

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LARRY HOLLEY TREE AND LAWN)
SPRAYING, INC.,)
)
Petitioner,)
)
vs.) Case No. 02-3373
)
DEPARTMENT OF TRANSPORTATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings (DOAH) held a formal hearing in this cause in Live Oak, Florida, on February 3, 2003. The following appearances were entered:

APPEARANCES

For Petitioner: Larry Holley, President
Larry Holley Tree and
Lawn Spraying, Inc.
Route 11, Box 588
Lake City, Florida 32502

For Respondent: Barbara G. Hines, Esquire
Department of Transportation
605 Suwannee Street
Haydon Burns Building, Mail Stop 58
Tallahassee, Florida 32399-0458

Angela T. Miller, Esquire
Department of Transportation
1109 South Marion Avenue
Mail Stop 2008
Lake City, Florida 32025-5874

STATEMENT OF THE ISSUE

The issue for determination is whether the Respondent should declare the Petitioner "non-responsible" for a period of one year; and, accordingly, ineligible to bid on any Respondent contract or perform as a material supplier, subcontractor, or consultant with regard to any Respondent contract for that period of time.

PRELIMINARY STATEMENT

By letter dated July 30, 2002, the Respondent's representative notified the Petitioner that the Respondent intended to declare the Petitioner non-responsible, pursuant to Section 337.16, Florida Statutes, and Rule 14-22.0141, Florida Administrative Code, for a period of one year because of the behavior, conduct, and work performance of the Petitioner's president.

On August 8, 2002, the Petitioner's request for a formal administrative hearing with regard to the Respondent's intended action was received by the Respondent.

Subsequently, on August 22, 2002, the case was forwarded to DOAH for formal proceedings.

During the final hearing, the Petitioner presented four exhibits and the testimony of one witness. The Respondent presented the testimony of eight witnesses and seven exhibits. The Transcript of the proceeding was filed with DOAH on February 19, 2003.

The parties' post-hearing submissions have been reviewed and considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. On July 30, 2002, the Respondent sent the Petitioner a Notice of Intent to declare the Petitioner non-responsible to bid on or be connected in any way for a period of one year with any contract issued by the Respondent. Reasons for the intended action, as cited in the Notice were: 1) numerous incidents involving unprofessional behavior on the part of the Petitioner's president in his relations with the Respondent's employees in the course of performing contractual work for the Respondent; 2) the attempt by the Petitioner's president to avoid contractual responsibility in a previous agreement with the Respondent by insisting that the Respondent's employees perform functions allocated to the Petitioner by the agreement; 3) attempts by the Petitioner's president to dictate which of the Respondent's employees would oversee contracts involving the Petitioner; 4) attempts by the Petitioner's president to remove the Respondent's employees from supervision of contracts involving the Petitioner when the employees disagreed with him; 5) substandard performance by the Petitioner as evidenced by contractor field performance scores on contracts with the Respondent; and 6) the attempts of the Petitioner's president to receive payment from the Respondent at the rate paid for more lucrative "spot" applications

as opposed to less highly paid "strip" applications when the contractual arrangement provided that the Respondent would determine the applicable rate. This activity by the Petitioner resulted in an unnecessary administrative burden to the Respondent's contract manager.

2. The Petitioner's president has threatened, intimidated, and displayed unprofessional behavior toward Respondent's employees. By letter dated October 1, 2001, he called the Respondent's employees "incompetent" and avowed that "this is like letting the thief watch the vault or putting the dog inside the chicken pen, at best, letting the blind lead the blind. Please Lord, help their ignorance."

3. By letter to the Respondent dated May 3, 2002, the Petitioner's president accused the Respondent's employees of going "to the very depths of evil or unfair competition-selective enforcement."

4. By letter to the Respondent dated May 20, 2002, the Petitioner's president accused the Respondent's personnel of "evil and corrupt abuse of power by a handful of revengeful men" and avowed that the Respondent selectively enforced its contracts and inflicted evil.

5. Several letters continued in the same vein from the Petitioner's president to the Respondent over ensuing months in which the Petitioner's president referred to various of the

Respondent's employees as stupid, incompetent, slothful, unknowledgeable, inexperienced, ignorant, ungodly, and wicked.

6. On July 3, 2002, the Petitioner's president called the Respondent's maintenance yard and spoke with the Respondent's employees, subjecting them to a tirade of extreme profanity, accusations, and threats.

7. On another occasion, the Petitioner's president told the Respondent's employees that he would resolve a problem with a Respondent's employee with something Petitioner's president had under his truck seat. The involved Respondent's employees assumed that the Petitioner's president was referencing a weapon under the seat of the truck.

8. In the course of a July 11, 2002, meeting, the Petitioner's president became loud and abusive to the extent that he could be heard through the walls of the Respondent's facility where the meeting was conducted.

9. Effected Respondent's employees were intimidated by the Petitioner's president and took his various threats and harangues of retaliation seriously.

10. As established by the conduct of the Petitioner's president at the final hearing, where he frequently referenced a recent stroke as the reason for his emotional manner, the Petitioner's president presents as unstable and threatening to others who disagree with him.

11. The Petitioner's president attempted to avoid the Petitioner's responsibilities under contracts with the Respondent, seeking to have the Respondent's employees tell the Petitioner's employees what to do on the job in the performance of contractual duties. Such an action by the Respondent's employees was appropriately considered by them to be beyond the scope of their responsibilities, since the agreements between the Petitioner and the Respondent basically specified that the Respondent determined the scope of work to be done while the Petitioner determined the methods to accomplish the specified tasks. Supervision of a contractor's employees is the duty of the contractor, not the Respondent.

12. The Petitioner's contractor field performance scores on Respondent contracts E2E47 and E2E27 were 48 and 51, respectively, well below the Respondent standards of acceptability that begin with a minimum score of 70 out of a possible 100 points. The scores were merited based on the Petitioner's failure to timely clean up tree trimmings, tree limbs, rubble and debris near roadways where such trash presented potential safety hazards to the motoring public.

13. On Respondent contract E2D95, the Petitioner's president knew that the scope of work involved spraying herbicide on a "spot" basis and a "strip" basis with the Respondent to determine which type would be applicable to each particular work order it

issued to the Petitioner under the contract. Despite these requirements of the contract, the Petitioner's president attempted to receive payment for the "spot" or higher-priced application when compliance with contractual provisions required that Petitioner accept payment at the lesser rate for "strip" application. By not complying with the contract in this respect, the Petitioner's president created unnecessary administrative burdens for the Respondent's contract manager.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Sections 120.569 and 120.57(1), Florida Statutes.

15. The Respondent is asserting that the Petitioner in this case is non-responsible. Affirmation of that issue must be supported by a preponderance of the evidence in these proceedings. Agrico Chemical Company v. State Department of Environmental Regulation, 365 So. 2d 759 (Fla. 1st DCA 1979).

16. The Respondent's notice of intent to declare the Petitioner non-responsible is issued pursuant to Section 337.16, Florida Statutes, and Rule 14-22.0141, Florida Administrative Code.

17. Section 337.16(2), Florida Statutes, in pertinent part, reads as follows:

(2) For reasons other than delinquency in progress, the department, for good cause, may determine any contractor not having a certificate of qualification nonresponsible for a specified period of time or may deny, suspend, or revoke any certificate of qualification. Good cause includes, but is not limited to, circumstances in which a contractor or the contractor's official representative:

(a) Makes or submits to the department false, deceptive, or fraudulent statements or materials in any bid proposal to the department, any application for a certificate of qualification, any certification of payment pursuant to s. 337.11(10), or any administrative or judicial proceeding;

18. The Petitioner has violated statutory proscriptions of Section 337.16(2), Florida Statutes, due to failure to comply with contract requirements of payment or performance as exemplified by the Petitioner's demands for and attempts to obtain higher payment spot spraying as opposed to the agreed-upon strip spraying rates of payment in contracts E2E47 and E2E27.

19. Rule 14-22.0141, Florida Administrative Code, reads in pertinent part, as follows:

14-22.0141 Contractor Non-Responsibility.

(1) Contractors who wish to bid for the performance of construction contracts less than or equal to \$250,000, or any maintenance contracts, are presumed to be responsible bidders unless the Department determines that good cause exists to declare the contractor non-responsible, which shall include the following:

(a) One of the circumstances specified in Section 337.16(2), Florida Statutes, occurs:

- (b) The contractor or its affiliate defaulted on any contract, or the contract surety assumed control of or financial responsibility for, any contract of the contractor;
- (c) The contractor's qualification to bid is suspended, revoked, or denied by any public agency or semi-public agency;
- (d) The contractor made or submitted to the Department false, deceptive, or fraudulent statements, certifications, or materials in any claim for payments or any information required by any Department contract;
- (e) The contractor failed to comply with contract requirements, or failed to follow Department direction in the execution of a contract;
- (f) The contractor did not pay its subcontractors or suppliers in a timely manner or in compliance with contract documents;
- (g) The contractor or affiliate(s) has been convicted of a contract crime, as provided in Section 337.165, Florida Statutes;
- (h) An affiliate of the contractor has previously been determined by the Department to be non-responsible, and the specified period of suspension, revocation, or denial remains in effect;
- (i) The contractor has demonstrated instances of poor or unsatisfactory performance, deficient management resulting in project delay, poor quality workmanship, a history of payment of liquidated damages, untimely completion of projects where liquidated damages were not paid, uncooperative attitude, contract litigation, claims, or defaults;
- (j) When the Department determines that any other circumstance constituting "good cause" under Section 337.16(2), Florida Statutes, exists.

(2) Determination of Contractor Non-Responsibility. The Contractor will be determined to be non-responsible and ineligible to bid on Department contracts for a period of time, based on the seriousness of the deficiency.

(a) Examples of factors affecting the seriousness of a deficiency are:

1. Impacts on project schedule, cost, or quality of work;

2. Unsafe conditions allowed to exist;
3. Complaints from the public;
4. Delay or interference with the bidding process;
5. The potential for repetition;
6. Integrity of the public construction process;
- and
7. Effect on the health, safety, and welfare of the public.

20. Again, the Petitioner's unprofessional and bizarre behavior, failure to comply with contract requirements, attempts to evade or allocate the Petitioner's responsibilities to the Respondent's employees, and below acceptable performance scores is sufficient to determine that the Petitioner is in violation of provisions of Rule 14-22.0141, Florida Administrative Code.

RECOMMENDATIONS

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

RECOMMENDED:

That a final order be entered finding the Petitioner to be non-responsible due to violations of Section 337.16(2), Florida Statutes, and Rule 14-22.0141, Florida Administrative Code.

DONE AND ENTERED this 11th day of March, 2003, in
Tallahassee, Leon County, Florida.

DON W. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of March, 2003.

COPIES FURNISHED:

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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.

LARRY HOLLEY
LARRY HOLLEY TREE &
LAWN SPRAYING, INC.
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