

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CANCO CONSTRUCTION, INC.,)
)
 Petitioner,)
)
vs.)
)
DEPARTMENT OF TRANSPORTATION,)
)
 Respondent,) Case No. 02-3023BID
)
and)
)
RICK RICHARDS, INC.,)
)
 Intervenor.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on September 10 and 11, 2002, in Sarasota County, Florida, before Carolyn S. Holifield, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

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.

PRELIMINARY STATEMENT

Canco Construction, Inc. ("Canco") filed a Notice of Intent to protest on July 3, 2002, and a Formal Written Protest ("Protest") on July 10, 2002. The Protest was in response to the Department's decision on April 30, 2002, to award Contract No. E1C74 to Rick Richards, Inc., and to reject Canco's bid as non-responsive. On July 12, 2002, Rick Richards, Inc., filed its Motion to Intervene in this matter. On July 31, 2002, the matter was referred to the Division of Administrative Hearings ("Division") for assignment of an Administrative Law Judge to conduct a formal hearing. The case was set for hearing on August 30, 2002. At the request of Intervenor, the hearing was continued until September 11, 2002.

On September 9, 2002, Intervenor filed a Motion to Dismiss ("Motion"). The Department joined in the Motion. On September 11, 2002, prior to the evidentiary part of the final hearing, oral argument was held on the Motion. In the Motion, Intervenor asserted that Petitioner interfered with the discovery process and engaged in discovery abuses. In response, counsel for Petitioner denied these assertions and represented that he had cooperated in discovery, produced all the requested documents that were provided to him by his client, and made available all witnesses within his client's control. The undersigned reserved ruling on the Motion at hearing. Upon consideration of the Motion, the record in this case, and applicable law, the underlying basis for the Motion is insufficient upon which to grant the Motion. Instead, the resolution of this matter requires and is based on the determination of the facts in dispute.

At hearing, Canco presented the testimony of Thomas Brown and Ronald Hummel. The Department presented the testimony of Alan Stein, Mario Resendiz, Randolph Thomas Lehman, James Callihan, James Lovell, Kenneth Akers, and Joseph Medlin. Intervenor called one witness, Elias Salinas, and offered excerpts from the depositions of Russell Graves, Thomas Brown, and Juan Manceras. Canco offered and had Petitioner's Exhibits 1 through 10 and 17 through 22 admitted into evidence.

The Department offered and had Respondents Exhibits 1 through 4, 6 through 10, 13 through 14, 23 through 31, and 33 through 42 admitted into evidence. Intervenor's Exhibits 1 through 3 were admitted into evidence.

Petitioner was represented by counsel throughout these proceedings, until December 2, 2002, when the above named-counsel and law office, filed a Notice of Withdrawal as Counsel of Record for Petitioner.

The two-volume Transcript was filed with the Division on November 7, 2002. Counsel for Petitioner and the Department filed proposed recommended orders and Intervenor filed a Post-Trial Memorandum, all of which were considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. On April 3, 2002, the Department posted its intent to award Contract No. E1C74 ("Contract" or "Contract No. E1C74") to Rick Richards, Inc. ("Rick Richards"). The Contract was for mowing and litter removal on the interstate system in Charlotte and Lee Counties, Florida.

2. Canco's bid was lower than Rick Richard's bid. However, after a thorough review of Canco's proposal and other relevant documents, the Department rejected Canco's bid as non-responsive. The Department's decision was based on its determination that Canco's bid proposal for Contract No. E1C74

provided false and misleading information and that Ronald Hummel ("Hummel"), the president and principal of Canco, is an illegal alien.

3. Hummel is a nonresident alien who was deported from the United States in the fall of 1996, after being convicted of a felony, manslaughter. Since being deported and at all times material to this proceeding, Hummel has lived in Canada.

4. Due to his being deported, Hummel is barred from entering the United States without the permission of the United States Attorney and cannot legally reside or work in this country.

5. At Hummel's direction, Canco, Inc., was incorporated in Florida in 1997, a few months after Hummel was deported from the United States.

6. After Canco was incorporated, the company submitted bid proposals to the Department and has been awarded at least two Department contracts. At the time these prior contracts were awarded to Canco, appropriate Department officials were not aware that Hummel, the principal of Canco, was a nonresident alien.

7. The Florida Department of Transportation Standard Specifications for Road and Bridge Construction 2000 ("Standard Specifications") are incorporated into the Department's

solicitation for Contract No. E1C74, together with additional specifications for the proposal.

8. In its response to the Department's solicitation for proposals for Contract No. E1C74, Canco submitted a bid proposal, signed by Hummel as president of Canco. The bid proposal declared that the bidder carefully and to its full satisfaction examined the Standard Specifications as amended by the specification package and any additional specifications.

9. By responding to the proposal, Canco became subject to Standard Specifications and the revisions thereto.

10. Specification 2-5.1 requires that proposals submitted on behalf of corporations indicate the corporation's bidding office street address. Consistent with this provision, the proposal form has a line marked "Bidding Office Physical Address--City--State--Zip." Hand-written on this blank on Canco's bid proposal is "3204 Lena Road, Bradenton, Florida 34211."

11. Because Hummel was barred from entering the United States, he prepared Canco's bid proposal for the Contract and its other bid proposals for Department projects in Canada. Hummel mailed the subject bid proposal to his accountant in Bradenton, Florida, who then sent it to the Department. Accordingly, the Bradenton, Florida, address listed by Hummel on the Canco proposal as the "bidding physical address" was false.

12. Standard Specification 2-6, Rejection of Irregular Proposals, states that a "proposal is irregular and the Department may reject it if shows omissions, . . . or irregularities of any kind."

13. Canco's bid proposal was non-responsive in that it listed a false "bidding office physical address" and was, thus, properly rejected by the Department pursuant to Standard Specification 2-6.

14. The bid proposal submitted by Canco states in paragraph 11, "The firm certifies that the bidder is not a nonresident alien, or a foreign corporation formed under the laws of a country other than the United States." Hummel signed the form, as president of Canco. By signing the proposal, Hummel certified that the proposal was not being submitted by a nonresident alien, when, in fact, he is a nonresident alien.

15. Petitioner's position is that Canco is an active Florida corporation in good standing and, thus, is permitted to submit proposals and perform work for the Department. Apparently, Petitioner believes that Hummel's status as a nonresident alien is of no import and should not be considered in evaluating Canco's proposal. However, this position is rejected, in view of the facts surrounding the formation and functioning of Canco.

16. Alan Stein ("Stein"), who prepared Canco's Articles of Incorporation ("Articles") and filed them with the Florida Department of State, was listed in the Articles as the sole incorporator. However, no directors were listed in the Articles. According to Section 607.0205, Florida Statutes, when no directors are named, the incorporator is required to hold an organizational meeting. Here, the incorporator took no steps to transfer matter over to directors. Furthermore, Canco never functioned as a corporation. Canco has never had by-laws, has no corporate books, records, or financial statements, has never authorized shareholder dividends, and has held no directors' meetings.

17. At all times since its inception, Hummel was the sole stockholder of the corporation and served as its sole director and sole officer. Also, from the time Canco was formed until approximately mid-August 2002, Hummel was president of Canco.

18. Canco has no real existence and serves only as a mere instrumentality for Hummel. Hummel used the corporation to submit proposals that he could not submit in his own name and to be awarded contracts that could not be legally awarded in his name because of his immigration status.

19. Hummel engaged in improper conduct in the formation and use of Canco. The corporation was formed after Hummel was deported, using a Florida address because Hummel could not

legally live or work in the United States. After the corporation was formed, Hummel consistently used the Lena Road address in Bradenton on all official documents, despite the fact that he was conducting and directing the operations of Canco from Canada.

20. The only signatories on the Canco corporate bank account are Ronald Hummel and his father, John Hummel, who lives in Florida. John Hummel keeps Canco's corporate seal and also submits Canco's time sheets to Stein.

21. In or about 1998, Canco filed a Form 1120S and claimed to be a Subchapter-S Corporation. The form listed the address of the sole shareholder, Hummel, as the Lena Road address in Bradenton, Florida. However, Canco could not legally claim Subchapter-S status because such a corporation cannot have a nonresident alien as a shareholder.

22. Stein, Canco's outside accountant, set up Canco as a Subchapter-S corporation, but would not have done so had he known that Hummel was an illegal alien. Prior to Canco's filing the Protest, Stein did not know that Hummel was a nonresident alien.

23. Neither Hummel nor Canco filed income tax returns for 1999, 2000, or 2001. Despite Stein's repeatedly asking Hummel to provide documents so that Stein could prepare the tax

returns, Hummel did not and, as of the date of the hearing, had not complied with Stein's request.

24. Hummel submitted two notarized documents to the Department as part of Canco's previous bid submittals, a Contractor's Affidavit of Vehicle Registration (Affidavit) and a Power of Attorney (Power of Attorney). Both documents were signed by Ron Hummel and bore the certificate of a Florida notary that Hummel had personally appeared before them. With regard to the Affidavit, Hummel did not sign the document in the notary's presence. Instead, Hummel signed the Affidavit while he was in Canada and then sent it to Florida where it was notarized. As a result of this action, the Affidavit was a false document.

25. As to the Power of Attorney, there was conflicting testimony regarding whether Hummel signed the document in the notary's presence. Hummel testified that he signed the Power of Attorney while he was in Canada. Contrary to Hummel's testimony, the notary who allegedly witnessed Hummel execute the document testified that Hummel was in Florida and in the notary's presence when the document was signed. Given the conflicting testimony, it is difficult to ascertain which version is true. However, regardless of which version is true, the effect and conclusion is that Hummel acted improperly. If Hummel signed the Power of Attorney in the presence of the

notary who was in Florida, Hummel was in Florida illegally. On the other hand, if Hummel signed the document while he was in Canada and then sent it to Florida to be notarized, Canco, through Hummel, submitted a false document to the Department.

26. Petitioner's bid was non-responsive in that Hummel falsely certified that the bidder is not a nonresident alien. This false certification by Hummel is a proper basis for the Department's rejecting the bid pursuant to Standard Specification 2-6.

27. The Standard Specifications, Section 2-11 provides in pertinent part the following:

The Department may disqualify any bidder and reject the bidder's proposal or proposals for any of the following reasons:

* * *

(e) Uncompleted work on other projects that, in the judgment of the Department could hinder or prevent the prompt completion of the proposed work.

(f) Failure to pay or satisfactorily settle all bills due for labor and material on other contracts in force at the time of advertisement for bids.

* * *

(h) Employment of unauthorized aliens in violation of Section 274A(e) of the Immigration and Nationality Act.

28. The Department rejected Canco's bid proposal because Canco had failed to complete work on other projects; failed to settle a bill due for labor on another contract; and employed an unauthorized alien in violation of the Immigration and

Naturalization Act. These all constitute a proper basis for rejecting Canco's bid proposal pursuant to Standard Specification 2-11.

29. Hummel submitted false claims to the Department on behalf of Canco for payment for herbicide sprayers and supplied the licenses of two men, James Callihan ("Callihan") and Randall Thomas Lehman ("Lehman"). Lehman never worked for Canco, did not give Canco permission to submit his license to the Department, and did not give a copy of his license to Hummel or any other person associated with Canco. The copy of Lehman's license that Hummel submitted was a copy of the license that the Department had previously supplied to Hummel in response to a public records request for documents from Rick Richards' file.

30. Callihan worked for Canco for three or four days in late March or early April 2002, but has not been paid in full for the work he performed for Canco. The failure of Canco and/or Hummel to pay Callihan for the services he provided on a Department project that was in force when the subject bid was advertised is a basis to reject Canco's proposal pursuant to Standard Specification 2-11(f).

31. After Callihan was no longer associated with Canco, he learned from the Department that the copy of the license that had been submitted by Hummel had expired. Immediately

thereafter, on or about June 10, 2002, Callihan contacted Hummel and demanded that his license not be used by Canco.

32. Hummel billed the Department for \$50,473.53 for herbicide spraying and received payment for such services by falsely claiming Lehman and Callihan were involved in the work for which the claim was submitted. The claim was for work that was allegedly performed after Callihan had demanded that his license not be used and when Callihan was no longer associated with Canco or Hummel. As noted in paragraph 29, Lehman was never associated with Hummel or Canco.

33. Canco's payroll records show no payments made to either Callihan or Lehman, although Hummel submitted their licenses to the Department indicating that they had performed herbicide services required for the Department project Canco was working on in the summer of 2002.

34. In the summer of 2002, Hummel directed Mario Resendiz, who was not a licensed herbicide sprayer, to spray herbicide on a Department project. Resendiz told Hummel that he did not have a license, but Hummel still told him to spray herbicide, which Resendiz did.

35. The herbicides used in roadside spraying, if used or applied incorrectly, can be harmful to people, animals and the environment. Accordingly, these chemicals are to be used only by licensed professionals. Here, the claim filed by Hummel for

herbicidal spraying allegedly done in the summer of 2002, was false. Therefore, the Department could not determine and Canco and/or Hummel did not establish that the herbicidal spraying was completed.

36. Based on the foregoing, the Department was authorized to reject Canco's proposal for failure to complete work on another project, which in the Department's judgment could hinder or prevent prompt completion of the work on the proposed project pursuant to Standard Specification 2-11(e).

37. Hummel has broad and almost exclusive authority of the overall and day-to-day operations of Canco. Hummel prepared and signed bids for Canco, supervised Canco employees, was the Department's contact person for Canco, told Department inspectors that he was on Department job sites, and, in September 2002, visited the Department's Sarasota Maintenance Yard regarding Canco business. No evidence was presented to indicate that the responsibilities now carried out by Hummel would be assigned to someone else.

38. Hummel has regularly received checks from Canco for unspecified amounts twice a month. Hummel testified that the money that he received from Canco was in the form of shareholder dividends. However, this testimony is not credible in light of the fact that Canco never held shareholders' meetings or directors' meeting where dividends were declared.

39. Hummel is an employee of Canco, and the money he receives from Canco twice a month is compensation. Because Hummel is an employee of Canco and is also a nonresident, unauthorized alien, the Department may reject the bid proposal submitted for Contract No. E1C74 pursuant to Standard Specification 2-11(h). Also, Subsection 448.09(1), Florida Statutes, makes it unlawful to employ an alien who is not duly authorized to work by the immigration laws or the Attorney General of the United States.

40. Standard Specification 5-8.3 requires that contractors have a supervisor, who is available at or reasonably near the jobsite at all times on a 24-hour basis and who speaks and understands English. Hummel testified that Elias Salinas ("Salinas") and Juan Manceras ("Manceras") were supervisors who worked, and presumably would work, on Department projects being performed by Canco. However, Salinas and Manceras have never performed supervisory duties, were not given the title of supervisor, and were not paid any more than other workers on the job. Salinas and Manceras were only tractor or truck drivers, and not supervisors. Moreover, even if Salinas and Manceras were supervisors, they would not meet the requirement of Standard Specification 5-8.3 because they speak only limited English.

41. Standard Specification 5-8.3 also requires that a contractor submit, by certified mail, the phone numbers and names of personnel designated to be contacted in cases of emergencies. Hummel and/or Canco have never provided this information to the Department for projects it has previously worked on or for the bid proposal for Contract No. E1C74. However, based on Hummel's admission, he is the contact person. In fact, for most, if not all, written communication between the Department and Canco, Hummel was the contact person.

42. Further indication that Hummel is the contact person for Canco is the fact that the telephone and fax number used by Canco and listed on its bid proposal for Contract No. E1C74 is a toll free telephone number located in Hummel's house in Canada.

43. Petitioner's failure to comply with Standard Specification 5-8.3 is a proper basis for the Department's rejecting Canco's bid proposal.

44. Standard Specification 5-8.2 requires that a contractor provide a superintendent with "the full authority to receive instructions from the Engineer and to execute orders or directions of the Engineer, including promptly supplying any materials, tools, equipment, labor, or incidentals that may be required." Hummel testified that he is the contact person within the meaning of this provision and that, depending on the situation, he would then contact someone else. Standard

Specification 5-8.2 clearly contemplates a superintendent who is available at or reasonably near the job site. In this case, Hummel is "1200 miles" away and is precluded from being available or reasonably near the job site. Canco's failure to comply with this provision is a basis for the Department's rejecting the bid proposal.

45. A few weeks prior to this hearing, Hummel took steps which he viewed as removing himself as president of Canco and appointing a new president. In mid-August 2002, in a telephone conversation, Hummel asked his friend, Thomas Brown ("Brown"), to serve as president of Canco and Brown agreed to do so. Brown is listed as the president of Canco on the August 22, 2002, annual report filed with the Florida Department of State. However, Brown has no duties, has no knowledge about Canco's Board of Directors, and does not know who Canco employees or supervisors are. As of the date of the hearing, Brown's salary and benefits had not yet been determined.

46. Notwithstanding Hummel's designating Brown as the president of Canco, Hummel has complete power to direct the activities of Canco and the actions of Brown. The credible testimony of Brown was that, with regard to Canco, he will follow Hummel's orders. In Brown's only action as president, Brown signed a bid proposal and Disadvantaged Business (DBE) statement submitted to the Department. However, Brown saw only

the pages that he signed. Hummel prepared that bid, which was submitted in Canco's name, and he remains the sole director and sole stockholder of the company.

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter presented herein, pursuant to Subsection 120.57(3), Florida Statutes.

48. Canco has challenged the Department's proposed agency action of determining that Canco's proposal is non-responsive.

49. This proceeding is de novo and for the purpose of evaluating the action that was taken by the Department in order to determine whether that action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid specifications. See Subsection 120.57(3)(f), Florida Statutes, and State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998). From the time the Department posted the intent to reject Canco's bid proposal as non-responsive and Canco filed its Protest, the Department had the opportunity to further review the proposal in light of the claim raised by Canco. Accordingly, the de novo proceeding encompasses a review of all of the Department's actions leading up to this proceeding.

50. In order for Canco to prevail, it must establish the proposed action by the Department was clearly erroneous,

contrary to competition, arbitrary, or capricious. Subsection 120.57(3)(f), Florida Statutes. Canco must meet that standard by a preponderance of the evidence. Subsection 120.57(1)(j), Florida Statutes.

51. An arbitrary decision is one not supported by facts or logic, or one that is despotic. To act capriciously is to act without thought or reason or to act irrationally. Agrico Chemical Co. v. State, et. al., 365 So. 2d 759 (Fla. 1st DCA 1978).

52. In determining whether the Department's actions were clearly erroneous, the appearance of error and the fact that reasonable persons may disagree with the actions do not constitute clear error. Capeletti Bros., Inc. v. State, Department of Transportation, 432 So. 2d 1359 (Fla. 1st DCA 1983). However, under Subsection 120.57(3)(f), Florida Statutes, the fact-finder is required to find for the Department unless the Department was clearly erroneous, contrary to competition, arbitrary, or capricious.

53. The evidence established that Canco is merely an instrumentality or alter ego of Hummel. Moreover, as reflected in paragraphs 16 through 25, Hummel engaged in improper conduct in the formation and use of the corporation. See Bellairs v. Mohrmann, 716 So. 2d 320 (Fla. 2d DCA 1998). Therefore, the corporate veil should be and is disregarded.

54. Petitioner failed to demonstrate that the Department's actions were clearly erroneous, contrary to competition, arbitrary or capricious. Likewise, Petitioner has failed to establish that the intended contract award to Rick Richards is contrary to the Department's governing statutes, applicable rules or policies, or the specifications of the request for proposals.

RECOMMENDATION

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

RECOMMENDED that the Department of Transportation issue a final order that rejects the bid proposal submitted by Canco Construction, Inc., awards Contract No. E1C74 to Rick Richards, Inc., and dismisses Canco's Bid Protest.

DONE AND ENTERED this 31st day of December, 2002, in Tallahassee, Leon County, Florida.

CAROLYN S. HOLIFIELD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of December, 2002.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 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.