

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
CONSTRUCTION INDUSTRY)	
LICENSING BOARD,)	
)	
Petitioner,)	
)	
vs.)	Case No. 05-1774PL
)	
STEPHEN WESLEY WILLIAMS,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held on July 19, 2005, by video teleconference in Tallahassee and Jacksonville, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Brian Elzweig, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Stephen Wesley Williams, pro se
3146 Brachenbury Lane
Jacksonville, Florida 32225

STATEMENT OF THE ISSUE

At issue is whether Respondent committed the offenses set forth in the Amended Administrative Complaint and, if so, what

penalty should be imposed.

PRELIMINARY STATEMENT

Petitioner, Department of Business and Professional Regulation, Construction Industry Licensing Board (Department), filed an Amended Administrative Complaint on December 29, 2004, which contained five counts of professional violations against Respondent, Stephen Wesley Williams. Specifically, the Department charged Respondent with violations of Subsections 489.129(1)(j), (i) and (m), Florida Statutes, by abandoning a construction project in which the contractor is engaged or under contract as a contractor; by failing to put the registration or certification number of each contractor on each offer of service, business proposal, bid, contract or advertisement used by that contractor in violation of Section 489.119(6)(b), Florida Statutes; by failing to include in a contract a written statement explaining the consumer's rights under the Construction Industries Recovery Fund as required by Section 489.1425, Florida Statutes; by failing to apply for a certificate of authority for Superior Design Construction Company, Inc., as a qualified business organization as required by Section 489.119(2), Florida Statutes; and by committing incompetency or misconduct in the practice of contracting.

Respondent disputed the allegations of the Amended Administrative Complaint and requested an administrative hearing. The case was referred to the Division of Administrative Hearings on or about May 17, 2005. A formal hearing was set for July 19, 2005.

At hearing, Petitioner presented the testimony of Thomas Shinn. Petitioner's Exhibits numbered 1 through 12 were admitted into evidence.

Respondent testified on his own behalf and did not offer any exhibits.

A Transcript, consisting of one volume, was filed on July 25, 2005. On August 3, 2005, the Department timely filed a Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. Respondent did not file any post-hearing submission. All citations are to Florida Statutes (2004) unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner, the Department, is the state agency charged with the duty and responsibility of regulating the practice of contracting pursuant to Chapters 20, 455 and 489.

2. At all times material to the allegations of the Amended Administrative Complaint, Stephen Wesley Williams, d/b/a Superior Design Construction, Co. Inc., was licensed as a Florida State Certified Building Contractor and a Florida

State Certified Pool/Spa Contractor, having been issued license numbers CRC 045849 and CPC 56443 respectively. His licensure status for the Residential Contractor license is designated as "Current, Active." His licensure status for the Pool/Spa Contractor license is designated as "Delinquent, Active."

3. On or about December 19, 2001, Respondent, doing business as Superior Design Construction Company, Inc., entered into a contract with Thomas and Denise Shinn (the Shinn's) for construction of a residential swimming pool and pool enclosure to be located at 4050 Retford Drive, Jacksonville, Florida. The contract price was \$40,000.00.

4. Respondent obtained a building permit for the job in question as "Superior Design Const Co."

5. The contract does not contain a written statement explaining the consumer's rights under the Construction Industries Recovery Fund.

6. The Department's records establish that Respondent's Certificate of Authority for Superior Design and Construction as a Contractor Qualified Business was issued on May 9, 1997, but has been null and void since August 31, 1999.

7. Construction on the project began around January 2002. Work on the project ceased in or around March 2002.

8. The construction was substantially completed when work ceased on the pool. Mr. Shinn described it as "98 percent of it was finished except for the heater." Other than the heater not being installed, Mr. Shinn considered the few other items that were not completed as minor.

9. The contract specified the installation of a heat pump called an Ice Breaker. This type of pump was specified because it can both heat and cool a pool, which is what the Shinns wanted.

10. Mr. Shinn paid Respondent a total of \$38,050 for the job. According to Mr. Shinn, he withheld the final payment of \$1,950 because the Ice Breaker heat pump was not installed. According to Respondent, he did not put in the heat pump because he had not been paid the remaining \$1,950.

11. The portion of the contract entitled Contract Price & Payment Schedule requires a payment of \$1,000 at contract execution and four subsequent payments:

- Payment #1 - 35% due at Excavation;
- Payment #2 - 30% due at Gunite;
- Payment #3 - 30% due at Deck;
- Payment #4 - 5% due at Plaster.

The amount listed for payment number 4 is \$1,950.

12. Included in the General Terms and Conditions portion of the contract is the following:

- PAYMENTS & COLLECTIONS. Contractor reserves the right to stop work at any time

past due payment occurs. Owner hereby expressly agrees to such work stoppage and any such work stoppage shall not constitute a breach of contract by contractor. If collection is required of any amounts due under the terms of this contract, or any subsequent approved schedule, owner expressly agrees that he shall be responsible for 18% interest and reasonable attorney's fees for trial, appeal and all costs.

13. Mr. Shinn contacted Respondent several times regarding completion of the contract. While Respondent did not answer many of Mr. Shinn's calls, he did come to the Shinn's home at one point to resolve the situation. However, the heat pump issue remained unresolved.

14. Out of frustration, Mr. Shinn contacted an attorney who wrote a demand letter to Respondent. On or about October 31, 2002, the City of Jacksonville, Department of Public Works, Building Inspection Division, sent a letter to Mr. Shinn notifying him that Respondent had not obtained any inspections for 180 days and that state law could consider this project abandoned. The letter suggested that he contact Respondent immediately to attempt to rectify this situation. Mr. Shinn continued to attempt to contact Respondent but was unsuccessful.

15. Respondent did not notify the Shinns in writing that he was canceling the contract. He did not go to the city to cancel the permit.

16. One work item that was not completed when Respondent ceased working on the job was an unfinished electrical socket near the pool. Mr. Shinn hired Thompson Electric to complete this electrical work that was contemplated by the contract. As a result, Mr. Shinn paid \$207.50 to Thompson Electric to have this work completed.

17. In January of 2004, Mr. Shinn contracted with Pinch-A-Penny to install a heater in the pool as one had never been installed. He paid Pinch-A-Penny \$3,777.09 to install a pool heater. Mr. Shinn chose to install only a pool heater and not the heating and cooling system specifically referenced in the contract (Ice Breaker) because the Ice Breaker would have cost him \$5,500 from Pinch-a-Penny.

18. The amount needed to complete the job as contracted totaled was \$5,707.50, which includes \$207.50 for Thompson Electric and \$5,500.00 for the Ice Breaker heat pump, which is what Pinch-a-Penny charges. Subtracting the \$1,950 that the Shinns never paid Respondent leaves a balance of \$3,757.50 that the Shinns paid or would have to pay to get the completed pool as contemplated by the contract.

19. As of June 2, 2005, the Department's costs of investigation and prosecution, excluding legal costs, totaled \$614.77.

20. Respondent's construction company went out of business on a date that is not clear from the record although Respondent described this job as "about the last pool I built." Clearly, he was no longer in the construction business on the date of the hearing.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569, 120.57(1), and 120.60(5), Fla. Stat. (2002)

22. Petitioner has the burden of proving by clear and convincing evidence the specific allegations of the Amended Administrative Complaint. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

23. Section 489.129(1) reads in pertinent part as follows:

(1) The board may take any of the following actions against any certificateholder or registrant: place on

probation or reprimand the licensee, revoke, suspend, or deny the issuance or renewal of the certificate, registration, or certificate of authority, require financial restitution to a consumer for financial harm directly related to a violation of a provision of this part, impose an administrative fine not to exceed \$5,000 per violation, require continuing education, or assess costs associated with investigation and prosecution, if the contractor, financially responsible officer, or business organization for which the contractor is a primary qualifying agent, a financially responsible officer, or a secondary qualifying agent responsible under s. 489.1195 is found guilty of any of the following acts:

* * *

(i) Failing in any material respect to comply with the provisions of this part or violating a rule or lawful order of the board.

(j) Abandoning a construction project in which the contractor is engaged or under contract as a contractor. A project may be presumed to be 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.

* * *

(m) Committing incompetency or misconduct in the practice of contracting.

24. Section 489.119 reads in pertinent part as follows:

489.119 Business organizations; qualifying agents.--

* * *

(2) 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.

* * *

(6)(b) The registration or certification number of each contractor or certificate of authority number for each business organization shall appear in each offer of services, business proposal, bid, contract, or advertisement, regardless of medium, as defined by board rule, used by that contractor or business organization in the practice of contracting.

* * *

(6)(e) The board shall issue a notice of noncompliance for the first offense, and may assess a fine or issue a citation for failure to correct the offense within 30 days or for any subsequent offense, to any contractor or business organization that fails to include the certification, registration, or certificate of authority number as required by this part when submitting an advertisement for publication, broadcast, or printing or fails to display the certification, registration, or certificate of authority number as required by this part.

25. Section 489.1425 reads in pertinent part as follows:

489.1425 Duty of contractor to notify
residential property owner of recovery
fund.--

(1) Any agreement or contract for repair,
restoration, improvement, or construction
to residential real property must contain a
written statement explaining the consumer's
rights under the [Construction Industries
Recovery Fund], except where the value of
all labor and materials does not exceed
\$2,500. . . .

* * *

(2)(a) Upon findings a first violation of
subsection (1), the board may fine the
contractor up to \$500, and the moneys must
be deposited into the recovery fund.

26. The Amended Administrative Complaint charges
Respondent with violating Section 489.129(1)(j), Florida
Statutes, by abandoning a construction project in which the
contractor is engaged or under contract. While Respondent
takes the position that the Shinns were in default by not
paying the final payment of \$1,950, the project was abandoned
by operation of law. § 489.129(1)(j), Fla. Stat.
Accordingly, the Department has met its burden of proof
regarding this allegation.

27. The Amended Administrative Complaint charges
Respondent with violating Section 489.129(1)(i), Florida
Statutes, by failing in any material respect to comply with
the applicable statutes and rules by doing business as
Superior Design Construction Company, Inc., but not having a

valid certificate of authority for Superior Design Construction Company, Inc., as a qualified business organization as required by Section 489.119(2)(b), Florida Statutes. As Respondent's certificate of authority has been null and void since August 1999, Respondent was not in compliance with Section 489.119(2)(b), Florida Statutes, and the Department met its burden regarding this allegation.

28. The Amended Administrative Complaint charges Respondent with violating Section 489.129(1)(i), Florida Statutes, by failing to include Respondent's registration or certification number on the contract as required by Section 489.119(6)(b), Florida Statutes. As the contract does not contain Respondent's license certificate number, the Department has met its burden in proving that allegation.

29. The Amended Administrative Complaint charges Respondent with violating Section 489.129(1)(i), Florida Statutes, by failing in any material respect to comply with applicable statutes and rules by failing to include in the contract with the Shinns a written statement explaining the consumer's rights under the Construction Industries Recovery Fund as required by Section 489.1425, Florida Statutes. Respondent did not include any such written statement in the contract with the Shinns. Accordingly, Petitioner has met its burden that Respondent violated this provision.

30. The Amended Administrative Complaint charges Respondent with violating Section 489.129(1)(m), Florida Statutes, by committing incompetency or misconduct in the practice of contracting. The Department takes the position that Respondent's abandonment of the job; failure to have a valid certificate of authority for Superior Design Construction Company, Inc., as a qualified business organization; failure to put his license certification numbers on the contract; and failure to include notice of the Construction Industries Recovery Fund in the contract, constitute misconduct. The Department has met its burden regarding this allegation.

31. Regarding Respondent's failure to include a registration or certification number of the contractor or certificate of authority of the business organization, Section 489.119(6), Florida Statutes, specifies that the Board shall issue a notice of noncompliance for the first offense, and may assess a fine or issue a citation for failure to correct the offense within 30 days. Accordingly, this appearing from the record to be Respondent's first offense, the only appropriate penalty is the issuance of a notice of noncompliance by the Construction Industry Licensing Board.

32. The Department, pursuant to Florida Administrative Code Rule 61G4-17.001 (2003), seeks imposition of fines in the

total amount of \$2,600.00, restitution, and a requirement that Respondent obtain a valid certificate of authority within 30 days of the Final Order. The fines sought by the Department are as follows: \$1,500 for abandonment of the job (from a range of \$500 to \$2,000); \$700 for misconduct (from a range of \$500 to \$1,000); \$100 for failure to put license number in the contract; and \$300 for failure to inform the consumer of the Construction Industry Recovery Fund (from a range of \$100 to \$500).

33. Florida Administrative Code Rule 61G4-17.001, sets forth guidelines referenced above, for the imposition of fines, absent aggravating or mitigating circumstances. Florida Administrative Code Rule 61G4-17.002 sets forth circumstances which may be considered for the purpose of mitigation or aggravation of penalty. Included are: danger to the public; the number of complaints filed against the licensee; the effect of the penalty on the licensee's livelihood; and any other mitigating or aggravating circumstances. Respondent is out of the construction business. He presents no danger to the public. There is no evidence of any prior complaints filed against Respondent. Any penalty will cause a hardship on Respondent as he has gone out of business. And, while Respondent abandoned the job through operation of law, it is equally clear that the amount

of the contract was not paid in full by the Shinns. The final payment of \$1,950 was required under the contract to be paid at time of plaster. Obviously, this did not happen. Accordingly, lesser fines are more appropriate here.

34. As to restitution, the evidence supports restitution in the amount of \$3,757.50, to reimburse the Shinns for moneys paid and will have to be paid to receive the products and services specified in the contract.

35. As to requiring Respondent to apply for a new certificate of authority within 30 days of the Final Order, Respondent's company is out of business. Thus, requiring him to obtain a new certificate of authority is unnecessary and not appropriate under this circumstance.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Construction Industry Licensing Board enter a final order imposing a \$100.00 fine to be deposited in the Construction Industries Recovery Fund for a violation of Section 489.1425; issue a notice of noncompliance pursuant to Section 489.119(6)(e); impose fines in the amount of \$500 for abandonment of a construction job; \$500 for misconduct; and \$100 for failure to put his license number on the contract;

pay \$3,757.50 in restitution; and require Respondent to pay \$614.77 in costs of investigation and prosecution.

DONE AND ENTERED this 11th day of August, 2005, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of August, 2005.

COPIES FURNISHED:

Brian Elzweig, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Stephen Wesley Williams
3146 Brachenbury Lane
Jacksonville, Florida 32225

Tim Vaccaro, Executive Director
Construction Industry Licensing Board
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Leon Biegalski, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

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.