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Contractors Beware: Major Changes in the ROC Complaint Process

Under the ROC's new procedures, from the moment a complaint is filed, virtually every step in the investigative and citation process has changed.

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The Arizona Registrar of Contractors (ROC) has adopted significant changes in the way it responds to complaints against its licensees. Abandoning its previous complainant-driven process, whereby citations were issued solely at the request of the complainant, regardless of whether the ROC found merit in the claims, now the ROC will decide whether the evidence provided by the complainant and/or gathered by the ROC investigator warrants a citation.

Also, for the first time, the ROC will review previous claims made against a contractor and how the contractor handled them as part of its evaluation of a pending complaint, in order to help determine the appropriate sanctions.

Finally, once a complaint is filed, the ROC owns the process. This means that even if the complainant and the contractor settle their dispute, the ROC is not necessarily going to be willing to dismiss the complaint and may continue to proceed with prosecuting the claim.

All of the above is a significant departure from what has been done for at least the last 30 years. Before engaging with the ROC moving forward, it will be important for a contractor or its attorney to be familiar with the changes. In order to avoid any confusion about how the process now operates, I took the opportunity to sit down with ROC director William Mundell and his team to discuss the new process and the rationale behind it.

WHY THE CHANGE?

A logical question to ask is, "Why make what appears to be such a significant change to the process?"

The ROC's mission is to promote quality construction and protect the public health, safety and welfare. The complaint process is one tool used in protecting the public; however, for quite some time there has been growing criticism of how that process has been administered. Going back as far as 1979, the state Auditor General's performance audits of the ROC have variously found that:

- the ROC has not adequately protected the public from incompetent, unscrupulous or insolvent contractors;
- the ROC's enforcement process requires improvement;
- the ROC does not aggressively discipline contractors who violate statutory provisions;
- a contractor's record of prior violations should be considered before making enforcement decisions; and
- a contractor that commits a violation of the statutes is in a position to avoid discipline by resolving its issues with the complainant.

The complaint process has been one that required the complainant, instead of the ROC, to incur expense and time to prove violations of the statutes. The ROC has played a passive role, which has, on occasion, allowed abuse by complainants who have pursued unwarranted ROC citations and prolonged the administrative process for years. Those of us in the construction community can likely think of at least one story of a contractor unfairly raked over the coals as part of a complainant's vendetta.

The prior process also resulted in the occasional repeat offender continuing to lawfully contract. (According to ROC statistics, only one percent of licensed contractors receive more than three complaints in a year.) While an examination of the ROC website suggests that the agency does a thorough job of tracking a contractor's complaint history, the ROC has not been taking this history into consideration in making determinations on sanctions. Prior to this change, it has examined each complaint in a vacuum.

It is in large part, based upon all of the above, that the ROC has initiated its new process.

HOW DOES THE NEW PROCESS WORK?

The ROC's previous, complainant-driven process let the complainant decide whether:

- to file a complaint;
- the ROC should issue a citation, regardless of whether an ROC investigation found merit with the complaint;

- a hearing should occur; and
- repairs or settlement agreements complied with the terms of the contract.

Under the ROC's new process, when a complaint is filed, the aforementioned decisions are made by the ROC. An investigator will be assigned, tasked with all pertinent information available, to determine whether the complaint has merit. The contractor should give the inspector as much relevant information as possible, directly or through the contractor's attorney. Upon completion of the investigation, the investigator's written findings and recommendation regarding a citation will be submitted to the ROC's legal department.

As part of the above investigation, the ROC may issue a written "directive" (formerly known as a "corrective work order") to a contractor to make repairs. Under the previous process, if a contractor complied with the corrective work order, the matter would generally be put to rest. Under the new process, even if the contractor complies with the directive, the ROC may still issue a citation.

Upon receipt of the investigator's written findings and recommendations by the legal department, the ROC's lawyers will examine the investigator's findings and evaluate any mitigating or aggravating factors. These factors will include the nature of the claim, the contractor's complaint history, and the contractor's response to the pending complaint. The ROC will then decide the appropriate course of action, ranging from a letter of concern placed in the contractor's file up through a decision to issue a citation and prosecute the contractor.

If the ROC decides to prosecute a claim, the complaining party still plays an important role as a fact witness and in helping the ROC's attorneys prepare for the administrative hearing. If the complainant settles with a contractor and the ROC still elects to prosecute a claim, the ROC may subpoena a complainant's testimony.

WHAT IS THE BOTTOM LINE?

The game has changed. The ROC is no longer a place to inexpensively litigate disputes; once the complaint gets filed with the ROC, the complainant loses control of the process.

For contractors, it is important to note the consequences of the ROC's investigative thoroughness. If the ROC discovers evidence of violations not included in the original complaint, the agency may elect to pursue the discovered issues independent of its determination on the complained of issues. For example, recently two contractors filed competing "no pay" complaints with the ROC. Neither party was ultimately cited for "no pay," but, in reviewing the submitted information, the ROC found other infractions by each contractor and issued citations. Knowing that the ROC is going to be thoroughly examining everything serves as a good reminder for contractors to review their materials and policies for compliance with the statutes.

For complainants, an additional consideration is that, traditionally, a Superior Court would bind the parties to a regulatory agency's final order. Previously, the complainant was a party to the administrative process and argued its case in front of an administrative law judge, with the ROC issuing a final order. Now, the complainant is no longer a "party" to the action, so there is a reasonable question of whether the final order would still be binding on any potential future court proceeding. However, in the event that a court still considers the outcome binding or even persuasive, there is a reason for a complainant to be cautious in filing an ROC complaint, as they will have no control of the process and will not be the one prosecuting the claim.

The ROC's position is that the new process will be more balanced to Arizona contractors, as it should:

- result in a significant reduction in actual citations being issued,
- reduce the risk of frivolous issues being litigated in front of the ROC, and
- reduce the number of repeat offender contractors in the marketplace.

All of this remains to be seen. In the meantime, contractors need to make sure that they and their attorneys sufficiently understand the new complaint process and its consequences.

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