

## GENERAL CONTRACTORS POTENTIALLY LIABLE FOR SUBCONTRACTOR'S TAXES?

By *Blake R. Nelson, Esq.*

In past newsletters, we have discussed recent law changes affecting the relationship between general contractors and subcontractors. These have included:

- Requiring individual, sole proprietor subcontractors to obtain Independent Contractor Exemption Certificates ("ICEC"). The failure to obtain an ICEC will result in the subcontractor being treated as an employee of the general contractor, and thus also obligate the general contractor to report and pay employment taxes regarding the subcontractor. However, this new law only obligates individuals to obtain an ICEC, and business entities, such as LLCs or corporations, are not required to obtain an ICEC. Therefore, the common practice in response to the new law has been for subcontractors to form corporations or LLCs rather than apply for an ICEC and engage in what can be a complicated and difficult process to obtain the necessary certification.

- Changes to Minnesota Statutes § 337.10, which now obligates general contractors to i) pay subcontractors within ten days after receipt of payment from the property owner, ii) make monthly progress payments, and iii) limit the amount of retainage withheld from the subcontractor. The "ten-day payment rule" cannot be waived by written agreement, but the monthly progress and retainage payment provisions may be modified in writing.
- Effective January 1, 2009, to ensure payment of income taxes Minn. Stat. § 290.92 requires a general contractor to withhold 2% of the gross amount paid to a sole proprietor subcontractor performing certain construction related work. Similar to the ICEC law, this provision does not apply to subcontractors who are business entities, such as corporations or limited liability companies.

One obvious goal of these new laws is to hold contractors and subcontractors accountable for payment of taxes. If the subcontractor is not treated as an employee and actually qualifies for true subcontractor status, the general contractor would not be liable for employment taxes or worker's compensation premiums regarding subcontractor or

the subcontractor's employees. And as stated above, the subcontractor can avoid both obtaining an ICEC and the 2% withholding law by forming a corporation or LLC. The relatively simple and inexpensive formation of a business entity allows contractors to continue with "business as usual," with the general contractor not being responsible for any taxes or other payments regarding the subcontractor's operations.

To combat the increased formation of subcontractor business entities to circumvent the new legal requirements, recent developments suggest the State of Minnesota may in the future rely upon a relatively unknown and unused statute as another means by which to hold the general contractor accountable for certain subcontractor taxes. Specifically, the State may attempt to enforce Minn. Stat. § 268.065 to hold general contractors accountable for their subcontractor's unpaid unemployment taxes. The applicable part of Minn. Stat. § 268.065 reads as follows:

**Subdivision 1. Subcontractors.** A contractor who contracts with any subcontractor must guarantee the payment of all amounts that are due or become due from the subcontractor with respect to taxable wages paid on the contract by:

- (1) withholding sufficient money on the contract; or
- (2) requiring the subcontractor to provide a sufficient bond guaranteeing the payment of all amounts that may become due.


The contractor may make a request for verification that the subcontractor has paid the taxes due 60 calendar days after the due date for filing the wage detail report that includes the final wages paid for employment performed under the contract. If the subcontractor has paid the amounts due for the period covered by the contract, the commissioner may release the contractor from its liability.

The words "contractor" and "subcontractor" include individuals, partnerships, firms, or corporations, or other association of persons engaged in the construction industry.

Upon information and belief, certain state unemployment insurance auditors may now be relying upon Section 268.065 to attempt to require general contractors to pay the subcontractor's unpaid unemployment taxes. In theory, the State could audit a general contractor's previous contracts and projects, calculate the amount paid to subcontractors on those projects, and then review the State's records as to whether the subcontractors paid their corresponding unemployment taxes in connection with the amounts received. If any subcontractors failed to pay the appropriate amount of unemployment taxes, the State could argue that the general contractor is liable to pay those amounts pursuant to Section 268.065

It remains to be seen whether the State of Minnesota intends to pursue enforcement of this statute. However, it is advisable for general contractors to begin requiring proof of tax payments from their subcontractors. Under § 268.065, the general contractor may demand written verification from the subcontractor that it has paid its unemployment taxes in connection any work performed. Upon receipt of confirmation that the subcontractor has paid these amounts, the general contractor would have no further liability under Section 268.065.

While there is no requirement for a general contractor to affirmatively report proof of subcontractor tax payments to the State of Minnesota, it is prudent to obtain this verification from subcontractors to keep on file in the event of any future audits.

The various recent law changes concerning relationships with and payments to subcontractors can be difficult to navigate and understand. However, steps can be taken to appropriately document a general contractor's files, amend their contracts, and take the reasonable steps necessary to insure compliance with these laws. 

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## LEED Certification Goals: Trim Your Risk


By Sarah E. Fisher, Esq.

The number of green building projects has grown rapidly in recent years and will continue to grow with the onslaught of government initiatives, improvements in sustainable materials, and increased demand in "green" living by consumers. While several organizations offer private certifications for green buildings, perhaps most commonly known is the U.S. Green Building Council's LEED Green Building Certification System.

Developed in 2000, LEED awards points to building projects for satisfying specific green building criteria. There are seven major performance categories for which LEED points can be awarded: Sustainable Sites; Water Efficiency; Energy and Atmosphere; Materials and Resources; Indoor Environmental Quality; Innovation in Design; and Regional Priority. Under LEED, a green building project is evaluated for its achievements within these categories and receives points for those achievements. 100 base points are possible, plus 10 bonus points (6 possible Innovation in Design points and 4 possible Regional Priority points). The number of points earned determines the level of LEED certification received: Certified (40-49 points); Silver (50-59 points); Gold (60-79 points); and Platinum (80+ points). LEED points are

awarded only after a building project is completed and occupied.

Although increasingly popular, green building's "unknowns" create risks. For example, because a LEED point evaluation does not occur until the end of a project, LEED certification is unknown until all project construction is complete. Until then, it is only a goal. Consequently, it is hard to guarantee a building project will achieve a certain LEED level and contractors should refrain from doing so.

Additionally, "green" law is still emerging because green building is still so new. The first case involving a LEED certification dispute - a Maryland case regarding lost tax credits after delays in performance caused a regulatory deadline to be missed - ended just last March. Because the case settled, the Courts did not get a chance to rule on the end result. In order to avoid becoming the "leading case" on green building liability, the parties to a LEED project (i.e. owner, design professional, contractor) should allocate risk and liability by deciding who will be responsible for getting certain LEED points and absorbing the costs associated with achieving those points. A green building contract that sufficiently defines the respective roles and responsibilities of the participants, outlines the process for dealing with a failure to meet those responsibilities, and even limits the liability of the parties is one way to minimize the risks that still accompany the many benefits of building green. 



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Hellmuth & Johnson, PLLC announced that Minnesota Law & Politics magazine has named four firm attorneys to the 2010 Minnesota Rising Star® list. The attorneys were recognized in the December 2009 issues of Minnesota Law & Politics, Twin Cities Business and Mpls/St.Paul Magazine.

The attorneys named to the 2010 list are: Matthew J. Franken, Joel A. Hilgendorf, Christopher R. Jones, and Anthony T. Smith.

Representing the top 2.5 percent of attorneys in the state as selected by their peers, the "Rising Star" list recognizes the accomplishments of attorneys who have practiced for 10 or less years and are 40 years of age or younger.

To learn more about the "Rising Stars", we invite you to visit their biographies on our website at [www.hjlawfirm.com](http://www.hjlawfirm.com).

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