

Construction and the Law

Regulation and Licensure of the Construction Industry: Beware When You Cross State Lines

By Michael Bosse



Michael Bosse is a shareholder at Bernstein Shur and chairs the firm's Construction Practice Group and is a member of the firm's Litigation Group and Data Security Team. Bosse is listed in Best Lawyers in America for construction law and rated by AV-rated by Martindale-Hubbell. Bosse is admitted to practice in Maine, Massachusetts and New Hampshire. He is a resident of Scarborough, Maine. He can be contacted at 207-228-7276 or mbosse@bernsteinshur.com.

Professionals in the construction industry used to work only in one state, but many had to abandon that practice when the recession hit, bidding on work in other jurisdictions to either stay profitable or just to stay afloat. Following the recession, many construction companies have found that the strategy of regionalization is the new reality in a new economy. Given that many of the regulations and statutes governing participants in the construction industry are state-based, attention and care must be maintained so that one doesn't run afoul of a particular licensing statute or regulation governing corporate activities.

First, if you are a corporation or some type of Limited Liability Company or partnership, that entity was set up pursuant to a particular state's law. Most in the construction industry have likely formed in their home state, and the filing and the yearly maintenance of the company in that statute provides the state revenue and gives the company authority to lawfully transact business in that state and to utilize the state's resources for its benefit, whether it be tax-related, filing a lien, or seeking redress in the state court system. Each state, in some manner, defines what it means to "transact business" in that state. Being the general contractor of a new 250-bed hospital almost certainly qualifies, whereas recording a mortgage usually does not, however recording a mechanics lien might. State statutes governing contracting with utilities, municipalities may or may not qualify. The point here is that if you are venturing to other jurisdictions, you have to check. And the act of filing whatever papers are required is usually not onerous, and can involve either registering to do business as a "foreign entity" (a Florida company doing business in Georgia), or sometimes, setting up a new entity or subsidiary (Acme might choose to set up a new entity, "Acme Georgia").

The consequences of not properly registering to do business can be harsh. The filed mechanics lien may be invalidated or there may be a fine, or a disgorgement of monies already collected. You may not be recognized by a court as a party that properly can file a legal action in the state against someone else. Some states have statutes that allow you to sign up retroactively, but it's best not to rely on such a clause to bail you out. The best practice is to spend the preventative monies or time

on the front end and really understand the risks of non-compliance with state-based corporate statutes.

The second major regulatory issue for contractors, and often design professionals, is state licensure statutes. All states require architects and engineers to be licensed. Many states require general contractors to be licensed, with some limiting it to residential construction and other states applying the licensure requirement across the board to all contractors. The statutes governing construction managers vary from state to state and some, but far from all, require licensure. Also, the requirements for specialty contractors, like HVAC contractors, also vary. All of these licensure statutes are geared towards the protection of the public, and the state ensuring a minimal level of due care that will be provided by the relevant party to the members of the public in the state. The point here is again, that if you are venturing into other jurisdictions, you have to know what you are facing in terms of licensure requirements.

Many states allow for reciprocity, meaning that if you are properly licensed in Oregon as an engineer, then the state of Vermont is likely willing to, for a fee and a properly filled out application, provide you with a license to operate as an engineer in Vermont. Alternatively, the reciprocity function might provide you the ability to do a one-off project, again probably in exchange for a fee and a properly filled out application. The same is true of other professions, such as law, where I am able to go into another state, Pennsylvania for instance, to work on one case for one of my clients, on the basis of my Maine law license, even though I do not hold a Pennsylvania law license. Yes, there is an application and a fee!

There also are often exemptions to a particular state's licensure requirements that should be reviewed. In some states, for instance, specialty electrical contracting work with a state-regulated utility is exempted from a licensure requirement for the electrical contractor. Many of these entities are nationally based, and the state regulating the local utility is able to protect the process and project for the public by regulation of utility, and the specialty electrical contractor is better poised to do the work, having done it on a national basis.

Finally, you may be able to contract around the licensure requirements. A New Mexico company must be able to utilize a

Texas architect with them or their Texas stamp for a new hotel in San Antonio. The idea of contracting around the licensure requirements must be taken with care, however, and this choice requires examination of the construction project from all angles. What are the lines of contractual privity? Do the parties have the right insurance in the event of an accident? Are the appropriate indemnitees in place between the parties, and will the person providing their license want to take the risk for the fee they are receiving? From a legal perspective for those in the construction industry, this is the option least favored, and is the most fraught with uncertainty and ambiguity.

The penalties vary from state to state, but many states conclude that practicing whatever job it is that is determined to need a license without one is a misdemeanor crime. Is prosecution a certainty? Far from it, but valuable time spent defending even a misdemeanor charge from a zealous prosecutor will sap energy that could be spent on the next bid for a new project. More importantly, a misstep in a licensure matter in a foreign state might be reported back to your home state, causing more problems with your business previously unforeseen and certainly were not worth the risk.

The recession has forced a new reality on the regionalization of construction, and post-recession, that regionalization appears to be the new normal and is probably here to stay. Those in the construction industry who are venturing into other states should be attentive to both corporate regulations and licensure requirements. Quality time spent at the beginning of a project can almost certainly avoid many potential headaches later and a future headache averted early on a construction project is almost always a good idea. ■



BERNSTEIN SHUR

COUNSELORS AT LAW