

CONSTRUCTION LAW

Alert

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

New Tennessee Laws Seek to Further Prevent Unlicensed Contracting and Contractual Lien Waivers

September 9, 2009

Contractors that Violate Licensing Laws, Rules or Regulations Risk Losing Profit and Undocumented Expenses

The Tennessee Legislature recently amended the section of the Contractor Licensing Act that limited¹ the recovery of damages by unlicensed contractors to actual, documented expenses. That prior version of this statutory limitation applied only to an “unlicensed contractor covered by the provisions of this chapter.” For example, an unlicensed contractor was not entitled to recover its profit or any undocumented expenses on a project.

The amended statute now limits the recovery to actual, documented expenses for “*any* contractor required to be licensed” who violates “*any* of the provisions of” the contractor licensing laws, rules or regulations. Tenn. Code Ann. § 62-6-103(b) (emphasis added). This provision went into effect on June 23, 2009. Presumably, this amended statute now limits the recovery for even a contractor who is licensed, but still violates the statute, such as by exceeding the monetary limit of a license.

Contractors that Require Subs to Waive Lien Rights in Subcontracts Risk Losing their Licenses

The Tennessee Legislature also recently amended the Mechanics’ and Materialmen’s Lien Law to provide redress for subcontractors asked to waive lien rights in their subcontracts. Contract provisions that require a party to waive its lien rights have been unenforceable since 2005. The amended law (which went into effect July 1, 2009) now provides an administrative process by which subcontractors can pursue removal of the lien waiver provision from the subcontract. Contractors who subsequently refuse to remove lien waiver provisions face revocation of their licenses. Additionally, contractors who include lien waiver provisions in their subcontracts may be required to pay the subcontractors’ attorney’s fees and costs.

¹ The statute allowing unlicensed contractors to recover their actual, documented expenses was an expansion of the rights available to them under the common law, which prohibited any recovery by unlicensed contractors. However, the exclusion of profit and undocumented expenses from the allowable recovery is now generally viewed as a limitation.

Section 66-11-124(b)(2) of the Tennessee Code Annotated now allows a subcontractor who is solicited to sign a subcontract containing a lien waiver to notify the Tennessee Board for Licensing Contractors. After receiving this notification, the executive director of the Board must notify the contractor attempting to procure a lien waiver that such action is against the law and public policy of the State of Tennessee. After being so notified, the contractor can prevent further action on the matter by:

1. removing the lien waiver provision from the contract, and
2. affirmatively stating that lien waiver provisions will not be included in future contracts to perform construction work in Tennessee.

If the contractor does not delete the lien waiver provision, there must be a hearing before the Board. If the Board finds that the contractor's contract contains a waiver of any right of lien, the contractor's license will be immediately revoked and notice of such revocation will be sent by the Board to all states in which the contractor is licensed.

Finally, when a potential right of lien arises, the amended statute allows a subcontractor to recover attorney's fees and costs from a contractor who solicits a lien waiver, by stating: "In any action for damages based on the waiver of a right of lien filed by a person solicited by the contractor, such person shall have the right to recover from the contractor reasonable attorney's fees and cost in connection with the enforcement of such lien." Tenn. Code Ann. § 66-11-124(b)(2)(D).

Bass, Berry & Sims News and Seminars

Brian Dobbs, a construction attorney with Bass, Berry & Sims PLC, recently became one of the first attorneys in Tennessee to earn the Green Building Certification Institute's new LEED® Green Associate designation. A LEED Green Associate is an individual who has demonstrated the knowledge and skill needed to understand and support green design, construction and operations. For more information, please visit [our website](#).

Additionally, Bass, Berry & Sims PLC construction attorneys will be speaking at the following upcoming seminars.

- Construction Alternative Dispute Resolution
Knoxville, Tennessee
L. Wearen Hughes
November 13, 2009
- Tennessee Stormwater Management Seminar
Memphis, Tennessee
John W. Dawson IV
November 19, 2009
- Current Issues in Tennessee Construction Lien Law
Teleconference
L. Wearen Hughes

December 8, 2009, 12:00-1:30 CST

- Top Concerns with Any Construction Contract: for the Real Estate Attorney
Nashville, Tennessee
R. Slade Sevier
December 11, 2009

More details about these seminars will be provided at a later date, but please feel free to contact Laura Clay at lclay@bassberry.com for further information. We hope that you will be able to join us at one or more of these programs.

Bass, Berry & Sims PLC Construction Attorneys

L. Wearen Hughes

(615) 742-6225

whughes@bassberry.com

John W. Dawson IV

(615) 742-7796

jdawson@bassberry.com

Brian M. Dobbs

(615) 742-7884

bdobbs@bassberry.com

R. Slade Sevier, Jr.

(615) 742-7771

ssevier@bassberry.com

William G. Whitman

(901) 543-5931

bwhitman@bassberry.com

Amy C. Worrell

(901) 543-5706

aworrell@bassberry.com

The materials contained herein have been abridged from the statutory sources and should not be construed or relied upon for legal advice. Readers are urged to consult legal counsel concerning particular situations and specific legal questions.

To ensure compliance with requirements imposed by the IRS, we inform you that this message is not intended to be used, and cannot be used, by the addressee or any other person for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.

315 Deaderick Street • Suite 2700 • Nashville, TN 37238-3001 • (615) 742-6200
The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103-3672 • (901) 543-5900
1700 Riverview Tower • 900 S. Gay Street • Knoxville, TN 37902 • (865) 521-6200