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Construction Industry Grapples With Array of Legal Issues

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Do Construction Managers Need to be Licensed? Most Likely, Yes

By David K. Ismay and Eric C. Tausend

Owners' reliance on professional construction managers (CMs) has understandably proliferated in recent years because CMs can give public and private owners alike seasoned advice on cost, constructability, scheduling, and more throughout the life of a project. In response, CMs increasingly offer a wide range of services from pre-construction and construction-phase advice to full-on CM multiple prime and CM-at-Risk project delivery. So the question arises (frequently, in our experience): "Do CMs need to be licensed in California?"

Let's start with the easy answers. The law is clear that, on public projects, CMs need to be licensed. No California government entity, state or local, may retain anyone other than a licensed architect, registered engineer, or licensed general contractor to perform "construction project management services." And anyone providing those services must demonstrate both expertise and experience in providing the typical CM services listed in the code (Govt. Code § 4529.5).

Similarly, by defining them as "contractors" for purposes of the Contractors' State License Law found in Sections 7000-7191 of the Business and Professions ("B&P") Code and administered by the Contractors State License Board (CSLB), the law (as of January 1, 2013) expressly requires CMs to be licensed if, in relation to a home improvement project (defined in § 7151 of the B&P Code), they either (a) provide or oversee a bid for a construction project, or (b) arrange for and set up work schedules for contractors and subcontractors and maintain oversight of a construction project to hold a contractor's license (B&P Code § 7026.1).

The law is less clear, unfortunately, regarding the licensing requirements for CMs on other private projects. And because it is less clear, it is worth stepping back to understand the broader licensing context at issue. As the California Supreme Court has firmly and repeatedly stated, contractors are required to be licensed in an effort to "protect the public from incompetence and dishonesty in those who provide building and construction services." The consequences of failing to comply with the licensing requirement are severe: a contractor who is not properly licensed for the entirety of a project cannot bring or maintain a court or other action to enforce his or her contract, and can be forced to return all monies paid to an owner under the contract regardless of the quality of the contractor's work.

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So what does that have to do with CMs on private projects? A lot. Although the cases are few, the courts and the CSLB have consistently interpreted the state's licensing scheme to require that CMs with active construction-phase roles hold a contractor's license. Their reasoning is this: read as a whole, the license law (B&P Code §§ 7026, 7026.1, and 7057) includes construction-phase CMs in the definition of a "contractor" since CMs are normally a "consultant to an owner-builder" whose "principle contracting business is in connection with" construction that requires "the use of at least two unrelated building trades or crafts, or to do or superintend the whole or *any part thereof*."

That reading of the law is not surprising. While various job-site roles may look distinct to those of us within the industry, to most judges, the things construction-phase CMs do – reviewing and approving RFIs, submittals, payment applications and the like, managing the schedule and directing construction activities as a result, conducting project meetings, etc. – look remarkably like "superintending" at least a "part," if not a significant portion, of the work.

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Applying that understanding to the range of services CMs are now offering in the market, there isn't much for which a contractor's (or other) license is not required. The law already sees a CM-at-Risk, that is, someone who schedules and coordinates construction work while guaranteeing price and schedule, as being identical to a general contractor (*City of Inglewood v. Superior Court of Los Angeles County* (1972) 7 Cal. 3d 861). And, in the only precedential decision it has ever published, the CSLB reached the same conclusion regarding a pool installation "consultant" who was performing as a CM Multiple Prime by orchestrating the procurement and work of a designer and trade contractor for homeowners who were "building their own pool."

What's left? Arguably only contractually well-defined design-phase, and purely advisory construction-phase services. Why "arguably"? Because except for a single, outlier case in 2009 regarding a CM who provided limited "owners representative" services during construction (*Fifth Day, LLC v. Bolotin* (2009) 172 Cal. App. 4th 939), courts and commentators alike have consistently recognized the entire scope of traditional CM services as falling within the broad statutory definition of "contractor" for purposes of state licensing. Given the harsh potential consequences of performing work without a license when one is required, CMs would be wise to think long and hard before trying to fit into this narrow and disappearing exception. ■

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