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LAC: On Top Of The Issues

Well fellow constructors and industry friends, it’s March already. In January of this year I wrote on what I thought would be crucial issues facing the construction industry – specifically, the recruitment, training and education of future construction workers and maintaining a strong legislative advocacy program. That being said, I’m continually amazed at the depth of other services being provided by our members and staff. Among these assets, we are extremely fortunate in having the expertise and commitment of our Legal Advisory Committee (LAC). With the strength of over 160 members comprised entirely of construction attorneys, the LAC is AGC of California’s largest committee.

This year’s LAC Chair is Larry Lubka of Hunt, Ortman, Palffy, Nieves, Lubka, Darling and Mah, Inc. In his role as Chair, Larry also sits on the AGC Executive Committee, where he keeps the Committee as well as the state board of directors informed on the important current and upcoming legal issues that impact the construction industry. Under his leadership the Committee provides AGC members strategic advice on solutions and responses to a wide range of issues.

We can only imagine what the California legislature may bring us this year as far as new regulations. One thing we can be sure of, though, is that new legislators bring new legislation, and new legislation often brings new regulations. The LAC provides AGC an invaluable service by constantly reviewing and monitoring upcoming and new legislative and regulatory processes in California and providing advice on how to combat anti-business measures and ensure the construction industry’s interests are well represented and heard.

In this issue of the Constructor as well as in follow-on issues throughout the year, you will see several legal articles prepared by LAC members covering topics ranging from knowing when to protest an award, to a recent appeals court decision that threatens a far-reaching expansion of California’s Prevailing Wage Law, to the latest on the Mechanic’s Lien laws, and new legislation often brings new regulations. The LAC provides AGC an invaluable service by constantly reviewing and monitoring upcoming and new legislation, and new legislation often brings new regulations. One thing we can be sure of, though, is that new legislators bring anti-business measures and ensure the construction industry’s interests are well represented and heard.

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THE VOICE OF THE CONSTRUCTION INDUSTRY
The Tax Extension Election: Why It’s an Uphill Battle

By Tony Quinn

The voters may have a simple way of resolving the state budget crisis: do away with state government. That’s a conclusion you can take from an unusual survey of opinions on government conducted for California Forward by Viewpoint Learning and released last month.

The survey looked at voter opinions of the various levels of government. Virtually without exception, respondents had more faith in local government to fix problems than state government. But neither level did particularly well. The survey asked how good a job STATE government was doing making California a good place to live: 21 percent said excellent or good; 75 percent said fair or poor. When asked about LOCAL government, the numbers were 36 percent excellent and good; 60 percent fair and poor.

When given 12 factors that kept state government from working well, too much “bureaucracy, waste and fraud” ranked first with 72 percent saying this was a big problem. It was followed by “political leaders don’t listen to regular people” (67 percent) and “elected officials aren’t held accountable for their action” (66 percent).

When asked a series of “agree or disagree” questions, 77 percent agreed that “too much money is spent on state programs that don’t do what they are supposed to do,” and 70 percent agreed that “state government is inefficient and wasteful.” Only 23 percent agreed with the statement, “taxes need to be higher to pay for the services Californians need.” How should we improve things, the survey asked, 81 percent said, “get rid of programs that don’t provide good results.”

This survey provides a window into two things: first why the voters turned down every tax increase proposal on the November 2010 ballot, despite a statewide Democratic landslide, and the difficulties Gov. Brown and Democrats will have selling the tax extension on a June special election ballot.

The cuts Brown has proposed work against extending the taxes; the more the state budget is cut, the more voters are going to think they are right: there is “bureaucracy, waste and fraud” that can be cut. If the voters are confronted with threats of even more draconian cuts, this survey suggests they will be even happier.

First, extending current taxes might work, but enacting new taxes are definitely out. So Brown and the Democrats face a serious political problem; they have to have a June special election before the 2009 tax hikes expire. After June, getting them back would be a new tax, not extending an old tax. Their window for action is very narrow, and it must include reversing the highly negative view of state spending this survey finds.

Secondly, the voters will not extend the tax hike to balance the budget; the voters are convinced it can be balanced by cutting “bureaucracy, waste and fraud.” The only way they might vote to extend the taxes is if they saw the money going to local services. Some 59 percent said they would be open to more taxes if “voters locally have more control over how the money will be spent,” and 58 percent want to “give local government more control over revenues because they are more in touch with their communities’ needs.”

But Brown seems to be heading in the opposite direction; his fight with local governments over redevelopment money and other budget actions seems to be sending the signal the state will take money from locals, not return money to them.

And the cuts Brown has proposed work against extending the taxes; the more the state budget is cut, the more voters are going to think they are right: there is “bureaucracy, waste and fraud” that can be cut. If the voters are confronted with threats of even more draconian cuts, this survey suggests they will be even happier.

The governor and legislature have prophesized Armageddon for the past five years, but budgets have been cut and voters have turned down tax increases, and nothing has happened. Maybe we actually need the $25 billion in cuts to schools, prisons, local programs that will come without the tax extension to change the public’s attitude that it is just a matter of “bureaucracy, waste and fraud.” Real cuts, and real agony, may well be necessary before the voters are willing to open their wallets to more taxes.

Tony Quinn has been a guest speaker at past AGC Board Meetings and is a frequent political commentator in the media. He is an authority on California political trends and demographics. He served as an assistant to the California Attorney General and is a former director of the Office of Economic Research in the Department of Commerce.
AGC of California held its first State Board of Directors meeting of the year on January 28 at Disney’s Grand Californian in Anaheim.

President’s Scholarship
Past President Bob Christenson announced the 2010 President’s Scholarship Award recipient, Jose Buenrostro. A junior at Sacramento State University pursuing his B.S. degree in Construction Management Engineering, Buenrostro was chosen for this award for his academic excellence, previous experience serving as an intern with several construction companies, and his community involvement.

State Board of Directors Orientation
After the new 2011 officers were sworn in, President Gerry DiIoli and CEO Tom Holsman provided an annual orientation outlining the duties and responsibilities for all State, Division, and District Directors, as well as the responsibilities for Chairs of the Standing State Committees/Councils. DiIoli highlighted key goals for 2011 in the areas of membership, marketing, organizational effectiveness and services.

President’s Report
President DiIoli gave a report on the activities of the Executive Committee, which met the day prior. Among many other actions, the Committee approved the Construction Industry Advancement Group’s (CIAG) 2011 Board of Directors that consist of President Gerry DiIoli, Sr. Vice President John Nunan, Vice President Randy Douglas, Treasurer Curt Weltz and Past President Bob Christenson. In addition, Carl Bauer, Dave McCosker of Independent Construction Co., and John Nunan of Unger Construction Company were reappointed as trustees on the California Construction Advancement Program (CCAP) board of trustees.

Keynote Speaker
California State Senator Mimi Walters discussed the new dynamics in California politics and the political environment in Sacramento with the new administration. Walters talked about the importance of eliminating the $25 billion budget deficit facing California and noted that there were no votes in the Republican Caucus to put a tax increase on the ballot. She pointed out the urgency of reforming the state workers’ pension plan as well as looking for other options to make needed cuts to balance the budget. Walters also noted that it was critical to get the private sector back to work, cut government regulations and give businesses incentives to do business.

CEO’s Report
CEO Tom Holsman touched on the highlights of the association’s accomplishments in 2010. He reported that AGC’s legislative successes were at the top of any prior year with an 80% passed sponsored legislation and 100% vetoed/defeated legislation rate. The biggest legislative success was the gas tax swap for highway funding, and going forward AGC hopes to once again introduce legislation that will continue to provide funds for infrastructure. Huge regulatory successes included the CARB/air quality issue, and AGC was the only construction trade association at the table that helped maneuver amendments and delayed implementation.

Membership Report
Vice President Randy Douglas, Tierra Contracting, Inc., reviewed the fourth quarter membership report and announced action items to increase membership in the year ahead. He presented the 2010 Dave McCosker Membership Awards for most new members and highest net gain in each district. The Delta-Sierra District received the award for the highest contractor member net gain, and the Los Angeles District was awarded for the most new members.

President DiIoli announced a new President’s Membership Award to recognize members who recruit the most new members during the year. Tony Campbell of Dynaelectric Company was the 2010 recipient for recruiting 13 new members.

AGC Education Foundation
Chair Michell Loveall reported that the Education Foundation distributed over $52,000 in scholarships and grants last year to deserving students. She reported that over 3,000 high school students participated in last year’s Construction Career Awareness Days (CCAD) and that the 2011 CCADs have been scheduled with Los Angeles on April 7, Fresno on April 29 and Vallejo still to be set. Education Foundation Director Erin Volk recapped the Foundation’s 2011 goals, which are to work on CCADs, develop an organized annual fund campaign to secure new avenues for revenue, and find additional grant funding.

P3 Policy Statement
Directors approved AGC’s policy statement in support of Public-Private Partnerships (P3) as one alternative project delivery method that will ultimately serve to benefit the state by reducing budget constraints on projects that would have otherwise not have been possible.

For complete highlights on AGC’s State Board of Directors meeting, visit AGC’s website at www.agc-ca.org, and go to: About AGC>Leadership Committee>Meeting Highlights.
AGC of California’s Awards Committee has announced the selection of 17 projects as finalists in the 24th Annual Constructor Awards program.

Final judging will be conducted April 9, 2011, at The Fairmont in Newport Beach, just prior to the 2011 Awards Banquet that evening. One winner will be selected in each of seven categories. The 17 finalists selected and the categories of their achievement are:

**Excellence In Project Management – Projects $10 Million Or Below**
- Herzog Contracting Corp.: “SCRRA Metrolink JO112-09” – Los Angeles
- Reyes Construction, Inc.: “Seismic Retrofit and Painting of First Avenue Bridge over Maple Canyon” – San Diego
- Shimmick Construction Co., Inc.: “Muni Misc. Rail Replacement” – San Francisco

**Excellence In Project Management – Projects Over $10 Million**
- Barnhart Balfour Beatty: “William B. McLean Laboratory” – China Lake
- Clark Construction Group – California LP: “John Muir Medical Center – Walnut Creek Campus Phase IV Expansion and Remodel Project” – Walnut Creek
- Diani Building Corp.: “DSS14 Hydrostatic Bearing Replacement” – Goldstone
- Hensel Phelps Construction Co.: “LAUSD Robert F. Kennedy Community Schools” – Los Angeles

**Innovation In Construction Techniques Or Materials**
- Ausonio Incorporated: “Monterey College of Law” – Seaside
- Barnhart Balfour Beatty: “Wounded Warrior Bachelor Enlisted Quarters (BEQ)” – Camp Pendleton
- Valley Slurry Seal Co.: “Santa Monica Airport” – Santa Monica

**Contribution to the Community**
- Marina Landscape, Inc.: “The Los Angeles Boys & Girls Club” – Los Angeles

**Meeting The Challenge Of The Difficult Job – Builder**
- Clark Construction Group – California LP: “John Muir Medical Center – Walnut Creek Campus Phase IV Expansion and Remodel Project” – Walnut Creek
- Diani Building Corp.: “DSS14 Hydrostatic Bearing Replacement” – Goldstone
- Hensel Phelps Construction Co.: “LAUSD Robert F. Kennedy Community Schools” – Los Angeles

**Meeting The Challenge Of The Difficult Job – Heavy Engineering**
- Atkinson Construction: “I-15 Managed Lanes in Escondido from Ninth Ave. to Rt. 15/78 Separation” – Escondido
- Granite Construction Company, Inc.: “Truckee River Canyon” – I-80 Truckee River Bridge to Nevada State Line

**Meeting The Challenge Of The Difficult Job – Specialty Contractor**
- Dynalectric: “Disney’s California Adventure, World of Color” – Anaheim
- Marina Landscape, Inc.: “The Elephants of Asia Exhibit, Los Angeles Zoo” – Los Angeles

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

Look for in-depth, informative articles on a variety of other legal topics in the months ahead including, among others:

- Equitable Subrogation and Mechanic’s Liens by Raymond A. Myer, Myer Law.
- ‘March Madness’ for Contractors, by Ernie Brown.
- Improper Post-award contract price negotiation, by Daniel F. McLennon and Geoffrey W. Glass, McLennon Law.
- Six Secrets to Winning a Construction Arbitration, by Richard Holderness.
2011 – A Time for Action

By Larry Lubka, LAC Chair

The last few years have been hard on contractors throughout California. Work load reductions of 50% or more are not uncommon. Financial strains have changed the way contractors do business. The great recession has been aggravated by a lack of construction loans (or loans of any sort), strained state and local budgets, a federal government struggling to find direction and real property values that have dropped below construction loan amounts.

The California AGC Legal Advisory Committee (LAC) is committed to assisting the AGC’s members in finding their way through these challenging times. One example is this annual edition of the Constructor, in which LAC members address some of the current legal issues that are faced by contractors in California.

The members of the LAC are notable for their focus on and knowledgeability of California construction law. Many of the members bring decades of experience to bear and, in turn, the benefit of that knowledge base is shared with the AGC. The members not only include private attorneys, but also in-house counsel to contractors and some of the finest arbitrators/mediators in the state. The LAC has an annual retreat which every year is notable for providing some of the very best presentations on California construction law found in any forum.

The LAC will continue to work closely with the Legislative Committee on issues such as taxes which impact contractors, labor laws – including prevailing wage laws, local hiring preferences, DVBE requirements on public works, indemnity issues, prequalification requirements and mechanic’s lien laws. In this time of budget concerns it is all the more important that any new laws or regulations are fair to California’s contractors. More than ever, it is critical that the LAC assist the AGC as a watch dog to prevent unfair levels of risk being shifted to contractors by new laws.

As the California attempts to deal with its enormous budget gap, it does so at a time of equally enormous infrastructure needs. It will try to do more with less money. As public entities struggle to make project delivery more cost efficient and less problematic, there will be a continuing shift in the types of contracts used by the state, counties and other local entities. In prior years, the LAC has conducted in-depth analysis of contract forms such as the Consensus Docs. As public entities move away, on some projects, from the classic low bid approach and move towards new project delivery methods such as public-private-partnerships, CM at risk, IPD and design-assist, the LAC will analyze these new project delivery methods to ensure that the interests of AGC’s members are being addressed. At the same time, the LAC will continue to address the types of issues which arise out of low bid procurements, such as bid protests.

LAC’s monthly meetings are always well attended, a tribute to the high level of information reviewed in those meetings. By example, recent cases from California Courts of Appeal are promptly reviewed and key issues are addressed each month. In addition, the LAC provides Amicus Briefs to ensure that the larger policy issues affecting AGC’s members are considered by the California Supreme Court, so that the court can understand the larger effects of any ruling it might make.

The LAC regularly provides seminars to other AGC committees and to the membership of the AGC. The members of the LAC, who volunteer their time for LAC activities, will continue to work with the AGC to provide it with full support for the many legal issues which arise each year.

In this time of budget concerns it is all the more important that any new laws or regulations are fair to California’s contractors. More than ever, it is critical that the LAC assist the AGC as a watch dog to prevent unfair levels of risk being shifted to contractors by new laws.

The articles in this edition of the Constructor are part of the LAC’s efforts to provide continuing support to the AGC. I encourage the AGC’s members to reach out to the LAC if there are challenges which you believe the LAC can help you address. The LAC looks forward to using its members experience, knowledge and abilities for the benefit of the AGC through 2011 and into the future.

I thank the members of the LAC for their continuing, active participation in the LAC. I particularly thank the authors of the articles in this and future editions of the Constructor for their extra effort to share their expertise with the readers of this magazine. It was time well spent and wholly appreciated.

Larry Lubka is 2011 Chair of AGC of California’s Legal Advisory Committee and is shareholder at Hunt Ortmann Palffy Nieves Lubka Darling & Mah, Inc., Pasadena.
LLCs had always been the one type of business entity that was precluded from holding a contractor’s license. The legislature finally changed this anomaly in 2010. Starting in 2012, an LLC can hold a license, and the qualifier shall either be a Responsible Managing Officer (RMO), a Responsible Managing Manager, Responsible Managing Member or Responsible Managing Employee (RME). (Bus. & Prof. Code § 7068(a)(4).)

However, the requirements of LLCs to hold a contractor’s license are more rigorous than what is required of the other traditional business entities such as corporations. For example, as a condition precedent to the issuance of a contractor’s license, the licensee must have on file a surety bond in the sum of $100,000 for damages arising out of employee wage and benefit claims. (Bus. & Prof. Code § 7071.6.5.) Corporations are not required to hold such a bond.

An LLC must also maintain liability insurance for errors and omissions and requires licensees to give notice of this policy to homeowners. The liability policy shall be issued for not less than $1,000,000 and not more than $5,000,000; for LLC’s of five or fewer members, a limit of not less than $1,000,000 is required. Bus. & Prof. Code § 7017.19(b)(1). For an LLC of five or more, an additional $100,000 for each member with a maximum of $5,000,000. Bus. & Prof. Code § 7017.19(b)(2). And once the LLC is dissolved, the company shall be required to maintain a three-year extension of the liability policy. (Bus & Prof. Code § 7017.19(e).) No such insuring limits are required of corporations.

With all the new requirements, it will be interesting to see how many entities take advantage of the LLC option. A corporation can transfer its license to an LLC. An individual can change to an LLC or corporation and have the license number reassigned. (Bus. & Prof. Code § 7051.1(c)(5).) The license can also be reassigned with the transfer of a corporate license to an LLC following the cancellation of the corporate license provided personnel are the same. Bus. & Prof. Code § 7071.1(c)(7). Also, transfer pursuant to an asset sale provided there is a qualifier allowed as when an LLC creates a subsidiary to continue the business.

But with the new requirements coupled with the ease of transfer, it is questionable whether using an LLC a cost effective option for contractors. Further it opens up LLC licensee to more possibilities of license suspension if the requirements are not met risking exposure to §7031 liability. In the end, contractors wanting to convert to an LLC need to evaluate the risks and costs contrasting the benefits when deciding on using an LLC for its business entity.
So You Lost The Contract - Now What? Understanding Whether to Protest an Award

By Mary A. Salamone and Stephen M. McLoughlin

It should come as no surprise that the recent economic downturn has resulted in a decrease in the number of public works construction projects. As backlogs shrink and the number of projects goes down, the number of bidders goes up. This fiercely competitive environment increases the prevalence of bid protests.

Essentially, a bid protest is a disappointed bidder’s tool to challenge a public agency’s decision to award a construction contract. All remedies available at the agency level must first be pursued before judicial relief is sought. Therefore, the contractor must carefully scrutinize the bid documents and any applicable agency regulations that provide for specific procedures to protest an award. Also, contractors beware as there are very short time periods within which to exercise these rights. After the awarding authority makes its final decision, a contractor then may seek judicial relief, which may include an injunction halting the construction or an order that the entity reconsider the bids. Regardless of the specific protest requirements, a bid protest generally must show that the public entity’s bid process violated the applicable public bidding regulations.

In order to be successful in this intense climate, contractors must familiarize themselves with the bid protest procedure so that they can file one when necessary and understand the risks created if another contractor files a protest. A series of recent California case decisions provide guidance regarding a successful bid protest.

In Cypress Security v. City of San Francisco (2010) 184 Cal.App.4th 1003, the court reviewed a protest challenging the City’s Request for Proposals (RFP) for security services. The protest came from a losing bidder who claimed that the City improperly considered factors beyond price in assessing the bids and awarded the project to a non-responsive bidder. The court concluded that the City’s procedure was proper because the RFP process generally allowed for consideration of other factors beyond price. Further, the City’s RFP made all considered factors known to all bidders.

In assessing whether the winning bid should have been rejected as non-responsive, the court acknowledged that proposals generally must be rejected if they do not conform to the requirements of the RFP. However, public entities are authorized to waive minor irregularities if the variance is considered inconsequential. The difference between a non-responsive bid and a bid with inconsequential irregularities is determined by considering the effect on the public interest. If the variance will put the public interest in danger by forcing the public entity into a contract with a potentially unprepared or corrupt contractor, the proposal is non-responsive. The Cypress Court looked at the specific irregularities of the winning bidder and found them to be waivable because they did not suggest that the bidder was not able to meet all the requirements of the bid documents.

Great West challenged the District’s decision by claiming that it was in actuality a non-responsibility determination which entitled Great West to a formal hearing. The court addressed the difference between responsibility and responsiveness under the Public Contract Code section 20111. Under PCC section 20111, responsibility refers to the bidder’s overall trustworthiness while responsiveness is determined by whether the bidder promises to do what the bidding instructions require. In order to receive a contract under PCC section 20111, the bidder must be responsive and responsible. A bidder is entitled to a formal administrative hearing to discuss the public entity’s findings before it is found to be non-responsive.

Irregularities in a bid may be waived if they do not expose the public to corruption or carelessness. Thus, a successful protest must not only identify an irregularity in the winning bid, but also it must show that this irregularity poses a threat to the public interest.
not require a formal hearing.

The court found that the District’s decision was a non-responsibility determination because the District used information outside of the four corners of the bid documents to reject Great West’s bid. Therefore, the bid could not be rejected until the bidder was granted an administrative hearing. Based on this case, contractors are able to demand a due process hearing if their bid is rejected on responsibility grounds even if the public entity claims non-responsiveness.

Schram Construction Inc. v. Regents of University of California (2010) 187 Cal. App.4th 1040 addresses the bidding procedure of the Regents under Public Contract Code section 10500 et seq. The Regents issued several discrete bid packages as well as an alternative bid package that combined some of the discrete bid packages. After opening the bids, the Regents decided to use the alternative combination bid package because it allowed the Regents to limit the total number of contractors working on the project. The Regents’ desire to limit the number of contractors on the project was not a listed factor to be considered in the bid documents.

Schram submitted bids for the individual packages but not the combination bid. After the project was awarded based on the combination package, Schram submitted a protest claiming the Regents’ process violated PCC section 10506.4 because the Regents failed to inform bidders of its desire to limit the number of contractors on the project. Schram testified that it would have submitted a bid for the combination package if it knew the Regents wanted to limit the number of contractors. The court found that the Regents’ procedure violated PCC section 10506.4 because it improperly considered an unpublished factor that was not expressly stated in the bid documents.

Taken together, these cases provide insight into the key factors that make or break bid protests on public construction projects.

Mary A. Salamone is a partner in the Orange County office of Atkinson, Andelson, Loya, Ruud & Romo and Stephen M. McLoughlin is an associate in the firm’s Cerritos office. They can be reached at msalamone@aalrr.com or smcloughlin@aalrr.com.
Take Note of New Changes to Mechanic’s Lien Laws, Forms and Procedures

By Bill Porter

Under new laws which took effect on January 1, 2011, claimants who seek to obtain payment for construction related debts through the California mechanic’s lien procedure must follow new rules and use new forms. Failure to do so will likely result in an unenforceable mechanics lien.

There are a number of reasons that the law has been changed. For example, until January 1, 2011 there was no requirement that a mechanic’s lien claimant actually inform the property owner that the claimant has recorded a mechanic’s lien on the owner’s property. There was also no requirement that a mechanic’s lien claimant inform an owner of exactly what a mechanic’s lien is or that the owner may be sued within 90 days to foreclose on the mechanic’s lien and sell the owner’s property to pay the unpaid debt. Property owners had long complained that, until they received the mechanic’s lien foreclosure lawsuit, they were often entirely unaware that a mechanics lien had even been recorded on their property. The owner asserted that if he/she had known that a mechanic’s lien then the original contractor or the construction lender can instead be served. This new process provides owners with notice that a mechanic’s lien has been recorded on their property and it gives them an opportunity to quickly address the situation and avoid a lawsuit. The form of the mechanic’s lien document itself was also changed to include a “Notice of Mechanic’s Lien,” which provides a brief explanation of the nature of a mechanic’s lien and options the property owner might pursue to address the situation. Finally, where a lawsuit is filed to foreclose on the mechanic’s lien a “Notice of Pending Action” must be recorded at the local County Recorder’s Office within 20 days after the filing of the mechanic’s lien foreclosure lawsuit. The Notice of Pending Action provides notice to potential property purchasers, lenders and others that a lawsuit has been filed in relation to the property and that the property may be sold in foreclosure to pay the underlying debt.

A form of the new mechanic’s lien document can be found free of charge at http://www.porterlaw.com/forms.htm. The new law provides the property owner with advance notice and an opportunity to remedy a pressing situation. Lawsuits can be avoided by early attention. Based on the premise that more information is better than less and fewer lawsuits are better than more, this legislation beneficially serves the public interest. It remedies longstanding problems without significant cost or inconvenience. The new law took effect on January 1, 2011. Potential claimants should educate themselves on the new law and begin using the new procedures and mechanic’s lien form immediately.

William L. Porter, Esq. is a shareholder in Porter Law Group, Inc. of Sacramento, California. He worked with Assemblyman Bill Monning (D-Monterey), Michael Brown of the California Contractor’s State License Board, attorneys John Boze of Sacramento and Sam Abdulaziz of North Hollywood on the legislation which is the subject of this article.

Changes Coming to the California Constructor

The California Constructor magazine is transitioning to a bimonthly print schedule beginning with the next issue, which will carry an April/May 2011 dateline. This move follows a trend of many other AGC Chapters as well as other industry publications nationwide.

Despite the reduced frequency, we remain committed to continuing to provide in-depth feature coverage on issues and trends impacting the California construction industry as well as news and perspective on a range of issues pertaining to regulatory, legislative, industrial relations, safety, education and workforce and association matters, among other things.

As always, the California Constructor welcomes and encourages reader input and feedback. Please feel free to contact California Constructor editor Carol Eaton at eatonc@comcast.net, or 707/789-9520, or AGC Communications Manager Sophia Taft at tafts@agc-ca.org, or (916) 371-2422, with any questions or input. In addition, we continue to welcome editorial suggestions from our readers as well as news items from any AGC member companies for inclusion in our Member News section.
Recent Court of Appeal Decision Threatens A Far-Reaching Expansion Of California’s Prevailing Wage Law

By John S. Miller, Jr. and Dwayne McKenzie

On December 21, 2010, the Second Appellate District of the California Court of Appeal issued a decision that greatly expands the reach of California’s Prevailing Wage Law (Labor Code § 1720, et seq. (“Prevailing Wage Law”)) to cover private works of construction that have never before been deemed “public works” subject to the Prevailing Wage Law. In Azusa Land Partners v. Department of Industrial Relations (No. B218275) 2010 WL 5158551, the Court adopted completely the expansive interpretation of section 1720 of the Prevailing Wage Law advanced by the Director of the California Department of Industrial Relations (“DIR”).

The Court held that: (a) the Prevailing Wage Law as it existed before the Senate Bill 975 amendments in 2001 renders an entire private master development a “public works” if any “public funds” are paid toward any construction done under contract within the overall development; (b) Mello-Roos funds are “public funds”; and (c) the payment of public funds toward construction of one public improvement within a development necessitates the payment of prevailing wages on all other public improvement projects within the development that are privately financed. The Court further suggests that a Mello-Roos community facilities district is an “improvement district” referenced in section 1720(a)(2) of the Prevailing Wage Law, and that all construction of all eligible projects within the community facilities district list of eligible projects constitute work “done for the improvement district.” Consequently, prevailing wages must be paid on all such projects whether they ever receive Mello-Roos funds or not.

The case arose out of the Rosedale Project in the City of Azusa, a master planned community consisting of over 1,200 homes, 50,000 square feet of commercial space, and typical, related public infrastructure and improvement projects (including school, rail, sanitation district, road, bridge and utility construction) (the “public improvements”). The developer agreed to construct each of the public improvements as a condition of approval of the project and in anticipation of Mello-Roos Act (Government Code § 53311, et seq.) bond proceeds paying the costs of construction of certain of those Public Improvements. As is typical, the bond proceeds only produced a portion of the funds (approximately $71 million of $146 million) necessary to complete all of the public improvements.

The Prevailing Wage Law imposes prevailing wage and other requirements on “public works” as defined by the statute. Historically, and under the primary definition in section 1720(a), “public works” have been those specific works of construction which are performed under contract and paid for in whole or in part out of public funds. From inception, the Prevailing Wage Law was intended to define a subset of the universe of works of construction commonly known to be “public” works (such as roads, bridges, dams, schools, libraries, etc.) and to impose prevailing wage payment obligations only on the specific public works that fall within this subset of all public works. Public works paid for with public funds are within this subset. Public works built with private funds and later dedicated to the public have never been, except in very limited circumstances, subject to prevailing wage requirements.

This focus on the work of construction to determine what is a “public works” subject to the Prevailing Wage Law has been the accepted analytical approach to application of the Prevailing Wage Law since it was enacted in 1931. However, the decision in Azusa Land Partners rejected this long-understood focus. Instead, the Court ruled that the Prevailing Wage Law, as it existed before the amendments of SB 975, applies to the “overall scheme of improvement,” the entire master-planned development if any construction within that overall development is paid for by public funds. Because $71 million of Mello-Roos bonds proceeds were paid for construction of specific public improvements, the Rosedale Project as a whole was deemed to be a “public works” subject to the Prevailing Wage Law.

However, the Court went on to find that the amendments of SB 975 (specifically, section 1720(c)(2)) were intended to “limit” the prevailing wage requirements on a master development deemed a “public works.” The Court determined that under this section, the private development portion of the Rosedale Project is not subject to the Prevailing Wage Law, but all of the various public improvements (whether paid for with Mello-Roos bond funds or private funds) are subject to the Prevailing Wage Law.

The Court’s new “development-wide” approach to application of the Prevailing Wage Law would have far reaching implications. Under this decision, if public funds are paid toward any work of construction within any discrete project or phase within a master-planned development, one must assume that the entire development is a “public works.” The extent of the prevailing wage obligations imposed as a result of
CA Supreme Court Clarifies Rule on Contractor Claims

By Alan Wilhelmy

In limited circumstances a contractor is no longer required to prove intentional misrepresentation or active concealment by a public agency to recover additional costs of performance.

The California Supreme Court recently issued its opinion in Los Angeles Unified School District vs. Great American Insurance 49 Cal. 4th 739 (2010) (“LAUSD”) to resolve conflicts in several court of appeal opinions addressing the right of a contractor to recover the additional costs of performance where material information that affects the performance of the work is not disclosed by a public agency. The concept that there is an implied warranty by the public agency of the correctness of the agency’s plans and specifications developed over the years and is reflected in both state court opinions such as A. Tiechert & Son Inc. v. State of California (1965) 238 C.A. 2d 736 and E. H. Morrill Co. v. State of California (1967) 65 Cal.2d 787, and in the seminal United States Supreme Court case of United States v. Spearin (1918) 248 U.S. 132. Those cases provide that unanticipated difficulty in the work is not sufficient to justify additional compensation. LAUSD addressed the case where the plans were accurate but other information was not disclosed by the agency.

Several California courts of appeal and the State’s Supreme Court have grappled with the issue over the years and have held the contractor to different standards with respect to what the contractor must prove to recover from a public agency.

In Souza & McCue Constr. Co. v. Superior Court (1962) 57 Cal.2d 508, the California Supreme Court ruled that nondisclosure combined with active concealment by the public agency is required to support a cause of action for misrepresentation. In Souza, the City’s chief engineer knew of highly unstable soils in portions of the project and directed the City’s consultant to perform limited testing that excluded the problem areas. The report that was generated was furnished to bidders who relied upon it.

Wunderlich v. State of California (1967) 65 Cal.2d 777 involved a report for a Caltrans project that expressed opinions as to the varied quality of materials to be found in a borrow pit. The court held that there was no misrepresentation by the state, that both parties had access to the same information, and that the contractor had made incorrect assumptions about the quality of the available fill material.

In Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal.3d 285, the California Supreme Court held that a contractor retains a cause of action for breach of contract even though it may not have a cause of action for fraudulent misrepresentation or for quantum meruit. In Warner, erroneous boring information was furnished to bidders. The court held that a public agency must disclose knowledge it has of difficulties that are expected to be encountered in the construction. The court identified three instances in which a contractor may have a cause of action in contract for the nondisclosure by a public agency:

1. The public agency makes representations but fails to disclose facts which render the statement likely to mislead.

2. The facts are known only to the agency and the agency knows this and they are not reasonably discoverable; and;

3. There is active concealment by the agency.

In Jasper Construction, Inc. v. Foothill Junior College Dist. (1979) 91 Cal. App. 3d 1, the court of appeal held that the contractor must establish active concealment or intentional omission of material information.

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In Welch v. State of California (1983) 139 Cal. App. 3d 546, the court held that nondisclosure alone may support an award without intentional misrepresentation or active concealment. Welch involved incorrect tide information published by Caltrans in connection with a bridge repair project. The court explained that the decision in Warner made it clear that liability may be imposed even in the absence of an intentional failure to disclose when the disclosure would have eliminated or materially qualified the misleading effect of the agency’s misrepresentation.

Finally, in Thompson Pacific Construction, Inc. v. City of Sunnyvale (2007) 155 Cal. App.4th 525 the court of appeal held that negligent failure to disclose information may provide the basis for recovery if the public agency possessed superior knowledge that was inaccessible to the contractor.

In LAUSD the court backed away from the Jasper active concealment or intentional omission rule to a limited extent.

Under LAUSD the Court held that a contractor may recover the additional cost of performance due to the nondisclosure of a public agency if the contractor was acting reasonably and it is misled by the plans and specifications and it is able to satisfy a four part test:

1. The bid was submitted without material information that affected the cost of performance.
2. The public agency had the information and knew that the contractor did not.
3. The information furnished actually misled the contractor, and did not put the contractor on notice to inquire, and;
4. The agency failed to furnish the information.

Under LAUSD, the contractor is now not required to show active concealment or intentional omission. In LAUSD the school district owner terminated its first contractor and then contracted with Hayward Construction to remedy defects in the original contractor’s work and to complete the project.

Hayward’s allegations were that the school district had knowledge of the methods Hayward intended to use based upon its bid. The district had a consultant’s report that, had it been disclosed by the district, would have alerted the contractor to latent defects in the prior contractor’s unfinished work. The trial court granted summary judgment against the contractor under Jasper concluding that the contractor had not alleged facts showing active concealment or intentional omission of material information by the district.

The court of appeal reversed the trial court ruling, holding that the contractor could maintain a cause of action based upon the allegation that the district had knowledge of material facts that affected the contractor’s bid or the cost of performance. The Supreme Court noted that it was necessary to decide whether a contractor may recover when the plans and specifications are correct but the public agency failed to disclose information in its possession that materially affected the cost of performance. The Court agreed with the court of appeal that active concealment or intentional omission of material information is not required but then held that the court of appeal was overbroad in concluding that a contractor may recover based upon any failure to disclose material information. The Court then set forth the four part test. The Court also cautioned that contractors still have a duty to exercise reasonable diligence to discover conditions and information that may affect the cost of the performance of the work.

The LAUSD ruling looks in part similar to the Thompson Pacific superior knowledge test and in that regard presents a lower standard of proof for contractors. It is typically very difficult to prove intentional misrepresentation or active concealment, and as a result the burden upon contractors in establishing claims against public agencies is relieved to some extent by the LAUSD decision.

**Alan Wilhelmy is a shareholder with Rogers Joseph O’Donnell in San Francisco, emphasizing construction law.**

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**Calendar of Events**

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<td>Trench, Shoring and Excavation - Competent Person at Trench Shoring Company</td>
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<td><strong>March 19-26</strong></td>
<td>Supervisory Training Program Unit #2 Oral and Written Communication</td>
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<td><strong>April 2</strong></td>
<td>Lead RRP at AGC Headquarters Office, West Sacramento</td>
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<td>OSHA 30 Hour at AGC’s Headquarters office in West Sacramento</td>
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<td>CESSWI - Certified Erosion, Sediment, &amp; Storm Water Inspector Training in Costa Mesa</td>
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<td><strong>April 14</strong></td>
<td>Project Manager Series - FM 1: Pre-Construction Planning at AGC’s Southern California Office in West Covina</td>
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<td>Project Manager Series - PM 2: Victorious Project Management at AGC’s Southern California Office in West Covina</td>
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<td><strong>April 19</strong></td>
<td>Oakland A’s Annual Membership Mixer at McAfee Coliseum</td>
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<td><strong>April 19-20</strong></td>
<td>Qualified SWPPP Practitioner (QSP) at AGC Headquarters Office in West Sacramento</td>
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After 25 years, long time AGC veteran Pam Gray left AGC at the end of February. Gray began her career with AGC in 1985 as the administrative assistant to the Joint Engineering Division, Legislative and Safety Departments. She was promoted to the Assistant to the Executive Vice President and Secretary to the State Board of Directors in 1987, and most recently served as the Manager of Communications & Conferences since 2006. Her many accomplishments include AGC of California receiving the coveted AGC of America Public Relations Award in 2005 for her coverage on the highway transportation/Proposition 42 issue. Her knowledge and expertise has been invaluable to the association, and everyone at AGC, industry colleagues and friends, will sorely miss her. AGC sends best wishes for Pam Gray’s fond farewell.

With Gray’s departure, Sophia Taft was selected as the new Communications Manager. Taft started with AGC in April 2005 as the administrative assistant to the Safety Director and Assistant to the CEO. In 2006 she was promoted to Executive Assistant and Secretary to the State Board of Directors, and has served in that capacity ever since. Prior to joining AGC, Taft’s prior work experience included a strong customer service background having worked in the wireless industry at Verizon Wireless as a sales analyst for over 5 years prior to joining AGC. She also attended Sacramento State and is currently pursuing a Bachelor’s degree in Business Marketing. As the new Communications Manager Taft will be responsible for the oversight of all AGC communications including newsletters, public relations and marketing. She is excited for the next step in her career and is looking forward to her continued growth with AGC.
Panel Discusses Defaults at Building Divn. Meet

Vice Chair Mike Mencarini, Unger Construction Company, led the Building Division’s first 2011 meeting on January 27th.

Panel Discussion on Subcontractor Defaults: Bob Cowan of Marina Landscape, Dave Garsee of Excel Bonds & Insurance Services, Larry Lubka of Hunt Ortman Palfy Nieves Lubka Darling & Mah, Leonard Ortiz of Lennova, and Chris Pesavento of Dynaelectric presented a panel discussion on prevention of subcontractor defaults, both public and private, and avenues for closure after default.

Construction Industry Force Account Council (CIFAC) Update: Executive Director Cathryn Hillard, gave an overview of what CIFAC does for the construction industry and the tremendous savings this group does to even the playing field.

Legal Advisory Committee (LAC) Update: LAC Chair Larry Lubka spoke on the numerous activities the LAC offers to the AGC of California and it members.

Public-Private Partnerships Policy Statement: The Division Directors approved AGC’s policy statement in support of Public-Private Partnerships (P3) as one alternative project delivery method that will ultimately serve to benefit the state by reducing budget constraints on projects that would have otherwise not have been possible.

OSHDP Liaison Committee Renewal: The Division discussed reconstituting the AGC – OSHDP Liaison Committee and related issues.

Legislative Update: AGC Advocate Dave Ackerman discussed ongoing legislation further expanding the use of design-build, including a bill sponsored by the Los Angeles Community College District.

Prepared by Building Division Director John Hakel. For more complete meeting highlights, go to www.agc-ca.org/about.aspx?id=66.

Upcoming Work Opportunities, Transportation Funding Top Jt. Engineering Division’s Meeting Agenda

The Joint Engineering Division leadership for 2011 includes Chair Jim Troup of Monterey Mechanical Co., and Clint Larison of Reyes Construction, Inc., as Vice Chair. Randy Douglas was recognized for his service and leadership in 2010 during the Division’s first meeting of the year in Anaheim.

NAVFAC Southwest – Workload and Outlook for Construction Contracts: Captain James Wink, Executive Officer, NAVFAC Southwest CEC, U.S. Navy, discussed the NAVFAC SW area of responsibility throughout the west coast. He provided a breakdown of the $3.3 billion spent during fiscal year 2010 and outlined upcoming military construction for fiscal year 2011, estimated at $1.22 billion.

LA Metro – Current and Projected Workload: Michele Smith, Metro Program Manager for Project Delivery, spoke for Doug Failing, Executive Director of the Highway Project Delivery program, and discussed the $16 billion rail projects and the $8 billion highway projects which are being funded under Measure R Highway and Transit programs in Los Angeles County.

Caltrans Update: Mark Leja, Caltrans Chief of Construction, presented the past, present and future of Caltrans construction contract work. He informed attendees that Caltrans has 625 projects with over $10 billion currently under construction and indicated that the fiscal year 2011 will add 306 projects at an additional $3.7 billion.

Transportation Funding: Dan Himick, President of C.C. Myers, Inc., gave a presentation on transportation infrastructure issues facing California and America. He discussed how rebuilding the infrastructure can improve the economy and advocated for a $1.00 gas tax increase which will generate $18 billion in revenue and put 500,000 people back to work.

Public Private Partnership (P3): Kome Ajise, Chief, Caltrans P3 Program, gave an overview of P3s in California and discussed current legislation to implement P3 projects.

Government Contracting – Perils and Pearls: Lee Barrus, Yerba Buena Construction, discussed what it takes a company to continue having the ability to participate in this market.

Adopt-A-Highway: Gina Schumann, Operations Manager, informed attendees that the Adopt a Highway Program provides an avenue for individuals, organizations and businesses to give back to the community while being recognized for their green effort. AGC will receive $100 per month for every segment adopted by an AGC member. These funds will help AGC raise revenue to benefit several important programs.

Prepared by Joint Engineering Division Director Sam Hassoun.
Employers Must Look Beyond the ‘Spin’ for Real Implications of AB 2774

By Eugene F. McMenamin

AB 2774 went into effect January 1, 2011, repealing and replacing Labor Code §6432. Its acknowledged goal is to make it easier for Cal/OSHA to establish a “serious” violation of a safety order. It preserves the affirmative defense of lack of employer knowledge, found in subsection (c) of the new version of §6432.

Under previous law, a serious violation was “deemed to exist if there was a substantial probability that death or serious physical harm could result from a violation.” AB 2774 creates a “rebuttable presumption that a serious violation exists if Cal/OSHA demonstrates a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.” This is intended to lower the bar in Cal/OSHA’s favor.

This new law adds a step in the citation issuing process. Now the employer must be notified in writing of Cal/OSHA’s intent to issue a serious citation and given an opportunity to express in writing why a serious citation is not warranted. It is being promoted by Cal/OSHA as a dialogue where the employer bares its soul – in writing and under oath.

DOSH Chief Len Welsh claims this process aims to foster communication between Cal/OSHA and employers who abate and prevent serious hazards – certainly a laudable goal. Nevertheless, employers should see that as PR spin.

Occasionally the scenario exists where voluntary release of information by the employer might head off a serious citation. But such proffered information offers little prospect of reward for the employer. In an accident investigation, a prudent employer is well-advised to reject the DOSH chief’s entreaties, and, to use his metaphor, hold the cards close to the vest.

The legal environment for employers involving matters of safety and health is increasingly precarious. Employers confront steady judicial erosion of the Privette/Toland Doctrine involving imputed liability for workplace injuries, and they are now faced with case law which allows consideration of safety orders to establish both a legal duty and standard of care in tort actions. The Workers’ Compensation Appeals Board continues to issue decisions favoring Applicants in Serious and Willful Misconduct claims based upon violations of safety orders. Discrimination/whistleblower lawsuits increasingly contain sops to workplace safety concerns. Central to these issues is the role played by the DOSH investigation file, a toxic stew of hearsay, unsupported conclusions and mischaracterizations. The dialog that DOSH promotes is a guaranteed expansion of the investigation file, available to anyone making a public records request. California Plaintiff’s Lawyer Bar is well-versed in the treasure trove that awaits review of a DOSH investigation file.

AB 2774 includes language which preserves the right of employers who decline this voluntary dialog to nevertheless advance all facts and evidence during appeal before the Appeals Board without negative inference, stemming from earlier failure to provide the information voluntarily. This is the only part of the bill that offers any comfort to the business community.

Welsh notes that OSHA’s Integrated Management Information System (IMIS) is a permanent repository of inspection results for all 50 states, and that, once a citation is issued and recorded, it is a permanent black mark on an employer’s safety record regardless of the eventual outcome of any appeal.

Welsh is wrong. A serious citation is frequently modified downward, vacated or withdrawn as part of the appeals process. The same IMIS report that Welsh swings like a sword also describes its subsequent resolution on appeal.

Persnickety customers (the oil industry comes to mind) can misuse IMIS to disqualify bidders based upon the irrelevant factor of citation issuance rather than the only legally relevant issue of whether the citation is sustained or vacated on appeal. DOSH’s propagation of the erroneous notion that a citation has independent significance regardless of whether it survived challenge on appeal is misplaced. Doing business in California is tough enough without subtle endorsement of a legally baseless and pernicious misinterpretation of IMIS data.

Two decades ago California codified its IIPP regulation in Title 8 CCR §3203. The business community has watched in angst as the Division has cobbled §3203 into a de facto General Duty Clause akin to Fed/OSHA’s §5(a)(1) through utilization of an aggressive citation issuance policy. This bureaucratic overreach reminds employers that redress lies with the Appeals Board – not joining hands with DOSH compliance personnel and singing Kumbaya. Employers should remain cautious about facilitating free information to the Division, whose enforcement model is citation-based, particularly with a demonstrated affinity for issuing hazard recognition-type, general duty citations. I know of few businesses that engage the Internal Revenue Service in dialogue over company accounting practices. A DOSH accident investigation involving serious injury or death is every bit as adversarial as an IRS tax audit. Unfortunately, safety professionals sometimes swallow the hokum that it is about safety, and, it is SAFETY FIRST - right?! Those same safety professionals sometimes learn that DOSH’s Bureau of Investigations (“BOI”) has a different mindset.

I had the pleasure of working with the California Chamber of Commerce in trying to defang this legislative beast during the give and take that resulted in AB 2774. My view is that the dialog language in this bill was a placebo. DOSH’s hype of this sugar pill is understandable. Business persons must mind their moms: Don’t take candy from strangers.

Eugene F. McMenamin is member with Atkinson, Andelson, Loya, Ruud & Romo.
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