INSIDE THIS ISSUE:
Wide Range of Legal Issues Impact California’s Construction Industry
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The U.S. Environmental Protection Agency (EPA) has awarded CalPortland Company the National 2009 ENERGY STAR® Award for Sustained Excellence in recognition of its continued leadership in protecting our environment through energy efficiency. CalPortland’s accomplishment over five consecutive years is a feat that has never been matched by any other U.S. building materials company.
Tapping Our Legal Resources

“A man’s word is his bond” is what my father told me long before I had a true appreciation of what it meant. There is no doubt that most of us long for the days when a business transaction was sealed by a handshake, but those days are gone. Most companies now engage an attorney for anything beyond the simplest transaction because the law has become so complex and there is an ever growing propensity for litigation. Likewise, since construction projects have so many participants and there are large sums of money at risk, engaging an attorney to identify and draft the necessary contracts will, in the long run, increase the odds of delivering a successful project. This helps all parties to understand what is expected of them and how to address the inevitable issues that arise during the life cycle of the project. In short, the legal profession has become an indispensable partner to the construction industry.

From an industry perspective, we recognize that most new legislation of any significance may prompt a legal challenge from some corner, and a thorough legal analysis is important if we are to properly understand the effect of new legislation and regulations on our members. Without such an understanding, it is difficult to form an opinion or to develop a plan to deal with those impacts.

AGC of California is fortunate to have a Legal Advisory Committee (LAC) comprised of 150 dedicated construction law attorneys and firms who donate their time to address legal issues affecting our association and its members. This year’s committee chair is William Hurley of Miller, Morton, Caillat & Nevis LLP, San Jose.

Some of the services provided by the LAC include reviewing proposed legislation and regulations to assess the impact on the construction industry; holding semi-annual meetings to provide strategic guidance on significant issues; preparing amicus briefs on industry wide matters; evaluating new contract forms such as the ConsensusDOCS; supporting the Legal Hotline; hosting legal seminars; and providing assistance on matters impacting our members’ collective interest. In certain matters of national importance, such as the new CARB regulations, our chapter’s efforts are supported at the national AGC level, bringing even more expertise and resources to benefit the industry. All of these activities and more are a prime example of the services that AGC of California brings its members.

I encourage you to visit the newly updated AGC of California website and to browse the Legal Information page to discover the many services that are available to support your business. You will be pleasantly surprised at the resources offered by your association. And remember to support those firms that are bringing so much value to all of us!

It’s Good Business to do Business with an AGC Member.

Sincerely,

Bob Christenson
Press releases and legislative proposals from the Governor and Democrat and Republican legislative leaders make it clear that our political leaders have gotten the message — California must create more jobs to pull the state out of the recession.

**Governor Proposes California Jobs Initiative**

First out of the starting block in January was Governor Schwarzenegger announcing his *California Jobs Initiative* proposal, which includes a $500 million employer hiring incentive designed to keep Californians in jobs and give employers increased exibility to adapt to the changed economy. Equivalent to the state paying half the payroll tax for each new employee for a year, the Governor’s claims this initiative will result in up to 100,000 new or retained jobs created and provide training to 140,000 individuals to qualify them for better jobs.

This initiative includes a $200 million hiring incentive for employers to pay for training new employees or retraining an existing employee for a new job. Employers will be reimbursed for training expenditures through the Employment Training Panel (ETP) after the person has been gainfully employed for three months. The average reimbursement for each employee is approximately $1,400.

An additional incentive of $300 million in reimbursement funds will be available to employers for training and employing out-of-work Californians. Employers will receive $3,000 for each unemployed worker who completes ETP training and stays on the job for nine months. Together, this funding for training and new hire grants is equivalent to the state paying half the payroll tax for each new employee for a year.

The *California Jobs Initiative* is a five-step plan to create jobs and foster a more business-friendly economy. In addition to the employer hiring incentive, the Governor proposes to streamline regulations to get shovels in the ground and projects moving to create jobs; extend and expand the $10,000 homebuyer tax credit to include the purchase of new or existing homes; and eliminate sales taxes on green tech manufacturing equipment. It would also reform the legal climate for California businesses by proposing a series of changes to regulations governing class action lawsuits, product liability suits and would seek to cap punitive damage awards to eliminate frivolous lawsuits and create an atmosphere where businesses can thrive.

**Democrats Propose 27 Bill Job Creation Package**

Following the Governor, Senate President Pro Tem Darrell Steinberg released a Democratic plan consisting of 27 bills designed to create 140,000 jobs for Californians.

According to Steinberg, this bill package, called “Agenda 2010,” invests existing state and federal funds for targeted projects, expands jobs in the new economy, prepares Californians for jobs in growth industries, and provides working families with sorely needed relief. Steinberg points out that the bill package proposes to create 140,000 jobs without raising taxes or waiving any environmental, consumer, or workplace protection laws.

The California Research Bureau has concluded that a jobs package which creates 100,000 jobs creates $6.7 billion in economic activity per year, saves the General Fund approximately $2.3 billion in increased revenue and avoided costs, and results in a net increase in employment of approximately 300,000 jobs — reducing unemployment by 275,000.

Among the Democrat’s ideas are bills to:
- Streamline the business permitting process by establishing one-stop permit centers. The centers were used successfully before in the mid-1990s to help speed job creation during an economic downturn.
- Authorize the spending of federal funds and bond money for projects already on the books. One bill would let the state spend $773 million in federal bonds to build schools in 43 districts, creating an estimated 11,400 jobs.
- Fast-track renewable energy projects eligible for stimulus funds. At least 11 projects are waiting for permits from state energy agencies.

**Republicans Propose Third Jobs Package**

Senate and Assembly Republican leaders also proposed a job-creation package that could work over the long term as well as boosting employment now. Called *California Jobs First*, the Republican proposals focus on supporting economic policies that create jobs and foster small business growth.

The Republicans say that the *California Jobs First* plan will help bring jobs back to California by giving small businesses relief from irrational regulations, cutting business costs that make California uncompetitive, and cracking down on frivolous lawsuit abuse.

In announcing their plan, the Republicans cited that California has a 12.4 percent unemployment rate, translating into 2.25 million people out of work.

The *California Jobs First* plan will encompass the following principles:
- First, stop California jobs from leaving
- Restore California’s competitive job creation climate
- Cut government spending and bureaucracy in the budget
- Initiate regulatory review and relief
- End frivolous lawsuits that are a full employment act for attorneys

Bills in the Republican’s package would:
- Require a third party, such as the Legislative Analyst’s Office, to analyze bills and estimate what job losses they might cause if enacted.
- Require the state auditor to review existing regulations and recommend eliminating those that are too costly and unnecessary. The bill would also require that regulations sunset after 10 years unless they are declared necessary.
- Require the Legislative Analyst’s Office to review regulations imposed by the California Air Resources Board that cost $10 million or more to determine the regulation’s impact on employment and whether it would cause job losses.

California cannot make progress toward economic revival or fiscal stabilization with continued political gridlock. A bipartisan process can begin with passage of some of these job-creating bills that have backing from both parties and the Governor. Time is running out for California not to take job creation seriously. 

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*By Dave Ackerman*
AGC of California held its first State Board of Directors meeting of the year on January 29, 2010 at Silverado Resort in Napa. President Bob Christenson, Panattoni Construction, Inc., presided over the meeting.

President’s Scholarship
Past President Tom Foss announced the 2009 President’s Scholarship Award recipient, Michael Snider, and recognized the Associates Council for their efforts to raise the scholarship fund to $5,000. Snider is a freshman civil engineering student at the University of Southern California with an interest in the heavy civil industry.

CEO’s Report
CEO Tom Holzman reported on the association’s accomplishments for 2009, noting AGC’s successes in the legislative arena, improved communications and marketing, and the expansion of value added services. He noted that AGC will continue to move forward and expand on technology use by utilizing webinars as an educational tool tailored to construction needs. Special recognition was given to Pam Gray, Manager of Conferences & Communications, for her 25 years of service with AGC.

President’s Report
Christenson highlighted key goals for 2010 that focus on promoting affordable social networking events at district and state levels, increased participation by young professionals through the Construction Leadership Council (CLC), new enhancements to the association’s website and communication practices, and expanding value-added revenue and services.

Christenson provided a summary of Executive Committee activities that took place the day prior, including review of the 2010 Strategic and Operating Business Plan and goals and approval of the 2010 budget and financial report. In legal news, the Committee approved an amicus brief in a workers’ compensation issue, in support of Bigge Crane, as a result of the court’s aberrant ruling in the Hunt v. Bigge Crane decision. It was also approved to submit a support letter in support of Martin Brothers v. Thompson Pacific decision relating to a prompt payment issue. The Committee also received a status report on the approved amicus brief in the Harris Construction v. DOSH decision in support of Harris Construction on a safety issue. The Committee approved trustee reappointments of Don Pfluger and Jay Quetnick to serve on the California Construction Advancement Program (CCAP) Board as well as the annual Construction Industry Advancement Group (CIAG) Board of Directors for 2010, which consists of the association’s officers and CEO.

President Christenson wrapped up his report by updating state directors on the status of the AGC headquarters remodel. The renovations were nearly complete and on track with budget. He noted that there are several sponsorship opportunities available for naming rights of the conference and training rooms. An open house is scheduled on March 9, 2010 in conjunction with the Legislative Committee meeting.

Keynote Speaker – Senator Abel Maldonado
Senator Abel Maldonado, who had been nominated as Lieutenant Governor, discussed the need to increase jobs and promote private and public projects, noting $2.2 billion coming to California for high speed rail. Senator Maldonado shared his thoughts on the Open Primary Act that will appear on the June Ballot, emphasizing his support for this measure that he said would dramatically transform California as it focuses on what is right for California and not on a political party. He also reported that Governor Schwarzenegger released his new budget proposal which is geared at creating jobs. Senator Maldonado stated that if appointed as Lieutenant Governor he will look forward to chairing the Economic Development Commission and will be committed to promoting economic development in California.

AGC Education Foundation
Chair Michell Loveall of First Regional Bank reported that the Education Foundation distributed $55,000 in scholarships last year. She announced the following Construction Careers Awareness days scheduled for 2010: Los Angeles – March 26; Fresno – April 30; and Sacramento and Vallejo to be held sometime in the fall.

Membership Report
Vice President John Nunan, Unger Construction Company, reviewed the year end membership report. For 2010 the membership goal is to continue with a net gain in membership as well as reach out to the Specialty Contractors community to increase their membership and involvement. He presented the David A. McCosker membership awards to the Los Angeles District for the highest member retention and member recruitment in 2009.

Legislative Program Report
Chair Steve Blois, Valley Vista Consulting, provided an update on the status of the 2010 Legislative Program and noted that AGC is sponsoring three bills, co-sponsoring three bills, and monitoring many other legislative bills. Blois reviewed the proposed ballot measures occurring in 2010 that include the Open Primary Act, Congressional redistricting, Water Act, and Local Taxpayer and Public Transportation Act, all of which AGC recommended to support. AGC is in opposition to the California Fair Elections Act and increased business taxes that are also on the ballot.
2010 Constructor Awards Finalists Announced

AGC of California’s Awards Committee has announced the selection of 21 projects as finalists in the 23rd Annual Constructor Awards program.

Final judging will be conducted April 10, 2010, at The Fairmont, San Francisco, just prior to the 2010 Awards Banquet that evening. One winner will be selected in each of six categories. The 21 finalists selected and the categories of their achievement are:

**Excellence In Project Management – Projects Over $5 Million Or Below**
- Frank Schipper Construction Co.: “California Trails at the Santa Barbara Zoo” – Santa Barbara
- Marina Landscape, Inc.: “University Housing at Poly Canyon Village” – San Luis Obispo
- Reyes Construction, Inc.: “Sector San Francisco Shoreline Stabilization” – San Francisco

**Excellence In Project Management – Projects Over $5 Million**
- Harbison-Mahony-Higgins Builders, Inc.: “California Teachers’ Retirement System (CalSTRS) Headquarters” – West Sacramento
- Hensel Phelps Construction Co.: “San Joaquin County Administration Building” – Stockton
- Shimmick Construction Co., Inc.: “City of Soledad Wastewater Treatment Plant 5.5 MGD Expansion project” – Soledad
- Turner Construction Company: “Terranea Resort” – Rancho Palos Verdes

**Innovation In Construction Techniques Or Materials**
- Sybiont Reid: “Flume 51 Replacement” – Pollock Pines

**Contribution to the Community**
- Barnhart, Inc.: “Ronald McDonald House” – San Diego
- Panattoni Construction, Inc.: “Congregate Residence” – Sacramento
- Unger Construction Company: “Make A Wish – The Wishing Place” – Sacramento

**Meeting The Challenge Of The Difficult Job – Builder**
- Clark /McCarthy A Joint Venture: “Tom Bradley International Terminal Interior Improvements and Baggage Screening Systems Project @ LAX” – Los Angeles
- Hensel Phelps Construction Co.: “San Quentin State Prison Central Health Services Building” – San Quentin
- Unger Construction Company: “AHU #10 Replacement” – Roseville

**Meeting The Challenge Of The Difficult Job – Heavy Engineering**
- Balfour Beatty Infrastructure, Inc.: “Freeport Regional Water Project Intake Facility” – Freeport
- C.C. Myers, Inc.: “2009 Detour Tie-In Bay Bridge Roll-Out/Roll-In” – San Francisco
- Flatiron Construction: “Interstate 238 Widening” – Hayward and San Leandro
- Granite Construction Company: “Design-Build, Construction of Monument 250 Roadway and Primary Border Barrier Fence” – San Ysidro Mountains
- William P. Young Construction, Inc.: “Wolf Road Overhead Rehabilitation Project” – Sunnyvale

To register to attend the prestigious Awards Banquet, please call AGC at (916) 371-2422 or visit AGC online at www.agc-ca.org.

Wide Range of Legal Issues Impact the Industry

The *California Constructor* gives special thanks to the AGC Legal Advisory Committee, whose members prepared articles on a host of legal issues that are impacting the construction industry and your business. Additional legal articles that could not be included in this issue will be featured in upcoming months in our Legal News column.

Look for in-depth, informative articles on a variety of other legal topics in the months ahead including, among others:
- Recent Supreme Court Ruling Appears to Extend Insurance Coverage for Contractors, by Marc L. Sherman of McLennon Law Corporation. (Coming in the April issue)
- How To “Win” A Mediation: Get the Settlement You Want, by Richard A. Holderness, Seyfarth Shaw LLP.
- Transportation Funding through Public-Private Partnerships Redux; Can it Work in California? by James A. Melino, Bell, Rosenberg & Hughes LLP.
2010 – Weathering the Storm

By William P. Hurley, LAC Chair

The past year presented significant challenges to virtually every sector of our economy, none more so than to the construction industry. Unfortunately, it appears 2010 will present even greater challenges to the construction industry. Private sector projects have been reduced to a trickle. Private financing is difficult to secure. Some owners are attempting to take advantage of the scarcity of work by pitting contractor against contractor to drive prices down to close to cost. California still faces seemingly an insurmountable budget crisis and this is affecting public works. Those public works projects that do go out to bid see record number of contractors submitting bids.

During these unprecedented times, it is critical to be more vigilant than ever in evaluating and managing the risks confronting your businesses. It is in the area of risk evaluation and management that the Legal Advisory Committee (“LAC”) provides an essential service to you as members. One of the primary goals of the LAC is to educate and advise members of recent legal developments so members can attempt to steer though the legal and regulatory obstacles inherent in doing business in California. During these times when work has become scarce and margins have gotten increasingly thin, contractors must exercise greater vigilance to avoid legal missteps.

The LAC is comprised of the best construction lawyers in the state. The LAC meets on a monthly basis to discuss the legal issues confronting the construction industry. Every year, the committee assists in the preparation of the “Legal Edition” of the Constructor by submitting articles on legal issues we believe will be of interest to the members. The articles in this edition range from licensing issues to Green Building to the American Recovery and Reinvestment Act to workplace safety. The diversity of the legal issues contained in this edition reflects the myriad of challenges that confront our diverse membership.

The LAC also submits amicus briefs to the California Supreme Court on critical issues which impact the way our member do business. The purpose of the “friend of the court” brief is to ensure the Court is advised and understands the position of the AGCC on the issue(s) before the Court. Presently, the LAC is preparing to submit an amicus brief in a case involving the interpretation and application of the California prompt payment statutes (i.e. Martin Bros. v. Thompson Pacific Construction).

During these times when work has become scarce and margins have gotten increasingly thin, contractors must exercise greater vigilance to avoid legal missteps.

Other essential services provided by the LAC include presenting legal seminars to the membership and participating in other committees such as the Legislative Committee. All of the time and resources contributed by members of the LAC is done at no cost to the AGCC. The LAC members are passionate in their dedication to the AGCC and the construction industry and remain committed to providing the highest quality of legal representation and advocacy to the organization.

Please enjoy the Legal Edition of the Constructor and the contributions of your LAC members.
Bid Rigging – A Trap For The Desperate In A Down Economy

By Rosemary K. Carson and Dani T. Nguyen

Innovative and creative business practices are useful and needed in today’s economy. This is particularly the case in the competitive market of public works, where contractors’ margins seemingly no longer exist. In certain instances, however, the lines between a creative business proposition, and an illegal one, are often blurred and challenging to distinguish. Such is the case with bid rigging.

Imagine one afternoon you receive a call from a friendly competitor who proposes a plan whereby the two of you could simply “cooperate” on the next bid. On projects segregated into separate biddable stages, your competitor might suggest an agreement whereby you would bid low on one portion of the project, and your competitor on the other, thereby ensuring that each of you would secure a successful bid. Or perhaps the suggestion is to take turns being the low bidder at an agreed upon rate. To the extent you agree, you immediately become a co-conspirator with your former competitor, simultaneously committing antitrust violations.

In today’s challenging market, the lure of “cooperating” with a competitor certainly appeals, but such collaboration can quickly slide into illegal collusion, resulting in hefty civil and criminal sanctions. This article provides information on bid rigging, how to detect it, potential consequences, and why having knowledge regarding bid rigging laws is crucial to protect your business interests in an economy where desperate measures suddenly seem justified.

Bid Rigging Fundamentals

When two or more companies conspire, in advance, regarding who will submit the winning bid on a contract that should have been obtained through an otherwise confidential and competitive bidding process, illegal collusion has occurred. Typically, bid rigging occurs when co-conspirators participate in a scheme designed to solicit higher payment from a government entity, but civil bid rigging schemes are also possible.

Bid rigging is an umbrella term encompassing four basic types of collusion: (1) bid suppression, (2) complimentary bidding, (3) bid rotation, and (4) subcontract bid rigging.

1. Bid suppression occurs when one or more competitors agree to withhold from bidding, or to withdraw their bids, so that another co-conspirator can secure the winning bid without competition.

2. Complimentary bidding, also known as “cover bidding” or “courtesy bidding,” occurs when a group of co-conspirators agree to intentionally submit high bids, which likely will be rejected but still give the façade of active competition, in order to allow another co-conspirator to secure the contract.

3. Bid rotation occurs when all co-conspirators submit bids, but a predetermined rotation scheme is set in place allowing each co-conspirator to eventually secure a winning bid.

4. Subcontract bid rigging occurs when a potential competitor forgoes or withdraws its bid, after receiving a guarantee that it will be hired as a subcontractor by the prime awarded the project.

Detecting Bid Rigging

Although participants in a bid rigging scheme behave in secret, there are certain signs indicative of collusion. Pay attention to trends or common occurrences, such as a discrete group of contractors seemingly in rotation as the successful bidder on similar work. A company withdrawing its successful bid, only to become a subcontractor to the winning bidder, should raise a red flag. Also suspicious are successive bids from the same contractor, containing quotes fluctuating wildly with no apparent justification, as quotes should be fairly consistent across bids for similar work.

Bid Rigging “Justifications,” Consequences, and Penalties

Antitrust laws are a combination of California and federal laws allowing the Attorney General to bring both civil and criminal actions against businesses or individuals who engage in anti-competitive acts. See, e.g., People of State of Cal. v. Steelcase, Inc., No. BC 048830, 1993 WL 286586, at *4 (Cal. Sup. Ct. Feb. 2, 1993) (ordering the defendants to pay plaintiff $200,000 in civil penalties and $100,000 in legal costs for participating in a bid rigging scheme); People v. Santa Clara Val. Bowling Proprietors’ Ass’n, 238 Cal. App. 2d 225, 227 (1965) (granting the state almost all of the equitable relief requested in response to defendant’s bid rigging and other antitrust violations.)

Under the federal Sherman Act, an individual violation can warrant up to three years in prison and a $350,000 fine; a cor-
poration can be fined up to $10,000,000. In addition, private individuals may bring civil lawsuits against bid riggers, and, if successful, can recover up to three times their damages.

When You Suspect Bid Rigging Is Occurring

If you suspect that a competitor is involved in a bid rigging scheme and you are asked to join, first and foremost unequivocally reject the offer. Audit internal behavior – your bid team in particular – to identify signs of bid rigging and protect your company from unwanted publicity and severe criminal and civil penalties.

You can also pursue the colluding contractor through various channels. The Attorney General’s office can be contacted to provide facts and evidence to prosecute the illegal collusion. A private civil law suit can be filed against the bid rigger, requesting treble damages. The offender can be reported to the California State License Board. Depending on timing, a bid protest can be filed informing the awarding agency of the bid rigging activities. This latter option calls into question the violator’s ability to be “responsible” under California’s Public Contract Code, and possibly whether the violator should be allowed future bidding with that public entity.

Understanding the basics of bid rigging is invaluable for contractors. Tight economies can foster poor decision-making; contractors do not want to be caught unintentionally participating in a bid rigging scheme marketed as a cooperative business arrangement. More importantly, recognizing and rejecting illegal collusion agreements fosters and fulfills the intent behind public works law to ensure that tax payers receive the best value for their dollar that the construction market can offer, which ultimately helps us all.  

Rosemary K. Carson and Dani T. Nguyen are Associates with Crowell & Moring LLP, Irvine.

Calendar of Events

March 15
D.O.T. Hazardous Materials Manifesting training in Oakland

March 16
Aerial Lift/Fall Protection Awareness in Sacramento
Lockout/Tagout (Blockout) and Electrical Safety course in Sacramento
On-Center On-Screen Takeoff online course

March 16-17
Construction Quality Management Training in Sacramento

March 18
LA-OC-Riverside-San Bernardino Districts Wine Tasting at the Summit House Restaurant, Fullerton
Project Manager 1: Pre-Construction Planning in West Covina

March 19
Project Manager 2: Victorious Project Management in West Covina

March 24
OSHA 10 - Hour Construction Safety Course in Sacramento

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AUCTIONS DONE RIGHT.
California’s prompt payment statutes require, in part, general contractors to pay their subcontractors within a defined timeframe. Specifically, Public Contract Code (PCC) section 7107 requires a public agency to pay retention to its general contractors within 60 days after the date of completion. The general contractor must then pay its subcontractors their respective portion of those retention proceeds within seven days. Failure to make timely payment results in a penalty of 2% per month (in lieu of interest) on the improperly withheld amount. In addition, in an action for collection of those funds, the prevailing party is entitled to recover attorneys’ fees and costs. Similarly, Business and Professions Code (BPC) section 7108.5 requires a general contractor to pay their subcontractors no later than 10 days after receiving progress payments from the owner.

Both of these statutes include exceptions that allow contractors to hold payments longer than the statutes generally provide. PCC section 7107(e) allows a contractor to withhold a portion of the retention if a “bona fide dispute” exists between it and the subcontractor. BPC section 7108.5 allows a contractor to forego its payment requirements if it agrees to an alternative arrangement in writing with the subcontractor.

On December 14, 2009, in the case of Martin Brothers Construction Inc. v. Thompson Pacific Construction, Inc. (2009) 179 Cal. App. 4th 1401 (Martin Bros.), the California Court of Appeal examined these exceptions in detail. This case provides general contractors a safe harbor for withholding retention in connection with disputes on a public works project and provides some guidance to subcontractors on how to minimize their exposure in these situations.

By way of brief factual background, Martin Brothers Construction, Inc. (Martin) was employed by Thompson Pacific Construction, Inc. (Thompson) under two subcontracts for clearing, grading and paving work on a school project in the City of Elk Grove. The subcontracts provided for monthly progress payments of “95% of labor and materials which have been placed in final position and for which the right to payment has been properly documented pursuant to the terms of this agreement.” An addendum provided: “Subcontractor agrees that payment is not due until Subcontractor has furnished all applicable administrative documentation required by the Contract Documents and the applicable releases pursuant to Civil Code section 3262.”

Disputes arose between the parties over extra work stemming from alleged unforeseen conditions. Thompson received its last progress payment on March 15, 2004, at which time Martin still had a number of disputed claims for additional payment. Martin served a stop notice for $427,326 and the district withheld 125% of that amount from Thompson. Thompson posted a stop notice release bond and the district made its final payment in August 2004. After negotiations, it was agreed that Martin would accept the sum of $632,792 in satisfaction of all claims. Thereafter, Martin brought an action seeking only to recover its statutory late penalties, interest, and attorneys’ fees.

With regard to PCC section 7107, the Court addressed the issue of whether a dispute over change orders qualifies as a bona fide dispute under the exception and allows contractors to withhold payment. As to BPC section 7108.5, the Court addressed whether contractors can forego the prompt payment requirement of the section by agreeing to another payment schedule with the subcontractor, even if the arrangement does not establish a fixed payment schedule.

Contractor’s Right to Withhold Payment Due to Change Order Disputes

Martin claimed that Thompson had violated the prompt payment statute by improperly withholding retention payments, and consequently, it owed late payment penalties. Thompson argued that the prompt payment exception in PCC section 7107(e) applied because a bona fide dispute existed over change orders issued by Martin. Pursuant to this exception, Thompson claimed that it was authorized to withhold retention funds in the amount of 150% of the disputed change order amount. Martin counter-argued that the language of the exception and other related code sections indicated that the right to withhold retention did not apply to disputes over change orders. In its decision, the Court considered a number of arguments put forth by Martin as to why the exception did not apply and rejected each of them.

First, the Court found that the prompt payment exception was not limited to specific types of disputes. Martin claimed that the language of the section only authorized contractors to withhold retention if the dispute over payment related to specific types of disputes such as breach of contract or failure to perform. The Court found that the “bona fide dispute” requirement only requires that the contractor have a good faith belief that it does not owe a specific amount of money to the subcontractor. The Court also concluded that the subject of the dispute is immaterial to the requirement of a bona fide dispute. The Court remarked that “there is simply nothing in the language of section 7107(e) that evinces a legislative intent to limit the types of honest dispute that will justify the withholding of retainments.”

Additionally, the Court determined that contractors can withhold a portion of retention if a good faith dispute arises over change orders. Martin argued that contractors are statutorily required to release retention before change order disputes are resolved, and therefore, a dispute over change orders does not qualify as a bona fide dispute. The Court also rejected this argument and found that the language of the statutes allows general contractors to withhold retention if a bona fide dispute over change orders is pending.

Contractor’s Ability to Establish Alternative Payment Schedule

The Court also analyzed the language in BPC section 7108.5 which indicates that the
prompt payment requirement applies “unless otherwise agreed to in writing.” The Court found that this exception allows parties to agree to any type of payment arrangement, even if the alternative arrangement does not establish a fixed payment schedule. The Court found that Martin agreed to an alternative arrangement through a provision in its subcontract with Thompson that required Martin to provide all administrative documentation required by the subcontract and the applicable releases pursuant to Civil Code section 3262.

Martin argued that the language in BPC section 7108.5 only allows alternative arrangements if the arrangement establishes a fixed payment schedule. Therefore, its contractual arrangement to issue documents before receiving payment did not act to supersede the prompt payment requirements of BPC section 7108.5. The Court disagreed and found that the parties are free to alter the timing of payments as they see fit. Specifically, the Court opined that parties can devise a payment schedule that is contingent on the general contractor receiving specific documents, including documents that require conditional lien releases before payment.

**Lessons Learned from Martin Bros. Decision**

Through its ruling in *Martin Bros.*, the Court clarifies some of the requirements of California’s prompt payment statutory scheme. Prior to the Court’s decision, many builders interpreted the penalty provisions of the prompt payment statutes to restrict withholding to the amount of claims asserted for additional costs. However, the Court determined that permissible withholding encompasses any good faith dispute between the general contractor and subcontractor. Specifically, contractors can withhold retention payments based on disputed change orders. However, contractors still must show that: (1) a bona fide, good faith dispute exists; and (2) the withheld retention does not exceed 150% of the estimated value of the dispute. Contractors can forego the prompt payment requirements of BPC section 7108.5 if they agree in writing with the subcontractor to establish an alternative payment schedule, even if a fixed schedule is not set. With this decision, both general contractors and subcontractors must be careful regarding what progress payment terms they accept in a subcontract because courts may uphold language that alters or completely opts out of the prompt payment provisions of the BPC section 7108.5.

The *Martin Bros.* decision offers guidance as to the protections contractors can receive from the penalties of the prompt payment statutes. Nevertheless, contractors must remain vigilant and strictly follow the requirements of the statutes in order to avoid the harsh penalties that will be levied against careless contractors. Subcontractors, on the other hand, must carefully review the progress payment terms in their contracts to ensure they do not give up their all of their late payment penalty rights.

Mary A. Salamone and Stephen M. McLoughlin are with Atkinson, Andelson, Loya, Ruud & Romo, Irvine.
Improper Post-Award Contract Price Negotiations Under Threat of ‘Termination For Convenience’

By Daniel F. McLennon

(Part 1, Private Works)

In this tough economic climate, with contractors vying for the little construction work available and driving down construction costs, owners have been tempted to threaten “termination for convenience” to force contractors to “renegotiate” the contract price after the contract has been entered, and even after construction has started. Some owners have succumbed to this temptation and extracted price concessions from contractors. Is this practice legal in California, or does it expose the owner (or general contractor who obtains concessions from subcontractors) to liability for damages?

In private works, threatening termination for convenience to obtain post-contract price concessions may breach the covenant of good faith and fair dealing, implied in every contract, and subject the breaching party to liability to pay the injured party the benefit of the bargain he originally struck.

In private works, threatening termination for convenience to obtain post-contract price concessions may breach the covenant of good faith and fair dealing, implied in every contract, and subject the breaching party to liability to pay the injured party the benefit of the bargain he originally struck.

First, the trial court found that CB Flooring had not materially breached the subcontract, and therefore, Questar could not terminate CB Flooring for cause. Next, the trial court rejected Questar’s contention that it enjoyed a right to terminate the subcontract for any reason. The court considered and rejected Questar’s claim that its subjective loss of faith in CB Flooring’s ability to perform satisfactorily “or for the agreed upon price” satisfied whatever implied limitations there might be on the exercise of the termination for convenience clause.

On review, the Court of Appeals considered in detail the development of the laws supporting the right to terminate for convenience and noted that the case law supporting the broad right of termination in federal contracts is of limited value when interpreting a contract between private parties. For political reasons, the federal government stands in a position entirely incomparable to that of a private person.

The court noted that under Maryland law illusory contracts are unenforceable, and an “illusory promise” appears to be a promise but it does not actually bind or obligate the promisor to do anything. A promise is illusory if the promisor retains an unlimited right to decide later the nature or extent of his performance. The courts prefer a construction of a contract that will make it effective rather than illusory or unenforceable. The Maryland court observed that the implied obligation to act in good faith and deal fairly with the other party governs the manner in which a party may exercise discretion accorded to it by the terms of an agreement. “Thus, a party

Misuse of the “Termination for Convenience” Clause in Maryland

In Questar Builders, Inc. v. CB Flooring, LLC (“Questar”) (Case # 153, September term, 2008, filed August 25, 2009), the Court of Appeals of Maryland – Maryland’s highest court – upheld the rule that “termination for convenience” clauses may be enforceable, subject to an implied obligation to exercise the right to terminate in good faith and in accordance with fair dealing. In that case, the trial court concluded that Questar improperly terminated its subcontract with CB Flooring, LLC (“CB Flooring”) and awarded more than $243,000 in damages to CB Flooring to compensate it for the profits it would have made on the contract.
to the ultimate issue of whether Questar breached the subcontract by not exercising in good faith its discretion to terminate the subcontract for convenience.

The Good Faith Requirement in California

California law in this area is expressed in language similar to that in Maryland.

• "In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract; however, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract."1

• "There is an implied covenant of good faith and fair dealing, implied by law in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement."2

• "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The covenant thus cannot be endowed with an existence independent of its contractual underpinnings. It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement."3

While California has yet to address good faith and fair dealing limits on exercise of the right to terminate for convenience, conditions are undoubtedly ripe for a test case to arise. As in Maryland, California probably will find that bad faith termination for convenience will support a terminated party's claim for loss of profits damages. Moreover, wrongful threats to terminate for convenience to leverage price concessions may also be actionable. 

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1  CACI 325: Breach of Covenant of Good Faith and Fair Dealing—Essential Factual Elements
2  (Comunale v. Traders & General Ins. Co. (1958) 50 Cal.2d 654, 658 internal citation omitted.)
Voluntary green building measures have become increasingly popular in California, and even world wide, over the last several decades. Beginning with rudimentary measures, such as installing weather stripping or retrofit insulation, and more recently with sophisticated protocols such as the Leadership in Energy and Environmental Design (LEED) certification, building owners large and small have progressively committed to minimizing their projects’ environmental impact. Some are motivated from a sense of ethical obligation, others by pecuniary concerns such as energy costs or tax breaks. But such individual incentives are becoming irrelevant. Starting this year, California has for the first time imposed mandatory statewide green building measures as part of the recently enacted California Green Building Standards Code, referred to as “CalGreen.”

CalGreen is administered as Part 11 of the California Building Code, in Title 24 of the California Code of Regulation. However, unlike the rest of the Building Code, which primarily addresses safety concerns, CalGreen’s priority is conserving resources and minimizing pollutants. The latest draft mandates green construction, such as plumbing with a 20% reduction in water flow, recycling of 50 percent of construction waste, and use of low “volatile organic chemical” (VOC) paint, carpet and flooring. Green Days Are Here

The 2008 version of CalGreen, currently in effect, was the first to include mandatory measures, though most of its provisions are voluntary. Whether a particular provision is mandatory depends on the type of occupancy and the governing agency with authority for that occupancy. The identification of mandatory measures for each agency and the effective dates are reflected in an “Application Matrix” at the end of the code. In the 2008 version, the mandatory measures apply only to low-rise residential structures governed by the Department of Housing and Community Development.

The first of these measures became effective on January 1, 2010, governing site development, energy efficiency, construction waste and indoor environmental quality. The provisions addressing residential water use do not become effective until July 1, 2011, although the later version of CalGreen may accelerate this date. Since August 1, 2009, local jurisdictions have been free to adopt components of CalGreen by mandatory ordinance. Local jurisdictions are also entitled to adopt more stringent measures, including LEED standards, and many have done so.

The 2010 version of CalGreen was recently approved by the California Building Standards Commission, the executive agency responsible for administering the Building Code. Its mandatory provisions are much farther reaching in scope and effect than the prior version. All of the responsible agencies have adopted at least some of the mandatory provisions. All of the provisions that have been adopted as mandatory are scheduled to take effect January 1, 2011. Like the earlier version, local jurisdictions can adopt stricter standards.

Save the Water, Clear the Air

CalGreen encompasses five distinct “green” areas: (1) Planning and Design; (2) Energy Efficiency; (3) Water Efficiency and Conservation; (4) Material Conservation and Resources Efficiency; and (5) Environmental Quality.

Planning and Design addresses the necessary approaches at the outset of a project, such as development of proper storm water drainage and retention. Energy Efficiency covers a variety of areas, such as the building envelope, “Energy Star” appliances, HVAC design, and use of renewable energy. Water Efficiency and Conservation regulates indoor water use, including installation of meters and reduced ow plumbing, as well as outdoor water use and recycled/gray water systems. Material Conservation and Resource Efficiency focuses on reducing job site waste, such as using local and recycled materials, and recycling of jobsite waste. Environmental Quality covers the reduction of air contaminants such a VOC’s in paint and fiberboard, and also mandates proper ventilation to minimize such pollutants.

CalGreen Is Not LEED

CalGreen is structured similarly to LEED standards, encompassing several distinct aspects of the building process, components and functions. Compliance with all of CalGreen’s provisions, both mandatory and voluntary, is roughly equivalent to a LEED “Silver Rating.” That said, CalGreen is fundamentally different from LEED. CalGreen is a legal requirement, enforced by the state. LEED, on the other hand, is a privately developed standard, administered by a non-profit entity, the United States Green Building Council (USGBC). LEED standards only become project requirements if they are specified by contract, and they are enforced through contract provisions, which typically provide for third-party verification. Private LEED certification is verified based on the design documents, whereas compliance with CalGreen and more stringent ordinances is approved through on-site inspection.

These differences will make compliance particularly challenging for projects in local jurisdictions that require LEED certification (such as Los Angeles and San Francisco). On those projects, contractors will have to comply with both CalGreen and LEED requirements. Where those requirements conflict, they will have to determine which is “more stringent” and comply with that requirement.
Make Your Contracts Green

Contract terms and conditions allocating risk may ultimately need to be modified to address special issues posed by CalGreen. For example, one of the primary benefits owners will expect from green construction requirements are the energy and water cost savings they anticipate over the life of the building. Unless the contract says otherwise, design professionals or contractors that breach those requirements will be potentially liable for the cost savings owners can show they would have enjoyed but for the breach. Since these will usually be both substantial and difficult to prove, owners may push to cover them in liquidated damages provisions, while design professional and contractors may seek to exclude or limit recovery through limitation of liability provisions.

A Template for the Future

The 2010 CalGreen contains a number of sections in the mandatory provisions that are “reserved” for future regulation. These range from deconstruction and reuse of existing structures to mandating efficient framing techniques. There is also still a large section that is entirely voluntary for both residential and non-residential structures. If the evolution of the code from its 2008 version to the 2010 version is any guide, it is likely that many of these voluntary provisions will become mandatory in future versions of CalGreen.

California continues to lead the nation and the world on these environmental issues. CalGreen is not only building on itself with each successive version, but also serving as a global vanguard for green construction laws. The International Code Council has announced it is developing a new code for commercial buildings entitled the “International Green Construction Code,” and will use the current CalGreen code as a key reference document. A committee of experts, including David Walls of the California Building Standards Commission, is currently meeting to draft this International Green Construction Code and present it for public comment.

Green construction is no longer just a trend, it is now an integral component of building practices in California. Contractors need to be prepared for the CalGreen of today and anticipate the CalGreen of tomorrow in order to avoid the pitfalls of these new requirements and to seize the opportunities that they provide.

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The Disgorgement Penalty – Another Warning to Maintain Proper Licensure

By Candace L. Matson

As AGC members know, California law requires that any person engaged as a contractor, or that acts in the capacity of a contractor, must be properly licensed by the Contractors State License Board (“CSLB”). Harsh penalties may be assessed against an unlicensed contractor for performing work in California requiring a license. An unlicensed contractor may be subject to both civil and criminal penalties. In addition, an unlicensed contractor may be assessed against an unlicensed contractor for performing work in California.

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Warning to Maintain Proper Licensure

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As AGC members know, California law requires that any person engaged as a contractor, or that acts in the capacity of a contractor, must be properly licensed by the Contractors State License Board (“CSLB”). Harsh penalties may be assessed against an unlicensed contractor for performing work in California requiring a license. An unlicensed contractor may be subject to both civil and criminal penalties. In addition, an unlicensed contractor may be assessed against an unlicensed contractor for performing work in California requiring a license: “A person who utilizes the services of an unlicensed contractor may bring an action . . . to recover all compensation paid to the unlicensed contractor for performance of any act or contract.” There is little case law interpreting the so-called “disgorgement” penalty since its adoption by the state legislature is relatively recent. The four opinions published to date are discussed below, and illustrate how even nominally licensed contractors can find themselves subject to this penalty.

In the first case, Wright v. Issak, 149 Cal. App. 4th 1116 (2007), a contractor sued two homeowners for unpaid compensation in connection with a home remodeling project. The homeowners cross-complained against the contractor seeking, among other things, the return of all amounts they had paid him on the ground that he did not have a valid contractor’s license. Although the contractor did hold a California contractor’s license, he grossly underreported his payroll to the State Compensation Insurance Fund and never obtained workers’ compensation for his crew on the project. The court held that the contractor’s license was automatically suspended for his failure to obtain workers’ compensation insurance for his employees. The court rejected the contractor’s argument that such suspension could not take effect until the contractor received a notice of suspension from the registrar of contractors. Because the contractor failed to properly report his payroll and obtain insurance for his workers, the contractor was found to be not properly licensed. Thus, the homeowners were entitled to recover all amounts they had paid to the contractor (as well as other damages).

In Goldstein v. Barak Construction, 164 Cal. App. 4th 845 (2008), homeowners entered into a contract to remodel their home in June 2004. The contractor began work on the project right away but did not obtain a contractor’s license for the first time until September 2004. The contractor eventually abandoned the project prior to completion. Homeowners then filed suit, seeking a writ of attachment against the contractor for the full amount they had paid it, plus attorneys’ fees and costs. The writ was granted by the trial court and upheld by the appellate court. The courts rejected the contractor’s contention that the amount of the attachment was excessive because most of the $362,629 it was paid had been paid, in turn, to laborers and material suppliers for the project. Though the appellate court recognized the draconian nature of the recoupment action, it held that the Contractors License Law allows recovery of all compensation paid to the unlicensed contractor, regardless of whether any portion of such amount is paid to others. Also, the court rejected the contention that the amount of the attachment should be reduced by the amount earned by the contractor after it became licensed. The court reiterated that to be entitled to retain compensation for its work on a project, a contractor must be licensed at all times during which it performs the work.

The most recent disgorgement case is White v. Cridlebaugh, 178 Cal. App. 4th 506 (2009). The Whites retained a contractor to build a log cabin. Due to various concerns, the Whites terminated the construction contract. The parties filed complaints against one another, the contractor to foreclose on its mechanic’s lien, among other things, and the homeowners to recover disgorgement of amounts paid. On appeal, one issue which the court considered was whether the Whites properly brought a claim for disgorgement. The appellate court
concluded that the contractor was not validly licensed because the responsible managing officer was not actively engaged in the business and had appointed another (unlicensed) individual to oversee the "dealings and daily work" of the contractor; therefore its license was suspended by operation of law. Under such circumstance the court held disgorgement was authorized. The court further considered "whether the recovery of compensation authorized by section 7031(b) [may] be reduced by offsets for materials and service provided or by claims for indemnity and contribution." The court concluded that it may not be so reduced, and that under the express terms of the statute, "unlicensed contractors are required to return all compensation received without reductions or offsets for the value of the materials or services provided." The cases discussed above make it clear that disgorgement under Section 7031(b) is a penalty against unlicensed contractors that has been accepted by the courts despite its draconian nature. These cases are especially instructive because several involve a scenario where the contractor was or had been licensed, but lost its licensure by operation of law due to its failure to comply fully with license law requirements. Even the most prudent AGC members are vulnerable to losing their license status due to glitches in renewal, RME/RMO status, or re-structuring. The lesson is clear: be ever diligent in maintaining proper licensure at all times. 

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Notes:
2 See, e.g., Cal. Bus. & Prof. Code § 7027.3 (one year imprisonment and/or $10,000 fine for intentional use of another person's license with intent to defraud), Cal. Bus. & Prof. Code § 7028 (contracting without a license is a misdemeanor; penalties range from fines of $5,000 to $10,000 or more and/or county jail time between 90 days and one year), Cal. Bus. & Prof. Code § 7028.7 (CSLB citation and fine of $200-$15,000), Cal. Bus. & Prof. Code § 7117 (CSLB disciplinary action); and Cal. Lab. Code §§ 1001-1023 (civil penalty of $200/day per employee performing work for an unlicensed contractor).
4 Cal. Bus. & Prof. Code § 7031(b).
5 The court cited Business & Professions Code section 7125.2 as the basis for the suspension.
6 The disassociation notice was issued in accordance with the provisions of section 7016 of the California Business & Professions Code which provides that "a partnership license shall be canceled upon the disassociation of a general partner or upon the dissolution of the partnership..." The remaining general partner or partners may apply to the CSLB for a license to complete projects contracted for or in progress prior to the date of disassociation or dissolution for a reasonable length of time...
7 Substantial compliance with the licensing law may be shown where a contractor had been duly licensed prior to performing the work, (i) acted reasonably and in good faith to maintain licensure, (ii) did not know and reasonably could not have known it was not duly licensed prior to performing the work, and (iii) acted promptly and in good faith to reinstate its license upon learning of its invalidity. Cal. Bus. & Prof. Code § 7031(b); see also MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc., 36 Cal. 4th 412 (2005).

Appeals Court Ruling Upholds Broad Liability Subsidence Exclusion

By Robert G. Mahan, Esq.

In November 2009 the CA 4th District Court of Appeals upheld the broad subsidence exclusionary language contained in the City of Carlsbad’s primary and excess liability policies issued by the Insurance Company of the State of Pennsylvania (ISOP), an AIG company. City of Carlsbad v. Insurance Co. of the State of Pa., 180 Cal.App.4th 176

The City of Carlsbad was sued when a hillside collapsed due to the negligent maintenance of a city fire hydrant and waterline. The landslide seriously damaged an adjacent condominium development, causing both bodily injury and property damage claims.

The ISOP policy contained a broad subsidence exclusion stating (ISOP) will not defend or pay under this policy for claims or suits against you for property damage arising out of land subsidence for any reason whatsoever. The policy defined "land subsidence" as follows: "Land subsidence means the movement of land or earth, including, but not limited to, sinking or settling of land, earth movement, earth expansion and/or contraction, landslide, slipping, falling away, caving in, eroding, earth sinking, and earth rising or shifting or tilting."

After the trial court upheld ISOP’s motion for summary judgment, the City appealed, alleging the exclusion did not apply to the facts of the case. The appeals court disagreed with all of the arguments of the City, emphasizing plainly and precisely that the peril of land subsidence, including landslides, was not covered, regardless of the cause.

The author has twice warned in earlier Constructor issues that the subsidence exclusionary endorsement attached to many Commercial General Liability and Excess policies is unacceptable. Originally, the exclusion applied only to completed operations property damage and was limited to subsidence generally caused by foundation failures. Many construction insurance carriers have extended the subsidence exclusion into an absolute earth movement exclusion including landslide and earthquake. Some limit the exclusion to property damage, but most extend the exclusion to bodily injury.

Why the big concern for most contractors? • Any earthquake induced bodily injury or property damage is excluded. If structural failure occurs arising out of construction defects, there is no coverage for the resulting damage. • There is no coverage for landslides, however they are caused. • There is no coverage for bodily injury arising out of a trench collapse on an ongoing job. Such is patently unfair for any earth moving contractors, but the carriers are indifferent to their plight.

There are possible coverage problems arising out of equipment upset. Many subcontractors will most likely have this exclusion endorsed on their liability policies.

What can you do to or mitigate the problem? • Request that the exclusion be deleted; many carriers will delete on request for no charge. Offer to pay extra premium to remove the exclusion, if needed. • Use a different insurer. Many A rated insurers don’t exclude subsidence.

• Ensure the exclusion is removed from both primary and excess policies. • Require your sub to disclose the existence of a subsidence exclusionary endorsement. The AGC Standard Form subcontract requires subsidence coverage.

• If the exclusion can’t be deleted, obtain a side letter from the insurer limiting the areas where the exclusion applies.

• Only work with insurance brokers who are construction savvy.

• Lastly, don’t accept coverage based on price alone. Brokers don’t have to act as pure order takers, accepting a carrier’s offering and passing it on to their clients. It is their duty to get the broadest cover at an acceptable price. Most construction liability policies today have numerous exclusionary endorsements, such as subsidence, which can catch contractors by surprise, especially after a loss occurs. Contractors need to understand that not all insurance policies are created equal and should be wary of the "devil in the details" when purchasing coverage.

Robert G. Mahan, Esq. is managing member of Mahan Insurance Brokers LLC in Tustin. He drafted most of the insurance provisions in the AGCC Standard Form Contracts. He can be reached at bob@mahaninsurance.com.
Employer On Multi-Employer Worksite Has Duty To Warn Other Companies’ Employees

By James S. Brown and Marilyn Klinger

In Miguel Suarez, et al. v. Pacific Northstar Mechanical, Inc., 180 Cal.App.4th 430 (2009), a California court of appeal ruled that a subcontractor had a statutory duty of care, created by workplace safety statutes and regulations, to report hazards that could injure its employees or the employees of other contractors on the project. A failure to meet that duty of care could make the subcontractor liable to another contractor’s employee who is injured as a result of that hazard.

During the course of the project, an employee of a subcontractor received an electrical shock from an ungrounded fixture – and I-bolt on the ceiling – but only received minor injuries. He reported it to his foreman, but no one from the subcontractor reported the incident to the general contractor or the project owner. A few weeks later, two employees of the general contractor, one on a ladder and the other below, suffered injuries when the employee on the ladder grabbed the I-bolt, received an electrical shock, fell off the ladder, and landed on the other employee.

The Litigation

The general contractor’s injured employees sued the subcontractor alleging negligence. The employees did not name the general contractor, their employer, because of workers’ compensation exclusivity. The claims against the subcontractor were premised on the theory that, although the subcontractor was aware of the hazard, it failed to report it to other contractors or the property owner.

The subcontractor brought a summary judgment motion requesting dismissal of the claims arguing it did not own, lease, occupy, or control the property where the accident occurred; its work did not create the hazardous condition; its scope of work did not include the inspection of or work on the ungrounded fixture; and it did not work on or use the ungrounded fixture. The trial court granted that summary judgment, and the two employees appealed. The court of appeal overturned the summary judgment.

The Court of Appeal’s Analysis

Under “common law tort principles,” in order to bring a negligence action, the plaintiff must establish a legal duty of care toward the plaintiff, a breach of that duty, and a resulting injury. The employees unsuccessfully argued that the subcontractor’s actual knowledge of the hazardous conditions created the duty to inform others on the project.

The court of appeal also rejected the employees’ argument that the “no duty to aid” rule did not apply, arguing that the subcontractor’s knowledge of the hazardous condition did not create a “special relationship,” an exception to the “no duty to aid” rule. The “no duty to aid” rule provides that a person has no duty to come to the aid of another if the person did not create the peril at hand.

The employees also argued that the subcontractor required the subcontractor to take precautions against any conditions created during the progress of the work which involved a risk of bodily harm to others, and further required the subcontractor to continuously inspect the work and all “facilities” that it used in performing its work so as to discover any such conditions. The court of appeal rejected that argument as well, because the “conditions” that injured the employees were not created during the progress of the subcontractor’s work or with facilities that it used in performing its work.

The Winning Argument

The court of appeal did agree with the employees on their Cal-Osha argument. Cal-Osha requires all employers to furnish a place of employment “that is safe and healthful for the employees therein.” Specifically, on multi-employer work sites, Cal-Osha can issue citations for violations when there is evidence that “an employee” was exposed to a covered hazard and that citation is against “the employer whose employees were exposed to the hazard (the exposing employer).”

The subcontractor’s employee that originally suffered a minor injury qualified the subcontractor as an “exposing employer” under Cal-Osha. Rejecting the subcontractor’s argument that the rule applied only to its employees, the court of appeal found that the statute refers to citations being issued when “an” employee, not “their” employee, is exposed, actually rejecting the idea that the Cal-Osha provisions be interpreted so narrowly that the subcontractor had no duty to protect employees other than its own from exposure to work site hazards.

Finally, the court of appeal noted that the legislature intended “to increase significantly the sanctions available against those in control of workplace safety” and “change existing law to make [Cal-Osha] statutes and regulations…admissible in personal injury and wrongful death lawsuits so that litigants in these actions could use these provisions as standards for determining negligence…”

As a result, the court of appeal concluded that these Cal-Osha provisions “impose a duty on each employer, at a multi-employer work site, to report all non-obvious hazards about which the employer learns because its employees were exposed to them during the course of their work, even if the employer in question did not create the hazard.”

The Lesson

It is imperative for all contractors on a project to assure that any and all Cal-Osha safety requirements are met and to report any and all hazards to the appropriate party to assure that the hazards are immediately corrected, even if the area of construction is not within the contractor’s purview and it is not within the contractor’s power to eliminate the hazard. It is further the contractor’s duty who knows about the hazard to take whatever steps it can to assure that no employees, its own or others, subject them-
new extended labor agreement is June 30, 2011. Additionally, the parties verbally agreed to reactivate the Iron Workers Geographic & Marketing Committee to address competitive issues for the parties. More changes or modifications may prove to have been better, but a one-year economic freeze is a significant accommodation in the positive direction to assist the job opportunities during these challenging times for both the signatory employers and the Union’s membership.

Between the Northern California and Southern California IR Departments, nine more stand alone Master Labor Agreements will be negotiated in 2010 on behalf of the AGC membership and the industry. In this challenging environment, management and labor must stand and work together on the basis of communication, integrity, and transparency to ensure that our partnerships, the Master Labor Agreements, are in the best competitive position for today and for when the recovery does take place.

As the reports keep coming in . . . the economic downturn continues for the nation. In January, AGC of America reported that every state lost construction jobs for the first time since the start of the economic downturn and that California has lost more construction jobs (116,100) than any other state during the past year. “There’s nowhere for construction workers to turn for relief from job losses and hardship,” Ken Simonson, the AGC’s chief economist, was quoted as saying.

With this in mind, the AGC Industrial Relation Departments, in conjunction with the California Ironworker Employers Council, met on January 27, 2010, with the District Council of Iron Workers over negotiations for a new successor labor agreement. During the course of the discussions, a tentative settlement agreement was reached.

In short summary, the settlement agreement calls for a new one-year extension of the current 2007-2010 Master Labor Agreement without any changes or modifications to the language and without any increases (freeze) to wages or fringe benefits at the 2009-2010 rates. The expiration date of this new extended labor agreement is June 30, 2011. Additionally, the parties verbally agreed to reactivate the Iron Workers Geographic & Marketing Committee to address competitive issues for the parties. More changes or modifications may prove to have been better, but a one-year economic freeze is a significant accommodation in the positive direction to assist the job opportunities during these challenging times for both the signatory employers and the Union’s membership.

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Employer On Multi-Employer Worksite . . .

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selves to the hazard. A failure to do so does not just subject the contractor to Cal-OSHA enforcement mechanisms and penalties, but it also exposes the contractor to civil liability to any employee on the project injured as a result of the unreported hazard.

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Building Directors Discuss Market Trends, Hear From DGS Officials During First Division Meeting of 2010

Chair Jon Ball, Hensel Phelps Construction Co., led the Building Division’s first meeting of 2010 on January 28.

New Regulations, New Projects 2010
Eric Mandell, Chief of the California Office of Small Business and Disabled Veterans for the Department of General Services (DGS), spoke on the numerous issues relating to how to do business with California state government. The five step process he outlined includes: 1) registering a business; 2) becoming a California Certified Small Business or Disabled Veteran Business Enterprise; 3) using the California State Contracts Register; 4) looking into becoming a California multiple award schedules contractor; and 5) how to market a business to state agencies. Mandell stated that the DGS continues to recruit new businesses and noted that recently passed legislation (AB 31) has allowed the threshold of contracts awarded to be raised to $250,000.

Bob Courtmier, Assistant Deputy Director DGS Real Estate Services Division, spoke on the tremendous downturn in awarding of contracts that the DGS is currently experiencing. There are 350 projects ready to proceed if funding were available. Some potential funding alternatives the DGS is looking at are public-private partnerships (P3), design-build and lease–lease back.

Division Directors agreed to form a subcommittee to interface with the DGS focused on funding opportunities in today’s construction market.

BIM and Future Trends
Viktor Bullain, manager, Virtual Design and Construction (VDC) at Turner Construction, addressed several items on Building Information Modeling (BIM) that included when to initiate BIM, how 3D models are used in pre-construction, constructability review, model based quantity takeoff, 2D versus 3D coordination, design fabrication, constructability and safety, risks of BIM, and turnover and facilities management.

Design-Build Legislation for 2010
AGC advocate Dave Ackerman discussed AB 1717, a bill that would allow county government to use design-build contracting. He went through the new four-step design-build method, which the Building Division will review and report back with proposed action items.

AIA / AGC of California Update
Dave Higgins, Harbison-Mahony-Higgins Builders, gave a detailed presentation on the Center for Innovation in Design and Construction and its organizational structure that consists of AGC of California, AIA, DBIA, CURT and McGraw Hill. Discussion was held on financial support of the program, and the Building Division asked that a support letter for financial commitment be drafted for AGC to solicit its members for support.

State Water Quality Regulations 2010
John Hakel, AGC Vice President Government Relations, reported on the newly adopted construction site water quality control regulation. AGC plans to hold statewide water quality regulation seminars sometime in March. Information on these seminars will be forthcoming.

Any questions relative to the Building Division should be directed to Building Division Director John Hakel.
Highlights of AGC’s January Meetings and Installation

Bob Hall, J.R. Roberts Corp., led the evening ceremonies and presented a gift from the Delta Sierra District to 2010 President Bob Christenson.

Immediate Past President Tom Foss, left, presented a plaque to Past President Wayne Lindholm honoring his years of service with AGC of California.

Assembyman Roger Niello of Sacramento presented AGC President Bob Christenson with a Proclamation from the California Legislature recognizing his years of service.

Charmaine Tyrrell, representing AGC discount partner Heistproof, discussed the company’s product, which was displayed during the AGC gathering in Napa.

Past President Steve Blois and wife, Barbara, at right, are pictured with AGC Treasurer Randy Douglas and wife, Sue.

Members of the 2009 Executive Committee who were present at the installation dinner and came up to be recognized for their service last year included, left to right, Tom Holsman, Tom Foss, Gerry Diloli, John Nunan, Jon Ball, Bob Christenson, Wayne Lindholm, Steve Blois, Tom Brickley, Curt Weltz and Cathy Skeen.

2009 President Tom Foss and First Lady Stancie Foss welcomed 2010 President Bob Christenson and First Lady Nancy Christenson.
Open Discussion – Outlook and Issues for 2010

Meeting attendees participated in a group discussion and provided the following list of priorities for 2010: funding; updates on legislative issues; DBE/UDBE; public contracting; emphasize “It’s good business to do business with an AGC member”; attract more members; partner with more agencies; and CARB.

Any questions relative to the Joint Engineering Division should be directed to Sam Hassoun.

FHWA - Highway Reauthorization Bill

Walter “Butch” Waidelich, California Division Administrator of the Federal Highway Administration (FHWA), made a presentation of the highway reauthorization bill and discussed what it meant to California. He addressed transportation authorization, status of highway trust funds, and preservation of the existing systems. He also discussed The American Recovery and Reinvestment Act of 2009 (ARRA) that included $48.1 billion for transportation.

DGS in 2010

Eric Mandell, Chief of the California Office of Small Business and Disabled Veterans Business Enterprises (DVBE) for the Department of General Services (DGS), highlighted the DGS’ outlook of new regulations and new projects for 2010.

DBE and DVBE Panel Discussion

Eric Mandell, Miguel Galarza of Yerba Buena Engineering, Chris Hickey of William P. Young Construction, Walter “Butch” Waidelich, and John Douglas participated in a panel discussion regarding their experiences using DBE and DVBE firms and how they were able to recruit and grow small business firms that continue to provide commercially useful functions.

Highway Funding, DBE/DVBE Issues Top Meeting
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