

Build New York

A
Roundtable
Discussion
on the
Ultimate

**Risk
Takers**

GBC



We know the majority of suppliers today. We have contacts where we say, "Look, if you know of something, call us," and they actually do. So, today, we deal with that all the time in making sure guys are okay, subcontractor wise.

Jeff Z.: One of the things that we have not talked about is the surety

company and your banker and your relationships with your professionals. Any comment about your relationship to them?

Tom: It seems more and more that we are working with the bonding company to let them know how we are doing and how things are going. It seems a few years ago, we

did not meet with them nearly as much as we do now. They seem to really want to have quarterly reports on how we are doing. They are looking at whip schedules and seeing how each project is going; not necessarily the jobs that are bonded, but all the jobs. The bonding company looks at it like it may not be a bonded job that puts a contractor out of business, but an unbonded job. Same thing with our bank. The bank seems more interested in looking at what we are doing and we meet with the bonding company and the surety together, because they seem to be looking for the same type of information. They are very, very much looking over our shoulder to see what we are doing and how we are doing.

Barry: We have reporting mechanisms to our bank, every quarter, and the same thing with our surety. We have not had any problems at all with lines of credit, with surety or the banks, but they are sure looking over our shoulder a lot more.

Closing Comments

Jeff Z.: Let's conclude by asking the four of you to make some summary observations of the state of your business today and the challenges going forward.

Tom: Our business is pretty healthy. I do think that we really could be doing better, but there are an awful lot of these things that we have been talking about today that we need to be careful of. I think one of the things that the owners need to do is take a look and make sure their contractors are making some money. I think that it is going to turn out that they get a better job if everybody is doing well. I also think Jeff was talking about getting the builder working on the project earlier so that we can help advise the owner, and I do think that them nickel and diming when they are hiring architects can really hurt. I think it would be much better for owners to spend more money up front making sure that they have a good A/E team on board.

Use Contracts to Protect Yourself from Possible Liability for Undocumented Workers Employed by Subcontractors

By Michael Stafford, Esq.

The federal Immigration Reform and Control Act ("IRCA") prohibits employers from hiring, or continuing to employ, any person who is not authorized to work in the United States. Typically, general contractors are not liable under the law for subcontractors who hire persons who are not authorized to work in the United States, because these individuals are not "employees" of the general contractor. That said, however, general contractors cannot knowingly use contracts to obtain the services of undocumented workers. Under IRCA, a knowing violation of the law occurs when an employer either has actual or constructive knowledge that a person is not authorized to work in the United States. In this regard, constructive knowledge means knowledge that can be inferred "through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition."

As such, a general contractor may be liable for a subcontractor's employment of undocumented workers if the general contractor uses a sub for the purpose of retaining the services of undocumented workers.

A recent, highly publicized incident involving Wal-Mart sheds light on the potential liability employers face when using independent contractors who employ undocumented workers. There, federal agents raided over 60 store locations throughout the country and detained more than 240 workers. The workers were mainly janitorial employees of independent contractors hired by Wal-Mart. The government alleged, in part, that Wal-Mart had developed a fraudulent scheme to use independent contractors employing undocumented workers to evade the requirements of IRCA. Ultimately, the Wal-Mart matter settled for over \$11,000,000.

There are some easy steps that a general contractor can take to minimize its potential liability for the employment of unauthorized workers by its subs. First, simply address the issue in your contracts with the subs. For example, you might include language clarifying that it is the sub's duty to properly complete I-9s for all its employees assigned to your worksite. The contract could also contain a warranty by the sub that it is aware of its obligations under IRCA and that it is in compliance with IRCA. You might also include language permitting you to audit or inspect the sub's I-9 files. Finally, your contract could also contain an indemnity provision under which the sub agrees to defend and indemnify you for any liability arising out of claims that the contractor's employees are not authorized to work in the United States and/or any other claims based upon alleged IRCA violations committed by the contractor.

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