STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, CONSTRUCTION INDUSTRY LICENSING BOARD,	)	
Petitioner,	)	
vs.	)	Case No. 08-4491
DOUGLAS J. RINGOLD, JR., d/b/a ALPHA RESTORATION, INC.,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on November 12, 2008, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Brian Coats
Assistant General Counsel
Department of Business and
Professional Regulation
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For Respondent: Paul Buschmann, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Douglas J. Ringold, Jr., d/b/a Alpha Restoration, Inc., committed the offenses alleged in a four-count Administrative Complaint filed with Petitioner, the Department of Business and Professional Regulation, on January 4, 2008, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

In December 2007 Petitioner issued a four-count Administrative Complaint in DBPR Case No. 2006-050524, alleging that Respondent had violated certain statutory provisions governing the conduct of individuals in Florida licensed by the Construction Industry Licensing Board. In particular, it is alleged in the Administrative Complaint that Respondent violated Section 489.129(1)(i), Florida Statutes, by "failing in any material respect to comply with the provisions of this part or violating a rule or lawful order of the board," by violating Section 489.126(2)(a), Florida Statutes (Count I); Section 489.129(1)(g)2., Florida Statutes, "by committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer" (Count II); Section 489.129(1)(j), Florida Statutes, "by abandoning a construction project in which the contractor is engaged or under contract as a contractor" (Count III); and Section 489.129(1)(m), Florida Statutes, "by

committing incompetency or misconduct in the practice of contracting" (Count IV).

Respondent, by executing an Election of Rights form, disputed the factual allegations of the Administrative Complaint and requested "a hearing before an administrative law judge before the Division of Administrative Hearings" pursuant to Section 120.57(1), Florida Statutes.

A copy of the Administrative Complaint and Election of Rights form were filed with the Division of Administrative Hearings on September 16, 2008. The matter was designated DOAH Case No. 08-4491PL and was assigned to the undersigned.

The final hearing was scheduled for November 12, 2008, by Notice of Hearing entered September 23, 2008. By Amended Notice of Hearing by Video Teleconference, the hearing was scheduled to be heard by video teleconferencing between sites in Lauderdale Lakes and Tallahassee, Florida.

At the final hearing, Petitioner presented the testimony of Raul Chinaya (Petitioner spelled Mr. Chinaya's name "Chinea" and, in the Transcript, his name is spelled "China." On page 15 of the Transcript, however, the witness spelled his name "Chi-nay-a"), and Jose Fons. Petitioner also had 13 exhibits admitted. Respondent testified on his own behalf and had one exhibit admitted.

On January 9, 2009, a Notice of Filing Transcript was issued informing the parties that the one-volume Transcript of the final hearing had been filed. The parties were also informed that their proposed recommended orders were to be filed on or before January 20, 2009.

Petitioner filed Petitioner's Proposed Recommended Order on January 20, 2009. Respondent filed Respondent's Proposed Recommended Order on January 27, 2009. It does not appear that Petitioner has been prejudiced by Respondent's failure to timely file his post-hearing submittal. Therefore, both proposed recommended orders have been fully considered in preparing this Recommended Order.

All references to the Florida Statutes in this Recommended Order are to the codification applicable to the years in which the events alleged in the Administrative Complaint took place, 2005 and 2006, unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, the Department of Business and Professional Regulation (hereinafter referred to as the "Department"), is the agency of the State of Florida charged with the responsibility for, among other things, the licensure of individuals who wish to engage in contracting in the State of Florida; and the investigation and prosecution of complaints against individuals who have been so licensed. See Chs. 455 and 489, Fla. Stat.

2. Respondent, Douglas J. Ringold, Jr., d/b/a Alpha Restoration, Inc., is and has been at all times material hereto a certified roofing contractor in Florida, having been issued license number CCC 1326506 by the Construction Industry Licensing Board (hereinafter referred to as the “Board”). At all times material hereto, the status of his license has been "Current, Active."

3. At all times material, Mr. Ringold was certified as doing business as Alpha Restoration, Inc. (hereinafter referred to as "Alpha"), a Florida corporation.

4. At the times material, Mr. Ringold was the qualifying agent for Alpha, which possesses a certificate of authority as a contractor qualified business in Florida, license number QB 40272. Alpha’s license was issued May 5, 2005, and it is scheduled to expire August 31, 2010.

5. On or about November 7, 2005, Alpha, through its employee Harry Youdell, met with Jose Fons at Mr. Fons’ residence located at 9922 Southwest 2nd Terrace, Miami, Florida (hereinafter referred to as the “Residence”), to inspect the roof on the Residence. Mr. Fons had not been successful in obtaining approval from his insurance company for replacement of the hurricane-damaged roof. Alpha represented that it would assist Mr. Fons in negotiating with his insurance company to

obtain approval for replacement of the roof, which Mr. Fons authorized, in writing, Alpha to do.

6. On January 15, 2006, Mr. Fons and Alpha entered into a written agreement (hereinafter referred to as the "Contract") whereby Alpha agreed to install a metal tile roof on the Residence in exchange for payment of $27,187.02, with possible increases for "additional payments & supplements," from Mr. Fons. The Contract provided for a 50 percent material deposit to be paid to Alpha.

7. By check dated January 15, 2006, Mr. Fons paid the 50 percent deposit totaling $13,600.00 to Alpha.

8. At the time the Contract was entered into, Alpha told Mr. Fons that a permit would be applied for the following week and that construction would commence in February. Although there was unsubstantiated hearsay that Mr. Fons was informed that the metal tile roof Mr. Fons was purchasing had not been approved for use in Miami-Dade County, Mr. Fons credibly denied being so informed. The credible, non-hearsay evidence supports a finding that Mr. Fons was not immediately informed that metal tile roofs were not authorized in Miami-Dade County.

9. Despite not providing written or verbal authorization to Alpha to wait more than 30 days after execution of the Contract to apply for the permit for the roof work, no permit was applied for by Alpha for the Residence roof work within

30 days after January 15, 2006. Nor did Alpha commence work of any kind on the project in January or February 2006.

10. During the first week of March, having heard nothing more from Alpha, Mr. Fons called Alpha and inquired about the status of the project. Mr. Fons was told by Mr. Youdell that the metal tile roof had not been approved by the Miami-Dade Building Department (hereinafter referred to as the "Building Department"). Mr. Youdell told Mr. Fons it would take another 30 days to obtain a permit.

11. As of April 2006, Alpha had not commenced work or contacted Mr. Fons. Therefore, Mr. Fons called and spoke to Mr. Youdell about the status of the project. Mr. Fons was again told that the metal tile roof had not been approved and that testing of the roof would take another 30 days.

12. In fact, Alpha had not made application for any permit for the Residence roof job through April 2006. On May 11, 2006, approximately 114 days after receiving Mr. Fons' deposit, Alpha finally submitted an application for the permit with the Building Department. The application was designated C2006169450 by the Building Department.

13. In May 2006, Mr. Fons again contacted Alpha to inquire about the project, since no work had been started and he had not heard from Alpha. For the third time, Alpha told Mr. Fons that

the roof had not gained approval from the Building Department and that another 30 days was needed.

14. In June 2006, Mr. Fons again contacted Alpha. Work on his roof had not started and he had not heard from Alpha. Not surprisingly, Mr. Fons was told for the fourth time that the roof had not gained approval and there would be another 30-day delay.

15. Mr. Fons, who was becoming frustrated with the delay, visited the Building Department and inquired about the project. He learned that Alpha had not applied for a permit until May 2006 and was told that the Building Department had "denied" it on May 16, 2006. Mr. Fons was not told by the Building Department that, despite the "denial," the permit application remained open.

16. By July 2006, Alpha had still not commenced work. Therefore, Mr. Fons contacted Alpha and requested a meeting to discuss alternatives to the metal tile roof. Obviously, Mr. Fons was aware that metal tile roofs were not approved for use in Miami-Dade County since entering into the Contract.

17. While no work had commenced from January 15, 2006, when the written agreement was entered into and the deposit was made, through July 2006, Mr. Fons effectively agreed to wait for Alpha to attempt to gain approval for the metal tile roof from the Building Department. Having obtained Mr. Fons' approval,

Alpha could not have commenced work on the project through July 2006.

18. On July 17, 2006, Alpha, through Mr. Youdell, met with Mr. Fons at the Residence. Because of the delays that had been caused by the failure of Alpha to gain approval of the metal tile roof from the Building Department and with assurances that the contract price would be the same, Mr. Fons agreed to accept, and Alpha agreed to provide, a tile roof.

19. Alpha represented to Mr. Fons that the tile roofing material was in-stock, that a permit would be obtained within a week, and that construction would commence by mid-August 2006.

20. Between July 25, 2006, approximately a week after the July 17, 2006, meeting, and August 7, 2006, Mr. Fons monitored the Building Department's web-site to see if Alpha had applied for a permit for the tile roof. When there was no indication that the permit had been applied for, Mr. Fons called Alpha on August 8, 2006. Mr. Youdell told him that the permit had been applied for and it had not appeared in the computer system because the Building Department was backlogged. Mr. Youdell told Mr. Fons that Alpha would be at the Residence in ten days to at least clean up debris.

21. As of August 18, 2006, no new permit had been applied for and no one from Alpha had been to the Residence.

Consequently, Mr. Fons wrote and delivered a letter by facsimile addressed to Mr. Ringold, stating, in part, the following:

> After months of dealing with you, this is my formal request for a full refund of $13,600 paid to you January 15, 2006, with my personal check #6408. Said amount was a deposit for the contract for the replacement of the roof at my residence located at 922 SW 2 Terrace, Miami, FL.
>
> As you are aware of, Florida Statutes 489.126 demands that you apply for the necessary permits within 30 days after the initial payment (my payment to you on 1-15-06 $13,600). Please do not call me, from now on all communications will be done in written form.
>
> If you fail to refund my deposit within 10 days, please be advised that I will file a complaint . . . .
>
> Since we are now in August, and you have not commenced work at my residence, this is my demand letter for a check in full refund of my deposit within 10 days of receipt of this letter.

22. On August 24, 2006, after having received Mr. Fons' August 18, 2006, letter, Alpha submitted an on-line application for a tile roof for the Residence. The matter was designated W2006262830. This permit application was not approved because Alpha failed to complete the application process.

23. When he did not receive a response to his August 18, 2006, letter, Mr. Fons wrote a second letter to Alpha, which was mailed by certified mail on or about September 4, 2006. In the second letter, Mr. Fons indicated that the ten-day deadline set

out in his previous letter had passed without response and he again requested the return of his deposit.

24. On September 3, 2006, the original metal tile roof permit application was rejected by the Building Department. On September 8, 2006, the permit application, having been converted from a metal roof to a tile roof, was approved and issued as permit number 2006126043.

25. On September 6, 2006, after Alpha had applied for and obtained a permit, Mr. Fons finally received a written response from Alpha to his August 18, 2006, letter. In the response, Mr. Ringold suggests the following: "At the signing of your contract you were aware that 'Metro Steel Tile' did not have Miami Dade approval and you were willing to wait for such to be approved. This made securing a permit in 30 days impossible and you were completely aware of that at the time." Mr. Ringold's understanding of Mr. Fons' "understanding" has not been substantiated by the evidence presented in this case, and is, therefore, rejected.

26. Mr. Ringold goes on to accurately suggest that Mr. Fons and Alpha had modified the agreement in July, when it was agreed that a tile roof would be placed on the Residence. Mr. Ringold then suggests that any delay in applying for a permit after July was due to the need to ensure that the tiles were delivered, facts Mr. Fons was not previously apprised of.

27. Mr. Ringold ends the letter as follows:

> We have confirmed that your tile is acquired and have applied for your permit. . . . Had we been informed that you were so concerned that your permit be pulled immediately we would have been more than happy to do so. We never worry about getting the permit in Dade County as they are very effective in issuing permits in a timely manner [a fact which Mr. Youdell was apparently not aware of, given his representation to Mr. Fons that the Building Department was back logged]. I do not understand the reason for the letter?
>
> We sincerely have always had your best interest at heart, and want to proceed with the install. I am confident that you will be pleased with the finished product.
>
> Please if you would contact me directly at . . . to discuss this matter.

28. On September 11, 2006, Mr. Fons found a copy of permit number 2006126043, issued on September 8, 2006, on the door of the Residence.

29. Other than a letter from Mr. Fons to Alpha dated October 23, 2006, requesting a list of subcontractors and suppliers used by Alpha, there was no further correspondence between Alpha and Mr. Fons. Nor did Alpha make any effort to fulfill its obligations under the Contract.

30. Ultimately, permit number 20066126043, issued September 8, 2006, was cancelled based upon a February 7, 2007, request from Alpha. No work took place on the project for more than 90 days after the permit was issued.

31. Based upon the foregoing, more than six months passed after the Contract was entered into without any work being performed by Alpha: January 15, 2006, to July 17, 2006. While the evidence failed to prove that Mr. Fons was fully informed at the time the Contract was entered into that the metal tile roofing he had selected was not approved for use in Miami-Dade County and, therefore, securing a permit would take some time to acquire, he was eventually informed of these facts. Ultimately, Mr. Fons acquiesced to the delay in commencing work between January 15, 2006, and July 17, 2006, when Mr. Fons and Alpha agreed to a modification of the Contract; in particular, to replace the roof on the Residence with a tile roof. There was, therefore, no "abandonment" of the project between January and July 2006.

32. Between July 17, 2006, and February 2007, a period of eight months, no work was performed on the project. In fact, after early September 2006 there was no meaningful communication between Mr. Fons and Alpha. Viewing the evidence most favorably to Alpha, Alpha had informed Mr. Fons in a letter he received on September 6, 2006, that the tiles were available (the evidence failed to substantiate this claim; if the tiles had been "available" they would have been delivered directly to the Residence), the permit had been obtained, Alpha indicated its willingness to fulfill its obligation, and Alpha attempted to

place the ball in Mr. Fons' court by asking that he call to discuss the matter, and Mr. Fons had demanded a return of his deposit.

33. Viewing the evidence most favorably to Mr. Fons, he had been waiting for eight months to have his roof repaired; he had on a monthly basis had to initiate contact with Alpha and every time he did, was told "it will be another 30 days"; Alpha had taken until May 2006 to make its first application for a permit, despite the fact that Alpha had represented to Mr. Fons that the permit would be obtained in January and that work would commence in February, the monthly representations that the permit had been applied for but was being held up by the Building Department. After renegotiating his contract, Mr. Fons was again told that the permit would be pulled within a week and that work would commence within a month. Despite these representations, no permit was applied for until after his August 18, 2006, letter was received and that permit was never approved. When Mr. Fons did finally complain and request the return of his deposit, although it had only been a month since renegotiating the type of roof to be placed on the Residence, Alpha did not respond until September 6, 2006, and only responded after finally obtaining a permit. Given these circumstances, the suggestion of Alpha that "[w]e sincerely have

always had your best interest at heart, and want to proceed with the install" must have seemed disingenuous to Mr. Fons.

34. Weighing the foregoing facts, it is ultimately found that simply "offering" to proceed, despite Mr. Fons' demand for the return of his deposit, was simply too little, too late. Given the total eight-month delay in the project and all the misinformation Mr. Fons had been given by Alpha, and especially in light of the fact that Alpha had $13,600.00 of Mr. Fons' money for which it had performed no work whatsoever, Alpha should have done more to attempt to fulfill the contract. Failing to do more under these circumstances constitutes an abandonment of the project to the financial detriment of Mr. Fons.

35. On February 21, 2007, Mr. Fons contracted with another company to install a tile roof on the Residence. Work commenced February 23, 2007, and was completed March 5, 2007.

36. Mr. Fons has suffered a loss of $13,600.00 as result of Alpha's failure to fulfill its obligations under the Contract.

37. The total costs of investigation incurred by the Department in this case, excluding costs associated with any attorney time, was $342.42.

CONCLUSIONS OF LAW

A. Jurisdiction.

38. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

B. The Burden and Standard of Proof.

39. The Department seeks to impose penalties against Mr. Ringold through the Administrative Complaint that include mandatory and discretionary suspension or revocation of his roofing contractor's license. Therefore, the Department has the burden of proving the specific allegations of fact that support its charges by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

40. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), as follows:

> . . . [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the

> witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

C. The Charges of the Administrative Complaint.

41. Section 489.129, Florida Statutes, provides that disciplinary action may be taken against a certificateholder, registrant, or licensee if it is found that the individual has committed certain enumerated offenses.

42. In this matter, it has been alleged that Respondent committed the offenses described in Section 489.129(1)(g)2., (i), (j) and (m), Florida Statutes, which provides:

> (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:

. . . .

(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

. . . .

(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.

43. Because of their penal nature, the foregoing statutory provisions must be strictly construed, with any reasonable doubts as to their meaning being resolved in favor of the certificateholder or registrant. See Jonas v. Florida Department of Business and Professional Regulation, 746 So. 2d 1261, 1262 (Fla. 3d DCA 2000)("[S]tatutes such as those at issue authorizing the imposition of discipline upon licensed contractors are in the nature of penal statutes, which should be strictly construed."); and Capital National Financial Corporation v. Department of Insurance, 690 So. 2d 1335, 1337 (Fla. 3d DCA 1997)("Section 627.8405 is a penal statute and therefore must be strictly construed: . . . . 'When a statute imposes a penalty, any doubt as to its meaning must be resolved in favor of a strict construction so that those covered by the statute have clear notice of what conduct the statute proscribes.'").

44. As the primary qualifying agent for Alpha, Mr. Ringold is jointly and equally responsible for all business operations of Alpha. See § 489.1195(1)(a), Fla. Stat.

D. Count I; Section 489.129(1)(i), Florida Statutes.

45. With regard to the alleged violation of Section 489.129(1)(i), Florida Statutes, the Department has alleged that this provision was violated by Mr. Ringold due to his failure to comply with Section 489.126(2)(a), Florida Statutes, which provides:

> A contractor who receives, as initial payment, money totaling more than 10 percent of the contract price for repair, restoration, improvement, or construction to residential real property must:
>
> (a) Apply for permits necessary to do work within 30 days after the date payment is made, except where the work does not require a permit under the applicable codes and ordinances

46. The evidence proved clearly and convincingly, that Mr. Ringold did not apply for any permit necessary to perform the work on the Residence within 30 days after Mr. Fons paid Alpha $13,600, well in excess of 10 percent of the contract price.

47. The evidence proved clearly and convincingly that Mr. Ringold violated Section 489.129(1)(i), Florida Statutes, by failing to comply with Section 489.126(2)(a), Florida Statutes.

E. Counts II, III, and IV; Sections 489.129(1)(g)2., (j), and (m), Florida Statutes.

48. The violations alleged in Counts II and III essentially turn on the issue of whether Alpha abandoned the

construction project it agreed to carry out on the Residence for Mr. Fons. Whether Mr. Ringold is also guilty of the violation alleged in Count IV also depends, at least in part, on whether Alpha abandoned the construction project.

49. First, Count II alleges that Mr. Ringold violated Section 489.129(1)(g)2., Florida Statutes, by committing mismanagement or misconduct in the practice of contracting that caused financial harm to a customer. Financial mismanagement or misconduct are specifically defined to include the abandonment of a job when the percentage of the job completed is less than the percentage of the contract price paid, "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."

50. Count III alleges that Mr. Ringold violated Section 489.129(1)(j), Florida Statutes, by "[a]bandoning a construction project in which the contractor is engaged or under contract as a contractor." This provision goes on to provided that "[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." (Emphasis added).

51. The facts in this case are not easily resolved. The

evidence proved that, although six months passed from the date of the Contract without any construction for at least the period between January and July 17, 2006, the delays were ultimately acquiesced to by both parties and the Contract was renegotiated. Consequently, there was no abandonment during that period of time.

52. After the Contact was renegotiated, the evidence clearly proved that no construction of any kind occurred after the permit was finally obtained until February 2007, a period of five months, when the work was performed by another contractor. Mr. Ringold argues that there was "just cause" for this delay and, therefore, no abandonment. While it is true that Mr. Fons had demanded a return of his deposit in August and that Mr. Ringold wrote to Mr. Fons in early September indicating he was ready to proceed, the evidence failed to prove that indeed he had the necessary materials to proceed on the project. While Mr. Ringold testified that the materials were available, that testimony is not credited for the reasons argued by Petitioner in its proposed order and because that testimony is inconsistent with Mr. Ringold's testimony that, when supplies come in, they are delivered directly to the construction site. More importantly, given all the facts and circumstances of this matter, the evidence supports a finding and conclusion that Mr. Ringold should have done more. He should have gone to

Mr. Fons, permit in hand and with the supplies delivered (or at least proof that they had been delivered) and convinced Mr. Fons that Alpha was therefore finally ready to proceed. Writing one letter simply was not enough.

53. In light of the foregoing, it is concluded that Mr. Ringold abandoned the project without "just cause" to do so.

54. The evidence also proved that, when the project was abandoned, the percentage of the job completed (zero) was less that the percentage of the contract price paid (50%), and that, even if Alpha was entitled to retain 30% of the contract price, which the evidence does not support, Alpha had no right under the Contract to retain the other 20% of the deposit. The abandonment, therefore, caused financial harm to Mr. Fons. The evidence, therefore proved, that Mr. Ringold is in violation of Section 489.129(1)(g)2., Florida Statutes, as alleged in Count II of the Administrative Complaint.

55. The evidence also clearly and convincingly proved that Mr. Ringold is in violation of Section 489.129(1)(j), Florida Statutes.

56. Finally, Count IV alleges that Mr. Ringold committed "incompetency or misconduct in the practice of contracting" in violation of Section 489.129(1)(m), Florida Statutes. In Petitioner's Proposed Recommended Order, Petitioner alleges that Mr. Ringold is guilty of incompetency or misconduct in his

practice of contacting because of the violations of Counts I, II, and III.

57. In support of this position, the Department cites Florida Administrative Code Rule 61G4-17.001(1)(m)2., which provides that misconduct or incompetency includes the violation of any provision of Chapter 489, Part I, Florida Statutes. Thus, the Department argues, by having violated Section 489.129(1)(g)2., (i), and (j), Florida Statutes, Mr. Ringold is guilty of misconduct or incompetency in his practice of contracting.

58. It having been found that Mr. Ringold has committed the violations alleged in Counts I, II, and III, Mr. Ringold is in violation of Section 489.129(1)(m), Florida Statutes, as alleged in Count IV.

F. The Appropriate Penalty.

59. The only issue remaining for consideration is the appropriate disciplinary action which should be taken against Mr. Ringold for the violations that were proven by the Department. To answer this question it is necessary to consult the "disciplinary guidelines" of the Board. Those guidelines are set forth in Florida Administrative Code Chapter 61G4-17, and they effectively place restrictions and limitations on the exercise of the Board's disciplinary authority. See Parrot Heads, Inc. v. Department of Business and Professional

Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); and § 455.2273(5), Fla. Stat. ("The administrative law judge, in recommending penalties in any recommended order, must follow the penalty guidelines established by the board or department and must state in writing the mitigating or aggravating circumstances upon which the recommended penalty is based.").

60. In Florida Administrative Code Rule 61G4-17.001, the Board has announced the "Normal Penalty Ranges" within which its disciplinary action against contractors will fall, absent aggravating or mitigating circumstances, for specified violations.

61. Violations of Section 489.129(1)(g)2., (i), (j), and (m), Florida Statutes, are specifically addressed in Subsection (1) of Florida Administrative Code Rule 61G4-17.001, which provides the following "Normal Penalty Ranges" for such violations:

	PENALTY RANGE	
VIOLATION	MINIMUM	MAXIMUM
(g) Section 489.129(1)(g), F.S.: Mismanagement or misconduct causing financial harm to the customer. FIRST OFFENSE REPEAT OFFENSE	$1,500 fine and/or probation or suspension. $2,500 fine and/or probation	$5,000 fine and/or probation or suspension. $10,000 fine and revocation.

	or suspension.	

(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.	Use penalty herein listed for the violation most closely resembling the act underlying the local discipline;	Use penalty herein listed for the violation most closely resembling the act underlying the local discipline;

(j) Section 489.129(1)(j), F.S.: Abandonment. FIRST OFFENSE REPEAT OFFENSE	 $2,500 fine and/or probation or suspension. $5,000 fine and/or probation or suspension.	 $7,500 fine and/or probation or suspension. $10,000 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. FIRST OFFENSE REPEAT OFFENSE	 $1,000 fine and/or probation or suspension. $2,500 fine and/or probation or suspension.	 $5,000 fine and/or probation or suspension. $10,000 fine and revocation.
2. Violation of any provision of Chapter 61G4, F.A.C., or Chapter 489, Part I, F.S. FIRST OFFENSE REPEAT OFFENSE	 $1,000 fine and/or probation or suspension. $2,500 fine and/or probation or suspension.	 $2,500 fine and/or probation or suspension. $10,000 fine and suspension or revocation.

62. Pursuant to Florida Administrative Code 61G4-17.001(6), where no penalty range has been provided for a

violation, the guideline penalty for an offense most closely related to the offense should be followed. There is not penalty guideline for a violation of Section 489.129(1)(i), Florida Statutes. The Department has reasonably suggested application of the following guideline:

(o) Section 489.129(1)(o), F.S.: Proceeding on any job without obtaining applicable local building department permits and/or inspections.		
1. Late permits. Contractor pulls permit after starting job but prior to completion of same and does not miss any inspections.	$250 fine.	$3,000 fine and/or probation.

63. Florida Administrative Code Rule 61G4-17.002 lists "Aggravating and Mitigating circumstances" to be considered in determining whether a departure from the "Normal Penalty Range" is warranted in a particular case. These aggravating and mitigating circumstances include 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.

64. In Petitioner’s Proposed Recommended Order, the Department has reasonably suggested that there is an aggravating circumstance in this case: the monetary damage to Mr. Fons. While the Department acknowledges that Mr. Ringold had not previously been found in violation, the Department has argued that, due to the aggravating circumstance in this case, the guidelines for a repeat offense should be followed. The penalties suggested by the Department however, do not appear to be consistent with this suggestion.

65. Based upon all the facts of this case, it is concluded that the bottom to middle of the penalty range for the various

violations for a first offense are adequate. Additionally, it is concluded that imposing any fine for the violation of Section 489.129(1)(m), Florida Statutes, ignores the fact that the violation is a technical one, predicated solely upon the other three violations. To impose a fine for this violation, would, therefore, punish Mr. Ringold twice for the same act.

66. In addition to any penalty imposed upon Mr. Ringold, Florida Administrative Code Rule 61G4-17.001(5), provides that "the board shall order the contractor to make restitution in the amount of financial loss suffered by the consumer to the extent that such order does not contravene federal bankruptcy law." That amount is $13,600.00 in this case.

67. Finally Florida Administrative Code Rule 61G4-17.001(4) provides that, in addition to any other disciplinary action it may impose, the Board will also "assess the costs of investigation and prosecution, excluding costs related to attorney time."

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Douglas J. Ringold, Jr., d/b/a Alpha Restoration, Inc., violated the provisions of Section 489.129(1)(g)2., (i), (j), and (m), Florida Statutes, as alleged in Counts I, II, III, and IV of the Administrative Complaint; imposing fines of $1,500.00

for Count I, $500.00 for Count II, and $2,500.00 for Count III; requiring that Mr. Ringold make restitution to Mr. Fons in the amount of $13,600.00; requiring that Mr. Ringold pay the costs incurred by the Department in investigating and prosecuting this matter; and placing Mr. Ringold's license on probation for a period of one year, conditioned upon his payment of the fines, restitution to Mr. Fons, payment of the costs incurred by the Department, and any other conditions determined to be necessary by the Board.

DONE AND ENTERED this 10th day of February, 2009, in Tallahassee, Leon County, Florida.

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.