

8/1/66

Memorandum 66-51

Subject: Study 49 - Rights of Unlicensed Contractor

The Commission has on its agenda a study relating to whether Business and Professions Code Section 7031, which provides that a contractor may not recover for work done while unlicensed, should be revised. At its July, 1965 meeting, the Commission considered a staff recommendation that this topic be dropped from the Commission's agenda. The Commission decided not to act on the staff recommendation at that time.

The staff renews its recommendation that this topic be dropped from the agenda. Attached is a draft of the text of the portion of the Annual Report that would effectuate this recommendation.

The staff feels that a Commission recommendation on this topic is neither suitable nor desirable for the following reasons:

1. This problem is purely a question of policy. Consequently, a legislative committee could resolve the problem as efficiently as or more efficiently than the Commission. The resolution of the questions here involved would not be significantly aided by extensive legal research and analysis.

2. If a recommendation on this topic is to be made, it would be more appropriate to make it in a broader context: Should this type of sanction ever be used in enforcing licensing acts? In this connection it should be noted that the sanction of denying recovery for work done or services rendered while a person is unlicensed also is used to enforce the licensing provisions relating to Cemetery Brokers (Bus. & Prof. Code § 9678), Mineral, Oil and Gas Brokers and Salesmen (Bus. & Prof. Code § 10508), Real Estate Brokers and Salesmen (Bus. & Prof. Code § 10136), and Structural Pest Control Operators (Bus. & Prof. Code § 8554).

Moreover, in applying the definition of contractor set forth in Business and Professions Code § 7026, it is not always clear whether a license is required. In addition, a license may be required in some cases which do not necessarily present situations in which the public needs to be protected against the risk of dealing with irresponsible, inexperienced, or incompetent contractors. For example, it is of dubious necessity to require a contractor to obtain a license to haul dirt for a highway project. But cf. Leonard V. Hermreck, 168 Cal. App.2d 142, 335 P. 2d 515 (1959) (dirt hauler may not recover for work done without a contractor's license). The solution to the problem may be that the licensing provisions should be revised to make it clear when a license is required but since this is a practical rather than a legal question, the drafting of a recommendation to accomplish this would not be appropriate for the Commission.

3. It does not appear that a Commission recommendation permitting unlicensed contractors to recover in full or in part for their services would meet with favorable legislative action. That the Legislature apparently feels additional sanctions and rules are necessary to inhibit activity by unlicensed contractors is evidenced by two statutes adopted at the 1965 session. See BUS. & PROF. CODE §§ 7028.3 (registrar of contractors may obtain injunction to restrain a person from contracting without a license), 7033 (city, county, and city and county shall require statement of valid license or exemption from Contractor's License law as condition precedent to issuing local business license to a contractor). Furthermore, it is probable that licensed contractors and particularly the Contractor's State Licensing Board would strongly oppose such an amendment. The Licensing Board has stated that Section 7031 "is actually the teeth in the contractor's license law in that it acts as a deterrent to

violations of a criminal nature and therefore places this agency in a better position to regulate the industry pursuant to the statutes." See the Research Study at 6. Thus, it would appear that even if it would be possible to obtain the adoption of such a recommendation, the Commission would be forced to expend an inordinate amount of its good will to do so.

4. The California Supreme Court's March, 1966 decision in Latipac, Inc. v. Superior Court, 64 AC 289, 49 Cal. Rptr. 676, ___ P.2d ___ (1966) indicates that the court will invoke the doctrine of substantial compliance to alleviate hardship in a number of unlicensed contractor cases. (Majority opinion set forth in Exhibit II.)

The court indicated that it would find sufficient compliance with the license law to permit a contractor to recover for work done while he was unlicensed if the following circumstances were present:

- (1) The contractor held a valid license at the time of contracting;
- (2) The contractor readily secured a renewal of that license; and
- (3) The contractor's responsibility and competence were officially confirmed throughout the period of performance of the contract. Id. at 293, 49 Cal. Rptr. at 679, ___ P.2d at ___.

The showing required to establish the first two elements of the doctrine is evident; in Latipac the third element was established by showing, in effect, that during the entire period of performance of the contract the plaintiff contractor held a valid license issued to him in the name of another firm. Since the contractor obtained and held the second license on the basis of the same qualifications as were necessary to obtain the expired license and to renew it, the plaintiff contractor's responsibility and competence were "officially confirmed".

The application of the substantial compliance doctrine will permit

recovery in those cases in which recovery will be most justifiable, thus reducing the necessity of legislative action to alleviate the burden imposed by Section 7031. As previously noted, the desirability of using the type of sanction provided in Section 7031 is purely a policy question and it well may be that recovery should be denied in those cases that will not fall within the exception. As a practical matter, we suspect that the contractors would object to the elimination of the present sanction since the Latipac case alleviates the hardship to a large extent in cases where the contractor once had a license but permitted it to expire through error. Accordingly, the section operates as an effective method of discouraging unlicensed contractors and would, we believe, be supported by the licensed contractors.

5. The time needed to fully study the unlicensed contractor problem and to formulate a recommendation on the topic is disproportionate to the seriousness of the problem and to the benefit to be gained from the resulting recommendation. If the unlicensed contractor problem were studied in the broader context of the desirability of using the type of sanction provided in Section 7031 to enforce licensing laws, it would be necessary to expend substantial additional time and effort on such a study. Even if the Commission confined itself merely to studying the unlicensed contractor problem, the existing Research Study would have to be updated. In view of the many topics on the Commission's agenda and the priority to be afforded to studying condemnation and inverse condemnation and to completing work on the Evidence Code, it is unlikely a recommendation on this subject could be submitted prior to 1971.

Accordingly, the staff recommends that this topic be dropped from the Commission's calendar of topics and that the material set out in Exhibit I be included in the 1964 Annual Report.

Respectfully submitted,

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EXHIBIT I

STUDIES TO BE DROPPED FROM CALENDER OF TOPICS FOR STUDY

Study Relating to the Rights of an Unlicensed Contractor

In 1957 the Commission was authorized to make a study to determine whether Section 7031 of the Business and Professions Code, which precludes an unlicensed contractor from bringing an action to recover for work done, should be revised.¹ The Commission requested authority to make this study because, despite judicial qualifications, the wide area of application of Section 7031 operated to visit a forfeiture on the contractor and to give the other party a windfall.

The recent decision of the California Supreme Court in Iatipac, Inc. v. Superior Court,² which permits an unlicensed contractor to recover for work done if he has substantially complied with the license law, will operate in many cases to solve the forfeiture and windfall problems. Moreover, the Commission has concluded that it would not be desirable to make a meaningful recommendation on Business and Professions Code Section 7031 without considering the fundamental policy question whether this type of sanction should be used to enforce other licensing laws.³ The Commission is not in a position to undertake such a comprehensive study at this time. Finally, the Commission is concerned that Section 7031 presents a policy question which is more of a political or judgmental nature than of a "legal" nature. The resolution of this question would not be particularly aided by the extensive legal research and analysis which the Commission undertakes to provide.

Accordingly, the Commission recommends that this topic be dropped from its calender of topics.

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1. This study was authorized by Cal. Stats. 1957, Res. Ch. 202, p. 4589. For a description of the topic, see 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1957 Report at 23 (1957).
 2. 64 Cal.2d , 49 Cal. Rptr. 676, P.2d (1966).
 3. See BUS. & PROF. CODE §§ 8554, 9678, 10136, 10508 for other instances of using this sanction to enforce a license law.