

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

G. D. PARKER SOD, INC.,)
)
 Petitioner,)
)
vs.) CASE NO. 87-2819A
)
FLYNN'S NURSERY AND LANDSCAPING,)
INC., and LAWYERS SURETY)
CORPORATION,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William R. Cave, held a public hearing in the above-styled case on October 9, 1987, in Ocala, Florida.

APPEARANCES

For Petitioner: Leo F. Steinmetz, President
G. D. Parker Sod, Inc.
Post Office Box 217
Lady Lake, Florida 32659

For Respondent: Thomas G. Flynn, President
Flynn's Nursery and
Landscaping, Inc.
1345 Southeast 33rd Court
Ocala, Florida 32671

No appearance for Lawyers Surety Corporation.

BACKGROUND

By complaint filed with the Bureau of License and Bond, Department of Agriculture and Consumer Services (Department) on May 14, 1987 and subsequently submitted to the Division of Administrative Hearings on July 2, 1987 for a formal hearing pursuant to Section 120.57(1), Florida Statutes, Petitioner seeks payment of a balance due on grass sod sold to Respondent, Flynn's Nursery and Landscaping, Inc. (Flynn) between December 4, 1986 and February 24, 1987 and payment for pallets used to handle the sod during the same period that were not returned to Petitioner. Respondent filed an answer alleging setoffs against the amount claimed for; (a) penalty charged against Respondent by prime contractor for Petitioner's failure to timely complete the Brooksville job; (b) additional money expended by Respondent to bring the Brooksville job into compliance for acceptance; (c) reimbursement to Respondent for damage to plants on the Brooksville job by Petitioner; (d) reimbursement to Respondent for the difference between the amount of sod billed and the amount of sod installed and; (e) pallets returned to Petitioner that are included in Petitioner's claim.

In support of its allegations, Petitioner presented the testimony of Leo P. Steinmetz. Petitioner's Exhibits 1 through 8 were received into evidence. Flynn presented the testimony of Thomas G. Flynn and Jason S. Tyler. Flynn's Exhibits 1 through 4 were received into evidence. James E. Brooks, Department Field Representative was called as a witness by the undersigned.

The parties waived the filing of Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant facts are found:

1. At all times pertinent to this proceeding, Petitioner was a "producer" of agricultural products in the State of Florida as defined in Section 604.15(5), Florida Statutes (1985).

2. At all times pertinent to this proceeding, Flynn was a licensed "dealer in agricultural products" as defined by Section 604.15(1), Florida Statutes (1985), issued license No. 04147 by the Department, and bonded by Respondent, Lawyers Surety Corporation (Surety) in the sum of \$4,500.00 - Bond No. 337892.

3. At all times pertinent to this proceeding, Surety was authorized to do business in the State of Florida.

4. Petitioner's complaint was timely filed in accordance with Section 604.21(1), Florida Statutes, (1985).

5. On November 28, 1986, Petitioner and Flynn entered into a contract whereby Petitioner would furnish, install and roll 100,000 square feet of Floratum sod for a total contract price of \$14,500.00. The sod was to be installed at the Brooksville Post Office (Brooksville) job site. Edwards Construction and Development, Inc. (Edwards), the prime contractor on the job, subcontracted with Flynn for the landscaping on the Brooksville job. Flynn in turn subcontracted with Petitioner for the sodding portion of the landscaping.

6. Flynn was delinquent in completing the landscaping contract, due in part to the sodding not meeting contract specification in a timely fashion, and was assessed a penalty of \$1,800.00 by Edwards for this delinquency.

7. Although there were problems with the sodding meeting contract specification in a timely fashion, there was insufficient evidence to show that the problems were due to Petitioner's failure to timely and properly install the sod in accordance with the contract between Petitioner and Flynn.

8. Although Flynn was required to expend additional funds to bring the sod into compliance with Edwards' contract for acceptance, there was insufficient evidence to show that this expenditure was due to Petitioner's failure to timely and properly install the sod in accordance with the contract between Petitioner and Flynn.

9. Flynn was required to spend \$77.00 to replace flowers damaged by Petitioner's employees while installing them on the Brooksville job.

10. Petitioner billed Flynn \$3,476.00 or \$0.11 per square foot for installing 31,600 square feet of bahia grass sod on the Carriage Hill job. The measured square feet of bahia grass sod actually installed was 24,570 square feet. Petitioner overbilled Flynn for 7,030 square feet of installed sod for a total dollar amount of \$773.30.

11. Petitioner billed Flynn \$130.00 for pallets used to deliver grass sod to Flynn which allegedly were not returned to Petitioner.

12. Pallets are not "agricultural products" as that term is defined in Section 604.15(3), Florida Statutes (1985). Likewise, Petitioner does not "produce" pallets.

CONCLUSIONS OF LAW

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

14. Flynn was a "dealer in agricultural products" as defined in Section 604.15(1), Florida Statutes (1985) and, as such, was required to be licensed by the Department pursuant to Section 604.17, Florida Statutes (1985), and, as a requirement of licensing, had to show the Department evidence of a surety bond or a certificate of deposit in accordance with Section 604.20, Florida Statutes (1985) and Rule 5H-1.001, or Rule 5H-1.004, Florida Administrative Code. Flynn was properly and sufficiently bonded by Surety for the sum of \$4,500.00.

15. The Petitioner a "producer" of agricultural products as defined by Section 604.15(5), Florida Statutes (1985) filed a timely complaint against Flynn and its surety, Lawyers Surety Corporation in accordance with Section 604.21, Florida Statutes (1985) alleging, among other things, that Flynn had refused to pay for "agricultural products" as defined by Section 604.15(3), Florida Statutes (1985) sold and delivered to Flynn between December 4, 1986 and February 24, 1987.

16. Pallets charged to Flynn by Petitioner do not come within the definition of "agricultural products" as defined in Section 604.15(3), Florida Statutes (1985) and were not produced by Petitioner. Therefore, the amount charged for pallets should be deducted from any amount owed. Petitioner's entitlement to payment for the pallets does not come within the jurisdiction of this forum and, therefore, no determination has been made in that regard.

17. The evidence is clear that Flynn owes Petitioner the sum of \$2,037.70 which is calculated by subtracting from \$3,018.00, the amount claimed, the sum of (a) \$773.30 for overbilling on the Carriage Hill job; (b) \$77.00 for replacement of plants damaged and; (c) \$130.00 for the pallets.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record and the candor and demeanor of the witnesses, it is, therefore

RECOMMENDED that Flynn be ordered to pay Petitioner the sum of \$2,037.70. It is further Recommended that if Flynn fails to timely pay the Petitioner as ordered, the Respondent Lawyers Surety Corporation be ordered to pay the

Department as required by Section 604.21, Florida Statutes (1985) and that the Department reimburse the Petitioner in accordance with Section 604.21, Florida Statutes (1985).

Respectfully submitted and entered this 28th day of October, 1987, in Tallahassee, Leon County, Florida.

WILLIAM R. CAVE
Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

FILED with the Clerk of the
Division of Administrative Hearings
this 28th day of October, 1987.

COPIES FURNISHED:

Doyle Conner, Commissioner
Department of Agriculture and
Consumer Services
The Capitol
Tallahassee, Florida 32301

Robert Chastain, Gen. Counsel
Department of Agriculture and
Consumer Services
Mayo Building, Room 513
Tallahassee, Florida 32301

Clinton H. Coulter, Jr., Esquire
Dept. of Agriculture and
Consumer Services
Mayo Building
Tallahassee, Florida

Ben H. Pridgeon, Jr., Chief
Bureau of License and Bond
Department of Agriculture and
Consumer Services
Mayo Building
Tallahassee, Florida 32301

Thomas G. Flynn
Flynn's Nursery and Landscape, Inc.
1345 S.E. 33rd Court
Ocala, Florida 32671

Lawyers Surety Corporation
Post Office Box 47480
Dallas, Texas 75247

Leo F. Steinmetz
G. O. Parker Sod, Inc.
Post Office Box 217
Lady Lake, Florida 32659