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OFFICE OF THE GENERAL COUNSEL

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida

AP

TKW-CLOS

GRANITE CONSTRUCTION COMPANY OF CALIFORNIA,

Petitioner,

vs.

DOAH CASE NO.: 03-2374BID
DOT CASE NO.: 03-067

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Respondent,

and

GILBERT SOUTHERN CORP.,

Intervenor.

FINAL ORDER

This proceeding was initiated by the filing of a Notice of Intent to Protest on May 27, 2003, and a Formal Written Protest and Petition for Formal Administrative Proceeding on June 5, 2003, by **Petitioner, GRANITE CONSTRUCTION COMPANY OF CALIFORNIA** (hereinafter **GRANITE**), pursuant to Section 120.57(1), Florida Statutes, in response to a Notice of Intent to Award posted on May 22, 2003, for a construction project known as Interstate 4 Reconstruction, from 14th Street to 50th Street, in Hillsborough County, Florida, FIN Project Nos. 258401152-01, 2584-0115602, and 25841005603, by the **Respondent,**

DEPARTMENT OF TRANSPORTATION (hereinafter **DEPARTMENT**). On June 25, 2003, the matter was referred to the Division of Administrative Hearings (hereinafter DOAH) for assignment of an administrative law judge and a formal hearing. On June 30, 2003, an order was issued granting the petition to intervene filed by **Intervenor, GILBERT SOUTHERN CORPORATION** (hereinafter **GILBERT**).

A formal administrative hearing was held in this case in Tallahassee, Florida, on July 28, 2003, before T. Kent Wetherell, II, a duly appointed administrative law judge.

Appearances on behalf of the parties were as follows:

For Petitioner: William E. Williams, Esquire
J. Andrew Bertron, Jr., Esquire
Huey, Guilday, Tucker, Schwartz,
& Williams, P.A.
1983 Centre Point Boulevard, Suite 200
Post Office Box 12500
Tallahassee, Florida 32317-2500

For Respondent: Robert C. Downie, II, Esquire
Assistant General Counsel
Department of Transportation
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

For Intervenor: Christopher T. McRae, Esquire
McRae & Metcalf, P.A.
1677 Mahan Center Boulevard
Tallahassee, Florida 32312

At the hearing, **GRANITE** presented the testimony of Jeffrey Wittmann, J. C. Miseroy, Robert Szatynski, Teresa Driskell, and Juanita Moore; and offered Petitioner's exhibits P1-A, P1-B, P1-C, P3, P4, P7, and P8, which were admitted into evidence. The **DEPARTMENT** and **GILBERT** jointly offered Exhibits R1, R2, and R5 through R11, which

were admitted into evidence. Joint Exhibits J1 through J27 were offered by the parties and were received into evidence. Official recognition was taken of all relevant statutes and rules. The transcript of the July 28, 2003, hearing was filed August 4, 2003. On August 14, 2003, the **DEPARTMENT** and **GILBERT** filed a Joint Proposed Recommended Order and **GRANITE** filed its Proposed Recommended Order. On August 25, 2003, Judge Wetherell issued his Recommended Order. On September 3, 2003, the **DEPARTMENT** and **GILBERT** filed joint exceptions to the Recommended Order. On September 4, 2003, **GRANITE** filed its exceptions to the Recommended Order. On September 10, 2003, the **DEPARTMENT** and **GILBERT** filed a response to **GRANITE'S** exceptions.

STATEMENT OF THE ISSUE

As stated by the administrative law judge in his Recommended Order, the issue presented was:

> [W]hether the Department of Transportation's proposed award of the contract for FIN Project Nos. 25840115201, 25840115602, and 25841005603 to Intervenor is contrary to the Department's governing statutes, rules, policies, or the bid solicitation specifications.

BACKGROUND

On February 28, 2003, the **DEPARTMENT** issued a Bid Solicitation Notice for the construction project known as Interstate 4 Reconstruction, from 14th Street to 50th Street, in Hillsborough County, Florida, FIN Project Nos. 258401152-01, 2584-0115602, and 25841005603. On May 22, 2003, the **DEPARTMENT** posted a Notice of Intent to Award for the project. On May 27, 2003, **GRANITE** filed of a Notice of Intent to Protest and filed a Formal Written Protest and Petition for Formal Administrative Proceeding on June 5, 2003.

The matter was referred to DOAH on June 25, 2003, and was assigned to T. Kent Wetherell, II, administrative law judge. On June 30, 2003, an order was issued granting **GILBERT'S** petition to intervene. The case was set for hearing and discovery ensued. A formal administrative hearing was commenced on July 28, 2003, before Judge Wetherell.

GRANITE'S EXCEPTION TO RECOMMENDED ORDER

GRANITE'S exception is to Conclusions of Law 105 and 106, which provide as follows:

> 105. Although Section 337.11(2) might have provided a basis for a solicitation protest directed at the erroneous estimated quantity for the noise wall once it became apparent that the Department did not intend to correct that error through an addendum, the statute does not impose a continuing obligation on the Department to unilaterally correct errors in the bid documents after the Project has been advertised. Accordingly, Section 337.11(2) does not provide a basis upon which to challenge the Department's intended award of a contract made pursuant to the bid documents, even if an item in those documents is shown to be inaccurate, as it was here. (emphasis in original)
>
> 106. This construction of Section 337.11(2) is consistent with *Capeletti Brothers* and its progeny which hold that challenges to the specifications must be timely raised during the pre-bid phase or they are waived. This construction of the statute also preserves the integrity of the competitive bidding process by prohibiting after-the-fact challenges to the specifications in the bid documents.

According to **GRANITE**, the conclusions reached by the administrative law judge in paragraphs 105 and 106 of the Recommended Order are clearly erroneous and inconsistent with his findings of fact. When properly interpreted and applied to the facts found by the administrative law judge, **GRANITE** claims that it is clear that the **DEPARTMENT** violated the provisions of Section 337.11(2), Florida Statutes, prior to advertising the project for bid,

and arbitrarily refused to correct the error in the estimated quantity even though the error was acknowledged by the **DEPARTMENT** sufficiently in advance of the bid submission date to allow it to be corrected by issuing an addendum. In this case, **GRANITE** argues that the **DEPARTMENT'S** failure to comply with the requirements of Section 337.11(2), Florida Statutes, requires the rejection of all bids. The central issue in this proceeding, according to **GRANITE**, is whether the manner in which the **DEPARTMENT** reacted upon discovery of an error in the estimated quantity for the noise wall comports with its statutory obligations, the bid solicitation requirements, and the **DEPARTMENT'S** policies and procedures.

GRANITE claims that the administrative law judge's suggestion that Section 337.11(2), Florida Statutes, could have served as a basis for solicitation protest, but has no other applicability to this dispute, is patently erroneous. As held in Capeletti Bros., Inc. v. Dep't of Transp., 499 So. 2d 855, 857 (Fla. 1st DCA 1987), "the purpose of the bid solicitation protest provision is to allow an agency, in order to save expense to the bidders and to assure fair competition among them, to correct or clarify plans and specifications prior to accepting bids." (emphasis added) Under the facts in this case, **GRANITE** argues, it was not required to file a bid specification challenge in order to challenge the **DEPARTMENT'S** proposed contract award. Here, the estimated quantity error was brought to the **DEPARTMENT'S** attention over one month prior to the bid submission date, the **DEPARTMENT** acknowledged the error, calculated the correct estimated quantity, and communicated the correct quantity to prospective bidders prior to bid submission. Thus, according to **GRANITE**, the only purpose to be served by a bid specification challenge, bringing a specification error to the agency's attention and affording it an opportunity to

correct that error, was accomplished without the necessity of a formal administrative challenge.

Section 337.11(2), Florida Statutes, mandates in unambiguous terms that the **DEPARTMENT** utilize correct estimated quantities in determining the lowest responsible bidder for contract award. Unlike other state agencies that competitively procure goods and services on behalf of the public, **GRANITE** argues that the Legislature has specifically directed the **DEPARTMENT** to "ensure that all project descriptions, including design plans are complete . . . [and] accurate." Id. In this regard, the administrative law judge concluded that "[i]t is important . . . that the estimated quantities be as accurate as possible so that the Department can develop a reasonably accurate cost estimate for budgeting purposes and so that contractors can have a good idea of the resources they will need to devote to construction when they are formulating their bids." (FOF. 24)[1]

The administrative law judge found that although the estimated quantity shown for the noise wall in the bid documents was 1,453 m^2 (FOF. 33), the **DEPARTMENT** knew by April 21, 2003, that the quantity was wrong, and had calculated the correct quantity to be 3,894 m^2. (FOF. 45) The administrative law judge concluded this error occurred because the "spreadsheet used . . . to calculate the original estimated quantity for the noise wall had a mathematical error in it." (FOF. 47) The administrative law judge also found that "[e]ven though the Department knew that the estimated quantity for the noise wall in the bid documents was 'inaccurate' and 'in error' . . . on April 21, 2003, the Department did not issue an

[1] Reference to the Findings of Fact in the administrative law judge's Recommended Order will be in the form of (FOF.) followed by the appropriate paragraph number(s).

addendum to change the estimated quantity." (FOF. 49) The administrative law judge concluded that no plan changes were necessary to correct the quantity error, that a corrected area computation sheet had already been prepared, and that "the only other thing that would have been necessary to correct the noise wall quantity was a revised electronic bid blank and revised Summary page." (FOF. 51) Under these circumstances, the administrative law judge concluded that "it would have only taken 'a few hours' to do an addendum to change the estimated quantity for the noise wall . . . ." (FOF. 52) The administrative law judge ultimately concluded that the **DEPARTMENT** "clearly made the wrong decision by not changing the estimated quantity for the noise wall . . . ." (FOF. 54)

GRANITE argues that the importance of the **DEPARTMENT'S** failure to correct the acknowledged quantity error was pointed out by the administrative law judge in paragraphs 88 and 89 of the Recommended Order where he found that:

> 88. If the Department used the 3,894 m^2 estimated quantity for the noise wall instead of the 1,453 m^2, Petitioner's bid amount would be $151,301,970.22 and Intervenor's bid amount would be $151,363,106.15. As a result, Petitioner would become the lowest bidder by approximately $61,000.
>
> 89. Petitioner informed the Department of these figures on May 20, 2003. Thus, at the time that the Department issued the notice of intent to award the contract to Intervenor, it was not only aware of the 'correct' estimated quantity for the noise wall, but it was also aware that Intervenor would not be lowest bidder if the 'correct' quantity were used.

Finally, the administrative law judge concluded that the effect of the **DEPARTMENT'S** failure to correct the quantity error was that the "Project has a built-in cost overrun of approximately $1.5 million (i.e., the difference between Intervenor's bid based

upon the 1,453 m^2 estimate and its 'corrected' bid based upon the 3,894 m^2 estimate) . . . ."

(FOF. 90)

Thus, **GRANITE** continues, the record in this case clearly establishes that during the pre-bid phase of this solicitation, an error in the estimated quantity for the noise wall was repeatedly brought to the **DEPARTMENT'S** attention by at least three of the four contractors who submitted bids. The **DEPARTMENT** ultimately investigated the claimed quantity error, acknowledged the existence of the error, and calculated the correct quantity prior to the bid submission date. The **DEPARTMENT** also made available to all prospective bidders, prior to the submittal of bids, a packet of documents acknowledging both the existence of the error and the correct estimated quantity for the noise wall item. The **DEPARTMENT** did not, however, issue an addendum correcting the known quantity error, notwithstanding the fact that two addenda were issued correcting other quantity errors after the noise wall quantity error had been acknowledged by the **DEPARTMENT**.

GRANITE argues that no **DEPARTMENT** policy has been identified in the record of this proceeding that would justify such a course of action, and the administrative law judge did not find that there was any reason established by the **DEPARTMENT** for its failure to correct a known quantity error. Indeed, **GRANITE** continues, the record clearly reflects that the **DEPARTMENT** has not awarded a contract knowing that the award was based upon a quantity error that had been brought to its attention but not corrected prior to bid submission. This is undoubtedly, according to **GRANITE**, due to the fact that doing so would be arbitrary and capricious and would violate the **DEPARTMENT'S** obligations under Section 337.11(2), Florida Statutes.

GRANITE notes that the **DEPARTMENT** argued below that it was not required to issue an addendum correcting the known quantity error, and that it was obligated to utilize an estimated quantity that it knew to be erroneous prior to bid submission in determining the lowest responsible bidder in this procurement because that number was set forth in the bid blank. The **DEPARTMENT'S** actions, according to **GRANITE**, were clearly illegal given its statutory mandate to "ensure" the accuracy of estimated quantities. In light of the **DEPARTMENT'S** conduct in issuing numerous addenda correcting quantities with less impact on the cost of this project than the noise wall bid item, **GRANITE** claims that the **DEPARTMENT'S** failure to correct and utilize the appropriate quantity for the noise wall item was arbitrary, capricious, contrary to competition, and in violation of Section 337.11(2), Florida Statutes. Accordingly, **GRANITE** argues, a final order should be entered rejecting all bids.

GRANITE takes exception to the administrative law judge's Conclusions of Law 105 and 106, which address the **DEPARTMENT'S** obligations under Section 337.11, Florida Statutes. In its exception, **GRANITE** argues these conclusions of law fail to properly interpret and apply the facts as found by the administrative law judge. **GRANITE'S** arguments in that regard are not supported by the record or the law. Moreover, **GRANITE'S** exception merely re-argues a legal theory rejected by the administrative law judge. As held by the administrative law judge in Conclusion of Law 100: "Petitioner's argument that the Department should nevertheless change the noise wall quantity estimate post-bid and award the contract based upon the 'correct' noise wall quantity of 3.894 m^2 is jurisdictionally foreclosed." (citations omitted) **GRANITE** filed no exception to Conclusion of Law 100 and

is foreclosed from further challenge in this regard. Commission on Ethics v. Barker, 677 So. 2d 254, 256 (Fla. 1996) (explaining that appellant waived his right to challenge a recommended order when no exceptions were filed).

GRANITE'S argument ignores the plain language of Section 337.11(2), Florida Statutes, which unambiguously provides that the obligation therein imposed on the **DEPARTMENT** is "**prior** to the advertisement for bids." § 337.11(2)(a), Fla. Stat. (emphasis added). There is no record evidence that the **DEPARTMENT** did not take all reasonable steps to "ensure" the project plans were accurate "prior to the advertisement for bids." Moreover, as held by the administrative law judge, **GRANITE** had an obligation to challenge the quantity issue prior to submitting its bid. (COL. 99, 100)[2] Thus, under the facts herein established, even if the obligation created by Section 337.11(2), Florida Statutes, were carried through to bid submission, **GRANITE** was still required to challenge the estimated quantity pre-bid, which it did not.

The statute and case law are clear that if potential bidders have problems with bid quantities, they should file bid solicitation challenges. § 120.57(3)(b), Fla. Stat.; Capeletti Bros., 499 So. 2d 855. As properly concluded by the administrative law judge, if a bidder does not file such a challenge, it is jurisdictionally foreclosed from raising the issue as a protest to an intended award. (COL. 100) **GRANITE'S** interpretation of the statute would adversely impact competitive bidding on **DEPARTMENT** projects.

GRANITE'S assertion that the administrative law judge did not find that the

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[2] Reference to the Conclusions of Law in the administrative law judge's Recommended Order will be in the form of (COL.) followed by the appropriate paragraph number(s).

DEPARTMENT had established any reason for its decision not to alter the estimated quantity is not only irrelevant and immaterial, but it fails to establish that the administrative law judge's conclusions of law are erroneous as a matter of law. Moreover, **GRANITE** seeks to shift the burden of proof to the **DEPARTMENT** to sustain its actions, or its failure to act. **GRANITE** bore the burden of "proving" that the **DEPARTMENT'S** actions were improper. (COL. 103, 108, 109) The administrative law judge also concluded that **GRANITE** failed to meet its burden of proof. (COL. 108) **GRANITE** filed no exception to the administrative law judge's Conclusions of Law 103, 108, and 109.

GRANITE'S exception is rejected.

DEPARTMENT'S AND GILBERT'S EXCEPTIONS TO RECOMMENDED ORDER

In their first exception, the **DEPARTMENT** and **GILBERT** challenge the first sentence of Finding of Fact 54, which states:

> 54. In hindsight, Ms. Driskell clearly made the wrong decision by not changing the estimated quantity for the noise wall because her concerns about the time it would take for an addendum and need for revisions to the plans were unfounded, she underestimated cost overrun that the error would cause by approximately $500,000, and it turned out that the ultimate award of the contract hinges on that pay item. Nevertheless, Ms. Driskell's decision not to seek an addendum to correct the estimated quantity for the noise wall was not arbitrary or illogical at the time that it was made.

The **DEPARTMENT** and **GILBERT** offer three independent bases for this exception: the finding is irrelevant, misleading, and prejudicial. Therefore, they argue, it should be stricken from the Recommended Order.

According to the **DEPARTMENT** and **GILBERT**, the primary allegation of

GRANITE'S case was that the **DEPARTMENT** had in fact changed the "estimated quantity for the noise wall" prior to the bid letting, but failed to use the changed specification in evaluating and awarding the bid. Contrary to the allegations in **GRANITE'S** petition that its employees relied on the apparent change in the bid specification to its detriment, **GRANITE'S** employees, Jeff Wittmann and J. C. Miseroy, testified that they knew the bid specification had not changed, and had acted accordingly. (FOF. 66-69)

The **DEPARTMENT** and **GILBERT** continue that **GRANITE** next attempted to establish the reasons the **DEPARTMENT** did not change the noise wall quantity pre-bid. In this regard, they note, **GRANITE** attempted to develop the theory that although the **DEPARTMENT** did not change the noise wall quantity pre-bid, it is required to change the estimated quantity post bid. The **DEPARTMENT** and **GILBERT** note that they made a standing objection of relevancy as to **GRANITE'S** introduction of evidence concerning what "could have or should have occurred prior to the bid [letting] date." (T. 133-34)[3] The **DEPARTMENT** and **GILBERT** argued at the hearing that what happened pre-bid should have been raised in a bid solicitation challenge, and **GRANITE'S** failure to timely do so was grounds for dismissal of the petition. Ultimately, Judge Wetherell in effect adopted this position and held that **GRANITE** is jurisdictionally foreclosed from arguing about why the specification was not changed pre-bid. (COL. 98-100) As a result, the **DEPARTMENT** and **GILBERT** continue to profess that evidence concerning what the **DEPARTMENT** did pre-bid is irrelevant to this bid protest proceeding. Therefore, according to the **DEPARTMENT** and

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[3] References to the transcript of the July 28, 2003, hearing will be in the form of (T.) followed by the appropriate page number(s).

GILBERT, seen in this light, it was neither proper nor possible for Finding of Fact 54 to be made.

First, they argue, because the issue was beyond the legal scope of the hearing, neither the **DEPARTMENT** nor **GILBERT** had any reason to "prove" that Ms. Driskell was right in her decision not to change the estimated quantity. Therefore, a finding that she "in hindsight" was "wrong" and should have done something different is both misleading and prejudicial. Conversely, if a bid solicitation protest had been filed on the noise wall quantity, then her decision would have been reviewed and developed more fully, and the **DEPARTMENT** would have had the opportunity to change the design of the noise wall, or even eliminate the noise wall altogether, thus potentially making her decision irrelevant even in the context of a bid solicitation protest.

Second, the **DEPARTMENT** and **GILBERT** argue, even if the record on this point had been fully developed, the evidence on the subject is irrelevant in light of the administrative law judge's decision that **GRANITE'S** challenge to the bid specification was jurisdictionally foreclosed. As noted, **GRANITE** failed to file such a protest.

Third, even if the record had been fully developed and even if Ms. Driskell's actions were relevant, the **DEPARTMENT** and **GILBERT** proclaim that the first sentence of the finding is beyond the scope of this bid protest case. Assuming relevance, the sole issue before the court was whether at the time Ms. Driskell made her decision she had a reasonable basis for doing so. Judge Wetherell found that she did. That, according to the **DEPARTMENT** and **GILBERT**, is the limit of his fact-finding duty and jurisdiction. Unlike hearings conducted pursuant to Section 120.57(1) and (2), Florida Statutes, the purpose of a bid protest

hearing is not to formulate agency action but rather to "evaluate the action taken by the agency" in accordance with the standards set forth in Section 120.57(3)(f), Florida Statutes. State Contracting & Engineering Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Under this standard of review, what impact later events may or may not have had on the correctness of Ms. Driskell's decision (i.e., "hindsight") is not relevant.

Simply stated, why Ms. Driskell decided not to seek a change in the quantity for the noise wall has no bearing on the decision in this case. The finder of fact had no reason to evaluate her decision, and doing so on the basis of an incomplete record, irrelevant evidence, and on an issue that was jurisdictionally foreclosed from consideration are sound reasons to strike the finding. The evidence in the record on this issue was inadmissible to the trier of fact based upon the issue itself being jurisdictionally foreclosed, and thus no competent or substantial evidence can support the finding. Therefore, the **DEPARTMENT** and **GILBERT** request that the first sentence of Finding of Fact 54 be stricken, including the first word "Nevertheless" from the second sentence.

In addressing the first exception raised by the **DEPARTMENT** and **GILBERT**, the record and the Recommended Order must be viewed in their entirety. First, the record contains no competent, substantial evidence to support a "finding," if Finding of Fact 54 is a factual finding, regarding the hindsight review of Ms. Driskell's actions. The administrative law judge's conclusion regarding his after-the-fact analysis of Ms. Driskell's actions is a conclusion of law over which the **DEPARTMENT** has substantive jurisdiction because it clearly draws a legal conclusion regarding the **DEPARTMENT'S** implementation of its obligations under Chapter 337, Florida Statutes. The fact that the final sentence of Finding of

Fact 54 exonerates Ms. Driskell and finds her actions were not arbitrary or illogical at the time they were made, does not support or resurrect the first sentence as a finding of fact supported by competent, substantial evidence. As such, the first sentence of Finding of Fact 54 must be rejected, including the word "Nevertheless" beginning the second sentence.

The **DEPARTMENT'S** and **GILBERT'S** first exception is accepted.

In its second exception, the **DEPARTMENT** and **GILBERT** challenge Findings of Fact 51, 52, and 65, which state, respectively:

> 51. No changes to the plans were necessary to correct the erroneous estimated quantity for the noise wall, and Mr. Szatynski had already provided a corrected area computation sheet. The only other thing that would have been necessary to correct the noise wall quantity was a revised electronic bid blank and revised Summary page.
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> 52. According to Juanita Moore, the Department's contract administrator in Tallahassee for the Project, it would have only taken "a few hours" to do an addendum to change the estimated quantity for the noise wall under such circumstances.
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> 65. Ms. Driskell's response to Mr. Wittmann is somewhat disingenuous because she had the necessary information since April 21, 2003, to make a change in the noise wall quantity through an addendum, and it would have taken only "a few hours" to do so. Indeed, on April 21, 2003, Ms. Driskell's supervisor, Brian McKishnie, told Ms. Driskell that she "need[ed] to tell them [the bidders] to 'bid it [the noise wall] as you see it' or get the corrected quantity to all bidders."

These findings all relate to what the **DEPARTMENT** could have done in regard to changing the quantity for the noise wall pre-bid. As noted in their exception to Finding of Fact 54, it continues to be the position of the **DEPARTMENT** and **GILBERT** that what the **DEPARTMENT** could have done or should have done pre-bid is irrelevant. Although Mr.

Szatynski, Ms. Driskell, and Ms. Moore are **DEPARTMENT** employees, their testimony on these issues was offered by **GRANITE** to support a legal theory determined to be jurisdictionally foreclosed. In addition, the **DEPARTMENT** and **GILBERT** objected to all testimony concerning what the **DEPARTMENT** could have or should have done pre-bid. Had this issue been of any legal significance, the **DEPARTMENT** and **GILBERT** may have offered additional testimony or other evidence. These findings are therefore based on evidence inadmissible to the finder of fact and should be stricken. The **DEPARTMENT** and **GILBERT** do not dispute the statement made by Brian McKishnie in the last sentence of Finding of Fact 65.

The three findings to which the **DEPARTMENT** and **GILBERT** take exception paraphrase testimony regarding what the **DEPARTMENT** could have done pre-bid. The **DEPARTMENT** and **GILBERT** properly argue that in light of the administrative law judge's conclusion that because it did not file a specification protest, **GRANITE** is "jurisdictionally foreclosed" from raising the noise wall quantity estimate in a bid protest, testimony regarding what the **DEPARTMENT** could have done or should have done pre-bid is irrelevant.

Although Finding of Fact 51 and the second sentence of Finding of Fact 65 are irrelevant, they are, nevertheless, supported by competent, substantial evidence. To the contrary, Finding of Fact 52 and the first sentence of Finding of Fact 65 are neither relevant nor supported by competent, substantial evidence. In Finding of Fact 52, the administrative law judge attributes to Juanita Moore testimony that preparation of an addendum to change the estimated quantity for the noise wall would take "a few hours." There is no competent, substantial evidence to support that statement, as Ms. Moore offered no such testimony.

(T. 183-228) Rather, Teresa Driskell was asked: "How long does it take to request and receive an addendum in a contract letting such as this?" She responded:

> A It would depend on the item and what was involved in that addendum. It could take days to do the work behind it, it could take hours. It really depends on the specific issue, the impact that issue has on the sheets that you're looking at, how many things – are you going to go back and relook at it at that time, or are you just going to go back and throw a number in there, what are you going to do? It's a lot more work to it than just making a number change.

(T. 175)

In Finding of Fact 65, the administrative law judge attributes to Teresa Driskell testimony regarding the fact that it would take "a few hours" to prepare an addendum to change the estimated noise wall quantity. As detailed above, that finding is not supported by competent, substantial evidence.

The **DEPARTMENT'S** and **GILBERT'S** second exception is rejected as to Finding of Fact 51 and the second sentence of Finding of Fact 65, and accepted as to Finding of Fact 52 and the first sentence of Finding of Fact 65.

The third exception of the **DEPARTMENT** and **GILBERT** is to certain statements in footnote 5 to Conclusion of Law 107:

> 5/ There is some merit to Petitioner's argument that the Department's policy makes no sense under the circumstances of this case since the primary purpose of an unbalanced bid review is to determine whether there is a quantity error in the bid documents that the bidder is exploiting to the State's detriment or to the detriment of the competitive bidding process. Here, the Department was aware at the time the bids were received of the error in the estimated quantity for the noise wall, as well as the cost overrun that the error would cause, and it was informed prior to noticing its proposed award of the contract to Intervenor that

> use of the "correct" estimated quantity would result in a change in low bidders. Nevertheless, the scope of review in this proceeding is limited to determining whether the Department followed its policy, as written, in awarding the contract, which it did.

Therein, the administrative law judge refers to the **DEPARTMENT'S** policy of rejecting materially unbalanced bids. According to the **DEPARTMENT** and **GILBERT**, and contrary to footnote 5, there is no merit to **GRANITE'S** argument that the unbalanced policy makes no sense because the very kind of backdoor challenge to a bid specification the administrative law judge ruled was jurisdictionally foreclosed in this case would be cognizable if the **DEPARTMENT'S** policy were as argued by **GRANITE**.

The **DEPARTMENT'S** unbalanced bid review process was accurately described in the Recommended Order as being a two-step process, with the first step being to determine whether a bid is mathematically unbalanced. (FOF. 77-85) Then, only if a particular bid item is mathematically unbalanced, does the **DEPARTMENT** review whether the bid is materially unbalanced. Mathematical unbalancing is a function of prices bid by the bidders being high or low as compared to the other bidders and the **DEPARTMENT'S** estimate. Material unbalancing is a function of the order of low bidders changing when the **DEPARTMENT** corrects estimated quantities for mathematically unbalanced items.

The **DEPARTMENT** and **GILBERT** argue that **GRANITE'S** argument on this point would turn the process upside down. Under **GRANITE'S** theory, the **DEPARTMENT** would be free to correct or change estimated quantities post-bid submittal so long as the **DEPARTMENT** knew of the error, or should have known of the error, pre-bid. Juanita Moore testified as to why this interpretation of unbalancing would be contrary to competitive bidding

(T. 216-217), and no witness contradicted her testimony. The reasons she cited were the potential for the **DEPARTMENT** to manipulate the outcome of the bidding process and the potential for the **DEPARTMENT** to "be in hearings all the time" about what the **DEPARTMENT** knew or should have known pre-bid about quantity discrepancies. (T. 217)

GRANITE'S suggestion to skip over the necessity of a bid item being mathematically unbalanced before reviewing the quantity would also have the effect of obviating the need for any bid solicitation challenges directed toward bid item quantities. Instead, a contractor could call the **DEPARTMENT'S** attention to a quantity issue by e-mail, submit its bid, determine whether a change in the quantity would change the low bidder, and file a bid protest accordingly.

Thus, from a policy standpoint, **GRANITE'S** argument has no merit and would adversely impact competitive bidding on **DEPARTMENT** projects. **GRANITE'S** position is also contrary to case law. If potential bidders have problems with bid quantities they should file bid solicitation challenges. If they do not file such challenges, then bidders are jurisdictionally foreclosed from raising these issues as bid protests. (COL.100) (citing Capeletti Bros., Inc. v. Dep't of Transp., 499 So. 2d 855, 857 (Fla. 1st DCA 1986) ("A failure to file a timely protest [of the plans and specifications for the project] constitutes a waiver of chapter 120 proceedings."); Vila & Son Landscaping Corp. v. Dep't of Transp., Case No. 93-4556BID, 1993 WL 944007, at *5 (DOAH October 22, 1993); State Paving Corp. v. Dep't of Transp., Case No. 87-3848, 1987 WL 488156, at *4 (DOAH October 1, 1987)). Rather than concluding that in this case the **DEPARTMENT'S** policy makes no sense, Judge Wetherell should have concluded that this case demonstrates the absolute necessity of such a policy, and the folly of

adopting **GRANITE'S** argument.

Footnote 5 is mixed with findings of fact and conclusions of law. Under such circumstances, it has been said that such findings must be supported by competent, substantial evidence. Tortoise Island Homeowners Ass'n, Inc. v. Tortoise Island Realty, Inc., 790 So. 2d 525, 530 (Fla. 5th DCA 2001). It has also been said that a "footnote is as important a part of an opinion as the matter contained in the body of the opinion and has like binding force and effect." Melancon v. Walt Disney Productions, 273 P.2d 560 (Cal. Ct. App. 1954). In this instance, at least one of the findings in the second sentence of footnote 5 is not supported by competent, substantial evidence. In that regard, the administrative law judge's statement that "the Department was aware at the time the bids were received . . . [of] the cost overrun that the [estimated quantity] error would cause," is not supported by the record. Rather, the witnesses consistently testified that the error "could" cause a cost overrun but that it was not necessarily so because the item could be reduced, altered, or eliminated altogether.

The **DEPARTMENT'S** and **GILBERT'S** third exception is accepted as noted, but is otherwise rejected.

FINDINGS OF FACT

1. After review of the record in its entirety, it is determined that the Administrative Law Judge's Findings of Fact in paragraphs 1 through 51, 53, 55 through 64, and 66 through 92 are supported by the record and are adopted and incorporated as if fully set forth herein.

2. Finding of Fact in paragraph 52 is rejected as not supported by competent, substantial evidence.

3. The second sentence of the Finding of Fact in paragraph 54 is adopted as

modified, hereinabove.

4. The first sentence of the Finding of Fact in paragraph 65 is rejected as not supported by competent, substantial evidence.

CONCLUSIONS OF LAW

1. The **DEPARTMENT** has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapters 120 and 337, Florida Statutes.

2. The Conclusions of Law in paragraphs 93 through 109 of the Recommended Order are fully supported in law. As such, they are adopted and incorporated as if fully set forth herein.

3. Whether the footnote to the Conclusions of Law in paragraph 107 is itself a Conclusion of Law or a Finding of Fact, it is adopted and incorporated as modified, as set forth hereinabove.

ORDER

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

ORDERED that the administrative law judge's Recommended Order is adopted as herein modified. It is further

ORDERED that the aware of the subject contract by the **Respondent, DEPARTMENT OF TRANSPORTATION**, to **Intervenor, GILBERT SOUTHERN CORP.**, is confirmed.

DONE AND ORDERED this 23rd day of September, 2003.

JOSE ABREU, P.E.
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
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NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

Robert C. Downie, II, Esquire
Assistant General Counsel
Department of Transportation
Haydon Burns Building
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

Juanita Moore
Contracts Administration Office
Department of Transportation
Haydon Burns Building
605 Suwannee Street, M.S. 55
Tallahassee, Florida 32399-0458

The Honorable T. Kent Wetherell, II
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550

Christopher T. McRae, Esquire
David J. Metcalf, Esquire
McRae & Metcalf, P.A.
1677 Mahan Center Boulevard
Tallahassee, Florida 32308

William E. Williams, Esquire
J. Andrew Bertron, Jr., Esquire
Huey, Guilday, Tucker, Schwartz
& Williams, P.A.
Post Office Box 12500
Tallahassee, Florida 32317-2500