

Disgorgement? But I'm a Construction Manager, NOT a Contractor



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You say potato, I say potahto. You say construction manager, California says, where's your contractor's license? And if you don't have one, disgorgement. Construction management is a growing profession in the construction industry. Commonly referred to as CMs, construction managers fill the gap between owners, design professionals, and general contractors, helping to coordinate project administration, construction meeting, scheduling, sequencing, project safety and a slew of other important, but often forgotten, tasks on a construction project. However, just because CMs don't swing a hammer doesn't necessarily mean they don't need a license. More and more, we are seeing that for CMs to protect their rights and avoid the harsh reality that is disgorgement, they should be licensed. Why you ask? The short answer is because California says so; for the long answer, read on.

What Is a Contractor?

To "protect the public from incompetence and dishonesty in those who provide building and construction services," California requires "any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct..." to hold a valid contractor's license throughout the entire project.

What Is a Construction Manager?

As construction needs grew, a new niche profession emerged – the CM. Defining a CM is a bit trickier than defining a contractor. On public works projects, Government Code section 4529.5 defines CMs as those who have expertise and experience in construction project design review and evaluation, construction mobilization and supervision, bid evaluation, project scheduling, cost-benefit analysis, claims review and negotiation, and general management and administration of a construction project. However, there is no clear-cut definition of a CM in private construction projects. This becomes an issue when evaluating the potential ramifications for performing CM work without a license.

Penalties for Unlicensed Construction Work

When a person or entity acts as a contractor without a contractor's license, the penalties are harsh. Under Business & Professions (B&P) Code section 7031(a) an unlicensed contractor cannot bring or maintain any action, in law or in equity, for the collection of compensation for the performance of unlicensed work. Even worse, subsection b allows an owner to seek disgorgement of all compensation paid to an unlicensed contractor on a project.

The question becomes, when does a CM need a license in California?

Public Works Projects

Let's start with an easy one: public works projects. The law is clear that for any state or local public works project, anyone providing construction management services (as defined in Government Code section 4529.5 above) must be a "licensed architect, registered engineer, or licensed general contractor." So, CMs working on public works projects must have a license.

Home Improvement Projects

Since Assembly Bill (AB) 2237 took effect January 1, 2013, this is an easy one too. Pursuant to B&P Code section 7026.1, "any person, consultant to an owner-builder...who or which undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid to construct any building or home improvement project, or part thereof." AB 2237 added a new subsection (2)(b) defining the term "consultant," as it relates to a home improvement contract, as a person, other than a public agency or an owner of privately owned real property to be improved, who 1) provides or oversees a bid for a construction project or 2) arranges for and sets up work schedules for contractors and subcontractors and maintains oversight of a construction project. Under the new subsection, it appears CMs fall within the definition of "consultant," at least as it relates to home improvement contracts, and thus must be licensed.

Other Private Projects

Now for the gray area – other private projects. For this we need to look at some case law. The seminal case on this issue is 2009's *The Fifth Day, LLC v. James P. Bolotin*. In this case, plaintiff The Fifth Day entered into a contract with the owner to provide certain "industrial real estate development and construction project management" services with respect to real property located in Chino, California. The plaintiff sued the owner and its principals for compensation allegedly due to the plaintiff. The trial court granted summary judgment in favor of the defendants on the ground the plaintiff was acting as a general building contractor and was required to hold a license pursuant to B&P Code section 7026. Moreover, because it was not licensed, the plaintiff was barred by section 7031(a) from maintaining its action against the defendants.

The California Court of Appeal reversed the judgment, framing the issue as whether "an entity which provides construction management services to a private owner developing commercial real property is required to be licensed pursuant to the Contractors' State Licensing Law." In answering this question, the court determined that the plaintiff's duties under its contract were: (i) to assist, on behalf of the owner, in coordinating the activities of the various workers to enable them to complete their assigned tasks in an organized and efficient manner, on time and on budget; (ii) to maintain records such as insurance certificates, as well as the financial books and records for the project; (iii) to keep the owner apprised of the status of the project; (iv) to be the on-site "point person" to respond to issues as they arose; and (v) generally to act as the owner's agent with respect to various parties connected with the development of the project. In essence, the court found the plaintiff played only an "advisory" role on the project. Moreover, since the plaintiff had no responsibility or authority to perform any actual

construction work on the project, nor did it enter into any contract or subcontract for the performance of such work, and in fact did not perform any such work, the court found that the code did not require the plaintiff to be licensed.

Writing in dissent, Justice Richard M. Mosk relied upon B&P Code sections 7026 and 7026.1 to argue that a contractor includes a “consultant to the owner-builder...” and thus CMs, acting as consultants to the owner-builder, must be licensed. Mosk’s reliance on section 7026.1 and the Legislature’s subsequent amendment to this section is interesting. Indeed, pursuant to legislative history, AB 2237 was enacted because “*The Fifth Day v. Bolotin* decision undermines the CSLB’s Precedential Decision, and the CSLB believes the law should be amended to clarify that an individual performing these services is required to be licensed as a contractor and comply with the law.” However, the language of B&P Code section 7026.1 still does not specifically address “construction managers.” Moreover, a strict reading of the new subsection 7026.1(2)(b) limits the term “consultants” to those who provide or oversee a bid for a construction project or arrange for and set up work schedules for contractors and subcontractors and maintain oversight of home improvement projects only.

Thus a conundrum – is a license required if you only provide or oversee bids or arrange for and set up work schedules as set forth in 7026.1(2)(b)? Or is a license required if you do either of those things AND construct any building or home improvement project as set forth in 7026? Under the first scenario, a CM is required to have a license, even if it does not perform any actual construction work. However, under the second scenario, a CM would only need a license if it performed actual physical construction work.

Conclusion

With the increased demand for CMs on public and private projects alike, the gap is quickly closing on “things a CM can do without a license.” There is already case law requiring CMs-at-risk (those who schedule and coordinate construction work while guaranteeing price and schedule) to have a license. Additionally, consultants involving pool installation must be licensed. Although *The Fifth Day* decision is still good law, good luck trying to fit into the narrow description of “purely advisory construction-phase services.” Indeed, given the harsh penalties for performing work without a contractor’s license, CMs without a license would be wise to heed the words of Dirty Harry and ask themselves, “Do you feel lucky? Well, do ya?”