



As a result of the extreme economic challenges facing the construction industry, construction managers, general contractors, trade subcontractors, design/builders, engineers and architects alike have been forced to adapt to survive. In many cases, structural reorganization and a focus on efficient operation have played a role in the adaptation, but these measures are often not enough, and some companies have been forced to look for work opportunities in new regions. By expanding the geographic area in which it is willing to perform work, a company can dramatically increase the number of available construction projects and work opportunities – particularly along the Northeast Corridor.

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However, when a business expands its geographic area to obtain new work, its management and field personnel must understand the legal pitfalls and advantages that are particular to the new jurisdiction. At a minimum, companies must be aware of licensing requirements, participation requirements for various business enterprise programs, contract provisions, and statutory and legal remedies.

Licensing Requirements

Many states require state licensure for entities conducting construction and design activities within their borders. All states require businesses to register with appropriate entities for tax purposes.

Construction and design firms must investigate whether the states in which they practice require licenses and make sure they comply with all licensing requirements, preferably before contracts for construction are entered

Crossing State Lines

➤ Contractors must act to minimize their risks when they pursue work in other states. Here is how they can do it.

into in a new state. Failure to comply could be catastrophic in a claim situation because, in some cases, an unlicensed company may be unable to enforce its contractual or statutory rights in a court of law.

For projects funded in whole or in part by public dollars, keep in mind that Minority-Owned Business Enterprise (MBE), Women-Owned Business Enterprise (WBE) and Disadvantaged Business Enterprise (DBE) participation guidelines and requirements vary among states. Although uniform federal regulations guide individual states' administration, the solicitation proce-

dures, contracting goals and requirements for engaging M/W/DBE firms – and the consequences for failing to adhere to the guidelines – will differ among states.

In addition, a brand-new Women-Owned Small Business (WOSB) Federal Contract Program will be fully implemented in coming months, with the first contracts expected to be let in the fourth quarter of this year. Therefore, construction firms working in more than one state (and in the federal sector) must understand the nuances of the MBE, WBE and/or DBE guidelines for each jurisdiction.



Contract Provisions

Many companies have developed form contracts that they are comfortable using. Although it is important for any construction company to periodically update its contract form, it is imperative that a company preparing to perform work in a new state carefully review its contract form and adapt its contract provisions to the applicable state law.

The enforceability of contract provisions varies greatly from state to state. Key distinctions in state law relate to common contract provisions such as liquidated damages provisions, lien waivers, indemnification provisions, notification requirements, pay-if-paid and pay-when-paid clauses and no-damage-for-delay clauses. Their enforceability materially impacts the risks a company may be exposed to and the risks that it is able to shift. In addition to making state-specific modifications to one's own form, it goes without

saying that these issues also emerge when a company is asked to execute another entity's contract form.

Statutory and Legal Remedies

In addition to the protections that can be incorporated into a contract form, companies also must be aware of the statutory and legal remedies available in each state. The protections afforded to contractors and design professionals under state laws vary widely, and companies must be familiar with their statutory and legal rights even before they execute a contract.

The most significant statutory and legal remedies to be cognizant of include the existence of prompt-payment acts, trust fund statute protections, the requirements of state bond laws, the availability of set-off as a defense to payment, mechanic's lien procedural requirements and statutes of limitations applicable to construction claims.

Contractors can adopt standard

business practices when venturing into different states to ensure they are operating in accordance with applicable state law. These include:

- » Reviewing, signing and maintaining a copy of the entire project contract;
- » Maintaining a copy of all bonds related to the project and understanding all applicable notice provisions set forth in the bonds, as well as how bond rights can be preserved before performing work on the project;
- » Understanding which state's law applies to the project and, accordingly, which trust fund acts, state payment acts, bond acts and/or mechanic's lien laws apply;
- » Understanding the force and effect of key contractual provisions as interpreted by recent case law in the relevant jurisdiction;
- » Keeping detailed records of all project activities and, when problems arise, documenting these issues contemporaneously; and
- » Understanding the applicable claims/dispute resolution procedure including, but not limited to, all applicable deadlines.

Performing work in another state is an effective way to grow one's business. When crossing borders, the best business results are achieved when construction entities abide by a new jurisdiction's regulations, rules and laws. Businesses that understand the nuanced but important differences that exist across borders and practice areas – before performing the work – can avoid costly mistakes and reap the rewards of the new market. ☺

Jack Graham, senior associate, and **Jennifer M. Horn**, senior counsel, are members of the Construction Group at Cohen Seglias Pallas Greenhall & Furman, PC. They will be presenting a series of seminars on the "crossing borders" topic throughout the Mid-Atlantic. To learn more, e-mail jgraham@cohenseglias.com or jhorn@cohenseglias.com.