STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

A.D. ANDREWS NURSERY, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-0382
	)	
L.M.I. EAST, INCORPORATED, d/b/a L.M.I. LANDSCAPERS, INC., AND WESTERN SURETY COMPANY, AS SURETY,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on April 16, 2008, by video teleconferencing between Jacksonville, Florida, and Tallahassee, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner A.D. Andrews Nursery, Inc:

Teal Pomeroy
Qualified Representative
A.D. Andrews Nursery, Inc.
Post Office Box 1126
Chiefland, Florida 32644-1126

For Respondent L.M.I. East, Incorporated d/b/a L.M.I. Landscapers, Inc.:

Pat Tronzano
Qualified Representative
1437 Halsey Way
Carrollton, Texas 75007-4410

For Respondent Western Surety Company:

(No appearance)

STATEMENT OF THE ISSUE

Whether Respondent, L.M.I. East, Incorporated d/b/a L.M.I. Landscapers, Inc. and its surety, Western Surety Company owes Petitioner $4,210.00 for East Palatka Holly Trees.

PRELIMINARY STATEMENT

This cause was referred to the Division of Administrative Hearings on or about January 23, 2008. On February 26, 2008, a Notice of Hearing by Video Teleconference for April 16, 2008, was entered, together with an Order of Pre-Hearing Instructions.

At the time set for hearing, Teal Pomeroy appeared at the Tallahassee site for Petitioner. Pat Tronzano on behalf of Respondent and the court reporter appeared at the Jacksonville, Florida, site. Upon examination by the undersigned and by oral authorization by Petitioner corporation’s principal, A.D. Andrews, Mr. Pomeroy was accepted to act as Petitioner's Qualified Representative. Mr. Tronzano was examined and conditionally accepted to act as Respondent's Qualified Representative, subject to Respondent's written corporate approval being filed within 10 days of hearing. That approval was timely filed.

Respondent's surety did not appear.

Petitioner presented the oral testimony of Pomeroy Teal, Mary Andrews, and A.D. Andrews, and had five exhibits admitted in evidence. Mr. Tronzano testified on behalf of Respondent and had seven exhibits admitted in evidence, several of which were composites.

No transcript was provided.

Pursuant to their oral stipulation at the close of hearing, each of the parties timely filed its Proposed Recommended Order on April 24, 2008, and May 5, 2008, respectively.

FINDINGS OF FACT

1. Petitioner A.D. Andrews, Inc. is a producer of agricultural products, pursuant to Section 604.15 (9), Florida Statutes.

2. Respondent L.M.I. East, Incorporated d/b/a L.M.I. Landscapes, Inc. is a dealer in agricultural products pursuant to Section 604.15 (2), Florida Statutes. Respondent's surety is Western Surety Company

3. Teal Pomeroy, a salesman for Petitioner, and Pat Tronzano, Purchasing Manager for Respondent, have a business history representing their respective principals. All previous dealings have been satisfactory, and they share a mutual respect.

4. While at a trade show in Orlando, Florida, Teal and Tronzano entered into an oral agreement for the sale of 31 East Palatka Holly bushes/trees (30 at the rate of $135.00 each, and one for $160.00) at a total price of $4,210.00, due from Respondent to Petitioner. Neither participant in this

arrangement testified to any oral terms covering "point of sale" or a guarantee of any condition of the hollies at a final destination. Neither participant testified that a standard course of business on these issues had arisen between them as a result of their prior transactions.

5. On October 9, 2007, Mr. Tronzano sent a third party freighter (trucker) to pick-up the hollies at Petitioner's nursery in Chiefland, Florida, and transport them, at Respondent's expense, to Selena, Texas, for planting and landscaping by Respondent.

6. Mr. Tronzano did not accompany the third party freighter to Petitioner's nursery or on the subsequent trip to Texas. He never saw the hollies in question prior to loading or while they were still on the truck after loading.

7. The trucker selected by Respondent was one specially skilled in the transport of landscape plants, and Respondent has successfully used him for prior purchases and transports.

8. The third party freight truck arrived at Petitioner's Chiefland, Florida, nursery at approximately 11:00 a.m. on October 9, 2007, before all the hollies had been dug up. However, the trees that were ready to load and those that had to be dug up were loaded by Petitioner, and by 2:00 p.m., the truck, fully loaded, left Petitioner's property.

9. Petitioner's invoice clearly states:

> ATTENTION: If these trees are not in satisfactory condition when received, do not accept them. We do not replace trees. Please note any discrepancies or problems with materials.

10. The invoice does not show the trucker noted any problems with the hollies.

11. The trucker also signed the delivery ticket under the statement, "I acknowledge that trees were received in good condition."

12. Approximately 48 hours later, Mr. Tronzano received a report from Texas that when the freighter delivered the hollies to the Selena, Texas site, some hollies were dead and other were dying. Mr. Tronzano did not personally witness anything at the final destination. Respondent's photographs in evidence, the date of which has not been automatically printed on them, show some trees which had already been unloaded in Texas with dried-out root balls. They show no trees with dried-out root balls still on the truck. All photographs show intact root balls, although they are dusty and some trees are clearly dead or dying. One tree is dead in a pot.

13. Although it had taken Respondent's trucker approximately 48 hours to get the hollies to their ultimate destination in Texas, the normal driving time is 16-20 hours. Because federal regulations require a period of rest for commercial drivers every eight hours, Respondent put forth the theory that because there had been a delay of three hours at Petitioner's nursery while some hollies were dug up and loaded, the delaying effect of three hours snowballed to a total delay of as much as 22-28 hours for the truck's arrival time at the final destination. This theory is speculative and unsubstantiated by the evidence.

14. Despite some earlier attempts, Respondent did not notify Petitioner of the condition of the hollies at the final destination until October 15, 2007.

15. Respondent concedes that 11 of the 131 hollies were accepted in good condition. Whether one of the survivors was the single holly tree sold for $160.00, is not in evidence. Respondent has not paid Petitioner for any of the hollies.

16. Mr. Tronzano has not had a dry-out problem like this one in ten years. Respondent's second theory of why the hollies arrived at the Texas destination in poor shape is an assertion that the way Petitioner processed and handled the harvesting of the hollies adversely affected their health. Respondent speculates that Petitioner's digging and immediately loading the just-dug hollies onto the truck sent by Respondent resulted in shock to the hollies' root systems so that the root systems dried out.

17. Mr. Teal and Mr. Tronzano agree that previous trees (not necessarily East Palatka hollies) sold by Petitioner to Respondent had been "pre-dug" and "staged" by Petitioner in anticipation of the arrival of the freighter. "Staging" means that Petitioner dug up the trees, put them on a trailer, and took them to a centralized loading area at the nursery for Respondent's pick-up.

18. According to Mr. Teal, the foregoing "pre-dig and stage" method prevents "double-handling" of trees, but many trees are dug up only when a truck arrives at the nursery to take them away. Mr. Teal was not present at the nursery on October 9,

2007, but opined that if the hollies on this occasion had been pre-watered, they would be unlikely to die of shock, despite being dug up and loaded right away. Moreover, the particular trees sold to Respondent came out of a field that Petitioner irrigates, so "dry out" should not have been a problem.

19. Mary Andrews works in Petitioner's business office. She did not know about Respondent's order until the truck arrived on October 9, 2007, but she managed the "dig and load" within three hours of the truck's arrival. She testified that Petitioner digs trees throughout the year so that when a truck arrives, the trees have not been sitting dry in a field for lengthy periods of time.

20. Petitioner sold 3500 similar trees in the previous year without any dry-out problems.

21. Petitioner had admitted in evidence, without objection, Florida Division of Forestry rainfall records for three locations near Petitioner's nursery. All three official records show six inches of rainfall for the week immediately preceding October 9, 2007.

22. Petitioner maintains that the trucker should have watered the hollies en route. Respondent believes the trucker did water them, but the trucker did not testify, so there is no direct evidence that the trucker watered the hollies en route.

23. The parties have tried to work this situation out, but their respective offers of compromise are not admissible herein, pursuant to Section 90.408, Florida Statutes.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.569 and 120.57(1), Florida Statutes, (2007).

25. Petitioner is a producer of "agricultural products," as defined in Section 604.15(1), Florida Statutes.

26. Petitioner has the burden of presenting evidence that Respondent has defaulted on paying the agreed amount pursuant to the oral agreement as stated by them. Thereafter, Respondent has the burden of presenting evidence that Petitioner violated their agreement by failing to furnish hollies of the agreed-upon quality standard. Dept. of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1995).

27. Respondent was acting in the capacity of a buyer when Mr. Tronzano negotiated the sale of Petitioner’s hollies and as a buyer, Respondent is responsible for payment to Petitioner unless Petitioner can be shown to have breached the contract.

28. The parties agree that there was an oral agreement. Because there was no clear specification of a different "point of sale," the point of sale herein occurred when care, custody, and control of the hollies passed to Respondent. The freighter, who was selected and paid solely by Respondent, was, in effect, Respondent's agent when he assumed custody and responsibility for the hollies.

29. There is no evidence herein that an up-front agreement was reached for the parties to share transportation costs or for Respondent to "broker" a sale to some other entity. Respondent's agent signed for the hollies and took sole possession of them. By signing and taking possession of the hollies for Respondent without noting any problem with the hollies on the invoice and/or delivery ticket, and without any other “point of sale” arrangement, the trucker acknowledged that the hollies were satisfactory, pursuant the printed disclaimer on Petitioner’s invoice and delivery ticket. Thereafter, only Respondent's agent (not Petitioner) had complete control of the hollies.

30. Absent some other understanding (such as a clear brokerage agreement, an agreement to share freight costs, mutual control of the third party freighter, an agreement on guaranteed quality of the product at the final destination, or something similar), he who has complete control of the product bears any loss to that product. In this case, that would be Respondent.

30. Even so, Petitioner presented sufficient evidence to demonstrate that Respondent's mere speculations (concerning shock from harvesting, the cause of the inordinate delay in Respondent's trucker's travel time, and selection of products with dried-out root balls) were reasonably unlikely, and

therefore these conjectures cannot shift responsibility for the dead and dying hollies back to Petitioner.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that a final order be entered that Respondent L.M.I. East, Incorporated d/b/a L.M.I. Landscapers, Inc., shall pay Petitioner, A.D. Andrews Nursery, Inc., the sum of $4,210.00, and that if L.M.I. East, Incorporated d/b/a L.M.I. Landscapers, Inc., fails to pay Petitioner, A.D. Andrews Nursery, Inc., within 30 days of the final order, then Respondent, Western Surety Company, shall pay the Department as required by Section 604.21, Florida Statutes, and that the Department reimburse Petitioner in accordance with Section 604.21, Florida Statutes.

DONE AND ENTERED this 3rd day of June, 2008, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of June, 2008.

COPIES FURNISHED:

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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.