Upcoming Events

Some exciting events to look forward to...

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<th>Date</th>
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<td>January 26, 2006</td>
<td>Construction Law Update</td>
<td>The Grand Conference Center, Long Beach</td>
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<td>February 16, 2006</td>
<td>Forget The Eichleay Formula!</td>
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<td>March 23, 2006</td>
<td>Making Mediation Work For Your Project</td>
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<td>April 20, 2006</td>
<td>Change Orders</td>
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<td>May 18, 2006</td>
<td>Mechanic’s Liens, Stop Notices and Bonds</td>
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Registration: 8:00 am  
Seminar: 8:30 – 10:30  
Admission:  
$55 Member  
$85 Non-Members  
Location: The Grand Conference Center, Long Beach

2005/2006 Legislative Session  
– Status as of November 1, 2005 Bills Relating to the Construction Industry  
By Chris Roux and Ann Taylor Weston  
Benshaft, Rochefort, Rubalcava & MacCuish

Hundreds of bills were introduced in the current legislative session. The current session convened December 6, 2004, and the legislative process began. Legislators had until February 18, 2005, to introduce bills. Bills that were passed in their house of origin by May 27, 2005, then had until September 9, 2005 to be passed in the other house. In between these deadlines policy committees met to hear and report on bills, hearings were held on the floors of both houses, and bills were amended throughout the process. Bills that were passed in both houses were then sent to the Governor. The Governor had until October 9, 2005, to sign or veto these bills. The Governor also could have taken no action on passed bills and they would have become law. Bills that become law will take effect on January 1, 2006, unless they were passed as an urgency statute. The Legislature reconvenes on January 4, 2006, and legislative process begins again.

A number of the bills that passed in both houses and were sent to the Governor during the current legislative session relate to several important construction issues. These issues include the validity of Type I indemnity clauses, labor compliance programs, extension of authority for public design-build contracting, stop notices, certified payroll information, and builders risk insurance, among others. These bills are summarized below and those that will become law will take effect January 1, 2006, unless otherwise noted.

CMAA
Southern California News
Fall 2005

On the CMAA’s website, you have a powerful resource: www.cmaanet.org. Bookmark the Construction Management Association of America’s website for standard contract documents, publications, education, and access to more than 2,500 construction management professionals.

Legal Fall 2005 V1 : CMAA Newsletter, Flat 1 of 4 - Pages: 8, 1, 11/09/05 03:26 PM
Assembly Bills

AB 57: Public Works – Prevailing Wages
The Governor vetoed this bill but consideration of his veto is pending. This bill would prohibit an employer from taking credit against prevailing wage obligations from pension or other contributions unless the employer makes the contribution on no less than a quarterly basis. This bill is substantially similar to AB 807 (Leno) Chapter 879, Statutes of 2003, and was reintroduced because it was inadvertently chaptered out by SB 868 (Dunn) Chapter 905, Statutes of 2003. This bill’s language is modeled after a federal labor regulation relating to labor standards applicable to construction contracts that are federally financed and assisted. If this bill becomes law, it will amend §1773.1 of the Labor Code. In his veto message the Governor states his belief that existing law satisfactorily affords the appropriate balance between fair compensation and flexibility for employers. He further states that this bill would arbitrarily impose timelines on employers and thus weaken the balance.

AB 239: Governor’s Budget – Services Contracts
The Governor vetoed this bill. The bill would have required the Governor to submit to the Legislature, with the Governor’s Budget, a report that contains, by agency, specified information regarding current and proposed contracts for services, including the name of the contractor and a description of the contract, the amount of funds involved, and whether the contract was a sole source procurement. This bill would have added §12025 to the Government Code.

AB 302: Architects – Reporting Requirements
This Governor signed this bill. The bill changes the reporting requirements for a civil judgment, settlement, arbitration or administrative action of $5,000 or more against an architect resulting from alleged fraud, deceit, misrepresentation, breach of contract, negligence, incompetence, or recklessness by the architect. This bill adds §§5581.1, 5582.2, 5588.3, and 5584, repeal §5589, and repeals and adds §5588 of the Business and Professions Code.

AB 316: Contractors
The Governor signed this bill. This bill, in part, clarifies the obligation of a qualifying partner, responsible managing officer, or responsible managing employee for a contractor’s license to comply with an arbitration award even if that person has notified the Contractors State License Board that he will no longer be the qualifier for that license. This bill amends §§7122.2, 7159 and 7167 and repeals §§7159.3 and 7159.4 of the Business and Professions Code and amends Civil Code §1689.7.
Legislative Highlights

AB 141: Labor Compliance Programs – Third Party Providers
The Governor signed this bill. This bill requires the awarding body on projects using funds from the 2002 and 2004 Kindergarten-University Public Education Facilities Bond Acts to initiate and enforce or contract with a third party for a labor compliance program. The third party must be independent from contractors and subcontractors performing the project as well as from construction managers that have a financial interest in the project. This bill amends Labor Code §1771.7.

AB 758: Construction Contracts – Indemnity
The Governor signed this bill. The bill may have a considerable impact on homebuilders. The bill’s main provision renders void, as a matter of public policy, the “Type I” indemnity language that most builders have included in their subcontract forms for many years. Express indemnity clauses are customarily used as a way of shifting liability risks to subcontractors. A “Type I” clause indemnifies the builder not only against liabilities arising from the subcontractor’s negligence in the performance of the work, but also from losses arising from the combined negligence of the builder and the subcontractor. (Example: Subcontractor is 1% negligent and builder is 99% negligent. Under a Type I clause, the subcontractor must still indemnify the builder for 100% of the resulting losses.) The new bill prohibits such agreements.

Residential builders who use Type I indemnity provisions and have not revised their subcontract forms as of January 1 will be issuing contracts with unenforceable indemnity provisions. With nothing to replace the unenforceable provisions, these builders will likely have no express indemnity rights. This may impact not only projects built under traditional insurance arrangements, but projects built under “wrap-up” policies as well. Wrap-ups may be affected in those situations where the loss falls within an exclusion from coverage; the loss is within the self-insured retention limit; the wrap policy has been exhausted; or the insurance carrier that issued the wrap policy has become insolvent. The new legislation applies only to contracts for “residential construction” entered into—or amended—after January 1, 2006. This bill will amend Civil Code §2728.

AB 882: School Facilities – Contracts with Architects or Structural Engineers
The Governor signed this bill. This bill requires school districts that reuse architect or structural engineer design plans and retain another certified architect or structural engineer to prepare those plans for reuse to indemnify and hold harmless the original certified architect or structural engineer from any claims arising from the reuse. This bill amends Education Code §17316.

AB 1329: Design-Build Contracting – Cities
The Governor signed this bill. This bill authorizes cities in Solano and Yolo counties to use design-build contracting until January 1, 2011. This bill adds and repeals Public Contract Code §20175.2.

AB 1511: Design-Build Contracting
The Governor vetoed this bill. This bill would have disallowed retention proceeds to exceed 10% of the progress payments until the completion proceeds exceed 5% of the progress payment. This bill would have further required that within 45 days of completion 50% of the retention proceeds could not exceed 5% of the progress payment. This bill would have amended Civil Code §3260 and added Civil Code §3260.3. In his veto message the Governor states that this bill has the potential to harm small businesses and unnecessarily intrudes into private business practices.

Senate Bills

SB 130: Works of Improvement – Stop Notices
The Governor signed this bill. This bill provides that a stop notice claimant may reduce or release a stop notice served on an owner and that any such reduction or release will not preclude service of a suit for damages.
sequent stop notices that are timely and proper. It also allows the use of a stop notice release in a form other than that currently provided in statute. This bill amends Civil Code §3262.

SB 140: Subsurface Installations
The Governor signed this bill. This bill allows excavators to use vacuum excavation devices or power tools near subsurface installations as long as there is an express written mutual agreement between the operator(s) and the excavator. Existing law requires the use of hand tools to locate underground utilities before bringing in heavy equipment. This bill amends Government Code §§4216.3 and 4216.4.

SB 224: Health Facilities – Construction Plans
The Governor signed this bill. This bill allows the Office of Statewide Health Planning and Development (OSHPD) to establish a master plan review process that would exempt multistory hospital buildings from plan review and inspection by OSHPD, when certain conditions are met, until January 1, 2009. Existing law requires OSHPD to approve or reject all plans for the construction or alteration of a hospital building with some exceptions. This bill amends Health and Safety Code §129885 and adds and repeals §§129875.2.

SB 287: Design-Build Contracting
The Governor signed this bill. This bill allows the City of Los Angeles to provide for a design-build contract for public works projects, to increase the speed and efficiency of public works projects, and to permit the City to negotiate any payment arrangements to get stop notices released. However, often the statutory waiver and release on final payment forms cannot be used to release the stop notice, because that form not only acknowledges payment in full, but also precludes any subsequent stop notice. To complicate matters, the statute prescribing the waiver and release forms says that no other form “purporting to waive, release, impair or otherwise adversely affect [such] a claim is enforceable or creates any estoppel or impairment of a claim” (Civil Code §3262(b)).

Releases of Actually Served Stop Notices Is Authorized

The amendment to Civil Code §3262 sanctifies the industry practice, by making it clear that actually served stop notices can be released to facilitate payment arrangements, and that subsequent stop notices can be served when appropriate.

The amendment adds the following language to Civil Code §3262(b): “Nothing in this section precludes a stop notice claimant from reducing the amount of, or releasing in its entirety, a stop notice that has been served upon an owner. The reduction or release of a stop notice, which shall be in writing, may be served in a form other than the forms of release set forth in this section. Any reduction or release of a stop notice: (1) shall not preclude the service of a subsequent stop notice that is timely and proper; (2) shall release the owner from any obligation to withhold money on account of the stop notice, to the extent of the reduction or release; (3) shall be effective to release the claimant’s right to enforce the stop notice, to the extent of the reduction or release; and (4) shall not operate as a release of any right that the claimant may have, other than the claimant’s right to enforce the stop notice, to the extent of the reduction or release.”

Although the amendment only refers to “owners,” it should also allow releases of stop notices served on lenders.

The procedure described by the amendment has no affect on the owner’s need to obtain from contractors and suppliers, at the time of the progress payments or final payment, the appropriate statutory form that prospectively waives and releases the right to receive stop notices. The amendment only covers the release of actually served stop notices for which the owner or lender is obligated to withhold money from the prime contractor.