

**MISSISSIPPI CONTRACTOR LICENSING AND
CERTIFICATE OF RESPONSIBILITY LAWS:
THREE MISTAKES TO AVOID**

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I. THREE MISTAKES TO AVOID UNDER THE MISSISSIPPI CONTRACTOR LICENSING LAWS

A. A Contractor Must Not Fail To Obtain a Mississippi Certificate of Responsibility with the Appropriate Classification or License

1. Penalties

A contractor who bids for and accepts commercial contracts without a certificate of responsibility where one is required will find that his contract is “null and void” and that he is subject to criminal penalties under Mississippi law.

Thus, § 31-3-15 *Miss.Code Ann.* states:

No contract for public or private projects shall be issued or awarded to any contractor who did not have a current certificate of responsibility issued by said board at the time of the submission of the bid, or a similar certificate issued by a similar board of another state which recognizes certificates issued by said board. *Any contract issued or awarded in violation of this section shall be null and void.*

(Emphasis added). In addition, § 31-3-21 provides that anyone “knowingly and willfully” submitting a bid for projects without a certificate of responsibility when required to do so, “shall be guilty of a misdemeanor” punishable by a fine up to \$1,000 and imprisonment for up to six (6) months.

Further the Mississippi Board of Contractors (MBOC), for any violation of its requirements for a certificate of responsibility:

...may, after notice and hearing, issue an order of abatement directing the contractor to cease all actions constituting violations of this chapter until such time as the contractor complies with Mississippi state law, and to pay the board a civil penalty to be deposited into the State Board of

Contractors' Fund...of not more than three percent (3%) of the total contract being performed by the contractor. In addition to, or in lieu of, such penalty, the board may require the performance of community service for a specified number of hours as determined by the board. The funds collected from civil penalty payments shall be used by the State Board of Contractors for enforcement and education.

§ 31-3-21 Miss. Code Ann. The Legislature amended the statute effective July 1, 2010 to include the possibility of community service in lieu of penalties.

While the MBOC is authorized to impose fines up to 3% of the total contract being performed, the MBOC can also negotiate lower fines with a cooperative contractor who is willing to provide information requested by the Board and demonstrates it is willing to take the steps necessary to get into compliance as quickly as possible. A contractor may wish to seek the assistance of counsel for such negotiations.

Residential builders and remodelers who operate without a license from the State Board of Contractors are barred by statute from enforcing their building or sales contracts. § 73-59-9. Unlicensed residential builders also risk fines from \$100 to \$5,000 and imprisonment from 30 to 60 days. *Id.*

2. Reciprocity

Although the commercial contractor statute provides that the State Board of Contractors will recognize another state's certificate if it reciprocates by recognizing a Mississippi certificate, the Board's rules state flatly that, "[n]o state recognizes the Certificate of Responsibility issued by this Board." Rule 9, *Rules*

and Regulations of the State Board of Contractors. Nonetheless a call to the MBOC indicates that the Board now recognizes some reciprocity for licensing with the following states, depending on the specific license sought: Alabama, Arkansas, Louisiana, Tennessee and South Carolina. One should call the Board office to check if reciprocity is possible in an individual case.

3. Effect of Violation on Arbitration Rights

One may note also that a Federal District Court has held that the failure of a Florida contractor to obtain a certificate of responsibility did not invalidate a federally protected arbitration clause in a contract involving interstate commerce. *Timberton Golf, L.P. v. McCumber Construction, Inc.*, 788 F. Supp. 919 (S.D. Miss. 1992).

4. Exceptions to the Certificate of Responsibility Requirement

The recitation of penalties, though, begs the question as to exceptions, and there are significant exceptions to the Mississippi requirement of a certificate of responsibility for contractors. The definition of commercial “contractor” in the licensing laws begins broadly, to be sure, covering “prime contractor, subcontractor or sub-subcontractor of any tier to do any erection, building, construction, reconstruction, repair, maintenance or related work on any public or private project”. § 31-3-1 Miss. Code Ann. However, the definition then goes on explicitly to exempt the following:

- (a) Any owner of a “dwelling or other structure” not constructed, altered or repaired for sale, lease, public use or assembly.

(b) Any contract for a public or private project where the contract, subcontract or undertaking is **less than \$50,000** [note the exemption amount for private projects was amended down from \$100,000 to \$50,000 effective July 1, 2010!!!];

(c) Highway and highway bridge projects and any other project incident to the construction of highways that are designated as federal aid projects and involve federal funds (but note: contractors on purely state aid road projects must qualify). The MDOT proposal should include a project number and description indicating whether the project is designated as a Federal Aid Project so as to qualify for the exemption.

(d) Residential projects occupied by 50 or fewer families and not more than 3 stories in height.

(e) Residential subdivision development of single-family or multi-family lots.

(f) New commercial construction not more than 7500 square feet and not more than 2 stories.

(g) Microwave towers for telecommunications.

(h) Fire protection systems on a public job less of than \$5,000, or on a private job of less than \$10,000.

(i) Mississippi installers of fire protection sprinkler systems who been in the business on or before July 1, 2000.

§ 31-3-1 Miss. Code Ann. **Be sure to note, as stated above, that the Legislature, effective July 1, 2010, amended the exemption amount for private projects downward from \$100,000 to \$50,000, so that the exemption amount for both public and private projects is in both cases is the same, limited to contracts less than \$50,000.00. This is an important change.**

The statute defines “private project” as “[a]ny project...which is not which is not funded in whole or in part with public funds.”

5. Categories of Contractors:

(a) Residential Builders and Remodelers: However, note that there is a separate licensing requirement that the Board of Contractors administers for residential builders of residences costing more than \$50,000 and of less than three stories. See § 73-59-1 (b), *Miss. Code Ann.* Similarly, remodelers of residences involving a cost of more than \$10,000 must be licensed. § 73-59-1 (c). See also the *Rules and Regulation of the State Board of Contractors As Applied to Residential Builders and Remodelers.*

(b) Commercial Contractors and Subcontractors: The Board of Contractor’s rules for commercial contractors provide that both a prime contractors and all sub and sub-sub contractors of the prime must hold certificates of responsibility as of the bid date where the contract of the prime, sub or sub-sub is for more than \$50,000 on a public or private project. Further, the rule provides that prime contractors, prior to the date of being finally awarded the prime contract (as opposed to the earlier date of the bid submission) shall submit to the awarding agency a list of all subcontracts on a public or private projects above the \$50,000 amount. Rule 12, *Rules and Regulations of the State Board of Contractors.* Similarly, any subcontractor used by a prime contractor must meet

the specifications set forth in the bid notice. Op. Atty. Gen. No. 95-0375, Dees, June 7, 1995. A subcontractor or sub-sub does not have to be licensed if the subcontract involved is less than the applicable \$50,000.00 amount. 31-3-1 Miss. Code Ann. and Rule 12. However, one can not evade the I the applicable \$50,000.00 amount by breaking up subcontracts to one person or entity into separate contracts for example for labor and materials to the same person. It is the total amount of the subcontracts for any one person or entity that counts. In the case of joint ventures, either all contractors within the joint venture or the joint venture itself must have any required certificates of responsibility prior to submitting bids or receiving a contract. Op. Atty. Gen., Harper, Dec. 3, 1990.

(c) **Owners:** The definition of “contractor” excludes owners from the certificate of responsibility requirement since, “[o]wners need no protection from themselves, so a certificate would serve no purpose.” *Associated Dealers Supply, Inc. v. Mississippi Roofing Supply, Inc.*, 589 So. 2d 1245 (Miss. 1991).

(d) **Materials only:** Also, if the contract is strictly for the supply of materials rather than services, not requiring the provider to act as a “contractor” within the meaning of § 31-3-1, then there is no requirement that the supplier obtain a contractor license. See Op. Atty. Gen. No. 2005-0012, Gabriel, January 28, 2005 WL 428019.

(e) **Maintenance only:** A maintenance contract similarly may not invoke the contractor licensing requirements if no construction is involved. See Op. Atty. Gen. No. 2001-0663, Meadows, October 26, 2001 (Contract for

maintenance of a beach that included running sweepers to sift rubbish from the sand and the use of heavy equipment to return sand to its original location does not require a certificate of responsibility because it is akin to janitorial work).

(f) Demolition only: Also, the Attorney General has stated that “a certificate of responsibility is not required for a demolition contractor” since “[d]emolition is not defined under the State Board of Public Contractors’ statutes and particularly by Section 31-3-1.” Op.Atty.Gen. No. 2002-0207, Hunter, May 3, 2002, WL 1380936; reaffirmed on reconsideration at Op.Att.Gen. No.2002-0662, Cardin, November 15, 2002, WL 31911122.

(g) Installers of Equipment: Does the statute cover installers of equipment? The MBOC takes the position that an installer needs certification if it is contracting or subcontracting out construction activities, such as electrical or mechanical work, to hook the equipment up on site, as opposed to say just delivering the equipment to the parking lot of a job site.

(h) Radio towers: The Attorney General of Mississippi has issued an opinion that the statute permitted the City of Vicksburg to award a contract to furnish and install a radio communications system and to build a tower to a company not having a certificate of responsibility. Op. Atty. Gen. No. 96-0096, Thomas, March 1, 1996. Similarly, public contracts focusing on the purchase of telecommunications or computer equipment to be installed or maintained by a bidder is not within the requirement for a certificate of responsibility. Op. Att. Gen. No. 94-0305, Ferguson, June 6, 1994.

Further, the Attorney General has opined that although the certificate statute does not apply to public bids under \$50,000, once the contractor has applied for and obtained a certificate under the rules, the contractor is bound by the Board's rules of conduct whether the bid would come under the requirements of the statute or not. Op. Atty. Gen. No. 2000-0372, Lowrey, July 14, 2000.

Finally, a licensed tree surgeon is not a "contractor" under § 31-3-1. Op., Atty Gen. No. 99-0185, Bowman, April 30, 1999.

3. Oversight of the Certificate Application Process

The State Board of Contractors has the responsibility of overseeing the certificate of responsibility process. § 31-3-1. The Board of Contractors has a web site that includes the statutes it operates under and its rules for commercial and residential contractors at www.ms boc.us. In addition, one may reach the Board of Contractors at 601-354-6161 or 1-800-880-6161; Fax 354-6715. The Board is located at 2001 Airport Road, Suite 101, Jackson, MS 39208.

The statutory mandate of the Board of Contractors is to protect the public "against incompetent, inexperienced, unlawful and fraudulent acts of contractors." § 31-3-2. Accordingly, the Board has the power to receive applications for certificates of responsibility, to investigate and examine applicants, hold hearings, conduct exams, and issue the certificates, "to such contractors as the board finds to be responsible." § 31-3-13.

4. The Application Process; Reciprocity With Other States.

A commercial contractor should apply with the State Board of

Contractors, using the Board's form, for a certificate of responsibility. § 31-3-19. The applicant must pay a \$100 application fee and a \$100 privilege license tax for a total of \$200.00. §§ 31-3-14(1), 31-3-17. The privilege tax will be refunded if the Board refused to issue the certificate. § 31-3-19. The applicant must provide the Board with a Mississippi sales tax or use tax number and a state income tax identification number. § 31-3-13 (a).

Obtaining a timely turnaround of the Application can be problematic and frustrating for the out of state contractor seeking an initial license prior to a looming deadline to submit a bid, especially if the Board has recently met and will not meet again before the bid deadline. The Board meets only quarterly to pass on applications. Further, the law provides that, “[n]o certificate or any renewal thereof shall be issued until the application has been on file with the board for at least thirty (30) days.” § 31-3-13 (a). Also, “[i]n the event a contractor bids on a job covered by this act without first having obtained a Certificate of Responsibility from the Mississippi State Board of Contractors, his, her or its application for a Certificate of Responsibility shall not be acted upon until a minimum period of ninety (90) days after receipt.” Rule 7 MSBOC. If a contractor cannot wait for Board action, it should recheck the exemptions to the licensing requirements (see above) carefully to see if they apply, or call one’s attorney or the Board to check on current reciprocity with other states for licensing (currently with the states of Alabama, Arkansas, Louisiana, Tennessee and South Carolina as to certain contracts).

The Board requires that applicants pass a standardized exam. If the applicant is an individual, he can take the test personally or have his managing employee take the test. If the applicant is a corporation, a managing officer can appear for the test. § 31-3-13 (a).

The statute, at § 31-3-13 (g), lists the factors the Board is to take into account in its evaluation of an applicant:

- (1) Experience and ability
- (2) Character
- (3) The manner of performance of previous contracts
- (4) Financial condition
- (5) Equipment
- (6) Personnel
- (7) Work completed
- (8) work on hand
- (9) Ability to perform satisfactory work under contract
- (10) Default in complying with the licensing or other state laws
- (11) Results of objective, standardized examinations.

The Board must keep a record of each examination and findings of the Board in the event the applicant should desire to appeal any order or decision of the Board. § 31-3-13 (g). Any applicant appealing a certification refusal must do so within 10 days after adjournment of the Board session in which the action was taken. § 31-3-23. Further, the applicant has an automatic right of appeal if the

Board does not enter an order or decision on the application within 180 days from the filing of the application. § 31-3-13 (h). The applicant would make the appeal to the Chancery Court on a bill of exceptions. § 31-3-23.

5. Classifications of Contractors

It is also a mistake for a commercial contractor to bid outside the classifications of work specified by his certificate of responsibility. The Board of Contractors by statute has the authority to issue rules classifying the kinds of work that a contractor can perform under a certificate. § 31-3-13 (g). The current rules provide for the following classifications:

- (a) building construction
- (b) highway, street and bridge construction
- (c) heavy construction
- (d) municipal and public works construction
- (e) electrical work
- (f) mechanical work
- (g) specialty.

The Board may issue a show cause order for possible suspension of a certificate if a contractor bids on projects outside the classification listed on his certificate.

Rule 5, Rules and Regulations of the State Board of Contractors.

More specifically, the Board rules provide when at least 50% of the total cost of a project is within a classification, such as electrical or mechanical work, the holder of a certificate for that classification may bid on the job. *Rule 4, Rules*

and Regulations of the State Board of Contractors. Moreover, where there are separate bids for the work, the rules expressly forbid holders of only the broad “building construction” classification from bidding on separate mechanical or electrical contracts, and similarly mechanical or electrical contractors holding only those designations are not permitted to bid as prime contractors for the building portion of a project when the building costs are at least 50% of the cost of a project. Rule 6, *Rules and Regulations of the State Board of Contractors.* If the awarding entity entertains combined bids for electrical, mechanical and electrical work, the holder of a certificate of building construction may submit a bid and receive the contract, even if more than 50% of the work is mechanical or electrical, so long as the building construction certificate holder also have the classification necessary to perform the mechanical, electrical or other classification. Rule 6, *Rules and Regulations of the State Board of Contractors.*

6. Limitations on the Board of Contractor’s Powers

The Board of Contractors specifically by statute are stated to have no powers to fix a maximum amount that a contractor may bid, a limit to the contractor’s bonding capacity, or to limit the amount of work the contractor may take on. § 31-3-13 (g).

B. A Commercial Contractor Must Not Fail to Display A Certificate of Responsibility Number on the Exterior of the Bid Envelope

A commercial contractor who simply forgets to place his certificate of responsibility number on the outside of his bid envelope will find no relief in the

courts, even if the contractor in fact has a certificate of responsibility, and even if the contractor places the certificate of responsibility number on the inside but not the outside of the sealed bid. Mississippi law at § 31-3-21 *Miss. Code Ann.* requires that a bid envelope without the requisite certificate of responsibility number on the outside of the envelope not even be opened or considered further if it is for a public or private project in excess of \$50,000. § 31-3-21 (2) *Miss. Code Ann.*, as amended effective July 1, 2010, states:

(2) All bids submitted for public or private projects where the bid is in excess of Fifty Thousand Dollars (\$50,000.00) **shall contain on the outside or exterior of the envelope or container of such bid the contractor's current certificate number, and no bid shall be opened or considered unless such contractor's current certificate number appears on the outside or exterior of said envelope or container**, or unless there appears a statement on the outside or exterior of such envelope or container to the effect that the bid enclosed therewith did not exceed Fifty Thousand Dollars (\$50,000.00) with respect to public or private projects. Any person violating the provisions of this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00), or by imprisonment for not more than six (6) months, or by both such fine and imprisonment.

(Emphasis added).

For example, the City of Durant awarded a bid for a million plus dollar project to the lowest bidder, King Metal Buildings, even though King had failed to include its certificate of responsibility number on the outside of its bid envelope. The second highest bidder, Laws Construction, protested King's award

and appealed. Even so, the City of Durant allowed King to proceed with the work. The Supreme Court of Mississippi later determined in *City of Durant v. Laws Construction Company, Inc.*, 721 So. 2d 598 (Miss. 1998) that the City of Durant had acted illegally in opening and accepting King's bid, and that the City was liable to Laws Construction in damages. The Court rejected the City of Durant's argument that the purpose of the statute had been upheld since King, in fact, was a licensed contractor with a valid certificate of responsibility number, but had made a mere negligent, technical mistake by failing to place its number on the bid envelope. The Supreme Court stated:

The statute clearly and unambiguously states that a bid may not be opened, the bid may not be considered, and the bid may not be awarded the contract if the contractor fails to include the certificate of responsibility number on the exterior of the envelope. The only exception to the rule is when a bid for a public project is not in excess of \$50,000.00.... However, even this exception requires that the bid contain a statement on the exterior of the bid envelope that the bid did not exceed the designated monetary limit.

In the case sub judice, King failed to include a certificate of responsibility number on the exterior of the envelope. Furthermore, the bid was in excess of \$50,000.00 for a public project. Therefore, the City should not have opened, considered, nor awarded King's bid. By opening, considering, and contracting with King, the City blatantly violated § 31-3-21.

Laws Construction Company, Inc., 721 So. 2d at 602. Thus, the courts can be of no assistance to a contractor on projects over the requisite amount who has failed to display his certificate number on the outside of the bid envelope, even one who

in fact has a certificate of responsibility number, since such a bid error violates a clear state statute. Indeed, the rules of the Board of Contractors reinforce this view, stating that any public agency awarding a contract of \$50,000 or more, “shall return unopened, any bids submitted by a contractor not having a Certificate of Responsibility”. Rule 3, *Rules and Regulations of the State Board of Contractors*.

C. A Contractor Must Not Fail To Timely Renew the Certificate of Responsibility or License

The commercial Contractor must renew the certificate of responsibility annually since all certificates expire automatically one year after the date of issuance. § 31-3-13 (a). The state law provides as a matter of statute that, “[n]o certificate or any renewal thereof shall be issued until the application has been on file with the board for at least thirty (30) days.” *Id.* The statute, though, provides that the filing of an application for renewal together with payment of the privilege license tax serve to extend current certificate until the Board either grants or denies the request for renewal. *Id.* The burden is on the contractor to come in and timely renew the certificate lest the contractor find it is without a certificate during the course of ongoing projects or prior to bidding on new projects.

The Board of Contractor rules provide that if a contractor bids on a job covered by the act without first obtaining a certificate of responsibility, the application will not be acted on for a minimum of 90 days after filing. Rule 7, *Rules and Regulations of the State Board of Contractors*. The rule increases the odds that a contractor who bids without a certificate of responsibility will not be

able to cure the defect before the award of the contract.

The Board of Contractors by statute is authorized to maintain a list of contractors to whom it has issued, refused, revoked or suspended certificates of responsibility. The list is available to, "any interested person." § 31-3-13 (d).

Similarly, the residential builder must timely renew his license or risk not being able to enforce contracts entered into without one. § 73-59-9 (3).

II. CONCLUSION

There are three mistakes a Mississippi contractor should not make involving the state licensing laws: (1) The contractor must not fail to obtain a certificate of responsibility for the classification of work it bids on since otherwise the any resulting contract he accepts is "null and void" or unenforceable; (2) the commercial contractor must not fail to display the contractor's certificate of responsibility number on the exterior of the bid envelope since the fact that he has such a number is not enough to permit the opening of the bid envelope without display of the number; and (3) the contractor must not fail to timely file an application to renew his certificate of responsibility license and pay the privilege license tax since the certificate or license expires automatically after a year, and the contractor will not want to risk submitting bids while unlicensed.

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