

STATE OF MINNESOTA
Department of Labor and Industry

In the Matter of Bogar Construction LLC

**LICENSING ORDER
WITH PENALTY**

I. ORDER

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

Pursuant to Minn. Stat. §§ 181.723, subd. 4 (2016), §§ 326B.082 through 326B.085 and 326B.701 (2016); the Commissioner hereby assesses against Respondent a monetary penalty of \$1,000.

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

II. FINDINGS OF FACT

1. Respondent is engaged in the business of providing building construction or improvement services and holds a construction contractor registration, No. IR673865, issued by the Commissioner on October 30, 2013. In its registration, Respondent asserted that it is owned by Marvin Smith and that its business address was 5905 Colfax Avenue South, Minneapolis, MN.
2. Respondent had previously held a residential building contractor license, No. BC633789, from March 13, 2009 through its expiration on March 31, 2012.
3. According to the records of the Minnesota Secretary of State, Marvin Smith is the owner of Bogar Construction LLC with a Registered Office Address of 5905 Colfax Avenue South, Minneapolis, MN.
4. As a registered construction contractor and previously licensed residential building contractor, Respondent must understand and adhere to the Minnesota statutes and regulations governing Contractor Registration and construction worker classification, Minn. Stat. §§ 181.723, 326B.701, and 326B.081 to 326B.085 (2014) and Minn. R. Chapter 5224 (2015).
5. On November 6, 2014, the Commissioner issued a Licensing Order against Respondent alleging that it had hired unregistered workers and treated them as independent contractors in violation of Minn. Stat. § 326B.701, subd. 5(b)(ii) (2014). However,

because this constituted Respondent's first violation of this statute, a \$2,000 monetary penalty assessed by the Licensing Order was forgiven pursuant to Minn. Stat. § 326B.701, subd. 6(b) (2014).

4. As a result of a complaint alleging non-payment of wages, the Minnesota Department of Labor and Industry ("Department") opened an investigation of Respondent on June 21, 2016 based on information that indicated Respondent may have engaged in violations the Minnesota statutes and rules governing worker classification in the construction industry.
5. On July 6, 2016, a Department investigator mailed a subpoena duces tecum via first-class and certified mail to Respondent at its Minneapolis, MN address.
6. The subpoena required the production of documentation relating to Respondent's subcontractors, contractors, and employees. The subpoena required that a response be submitted within 30 days of the issuance of the subpoena and was sent via first class and certified mail. Receipt of the subpoena sent via certified mail was acknowledged by Smith. The subpoena sent via first-class mail was not returned by the United States Postal Service ("USPS").
7. When Respondent failed to respond to the subpoena as required, the Department investigator mailed a second request for information to Respondent at the Minneapolis address on August 4, 2016. The letter was not returned by the USPS.
8. On August 3, 11, 23 and September 16, 2016, the Department investigator spoke with or left phone messages for Smith asking that he respond to the subpoena.
9. On September 27, 2016, Respondent finally provided an answer to the subpoena. The Department's review of the information provided revealed that from January 1, 2015 to December 31, 2015, Respondent paid "WPM" and "Legacy" for the performance of building construction or improvement services and treated them as independent contractors even though they were not licensed by the Department or actively registered in the Registration Program at the time they performed construction services on Respondent's behalf.
10. Minn. Stat. § 181.723, subd. 4(b) states that an individual owner of a business entity that provides building construction services without being registered is presumed to be an employee of a person for whom the individual provides such services. The person for whom the services were provided may rebut this presumption of an employer-employee relationship by demonstrating that the business entity met the "nine factor test"
11. On November 1, 2016, the Department investigator mailed a letter requesting that Respondent provide all documentation to rebut the presumption that WPM and Legacy were, in fact, Respondent's employees and not independent contractors. The letter was not returned by the USPS.
12. As of the date of this Order, Respondent has failed to provide a response to the November 1, 2016 letter.

III. CONCLUSIONS OF LAW

1. Respondent hired persons who 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) (2016).
2. By operation of Minn. Stat. § 181.723, subd. 4 and Minn. Stat. § 326B.701 (2016), the individuals who own WPM and Legacy are deemed to be Respondent's employees. Because Respondent was subject to previous investigation and enforcement action for hiring unregistered workers, Respondent knowingly misclassified these individuals as independent contractors in violation of Minn. Stat. § 181.723, subd. 7(c)(2) (2016).

IV. DETERMINATION OF PENALTY AMOUNT

In determining the amount of the penalty, the Commissioner considered: the extent of deviation from compliance; whether the violation was willful; the gravity of the violation; 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) (2016), 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) (2016).

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) (2016). 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) (2016).

The monetary penalty assessed against the Respondent by this Licensing Order is due and payable on the date the Licensing Order becomes final. *See* Minn. Stat. § 326B.083, subd. 3(a) (2016). 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 (2016) and 326B.083, subd. 2 (2016). 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 (2016). Also, pursuant to Minn. Stat. § 16D.13 (2016), 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 (2016) will begin to accrue on the unpaid portion of the penalty.

Dated: 12/28/16

KEN B. PETERSON
Commissioner


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