Legal Concerns for Chasing Work in Other States

Firestop Contractors International Association
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Legal Concerns for Chasing Work into Other States and Current Litigation Trends/Topics

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What is the Role of the Lawyer?

- “To me, a lawyer is basically the person that knows the rules of the country. We're all throwing the dice, playing the game, moving our pieces around the board, but if there is a problem the lawyer is the only person who has read the inside of the top of the box.”
  - Jerry Seinfeld
What is the Role of the Lawyer?

- “I don't want a Lawyer to tell me what I cannot do; I hire him to tell me how to do what I want to do.”
  - J.P. Morgan

- A Lawyer should:
  - Assist you in accomplishing your business’s goals.
  - Defend your business if it is sued or it initiate suit if it is necessary to achieve your business’s goals.
Chasing Work in Other States

- A Lawyer is a good person to work with when you decide to perform work in a new state.

- Why are you working in a new state: GREENER PASTURES!

- How Will it be GREENER PASTURES!
  - Comply with the laws.
  - Obtain payment.
  - Have access to the courts.
  - Perfect lien rights.
  - Pursue payment bond claims.

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Chasing Work in Other States

- To ensure GREENER PASTURES a lawyer can help ensure you:
  - Comply with the laws.
  - Obtain payment.
  - Have access to the courts.
  - Perfect lien rights.
  - Pursue payment bond claims.
Chasing Work in Other States

Do I have to do anything before:

- **Soliciting** work on an out-of-state project?
- Submitting a **bid** on an out-of-state project?
- **Negotiating** a contract on an out-of-state project?
- **Shipping** materials to an out-of-state project?
- **Performing** work on an out-of-state project?
Chasing Work in Other States

- **FAILURE TO COMPLY MAY BE:**
  - Curable
  - Small fine (e.g., $50)
  - Large fine (e.g., $10,000)
  - Punitive
    - E.g., pay back any compensation received
    - E.g., forfeiting property
    - E.g., banned from pursuing private or public work
  - Cumulative
  - Civil or criminal, or both
    - Imprisonment
  - Unenforceable or void contract
Enforcement Example

Even a Lying Owner Not Required to Pay

• Owner approached foreign company to do work
• Foreign company manufactured patented equipment that simulated ocean waves for water parks (presumably not construction)
• Foreign company told owner it was unwilling to sign contract calling for “construction work”
• Owner insisted foreign company sign and use expertise to assist in the construction of pool by others
• Owner promised to pay for the construction work
• Owner assured foreign company that licensed contractors would be involved on project
• Foreign company, relying on promises, agreed to do work
• Owner did not pay and foreign company sued
• CA State Law: Anybody entering into a construction contract, even if done by others, must have a contractor’s license
• CA Court Ruling: No obligation to pay by Owner
Bank Wins Right to Equity in Property

• Contractor constructed hotel
• Contractor filed lien for unpaid contract balance of $852,000
• AL State Law: mechanic’s lien on property and improvements has priority over all other liens, mortgages or encumbrances after builder begins work
• Bank sought to declare lien invalid by alleging that builder was an unlicensed contractor
• AL Court Ruling: Express or implied contracts entered into by an unlicensed general contractor are null and void because they violate public policy
• AL Court Ruling: Contractor was unlicensed and, therefore, contract was void
• AL Court Ruling: Bank has priority in property

Lee v. YES of Russellville, Inc., 858 So. 2d 250 (Ala. 2003)
Enforcement Continued

Owner Acts as General Contractor
- Total cost of construction $105,000
- Drywall contractor did $4,000 of work
- TN State Law: Owner exempted from having general contractor’s license
- TN Court Ruling: Drywall contractor was a “general contractor in his line of work”
- TN Court Ruling: Drywall contractor not entitled to payment since not a licensed general contractor
  Santi v. Crabb, 574 S.W.2d 732 (Tenn. 1978)
Enforcement Continued

Owners in some states may sue unlicensed contractor for return of all monies paid, even when workmanship and materials were of good quality.

E.g., “a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the contractor for the performance of any act or contract.” West’s Cal. Bus. & Prof. Code § 7031(b)

E.g., Arizona Supreme court enforced ruling that imposed as criminal restitution the repayment of all compensation received from owner. State v. Wilkinson, 202 Ariz. 27, 39 P.3d 1131 (2000).
Enforcement Continued

• Contractor may have to forfeit tools and equipment
  – E.g., Haw. Rev. Stat. § 444-23.5 (Hawaii) Forfeiture of Property for Unlicensed Activity
Who is Requiring Licensing?

Federal
- Supremacy Clause prohibits state licensing laws from being automatically imposed upon federal government contractors
- However, the federal government, agencies and contracting officers may nevertheless require them as a condition of awarding contract

State
County
Municipality

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Why Are They Requiring Licensing?

- Revenues (i.e., fees, taxes)
- Protecting Life, Property and Health
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State
County
Municipality
What Is Being Required.

- Certifications
- Pre-Qualifications
- Licensing
- Examinations
- Financial Responsibility
- Insurance
- Bonds
- Continuing Education
- Permits
- Approvals
- And More
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State

County

Municipality
Drill Down From the Top Down

- State Level Requirements
- County Level Requirements
- City Level Requirements
Drill Down From the Top Down

- Are Their Front End Requirements to provide a bid or negotiate a contract?
- What licenses are required?
- What Permits are required?
- Are any bonds required?
- Any registration required?
- Any immigration requirements?
- Are there any front end lien law notices required?
- Union concerns?
- Specific Contract public policy restraints.
Examples of State Level Requirements

- Doing Business Requirements
  - Qualifying company to do business in state
    - Certificate of Authority

- Licenses
  - General Contractor License
  - Subcontractor or Trade Licenses

- Financial Statement
- Tax License
- Surety or Cash Bond
Examples of State Level Requirements

- If Doing Business, and Depending Upon the Type of Company, You May Be Required to “Qualify” to Do Business, Which May Require You, among other things, to. . . .
  - Obtain a Certificate of Authority
  - Appoint a Registered Agent

Example: Georgia requires foreign corporations, foreign partnerships, foreign limited liability companies, and foreign limited liability partnerships to secure a certificate of authority when doing business in Georgia
What if You Fail to Qualify to Do Business?

- **Denied Access to State Courts**
  - If so, how will you enforce contracts?
  - Curable?
    - Majority View—when a foreign company is barred from bringing a lawsuit because it transacted business without a certificate of authority, subsequent qualification will cure the disability and enable it to bring suit
      - Taxes, Fees and Penalties
      - Statute of Limitation Issues
What if You Fail to Qualify to Do Business?

- Minority View—failure to obtain certificate of authority is not curable
  - Example: Alabama—all contracts or agreements made or entered into in Alabama by foreign corporations prior to obtaining a certificate of authority to transact business are void

- Directors, Officers, Employees and/or Agents may also be fined.
  - Examples: California, Colorado, Delaware, Louisiana, Maryland, North Dakota, Ohio, Oklahoma, Utah, Virginia, Washington
Example: New Mexico

- Obtaining a Certificate of Authority to Transact Business:
  - “No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state, until the corporation has obtained a certificate of authority.” N.M. Stat. Ann. § 53-17-20
  - However, “[t]he failure of a foreign corporation to obtain a certificate of authority to transact business in this state does not impair the validity of any contract or act of the corporation, and does not prevent the corporation from defending any action, suit or proceeding in any court of this state.” Id.
  - **Curable** with Nominal Punishment: A corporation transacting business without registration liable to the state for fees, taxes plus $200 penalty. Id.
Example: New Mexico

- **Licensure:**
  - **Purpose:**
    - Avoid duplicate licensing and inspections. Id.
    - Require proof of responsibility (insurance?). Id.
    - Ensure highest quality of performance and compliance with codes and laws. Id.
Example: New Mexico

Licensure Continued:

- Who is covered?:
  - Those **undertaking** or **offering to undertake by bid** or other means contracting.
  - Contracting is: constructing, altering, repairing, installing or demolishing any:

1. road, highway, bridge, parking area or related project;
2. building, stadium or other structure;
3. airport, subway or similar facility;
4. park, trail, bridle path, athletic field, golf course or similar facility;
5. dam, reservoir, canal, ditch or similar facility;
6. sewerage or water treatment facility, power generating plant, pump station, natural gas compressing station or similar facility;
7. sewerage, water, gas or other pipeline;
8. transmission line;
9. radio, television or other tower;
10. water, oil or other storage tank;
11. shaft, tunnel or mining appurtenance;
12. leveling or clearing land;
13. excavating earth;
14. air conditioning, conduit, heating or other similar mechanical works;
15. electrical wiring, plumbing or plumbing fixture, consumers' gas piping, gas appliances or water conditioners; or
16. similar work, structures or installations which are covered by applicable codes adopted under the provisions of the Construction Industries Licensing Act;

Includes subcontractors and specialty contractors;

Includes a construction manager who coordinates and manages the building process;
Example: New Mexico

- **Licensure Continued:**
  - **Enforcement:**


- Can’t **bid** on a construction contract without a license. However, GC’s can bid on work that includes trades incidental to the GC’s contracting work if the GC has licensed tradesmen perform the work. Id.
Example: New Mexico

- Licensure Continued:
  - Enforcement:
    - If you do not indicate your license number on all bids and permit applications you are subject to a fine of $150
    - If you do not disclose to the owner on forms issued by the licensure division, on residential projects “that the license issued and the bond or other proof of responsibility required pursuant to the Construction Industries Licensing Act does not protect the consumer if the contractor defaults,” you will be subject to a fine up to $1,5000
      - Id.
Example: New Mexico

Licensure Continued:

- Enforcement:
  - Need for License at time of bidding and performance
  - May not file or maintain a lawsuit without alleging and proving that it had a license "at the time the alleged cause of action arose."
    - At time of breach (i.e. failure to pay. This appears not to be curable.)
  - "Contractor operating without a license" may not file a claim of lien
    - Id. (also appears not to be curable)
  - Any person operating in capacity of a contractor without a license "where the dollar value of the contracting work exceeds five thousand dollars ($5,000), sentence the person to be imprisoned in the county jail for a term of six months or to the payment of a fine of ten percent of the dollar value of the contracting work, or to both such imprisonment and fine in the discretion of the court."
Example: New Mexico

- Licensure Continued:
  - Bond Required:

  - Need “proof of responsibility”
    - Bond by corporate surety in the amount of $10,000
    - Payments from a bond only to be used to cure code violations caused by a licensee, certified by the division and not corrected by the licensee. Claims against the bond shall be made within two years following final inspection by the governmental entity or within two years of issuance of a certificate of occupancy.
    - The total aggregate liability of the surety for all claims shall be limited to the face amount of the bond
    - 30 day notice of cancellation
    - Failure to obtain or maintain bond grounds for license revocation.


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Example: New Mexico

- Yes, Another Bond!
  - Taxes

- A person engaged in the construction business who does not have a principal place of business in New Mexico and who enters into a prime construction contract to be performed in this state shall, at the time such contract is entered into, furnish the secretary or the secretary's delegate with a surety bond, or other acceptable security, in a sum equivalent to the gross receipts to be paid under the contract multiplied by the sum of the applicable rate of the gross receipts tax imposed by Section 7-9-4 NMSA 1978 plus the applicable rate or rates of tax imposed pursuant to local option gross receipts taxes.

- Applies to contracts over $50,000
  - Id.
- May be enjoined (in other words they can stop the work).
  - Id
Yes, Another Bond!

- Taxes

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  - Id.

- May be enjoined (in other words they can stop the work).
  - Id
Example: New Mexico

- Immigration

- No E-Verify requirement
Example: New Mexico

- Lien Law
  - Preliminary Notices
    - Liberally construed or “tie in favor of the claimant”
    - Preliminary notice of lien rights sent to owner or prime contractor (both) within 60 days of first date of work or material delivery (for liens over $5,000).
    - Notice must include, description of property, name, address and phone number of claimant and name and address of claimant’s contracting party.
      - Id.
    - Late notice limits your lien rights to work 30 days prior to the notice.
      - Id.
Example: New Mexico

- **Lien Law**
  - Prime contractor must file lien with 120 of completion of contract.
    - *N.M. Stat. Ann. § 48-2-6*
  - Subcontractors and suppliers must file lien within 90 days of substantial completion of building improvement, or structure or repair of same.
    - *Id.*
  - Claim of lien is verified
    - *Id.*
  - Must file suit to perfect lien within 2 years of file lien.
    - *Id.*
Example: New Mexico

○ Bond Law—Public Projects

○ Government may waive obligation of bond on projects below $25,000
  ○ N.M. Stat. Ann. § 13-4-18
  ○ All Public Project over $25,000 must be bonded.
    ○ Id.

○ Bond must be 100% of value of contract.
  ○ Id.

○ Remote subcontractors and suppliers must provide party obtaining the bond written notice of claim within 90 days of the last date of work or furnishing materials.

○ Must sue within one year of final settlement of the contract (contract of procuring entity—most cases the entire project) in the name of the State of New Mexico.
  ○ Id.
Example: New Mexico

- Other Contract Considerations
  - Pay-if-paid. This is fully enforceable in NM
  - Retainage prohibited on all projects other than residential on four units or less.
    - N.M. Stat. Ann. § 57-28-5 (relatively new) Downward trend since 2001 (5%), 2007 (0%).
      - But see GA, SC no limit within reason.
      - TN, capped at 5% in interest bearing escrow account
      - AL capped at 10%
Example: New Mexico

- **Other Contract Considerations**
  - **Prompt Pay Act**
    - Cannot be contracted around.
    - Contract to be paid within 21 days of undisputed pay application (45 days with written notice on contract documents on public projects)
    - Consequence of failure is 1.5% interest beginning on 22nd day.
      - Id.
    - Subcontractors and Suppliers to be paid within 7 days of payment from above.
    - Attorneys’ fees available (discretion of court) for enforcement of Prompt Pay Act obligations.
      - Id.
  - Governing Law Clause Unenforceable
  - Forum Selection Clause Unenforceable
Example: Alabama

- Register with Department of Revenue
  - Surety/Tax Bond (5%)
  - Statement w/in 30 days
- Licenses
  - Architects
  - Engineers
  - General Contractors
  - Subcontractors
  - Trade Contractors
Example: Alabama – Types of Licenses

○ General Contractors:
  ● Building Construction
  ● Highways and Streets
  ● Municipal and Utility
  ● Heavy and Railroad Construction
  ● Mechanical
  ● Electrical
  ● Environmental Remediation
  ● Sheet Metal
  ● Masonry
  ● Painting
  ● Roofing and Siding
  ● Heating and Air Condition
  ● Bridges
  ● Swimming Pools
  ● Demolition
  ● Landscaping
  ● Construction Manager
  ● Fire Protection Systems
  ● Golf Course
  ● Tennis Courts, Running Tracks, and Recreational Areas
  ● Sprinkler Systems
  ● Asbestos Material Handling and Removing
  ● POL Dispensing Systems
  ● Outdoor Advertising Signs

Home Builders Board of Certificate of Licensure

○ Electrical:
  ● Electrical Administrator – Inside Outside Wiring
  ● Electrical Administrator – Inside Outside Communications
  ● Electrical Administrator – Residential Wiring

○ Plumbing and Gas Fitting:
  ● Apprentice
  ● Journeyman Gas Fitter
  ● Journeyman Plumber
  ● Master Gas Fitter
  ● Master Plumber
Alabama – Lien Law

- Two Types of Liens
  - Full Purchase Lien
  - Unpaid Balance Lien
- Full Purchase Lien
  - All persons who had a direct contract with Owner before working/supplying materials to the property have the right to claim a Lien to the full extent of the Owner’s interest in the Property
  - If prior notice was given to the owner, even one who is not in direct contract with the Owner may claim a full purchase lien

- Unpaid Balance Lien
  - Persons that do not have a full purchase lien have an unpaid balance lien. This lien exists only if the Owner owes the Contractor money at the time the Owner receives notice from the lien claimant of its intent to claim a lien
  - The purpose of the notice to the Owner is to protect the Owner from the possibility of paying twice for the same work.
  - If the Owner does not owe the Contractor any money, the potential lien claimant does not have a lien
Alabama – Lien Law

- If Contract with Owner:
  - File Verified Statement of Lien with the Probate Court in the County in which the property is located, within 6 months of the last work on the property. There is a statutory form.
  - File Suit in the County where the property is located, within 6 months of the date the debt became due.

- If Subcontractor or Supplier:
  - File Verified Statement of Lien in the Probate Court in the County where the property is located, within 4 months of the date of last work.
  - File Suit in the County where the property is located, within 6 months of the date the debt became due.
Example: Florida – Lien Law

- **Subcontractors and Suppliers**
  - Serve Notice to Owner within 45 days of first materials delivered or work performed
    - Statutory Form
  - Must also serve Contractor with Notice to Owner if not in privity
  - Should serve Lender with Notice to Owner

- **Notice of Commencement**
  - Obtain copy

- **Claim of Lien**
  - Record Claim of Lien within 90 days of final furnishing of materials, labor or work
  - Promptly serve Claim of Lien by certified mail, return receipt requested, on all of the applicable parties listed in the Notice of Commencement

- **File Suit**
  - Suit must be filed within 1 year from the date the lien is recorded
### Florida Licensure

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