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Responsible Contractor Act needs fixes, builders say

BY BRIAN JOHNSON
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Minnesota’s Responsible Contractor Act has only been in effect since Jan. 1, so the jury is still out on the law’s impact on the construction industry. But some building industry advocates already don’t like what they see.

The union-backed law, passed with bi-

partisan support in the 2014 legislative session, is designed to keep contractors with certain violations — such as failure to pay the prevailing wage — away from public construction projects over \$50,000.

But critics in the building industry say the law is ambiguous and confusing. Some fear it will have unintended consequences, like steering good contractors away from public work and penalizing contractors

for honest mistakes.

Tim Worke, director of AGC Minnesota’s transportation division, said AGC is having “initial discussions” with proponents of the new law and others about potential legislative tweaks that would address some of the concerns.

At a recent Associated General Contractors of Minnesota event in Roseville, construction lawyers walked contractors

through the new law and talked about what it might mean for the industry.

Government contractors understand that public work requires a lot of compliance that's not found in the private sector, but the new law "ups the stakes quite significantly," said Mark Becker, shareholder with the Minneapolis law firm Fabyanske Westra Hart & Thomson.

Violators can be debarred from participating on public contracts over \$50,000 for three years, which is "basically a death sentence" for contractors that rely on public work, Becker said.

He said contractors should "err on the side of being conservative" if they're not sure what they need to do to comply.

Backers of the law say the intent is not to punish contractors who make an honest mistake.

Rather, it's aimed at the "small number of bad actors" who repeatedly break the rules and "play catch-me-if-you-can," said Kyle Makarios, director of government affairs for the North Central States Regional Council of Carpenters.

"It seems to us that if you are going to get caught gaming the system, especially in a significant way, you should not be eligible to work for the taxpayers," said Makarios, who helped lobby for the new law.

Minnesota isn't alone in trying to keep renegade contractors out of public projects. At least eight other states have statutes that fall under the broad definition of "responsible contractor" laws.

But Minnesota's law is unique — and is arguably the most stringent, Becker said.

Under the law, a contractor has to meet certain "minimum criteria" to be eligible for a public contract.

That includes being in compliance with workers' compensation and unemployment requirements, and being free of any violations of federal and state labor laws related to things like overtime, minimum wage and prevailing wage.

A contractor in violation of the law "re-

peatedly" fails to pay wages and penalties in an amount of \$25,000 or more on one or more projects within the past three years, according to materials presented at the event.

The law applies to all levels of public work, including projects for cities, counties, school districts and state agencies.

As part of their bids for those projects, contractors must submit notarized "verification" forms, which state that they and the subcontractors they intend to use are in compliance with the law's requirements.

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Contractors that don't submit the proper verification forms aren't eligible to get the contract.

Some of the confusion in the law applies to the verification forms.

For example, general contractors and subcontractors are required to submit the forms, but material suppliers aren't. But what if the material contract includes a small amount of labor? Should it be treated as a subcontract?

Another example: Contractors often hire outside consultants to test their earthwork or concrete strength on a road project. Should those engineering con-

sultants be considered subcontractors?

"Conservatively, the answer would be 'yes,'" Becker said.

Other concerns include losing a job or being debarred from public work as a result of an honest oversight, taking on new administrative burdens, and not having a central body to administer the law.

"Without a central focus, that means every public owner from the Mosquito Control District to the University of Minnesota to the Department of Administration is going to administer this a little differently," Worke said.

For its part, the Minnesota Department of Administration will rely on the "honor system" to implement the new law, says Kent Allin, director of materials management and chief procurement officer for the department.

"Vendors who don't have repeat records of underpaying prevailing wage or issues of that sort should not have any problems remaining eligible" for state contracts, Allin said in an interview.

Still, there's a lot of concern about the law, including fears that it's another regulation that will drive more contractors away from public sector work.

"It does create a situation where contractors said, 'If I have private work to do, where I don't have these obligations, I am going to do the private work over the public work,'" Dave Semerad, CEO of AGC-Minnesota, said at the event. "And I don't think that is a good situation for the market."

AGC-Minnesota will offer an abbreviated version of the responsible contractor event in a Feb. 10 webinar. For details, go to www.agcmn.org.

