

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
CONSTRUCTION INDUSTRY )  
LICENSING BOARD, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 11-2797PL  
 )  
JORDAN TAL KOHN, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes<sup>1</sup>, before Jessica Enciso Varn, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH), on September 26, 2011, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Andrew R. Fier, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

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

For Respondent: Alexander O. Soto, Esquire  
The Soto Law Group, P.A.  
2400 East Commercial Boulevard  
Suite 400  
Fort Lauderdale, Florida 33308

STATEMENT OF THE ISSUES

Whether Respondent abandoned a construction job, and whether Respondent failed to include a statement of consumer's rights in a contract; if so, whether (and what) discipline should be imposed against Respondent's general contractor's license.

PRELIMINARY STATEMENT

On February 4, 2011, the Department of Business and Professional Regulation, Construction Industry Licensing Board (Department), issued a three-count Administrative Complaint alleging that Respondent, in his capacity as the primary qualifying agent for IGK Design Group, Inc. (IGK), engaged in disciplinable wrongdoing in connection with a residential construction project undertaken by IGK pursuant to a contract with Kevin Barrington (Barrington). Count One alleged that Respondent violated section 489.129(1)(i), Florida Statutes (2007), by failing to include in the contract written explanation of the Florida Homeowners Construction Recovery Fund, as required by section 489.1425, Florida Statutes (2007).

Count Two alleged Respondent violated section 489.129(1)(i), by receiving, as initial payment, money totaling more than 10 percent of the contract price for repair, restoration, improvement, or construction to residential real property without applying for permits within 30 days after the payment was made, as required by section 489.1426, Florida Statutes (2007). Count Three alleged that Respondent violated section 489.129(1)(j), Florida Statutes (2008), by abandoning the construction project in which Respondent was engaged or under contract as a contractor. Count Two was voluntarily dismissed by the Department at the hearing.

By filing a completed Election of Rights form with the Department, Respondent requested a formal hearing before a DOAH Administrative Law Judge. On June 3, 2011, the matter was referred to DOAH.

As noted above, the final hearing in this case was held before the undersigned on September 26, 2011. The Department offered the testimony of Kevin Barrington; Department exhibits 1-17 were offered and admitted into evidence. Respondent testified on his own behalf and offered the testimony of Greg Tal Kohn; Respondent exhibits 1-7 were offered and admitted into evidence, Respondent's exhibit 8 was pre-filed on the eve of hearing, and offered and admitted into evidence over the

Department's objection. The undersigned saw no prejudice to the Department in admitting Exhibit 8 into the record.

The two-volume Transcript of the hearing was filed with DOAH on October 13, 2011. Both parties filed timely Proposed Recommended Orders, which were considered in preparation of this Recommended Order.

#### FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. At all times material to the instant case, Respondent was a Florida-licensed general contractor, holding license number CGC 1509917.

2. At all times material to the instant case, IGK held a certificate of authority authorizing it to engage in contracting in Florida through a qualifying agent. Respondent was the licensed primary qualifying agent for IGK.

3. On or about December 20, 2007, Respondent entered into a contract to renovate Kevin Barrington's residence, located at 1315 Lenox Avenue, Miami Beach, Florida.

4. The written contract did not contain a statement explaining a consumer's rights under the Florida Homeowners Construction Recovery Fund, as then required by section 489.1425. At hearing, Respondent produced a copy of a statement that explained a consumer's rights under the Florida Homeowners

Construction Recovery Fund, and testified that he had attached this statement to the written contract. The statement produced by Respondent at hearing was dated December 24, 2011, four days after the contract was executed, and signed only by Respondent. Barrington testified that he never received the statement. The undersigned finds Barrington's testimony credible, and finds that the statement was not contained in the written contract as required by statute.

6. Respondent has never been disciplined for a violation of section 489.1425.

7. The initial contract price for the residential renovation totaled approximately \$114,320.00.

8. Several change orders increased the final contract price to approximately \$148,603.25.

9. On December 20, 2007, Barrington paid Respondent an initial payment of \$46,968.00.

10. Respondent began work on the renovation project in January, 2008. Barrington rented an apartment while the home was under construction.

11. Between December, 2007, and June, 2008, Barrington made several payments to Respondent. By June, 2008, Respondent had received approximately \$155,505.81, which was more than the original contract price, and more than the amount agreed to with the additional change orders.

12. By August, 2008, Respondent was struggling financially. IGK experienced a significant decline in business and was forced to lay off employees.

13. On August 23, 2008, Barrington sent Respondent an e-mail, stating, in part:

I wanted to summarize our meeting yesterday. I appreciated your honesty, and I believe we came to a resolution that satisfies both our objectives; remodel 1315 Lenox Avenue with high quality standards in a timely manner. Due to unforeseen market conditions, we are not able to continue work within the confines of the existing contract dated 12/20/2007 between IGK and Kenneth Barrington. Therefore, we agreed to the following course of action.

. . .

If the stated objectives are completed on August 29th to Kenneth Barrington's satisfaction, we decided to terminate the existing contract and have my legal team draft a new contract between IGK and Ken Barrington that outlines the remaining scope of services and payment plan. The payment plan will be arranged as a loan between IGK and Ken Barrington where Ken Barrington will act as Lender and IGK as Borrower, IGK will be responsible to perform the duties outlined in the scope of services and payback monies at a specified date. Loan payments distributed to IGK are intended solely for the purpose of paying for the labor and materials used at 1315 Lenox Ave.

14. On September 17, 2008, Respondent emailed Barrington, stating, in pertinent part:

As discussed many times, I am trying to do the right thing and complete your project. However as stated before we are not in complete projects (sic) that were underbid last year. You are well aware that we came in below everyone else. At the time business was good and we could afford to work on a very low mark up. I tried...however and unfortunately the business environment has change (sic) and we can not (sic) do it any longer!!!

. . .

As it stands, for us to complete the project as mentioned above, we will have to receive a payment in the amount of \$20,000.00. You may of course decide to hire to have some one (sic) else finish the project, by (sic) I believe your cost will be in excess of \$40-\$50k.

15. By September, 2008, approximately 60 percent of the renovation project had been completed.

16. On September 23, 2008, Respondent emailed Barrington stating, in part:

Good morning Ken,

We are still awaiting your decision in regards to which way your [sic] ant [sic] to go with your project. I do understand and per your advise [sic], that you are trying to hire other contractors to finish your project.

However, if you decide to take/hire another contractor, you must apply for a change of contractors [sic]to, either [sic] another contractor or to yourself as a owner/contractor.

**No one, including yourself can do work, under our permits and/or call for inspections!!!**

Please **refrain** from trying to hire my employees to do unlicensed side jobs, they

will not, and if they do they lose their jobs and/or be liable for prosecution by the state/county for working without a license and permit.

17. Respondent, having indicated to Barrington that he needed more money to complete the project, and expressing a willingness to complete the renovation project, was clearly awaiting Barrington's decision as to the renegotiation of the contract.

18. Barrington began to interview other contractors in October, 2008.

19. On October 10, 2008, Barrington sent Respondent Change of Contractor forms to sign and have notarized. On October 14, 2008, Respondent signed the forms and had them notarized.

20. Also on October 14, 2008, Barrington sent Respondent a letter, stating, in pertinent part:

I, Ken Barrington, property owner of 1315 Lenox Ave [sic], Miami Beach, FL 33139, am notifying you that your services are hereby terminated from our project/permit #s: B08014536, B0801910, B0804552, BE080944, BE082572, BMS0801808.

You are being terminated because:

You have acknowledged that you are no longer capable of completing the project according to our agreed upon contract.

You are no longer authorized to enter my property.

21. On or about November 11, 2008, Barrington entered into a contract with a new contractor, Strategic Engineering, to



complete the renovation project.

22. The renovation project was complete by July, 2009, when Barrington was able to move into his home. Respondent and Barrington began to communicate again around this same time.

23. Respondent informed Barrington that Respondent could return to work on the home, but that IGK was filing for bankruptcy. Respondent suggested that a Mutual Release be executed.

24. On September 23, 2009, Barrington and IGK entered into a Mutual Release, intended to effect the elimination of any obligations by either party.

25. Respondent never expressed any intention to abandon the project; rather, Barrington terminated Respondent shortly after Respondent expressed a willingness to complete the project despite his financial difficulties. During the time when Respondent was awaiting Barrington's decision as to the offer to renegotiate the contract price, Barrington elected to terminate Respondent, and did so. Barrington also forbade Respondent from entering the property. Thus, Respondent's separation from the project was caused by Barrington's actions, not by his own volition.

CONCLUSIONS OF LAW

26. DOAH has jurisdiction over the subject matter of the instant proceeding and of the parties hereto pursuant to chapter 120, Florida Statutes.

27. The Construction Industry Licensing Board (Board) may take disciplinary action against a licensed contractor serving as the primary qualifying agent for a business organization for violations of section 489.129(1), Florida Statutes, committed by either the contractor or business organization for which the contractor is a primary qualifying agent. Hunt v. Dep't of Prof. Reg., Constr. Indus. Licensing Bd., 444 So. 2d 997, 999 (Fla. 1st DCA 1983).

28. The Board may take such disciplinary action only after the licensee has been given reasonable written notice of the charges and an adequate opportunity to request a proceeding pursuant to sections 120.569 and 120.57, Florida Statutes.

29. At the hearing, the Department bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the Administrative Complaint. Proof greater than a mere preponderance of the evidence must be presented by the Department to meet its burden of proof. Clear and convincing evidence of the licensee's guilt is required. See Dep't of Banking & Fin., Div. of Sec. and Investor Prot. v. Osborne Stern and Co., 670 So. 2d 932, 935

(Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); and § 120.57(1)(j), Fla. Stat.

30. Clear and convincing evidence is an intermediate standard, requiring more proof than a preponderance of the evidence but less than the exclusion of a reasonable doubt. In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered clear and convincing, 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. In re Davey, 645 So. 2d 398, 404 (Fla. 1994).

31. The Administrative Complaint contains three counts: Count One, alleging a violation of section 489.129(1)(i) (by failing to comply with section 489.1425; Count Two, alleging a violation of section 489.129(1)(i); and Count Three, alleging a violation of section 489.129(1)(j).

32. 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 licensee. Jonas v. Fla. Dep't of Bus. & Prof. Reg., 746 So. 2d 1261, 1262 (Fla. 3d DCA 2000).

33. At all times material to the instant case, section 489.129(1)(j), provided that the following was a disciplinable act:

(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.

34. A contractor abandons a construction project, as proscribed by section 489.129(1)(j), when it stops working on the project and has no intent to resume its work. Cf. State v. Schultz, 388 So. 2d 1326, 1329 (Fla. 4th DCA 1980) (stating that abandonment of personal property is the intention to part with the property forever).

35. Because intent is difficult to prove, the Legislature has provided, in section 489.129(1)(j), that abandonment may be presumed under certain circumstances, including where the contractor has failed to perform work without just cause for 90 consecutive days.

36. Here, the Department has not successfully established a prima facie case of abandonment through use of this presumption, as Respondent had not ceased working on the project for 90 days when he was terminated by Barrington.

37. Absent from the record is clear and convincing evidence that Respondent abandoned the renovation project. As Respondent credibly testified at the final hearing, Respondent never intended to abandon the project; he simply made an offer to renegotiate the contract price. Barrington, rather than insist that the contract be executed as written, terminated Respondent and forbade him from entering the property. No basis, therefore, exists to support a conclusion that Respondent's separation from the project constituted abandonment.

38. In light of the foregoing, Counts Two (dismissed at hearing) and Three of the Administrative Complaint, which allege violations of section 489.129(1)(i), and section 489.129(1)(j), respectively, must be dismissed.

39. At all times material to the instant case, section 489.129(1)(i), provided that the following was a disciplinable act:

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

40. At all times material to the instant case, the failure in any material respect to comply with the provisions of section 489.1425(1), Florida Statutes (2007), constituted wrongdoing of the type described in section 489.129(1)(i):

Any agreement or contract for repair, restoration, improvement, or construction to residential real property must contain a written statement explaining the consumer's rights under the recovery fund, except where the value of all labor and materials does not exceed \$2,500. The written statement must be substantially in the following form:

FLORIDA HOMEOWNERS' CONSTRUCTION RECOVERY  
FUND

PAYMENT MAY BE AVAILABLE FROM THE FLORIDA HOMEOWNERS' CONSTRUCTION RECOVERY FUND IF YOU LOSE MONEY ON A PROJECT PERFORMED UNDER CONTRACT, WHERE THE LOSS RESULTS FROM SPECIFIED VIOLATIONS OF FLORIDA LAW BY A LICENSED CONTRACTOR. FOR INFORMATION ABOUT THE RECOVERY FUND AND FILING A CLAIM, CONTACT THE FLORIDA CONSTRUCTION INDUSTRY LICENSING BOARD AT THE FOLLOWING TELEPHONE NUMBER AND ADDRESS:

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

Subsection (2) of section 489.1425 provided that such wrongdoing was punishable as follows:

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

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

41. The record evidence clearly and convincingly establishes that IGK failed to comply with section 489.1425, and thereby committed a violation of section 489.129(1)(i).

42. In determining what disciplinary action should be taken against Respondent for this violation of section 489.129(1)(i), it is necessary to consult the Board's disciplinary guidelines set forth in Florida Administrative Code Chapter 61G4-17, which impose restrictions and limitations on the exercise of its disciplinary authority. See § 455.2273(5), Fla. Stat. (providing that 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).

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

44. At all times material to the instant case, rule 61G4-17.001 has provided, in pertinent part, that for a first offense of section 489.129(1)(i), by failing to comply with section 489.1425, a violator could expect, absent aggravating or mitigating circumstances, to receive a penalty ranging from a

minimum of a \$250 fine to a maximum of a \$500 fine. Fla. Admin. Code R. 61G4-17.001(1)(i)4. The rule has also, among other things, given notice of the Board's additional authority to assess the costs of investigation and prosecution. Fla. Admin. Code R. 61G4-17.001(4).

45. 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.<sup>2</sup> At all times material to the instant case, these aggravating and mitigating circumstances have included 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.

46. Having considered the facts of the instant case in light of the pertinent and applicable provisions of Florida Administrative Code Chapter 61G4-17, it is the view of the undersigned that the appropriate disciplinary action that should be taken against Respondent in the instant case for his violation of section 489.129(1)(i), is to fine him \$250.00 and order him to reimburse the Department for investigative and prosecutorial costs related to such violation.

#### RECOMMENDATION

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

RECOMMENDED that the Board issue a Final Order:

(1) dismissing Counts Two and Three of the Administrative Complaint; (2) finding Respondent guilty of violating section 489.129(1)(i), by failing to comply with section 489.1425, Florida Statutes, as alleged in Count I of the Administrative Complaint; (3) fining him \$250.00 for having committed this

violation; and (4) ordering him to reimburse the Department for investigative and prosecutorial costs related to this violation.

DONE AND ENTERED this 10th day of November, 2011, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the  
Division of Administrative Hearings  
this 10th day of November, 2011.

ENDNOTES

<sup>1</sup> Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2011).

<sup>2</sup> With respect to violations of section 489.129(1)(i), Florida Statutes, resulting from a failure to comply with section 489.1425, Florida Statutes, only a downward departure is possible for a first violation, given that section 489.1425 provides that the Board may only impose a fine of up to \$500 for such a violation.

COPIES FURNISHED:

Alexander O. Soto, Esquire  
The Soto Law Group, P.A.  
2400 East Commercial Boulevard  
Suite #400  
Fort Lauderdale, Florida 33308

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

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

G. W. Harrell, Executive Director  
Construction Industry Licensing Board  
Department of Business and  
Professional Regulation  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

Layne Smith, General Counsel  
Department of Business and  
Professional Regulation  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

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.