

12-31-02

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

CSH-CLOS

CANCO CONSTRUCTION, INC.,

AT

Petitioner,

vs.

DOAH CASE NO.: 02-3023BID
DOT CASE NO.: 02-080

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

RICK RICHARDS, INC.

Intervenor.

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FILED
DIVISION OF
ADMINISTRATIVE
HEARINGS

FINAL ORDER

This proceeding was initiated by the **Petitioner, CANCO CONSTRUCTION, INC.**, (hereinafter **CANCO**), filing a Notice of Intent to Protest on July 3, 2002, and a Formal Protest and Request for Hearing on July 10, 2002, pursuant to Section 120.57(3)(b), Florida Statutes. The protest was in response to the rejection by the **Respondent, DEPARTMENT OF TRANSPORTATION** (hereinafter **DEPARTMENT**), of **CANCO'S** bid on Contract Number E1C74 for mowing and litter removal on the interstate system in Charlotte and Lee Counties, Florida. **CANCO'S** bid was rejected as non-responsive for supplying false and misleading information, for being a non-resident alien, for failure to pay a subcontractor, for employing an illegal alien, and for performance on other **DEPARTMENT** contracts that in the

judgment of the **DEPARTMENT** could hinder the prompt completion of work on the proposed project.

On July 12, 2002, **RICK RICHARDS, INC.** (hereinafter **RICK RICHARDS**), filed its Motion to Intervene in this matter. On July 31, 2002, the matter was referred to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge and a formal hearing.

A formal administrative hearing was held in this case in Sarasota, Florida, on September 10-11, 2002, before Carolyn S. Holifield, a duly appointed Administrative Law Judge. Appearances on behalf of the parties were as follows:

For Petitioner: John O. Williams, Esquire
 Williams & Holtz, P.A.
 The Cambridge Centre
 211 East Virginia Street
 Tallahassee, Florida 32301

For Respondent: Barbara Gasper Hines, Esquire
 Assistant General Counsel
 Department of Transportation
 605 Suwannee Street, M.S. 58
 Tallahassee, Florida 32399-0458

For Intervenor: John S. Jaffer, Esquire
 Wilson, Johnson & Jaffer, P.A.
 27 South Orange Avenue
 Sarasota, Florida 34236

At the hearing, **CANCO** presented the testimony of two (2) witnesses and offered sixteen (16) exhibits, which were admitted into evidence. The **DEPARTMENT** presented the testimony of seven (7) witnesses and offered twenty-seven (27) exhibits, which were admitted into evidence. **RICK RICHARDS** presented the testimony of one (1) witness, offered

excerpts from three (3) depositions, and offered three (3) exhibits, which were admitted into evidence.

The transcript of the proceedings was filed with DOAH on November 7, 2002. On November 18, 2002, the **DEPARTMENT** and **CANCO** each filed a Proposed Recommended Order, and **RICK RICHARDS** filed a Post-Trial Memorandum. On December 2, 2002, counsel for **CANCO** filed a Notice of Withdrawal of Counsel of Record for Petitioner. On December 31, 2002, the Administrative Law Judge entered a Recommended Order. No exceptions to the Recommended Order were filed.

By letter dated January 3, 2003, **RICK RICHARDS** requested that the Administrative Law Judge make certain findings in the Recommended Order and award attorney's fees and costs to **RICK RICHARDS**, to which no response was filed. On January 10, 2003, the **DEPARTMENT** filed a Motion for Costs, to which no response was filed.

STATEMENT OF THE ISSUE

As articulated by the Administrative Law Judge in his Recommended Order, the issue presented was: "Whether the proposed decision of the Department of Transportation to award Contract No. E1C74 to Intervenor, Rick Richards, Inc., is contrary to the agency's governing statutes, rules, or policies or the specifications of the contract."

BACKGROUND

On June 28, 2002, the bid tabulation was posted awarding **RICK RICHARDS** the Contract Number E1C74 for mowing and litter removal on the interstate system in Charlotte and Lee Counties, Florida. On July 3, 2002, **CANCO** filed a Notice of Intent to Protest and a Formal Protest on July 10, 2002, contesting the **DEPARTMENT'S** rejection of **CANCO'S**

bid as non-responsive. On July 12, 2002, **RICK RICHARDS** filed its Motion to Intervene. The matter was referred to DOAH, and a final hearing was held on September 10, 2002.

THE RICK RICHARDS' LETTER

By its letter, **RICK RICHARDS** appears to be seeking a rehearing and asking the Administrative Law Judge to include certain findings of fact in her Recommended Order. Although neither properly styled as exceptions to the Recommended Order nor articulated as exceptions, even if the letter can be construed as exceptions to the Recommended Order, they are insufficient as a matter of law. It is well established that the **DEPARTMENT** can neither modify an Administrative Law Judge's findings of fact nor make new findings of fact. Perdue v. TJ Palm Associates, Ltd., 755 So. 2d 660 (Fla. 4th DCA 1999); Heifetz v. Dep't of Business Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

In addition, the **DEPARTMENT** has no authority to grant **RICK RICHARDS'** request for fees and costs. In order to be so entitled, the Administrative Law Judge, upon motion, must specifically find that "the nonprevailing adverse party [has] participated in the proceeding for an improper purpose." § 120.595(1)(b), Fla. Stat. A letter, such as that of **RICK RICHARDS**, even if construed to be a motion pursuant to Section 170.595(1)(6), Florida Statutes, is not timely when submitted after jurisdiction has returned to the **DEPARTMENT** for entry of a final order.

As such, **RICK RICHARDS'** letter is both insufficient as a matter of law and untimely.

FINDINGS OF FACT

1. After review of the record in its entirety, it is determined that the Administrative

Law Judge's Findings of Fact in paragraphs 1 through 46 of the Recommended Order are supported by the record and are accepted and incorporated as if fully set forth herein.

2. A total of \$1,518.50 of taxable costs and charges have been incurred by the **DEPARTMENT** for court reporter fees and transcription fees, and court reporter Federal Express charges.

CONCLUSIONS OF LAW

1. The **DEPARTMENT** has jurisdiction over this matter pursuant to Chapter 120, Florida Statutes, and Section 337.11, Florida Statutes.

2. The Conclusions of Law contained in paragraphs 47 through 54 of the Recommended Order are fully supported in law. As such, they are adopted and incorporated as it fully set forth herein.

3. Pursuant to Section 337.11(5)(b), Florida Statutes, "[i]f at the completion of the administrative hearing process and any appellate court proceedings, the department prevails, it shall recover all costs and charges which shall be included in the final order of judgment, excluding attorney fees. Upon payment of such costs and charges by the person filing the protest, the bond shall be returned to him or her."

4. As a matter of law, no relief requested by **RICK RICHARDS** in its January 3, 2003, letter can be granted.

ORDER

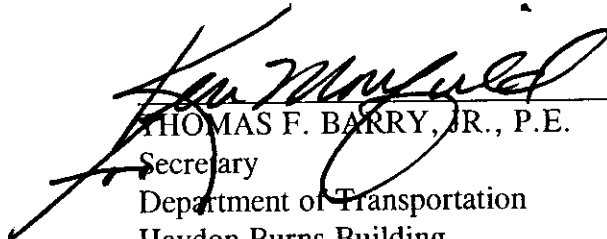
Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED that the Administrative Law Judge's Recommended Order is adopted in its entirety. It is further

ORDERED that Contract Number E1C74 is hereby awarded to **Intervenor, RICK RICHARDS, INC.** It is further

ORDERED that **Petitioner, CANCO CONSTRUCTION, INC.**, shall pay costs in the sum of \$1,518.50, to the **Respondent, DEPARTMENT OF TRANSPORTATION**, upon the expiration of thirty (30) days from the date of this Final Order or at the conclusion of any appellate proceedings emanating from this Final Order, whichever occurs later. If such costs are not paid, steps will be undertaken to recover the amount from the bond posted by **Petitioner, CANCO CONSTRUCTION, INC.**

DONE AND ORDERED this 23rd day of January, 2003.


THOMAS F. BARRY, JR., P.E.
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
2003 JAN 23 PM 2:44

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, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

The Honorable Carolyn S. Holifield
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550

Barbara Gasper Hines, Esquire
Assistant General Counsel
Department of Transportation
Haydon Burns Building
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

Cheryl Sanchious
Department of Transportation
District I Contracts Administrator
301 North Broadway
Bartow, Florida 33830-1249

Ronald Hummel, President
Canco Construction, Inc.
3204 Lena Road
Bradenton, Florida 34235

Robert M. Johnson, Esquire
John Jaffer, Esquire
Wilson, Johnson & Jaffer, P.A.
27 South Orange Avenue
Sarasota, Florida 34236