



Summary of Construction Law Updates for 2009

A. Recent Changes in Contractor Licensing Law

1. New Regulations

- a. Expansion of Bond Recovery: Requires that a contractor's bond and qualifying individuals' bond be available to property owners whose single family dwelling is damaged as a result of violation of the State Contractors Licensing Law if the dwelling is not intended or offered for sale at the time the damages were incurred.

Consequences: Expands homeowner's ability to collect on a contractor's licensing bond

- b. Owner-builder Permitting: Requires the owner-builder to acknowledge the risk of contracting with unlicensed contractors when obtaining building permits. New permits also require the owner-builder to acknowledge that it is an employer under state law and must acquire workers compensation insurance and that he may be liable for construction defects on the property

Consequences: State is attempting to educate owner-builders regarding the dangers of contracting with an unlicensed contractor.

2. New Case Law

- a. *Great West Contractors v. WSS Industrial Construction, Inc.* - Unlicensed Contractor CAN NOT recover damages for any portions of their contract work, even shop fabrication, (which does not require a license), performed prior to issuance date of license.

Takeaway - Contractor has no legal rights to recover damages unless he is properly licensed at all times that it performs any act under a contract that requires a License.

- b. *Goldstein v. Barak Construction* - Owner has the right to attach payments to Unlicensed Contractor to recover all funds paid, (*Goldstein v. Barak Construction*)

Takeaway - Contractor who is not properly licensed at all times that it performs any act under a contract that requires a license is subject for a full attachment for the full amount paid plus attorney's fees and costs.

- c. *In Re Yehuda* - Unlicensed Contractor debtor can discharge a "disgorgement" in a Chapter 7 Bankruptcy.

Takeaway - Unlicensed Contractor can avoid reimbursement of amounts paid with the filing of bankruptcy.

B. Rights and Remedies for Projects Suspended, Delayed or Terminated

1. Private Projects – Rights/Duties and Obligations are Governed by Contract
 - AIA A201: The Owner may, without cause, order the contractor in writing to suspend, delay or interrupt the work in whole or in part. Contract Sum and Contract Time shall be adjusted for increases in the cost and time. Adjustment of Cost shall include profit.
 - Could Recover: Job Site Costs, Equipment Standby Costs, Financing Costs, Wage Escalation, Extended Supervision, Material Escalation, Extended OH and Profits
Takeaway – Contract must provide notification requirements; specifically define what is recoverable in costs and profits; define liquidated damage provisions as applied to suspensions; and project security requirements.
2. Public Project – Rights/Duties and Obligations are Governed by the Contract.
 - Greenbook: Work may be suspended in whole or in part. The contractor will be compensated for damages incurred due to delays.
 - Could Recover: Job Site Costs, Equipment Standby Costs, Financing Costs, Wage Escalation, Extended Supervision, Material Escalation and Extended OH – Profits, sometimes.
Takeaway – Owner’s Contract should establish a means for calculating Daily Rates for delay or suspension to manage expectations and risk.

C. “Green” – New Legislation, Regulations and Opportunities

1. Summary of Major Legislation
 - a. Federal
 - New Tax Incentives – Emergency Economic Stabilization Act of 2008 extends the production and investment tax credits TARP, (Troubled Asset Relief Program), which provides tax credits for renewable energy installations
 - Stimulus Package – ARR Bill includes \$120 billion for infrastructure work including both tax incentives and direct spending as well as bond and loan programs for renewable energy projects
 - EPA Waiver – Allows stricter California emissions standards under the Clean Air Act
 - b. California – New Green Building Standards Code
 - Stimulus Package – Mirrors Federal Plan for “shovel ready projects”.
 - New Green Building Standards Code – Major Legislation includes: California Global warming Act, (AB 32); California “Green” Building Standards Code, (Part 11 of Title 24); and SB 375, Transportation planning – sustainable communities strategy. Other “Green Bills are AB 811, AB 2804, AB 3034, SB 1754 & SJR 27.
 - AQMD Permits – Moratorium on Issuance of Certain AQMD Permits
 - c. Local – Los Angeles Green Building Program
 - Standard of Sustainability – Mandatory. Requires a LEED Accredited Professional on Professional team.
 - Standard of Sustainability Excellence – Incentive program to encourage LEED Certification

2. Takeaways

- a. "Green is here to stay and will be the new foundation for building codes – get use to it.

D. New Indemnity and Wrap-Up Rules

1. New Laws

- a. Assembly Bill 2738 – Makes unenforceable any provisions in residential only construction subcontracts entered into after January 1, 2009 to the extent that such provisions require a subcontractor to defend or indemnify a Builder or General Contractor from:

- Defect claims that arise from the Builder or GC own fault.
- Defects in design
- Defects that do not arise or relate to the scope of his subcontract

Consequences: Indemnity clauses for claims covered by wrap insurance policies are unenforceable, (See Civil Code Sec. 2782.9).

2. New Case Laws

- a. Crawford v. Weather Shield - Holds that for contracts entered into prior to January 1, 2006 that a subcontractor owes a General Contractor an immediate defense regardless of proof of negligence unless the indemnity agreement expressly disclaims such a defense obligation.

Takeaway - This ruling still applies to all non-residential construction

- b. TSI Seismic Tenant Space, Inc. v. Superior Court – A settlement within the contract liability limit when the actual liability is vastly greater is probably NOT a “good faith” settlement in the eyes of the court

Takeaway - Limitation of liability must be coupled with an agreement to be indemnified for liabilities in excess of the limit.

- c. D. H. Williams Construction, Inc. v. Clovis Unified School District – There is NO blanket rule that a subcontractor must be licensed at the time of bid submittal.

Takeaway – Must be specifically called for in Instructions to Bidders if this is what you want.

E. New Developments in Public Contracting

1. New Laws and/or New Case Law

- a. Public Contracts Project Delivery Trends

- AB 642 – Extends the authorization to use design - build contracting to all cities (Adds Code Sects. 20193 – 20195)
- CE & LS OF CA v. Caltrans – Court held that the Legislature Cannot Mandate Use of Caltrans’ Engineers for MTA HOV Lane Projects.

- b. Public Contracts

- SB 593 – Caltrans is prohibited from withholding retention
- SB 161 – If local agencies require electronically submitted bids or supporting materials they must also provide an electronic receipt to the contractor.

- AB 761 – Mandates that each state agency establish a 25 percent small business participation goal for construction of state's infrastructure financed and infrastructure-related bond proceeds and to provide information to small business to assist in the bidding process.
 - S&S Cummins Case – Affirmed statutory prompt payment requirements under Sec. 7107 of Public Contract Code.
- c. Claims
- Arntz v. City of Berkeley – Court ruled that where a local entity provides for a claim procedure in a contract, that the entity's procedure takes precedence.
 - Begl Construction v. LAUSD – Court ruled that a contractor can recover lost profits because bonding capacity was impaired during project delay.

F. Public-Private Partnerships (PPP's or "P3")

1. 2009 Legislation Removes Prior Limitations
 - Senate Bill Second Extraordinary Legislative Session 4 (SBX2 4) removes California Streets and Highway Code Sec. 143 restraints against the use of P3's and establishes a Public Infrastructure Advisory Committee, (PIAC), to act as a clearinghouse for P3 related projects

G. Additional changes in California Construction Law

1. Contract Performance
 - Murray's Iron Works v. Boyce: Defendant refused to pay Plaintiff full amount of contract claiming that Plaintiff did not use real gold leaf on iron fence. P stated that if D wanted real gold leaf, he should have specified it in contract. P won.
Takeaway – Make sure that agreement/contract is specific as to scope of work.
2. Mechanics Liens
 - T.O. IX v. Superior Court – Street Contractor filed nine Liens against the Developer's nine properties in the development each for the full amount of his claim. The Appeal Court ruled the amount of a Mechanic 's Lien is limited to the "reasonable value of the value of the labor, services equipment, or materials furnished or for the price agreed upon by the Claimant and the person with whom he or she contracted, whichever is less." This limited the amount of the Lien and allowed the Developer to bond around it at a reasonable rate.
Takeaway – Do not be greedy
3. Arbitration and Mediation
 - Lambert v. Carneghi – Court ruled that a property appraisal for insurance purposes, if disputed, is considered an Arbitration and therefore the appraisers are immune to any liability resulting from the appraisal.

4. Attorneys Fees
 - Ford Motor v. Hunsberger – Defendant is not entitled to recover attorney's fees when Plaintiff voluntarily dismisses Defendant from the action.
Takeaway – Sometimes you get stuck. Best try for a pre-litigation ADR settlement. It could be the cheapest solution.
5. Jobsite Safety
 - Madden v. Summit View - General Contractor was held NOT liable for injury to subcontractor employee because he did not contribute to the unsafe practices of the subcontractor in this case.
Takeaway – My experience tells me, do not count on this ruling. In general, GC does have a duty to manage the jobsite safety, usually through a requirement in his contract with owner.
6. Subcontractor Listing Law
 - Titan Electric v. LAUSD – A substituted subcontractor challenged the substitution hearing as “improper”. Court held that the purposes of the listing law were not circumvented since the subcontractor had failed and refused to perform.
 - H. Williams Construction, Inc. v. Clovis Unified School District – There is NO blanket rule that a subcontractor must be licensed at the time of bid submittal.
Takeaway – Must be specifically called for in Instructions to Bidders if this is what you want.
7. Differing Site Conditions
 - Condon Johnson v. Sacramento Muni. Utility District – A public owner cannot disclaim liability for site conditions different than those included in the information given to bidders.
8. California False Claims Act
 - Fassberg Construction Co. v. Housing Authority – Incorrect Records or Statements, such as weekly payroll reports or change order proposals are not considered as “False Claim”.

Author's Comments

This Summary is based primarily on presentations at construction law update seminars by Gibbs, Giden, Locher, Turner & Senet LLP, titled, “*Review Preview Seminar*” and by CMAA SCC by Kevin Collins, Esq. of Weston Benshoof Rochefort Rubalcava MacCuioosh LLP and Kyle Ostergard, Esq. of Alston & Bird LLP, titled “*Construction Law Update*”, presented earlier this year. The Author has attempted to condense the wealth of materials presented at these two excellent updates into a helpful summary, by topic, which can be used as a reference by construction managers to control their projects. Some of the seminar discussions have been simplified to emphasize the main issues. Some of the detailed Case examples presented in the seminar hand-outs have been edited and/or deleted from this summary as they deal with highly legal technicalities from Appellate Court rulings and may not be directly applicable to a CM's site control needs.