STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF TRANSPORTATION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-1020
	)	
AMEC CIVIL, LLC,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was convened in this cause on September 20, 2007, in Jacksonville, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Erik Fenniman, Esquire
Department of Transportation
Haydon Burns Building
605 Suwannee Street, Mail Station 58
Tallahassee, Florida 32399

For Respondent: F. Alan Cummings, Esquire
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1004 DeSoto Park Drive
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STATEMENT OF THE ISSUE

Whether the Department of Transportation (Petitioner) may declare AMEC CIVIL, LLC, (Respondent) non-responsible for 90 days and ineligible to bid on Department contracts during that

period, based upon Respondent's alleged failure to timely submit contract documents and comply with contract requirements on Contract Numbers 21349 and 21350 (Financial Project Numbers 209600-1-52-01 and 213290-1-52-01).

PRELIMINARY STATEMENT

On January 17, 2007, the Department of Transportation (DOT) notified AMEC Civil, LLC, of the Department’s intent to declare AMEC non-responsible for a period of three months based upon AMEC's failure to timely comply with contract requirements on DOT Contract numbers 21349 and 21350.

Respondent filed a Petition for Formal Administrative Proceedings, and on March 1, 2007, DOT referred the matter to the Division of Administrative Hearings.

The hearing was initially scheduled for May 3, 2007, but was twice continued. All interlocutory Motions and Orders appear in the case file.

At the disputed-fact hearing held September 20, 2007, the style of this cause was orally amended, as set-out above, to reflect the duty to go forward. (TR-19)

The parties stipulated that Florida Statutes (2006) apply, in particular Sections 337.14, 337.16, and 337.164.

At hearing, Florida Administrative Code Rule 14-22.0141 as presented, was officially recognized. AMEC was granted 10 days from the close of hearing to object in writing to any other

portions of Chapter 14-22, as presented at hearing. (TR-18-19) No written objection was filed, so Chapter 14-22, has been officially recognized for purposes of this Recommended Order.

Petitioner DOT presented the oral testimony of Terri Towers, its Final Estimates Manager for District II, and Brian Blanchard, its Director, Office of Construction. Petitioner's Exhibits P-1 through P-10 were received in evidence. Respondent AMEC presented the oral testimony of Carlos Rosand, AMEC's Project Manager, and had Exhibits R-1 through R-6 admitted in evidence.

A Transcript was filed with the Division on October 10, 2007. The parties had stipulated to 30 days thereafter for the filing of their respective Proposed Recommended Orders. Each party's Proposed Recommended Order has been considered in preparation of this Recommended Order.[1/]

FINDINGS OF FACT

1. Respondent AMEC Civil, LLC, is a Florida corporation whose principal business is road and bridge construction.

2. DOT is the state agency responsible for entering into contracts for the construction, improvements, and maintenance of state roads. DOT's legislative authority includes preserving the integrity of the public contracting process and determining contractors non-responsible. §§ 337.164 and 337.16, Fla. Stat.

(2006). The point in contention herein is DOT's January 17, 2007, Letter of Intent to Declare AMEC Non-responsible.

3. This case arises from two separate contracts Respondent AMEC entered into with Petitioner DOT to construct the interchange at Interstate 295 and Interstate 95 in Duval County, which construction project stretched over five years.

4. AMEC has filed no challenge, pursuant to Section 120.57(3), Florida Statutes, to the specifications of either contract. AMEC waived any Section 120.57(1)(e) issues with regard to forms utilized by DOT, but which forms had not been adopted as rules in their own right. (TR-26)

5. The interchange was comprised of two separate financial project numbers with two separate sets of plans, one using the metric form of computation and the other using the English form of computation. The two projects were bid together and were combined for purposes of the total construction.

6. The contract and bid specification package incorporated by reference the 2000 Edition of DOT's Standard Specifications for Road and Bridge Construction, and also included supplemental specifications for each element. Therefore, all these items became part of the contracts between the parties.

7. The construction was supposed to be completed in 1461 days, but suffered significant delays.

8. DOT made periodic pay estimates to AMEC on the two separate contact numbers. Contract No. 21349, Financial Project 209600-1-52-01, was the smaller project, in English Units, for which DOT paid AMEC $11,388,417.98. Contract No. 21350, Financial Project 213290-1-52-01 was the larger project, in Metric Units, for which DOT paid AMEC $98,816,947.85.

9. AMEC's two contracts are still open and will be closed only when all claims are resolved.

10. DOT's contracts provide a mechanism at the end of construction projects for a final "settling up" between the parties, recognizing that the periodic payments were only estimates of quantities installed. This mechanism, handled by DOT's Final Estimates Office, affords the contractor and the Agency an opportunity to make a final identification of the full particulars of any payment issues within 90 days of final acceptance. This contractual "ACCEPTANCE AND FINAL PAYMENT" process, found at Section 9-9 of the Supplemental Specifications of the instant contracts, states, in pertinent part:

* * *

> . . . The Department will pay the estimate, less any sums that the Department may have deducted or retained under the provisions of the Contract, as soon as practicable after final acceptance of the work, provided the Contractor has met the requirements of (a) through (g) below.
>
> If the Contractor fails to furnish all required Contract Documents within 90 days

of the Department's offer of final payment or request for refund of overpayment, the Department may suspend the Contractor's Certificate of Qualification under the provision of Florida Administrative Code, 14-22.

(a) The Contractor has agreed in writing to accept the balance due or refund the overpayment, as determined by the Department, as full settlement of his account under the Contract and of all claims in connection therewith, or the Contractor, has through the use of the Qualified Acceptance Letter, accepted the balance due or refunded the overpayment, as determined by the Department, with the stipulation that his acceptance of such payment or the making of such refund does not constitute any bar, admission, or estoppel, or have any effect as to those payments in dispute or the subject of a pending claim between the Contractor and the Department. To receive payment based on a Qualified Acceptance Letter, define in writing the dispute or pending claim with full particular of all items of all issues in dispute, including itemized amounts claimed for all particulars of all items, and submit it as part of the Qualified Acceptance Letter. The Contractor further agrees, by submitting a Qualified Acceptance Letter that any pending or future arbitration claim or suit is limited to those particulars, including the itemized amounts, defined in the original Qualified Acceptance Letter, and that he will commence with any arbitration claim or suit within 820 calendar days from and after the time of final acceptance of the work and that his failure to file a formal claim within this period constitutes his full acceptance of the Engineer's final estimate and payment. The overpayment refund check from the Contractor, if required, will be considered a part of any Acceptance Letter executed.

* * *

> (d) The surety on the Contract bond consents, by completion of their portion of the affidavit and surety release subsequent to the Contractor's completion of his portion, to final payment to the Contractor and agreed that the making of such payment does not relieve the surety of any of its obligations under the bond.
>
> * * *
>
> (g) The Contractor has submitted the Form FHWA-47 (formerly known as PR-47) Record of Materials and Labor on Federal-aid Projects, to the Engineer for transmittal to the FHWA. . . . (Emphasis supplied)

11. Section 5-12.2 of the contracts provides, in pertinent part:

> 5-12.2 Notice of Claim.
> 5-12.2.1 Claims For Extra Work: . . . On projects with an original Contract amount greater than $3,000,000 within 180 calendar days after final acceptance of the project in accordance with 5-11, the Contractor shall submit full and complete documentation as described in 5-12.3. . . .

12. By contract, a contractor's claim is a pre-requisite to filing a circuit court action, and there is a Claims Office and a complete claims resolution procedure within DOT, including utilization of a three-member Dispute Resolution Board.

13. Contrary to Contract Specification 9-9, AMEC filed suit against DOT prior to final acceptance of the projects. That lawsuit became Duval County Circuit Court Case 03-CA-005462. Exactly when that lawsuit was instituted is not clear on this record, but the prefix "03," suggests it was filed in

2003, even before AMEC made its first formal claim. (See Finding of Fact 14.) DOT's Director of the Office of Construction, Brian Blanchard, was not aware of any prior instance of a contractor suing DOT before the issuance of a Qualified Acceptance Letter.

14. On May 5, 2006, AMEC submitted to DOT's Claims Office, a claim document, addressing both project numbers, allegedly pursuant to the contracts' Section 5-12, in relation to the issue of "night work." Apparently, AMEC felt DOT had forbidden, or put significant impediments on, AMEC's doing "night work" on the projects in order to speed up construction by spending more on labor, so this claim involved the equivalent of time delays as well as overtime costs.

15. On July 19, 2006, DOT issued to AMEC a single "Offer of Final Payment" authored by Terri Towers, District II Final Estimates Manager, for each of the two financial projects. This letter essentially asked what balance AMEC would accept to close the contracts. In this letter, DOT acknowledged May 5, 2006, as the date of "final acceptance of work." The effect of DOT's designation of May 5, 2006, as the date of final acceptance was that AMEC then had 180 days from May 5, 2006 (until November 5, 2006), to submit any and all claims, pursuant to Specification 5-12, to DOT's Claims Office, while having 90 days from DOT's Offer of Final Payment to submit all documents required by the

contract and to state a balance AMEC would accept for each project, with all the particulars, pursuant to Supplemental Specification 9-9. Under that contract specification, AMEC's failure to timely challenge the amount(s) offered by DOT would cut AMEC off from claiming more than was offered and constituted AMEC's agreement to take the amount DOT's Final Estimates Office had offered on each project. Challenging the amount offered through timely filing a qualified acceptance with full particulars would not have precluded payment of any additional amounts AMEC claimed. However, within 90 days of DOT's offer, AMEC was required either to submit a signed regular acceptance of the amount offered for each project or to submit a signed qualified acceptance of the amount offered for each project. Whichever type of acceptance AMEC elected to file, the contract required, and DOT's July 19, 2006, Offer of Final Payment letter instructed, that AMEC's acceptance, the surety release, and the FHWA-47 form must be filed within 90 days of the Offer of Final Payment. It is un-refuted that either a regular acceptance or a qualified acceptance is a "contract document."

16. Ms. Towers acknowledged that the July 19, 2006, Offer of Final Payment letter incorrectly referred to "Article 9-9 of the Standard Specifications," when it stated, "Please be advised that this letter constitutes an offer of final payment and is being made pursuant to and subject to all requirements and

conditions set out in Article 9-9 of the Standard Specifications." However, there is no material difference, for purposes of this case, between that item and Supplemental Specification 9-9, (See DOT Exhibit 10, showing revision dates and contents). Moreover, subsequent correspondence clarified which specification was involved, and no one testified that AMEC was misled or confused as to which contract specification was being invoked by DOT's July 19, 2006, letter or which specification is applicable to this case.

17. Ms. Towers testified that the Offer of Final Payment is the last estimate of the total job and is the summary of DOT's whole estimate for each financial project.

18. DOT's Offer of Final Payment dated July 19, 2006, stated, in sum, "We think that we owe AMEC nothing on No. 209600-1-52-01 and that we owe AMEC $752.63 on No. 213290-1-52-01." DOT's accompanying pay estimates included categories for item descriptions, item numbers, quantities, unit price and the total payment amount to date for each financial project number. The letter, which referenced both project numbers, requested that AMEC, "Please sign and return the enclosed Letters of Acceptance to this office (one for each financial project number)." A form for AMEC to fill out on each project number was attached.

19. The DOT forms AMEC was requested to sign (one form for each financial project number) were entitled “Acceptance on Offer of Final Payment.” They permitted AMEC to either accept the final balance payment offered by DOT or to disagree with the amount offered, stating the alternative balance AMEC believed to be due from DOT; stating the additional amount separately, with a breakdown of project number, pay item, and dollar amount; to acknowledge that by accepting payment, AMEC was not subject to any bar or estoppel, or to any effect as to those payments in dispute or which were the subject of a pending claim. The form also stated in all capital letters, “NOTE: FULL PARTICULARS OF THE ABOVE DISPUTE OR PENDING CLAIM MUST BE SUBMITTED WITH THIS ACCEPTANCE LETTER. ANY OUTSTANDING CONTRACT DOCUMENTS, INCLUDING THE 21-A, MUST BE RECEIVED BEFORE THIS PAYMENT CAN BE ALLOWED.”

20. Blank Acceptance on Offer of Final Payment forms, with the respective project number on each of them, were attached to the Offer of Final Payment letter. Ms. Towers acknowledged that neither the Offer of Final Payment letter, nor the attached forms upon which AMEC was expected to itemize the amounts still in dispute, bore the specific words “qualified acceptance letter,” a term used in Supplemental Specification 9-9 (see Finding of Fact 10) or the term “qualified letter of acceptance.”

21. Behind the Acceptance on Offer of Final Payment form for the English project/contract, which the July 19, 2006, Offer of Final Payment letter requested that AMEC fill-out, were DOT's final audit, or accounting of, the amounts the Final Estimates Office believed were owed by DOT to AMEC for the English project/contract numbers. Behind the Acceptance on Offer of Final Payment forms for the Metric project/contract, which the July 19, 2006, Offer of Final Payment letter requested that AMEC fill-out, were DOT's final audit, or accounting of, the amounts the Final Estimates Office believed were owed by DOT to AMEC for the Metric project/contract numbers.

22. A "21-A" is a surety release form. An "FHWA-47" is a form required by the Federal Highway Administration for release of funds on a federally-funded project, such as the two projects in the instant case. It is un-refuted that each of these forms qualifies as a "contract document." A blank DOT-approved 21-A form and a blank FHWA-47 form were supposed to be attached to, and transmitted to AMEC, with DOT's July 19, 2006, Final Offer of Payment letter, but these forms were not attached.

23. On August 16, 2006, AMEC acknowledged receiving DOT's Offer of Final Payment letter on August 9, 2006.

24. On August 31, 2006, DOT responded that, due to mailing problems, the timetable for AMEC to submit the required contract documents was adjusted to 90 days from August 7, 2006. This

response date for AMEC would have been November 7, 2006. DOT's August 31, 2006, letter re-stated that the FHWA-47 form and the Surety Release (Form 21-A) also must be submitted with the response.

25. Having received nothing from AMEC in response to the July 19, 2006, Offer of Final Payment, the Final Estimates Office, on October 11, 2006, sent AMEC a Notice of Missing or Incomplete Contract Documents, advising that 60 days had elapsed since DOT's Offer of Final Payment. DOT routinely sends this type of letter to alert contractors that the 90 days from the Offer of Final Payment in which to submit their regular acceptance or qualified acceptance and required contract documents is running out. The letter to AMEC also specifically named the 21-A and FHWA-47 forms. If the time provided by Specification 9-9 runs out without a challenge to the amount offered by DOT, then the contractor loses the opportunity to contest the amount offered. Therefore, when contractors receive DOT's Notice of Missing or Incomplete Documents letter, they usually communicate with DOT's Final Estimates Office or otherwise coordinate the submittal of the appropriate missing documents within the remaining 30 days allowed. DOT's October 11, 2006, letter contained boilerplate language warning AMEC that its certificate of qualification to bid could be suspended for failure to submit the necessary documents.

26. On October 30, 2006, AMEC submitted to DOT's Claims Office a second claim, again addressing both project numbers, and allegedly pursuant to Contract Section 5-12, on all remaining issues besides the night work issue which had been raised on May 5, 2006. (See Finding of Fact 14.)

27. The supporting documents for AMEC's two claims constitute 10 large notebooks, observed at final hearing but not admitted in evidence. AMEC's Project Engineer testified that there were also five or more boxes of paper related to impact delay. It is not clear whether these boxes were or were not sent to DOT's Claims Office with the two claims.

28. On November 1, 2006, AMEC sent DOT a letter headed "Qualified Acceptance", stating:

> This will acknowledge receipt of your letter dated August 7, 2006, and a copy of the Department's Offer of Final Payment. We agree to accept $752.63 payment as the amount due to us under said contract with the understanding that acceptance of such payment shall not constitute any bar, estoppels, or have any effect as to those payments in dispute or those matters which are the subject of a pending claim or lawsuit.
>
> The matters which are the subject of pending claims and lawsuits are hereby adopted by reference. The lawsuit is styled AMEC Civil, LLC v. State of Florida, Department of Transportation, Duval County Circuit Court, Case No: 03-CA-005462. The Department is in possession of the complaint and other pleadings, as well as matters obtained through discovery. The documents

> are extremely voluminous and too burdensome to attach to this letter. All pending claims have been certified and submitted to the Department. Many of these claims have already gone through the DRB process. The Department is aware of all of AMEC's lawsuits and pending claims, in regard to which AMEC reserves all of its rights.

29. "DRB" stands for "Dispute Resolution Board." AMEC had provided a copy of the voluminous documentation supporting its two claims (see Finding of Fact 27) to each of the three members of the DRB as well as to DOT's Claims Office.

30. Terri Towers testified that AMEC's November 1, 2006, letter to the Final Estimates Office was not sufficient to constitute a Qualified Acceptance Letter, because it incorrectly incorporated a lawsuit and the lawsuit's pleadings and referenced DOT's possession of a circuit court complaint, and because it did not give a separate dollar amount for each of the two respective financial project numbers. Brian Blanchard, Director of Construction, also testified that AMEC's letter was unacceptable for compliance with Supplemental Specification 9-9, because the letter did not give the Department a high-level view of the itemized amounts in dollars and time. Both DOT witnesses were concerned because AMEC had provided no breakdown of the dollar amount AMEC was still requesting for each respective project/contract. The purpose of Specification 9-9, is to cut off any additional requests for payment, claims, amendments to

claims, or lawsuits that could raise the dollar amount specified in the qualified offer of acceptance. The statement of particulars would limit how claims might move money demands around. In short, a qualified acceptance letter is designed to work as a final cut-off of demands, and AMEC's submittal was unclear and missing two respective "bottom lines."

31. Ms. Towers testified that DOT would have accepted from AMEC the filled-in Acceptance on Offer of Final Payment forms she had enclosed with her July 19, 2006, Offer of Final Payment letter (see Findings of Fact 19-21); would have accepted a summary of the 10 three–ring binders submitted with the two claims; probably would have accepted the equivalent information in another format; and would even have accepted AMEC's November 1, 2006, Qualified Acceptance Letter, provided AMEC had submitted the final separate totals (balances) it claimed on each project and the supporting particulars for each amount by project.

32. Mr. Blanchard understood the concept AMEC was attempting to use in its November 1, 2006, letter of "incorporation by reference," but stated that the goal of an acceptance or qualified acceptance letter to the Final Estimates Office, as required by 9-9, was to avoid overlaps and redundancy and to limit amounts claimed, and accordingly, AMEC's vague November 1, 2006, incorporation by reference was unacceptable.

33. AMEC's November 1, 2006, letter referred to "lawsuits" and "claims' in the plural. It left Ms. Towers unsure about whether the final amount AMEC was seeking was included in the lawsuit named and further unsure about how the two claims were related to that lawsuit or possible other lawsuits. Ms. Towers did not consult DOT's legal staff about the status of any lawsuits, but there is no certainty that even if she had consulted DOT's Legal Section concerning the lawsuit specifically named in AMEC's November 1, 2006, letter, she would have gotten a current "bottom line" dollar amount requested for final payment on each project.

34. Ms. Towers knew AMEC had filed claims on May 5, 2006, and October 30, 2006, but she did not take it upon herself to go to DOT's Claims Office in the same building and try to analyze all AMEC's claim documents, either as they had existed when they had been submitted or as they may have been modified over time. She thought that at least one payment of about $50,000, was about to be made by DOT upon negotiations that had occurred since May 5, 2006, (ultimately, $50,000 was actually paid to AMEC in mid-2007), but how on-going negotiations might have affected the balance AMEC was willing accept for the respective projects 90 days past August 7, 2006 (November 7, 2006), was not up to Ms. Towers to ferret out. AMEC was required to clarify these amounts in writing and sign-off on them.

35. At hearing, AMEC's Project Engineer testified that each of AMEC's two claims constituted "all particulars." He also stated that both claims were covered in the single-referenced lawsuit. He further testified that AMEC's May 5, 2006, claim clearly demanded a balance of $18,164,105.00. This amount is supported by the exhibit related thereto. However, the October 30, 2006, claim was divided into at least four sections, and although each section was totaled, the reader would have to add together the several sections' bottom lines to get the total $51,534,615.00 claim amount. Therefore, it appears that only with such addition would even the DOT Claims Office be able to discern the fiscal extent of AMEC's second claim. Moreover, the two claims AMEC had attempted to incorporate by reference in its November 1, 2006, letter contained at least one cross-over or redundancy. AMEC calculated a bonus amount into its May 5, 2006, claim and listed the same bonus in the October 30, 2006, claim with a caveat to the effect of "DOT, don't pay us a second time if you paid us under the first claim." This bonus redundancy constituted a potential five-million dollar overlap of the two claims. AMEC's Project Engineer did not know if there were any other duplications within AMEC's two claims. Finally, the two claims each combined material concerning both project/contract numbers.

36. Mr. Blanchard had looked at the two claims only in preparation for hearing, but he had noted a lot of duplication, "over-accounting," overlap, and redundancy, and testified that Supplemental Specification 9-9 was designed to weed out such problems by requiring that the contractor list a total balance claimed for each project.

37. Ms. Towers testified that AMEC did not provide the three required contract documents (a sufficient qualified acceptance letter, Form 21-A, and Form FHWA-47) within 90 days of August 7, 2006 (November 7, 2006).

38. On November 16, 2006, Ms. Towers notified AMEC that AMEC's November 1, 2006, letter was materially unacceptable, stating that the letter failed to comply with Supplemental Specification 9-9 (a)-(g) and:

> The Qualified Acceptance Letter submitted by AMEC materially failed to meet the express requirements set forth in Supplemental Specification 9-9, of the Contract as previously stated. Specifically AMEC requested to have "matters which are the subject of pending claims and lawsuits adopted by reference." AMEC cited "Case No. 03-CA-005462" and stated that "the Department is in possession of the complaint and other pleadings." Are the pending claims referenced by AMEC included in the cited Case No. 03-CA-005462? AMEC must clearly provide the particulars, regarding dollar amount, all issues and time being requested in order to have the Qualified Acceptance Letter properly processed. In addition, as requested in the Offer of Final Payment letter, AMEC must provide the

> properly executed Form 21-A (Affidavit as noted in (c) and (d) above) and Form FHWA-47 (as noted in (g) above). (Emphasis supplied)

39. The emphasized language explicitly stated DOT's problem with reconciling AMEC's multiple claims with a single lawsuit as described within AMEC's November 1, 2006, Qualified Acceptance letter. The rest of DOT's November 16, 2006, letter also clearly enumerated the remainder of what was required under Supplemental Specification 9-9 (a) through (g), and again listed the missing 21-A and FHWA-47 forms.

40. DOT's November 16, 2006, letter also stated that AMEC's failure to comply with 9-9, within the 90 days provided in 9-9, was sufficient for DOT to invoke Rule 14-22.012, to suspend the contractor's certificate of qualification, and if the certificate of qualification were already suspended, DOT would invoke Florida Administrative Code Rule 14-22.0141(a) and Section 337.16(2)(c), Florida Statutes, to declare the contractor non-responsible. The language concerning non-responsibility was apparently suggested by DOT's Legal Section.

41. DOT's November 16, 2006, letter closed with the language, "As 90 days have already passed, please provide the documentation as requested in the Offer of Final Payment within 14 days from receipt of this letter so we may process the pending payment." (Emphasis supplied)

42. On November 16, 2006, DOT was still seeking 21-A and FHWA-47 forms, even though DOT now viewed the balances DOT had offered on July 19, 2006, as uncontested, due to AMEC's failure to timely submit a qualified acceptance letter with sufficient particulars.

43. AMEC did not return the executed 21-A and FHWA-47 forms within 14 days of DOT's November 16, 2006, letter, so on January 17, 2007, DOT issued its Notice of Intent to Declare Non-Responsible, which is the subject of the instant case. DOT sought to declare AMEC non-responsible for only 90 days, since theirs was a first offense.

44. DOT's January 17, 2007, letter cited AMEC's failure to submit an Acceptance Letter, Form 21-A, and FHWA-47, within 90 days of August 7, 2006.

45. DOT's January 17, 2007, letter stated that the determination of non-responsibility would become "conclusive" if, within 21 days, AMEC did not either submit the required contract documents or request an administrative hearing.

46. The decision to cite AMEC as non-responsible was made by Brian Blanchard, Director of Construction, after consultation with employees of the Office of Construction, District II personnel, the Chief Engineer, and DOT legal staff, but the January 17, 2007, letter was signed by DOT's Chief Engineer.

47. On February 14, 2007, DOT received a letter dated February 13, 2007, from AMEC, entitled "Offer of Final Payment." AMEC's February 13, 2007, letter incorporated by reference AMEC's November 1, 2006, letter as its Qualified Acceptance Letter. The letter dated February 13, 2007, attempted to incorporate both claims into the only named lawsuit, but it also referred to actions both prior to, and since, each of AMEC's claims had been filed. The letter again stated that "As the Department is fully aware, the documentation requested by the Department in the lawsuit is already within the Department's possession, and constitutes several hundred boxes. The Claims themselves, also within the possession of the Department, comprise over ten three-inch ring binders, which included detailed itemization and documentation." (Emphasis added.) This language only further complicated and undermined any attempt to incorporate other materials by reference.

48. Attached to AMEC's February 13, 2006, letter was a completed FHWA-47 Form and a completed Form 21-A. February 14, 2006, when the letter was received by DOT's Final Estimates Office, was 191 days after the Offer of Final Payment (see Finding of Fact 24, counting from August 7, 2006); 90 days after DOT's November 16, 2006, letter requesting that the executed forms be filed within 14 days; and 28 days after DOT's

January 17, 2007, letter gave AMEC another 21 days to submit the forms.

49. On February 21, 2007, one of Ms. Towers' subordinates sent AMEC a letter acknowledging the February 14, 2007, receipt of AMEC's letter. This DOT letter referenced both contract numbers and both project numbers and requested that AMEC fill out and submit an attached two-page Acceptance on Offer of Final Payment form (see Findings of Fact 19-20) on Project 213290-1-52-01. Only the second page of the two-page Acceptance on Offer of Final Payment form for Project 209600-1-52-01 was attached. The letter also stated that Form 21-A, which had been received with AMEC's February 14, 2007, letter, was unacceptable because the accompanying power of attorney did not grant the proper authority to execute consents.

50. No testimony was presented at hearing concerning the sufficiency vel non of the 21-A form submitted by AMEC on February 14, 2006.

51. The most common procedure DOT employs when a contractor fails to comply with 9-9 or other DOT requirements in the execution of a contract is one in which a pre-qualified contractor is declared "not qualified," or "de-certified." That procedure, technically called a "suspension of qualification," renders the previously pre-qualified contractor ineligible to bid on DOT projects.

52. However, pursuant to Florida Administrative Code Rule 14-22.0141, a contractor who wishes to bid for the performance of construction contracts less than $250,000, or to work on any DOT maintenance project is presumed to be a responsible bidder unless DOT determines good cause exists to declare the contractor non-responsible.

53. There was credible testimony herein that, in order to prevent a de-certified contractor from “subbing” or “supplying” on a DOT contract while disqualified, DOT uniformly follows-up its de-certification to bid with a determination that the de-certified contractor is also “non-responsible.”

54. The credible testimony herein also shows that DOT has de-certified at least two contractors who failed to timely submit Letters of Qualified Acceptance after a job was completed. Whether or not these particular contractors also were declared non-responsible is not in this record.

55. When DOT entered its intent to declare Respondent AMEC non-responsible on January 17, 2007, AMEC had not been pre-qualified with DOT since May 2004, and AMEC has not applied for pre-qualification/certification with DOT since May 2004. A settlement agreement regarding resolution of AMEC’s pre-qualification application from 2004, indicates that DOT agreed that “[n]o further action will be taken by the Department in relation to the May 26, 2004, Application for Qualification.”

56. Since 2004, AMEC also has not attempted to obtain any DOT bid documents for construction projects of less than $250,000, for which a contractor need not be pre-qualified, and has not attempted to “sub” or to do maintenance work on any DOT project. AMEC’s Project Engineer testified that AMEC has no current intent to apply for jobs with such a low financial return.

57. However, absent a de-certification or declaration of AMEC as non-responsible, AMEC remains eligible at any time to apply for certification or to apply for the low financial return work that does not require pre-certification.

58. DOT’s Construction Director, Brian Blanchard, manages the State’s 2.5 billion dollar work program, and testified that the integrity of the bidding process depends upon treating all contractors alike, and therefore, AMEC should be declared non-responsible because it did not meet the contract requirements that all other contractors had to meet, such as the timely filing of its final acceptace figures and the appropriate forms in compliance with a contract specification.

59. On or about March 1, 2007, AMEC filed its petition for formal hearing herein, and the case was referred to the Division of Administrative Hearings. DOT has not challenged the timeliness of the petition.

CONCLUSIONS OF LAW

60. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding, pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2007).

61. The duty to go forward and burden of proof is upon DOT, which seeks to change the status quo. See Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Pursuant to Section 337.167 (1), de-certification is not equivalent to revocation of a license, and it is concluded here that a declaration of non-responsibility also is not equivalent to revocation of a license. Therefore, the standard of proof herein is "by a preponderance of the evidence."

62. Supplemental Specification 9-9, quoted in Finding of Fact 10, is adopted by reference here. Although that specification only provides for de-certification, the statutes and rules permit a declaration of non-responsibility.

63. Section 337.16(2), Florida Statutes, provides, in pertinent part:

> [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:

* * *

(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; (Emphasis supplied)

64. Florida Administrative Code 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;

* * *

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

* * *

(j) When the Department determines that any other circumstance constituting "good cause" under Section 337.16 (2), F.S., exists.

* * *

(2) 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.

(a) Examples of factors affecting the seriousness of the deficiency.

1. Impacts on project schedule, cost, or quality of work;
2. Unsafe conditions are allowed to exist;
3. Complaints from the public;
4. Delay or interference with the bidding process;
5. The potential for repetition;
6. Integrity of the public construction process; and
7. The effect on the health, safety, and welfare of the public.(Emphasis supplied)

65. Florida Administrative Code Rule 14-22.012 addresses only de-certifications, but DOT submits that rule is instructional for this non-responsibility case, because the situations and actions are analogous. Therein, sub-paragraph (b)(1) states that a suspension of 90 days shall occur for pre-qualified contractors who fail to timely provide contract documents.

66. Section 337.164, Florida Statutes, states:

> Recognizing that the preservation of the integrity of the public contracting process of the department is vital to the development of a balanced and efficient transportation system and is a matter of interest to all the people of the state, the Legislature determines and declares that:
>
> (1) The procedures of the department for bidding and qualification of bidders on department contracts exist to secure the public benefits of free and open competition and to secure the quality of public works.
>
> (2) The opportunity to bid on department contracts or to supply goods or

> services to the department is a privilege, not a right.
>
> * * *
>
> To this end, it is the intent of the Legislature to provide sufficiently broad authority to the department to ensure the integrity of its public contacting process.

67. AMEC submits the following propositions: (1) That AMEC does not meet the definition of "contractor" under Section 337.165, because AMEC has neither "bid" or "applied to bid"; (2) That because Rule 14-22.0141 addresses only "contractors who wish to bid" and AMEC does not wish to bid, that rule does not apply to AMEC; (3) That contract Specification 9-9 lists only the penalty of de-certification, and accordingly DOT cannot declare AMEC "non-responsible"; (4) That, in the present situation, the appropriate and required information was timely provided by AMEC, but the information just was not put on the appropriate Acceptance on Offer of Final Payment form, provided with DOT's July 19, 2006, Offer of Final Payment (see Findings of Fact 18 and 21), and that AMEC's incorporation by reference, of voluminous documents associated with AMEC's two pending claims plus the circuit court case citation, in a separate November 1, 2006, letter labeled "Qualified Acceptance," was sufficient to comply with Specification 9-9, which uses the term "qualified acceptance letter," and which does not use the term "acceptance on offer of final payment" or "total"; and (5) that

DOT's January 17, 2007, notice of intent to declare non-responsible was selective enforcement, used by DOT as leverage in the parties' circuit court case, because the portions of the November 16, 2006, and January 17, 2007, letters concerning the "non-responsible" declaration were drafted by DOT's legal staff, without any precedent.

68. AMEC's first three arguments ("not a contractor", "not a contractor wishing to bid", and "exclusivity of contract specification penalty") are without merit. AMEC admits it is the "contractor" pursuant to the existing interchange contracts between the parties. DOT cannot be expected to "get inside the head" of every corporate contractor to determine if that contractor will ever, in the future, "wish to bid." Just as a statute must be construed in a reasonable manner so as to avoid absurd results (see State v. Webb, 398 So. 2d 820 (Fla. 1981)), so must rules. Finally, just because Supplemental Specification 9-9 only threatened de-certification as a penalty, DOT is not required to ignore applicable statutes and rules and restrict itself to the contract specifications when it administers State contracts and addresses the contractors it employs. Herein, the quoted statutes, rules, and contract terms all apply to AMEC.

69. There are two branches to AMEC's fourth argument. Both are related to DOT's answers to AMEC's interrogatories. Interrogatory No. 1 requested a detailed statement of DOT's

basis for its January 17, 2007, declaration of non-responsibility. As part of a much longer answer, DOT responded " . . . AMEC had not submitted the proper forms or itemized the total amount claimed in a Qualified Acceptance Letter." In response to AMEC's Interrogatory No. 4, DOT responded, in summary, that it agreed it could not require AMEC to use its "Acceptance on Offer of Final Payment" forms (see Findings of Fact 19-21), but it did require the substance of the form.

70. First, there is no significant difference between these interrogatory answers and the DOT witnesses' testimony at hearing, nor are these interrogatory answers and the testimony contrary to contract specifications or any of the correspondence between the parties. While AMEC is entirely correct that the word "total" does not appear in Specification 9-9, the overall thrust of that specification and of all DOT's correspondence was that AMEC was expected to provide "itemized amounts" for each project number. These amounts had to be stated so that DOT's Final Estimates Office could rely upon them as being truly final claims for each project, much as an insurance company sets up reserves against outstanding accident claims, and so that the final finite amount requested by the contractor could be analyzed by DOT for payment and/or negotiation, ultimately leading to a close-out of the contract file(s). Likewise, even the truncated portion of DOT's full answer to Interrogatory No.

1, clearly does not omit DOT's view that, in addition to "itemized amounts," certain mandatory forms were required of AMEC and that AMEC was being held non-responsible for not timely submitting those forms.

71. Specification 9-9 states that a contractor can be de-certified for failure to follow DOT's instructions in the execution of a contract. The letters of instruction by DOT were clearly ignored by AMEC.

72. Ms. Towers' July 19, 2006, written instructions were to submit itemized amounts by project/contract numbers. (See Finding of Fact 18). If anything, the blank forms made these instructions even clearer. (See Finding of Fact 19). Without determining whether or not a total on each project/contract was absolutely necessary to comply with 9-9, it is concluded that DOT was clearly entitled to seek "itemized amounts" (the term specifically used in 9-9) by various components within each project number. Each of AMEC's two claims commingled components of the two project numbers. The November 1, 2006, AMEC letter did not itemize any amounts. Therefore, that letter's attempt to incorporate the two claims, each claim combining the two projects, still did not provide any "itemized amounts" by project number. That was one material flaw in the November 1, 2006, and the February 13, 2007, proposed "qualified acceptances".

73. The second branch of AMEC's fourth argument is a non-issue. Legally, AMEC waived any Section 120.57(1)(e) issues with regard to whether or not the Acceptance on Offer of Final Payment form constituted a "rule" or should have been adopted as a rule. (See Preliminary Statement). Factually, this is not a situation of DOT arbitrarily requiring a specific form. DOT did not require that AMEC use its Acceptance on Offer of Final Payment forms. (See Finding of Fact 31.) In fact, as AMEC is quick to point out, DOT's answer to AMEC's Interrogatory No. 4, states that DOT believes it cannot require that contractors use that specific form but can require that contractors submit the substance of the form.

74. The evidence shows that DOT's Final Estimates Office probably would have accepted a reasonable incorporation by reference, with minimal supporting documentation on each project, provided AMEC had broken down the disputed amounts into the two separate project numbers. Based on the evidence presented (see Findings of Fact 35-36), DOT might have regretted such leniency, but use of a printed form for the balances claimed was not required. Non-use of a standardized form is not a genuine issue herein. What does matter here is that the claims themselves, even if incorporated by reference, did not break the balance claimed by AMEC down by project number, so

AMEC did not provide “itemized amounts,” the term used in Specification 9-9.

75. The remainder of AMEC’s fourth argument seems to be that it is up to DOT's District II Final Estimates Office to sift through voluminous papers in other offices of DOT in order to determine what are “the particulars” of a contractor’s qualified acceptance, before DOT can close out a contract, and that the contractor is not required to timely submit either a regular acceptance or qualified acceptance that meets DOT’s instructions by contract or by letter. This interpretation is inconsistent with the clear language of Supplemental Specification 9-9 and DOT’s Offer of Final Payment.

76. Supplemental Specification 9-9 clearly requires that specificity “in the particulars” of any disputed amount is required from the contractor and that the specificity requirement is designed to prevent any further claims or claim amendments after the disputed amount and supporting particulars have been presented. AMEC’s Project Engineer’s testimony is insufficient to show that even with a diligent search “upstairs and downstairs and in my lady’s chamber,” as it were, Ms. Towers could have deciphered AMEC’s respective balances to resolve the two projects. Therefore, DOT could reject AMEC’s November 1, 2006, and February 13, 2007, letters as qualified acceptance

letters. The second material flaw in AMEC's November 1, 2006, and February 13, 2007, letters was the lack of particulars.

77. Specification 9-9 clearly states the contractor must submit either the regular acceptance or the compliant qualified acceptance within 90 days of the Offer of Final Payment. AMEC did not do either. It is un-refuted that the 21-A and FHWA-47 forms are "contract documents" that must be submitted under DOT direction; that direction of when to submit them was repeatedly given by DOT; and that the dates required by DOT for filing them were repeatedly missed by AMEC.

78. It is not necessary to belabor whether Form 21-A, when finally submitted on February 14, 2007, was compliant. The evidence is clear that AMEC did not timely (by November 7, 2006,) or by any other date instructed by DOT, submit any variety of the 21-A or FHWA-47 forms. It is also clear that AMEC did not timely submit either a regular or qualified acceptance letter which was materially compliant with Supplemental Specification 9-9. AMEC thereby rendered itself subject to being declared non-responsible under the cited statutes and rules.

79. Finally, AMEC's fifth argument, that DOT's intent to declare AMEC non-responsible was related to the parties' lawsuit simply because DOT's legal staff contributed to the contents of

DOT's November 16, 2006, letter, is pure speculation. No credible evidence to that effect was presented.

80. AMEC's corollary argument that this was selective prosecution on a theory that "there have been no prior declarations of non-responsibility separate from de-certifications and therefore the non-responsible declaration in this case must have been selective prosecution due to the parties' lawsuit," is not supported in fact. While admittedly not identical, there have been similar declarations of non-responsibility which are discussed in Findings of Fact 51-54. AMEC's fifth argument also is not supported in law, because the instant case is not, strictly speaking, a case of first impression. Although the declarations as non-responsible in the cases of CPW Enterprises, Inc. d/b/a Cherokee Construction Company v. DOT, DOAH Case No. 03-1253 (RO: 9/18/03; FO: 12/02/03), and Larry Holley Tree and Lawn Spraying, Inc. v. DOT, DOAH Case No. 02-3373 (RO: 3/11/03; FO: 4/24/03), were not based on failure to submit a Letter of Qualified Acceptance after a job was completed, DOT did, therein, successfully declare those contractors "non-responsible," without a concurrent de-certification.

RECOMMENDATION

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

RECOMMENDED that the Department of Transportation enter a final order ratifying its January 17, 2007, declaration of AMEC as non-responsible for 90 days, the 90 days to run from the date of the Final Order.

DONE AND ENTERED this 18th day of January, 2008, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of January, 2008.

ENDNOTE

1/ One Proposed Recommended Order was filed three days late, but has been considered, anyway.

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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.