STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

M AND B LAWN MAINTENANCE
SERVICE, INC.,

Petitioner,

vs. Case No. 16-2567

DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard before Administrative Law Judge Robert L. Kilbride, of the Division of Administrative Hearings ("DOAH"), via video teleconference on September 15, 2016, in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

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For Respondent: Kimberly Clark Menchion, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner's conduct, omissions or actions in failing to execute and provide required documentation regarding

roadway maintenance contracts awarded by Respondent, warrants a finding that Petitioner is "non-responsible" for a two-year period and prohibited from contracting with the state for that period of time.

PRELIMINARY STATEMENT

On March 28, 2016, Respondent, Department of Transportation ("Department"), took written action to declare Petitioner, M and B Lawn Maintenance Service, Inc. ("M&B"), a non-responsible contractor for a two-year period pursuant to section 337.16, Florida Statutes.

This intended action would prohibit M&B from bidding on any state maintenance contracts for the debarred period of time. Likewise, a declaration of non-responsibility would prohibit M&B from being a supplier, subcontractor, or prime contractor on any Department projects for the specified period of time.

Taking exception to this determination, M&B timely requested a hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes, and the matter was referred to DOAH.

The final hearing was held on September 15, 2016. M&B presented the testimony of Jonathan McIntyre and submitted Exhibits 1 through 6, which were admitted into evidence pursuant to the parties' stipulation.

The Department offered the testimony of Michael E. Sprayberry and Alan Autry and offered Exhibits 1 through 48,

which were admitted into evidence pursuant to the parties' stipulation.

The Transcript was filed with DOAH on October 19, 2016. The parties were granted an extension of time to file their proposed recommended orders.

Both parties' proposed recommended orders were then timely filed and considered by the undersigned in preparing this Recommended Order.

References to Florida Statutes are to the 2015 version, unless otherwise indicated.

FINDINGS OF FACT

The undersigned makes the following findings of relevant and material facts:

1. M&B bid on Department Contract E7J12 let on October 9, 2013.

2. M&B bid on Department Contract E1N43 let on January 16, 2014.

3. M&B bid on Department Contract E3082 let on August 13, 2015.

4. M&B bid on Department Contracts E6K44, E6K45, E6K46, and E6K51 let on January 28, 2016.

5. M&B bid on Department Contract E4R75 let on February 5, 2016.

6. M&B does not have a certificate of qualification from the Department, nor is it required to have one.

7. The Department is the state agency responsible for coordinating the planning of a safe and efficient state transportation system. To accomplish that, the Department relies on qualified contractors to provide roadway mowing and other landscaping maintenance services in order to meet Florida's transportation needs.

8. Jonathan McIntyre owns and operates M&B, a company that provides mowing and landscaping maintenance services for the Department. The company was previously owned by his father.

9. The company has been a contractor for the Department for over 30 years and has adequately performed many mowing and landscaping maintenance contracts for the state. "One hundred percent" of M&B's business is derived from mowing and landscaping maintenance contacts with the Department, and the state is its exclusive client.

10. During the hearing, Alan Autry, manager of Contract Administration for the Department, provided an overview of the bidding process. The bidding process begins with a bid solicitation notice which is also known as the advertisement. The solicitation outlines the requirements for bidders and includes project specific information. It also establishes when bids will be received. Resp. Ex. 46.

11. The next step in the bidding process is for the Department to receive and open bids on the date and time identified in the solicitation. Depending upon the nature of the bid, a technical review is done.

12. Once the contract is awarded, the vendor is notified and sent an award letter along with the contract and other pertinent documents for execution. The award letter identifies the date for which the signed contract along with other documents are to be returned to the Department for review to ensure conformance with the solicitation and specifications. Subsequently, the Department has a specific timeframe to execute and enter into the agreement.

13. After being awarded several maintenance contracts as the low bidder, the Department issued a Notice of Intent to Declare Non-responsible ("Notice") to M&B on March 28, 2016, concerning its failure to "execute" eight contracts that had been awarded.[1/]

14. A noteworthy document that must be returned to the Department, along with the signed contract, is a payment performance bond, also known as a contract bond (a document that is signed by or executed by the vendor, and the vendor's surety). Other documents that must be promptly returned include a contract affidavit and insurance confirmation, such as policies and

certificates as required by the contract specifications or "specs." Resp. Ex. 46–48.

15. According to contract specifications 3-6 and 3-7, if the Department does not receive the executed documents from the vendor within ten days, excluding weekends and holidays, the Department may annul the contract, award it to another vendor, or perform the work by other means. Resp. Ex. 47.

16. The solicitations for the contracts in this case expressly incorporated contract specifications 3-6 and 3-7. Resp. Exs. 1, 5, 10, 16, 22, 28, 35, 40.

17. The contracts at issue in this case are considered "low bid" contracts, meaning that the award of these contracts is made to the vendor that submits the lowest cost bid in response to the solicitation, without further inquiry or analysis. Resp. Ex. 48.

18. Concerning Department Contract E7J12, M&B was the initial lowest bidder. The Department awarded the contract to M&B; however, M&B failed to return a signed contract form, contract bond, contract affidavit, and/or sufficient insurance documentation within the ten-day time period. Resp. Exs. 3, 4, 4b.

19. Concerning Department Contracts E1N43, E3082, E6K46, and E4R75, M&B was also the initial lowest bidder. The Department awarded the contracts to M&B; however, M&B failed to

return a signed contract form and required documents within the allotted time period. Resp. Exs. 7-9, 12-15, 30-33, 42-45.

20. Concerning Department Contracts E6K44, E6K45, and E6K51, M&B was not the initial lowest bidder according to preliminary bid tabulations. However, the initial lowest bidder (another company) was found to be non-responsive, and M&B subsequently became the lowest bidder and was awarded those contracts as well. However, M&B also failed to return the executed contract and accompanying documents to the Department within the ten-day period. Resp. Exs. 18-21, 24-27, 36-39.

21. There was no dispute regarding the calculation of the ten-day timeframe for M&B to sign the contract(s) and return the required contract documents.

22. McIntyre admitted during testimony to never signing these contracts or obtaining bond approval "certificates" in a timely fashion for the subject contracts.

23. In enforcement actions like this, the Department considers several factors to determine the appropriate length of time to declare a contractor non-responsible. The Department considers the severity of the situation and makes an evaluation on a case-by-case basis.

24. Maintaining the integrity of the bidding process is also a focus of concern. Typically, the Department will impose

six months to a year of non-responsibility per incident. Resp. Ex. 48.

25. Throughout all the evidence and testimony presented, it was clear to the undersigned that a lack of contract work performance or anticipated work performance by M&B was not the ground(s) for finding M&B "non-responsible." Rather, it was M&B's failure to (1) sign the subject contracts and (2) provide required supporting documents that formed the basis for finding M&B non-responsible.

26. Despite his candid testimony that he did not sign or timely provide the supporting documents, M&B raised several defenses claiming there was *not* sufficient cause to hold M&B "non-responsible."

27. McIntyre explained that a series of events with the Department regarding *another* maintenance contract prevented him from complying with the bonding requirement. He argued that other conduct of the Department, inextricably intertwined with these contracts, belies any finding that M&B was at fault, or non-responsible.[2/]

28. More specifically, M&B asserted that the failure on the part of M&B to "execute" the 2016 contracts cited in the Department's Notice was caused by the Department's failure to timely pay M&B for five months of work which M&B had

completed for the Department on a prior contract, Department Contract E4Q26.

29. Stated differently, M&B argued that it did not obtain required performance bonds on the subject contracts let in 2016 because M&B did not have the funds needed to pay the performance bonds on those contracts. This in turn was due to the Department's failure to pay M&B for five months of work it had completed for the Department on a prior contract, Department Contract E4Q26.[3/]

30. As a part of this defense, evidence was presented that on March 8, 2016, M&B, through its counsel, sent a letter to the Department demanding payment that was overdue on Department Contract E4Q26. Pet. Ex. 1. This included a claim for payment for five months of work M&B had already completed for the Department.

31. After M&B retained counsel and demanded payment, the Department, on March 28, 2016, mailed notice to M&B that the Department was declaring M&B "non-responsible."

32. McIntyre testified that when M&B bid on the subject contracts in 2016, he anticipated that the Department would have timely and regularly paid it the monies the Department owed it on Department Contract E4Q26. The undersigned finds that based on his longstanding relationship with the Department and its

practice of paying M&B each month on Department Contract E4Q26, this reliance was not unreasonable.

33. By all accounts and the reasonable inferences drawn from the evidence and testimony of McIntyre, M&B would have been in a solvent financial position to post performance bonds on the subject contracts let in 2016, but for the fact that the Department had delayed monthly payments for work M&B had performed on Department Contract E4Q26. There was no persuasive or credible evidence presented to dispute this.

34. Likewise, there was no persuasive evidence presented to show or suggest that there were any performance issues related to Department Contract E4Q26 which would have justified a material or significant offset or deduction of what was due to M&B on that contract.

35. When Autry was reviewing the file and evaluating the enforcement options available to the Department, he was *not aware* that counsel for M&B had already written the Department and asserted that M&B had not been paid for five months of work M&B had performed on a prior contract, Department Contract E4Q26.

36. The Department's ongoing monthly payment for work M&B had completed on Department Contract E4Q26 was interrupted and significantly delayed because of problematic language in the E4Q26 contract prepared by the Department. More specifically, the Department had been paying M&B for work on Department

Contract E4Q26 on a monthly basis, for seven months. At some point, the Department was audited by the Department of Financial Services and learned that monthly payments were *not* permitted under that contract's language, as written.

37. In a legitimate and good faith effort to correct the payment delay, the Department drafted and requested that M&B sign a supplemental contract that *it felt* would have corrected the payment delay. As it turned out, when it submitted the supplemental contract to M&B, nearly all 12 months of the work under Department Contract E4Q26 had been completed, and only a few weeks remained on that contract.

38. McIntyre, not being particularly skilled at understanding supplemental contracts, was skeptical and concerned that signing a supplemental contract could jeopardize his ability to insist on getting all the money he was due on Department Contract E4Q26.

39. While McIntyre grappled with how to respond to the supplemental contract proffered by the Department, Michael E. Sprayberry was aware and mulling over the March 8, 2016, letter from M&B's counsel demanding that the Department pay M&B $66,666.65 owed for the five months of work it had completed.

40. In M&B's counsel's March 8, 2016, letter to the Department, which attached M&B's Invoice No. 8 for $66,666.65, he asked for an explanation as to why payment was not being made to

M&B and why the Department was asking M&B to sign a supplemental contract when the contract had been completed by M&B.

41. The Department failed to provide any detailed explanation before issuing its Notice on March 28, 2016.

42. Other important events are worth noting. Prior to issuance of the Notice declaring it non-responsible, M&B had obtained four necessary Bond Approval Advisories dated March 10 and 14, 2016, which verified that all the subject contract bonds were pre-approved by the insurer and were ready to be issued pending receipt of the premium payments. Pet. Composite Ex. 4.[4/]

43. Payment to M&B on Department Contract E4Q26 in the amount of $48,102.65 finally came from the Department on May 16, 2016. Pet. Ex. 5.[5/]

44. Sprayberry acknowledged that the Department quit paying M&B after the seventh month on Department Contract E4Q26, which was a 12-month contract. Sprayberry testified that the Department was "very surprised" when the Department of Financial Services directed the Department to discontinue paying M&B because of the language of the contract entitling M&B to be paid monthly.[6/]

45. Sprayberry forthrightly acknowledged that M&B should have been paid on contract #E4Q26 and that he had difficulty understanding the language of the contract which prompted the Department of Financial Services to suddenly direct the

Department to stop paying M&B on a monthly basis. See generally Pet. Ex. 6.

46. Sprayberry also acknowledged that the "snafu" the parties experienced with the payment provisions of Department Contract E4Q26 was, indeed, "a problem" that "we need to get solved."

47. Insofar as the interruption in monthly payments under Department Contract E4Q26 was concerned, Sprayberry went on to add that the Department was "very surprised" by the audit response by the Department of Financial Services and "didn't count on that." He went on to explain that the Department was also certain that "McIntyre didn't count on that" (meaning the abrupt discontinuation in monthly payments).

48. Once M&B was paid the monies that the Department owed on Department Contract E4Q26, M&B was awarded two additional Department contracts for which it timely returned all required documents and the performance bonds.

CONCLUSIONS OF LAW

49. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2016).

50. Proceedings conducted by DOAH are "de novo" in nature. § 120.57(1)(k), Fla. Stat. A hearing before DOAH is intended to assist in formulating final agency action, not to review and

approve action taken earlier and preliminarily by the agency. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

51. As the party asserting the affirmative of the issue (seeking to designate the contractor as "non-responsible" for a two-year period), the Department bears the burden of proof. J.W.C. Co., supra, and Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977).

52. In preparing a recommended order, it is the evidence presented at the hearing upon which the Administrative Law Judge should rely. As a result, he or she may consider facts and circumstances not previously considered by the agency. See J.D. v. Fla. Dep't of Child. & Fams., 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013), citing with approval Couch Const. Co. v. Dep't of Transp., 361 So. 2d 172 (Fla. 1st DCA 1978). See also Caber Sys., Inc. v. Dep't of Gen. Servs., 530 So. 2d 325, 334 (Fla. 1st DCA 1988).

53. Within the context of chapter 337 and its related state contracting rules and provisions, the discretion reposed in the Department to suspend the ability of contractors to bid on state projects "for cause" has been characterized as being in the nature of "drastic authority and responsibility" involving an important matter and has likewise been described as "highly penal

in nature." White Constr. Co. v. Div. of Admin., State Dep't of Transp., 281 So. 2d 194, 197 (Fla. 1973).[7/]

54. In a similar vein, the right to engage in business is an important right and interference with that right is a serious matter and should only be done in strict compliance with law. Id.

55. Additionally, when suspending a malfeasant contractor's right to bid on public contracts, the First District Court of Appeal approved the determination by an Administrative Law Judge that there must be a showing of fault by the contractor to support a suspension of its certificate of qualification. See generally White Constr. Co. v. State, Dep't of Transp., 535 So. 2d 684 (Fla. 1st DCA 1988).[8/]

56. Since several statutes and rules are implicated in this case, a brief overview is useful.

57. Section 337.16(2), which serves as the foundation of the Department's position, states:

> For reasons other than delinquency in progress, the department, for good cause, may determine any contractor not having a certificate of qualification non-responsible for a specified period of time or may deny, suspend, or revoke any certificate of qualification.[9/]

58. Florida Administrative Code Rule 14-22.0141, which more fully implements the statute, 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.

59. Relevant provisions of rule 14-22.012 state:

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:
>
> * * *
>
> (f) The contractor failed to comply with contract or warranty requirements, or failed to follow Department direction in the performance of a contract.
>
> (g) The contractor failed to timely furnish all contract documents required by the contract specifications, special provisions, or by any state or federal statutes or regulations. If the contractor fails to furnish any of the subject contract documents by the expiration of the period of suspension, revocation, or denial set forth above, the contractor's Certificate of Qualification shall remain suspended, revoked, or denied until the documents are furnished.

60. Insofar as the arguments raised by M&B are concerned, there is a body of jurisprudence addressing defenses and excuses for the nonperformance of the specific terms of a contract.[10/] This body of law indirectly speaks to the "good cause" finding required by chapter 337 that is needed to invoke the discretionary decision to find a contractor "non-responsible."

61. The Restatement of Contracts, section 261, provides:

> § 261 Discharge by Supervening Impracticability. Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of

> which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

See generally, Leon Cnty. v. Gluesenkamp, 873 So. 2d 460,463 (Fla. 1st DCA 2004), and J.C. Gibson Plastering Co. v. XL Specialty Ins. Co., 521 F. Supp. 2d 1326 (M.D. Fla. 2007), both applying the Restatement of Contracts, section 261. The same restatement of the law is adopted and can be found at 11 Florida Jurisprudence 2d Contracts section 263, note 11.

62. In this case, there was ample and compelling proof that McIntyre anticipated the continuation of monthly payments by the Department, and it was at no fault of his own that he was unable to promptly pay for the performance bonds due to the state's abrupt and unexpected discontinuation of monthly payments on Department Contract E4Q26.

63. This expectation on his part was reasonable and justified based on the past course of dealings and custom and usage between the parties involving several months of uninterrupted monthly payments.

64. To that point, a general principle of law is instructive. In Carr v. Stockton, 84 Fla. 69, 92 So. 814 (Fla. 1922), the Florida Supreme Court held that custom or trade usage is implied to be a part of a written contract, and a contract should be interpreted in light of the custom or usage (course of

dealings) between the parties. See also 11 Fla. Jur. 2d Contracts § 167. This principle of law is still followed and is well entrenched in Florida's jurisprudence concerning contracts.

65. A reasonable conclusion to draw from the unique facts of this case, based on the long course of dealings between the parties, is that M&B had valid and compelling reasons for failing to promptly execute the contracts.

66. At no fault of its own, payment was abruptly discontinued by the state frustrating and preventing M&B from securing the performance bond certificates, as it had regularly done in prior cases.

67. Answers from the Department were not forthcoming to its counsel's letter requesting an explanation for the abrupt discontinuation of monthly payments.

68. Even the Department and its staff were confused and very surprised by the Department of Financial Services' audit response, not to mention the confusion in the mind of McIntyre.

69. Based on the more persuasive and credible evidence, the undersigned concludes that had monthly payments on Department Contract E4Q26 continued in early 2016, M&B would have promptly secured the performance bond certificates and performed the other tasks necessary to execute the contracts.

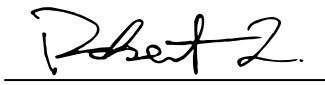
70. Despite the good faith efforts by the parties to work out the contract problem, time, logistics, and poor

communications prevented this, and it was not accomplished. Regardless, under this unique set of facts and on this record, the undersigned cannot conclude that there was good cause to find M&B non-responsible.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Transportation reconsider its preliminary decision and reverse its determination that M&B was non-responsible.

DONE AND ENTERED this 5th day of December, 2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of December, 2016.

ENDNOTES

[1/] Failure to sign a contract and return specific contracts documents within ten days of receiving the award letter is considered by the Department to be a failure by the vendor to "execute" the contract.

[2/] This theory, and lack of good cause to support a determination that it was non-responsible, was raised in the various pleadings and responses M&B filed throughout the proceedings.

[3/] Although there was some dispute regarding what was owed, the Department ultimately paid M&B $48,000.00 of M&B's invoice for $66,666.65.

[4/] It is also significant to note that despite having the bond approvals in hand, M&B had not received the payment it needed to pay for the bonds. While these were not the "certificates" confirming that the bonds were, in fact, secured, they nonetheless are convincing evidence that M&B was diligently attempting to get the documents it needed to be in compliance.

[5/] Unfortunately, the payment date fell more than 45 days after the Notice had already been issued and was too late to forestall the issuance of the Notice.

[6/] M&B had been paid monthly through the seventh month of that 12-month contract when the Department of Financial Services made this decision.

[7/] While White Construction Co. involved a contractor who held a certificate of qualification, this distinction is not controlling. Contractors with or without certification of qualifications are both subject to similar sanctions under section 337.16(2). For instance, a finding of non-responsible for a contractor without a certificate of qualification and subsequent debarment is no less penal than suspending or revoking a contractor's certificate of qualification. Both are prohibited from providing services on state contracts.

The effect upon either is "drastic" and "highly penal in nature." Therefore, White Construction Co. is instructive in either instance and bears upon either certificated or non-certificated contractors under section 337.16(2).

[8/] This legal concept remains viable since chapter 337 continues to require proof of "good cause" for debarment.

[9/] It is significant to note that the "good cause" finding does not mandate a finding of "non-responsible." Rather, by use of the word "may," it gives the agency the discretion to make the finding.

[10/] This analysis does not require the undersigned to interpret ambiguous provisions of the parties' contracts.

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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.