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CONTRACTOR LICENSING: WHAT YOU DON'T KNOW CAN HURT YOU

By Jon Straw

Does an owner have to pay an unlicensed contractor for work performed? May contracting parties waive the contractor licensing requirement? What happens when a contractor's license temporarily lapses between bid award and notice to proceed? May an unlicensed contractor acting in good faith recover in equity for services performed?

These questions arise on private or public projects and may be faced by owners, primes or subs. Answers to these questions vary because each state's contractor licensing laws are different. The price can be steep in some states for failing to strictly follow the contractor licensing law while other states give the benefit of the doubt to a contractor acting in good faith.

Failure to follow contractor licensing laws can have draconian consequences. In California, for example, if a contractor is not licensed at all times while performing work, which includes bid submittal, then the contractor is not entitled to any future payment and forfeits all prior payments. Such was the case in *Davis Moreno Construction, Inc. v. Frontier Steel Buildings Corp.* where the court ordered the sub-contractor to return all monies paid and forfeit all future amounts due because the sub was not licensed when it offered to "assist" the prime contractor with steel erection to build a records retention facility for the Kern County, California Unified School District. 2010 U.S. Dist. Lexis 116566 (E.D. Cal., Nov. 2, 2010).

Strict and careful compliance with the contractor licensing law are often required. In the recent case of *Lemoine/Brasfield & Gorrie Joint Venture, LLC v. Orleans Parish Criminal Sheriff's Office*, the Louisiana Court of Appeal denied injunction and a bid protest by a joint venture for failing to secure a contractor license. The joint venture argued that because one of the two companies forming the joint venture was a licensed contractor, the joint venture was licensed. In some states, this argument would succeed. This court, however, disagreed finding that when the two companies formed the joint venture, a new business entity and thus a new contractor was formed which required a new contractor license. 2011 La. App. Lexis 392 (La. App. 4th Cir., Mar. 3, 2011). Knowledge and proper application of the pertinent law is critical to avoiding mistakes like this.

Knowledge of license status and licensing laws affects primes and subs alike. On one end of the knowledge spectrum, contracting parties with actual knowledge cannot waive the license requirement. Thus, even if an owner or prime actually knew that a sub was unlicensed and the sub performed work with the owner's consent, in a later action to recover monies due from the owner, the sub could not recover. Sometimes, a prime attempting to waive the license requirement for a sub will be stuck holding the bag. For example, in the recent case of *Dennis Talbot Construction Co., Inc. v. Privat General Contractors, Inc.*, the Court of Appeal of Louisiana dismissed a prime's counterclaim because the prime knew at the time of contracting that the site-work subcontractor was unlicensed. 2011 La. App. Lexis 342 (La. App. 3d Cir., March 23, 2011).

Whether contracting parties knew the contractor(s) was or were not licensed depends on the particular facts and circumstances of each case. For example, a Federal Court in Oregon permitted a prime contractor to recover from a sub although the prime should have known, but did not actually know, that the sub was unlicensed when the sub represented the status of its Oregon contractor license as "N/A." The sub argued that from this representation the prime's recovery was barred because the prime should have known that the sub was unlicensed. The court disagreed and granted the prime's recovery reasoning that the prime did not actually know the sub was unlicensed. The court did not mention whether the prime had a duty to investigate the status of the sub's license. The court also denied the sub's counterclaim because the sub was not licensed during the performance of the work or when the counterclaim was submitted. *Stellar J. Corp. v. Smith & Loveless, Inc.*, 2010 U.S. Dist. Lexis 91672 (Dist. of Oregon, May 11, 2010).

In some states, like Virginia, a contractor's good faith effort to comply with the licensing law is a factor in determining whether that contractor may recover in equity. For example, in *J.W. Woolard Mechanical & Plumbing v. Jones Development Corp.*, the Supreme Court of Virginia in finding for the contractor considered a contractor's reasoned belief that it was in compliance with the licensing law. 235 Va. 333 (1988). Since then, lower Virginia courts have generally not automatically precluded recovery based solely on a contractor's license status.

Whether working in a state like California with strict requirements and seemingly harsh penalties or a state like Louisiana where a prime contractor could be on the hook for its unlicensed subcontractors, best practices include a regular review of current license status and any new or unfamiliar requirements.

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