

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GREG DAVENPORT ENTERPRISES, )  
INC., d/b/a CONTAINER GROWN, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case Nos. 12-3637  
 ) 12-3638  
 A. W. KELLEY'S GARDENS, INC., )  
 AND SURETEC INSURANCE, CO., AS )  
 SURETY, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice to all parties, the final hearing was conducted in this case on February 19, 2013, in Naples, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Greg Davenport, pro se  
Greg Davenport Enterprises, Inc.  
d/b/a Container Grown  
613 Corbel Drive  
Naples, Florida 34110-1106

For Respondent: A.W. Kelley, pro se  
A.W. Kelley's Gardens Inc.  
6901 Hendry Creek Drive  
Fort Myers, Florida 33908

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner, Greg Davenport Enterprises, Inc., d/b/a Container Grown, is entitled to payment

from an Agricultural Bond issued to Respondent, A.W. Kelley's Gardens, Inc., and, if so, the amount owed to Petitioner.

PRELIMINARY STATEMENT

This case commenced with the filing of two Agricultural Products Dealer Claim Forms by Petitioner, each dated September 21, 2012, with the Department of Agriculture and Consumer Services (Department). The claims were for \$4,805.00 and \$3,170.00, for a total of \$7,975.00 in unpaid invoices. Petitioner is also claiming a \$50.00 filing fee for each of the claims.

At the final hearing, Petitioner certified on his own behalf and offered Exhibits 1 through 3 into evidence, each of which was accepted. Respondent testified on his own behalf and offered one exhibit into evidence, which was received.

The final hearing was recorded by a licensed court reporter. At the conclusion of the final hearing, Petitioner advised the undersigned that the transcript would be ordered. By rule the parties have ten days from the date the transcript is filed at the Division of Administrative Hearings to file proposed recommended orders (PROs). Later, however, the parties advised that no transcript was being provided. They were given ten days to submit their PROs. Petitioner filed a PRO on March 12, 2013. Respondent asked for and was given leave to submit its PRO no later than March 19, 2013. Its PRO was received on that date.

Each party's PRO was then duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a licensed producer of an agricultural product: Nursery plants and flowers. Petitioner is duly incorporated by the State of Florida and is in good standing. Greg Davenport is listed as Director and President of the corporation in the Division of Corporations' web-based records.

2. Respondent is a duly incorporated Florida corporation. Its business address is 6901 Hendry Creek Drive, Ft. Myers, Florida. The directors of the corporation are listed as Dixie Kelley, Drew Kelley, and Kent Kelley. Respondent is a plant retail business.

3. Respondent has been a customer of Petitioner for many years, going back as far as 2006 according to evidence submitted at final hearing. During that time, Respondent has purchased approximately \$91,000.00 worth of goods from Petitioner. (In its PRO, Respondent says the relationship goes back 25 years or more, but there was no sworn testimony to that effect.)

4. During the period March 22 through May 24, 2012, Respondent ordered numerous items from Petitioner for which he was billed in accordance with standard practices. The following invoices provide the invoice number, date of invoice, and amount of purchase:

Invoice 1399 - March 22, 2012 - \$1,570.00  
Invoice 1818 - March 27, 2012 - \$2,105.00  
Invoice 1391 - April 10, 2012 - \$1,130.00  
Invoice 1303 - April 25, 2012 - \$ 850.00  
Invoice 1419 - May 16, 2012 - \$1,145.00  
Invoice 1431 - May 24, 2012 - \$1,175.00

TOTAL - \$7,975.00

5. Petitioner contacted Respondent on numerous occasions to request payment on the outstanding invoices. Those efforts were in vain. At first, Respondent would make empty promises to pay, but ultimately just refused to accept Petitioner's calls. Meanwhile, Respondent's owner relocated to North Carolina, causing Petitioner to fear that payment may never be forthcoming.

6. Respondent made some promises to make payments "whenever he could" to satisfy the debt. He said, however, that even if he could not pay, Petitioner should not attach his agriculture bond. Respondent's failure to make any promised payments was the basis for Petitioner seeking payment by way of the bond.

7. Respondent does not deny his failure to pay the outstanding invoices. He does not dispute that the products he received were of acceptable quality. He does, in fact, admit his indebtedness to Petitioner.

8. Respondent does not feel his bond should be attached for payment of this debt. He cites, as reasons, that: 1) his business suffered during the national financial crisis; 2) there was some embezzlement going on in his business that affected his ability to pay obligees; 3) there is a related civil lawsuit

underway in circuit court relating to the embezzlement; and 4) Davenport and Kelley have been friends for a long time and thus he should be allowed more time to pay the invoices.

9. Respondent's PRO sets forth other bases for why he believes it would be improper to attach his agriculture bond. However, none of those bases was addressed by sworn witnesses at final hearing and are thus not evidence in this case. Further, Respondent contends that two witnesses he subpoenaed but failed to show up for final hearing prejudiced his case. He did not prove, however, that either of the supposed witnesses had been properly served. Respondent's PRO also sets forth facts not elicited through testimony or documentary evidence during final hearing. Respondent relies in part on various documents exchanged between the parties during discovery, but none of those were offered into evidence and thus are not part of the record.

10. Respondent acquired a bond through Suretec Insurance Company. The amount of the bond was not disclosed at final hearing but, per statute, must be at least \$5,000.00. The surety company was not represented at final hearing. No defense was raised by the surety company concerning Petitioner's attempt to attach the bond.

11. Petitioner is entitled to payment in the amount of \$7,975.00 for the products it provided to Respondent.

12. Besides the amount set forth above, Petitioner claims the sum of \$100.00 paid for the filing of his two claims against Respondent's bond.

13. The total sum owed to Petitioner by Respondent is \$8,075.00.

#### CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2012). (Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2012 codification.)

15. The burden of proof in an administrative proceeding is on the party asserting the affirmative of an issue. Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osbourne, Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Dep't of Agric. & Consumer Servs., 550 So. 2d 112 (Fla. 1st DCA 1989). In this case, Petitioner must prove by a preponderance of the evidence that it provided goods or services to Respondent and that Respondent failed to pay for such goods or services. Based upon the testimony at final hearing, offered in full candor by each witness, it is clear there is no dispute as to receipt of goods by Respondent, and Petitioner was not paid for those goods.

16. Respondent's defense, i.e., that there are other actions pending and potentially intervening causes, is rejected. There is no competent or persuasive evidence to support that contention. Even so, such actions would not prevent Petitioner from seeking remedies allowed by law.

17. Section 604.21, Florida Statutes, sets forth the process for attaching a bond when a bonded party fails to make payments for purchased goods or services. Petitioner has complied with the requirements of that statutory section.

#### RECOMMENDATION

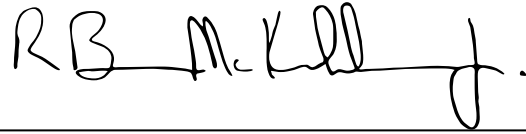
Based upon the findings of fact and conclusions of law set forth above, it is hereby RECOMMENDED that:

1. Respondent shall pay to Petitioner, within 15 days of the entry of the Final Order, the sum of \$8,075.00;

2. If Respondent fails to timely make the aforementioned payment, the Department shall call upon Suretec Surety Company to pay over to the Department the full amount of Respondent's bond; and

3. The Department shall then turn the proceeds of the bond over to Petitioner to satisfy the debt that has been established.

DONE AND ENTERED this 26th day of March, 2013, in  
Tallahassee, Leon County, Florida.



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R. BRUCE MCKIBBEN  
Administrative Law Judge  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 26th day of March, 2013.

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.