AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 1369304
FLORIDA SOL SYSTEMS INC
7055 SW 10TH ST
MIAMI FL 33144-4607

RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 2010-83589L

O R D E R

This matter comes before me for final Agency Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated April 27, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **October, 2010**.

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 1369304
FLORIDA SOL SYSTEMS INC
RODOLFO GUTIERREZ
7055 SW 10TH ST
MIAMI FL 33144-4607

PROTEST OF LIABILITY
DOCKET NO. 2010-83589L

RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated April 27, 2010.

After due notice to the parties, a telephone hearing was held on August 6, 2010. An attorney appeared on behalf of the Petitioner. The Petitioner's president was called as a witness. The Joined Party appeared and testified on his own behalf. A tax specialist II appeared and testified on behalf of the Respondent.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were received.

Issue:

Whether services performed for the Petitioner by the Joined Party constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a subchapter S corporation, incorporated in 1989 for the purpose of running a satellite system installation business.

2. The Joined Party approached the Petitioner while seeking work. The Petitioner offered employment. The Joined Party requested to be allowed to work as an independent contractor.

3. The Joined Party provided services as a technician supervisor for the Petitioner from January 19, 2009, through February 2010.

4. The Joined Party would check in to get work orders for the day. The Joined Party would then distribute the work orders to the technicians available for that day. The Joined Party would make certain that the technicians had whatever equipment was needed to complete the work order. The Joined Party would perform spot checks to assure that the technicians were performing the work to the Petitioner's standards.

5. The Joined Party was required to use a camera while performing the spot checks. The Joined Party provided his own camera. The Petitioner allowed the Joined Party to borrow a vehicle from the Petitioner while the Joined Party had no vehicle.

6. The Joined Party determined his own hours based upon the needs of the job. The Joined Party was not given any supervision or instruction by the Petitioner. The Joined Party had a key to the Petitioner's place of business and was free to come and go outside of normal business hours.

7. The Joined Party is an SBCA Certified Installer. The Joined Party was certified prior to making contact with the Petitioner.

8. The Joined Party was paid a salary of $800 per week.

9. The Joined Party was allowed to work for a competitor.

10. The Joined Party could subcontract the work.

Conclusions of Law:

11. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.

12. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).

13. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987).

14. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.

15. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:

    (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.

(2) The following matters of fact, among others, are to be considered:
(a) the extent of control which, by the agreement, the business may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant;
(j) whether the principal is or is not in business.

16. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often cannot be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

17. The evidence presented in this case reveals that the Petitioner did not control where, when, or how the Joined Party performed the work. The Joined Party was free to set his own schedule and work as many or as few hours as the Joined Party wished. The Petitioner's sole concern was that the work was performed. The Joined Party had access at all hours to the Petitioner's place of business and could perform the work at any time. The Petitioner did not instruct the Joined Party as to how the work should be performed.

18. The Petitioner and the Joined Party verbally agreed to an independent contractor relationship. While an agreement is not dispositive in and of itself, the presence of an agreement between the parties does reflect the intentions of the parties at the time of hire.

19. The Joined Party provided his own equipment for the work. The Joined Party provided his own camera and computer for the work. The Petitioner did loan a vehicle to the Joined Party for use performing the work.

20. The Joined Party is a certified cable installer. The Joined Party is a skilled worker, hired for his ability to perform the tasks assigned to him.

21. A preponderance of the evidence presented in this case reveals that the Petitioner did not exercise sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

22. The Petitioner submitted proposed findings of fact and conclusions of law on August 17, 2010. The Special Deputy considered the proposals. Where the proposals comport with the record, the proposals are incorporated into this recommended order. Where the proposals do not comport with the record, the proposals are respectfully rejected.

Recommendation: It is recommended that the determination dated April 27, 2010, be REVERSED.

Respectfully submitted on September 1, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals