

Consultants and contractor's licensing in California

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CONSULTING ARBORISTS often work closely with builders and other trade contractors on development projects and tree pruning operations. Depending on the situation, some of the work they engage in may legally require them to hold a contractor's license in California. This article discusses the impact of AB2237 on the definition of "consultant" and what causes consultants to become classified as contractors. It also discusses the requirements to obtain a contractor's license.

AB2237 uses a narrow definition of the word "consultant" that does not encompass all of the meaning conveyed in the conventional use of the word. Therefore, for clarity within this article, the word "consultant" fitting the definition outlined in AB 2237 will be indicated by quotation marks and the more general usage of the word consultant will not.

Case history

In 2013, the California Contractor's State License Board (CSLB) passed Assembly Bill 2237, defining a consultant as a person who either "Provides or oversees a bid for a construction project." or "Arranges for and sets up work schedules for contractors and subcontractors and maintains oversight of a construction project." AB2237 narrowed the definition of "consultant" in an attempt to close a loophole that was being exploited by some unlicensed individuals to avoid the requirements of licensing.

The origin of AB2237 can be traced back to a pivotal case in 2008. Shawn Michael Sage of Sage Pool Builders was cited in a precedential decision regarding his status as a consultant. He claimed to be a swimming pool

consultant that guided his clients through the process of owner-builder construction for a fee. He believed he was exempt from the requirements of a contractor's license because he was instructing his clients to be owner-builders. Shawn provided plans, scheduled subcontractors, and oversaw the construction process. The CSLB issued a citation that he was acting in the capacity of a contractor.

The CSLB also issued a citation for violating Business and Professions code 7027.2 requiring all advertisements for construction work to include a disclaimer that the individual or company is not a licensed

Consulting arborists involved strictly in the planning phase of a project fall outside the definition of "consultant" outlined in the bill. It is only when an arborist places a bid or acts to procure labor or subcontractors for a project that they fall under the definition used in this bill.

To illustrate by example, suppose a consulting arborist is retained to assist with the planning of a landscape installation. As part of the landscape installation, grade will be modified, new soil will be delivered to the site, and several dozen trees will be planted. If the consulting arborist were to prepare a report recommending

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contractor. His business card implied that he was a "builder" and not a "consultant," giving consumers the impression they were dealing with a contractor.

Upon Shawn's appeal, an administrative law judge affirmed the CSLB's citation.

Application to consulting arborists

The CSLB is intending to differentiate those who plan from those who build. The key language in AB2237 is defining a contractor as anyone "who or which undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid to construct any building or home improvement project, or part thereof."

specifications for soil types and species for new trees, that would not be acting as a contractor. However, if the consulting arborist were to make arrangements for the delivery of the soil and planting of the trees, he would be acting as a contractor and would need to possess a license.

Often consulting arborists are called upon to monitor and "oversee" construction activity as part of a tree protection plan or for compliance with a tree protection municipal ordinance. Consultants have expressed concern that their oversight of the construction activity may cause them to become categorized as contractors. There are two subparagraphs in the bill delineating categories that define

a “consultant” (and therefore a contractor) for purposes of that bill, and we will discuss each in detail.

The first subparagraph is one who “provides or oversees a bid for a construction project.” Ordinarily, consultants overseeing tree preservation are simply present to ensure that collateral damage does not occur to the assets planned for preservation and that the tree protection plan is followed. They do not oversee the project bid in the sense of being held accountable for its timely completion. Usually this subparagraph is not problematic to consulting arborists.

However, sometimes new information is discovered by the consulting arborist in the course of overseeing the construction. For example, a large root of a protected tree may be discovered in an unfortunate orientation such that the plans for a building’s footing must be altered slightly to accommodate the root. If the consultant were asked to obtain a cost estimate for making the change to the plans, that could potentially be interpreted as providing or overseeing a bid. It would be wise for a consultant not carrying a contractor’s license to avoid such a potential trap and to invite the client to obtain a bid directly from the project contractor.

The second subparagraph defining a “consultant” for purposes of AB 2237 is one who “arranges for AND sets up work schedules for contractors and subcontractors and maintains oversight of a construction project [*emphasis added*].” Although a consultant may be filling the role of overseeing construction and ensuring the proper execution of the tree protection plan, he does not meet the definition of this subparagraph without BOTH arranging schedules of contractors AND overseeing the project.

Again, it may be possible for a consulting arborist without a contractor’s license to overstep. If the consultant is asked to make arrangements with the contractors to oversee their operations, then he may meet the definition of “consultant” and would

be required to hold a contractor’s license. To avoid this potential trap, the arborist should invite the project owner to schedule directly with the project contractor and to tell the arborist when to be present on the site to oversee the execution of the tree protection plan.

Ultimately, AB 2237 greatly narrowed the definition of the word “consultant.” The definition used in the bill does not include many of the activities commonly undertaken by a consulting arborist, which can be confusing to some readers.

Potentially problematic activities

There are two activities frequently undertaken by consulting arborists that have been raised as potentially problematic with regards to AB 2237: specification writing and tree risk assessments.

With tree inventories for HOA’s or other large sites, the owner or board often does not have the expertise to know when a tree should be pruned or what constitutes proper pruning. Consulting arborists may assist with this process by inspecting the trees and making recommendations for tree service with a next date of service specified. It is acceptable for the owner or board to use these recommendations as bid specifications, provided that the arborist’s involvement with that assignment ends when the recommendations are submitted to the owner or board. If the consulting arborist were to oversee the work as the owner’s representative then the consultant would be overstepping

his role and would then be acting as a contractor. As a consultant, he would define the work and recommend a timeline, but as a contractor, he would be managing the project and the timeline. If this were the case, the consulting arborist would need to possess a contractor’s license.

The important distinction to make here is the difference between recommendations and requirements. The consultant may recommend that the owner require contractors to prune trees in a certain manner or to prune trees on a certain date, but he may not require the contractors to follow his recommendations without becoming a contractor. The owner must have the option of choosing to require contractors to prune in a different way or on a different date from what is found in the consulting arborist’s recommendations.

This same distinction also carries over to tree risk assessment. The ISA Best Management Practices for risk assessment delineates clearly between the roles of the Tree Risk Assessor and the Tree Risk Manager (or owner). The assessor’s role is to communicate the level of risk and to recommend possible mitigation. The manager’s role is to decide the acceptable risk threshold, set a budget, and choose the final mitigation strategy. An assessor steps beyond his role if he sets a threshold, chooses a budget, or makes any mitigation requirements.

If a tree risk assessor submits a risk assessment report with risk ratings and possible mitigation strategies, he does not fall under the definition of “consultant” in AB 2237. However, if he were to mandate the mitigation and arrange for contractors to perform it, then he would fall under the definition of “consultant” and need to possess a license. Just by turning in a report with mitigation options, the risk assessor does not meet the definition of “consultant” used in the law. He must be actively involved in the coordination of contractors to perform the mitigation work or directly responsible for requiring the mitigation strategy.



So long as the boundaries between assessor-manager and consultant-contractor are observed and not crossed, consulting arborists do not need to possess California contractor licenses.

Obtaining a contractor's license

Even though it may be possible to carefully avoid overstepping into the role of "consultant", it might just be easier to simply obtain a contractor's license for peace of mind. Some consultants cite the difficulty in obtaining a contractor's license as the reason for not holding one. However, it may be easier to qualify for and obtain a license than previously thought. There are six basic requirements to obtaining a contractor's license in the state of California:

- Document four years journeyman level experience
- Obtain a signature of a certifying individual
- Pass an exam
- Provide proof of insurance and bonding
- Provide fingerprinting
- Pay a fee

Journeyman level experience must have been obtained in the last ten years. It can be documented by showing any combination of one or more of the following: tax documents, invoices from prior work, business licenses, cancelled checks, or education transcripts. For more recently-certified consulting arborists, the CSLB has accepted a certified arborist certificate as proof of three years' experience.

A certifying individual is required to personally verify the applicant has obtained the necessary experience. The CSLB defines the certifying individual as an "employer, fellow employee, ..., business associate, or a client if the applicant is/was self-employed" with "direct knowledge" of the applicant's experience. For self-employed individuals or those with multiple employers over the course of the four years of documentable experience, multiple certifying indi-

viduals may be necessary. Although compiling sufficient documentation of the certifying individuals may be the most difficult step in the application process for some consultants, it is not an insurmountable task.

The exam tests basic knowledge of the contractor's license law and management of business affairs. Some consultants with years of experience may already know enough to pass the exam, but training courses and study materials that address contractor's license law and labor law are available to assist in preparation. Some preparatory courses even offer a no-fail guarantee that pays for the costs of retaking the exam if the applicant fails the first time. Depending on the license classification applied for, there may be a trade exam that accompanies the law exam. The D-49/C-61 Tree Service classification does not have a trade exam component, but the C-27 landscape contractor classification does. The applicant should decide which classification is more appropriate for the work in which he engages.

The biggest burden of cost lies in the required insurance and bonding. Worker's compensation and general liability policies are obtained after qualifying for and passing the examination. Business owners and sole proprietors may elect to exempt themselves from worker's compensation insurance as long as they do not hire any employees. General liability insurance is required with a minimum limit of \$1 million for businesses with 5 or fewer persons, and an additional \$100,000 for each additional person over 5 (not to exceed \$5 million total). Liability insurance is a good idea for a consulting arborist to have, even if possessing a contractor's license is not necessary. Some insurers even provide a consulting services endorsement to such a policy at a very low relative cost. Bonding is relatively inexpensive, at about \$150 per year for the minimum \$15,000 contractor's bond. Proof of insurance and bonding will need to be obtained and submitted after passing the exam but prior

to receiving the contractor's license. Other requirements include fingerprinting, a \$300 application fee, a \$180 license fee, and biennial renewal fee with the CSLB.

Another consideration for potential applicants is the time to process an application. It can take 60-90 days to process an application without any errors, and longer if the application is returned with a request for changes or additional information. It would be a good idea to start the process sooner rather than later for consultants desiring the protection of a contractor's license.

Conclusion

Consultants that act as contractors by scheduling subcontractors, providing bids, and overseeing work are required to hold contractor's licenses. Although it may not be necessary for some of the work done by arboricultural consultants, the cost of obtaining one is not prohibitive, and it may still be a good idea to obtain one as a means of protection from citations.

This article does not constitute legal advice – the reader is advised to consult with a licensed attorney for more information.

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