AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2130367
QUALITY RESIDENTIAL SERVICES INC
5423 HARBOUR CASTLE DRIVE
FORT MYERS FL 33907-7842

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

PROTEST OF LIABILITY
DOCKET NO. 2011-11482L

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 November 8, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **June, 2011**.

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. - 2130367
QUALITY RESIDENTIAL SERVICES INC
ATTN: CRAIG BOOTES
5423 HARBOUR CASTLE DRIVE
FORT MYERS FL 33907-7842

PROTEST OF LIABILITY
DOCKET NO. 2011-11482L

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 November 8, 2010.

After due notice to the parties, a telephone hearing was held on March 9, 2011. The Petitioner's owner/president appeared and testified at the hearing. A senior tax specialist appeared and called a tax auditor as a witness for 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 not received.

Issue:

Whether services performed for the petitioner constitute insured employment, and if so, the effective date of the petitioners liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner was selected for a random audit covering the 2008 tax year.

2. The audit was conducted via telephone with documents mailed from the Petitioner's Power of Attorney representative in Michigan. The audit was conducted by a tax auditor.

3. The audit found insufficient evidence that one worker was an independent contractor.

4. The Petitioner provided an independent contractor agreement and 1099 form.

5. The Petitioner is a subchapter S corporation, incorporated in 2001, for the purpose of running a remodeling business.

6. The worker performed services for the Petitioner from 2007 through 2008. The worker was responsible for doing cleanup and disposal of construction debris and waste.

7. The worker requested work from the Petitioner as an independent contractor. The worker signed a standard form independent contractor agreement with the Petitioner.

8. The Petitioner would contact the worker when work was available. The worker could refuse work without penalty. The Petitioner would inform the worker what work needed to be performed and where the work site was located. The worker did not perform services at the Petitioner's office.

9. The worker could work for a competitor. The worker did perform services for other businesses.

10. The worker was not covered by the Petitioner's worker's compensation policy.

11. The worker was required to submit an invoice to the Petitioner after each job. The worker was paid by the day or by the half day. The worker was paid $150 per day or $75 per half day. The rate of pay was set by the worker.

12. The worker was responsible for his own tools, equipment, and transportation to the work site.

13. The Petitioner did not provide any training.

14. The worker could subcontract the work. The worker would be responsible for the payment of any subcontracted workers.

15. The worker did not receive any benefits from the Petitioner.

Conclusions of Law:

16. 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.

17. 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).

18. 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).

19. 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.

20. 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.

21. 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.

22. The evidence presented in this hearing reveals that the Petitioner did not exercise control over how the worker performed the work. The worker was informed of opportunities to perform work. The worker was free to accept or reject any given opportunity. The Petitioner would inform the worker of where the work was to be performed and what work should be done.

23. The parties intended to form an independent contractor relationship as demonstrated by both the worker's stated desire and the independent contractor agreement entered into by the parties.

24. The worker was responsible for his own tools, equipment, and transportation.

25. The worker was free to subcontract or work for a competitor of the Petitioner.

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

Recommendation: It is recommended that the determination dated November 8, 2010, be REVERSED.

Respectfully submitted on May 17, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals