

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SKINNER NURSERIES, INC.,                    )  
  )  
      Petitioner,                                )  
  )  
vs.    )     Case No. 05-3372  
  )  
AKERS HOLDINGS, LLC AND                    )  
FIDELITY AND DEPOSIT COMPANY OF        )  
MARYLAND, AS SURETY,                     )  
  )  
      Respondents.                            )  
\_\_\_\_\_  
  )

AMENDED RECOMMENDED ORDER

This cause came on for final hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on November 14, 2005, in Jacksonville, Florida. A Recommended Order was entered in this matter on January 26, 2006. A final order was not entered by the Department of Agriculture and Consumer Services. This matter was reopened and additional evidence was taken. This Amended Recommended Order results from the further proceedings that will be discussed in greater detail below.

APPEARANCES

For Petitioner Skinner Nurseries, Inc.:

Charles B. Jimerson, Esquire  
Tritt & Franson, P.A.  
707 Peninsular Place  
Jacksonville, Florida 32204

For Respondent Akers Holdings, LLC:

No appearance

For Respondent Fidelity and Deposit Company of Maryland,  
as Surety:

No Appearance

STATEMENT OF THE ISSUE

The issue is whether Respondent Akers Holdings, LLC (Respondent Akers), and its surety, Fidelity and Deposit Company of Maryland, are liable for funds due to Petitioner from the sale of agricultural products.

PRELIMINARY STATEMENT

On or about March 23, 2005, Petitioner filed an Agent Complaint with the Florida Department of Agriculture and Consumer Services (the "Department"). The Complaint alleged that Respondent Akers or its surety owed funds to Petitioner for nursery products in the amount of \$136,942.49, which was purchased by Respondent Akers under the provisions of the Agricultural Bond and License Law, Sections 604.15 through 604.34, Florida Statutes (2004). Thereafter, on or about May 18, 2005, Respondent Akers filed a response to the Complaint in which it alleged that all accounts with Petitioner are paid as agreed and that none of the alleged open accounts were, in fact, open. Respondent Akers, therefore, claimed that it owed Petitioner nothing.

The matter was referred to the Division of Administrative Hearings on October 18, 2005. A Notice of Hearing was issued scheduling the matter for November 14, 2005. The hearing commenced and was completed that morning in Jacksonville, Florida, with the testimony of Petitioner's witnesses only. Neither Respondent Akers nor Respondent Fidelity and Deposit Company of Maryland appeared by counsel or pro se.

At the hearing, Petitioner presented the testimony of Chris Diaz, Petitioner's controller, and Alice Hunt, Petitioner's credit manager, and offered Exhibits 1 through 3, all of which were admitted into evidence. Respondents presented no evidence or witnesses and did not contact the Division of Administrative Hearings to attempt to excuse their appearance at the hearing. A transcript of the hearing was not filed. Neither Petitioner nor Respondents submitted proposed findings of fact and conclusions of law.

Post-hearing, a final order was never entered by the Department. Instead, the Department issued a letter requesting clarification of the Recommended Order, specifically, how the \$112,390.39 amount awarded was determined. The letter referenced the Amended Complaint in this matter which had requested \$30,066.00. On June 18, 2008, an Order was entered by the undersigned reopening the case. Mr. Jimerson filed a Notice of Appearance as counsel for Petitioner on June 25, 2008.

Thereafter, on July 7, 2008, Petitioner filed a Second Amended Complaint, claiming \$48,674.79 as due from Respondent Akers, including the \$50.00 complaint filing fee. On July 17, 2008, the Department issued a partial denial of the Second Amended Complaint, as untimely, and based upon claims incurred greater than six months prior to the Second Amended Complaint. The undersigned issued an Order to Show Cause on July 23, 2008, as to why the Department's partial denial of Petitioner's claim should not be granted. Petitioner responded to the Order to Show Cause on August 4, 2008. No further proceedings were conducted in this matter. The undersigned issued an Order on Agency's Partial Denial of Claim on June 25, 2009, limiting Petitioner's award in this matter to the bond amount of \$30,000.00, and denying all other amounts claimed by Petitioner.

References to statutes are to Florida Statutes (2004) unless otherwise noted.

#### FINDINGS OF FACT

1. Petitioner is a producer of agricultural products as defined by Subsection 604.15(5), Florida Statutes. Petitioner operates a nursery supply company that produces trees, plants, and other landscaping supplies at a location in Bunnell, Florida.

2. Respondent Akers is a dealer in agricultural products as defined by Subsection 604.15(1), Florida Statutes. At the

time of the transactions in question, Respondent Akers was a landscape distribution company and a licensed dealer in agricultural products supported by a surety bond provided by Fidelity and Deposit Company of Maryland.

3. This matter arose over an Agent Complaint filed by Petitioner on March 23, 2005, in which it alleged that Respondent Akers owed \$136,942.49, based upon numerous invoices for nursery goods delivered to various job sites where Respondent Akers was providing landscaping services.

4. Respondent Akers, by its agent or employee, R. Dean Akers, signed a Promissory Note on March 23, 2005, in the amount of \$137,445.47 plus ten percent simple interest per annum. Under the note, Respondent agreed to repay its outstanding debt to Petitioner at the rate of \$12,083.64 per month, commencing March 15, 2005, until paid in full.

5. Respondent made payments under the note as follows:

<u>Date of Payment</u>	<u>Amount Paid</u>	<u>Check No.</u>
3/15/2005	\$12,083.64	13536
4/15/2005	12,097.81	1360
5/13/2005	12,090.51	13657
6/14/2005	12,129.37	1372
7/29/2005	12,103.41	13782

6. The payment dated July 29, 2005, was received by Petitioner on August 8, 2005. No subsequent payments were made by Respondent Akers after that date.

7. At the time of hearing, based upon the evidence presented by Petitioner, the amount due to Petitioner under the Promissory Note was \$81,655.81, and the amount due to Petitioner on open account was \$30,734.58. This amount far exceeds the amount of the surety bond in this case, \$30,000.00.

8. Respondent Akers offered no excuse for its nonpayment of either the Promissory Note or the open account with Petitioner.

9. Petitioner filed a Second Amended Complaint on July 7, 2008, in which it sought \$48,624.79, plus the \$50.00 complaint filing fee, for a total claim of \$48,674.79.

10. Petitioner's claim in the Second Amended Complaint is based upon its theory that the \$48,624.79 is for claims that relate back to the original Complaint of March 17, 2005.

11. The Department objects to the Second Amended Complaint as being untimely filed and seeking recovery of claims incurred more than six months prior to the filing of the new pleading.

12. Neither the Department nor Respondents participated in the original hearing held in this matter.

#### CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 604.21(6), Fla. Stat.

14. Section 604.15, Florida Statutes, contains the following definitions, in pertinent part:

(1) 'Agricultural products' means the natural products of the farm, nursery, grove, orchard, vineyard, garden, and apiary (raw or manufactured); . . . .

(2) 'Dealer in agricultural products' means any person, partnership, corporation, or other business entity, whether itinerant or domiciled within this state, engaged within this state in the business of purchasing, receiving, or soliciting agricultural products from the producer or the producer's agent or representative for resale or processing for sale; acting as an agent for such producer in the sale of agricultural products for the account of the producer on a net return basis; or acting as a negotiating broker between the producer or the producer's agent or representative and the buyer.

\* \* \*

(5) 'Producer' means any producer of agricultural products produced in the state.

15. Section 604.17, Florida Statutes, requires dealers in agricultural products to have a license to engage in such business.

16. Before dealers receive their licenses, they must deliver to the Department a surety bond or a certificate of deposit. The surety bond or certificate of deposit secures payment to producers for agricultural products sold to dealers.

§ 604.20(1), Fla. Stat.

17. Petitioner's claims made in the Second Amended Complaint "relate back" to the original transactions that gave rise to the first hearing in this matter. An administrative law judge has the power to allow amendments to a Petition for Formal Hearing pursuant to Florida Administrative Code Rule 28-106.202. The "relate back" doctrine is to be liberally applied and should apply in this case because the claims made by Petitioner directly relate back to the original Complaint in this matter. Holley v. Innovative Technology, Inc., 803 So. 2d 749 (Fla. 1st DCA 2001). See Ron's Quality Towing, Inc. v. Southeastern Bank of Florida, 765 So. 2d 134, 135 (Fla. 1st DCA 2000) (citing Schwartz ex rel. Schwartz v. Wilt Chamberlain's of Boca Raton, Ltd., 725 So. 2d 451, 454 (Fla. 4th DCA 1999); R.A. Jones & Sons, Inc. v. Holman, 470 So. 2d 60, 66 (Fla. 3d DCA 1985), rev. dismissed sub nom. Ford Motor Co. v. R.A. Jones & Sons, Inc., 482 So. 2d 348 (Fla. 1986)).

18. Petitioner has met its burden of proving, by a preponderance of the evidence, that Respondents are indebted to Petitioner for unpaid invoices in the amount of \$48,624.79, plus the \$50.00 filing fee, for a total amount due of \$48,674.79. The amount due, however, is limited by the size of the surety bond applied to this case which is \$30,000.00. Therefore, the amount awarded in this proceeding cannot exceed \$30,000.00.



RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law,  
it is

RECOMMENDED that the Florida Department of Agriculture and  
Consumer Services enter a final order requiring Respondent  
Akers, or its surety, to pay Petitioner \$30,000.00 for unpaid  
invoices.

DONE AND ENTERED this 7th day of July, 2009, in  
Tallahassee, Leon County, Florida.



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ROBERT S. COHEN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 7th day of July, 2009.

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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.