Addressing Employment of Unauthorized Workers by Subcontractors

The Immigration Reform and Control Act (IRCA) of 1986 requires employers to verify that every employee they hire is legally entitled to work in the U.S. IRCA makes it illegal for any U.S. employer to hire, recruit or refer for a fee an alien known to be unauthorized to work; continue to employ an alien known to be unauthorized; and hire, recruit or refer for a fee any person (citizen or alien) without following the act's recordkeeping requirements. If a contractor knowingly hires illegal immigrants to work after discovering they are not legal, he or she faces fines and penalties.

The Form I-9 is used to determine whether a particular individual is authorized to work in the U.S. However, employers are not required to obtain Form I-9s from their independent contractors, including subcontractors. Although an employer is not required to verify the employment eligibility of true independent contractors or the employment eligibility of the employees of true subcontractors, if an employer contracts with an independent contractor or subcontractor knowing they employ unauthorized workers, he or she will be in violation of IRCA. For purposes of IRCA, a person or other entity who uses a subcontract to obtain the labor of an unauthorized worker in the U.S. knowing that the worker is unauthorized is considered to have hired the unauthorized worker. Once deemed to employ the unauthorized worker, the person or entity that contracted with the subcontractor is subject to civil and criminal penalties under IRCA.

To avoid any liability for the employment of unauthorized workers by subcontractors, the prudent roofing contractor should implement protective measures to ensure things will go smoothly in the event of an I-9 audit by Immigration and Customs Enforcement. The best place to implement these protective measures is within the subcontract agreement.

Some states require certain specific contractual provisions to be included in construction contracts as it concerns the verification of employment eligibility of employees. Each roofing contractor should verify the law in his or her state to see whether such a requirement exists in his or her jurisdiction. Even in the absence of a contractual provision required by state law, roofing contractors can find that the following examples are effective clauses which provide protection from liability for the employment of unauthorized workers by subcontractors:

(A) "The Subcontractor represents and warrants that it is in compliance with and agrees that it will remain in compliance with the provisions of the Immigration Reform and Control Act of
1986, including but not limited to the provisions of the Act prohibiting hiring and continued employment of unauthorized aliens, requiring verification and record keeping with respect to identity and eligibility for employment, and prohibiting discrimination on the basis of national origin, United States citizenship, or intending citizen status."

(B) “It is the Contractor’s intention to allow only individuals authorized to work in the United States to provide labor, tools or equipment to the Project. Accordingly, during the performance of this Subcontract, the Subcontractor agrees to comply with all provisions of all local, state and federal immigration laws, statutes, rules, codes, orders and regulations, including, without limitation, the Immigration Reform and Control Act of 1986, as amended, the Immigration and Nationality Act, as amended, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, and any successor statutes, laws, rules and regulations thereto (collectively, the “Immigration Laws”). Subcontractor agrees to indemnify, defend, and hold harmless Owner and Contractor from any and all liability, including fines, attorneys’ fees and court costs, assessed against Contractor or Owner due to noncompliance with the Immigration Laws by Subcontractor or any of its sub-subcontractors.”

For a more burdensome clause, the following may be used:

(C) “Subcontractor hereby represents, warrants and covenants to Contractor as follows: Subcontractor (i) has complied, and shall at all time during the term of this Contract comply, in all respects with all immigration laws, statutes, rules, codes, orders and regulations, including, without limitation, the Immigration Reform and Control Act of 1986, as amended, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, and any successor statutes thereto, (ii) has properly maintained, and shall at all times during the term of this Contract properly maintain, all records required by the United States Citizenship and Immigration Services (the “USCIS”), including, without limitation, the completion and maintenance of the Form I-9 for each of Subcontractor’s employees, and (iii) has responded, and shall at all times during the term of this Contract respond, in a timely fashion to any inspection requests related to such I-9 Forms. During the term of this Contract, Subcontractor shall, and shall cause its directors, officers, managers, agents and employees to, fully cooperate in all respects with any audit, inquiry, inspection or investigation that may be conducted by the USCIS of Subcontractor or any of its employees. Subcontractor shall, on a bi-annual basis during the term of this Contract, conduct an I-9 audit of the I-9 Forms for its employees and shall promptly correct any defects or deficiencies which are identified as a result of such audit. Contractor may, in its sole discretion, terminate this Contract immediately if, at any time during the term, (x) Subcontractor violates or is in breach of any provision of this paragraph or (y) the USCIS determines that Subcontractor has not complied with any of the immigration laws, statutes, rules, codes, orders or regulations of the United States, including, without limitation, the Immigration Reform and Control Act of 1986, as amended, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, and any successor statutes thereto.

For even additional protections, some roofing contractors may decide to play an active, hands-on role in reviewing and verifying the legal status of employees of subcontractors. Some roofing contractors implement this protective measure by including a subcontract clause requiring subcontractors to verify employment for all personnel who will work at a particular project. This
clause can be particularly important if work involves a federal project where there is a greater likelihood of being the subject of an audit by ICE, which is under the direction of the U.S. Department of Homeland Security. But those contractors who choose to review the I-9 forms of the employees of their subcontractors may be inviting liability where liability does not otherwise exist. Consider the case where a review is done, and ICE determines that the contractor should have seen that some of the employees of the subcontractor were not authorized to work. In that instance, contractor may have bought himself or herself liability under IRCA.