

GENERAL CONTRACTOR'S FALSE CERTIFICATIONS BAR IT FROM ANY RECOVERY FROM OWNER

by Maury E. Lederman and Sara P. Bryant

In a case of first impression, a Massachusetts Superior Court judge recently ruled that a general contractor, G4S ("the General"), could not recover any of its over \$14M claim against a public owner MTPC ("the Owner") because it had violated its contract with the Owner by certifying that it had paid its subcontractors in full and on time when in fact it hadn't. This harsh result should serve as a warning to general contractors and others to take seriously their contract requirements, including the certifications they routinely sign as a part of the payment application process.

The Decision

The general contract required the General to pay its subcontractors all sums due within the time required by the subcontracts, and to certify that it had done so in its payment applications to the Owner. The General submitted dozens of such certifications to the Owner knowing full well that it hadn't paid its subcontractors as required. The General utilized the sums paid by the Owner but not paid to its subcontractors to make its financial condition look better to outsiders, e.g. shareholders or potential investors. The Owner paid the General in reliance on the false certifications. The General eventually paid its subcontractors all sums due.

The Owner refused to pay the General a \$4.1M contract balance or \$10.1M in extra work claims citing the General's intentional failure to pay its subcontractors as required. The General then sued the Owner claiming that it would be unfair for it not to pay over \$14M because its subcontractors had suffered relatively little harm, in comparison to the \$14M claim.

The Court found that neither the fact that the General eventually paid its subcontractors all sums due, nor the fact that the late payments to the subcontractors did not adversely affect the project or harm the Owner in any material way, changed that the General submitted false certifications to the Owner to induce it to pay the General. The judge dismissed the General's suit because filing the false certifications was an intentional breach of the contract. The Court applied long-standing Massachusetts decisional law that a contractor which intentionally violates a contractual requirement cannot recover anything for its work, except in the case of "de minimus" departures or where there are other mitigating factors, e.g. the owner was partially responsible for the contractor's failure to perform. Finding that the

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false certifications were not “de minimus,” that there were no mitigating factors, and that the General, by definition, did not endeavor to perform fully its contract obligations in good faith since it intentionally ignored those obligations, the Court dismissed the General’s suit against the Owner.

The Court justified the harsh result here in part on the fact that some of the funds the Owner used to pay the General were from a Federal grant, the purpose of which was to benefit subcontractors hurt by the 2008 financial crisis. Also, the fact that the General furnished numerous knowingly false certifications for a period of more than a year likely also contributed to the judge’s willingness to impose such a harsh result.

Take Away

This decision is yet another reason why contractors and their employees must be careful in certifying that subcontractors have been paid in order to get paid. Although the Court did not find that the General’s certifications were fraudulent, a person who signs false certifications stating that subcontractors were paid could be personally liable for the owner’s loss, i.e. the signer is not protected by the corporate “veil.” Also, contractors should be especially cautious where projects, like this one, are governed by the Federal or state False Claims Act, which have significant penalties for presenting false claims to the government.

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