STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida

M AND B LAWN MAINTENANCE SERVICE, INC.,

Petitioner,

vs. DOT Case No. 16-028

DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

FINAL ORDER

The Department took written action to declare M & B Lawn Maintenance Service, Inc., a non-responsible contractor for a two-year period under Section 337.16(2), Florida Statutes. (RO at 2.) Such a declaration would prohibit M & B from bidding on state maintenance contracts, or from being a supplier, subcontractor, or prime contractor on Department projects, for the specified period of time. Id.

M & B timely requested a hearing and this case was referred to the Division of Administrative Hearings. Id. Pursuant to notice a hearing was conducted before the assigned Administrative Law Judge, Hon. Robert L. Kilbride, in September 2016. The ALJ entered a Recommended Order on December 5, 2016. The

Department timely filed exceptions to the Recommended Order on December 20, 2016. M & B did not file a response to the Department's exceptions.

Standards for agency rulings on exceptions

Where a party files exceptions to a recommended order within 15 days of its entry, "[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat.; see also Fla. Admin. Code R. 28-106.217(1) ("Exceptions shall identify the disputed portion of the recommended order by page number or paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record.").

The Department may not reject or modify a finding of fact unless the Department first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings did not comply with essential requirements of law. § 120.57(1)(*l*), Fla. Stat. "Competent, substantial evidence is such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred or such evidence as is sufficiently relevant and

material that a reasonable mind would accept it as adequate to support the conclusion reached." Bill Salter Adver., Inc. v. Dep't of Transp., 974 So. 2d 548, 550-551 (Fla. 1st DCA 2008) (citations and internal quotations omitted).

There is a fundamental difference between the deference an agency must accord to findings of evidentiary fact and findings of ultimate fact infused by policy considerations. "Matters that are susceptible of ordinary methods of proof, such as determining the credibility of witnesses or the weight to accord evidence, are factual matters to be determined by the hearing officer. On the other hand, matters infused with overriding policy considerations are left to agency discretion." Baptist Hosp., Inc. v. Dep't of Health & Rehab. Servs., 500 So. 2d 620, 623 (Fla. 1st DCA 1986); see also McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 579 (Fla. 1st DCA 1977) ("[W]here the ultimate facts are increasingly matters of opinion and opinions are increasingly infused by policy considerations for which the agency has special responsibility, a reviewing court will give correspondingly less weight to the hearing officer's findings in determining the substantiality of evidence supporting the agency's substituted findings.").

The Department may reject or modify conclusions of law over which it has substantive jurisdiction. § 120.57(1)(*l*), Fla. Stat. When rejecting or modifying such conclusion of law, the Department must state with particularity its reasons for rejecting or modifying such conclusion of law and must make a finding that its

substituted conclusion of law is as or more reasonable than that which was rejected or modified. Id.

Specific standards for agency rulings on findings of no good cause

As background, the ALJ's findings of evidentiary fact, which the Department does not dispute, establish that the Department relies on outside contractors to provide mowing and other maintenance services. (RO ¶ 7.) M & B bid on several Department maintenance contracts (RO ¶¶ 1-5) and was awarded them as low bidder (RO ¶¶ 13, 17).

Section 337.16(2), Florida Statutes, which the ALJ found to serve as the "foundation" of the Department's position (RO ¶ 57; the Department's exceptions do not dispute the characterization), provides:

> 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.

(emphasis supplied.) Florida Administrative Code Rule 14-22.0141 provides that "good cause shall exist when one of the circumstances specified in subsection 14-22.012(1) occurs." (RO ¶ 58.) Among these circumstances are (1) failure to comply with contract or warranty requirements and (2) failure to timely furnish all contract documents required by the contract specifications. (RO ¶ 59) (quoting Fla. Admin. Code R. 14-22.012(1)(f), (g)); see also Fla. Admin. Code R. 14-22-012(1)(m) (good

cause includes "[a]ny other circumstance constituting 'good cause' under Section 337.16(2), F.S., exists."); § 337.16(2)(c), Fla. Stat. ("Good cause includes, but is not limited to, circumstances in which a contractor or a contractor's official representative . . . [f]ails 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.").

The ALJ found the contract specifications incorporated into the contracts awarded M & B required M & B to furnish the signed contracts, payment performance (contract) bonds, contract affidavits, and insurance confirmations within ten days of the contracts' award. (RO ¶¶ 14-15.) The ALJ found that M & B failed to furnish these documents within ten days. (RO ¶¶ 18-20.) M & B's owner admitted as much. (RO ¶¶ 21-22.) The ALJ found as a matter of evidentiary fact that these failures to sign the contracts and provide the supporting documents were the basis for finding M & B non-responsible. (RO ¶ 25.) Again, the Department does not dispute these evidentiary findings.

The remainder of the Recommended Order is devoted to whether these admitted facts constitute good cause for determining M & B non-responsible. The ALJ "could not conclude" there was good cause to find M & B non-responsible (RO ¶ 70) and recommended that the Department should reconsider its preliminary decision and reverse its determination that M & B was non-responsible (RO at 20).

What constitutes "good cause" for determining a contractor non-responsible under Section 337.16(2) "is a legal question properly within the expertise of the . . . the administrative agency responsible for that area of the law." See Shapiro v. nemployment Appeals Comm'n, 745 So. 2d 548, 549 (Fla. 4th DCA 1999); Longcor v. Florida Unemployment Appeals Comm'n, 917 So. 2d 288, 288 (Fla. 1st DCA 2005) (same); Ritenour v. Unemployment Appeals Comm'n, 570 So. 2d 1106, 1108 (Fla. 5th DCA 1990) ("The commission in this case, basing its decision on the referee's facts, concluded that the referee's conclusion of law was erroneous. The legislature has given the commission that authority.").

Alternatively, if good cause is a mixed question of law and fact, the Department is not free to reject the ALJ's factual findings, but the Department's "decision on such a mixed question is entitled to 'increased weight when it is infused by policy considerations for which the agency has special responsibility.'" Harloff v. City of Sarasota, 575 So. 2d 1324, 1328 (Fla. 2d DCA 1991) (quoting Santaniello v. Dep't of Prof. Reg., 432 So.2 d 84, 85 (Fla. 2d DCA 1983)). The Department is free to substitute its judgment for that of the ALJ concerning the legal question of whether the evidentiary facts establish good case under Section 337.16(2). See Harloff, 575 So. 2d at 1238 (deferring to Water Management District's legal conclusion in mixed question of law and fact). This is because the Department is responsible for carrying out the powers and duties conferred by the

Florida Transportation Code, § 334.044(30), Fla. Stat., which includes Chapter 337, § 334.01, Fla. Stat., and the policy decision of whether good cause is shown under Section 337.16(2) "must be carefully reviewed by a single, experienced governmental body that is responsible for that function and responsive to the electorate. If the legal interpretation of these policies were left to various hearing officers, the concepts would inevitably receive different meanings before different hearing officers." Harloff, 575 So. 2d at 1327. Because the Department is "charged with the responsibility of enforcing the statutes which govern [its] area of regulation, courts give great weight to [its] interpretations of those statutes." Id. (citations omitted).

Exception to Paragraph 55: The Department takes exception to Paragraph 55 of the Recommended Order. Paragraph 55 is a conclusion of law that "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." (citing White Constr. Co. v. Dep't of Transp., 535 So. 2d 684 (Fla. 1st DCA 1988)). The endnote to Paragraph 55 concludes this concept "remains viable" because Chapter 337 requires proof of good cause. (RO n. 8.)

The Department rejects Paragraph 55 in part. The Department agrees that Chapter 337 requires proof of good cause. If Paragraph 55 is intended as a

conclusion of law that good cause under Section 337.16(2) requires a showing of "fault,"[1] the Department rejects that conclusion of law. White does not hold otherwise. First, White involved the Department's suspension of White Construction's certificate of qualification under Section 337.16(1), Florida Statutes, based on a finding that White Construction was delinquent in its completion of a contract. 535 So. 2d at 685. The Department's declaration here was pursuant to Section 337.16(2), Florida Statutes, which expressly does not apply to cases involving "delinquency in progress."

Second, unlike the applicable rule here, the applicable rule in White expressly made lack of fault an "absolute defense" to a delinquency charge. 535 So. 2d at 685 (citing Fla. Admin. Code R. 14-23.001(3)(c)(2) (1987) (repealed). Specifically, under former Rule 14-23.001(3)(c)(2), a contractor that proved it "had expended its best efforts in a 'diligent attempt to complete its job on time or in an expeditious manner, and was delayed through no fault on [its] part'" was deemed not delinquent. White, 535 So. 2d at 685 (quoting Fla. Admin. Code R. 14-23.001(3)(c)(2) (1987) (repealed)). In White, the ALJ found an additional delay, not attributable to White Construction, was sufficient to extend the contract time,

[1] The Department understands Paragraph 55 as stopping short of drawing this conclusion. Rather, it concludes the First DCA "approved" another ALJ's finding that there must be a showing of fault to support a suspension of a contractor's certificate of qualification in a different factual and legal context.

and therefore recommended a finding of no delinquency. 535 So. 2d at 685. The Department accepted the ALJ's finding of fact that the delay was not White Construction's fault. Id. White held that because the delay was not attributable to White Construction, and because White Construction completed the contract within the extended time, no finding of delinquency was supported. Id.

Thus, while a factual finding that a delay is not the fault of the contractor is a complete defense to a delinquency charge under former Rule 14-23.001(3)(c)(2), White, 535 So. 2d at 685, a showing of fault by the contractor is not required to support a finding of good cause under Section 337.16(2). To the extent Paragraph 55 concludes otherwise, Paragraph 55 is rejected.

The Department finds this conclusion of law is as or more reasonable than the ALJ's rejected conclusion. § 120.57(1)(*l*), Fla. Stat. Because whether good cause exists under Section 337.16(2), Florida Statutes, and the implementing rules is a policy judgment for which the Department has special responsibility, this finding is consistent with precedent requiring the Department to adopt the ALJ's evidentiary factual findings supported by competent substantial evidence, but enabling the Department to reject the legal conclusions or ultimate findings based on those evidentiary findings. Harloff, 575 So. 2d at 1238; Shapiro, 745 So. 2d at 549; Ritenour, 570 So. 2d at 1108; Baptist Hosp., 500 So. 2d at 623; McDonald, 346 So. 2d at 579.

Exceptions to Paragraphs 60 and 61: The Department takes exception to Paragraphs 60 and 61 of the Recommended Order. Paragraph 60 is a conclusion of law that the "body of jurisprudence addressing defenses and excuses for the nonperformance of the specific terms of a contract . . . 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.'" Paragraph 61 is the ALJ's summary of this "body of jurisprudence": it quotes an excerpt of Section 261 of the Restatement of Contracts, which maintains that where a contracting party's performance is made "impracticable" by the occurrence of an event, "the non-occurrence of which was a basic assumption on which the contract was made," the party's duty to perform is discharged. Paragraph 61 also cites two cases and a note to Florida Jurisprudence 2d which recognize Section 261.

The Recommended Order finds as a matter of evidentiary fact that M & B did not obtain required performance bonds on the subject contracts because M & B lacked the funds to pay for them. (RO ¶ 29.) M & B lacked these funds because the Department did not pay M & B for five months of work it completed on a different, earlier contract, Contract E4Q26, on per-month basis. (RO ¶¶ 29, 32-33.) The Department did not pay for this work on a monthly basis because a Department of Financial Services audit discovered monthly payments were not permitted under Contract E4Q26 (RO ¶ 36), which required annual payments (RO

¶ 44). The Department ultimately did pay for services rendered under Contract E4Q26 (RO ¶ 43), but did so more than 45 days after the notice issued (RO n. 5).

These factual findings provide context to the ALJ's conclusion of law that where nonperformance of a contract is made "impracticable" by the occurrence of an event, "the non-occurrence of which was a basic assumption on which the contract was made," the nonperformance is discharged, and this discharge obviates or mitigates a finding of good cause. According to the ALJ, the "event" is not having enough money to obtain performance bonds, the non-occurrence of this "event" was a "basic assumption on which" the subject contracts were made, and the occurrence of this "event" rendered it "impracticable" for M & B to obtain performance bonds. Because it was impracticable, M & B's duty to obtain performance bonds was discharged, and the discharge of this duty "indirectly speaks" to the good cause finding necessary under Section 337.16(2), Florida Statutes.

The Department's exceptions note that DOAH lacks jurisdiction over contract claims. While true, the Department is not convinced Paragraphs 60 and 61 purport to arrogate such jurisdiction to DOAH. Rather, the Department views Paragraphs 60 and 61 as a conclusion of law that these principles of contract law "indirectly" bear on whether good cause under Section 337.16(2) exists under these facts.

The Department rejects that conclusion of law. Rule 14-22.0141 provides that "good cause shall exist when one of the circumstances specified in subsection 14-22.012(1) occurs." (RO ¶ 58.) Among these circumstances are (1) failure to comply with contract or warranty requirements and (2) failure to timely furnish all contract documents required by the contract specifications. (RO ¶ 59) (quoting Fla. Admin. Code R. 14-22.012(1)(f), (g)); see also Fla. Admin. Code R. 14-22-012(1)(m) (good cause includes "[a]ny other circumstance constituting 'good cause' under Section 337.16(2), F.S., exists."); § 337.16(2)(c), Fla. Stat. ("Good cause includes, but is not limited to, circumstances in which a contractor or a contractor's official representative . . . [f]ails 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."). Neither the rules nor the statute envision consideration of common law defenses to contract breach claims.

If such common law defenses could be considered, the Department concludes they do not apply here.[2] The brass tacks conclusion is that M & B

[2] The Department recognizes that the common law of contracts is not within its substantive jurisdiction and that therefore the Department cannot reject or modify conclusions of law based on the common law of contracts. Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1144 (Fla. 2d DCA 2001). That said: (1) as the Department's exceptions point out, DOAH also lacks jurisdiction to rule on contract claims, so Paragraphs 60 and 61 could be considered dicta, and (2) the Department is not rejecting the ALJ's conclusions of law on the common law of

assumed it would have enough money to secure performance bonds, that this assumption proved unfounded, and that M & B should be discharged from its contractual duty to secure performance bonds because M & B's financial inability to secure performance bonds was not its fault.

A comment to Restatement Section 246 establishes that for a supervening event to discharge a contractual duty, "the non-occurrence of that event must have been a 'basic assumption' on which both parties made the contract . . . ." Restatement (Second) of Contracts § 246 cmt. b (1981). The comment further establishes "[t]he continuation of existing market conditions and of the financial situation of the parties are ordinarily not such assumptions, so that mere market shifts or financial inability do not usually effect discharge under the rule stated in this Section." Id. An illustration to the comment demonstrates the point:

> A contracts to produce a movie for B. As B knows, A's only source of funds is a $100,000 deposit in C bank. C bank fails, and A does not produce the movie. A's duty to produce the movie is not discharged, and A is liable to B for breach of the contract.

Restatement (Second) of Contracts § 246 cmt. b, illus. 2 (1981).

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contracts, it is rejecting the ALJ's conclusion of law that the common law of contracts "indirectly" bears on whether good cause is shown under Section 337.16(2) on these facts, a legal matter over which the Department has substantive jurisdiction.

Section 246 also undercuts the implicit conclusion of impracticability. First, "a party is expected to use reasonable efforts to surmount obstacles to performance . . . , and a performance is impracticable only if it is so in spite of such efforts." Restatement (Second) of Contracts § 246 cmt. d (1981). There are no findings that M & B undertook such efforts or that its performance was impracticable despite such efforts.

Also, the rule stated in Section 246

> applies only when the performance itself is made impracticable, without regard to the particular party who is to perform. The difference has been described as that between "the thing cannot be done" and "I cannot do it," . . . . This Section recognizes that if the performance remains practicable and it is merely beyond the party's capacity to render it, he is not ordinarily discharged . . . . [T]he rationale is that a party generally assumes the risk of his own inability to perform his duty.

Restatement (Second) of Contracts § 246 cmt. e (1981). The ALJ made no findings that performance bonds could not be supplied, only that M & B could not supply them. This is insufficient under Section 246.

The Department rejects the conclusions of law in Paragraphs 60 and 61. The Department finds its substituted conclusion of law that Section 246 of the Restatement of Contracts does not bear on whether good cause is shown under Section 337.16(2) on these facts is as or more reasonable than the ALJ's rejected conclusion. § 120.57(1)(*l*), Fla. Stat. Because whether good cause exists under

Section 337.16(2), Florida Statutes, and the implementing rules is a policy judgment for which the Department has special responsibility, this finding is consistent with precedent requiring the Department to adopt the ALJ's evidentiary factual findings supported by competent substantial evidence, but enabling the Department to reject the legal conclusions or ultimate findings based on those evidentiary findings. Harloff, 575 So. 2d at 1238; Shapiro, 745 So. 2d at 549; Ritenour, 570 So. 2d at 1108; Baptist Hosp., 500 So. 2d at 623; McDonald, 346 So. 2d at 579.

Exception to Paragraphs 64 and 65: The Department takes exception to Paragraph 64, a conclusion of law that finds a contract should be interpreted in light of custom and usage, or course of dealing, between the parties. The Department also takes exception to Paragraph 65, a conclusion of law that, "under the unique facts of this case," it is reasonable to conclude M & B had "valid and compelling reasons for failing to execute the contracts."

The Department rejects the Department's exception to Paragraph 64. The common law of contracts is not within the Department's substantive jurisdiction and therefore the Department cannot reject or modify conclusions of law based on the common law of contracts. Deep Lagoon, 784 So. 2d at 1144. If Paragraph 64 was within the Department's substantive jurisdiction, it would agree that, as a general proposition, the parties' course of dealing can be helpful in interpreting an

ambiguous contract. Rafael J. Roca, P.A. v. Lytal & Reiter, Clark, Roca, Fountain & Williams, 856 So. 2d 1, 5 (Fla. 4th DCA 2003) ("Where an agreement is ambiguous, the meaning of the agreement may be ascertained by looking to the interpretation that the parties have given the agreement and the parties' conduct throughout their course of dealings."). The Department notes, however, that the parties do not contend, and the ALJ did not find, Contract E4Q26 is ambiguous. In fact, the ALJ expressly concluded he was not interpreting ambiguous provisions of the parties' contracts (RO n. 10), and his findings of fact expressly find "that monthly payments were *not* permitted under that contract's language, as written." (RO ¶ 36) (emphasis in original). Because there is no ambiguity, the parties' course of conduct cannot supplant the contract's express terms. Indian Harbor Citrus, Inc. v. Poppell, 658 So. 2d 605, 605 (Fla. 4th DCA 1995) ("We hold that when the contract is clear and unambiguous, the contract terms may not be varied by resort to those concepts [of custom and usage and course of dealing].").

To the extent Paragraph 64 concludes otherwise, the Department's exception to Paragraph 64 is rejected, with the reservation that this conclusion is not immune from review. Barfield v. Dep't of Health, Bd. of Dentistry, 805 So. 2d 1008, 1013 (Fla. 1st DCA 2001). Barfield holds an agency may enter a final order under protest and thereafter appeal from its own order as a party adversely affected. Id. (citing § 120.68(1), Fla. Stat.). Accordingly, the Department does not reject, under

protest and subject to the right of the Department to appeal from this order as a party adversely affected, the conclusion of law in Paragraph 64 that the parties' course of dealing supplants the Contract E4Q26's express terms.

To the extent, however, Paragraph 64 concludes that M & B was somehow excused from its duty to fully execute the subject contracts, and that therefore the Department lacks good cause under Section 337.16(2), Florida Statutes, and the implementing rules to determine M & B non-responsible, the Department rejects Paragraph 64, for the reasons stated in its ruling on the Department's exception to Paragraph 70.

The Department also rejects the Department's exception to Paragraph 65. The Department agrees M & B had "valid and compelling reasons for failing to promptly execute the contracts[,]" chief among them the fact that it did not have enough money to obtain performance bonds. (RO ¶ 29.) Paragraph 65 does not conclude that these "valid and compelling reasons" negate the Department's finding of good cause under Section 337.16(2), Florida Statutes, and the implementing rules.

Exception to Paragraph 66: The Department takes exception to Paragraph 66, a conclusion of law that by discontinuing monthly payments, the state "frustrat[ed] and prevent[ed]" M & B from securing performance bonds.

Again, the Department lacks substantive jurisdiction over the common law of contracts, and is therefore unable to reject or modify conclusions of law based on the common law of contracts. Deep Lagoon, 784 So. 2d at 1144. If the Department was able to reject or modify Paragraph 66, it would substitute its finding that the doctrine of frustration "is limited to cases where performance is possible but an alleged frustration, which was not foreseeable, totally or nearly totally destroyed the purpose of the agreement," Valencia Ctr., Inc. v. Publix Super Markets, Inc., 464 So. 2d 1267, 1269 (Fla. 3d DCA 1985), and that not making monthly payments under Contract E4Q26 did not affect, much less totally or nearly totally destroy, the purpose of the subject contracts. To the extent Paragraph 66 concludes the doctrine of frustration applies under these facts, the Department's exception to Paragraph 66 is rejected, with the reservation that this conclusion is not immune from review. Barfield, 805 So. 2d at 1013. Accordingly, the Department does not reject, under protest and subject to the right of the Department to appeal from this order as a party adversely affected, the conclusion of law in Paragraph 66 that the doctrine of frustration applies under these facts.

To the extent, however, Paragraph 66 concludes the doctrine of frustration applies under these facts, and that therefore M & B had no duty to fully execute the subject contracts, and that therefore the Department lacks good cause under Section 337.16(2), Florida Statutes, and implementing rules, the Department

rejects Paragraph 66, for the reasons stated in its ruling on the Department's exception to Paragraph 70.

Exception to Paragraph 69: The Department takes exception to Paragraph 69, a conclusion of law that had monthly payments continued on Contract E4Q26, M & B would have secured the performance bond certificates and otherwise executed the contracts.

The Department rejects the Department's exception to Paragraph 69, which reflects the ALJ's supposition of what M & B hypothetically would have done had the facts been different.

Exception to Paragraph 70: The Department takes exception to Paragraph 70, which finds that the parties made good faith efforts "to work out the contract problem" but "it was not accomplished." Paragraph 70 concludes that "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."

The Department rejects Paragraph 70 in part. The Department agrees that the parties made good faith efforts to resolve the problem, but were ultimately unsuccessful. The Department has no position on what the ALJ could or could not conclude vis-à-vis whether there was good cause to find M & B non-responsible. To the extent Paragraph 70 concludes that there was not good cause to find M & B

non responsible under Section 337.16(2), Florida Statutes, and the implementing rules, the Department rejects Paragraph 70.

The statute provides:

> 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.

(emphasis supplied.)

Rule 14-22.0141 provides that "good cause shall exist when one of the circumstances specified in subsection 14-22.012(1) occurs." (RO ¶ 58.) Among these circumstances are (1) failure to comply with contract or warranty requirements and (2) failure to timely furnish all contract documents required by the contract specifications. (RO ¶ 59) (quoting Fla. Admin. Code R. 14-22.012(1)(f), (g)); see also Fla. Admin. Code R. 14-22-012(1)(m) (good cause includes "[a]ny other circumstance constituting 'good cause' under Section 337.16(2), F.S., exists."); § 337.16(2)(c), Fla. Stat. ("Good cause includes, but is not limited to, circumstances in which a contractor or a contractor's official representative . . . [f]ails 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.").

The Recommended Order finds as a matter of evidentiary fact that M & B did not obtain required performance bonds on the subject contracts because M & B lacked the funds to pay for them. (RO ¶ 29.) M & B lacked these funds because the Department did not pay M & B for five months of work it completed on a different, earlier contract, Contract E4Q26, on per-month basis. (RO ¶¶ 29, 32-33.) The Department did not pay for this work on a monthly basis because a Department of Financial Services audit discovered monthly payments were not permitted under Contract E4Q26 (RO ¶ 36), which required annual payments (RO ¶ 44). The Department ultimately did pay for services rendered under Contract E4Q26 (RO ¶ 43), but did so more than 45 days after the notice issued (RO n. 5).

The Department concludes that the common law contract concepts identified by the ALJ, including impracticability, course of dealing, and frustration of purpose, do not negate a finding of good cause under these facts.

The Department finds its substituted conclusion of law that it has good cause under Section 337.16(2), Florida Statutes, and the implementing rules to find M & B non-responsible is as or more reasonable than the ALJ's rejected conclusion. § 120.57(1)(*l*), Fla. Stat. Because whether good cause exists under Section 337.16(2) and the implementing rules is a policy judgment for which the Department has special responsibility, this finding is consistent with precedent requiring the Department to adopt the ALJ's evidentiary factual findings supported

by competent substantial evidence, but enabling the Department to reject the legal conclusions or ultimate findings based on those evidentiary findings. Harloff, 575 So. 2d at 1238; Shapiro, 745 So. 2d at 549; Ritenour, 570 So. 2d at 1108; Baptist Hosp., 500 So. 2d at 623; McDonald, 346 So. 2d at 579.

Standards governing an agency's ruling on the recommended penalty

By statute, an agency may not increase a recommended penalty "without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action." § 120.57(1)(*l*), Fla. Stat.

The Department's ruling on the recommended penalty

The Department takes exception to the ALJ's recommendation that it reconsider its preliminary decision and reverse its determination that M & B was non-responsible. The Department argues M & B should be determined non-responsible for a two-year period.

The Department's reasons for its partial rejection of the ALJ's conclusions of law in Paragraphs 55, 60, 61, 64, 66, and 70 are stated with particularity above. The Department has made a review of the complete record as required by the statute. § 120.57(1)(*l*), Fla. Stat. Based on that review, the record reflects:

1. The parties stipulate that M & B bid on Contracts E7J12, E1N43, E3082, E6K44, E6K45, E6K51, and E4R75 (Subject Contracts). (July 8, 2016, Joint Stipulation; RO ¶¶ 1-5.)
2. The parties stipulate that M & B does not have, and is not required to have, a certificate of qualification from the Department. (July 8, 2016, Joint Stipulation; RO ¶ 6.)
3. The solicitations for the Subject Contracts expressly incorporated contract specifications 3-6 and 3-7. (Tr. 39-40; Resp. Ex. 1, 5, 10, 16, 22, 28, 35, 40; RO ¶ 16.)
4. Per contract specifications 3-6 and 3-7, if the Department does not receive the signed contract, a payment performance (or "contract") bond, contract affidavit and insurance confirmation, within ten days, the Department may annul the contract, award it to another vendor, or perform the work by other means. (Tr. 36; Resp. Ex. 46-48; RO ¶¶ 14-15.)
5. The Subject Contracts are "low bid" contracts. They are awarded to the vendor who submits the lowest cost bid, without further inquiry or analysis. (Tr. 36-37; Resp. Ex. 48; RO ¶ 17.)
6. M & B was the initial low bidder on Contract E7J12. The Department awarded that contract to M & B, but M & B failed to return a signed contract form, contract bond, contract affidavit, and sufficient insurance

documentation within the ten day period. (Tr. 39-42; Resp. Ex. 3, 4, 4a, 4b; RO ¶ 18.)

7. M & B was the initial low bidder on Contracts E1N43, E3082, E6K46, and E4R75. The Department awarded that contract to M & B, but M & B failed to return a signed contract form and other required documents within the ten day period. (Tr. 42-46, 52-55; Resp. Ex. 7-9, 12-15, 30-33, 42-45; RO ¶ 19.)
8. M & B was not the initial lowest bidder on Contracts E6K44, E6K45, and E6K51. The initial lowest bidder was found non-responsive, and M & B was then awarded those contracts as the lowest responsive bidder. M & B failed to return a signed contract form and other required documents within the ten day period. (Tr. 47-48, 50-55; Resp. Ex. 18-21, 24-27, 36-39; RO ¶ 20.)
9. M & B admitted it never signed the Subject Contracts and did not obtain contract bonds for them. (Tr. 112-115.)
10. The Department provided notice of its intent to declare M & B non-responsible by letter dated March 28, 2016. This notice stated M & B failed to execute the Subject Contracts. The notice apprised M & B of its hearing rights. (R 48.)
11. The Department considered several factors in determining M & B non-responsible for two years, including delay, costs, and the integrity of the bidding process. When a contractor habitually fails to satisfy the contractual

requirements (here, 8 times since 2013), the integrity of the bidding process is undermined. The Department typically will suspend contractors for between six months and two years per incident, depending on the severity of the violation. M & B has been declared non-responsible twice before, resulting in a suspensions of six months and one year. The Department noted that a six month suspension per incident here would result in a suspension of four years. The Department settled on a two year suspension out of lenity. (Tr. 76-78.)

The recommended order notes that a finding of good cause does not mandate a finding of "non-responsible" and that the Department retains discretion to find, or not find, a contractor non-responsible even where good cause is established. (RO n. 9.) The Department agrees. Phillips v. Dep't of Juvenile Justice, 736 So. 2d 118, 119 (Fla. 4th DCA 1999) (holding "even if" petitioner presented "clear, convincing, and unrefuted evidence that he qualified for an exemption, the agency was not under any obligation to give him one. This court may not substitute its judgment for that of the agency on an issue of discretion.") For the foregoing reasons, the Department finds it has good cause to find M & B non-responsible under Section 337.16(2), Florida Statutes, and the implementing rules, and exercises its discretion under the statute (RO n. 9) to find M & B non-responsible for a period of two years.

Findings of Fact

The Department adopts the Findings of Fact in the Recommended Order and incorporates them by reference.

Conclusions of Law

Except as stated above, the Department adopts the Conclusions of Law in the Recommended Order and incorporates them by reference.

Order

The Department has established good cause to determine M & B Lawn Maintenance Service, Inc., non-responsible. The Department therefore determines M & B Lawn Maintenance Service, Inc. non-responsible for two years. M & B is prohibited from bidding on state maintenance contracts, or from being a supplier, subcontractor, or prime contractor on Department projects, for two years from the date this order is rendered.

DONE and ORDERED this 11th day of January, 2017.

Jim Boxold
Secretary
Florida Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
2017 JAN 11 PM 12:55

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, MS 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN 30 DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

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Administrative Law Judge
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