STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, CONSTRUCTION INDUSTRY LICENSING BOARD,	)	
Petitioner,	)	
vs.	)	Case No. 10-7772
THOMAS COLAN, d/b/a THOM COLAN CONSTRUCTION, INC.,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on February 4, 2011, by video teleconference in Tallahassee and Sarasota, Florida, before Administrative Law Judge Elizabeth W. McArthur of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brian P. Coats, Esquire
Department of Business and Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399

For Respondent: Gregg M. Horowitz, Esquire
Post Office Box 2927
Sarasota, Florida 34230

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed the violations alleged in the Administrative Complaint, and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

Petitioner, Department of Business and Professional Regulation, Construction Industry Licensing Board (Petitioner), filed a four-count Administrative Complaint against Respondent, Thomas Colan, d/b/a Thom Colan Construction, Inc. (Respondent or Mr. Colan), a licensed contractor. The Administrative Complaint alleged that in carrying out a contract with Kathleen and Robert Masten to build a house and pool, Respondent committed violations of sections 489.129(1)(g)1. and 3., (1)(m), and (1)(l), Florida Statutes (2005).[1/]

Respondent timely requested an administrative hearing to contest the allegations in the Administrative Complaint, and the matter was referred to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge to conduct the hearing requested by Respondent.

The final hearing was set for November 15, 2010, in accordance with the parties' request. On November 10, 2010, Respondent moved for a continuance because of a scheduling conflict. Petitioner did not oppose the request, and the hearing was rescheduled for February 4, 2011.

The parties entered into a pre-hearing stipulation in which they admitted certain facts, which are included in the Findings of Fact below. In addition, by the pre-hearing stipulation, Petitioner voluntarily dismissed Count One of the Administrative Complaint, which alleged a violation of section 489.129(1)(g)1. Remaining in dispute for litigation at the final hearing were Counts Two through Four, charging violations of section 489.129(1)(g)3., (1)(m), and (1)(l), respectively.

At the final hearing, Petitioner presented the testimony of Mrs. Masten and Mr. Colan. Petitioner's Exhibits 1 through 19 and 21 were received into evidence. Respondent testified on his own behalf and presented the testimony of Mrs. Masten. Respondent's Exhibits 1 through 3 were received into evidence.

At the close of the hearing, a transcript was ordered, and the parties agreed to file their proposed recommended orders (PRO) within ten days after the filing of the transcript at DOAH. The Transcript was filed on February 24, 2011. Petitioner timely filed its PRO on March 7, 2011. On March 16, 2011, Respondent filed a motion to allow the late filing of its PRO, because counsel for Respondent had failed to properly calendar the deadline and had just obtained a copy of the Transcript. Petitioner objected on the grounds that Respondent would gain an unfair advantage by being able to respond to Petitioner's submittal, when the uniform rules contemplate

simultaneous filings. The undersigned issued an Order allowing Respondent additional time to late file its PRO, but affording Petitioner the opportunity to supplement its PRO within ten days after service of Respondent's filing. Respondent filed its PRO by the extended deadline. Petitioner did not supplement its PRO within the time allowed, but filed a Notice of Scrivener's Error to correct a statutory citation. Both Petitioner and Respondent's PROs, as well as Petitioner's Notice of Scrivener's Error, have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Admitted Facts Per Pre-Hearing Stipulation

1. Petitioner is the state agency charged with regulating the practice of contracting pursuant to section 20.165 and chapters 455 and 489, Florida Statutes.

2. Respondent is a state-certified building contractor in the State of Florida, having been issued license No. CBC 039025.

3. Respondent was the licensed primary qualifying agent for Thom Colan Construction, Inc., from June 10, 2004, to September 4, 2008.

4. On January 10, 2006, Thom Colan Construction, Inc., entered into a contract with Kathleen and Robert Masten to construct a house and pool on property located at 547 Bradenton Road, Venice, Florida (the project).

5. The contract price for the project was $260,000.00.

6. The project was completed with the issuance of a certificate of occupancy.

Additional Findings of Fact

Based on the weight and credibility of the testimony and evidence presented, the following additional facts are found:

7. The contract between Respondent and the Mastens was a fixed-price contract. Although the contract price was $260,000.00, the Mastens paid a total of $320.394.19 for the project. The payments were made by the following methods: $49,968.58 was paid by check from the Mastens directly to Respondent; Respondent obtained an additional $222,320.71 in total bank draws, pursuant to a construction loan that authorized Respondent to draw funds directly from the bank for the project; and the remaining $48,104.90 was paid by check or credit card by the Mastens directly to subcontractors for labor and materials provided for the project. Thus, the Mastens paid $60,394.19 more than the contract price. At issue, and the subject of much dispute at the final hearing, was why the project exceeded the contract price by over $60,000.00.

8. Respondent asserted that the entire amount by which the contract price was exceeded was attributable either to changes to the contract terms required by the Mastens or to

circumstances beyond Respondent's control, such as price increases by subcontractors.[2/]

9. It was difficult to establish the causes for the price increases, in part, because the parties to the contract did not adhere to the formalities called for by the contract. For example, while both witnesses acknowledged that the Mastens requested changes as the project progressed, there was substantial disagreement about the extent of these changes and the cost differential. Unfortunately, there were no written change orders as required by the contract. Written change orders would have documented exactly what was changed and what cost was attributable to the change.

10. Another problematic area in attempting to pinpoint why the contract price was exceeded was that there was no clear proof of the contract specifications detailing the design features of the house and pool. The written contract described a process of developing "plans" with "specifications" as to design elements. Initially, the plans would be preliminary, with items designated for buyer selections. The contract contemplated that the buyer would make these selections, which would become part of the plans, and the plans would then be considered final. Thus, certain buyer selections would be part of the contract. Thereafter, if the buyer wanted to change the

final plans and specifications, the buyer would be responsible for the increased costs.

11. No evidence was presented as to what the plans provided with respect to design features and which of those design features provided for buyer selections. Neither the preliminary plans and specifications for the Masten contract, nor the final plans and specifications after buyer selections, were offered into evidence, and it is unclear whether the process contemplated by the written contract was even followed.

12. Nonetheless, Mrs. Masten admitted that she requested certain changes, which she acknowledged were not contemplated by the contract and were more costly than what the contract contemplated. For example, Mrs. Masten acknowledged that she requested an upgrade in kitchen appliances, increasing the cost by $2,703.55. She also acknowledged that she requested an upgrade in bathroom fixtures, but she was unsure of the cost attributable to the upgrade. Respondent testified that the total cost increase for upgrades requested by Mrs. Masten to plumbing and fixtures was $4,745.42. Mrs. Masten thought that amount was too high; it included changes claimed by Respondent, but disputed by Mrs. Masten, such as an upgrade to a hot tub that Mrs. Masten said she did not want but, apparently, was installed.

13. The circumstances surrounding other apparent changes were in dispute. For example, an expedition, including Mrs. Masten and Respondent, trekked to a tile outlet store in Fort Meyers to pick out tile to use in the shower stall and floors. For the shower stall, Respondent testified that he "insisted" on travertine; Mrs. Masten apparently agreed, but said that she felt pressured to do so. The purchase was made, and Respondent returned to haul the travertine and other tile for the flooring on a trailer back to Venice. At some point, Mrs. Masten changed her mind about the travertine after being told by a competitor that travertine was a high-maintenance bad choice. Respondent claimed it was too late to return the tile, which he valued at $750.00, and so he testified that he threw it away. Mrs. Masten then selected different tile from the competitor at a price that was $1,292.16 higher than the travertine.

14. The circumstances surrounding the selection of cabinetry were also in dispute. Respondent testified that he planned to use Enrique Benitez, a subcontractor who was doing other work in the house, to make the cabinets. Respondent claimed that he had Enrique prepare wood samples with different stains and that Mrs. Masten approved the samples and picked out the stain. At that point, Respondent said he paid Enrique $2,970.00 to begin constructing the cabinets. Mrs. Masten

claimed that she never approved any samples, was shown only a rough, long plank of splintered wood that she said was awful and would not approve, and that she did not like any of the work this particular subcontractor was doing throughout the house. At some point, Mrs. Masten impressed upon Respondent that she would not accept these cabinets, and she selected different cabinets at an increased cost of $6,886.00. If Enrique ever built cabinets for the Mastens, he kept them.

15. Another outing was made to select countertops. Mrs. Masten did not like the granite pieces that Respondent had intended to use, and the result was that the cost of the granite countertops selected by Mrs. Masten was $5,000.00 higher.

16. Respondent and Mrs. Masten also could not agree on the extent of requested changes to the plans for flooring or the cost of those changes. Respondent testified that Mrs. Masten changed the mix of tile and carpeting, but Mrs. Masten disagreed. Respondent testified that Mrs. Masten required an upgraded carpet style, and although Mrs. Masten acknowledged that she selected a different carpet style, there was no evidence pinpointing the cost difference of the carpet upgrade. Additionally, Respondent acknowledged that one reason why the total cost for flooring was higher than expected was that Enrique Benitez increased the price to install the tiles from $3,000.00 to $7,500.00. Respondent sought to blame Mrs. Masten

for the increased installation price, claiming that Mrs. Masten "fired" Enrique over the cabinet debacle, but Respondent had to rehire Enrique to install the floors and had to pay the increased price to overcome Enrique's hurt feelings. Mrs. Masten denied the claim that she "fired" Enrique, though she acknowledged that she was not happy with his work and that she refused to approve the cabinets Enrique was supposed to build, because the sample was unacceptable.

17. Respondent testified that an additional $3,079.90 was spent for upgraded lighting and fans requested by the Mastens and for other electrical upgrades to accommodate other changes, such as the pool heater and spa tub.

18. The cost to construct the pool increased by $3,700.00. According to Respondent, this increase was due to the cost of adding a pool heater that was not part of the original plans, at the request of the Mastens. Mrs. Masten disputed that this was a change.

19. Respondent testified that there was a $323.00 cost increase because of the Mastens' request for an upgraded water softener.

20. Post-contract changes made by the engineer to relocate the septic tank system necessary to obtain the requisite permits, altered the elevation and slope of certain parts of the property, including the space where the air conditioner would

sit. Those changes resulted in the need to add a concrete slab and platform for the air conditioner. This additional cost was $419.25.

21. Also because of the septic system design change, the county imposed additional landscaping requirements in order to obtain a certificate of occupancy. This resulted in an additional $979.05 spent to purchase trees.

22. Respondent testified that permitting fees imposed by the county exceeded the estimated cost by $2,365.63. Respondent attributed the increase to the higher impact fee charged by the county as a condition to obtain a certificate of occupancy because the post-construction value of the house was higher than estimated. In other words, the combination of cost increases and upgrades led to imposition of a higher impact fee.

23. The rest of the difference between the contract price and the total paid by the Mastens was attributable to increases in costs because of the delay in completing the project or increases in prices charged by subcontractors for their labor and materials. These included increases in the price of concrete, plumbing work, framing, insulation, roofing, drywall, hauling trash, installation of flooring, electrical work, equipment rental, and electricity charges. Respondent explained that he obtained "bids" for various components of the project in September 2005, although he did not sign the contract with the

Mastens until January 10, 2006. Respondent anticipated that he would start the project that month, but the start was delayed by more than two months because of the septic system permitting difficulties encountered by the project engineer who had been retained by the Mastens.

24. Mr. Colan utilized the estimates he received from others to develop his overall cost estimates for the project, which he used to establish the contract price. There was no allowance built into the cost estimations for inflation, price increases, or contingency reserves.

25. Although Respondent characterized the price estimates he obtained from subcontractors as "bids," they were not bids in the sense of being firm offers to do work or supply material at a specific cost; they were essentially price estimates subject to change. Respondent testified that at least in some cases, he could count on a bid price being "good" for six months and, in some cases, for as long as seven months. However, Respondent did not lock in any of the bid prices by contracting with the subcontractors in September 2005 or in January 2006 when the Masten contract was executed. Thus, Respondent's reliance on the price estimates given to him in September 2005 was not shown to be reasonable. These estimates would have been four months old before Respondent anticipated starting the project and closer to seven months old before the project actually began.

Since many of the price estimates were for items that would not be needed for months after the project began (such as bathroom fixtures, appliances, cabinetry, flooring, and lighting), even under the best-case scenario without any delays, Respondent was plainly taking a risk by using September 2005 cost estimates as if they were guaranteed prices in determining the contract price for the Mastens' project. Not surprisingly, many subcontractors were not willing to honor the stale price estimates when Respondent sought to contract with them many months later.

26. Respondent suggested that he should not bear the risk of others' price increases, because they were not within his control. But Respondent controlled how he went about estimating his costs for the project and how he established the fixed price he agreed to in the contract. No credible evidence was presented to establish that the price increases by Respondent's subcontractors were due to such extraordinary market conditions or delays that they could not have been reasonably anticipated and addressed sufficiently through inflation allowances or contingency reserves built into the cost estimations.

27. While Respondent attempted to characterize certain price increases, such as the rise in the price of cement and copper or the increased cost of dirt, as attributable to a "heated up" construction market, which caused unanticipated demand, Respondent's testimony was not credible and was not

supported by any independent non-hearsay evidence. Indeed, Respondent admitted that in most cases, he did not shop around before accepting the price increases demanded by his subcontractors. In some cases, he had checked on prices within the two-county area when obtaining the cost estimates in September 2005, and then he assumed that by identifying the lowest price or best supplier in September 2005, there was no need to check around when that supplier demanded a price increase later. In no instance did Respondent check prices outside of his local area.

28. Respondent acknowledged that the total amount spent for engineering and surveying fees exceeded his estimate by $4,177.12. Respondent argued that these fees were beyond his control, because the Mastens had retained the engineer and surveyor before Respondent entered into a contract with the Mastens. However, Respondent included the engineer and surveyor fee expenses in his cost estimates and assumed the responsibility for covering these fees as part of the overall construction of the house and pool within the fixed contract price. No credible evidence established that the fees were unusually high and could not have been anticipated or addressed by appropriate contingency reserves.

29. Respondent attempted to blame many of the price increases on the two-plus month delay in starting the project

because of the engineer's need to relocate the septic system to resolve permitting issues. As pointed out above, this delay did not in and of itself cause the problem of price increases by subcontractors unwilling to honor price estimates quoted in September 2005. In any event, Respondent did not testify that the delays were extraordinary and not reasonably anticipated, even if the exact reason for the delays may not have been known. Instead, various delays for various reasons are to be expected, and, indeed, are expressly contemplated throughout the written contract. Notably, in a section called "Price Guarantee," the contract form allowed the parties to specify a month by which construction had to begin or else the builder would have a qualified right to adjust the contract price. Respondent waived that right by specifying "N/A" in the blank where a start-by month could have been named:

> This Contract price is guaranteed to Buyer only if it is possible for Builder to start construction on or before the month of N/A. If start of construction is delayed beyond this time by Buyer, or due to any ruling or regulation of any governmental authority, or due to any other cause which is not the fault of the Builder, the Contract price may be adjusted to the current list price or to cover any cost increases incurred by Builder.

30. A plausible explanation for Respondent's lack of care in developing reasonable, achievable cost estimates is that Respondent did not consider the fixed-price contract to be a

fixed-price contract. Respondent testified that even though the contract on its face is a fixed-price contract, he believed that he had an understanding with the Mastens that the contract was really a "cost-plus" contract. Respondent testified that despite what the contract said, the Mastens had agreed that they would pay whatever the ultimate costs were, even if the prices went up from his estimates, plus an additional $37,000 for Respondent's profit. Respondent testified that the only reason that the contract was written up as a fixed-price contract was to secure the bank loan. That suggestion would be troubling, if true, because the implication is that Respondent was a party to fraud or deception to induce the construction loan. However, there was no credible evidence to support Respondent's attempt to justify recovering full costs, plus full profit, when the fixed price he contracted for proved inadequate. Notwithstanding Mr. Colan's apparent view that there was a secret deal standing behind the written contract, he signed the written contract, is bound by the fixed-price term, and must bear the consequences of his inadequate cost estimations.

31. At some point when the Mastens became concerned about the extent to which they were apparently exceeding the contract price while Respondent was still drawing bank funds from the Mastens' construction loan, Mrs. Masten testified that she told Respondent not to draw any more bank funds. The evidence did

not clearly establish whether Respondent violated Mrs. Masten's instructions by withdrawing more bank funds after the instructions were given. The Administrative Complaint had alleged that the Mastens contacted the bank and ordered the bank to make no further disbursements, and that the next day, Respondent attempted to withdraw all remaining funds in the construction loan account. No evidence was presented to substantiate this allegation.

32. Petitioner incurred total costs of $299.36 in the investigation of this matter, excluding costs associated with attorney time.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2010).

34. Petitioner has the burden of pleading with particularity in the Administrative Complaint the facts and law on which it relies to take disciplinary action against Respondent. United Wisconsin Life Ins. Co. v. Off. of Ins. Reg., 849 So. 2d 417, 422 (Fla. 1st DCA 2003); Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Willner v. Dep't of Prof'l Reg., Bd. of Medicine, 563 So. 2d 805, 806 (Fla. 1st DCA 1990).

35. In addition, Petitioner has the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking and Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). The clear and convincing evidence standard was defined in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), 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 testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

36. The four-count Administrative Complaint charged Respondent with violations of section 489.129(1)(g)1. (Count One); (1)(g)3. (Count Two); (1)(m) (Count Three); and (1)(l) (Count Four). Section 489.129(1) provides in pertinent part:

> 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:

1. Valid liens have been recorded against the property of a contractor's customer for supplies or services ordered by the contractor for the customer's job; the contractor has received funds from the customer to pay for the supplies or services; and the contractor has not had the liens removed from the property, by payment or by bond, within 75 days after the date of such liens; [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.

* * *

(l) Committing fraud or deceit in the practice of contracting.

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

37. Petitioner voluntarily dismissed Count One of the Administrative Complaint via the parties' pre-hearing stipulation. Thus, Respondent is not charged with a violation of section 489.129(1)(g)1.

38. Count Two charged Respondent with a violation of section 489.129(1)(g)3., because the Mastens had to pay more than the contract price, adjusted by any change orders. Respondent claimed that the increased price was attributed solely to either the increased cost of the Mastens' changes or price increases caused by circumstances beyond Respondent's control or caused by the Mastens.

39. In Dep't of Bus. and Prof'l Reg., Constr. Indus. Licensing Bd. v. Battaglia, Case No. 07-0052PL (Fla. DOAH May 8, 2007), Administrative Law Judge Stuart Lerner examined this statute and reached the following conclusions with regard to burden of proof:

> To meet its burden of proving a violation of Section 489.129(1)(g)3., the Department must establish that the "contractor's job ha[d] been completed, and . . . that the customer ha[d] had to pay more for the contracted job than the original contract price, as adjusted for subsequent change orders." Once it makes such a showing, the burden shifts to the licensee to demonstrate that "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."

Cited in support of these conclusions were a number of cases explaining that the structure of this statute, with exceptions following the main sentence, such as where the main part of the sentence is followed by a phrase starting with the word "unless," means that the phrase following "unless" serves as a qualifier to the main part of the sentence and demonstrates that the phrase is intended to be an affirmative defense. Battaglia, Case No. 07-0052PL, RO at 35-36 n. 9.

40. Thus, under the Battaglia analysis, which is adopted here, it was Petitioner's burden to prove by clear and convincing evidence that the price paid by the Mastens exceeded the contract price as adjusted by change orders. It was Respondent's burden to prove as affirmative defenses that any increase in contract price was the result of circumstances beyond his control, was caused by the Mastens, or was otherwise permitted by the contract.

41. Petitioner met its burden of proof, by clear and convincing evidence, that the amount the Mastens paid for the project exceeded the contract price as adjusted by change orders, in violation of section 489.129(1)(g)3. However, in terms of the amount by which payment exceeded the adjusted contract price, Respondent will be given credit for: (1) the amount of proven cost increases caused by changes to which the

Mastens admitted; and (2) the amount of cost increases established by credible testimony by Respondent for additional project changes made at the Mastens' request that were not contemplated by the final plans. Although the second category of claimed changes was disputed, Petitioner bears the burden of proving the adjusted contract price, and Petitioner failed to refute the claimed changes by clear and convincing evidence.[3/]

42. Accordingly, the contract price of $260,000.00 is adjusted upward by the following amounts: $2,703.55 for the upgrade to energy efficient appliances; $4,745.42 for changes to plumbing and fixtures; $1,292.16 for tiles; $6,886.00 for cabinets; $5,000.00 for countertops; $3,079.90 for lighting and other electrical material; $3,700.00 for the pool heater; $323.00 for the water softener upgrade; $419.25 for the air conditioning slab and platform; $979.05 for trees; and $1,182.82 for one-half of the increase in the county permitting and impact fees.[4/] The specific costs of other claimed changes were not sufficiently established by competent substantial evidence. The resulting adjusted contract price is $290,311.15.[5/]

43. Respondent did not meet his burden of proof with regard to the claimed affirmative defenses. A preponderance of the more credible evidence does not support Respondent's assertion that exceeding the contract price was justified

because of circumstances beyond his control or because of circumstances caused by the Mastens.

44. Respondent's position that he should be entitled to adjust the contract price any time a supplier increases its price because that is a circumstance he does not control, is rejected. To the contrary, when Respondent chooses to enter into a fixed-price contract without locking in the prices of subcontractors whose estimates Respondent uses, then Respondent bears the risk of price changes, at least absent evidence of circumstances beyond the realm of reasonable anticipation. Market fluctuations in prices, particularly in what was admittedly a "hot" construction market, should be expected. It was wholly within Respondent's control to build price fluctuations into his estimates. While Respondent testified that in a few instances, the price increases were higher than what he had seen in some time, Respondent did not adequately support his position. Moreover, Respondent's attempted rationale fails to explain why absolutely no price increases or contingency reserves were built into his cost estimates. The only apparent explanation was that Respondent was improperly relying on a secret deal and thought he could charge the Mastens the actual costs, whatever they were, plus his profit.

45. Respondent likewise did not meet his burden of proving his claim that he should be allowed to adjust the contract price

because the delay in starting construction was a circumstance beyond his control. As pointed out in the Findings of Fact, Respondent could have designated a limit to the guaranteed fixed contract price by specifying a month by which, if construction did not start, Respondent would have had a limited right to adjust the contract price. Respondent waived this option by writing in "N/A," instead of naming a specific start-by month.

46. Petitioner met its burden of proving by clear and convincing evidence that Respondent violated section 489.129(1)(m) as charged in Count Three, by committing mismanagement or incompetence in the practice of contracting. Petitioner proved at least mismanagement and incompetence by proving the poor job Respondent did in estimating costs used to establish the fixed contract price, by not making a greater effort to achieve those estimates, and by apparently believing he could pass all cost increases on to the Mastens because of the secret deal he thought would override his written contract.

47. Petitioner did not prove by clear and convincing evidence the allegation in Count Four that Respondent committed fraud or deceit in violation of section 489.129(1)(l) by attempting to withdraw all remaining funds from the construction loan account after being instructed not to make further withdrawals. The only evidence offered on the subject of Respondent's withdrawal attempts was hearsay--what Mrs. Masten

was told by someone at the bank and even that testimony did not support the allegation underlying Count Four's charge. Petitioner offered no documentation or testimony by a bank representative with direct knowledge of the allegation that Respondent attempted to withdraw the remaining balance of nearly $38,000 after the Mastens discontinued his authority to make bank draws by freezing the account.

48. Respondent's own testimony was suggestive of different fraudulent conduct. According to Respondent, there was a secret deal for the Mastens to pay actual costs, whatever they were, plus Respondent's profit, and that the only reason the contract with the Mastens was written as a fixed-price contract was in order to secure the Mastens' construction loan. This suggestion is troubling, but as it was not charged in the Administrative Complaint, it cannot be the basis for disciplinary action. However, Mr. Colan's explanation for what he understood to be the secret agreement standing behind the actual agreement puts into context his apparent inattention to developing realistic cost estimates to arrive at the contract price. If Mr. Colan never believed that the contract price was any kind of cap and that he would not have to live with his estimates, good or bad, high or low, that would explain why he did not use more care in obtaining bids, shopping around for lower-cost suppliers or, at

least, building inflation and contingency reserves into his cost estimates.

Appropriate Penalty

49. Section 455.2273(5) provides that the Administrative Law Judge, in recommending penalties, 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.

50. Petitioner's penalty guidelines are codified in Florida Administrative Code Rule 61G4-17.001, which, effective January 24, 2005, provided in pertinent part:

> (1) The following guidelines shall be used in disciplinary cases, absent aggravating or mitigating circumstances and subject to other provisions of this chapter.
>
> * * *
>
> (g) Section 489.129(1)(g), F.S.: Mismanagement or misconduct causing financial harm to the customer. First violation, $1,500 to $2,500 fine, restitution and/or probation.
>
> * * *
>
> (m) Section 489.129(1)(m), F.S.: Misconduct or incompetence in the practice of contracting shall include, but is not limited to:
>
> * * *
>
> 2. 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.

* * *

(l) Section 489.129(1)(l), F.S.: Committing fraud or deceit in the practice of contracting.

* * *

1. Causing no monetary or other harm to licensee's customer or physical harm to any person. First violation, $1,000 to $2,500 fine and/or probation. . . .

51. Aggravating and mitigating circumstances established by Petitioner are codified in rule 61G4-17.002, providing in pertinent part:

> 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. . . .
>
> (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) Other mitigating or aggravating circumstances.

52. Petitioner's rule 61G4-17.003 addresses the effect of repeat violations on penalty assessments. No evidence was presented of any prior violations by Respondent.

53. In recommending penalties for the proven violations charged in Counts Two and Three, the undersigned finds the following aggravating circumstances: Respondent's violations caused financial harm to the Mastens which Respondent has not corrected; and imposition of a fine and restitution should have a deterrent effect in that Respondent should understand that he can avoid the problems presented here by adhering to the formalities of the contracts he signs and using greater care and caution in developing the cost estimations underlying his contract prices.

54. The undersigned finds the following mitigating circumstances: No evidence was presented to show that

Respondent has any prior disciplinary history or has had complaints filed against him in the past; and according to Respondent's licensure record, Respondent held a license from December 5, 1986, which was current and active through September 21, 2008, when the status changed to current, but inactive through August 31, 2010. However, as of the final hearing, Respondent's licensure status had changed to "delinquent, inactive."

55. Upon consideration of the foregoing penalty guidelines and the aggravating and mitigating circumstances found above, the undersigned recommends the following as the appropriate penalties: for Count Two, a fine of $1,500.00, plus restitution in the amount of $30,083.04; and for Count Three, an additional fine of $1,500.00.

56. Section 455.227(3)(a) authorizes imposition of the costs associated with investigation and prosecution of a disciplinary complaint, excluding costs associated with an attorney's time, in addition to any other discipline imposed. Under the authority of this statute, imposition of investigation costs in the amount of $299.36 is warranted.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Petitioner, Department of Business and Professional Regulation, Construction Industry Licensing Board, finding that Respondent, Thomas Colan, d/b/a Thom Colan Construction, Inc.:

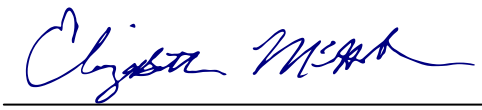
1. Violated section 489.129(1)(g)3. and (1)(m), as charged in Counts Two and Three, and for those violations, imposing a total fine of $3,000.00;

2. Requiring Respondent to pay restitution to the Mastens in the total amount of $30,083.04;

3. Requiring Respondent to pay costs of $299.36; and further

4. Dismissing Count One (based on Petitioner's voluntary dismissal) and Count Four (based on an absence of proof).

DONE AND ENTERED this 14th day of April, 2011, in Tallahassee, Leon County, Florida.



ELIZABETH W. MCARTHUR
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of April, 2011.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2005 version.

[2/] Although Respondent argued in his Proposed Recommended Order that he bears no responsibility for any of the cost increases, at the final hearing, Mr. Colan candidly accepted responsibility for one small item, a $527.73 cost increase for trash hauling: "[O]verall, it was just a matter of underestimating on my part--I'll admit to this--that it was going to be a lot more trash on this job than I expected." Transcript at 82.

[3/] Petitioner argued that there should be no contract price adjustment for change orders, because the change orders were not in writing. Even though the contract requires written change orders, the statute does not limit adjustments to only written change orders or only change orders that comply with the contract. However, because there were no change orders in writing to document the cost difference, adjustments could only be made when competent substantial evidence was presented of what was called for by the contract, how much the contract item would have cost, and what the cost of the changed item was. For example, although Respondent indicated in his testimony that the contract called for a certain mix of tiles and carpeting, and that mix was changed, there was no evidence establishing what exactly the contract called for, what it would have cost, what exactly was changed, and what the cost difference would be. Vague testimony about "more tile" costing "more," or different carpet costing "more" was insufficient to support an upward adjustment to the contract in a specific dollar amount.

[4/] While the increase in permitting fees attributable to just the upgrades requested by the Mastens cannot be determined with precision to the extent the increased value of the house (and, thus, the increased impact fee) is attributable to upgrades, then that portion of the increased impact fee should be fairly included as an upward adjustment to the contract price. Since roughly one-half of the increased cost of the project was attributable to upgrades, the contract price is adjusted upward by one-half of the increased permitting fees.

[5/] No upward adjustment to the contract price is made for the cost of the travertine tile that Respondent claimed to have thrown away. Respondent's claim is not found to be credible and would, in any event, be considered an unreasonable action that is not chargeable to the Mastens. Likewise, the contract price

is not adjusted for payments made by Respondent to Enrique Benitez to begin building cabinets. Mrs. Masten credibly testified that she did not approve any samples or authorize construction of cabinets after seeing the unacceptable sample.

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.