

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BESTS MAINTENANCE AND)
JANITORIAL SERVICES, INC.,)
)
Petitioner,)
)
vs.) Case No. 08-3478
)
DEPARTMENT OF REVENUE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 9, 2008, by video teleconference, with the parties appearing in Miami, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Joseph C. Moffa, Esquire
Law Offices of Moffa & Gainor, P.A.
One Financial Plaza, Suite 2202
100 Southeast Third Avenue
Fort Lauderdale, Florida 33394

For Respondent: John Mika, Esquire
Office of the Attorney General
The Capitol - Tax Section
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

Whether the Petitioner owes sales and/or use tax as set forth in the Respondent's Notice of Decision dated May 12, 2008, and, if so, the amount that is owed.

PRELIMINARY STATEMENT

In a Notice of Decision dated May 12, 2008, the Department of Revenue ("Department") notified Bests Maintenance & Janitorial Services, Inc. ("Bests") that the Department had determined that it owed sales and use tax for the period extending from September 1, 2002, through August 31, 2005, in the assessed amount of \$60,150.81, with a balance due of \$67,480.89, considering payments and interest accrued through May 9, 2008. Bests timely filed a Petition for a Chapter 120 Hearing, in which it disputed its liability for sales and use tax on tangible personal property supplied as part of an agreement to provide custodial and cleaning services, and the Department transmitted the matter to the Division of Administrative Hearings for assignment of an administrative law judge. Pursuant to notice, the final hearing was held on October 9, 2008.

Prior to the final hearing, the parties filed a Joint Prehearing Statement that contained extensive stipulated facts. At the hearing, the Department acknowledged that it carried the burden of proof by a preponderance of the evidence. The

Department presented the testimony of Joseph Franklin, an employee of the Department, and Bests presented the testimony of Stephen Schoor, an owner. Joint Exhibits 1 through 19 were offered and received into evidence.

The transcript of the proceedings was filed with the Division of Administrative Hearings on November 4, 2008, and the parties timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The following facts were included in the stipulation of facts included in the parties' Joint Prehearing Statement:

1. Bests is a domestic corporation headquartered in Broward County, Florida.
2. Bests is a cleaning and maintenance company. The company contracts with customers to clean non-residential buildings only. The majority of the customers are government agencies and state colleges. The company hires subcontractors for some of the services such as pressure cleaning, window cleaning, grounds maintenance and landscaping.
3. The Department is the agency of state government authorized to administer the tax laws of the State of Florida. § 213.05, Fla. Stat. (2008).¹

4. The Department is authorized to prescribe the records to be kept by all persons subject to taxes under Chapter 212, Florida Statutes. Such persons have a duty to keep and preserve their records, and the records shall be open to examination by the Department or its authorized agents at all reasonable hours, pursuant to Section 212.12(6), Florida Statutes.

5. The Department is authorized to conduct audits of taxpayers and to request information to ascertain their tax liability, if any, pursuant to Section 213.34, Florida Statutes.

6. On October 3, 2005, the Department initiated an audit of Bests to determine whether Bests was properly collecting and remitting sales and use tax to the Department.

7. The audit period was from September 1, 2002, through August 31, 2005.

8. The audit determined liability existed in four areas²: Exhibit A01 - cleaning contracts for which documentation supporting the claimed exempt nature of the transaction could not be produced; Exhibit B01 - paper products and hand soaps purchased by Bests in performance of the facility custodial service contract with Florida Atlantic University; Exhibit B02 - items purchased by Bests for general use in the operation of its business, such as office supplies, automobile and truck expenses, repair and maintenance to equipment, computer

services, etc. Only the amount assessed in Exhibit B01 is at issue.

9. On July 26, 2006, the Department sent Bests its Notice of Intent to Make Audit Changes ("NOI"), with schedules, showing that Bests owed to the Department additional sales and use tax in the amount of \$195,540.35, penalty in the amount of \$41,885.11, and interest through July 27, 2006, in the amount of \$41,514.08, making a total assessment in the amount of \$285,939.54.

10. Additional documentation was provided by Bests, resulting in revisions to the NOI. On January 16, 2007, the second and final revised NOI was issued. The amount of sales and use tax due had been adjusted to \$47,473.46 and interest in the amount of \$12,536.88. The penalty amount was waived in its entirety.

11. On January 25, 2007, the Department issued its Notice of Proposed Assessment.

12. Bests timely filed a written protest of the Department's proposed assessment.

13. On May 12, 2008, the Department issued the Notice of Decision ("NOD") in response to the protest by Bests, sustaining the assessment in its entirety.

14. By check dated July 9, 2008, Bests remitted \$12,500.00 to the Department to be applied to the assessment found in Exhibits A01 and B02.

The following facts are based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding:

15. On May 1, 2003, Florida Atlantic University issued a Request for Proposal ("RFP") for facility custodial services at its Boca Raton, Florida, campus. Section 5 of the General Conditions of the RFP, advised that it was "a public corporation of the State of Florida [that] does not pay Federal Excise or Sales taxes on direct purchases of services."³ Florida Atlantic University has been considered a tax-exempt entity for the purposes of this proceeding.

16. Section 3.0.0 of the RFP described the scope of work covered by the RFP, and, in general, required that the contractor be "fully responsible for providing services called for in this RFP."⁴ The scope of work described for restrooms and locker rooms included cleaning, polishing, washing, dusting, mopping, and scrubbing, and, pertinent to this case, the contractor was specifically required to "[e]mpty waste receptacles and change liner," and "[r]estock dispensers: soap, paper towel, toilet tissue and sanitary napkins."⁵

17. Section 4.4.8 of the RFP specified the supplies that were to be furnished by the contractor:

Services shall include all equipment, supplies and materials to include liquid hand soap of a bactericidal type, paper towels, toilet tissue, toilet seat covers, sanitary napkins, wax bags, plastic bags for waste paper baskets, all cleaners, waxes, deodorants and other cleaning materials to perform the contract services. . . .

* * *

Contractor shall be responsible for keeping soap, paper towel, sanitary napkin and toilet tissue dispensers adequately filled at all times.

* * *

SUPPLIES AND MATERIALS

All product selection and usage must be approved by the Director.

Minimally, the following products are used (no equivalents without the approval of the Director):

Johnson Softcare
Multi-fold Natural Scott Towels
JRT/JRT Escort Tissue
Merfin paper towel rolls
. . .^[6]

18. Section 4.5.0 of the RFP specified the cleaning standards that must be met by the contractor. Pertinent to this proceeding, general cleaning standards for restrooms included the following requirements:

d. Dispensers & Receptacles - All supply dispensers shall be filled. . . .

Waste receptacles shall be emptied and supply dispensers shall be refilled. . . .

All toilet stalls shall be furnished with toilet seat cover dispensers. . . . The Contractor shall be responsible for maintaining them and making certain that they are properly stocked at all times.^[7]

19. Finally, Section 1 of the "Special Conditions" portion of the RFP provides:

Florida Atlantic University's Physical Plant Department ("Department") requires the services of a Facilities Services Contractor to provide Facility Custodial Services at a firm square foot price for cleaning services in designated buildings on FAU's Boca Raton Campus. FAU is also requesting unit prices to enable adding additional areas to the contract, and per man-hour prices for adding additional staffing services to the contract as needed.^[8]

Section 9(d) of the "Special Conditions" portion of the RFP provides with respect to contract service costs: "This RFP seeks firm pricing for facilities management services on both existing and future buildings. The fixed fee will be broken down as indicated on the forms. Charges for additional services will be provided on the forms as unit prices."⁹

20. The Contract Services Costs form to be submitted with proposals is found in Section 5.3.1 of the RFP, and the instructions provide: "The below listed annual fixed costs are quoted for the provision of necessary management, supervision, labor, material, supplies, equipment, vehicles, and all related

items to perform the work described in the Scope of Work and Specifications contained herein and as related to the initial areas of coverage. . . ."10

21. Bests was awarded the contract for custodial services at the Boca Raton campus, and Florida Atlantic University entered in the Agreement for Services, with services to begin on August 9, 2003, and end on June 30, 2006. In the agreement, Bests agreed to provide custodial services in accordance with the provisions of the RFP, and it agreed to be "responsible to provide all material, labor, equipment and supplies necessary to provide custodial and cleaning services for designated buildings on Florida Atlantic University's Boca Raton Campus."11 The agreement also provided that the total amount payable under the agreement would not exceed \$3,500,000.00, with the amount "determined in accordance with the Vendor's price proposal dated May 29, 2003, incorporated and attached herein as Attachment A, and based on estimated usage."

22. Bests calculated the total annual cost to include on the Contract Service Costs form, first, by examining the buildings included in the RFP and calculating the annual cost per square foot of providing the cleaning and maintenance services specified in the RFP. Bests separately calculated the annual cost of the paper products and hand soap to be used to fill the restroom dispensers by examining demographic data about

the users of the restroom facilities, as well as the hours of usage, and added it to the annual cost per square foot of providing the services specified in the RFP to arrive at its total annual costs.

23. Bests purchases the paper supplies and soap used to fill the restroom dispensers from a supplier, who delivers the supplies directly to the storage room at the Florida Atlantic University Boca Raton campus used by Bests to store their cleaning materials and supplies. These paper products are used by Bests to refill the restroom dispensers, as required by the RFP.

24. The Department set forth the facts and legal grounds on which it based its assessment of use tax for the paper products and soap used to fill the restroom dispensers in the Notice of Decision dated May 12, 2008, in which it concluded "that the taxpayer is the ultimate consumer [of the paper products and hand soap] and therefore liable for use tax on all taxable cleaning supplies."¹² The Department based this conclusion on the following reasoning:

"As shown, the laws governing sales and use tax makes [sic] the purchaser obligated to pay a use tax at the moment taxable goods and services are purchased for its own use. Take toilet tissue, paper towels, feminine napkins and hand soap for instance. These items are purchased by the taxpayer, removed from their container by the taxpayer, then unwrapped from the original packaging and

placed in service by placing them in paper towel holders or toilet tissue holders located in the area being cleaned (e.g. restroom) by the taxpayer. At no time during the term of the agreement does the taxpayer's customer know the quantity of items used, nor does the taxpayer's customer personally handle these items. The taxpayer takes issue with these items being subject to use tax because the taxpayer does not personally dispose of these items. . . . [I]t is not the ultimate act resulting in the disposal of the items that triggers the tax. It is the taxpayer's use during the cleaning process that makes the taxpayer the ultimate consumer.^[13]

Summary

25. The evidence establishes that the services Bests agreed to perform under the Agreement for Services with Florida Atlantic University included cleaning the restrooms in the buildings covered by the agreement, refilling the restroom dispensers, and providing the paper products and soap to be used in refilling the restroom dispensers. The evidence establishes that, taken in the context of the RFP as a whole, the purchase of the paper products and soap supplies is incidental to the main purpose of Bests agreement with Florida Atlantic University, which is to provide custodial services. The Department's contention that the paper products and soap used to refill the restroom dispensers at the Florida Atlantic University Boca Raton campus are cleaning supplies taxable to Bests is rejected. The cleaning supplies taxable to Bests are

such things as mops, brooms, sweepers, cleaning agents, chemical, solvents, and rags, that it uses and consumes in performing cleaning services for Florida Atlantic University, and Bests does not contest the tax assessment on such items.

26. Bests did not use or consume the paper products and soap, or otherwise exercise the rights of ownership over these products, simply because its employees removed them from the room in which they were stored, removed them from their packaging, and placed them in the restroom dispensers. Bests never exercised any rights of ownership over the products at issue, and the Department's contention that the taxable event in this case occurred when "the items were delivered to Bests and Bests put those items into operation" is rejected.¹⁴ First, the evidence establishes that delivery of the paper products and soap was made to a storage room on the Florida Atlantic University Boca Raton campus and that Bests left in the storage room the paper products and soap remaining at the time the Florida Atlantic University contract was complete. Second, Bests did not consume or use the products simply by placing them in the restroom dispensers. Placing them in the dispensers was part of custodial service Bests provided under the agreement with Florida Atlantic University; the mere fact that Bests was required as part of its Agreement for Services with Florida

Atlantic University to purchase the paper products and soap did not render Bests the user or consumer of the products.

27. Rather, the evidence establishes that Florida Atlantic University provided the paper products and soap for the use of its students and staff, both for sanitation purposes and for the convenience and comfort of its students and staff. Florida Atlantic University, therefore, used the paper products and soap as part of the business of operating a university, and, were it not for its tax-exempt status, Florida Atlantic University would be responsible for paying Florida's sales and use tax on the paper products and soap.

28. Finally, the Department's contention that Bests did not "sell" the paper products and soap to Florida Atlantic University because they were not separately priced in its proposal or separately listed in the invoices submitted to Florida Atlantic University is rejected. The RFP pursuant to which Bests submitted its proposal specifically required that the total cost of providing the cleaning services and supplies, including the paper products and soap used to fill the restroom dispensers, were to be included on the Contract Service Costs form, and the evidence establishes that Bests asked Florida Atlantic University if it could invoice the paper products and soap separately and was told that they could not.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

30. Section 212.05, Florida Statutes (2005),¹⁵ provides in pertinent part

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

* * *

(b) At the rate of 6 percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state;

31. The following definitions are found in Section 212.02, Florida Statutes (2005):

(20) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof,

or interest therein, except that it does not include the sale at retail of that property in the regular course of business.

(21) The term "use tax" referred to in this chapter includes the use, the consumption, the distribution, and the storage as herein defined.

32. Non-residential cleaning services are taxable.

§ 213.05(1)(j)1.b., Fla. Stat. (2005). The Department has adopted rules dealing more specifically with nonresidential cleaning services. Florida Administrative Code Rule 12A-1.0091 provides in pertinent part:

(1)(a) Nonresidential cleaning services are subject to tax. Nonresidential cleaning services are those services (not involving repair) rendered to maintain the clean and sanitary appearance and operating condition of a nonresidential building, but they do not include cleaning services provided for tangible personal property. Examples of such nonresidential cleaning services subject to tax are:

1. Acoustical tile cleaning services;
2. Building cleaning services, interior;
3. Chimney cleaning services;
4. Custodians of schools on a contract or fee basis;
5. Deodorant servicing of restrooms;
6. Disinfecting services;
7. Floor waxing services;
8. Housekeeping (cleaning services) on a contract or fee basis;

9. Janitorial services on a contract or fee basis;
10. Lighting maintenance services (bulb replacement and cleaning);
11. Maid services on a contract or fee basis;
12. Maintenance of buildings (except repairs);
13. Office cleaning services;
14. Restroom cleaning services;
15. Service station cleaning and degreasing services;
16. Venetian blind cleaning;
17. Washroom sanitation service; and
18. Window cleaning (interior or exterior).

* * *

(5) Cleaning service providers are considered the ultimate users or consumers of the tangible personal property sold to them and used in connection with their service and are required to pay the tax imposed upon such sales of tangible personal property to their dealers.

33. Florida Administrative Code Rule 12A-1.0161 provides in pertinent part:

(1)(a) A tax is imposed on the sale at retail or use in this state of . . . nonresidential cleaning services described in Rule 12A-1.0091, F.A.C. . . . The tax is imposed at the rate of 6 percent of the total sales price or cost price of such service. . . .

* * *

(5) Service providers are considered the ultimate consumers of any tangible personal property used in providing their services. As such, the service provider is liable for the sales and use tax on any purchases of tangible personal property used in providing the services.

34. Pursuant to Section 120.80(14)(b)2., Florida Statutes, the "department's burden of proof, except as otherwise specifically provided by general law, shall be limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the applicable Department made the assessment." "Once the Department has met this initial burden of proof, the burden of proof shifts to the taxpayer to demonstrate by a preponderance of the evidence that the assessment is incorrect." IPC Sports, Inc. v. State, Dep't of Revenue, 829 So. 2d 330, 329 (Fla. 3d DCA 2002).

35. The Department met its burden of proving the facts and the legal grounds on which it based its assessment.

36. Based on the findings of fact herein, however, Bests has satisfied its burden of proving by a preponderance of the evidence that it is not the "user" of the paper products and soap at issue. Bests is not the ultimate user or consumer of the paper products and soap because it does not use or consume the paper products and soap when providing cleaning services to

Florida Atlantic University. Rather, Bests used these products to refill restroom dispensers on the Florida Atlantic University Boca Raton campus and, thereby, provided these products for the use of Florida Atlantic University.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue issue a final order withdrawing the sales and use tax assessment against Bests Maintenance and Janitorial Services, Inc., for the audit period extending from September 1, 2002, through August 31, 2005.

DONE AND ENTERED this 3rd day of February, 2009, in Tallahassee, Leon County, Florida.



PATRICIA M. HART
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of February, 2009.

ENDNOTES

- ¹/ References to the Florida Statutes herein are to the 2008 edition unless otherwise indicated.
- ²/ There were actually only three items addressed in the audit.
- ³/ Joint Exhibit 14 at page 1.
- ⁴/ Joint Exhibit 14 at page 20.
- ⁵/ Joint Exhibit 14 at page 22.
- ⁶/ Joint Exhibit 14 at page 37.
- ⁷/ Joint Exhibit 14 at page 40.
- ⁸/ Joint Exhibit 14 at page 6.
- ⁹/ Joint Exhibit 14 at page 11.
- ¹⁰/ Joint Exhibit 14 at page 49.
- ¹¹/ Joint Exhibit 15 at page 1.
- ¹²/ Joint Exhibit 16 at page 5.
- ¹³/ Joint Exhibit 16 at page 4.
- ¹⁴/ Transcript at page 45.
- ¹⁵/ The statutory language in the 2005 edition of the Florida Statutes was in effect during the audit period.

COPIES FURNISHED:

Joseph C. Moffa, Esquire
Law Offices of Moffa & Gainor, P.A.
One Financial Plaza, Suite 2202
100 Southeast Third Avenue
Fort Lauderdale, Florida 33394

Jarrell L. Murchison, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

Marshall Stranburg, General Counsel
Department of Revenue
The Carlton Building, Room 204
501 South Calhoun Street
Tallahassee, Florida 32314-6668

John Mika, Esquire
Office of the Attorney General
The Capitol - Tax Section
Tallahassee, Florida 32399-1050

Lisa Echeverri, Executive Director
Department of Revenue
The Carlton Building, Room 104
501 South Calhoun Street
Tallahassee, Florida 32314-6668

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.