

## ***Legal Issues/Construction Litigation***

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### **Licensing**

- If contractor has no license at beginning of project, cannot sue to receive payment for work performed after acquire license or for work "unrelated" to job. *Goldstein v. Barak Construction*
- If a company does not have a license, it is barred from making a claim under CSLB even if its President has several licenses. *Great West Contractors, Inc v. WSS Industrial Construction*

### **New Cases**

## **Rights of Contractors**

- General Contractors can substitute subcontractors before completion of requirements under Public Contract Code.  
*Titan v. Kemp*

**New Cases**

## **Indemnity/Insurance**

- Subcontractor's duty to defend in a standard indemnity agreement applies even if the sub is found not negligent.  
*Crawford v. Weather Shield*

**New Cases**

- Coordinate contract documents for responsibilities of each party
- Basic responsibilities remain with architect under Title 24
- Sophistication of the contractors
- Example is duty to coordinate internally on shop drawings

## **BIM Issues**

- Documentation of ongoing conditions
- Litigation issues
- Timing of documents is important
- Ability to change documents on the web based system is critical
- Tracking documents at a particular place and time

## **Electronic Web Based Documents**

- Control of documents at the end of the project
- Contractor ability to use web based posting as a tool to build claims
- Searchability of web based documents

## **Electronic Web Based Documents**

- OPSC revising certain regulations
- Hardship regulations
  - Attempt to eliminate 3 year opt out of Hardship
  - Significance of the San Bernardino Appeal
- Material Inaccuracy regulations
  - Timing of entry into contracts
  - DSA approval timing
  - Coordination of bidding with OPSC filings

## **The Current Environment at the State**

- Check on compliance with California Environmental Quality Act (CEQA)
- Make sure the District supplied materials are coordinated and scheduled
- Make sure all the property is acquired and ready for construction
- All architectural offsites are designed and ready to go
  - Local Agency approval of plans

## **Pitfalls for the CM**

- Check civil drawings carefully
- Current trend of architect delegating design authority
  - Check exterior stud wall shop drawing requirements
  - Structural steel HVAC and other opening coordination
  - Meeting all one hour requirements
  - Be wary of architects that don't do schools

## **Pitfalls for the CM**

- Deferred approvals may not even be allowed in some cases
- Changing nature of bid environment
- Non-responsibility hearings for unqualified contractors

## **Pitfalls for the CM**

- Quasi Judicial Immunity of Disputes.  
*Huber, Hunt & Nichols v. Moore* (1977) 67 Cal.App.3d 278, 299-300, 136 Cal.Rptr. 603, 616.
  - Stature as a professional with technical expertise.
  - Prominent role in the pre-construction design.
  - Relative lack of sophistication of owners
- The architect's reasons need to be articulated in writing and relatively well reasoned.

## **Claims and Close Out**

- Make sure when negotiating change orders that DSA requirements for close out are met
- CM's and Architect's job is not over until all close out is completed, don't get caught short without covering with the District
- DSA prohibition on opening new project
- Liability issue with lack of close out
  - Letter being sent by DSA to School Districts

## **Claims and Close Out**

- Addressing Poor performing contractors
  - Don't let a contractor hold the project hostage
  - Notify performance bond company
    - Follow contract procedures for default
    - Don't terminate after or near substantial completion
      - Definition of substantial completion
  - Be prepared to take away work
  - Issue with takeover of work
    - Bidding required
    - Exception with a termination for cause

## **Close Out of Projects**

- Properly document punchlist
- Proper notification and timing of taking work away
  - Photodocument final punchlist
  - Value final punchlist
- Public Contract Code Section 7107 issues with retention

## **Close Out of Projects**

- Claims procedures
  - Have a well documented claims procedure
  - Submission of back-up documentation and certification requirement
  - Mediation of claims
  - Arbitration of claims
  - Be careful of the Public Contract Code Claims Procedures
    - Attorney's fees exposure

## **Close Out of Projects**

# **Thank you for Coming**

**Atkinson, Andelson, Loya, Ruud & Romo**

For questions or comments, please contact

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# **C.A.S.H. Workshop**

## **Tuesday, September 23, 2008**

### **Advanced Concepts in Construction Management: Innovative Solutions for Your Next Project**

#### **Summary of Recent Court Decisions**

##### **Titan Electric Corporation v. Los Angeles USD and Kemp Bros Construction, Inc. - 2/19/08, California Court of Appeal, 2nd Appellate District**

Titan, a subcontractor, was replaced on a Project by Kemp, the general contractor. Titan filed a complaint claiming that the substitution was unlawful because the requirements for substitution stated in Public Contract Code Section 4107 were not fulfilled before the substitution took place. The Court concluded that the substitution was not in violation of Section 4107 because the goals of the Section were satisfied even though the requirements were completed after the substitution took place.

##### **Best Interiors Inc. v. Millie and Severson, Inc 3/12/08 - California Court of Appeals, 2<sup>nd</sup> District**

Subcontractor sued contractor, owner and building inspectors claiming that contractor failed to pay in full and inspectors hindered their work. Arbitration agreements existed in the contracts between contractor, subcontractor and owner but not inspectors. The Court upheld the lower court's decision to deny the right to arbitration to all parties pursuant to Civil Code Section 1281.2 because some triable issues were not subject to arbitration and separate proceedings might result in conflicting adjudications. The court stated that the Federal Arbitration Act did not preempt this state law.

##### **Universal By-Products, Inc. v. City of Modesto - 10/15/74 - 43 CalApp3d 145 California Court of Appeal 5<sup>th</sup> District**

City of Modesto sought bids for an exclusive contract for garbage collection. After Universal By-Products was deemed the low bidder, Modesto rejected all bids and negotiated separately with another party. Because the City reserved the right to reject all bids, the court found that its actions were permissible and rejected Universal's argument that the request for bids constituted an offer which was accepted when the bid was submitted and therefore formed a contract. The court also rejected that the City made an implied promise to consider the bids before rejecting them.

##### **Stephen L. Cooley v. The Superior Court of Los Angeles and Melissa Greenstein 6/26/06 - California Court of Appeal, 2<sup>nd</sup> District**

During the District Attorney's prosecution of Weller for vehicular manslaughter, the police department gave the DA a number of investigation reports on the accident at issue. In a separate proceeding,

Greenstein served a deposition subpoena duces tecum on nonparty DA which sought production of the reports generated by the police department as business records. The court found that Greenstein's motion to compel production should be denied because the DA cannot make the necessary attestations that must accompany the business records under Evidence Code 1561. Even though the DA held the documents, the court found that it was not the custodian of the documents under Section 1561 because the DA could not attest to the documents authenticity and trustworthiness as required by the Section.

**Anita Goldstein v. Barak Construction**  
**- 7/8/08 - California Court of Appeal, 2<sup>nd</sup> District**

Barak performed remodeling work on Goldstein's home without a contractor's license. Goldstein brought a claim under the Contractors State License Law (CSLL). The Court ruled on four issues regarding Goldstein's rights under the CSLL. First, Goldstein was granted a prejudgment attachment under Civil Procedure Section 483.010. Barak claimed that the attachment was improperly issued under this Section because the action was based upon a punitive statute and not a contract. The court allowed attachment based on the Contractors license law because "an agreement for the performance of services lies at the heart of" the CSLL claim. Second, the Court rejected Barak's argument that it should receive credit against the claim for all of the work it performed after it acquired a license. The Court declared that the CSLL is designed to protect people from unlicensed contractors at all times of the contract. Third, the Court held that the CSLL applied to services provided by Barak that were related to the contract but performed pursuant to separate oral agreements. The CSLL is designed to protect the public from all unlicensed services. Finally, the Court found that Weisz, an individual who made representations and promises on behalf of Barak, was held individually accountable under the CSLL.

**The State of California ex rel. Dennis Dockstader et al v. Beth Hamby et al**  
**4/25/08 - California Court of Appeal 4<sup>th</sup> District**

The State brought a lawsuit under the California False Claim Act (CFCA) against employees of the Los Angeles Unified School District (LAUSD) claiming that they wrongfully obtained state funds for new school construction available under the Green Act Ed Code Section 17070.10 by understating the number of classrooms available and overstating the number of students anticipated to attend. Plaintiff recognized that it could not bring a claim against LAUSD directly because it is not a "person" as required by the statute. However, Plaintiff contended that the individual employees were subject to the CFCA because they were "any natural person" as stated in the statute. The court rejected this argument and held that an individual working in his or her official capacity is not a person under the CFCA.

**Great West Contractors, Inc. v. WSS Industrial Construction Inc.**  
**4/28/08 - California Court of Appeals 2<sup>nd</sup> District**

WSS sued contractor GWC for incomplete payment for a job. GWC countered by claiming that WSS as barred from making a claim under Construction Services Licensing Law (CSLL) because it was not licensed at all times during the project. The court found that WSS's action was barred due to the CSLL even though the president of WSS held a valid license during the entire project because WSS was a corporation acting in the capacity of a contractor. The substantial compliance exception does

not apply even though the president held various contractors licenses for other entities. The court also rejected the argument that the work completed by WSS prior to receiving a license, which consisted of ordering anchor bolts and preparing shop drawings, did not constitute work under the contract.

**Cal-City Construction, Inc. v. Wilson, Elser, Moskowitz, Edelman & Dicker**  
**5/28/08 - California Court of Appeal 2<sup>nd</sup> district**

Los Angeles Unified School District refused to make progress payments to Cal-City for construction work on a project. Cal-City retained Wilson, Elser who advised them to walk off the project. Later Wilson, Elser informed Cal-City that it should not have walked off the project and it will have to settle for unfavorable terms because it did so. Cal-City sued Wilson, Elser and won damages for the settlement terms and lost profits because Wilson's negligence caused Cal-City to lose bonding capacity and forfeit projects. Wilson received a partial JNOV as to the lost future profits because Cal-City's evidence was speculative and uncertain. In general, seeking damages for lost profits on future contracts due to loss of bonding capacity is too speculative.

**Niles Freeman Equipment et al v. Ron Joseph et al**  
**3/28/08 - California Court of Appeals, 3<sup>rd</sup> District**

Niles Freeman Excavating formed a partnership with Moody Construction named NFE. Because Moody Construction was a qualified disabled veteran, NFE was certified as a California Disabled Veteran Business Enterprise (DVBE) and received preference in state contracting. An administrative Law Judge decertified NFE and suspended all parties and NFE from participating in any state contracts for 3 years. The court found that the Department had authority to suspend the entities from participating through Government Code Section 14600, and Military and veterans Code Section 999.9.

**Kirk Crawford et al v. Weather Shield Mfg. Inc.**  
**7/21/08 - U.S. Supreme Court 7/21/08**

General Contractor JMP and Subcontractor Weathershield constructed new homes and were subsequently sued by the owners for various defects in construction. JMP immediately settled but Weathershield went to trial and was found not negligent. JMP then sued Weathershield for attorney fees under the duty-to-defend provision in the contract between JMP and Weathershield. The court addressed whether a subcontractor is required to defend a developer pursuant to a duty-to-defend provision even if the subcontractor was found not negligent. The court found that the duty under the contract was imposed as soon as the suit was filed regardless of the eventual outcome of other decisions so Weathershield was responsible for attorney fees and costs.

**Murray's Iron Works, Inc. v. Phillip R. Boyce**  
**1/15/08 - California Court of Appeal 6<sup>th</sup> district**

Murray's contracted with Phillip Boyce to install ironwork in his residence. MIW finished the work and asked for full payment but Boyce refused to pay. MIW filed suit to get payment and for the two percent late payment penalty under Civil Code Section 3260.1. Boyce filed a motion for nonsuit claiming that MIW failed to show that all conditions required for performance under the contract had

occurred because they refused to fix a small problem in its work. Boyce also claimed that Civil Code Section 3260.1 did not apply to the case at bar. The court found that MIW stated a cause of action for breach because it substantially completed the project. Substantial completion occurs when the unfinished work does not impair the building as a whole and still can be used for its intended purpose. The court found that Civil Code 3260.1 did not apply because the section applies to withheld progress payments. In this case, Boyce was withholding the final payment.

**William Keith Johnson v. American Standard, Inc.**  
**4/13/08 - California Supreme Court**

Plaintiff Johnson was a HVAC technician who sued American Standard because he developed pulmonary fibrosis from working on air conditioning equipment manufactured by defendant. He claimed Defendant failed to adequately warn him of the potential hazards of being exposed to the gas in the equipment. The court, in a question of first impression, decided that California courts should adopt the sophisticated user doctrine which eliminates a manufacturer's duty to warn users for a product's potential danger when the user has specialized knowledge of the product. This doctrine applies to strict liability as well as negligent failure to warn cases and is measured by what is generally known or should have been known to the class of sophisticated users.