

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
CONSTRUCTION INDUSTRY LICENSING )  
BOARD, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 08-0226PL  
 )  
RAYMOND SPENCER, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 4, 2008, in Cocoa Beach, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Collin W. L. Mcleod, Esquire  
Robert A. Crabill, Esquire  
Wright, Fulford, Moorhead  
& Brown, P.A.  
145 North Magnolia Avenue  
Orlando, Florida 32803

For Respondent: Raymond Scott Spencer, pro se  
319 Kent Drive  
Cocoa Beach, Florida 32931

## STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated Subsections 489.129(1)(g)2., (g)3., (j), (o) and (m), Florida Statutes (2004),<sup>1</sup> and, if so, what discipline should be imposed.

## PRELIMINARY STATEMENT

On March 28, 2007, the Department of Business and Professional Regulation, Construction Industry Licensing Board (Department), filed a five-count Administrative Complaint against Respondent, Raymond Spencer (Mr. Spencer), alleging that Mr. Spencer violated Subsections 489.129(1)(g)2., (g)3., (j), (o), and (m), Florida Statutes. Mr. Spencer requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on January 11, 2008, for assignment to an Administrative Law Judge to conduct the final hearing.

At the final hearing, the Department called the following witnesses: Jesse J. Ross, Sr.; Dawn Lynn Ross; Frank Wisniski; Robert T. Shindo; and Michael McCaughin. Petitioner's Exhibits 1 through 14 were admitted in evidence. Mr. Spencer testified in his own behalf and offered no exhibits.

The Transcript of the final hearing was filed on March 24, 2008. The parties agreed to file their proposed recommended orders within ten days of the filing of the Transcript. The Department filed its Proposed Recommended Order

on April 3, 2008. To date, Respondent has not filed any post-hearing submittal. The Department's Proposed Recommended Order has been given consideration in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Mr. Spencer holds a current, active Florida State Certified Building Contractor License, having been issued license number CBC 1252039. He is certified with the Department as doing business as KCLS Spencer, Inc. (KCLS), and is the primary qualifying agent thereof.

2. Mr. Spencer submitted a Proposal, bearing the letterhead of KCLS and dated September, 14, 2004, to Jesse J. Ross, Sr. (Mr. Ross), which pertained to the exterior remodeling of Mr. Ross' jewelry store located at 6290 North Atlantic Avenue, Cape Canaveral, Florida 32920. Initially, the Proposal put the cost for the remodeling at \$48,762.86. After some negotiating, the Proposal that ultimately formed the basis of their contract set the cost at \$45,000.00 and relieved Mr. Spencer of the obligation of constructing walkways.

3. The Proposal's explicit terms provide:

As per specifications and blueprints pricing is as follows; labor and material to renovate existing exterior building. Prices to include all demolition of all exist [sic] structures, installation of siding, columns, dormers, cupolas, two (2) French doors,

windows, front gutters and down spouts, electrical, and final painting.

Notes:

1. Signs by owner.
2. Paint colors by owner.
3. Power and water supplied by owner.
4. Color of pre-painted metal roof determined by owner.
5. Material storage space to be provided by owner.
6. Quotes good for 10 days (after 10 days, please reconfirm material pricing).
7. 20% deposit \$9752.57 due to start project, invoicing to [sic] made weekly per actual costs.

Essentially, much of the exterior remodeling to be performed is simply stated as being based on the specifications and blueprints, which Mr. Ross provided to Mr. Spencer. These specifications and blueprints have not been received in evidence, but there appears to be no dispute among the parties regarding the scope of the work.

4. The terms of payment were for an initial 20 percent deposit of \$9,752.57, with weekly invoices to follow based on actual, ongoing costs. On October 25, 2004, Mr. Ross' lender, Coastal Bank, drafted a loan check for \$9,752.57 made payable to KCLS. Sometime shortly thereafter, KCLS began the work of remodeling the exterior of Mr. Ross' store.

5. As work progressed, Mr. Spencer provided Mr. Ross with an invoice, dated November 11, 2004, requesting payment for costs incurred. Despite listing on the invoice an "off set

balance" of \$2,515.32 that applied costs to date against the initial deposit, the total amount due was nevertheless listed as \$12,268.04. On November 23, 2004, Mr. Ross wrote a check for \$12,268.04 made payable to Mr. Spencer personally.

6. Later, Mr. Spencer provided Mr. Ross with another invoice, dated December 23, 2004, requesting payment for further costs incurred. The total amount due was \$8,475.24. By check dated that same day, Mr. Ross wrote a check for \$8,475.24 made payable to Mr. Spencer personally. At this time, Mr. Ross received assurance from Mr. Spencer that no further money would be due, until the work was entirely completed.

7. Sometime between Christmas 2004 and New Year's 2005, Mr. Spencer returned again to Mr. Ross' store and requested from him an additional \$3,000.00. At this point, Mr. Ross refused, because of Mr. Spencer's earlier assurance that no further ongoing payments would be demanded and because of the lack of any work performed since the last payment. Mr. Spencer insisted that he had all of the necessary materials in his warehouse and that he would be back on the Monday following the New Year's holiday to work on the store. He never returned and could not be contacted by Mr. Ross.

8. As the storefront remained in disrepair, Mr. Ross was compelled to contract with other parties to complete the work. Sunland General Contractors, Inc. (Sunland); Baker Roofing

(Baker); and D.A.B. Painting, Inc. (DAB), completed the work that Mr. Spencer had previously been contracted with to perform. According to the testimony of Mr. Ross, they based their work upon the same specifications and blueprints that Mr. Ross had previously provided to Mr. Spencer. Sunland, except for the roofing and painting, performed what work that remained.

9. Based on a payment history dated December 16, 2005, the total cost of Sunland's work for Mr. Ross was \$23,770.00. However, this cost includes \$3,990.00 for walkway decking, which Mr. Ross and Mr. Spencer, in their previous negotiations, had agreed would not be part of their final agreement. As such, the relevant cost in the instant case for Sunland's work is \$19,780.00. According to a Baker invoice, dated November 10, 2005, the cost to Mr. Ross for the new roof was \$14,935.00. According to a letter from DAB, dated April 23, 2005, Mr. Ross paid \$6,500.00 for the painting of his store. In sum, the relevant costs to Mr. Ross for this subsequent work total \$41,215.00.

10. Sometime in October of 2005, Mr. Ross provided Mr. Frank A. Wisniski (Mr. Wisniski), a general contractor and owner of Sunland, with a set of blueprints and asked him to takeover the job that Mr. Spencer had not completed. Mr. Wisniski further testified on the condition of the building, as Mr. Spencer had left it. According to his testimony, some of

the siding was not nailed properly, and the columns in the front of the store were not well secured, a potentially hazardous situation. Overall, in his opinion, he felt that Mr. Spencer had completed approximately 25 percent of the total scope of the job.

11. Mr. Robert T. Shindo (Mr. Shindo) is an investigator for the Department. He responded to Mr. Ross' complaint to the Department regarding Mr. Spencer's work on the store. He found, "basically, a building that was not in repair." Some siding work had been done on the north face of the building, as well as some column work. However, the columns appeared damaged or incomplete, and the siding appeared incomplete as well.

12. Besides the siding and columns, Mr. Shindo testified that "[t]here did not appear to be any other work." Overall, Mr. Shindo had familiarized himself with the Proposal and estimated that between ten and 15 percent of the job appeared to be complete.

13. Mr. Michael McCaughin (Mr. McCaughin) is employed at the Building Code Division of Brevard County and is the chief building official for the county. Mr. McCaughin concluded that based on the work specified in the Proposal of Mr. Spencer, the only item which would not have required permitting is the gutters. Mr. McCaughin personally searched the county permit database, and no permits were ever pulled by Mr. Spencer for the

remodeling of Mr. Ross' store. Petitioner's Exhibit 14, a printout of the permits that have been pulled for Mr. Ross' store, confirms Mr. McCaughin's testimony. Moreover, Mr. McCaughin "performed a search of Mr. Spencer under his name, under his state license number, and also under the company name, KCLS and, could not find any record of any permits being pulled, nor was he registered with Brevard County contractor licensing."

14. Mr. Spencer, in testifying in his own behalf, mainly confirmed the testimony of the other witnesses and the other facts in evidence. Among other things, he confirmed that he and Mr. Ross had an agreement for KCLS to remodel the exterior of the store and that the agreement was based on the Proposal he had submitted to Mr. Ross. He agreed that he received the payments that Mr. Ross testified to having paid and testified that he never pulled the permits for the job, because he "[j]ust didn't take the time to do it."

15. Mr. Spencer's recollection of his final conversation with Mr. Ross was substantially the same as Mr. Ross' testimony, with Mr. Spencer testifying that he had told Mr. Ross he would be back to work on the job and that there was an understanding that final payment would be made at the end of the project. He goes on to testify that he did actually go back after this final conversation to finish up the siding on the south side of the



store and that the siding was completed. This last testimony is not credible.

16. In Mr. Spencer's defense, some of the work was farmed out to subcontractors, and they were paid in full. He then testified that he was planning on continuing the work but that he was waiting on a roofer. While he was waiting for the roofer, he testified that there was some dispute between himself and Mr. Ross regarding a ring he had received from Mr. Ross. He testified that the ring fell apart and that the dispute ended their working relationship.

17. But for "\$8200 - Ring" being handwritten on the Proposal alongside the other payments made by Mr. Ross, no mention of this ring was made by the Petitioner. Presumably, this ring was given as in-kind payment to Mr. Spencer, but without anything more to go on, the insufficiency of the relevant evidence precludes any recognition of the ring as payment.

18. Therefore, the three previously described checks, furnished by Mr. Ross and made payable to Mr. Spencer or KCLS, are found to represent the entirety of the consideration furnished. To refresh, these checks are dated October 25, 2004; November 23, 2004; and December 23, 2004, and amount to \$9,752.57; \$12,268.04; and \$8,475.24, respectively. In sum, they total \$30,495.85.

19. Mr. Spencer also testified about the installation of French doors at Mr. Ross' store. Mr. Ross earlier testified that he had refused delivery of two French doors, when a subcontractor arrived to install them, because they were not the style, size or number he desired. He further testified that Mr. Spencer was aware that he desired six doors with plastic slats (not two as listed in the Proposal), because he had directed Mr. Spencer to examine the doors of a nearby storefront, whose style he wished to replicate.

20. Mr. Spencer was questioned about these doors by opposing counsel. Opposing counsel asked, "Were the French doors ever installed into the building?" Mr. Spencer responded, "Not that I know of, by Bill, no." Several questions later, opposing counsel asked, "Okay. My point is, the doors were never installed in the project; is that your understanding?" Mr. Spencer responded, "My understanding from Bill was that, yes, they were installed." On this issue, Mr. Spencer could only speculate, because he never returned to the job site to check whether the doors had been installed. Mr. Spencer's testimony on this topic is not credible.

21. Despite never being installed, Mr. Ross paid a \$4,700.00 deposit for the French doors that was never refunded. When asked why this money was never refunded to Mr. Ross, Mr. Spencer goes on to testify that he trusted the subcontractor

delivering the doors, that he assumed they were delivered, and that that's why he never attempted to receive a refund of the doors' cost from the subcontractor.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2007).

23. The Department has the burden to establish the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). The Department has alleged that Mr. Spencer violated Subsections 489.129(1)(g)2., (g)3., (j), (m), and (o), Florida Statutes, which provides that the following acts constitute grounds for disciplinary action by the Department:

(g) Committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer. Financial mismanagement or misconduct occurs when:

\* \* \*

2. The contractor has abandoned a customer's job and the percentage of completion is less than the percentage of the total contract price paid to the contractor as of the time of abandonment, unless the contractor is entitled to retain such funds under the terms of the contract or refunds the excess funds within 30 days after the date the job is abandoned; or

\* \* \*

3. The contractor's job has been completed, and it is shown that the customer has had to pay more for the contracted job than the original contract price, as adjusted for subsequent change orders, unless such increase in cost was the result of circumstances beyond the control of the contractor, was the result of circumstances caused by the customer, or was otherwise permitted by the terms of the contract between the contractor and the customer.

\* \* \*

(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.

\* \* \*

(o) Proceeding on any job without obtaining applicable local building department permits and inspections.

24. Mr. Brown is and was the primary qualifying agent for KCLS during all the times material to this proceeding.

Subsection 489.1195(1)(a), Florida Statutes, provides:

(1) A qualifying agent is a primary qualifying agent unless he or she is the secondary qualifying agent under this section.

(a) All primary qualifying agents for a business organization are jointly and equally responsible for supervision of all operations of the business organization; for all field work at all sites; and for financial matters, both for the organization in general and for each specific job.

Thus, irrespective of whether or not the work was subcontracted to others, Mr. Spencer, as primary qualifying agent for KCLS, was responsible for all of the work that was performed under the aegis of KCLS at Mr. Ross' jewelry store.

25. The Department established by clear and convincing evidence that KCLS abandoned the project in violation of Subsection 489.129(1)(j), Florida Statutes. The project was not completed, KCLS left the job and never returned, and KCLS gave no reason to Mr. Ross for not returning to the job to complete the work. As primary qualifying agent for KCLS, Mr. Spencer was responsible for completing the work.

26. The Department established by clear and convincing evidence that the percentage of completion of the job was less than the percentage of the total contract price paid to KCLS as of the time of abandonment in violation of Subsection 489.129(1)(g)2., Florida Statutes. Mr. Wisniski testified that he estimated the job, as he originally found it, to be approximately 25 percent complete, and Mr. Shindo estimated it to be approximately 10 to 15 percent complete. Their testimonies are given additional illumination by the fact that

Mr. Ross was compelled to expend an additional \$41,215.00 to complete the job. The evidence establishes that Mr. Ross paid Mr. Spencer a total of \$30,495.85, which is 68 percent of the total contract price.

27. The Department has failed to establish by clear and convincing evidence that Mr. Spencer violated Subsection 489.129(1)(g)3., Florida Statutes. The strict construction of Subsection 489.129(1)(g)3., Florida Statutes - required due to the statute's penal nature<sup>2</sup>--leads to the determination that the subsection is only applicable when the contractor charged with violating Subsection 489.129(1)(g)3., Florida Statutes, completes the job. The record affirmatively establishes that Mr. Spencer never completed the job but rather abandoned it.

28. The Department established by clear and convincing evidence that Mr. Spencer never pulled the necessary permits in violation of Subsection 489.129(1)(o), Florida Statutes. Ample evidence was presented by the Department that no permits were ever pulled, and, by Mr. Spencer's own admission, he never pulled the permits.

29. The Department established by clear and convincing evidence that Mr. Spencer committed incompetency or misconduct in the practice of contracting in violation of Subsection 489.129(1)(m), Florida Statutes. Mr. Spencer, in failing to ensure the columns were properly secured, created a potential

hazard to the public-at-large that remained lurking at the entrance to Mr. Ross' store for almost a year. Moreover, on more than this one occasion, Mr. Spencer's lack of supervision of his subcontractors led to unacceptable or shoddy work; the example above is simply the most egregious.

30. Florida Administrative Code Rule 61G4-17.001(1) (2004)<sup>3</sup> lists the "normal penalty ranges" that, in the absence of aggravating or mitigating circumstances, must be applied, by both the undersigned and the Department, when determining appropriate penalties for violations of Chapter 489, Part I, Florida Statutes. See Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988); § 455.2273(5), Fla. Stat. The rule provides for separate first and repeat offender penalty ranges, and, since Mr. Spencer is a first offender, the former penalty ranges are applicable.

31. Florida Administrative Code Rule 61G4-17.001(1) (2004) provides the following relevant penalty ranges:

(g) Section 489.129(1)(g), F.S.:  
Mismanagement or misconduct causing financial harm to the customer. First violation, \$ 750 to \$ 1,500 fine and/or probation; repeat violation, \$ 1,500 to \$ 5,000 fine and suspension or revocation.

\* \* \*

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

\* \* \*

4. The following guidelines shall apply to cases involving misconduct or incompetency in the practice of contracting, absent aggravating or mitigating circumstances:

\* \* \*

c. Any other form of misconduct or incompetency. First violation, \$ 250 to \$ 1,000 fine and/or probation; repeat violations \$ 1,000 to \$ 5,000 fine and suspension or revocation.

\* \* \*

(o) Section 489.129(1)(o), F.S.: Proceeding on any job without obtaining applicable local building department permits and/or inspections.

\* \* \*

3. Job finished without a permit having been pulled, or no permit until caught after job, or late permit during the job resulting in missed inspection or inspections. First violation, \$ 500 to \$ 1,500 fine; repeat violation, \$ 1,000 to \$ 2,500 fine and suspension or revocation.

32. Florida Administrative Code Rule 61G4-17.001(5) requires the Department to order the contractor to make restitution in the amount of financial loss suffered by the consumer. Evidence was presented that the total cost to Mr. Ross for the three other contractors to complete the work that Mr. Spencer had abandoned was \$41,215.00. Mr. Ross is recognized as having paid Mr. Spencer a total of \$30,495.85. Mr. Ross ultimately paid \$71,710.85 to complete a job that was



originally contracted to cost only \$45,000, and thus, absent any evidence to the contrary, Mr. Ross' amount of financial loss suffered is the difference between these two amounts, \$26,710.85.

33. Florida Administrative Code Rule 61G4-17.001(4) provides that the Construction Industry Licensing Board may assess the costs of investigation and prosecution, excluding costs relating to attorney time. No evidence was presented as to the amount of these costs.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Respondent violated Subsections 489.129(1)(g)2., 489.129(1)(j), 489.129(1)(m), and 489.129(1)(o), Florida Statutes; finding that Respondent did not violate Subsection 489.129(1)(g)3., Florida Statutes; imposing an administrative fine of \$1,500.00 for the violation of Subsection 489.129(1)(g)2., Florida Statutes; imposing an administrative fine of \$2,000.00 for the violation of Subsection 489.129(1)(j), Florida Statutes; imposing an administrative fine of \$1,000.00 for the violation of Subsection 489.129(1)(m), Florida Statutes; imposing an administrative fine of \$1,500.00 for the violation of Subsection 489.129(1)(o), Florida Statutes; requiring Respondent to make restitution to Mr. Ross in the amount of

\$26,710.85; placing Respondent on probation for a period of three years; and requiring Mr. Spencer to attend a minimum of seven additional hours of continuing education classes.

DONE AND ENTERED this 18th day of April, 2008, in Tallahassee, Leon County, Florida.



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SUSAN B. HARRELL  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 18th day of April, 2008.

ENDNOTES

<sup>1/</sup> Unless otherwise noted, all subsequent statutory references are to the 2004 Florida Statutes.

<sup>2/</sup> See State v. Pattishall, 126 So. 147 (Fla. 1930); Lester v. Department of Professional and Occupational Regulation, State Board of Medical Examiners, 348 So. 2d 923 (Fla. 1st DCA 1977).

<sup>3/</sup> As it would be a violation of the ex post facto clause to apply the higher penalties provided for in the current rule, the applicable "Normal Penalty Ranges" are those that were in effect in 2004, when the acts subject to discipline occurred. See Arias v. Dep't of Business and Professional Regulation, 710 So. 2d 655, 661 (Fla. 3d DCA 1998).

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.