

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

H.P. SOD, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 13-0101
)
 PSL LANDSCAPE SERVICES, INC.,)
 AND UNITED STATES CORPORATION)
 COMPANY, AS SURETY,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Pursuant to notice to all parties, the final hearing was conducted in this case on February 20, 2013, in Arcadia, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Paul Bennett Seusy, Esquire
Paul Bennett Seusy, P.A.
203 West Oak Street
Arcadia, Florida 34266

For Respondent: George Kijewsky, pro se
PSL Landscape Services, Inc.
6132 Snook Court
Port St. Lucie, Florida 34983

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner, H.P. Sod, Inc., is entitled to payment from an Agricultural Bond issued to

Respondent, PLS Landscape Services, Inc., and, if so, the amount owed to Petitioner.

PRELIMINARY STATEMENT

This case commenced with Petitioner filing an Agricultural Products Dealer Claim Form dated November 12, 2012, with the Department of Agriculture and Consumer Services (Department of Agriculture or Department). The claim was for \$4,531.16, representing \$4,481.16 in unpaid invoices and \$50.00 for the claim filing fee.

At the final hearing, Petitioner called four witnesses: Sonia Pereira, Horacio Pereira, Larry Calloway, and George Kijewski. Petitioner's Exhibits A through I and K through Q were admitted into evidence. Respondent testified on his own behalf and did not offer any documentary evidence.^{1/}

The final hearing was digitally recorded by the undersigned. Neither party requested or was provided a copy of the recording. By rule, the parties had ten days from the date of final hearing to file proposed recommended orders (PROs). Petitioner filed a "Final Judgment" on February 21, 2013, which set forth findings of fact, and it was accepted as Petitioner's PRO. Respondent submitted a one-page document in the form of a letter with numbered paragraphs on March 1, 2013; it was accepted as Respondent's PRO. Each party's PRO was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a licensed producer of an agricultural product, i.e., sod. Petitioner is a duly incorporated for-profit corporation in the State of Florida and is in good standing. Horacio Pereira is the putative owner of the company, referring to himself at final hearing as "the boss, the guy who tells people what to do."

2. Respondent is a duly incorporated Florida corporation. Its business address is 6132 Snook Court, Port St. Lucie, Florida. The only officer or director of the corporation is George J. Kijewski. Respondent is a landscaping business.

3. From the period July 23, 2012, through October 16, 2012, Respondent purchased quantities of Bahia sod from Petitioner on numerous occasions. The dates of purchase, quantity of sod purchased, and ticket numbers for each purchase are as follows:

- July 23 - Ticket 36930 - 10 pallets
- July 23 - Ticket 36983 - 16 pallets
- July 30 - Ticket 37185 - 10 pallets
- August 1 - Ticket 36818 - 16 pallets
- August 1 - Ticket 37276 - 16 pallets
- August 1 - Ticket 37283 - 16 pallets
- August 6 - Ticket 36872 - 16 pallets
- August 8 - Ticket 37319 - 16 pallets
- August 10 - Ticket 37339 - 16 pallets
- September 4 - Ticket 37727 - 16 pallets
- October 15 - Ticket 38712 - 16 pallets
- October 16 - Ticket 38720 - 16 pallets

4. Petitioner issued the following invoices to Respondent concerning the aforementioned purchases of Bahia sod:

- Invoice 6615 - July 26 - Tickets 36930, 36983 \$620.20
- Invoice 6640 - August 2 - Tickets 36818, 37185, 37276, 37283 - \$1,420.96
- Invoice 6671 - August 16 - Tickets 36872, 37319, 37339 - \$1,104.24
- Invoice 6735 - September 6 - Ticket 37727 - \$445.12
- Invoice 6875 - October 18 - Tickets 38712, 38720 - \$890.24
- TOTAL - \$4,481.11

5. Respondent did not remit payments on any of the aforementioned invoices.

6. Respondent contends that some of the sod which it purchased from Petitioner was of inferior quality or was in less quantity than ordered. Specifically, Respondent said some of the sod was wet and fell apart when being installed. He also said the wet sod resulted in some pallets containing 370 to 390 square feet of sod rather than the 400 feet that is standard on a pallet.

7. Respondent's testimony was general in nature, not specific to any particular shipment, and flies in the face of his on-going purchases of sod from Petitioner. Further, there was no credible evidence presented at final hearing that Respondent ever

complained to Petitioner about the quality or quantity of the sod. Had he done so, Petitioner said it would have corrected the problem. Respondent did reportedly tell one of his drivers, Mr. Calloway, on occasion that the sod was wet or otherwise not up to par. However, that complaint was never provided to Petitioner so that action could be taken.

8. Respondent acquired a bond in the sum of \$5,000.00 through TD Bank, N.A. (also referred to in this matter as United States Corporation Company, as Surety). The bank was not represented at the final hearing held in this matter. No defense was raised by the bank concerning Petitioner's attempt to attach the bond.

9. Petitioner paid a fee of \$50.00 to the Department of Agriculture to bring this action.

10. Petitioner hired an attorney to represent its interest in this matter. The attorney charged \$175.00 per hour and, as of the date of the final hearing, had billed approximately five hours of time or \$875.00 in fees. Subsequent to the final hearing, the attorney submitted a post-hearing proposed order on behalf of Petitioner. The attorney expended \$180.00 in costs for service of a subpoena and witness fees.

11. The total sum demanded by Petitioner in its action against Respondent is \$5,586.11.

12. Respondent's PRO filed in this matter asserts a number of "facts" which were not established by competent testimony at the final hearing. Those facts were not considered in the preparation of this Recommended Order.

CONCLUSIONS OF LAW

13. 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).^{2/}

14. 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 the instant 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 non-receipt of payment by Petitioner.

15. Respondent's defense, i.e., that some of the sod was inferior and that pallets contained less than the purchased quantity, is rejected. There is no competent or persuasive

evidence to support that contention. Absent any proof that Respondent complained about the sod contemporaneously with its purchase, it is impossible to now ascertain whether the sod was inferior or less than ordered.

16. 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.

17. Petitioner met its burden of proof. Respondent's defenses are not substantiated by persuasive evidence.

RECOMMENDATION

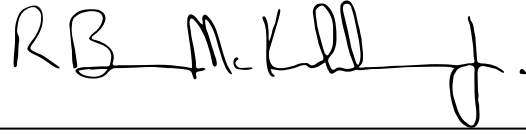
Based upon the findings of fact and conclusions of law set forth above, it is hereby RECOMMENDED that a Final Order be entered by the Department of Agriculture and Consumer Services as follows:

1. Respondent shall pay to Petitioner, within 15 days of the entry of the Final Order, the sum of \$5,586.11; or

2. If Respondent fails to timely make the aforementioned payment, the Department shall call upon TD Bank, N.A., to pay over to the Department the full amount of Respondent's bond; and

3. The Department shall then turn the entire proceeds of the bond over to Petitioner.

DONE AND ENTERED this 8th day of March, 2013, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of March, 2013.

ENDNOTES

^{1/} At final hearing, Petitioner objected to George Kijewski representing the corporation, PLS Landscape Services, Inc., on the basis that the corporation - as a legal person under Florida law - could represent itself pro se, but Mr. Kijewski was not the corporation. Over objection, the undersigned allowed Mr. Kijewski to represent the corporation as a quasi-Qualified Representative.

^{2/} Unless stated specifically otherwise in this Recommended Order, all references to Florida Statutes shall be to the 2012 codification.

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.