STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CPW ENTERPRISES, INC., d/b/a CHEROKEE CONSTRUCTION COMPANY,	)	
Petitioner,	)	
vs.	)	Case No. 03-1253
DEPARTMENT OF TRANSPORTATION,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 11, 2003, by video teleconference between sites in Orlando and Tallahassee, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brant Hargrove, Esquire
Law Office of Brant Hargrove
2984 Wellington Circle, West
Tallahassee, Florida 32308

For Respondent: Robert M. Burdick, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0458

STATEMENT OF THE ISSUES

The issues are whether the Department of Transportation may declare Petitioner non-responsible and ineligible to bid on

Department contracts based upon Petitioner's alleged unsatisfactory performance and default on Department contract number E-5G08; and if so, for what period of time should Petitioner be declared non-responsible.

PRELIMINARY STATEMENT

By letter dated February 12, 2003, the Department of Transportation (Department) notified Petitioner of its intent to declare Petitioner non-responsible for a period of two years based upon Petitioner's unsatisfactory performance and default on Department contract number E-5G08. On March 4, 2003, Petitioner timely requested a formal hearing on the Department's proposed action. On April 7, 2003, the Department referred the matter to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge to conduct the hearing requested by Petitioner.

The hearing was initially scheduled for June 24, 2003, but was subsequently continued based upon Petitioner's unopposed motion. The hearing was rescheduled for and held on July 11, 2003.

At the hearing, Petitioner presented the testimony of Charles Welch and Elizabeth Gornick. Petitioner's Exhibits A and B were received into evidence. The Department presented the testimony of Judson Pankey, Stephen Bass, and Calvin Landers. The Department's Exhibits 1 through 3, 4A, 4B, 5 through 20,

and 22 through 24 were received into evidence. Upon the Department's request, official recognition was taken of Rule 14-22.0141, Florida Administrative Code.

Petitioner was permitted to submit the deposition testimony of Michael Huggins after the hearing. Mr. Huggins' deposition was taken on July 22, 2003, and the Transcript of the deposition was filed with the Division on August 22, 2003, and is hereby received as Petitioner's Exhibit C.

The one-volume Transcript of the hearing was filed with the Division on August 13, 2003. The parties requested and were given 20 days from the date that the hearing Transcript was filed to file their proposed recommended orders (PROs). The parties' PROs were timely filed on September 2, 2003, and they were given due consideration by the undersigned in preparing this Recommended Order.

All statutory references in this Recommended Order are to the 2002 codification of the Florida Statutes unless otherwise indicated, and all references to Rules are to the current version of the Florida Administrative Code.

FINDINGS OF FACT

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

A. Parties

1. Petitioner is a Florida corporation whose principal business is road and bridge maintenance. Petitioner also does some landscape installation work.

2. Petitioner's president is Charles Welch.

3. Petitioner has received between ten and 20 contracts from the Department since 1993. However, the contract at issue in this proceeding is the first landscape installation project that Petitioner has done for the Department.

4. The Department is the state agency responsible for maintaining and regulating the use of the right-of-way along the state highway system. That responsibility includes overseeing the installation and maintenance of landscaping within the right-of-way.

B. Department Contract No. E-5G08

5. In November 2001, the Department awarded Petitioner a contract to install landscaping around six interchanges in the central Florida area.

6. The interchanges were identified and prioritized in the bid specifications as follows: (1) I-95/US 192 interchange; (2) I-4/Lake Mary Boulevard interchange; (3) SR 25/SR 200 interchange; (4) SR 482/SR 435 interchange; (5) I-95/SR 518 interchange; and (6) US 441/SR 46 interchange. The SR 482/SR 435 interchange was subsequently deleted from the project, and

the I-4/Lake Mary Boulevard interchange was subsequently prioritized ahead of the I-95/US 192 interchange.

7. The Department's contract identification number for the project was E-5G08.

8. The contract required Petitioner to prepare and mulch 66,667 square yards of beds for the landscaping and then to install a total of 63,667 plumbago shrubs and 927 sabal palm trees. The plumbagos were required to be ten to 18 inches in height, and the palm trees were required to be nine to 20 feet in height.

9. Petitioner did not challenge the specifications for the project.

10. Petitioner bid $745,160.90 for the contract, and the Department accepted the bid at that amount.

11. Petitioner's bid amount was calculated by multiplying a unit price for each plant type by the number of plants required under the contract, plus a unit price for the mulching/bed preparation multiplied by the total number of square yards in the beds. No separate amount was bid by Petitioner for "maintenance," and the bid form did not include a separate line for that item.

12. The contract generally described the work to be performed by Petitioner as "furnish[ing] and install[ing] palms, plants and associated landscape materials at various locations."

13. A similar description of the project was provided on the first page of the bid specification package.

14. The contract and the bid specification package incorporated by reference the 2000 edition of the Department's Standard Specifications for Road and Bridge Construction (Standard Specifications).

15. Mr. Welch was generally familiar with the Standard Specifications as a result of the prior contract work that he and Petitioner had done for the Department. He understood that the Standard Specifications were part of each Department construction and maintenance contract.

16. Section 580-10 of the Standard Specifications, entitled "Contractor's Responsibility for Condition of the Plantings," requires the contractor to:

> [e]nsure that the plants are kept watered, that the staking and guying is adjusted as necessary, that all planting areas and beds are kept free of weeds and undesirable plant growth and that the plants are maintained so that they are healthy, vigorous, and undamaged at the time of acceptance.

17. Section 580-11 of the Standard Specifications, entitled "Plant Establishment Period and Contractor's Warranty," requires the contractor to:

> [a]ssume responsibility for the proper maintenance, survival and condition of all landscape items for a period of one year after the final acceptance of all work under the Contract in accordance with [Section]

> 5-11. [The contractor shall also] [p]rovide a Warranty/Maintenance Bond to the Department in the amount of the total sums bid for all landscape items as evidence of warranty during this plant establishment period. The costs of the bond will not be paid separately, but will be included in the costs of other bid items.
>
> * * *
>
> [The contractor shall] [t]ake responsibility to apply water as necessary during this period and include the cost in the various landscape items. No separate measurement of payment will be made for water during the plant establishment period.

18. Pursuant to Sections 5-10 and 5-11 of the Standard Specifications, "acceptance" of a project does not occur until the Department determines that the contractor has satisfactorily completed all work on the project and informs the contractor in writing that the project is accepted.

19. Sections 5-10.2 and 5-10.3 of the Standard Specifications allow for acceptance of portions of the project, called "partial acceptance." Those provisions do not, however, require the Department to accept projects on a piecemeal basis.

20. At the pre-construction conference held on November 19, 2001, Mr. Welch asked, "if a single location [would] be accepted as it is completed." The Department's project manager, Stephen Bass, replied that he would "check to see if this is possible," and he told Mr. Welch that "[i]n the

meantime, as you complete a site, advise me in writing and I will respond . . . ."

21. Based upon the subsequent correspondence between the parties, it can be inferred that the Department decided against accepting the project on a site-by-site basis. No partial or final acceptance was ever given for the project or any of the individual sites.

22. The first page of the specification package provided that the contract period was "270 days for installation," and "365 addtl [sic] days after acceptance for establishment."

23. The 365-day, post-acceptance establishment period referred to in the specification package is the same as the one-year period referred to in Section 580-11 of the Standard Specifications.

24. Petitioner's obligations during the establishment period were specifically discussed at the pre-construction conference. At that time, Mr. Bass made it clear to Mr. Welch that the contract included the one-year establishment period, in addition to the 270-day installation period.

25. The installation period began on December 3, 2001, and ended on September 8, 2002. The latter date takes into account the ten "[bad] weather days" added to the installation period under the terms of the contract.

26. Mr. Welch understood the project to be an installation-only contract. That understanding was based upon the reference to a 270-day installation period in the specifications, and the fact that the bid form did not have a separate line-item for maintenance.

27. Mr. Welch did not read the specifications word-for-word prior to bidding on the project, nor did he take into account Section 580-11 of the Standard Specifications or the language on the first page of the specification package which clearly referenced the 365-day, post-acceptance establishment period.

28. Mr. Welch did not understand the contract to require Petitioner to weed or otherwise maintain the beds after the plants were installed. He understood the contract to only require Petitioner to install the plants and then water them through the end of the 270-day installation period. In reaching this conclusion, Mr. Welch did not take into account Section 580-10 of the Standard Specifications, which clearly requires pre-acceptance weeding and which makes the contractor the absolute insurer of the plants until acceptance by the Department.

29. The Department did not in any way contribute to Mr. Welch's misunderstanding of the scope of the contract. The contract documents were clear and unambiguous on the issue and

the Department made it clear from the outset that the contract included a one-year establishment period.

C. Petitioner's Performance Under the Contract

30. Petitioner performed its work under the contract in a series of steps.

31. Petitioner first sprayed the areas at each site where the landscaping would be installed with a herbacide to kill any existing vegetation. Two herbacide treatments were done at each site.

32. Petitioner then "mulched" the planting areas at each site by mowing the dead vegetation and marked the locations at each site where the palm trees were to be installed.

33. Petitioner then planted the palm trees at each site.

34. Next, Petitioner installed "weed fabric" at the I-4/Lake Mary Boulevard interchange (hereafter "the Lake Mary site").

35. The weed fabric has two purposes: it blocks the light that reaches the ground thereby reducing or eliminating weeds, and it also helps prevent erosion.

36. After installing the weed fabric, Petitioner began planting the plumbago shrubs at the Lake Mary site. To do so, Petitioner cut and folded back the weed fabric where each plumbago was to be located and then dug the hole within which

the plant was placed. After the plant was placed in the hole, the weed fabric was then re-folded around the base of the plant.

37. After the plumbagos were planted, Petitioner completed its work at the Lake Mary site by spreading pine straw mulch in the landscaped beds. The contract required a four-inch layer of mulch.

38. After completing its work at the Lake Mary site, Petitioner moved to another site and installed the weed fabric, planted the plumbagos, and spread the pine straw mulch at that site. Petitioner continued working on a site-by-site basis in this manner until all of the sites had been completed.

39. In June 2002, the Department expressed concern to Petitioner that it had fallen behind its installation schedule. In response, Petitioner put more people on the job and was able to get back on schedule. Petitioner completed the installation of the plants within the 270 days allotted for installation.

40. Petitioner periodically watered each of the sites as the plants were being installed. Petitioner had two water trucks that it used for watering. The truck used at the Lake Mary site sprayed a stream of water out of a hose at a relatively high flow rate.

41. Because large portions of the landscaped beds at the Lake Mary site were on steep slopes around the interchange, the stream of water from the water truck caused some of the pine

straw to wash down the slope. Heavy rains also caused the pine straw to wash down the slope and, in some areas, to wash away completely. As a result, some of the landscaped areas were not covered with the four inches of mulch required by the specifications.

42. Mr. Welch acknowledged the loss of mulch in some areas, and he attributed it to the weed fabric being too "slick" to hold the mulch. Nevertheless, because Mr. Welch considered the replacement of the mulch to be maintenance, which he did not consider to be part of the contract, Petitioner never replaced the pine straw.

43. Petitioner did not consider using a "drip line" or other watering system which would have applied the water at ground level or at a lower rate of flow than the stream of water being sprayed from the water truck. Such an alternative system may have minimized the amount of mulch that washed down the slope from watering, but it may not have affected the mulch that washed away due to heavy rains. Such a system may have also gotten more water to the plants' roots.

44. Despite the watering done by Petitioner, plumbagos and palm trees died at the Lake Mary site, as well as at the other sites. Mr. Welch acknowledged the "loss" of a number of trees and plants, although he testified that fewer plants had died than he had projected at the outset of the project. The precise

number of trees and plants which died before Petitioner was declared in default on the contract and told to stop work on the project is not clearly reflected in the record.

45. The loss of the plumbagos at the Lake Mary site may be partially attributable to the weed fabric selected by Petitioner not being permeable enough to allow the water to reach the plant roots, but Petitioner's failure to utilize an alternative watering system to compensate for the "problems" it encountered with the weed fabric also contributed to the loss of the plumbagos.

46. On August 12, 2002, the Department and Petitioner "agreed that substantial completion has been achieved" on each of the sites. That means that all or substantially all of the plants had been installed by that date; it does not mean that the Department had accepted the work, either partially or conditionally.

47. By letter dated August 13, 2002, the Department informed Petitioner that maintenance of the completed sites was necessary. Specifically, the letter informed Petitioner that there were dead palm trees and plumbagos at all of the sites which needed to be replaced, that the pine straw mulch needed to be replaced at most of the sites, and that weeding needed to be done.

48. Petitioner did not perform the weeding or other maintenance directed by the Department. Indeed, the only work that Petitioner did on the project after August 13, 2002, was on August 20, 2002, when it watered two of the sites.

49. By letter dated August 15, 2002, Petitioner responded to the Department's direction that maintenance be commenced at the completed sites. In that letter, Petitioner characterized the maintenance as "extra work" and requested additional compensation for the maintenance work.

50. The Department denied Petitioner's request for additional compensation by letter dated August 15, 2002. That letter informed Petitioner that "a Deficiency Letter would be forthcoming if weed removal operation does not begin immediately." Petitioner did not respond to the letter.

51. By letter dated August 21, 2002, the Department issued a "performance deficiency" based upon Petitioner's failure to maintain the planted areas as required by the contract and as directed by the Department in the letters dated August 13 and 15, 2002. Petitioner did not contest the deficiency within the ten-day period prescribed by the letter.

52. By letter dated August 22, 2002, the Department requested that Petitioner submit the Warranty/Maintenance Bond required by the contract since "substantial completion has been achieved on the . . . project." The letter further advised

Petitioner that the one-year establishment period would not commence until the bond was received by the Department. Petitioner did not respond to the letter.

53. By letter dated August 27, 2002, the Department provided Petitioner with a "punch list" of items that required correction before the project could be accepted. The list included the replacement of dead palm trees and dead or under-sized plumbago shrubs at all of the sites; missing pine straw mulch at all of the sites; weeding and general clean-up of all of the sites; and submittal of the Warranty/Maintenance Bond.

54. At the time of the Department's August 27, 2002, letter, 12 days still remained in the installation period. Petitioner did not respond to the letter and it made no effort to complete the punch list items identified by the Department.

55. The Department never accepted the work performed by Petitioner under the contract because of the deficiencies identified above. As a result, the 365-day post-acceptance establishment period never commenced.

56. Petitioner never provided the Department the Warranty/Maintenance Bond required by Section 580-11 of the Standard Specifications, which was incorporated by reference into the contract.

57. The Lake Mary site is highly visible because the adjacent roads are very heavily traveled.

58. The Department received complaints regarding the appearance of the Lake Mary site. The complaints came from Seminole County officials and members of the public.

D. Alternative Weed Fabric Proposed by Petitioner

59. The specifications package for the contract provided general requirements for the weed fabric to be used on the project. It did not, however, specify a specific brand of fabric which must be used.

60. The specifications package provided that "[t]he fabric shall conform to the physical requirements on Roadway and Traffic Design Standards, Index No. 199 according to its application."

61. Index No. 199 refers to the weed fabric as an "erosion mat," and requires it to have an ultra violet (UV) rating of 2,000 hours. Index No. 199 does not prescribe criteria for water permeability for the weed fabric.

62. Petitioner provided the information in the specifications package relating to the weed fabric to its material supplier, who then provided Petitioner a fabric that met the specifications. The Department was not involved in those discussions.

63. As required by the specifications package, Petitioner provided the Department a copy of the product data sheet for the

selected fabric so that the Department could confirm that the fabric met the requirements of Index No. 199.

64. The weed fabric which Petitioner selected was called "gold line." It had a UV rating of 2,500 hours, which met the requirements of Index No. 199. It had a water permeability rating of 15 gallons per minute per square foot (gal/min/SF).

65. After encountering the problems described above at the Lake Mary site, Petitioner began looking for an alternative weed fabric which would be more permeable to water.

66. The alternative fabric identified by Petitioner was "Style 125EX" from Linq Industrial Fabrics, Inc. The water permeability rating for that fabric was 150 gal/min/SF, but its UV rating was only 500 hours.

67. Mr. Welch provided the data sheet for the Style 125EX fabric to Mr. Bass and requested that Petitioner be allowed to substitute that fabric for the fabric that it had used at the Lake Mary site. The Style 125EX fabric would have been used on the remaining sites, because the Lake Mary site had been completed with the original weed fabric by that time.

68. That request was denied by the Department because the UV rating for the Style 125EX fabric did not meet the requirements of Index No. 199. The lower UV rating meant that the fabric would not hold up as long and, therefore, could create maintenance problems in the future.

69. After the request to substitute the Style 125EX fabric was denied, Petitioner did not attempt to locate an alternative material which met the UV rating specified in Index No. 199, but was more permeable to water than the gold line fabric.

E. Petitioner's Default and Unsatisfactory Performance Rating

70. Section 8-9.1 of the contract provides that:

> The following acts or omissions constitute acts of default and . . . the Department will give notice, in writing, to the Contractor and his surety for any delay, neglect or default, if the Contractor:
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> * * *
>
> (c) performs the work unsuitably, or neglects or refuses to remove materials or to perform anew such work that the Engineer rejects as unacceptable and unsuitable;
>
> (d) discontinues prosecution of the work, or fails to resume discontinued work within a reasonable time after the Engineer notifies the Contractor to do so;
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> * * *
>
> (j) for any other cause whatsoever, fails to carry on the work in an acceptable manner, ...
>
> For a notice based upon reasons stated in subparagraphs (a) through (h) and (j): if the Contractor, within a period of ten calendar days after receiving the notice described above, fails to correct the conditions of which complaint is made, the Department will . . . have full power and authority, without violating the Contract, to take the prosecution of the work out of

> the hands of the Contractor and to declare the contractor in default.

71. On September 16, 2002, the Department notified Petitioner that it intended to "default" Petitioner under the contract based upon its failure to maintain the planted areas, its failure to replace the dead plumbagos and palms, and its failure to provide the required Maintenance/Warranty Bond. As required by the contract, the letter gave Petitioner 10 days to cure the deficiencies in its performance.

72. Petitioner did not respond to the Department's default letter, nor did it take any action to cure the deficiencies identified by the Department. As a result, on September 30, 2002, the Department formally declared Petitioner in default on the contract and directed Petitioner not to perform any additional work on the project.

73. By letter dated October 22, 2002, the Department advised Petitioner of its "preliminary" field performance rating for the contract. Petitioner received a raw score of 53 (out of 90), which is a scaled score of 59. That is an unsatisfactory rating.

74. Petitioner did not contest its rating within the time allowed by the Department's October 22, 2002, letter. As a result, the preliminary rating became final.

75. Petitioner was not scored in the area of "maintenance of traffic operations." The Department had not received any complaints from the public on that issue, which is the primary consideration upon which that score is based.

76. Had Petitioner received a "satisfactory" grade in that category, Petitioner's total score would have been 60. If Petitioner received a higher grade in that category, its total score could have been as high as 63. In either event, those scores still result in an unsatisfactory rating.

77. By letter dated February 12, 2003, the Department advised Petitioner that it intended to declare Petitioner non-responsible for a period of two years based upon its default and unsatisfactory performance on Department contract number E-5G08. Petitioner timely requested a formal hearing, and this proceeding followed. The Department stipulated at the hearing that its decision to declare Petitioner non-responsible was not based on Petitioner's numerical performance rating (whether it is 59, 60, or 63), but rather on the actual unsatisfactory performance that is described above.

F. Subsequent Department Contract With Vila & Sons

78. After Petitioner's default, the Department contracted with another entity "in order to salvage the Department's investment in this landscaping project, i.e., ensure that the plantings become established, ..."

79. That contract, entered into in May 2003 between the Department and Vila & Sons Landscaping Corporation, is identified as contract number E-5H09 (Vila & Sons Contract). The contract amount was $112,461.36.

80. The Vila & Sons Contract was for "one-time maintenance" of three of the sites that Petitioner was responsible for under its contract with the Department. The sites were the I-4/Lake Mary Boulevard interchange, the SR 25/SR 200 interchange, and the US 441/SR 46 interchange.

81. The Vila & Sons Contract was only for a 60-day period and consisted of the following landscape maintenance functions:

> 1) weeding [which includes pruning of existing live shrubs], 2) removal and replacement of dead shrubs, 3) fertilizing [which includes "watering in"], 4) remulching as necessary, 5) watering for plant establishment and/or maintenance.

(Brackets in original).

82. The Vila & Sons Contract called for the installation of 3,700 plumbago shrubs. It does not make reference to the removal of dead palm trees, the re-erection of fallen palm trees, or the installation of new palm trees.

83. The bid form for the Vila & Sons Contract included separate line-items for water, mulch pine bark, plumbago shrubs, slow-release fertilizer, and "landscape maintenance (weed removal, manual)."

84. The record does not establish whether the Vila & Sons Contract was satisfactorily performed or whether it was successful in "salvaging" the installation work which had been done by Petitioner.

85. Between the time that Petitioner was declared in default in September 2002 and May 2003 when the Vila & Sons Contract was entered into, the Central Florida area had periods of cold weather. The cold temperatures during those periods may have killed some of the plumbagos and palm trees installed by Petitioner, but the record does not establish how many plants, if any, were killed by the cold weather as compared to the plants that were already dead at the time of Petitioner's default.

CONCLUSIONS OF LAW

A. Jurisdiction and Burden of Proof

86. The Division has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1).

87. The Department has the burden of proof in this proceeding because it is the party seeking to change the status quo and because it is asserting the affirmative on the issue of Petitioner's non-responsibility. See, e.g., Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981) (burden of proof is on party asserting the

affirmative of an issue unless a statute provides otherwise); Amico v. Division of Retirement, 352 So. 2d 556 (Fla. 1st DCA 1977) (agency had the burden of proof in case involving change in person's retirement status); Balino v. Dept. of Health and Rehabilitative Servs., 348 So. 2d 349 (Fla. 1st DCA 1977) (agency had the burden to establish that persons receiving Medicaid benefits were no longer eligible). And cf. Rule 14-22.0141(1) (creating presumption that bidders for certain projects are responsible "unless the Department determines that good cause exists to declare the contractor non-responsible.")

88. The parties disagree as to the appropriate standard of proof. The Department contends that the preponderance of the evidence standard applies, see Department's PRO at 9; Petitioner contends that the clear and convincing evidence standard applies. See Petitioner's PRO at Paragraph 35.

89. In Capeletti Brothers, Inc. v. Department of Transportation, 362 So. 2d 346, 347 (Fla. 1st DCA 1978), the court characterized a proceeding involving the suspension of a contractor's certificate of qualification as "in effect [a] license revocation proceeding[.]" The relief being sought by the Department in this proceeding is substantially the same as that in Capeletti Bothers. This proceeding is also penal in nature because it will result in Petitioner's losing income that

it might have received as the successful bidder on Department contracts over the next two years. Accordingly, the clear and convincing evidence standard of proof applies. See Dept. of Banking & Finance v. Osborne, Stern & Co., 670 So. 2d 932 (Fla. 1996) (clear and convincing evidence standard applies in disciplinary proceedings and proceedings to impose administrative fines); Section 120.57(1)(j) (preponderance of the evidence standard does not apply in "penal or license disciplinary proceedings").

B. May the Department Declare Petitioner Non-responsible?

90. Section 337.16(2) provides in pertinent part that:

> [T]he 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:
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> * * *
>
> (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;

91. Rule 14-22.0141, which implements this statute, provides in pertinent part:

> (1) Contractors who wish to bid for the performance of construction contracts less

than or equal to $250,000, or any maintenance contracts, are presumed to be responsible bidders unless the Department determines that good cause exists to declare the contractor non-responsible, which shall include the following:

(a) One of the circumstances specified in Section 337.16(2), Florida Statutes, occurs;

(b) The contractor or its affiliate defaulted on any contract, or the contract surety assumed control of or financial responsibility for, any contract of the contractor;

* * *

(e) The contractor failed to comply with contract requirements, or failed to follow Department direction in the execution of the contract;

* * *

(i) The contractor has demonstrated instances of poor or unsatisfactory performance, deficient management resulting in project delay, poor quality workmanship, a history of payment of liquidated damages, untimely completion of projects where liquidated damages were not paid, uncooperative attitude, contract litigation, claims, or defaults.

(j) When the department determines that any other circumstance constituting "good cause" under Section 337.16(2), Florida Statutes, exists.

92. The Department met its burden to prove that Petitioner defaulted on contract number E-5G08 by failing to weed and maintain the beds during the installation period as required by Section 580-10 of the Standard Specifications and as repeatedly

directed in the Department's August 2002 letters; by failing to ensure that the plants were "healthy, vigorous, and undamaged at the time of acceptance" as required by Section 580-10 of the Standard Specifications; and by failing to provide the Warranty/Maintenance Bond required under the contract.

93. The Department also met its burden to prove that Petitioner's performance on the contract was unsatisfactory as a result of its failure to weed and maintain the beds and its failure to replace the plants and trees that died during the installation period.

94. As a result, good cause exists to declare Petitioner non-responsible under Section 337.16(2)(c) and Rule 14-22.0141(1)(a), (b), (e), (i), and/or (j).

95. Petitioner's misunderstanding of the scope of the project is no excuse for its default and unsatisfactory performance since the specifications and the contract were unambiguous. Specifically, the first page of the specification package clearly stated that the contract included both a 270-day installation period and an additional 365-day establishment period, and the Standard Specifications clearly described the contractor's obligations to keep the landscaped areas "free of weeds and undesirable plant growth" prior to acceptance (Section 580-10); to maintain the plants and ensure their survival through acceptance (Id.) and for a one-year period after

acceptance (Section 580-11); and to provide a Warranty/Maintenance Bond to the Department. Id.

96. Contrary to Petitioner's argument and despite the fact that Petitioner completed the installation of the plants within the time prescribed by the contract, the evidence fails to establish that Petitioner substantially performed all of its obligations under the contract. Indeed, the evidence clearly and conclusively establishes that Petitioner refused to perform the pre-acceptance weeding and maintenance of the beds required under the contract and that it failed to submit the Maintenance/Warranty Bond required under the contract or to otherwise accept its responsibilities during the post-acceptance maintenance period.

97. Even if, as Petitioner argues, the Department's refusal to allow the use of an alternative weed fabric can be raised in this proceeding as a defense to its default under the contract, the evidence does not support Petitioner's claims that such refusal was unreasonable or that it created an insurmountable obstacle to Petitioner's performance under the contract. Indeed, the evidence establishes that the Department's rejection of the single alternative weed fabric proposed by Petitioner was based upon legitimate concerns regarding the fabric's durability and that Petitioner did not avail itself of other alternatives (such as watering at a lower

flow rate or using a drip line) that may have gotten more water to the plants' roots.

C. For What Period Should Petitioner be Declared Non-responsible?

98. The determination as to the length of time that Petitioner should be declared non-responsible is governed by Rule 14-22.0141(2), which provides:

> Determination of Contractor Non-Responsibility. The Contractor will be determined to be non-responsible and ineligible to bid on Department contracts for a period of time, based on the seriousness of the deficiency.
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> (a) Examples of factors affecting the seriousness of a deficiency are:
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> 1. Impacts on project schedule, cost, or quality of work;
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> 2. Unsafe conditions allowed to exist;
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> 3. Complaints from the public;
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> 4. Delay or interference with the bidding process;
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> 5. The potential for repetition;
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> 6. Integrity of the public construction process; and
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> 7. The effect on the health, safety, and welfare of the public.

99. There is no evidence that Petitioner's performance under the contract created an unsafe condition or adversely affected the public safety. Nor is there any evidence of a

delay or interference with the bidding process or the project schedule.

100. Petitioner's performance did generate complaints from the public because of the poor appearance of the Lake Mary site, although the record does not reflect how many complaints were received or whether any complaints were received about the other sites.

101. Petitioner's poor performance and ultimate default significantly impacted the cost of the project since it ultimately required the Department to contract with another company at a cost of more than $112,000.00, "in order to salvage the Department's investment in this landscaping project."

102. Petitioner's apparent ignorance of or blatant disregard for its contractual obligations, as shown by its refusal to provide pre-acceptance maintenance of the landscaped areas and its refusal to recognize its obligations during the establishment period, undermines the competitive bidding process through which Petitioner obtained this contract. Moreover, in light of Mr. Welch's continued misinterpretation of the relevant provisions of the Standard Specifications, Petitioner's unsatisfactory performance on this project is capable of repetition on future projects if not addressed here.

103. These factors, taken together, support the Department's preliminary determination that Petitioner should be

declared non-responsible for a period of two years. And cf. Rule 14-22.012(1)(a)4.(contractor's certificate of qualification should be suspended for "at least one year" when it is determined that contractor defaulted on a contract).

104. The record does not establish whether Petitioner has bid on any Department projects since it was declared in default in September 2002, or since February 2003, when the Department gave notice of its intent to declare Petitioner non-responsible. Nevertheless, based upon Capeletti Brothers, supra, the period of Petitioner's non-responsibility should commence on the date that the Department enters its final order in this proceeding, not an earlier date on which Petitioner may have voluntarily stopped bidding on Department projects.

RECOMMENDATION

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

RECOMMENDED that the Department of Transportation issue a final order which declares Petitioner non-responsible and ineligible to bid on Department contracts for a period of two (2) years, commencing on the date of the final order.

DONE AND ENTERED this 18th day of September, 2003, 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
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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.