same staff that was initially assigned to the projects. Consequently, we directly challenge your self-serving interpretation of Section 8-5 of the Standard Specification and will not cooperate with directives that are issued without due process and that fly in the face of basic freedoms guaranteed in the US Constitution.

Ms. Allen went on to state the following, which summaries the attitude of Buckholz Traffic concerning its unwillingness to give the Department any

assurances that Mr. Buckholz would not be a threat to the safety of other Department employees:

So what do I need to clear Mr. Buckholz' good name, a "letter of normalcy" from a shrink or a "certificate of contriteness" from the local Baptist Church?"

73. Ms. Allen and Buckholz Traffic responded to the legitimate fears of the Department about Mr. Buckholz' conduct with sarcasm rather than in a meaningful way. Ms. Allen and Buckholz Traffic made no effort to cooperate with the Department or attempt to correct a problem with a person that had consistently held himself out as an important part of Buckholz Traffic.

74. Buckholz Traffic told the Department it would not comply with the directive the Department was authorized to issue pursuant to Standard Specification 8-5.

75. By letter dated June 17, 1999, Mr. Xanders responded to Ms. Allen's June 6, 1999, letter. Mr. Xanders informed Ms. Allen that the Department welcomed any explanation of the incident she wished to give. Mr. Xanders also suggested that legal counsel for Buckholz Traffic, if any, could contact Department legal counsel to provide an explanation. Mr. Xanders restated the Department's directive, clarifying that the directive only pertained to construction work by Mr. Buckholz

and not his engineering work. Ms. Allen made no effort to respond to Mr. Xanders' offers.

F. Mr. Buckholz' Return to Baymeadows.

76. A meeting was scheduled for August 11, 1999, between Ms. Maxwell and representatives of the City of Jacksonville (hereinafter referred to as the "City"). The meeting had been scheduled to turn on the newly installed traffic signals.

77. In direct contravention to the Department's directive to Buckholz Traffic that Mr. Buckholz not return to the Baymeadows Project site, Mr. Buckholz returned to the site on August 11, 1999, to attend the meeting Ms. Maxwell had scheduled with the City. At no time did Ms. Allen, Mr. Buckholz, or anyone else on behalf of Buckholz Traffic request permission of the Department for Mr. Buckholz to return to the project site.

78. Mr. Buckholz and Ms. Allen fully understood that Mr. Buckholz was not to return to the Baymeadows Project site. Despite their understanding of the Department's reasonable directive, Mr. Buckholz claimed to have returned to the site at the invitation of representatives of the City. He also claimed to have returned to the site to assist the City with the installation of traffic light timing software he had prepared and not in any capacity with Buckholz Traffic. Testimony in support of Mr. Buckholz' claims was not convincing. Nor was the

evidence concerning the necessity that Mr. Buckholz be on the site during a meeting with Department employees convincing.

79. Mr. Buckholz simply chose to ignore the Department's directive not to return to the site. Mr. Buckholz continued to believe that his actions on May 28, 1999, were justified and failed to consider the harm his conduct had caused to Department employees. Mr. Buckholz arrogantly volunteered his services to the City so that he could flaunt the Department's directive not to appear at the site. Had Mr. Buckholz given the Department's directive any consideration, he could have waited for the City and Department to complete their meeting and then meet with City representatives to perform any work required of him.

G. The Department's Reaction to the Failure of Buckholz Traffic to Comply with the Directive of June 1, 1999.

80. Mr. Xanders has been responsible for providing policy and procedure guidelines for the Department's Districts, carrying out construction programs, and providing training and quality assurance initiatives.

81. In his capacity as State Construction Engineer, Mr. Xanders reviewed Mr. Buckholz' conduct described supra, and the reactions of Buckholz Traffic to Department directives concerning Mr. Buckholz' conduct. Mr. Xanders reviewed and relied upon correspondence from Ms. Allen dated May 1, 1999, May 16, 1999, and June 6, 1999.

82. Based upon the foregoing, the Department informed Buckholz Traffic by letter dated October 6, 1999, that the Department was revoking Buckholz Traffic's qualification to bid.

CONCLUSIONS OF LAW

A. Jurisdiction.

83. The Division of Administrative Hearings has jurisdiction of the parties to, and the subject matter of, this proceeding. Section 120.57, Florida Statutes (1997).

B. The Burden and Standard of Proof.

84. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative 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).

85. In this proceeding, it is the Department that is asserting the affirmative: that there is good cause for the Department to revoke the qualification of Buckholz Traffic to bid on Department contracts for which prequalification is required by Section 337.14, Florida Statutes; and to declare that Buckholz Traffic is prohibited from bidding on any other construction or maintenance contract and from acting as a material supplier, subcontractor, or consultant on any

Department contract or project during the period of revocation pursuant to Section 337.16, Florida Statutes, and Rule 14-22.012, Florida Administrative Code. The Department, therefore, had the ultimate burden of proof.

86. Buckholz Traffic has argued that the standard of proof which the Department was required to meet in this case was the "clear and convincing" standard because an action to revoke a certificate of qualification is in effect a license revocation proceeding. In support of this argument, Buckholz Traffic relies on Capeletti Brother, Inc. v. Department of Transportation, 362 So. 2d 346 (Fla. 1st DCA 1978) and related cases, and cases dealing with actions to revoke business and professional licenses.

87. Cases dealing with actions to revoke business and professional licenses are distinguishable from this case and the Capeletti Brother decision concerning the revocation of a certificate of qualification has been superceded by Section 337.167, Florida Statutes, adopted by the Legislature in 1983:

(1) A certificate to bid on a department contract, or to supply services to the department, is intended to assist the department in determining in advance the performance capabilities of entities seeking to supply goods and services to the department and is not a "license" as defined in s. 120.52. The denial or revocation of a certificate is not subject to the provisions of s. 120.60 or s. 120.68(3). The provisions of ss. 120.569 and 120.57 are

applicable to the denial or revocation of such certificate.

See White Construction Co., Inc. v. Department of Transportation, 526 So. 2d 998 (Fla. 1st DCA 1988).

88. Based upon the foregoing, it is concluded that the Department was required to meet its burden of proof in this case by the preponderance of the evidence. J.W.C. Co., supra.

89. The Department met its burden in this case. The Department also met the higher burden of clear and convincing, even though it was not required to do so.

C. Certificates of Qualification.

90. Any persons desiring to bid on proposed Department construction contracts in excess of \$250,000.00 are required to be certified by the Department as qualified pursuant to Section 337.14, Florida Statutes, and Rule 14-22.011, Florida Administrative Code, prior to bidding. Buckholz Traffic has been certified qualified by the Department.

91. Section 337.16(2), Florida Statutes, provides ground for the Department to revoke the qualification of any contractor to bid for "good cause":

(2) For reasons other than delinquency in progress, the department, for good cause . . . may deny, suspend or revoke any certificate of qualification.

Section 337.16(2), Florida Statutes, goes on to list several examples of what constitutes "good cause," but

provides that the examples do not constitute an exclusive list of what constitutes "good cause." None of the specified examples apply to this matter.

92. The conduct supporting a determination of "good cause" contemplated by Section 337.16(2), Florida Statutes, must be conduct of the "contractor or the contractor's official representative."

93. Rule 14-22.012(1), Florida Administrative Code, provides that a determination that a contractor's qualification to bid should be revoked for good cause also constitutes a determination of non-responsibility to bid on any construction or maintenance contract and a bar from acting as a material supplier, subcontractor, or consultant on any Department contract or project during the period of revocation.

D. Good Cause Exists in This Case.

94. Much of the argument of the parties in their Proposed Recommended Orders has been devoted to the standard of proof and the scope of the appropriate charges against Buckholz Traffic. Regardless of what standard of proof is applied and even restricting the actions which can be considered in determining whether good cause for the Department's proposed revocation exists in this case to Ms. Allen's letter of June 6, 1999, the evidence proved that good cause exists in this case to revoke Buckholz Traffic's certificate of qualification.

95. First, the actions of Mr. Buckholz alone constitute good cause for the Department's actions. Mr. Buckholz' actions indicated a pattern of abusive, intemperate, disorderly, and insubordinate conduct in dealing with Department employees. While Mr. Buckholz may not have technically been an employee of Buckholz Traffic, he was treated as an important and integral part of the Buckholz Traffic. Mr. Buckholz refused to follow proper Department directives, committed an assault and battery against a Department employee, and refused to follow a directive of the Department not to return to the Baymeadows site. At no time has Mr. Buckholz taken any action to give the Department assurances that the conduct he displayed during 1998 and 1999 will not continue.

96. Secondly, the actions of Buckholz Traffic in dealing with Mr. Buckholz also constitute good cause for the revocation of its qualification to bid. Buckholz Traffic was aware of Mr. Buckholz' problem controlling his temper as early as November 1998 when he lost control at the Haines Street Project.

97. Buckholz Traffic's June 6, 1999, response to Mr. Xander's letter of June 1, 1999, directly challenges the directions of the Department and clearly indicates the intent of Buckholz Traffic to take no action to ensure that further acts of violence are not perpetrated against Department employees by Mr. Buckholz.

98. The Department had the authority pursuant to Standard Specification 8-5 to direct Buckholz Traffic not to allow Mr. Buckholz to return to a Department construction project until some assurances were given to the Department that Mr. Buckholz could control his temper. Buckholz Traffic not only made no effort to comply with this directive, it indicated it had no intention of doing so. These actions constitute "good cause" as used in Section 337.16, Florida Statutes.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department revoking the qualification to bid of Precision Traffic Counting, d/b/a Buckholz Traffic, for a period of one year from the date of the final order and that Precision Traffic Counting, d/b/a Buckholz Traffic be considered non-responsible to bid on any construction or maintenance contract and to act as a material supplier, subcontractor, or consultant on any Department contract or project during the period of the revocation.

DONE AND ENTERED this 3rd day of May, 2000, in Tallahassee,
Leon County, Florida.

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 3rd day of May, 2000.

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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.