

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STRAIGHT AND NARROW STRIPING,
INC.,

Petitioner,

vs.

Case No. 15-1101

DEPARTMENT OF TRANSPORTATION,

Respondent.

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings (Division), on June 22, 2015, by video teleconferencing at sites located in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Broderick Smith, pro se
Straight and Narrow Striping, Inc.
Suite 225
1830 North University Drive
Plantation, Florida 33322

For Respondent: Kimberly Clark Menchion, Esquire
Department of Transportation
Mail Station 58
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Tallahassee, Florida 32399-0450

STATEMENT OF THE ISSUE

The issue is whether the Department of Transportation (Department) properly issued a Notice of Intent to Declare Non-Responsible (Notice) to Straight and Narrow Striping, Inc. (S&NS).

PRELIMINARY STATEMENT

The Department issued a Notice to Broderick Smith of S&NS on September 30, 2014. A declaration of non-responsibility prohibits S&NS from bidding on any Department construction or maintenance contract and would prohibit S&NS from acting as a subcontractor, consultant, or material supplier on any Department contract or project during the period of non-responsibility. The Department issued the Notice based upon a Declaration of Contract Default issued to S&NS, regarding Department Contract E4M99, for failure of the company to perform its contract obligations.

S&NS filed a petition for administrative hearing on October 22, 2014. The petition and accompanying documents were filed with the Division on March 2, 2015. The matter was assigned to the undersigned and was scheduled for hearing on June 22, 2015.

At the hearing, Broderick Smith, Petitioner's president, testified on behalf of Petitioner. The Department presented the testimony of Chi-Yu Sheu, a contract manager for Broward County Operations with the Department, and Mike Sprayberry, state

administrator for maintenance contracting for the Department, as witnesses, and offered 14 exhibits, all of which were admitted into evidence.

A one-volume Transcript of the final hearing was filed on July 9, 2015. The Department filed its proposed findings of fact and conclusions of law on July 20, 2015. Petitioner requested an extension of time to file its post-hearing submittal on August 6, 2015. Despite the lateness of the request, the time for filing was extended to August 17, 2015. Petitioner filed its papers on August 18, 2015. Despite the tardiness of Petitioner's filing, the post-hearing submittals of both S&NS and the Department have been fully considered for preparation of this Recommended Order.

References to statutes are to Florida Statutes (2014), unless otherwise noted.

FINDINGS OF FACT

1. The Department is the state agency responsible for coordinating the planning of a safe, viable, and balanced state transportation system. The Department relies on qualified contractors to provide services in order to meet Florida's transportation needs.

2. Broderick Smith owns S&NS, a company that provides maintenance services for the Department and has been a contractor for the Department since 1999. Mr. Smith entered into Contract E4M99 with the Department for sign replacement on

interstate and primary roads. The date of the contract was May 4, 2012, with an award amount maximum of \$250,000.

3. Contract E4M99 incorporates the 2010 edition of the Department's standard specifications for road and bridge construction, as amended, in accordance with a specification package.

4. Pursuant to Contract E4M99, the Department issues work orders. The Department issued Work Order 358 to S&NS on February 24, 2014, with a completion due date of April 10, 2014, to remove and replace post signs. The signs to be removed and replaced were identified as Southbound Flamingo at Red Road split WO-13-21-AM (Flamingo Signs).

5. S&NS was not making progress on the Flamingo Signs work order, and the Department reached out to S&NS on multiple occasions regarding the lack of progress.

6. In March 2014, Mr. Smith discussed Work Order 358 with Courtney Drummond, the Department's District Director of Operations, and, as a result, the work order was modified with a new start date of March 11, 2014, and a completion due date of April 25, 2014.

7. On April 3, 2014, Chi-Yu Sheu, a contract manager for the Department's Broward County operations, reaffirmed the terms of the contract by sending Mr. Smith an email. The email reminded Mr. Smith of the modified start and completion dates and

that all other terms and conditions of the contract remained in full force and effect. The contract provided 45 days for completion of the work and further clarified that an extension of time to complete the work beyond the 45 days was denied.

8. Mr. Sheu sent additional correspondence to Mr. Smith on April 23, 2014, two days before the completion deadline, inquiring about the status of the work and reminding him the work was due on April 25. As of that date, the existing overhead sign panels had not been removed.

9. James Wolf, the Department's District Four Secretary at that time, sent Mr. Smith a letter on May 1, 2014, regarding a previous letter received from him on April 21. Mr. Wolf's letter again reaffirmed the terms of the contract and specificity of the work order.

10. On May 20, 2014, the overhead signs had still not been removed, and Mr. Sheu sent correspondence to Mr. Smith telling him the Work Order 358 had been due to be completed on April 25 and inquiring about his intentions to finish the work.

11. On June 11, 2014, Francis Lewis, the Department's Broward Operations Engineer, sent a pre-notice of default to Mr. Smith informing him that the Department was considering default due to a lack of progress on Work Order 358. The pre-notice stated that as of the date of the letter, no work had been performed, even though the modified due date had been

April 25. S&NS was advised that the Department would proceed with defaulting S&NS under the contract if the work was not completed by June 21, 2014.

12. The Department issued a Notice of Intent to Default to S&NS on July 7, 2014, for failure to commence and complete Work Order 358 within the required time period, as amended, therefore violating Standard Specification 8-9.1. S&NS was given an additional ten days to demonstrate completion of the signs.

13. After proof of completion was still not received by the Department, it issued a Declaration of Default on July 31, 2014, for failure to commence and complete Work Order 358. S&NS was informed it had committed acts or omissions that constitute default under Standard Specification 8-9.1. The specific acts or omissions specified were that Petitioner had failed to begin the work under the contract within the time specified, had failed to ensure prompt completion of the contract, and for any cause whatsoever had failed to carry on the work in an acceptable manner.

14. Pursuant to the Takeover Agreement, the surety company, Travelers Insurance Company of America (Travelers Insurance), assumed financial responsibility for the contract. Travelers Insurance procured another contractor, Florida Safety Corporation, to complete Work Order 358. The work was completed on December 24, 2014.

15. The Department issued a Notice to S&NS on September 30, 2014. When a contractor is found to be non-responsible, it is prohibited from bidding, subcontracting, or supplying material on any Department project for a specified period of time.

16. S&NS filed a petition in response to the Notice. During the pendency of this proceeding, Petitioner has had the ability to bid on Department projects, and Mr. Smith testified at hearing that it had bid on projects in April 2015.

17. S&NS took the position at hearing that the Department failed to provide the proper sign specifications to complete the work order, yet provided no evidence about how the specifications differed from what is required either by industry or the Department's standards.

18. Despite the Department continuously informing S&NS that it was moving towards a default on the contract and despite the numerous extensions given, Petitioner still failed to commence the sign project prior to the completion date as extended by the series of communications from Department personnel to S&NS.

19. Petitioner made repeated reference to "proof given to the department from numerous sign manufacturers stating they would not be able to manufacturer [sic] the sign due to their back log." Petitioner, however, failed to offer any of this proof into evidence at the hearing other than through Mr. Smith's testimony, and, therefore, this line of proof is discredited.

20. Mr. Smith testified that sign manufacturers informed him that the subject signs could not be available for installation in less than 65 days from the date of the order. Had the signs been ordered on February 24, 2014, the commencement date of the contract, they would have been ready for installation by May 1, 2014. This would have been within the numerous grace periods created by the Department's notices prior to the actual Declaration of Contract Default on July 31, 2014, which was not issued until two weeks after the Notice of Intent to Default (giving S&NS one final ten-day period to perform) was issued on July 7, 2014. Petitioner had ample time to complete the project within the contract period as extended by the various steps taken by the Department prior to determining S&NS to be non-responsible.

21. In order to avoid the possibility of a suspension due to a finding of non-responsibility, Petitioner could have requested a self-imposed or voluntary suspension from the Department. Had this been done, the Department has, in some instances, considered this like "time served" when determining whether a suspension is to be imposed and how long that suspension should last. Petitioner did not affirmatively request or offer to undergo a suspension during the pendency of these proceedings.

22. Mr. Smith's testimony lends supports that for a non-specified period of time from Petitioner's challenge on October 22, 2014, to the Notice until sometime in April 2015, when he bid on one or two Department contracts, he believed he was not permitted to bid on contracts due to the Notice being issued. The evidence is not clear on this point, but Mr. Smith testified he became aware in April 2015, he was still permitted to bid on contracts and that he did at that time. He was not awarded any Department contracts at that time or at any time subsequent to that date.

23. Despite the petition to challenge the Notice being filed with the Department on October 22, 2014, the matter was not referred to the Division until March 2, 2015, more than four months later. No explanation was given for this delay.

CONCLUSIONS OF LAW

24. The Division has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2015).

25. Proceedings under the jurisdiction of the Division are de novo in nature. § 120.57(1)(k), Fla. Stat.

26. The Department has the authority to enter into contracts for the construction and maintenance of all roads designated as part of the State Highway System, of the State Park

Road System, or of any roads placed under its supervision by law.
§ 337.11, Fla. Stat.

27. As the party asserting the affirmative of an issue, the Department bears the duty to go forward and the burden of proof by a preponderance of the evidence. Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

28. Section 337.11, Florida Statutes, gives the Department the authority to administer and enter into maintenance contracts. An agency is afforded wide discretion in the interpretation of statutes which it administers. Republic Media, Inc. v. Dep't of Transp., 714 So. 2d 1203, 1205 (Fla. 5th DCA 1998); Atlantic Outdoor Adver. v. Dep't of Transp., 518 So. 2d 384, 386 (Fla. 1st DCA 1987), rev. den., 525 So. 2d 876 (Fla. 1988); and Natelson v. Dep't of Ins., 454 So. 2d 31, 32 (Fla. 1st DCA 1984); rev. den., 461 So. 2d 115 (Fla. 1985).

29. Section 337.16(2) states, "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."

30. Florida Administrative Code Rule 14-22.0141 states:

(1) Contractors who do not possess a Certificate of Qualification shall be determined non-responsible if the Department determines that good cause exists. Good cause shall exist when any one of the

circumstances specified in subsection 14-22.012(1), F.A.C., occurs.

(2) Determination of Contractor Non-Responsibility. The Contractor will be determined to be non-responsible based upon good cause as set forth in subsection 14-22.012(1), F.A.C., for a specific period of time based on the factors specified in subsection 14-22.012(5), F.A.C.

(a) This rule does not limit the Department's ability to reject a bid or cancel an award for a particular contract based upon the contractor being non-responsible.

(b) A determination of non-responsibility shall prohibit a contractor from bidding, subcontracting, or acting as a material supplier on any Department contracts or projects during the period of non-responsibility.

(c) If a contractor is declared non-responsible and the contractor receives an additional determination of non-responsibility, the time periods shall run consecutively.

31. Rule 14-22.012 states:

(1) As provided in Section 337.16(2), F.S., the Department, for good cause, may deny, suspend, or revoke a contractor's Certificate of Qualification. 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 qualification is required by Section 337.14, F.S., shall constitute a determination of non-responsibility to bid on any other Department construction or maintenance contract, and shall prohibit the contractor from acting as a material supplier or subcontractor on any Department contract or project during the period of suspension, revocation, or denial. Good cause shall include the following:

* * *

(d) The contractor or its affiliate defaulted on any contract or a contract surety assumed control of financial responsibility for any contract of the contractor.

* * *

(5) The revocation, denial, or suspension of a contractor's Certificate of Qualification under this Section shall be for a specific period of time based on the seriousness of the deficiency.

Examples of factors affecting the seriousness of a deficiency are:

- (a) Impacts on project schedule, cost, or quality of work,
- (b) Unsafe conditions allowed to exist,
- (c) Complaints from the public,
- (d) Delay or interference with the bidding process,
- (e) The potential for repetition,
- (f) Integrity of the public contracting process,
- (g) Effect on the health, safety, and welfare of the public.

32. The Department's Standard Specification (2010) states:

8-9.1 Determination of Default: The following acts or omissions constitute acts of default and, except as to subparagraphs (i and k), the Department will give notice, in writing, to the Contractor and his surety for any delay, neglect, or default, if the Contractor:

- (a) fails to begin the work under the Contract within the time specified in the Notice to Proceed;
- (b) fails to perform the work with sufficient workmen and equipment or with sufficient materials to ensure prompt completion of the Contract;
- (c) performs the work unsuitably, or neglects or refuses to remove materials or

perform anew such work that the Engineer rejects as unacceptable and unsuitable;

- (d) discontinues the prosecution of the work, or fails to resume discontinued work within a reasonable time after the Engineer notifies the Contractor to do so;
- (e) becomes insolvent or is declared bankrupt, or files for reorganization under the bankruptcy code, or commits any act of bankruptcy or insolvency, either voluntarily or involuntarily;
- (f) allows any final judgment to stand against him unsatisfied for a period of ten calendar days;
- (g) makes an assignment for the benefit of creditors;
- (h) fails to comply with Contract requirements regarding minimum wage payments or EEO requirements;
- (i) fails to comply with the Engineer's written suspension of work order within the time allowed for compliance and which time is stated in that suspension of work order; or
- (j) for any cause whatsoever, fails to carry on the work in an acceptable manner, or if the surety executing the bond, for any reasonable cause, becomes unsatisfactory in the opinion of the Department.
- (k) fails to comply with 3-9.

33. As a maintenance contractor who bids on projects less than \$250,000, S&NS does not possess a certificate of qualification, but may be determined non-responsible and prohibited from bidding, subcontracting, or supplying materials for Department projects.

34. Credible evidence was presented by the Department to establish that S&NS defaulted on Contract E4M99 and that a surety company, Travelers Insurance, assumed financial responsibility for the contract. Defaulting on a contract constitutes a basis

for the Department determining a contractor to be non-responsible pursuant to rule 14-22.012(1)(d).

35. Mr. Smith neither denies the default or that the surety company assumed financial responsibility for the contract.

Rather, Mr. Smith contends that the contract terms were not to his satisfaction and testified that the companies with whom he worked to create the sign under Work Order 358 would not perform within the contractual timeframe. Further, he argued that the sign did not meet unspecified national standards and could not be made by the companies. Mr. Smith failed to provide any specific standards that could not be met or any credible evidence from the sign companies that the signs could not be constructed in a timely manner to meet the terms of the contract.

36. The fact that Travelers Insurance, acting as the surety for Petitioner, was able to take over the contract and deliver and install the sign under Work Order 358 within the 45-day time period specified, makes S&NS' argument even less credible. No credible explanation was given for the excessive delay in having the sign fabricated when it was in the hands of S&NS. The fact that the work was never even begun within the extended timeframe given Petitioner by the Department further erodes the case presented by S&NS.

37. Mr. Smith's argument that the design of the sign was faulty, without concrete evidence or testimony from the sign

companies, is not appropriate for this proceeding. This issue was not raised in the petition for an administrative hearing and is not relevant to whether S&NS should be found non-responsible. Without concrete evidence of communications between Mr. Smith and the Department to prove attempts were made to either modify the design of the sign or formally request additional time to have the sign created and installed, Petitioner falls short of the type of evidence required to rebut the Notice. The only conclusion that can be reasonably drawn in this matter is that S&NS did not complete Work Order 358 in a timely fashion and, therefore, defaulted under Contract E4M99.

38. Except for the four-month delay in referring the petition for administrative hearing to the Division, the Department gave S&NS multiple opportunities to complete the work order, discuss and eliminate any work issues, and proceed through the administrative process. The Department gave no explanation for the delay in referring the case, which cost Petitioner at least three to four months in bringing the administrative process to a close.

39. The Department provided credible evidence and met its burden of proving by a preponderance of the evidence that it followed the statutes and rules governing responsiveness to the terms and conditions of a work order pursuant to the contract entered into by S&NS. The Department must rely on its

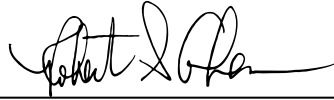
contractors to meet the public's transportation needs within the time frames of the contracts and work orders between the two parties. After providing S&NS several opportunities to complete the work, S&NS chose not to do so and should be deemed a non-responsible contractor for a specified period of time.

40. While ordinarily, the case presented by the Department would support Petitioner being deemed a non-responsible contractor for one year, the Department might consider the impact of the delay in referring the petition to the Division on Petitioner. The three-to-four month delay adds to the time this case took to go to hearing and be resolved through recommended and, ultimately, final order. This delay does not appear to be caused by actions of S&NS. Accordingly, the Department might want to consider shortening the time of non-responsibility by at least three months.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Transportation enter a final order upholding its determination of non-responsibility for a period not to exceed one year for Straight & Narrow Striping, Inc.

DONE AND ENTERED this 4th day of September, 2015, in
Tallahassee, Leon County, Florida.



ROBERT S. COHEN
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.