



June 29, 2016

Scott Archer
Scott Archer Construction, LLC
6481 Hwy 30 E., PO Box 385
Blooming Prairie, MN 55917

Re: Our Investigative File #REG1512-00016/KBU
Contractor Registration IR702182

Dear Mr. Archer:

The Department of Labor and Industry has concluded its investigation of the above captioned matter. The purpose of this letter is to inform you of the result of our investigation and the disciplinary action that we have determined is appropriate in light of the violations we have discovered.

Enclosed is a Licensing Order by which a monetary penalty of \$3,500 is assessed based on our determination that you hired subcontractors who were not licensed by the Department or registered in the Construction Contractor Registration Program, and misclassified three of those persons as independent contractors. However, due to a recent change in the law governing the Registration Program, \$2,000 is forgiven as a first time violation. The remaining penalty of \$1,500 is due and payable on the date the Licensing Order becomes final.

As provided by law and noted in the Order, you have the right to appeal this Order by requesting a hearing. A request for hearing must be made in writing as explained in the Order. However, you should be aware that if an administrative law judge finds that the hearing was requested solely for purposes of delay or that the request was frivolous, the Department may add to the amount of the penalty the costs charged to the agency by the Office of Administrative Hearings for the hearing.

If you have any questions, please contact me directly.

Sincerely,

A handwritten signature in black ink that reads "Karen Bugar". The signature is written in a cursive, flowing style.

Karen Bugar
Senior Investigator
Construction Codes and Licensing Division
Tel: (651) 284-5374
Fax: (651) 284-5749
E-mail: karen.bugar@state.mn.us

Encl: Licensing Order

STATE OF MINNESOTA
Department of Labor and Industry

In the Matter of Scott Archer Construction, LLC

**LICENSING ORDER
WITH PENALTY**

I. ORDER

The Commissioner of the Minnesota Department of Labor and Industry (“Commissioner”) issues this Order against Scott Archer Construction, LLC (“Respondent”).

Pursuant to Minn. Stat. §§ 181.723, subd. 4 (2014), §§ 326B.082 through 326B.085, and 326B.701 (2014), the Commissioner hereby assesses against Respondent a monetary penalty of \$3,500 of which \$2,000 is hereby forgiven pursuant to Minn. Stat. §326B.701, subd. 6 (2014).

Pursuant to Minn. Stat. § 326B.082, subds. 11(b) and 12 (2014) and Minn. Stat. § 326B.083 (2014), the Commissioner hereby suspends the construction contractor registration of Respondent, No. IR702182, until such time that Respondent pays the portion of the monetary penalty imposed herein that is not forgiven.

The Commissioner takes the above action based upon the following Findings of Fact and Conclusions of Law:

II. FINDINGS OF FACT

1. Minn. Stat. § 326B.701, subd. 2 (2014) requires all contractors who intend to provide commercial or residential building construction or improvement services in Minnesota to be registered with the Minnesota Department of Labor and Industry (“Department”)’s Construction Contractor Registration Program (“Registration Program”) if they are not required to hold a license issued by the Department.
2. Pursuant to Minn. Stat. § 181.723, subd. 3 (2014), an individual who performs services for a person that are in the course of the person’s trade, business, profession, or occupation is an employee of that person and that person is an employer of the individual unless the individual meets all nine factors described in Minn. Stat. § 181.723, subd. 4(a) (2014) (“the nine factor test”). If the individual cannot meet all nine factors, he or she is deemed to be an employee of the person that hired the individual.
3. Minn. Stat. § 181.723, subd. 4a (2014) also states that an individual who is required to be registered in the Registration Program but who fails to do so, is presumed to be an employee of any person that hires the individual to perform services on the person’s behalf. However, the person for whom the services were performed may rebut this presumption by showing that the unregistered individual met all nine factors of the nine

factor test at the time the services were provided.

4. According to the records of the Minnesota Secretary of State, Scott Archer Construction, LLC registered as a limited liability company on May 18, 2010 with a registered office address of 6481 Hwy 30 E., PO Box 385, Blooming Prairie, MN 55917.
5. Respondent holds a contractor registration issued by the Department on December 21, 2015, No. IR702182.
6. Respondent, as a registered contractor, must comply with all statutes and rules governing the construction industry, including contractor registration and worker classification, Minn. Stat. §§ 181.723, 326B.701, and 326B.081 to 326B.085 (2014) and Minn. R. Chapter 5224 (2015).
7. Minn. Stat. § 326B.701, subd. 5 (2014) prohibits a contractor from hiring another contractor to perform building construction services unless the contractor being hired is licensed with the Department or registered in the Registration Program.
8. On December 8, 2015, the Department opened an investigation of Respondent based on information that indicated Respondent may have engaged in violations of the Minnesota statutes and rules governing worker classification in the construction industry.
9. On December 16, 2015, a Department investigator mailed a subpoena duces tecum to Respondent. The subpoena required the production of documentation relating to Respondent's subcontractors, contractors, and employees.
10. Respondent complied in part with the subpoena by providing a list of four persons that were paid for performing construction or improvement services. The Department concluded that Respondent paid Joseph Suchanek and Heath Lembke for the performance of building construction or improvement services and treated them as independent contractors despite the fact that the contractors were not licensed by the Department or registered in the Registration Program at the time they performed construction services on Respondent's behalf.
11. On January 11, 2016, the Department investigator mailed a letter to Respondent requesting additional records including all bids or invoices received from the subcontractors to determine if the business relationship with each person complied with the nine factor test.
12. Based on its review of Respondent's response, the Department determined that between January 2014 and December 31, 2015, at least three of Respondent's subcontractors failed to meet the nine factor test including Dave Wilker, Joseph Suchanek and Heath Lembke. Respondent made payments to the individuals and not their business entities. Respondent provided this explanation of the business relationship in writing to the Department on January 18, 2016: "In each of these projects, the subcontractors were paid using a set price, either per unit or per square, depending on the project they were on. There have been no written contracts nor have they submitted any written invoices for work performed. They were paid by check using the negotiated terms."

III. CONCLUSIONS OF LAW

1. Respondent has committed a violation of applicable law. Minn. Stat. §§ 181.723, 326B.701 and 326B.082, subd. 11 (2014).
2. Respondent contracted to perform or performed construction services for another person without first being registered in the Registration Program in violation of Minn. Stat. § 326B.701, subd. 5 (b)(1) (2014).
3. Respondent hired persons that were neither licensed by the Department nor registered in the Registration Program to provide construction services on Respondent's behalf and treated them as independent contractors in violation of Minn. Stat. § 326B.701, subd. 5 (b)(2) (2014).
4. Respondent misclassified employees as independent contractors in violation of Minn. Stat. § 181.723 subd. 4(a) and (b)(2014).

IV. DETERMINATION OF PENALTY AMOUNT

In determining the amount of the penalty, the Commissioner considered: the extent of deviation from compliance; whether the violations were willful; the gravity of the violations; the number of violations; whether there is a history of past violations; whether Respondent gained economic benefit in not complying with the law; and other factors as justice may require.

V. REQUEST FOR HEARING

Pursuant to Minn. Stat. § 326B.082, subd. 12(c) (2014), Respondent shall have 30 days after issuance of this Licensing Order to request a hearing. A request for hearing must be in writing and must be served on or faxed to the Commissioner at the following address or fax number by the deadline.

Minnesota Department of Labor and Industry
CCLD - Enforcement Services Unit
Attention: Charlie Durenberger
443 Lafayette Road North
St. Paul, MN 55155

Fax number: (651) 284-5746

The date on which a request for hearing is served by mail shall be the postmark date on the envelope in which the request for hearing is mailed. If the request for hearing is served by fax it cannot exceed 15 pages in length and must be received no later than 4:30 p.m. central time on the last day permitted for serving a request. Respondent's review rights are more thoroughly described in Minn. Stat. § 326B.082, subs. 4 and 12(c) (2014).

If Respondent submits to the Commissioner a timely request for hearing, this Licensing Order shall be stayed unless otherwise ordered by a judge, and a contested case hearing will be conducted. The contested case procedures are set out in chapter 14 of the Minnesota Statutes, and the Rules of the Office of Administrative Hearings, Minn. Rules 1400.5010 to 1400.8400

(2015), and Minn. Stat. § 326B.082, subd. 12(c) (2014). These materials may be purchased from the Minnesota Book Store, telephone (651) 297-3000, and are also available at www.revisor.mn.gov.

VI. EFFECT OF FINAL ORDER


If Respondent does not request a hearing or Respondent's request for a hearing is not served on or faxed to the Commissioner by 30 days after issuance of this Licensing Order, this Licensing Order shall become a final order of the Commissioner and will not be subject to review by any court or agency. *See* Minn. Stat. § 326B.082, subd. 12(c) (2014).

The portion of the monetary penalty assessed against the Respondent by this Licensing Order for hiring unregistered subcontractors is forgiven, but the violation alleged herein shall be deemed evidence of a history of a violation for hiring an unregistered subcontractor for purposes of calculating a monetary penalty for any future violation of Minn. Stat. § 326B.701, subd. 5 (b)(2) (2014).

The monetary penalty assessed against the Respondent by this Licensing Order other than the forgiven portion, is due and payable on the date the Licensing Order becomes final. *See* Minn. Stat. § 326B.083, subd. 3(a) (2014). When this Licensing Order becomes final, the Commissioner may file and enforce any unpaid portion of the penalty as a judgment in district court without further notice or additional proceedings. *See* Minn. Stat. §§ 16D.17 (2014) and 326B.083, subd. 2 (2014). Failure to pay a monetary penalty owed may result in the revocation, suspension, or denial of any or all licenses, permits, certificates, and registrations issued by the Commissioner. *See* Minn. Stat. § 326B.082, subd. 17 (2014). Also, pursuant to Minn. Stat. § 16D.13 (2014), Respondent is hereby notified that thirty (30) days after the date this Licensing Order becomes final, simple interest computed in accordance with Minn. Stat. § 16D.13, subd. 2 (2014) will begin to accrue on the unpaid portion of the penalty.

Dated: 6/29/16

KEN B. PETERSON
Commissioner

BY: 
CHARLIE DURENBERGER
Director of Licensing and Enforcement
Construction Codes and Licensing Division
Department of Labor and Industry