

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY)
LICENSING BOARD,)
)
Petitioner,)
)
vs.) Case No. 01-3124PL
)
MANUEL RIVERO,)
)
Respondent.)
_____)
—)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held by video teleconference at sites in Miami and Tallahassee, Florida, on October 23, 2001, by Florence Snyder Rivas, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Diane Snell Perera, Esquire
Department of Business and
Professional Regulation
401 Northwest Second Avenue, Suite N-607
Miami, Florida 33128

For Respondent: Manuel Rivero
61 East 16th Street
Hialeah, Florida 33010

STATEMENT OF THE ISSUE

Whether Respondent committed the offenses as set forth in the Administrative Complaint dated June 13, 2000, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated June 13, 2000, Petitioner alleged that Respondent had violated the laws regulating his professional activities as a certified general contractor. Specifically, the three-count Administrative Complaint charged the Respondent violated: Section 489.129(1)(k), Florida Statutes (1995), by abandoning a professional project; Section 489.129(1)(r), Florida Statutes (1997), by failing to satisfy the terms of a civil judgment within a reasonable time; and of violating Section 489.129(1)(j), Florida Statutes, by failing to obtain a qualified business certificate of authority.

Respondent timely requested a formal hearing pursuant to Chapter 120, Florida Statutes. Respondent appeared at the hearing and was represented by his son as a qualified representative.

At the final hearing the Petitioner presented the testimony of Manual Chamizo and Serajo Ascunce. Jose D. Mitrani was tendered by Petitioner and received without objection as an expert regarding the construction profession.

Petitioner's Exhibits 1-9 and Respondent's Exhibits 1-3 were accepted into evidence during the video hearing, but were not filed with the Division of Administrative Hearings.

The transcript of the hearing was filed November 15, 2001. The parties timely filed their respective Proposed Recommended Orders which have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this case, Respondent is a licensed Certified General Contractor in the State of Florida.

2. At all times material to this case, Respondent was the qualifying agent for Rivero Construction, Inc.

3. On or about June 20, 1996, Respondent contracted with Manuel Chamizo (Chamizo) to construct a parking lot with drainage at 4735 Palm Avenue, Hialeah, Florida, and to repave the parking lot at 4719 Palm Avenue, Hialeah, Florida, for the total price of \$7,090.00.

4. Chamizo paid Rivero Construction, Inc., the full contract price.

5. Respondent constructed the parking lot at 4735 Palm Avenue, but did so in a substandard manner. Specifically, the parking lot flooded and was rendered unusable because Respondent had broken a sewer pipe during construction. After

being notified of the problem, Respondent failed to correct it.

6. Respondent failed to perform any of the contracted work at 4719 Palm Avenue.

7. Dissatisfied with Respondent's performance, Chamizo sued Rivero Construction, Inc., for damages in the County Court in and for Miami-Dade County, Florida.

8. On or about August 24, 1998, the lawsuit was concluded in Chamizo's favor with the entry of a final judgment against Rivero Construction, Inc.

9. Respondent has failed to satisfy the final judgment.

10. Respondent has failed to obtain a qualified business certificate of authority.

11. Petitioner has incurred costs of \$1,669.09 in the investigation and prosecution of Respondent.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57, Florida Statutes.

13. Petitioner is empowered to revoke, suspend or otherwise discipline the license of a contractor for any or all of the violations charged in the Administrative Complaint. Section 489.129, Florida Statutes (1995).

14. To prevail, Petitioner must prove its allegations by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

15. Count 1 of the Administrative Complaint charges the Respondent with violating Section 489.129(1)(k), Florida Statutes(1995), which prohibits:

. . . abandoning a construction project in which the contractor is engaged or under contract as a contractor. A project may be presumed abandoned after 90 days if the contractor terminates the project without just cause or without proper notification to the owner, including the reason for termination, or fails to perform work without just cause for 90 consecutive days.

16. There is clear and convincing evidence that Respondent, after being paid the full contract price, performed negligently with respect to the property at 4735 Palm Avenue, and failed to correct his deficient performance. With respect to the property at 4719 Palm Avenue, Respondent failed to perform at all.

17. Count II of the Administrative Complaint charges the Respondent with violating Section 489.129(1)(r), Florida Statutes (1997), which prohibits:

. . . failing . . . to satisfy within a reasonable time, the terms of a civil judgment obtained against the licensee, or the business organization qualified by the licensee, relating to the practice of the licensees profession.

18. Further, the Construction Industry Licensing Board in Rule 61G4-17.001(23), Florida Administrative Code, has provided:

For purposes of Section 489.129(1)(r) [now Section 489.129(1)(q), F.S.] reasonable time means ninety (90) days following the entry of a civil judgment that is not appealed. The Board will consider a mutually agreed upon payment plan as satisfaction of such a judgment so long as the payments are current.

Petitioner has met its burden of clearly and convincingly proving that Respondent was the subject of a valid final judgment. The judgment has not been satisfied in whole or in part, nor have the parties agreed to a payment plan.

19. Count III of the Administrative Complaint charges that the Respondent violated Section 489.129(1)(j), Florida Statutes (1997), by failing to comply with Section 489.119(2), Florida Statutes, (1995). The relevant statutory provisions provide:

If the applicant proposes to engage in contracting as a business organization, including any partnership, corporation, business trust, or other legal entity, or in any name other than the applicant's legal name or a fictitious name where the applicant is doing business as a sole proprietorship, the business organization must apply for a certificate of authority through a qualifying agent and under, the fictitious name, if any.

Petitioner has clearly and convincingly proven that Respondent has not obtained a qualified business certificate of authority for Rivero Construction, Inc.

20. Petitioner has incurred costs in its investigation and prosecution of Respondent. The Petitioner, pursuant to Rule 61G4-17.007(19) and Rule 61G4-12.07.8, Florida Administrative Code, promulgated pursuant to Chapter 489, Florida Statutes, is entitled to recover its costs. Rule 61G4-17.001(19) provides:

For any violation occurring after October 1, 1989, the Board may assess the costs of investigation and prosecution. The assessment of such costs may be made in addition to the penalties provided by these guidelines without demonstration of aggravating factors set forth in Rule 61G4-17.002.

21. Petitioner's affidavit of costs, while not finalized, is a true and correct reflection of costs incurred through May 30, 2001. In accordance with Rule 61G4-17.001(20) and Rule 61G4-12.018, Florida Administrative Code, promulgated pursuant to Section 489.129, Florida Statutes, Petitioner has requested that the record of this proceeding be kept open through the date of final disciplinary action as Petitioner is entitled to recover all costs incurred for the investigation and prosecution of this matter. At this date, Petitioner's costs are not certain, as costs may increase through the date of final disciplinary action. Petitioner represents that the

affidavit of costs submitted by Petitioner will be amended to reflect the Petitioner's total costs through final disciplinary action at the time final agency action is to be taken.

22. In accordance with Rule 61G4-17.001, Florida Administrative Code, the following guidelines shall be used in disciplinary cases:

489.129(1)(k): Abandonment. First violation, \$500 to \$2,000 fine; repeat violation, revocation and \$5,000 fine.

489.129(1)(h): Failure to satisfy a civil judgment obtained against the licensee or business organization. First violation, \$500 to \$7,000 fine and/or proof of satisfaction of civil judgment. Repeat violation, \$1,000 to \$5,000 fine and/or proof of satisfaction of civil judgment, probation, suspension, or revocation.

489.129(1)(j): 489.119, failure to register qualified business organization. First violation, \$250 to \$500 fine; repeat violation, \$500 to \$1000 fine and/or probation, suspension or revocation.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Respondent committed the offenses set forth in the Administrative Complaint dated June 13, 2000; ordering that Respondent pay an administrative fine in the amount of \$1,250; pay restitution to Manuel Chamizo in the amount of the

Final Judgement obtained by Manuel Chamizo; and pay costs incurred in the investigation and prosecution of this proceeding in the initial amount of \$1,669.09, plus costs incurred through the date of final action, which revised affidavit of costs will be submitted to the Board at final action.

DONE AND ENTERED this 12th day of December, 2001, in Tallahassee, Leon County, Florida.

FLORENCE SNYDER RIVAS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of December, 2001.

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.