

Old Country Lawyer, June 2010 Regulating Contractors

One of the functions of local government is regulating contractors in the construction business, so that the contractors are likely to build structures that perform as intended, and so that the contractors don't damage other people's stuff while the contractors are working. There are two government systems to perform this function, "inspection" and "bonding". These two systems generally work side-by-side, with inspection providing more preventive enforcement and bonding providing more remedial enforcement. Bonding serves a preventive purpose as well, as it can be a strong incentive to the contractor to do the job right whether or not there is inspection.

Inspection has its limitations. Occasionally, the electrician will complete an installation, which is supposed to remain open to view until the inspector can approve the work, but because of scheduling issues, the drywall installer will cover the electrical installation before the electrical inspector arrives. This may be dealt with by requiring the removal of the drywall to permit the inspection, or by requiring the electrician's bond to remain in place longer, or, one hears, by informal negotiation.

The essential legal element of inspection, disregarding the informal negotiations aspect, is the establishment of a pre-existing code that describes in detail what building systems may be used for what purposes. A code is generally adopted by the legislative authority upon the recommendation of a council of experts in relevant areas - architects, engineers of structural, mechanical, and electrical systems, fire prevention professionals, master tradesmen, liability underwriters, and general contractors - who reach agreement on minimal acceptable standards for safe and functional construction.

Once the code is established, persons who wish to engage in the regulated trade within the regulating jurisdiction are required to learn the code, frequently are required to demonstrate their knowledge of the code by passing an examination, and are required to register with the regulating jurisdiction and acknowledge that their work will be inspected to establish compliance with the code. At this point the bond requirement comes in.

Upon registering, the contractor is required to post a bond or policy of insurance with the regulating jurisdiction to cover liability for damages to third parties, meaning harming other people's stuff. Then, upon applying for a permit for a specific project, the contractor is required to post a performance bond, to cover damages to the customer in the event the contractor fails to complete the project or constructs the project in a defective manner. The bonding process requires that the contractor either post a significant amount of the contractor's own money to guarantee performance, or that the contractor convince a private financial institution of the contractor's ability to perform the work properly, so that the financial institution will post the bond. This requirement tends to eliminate less-responsible would-be contractors - if a contractor cannot convince a bonding agent that the contractor knows what the contractor is doing, the bonding agent will not issue a bond and the contractor will not get the permit..

All this to build a garage in Parma, Ohio. One would think that if the wealthiest business in

the United Kingdom proposed to build an experimental structure a mile beneath the surface of the Gulf of Mexico, the federal Minerals Management Service would have (a) devised a construction code that would have identified proven systems, proven equipment, and proven techniques and required that the builder use those systems, (b) required that the builder provide access to the construction site so that MMS inspectors could enforce compliance with that code, or (c) since it is impossible to provide access for an inspector to a building site a mile beneath the surface of the ocean, required that the project owner, British Petroleum, post a billion-dollar liability bond for each well to remain on deposit for the life of the well plus a two-year post-closing damage retention period, and required that the construction company, Transocean Ltd., post a separate billion-dollar performance bond for each well it drills to remain on deposit for two years after completion of construction of each well to stand surety for the performance of each structure for its intended purpose. One may imagine that the project owner and the general contractor might privately require similar financial sureties from the equipment supplier, Halliburton.

Beyond question, imposing IN ADVANCE realistic costs of financial responsibility on oil producers will increase the price those producers charge to consumers of petroleum products. That is the moral point. Folks who want to burn gasoline must internalize the cost of that practice. If producing oil in a manner that minimizes damage to the planet results in a cost to the consumer of five dollars a gallon, the consumer should be presented with that cost so as to be able to make an informed decision as to whether to continue to consume that product.

It costs more to hire a contractor to build a garage if that contractor is licensed, bonded and insured, than it does to hire the guy who stops by in a pickup truck with no paperwork and wants to be paid in cash.. It is more likely that the garage will be completed properly if the work is done by the licensed, bonded, and insured contractor. One would think the folks who run the Department of the Interior would ponder that concept when they approve contractors to build wells a mile under the ocean.

- Christopher J. Mallin, Old Country Lawyer
OldCountryLawyer.us