

Construction Law Focus: What is the Future of the Total Cost Claim?

One of the hottest topics in construction law today is the evolution of the law concerning "total cost" claims. In a decision that is sure to have far reaching implications, the California Supreme Court's recent ruling in *Amelco Electric v. City of Thousand Oaks* significantly impacts a contractor's ability to recover damages based on the total cost theory. Also effecting the total cost claim is the

In this issue, a series of articles examine total cost claims:

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- Total Cost Claims after the *Amelco* Decision (page 2)
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recent success owners have experienced by defending themselves against total cost claims with False Claims Act cross-complaints.

In this issue of the CMAA S. Ca. Chapter Legal & Legislative E-News, Jack Fleming provides a comprehensive look at the effect recent rulings and industry trends have had on total cost claims. In a series of related articles, Mr. Fleming examines both the current issues surrounding these claims and the implications on future construction litigation.

Evolution of Total Cost Claims and the Four-Part Test

Frequently applied to public construction projects, the total cost measure of damages awards a contractor an equitable adjustment to its contract based on the difference between the contractor's actual and originally estimated costs. A "modified" total cost measure of damages is similar but also makes adjustments for items that are the contractor's responsibility.

With the earliest reported cases involving the application of the total cost measure of damages dating back to the 1950s, it was in the 1965 case of *J.D. Hedin Construction Co. v. United States* that the Court of Claims made it clear the method was only to be used when the record showed there was not a more reasonable way to measure the contractor's damages:

"We are aware that we have on a number of occasions expressed our dislike for this method of computing breaches of contract damages, and we do not intend to condone its use as a universal rule. However, we have used this method under proper safeguards where there is no other alternative, since we recognized that the lack of certainty as to the amount of damages should not preclude recovery" (347 F.2d at 246-247).

Then in 1968 the Court of Claims established the "four-part test" to determine the validity of recovering damages under the total cost theory. Issued in the

What's Inside . . .

The CMAA S. Ca. Chapter Legal & Legislative E-Newsletter covers the latest construction law trends and issues as they relate to the CM industry, and is emailed, free of charge, to all CMAA S. Ca. Chapter members. Inside this issue:

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landmark *WRB v. United States* case, the four-part test requires the contractor to satisfy all of the following factors:

- Determining the losses with a reasonable degree of accuracy is impossible or highly impractical;
- The contractor's bid or estimate was realistic;
- The contractor's actual costs were reasonable; and
- The contractor was not responsible for the added expenses.

After a second case (*Boyajian v. United States*) reaffirmed the federally-established four-part test, use of the total cost theory became more widespread. Since the 1970s reported decisions in more than a dozen states recognize the viability of the test as the basis for determining when the total cost method of proving damages will be accepted.

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Total Cost Claims after the Amelco Decision

The California Supreme Court's recent decision in *Amelco Electric v. City of Thousand Oaks*, *supra*, regarding a contractor's ability to recover damages based on the total cost theory has caused an uproar in the construction law community. While the *Amelco* decision appears to simply conform with the majority of jurisdictions in the country by adopting the four-part test established by the federal courts (and discarding the somewhat arcane abandonment of contract theory on public works projects), the decision has, instead, thrown the law involving total cost claims into a state of turmoil.

The Amelco Decision

In *Amelco Electric v. City of Thousand Oaks*, *supra*, the City solicited bids for the construction of a Civic Arts Plaza including a civic center, a city council chamber and forum theater, and a performing arts theater. Choosing not to hire a general contractor, the City selected a construction manager and bid the project as multi-prime contracts. Amelco Electric was the successful electrical contractor and was awarded a \$6.1 million contract to perform the electrical work.

During the course of construction, the City issued 1,018 sketches to clarify or change the original contract drawings or to respond to requests for information -- 248 of which affected the electrical work. Amelco requested 221 change orders, 32 of which were agreed upon between the parties and resulted in payment to Amelco of \$1,009,728 above the contract price -- an increase of nearly 17%.

At odds with the City as to what additional monies were owed, Amelco submitted a total cost claim seeking \$2.2 million in damages for the "noncaptured costs of the change orders" claiming the numerous changes resulted in inefficiencies. The case proceeded to trial where Amelco asserted the City both breached and abandoned the contract. Initially, the jury awarded Amelco \$2,134,586 but the City appealed on grounds that a public works contract could not be abandoned as a matter of public policy -- and the California Supreme Court agreed.

The California Supreme Court concludes an abandonment of contract cause of action cannot be asserted against a public agency.

In the decision, the Court recognized that a private works contract may be impliedly abandoned when the final product differs substantially from the original, and the parties ignored or failed to follow the contract's change order procedures. However, on public works projects, the Court concluded, the abandonment of contract theory was fundamentally inconsistent with the purpose of competitive bidding statutes. Thus, an abandonment of contract cause of action cannot be asserted against a public agency because it circumvents the public contract bidding laws.

Interpretation of the Amelco Decision

By discarding the abandonment of contract theory and adopting the four-part test, the Supreme Court brought California in line with the standard established by the federal courts in determining when a total cost claim will be accepted. However, advocates for public entities contend the effects of *Amelco* are far more pervasive. It has been successfully argued that on public projects "modified" total cost claims are prohibited under *Amelco* and, since most total cost claims are presented in a modified form, this concept could have serious ramifications for contractors. In addition, under *Amelco*, a contractor failing to make a good faith effort in tracking costs of owner-directed changes as required by the contract, may jeopardize any chance of recovering additional compensation for those changes.

Advocates for contractors argue that, while barring an abandonment of contract claim on public works contracts, the *Amelco* decision still enables recovery under a total cost claim if the four-part test is satisfied.

The California Supreme Court **has** made it clear in the *Amelco* decision that public entities should be protected from unwarranted contract claims exposing them to sizeable cost overruns on construction projects. However, there remains considerable uncertainty regarding the full impact of the *Amelco* decision -- as described in the article on page 3, *A Local Court's Interpretation of the Amelco Decision*.

-- Jack W. Fleming, Partner, Musick, Peeler & Garrett LLP

Evolution of Total Cost Claims and the Four-Part Test (continued from page 1)

However, prior to the *Amelco* decision, California was not one of the jurisdictions recognizing the four-part test -- it was one of the few states recognizing an abandonment of contract theory under which the entire contract could be disregarded. Proving abandonment only requires demonstration that the project experienced excessive changes and the parties have, through their conduct, ignored the change order provisions in the contract.

A contractor asserting a total cost claim in California could merely attempt to characterize the changes as excessive and invoke a

quantum meruit measure of recovery. This cause of action was applied to both private and public projects, and, because there was no clear definition of what constituted "excessive changes," any construction project with an unusual number of changes risked being a candidate for the abandonment of contract theory.

This practice increased the popularity of the total cost approach in California and placed owners on the defensive -- until just this past year when the California Supreme Court addressed for the first time the question of

whether an abandonment of contract cause of action could be asserted against a public entity (*Amelco Electric v. City of Thousand Oaks*, *supra*). As discussed in this series of articles, this decision has changed the rules of the game in several important respects and is expected to have far reaching implications in the future regarding the viability of the total cost measure of damages.

-- Jack W. Fleming, Partner, Musick, Peeler & Garrett LLP

CMAA S. Ca. Chapter Legal & Legislative News

A Local Court's Interpretation of the Amelco Decision

While the *Amelco* decision definitely establishes usage of the four-part test for total cost claims in California, the decision is silent concerning the viability of a *modified* total cost claim. The Supreme Court's decision **did** cite a federal case where damages were awarded to a contractor based on the modified total cost theory (*Servidone Construction Corp. v. United States*) which certainly creates the impression the Supreme Court would look favorably on the viability of this measure of damages. However, as discussed below, at least one judge has interpreted *Amelco* to the contrary.

In a case which is certain to be appealed, a Los Angeles Superior Court judge has thrown out a substantial portion of a \$60 million claim which was largely based on the modified total cost theory. In addition, elements of the contractor's extra work claims -- which were not based on the total cost theory but were priced on estimates -- have also been dismissed by the same judge as a result of his interpretation of *Amelco*. These rulings, if affirmed by the Court of Appeal, may come close to eliminating the "total cost" approach as an effective method of proving damages on a public works project.

The *Dillingham-Ray Wilson v. City of Los Angeles* case arose from the expansion of the Hyperion Wastewater Treatment Plant for which Dillingham-Ray Wilson (DRW) entered into a contract with the City at a bid price of \$167.5 million. After the work was completed, DRW

filed suit against the City alleging damages of more than \$64 million due to errors in the design documents, interferences and delays caused by the City, and changes to the work which were directed by the City but not properly incorporated into change orders.

The bulk of DRW's damage claim was based on the modified total cost theory

which the City challenged asserting that DRW had not met two parts of the four-part test. The City further argued that since a contractor should not be permitted to present a modified total cost claim at trial without satisfying the four-part test, the trial judge had the responsibility of serving as a gatekeeper in determining whether any such evidence should be allowed at trial.

The trial judge granted the City's motion, and accepted all arguments. In addition to finding DRW had failed to satisfy two parts of the four-part test, the judge held that modified total cost claims are not permitted under California law. As a result, the contractor is precluded from introducing any evidence at trial involving its modified total cost claim. After the issuance of this decision, DRW filed a Petition for Writ of Mandate with the Court of Appeal which was summarily denied.

At this point, having lost the ability to pursue a total cost claim, DRW was forced to rely solely on *estimates* for the extra work in the disputed changes -- actual costs had not been separately tracked during construction. In response, the City asked the court to preclude any evidence involving cost estimates since, as established by *Amelco*, a contractor failing to comply with

contractual requirements related to tracking the costs of owner-directed changes should be barred from receiving any additional payment for those changes. (The City cited several provisions in the contract requiring separate cost tracking for any City-directed changes.)

Once again siding with the City, the trial judge stated that under the terms of the contract where change order "negotiations fail and the contractor is forced to carry out the work, the contractor must then produce the records for the actual costs of the work." The court noted that in the *Amelco* decision the "California Supreme Court has virtually imposed strict liability for the contractor where there is a failure to abide by the terms of the contract relating to change orders." The court further observed that "While *Amelco* may very well dictate that this Court grant the instant motion in limine, there can be no dispute that the effect of the ruling will provide an unjust windfall to the City."

DRW again filed a Petition for Writ of Mandate with the Court of Appeal that was summarily denied. The case is scheduled to begin trial some time later this year, and, once the trial is completed, the parties may revisit these issues before the Court of Appeal.

-- Jack W. Fleming, Partner, Musick, Peeler & Garrett LLP

A contractor's damage claim is decimated when the owner successfully seeks to bar all evidence involving estimates of costs for extra work.

Rulings in this case could eliminate the effectiveness of total cost claims on public projects.

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Total Cost Claims and the False Claims Act

While in existence for more than 100 years, only recently has the federal False Claims Act (and its progeny at the state level) impacted the construction industry. Several recent cases (for examples, see *Current California False Claims Act Litigation* on page 5) suggest a trend on the part of federal, state and local agencies to employ false claims statutes as a defense against construction claims -- particularly total cost claims.

Most frequently in the disadvantaged position in False Claims Act (FCA) cases, contractors are having to carefully evaluate whether the benefit of pursuing a total cost claim outweighs the burden of potentially having to defend an FCA claim. Contractors are also faced with the sometimes difficult decision of whether to pass through a questionable total cost claim by a subcontractor that could leave the contractor at risk for an FCA cross-complaint.

For public owners, the False Claims Act provides an offensive tool for deterring contractors from pursuing exaggerated or frivolous construction claims.

Background of the False Claims Act

Originally enacted in 1863, the federal FCA imposes liability on a person who knowingly presents or makes a false statement, or submits a false claim for payment. Initially the federal statute required a showing that the person submitting a false claim did so with the knowledge that the claim was false. However, as amended in 1986, it is now sufficient to show merely that a person acted in reckless disregard of the truth or falsity of the information comprising the claim -- no proof of a specific intent to defraud is required to establish liability. Shortly after 1986, a number of states passed their own FCAs based on the federal language -- the first state was California.

Under both federal and state FCAs, violators are liable for three times the amount of damages; a separate penalty of up to \$10,000 for each false claim; and are required to pay reasonable attorneys' fees and costs of the public agency.

The False Claims Act in the Construction Industry

In construction a false claim is typically characterized as a demand

by a contractor for payment by the government of monies that are not due and owing. However, a series of federal cases have extended the meaning of false claims to include false statements or fraudulent conduct which wrongfully induces the government to enter into a contract.

Under this interpretation courts have found FCA violations associated with bid-rigging situations, fraudulent pricing or when a contract was obtained by falsely representing the ability to perform the contract. In addition, a number of courts have found FCA violations when contractors falsely certified compliance with conditions required by the government contract or program, and in one case a contractor that front-end loaded its payment applications was held to have violated the FCA (*Young-Montenay, Inc. v. United States*).

Contractors Fight Back

In response to the increased demands and responsibilities FCA claims place on contractors, the Associated General Contractors of California is sponsoring a bill aimed at modifying the California False Claims Act and addressing the "increasing inappropriate use of false claims against contractors." AB972, which is currently pending before the California State Legislature, offers these changes to the California False Claims Act:

- As a result of a diligent investigation, the public agency must conclude there is a reasonable good faith belief that a violation of the False Claims Act has occurred; and
- The action is not in retaliation for a contractor's good faith dispute or claim.

The legislation further states that if the court finds the False Claims Act claim was filed in retaliation for a contractor's claim, the contractor shall be awarded reasonable attorneys' fees and expenses.

-- Jack W. Fleming, Partner, Musick, Peeler & Garrett LLP

Don't miss CMAA S. Ca. Chapter Events!

DATE	TIME	EVENT	TOPIC	LOCATION
May 17-19		Conference	CMAA Spring Conference	Boston
May 20	8:00 – 10:30 am	Seminar	Cost Control	The Grand, Long Beach
May 27	5:30 – 8:30 pm	Dinner	Education Night	Marriott, Downtown LA
June 17	8:00 – 10:30 am	Legal	Construction Litigation	The Grand, Long Beach
June 24	8:00 – 11:30 am	Seminar	Jobsite Dispute Resolution Boards	The Grand, Long Beach

For more information about CMAA S. Ca. Chapter events, event calendar updates, and on-line registration, please e-mail <mailto:scmmaa@pavenet.net> or go to <http://chapters.cmaanet.org/sca>.

Current California False Claims Act Litigation

Although not historically applied to the construction industry, False Claims Act (FCA) claims are increasingly being filed by federal, state and local agencies as a mechanism to deter contractors from pursuing frivolous claims. In California, several recent cases illustrate the activist approach taken by public agencies in prosecuting actions against contractors under the FCA -- following are three examples.

Tutor-Saliba-Perini J.V. v. LA County Metropolitan Transportation Authority

In this case, involving construction of the Los Angeles light rail transit system, a jury awarded the Los Angeles County Metropolitan Transportation Authority (MTA) \$29.5 million in damages based largely on a number of false claims violations.

Prevailing in its claim that virtually every progress payment application submitted by

the contractor throughout the course of the project constituted a false claim, the MTA also pinpointed numerous false statements contained in letters and other documents submitted by the contractor. Since each false statement or improper demand for payment was valued at \$10,000 under the California FCA, the total value of MTA's false claims exceeded \$20 million. Now under appeal, this case is certain to result in a published opinion.

Kajima's inability to support its "modified total cost" claim.

The City and County of San Francisco v. Tutor-Saliba Corporation

In this case, the initial lawsuit was an FCA complaint filed by the owner -- rather than a cross-complaint in response to a total cost claim. Seeking \$30 million, the City and County of San Francisco filed suit in September 2002 against Tutor-Saliba Corporation (Tutor) for damages related to seven contracts for the expansion of the San Francisco International Airport. The initial value of the seven contracts totaled \$626 million while the final value was \$984 million -- an increase of 57%. The complaint includes violations of the California FCA, the RICO statute, fraud, breach of contract and debarment.

The lawsuit accuses Tutor of the following false claims:

- Making numerous false statements regarding the legitimacy of certain MBE and WBE subcontractors;
- Directing its MBEs to submit false and fraudulent invoices to disguise payoffs;
- Falsely representing that it had deposited into an escrow account all bid documents as required by the contract;
- Submitting monthly schedules and updates that falsely represented the progress of the work;
- Submitting false payment applications;
- Submitting false change order requests; and
- Knowingly failing to list subcontractors that performed work on the airport contracts.

The complaint seeks treble damages plus award of attorneys' fees. This case is still in the early stages of discovery, no trial date has yet been set.

-- by Jack W. Fleming, Partner, Musick, Peeler & Garrett LLP

Contractor Claims FCA Cross-Complaint Violates First Amendment Rights

While the contracting community will certainly contend the jury in the MTA case ran amuck in its award, the decision has encouraged other public entities to become bolder in asserting false claims. In response, one contractor attempted to have a public agency's false claims complaint dismissed on the grounds that it was a violation of the contractor's First Amendment rights.

Kajima Engineering & Construction, Inc. v. City of Los Angeles

In this case the contractor sued the City of Los Angeles for \$35 million in damages arising from the reconstruction of the Badger Avenue Bridge for the Port of Los Angeles. The City filed a cross-complaint containing a total of 21 causes of action including 10 separate FCA violations pertaining to bid-shopping, illegal substitution of subcontractors, violation of the City's Minority Business Enterprise requirements, submission of false and inflated construction claims, and front-end loading of the contractor's payment applications.

Kajima moved to have the cross-complaint stricken citing an anti-SLAPP (strategic lawsuits against public participation) law which states that it is an abuse of the judicial process to file a lawsuit solely for the purpose of punishing an activist (in this case Kajima) by imposing litigation costs in an effort to discourage someone from exercising his or her constitutional rights.

The trial court ultimately denied Kajima's motion to strike the cross-complaint, and the Court of Appeal affirmed the ruling concluding the anti-SLAPP statute had no application since the alleged improper conduct arose from Kajima's bidding and contracting activities, not from the furtherance of a right of petition or free speech. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles*, 95 Cal. App. 4th 921 (2002).)

Key to the City's cross-complaint was an allegation that Kajima's "modified total cost" claim was a false claim under the FCA. Kajima had priced more than \$15 million of its extra work claims by subtracting its bid estimate for various work items from the total costs incurred, and applying a small credit adjustment amounting to between 10% to 15% of the overrun. Kajima was asked to provide the rationale for these adjustments but responded that no written documentation existed -- the adjustments were arrived at during the course of an informal meeting between three of Kajima's representatives. The case ultimately settled on terms favorable to the City, due in part to

Procurement of CM Services at the Local Level

Typically not subject to state procurement laws, local agencies retain relatively free reign in the selection of construction managers.

With the boom in public works construction there has been a similar increase in opportunities to provide CM services to public entities -- particularly local agencies. While the requirements that apply to State of California agencies in the procurement of CM services provide general selection standards, local public agencies have substantial autonomy in determining their selection process.

Classified as "professional services," CM services are typically procured through a competitive proposal process where selection is not based on price, but on "demonstrated competence and on professional qualifications necessary for the satisfactory performance of the services required" (California Government Code § 4526). A

common criticism of this system is that awards are left to the broad discretion of the public entity allowing very subjective decisions to be made that may be influenced by factors such as personal relationships, politics, political contributions and other factors that have little to do with which candidate presents the best "demonstrated competence and professional qualifications to do the job."

So is there a way to truly select a "professional service" provider based on qualifications rather than price? And why should local agencies make the effort to do so? What are the standards governing the procurement of CM services and do those standards establish any level of objectivity?

The Benefits of a Formal Process

Without an established process including clearly stated selection criteria, local agencies expose themselves to substantial risk. Benefits of proper documentation include an agencies increased ability to justify a selection decision should a project go bad as well as the elimination of "unsubstantiated" selections which tend to demoralize public agency staff, possibly leading to conflict between the construction manager and staff that can seriously impact the success of the project. Most importantly, public agencies can only benefit from a process that results in the selection of the most qualified construction manager — a factor public agencies are unable to control with the selection of the construction contractor.

Adopting the State's Process

Local agencies have the option of adopting the State of California's guidelines which call for the establishment of an annual prequalification process, and provides that "the agency head" evaluate proposals and conduct discussions with "no less than three firms" and select the firm deemed to be the most highly qualified to provide the services" based upon "criteria established and published by the "agency head." The selection should then be supported by written evaluations of the candidates in the event of a protest.

While not required to follow State guideline, local agencies may become liable in court should a selected construction manager not meet the criteria established in the State's code.

Adopting the State's selection process can provide extensive protection for a local agency against future litigation. The Government Code defines "construction project management services" to be "those services provided by a licensed architect, registered engineer or licensed general contractor which meet the

requirements of § 4529.5 for management and supervision of work performed on state construction projects." Although a local agency project would not be considered a "state construction project" this code has been construed to apply to local agency contracts as well. (See 78 Op.Atty.Gen.Cal. 48 (1995).) This means that while local agencies are not required to follow the State's selection process, they may

become liable in court should the selected construction manager not meet the criteria established in the State's code.

Taking it One More Step: Selecting the Best Candidate

As CM opportunities have grown, entities that previously focused solely on engineering, design or construction with little or no experience managing construction projects have "grown" construction management capabilities. At the very least, any solicitation for construction management services should require applicants to provide evidence of experience and expertise in the specific areas discussed in both Section 4525 of the Government Code which requires a construction manager to hold either an architect's license, an engineer's registration or a general contractor's license as well as Section 4529.5 which reads:

"[a]ny individual or firm proposing to provide construction project management services . . . shall provide evidence that the individual or firm and its personnel carrying out onsite responsibilities have expertise in construction project design review and evaluation, construction mobilization and supervision, bid evaluation, project scheduling, cost benefit analysis, claims review and negotiation, and general management and administration of a construction project."

Everyone Wins

Both parties — the local agencies and the construction managers — would benefit if local public agencies adopt the specific standards for the selection of the most qualified construction manager set forth in the Government Code. For the local agency, this would more accurately enable the best candidate to be selected (resulting in the best chance of success for the project) and, for the construction manager, established selection criteria go a long way in leveling the playing field during the selection process.

— G. Christian Roux, Partner, Weston, Benshoof, Rochefort, Rubalcava & MacCuish LLP

The Latest in Pending Construction-Related Legislation

Keeping CMAA members current regarding the latest rulings effecting the construction industry is a priority for the CMAA S. Ca. Chapter Legal & Legislative E-Newsletter. This month we have included summaries of the 2004 Legislative Session's pending construction-related legislation.

AB 1995 - Public Works: Prevailing Wages/Offsite Work (Cox) This bill would exempt fabrication or prefabrication work done at permanent offsite facilities of a contractor from the prevailing wage requirements on public works projects. The bill would amend the Labor Code and it will be heard in committee on March 18, 2004.

AB 2147 - Liability Insurance: Wrap-Up Policies (Kehoe) If an owner or contractor obtains a wrap-up insurance policy for a private project and requires a subcontractor to provide a credit based on an apportionment of the cost of the policy, this bill would limit the credit to no greater than the cost of a policy insuring only the subcontractor for equivalent coverage. This bill would also require an insurer, that typically sets liability insurance rates for a company by using prior claims or other information on the safety record, to also consider any work performed while covered by a wrap-up policy. Further, an insurer under a wrap-up policy would be required to report to its rating organization all information related to each covered contractor and subcontractor when it reports with respect to any named insured. The bill would add to the Insurance Code and is currently in the Committee on Insurance.

AB 2375 - Design-Contract-Build Procurement Program (Harman) This bill would establish the Design-Contract-Build Procurement Program to give state and local agencies the option of using either the design-contract-build process or the existing design-bid-build procurement process. This bill would, in part, authorize a public agency to procure any infrastructure project using the design-contract-build project delivery method in lieu of competitive bidding where appropriate. The details of the one-step or

two-step selection process used by the public agency are defined, including requirements for requests for qualifications, requests for proposal, evaluating proposals, the selection process, the posting of performance bonds, and making progress payments. This bill would add to the Public Contract Code and is currently in the Committee on Business and Professions.

AB 2375 authorizes state and local agencies to use either the design-contract-build process or the existing design-bid-build procurement process.

AB 2397- Public Contracts: Debarment and Suspension (Horton) This bill would permit a contractor to be suspended for up to 180 days or debarred for up to three years from future bidding and contracting by the Department of General Services for grounds including unsatisfactory contract performance, unwillingness to honor a binding bid or contract and multiple strikes. This bill would establish procedures and factors to be considered for debarment and suspension, and provide for an appeal to an administrative law judge. This bill would amend the Government Code and the Public Contract Code, and is currently in the Committee on Business and Professions.

AB 2589 - Works of Improvement: Disputed Amounts (Pacheco) This bill defines the term "disputed amount," (as related to retention proceeds withheld from payment on private and public works of improvement) as the greater of: A) not more than 150% of the amount paid or will be paid to repair or replace defective work; B) 100% of the amount for any mechanics lien or stop notice claim that is for work already paid to the prime contractor; or C) no more than 100% of any disputed liquidated damages. This bill would add to the Civil Code and is currently in the Committee on the Judiciary.

AB 2594 - Public Accommodations: Persons With Disabilities (Leslie) This bill would entitle a person who hires a certified access specialist to review the design and construction of the person's premises to issue a Certificate of ADA

Compliance if the specialist deems the premises in compliance with standards governing access. This bill would change existing law that authorizes a person aggrieved by violation to bring a civil action to enjoin the violation. Instead, an

aggrieved person could bring a civil action only after the person who is aggrieved notifies the premises' owner (where the certificate is clearly visible) of the violation by certified mail, and the owner has had an opportunity to both respond to and address the allegations in the notice. This bill would add to the Civil Code and is currently in the Committee on the Judiciary.

AB 2720 - Health Facilities: Seismic Safety (Laird) This bill modifies both the requirement that all plans and specifications for the alteration or construction of hospital buildings be prepared under the responsible charge of an architect or structural engineer or both, as well as the requirement that the administration of the work be under the responsible charge of the architect and structural engineer except when architectural or structural conditions are not affected -- then the plans and specifications may be prepared by and the work of construction administered by a duly qualified professional engineer. Instead, when the design, plans and specifications do not *substantially* impact the structural design or conditions, they may be prepared by and administered by a duly qualified professional engineer. This bill would

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The Latest in Pending Construction-Related Legislation *(continued from page 7)*

amend the Health and Safety Code and is currently in the Committee on Health.

AB 2806 - Payment Bonds: Notices (Wyland) This bill would delete provisions of existing law that extend the time for giving written notice of a claim on a payment bond to the surety on a public work to 75 days after the completion of work when a notice of completion is not recorded. This bill would amend the Civil Code and it is currently in the Committee on the Judiciary.

ACR 144 - Feng Shui (Yee) This resolution urges the State Architect, local planning commissions, local design review boards and other appropriate agencies to consider design concepts that allow for the use of Feng Shui. This resolution is currently in the Committee on Business and Professions.

SB 1166 – Public Works (Chesbro) This bill authorizes design professionals, defined as licensed professional engineers or licensed professional land surveyors, to obtain information regarding subsurface installations from a regional notification center when retained to perform a fixed work, geotechnical engineering, soils engineering or land surveying assignment. This bill would add to the Government Code and is currently in the Committee on Local Government.

SB 1452 - Public Contracts (Figueroa) This bill would prohibit the state from contracting with any individual or entity that employs persons or subcontractors outside of the United States in order to perform or complete that contract. This bill would add to the Public Contract Code and is currently in the Committee on Governmental Organization.

SB 1828 - Socially Responsible Business (Alarcon) This bill would declare the Legislature's intent to create a category of business to be known as the "socially responsible business" and to encourage businesses to be socially responsible. A "socially responsible business" is defined to include one that shows respect for the environment, human rights, public health and safety, the

TEA-LU Bill Extended for the Third Time

Expiring on April 30, 2004, the Transportation Equity Act for the 21st Century (TEA-21) legislation that funds highway and transit projects over the next six years has been extended by Congress for the third time. The extension through June 30, 2004, gives lawmakers more time to negotiate the next six-year bill known as the Transportation Equity Act: A Legacy For Users (TEA-LU).

Providing \$275 billion for highway and transit projects over the next six years, TEA-LU was approved by the U.S. House of Representatives by a vote of 357 to 65 on April 2, 2004.

Now pending approval by the U.S. Senate, the legislation has received a formal veto threat from the Bush Administration. Among other things, the White House objects to the overall cost of the House legislation, which exceeds the administration's transportation plan by approximately \$20 billion.

welfare of the community where it operates, its employees and its shareholders. This bill is currently in the Committee on Rules.

SB 1839 - Construction Contracts: Indemnity Agreements (Figueroa) This bill revises existing law that makes certain indemnity agreements contained in or affected by a construction contract to be void and unenforceable as against public policy to the extent they purport to indemnify the promisee against liability for damages arising from his sole negligence or willful misconduct, or that of his agents or independent contractors, including defects in design. Instead, the provision would be revised to apply to damages arising in whole or in part from the negligent or willful misconduct of the indemnitee or his agent or independent contractors that are directly or indirectly responsible to the indemnitee, as well as to agreements to defend the indemnitee. This bill would amend the Civil Code and is currently in the Committee on Judiciary.

-- G. Christian Roux, Partner, Weston, Benschhoff, Rochefort, Rubalcava & MacCuish LLP

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More Legislative News

The following additional pending legislation has been reprinted with permission from the Legislative Bulletin which is published by the California State Association of Counties (CSAC).

SB 1443

SB 1443, by Senator Kevin Murray, passed the Senate Transportation Committee and is next scheduled for the Senate Appropriations Committee. This measure would provide that all moneys in the Highway Users Tax Account in the Transportation Tax Fund and in the State Highway Account in the State Transportation Fund are continuously appropriated and may be encumbered in any year in which a Budget Act has not been enacted by July 1 for the fiscal year beginning on July 1. SB 1443 would authorize the controller to make estimates in order to implement these provisions.

Due to the loss of transportation funds in recent budget acts, which has resulted in uncertainty and instability of transportation revenue streams, it is imperative that the gas tax revenues continue to flow unimpeded. SB 1443 ensures that both the state and local portion of the gas tax monies will continue to flow in the case of a delayed budget adoption.

AB 2847

AB 2847, by Assembly Member Jenny Oropeza, is scheduled to be heard before the Assembly Transportation Committee on April 12. This measure would impose a 5-cent fee on gasoline until January 1, 2008. This is estimated to generate approximately \$180 million for every 1-cent or approximately \$900 million annually. The bill would require the revenues generated to be allocated for maintenance, operation, improvements, and construction of state highways and local streets and roads. Further, the bill would authorize expenditure for environmental programs to mitigate air impacts of motor vehicles. The bill does not contain any specific allocation formulas. While CSAC supports stabilizing transportation revenues and enhancing those revenues to meet the tremendous unmet need in transportation, the allocation of those funds in an equitable manner is critical to garner CSAC support.

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