STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MITCHELL BROTHERS, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-4234RX
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to notice, this cause was heard by William R. Pfeiffer, the assigned Administrative Law Judge of the Division of Administrative Hearings, on November 14, 2000, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the challenged portions of Rule 14-22.012, Florida Administrative Code, constitute an invalid exercise of delegated legislative authority as defined by Section 120.52(8), Florida Statutes.

PRELIMINARY STATEMENT

On May 18, 2000, the State of Florida, Department of Transportation ("Department"), issued a Notice of Intent to Deny Application for Qualification to Petitioner, Mitchell Brothers, Inc. ("MBI"). The Department based its written denial of MBI's Application on an alleged demonstration of a "pattern of exorbitant and false, deceptive, or fraudulent statements, certifications, or materials in claims for payment, which constitute violations of Rule 14-22.012(1)(a)3, Florida Administrative Code." On May 30, 2000, MBI timely initiated an administrative proceeding pursuant to Section 120.57, Florida Statutes. The case was designated DOAH Case No. 00-2431, and assigned to Administrative Law Judge William R. Pfeiffer. A Notice of Hearing was issued, setting the final hearing for October 26, 2000.

On October 13, 2000, MBI timely filed a Petition Seeking Administrative Determination that Florida Administrative Code Section 4-22.012 is Invalid. The petition was designated DOAH Case No. 00-4234RX.

On October 26, 2000, MBI filed a notice withdrawing its Section 120.57 petition, but expressing its intent to continue to pursue Case No. 00-4234RX. A Notice of Hearing was issued setting the final hearing in Case No. 00-4234RX for November 14 through 16, 2000, in Tallahassee, Florida.

At the final hearing, MBI presented the testimony of two witnesses and offered four exhibits. Petitioner's Exhibits 1, 2, and 4 were admitted into evidence. Petitioner's Exhibit 3 was not admitted into evidence. The Department presented no testimony of witnesses, but offered nine exhibits, all of which were admitted into evidence.

FINDINGS OF FACT

The Parties

The Respondent

1. The Department is the state agency charged with the responsibility of building and maintaining the state’s transportation system. Each year the Department lets out hundreds of road and bridge construction projects totaling over one billion dollars. The projects range from sidewalk improvements to major bridge construction.

2. Accordingly, there is a wide range of expertise and qualifications necessary for the different kinds of projects let by the Department in Florida. Section 337.14(1), Florida Statutes, requires any person desiring to bid on any Department

construction contract in excess of $250,000 to first be certified by the Department as qualified to perform the work to be let.

3. Pursuant to Section 337.164, Florida Statutes, the Department qualifies contractors to preserve the integrity of the public contracting process, to ensure an open and competitive environment for the benefit of the taxpayers, and to ensure a quality project in terms of public works.

4. Pursuant to Section 337.14, Florida Statutes, persons seeking to bid on contracts in excess of $250,000 must first file an application for a Certificate of Qualification with the Department. The statute specifically authorizes the Department to enact rules addressing the qualification of persons to bid on contracts in excess of $250,000, including requirements with respect to competency, responsibility, equipment, past record, experience, financial resources, and organizational personnel of the applicant.

5. Gregory Xanders is the State Construction Engineer. His duties include setting policy and reviewing contractor responsibility and qualifications under Chapter 337, Florida Statutes, and Chapter 14-22, Florida Administrative Code.

6. In conjunction with reviewing a contractor’s qualifications, the State Construction Engineer’s Office receives input from other personnel, including contract managers

in the field, the Department General Counsel's Office, the Department Inspector General's Office, and other cities and counties who may work with the contractor. The State Construction Engineer's Office also reviews any intended decision to deny, suspend, or revoke a contractor's Certificate of Qualification with the Assistant Secretary of the Department.

7. When the State Construction Engineer's Office makes a preliminary determination that a contractor's Certificate of Qualification should be suspended, revoked, or denied, the contractor is notified and informed of its rights to an administrative hearing to contest the intended decision under Section 120.569, Florida Statutes.

The Petitioner

8. MBI is a company which engages in road building and asphalt paving. Since the early 1980s MBI has been qualified to bid on and awarded several Department projects. Approximately 80 percent of MBI's workload involves Department projects.

9. Pursuant to Department rules, MBI annually submits an application to renew or obtain an updated Certificate of Qualification in order to continue bidding and performing Department projects. In 1997, MBI was denied qualification to bid on Department projects for approximately ten months. However, MBI was subsequently qualified by the Department during calendar year 1999.

10. On or about March 31, 2000, MBI filed an Application for Qualification with the Department. By letter dated May 18, 2000, the Department gave MBI notice of its intent to deny MBI's Application for Qualification, and stated that any subsequent application would not be considered for a period of two years. The Department's letter advised MBI that the denial of the application constituted "a determination of non-responsibility to bid on any other construction or maintenance contract" for the same period. Specifically, the letter provided:

> Please be advised that pursuant to Chapter 337, Florida Statutes, and Rule Chapter 14-22, Florida Administrative Code, it is the intent of the Department of Transportation (hereinafter Department) to deny Mitchell Brothers, Inc.'s (hereinafter Mitchell Brothers) Application for Qualification dated March 31, 2000. This denial shall preclude consideration of any subsequently submitted Application for Qualification for a period of two (2) years. Additionally, this denial shall constitute a determination of non-responsibility to bid on any other construction or maintenance contract and shall prohibit Mitchell Brothers from acting as a material supplier, contractor, or consultant on any Department contract during the period Mitchell Brothers is not qualified by the Department.

11. The Department's Notice of Intent denied MBI's Application based upon a determination that MBI had demonstrated "a pattern of exorbitant and false, deceptive or fraudulent statements, certifications, or materials in claims for payment," and "a lack of management expertise and continuity."

12. By Petition for Formal Hearing dated May 30, 2000, MBI challenged the Department's Notice of Intent to Deny MBI's Application for Qualification. MBI's Petition for Formal Hearing was referred to the Division of Administrative Hearings and assigned DOAH Case No. 00-2431.

13. On September 18, 2000, the Department served on MBI a Modified Notice of Intent to Deny MBI's application. The Modified Notice gave additional grounds for the Department's decision to deny MBI's Application for Qualification. Among the additional grounds for denying MBI's Application were the following: MBI submitted false, deceptive, fraudulent, erroneous or unreasonable statements, certifications, or materials in its claims for payment to the Department, the City of Tallahassee, the Leon County School Board, and other owners; MBI submitted claims or statements for services not performed or expenses not incurred; MBI failed to avoid, diminish or otherwise mitigate the effects of construction delays; and MBI failed to reasonably cooperate with the Department's efforts to investigate the accuracy of MBI's delay claims and statements.

14. On October 13, 2000, MBI filed it's Petition Seeking Administrative Determination that Rule 14-22.012, Florida Administrative Code, is an invalid exercise of delegated legislative authority (DOAH Case No. 00-4234RX). Specifically, in paragraph 11 of its Petition, MBI alleges that the Rule

enlarges, modifies, or contravenes specific provisions of the law implemented, and that the Rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency. MBI later alleged that the Department had also exceeded its grant of rulemaking authority.

15. A three-week final hearing was scheduled to commence in DOAH Case No. 00-2431 on October 26, 2000. Shortly prior to hearing, Petitioner filed a Motion to consolidate DOAH Case Nos. 99-2431 and 00-4234RX. The Department opposed the motion based on their counsel's inability to be adequately prepared for the 00-4234RX rule challenge proceeding. In lieu, the parties agreed to temporarily break from the 00-2431 hearing during the second week and commence the rule challenge. However, on the morning of October 26, 2000, MBI filed a Notice of its Withdrawal of its Petition for Formal Hearing in DOAH Case No. 00-2431. Consequently, DOAH Case No. 00-4234RX was scheduled for hearing on November 14, 2000.

16. Based on MBI’s Notice of Withdrawal of its Petition, an Order Closing File was entered in DOAH Case No. 00-2431 on November 1, 2000.

17. On November 2, 2000, the Department entered a Clerk’s Order of Dismissal of MBI’s Petition challenging the denial of its Application for Qualification.

"Good Cause" Defined in Section 337.16(2), Florida Statutes

18. Section 337.16(2), Florida Statutes, provides:

> (2) For reasons other than delinquency in progress, the department, for good cause, may determine any contractor not having a certificate of qualification nonresponsible for a specified period of time or may deny, suspend, or revoke any certificate of qualification. Good cause includes, but is not limited to, circumstances in which a contractor or the contractor's official representative:
>
> (a) Makes or submits to the department false, deceptive, or fraudulent statements or materials in any bid proposal to the department, any application for a certificate of qualification, any certification of payment pursuant to s. 337.11(10), or any administrative or judicial proceeding;
> (b) Becomes insolvent or is the subject of a bankruptcy petition;
> (c) Fails to comply with contract requirements, in terms of payment or performance record, or to timely furnish contract documents as required by the contract or by any state or federal statute or regulation;
> (d) Wrongfully employs or otherwise provides compensation to any employee or officer of the department, or willfully offers an employee or officer of the department any pecuniary or other benefit with the intent to influence the employee or officer's official action or judgment;
> (e) Is an affiliate of a contractor who has been determined nonresponsible or whose certificate of qualification has been suspended or revoked and the affiliate is dependent upon such contractor for personnel, equipment, bonding capacity, or finances;
> (f) Fails to register, pursuant to chapter 320, motor vehicles that he or she operates in this state.

19. Section 337.16(2), Florida Statutes, authorizes the Department to deny, suspend, or revoke an Application for Qualification based upon a determination of "good cause." "Good cause" is defined by six examples specified in Section 337.16(2), Florida Statutes, but the statute further provides that "good cause includes, but is not limited to" the six circumstances specified in the statute.

"Good Cause" Defined in the
Rule 14-22.012, Florida Administrative Code

20. Rule 14-22.012, Florida Administrative Code, is entitled: "Suspension, Revocation, or Denial of Qualification." Subsection (1) of this Rule provides in pertinent part:

> (1) The Department will, for good cause, as that term is defined in Section 337.16(2), Florida Statutes, suspend, revoke, or deny any contractor's qualification to bid. A suspension, revocation, or denial for good cause pursuant to this rule shall prohibit the contractor from bidding on any Department construction contract for which prequalification is required by Section 337.14, Florida Statutes, and shall constitute a determination of non-responsibility to bid 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 suspension, revocation, or denial. As provided in Section 337.16(2), Florida Statutes, such good cause shall include, but shall not be limited to, the provisions of paragraphs (a) through (e) below. When a specific period of revocation, denial, or suspension is not specified by this rule, the period shall be based on the criteria of Rule 14-22.0141(4),

> F.A.C., as well as Department contractor certification activities.
>
> (a) The contractor’s Certificate of Qualification shall be denied or revoked for at least one year when it is determined by the Department that any of the following has occurred:
>
> 1. One of the circumstances specified under Section 337.16(2)(a), (b) or (d), Florida Statutes, has occurred.
> 2. Affiliated contractors submitted more than one proposal for the same work. In this event the Certificate of Qualification of all of the affiliated bidders will be revoked or denied. All bids of affiliated bidders will be rejected.
> 3. The contractor made or submitted to the Department false, deceptive, or fraudulent statements, certifications, or materials in any claim for payment or any information required by any Department contract.
> 4. The contractor defaulted on any Department contract or the contract surety took over any Department contract from the contractor.

21. Rule 14-22.012(1), Florida Administrative Code, authorizes the Department to deny, suspend, or revoke a contractor’s qualification to bid based on a determination of "good cause" as that term is defined in Section 337.16(2), Florida Statutes. The term is defined by examples contained in Section 337.16(2), Florida Statutes, and in the Rule, but it is not exhaustive.

22. In addition to the list of examples of "good cause" specified in Section 337.16(2), Florida Statutes, and Rule 14-22.012(1), Florida Administrative Code, the Department

consistently considers other criteria contained in Chapter 337, Florida Statutes, which relate to the qualifications of a contractor. Section 337.14, Florida Statutes, requires the Department to consider a contractor's equipment, past record, experience, financial resources and organizational personnel. Other factors considered are contained in Rule 14-22.003, Florida Administrative Code, which addresses the rating of the applicant, work performance record, quality of work performed, history of payment, timeliness of completing projects, cooperative attitude, contract litigation, claims, defaults, integrity, and responsibility. Both Chapter 337, Florida Statutes, and Chapter 14-22, Florida Administrative Code, provide the industry with sufficient guidance as to the criteria for "good cause."

Responsibility

23. A contractor bidding on projects of less than $250,000 is presumed to be responsible unless one of the circumstances specified in Rule 14-22.0141, Florida Administrative Code, occurs, in which case the contractor may be deemed "non-responsible."

24. In addition to being "qualified," a contractor seeking to bid on projects over $250,000 must also be deemed to be "responsible." By statute, a contractor must be "responsible"

as a prerequisite to being "qualified." Section 337.14(3), Florida Statutes, provides:

> (3) Upon the receipt of an application for certification, the department shall examine it, verify its statements when necessary, and determine whether the applicant is competent, is responsible, and possesses the necessary financial resources to perform the desired work.

25. The Department must consider the responsibility of the contractor during the review of its Application for Qualification. If a contractor's qualification has been denied, suspended, or revoked for "good cause," then the contractor is deemed to be non-responsible and not allowed to bid on any project. Under Section 337.16(2), Florida Statutes, the Department may determine the time period in which a contractor is deemed to be non-responsible.

Period of Disqualification

26. As to the period of disqualification, Section 337.16(2), Florida Statutes, and Rule 14-22.012, Florida Administrative Code, provide a framework of guidelines and, in some instances, detailed timeframes relating to specific circumstances. For example, Section 337.165(2)(b)1, Florida Statutes, specifically requires the Department to deny or revoke a contractor's certification for a period of 36 months when the Department determines that the contractor has been convicted of a contract crime. This statute provides a frame of reference

for the Department in establishing the period of disqualification. Within the framework provided by Chapter 337, Florida Statutes, and Chapter 14-22, Florida Administrative Code, the Department considers a period of disqualification ranging from 0 to 36 months.

27. Rule 14-22.012, Florida Administrative Code, states that when a Certificate of Qualification is denied or revoked for any of the specified reasons in Rule 14-22.012(1)(a), Florida Administrative Code, the denial or revocation is "for at least one year." This revocation period only provides a lower limit. Rule 14-22.012(1), Florida Administrative Code, further provides: "When a specific period of revocation, denial, or suspension is not specified by this rule, the period shall be based on the criteria of Rule 14-22.0141(4), Florida Administrative Code, as well as Department contractor certification activities."

28. Rule 14-22.0141(4), Florida Administrative Code, provides that a contractor will be "ineligible to bid on Department contracts for a period of time based on the seriousness of the deficiency." Rule 14022.0141(4), Florida Administrative Code, provides examples of factors affecting the seriousness of the deficiency. Under the Rule, the examples of factors affecting the seriousness of the deficiency include impacts on project schedule, cost, quality of work, unsafe

conditions allowed to exist, complaints from the public, delay or interference with the bidding process, and the potential for repetition.

29. It is not possible to codify in a rule the precise time period of disqualification for every single instance. Because the facts and circumstances supporting a determination of "good cause" vary, it is impracticable to compile an exhaustive list for each instance.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, this proceeding pursuant to Section 120.56, Florida Statutes.

Standing

31. Section 120.56(1), Florida Statutes, provides that "[a]ny person substantially affected by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." Pursuant to Section 120.56(3)(a), "[a} substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule."

32. MBI is substantially affected by the Rule and has standing to bring this rule challenge. Moreover, the challenge is not mooted by withdrawal of MBI's 120.57 petition. See

Greynolds Park Manor, Inc. v. Dept. of Health and Rehab. Serv., 491 So. 2d 1157 (Fla. 1st DCA 1986); Hasper v. Department of Administration, 459 So. 2d 398 (Fla. 1st DCA 1984).

33. The Department removed MBI from the bid list by denying MBI's March 31, 2000, application for a period of two years. In the Department's initial notice of disqualification dated May 18, 2000, as well as its amended notice dated September 18, 2000, the Department cited the challenged rule, Rule 14-22.012, Florida Administrative Code, as authority for its action.

34. The Department's action under Rule 14-22.012 disqualifies MBI from bidding on Department projects, both in excess of or less than $250,000, as well as on a substantial number of other projects, including local governmental projects, where Department prequalification has been adopted as a prerequisite to bidding. By the Department's action under Rule 14-22.012, MBI is unable to bid on projects that consist of the majority of its past workload. MBI has targeted government contracts for its financial livelihood and, therefore, has been substantially affected by the action taken by the Department under its challenged rule.

35. As the Department has been MBI's primary source of business for over 20 years, the adverse financial impact to MBI from this action has been substantial.

36. Under these facts and the authority of Greynolds and Hasper, supra, MBI has been substantially affected by Rule 14-22.012, Florida Administrative Code, and is entitled to a declaration of the Rule's validity or invalidity regardless of MBI's decision to withdraw its Section 120.57 petition, and whether or not further relief is available to MBI if it is successful in invalidating the challenged rule.

Burden of Proof

37. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in a Chapter 120, Florida Statutes, proceeding. See Florida Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); see also Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932, 934 (Fla. 1996)("The general rule is that a party asserting the affirmative of the issue has the burden of presenting evidence as to that issue.").

38. Because MBI is asserting that existing Rule 14-22.012, Florida Administrative Code, constitutes an invalid exercise of delegated legislative authority, it has the burden of proving the invalidity of the challenged rule. See St. Johns River Water Management Dist. v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 76-77 (Fla. 1st DCA 1998).

Rule Validity

39. Section 120.56(1)(a), Florida Statutes (2000), provides that "[a]ny person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the Rule on the ground that the Rule is an invalid exercise of delegated legislative authority." The phrase "invalid exercise of legislative authority" is defined in Section 120.52(8) as "an action which goes beyond the powers, functions, and duties delegated by the Legislature." The statute enumerates seven circumstances in which a proposed or existing rule constitutes an invalid exercise of delegated legislative authority:

> (1) The agency has materially failed to follow the applicable rulemaking procedures or requirements;
> (2) The agency has exceeded its grant of rulemaking authority;
> (3) The rule enlarges, modifies, or contravenes the specific provision of law implemented;
> (4) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
> (5) The rule is arbitrary or capricious;
> (6) The rule is not supported by competent substantial evidence;
> (7) The rule imposes regulatory costs on the regulated person, county or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

40. Following the seven enumerated grounds for challenging a rule, Section 120.52(8), Florida Statutes, provides a set of

standards to be used in determining the validity of a rule in all cases:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

41. The Petitioner alleges that Rule 14-22.012, Florida Administrative Code, is an invalid exercise of legislative authority because (1) the agency has exceeded its grant of rulemaking authority; (2) the rule enlarges, modifies or contravenes the specific provisions of law implemented; and (3) the rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency.

The Department has not exceeded its Rulemaking Authority

42. The Legislature has provided the Department with general statutory authority to enact Rule 14-22.012, Florida Administrative Code. Specifically, Section 334.044(2), Florida Statutes, provides:

> 334.044 Department; powers and duties.— The department shall have the following general powers and duties:
>
> * * * *
>
> (2) To adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of law conferring duties upon it.

43. In addition, Section 337.14, Florida Statutes, requires the Department to promulgate rules in order to review Applications for Qualifications. It provides in pertinent part:

> The rules of the department shall address the qualification of persons to bid on construction contracts in excess of $250,000 and shall include requirements with respect to the equipment, past record, experience, financial resources, and organization personnel of the applicant necessary to perform the specific class of work for which the person seeks certification.

44. Pursuant to Section 120.52(8), Florida Statutes, a grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule. In addition, a specific law to be implemented is also required. In promulgating Rule 14-22.012, Florida Administrative Code, the Department has clearly adopted a rule which implements the provisions of Sections 337.14 and 337.16(2), Florida Statutes. These statutes clearly impose upon the Department the duty of reviewing Applications for Qualifications and of denying, suspending, or revoking Certificates of Qualification for good cause. Since the Legislature has specifically imposed these duties upon the

Department, the Rule does not exceed the Department's statutory authority.

Rule 14-22.012 Does Not Invalidly Enlarge, Modify Or Contravene Section 337.16(2), Florida Statutes.

45. In its Petition, MBI alleges that Rule 14-22.012, Florida Administrative Code, enlarges, modifies, or contravenes the grounds for suspending, revoking, or denying an Application for Qualification set forth in Section 337.16(2), Florida Statutes. Specifically, MBI alleges that the Florida Legislature restricted the circumstances in which the Department could deny, suspend, or revoke a Certificate of Qualification to the listed examples set forth in Section 337.16(2), Florida Statutes.

46. The plain wording of Section 337.16(2), Florida Statutes, does not support MBI's claim. Section 337.16(2) provides in pertinent part:

> (2) For reasons other than delinquency in progress, the department, for good cause, may determine any contractor not having a certificate of qualification non-responsible for a specified period of time or may deny, suspend or revoke any certificate of qualification. Good cause includes, but is not limited to, circumstances in which a contractor or the contractor's official representative. . . .

Under MBI's interpretation of Section 337.16(2), Florida Statutes, the statutory provision "includes, but is not limited

to," is ignored and rendered meaningless. The provision does have meaning.

47. The Legislature has used the term "includes, but is not limited to" or words of similar effect in several hundred statutes. The Legislature has used this term when it was not practical or feasible for the Legislature to list all of the precise circumstances in which an official or agency was justified in taking certain action.

48. Clearly, the Legislature intended the provision "includes, but is not limited to" to be given meaning, or it would not have used that phrase in these statutes. This phrase should be given its common, normal, plain, and ordinary meaning. State v. Cormier, 375 So. 2d 852, 854 (Fla. 1979). In addition, the Florida Supreme Court has recognized and supported the principle that rules may clarify and flesh out the details of an enabling statute. Agencies utilize their expertise by creating rules to effectuate the Legislature's stated policy. "The Legislature itself is hardly suited to anticipate the endless variety of situations that may occur or to rigidly prescribe the conditions or solutions to the often fact-specific situations that arise." Avata Development Corporation v. State, 713 So. 2d 199, 204 (Fla. 1998).

49. By the express terms of Section 120.52(8), Florida Statutes, the Department may adopt rules to implement or

interpret the specific powers and duties granted by the enabling statute. As the First District Court of Appeals recently determined in Southwest Florida Water Management District v. Save the Manatee, 25 Fla. L. Weekly 02737a (2000), "the use of the word 'interpret' suggests that a rule will be more detailed than the applicable enabling statute. . . . The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough."

50. MBI's contention that "good cause" must be strictly limited to the examples set forth in Section 337.16(2), Florida Statutes, notwithstanding the language "includes, but not limited to," ignores the principles above.

51. In addition to being inconsistent with the plain meaning of the statute, MBI's interpretation of Section 337.16(2), Florida Statutes, flies in the face of several well established rules of statutory construction. First, a statute must be construed so as to give effect to all of its parts. State v. Gale Distributors, Inc., 349 So. 2d 150 (Fla. 1977). These words should be given their plain and ordinary meaning. Cormier, (supra).

52. Second, MBI's construction of Section 337.16(2), Florida Statutes, ignores the rule of statutory construction of ejusdem generis, which means "of the same kind or class."

Black's Law Dictionary (7th Edition). Under the doctrine of ejusdem generis, where a general word or phrase follows a list or class of items, the general word or phrase is construed as including within it items of the same general nature or class as those specifically enumerated. Brown v. Saint City Church of God, 717 So. 2d 557 (Fla. 3d DCA 1998). Under the doctrine of ejusdem generis, a statute containing a general phrase followed by a list or class of items should not be construed as limiting its scope to the items specifically mentioned in the statute. If a statute were construed in this fashion, it would render the general phrase "entirely inoperative, and thereby violate another statutory rule of construction, namely, that every part of a statute should, if possible, be sustained and given appropriate effect." Children's Bootery v. Sutker, 91 Fla. 60, 107 So. 345, 347 (1926); see also Halifax Area Council v. City of Daytona Beach, 385 So. 2d 184, 187 (Fla. 5th DCA 1980).

53. The doctrine of ejusdem generis applies to Section 337.16(2), Florida Statutes. See Soverino v. State, 356 So. 2d 269, 273 (Fla. 1978)(ejusdem generis applied by the Florida Supreme Court to the phase "includes, but shall not be limited to"); Section 337.16(2), Florida Statutes, plainly authorizes the Department to consider as "good cause" other circumstances which are of a similar nature or character as those expressly listed in the statute.

54. Third, a statute must be construed in a reasonable manner and so as to avoid absurd results. State v. Webb, 398 So. 2d 820 (Fla. 1981). It requires little effort to identify examples of misconduct which are not listed in Section 337.16(2), Florida Statutes, as examples of good cause. If a contractor commits serious and relevant misconduct, the Department cannot be held powerless to consider it when reviewing the contractor's Application for Qualification. Under MBI's construction, the Department would be precluded from considering not only physical assaults on its employees, but literally countless other types of potential misconduct by a contractor, including the submission of fraudulent statements to other owners.

55. Moreover, many statutes authorize state agencies to take action based upon a finding or determination of "good cause." See, e.g., Section 465.013, Florida Statutes ("The board may refuse to certify to the department or may revoke the registration of any intern for good cause, including grounds enumerated in this chapter for revocation of pharmacists' licenses."); Section 487.041(3), Florida Statutes ("The department, for reasons of adulteration, misbranding, or other good cause, may refuse or revoke the registration of any pesticide, after notice to the applicant or registrant giving the reason for the decision.") To adopt an exceedingly narrow

construction of Section 337.16(2), Florida Statutes, would be an incorrect precedent and may potentially jeopardize the ability of other state agencies to rely upon and enforce state statutes authorizing them to take certain action based upon a finding or determination of good cause.

56. Based on the plain meaning of the statute, and the applicable rules of statutory construction discussed above, it is clear that the Department is not limited to the specific examples of good cause set forth in Section 337.16(2), Florida Statutes. Rather, the Legislature has given the Department the discretion to consider as "good cause" other factors of a similar nature or class as the examples given by the Legislature in Section 337.16(2), Florida Statutes.

57. The examples of "good cause" set forth in Rule 14-22.012, Florida Administrative Code, are of the same class and nature as the examples set forth by the Legislature in Section 337.16(2), Florida Statutes.

58. Rule 14-22.012, Florida Administrative Code, does not impermissibly enlarge, modify or contravene the provisions of Section 337.16(2), Florida Statutes.

Rule 14-22.012, Florida Administrative Code, Is Not Vague, Does Not Fail To Establish Adequate Standards For Agency Decisions. And Does Not Vest Unbridled Discretion.

59. MBI’s Petition also alleges that Rule 14-22.012, Florida Administrative Code, is vague, fails to establish

adequate standards for agency discretion, and vests unbridled discretion in the agency. Rule 14-22.012, Florida Administrative Code, does not give the Department the discretion to deny, suspend, or revoke Certificates of Qualification. Rather, it is Sections 337.14 and 337.16(2), Florida Statutes, that grant the Department the authority to take such actions. An administrative rule cannot be invalidated simply because the governing statutes, not the challenged rule, confer discretion upon an agency. Florida Public Service Commission v. Florida Waterworks, 731 So. 2d 836 (Fla. 1st DCA 1999).

60. Section 337.164, Florida Statutes, is entitled "Legislative intent with respect to integrity of public contracting process." In Section 337.164, Florida Statutes, the Legislature expressly states that the preservation of the integrity of the public contracting process is vital to the development of a balanced and efficient transportation system and a matter of great interest to the State. In addition, Section 337.164(4), Florida Statutes, provides that "it is the intent of the Legislature to provide sufficiently broad authority to the department to ensure the integrity of its public contracting process."

61. MBI asserts that Section 337.16(2), Florida Statutes, is a penal statute that must be strictly construed and relies upon White Construction Co. v. Dep't of Transportation, 281 So.

2d 194 (Fla. 1973). The statutory provisions at issue in White have been eliminated since that decision was rendered in 1973. Further, the Legislature has since established that the opportunity to bid on Department contracts is a privilege, not a right. Specifically, Section 337.164(2), Florida Statutes, provides: "The opportunity to bid on department contracts or to supply goods or services to the department is a privilege, not a right." In addition, Section 337.167(1), Florida Statutes, provides:

> (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.

62. Based on Sections 337.164(2) and 337.167(1), Florida Statutes, it is clear that Section 337.16(2), Florida Statutes, is not a penal statute. Holding a Certificate of Qualification merely gives a contractor the privilege of bidding on Department contracts in excess of $250,000. Denial of a Certificate of Qualification does not deprive a contractor of the ability to engage in business or to work for other owners as would the denial of a professional or business license.

63. "[T]he test for vagueness is more lenient where an administrative rule, rather than a penal statute is being examined." City of St. Petersburg v. Pinellas County, 414 So. 2d 293, 294 (Fla. 2d DCA 1982); see also Florida East Coast Industries v. State, Dep't of Community Affairs, 677 So. 2d 357, 362 (Fla. 1st DCA 1996)("[T]he fundamental concern of the vagueness doctrine is not threatened here because the consequences of being found out of compliance with the challenged rules is not penal.")

64. In addition, Section 120.54(1)(a)2., Florida Statutes, provides that rulemaking is not practicable and therefore not required when an agency establishes that either of the following is true:

> (a) Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or
> (b) The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

65. The sufficiency of a rule's standards and guidelines depends upon the subject matter dealt with and the degree of difficulty involved in articulating finite standards. Cole Vision Corp. v. Department of Business & Professional Regulation, 688 So. 2d 404, 410 (Fla. 1st DCA 1997). In this

case, it is not practical or feasible for either the Legislature or the Department to list every circumstance that may constitute "good cause" for suspending, denying, or revoking an Application for Qualification. Any attempt at an exhaustive list would be incomplete. See Florida East Coast Industries v. Dep't of Community Affairs, 677 So. 2d 357 (Fla. 1st DCA 1996); City of St. Petersburg v. Pinellas County, 414 So. 2d 293 (Fla. 2d DCA 1982).

66. Similarly, it is not feasible to establish by rule with precision or exactness the period of time for which a contractor's Application for Qualification will be suspended or denied in all cases. The factors to be considered will vary depending upon the circumstances and severity of the contractor's actions.

67. In paragraph 14 of its Petition, MBI also seeks an administrative determination that Rule 14-22.012(1)(a), Florida Administrative Code, is invalid because it states that a contractor's Certificate of Qualification shall be denied or revoked "for at least one year when it is determined by the Department that any of the following has occurred. . . ." It is alleged that this provision improperly gives the Department "unbridled discretion to set a period of suspension or revocation for any period of time over one year."

68. As indicated, the governing statutes specifically confer discretion to the Department. In particular, Section 377.16(2), Florida Statutes, requires the Department to "specify" a period of time. It provides:

> [T]he Department, for good cause, may determine any contractor not having a Certificate of Qualification non-responsible for a specified period of time or may deny, suspend, or revoke any Certificate of Qualification.

69. MBI argues the Rule improperly gives the Department the discretion to establish a period of suspension or revocation for any period of time over one year. However, it is the statute, and not the rule, that provides this discretion. "An administrative rule cannot be invalidated simply because the governing statute, not the challenged rule, confers discretion upon an agency." Florida Public Service Commission v. Florida Waterworks, 731 So. 2d 836 (Fla. 1st DCA 1999). See also Cortez v. State Board of Regents, 655 So. 2d 132 (Fla. 1st DCA 1995)(governing statutes, not the challenged rule, confer the discretion).

70. Notwithstanding the fact that the governing statute confers discretion, the Department has established criteria and standards for the implementation of its grant of legislative authority and application of rules.

71. Rule 14-22.012(1), Florida Administrative Code, provides several specific periods of suspension, revocation, or denial. (See, for example, 90 days for a first occurrence of submitting a false, deceptive, or fraudulent certification of current capacity (Rule 14-22.012(b)(1)); not exceeding one year for a second occurrence of submitting a false, deceptive, or fraudulent certification of current capacity (Rule 14-22.012(b)(2)); four months based on a determination that the contractor failed to notify the Department of being declared in default or suspended by any public official (Rule 14-22.012(a)); and four months when it is determined the contractor failed to register motor vehicles (Rule 14-22.012(e)(2)).

72. Included in this list of periods of suspension, revocation, or denial is Subsection (1)(a) which states, "[T]he contractor's Certificate of Qualification shall be denied or revoked for at least one year when it is determined by the Department that any one of the following has occurred. . . ." This period is not specific in that it only provides a lower limit.

73. The sentence immediately preceding subsection (1)(a) states that when a specific period of suspension, revocation, denial is not specified by this rule, the period shall be based on the criteria of Rule 14-22.0141(4), Florida Administrative Code. Since the period of disqualification for the acts listed

in subsection (1)(a) is general and not specific (denial or revocation for at least one year), the Rule specifies that the criteria contained in Rule 14-22.0141(4) shall be considered in determining the period of disqualification.

74. As indicated in Rule 14-22.012(1), Florida Administrative Code, the criteria of Rule 14-22.0141(4), Florida Administrative Code, are applied to determine the specific period of suspension, revocation, or denial when the denial or revocation is "at least one year." Rule 14-22.0141(4), Florida Administrative Code, establishes the standards and guidelines. Rule 14-22.0141(4), Florida Administrative Code, establishes that the contractor will be "ineligible to bid on Department contracts for a period of time based on the seriousness of the deficiency." The Rule then provides "examples of factors affecting the seriousness of the deficiency." These examples include: (1) impacts on project schedule, cost or quality of work; (2) unsafe conditions allowed to exist; (3) complaints from the public; (4) delay or interference with the bidding process; and (5) the potential for repetition. (Rule 14-22.0141(4)(a)1-5, Florida Administrative Code). Rule 14-22.012(1), Florida Administrative Code, expressly provides examples of the criteria to be applied.

75. Rule 14-22.012(1), Florida Administrative Code, does not give the Department unbridled discretion. The Rule

establishes criteria and guidelines well within the statutory scheme.

76. Section 337.16, Florida Statutes, along with the other sections of Chapter 337 discussed above, and Rules 14-22.012(2) and 14-22.0141, Florida Administrative Code, guide the Department in determining the appropriate period of suspension, revocation, or denial. The time period for a particular set of facts and circumstances present narrow questions that are addressed and must be on a case-by-case basis. Environmental Trust v. State, Dep't of Environmental Protection, 714 So. 2d 493, 498 (Fla. 1st DCA 1998). An applicant who believes the time period is inappropriate for any reason can challenge the agency action pursuant to Sections 120.569 and 120.57, Florida Statutes.

77. It is also important to note that some authority, discretion, or judgment is necessarily required to be exercised in carrying out a duty imposed by a statute. Performing such function does not invalidate a rule. See Ameriaquatic, Inc. v. State Department of Natural Resources, 651 So. 2d 114 (Fla. 1st DCA 1995). This is especially true when a determination of "good cause" can depend on numerous factors. More detailed or specific legislation would not be practical. Id. The criteria for determining the period of suspension, revocation, or denial track the implementing statute and are consistent with its broad

legislative intent. Id. To set any more definitive standards and guidelines, given the requirement to determine "good cause," would not be practical. See Cole Vision Corporation v. Department of Business and Professional Regulation Board of Optometry, 688 So. 2d 404 (Fla. 1st DCA 1997). The Department "cannot be expected to adopt rules in 'excruciating detail' so as to recognize every potential circumstance that might arise." Consolidated – Tomoka Land Company vs. St. John's Water Management District, DOAH Case No. 97-0870 RP (DOAH 1997) (quoting Cole Vision at p. 410), reversed on other grounds, 717 So. 2d 72 (Fla. 1st DCA 1998).

ORDERED

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

ORDERED that Petitioner has not established that Rule 14-22.012 is an invalid exercise of delegated legislative authority. Accordingly, the Petition filed herein is hereby dismissed.

DONE AND ORDERED this 29th day of December, 2000, in Tallahassee, Leon County, Florida.

WILLIAM R. PFEIFFER
Administrative Law Judge
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.