

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

UNIVERSAL TREE FARMS, LLC,                    )  
  )  
      Petitioner,                                )  
  )  
vs.    )     Case No. 10-0498  
  )  
QUALITY BY DESIGN INC. and                    )  
THE OHIO CASUALTY INSURANCE                )  
COMPANY, AS SURETY,                         )  
  )  
      Respondents.                            )  
\_\_\_\_\_)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,<sup>1</sup> before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings, on March 19, 2010, by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Sergio Cruz, Esquire  
                  245 Southeast First Street, Suite 214  
                  Miami, Florida 33131-1933

For Respondent Quality By Design, Inc.:

                  James M. Watson, President  
                  38115 Yale Circle  
                  Leesburg, Florida 34788

For Respondent Ohio Casualty Insurance Company:

                  No Appearance

STATEMENT OF THE ISSUE

Whether Respondent Quality By Design, Inc. (QBD) owes Petitioner \$2,166.75, or some lesser amount, for 45 Washingtonia Palms it purchased from Petitioner in June 2009.

PRELIMINARY STATEMENT

On December 16, 2009, Petitioner filed a complaint with the Department of Agriculture and Consumer Services (Department) alleging that QBD had failed to pay for 45 Washingtonia Palms it had purchased from Petitioner in June 2009. Ohio Casualty Insurance Company (OCIC) was identified in the complaint as surety for QBD. On January 7, 2010, Petitioner amended its complaint by correcting items 11 ("Complete mailing address of Co-Respondent"), 14 ("For Producer's Agent Only"), and 15 ("Manner of Purchase").

By separate letters, each dated January 7, 2010, the Department notified QBD and OCIC of the filing of Petitioner's amended complaint and of their (QBD's and OCIC's) opportunity to file a written answer to the amended complaint.

On or about January 26, 2010, QBD filed with the Department an answer to Petitioner's amended complaint, in which it admitted purchasing from Petitioner 45 Washingtonia Palms for the amounts claimed by Petitioner (\$45 each, plus tax), but claimed that the "amount [it] owed . . . should be reduced by [a total of] \$1,625.00," \$950.00 to offset the extra transportation

"cost[s]" it incurred and "loss of revenue" it suffered as a result of Petitioner's not having had the trees ready for pick up at the "pre-arranged" time<sup>2</sup>; and \$675.00 to offset the "cost" of "rehabilitating" the trees after they had "go[ne] into severe shock within a few days of arriving at [QBD's] holding yard." In its answer, QBD also "request[ed] a hearing." OCIC neither filed an answer to the amended complaint, nor requested a hearing.

On February 1, 2010, the Department referred the matter to the Division of Administrative Hearings to conduct the hearing QBD had requested.

As noted above, the hearing was held on March 19, 2010. Three witnesses testified at the hearing: Ivan Caro, Petitioner's president; James Watson, QBD's president; and Buddy Ward, a QBD employee. In addition to the testimony of these three witnesses, one exhibit, Petitioner's Exhibit 1, was offered and received into evidence.

At the conclusion of the evidentiary portion of the hearing, the undersigned advised the parties, on the record, that if they desired to file proposed recommended orders, they had to do so within 14 days of the date of the hearing (that is, no later than April 2, 2010). To date, no proposed recommended order has been filed by any party.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Petitioner is a producer of Washingtonia Palms and other trees.
2. It grows these agricultural products on its 140-acre tree farm located in Moore Haven, Florida.
3. The farm utilizes a ditch/canal irrigation system.
4. In June 2009, Petitioner received two separate orders from QBD for a total of 45 Washingtonia Palms, ten-to-14 feet in overall height: a June 16, 2009, order for 27 trees (Invoice 1081); and a June 24, 2009, order for 18 trees (Invoice 1083). For both orders, the agreed-upon purchase price was \$45.00 per tree. Accordingly, the amount due, including sales tax (of \$85.05), for the trees ordered on June 16 was \$1,300.05, and the amount due, including sales tax (of \$56.70), for the trees ordered on June 24 was \$866.70.
5. QBD took delivery of the trees at Petitioner's tree farm.
6. David Lindsey and Buddy Ward were the truck drivers dispatched by QBD to Petitioner's tree farm to take delivery of the trees. Mr. Lindsey picked up the 27 trees that had been ordered on June 16. Mr. Ward picked up the 18 trees that had been ordered on June 24.

7. Petitioner readied the trees for delivery before they were picked up. Among the things it did as part of the preparation process was to wrap the root ball of each tree in plastic sheeting to retain moisture.

8. After arriving at Petitioner's tree farm, Mr. Lindsey and Mr. Ward each inspected the trees Petitioner had readied for pick up and accepted them on behalf of QBD (Mr. Lindsey by signing Invoice 1081, and Mr. Ward by signing Invoice 1083).

9. After being inspected and accepted, the trees were loaded onto Mr. Lindsey's and Mr. Ward's semi-trailer trucks and transported to QBD's tree farm in Umatilla Florida, approximately five hours away (by truck). Each of the 45 trees was in excellent condition when loaded.

10. Mr. Lindsey's trip to QBD's tree farm was uneventful. Mr. Ward, on the other hand, was not so fortunate. As he was leaving Petitioner's property, he drove his semi-trailer truck into a ditch while making a turn. Mr. Ward was not seriously injured, and none of the trees fell off the trailer bed as a result of the mishap. A tow truck was called to the scene. Within 15 minutes of the tow truck's arrival, Mr. Ward's truck was pulled out of the ditch and he "went on [his] way," with his load of 18 Washingtonia Palms.

11. The morning after they arrived at QBD's tree farm, the trees on Mr. Lindsey's and Mr. Ward's trucks were offloaded and "watered down." They were then put in the ground.

12. Subsequently, fronds on each of the trees "turned brown."

13. QBD was able to "rehabilitate" the trees by cutting off the outside row of fronds on each tree and "re-tying the heads." The labor cost of this "rehabilitation" work was \$13.50 per tree. The QBD employees who did the work used a piece of equipment that QBD rented at the rate of approximately \$75.00 per hour.

14. At no time prior to the initiation of the instant litigation did QBD notify Petitioner that any of the 45 trees it had purchased was defective or non-conforming, nor did it seek to revoke its acceptance of the trees or to return the trees to Petitioner.

#### CONCLUSIONS OF LAW

15. In accordance with Section 604.18, Florida Statutes, a "dealer in agricultural products," must be licensed by the Department to transact business in the State of Florida.

"Before any [such] license is issued, the applicant therefor shall make and deliver to the [D]epartment a surety bond or certificate of deposit in the amount of at least \$3,000 or in

such greater amount as the [D]epartment may determine." §  
604.20(1), Fla. Stat.

16. A "dealer in agricultural products," as that term is used in Sections 604.15 through 604.24, Florida Statutes, is defined in Section 604.15(2), Florida Statutes, as follows:

"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.

17. At all times material hereto, QBD was a "dealer in agricultural products," as defined in Section 604.15(2), Florida Statutes, and was licensed as required by Section 604.18, Florida Statutes.

18. "Agricultural products," as that term is used in Section 604.15(2), Florida Statutes, and elsewhere in Sections 604.15 through 604.24, Florida Statutes, is defined in Section 604.15(1), Florida Statutes, as follows:

"Agricultural products" means the natural products of the farm, nursery, grove, orchard, vineyard, garden, and apiary (raw or manufactured); sod; tropical foliage; horticulture; hay; livestock; milk and milk

products; poultry and poultry products; the fruit of the saw palmetto (meaning the fruit of the *Serenoa repens*); limes (meaning the fruit *Citrus aurantifolia*, variety Persian, Tahiti, Bearss, or Florida Key limes); and any other nonexempt agricultural products produced in the state, except tobacco, sugarcane, timber and timber byproducts, forest products as defined in s. 591.17, and citrus other than limes.

19. Washingtonia Palms are "agricultural products, as defined in Section 604.15(1), Florida Statutes.

20. "Any person, partnership, corporation, or other business entity claiming to be damaged by any breach of the conditions of a bond or certificate of deposit assignment or agreement given by a dealer in agricultural products as hereinbefore provided may enter complaint thereof against the dealer and against the surety company, if any, to the [D]epartment, which complaint shall be a written statement of the facts constituting the complaint. Such complaint shall include all agricultural products defined in s. 604.15(1), as well as any additional charges necessary to effectuate the sale unless these additional charges are already included in the total delivered price. Such complaint [must] be filed within 6 months from the date of sale in instances involving direct sales or from the date on which the agricultural product was received by the dealer in agricultural products, as agent, to be sold for the producer. No complaint shall be filed pursuant to this



section unless the transactions involved total at least \$500 and occurred in a single license year. Before a complaint can be processed, the complainant must provide the [D]epartment with a \$50 filing fee. In the event the complainant is successful in proving the claim, the dealer in agricultural products shall reimburse the complainant for the \$50 filing fee as part of the settlement of the claim." § 604.21(1)(a), Fla. Stat.

21. "Upon the filing of such complaint . . . , the [D]epartment [must] investigate the matters complained of; whereupon, if, in the opinion of the [D]epartment, the facts contained in the complaint warrant such action, the [D]epartment shall serve notice of the filing of complaint to the dealer against whom the complaint has been filed at the last address of record. Such notice shall be accompanied by a true copy of the complaint. A copy of such notice and complaint shall also be served to the surety company, if any, that provided the bond for the dealer, which surety company shall become party to the action. Such notice of the complaint [must] inform the dealer of a reasonable time within which to answer the complaint by advising the [D]epartment in writing that the allegations in the complaint are admitted or denied or that the complaint has been satisfied. Such notice [must] also inform the dealer and the surety company or financial institution of a right to a hearing on the complaint, if requested." § 604.21(2), Fla. Stat.

22. Should there exist disputed issues of material fact, a hearing conducted pursuant to Section 120.57(1), Florida Statutes, will be held. § 604.21(6), Fla. Stat.; see also Rosenzweig v. Department of Transportation, 979 So. 2d 1050, 1055 (Fla. 1st DCA 2008)("If an agency's action will determine the substantial interests of a party and there are disputed issues of material fact, a party is entitled to a formal proceeding under section 120.57(1), Florida Statutes.").

23. At the hearing, the complainant has the burden of proving the allegations of the complaint by a preponderance of the evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996)("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."); Espinoza v. Department of Business and Professional Regulation, Florida Board of Professional Engineers, 739 So. 2d 1250, 1251 (Fla. 3rd DCA 1999)("The general rule is that, apart from statute, the burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal."); Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 415 (Fla. 4th DCA 1974)("As a general rule the comparative degree of proof by which a case must be established is the same before an administrative

tribunal as in a judicial proceeding - that is, a preponderance of the evidence."); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

24. If, following the hearing, the Department determines that the complainant has met its burden of proof, the Department must "enter its order adjudicating the amount of indebtedness due to be paid by the dealer to the complainant," which order is "final and effective on the date filed with the [D]epartment's agency clerk." § 604.21(4),(5) and (6), Fla. Stat.

25. If payment is not made within 15 days after the issuance of the Department's order, the Department must, "in instances involving bonds, call upon the surety company to pay over to the [D]epartment out of the bond posted by the surety company for such dealer . . . the amount called for in the order of the [D]epartment, not exceeding the amount of the bond or the principal of the certificate of deposit." § 604.21(7) and (8), Fla. Stat.

26. In the instant case, Petitioner timely filed an amended complaint against QBD and its surety, OCIC, alleging that QBD had failed to pay Petitioner \$2,166.75 for 45 Washingtonia Palms QBD had purchased from Petitioner in June

2009. In its answer to the amended complaint, QBD disputed that it was indebted to Petitioner in this amount.

27. The preponderance of the evidence establishes Petitioner's entitlement to the amount claimed.

28. The transactions between the parties in this case are generally governed by Chapter 672, Florida Statutes, known as the "Uniform Commercial Code-Sales." See § 672.101, Fla. Stat.

29. Pursuant to Section 672.607(1), Florida Statutes, "[t]he buyer must pay at the contract rate for any goods accepted."

30. Section 672.606(1), Florida Statutes, describes "[w]hat constitutes acceptance of goods." It provides as follows:

(1) Acceptance of goods occurs when the buyer:

(a) After a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that the buyer will take or retain them in spite of their nonconformity; or

(b) Fails to make an effective rejection (s. 672.602(1)), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) Does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by her or him.

According to Section 672.602(1), Florida Statutes, a "[r]ejection of goods must be within a reasonable time after their delivery or tender" and "[i]t is ineffective unless the buyer seasonably notifies the seller."

31. "Acceptance of goods by the buyer precludes rejection of the goods accepted . . . ." § 672.607(2), Fla. Stat.

32. An acceptance, however, may be revoked under certain circumstances. "Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it." § 672.608(2), Fla. Stat. "A buyer who so revokes has the same rights and duties with regard to the goods involved as if she or he had rejected them." § 672.608(3), Fla. Stat.

33. "Where a tender has been accepted[,] [t]he buyer must within a reasonable time after he or she discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." § 672.607(3)(a), Fla. Stat.

34. If such timely notification is given, then, and only then, may a buyer "deduct all or any part of the damages resulting from any breach of the contract [by the seller] from

any part of the price still due [the seller] under the same contract." § 672.717, Fla. Stat.; see also Shreve Land Co. v. J & D Financial Corp., 421 So. 2d 722, 724 (Fla. 3d DCA 1982)("Ordinarily, acceptance of the 55 doors would make Shreve liable for payment under section 672.607(1), Florida Statutes (1979). However, since Shreve notified both Pac-Dor and J & D of the nonconformity within a reasonable time as required by section 672.607(3)(a), Florida Statutes (1979), it was entitled to deduct all or any part of the damages from the price of the 55 doors under section 672.717, Florida Statutes (1979).").

35. The record evidence in the instant case establishes that Petitioner tendered to QBD, and QBD accepted, all 45 Washingtonia Palms that were the subject of their sales/purchase agreement and that QBD did not timely revoke its acceptance, nor timely notify Petitioner of any alleged nonconformity. Moreover, no showing has been made that the trees tendered were in fact nonconforming.

36. Under such circumstances, QBD is obligated to pay Petitioner the full agreed-upon purchase price for each of the 45 trees, plus tax (or a total of \$2,166.75).

#### RECOMMENDATION

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

RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order (1) finding that QBD is indebted to Petitioner in the amount of \$2,166.75 for the 45 Washingtonia Palms it purchased from Petitioner in June 2009; (2) directing QBD to make payment to Petitioner in the amount of \$2,216.75 (\$2,166.75, plus \$50.00 for reimbursement of the filing fee Petitioner paid) within 15 days following the issuance of the order; (3) providing that Petitioner, upon receipt of this payment, shall remit \$141.75 to the appropriate taxing authority; and (4) announcing that if QBD fails to make timely payment in full, the Department will seek recovery from OCIC, QBD's surety.

DONE AND ENTERED this 14th day of April, 2010, in Tallahassee, Leon County, Florida.



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STUART M. LERNER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of April, 2008.

ENDNOTES

<sup>1</sup> All references to Florida Statutes in this Recommended Order are to Florida Statutes (2009).

<sup>2</sup> At the final hearing, QBD formally abandoned its claim that it was entitled to this \$950.00 offset.

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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.