

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SPIVEY UTILITY CONSTRUCTION)
COMPANY, INC.,)
)
Petitioner,)
)
vs.) Case No. 02-0286
)
DEPARTMENT OF MANAGEMENT)
SERVICES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 25, 2002, by video teleconference between sites in Tampa, Florida, and Tallahassee, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ronald R. Swartz, Esquire
18045 Jorene Road
Odessa, Florida 33556

For Respondent: Stephen S. Godwin, Esquire
Department of Management Services
4050 Esplanade Way, Suite 260
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

Whether Petitioner's application for certification as a minority business enterprise should be granted.

PRELIMINARY STATEMENT

On July 16, 2001, Spivey Utility Construction Company, Inc. (Petitioner or Spivey Utility) filed an application with the Department of Management Services (Department) for certification as a minority business enterprise (MBE). By letter dated October 2, 2001, the Department informed Petitioner that its application was denied. Petitioner timely filed a petition requesting a formal administrative hearing, and on January 18, 2002, the petition was referred to the Division of Administrative Hearings (Division) and assigned to the undersigned.

At the hearing, Petitioner offered the testimony of Ed Blattler, C.P.A., Petitioner's accountant; Sandra Spivey, Petitioner's president and chief executive officer; and Collette Lazar, Petitioner's corporate secretary. Mr. Blattler was accepted as an expert in accounting. Petitioner's exhibits, numbered P1 and P2, were admitted into evidence. Petitioner submitted a copy of Spivey Utility's articles of incorporation with its post-hearing submittal and requested that it be included as part of the official record. The request is denied. The articles of incorporation were received into evidence at the hearing as Respondent's Exhibit R7.

At the hearing, the Department offered the testimony of Robert Crabill, Executive Director of the Construction Industry

Licensing Board (CILB), and Lloyd Ringgold, the Department employee who reviewed Petitioner's application. The Department's exhibits, numbered R1-R7, were admitted into evidence.

At the conclusion of the hearing, Petitioner requested that the record in this case be sealed because it included copies of the Schedule K-1 tax returns filed by Spivey Utility's owners. The undersigned reserved ruling on that request and gave the parties an opportunity to identify a statute or other legal authority which would authorize the undersigned to seal any part of the record despite the application of the Public Records Act. The parties did not identify any such authority, nor did the undersigned's research. Accordingly, no part of the record of this case will be sealed. The undersigned did, however, redact from the exhibits and the parties' pre-hearing filings, the FEI number of the corporation, the owners' social security numbers, and the corporation's bank account number.¹ The unredacted documents previously posted on the Division's website were replaced with the redacted versions.

No transcript of the hearing was ordered. The parties agreed to file their proposed recommended orders no later than ten days after the conclusion of the hearing. The parties' proposed recommended orders were timely filed and were

considered by the undersigned in preparing this Recommended Order.

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing, the following findings are made:

1. Spivey Utility is an active for-profit Florida corporation headquartered in Odessa, Florida.

2. The company was formed in August 1986. Sandra Spivey (Mrs. Spivey) provided the initial capital for the company in the amount of \$500. Since 1986, the company has grown significantly. Its gross revenues for 2001 were over \$11 million.

3. At the time Spivey Utility was formed, Mrs. Spivey was a full-time school bus driver and her husband worked for another excavating company. Between 1986 and 1991 (when she retired from school bus driving), Mrs. Spivey devoted several hours each weekday to running Spivey Utility, and on the weekends she worked as "grunt" (e.g., carrying conduit) for her husband on job sites. Since 1991, Mrs. Spivey has devoted all of her time to running Spivey Utility.

4. The company currently employs 170 people, but it is still a "family business." All of the outstanding stock of Spivey Utility is owned by Mrs. Spivey and her five children.

5. Mrs. Spivey is a white female. She owns 51 percent of the company's outstanding stock. Her daughter Collette Lazar (Ms. Lazar) is also a white female, and she owns ten percent of the company's stock. Thus, white females collectively own 61 percent of the outstanding stock of Spivey Utility. These ownership percentages have not changed since the stock was first issued in October, 1986.

6. Mrs. Spivey's sons, all white males, own the remainder of the stock in the following percentages: Jim Spivey (15 percent); Steve Spivey (ten percent); Daniel Spivey (seven percent); and Tim Spivey (seven percent). Mrs. Spivey's husband, Verlyn Spivey, does not own any of the corporation's stock.

7. The Schedule K-1 tax returns of Mrs. Spivey, Ms. Lazar, and Mrs. Spivey's sons demonstrate that their shares of the company's income is commensurate with their ownership percentages.

8. Mrs. Spivey is the president and chief executive officer of Spivey Utility. She is also a member of the board of directors.

9. Ms. Lazar is secretary of the company. She is also a member of the board of directors.

10. Spivey Utility's bylaws provide that "[t]he business affairs of the corporation shall be managed by its board of

directors." Bylaws at Article III, Section 1. Accord Section 607.0802. The bylaws further provide that the president shall supervise and control all of the business affairs of the corporation "subject to the control of the directors." Bylaws at Article IV, Section 5.

11. The board of directors has seven members. In addition to Mrs. Spivey and Ms. Lazar, the board consists of Mrs. Spivey's husband and her sons. Thus, five members of the board are white males and only two members are white females. Five (of seven) directors are required for a quorum of the board of directors.

12. As the holder of more than 51 percent of the company's outstanding stock, Mrs. Spivey has the authority under the bylaws to remove any of the directors and replace them with persons of her choosing. See Bylaws at Article II, Section 9 (stockholders entitled to one vote per share and directors elected by plurality vote); id. at Article III, Section 9 (directors may be removed with cause by the board or stockholders and without cause by the stockholders). However, Mrs. Spivey testified at hearing that she had no intention of removing her children as directors because Spivey Utility was a "family business."

13. Over the years there have been disputes among the board members regarding company policy but, in the end,

Mrs. Spivey always made the final decision. She testified that her final decision has never been overruled by the board and testified that she could not conceive of it ever happening. She further testified that, if it ever came down to it, she would overrule the board's decision overruling her through her ownership of the majority of the company's stock. Similarly, Ms. Lazar testified that Mrs. Spivey makes the final decisions, despite what the board might want to do because she owns the most stock.

14. Spivey Utility is in the underground excavating business. Its articles of incorporation describe the nature of its business as "engag[ing] in all activities relating to the installation and maintenance of telephone cable and conduit." Articles of Incorporation, at Article II.a. Similarly, paragraph 8 of the MBE application described the nature of the company's business as "[u]nderground utilities, install manholes, place conduit, pull cable, fiber optic, directional boring, trenching & conventional boring."

15. The largest portion of Spivey Utility's business is installing underground cable and conduit for telecommunications companies and utility providers such as Verizon and Tampa Electric Company. The company also has a water and sewer division which installs water and sewer lines, as well as a site preparation division which clears land for development. The

water and sewer and site preparation divisions constitute only ten percent of the company's business.

16. The company does not install or hook up "hot" wires, i.e., wires which are electrically charged. It only installs empty conduit and "cold" wires.

17. The underground excavating work conducted by Spivey Utility does not require extensive technical training. At hearing, it was described as "glorified ditch digging."

18. Mrs. Spivey's sons supervise the field operations of the various divisions within the company, and her husband oversees the bidding and contract work done by the company. Ms. Lazar provides administrative support for the corporation.

19. Mrs. Spivey's sons each have more than 20 years of experience in the underground excavation industry. Her husband has almost 50 years of experience in the industry.

20. Despite the delegation of supervisory authority of the field work to her sons, Mrs. Spivey remains actively involved in the day-to-day operations of the company. She is in direct communication with her sons on a daily basis to ensure that they have all of the equipment and resources they need to perform their work. They come to her when they need additional resources.

21. Mrs. Spivey is 67 years old, but she is still comes to the office on a daily basis. She spends most of her time in the

office dealing with financial matters and overseeing work in the shop where equipment is serviced and repaired. She generally does not spend time in the field, although she has done so when necessary.

22. Mrs. Spivey has the authority to hire and fire employees and she has done so when necessary. She has also shifted employees, including her sons, from one division of the company to another to enhance the company's operation.

23. Mrs. Spivey controls all of the financial aspects of the corporation. Her signature is required on all contracts to bind the corporation, including bids prepared by her husband or sons. Neither her sons nor her husband has the authority to bind the corporation. No financial decisions are made without Mrs. Spivey. The company's CPA testified that Mrs. Spivey is the only person in the company that has expertise in financial matters.

24. Mrs. Spivey is the sole personal guarantor for Spivey Utility's lines of credit, indemnity agreements, and bonding line.

25. Mrs. Spivey and Ms. Lazar sign nearly all of the checks written by the corporation out of the company's primary account with Sun Trust Bank. The authorized signatories for that account include, in addition to Mrs. Spivey and Ms. Lazar, Mrs. Spivey's sons: Steve Spivey, Daniel Spivey, Jim Spivey, and

Tim Spivey. Only one signature is required on that account; no countersignature is required. The purpose of the sons being signatories on the account was for convenience in the event Mrs. Spivey or Ms. Lazar was unavailable.

26. Although there is no formal limitation with the bank on the authority of Mrs. Spivey's sons to write checks in any amount, the evidence shows that the sons "know better" than to write checks for amounts in excess of \$1,000 or so.

27. It was apparent from her testimony that Mrs. Spivey has a keen understanding of the business operations of the company. Although she does not, and has never, performed the excavating work done by the company, she has been in the field to watch the work. She was able to explain and distinguish between the various types of excavating done by the company (e.g., jack and bore, directional boring, etc.) as well as the process and purpose of de-watering soil. She was also able to explain and discuss changes in the industry, including the need for specialized equipment and increased liability insurance when laying fiber optic cable.

28. Mrs. Spivey's testimony also demonstrated her understanding of the company's operations. She is intimately familiar with the various divisions of the company and the services they perform and the clients they serve. Similarly, she demonstrated her familiarity with equipment and inventory of

the company, such as the type, number, and cost of trucks, backhoes, and boring equipment owned by the company.

29. Mrs. Spivey gained her knowledge of the excavating business from her husband who has been in the business for almost 50 years. As noted above, in the early years of the company, Mrs. Spivey often accompanied her husband on the job-site and assisted him as a "grunt" on the job.

30. Spivey Utility has a certificate of authority from the CILB. The certificate is not a license to perform work. It only allows the company to do business if it has a qualifier.

31. Spivey Utility has two qualifiers, Robert King in the areas of underground excavating and pollutant storage and Robert Burns in electrical. Neither of those individuals is a member of the Spivey family nor are they owners, officers, or directors of Spivey Utility.

32. Spivey Utility obtained the certificate of authority when its water and sewer division was formed three years ago. Prior to that, Spivey Utility did not hold any state licenses or certificates.

33. Neither Mrs. Spivey nor Ms. Lazar is registered or certified as a contractor by the CILB. Mrs. Spivey does have a commercial driver's license which authorizes her to drive vehicles, which weigh up to 26,000 pounds, including some of the company's dump trucks.

34. The Department did not perform an on-site investigation of Spivey Utility in connection with its review of the company's MBE application. The Department's decision to deny the application was based solely on the information presented by Spivey Utility with its application and the supplemental information it provided on August 2, 2001, pursuant to the Department's request.

35. The résumés included with Spivey Utility's MBE application and the supplemental job descriptions provided in the August 2, 2001, letter are not comprehensive and do not fully reflect Mrs. Spivey's understanding of or control over the management and daily operations of the company.

CONCLUSIONS OF LAW

36. The Division has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 120.60, Florida Statutes. (All references to Sections are to the Florida Statutes. All references to Rules are to the Florida Administrative Code.)

37. The Department's initial decision to deny Spivey Utility's MBE application was based on Rule 38A-20.005(2)(b), (3)(a), (3)(b), and (3)(d)4. Petitioner has the burden of proof in this de novo proceeding² to demonstrate by a preponderance of the evidence that it satisfied each of those requirements. See Dept. of Banking & Finance v. Osborne Stern & Co., 670 So. 2d

932, 934 (Fla. 1996); Dept. of Transportation v. J.W.C. Co., 396 So. 2d 778, 788-90 (Fla. 1st DCA 1981).

38. As more fully discussed below, the undersigned concludes that Petitioner met its burden of proof.

39. At the outset, it should be noted that an on-site investigation is not required under current law. The requirement for an on-site investigation was eliminated in 2000 when the following language was deleted from Section 287.0943:

The certification procedures should include, at a minimum, an onsite visit to inspect business operations and verify statements included in the application, unless verification can be accomplished by other methods of adequate verification or assessment of ownership and control.

See Chapter 2000-286, Laws of Florida, at Section 2.

40. Section 288.703(2) defines "minority business enterprise" for purposes of MBE certification as:

any small business concern . . . which is organized to engage in commercial transactions, which is domiciled in Florida, and which is at least 51-percent-owned by minority persons who are members of an insular group that is of a particular racial, ethnic, or gender makeup or national origin, which has been subjected historically to disparate treatment due to identification in and with that group resulting in an underrepresentation of commercial enterprises under the group's control, and whose management and daily operations are controlled by such persons.
. . . .

41. There is no dispute in this case that Spivey Utility is a small business concern, that it is organized to engage in commercial transactions, and that it is domiciled in Florida.

42. Initially, the Department took the position that Spivey Utility failed to demonstrate that is at least 51 percent owned by minority persons pursuant to Rule 38A-20.005(2)(b). That rule requires the applicant to demonstrate that the minority owners' share of the company's income is commensurate with their ownership interests. The Department stipulated at the outset of the hearing that, based upon additional information obtained during discovery, it was now satisfied that Petitioner met the requirements of Rule 38A-20.005(2)(b). Despite the stipulation, Petitioner presented evidence at the hearing in the form of the Schedule K-1 tax returns for Spivey Utility's owners and the testimony of the company's CPA which showed that the minority owners' share of the company's income is commensurate with their percentages of ownership in the business. Based upon the stipulation and the evidence presented at the hearing, it is concluded that Petitioner satisfies the requirements of Rule 38A-20.005(2)(b).

43. Thus, the only remaining dispute in this proceeding is whether the management and daily operation of Spivey Utility is controlled by minority persons. The criteria for determining whether the minority owners control the management and daily

operations of the company are set forth in Rule 38A-20.005(3) which implements Sections 288.703 and 287.0943. The specific provisions of the rule still at issue in this proceeding are paragraphs (3)(a), (3)(b), and (3)(d)4. Each will be discussed in turn.

Rule 38A-20.005(3)(a)

44. Rule 38A-20.005(3)(a) provides:

The discretion of the minority owners shall not be subject to any formal or informal restrictions (including, but not limited to, by-law provisions, purchase agreements, employment agreements, partnership agreements, trust agreements or voting rights, whether cumulative or otherwise), which would vary or usurp managerial discretion customary in the industry. (emphasis supplied).

45. The Department contends that Spivey Utility's bylaws restrict the minority owners' control of the company because the bylaws vest management of the company in the board of directors and five of the seven board members are non-minorities.

46. In light of the bylaw provisions quoted in paragraph 10, the Department's position is not entirely without merit. Indeed, several of the prior administrative decisions attached to the Department's proposed recommended order support its position. See Tele-Net Communications, Inc. v. Dept. of Management Services, DOAH Case No. 00-2488 (Oct. 25, 2000); Buell & Company, Inc. v. Dept. of Labor & Employment Security,

DOAH Case No. 99-0645 (Aug. 11, 1999); Locker Service, Inc. v. Dept. of Labor & Employment Security, Case No. 99-3063 (Mar. 27, 2000).

47. Those prior orders are distinguishable because the bylaw provisions in those cases were not determinative, and the evidence of the minority owners' control in this case is much more compelling than the circumstances of those cases.

48. For example, in both Buell and Tele Net, the minority owners' share of the company's income was not commensurate with their ownership percentage. Moreover, in Buell, the bylaws required written consent of the board of directors before the corporation could take action; there was no discussion of the authority of the corporate officers to act on behalf of the corporation. In Tele Net, the president of the company was the non-minority owner and the minority owner performed only the basic administrative functions for the company. In Locker Services, there is no discussion regarding the extent of the minority owner's participation in the management of the company and the non-minority owner was the personal indemnitor for the corporation's bonding line. By contrast, in this case, the weight of the evidence establishes that Mrs. Spivey has devoted all of her time to running Spivey Utility since 1991 and, as president and chief executive officer of the company, she has full authority to act on behalf of the company.

49. Under the facts of this case, the Department's focus on the bylaws overlooks two important considerations. First, the corporation's officers, namely its president, run the day-to-day operations, not the board of directors. Second, the board of directors can be changed at will by a majority of the stockholders and, in this case, Mrs. Spivey constitutes a majority of the stockholders. On these two points, the undersigned finds persuasive the following analysis from Center Office Products, Inc. v. Dept. of General Services, DOAH Case No. 88-1991 (Rec. Order dated Feb. 21, 1989):

Respondent's salient contention is that by-law provisions require the Board of Directors to be made up of three persons, with the majority vote of that board being required to effect corporate decisions and that, given that Mrs. Forbess is only one of three votes on the Board of Directors, she cannot really control the operation of the business. This position overlooks a very important consideration, which is that the daily activities of the corporation, (and any corporation) are run by the president or chief executive officer, which is Mrs. Forbess in this case. Secondly, the Respondent's position overlooks the fact that the Board of Directors can be changed, that is, the Directors can be removed by vote of the majority of shareholders. It is undisputed that Mrs. Forbess owns the majority of the corporation's stock, with full voting power. She can convene a meeting of the board of directors on her own motion as president of the company. Even if, as Respondent points out, sufficient stock was transferred to Mrs. Forbess in the recent past in order to give her 51 per cent majority interest merely for the purpose of

applying for the subject certification, the fact remains that indeed she actually holds the majority of outstanding stock and therefore the majority of voting power on the board of directors. It is not important that she has not historically exercised that power to alter the board. The point is that she has authority to do so, and that authority carries with it the most important element and indicator of control of the operation and ownership of this business. By controlling the majority of the outstanding shares of the corporation, Mrs. Forbess can remove and replace the members of the board at will and replace them with directors who will vote in accordance with her wishes. Thus, notwithstanding her position as a chief executive officer and president of the Petitioner corporation, with all the attendant authority to control the operations of the business, she can independent of that ability, exercise controlling authority over the board of directors. Recognition of this power of a majority stockholder has been considered pivotal in the case of Aguiar Defense v. Department of General Services, DOAH 87-5552 (June 20, 1988); Final Order entered June 29, 1988, a case involving minority business certification very similar to this one.

Id. at Paragraph 29.

50. The Department's position that the bylaws are dispositive also overlooks the reality that Spivey Utility is a closely-held family corporation. It only has six stockholders, all of whom are members of the board of directors and all of whom are involved in some aspect of the operation of the business. Florida law recognizes that such corporations do not act with as much formality as larger corporations. As the court

explained in Etheredge v. Barrow, 102 So. 2d 660 (Fla. 2nd DCA 1958):

The doctrine of permitting closed corporations to act informally is recognized as an exception to the general rule that directors must act as a board at duly convened meeting. In fact it is well known that corporations which include only a few stockholders do not often act with as much formality as larger companies. This is especially so where the members of the board, actually and directly, personally conduct the business.

Id. at 663 (citation omitted). And Cf. Section 607.0732 (authorizing closely-held corporation to modify its governance structure through a shareholders' agreement).

51. It is apparent from the testimony at hearing that the company's business is not conducted through formal board meetings; instead, it is conducted by Mrs. Spivey independently or after informal consultation and discussion with the other members of the board. Based on Etheredge, the actual manner in which Spivey Utility operates should be given more weight than the manner in which the bylaws say that it should or could operate.

52. In this regard, Mrs. Spivey testified that the board members have never tried to overrule her decision and that she could never conceive of it happening. Similarly, Ms. Lazar testified that it is well-established and understood that "mom [Mrs. Spivey] makes the decisions" for the company. Mrs. Spivey

testified that if it ever came down to it, she would "overrule" the board since she "is the momma and the main owner." There was no testimony to the contrary. Thus, even though under the bylaws Mrs. Spivey is technically entitled to only one (of seven) votes on the board, it is apparent from the testimony that in practice her decisions are given considerable, if not absolute deference as a result of her 51 percent ownership of the company.

53. Through the evidence at hearing, Petitioner has demonstrated that the bylaws do not in fact restrict Mrs. Spivey's control over the operation of the company. Indeed, as was the case in Center Office Products, supra, other provisions of the bylaws confirm Mrs. Spivey's authority, as the holder of 51 percent of the company's outstanding stock, to remove directors with or without cause. See Finding of Fact 12. And see Section 607.0808. Even though Mrs. Spivey testified that she has no intention of removing any of her children from the board, the bylaws clearly give her the authority to do so.

54. Accordingly, Petitioner satisfies the requirements of Rule 38A-20.005(3)(a).

Rule 38A-20.005(3)(b)

55. Rule 38A-20.005(3)(b) provides:

If the applicant business is a corporation and the business affairs of the corporation are managed under the direction of a board

of directors as provided by the articles of incorporation or bylaws of the corporation or Section 607.0824, Florida Statutes, the articles of incorporation or bylaws must explicitly clarify the number of the board of directors for establishing a quorum, or it will be deemed by this office that a quorum of the board of directors consists of a majority of the number of directors presented by the articles of incorporation or the bylaws.

56. Rule 38A-20.005 (3)(b) does not provide an independent basis to deny an MBE application. It simply establishes a presumption to assist the Department in determining whether the minority owner(s) have the votes necessary to control the board of directors in all circumstances.

57. The presumption is not implicated in this case because Spivey Utility's bylaws expressly provide the number of board members (i.e., five) that are necessary to establish a quorum. See Bylaws, at Article III, Section 6. In any event, as discussed above in connection with Rule 38A-20.005(3)(a), the weight of the evidence establishes that Mrs. Spivey controls the management and daily operation of the company despite a majority of non-minorities on the board of directors.

Rule 38A-20.005(3)(d)4.

58. Rule 38A-20.005(3)(d)4. provides:

The minority owners shall have managerial capability, knowledge, training, education and experience required to make decisions regarding the operations of the business. In determining the applicant business'

eligibility, the Office will review the prior employment and educational backgrounds of the minority 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 familially related, and the timing and purpose of management changes. If the minority owners have delegated management and technical responsibility to others, the minority owners must substantiate that they have caused the direction of the management and the technical responsibilities of the business. When the applicant business provides services which require that the business and/or its professional qualifier be licensed, the minority owner shall hold the requisite license issued by the State of Florida or local licensing entity. The minority license holder need not be the controlling owner of the business, but must hold an ownership interest. (emphasis supplied).

59. The Department contends that Spivey Utility fails to meet the requirements in Rule 38A-20.005(3)(d)4., and particularly the underlined language, because the company's business constitutes underground utility and excavation contracting which requires a license from the State and neither of the company's minority owners (i.e., Mrs. Spivey or Ms. Lazar) is certified or registered as a contractor in that field. In response, Petitioner argues that the bulk of the business conducted by Spivey Utility does not require a license from the State.

60. The undersigned agrees with the Department that all of Spivey Utility's activities require a license from the State. However, the undersigned agrees with Petitioner that control can be demonstrated by the minority owner though licensure or expertise, notwithstanding the underlined language in Rule 38A-20.005(3)(d)4.

Licensure Requirement

61. Petitioner contends that the installation of empty conduit and "cold" wires, which constitutes approximately 90 percent of its business, does not require a license from the State. The Department (supported by the testimony of the Executive Director of the CILB) argues that those services fall within the definition of underground utility and excavation contracting which is regulated by the State.

62. The definition of "underground utility and excavation contractor" in Section 489.105(3)(n) includes three sentences; however, only the first two are pertinent here.³ The first sentence limits the scope of services which underground utility and excavation contractors to:

construction, installation, and repair . . .
of main sanitary sewer collection systems,
main water distribution systems, storm sewer
collection systems, and the continuation of
utility lines from the main systems to
[specified points of termination].

63. The second sentence expands the scope of services described in the first sentence to also include the installation of:

empty underground conduits in rights-of-way, easements, platted rights-of-way in new site development, and sleeves for parking lot crossings no smaller than 2 inches in diameter, provided that each conduit system installed is designed by a licensed professional engineer or an authorized employee of a municipality, county, or public utility and that the installation of any such conduit does not include installation of any conductor wiring or connection to an energized electrical system.

64. Thus, there are two distinct types of services which constitute underground utility and excavation contracting: (1) installation, etc., of water and sewer lines and (2) installation of empty underground conduit which does not involve "hot" wires.

65. Performance of either of these types of services requires certification from or registration with the CILB. See Section 489.113(1) (certification is required if the services will be performed on a statewide basis; registration is required if the services will be performed on a less than statewide basis). A person who is not certified or registered may not perform contracting work except under the supervision of a person who is certified or registered. See Section 489.113(2).

66. The business conducted by Spivey Utility was described on its application for MBE certification as follows:

"underground utilities, install manholes, place conduit, pull cable, fiber optic, directional boring, trenching and conventional boring." These services, as further explained through the testimony at hearing, clearly fall within the second sentence of Section 489.105(3)(n). The fact that Spivey Utility only installs empty conduit and "cold" lines does not exempt it from the definition in Section 489.105(3)(n). Indeed, the second sentence of the definition specifically provides that the installation of "cold" lines is a service which underground utility and excavation contractors can perform; by contrast, it appears that only electrical contractors can install "hot" lines. See Section 489.505(12).

67. Spivey Utility argues that Section 489.503(14)(a) and (14)(b) exempt its business activities from State regulation.

Those statutory provisions provide exemptions for:

(a) The installation of, repair of, alteration of, addition to, or design of electrical wiring, fixtures, appliances, thermostats, apparatus, raceways, and conduit, or any part thereof, when those items are for the purpose of transmitting data, voice communications, or commands as part of a cable television, community antenna television, or radio distribution system. The scope of this exemption is limited to electrical circuits and equipment governed by the applicable provisions of Articles 725 (Classes 2 and 3 circuits

only), 770, 800, 810, and 820 of the National Electrical Code, current edition, or 47 C.F.R. part 68.

(b) The installation of, repair of, alteration of, addition to, or design of electrical wiring, fixtures, appliances, thermostats, apparatus, raceways, and conduit, or any part thereof, when those items are for the purpose of transmitting data, voice communications, or commands as part of a system of telecommunications, including computers, telephone customer premises equipment, or premises wiring. The scope of this exemption is limited to electrical circuits and equipment governed by the applicable provisions of Articles 725 (Classes 2 and 3 circuits only), 770, 800, 810, and 820 of the National Electrical Code, current edition, or 47 C.F.R. part 68. A company certified under chapter 364 is not subject to any local ordinance that requires a permit for work performed by its employees related to low voltage electrical work, including related technical codes and regulations. The exemption in this paragraph shall apply only if such work is requested by the company's customer, is required in order to complete phone service, is incidental to provision of telecommunication service as required by chapter 364, and is not the subject of a competitive bid. The definition of "employee" established in subsection (1) applies to this exemption and does not include subcontractors.

68. Section 489.503 is included in Part II of Chapter 489 which relates to electrical and alarm system contractors. The exemptions in Section 489.503 apply only to Part II of Chapter 489, and not to Part I of the chapter which regulates construction contracting. See Section 489.503 which begins

"[t]his part does not apply to: . . . " (emphasis supplied). Accordingly, the fact that Section 489.503(14)(a) and (14)(b) may⁴ exempt Spivey Utility from regulation under Part II of Chapter 489, it remains subject to regulation under Part I of Chapter 489 when engaged in underground utility and excavation contracting.

69. Accordingly, the services performed by Spivey Utility constitute underground utility and excavation contracting for which a State license (i.e., certification or registration) is required.

Licensure "or" Demonstrated Expertise

70. Having determined that Spivey Utility's business constitutes underground utility and excavation contracting for which a license is required, the next issue is whether the company's MBE application must be denied because neither of the company's minority owners is a certified or registered underground utility and excavation contractor. The Department contends that Rule 38A-20.005(3)(d)4., and more particularly the language in that rule underlined above, requires it to deny Spivey Utility's application. In response, Petitioner argues that the Rule conflicts with its implementing statute, Section 287.0943(1)(e)1., which allows control to be shown by "demonstrated expertise or licensure."

71. The history note for Rule 38A-20.005 indicates that the Rule became effective on September 11, 1996, and that it has not been amended since that date. Section 287.0943, the law implemented by Rule 38A-20.005, was substantially amended in 2000. See Chapter 2000-286, Laws of Florida, at Section 2 (effective July 1, 2000).

72. Section 287.0943(1)(e)1., Florida Statutes (1999), read:

In assessing the status of ownership and control, certification criteria shall, at a minimum include:

1. Link ownership by a minority person, as defined in s. 288.703(3), or as dictated by the legal obligations of a certifying organization, to day-to-day control and financial risk by the qualifying minority owner, and to licensure of a minority owner in any trade or profession that the minority business enterprise will offer to the state when certified; however, the minority licenseholder need not be the controlling owner of the enterprise, but must hold an ownership interest. Minority business enterprises presently certified in the state will not be subject to the licensure requirement until 5 years after the effective date of this act.

73. This language was moved to Section 287.0943(2)(e)1. by Chapter 2000-286, Laws of Florida, and was amended as follows:

In assessing the status of ownership and control, certification criteria shall, at a minimum include:

1. Link ownership by a minority person, as defined in s. 288.703(3), or as dictated

by the legal obligations of a certifying organization, to day-to-day control and financial risk by the qualifying minority owner, and to demonstrated expertise or licensure ~~licensure~~ of a minority owner in any trade or profession that the minority business enterprise will offer to the state when certified; ~~however, the minority licenseholder need not be the controlling owner of the enterprise, but must hold an ownership interest.~~ Minority business enterprises presently certified in the state will not be subject to the licensure requirement until 5 years after the effective date of this act. Businesses must comply with all state licensing requirements prior to becoming certified as a minority business enterprise.

74. The 2000 amendments call into question the validity of that portion of Rule 38A-20.005(3)(d)4. relied on by the Department which requires the minority owner to be licensed. Indeed, the language of the 1999 statute, which was changed by the Legislature, was virtually identical to the language in the Rule.

75. The staff analysis for the bill which became Chapter 2000-286 supports the conclusion that the amendments were intended to allow the minority owner to demonstrate control by either licensure or expertise. The staff analysis states:

With regard to the assessing the status of ownership and control, this bill changes licensure of a minority owner in his or her trade or profession, to demonstrated expertise in such trade. It requires businesses to comply with all state licensing requirements prior to becoming a certified minority business enterprise.

Analysis of House Bill 2127, House Committee on General Government Appropriations, at 7, 8 (Apr. 26, 2000) (underlining original)(available at <<http://www.leg.state.fl.us/data/session/2000/House/bills/analysis/pdf/HB2127A.GG.pdf>>).

76. Similarly the staff analysis of the companion bill explained:

Under current law, a MBE owner must be licensed in the trade or profession that the MBE will offer to the state; however, under the bill the owner need only comply with any state licensing requirements, and need only have demonstrated expertise in the trade or profession to be offered to the state.

Analysis of Senate Bill 2618, Senate Committee on Governmental Operations, at 6 (Apr. 26, 2000) (available at <<http://www.leg.state.fl.us/data/session/2000/Senate/bills/analysis/pdf/SB2618.go.pdf>>).

77. Thus, after the 2000 amendments, a business is eligible for MBE certification if it complies with all state licensing requirements and if its minority owner is either licensed in the trade or profession for which the business seeks certification or has demonstrated expertise in that trade or profession. Stated another way, under the statute, licensure of the minority owner is now an alternative, not a requirement. Under the rule, however, licensure of the minority is a requirement.

78. It is axiomatic that where a statute and rule are in conflict, the statute controls. See Willette v. Air Products, 700 So. 2d 397, 401 (Fla. 1st DCA 1997) and cases cited therein. This principle applies even where the rule has not been administratively challenged. Id. at 399 (expressly rejecting the proposition that the rule must be followed despite the statutory change simply because the rule has not been challenged or invalidated pursuant to Section 120.56). Indeed, the principle is particularly applicable where, as here, the rule is based upon a statute which has subsequently been changed by the Legislature. See, e.g., Florida Municipal Power Agency v. Dept. of Revenue, 764 So. 2d 914 (Fla. 1st DCA 2000)(directing agency to amend a rule that was adopted under prior version of statute, but which is in conflict with the present version of the statute), approved 789 So. 2d 320 (Fla. 2001). Accordingly, notwithstanding the contrary language in Rule 38A-20.005(3)(d)4., a business may be certified as an MBE even if it provides services for which a State license is required and its minority owner(s) do not hold the license, so long as (1) the minority owner(s) has demonstrated expertise in the trade or profession, and (2) the business has complied with all state licensing requirements. See Section 287.0943(2)(e)1.

79. As to the first requirement, the evidence shows that Mrs. Spivey has the managerial capability, knowledge, and

experience to make decisions regarding the operation of the company. Although she has no formal training in underground excavation, none is required; as described at hearing, it is "glorified ditch digging." Mrs. Spivey has gained the requisite knowledge and experience in the industry during her 15 years of running Spivey Utility on a day-to-day basis.

80. Rule 38A-20.005(3)(d) creates a presumption that the minority owners will not be considered to be controlling the business where it is a family-operated business with duties shared between minority and non-minority owners along operational lines. The presumption is not conclusive. It may be overcome by evidence showing that the distribution of duties is based upon delegations made by the minority owner, rather than the minority owner's lack of knowledge or capability to independently make decisions. The evidence in this case is sufficient to overcome the presumption in the Rule.

81. Mrs. Spivey has run Spivey Utility since its inception in 1986 and her involvement in the company since that time has been significant. Even though her sons supervise the company's operations in the field, the evidence demonstrates that Mrs. Spivey has sufficient knowledge of the industry and an ability to independently make decisions regarding the management and day-to-day operation of the company. See Rule 38A-20.005(3)(d) (second and third sentences). Indeed, the evidence shows that

Mrs. Spivey maintains real and substantial control over the company's operations, despite the delegation of authority to her sons. For example, she has shifted the duties delegated to her sons on occasion to enhance the company's operation.

82. The evidence shows that Mrs. Spivey has "dominant responsibility for the management and daily operations of the business" in all other respects as well. She is knowledgeable about the equipment used in the industry and she controls its purchase. See Rule 38A-20.005(3)(d)1. She has the capability to evaluate employees' performance and she controls the hiring and firing of employees. See Rule 38A-20.005(3)(d)2.

83. She controls the financial affairs of the business and is the sole personal guarantor of the company's various debts. See Rule 38A-20.005(3)(d)3. Contrary to the Department's argument, the ability of non-minority owners to sign corporate checks is not dispositive under Rule 38A-20.005(3)(d)3. It is only a factor which is "considered" in evaluating the minority owner's control of the financial affairs of the company. Even though Mrs. Spivey's sons are listed as authorized signatories on the SunTrust bank account for purposes of emergency, the weight of the evidence in this case demonstrates that Mrs. Spivey has the requisite control over the financial affairs of Spivey Utility. Her signature is necessary to bind the company to bids and the company's CPA testified that she is the

only member of the Spivey family with the requisite financial knowledge to run the company.

84. Although Mrs. Spivey does not directly negotiate contracts and bids, she is involved in that process because only she has the authority to bind the company. See Rule 38A-20.005(3)(d)5. Finally, her testimony at hearing substantiates her involvement with all major aspects of the business. See Rule 38A-20.005(3)(d)6.

85. As to the second requirement, the Department does not dispute that Spivey Utility has complied with all State licensing requirements. See generally Section 489.119 (establishing the requirements for engaging in contracting through a business organization). The company was issued a certificate of authority by the CILB and it has a qualifying agent who is a registered or certified underground utility and excavation contractor. Accordingly, consistent with the testimony of the Executive Director of the CILB, the undersigned concludes that Spivey Utility has met all of the State requirements necessary for it to engage in underground utility and excavation contracting.

86. Spivey Utility satisfies the requirements in Rule 38A-20.005(3)(d)4.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department issue a final order which grants Spivey Utility's application for certification as a minority business enterprise.

DONE AND ENTERED this 18th day of March, 2002, in Tallahassee, Leon County, Florida.

T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of March, 2002.

ENDNOTES

1/ There is no legitimate reason for this information to be publicized and redacting it consistent with public policy. See Section 119.07(3)(i), (t), (x), (z), (bb), (cc), (dd) (exempting social security numbers and bank account numbers from disclosure under the Public Records Act in other contexts); CS/SB 1588 (2002) and HB CS/1673 (2002) (proposed legislation to exempt from the public records all social security numbers in documents in the possession of government agencies); SB 1230 (2002) and HB 1675 (2002) (proposed legislation to exempt from the public records all bank account numbers in documents in the possession of government agencies). And Cf. CS/CS/SB 668 (2002) and CS/HB 1679 (2002) (proposing a study commission to review public

policies implicated by Internet access to public records which contain sensitive personal information).

2/ See Section 120.57(1)(k) ("All proceedings conducted pursuant to this subsection shall be de novo."); Capelletti Bros., Inc. v. Dept. of General Servs., 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983) (noting that the purpose of Section 120.57 hearings is "to give affected parties an opportunity to change the agency's mind").

3/ The third sentence precludes underground utility and excavation contractors from installing piping which is an integral part of a fire protection system as defined in Section 633.021.

4/ It is unnecessary to determine whether the services performed by Petitioner would qualify for the exemptions in Section 489.503(14)(a) and (14)(b). Indeed, the record does not reflect whether the work performed by Petitioner relates to the classes of equipment referred to in those paragraphs or whether Petitioner performs work for customers of a company certified under Chapter 364.

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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.