



1 considered in arriving at the following findings of fact, conclusions of law, and  
2 recommended decision which are set out below.

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**FINDINGS OF FACT**

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2           1. Complainant came into possession of an abandoned building, known as the  
3 Old Wellton Hotel, after her mother conveyed it to her. The building is located in  
4 Wellton, Arizona.

5           2. The building had become so dilapidated and posed such a hazard that the  
6 Town of Wellton issued a citation to Complainant, finding the building to be in violation  
7 of the town's nuisance ordinance. The town also ordered Complainant to abate the  
8 nuisance.

9           3. Initially, the town and Complainant commendably worked together to remedy  
10 the problem. Gary L. Rinehart, the Wellton Town manager, was able to bring together  
11 Complainant, Respondent, and town representatives to arrive at a solution to resolving  
12 the problem. Indeed, the evidence adduced at the hearing demonstrates that Town  
13 Manager Rinehart brokered this resolution. This is demonstrated in Rinehart's letter to  
14 Complainant dated October 26, 1999, wherein Rinehart stated "The enclosed cost  
15 estimate, submitted for your review, is for demolishing and hauling away debris from the  
16 subject property. In my opinion, it is a very reasonable cost estimate because we have  
17 secured, on a one-time only basis, a dump site for the debris at no charge. Please let  
18 us know immediately if you are interested."

19           4. On November 15, 1999, Complainant, a representative of Respondent, Tom  
20 Drysdale, Sr., and Town Manager Rinehart met to discuss the situation and  
21 Complainant's possible employment of Respondent to tear down and remove the old  
22 building. The parties reviewed the site of the demolition and Respondent prepared a  
23 written estimate of the cost for Respondent to do the work. The written estimate stated  
24 on the back side, "Apex Trucking agrees to do the work described on the other side."  
25 After reviewing the estimate, Complainant agreed to have the work done and at that  
26 point a contract was formed between Complainant and Respondent. Complainant  
27 wrote out a check for the total amount of the bid, \$8,040.00 to Respondent and  
28 delivered the check to the Wellton Town Clerk for safekeeping. In essence, the check  
29 was being held in a sort of escrow by the Town of Wellton until Respondent completed  
30 its work.

1           5. The bid plainly discloses that it is premised on Respondent's ability to be able  
2 to haul the waste from the site clean-up to a dump site locate approximately three miles  
3 north of Wellton. This was made evident from the testimony of Respondent's president,  
4 Tom Drysdale, Jr.<sup>1</sup> It is also made evident by Rinehart's October 26, 1999 letter to  
5 Complainant.

6           6. Respondent began the work sometime in late 1999 or early 2000. A portion  
7 of the building was demolished and hauled to the dump site described above.  
8 Unfortunately, a random sampling of some of the materials taken to the dump site  
9 showed that the building contained asbestos. The dump site that had been the lynch  
10 pin of the contract between the parties was not able, because of environmental  
11 restrictions, to accept asbestos. Furthermore, Respondent was not properly licensed to  
12 carry out the asbestos abatement procedures that would have to be employed once it  
13 was discovered that the site contained asbestos.

14           7. In an effort to get the demolition back on track, Mr. Rinehart began searching  
15 for alternatives to the dump site three miles away. He apparently suggested the use of  
16 a dump site known as Copper Mountain, which was located some twelve miles away.  
17 He also obtained bids from a company specifically licensed to abate asbestos in order  
18 to remove the material that had already been taken to the landfill three miles away.  
19 Because of the cost involved, Respondent requested additional time in order to "check  
20 around" to see if there might be a less expensive means of completing the clean-up.  
21 Unfortunately, the window of opportunity for using the Copper Mountain dump site was  
22 short, and before any accord could be reached between the parties, the Copper  
23 Mountain site became unavailable.

24           8. The only alternative left to the parties was to haul the material to a dump site  
25 in Mobile , Arizona, some one hundred or more miles away from the demolition site.  
26 Needless, to say, the cost of having to haul the material to a much further site, due to  
27 the unknown presence of asbestos, in conjunction with the fact that special asbestos  
28 abatement procedures would be required, dramatically increased the cost of the  
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30 <sup>1</sup> Tom Drysdale, Jr. is the son of Tom Drysdale, Sr., the person who prepared and submitted the bid for  
the work to Complainant.

1 demolition work. The cost had now become \$27,000.00 to \$30,000.00. Respondent  
2 and the Town of Wellton agreed to each cover one-third of the cost, and attempted to  
3 get Complainant to cover one third of the cost. Respondent has paid over \$10,000.00 in  
4 order to have the materials that were placed into the dump three mile north of town  
5 removed and disposed of properly.

6 9. Although Complainant indicated that she would consider this arrangement, for  
7 some reason, the arrangement was never concluded. Because Respondent could not  
8 cover the cost, and because Respondent apparently is not licensed to do the special  
9 abatement procedures necessary to remove the asbestos contaminates, the demolition  
10 is not yet finished. The building, in a partially demolished state, still sits on the Wellton  
11 site today.

12 10. Complainant's check was never delivered to Respondent. Instead, once the  
13 situation between the parties deteriorated, the check was returned uncashed by the  
14 town to Complainant.

15 11. It is clear that none of the parties were aware of the presence of the  
16 asbestos at the time they entered into their agreement. Complainant contends that  
17 Respondent should have been aware of its presence or at least thought about the  
18 presence of the asbestos and its failure to do so does not relieve Respondent of the  
19 obligation to complete the contract. Respondent's testimony, which was uncontradicted  
20 at the hearing, was that Respondent was never informed by any party of the existence  
21 of the asbestos. Respondent contends that this case amounts to a mutual mistake of  
22 fact that absolved it of any responsibilities under the agreement.

### 23 CONCLUSIONS OF LAW

24 1. The complainant has the burden of proof, and the standard of proof on all issues  
25 is by a preponderance of the evidence. *Culpepper v. State*, 187 Ariz. 431, 930 P.2d 508  
26 (App. 1996). A "preponderance of the evidence is such proof as convinces the trier of fact  
27 that the contention is more probably true than not." Morris K. Udall, *Arizona Law of*  
28 *Evidence*, §5 (1960). It "is evidence which is of greater weight or more convincing than the  
29 evidence which is offered in opposition to it; that is, evidence which as a whole shows that  
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1 the fact sought to be proved is more probable than not." *Black's Law Dictionary*, 1182 (6th  
2 ed. 1990).

3 2. A.R.S. §32-1154(A) provides in pertinent part:

4 **A.** The holder of a license or any person listed on a  
5 license pursuant to this chapter shall not commit any of the  
6 following acts or omissions:

7 (1). Abandonment of a contract or refusal to perform after  
8 submitting a bid without legal excuse for the abandonment or  
9 refusal.

10 \* \* \*

11 (7). The doing of a wrongful or fraudulent act by the licensee  
12 as a contractor resulting in another person being  
13 substantially injured.

14 \* \* \*

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16 3. The primary purpose of the Registrar of Contractors is to police the licenses of  
17 contractors so as to protect the public from unscrupulous contractors. In carrying out this  
18 function, it may become necessary to determine the relative contractual rights and  
19 obligations of parties before the Registrar. Nevertheless, the primary concern is to ensure  
20 that the public is adequately protected from unscrupulous contractors.

21 4. In this matter, the contract agreed to between the parties was to demolish the  
22 building and haul away the debris to a landfill which was only three miles away. While  
23 Complainant has attempted to downplay this portion of the contract, it is clear from the  
24 evidence adduced at the hearing -- specifically, the language of the bid as prepared by, the  
25 testimony of Tom Drysdale, Jr., and the extensive brokering and involvement of the Town  
26 of Wellton (as demonstrated by Rinehart's October 26, 1999 letter to Complainant) -- that  
27 the ability to haul this material to the dump site which was just three miles away from  
28 Wellton was an essential element of the contract between the parties. Furthermore, again  
29 as evidenced by the October 26, 1999 letter prepared by Rinehart and sent to  
30 Complainant, it is evident that Complainant knew or should have known this factor was

1 essential to the formation of this contract and in particular was essential to the price of the  
2 proposal.

3 5. Respondent undertook its obligation under the contract and began to demolish  
4 the building and haul the materials to the local land fill. Once it was determined that waste  
5 from the building site contained asbestos, and could not be dumped at the landfill just three  
6 miles away, Respondent's performance became legally impractical and the purpose of the  
7 contract was frustrated. See, § 266<sup>2</sup>, *Restatement of Contracts 2nd*; c.f., *7200 Scottsdale*  
8 *Road General Partners v. Kuhn Farm Machinery, Inc.*, 184 Ariz. 341, 346, 909 P.2d 408,  
9 413 (App. 1995).<sup>3</sup> In this case, Complainant was well aware that this contract was based  
10 on the ability of Respondent to haul the material to the dump site three miles away. Once  
11 that purpose was frustrated by the unanticipated consequence of the discovery of the  
12 asbestos and the concomitant inability to place the waste at the dump site three miles from  
13 town, Respondent's obligations to complete the contract for the \$8,040.00 price were  
14 legally excused.

15 6. Moreover, it does not appear that Respondent in any sense of the word  
16 "abandoned" the contract. Respondent did not simply walk away from the situation once  
17 the asbestos contamination and disposal problem was discovered. Both Respondent and  
18 the Town of Wellton made a valiant effort to resolve the problem to the satisfaction of the  
19 Complainant by offering to pick up one third of the cost of transporting the materials to the  
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24 <sup>2</sup> This Restatement indicates : " (1) Where, at the time a contract is made, a party's performance under it  
25 is impracticable without his fault because of a fact of which he has no reason to know and the non-  
26 existence of which is a basic assumption on which the contract is made, no duty to render the  
27 performance arises, unless the language or circumstances indicate the contrary. (2) Where, at the time a  
28 contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which  
29 he has no reason to know and the non-existence of which is a basic assumption on which the contract is  
30 made, no duty of that party to render performance arises, unless the language of circumstances indicate  
to the contrary."

<sup>3</sup> In *Kuhn*, the court discussed the similar doctrine of frustration of purpose and, quoting *Lloyd v. Murphy*,  
25 cal.2d 48, 153 P.2d 47 (1944), stated "The question in cases involving frustration is whether the equities  
of the case, considered in the light of sound public policy, require placing the risk of a disruption or complete  
destruction of the contract equilibrium on defendant or plaintiff under the circumstances of a given case, and  
the answer depends on whether an unanticipated circumstance, the risk of which should not be fairly thrown  
on the promisor, has made performance vitally different from what was reasonably to be expected."

1 Mobile, Arizona dump site. Apparently, by that time, Complainant had come to the  
2 conclusion that a breach of the contract had occurred and was unwilling to incur any  
3 additional expense in order to resolve the issue.

4 7. Complainant also seems to suggest that the delay in Respondent's decision on  
5 how to proceed after the discovery of the asbestos, which Complainant contends affected  
6 the ability of the parties to utilize the Copper Mountain dump site twelve miles away, further  
7 exacerbated the situation. This argument, however, is inconsequential to the issue in this  
8 case: the purported breach of the contract to haul the materials to the dump site just three  
9 miles away. It was that contract - the essential term of which was the ability to haul the  
10 material to the site three miles away - which was the contract to which Respondent agreed.

11 8. Because Respondent would have been legally excused from his performance in  
12 this matter at the agreed upon price, and because there is insufficient evidence to  
13 demonstrate that Respondent abandoned the contract, Complainant has failed in her  
14 burden of proof to demonstrate a violation of A.R.S. §32-1154(A)(1).

15 9 Because Complainant has failed to demonstrate a violation of A.R.S. § 32-  
16 1154(A)(1), and because there was no allegation or any evidence adduced that fraud was  
17 involved, Complainant has failed to demonstrate a violation of A.R.S. §32-1154(A)(7).

18 10. Complainant's request for attorneys' fees must be denied.<sup>4</sup>

19 **RECOMMENDED DECISION**

20 Based on the foregoing, it is recommended that Director dismiss the citation and  
21 complaint issued in this matter.

22 Done this day, December 21, 2001

23  
24 \_\_\_\_\_  
25 Gregory L. Hanchett  
26 Administrative Law Judge

27 Original transmitted by mail this  
28 \_\_\_\_\_ day of \_\_\_\_\_, 2001, to:

29 <sup>4</sup> Even if Complainant were to have prevailed on her claim, she would not be entitled to attorney's fees in this  
30 forum. Neither the terms of A.R.S. §41-1007 nor A.R.S. § 41- 1092.12 allow the undersigned to award  
such fees in this type of case. A.R.S. §12-341 does not apply to administrative proceedings. As this  
tribunal is a creature of statute and has only such powers as a statutorily delineated, an award of  
attorney's fees is not possible in this case.

Registrar of Contractors  
Michael P. Goldwater  
ATTN: Joyce Armijo  
800 West Washington, 6th Floor  
Phoenix, AZ 85007

By \_\_\_\_\_