

**BEFORE THE CONSTRUCTION SERVICES COMMISSION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

IN THE MATTER OF THE DENIAL	:	FINDINGS OF FACT
OF THE RENEWAL OF THE LICENSE OF	:	CONCLUSIONS OF LAW
SUNDIAL CONSTRUCTION	:	AND ORDER
TO PRACTICE AS A CONTRACTOR	:	
IN THE STATE OF UTAH	:	Case No. DOPL-2009-372
	:	

APPEARANCES:

Richard A. Lyver for Applicant

Lenore Epstein for the Division of Occupational and
Professional Licensing

BY THE COMMISSION:

A December 30, 2009 hearing was conducted in the above-entitled proceeding before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the Construction Services Commission. Members of the Commission present were David Told, Wendy D. Gibbs, Carl R. Tippets, Steve Bowers, Larry G. Love, Jerry J. Preston and C. Reed Brown.

The remaining Commission members (John B. Wilcox and Dirk Burton) were absent. Mark B. Steinagel, Director of the Division of Occupational and Professional Licensing, was present. Thereafter, evidence was offered and received. The hearing

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concluded on December 30, 2009. The Commission then took the matter under advisement and conducted initial deliberations in this case with the expectation that the Court would prepare a draft of the Commission's Findings of Fact, Conclusions of Law and Order and submit that draft to the Commission for its review and action.

The Commission reviewed that draft and resumed its deliberations in this proceeding. The Commission now enters its Findings of Fact and Conclusions of Law, and submits the following Order to the Division for its review and action:

FINDINGS OF FACT

1. Applicant is, and at all time relevant to this proceeding has been, licensed to practice as a contractor in this state. Applicant became so licensed on September 2, 1998 in a B-100 Classification (General Building Contractor). Richard A. Lyver is Applicant's qualifier under that license.

2. Applicant submitted a request to renew its license, which was scheduled to expire unless renewed by November 30, 2009. Pursuant to an October 27, 2009 letter, the Division notified Applicant its request for license renewal was conditionally denied because the application was incomplete.

3. The October 27, 2009 letter recites Applicant has failed to demonstrate financial responsibility and Applicant's financial history includes substantial delinquent obligations

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which resulted in a recent bankruptcy. The Division thus notified Applicant that it could alternatively demonstrate financial responsibility by providing a license bond. The Division also informed Applicant that it could submit any further documentation relevant to its request for license renewal and such a response would be due by November 27, 2009.

4. Applicant submitted additional information to the Division in a November 9, 2009 letter. Pursuant to a November 12, 2009 letter, the Division notified Applicant that its application remained conditionally denied because it was still incomplete.

5. The Division also informed Applicant that financial responsibility has not been demonstrated, but that providing a license bond would resolve that issue. The Division further informed Applicant that the submission of necessary items noted by the Division must be made no later than December 12, 2009 or the application would be denied with no further action taken by the Division.

6. Applicant provided additional information to the Division on November 18, 2009. Pursuant to a November 19, 2009 letter, the Division notified Applicant that its application remained conditionally denied because it was still incomplete.

7. The letter also recites Applicant failed to demonstrate financial responsibility and Applicant's financial history

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includes substantial delinquent obligations which resulted in a recent bankruptcy. The Division also informed Applicant that it could demonstrate financial responsibility by providing a license bond.

8. The Division also informed Applicant that it must correct the deficiencies in its application by submitting the required matters to the Division no later than December 19, 2009. Applicant was also informed it could request a hearing before the Division to challenge the denial of Applicant's request to renew its contractor's license.

9. Pursuant to a November 30, 2009 fax transmission, Applicant requested a hearing to challenge the denial of its request for license renewal. Pursuant to a December 1, 2009 notice, the Division informed Applicant that a December 30, 2009 hearing would be conducted before the Commission to determine what action should be taken as to the denial of Applicant's request for license renewal.

10. The December 1, 2009 notice also recites Applicant's license is continually renewed during the pendency of the proceeding, wherein Applicant challenges the denial of its request for license renewal.

11. The construction services Applicant provided following the initial issuance of its license basically involved small jobs. Commencing June 2005, Applicant periodically provided

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construction services for Home Depot as a subcontractor.
Applicant rarely used any subcontractors in that work.

12. Applicant maintained minimal supplies and received any compensation for work performed directly from Home Depot. Applicant's business relationship with Home Depot requires Applicant to maintain an active contractor's license.

13. During the last four years, Applicant has provided construction services on a full time basis for Home Depot. Sometime in late 2005, Mr. Lyver's wife became increasingly affected by a prior lupus condition. She thus required ongoing hospitalization. However, the Lyvers had no health insurance coverage to defray those expenses.

14. Applicant subsequently filed for bankruptcy due to the just-described personal debts. No business related debts were involved in that bankruptcy proceeding. Applicant has made payments to satisfy state tax indebtedness. Applicant pays \$50 per month to the Internal Revenue Service on a repayment schedule for federal tax indebtedness. This record does not reflect the total of that indebtedness or when such indebtedness is to be fully satisfied.

15. Applicant has attempted to locate a license bond to establish financial responsibility and maintain its contractor's license. The Division requires any such bond be not less than \$50,000. Applicant has made an inquiry, which reflects such a

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bond would cost \$10,000 on an annual basis. Applicant may obtain a license bond if necessary to preserve its contractor's license. However, Applicant could only do so if installment payments could be made to the bonding company.

CONCLUSIONS OF LAW

The Division contends Applicant is substantially limited in its access to income, despite the discharge of personally related debts in the bankruptcy proceeding. The Division asserts the Commission should require Applicant to post a \$50,000 bond as the means to properly protect the public health, safety and welfare.

The Division also contends the Commission must avoid arbitrary and capricious decisions in both this and any future cases. The Division questions how any compassion might be properly exercised in this proceeding. The Division asserts that requiring Applicant to obtain a bond represents the best resolution of this case, but placing Applicant's license on probation would raise various questions regarding what issues could be effectively monitored during that probation.

Given the foregoing, the Division contends the Commission should deny Applicant's request for license renewal. The Division further asserts Applicant might then pursue and possibly obtain a license bond which could prompt the issuance of a license to Applicant.

Utah Code Ann. §58-55-306(1) provides:

. . . a licensee applying for renewal. . . of a contractor's license shall demonstrate to the division and the commission the . . . licensee's financial responsibility before. . . the renewal. . . of a license by:

- (a)(i) completing a questionnaire developed by the division; and
- (ii) signing the questionnaire certifying that the information provided is true and correct; or
- (b) submitting a bond in an amount and form determined by the commission with the concurrence of the director.

§58-55-306(3) provides the "burden to demonstrate financial responsibility is upon the . . . licensee."

§58-55-102(16) defines "financial responsibility" as:

- (a) . . . a demonstration of a current and expected future condition of financial solvency evidencing a reasonable expectation to the division and the board that an applicant. . . can successfully engage in business as a contractor without jeopardy to the public health, safety, and welfare.

§58-55-102(16) also provides:

- (b) Financial responsibility may be determined by an evaluation of the total history concerning the licensee. . . including past, present, and expected condition and record of financial solvency and business conduct.

Based on the substantial and credible evidence presented, the Commission finds and concludes Applicant has demonstrated a degree of financial responsibility. Applicant has a repayment schedule to satisfy existing federal tax indebtedness and

Applicant makes monthly payments on that schedule.

Mr. Lyver and his wife have sold their home to satisfy other sources of indebtedness. Applicant has an ongoing business relationship to provide construction services to Home Depot under circumstances where Applicant has minimized its possible expenses for supplies and subcontractors.

Given the foregoing, particularly the specific nature of Applicant's limited scope of providing construction services, the Commission finds and concludes Applicant's request for renewal of its license should be granted. The Commission duly acknowledges the Division's assertion that Applicant should first obtain a bond as the means to demonstrate financial responsibility. The Commission also acknowledges Applicant must retain its existing contractor's license to preserve its working relationship with Home Depot.

Based on Applicant's rather limited financial assets and current income, the Commission concludes Applicant should be required to obtain a bond as a means to further protect the public health, safety, and welfare. However, the Commission also concludes the bond could appropriately be six (6) months in its initial duration, which would also reduce the cost to Applicant for such a bond.

The Commission also concludes Applicant should be required to meet with the Commission at its next regularly scheduled

meeting, whereby the Commission will review the status of Applicant's ongoing practice as a contractor. The Commission will also review any interim changes in Applicant's income, debts and Applicant's ongoing efforts to satisfy existing indebtedness.

ORDER

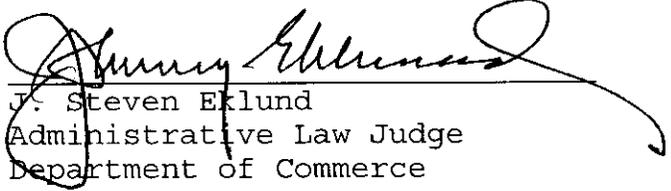
WHEREFORE, IT IS ORDERED Applicant's request to renew its contractor's license shall be granted, subject to the following terms and conditions.

1. Applicant - through Mr. Lyver - shall meet with the Commission on June 30, 2010. During that meeting, the Commission will review the construction services provided by Applicant since mid-November 2009. The Commission will also review Applicant's financial history since that time, including Applicant's current income, existing indebtedness and payments made thereon.

2. Within fifteen (15) days from the date this Order may become effective, Applicant shall obtain a \$50,000 bond of six (6) months in duration. Applicant shall also provide documentation to the Division within that time that such a bond has been obtained.

Based on the Commission's June 30, 2010 meeting with Applicant, the Commission will determine if further terms and conditions should govern Applicant's license and establish the duration of the probationary status of that license.

On behalf of the Construction Services Commission and the Division of Occupational and Professional Licensing, I hereby certify the foregoing Findings of Fact, Conclusions of Law and Order was submitted to the Commission and the Division on the 26th day of May 2010 for their review and action.


J. Steven Eklund
Administrative Law Judge
Department of Commerce