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The Effects of Geographic and Substantive Shifts in Business

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For an increasing number of construction-related entities, survival in the current economy has meant expansion of both geographic and substantive work area comfort zones. Branching out in this manner can result not only in a broader client base, but, as when a joint venture is involved, may lead to a mutually beneficial new business relationship.

In crossing state borders and embracing new areas of work, however, both clients and the practitioners who advise these entities must be mindful of a multitude of legal pitfalls that can have a significant impact on the parties' rights and responsibilities.

Shift in Geography

In the search for good work, some construction entities are expanding geographically to include projects in other states. In doing so, many overlook the professional licensing requirements of the new state that, in some cases, impact an unlicensed contractor's ability to enforce a contractual right to payment in the event of a dispute. Such entities must be advised to adhere to the licensing requirements of each state in which work is performed, if possible, before the contract is signed to avoid embarrassment and/or curtailment of legal rights.

In addition, the requirements and consequences of a company's compliance or failure to comply with Minority-Owned Business Enterprises (MBE), Women-Owned Business Enterprises (WBE) and Disadvantaged Business Enterprises (DBE) participation guidelines and regulations may also differ across state lines despite the uniform federal regulations that guide the administration of these regulations. Thus, even though similarities exist, the administration of MBE, WBE and/or DBE guidelines and the consequences to a contractor of even inadvertent MBE, WBE and/or DBE misrepresentations can vary from state to state. A contractor performing work in a different jurisdiction would be wise to understand

how the particular state administers MBE, WBE and/or DBE issues and recognize that expectations and consequences may differ depending upon the jurisdiction.

Perhaps most obvious, contractors performing work in a new state must be cognizant of important statutory and legal differences that impact lien and bond rights. Such contractors should seek assistance before performing work in a new jurisdiction. In some states, a careless supplier may unknowingly waive its bond rights even before delivering materials to the project work site. Lien and bond deadlines, of course, are often strictly construed and vary significantly depending upon the jurisdiction.

Practitioners should also be prepared to advise construction clients on the jurisdictional differences in the permissibility of particular contract provisions, including liquidated damages provisions, indemnification provisions and other standard contractual provisions. The provisions of state payment acts and trust fund acts, as well as the relief afforded, also vary widely from state to state.

Likewise, the impact of an owner's bankruptcy filing on a contractor's lien rights and ability to recover payment is not uniform across state lines. Distinctions also emerge when one compares the enforceability of pay-if-paid and pay-when-paid clauses, lien waivers, and no damage for delay clauses throughout jurisdictions. These are just a few examples of the myriad issues construction entities should be cognizant of before performing work and before a construction contract is executed.

For design professionals accustomed to practicing in a particular state in which certain form AIA contracts are generally utilized, performing work in a neighboring state can also create significant issues if they do not carefully review the contract's fine print. Such contracts may differ substantially from the modified AIA documents to which these design professionals are accustomed and dramatically impact the administration of the contract and ability to get paid for the design services rendered. Although similar in appearance, these contracts must be scrutinized and the force and effect of even nuanced changes understood.

Design professionals working in new geographic areas should also be mindful of whether the principles of *Bilt-Rite Contractors Inc. v. The Architectural Studio* and its progeny are applicable or unrecognized in the jurisdiction at issue. Of course, professional licensing requirements must be satisfied when work is performed in a neighboring state. Understanding potential causes of action before problems arise can not only guide the work of the design professional, but factor into how a firm implements a geographic expansion plan.

Shift in Substantive Focus

Although many contractors are interested in shifting their business from the private into the federal sector, such attempts are fraught with peril in light of the highly specialized federal regulations governing such work and the fact that an examination of a contractor's prior past performance on other federal jobs is often necessary before new work is awarded.

Nevertheless, many contractors are shifting the substance of their new work from the private to the public sector. Funding streams, fueled by government stimulus money — as well as the proliferation and ease of joint venturing as a means of expanding one's business — have facilitated this change. For contractors that have never performed such work, federal contracting consulting groups can assist with the joint venturing, bidding, and contract review process to ensure compliance with all regulations.

Shift in Standard Business Practices

As a result of the trends described above, smart construction entities and the construction law practitioners who advise them strive to adhere to standard business practices that facilitate and support changes in geography and substance.

Such practices include, but are not limited to, the following:

- Reviewing, signing and maintaining a copy of the entire project contract. This includes all of the general conditions, specifications, integrated drawings (if applicable), addenda, administrative procedures, state regulatory codes and any other document identified as part of the project contract or incorporated into the contract by reference;
- Maintaining a copy of all bonds related to the project and understanding any and all applicable notice provisions set forth in the bonds as well as how one's 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 acts 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.

As referenced above, some entities have found success by engaging in joint ventures with others who possess detailed knowledge of the particular region and/or area of work. Others achieve geographic and substantive expansion by affiliating with and/or opening a branch office in the new market and, in doing so, benefit from experienced local talent.

In any event, the best business results are achieved when construction entities shift their standard business practices to account for a new jurisdiction's regulations, rules and laws and take care to understand the nuanced but important differences that exist across borders and practice areas before performing the work.

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