



Recent Changes to Delaware Construction Law

Disclaimer: This article is not intended to provide legal advice. Contractors and subcontractors whose business may be affected by these changes to Delaware Law should seek the advice and guidance of counsel with respect to compliance with the referenced statutes and regulations.

SIGNIFICANT CHANGES to the law were passed by Delaware's 150th General Assembly that all construction firms doing business in the First State should be aware of. Generally, these changes amend the Workplace Fraud Act (19 Del.C. §§3501-3515), create the Delaware Contractor Registration Act (19 Del.C. §§ 3601-3611), and establish an apprenticeship training requirement under the Large Public Works Contract Procedures statute (29 Del.C. § 6962).

Senate Substitute 1 to Senate Bill 95 modified the Workplace Fraud Act and implemented new requirements for firms conducting construc-

tion business in the First State. This statute is specifically limited to the "construction services industry" and makes no distinction between public and private construction projects, or between commercial, industrial, or residential construction. The Workplace Fraud Act prohibits employers that engage in construction in the state of Delaware from misclassifying employees as so-called "1099 independent contractors." The Act provides a fairly detailed explanation of what is and is not considered construction services and should be consulted to determine whether a business falls within the Act's authority. This article, however, is concerned with the two important changes adopted by the noted legislation: 1) businesses subcontracting with other businesses are now permitted to subcontract with other businesses that offer the same or similar services or that conduct the same core business; and 2) all individuals or businesses engaging in construction must (as of October 1, 2020) be registered with the new Delaware

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Contractor Registry Office in order to lawfully engage in construction work within the state.

The change to subcontracting represents a significant departure from what was previously unlawful conduct under the act. Until this amendment, businesses could be fined or debarred for subcontracting to another business or individual engaged in the same core business or offering the same services. This meant, for example, that a company offering plumbing services could not subcontract with a different plumbing company to do a portion of a plumbing contract. The Act was interpreted to require fines for each such violation, with a violation being counted for each individual employee working pursuant to such a subcontracting arrangement. Under the change to the Bill, this prohibition was removed, thus permitting subcontracting to any construction firm so long as they are registered under the additional major change introduced by the Bill.

Regarding the noted registration, the Bill also imposes a new requirement that a company register to lawfully carry out construction services in Delaware. To register, companies must pay a fee and certify that they are complying with a number of preexisting legal requirements (such as being registered to pay taxes, having proper licenses, and active workers' compensation insurance). A company is then designated as a "registered" contractor and may be free to contract its services within Delaware. Businesses that fail to register and engage in construction services, after the effective date, can be barred from doing further business in Delaware and fined at differing levels depending upon whether there was a knowing violation. Although the removal of the subcontracting prohibitions resolves a significant pitfall for the unwary, the new registry requirement could lead to severe consequences.

While Workplace Fraud applies to all contractors, Senate Substitute 1 to Senate Bill 48 (apprenticeship training) applies only to firms bidding on public works projects that are subject to prevailing wage requirements (that are not federal highway projects) and that have ten or more total employees (Note: the minimum does not distinguish between field personnel and office or shop employees). This amendment requires the bidding firm to have active training programs for apprentices and journeymen at the time that a project is awarded, though it is unclear what process exists for a registered journeyman program. If a contractor fails to maintain such a training program, the contractor may be suspended or debarred from bidding on public works projects for a period of up to five years (additional penalties exist for other violations of the procurement statute, including permanent debarment). To qualify for providing craft training, the contractor may either have their own program (approved by the Department of Labor) or participate in a collective training program as a company member of an organization that offers such training.

The apprenticeship amendments provide that the Delaware Department of Labor will promulgate regulations, but alleged violations may only be initiated by the contracting agency. Alleged violations are filed with the Director of the Office of Management and Budget, who will hold a hearing to determine if a violation in fact occurred, and what penalty to assess. These decisions are appealable (on the record) to the Delaware Superior Court.

The upshot of these new laws and amendments is that construction is becoming a far more regulated field. Contractors and subcontractors, regardless of the type of construction (industrial, commercial, residential) and the ownership of the project (public, private) must take steps to ensure compliance now, and not delay until the effective dates of these changes. ■

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