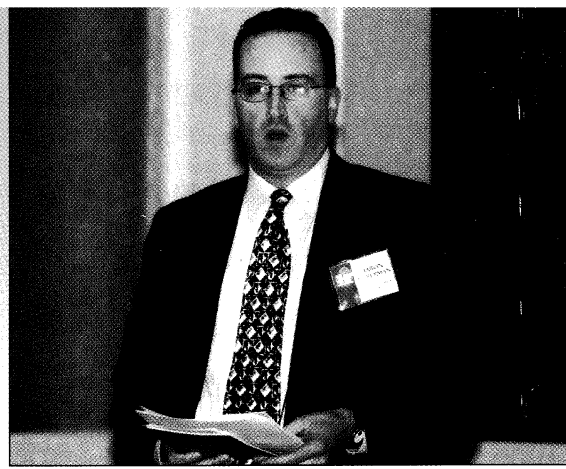


Major Legal Issues Impacting California Contractors

By Aaron P. Silberman



AGC Legal Advisory Committee Chair Aaron Silberman addressed AGC leadership during a January meeting, highlighting the major legal issues that will impact the industry this year.

There were many important legal developments impacting contractors over the past year and in the year ahead. Here are some of the most significant:

Licensing

The "substantial compliance" doctrine for state contractor's licensing requirements took another hit in *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (see Legal Brief 06-02). In that case, the court ruled that a contractor that started a job without a required license and obtained that license a few weeks later cannot recover for any of the work it performed, even that done while licensed.

Health & Safety

General contractor liability for injuries to subcontractor employees caused by Cal/OSHA safety violations were expanded by a trial court in a non-precedential decision in *Overaa Constr. v. Cal. Occupational Safety & Health Board*. How much that liability has been expanded remains to be seen. In *Overaa*, the court ruled that Cal/OSHA does not need to prove lack of diligence by the general contractor to establish "controlling employer" liability for safety violations causing subcontractor employee injuries. It is unclear whether this ruling would preclude general contractors from proving they acted diligently as an affirmative defense. The case is now on appeal, and the AGC of California filed an amicus brief in support of the contractor.

Indemnification

In residential construction, significant limits have been imposed on developer-contractors' ability to obtain indemnification through their subcontracts. California Civil Code Section 2782 (AB 758), enacted in 2005, will preclude developer-affiliated contractors on residential projects from recovering indemnification from their subcontractors for construction defects caused by the contractors' negligence. The AGC of California's form subcontracts have been

revised to account for this new law.

The courts have also weighed in on general contractors' ability to recover indemnification from their subcontractors. In *McCrary Constr. v. Metal Deck Specialists*, a court ruled that an actively negligent general contractor cannot recover indemnity from its subcontractors under a general indemnity clause.

Construction Defects

The Legislature was not alone in increasing general contractors' exposure to potential liability for construction defects. In *Acosta v. Glenfed Dev. Corp.*, a court increased that exposure by eroding the protections afforded contractors by the ten-year statute of repose for construction defects. The statute of repose generally meant that, with limited exceptions, contractors could have no liability for construction defects more than ten years after the work was done. In *Acosta*, the court expanded the fraud exception to this general rule to include situations where a general contractor was reckless regarding its subcontractors' willful acts to create or conceal the defects.

Pre-Construction

Contractors with substantial pre-construction work on a project beware. In *D'Orsay Int'l Partners v. Superior Court*, a court held that contractors have no lien rights when a project stalls before construction begins, even if they have performed substantial pre-construction work. And in *City of Long Beach v. Dept. of Industrial Relations*, the court left open the question of whether prevailing wage requirements apply to publicly funded pre-construction.

Public Contracting

In the ever-troubling area of false claims, the news for contractors was mixed. On the one hand, a federal court ruled in *United States ex rel. Bettis v. Odebrecht Contractors of California, Inc.* that

underbidding on a job, by itself, is not a violation of the federal False Claims Act. (Underbidding was one of the primary allegations in the false claims lawsuits against Tutor-Saliba concerning the Los Angeles subway and the San Francisco International Airport projects.) On the other hand, a court ruled in *State of Cal. ex rel. Harris v. PriceWaterhouseCoopers LLP* that cities can sue as whistleblowers under state False Claims Act, which would allow them to sue even if none of their funds were involved and to recover their attorneys' fees if they prevail.

The news was also mixed regarding contractor recoveries when public projects go bad. The results were devastating to the contractor in *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.*, in which the court ruled that a wrongfully terminated public contractor can only recover its lost profits on the terminated job, even if that termination diminished the contractor's bonding capability and so caused it to lose profits on many other public jobs. The results were better for the contractor in *N.V. Heathorn v. County of San Mateo*. That case held that a public owner that fails to require that prime contractor obtain a payment bond required by statute may be liable to subcontractors for the resulting damages.

Conclusion

2006 promises to be another year filled with big construction law developments. Stay tuned!

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