

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 06-0125PL
)
GEORGE WALLACE MILLION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On March 8, 2006, an administrative hearing in this case was held by videoconference between Tallahassee and Fort Myers, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brian Patrick Coats, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32309

For Respondent: Michael F. Kayusa, Esquire
Post Office Box 6096
Fort Myers, Florida 33911

STATEMENT OF THE ISSUES

The issues in the case are whether the allegations of the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated October 26, 2005, the Department of Business and Professional Regulation (Petitioner) alleged that George Wallace Million (Respondent) violated various statutes related to the practice of contracting. The Respondent disputed the allegations and requested a formal administrative hearing. The Petitioner forwarded the matter to the Division of Administrative Hearings.

At the hearing, the Petitioner presented the testimony of one witness and had Exhibits 1 through 5, 8, and 10 through 23 admitted into evidence. The Respondent testified on his own behalf, presented the testimony of three witnesses, and had Exhibits numbered 1 through 3 admitted into evidence.

The one-volume Transcript of the hearing was filed on March 21, 2006. The Petitioner filed a Proposed Recommended Order.

FINDINGS OF FACT

1. At all time material to this case, the Respondent was a certified contractor doing business as "A Quality Roofing of

Southwest Florida, Inc.," holding license number CCC 056383 issued by the Florida Construction Industry Licensing Board.

2. On or about May 6, 2004, the Respondent, doing business as A Quality Roofing of Southwest Florida, Inc., submitted two proposals to Randy Whidden for roofing projects at the Whidden residence located at 1718 Richmond Avenue, Lehigh, Florida. On or about May 10, 2004, Mr. Whidden accepted the proposals and signed the contracts.

3. One of the contracts was for a project identified as "Flat Reroof," in which a single-layer fiberglass sheet was to be installed over a flat roof deck attached to the Whidden residence at a cost of \$1,200.

4. The other contract was for a project identified as "Metal Roof-Over," in which a metal roof was to be installed over the pre-existing shingle roof covering the Whidden residence at a cost of \$13,000.

5. Subsection 489.1425(1), Florida Statutes (2005), requires that construction contracts in an amount exceeding \$2,500 include notice of the Florida Homeowners' Construction Recovery Fund. The Metal Roof-Over contract should have, but did not, contain the required notice.

6. Both contracts required that a deposit of one-third the contract total be provided at commencement with the balance due upon completion of construction.

7. On or about May 21, 2004, a single deposit of \$5,000 was paid by check from Mr. Whidden to the Respondent.

8. Mr. Whidden believed that the job would be completed within seven days from the delivery of materials to the work site.

9. The Flat Reroof project commenced and was completed without issue.

10. During approximately the last week of May, some of the materials for the Metal Roof-Over were delivered to the Whidden house, and work on the Metal Roof-Over commenced around the beginning of June 2004.

11. Initial work on the project did not meet Mr. Whidden's expectations. Portions of the roof were scratched and damaged by the ladders used by the Respondent's employees who were installing the roof.

12. Mr. Whidden was also displeased by the fact that the Respondent's employees scattered construction materials and debris around the Whidden property. Mr. Whidden had offered to permit the materials to be stored on his driveway during the construction. Photos taken by Mr. Whidden (or by his wife in his presence) displayed metal panels and other construction materials scattered in various parts of the Whidden property for a time sufficient to permit vegetation growth to occur around the debris.

13. Mr. Whidden expressed his unhappiness with the state of the project to the Respondent, and a dispute occurred as to who bore responsibility for the damaged metal panels.

Mr. Whidden asserted that the damage was caused by the installation process used by the Respondent's employees. The Respondent asserted that the damage was a manufacturing defect and that touch-up paint would remedy the problem, a solution with which Mr. Whidden disagreed.

14. Work on the Metal Roof-Over project continued sporadically through June 2004. At some point in late June or early July, work on the project ceased. Water leaks began to occur during July rains, and the interior of the Whidden residence was damaged by the leaks.

15. The materials initially delivered to the worksite were insufficient to complete the job. The Respondent did not obtain the remainder of the materials until mid-August, at approximately the same time that Hurricane Charley struck the area. The hurricane damaged other homes in the area, and work on the Whidden project did not resume.

16. A meeting occurred in August 2004, with Mr. Whidden, the Respondent, and a county roofing inspector present. At the meeting, the participants agreed that within approximately one week, the leaks in the Whidden structure would be repaired, and that the remainder of the roof project would be completed within

three weeks. After the meeting, some roof leaks were repaired, but otherwise work on the roof did not resume.

17. One apparent reason for the delay was a continuing disagreement centered on replacement of missing shingles from the existing roof. Mr. Whidden asserted that the Respondent's salesman promised that shingles missing from the existing roof would be replaced prior to the installation of the metal. The contract for the Metal Roof-Over project does not address replacement of shingles on the existing roof.

18. By letter to Mr. Whidden dated September 7, 2004, the Respondent provided an explanation for the delay and stated that the project would be completed according to the contract, including replacement or repair of missing or damaged materials.

19. By letter to the Respondent dated September 8, 2004, Mr. Whidden disagreed with the Respondent's assertions and requested that the project be completed by November, stating "[t]hen I will look at it and decide what to do."

20. On an unidentified date in September 2004, an employee of the Respondent arrived to apply paint to some scratched roofing panels, found the roofing job was incomplete, and left the property. Mr. Whidden believed that the employee would advise the Respondent that the roofing job remained unfinished.

21. By letter to the Respondent dated November 2, 2004, Mr. Whidden noted that although the "major leaks" were repaired

by mid-September, the job remained unfinished. Mr. Whidden wrote that he believed that the Respondent was "in no way able to provide a professional grade roofing system for my home" and requested that the Respondent refund his deposit, "pay for the damages to my home, pay to tear down the part of the roof you installed as well as the shingle roof, and pay for all repairs due to rotten wood." Mr. Whidden wrote that he would "pay a professional contractor to install a new roof."

22. In early November 2004, Mr. Whidden contacted another roofing contractor to obtain various estimates on the metal roof project, including an estimate of \$12,000 to remove the partially-installed metal and the existing shingle roof system, replacement of wood rot, and installation of felt paper. An estimate to install a new metal roof ranged from \$11,500 to \$19,500, depending on the type of metal system desired.

23. At some point, the figure of \$20,000 was identified as the cost to perform the work requested by Mr. Whidden. By letter to Mr. Whidden dated November 9, 2004, the Respondent declined to pay \$20,000. The letter stated that the job would either be finished pursuant to the contract, or that the \$5,000 deposit would be refunded, and the Respondent would "remove and dry-in the metal roof and remove any metal panels or trash that was left in your yard."

24. By letter to Mr. Whidden dated November 12, 2004, the Respondent stated that the job would be finished pursuant to the contract, and that additional work could require additional charges.

25. By letter to the Respondent dated November 14, 2004, Mr. Whidden demanded that the roof be "replaced all the way down to the rot." Mr. Whidden referenced information he had obtained about the Respondent's business and personal life, and wrote "the only time I want to see you . . . on my property is with a local inspector present. Any other time I will have you arrested for trespassing." The letter concluded by advising the Respondent to send his reply to a local law firm representing Mr. Whidden.

26. By letter to Mr. Whidden dated November 15, 2004, Frank Manor, the general manager of the Respondent's company, informed Mr. Whidden that he had assumed the responsibility for resolving the situation. Mr. Manor suggested several options, the first being total removal and replacement of the unfinished metal roof at no additional cost. A second option proposed was to remove the partially installed metal roof as well as the underlying shingle roof at an additional cost of \$4,500, with any wood rot repair being billed based on time and material costs. The letter suggested that any funds required be held in

escrow by the Respondent's attorney until such time as the work was completed.

27. By letter to Mr. Whidden dated November 18, 2004, Frank Manor advised that work was tentatively scheduled to begin on November 22, 2004, and that Mr. Manor hoped to "touch base" with Mr. Whidden prior to that date.

28. By letter to Mr. Whidden's attorney dated November 22, 2004, Frank Manor advised that work had been scheduled to begin on that date, but there had been no confirmation by Mr. Whidden as to his agreement, and the Respondent was uncertain how to proceed.

29. Mr. Whidden filed a complaint with the Department of Business and Professional Regulation (DBPR) which resulted in negotiations to resolve the dispute. By undated letter to the Respondent apparently sent January 21, 2005, Mr. Whidden restated his complaints regarding the Respondent, and again demanded that the entire roof be replaced, including the underlying shingles, or that the Respondent refund the deposit and pay damages identified by Mr. Whidden's attorney.

30. By letter to the Respondent dated August 3, 2005, Mr. Whidden noted that he was unhappy with the resolution of the complaint he filed with DBPR and had forwarded his complaints to various other agencies. He also stated that he intended to file suit against the Respondent unless the Respondent agreed to one

of two options proposed in the letter. The options were presented as follows:

You can either:

Show up to my house in the next ten days, replace all of the metal, and finish my job, get an inspection, and do a quality job. Deduct my \$1,000.00 insurance deductible from the remaining balance that would be due at completion. You will be paid what you are owed and I will have a full warranty. (By the way, my roof leaks right now around the vent stacks)

Or:

Pay me my \$5,000 deposit back, pay the \$12,000.00 it will take to remove your shoddy work and get the roof back ready for metal, pay my \$1,000 insurance deductible (from the \$10,000.00 you did in damage to my home) and I will go away.

31. By letter to the Respondent dated August 29, 2005, Mr. Whidden noted that there has been no response to his August 3rd letter, and again asked for a reply. In the letter Mr. Whidden asserted that the Respondent "has access to my property as a jobsite during normal business hours as long as there is a current permit allowing A Quality Roofing to do work on my home." Mr. Whidden further wrote, "I want my roof finished per contract."

32. The Respondent did not complete the work identified on the Metal Roof-Over contract. No work of substance occurred on the Metal Roof-Over project after July 2004.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.57, Fla. Stat. (2005).

34. The Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against the Respondent. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). In this case, the burden has been met.

35. Section 489.129, Florida Statutes (2005), provides in part as follows:

489.129 Disciplinary proceedings.--

(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 \$10,000 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 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.

36. Section 489.1425, Florida Statutes (2005), requires that contractors notify property owners of the Florida Homeowners' Construction Recovery Fund, and provides 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 recovery fund, except where the value of all labor and materials does not exceed \$2,500. The written statement must be substantially in the following form:

FLORIDA HOMEOWNERS' CONSTRUCTION
RECOVERY FUND

PAYMENT MAY BE AVAILABLE FROM THE FLORIDA HOMEOWNERS' CONSTRUCTION RECOVERY FUND IF YOU LOSE MONEY ON A PROJECT PERFORMED UNDER CONTRACT, WHERE THE LOSS RESULTS FROM SPECIFIED VIOLATIONS OF FLORIDA LAW BY A LICENSED CONTRACTOR. FOR INFORMATION ABOUT

THE RECOVERY FUND AND FILING A CLAIM,
CONTACT THE FLORIDA CONSTRUCTION INDUSTRY
LICENSING BOARD AT THE FOLLOWING TELEPHONE
NUMBER AND ADDRESS:

The statement shall be immediately followed
by the board's address and telephone number
as established by board rule.

(2)(a) Upon finding 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.

(b) Upon finding a second or subsequent
violation of subsection (1), the board shall
fine the contractor \$1,000 per violation,
and the moneys must be deposited into the
recovery fund.

37. The evidence establishes that the Respondent failed to
include the required statement in the contract for the Metal
Roof-Over project and thereby violated Subsection 489.129(1)(i)
and Section 489.1425, Florida Statutes (2005).

38. The evidence establishes that the Respondent violated
Subsection 489.129(1)(j), Florida Statutes (2005), by abandoning
the project. The evidence establishes that the Whidden Metal
Roof-Over project commenced at about the beginning of June 2004.
After July 2004, no work of substance occurred on the project,
and the roof project was not completed.

39. The evidence fails to establish that there was just
cause for the abandonment. The Respondent suggested in part
that the impact of Hurricane Charley explained the delay in the
project; however, the evidence fails to support the assertion.

Insufficient materials were delivered at commencement of the project, and therefore the project could not have been completed by August 2004 despite the impact of the hurricane. Once materials were available in August 2004, the Respondent failed to resume work on the project. The fact that other area homes had storm-related roof damage does not excuse the Respondent's non-performance at the Whidden property, where roof leaks were also occurring.

40. At no time did the Respondent provide notice to Mr. Whidden that work was being terminated. At hearing, the Respondent implied that Mr. Whidden's letter of November 14, 2004 (wherein he stated that he did not want the Respondent on his property without being accompanied by a local inspector), prevented completion of the job; yet the November 15 letter to Mr. Whidden from the Respondent's general manager clearly establishes that Mr. Whidden's letter was not interpreted in such manner at the time. In any event, beyond a continuing exchange of correspondence and sporadic meetings at the job site, no work of substance was completed on the roof after July 2004, other than in September when some leaks were repaired.

41. The evidence establishes that the Respondent violated Subsection 489.129(1)(m), Florida Statutes (2005), by committing incompetency or misconduct in the practice of contracting by

abandoning the project, by failing to maintain worksite conditions in a proper manner, and by failing to timely complete the roof resulting in water intrusion at the Whidden home.

42. Pursuant to Subsection 455.2273(1), Florida Statutes (2005), the Petitioner has adopted disciplinary guidelines which govern the penalty imposed in this case. The administrative law judge is bound by such guidelines, including consideration of mitigating or aggravating circumstances upon which the recommended penalty is based. § 455.2273(5), Fla. Stat. (2005).

43. Florida Administrative Code Rule 61G-17.001 provides in relevant part as follows:

61G4-17.001 Normal Penalty Ranges.

(1) The following guidelines shall be used in disciplinary cases, absent aggravating or mitigating circumstances and subject to other provisions of this chapter.

* * *

(i) Section 489.129(1)(i), F.S.: Failing in any material respect to comply with the provisions of Part I of Chapter 489, F.S.

* * *

4. Section 489.1425, F.S.: Failure to notify residential property owner of recovery fund. First violation, \$250 to \$2,000 fine; repeat violation, \$2,000 to \$5,000 fine.

* * *

(j) Section 489.129(1)(j), F.S.: Abandonment. First violation, \$5,000 to

\$1,000 fine and/or probation; repeat violation, \$5,000 fine and revocation.

* * *

(m) Misconduct or incompetency in the practice of contracting, shall include, but is not limited to:

1. Failure to honor a warranty.
2. Violation of any provision of Chapter 61G4, F.A.C., or Chapter 489, Part I., F.S.
3. Failure to abide by the terms of a mediation agreement.
4. The following guidelines shall apply to cases involving misconduct or incompetency in the practice of contracting, absent aggravating or mitigating circumstances:
 - a. Misconduct by failure to honor warranty. First violation, \$1,000 to \$2,500 fine; repeat violation, \$2,500 to \$5,000 fine and suspension or revocation.
 - b. Violation of any provision of Chapter 61G4, F.A.C., or Chapter 489, Part I, F.S. First violation, \$1,000 to \$2,500 fine; repeat violations, \$2,500 to \$5,000 fine and suspension or revocation.
 - c. Any other form of misconduct or incompetency. First violation, \$500 to \$1,000 fine and probation; repeat violations \$1,000 to \$5,000 fine and suspension or revocation.

44. Florida Administrative Code Rule 61G-17.002 provides in relevant part as follows:

61G4-17.002 Aggravating and Mitigating Circumstances.
Circumstances which may be considered for the purposes of mitigation or aggravation of penalty shall include, but are not limited to, the following:
(1) Monetary or other damage to the licensee's customer, in any way associated with the violation, which damage the licensee

has not relieved, as of the time the penalty is to be assessed. (This provision shall not be given effect to the extent it would contravene federal bankruptcy law.)

(2) Actual job-site violations of building codes, or conditions exhibiting gross negligence, incompetence, or misconduct by the licensee, which have not been corrected as of the time the penalty is being assessed.

(3) The danger to the public.

(4) The number of complaints filed against the licensee.

(5) The length of time the licensee has practiced.

(6) The actual damage, physical or otherwise, to the licensee's customer.

(7) The deterrent effect of the penalty imposed.

(8) The effect of the penalty upon the licensee's livelihood.

(9) Any efforts at rehabilitation.

(10) Any other mitigating or aggravating circumstances.

45. No aggravating or mitigating circumstances exist which warrant variance from the disciplinary guidelines adopted by the Petitioner.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Business and Professional Regulation, Construction Industry Licensing Board, enter a final order imposing the following penalty:

1. A total administrative fine of \$6,000 which includes:
a fine of \$500 for failing to include notice of the Florida

Homeowners' Construction Recovery Fund in the contract, a violation of Subsection 489.129(1)(i) and Section 489.1425, Florida Statutes (2005); a fine of \$5,000 for abandonment of the Whidden Metal Roof-Over project, a violation of Subsection 489.129(1)(j), Florida Statutes; and a fine of \$500 for incompetency and misconduct in the practice of contracting, a violation of Subsection 489.129(1)(m), Florida Statutes.

2. Financial restitution to Mr. Whidden in a total amount of \$15,800, which includes repayment of the remaining deposit funds in an amount of \$3,800 (an amount calculated by deducting the \$1,200 cost of the completed Flat Reroof project from the original \$5,000 deposit) and payment of \$12,000 to cover the cost of removing the partially-installed metal and the existing shingle roof system, replacement of wood rot, and installation of felt paper.

3. Suspension of the Respondent's licensure until administrative fines and restitution are made in full, followed by a period of three years' probation.

DONE AND ENTERED this 20th day of April, 2006, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of April, 2006.

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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.