

## Proposal #2: Construction Contractors Board Enforcement and Licensing Changes September 19, 2006

During the May 24, 2006 meeting, the Task Force directed staff “to investigate whether improvements in the CCB’s method of researching corporate entities should be a recommendation of this task force.”<sup>1</sup> In the same meeting, the Task Force also moved to approve the following concepts:

- Provide CCB with emergency suspension powers.
- Increase power of CCB to investigate and prosecute contractors.
- Give the Construction Contractors Board the authority to issue criminal citations against the most egregious contractors.<sup>2</sup>
- Investigate whether improvements to CCB’s methods of researching whether an applicant was involved with a corporate entity disciplined by the CCB needs to be changed.
- Investigate whether improvements to CCB’s methods of inquiry into the criminal history and financial stability of prospective contractors through the application process needs to be changed.

After reviewing Task Force direction, testimony and research, staff looked at an expedited emergency suspension process, prohibiting contractors with disciplinary problems from entering the business as a new corporate entity, changes to financial and criminal background checks and enhancing criminal penalties against contractors.

### Emergency Suspension of Contractor Licenses

#### 1. *Current Oregon Law*

Generally, administrative agencies are required to comply with the Oregon Administrative Procedures Act, ORS ch. 183 *et seq.*, when the agency intends to suspend a license. Under the Administrative Procedures Act, an agency seeking to take administrative action against a licensee must give them notice.<sup>3</sup> Among other things, the notice includes a short and plain statement of the matters alleged, the legal bases for administrative action, and the opportunity for a hearing before an administrative law judge.<sup>4</sup> At the conclusion of a hearing, the administrative law judge issues a final proposed order.<sup>5</sup> A licensee can still file what is known as an “exception” to the proposed order, which allows the licensee to challenge the administrative law judge’s legal conclusions.<sup>6</sup>

The Administrative Procedures Act does contain an emergency suspension procedure, but it requires the agency invoking the authority to demonstrate specific reasons why a licensee poses a “serious danger to the public health and safety.”<sup>7</sup> After sending the emergency suspension notice, the agency can suspend the license without a hearing.<sup>8</sup> However, if the licensee formally contests the emergency suspension notice within 90 days after the date of notice, then the agency must reverse its earlier order and hold a hearing as soon as practicable.<sup>9</sup>

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<sup>1</sup> Audio recording: Construction Claims Task Force (May 24, 2006) (on file with author).

<sup>2</sup> Id.

<sup>3</sup> ORS 183.415(1). *See also* OAR 137-003-0505.

<sup>4</sup> ORS 183.415(2). *See also* OAR 137-003-0505.

<sup>5</sup> ORS 183.464. *See also* OREGON DEPARTMENT OF JUSTICE, OREGON ADMINISTRATIVE LAW MANUAL 154 (January 1, 2006).

<sup>6</sup> ORS 184.460; OAR 137-003-0060 and 137-003-0650.

<sup>7</sup> ORS 183.430(2).

<sup>8</sup> Id.

<sup>9</sup> Id.

Currently, the CCB Administrator has power to suspend a license prior to a hearing only when there is a “serious danger to the public welfare” and the contractor has failed to obtain a bond, maintain insurance, hired employees when licensed as an exempt contractor, or acted fraudulently or dishonestly.<sup>10</sup>

## *2. Staff Analysis and Recommendations*

An expedited emergency suspension process means that the license is immediately suspended, and the licensing agency must hold a post-suspension hearing so the contractor can contest the suspension. Staff recommends that in addition to other sanctions already in place under existing law, the CCB should be given additional authority to suspend a contractor’s license immediately, without prior notice and hearing, for a period of sixty days or less. The contractor should receive a statement of the reasons why the license was suspended within ten days of suspension.

### Prohibiting Contractors with Disciplinary Problems from Reincorporating as a New Entity

#### *1. Current Oregon Law*

Currently, Oregon law allows the Construction Contractors Board to suspend or refuse to issue a license if the owner or officer of a business was also an owner or officer of a business in any state of the Union that had a “construction debt”, or for an event that led to the suspension or revocation of the business license.<sup>11</sup> A construction debt is further defined as a “an amount owed under a final order or arbitration award issued by the board, or a judgment or civil penalty arising from construction activities within the United States.”<sup>12</sup>

#### *2. Other Oregon Models*

In the 2005 legislative session, the legislature enacted House Bill 3273.<sup>13</sup> House Bill 3273 addresses two concerns. First, it prohibits individual licensees from transferring to another organization to escape administrative sanction. The Department of Consumer and Business Services can refuse to issue or renew an individual’s license if the person is or was subject to civil penalties or administrative action taken on the license.<sup>14</sup> The second aim of the bill was to prohibit the dissolution and reformation of corporate entities to escape administrative sanction. Thus, if a person was the owner or an officer of a corporation that was involved in an act that resulted in civil penalty or administrative action against a license, the person can be denied a new license or a license renewal.<sup>15</sup>

#### *3. Staff Analysis and Recommendation*

Staff recommends that the Construction Contractors Board provisions for disciplining contractors with “construction debt” be expanded to meet two aims: first, CCB licensees subject to sanction that attempt to work for another entity should be denied a new license or a renewed license. Second, CCB businesses attempting to dissolve and reform as a new corporate entity should be refused a new business license or a license renewal.

### Investigating An Applicant’s Criminal or Financial Background

#### *1. Other States’ Approaches*

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<sup>10</sup> ORS 701.135(2)

<sup>11</sup> ORS 701.102(2)(c).

<sup>12</sup> ORS 701.005(2).

<sup>13</sup> 2005 Or. Laws ch. 416. The bill was codified as ORS 455.127.

<sup>14</sup> ORS 455.127(2)(a).

<sup>15</sup> ORS 455.127(2)(b).

In researching what other jurisdictions require in terms of financial stability and criminal background checks, approaches tend to vary – states either ask for evidence of the applicant’s financial stability, require disclosures concerning an applicant’s criminal past, or ask for both types of information.

Some states examine the fitness of an applicant through the lens of financial statements. Georgia requires applicants for a general contractor license to provide proof of their minimum net worth, as specified by the general contractor division<sup>16</sup>. Georgia also requires “suitable verification of tax payments”<sup>17</sup>. In Louisiana, applicants for various contractor licenses must submit a financial statement, “current within twelve months of the date of filing,” which is prepared by an independent auditor and signed in front of a notary<sup>18</sup>. The state can deny the issuance of a license for “good cause,” which can encompass the ability of the applicant to engage in the construction business<sup>19</sup>. Good cause is determined in part by an applicant’s bankruptcies, unpaid legal judgments, insolvencies, or other liabilities<sup>20</sup>.

Tennessee requires a letter of reference from a past client, employer, or codes administration official as well as a financial statement<sup>21</sup>. The level of review required in the financial statement varies by the monetary limit the applicant is seeking – in other words, the value of the job on which a Tennessee contractor can legally bid. For a monetary limitation greater than \$1.5 million dollars, the financial statement must be audited and attested<sup>22</sup> to by a certified public accountant<sup>23</sup>. For a monetary limitation of less than \$1.5 million, the applicant must furnish a financial statement that is reviewed or audited by a certified public accountant.<sup>24</sup>

Other states disallow the issuance of a license to a person that committed certain acts or crimes. In Alaska, residential contractor licenses cannot be issued to a person sentenced for an offense related to forgery, certain classes of theft, extortion, defrauding creditors or a felony involving dishonesty<sup>25</sup>. Minnesota statute requires an application for a contractor license include information on the applicant’s criminal and civil record<sup>26</sup>. Information includes whether the applicant has criminal convictions for crimes “related directly to the business for which the license is sought”, fraud, misrepresentation, or misuse of funds<sup>27</sup>. Information on civil matters includes past judgments involving fraud, misrepresentation, negligence, or breach of contract<sup>28</sup>. Finally, Minnesota also requires information on whether an applicant “has had any government license or permit suspended or revoked” by Minnesota, other states, or the federal government<sup>29</sup>.

In investigating the criminal past of applicants, three states – California, Nevada and Texas – actively search criminal records. In California, applicants for a contractor license and any of the corporate officers, partners, directors and other responsible individuals “shall not have committed acts or

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<sup>16</sup> GA. CODE ANN. § 43-41-6(e).

<sup>17</sup> Id.

<sup>18</sup> LA. REV. STAT. § 2156.1(C).

<sup>19</sup> LA. REV. STAT. § 2156.1(D).

<sup>20</sup> Id.

<sup>21</sup> TENN. CODE ANN. § 62-6-111(b)(2).

<sup>22</sup> Attested generally means “to affirm to be true or genuine, to authenticate by signing as a witness.” BLACK’S LAW DICTIONARY 124 (7th ed. 1999).

<sup>23</sup> TENN. CODE ANN. § 62-6-111(b)(3).

<sup>24</sup> TENN. CODE ANN. § 62-6-111(b)(4).

<sup>25</sup> ALASKA STAT. § 08.18.025(b)(5).

<sup>26</sup> MINN. STAT. § 326.89(7).

<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> Id.

crimes that are grounds for denial of licensure” under California law<sup>30</sup>. In the application process, California requires all applicants furnish “a full set of fingerprints for purposes of conducting a criminal records history check.”<sup>31</sup> Submitted fingerprints are then used to obtain criminal history information from the California Department of Justice and the Federal Bureau of Investigations<sup>32</sup>. If arrest information is uncovered as part of the search, statute authorized the state to obtain the information<sup>33</sup>.

Similarly, Nevada law states that applicants must possess good character<sup>34</sup>. “Lack of character”, in turn, comes from proof that the applicant “committed any act which would be grounds for the denial, suspension or revocation of a contractor’s license”, has “a bad reputation for honesty and integrity”, or entered a plea of no contest or guilty to a crime “arising out of connection with or related to” the applicant’s fitness as a contractor<sup>35</sup>. Revocation or suspension of a license “for reasons that would preclude the granting or renewal of a license” also shows lack of character<sup>36</sup>. In addition to making findings that an applicant has no ‘character’, the Nevada State Contractor’s Board may also require from an applicant a completed fingerprint card and a form authorizing the investigation of the applicant’s background<sup>37</sup>. Fingerprint submissions go to the Nevada Records of Criminal History and the Federal Bureau of Investigations<sup>38</sup>. The board can also procure records covering a laundry list of criminal proceedings for its investigations: arrests, guilty pleas, sentencing, probation, parole, bail, complaints and final dispositions<sup>39</sup>. Investigations into criminal histories are kept confidential by the board<sup>40</sup>.

Texas requires applicants to disclose if they pleaded no contest or were convicted of a crime (felony and misdemeanor) of moral turpitude<sup>41</sup>. Regulations require that applicants for a builder registration disclose any affiliates that previously applied for registration, had an application administratively withdrawn or let a registration expire due to non-payment<sup>42</sup>. Applications for registration also include enough information for the Texas Residential Construction Commission to undertake a background check<sup>43</sup>. The commission conducts criminal background checks on the applicant’s designated agent and any other person responsible for the registration, if needed<sup>44</sup>. If a criminal history is discovered, factors the commission must consider the nature and seriousness of the crimes, whether contracting would allow the applicant “an opportunity to engage in further criminal activity”, the extent and nature of the applicant’s past crimes, the applicant’s age when the crimes occurred, the span of time between application and the crimes, overall work history, evidence of successful rehabilitation efforts, and other evidence of eligibility as requested<sup>45</sup>.

Other states require a combination of financial stability and proof of good character. For instance, in Arizona a person is not of “good character” if they commit an act that would be ground for revocation or suspension of a contractor license<sup>46</sup>. An applicant for an Arizona contractor license must not also have

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<sup>30</sup> CAL. BUS. & PROF. CODE § 7069(a).

<sup>31</sup> CAL. BUS. & PROF. CODE § 7069(b).

<sup>32</sup> CAL. BUS. & PROF. CODE § 7069(b).

<sup>33</sup> Id.

<sup>34</sup> NEV. REV. STAT. 624.265(1).

<sup>35</sup> NEV. REV. STAT. 624.265(1)(a)-(c).

<sup>36</sup> NEV. REV. STAT. 624.265(1)(d).

<sup>37</sup> NEV. REV. STAT. 624.265(2).

<sup>38</sup> Id.

<sup>39</sup> NEV. REV. STAT. 624.265(5)(a)-(h).

<sup>40</sup> NEV. REV. STAT. 624.265(3).

<sup>41</sup> TEX. PROP. CODE ANN. § 416.002(b)(1)-(2).

<sup>42</sup> 10 TEX. ADMIN. CODE § 303.5(b).

<sup>43</sup> 10 TEX. ADMIN. CODE § 303.5(c).

<sup>44</sup> 10 TEX. ADMIN. CODE § 303.5(f).

<sup>45</sup> 10 TEX. ADMIN. CODE § 303.5(e)(1)-(8).

<sup>46</sup> ARIZ. REV. STAT. § 32-1122(D).

been named on a contractor's license that was suspended or revoked in another state<sup>47</sup>. Additionally, applicants for an Arizona contractor license submits a "detailed statement of current financial condition" that meets the Registrar of Contractors' requirements<sup>48</sup>.

In Florida, an applicant for a contractor license must possess the requisite "good moral character" to contract with the general public<sup>49</sup>. The state may refuse to issue an applicant's license if "there is a substantial connection between the lack of good moral character of the applicant and the professional responsibilities of a certified contractor", supported by clear and convincing evidence<sup>50</sup>. Florida interprets its contractor licensing laws to require credit reports, financial statements and satisfactory responses to a financial questionnaire<sup>51</sup>. An unfavorable credit report, a determination of financial instability by the state or the existence of unsatisfied court judgments rendered against the applicant are all grounds on which the state can deny a contractor license<sup>52</sup>.

Hawaii administrative rules require applicants for contractor licenses to provide a "minimum of three notarized letters certifying the individual's or [responsible managing employee's] history of honesty, truthfulness, financial integrity, and fair dealing."<sup>53</sup> Hawaii also requires that all applicants for a contractor license provide a current financial statement prepared by a certified public accountant, as well as a current state tax clearance or proof of payment arrangements through the Department of Taxation<sup>54</sup>. Michigan statute requires proof of financial stability and good moral character<sup>55</sup>. Michigan regulations interpreting the statute require applicants for a contractor license submit a "construction credit report"<sup>56</sup> and a financial statement that shows the applicant's current financial condition<sup>57</sup>. The financial statement is prepared under established accounting principles and submitted with the application<sup>58</sup>.

North Carolina denies contractor licenses to persons that committed an act involving dishonesty, fraud or deceit, have committed a felony of "moral turpitude" (i.e., dishonest conduct), or were involved in embezzlement or misappropriation of funds entrusted to them<sup>59</sup>. Applicant must not also have committed an act that would be grounds for suspension or revocation of a license in North Carolina or in another state, they may be denied a license<sup>60</sup>. North Carolina regulations require applicants for the general classes of contractor licenses "be financially stable to the extent that they total current assets of the applicant or the firm or corporation he represents exceed the total current liabilities" by a given amount<sup>61</sup>. Unlimited and intermediate licenses must show assets of \$150,000 and \$75,000 over liabilities, respectively; these are shown through audited financial statements prepared by a certified public accountant<sup>62</sup>. Limited licenses only need to show assets of \$17,000 over liabilities, and provide an audited financial statement with a classified balance sheet when the applicant is in bankruptcy<sup>63</sup>.

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<sup>47</sup> Id.

<sup>48</sup> ARIZ. REV. STAT. § 32-1122(C) (2006).

<sup>49</sup> FLA. STAT. § 489.111(2)(c).

<sup>50</sup> FLA. STAT. § 489.111(3)(a).

<sup>51</sup> FLA. ADMIN. CODE ANN. r. 61G4-15.005.

<sup>52</sup> FLA. ADMIN. CODE ANN. r. 61G4-15.006.

<sup>53</sup> HAW. ADMIN. R. § 16-77-10(a)(1).

<sup>54</sup> HAW. ADMIN. R. § 16-77-10(b)(1)-(2).

<sup>55</sup> MICH. COMP. LAWS § 339.2404.

<sup>56</sup> MICH. ADMIN. CODE r. 338.1521(5).

<sup>57</sup> MICH. ADMIN. CODE r. 338.1521(6).

<sup>58</sup> Id.

<sup>59</sup> N.C. GEN. STAT. § 87-10(a).

<sup>60</sup> Id.

<sup>61</sup> N.C. ADMIN. CODE tit. 21, r. 12.0204(a)-(c).

<sup>62</sup> N.C. ADMIN. CODE tit. 21, r. 12.0204(b)(2) and (c)(2).

<sup>63</sup> N.C. ADMIN. CODE tit. 21, r. 12.0204(a)(2).

Virginia law requires review of past performance of applicants, which includes their reputation to pay material bills. Applicants are also required to supply information on outstanding past-due debts, tax obligations, defaulted bonds, etc. Finally, applicants in Virginia disclose the number of misdemeanor citations from the last three years as well as any felony convictions

## 2. *Staff Recommendations*

Based on the comparative research provided, staff believes that an applicant should disclose financial matters that evidence past financial malfeasance – unsatisfied court judgments, insolvencies, fraud, misrepresentation, conversion of funds, and other criminal and civil acts that may unfavorably affect future construction contracts. Staff recommends active criminal check through the use of state and federal biometric databases. Staff also recommends conferring on the CCB the authority to acquire criminal records in the course of investigating applicants, and the ability to reciprocate with other contractor licensing agencies in the United States.

### Expanding Criminal Penalties

#### 1. *Current Oregon Law*

Under Oregon law, persons that use a contractor's license number without authorization or with intent to deceive the public can be prosecuted for a Class A misdemeanor.<sup>64</sup>

#### 2. *Other States' Approaches*

Nine states surveyed consider certain acts related to construction a criminal offense. Generally speaking, criminal sanctions against contractors are misdemeanors. In all nine of these states, authority for pursuing criminal penalties is given to their attorneys general or district attorneys.

Hawaii criminalizes working without a contractor license during a state disaster, assessing fines of up to \$10,000 and imprisonment for up to one year.<sup>65</sup> Hawaii also enhances penalties (assessing fines of up to \$10,000 and imprisonment for up to one year) for persons contracting to do work for the elderly without a license.<sup>66</sup> Another example is Florida, which treats certain licensing offenses as a misdemeanor.<sup>67</sup> If a person commits another misdemeanor of the same type, the act can be prosecuted as a felony "in the third degree."<sup>68</sup> Licensing violations occurring during a state of emergency are considered a felony in the third degree, even if they would normally be considered misdemeanors.<sup>69</sup>

Staff located only one state, California, that gives criminal citation authority to the agency that regulates contractors. California allows investigators employed by the Contractors' State License Board to act as "peace officers."<sup>70</sup> California officials can directly or indirectly commence criminal actions in connection with investigations undertaken by the Board.<sup>71</sup>

#### 3. *Staff Recommendations*

Based on the research, the more common approach taken by other states in applying criminal law to contractor conduct is to simply offer enhanced criminal penalties, rather than transferring law

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<sup>64</sup> ORS 701.990. A Class A misdemeanor is the most severe classification of misdemeanor in Oregon law, punishable by up to the statutory maximum of one year in jail and unspecified fines. *See* ORS 161.545; ORS 161.555.

<sup>65</sup> HAW. REV. STAT. § 444-10.6.

<sup>66</sup> HAW. REV. STAT. § 444-10.7.

<sup>67</sup> FLA. REV. STAT. § 489.127(2)(a).

<sup>68</sup> FLA. REV. STAT. § 489.127(2)(b).

<sup>69</sup> FLA. REV. STAT. § 489.127(2)(c).

<sup>70</sup> CAL. BUS. & PRO. CODE § 7011.5. A "peace officer" is generally defined as a "civil officer (such as a sheriff or police officer) appointed to maintain public tranquility and order." BLACK'S LAW DICTIONARY 1151 (7th ed. 1999).

<sup>71</sup> *Id.*

enforcement authority. Staff thus recommends expanding current criminal sanctions to include activities other than provided for under current law. Along with expanded activities, staff recommends that the Task Force consider the following criminal penalty enhancements. For willful and intentional violations of the CCB's civil grounds for discipline<sup>72</sup>, a sliding scale of penalties can be prosecuted, based on the monetary value of the contract. For example, in contracts valued at \$1 to \$10,000, a contractor willfully and intentionally violating CCB law may be prosecuted for a Class D misdemeanor. Contracts valued at \$10,000 to \$100,000 may subject a contractor who willfully and intentionally violates CCB law to a Class C misdemeanor. Contracts valued at \$100,000 to \$500,000 may subject a contractor who willfully and intentionally violates CCB law to prosecution for a Class B misdemeanor. Finally, for contracts valued at \$500,000 and up, a contractor willfully and intentionally violating CCB law may be prosecuted for a Class A misdemeanor. For the first offense, criminal penalties should focus on a discretionary mix of restitution to the aggrieved party, incarceration, fines to the state and recouping of investigative costs. Second offenses should bring mandatory incarceration in addition to restitution, fines and reimbursement of investigative costs.

### Summary

Based on the Task Force guidance, testimony, and research, staff recommends the following changes to CCB enforcement powers:

**Recommendation #2. Incorporate into the final legislative report changes to the CCB's enforcement authority to include:**

- 1. Adding an expedited emergency suspension process outside the Administrative Procedures Act to deal with problem contractor licenses.*
- 2. Deny CCB licensees subject to sanction that attempt to work for another entity a new license or a renewed license.*
- 3. Deny CCB businesses attempting to dissolve and reform as a new corporate entity should a new business license or a license renewal.*
- 4. Require applicants to disclose financial matters that evidence past financial malfeasance – unsatisfied court judgments, insolvencies, fraud, misrepresentation, conversion of funds, and other acts that may unfavorably affect future construction contracts.*
- 5. Require active criminal check through the use of state and federal biometric databases. Staff also recommends conferring on the CCB the authority to acquire criminal records in the course of investigating applicants.*
- 6. Expand prohibited acts by contractors that can be prosecuted by the government as crimes, and expand the range of penalty options to include restitution, enhanced fines and limited incarceration based on the monetary value of the contract, the nature of the offense and whether a person is a repeat offender.*

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<sup>72</sup> ORS 701.135.