



## American Subcontractors Association of California

### **VICTORIES FOR SUBCONTRACTORS AND SUPPLIERS!**

- **Retention Reform-Public Works – AB 2173 (2022) Effective 1/1/23 secures 5% retention *perpetually*.** ASAC has been in the forefront and heavily supported 5% retention bills. Previous bills included AB 92 (2017) Effective 1/1/18: Extended SB 293 (2011) through 1/1/2023. The huge victory was won in 2011 when SB 293 was signed by Governor Brown capping retention at 5% (for non-substantially complex projects-see AB 1705).
- **Win in critical “Pay When Paid” California Case (April 2020):** The American Subcontractors Association made a significant win for subcontractors in *Crosno Construction, Inc. et al v. Travelers Casualty and Surety of America*. In 2019 ASA/ASAC produced a friend-of-the-court brief affirming a California Superior Court’s judgment regarding “pay when paid” provisions used to withhold payment from a subcontractor. On April 17, 2020, the California Court of Appeals ruled in favor of subcontractors to limit enforcement of “pay-when-paid” clauses that delay those payments to subcontractors.
- **Public Contracts Payment - AB 1223 (2017) Effective 1/1/18:** Requires within 10 days of making a construction contract payment, a state agency that maintains an Internet Web site to post on its Internet Web site the project for which the payment was made, the name of the construction contractor or company paid, the date the payment was made or the date the state agency transmitted instructions to the Controller or other payer to make the payment, the payment application number or other identifying information, and the amount of the payment. Exempt from these provisions are construction contracts valued below \$25,000 and specified progress payments published in the California State Contracts Register under existing law.
- **Public Contracts Payment - AB 1705 (2013) Effective 1/1/15:** In 2014 ASAC successfully sponsored this bill which closed a loophole in **SB 293 (2011, effective 1/1/12)**, to define/delete what public project is “substantially complex.” Without a clear definition any project could be deemed “substantially complex” and the 5% cap on retention could be exceeded. The bill requires agencies to explain why they determined a project to be substantially complex and to disclose that to bidders along with the increase in retention if applicable. The bill also extended the “sunset” to Jan.1, 2018. Governor Brown signed the bill, which became effective January 1, 2015. NECA co-sponsored this legislation.
- **Payment Protection - AB 164 (2013) Effective 1/1/14:** Governor Jerry Brown signed this ASAC bill requiring the developer to provide payment and performance bonds, in a manner similar to the Little Miller Act, on **Public/Private Partnerships (3Ps)** in California.  
  
3Ps, is an emerging trend whereby the **public** provides lands that are being developed by **private** companies that have no legal obligation to pay contractors. The contractors have no lien rights because the land is publically owned, there is no public money to go after with a Stop Notice, and payment and performance bonds WERE not required to be in place.  
  
Much of the money for these 3P projects comes from outside the United States. The developers are forming LLCs and other protected entities. If the project goes bad or gets canceled, the developer can bankrupt the LLC and move on without paying anybody -- there was no recourse for the contractors.  
  
Beginning 1/1/2014, payment and performance bonds must be in place, providing payment remedies for subcontractors and suppliers, and ensuring that the project will be completed for the public entity.
- **Indemnification Reform - SB 474 (2012) Effective 1/1/13:** ASAC has always supported the idea that the person indemnifying has no obligation to defend actions or proceedings prior to a preliminary or final determination of liability. Neither should that person be liable in any amount that exceeds the finally determined percentage of liability, based upon comparative fault.  
  
In 2012 Governor Brown signed SB 474, which establishes a proportionate, or comparative, liability standard that holds each party responsible only for the damage it causes and defense costs for that damage. The new law improves California’s statute, which, when other parties are not solely at fault in the past allowed subs to be held responsible for 100% of the injuries, damage, and defense costs arising from other parties’ mistakes. The new law applies to public and private construction contracts entered into on or after Jan.1, 2013. One of the principal supporters of this bill was ASAC. Bottom line is if a claim has nothing to do with your work you will not have to pay for someone else’s mistakes.

▪ **Payment Protection - Amicus Brief in Eggers Industries v. Flintco, Inc. (2012):** 2nd tier supplier is “subcontractor” when providing manufactured items pursuant to specifications entitled to lien, payment bond and stop payment notice rights. ASA submitted Amicus Brief in support of contractors in this case and it resulted in a published opinion supporting contractors.

▪ **Retention Reform-Public Works - SB 293 (2011) Effective 1/1/12:** Retention reform has always been an important issue for ASAC. There is no quick solution to this problem that has developed over the years, but ASAC persists in chipping away at it as the occasion arises. A huge victory was won in 2011 when SB 293 was signed by Governor Brown, effective 1/1/12 capping retention at 5% (for non-substantially complex projects-see AB 1705 above). **AB 92 (2017) Effective 1/1/18: Extended through 1/1/2013.**

SB 293 caps retainage from the owner to the prime contractor at 5% on state and local public contracts entered into between Jan. 1, 2012 and Jan. 1, 2016. State law already prohibits a prime contractor from retaining more from a sub than the owner retains from the prime. The new statute also improves the state’s prompt payment law by requiring upper-tier contractors on public projects to pay lower-tier contractors *within 7 days* of receiving a progress payment. Previously, upper-tier contractors had 10 days to pay. This bill was supported by ASAC, AGC and many construction trade organizations. While ASAC didn’t sponsor this bill, we did get language added that helps preserve subcontractors’ late bond claim rights.

▪ **Mechanics Lien Law – SB 189 (2010) Effective 7/1/12:** In 2011 ASAC monitored the California Law Revision Commission (CLRC) as they reviewed and proposed revisions to the state Mechanics Lien Law. The resulting changes were presented to the legislature in SB 189 (Lowenthal), with additional changes presented in **SB 190**.

SB 189 was a complete overhaul of all Mechanic Lien statutes. A massive 244 pages long, it recodified code sections, made substantive changes in law, and might have inadvertently

overruled or called into question recent court rulings that are beneficial to sub-trades.

A group of construction associations, ASAC included, determined that the measure needed thorough analysis in order to accept, support or oppose the proposed revision to the codes. A team of eminently qualified attorneys agreed to represent the sub-trades and trade associations and take on this task. This team delivered to the CLRC a 25-page executive summary (supported by over 100 pages of detailed analysis) setting forth trades’ concerns and recommendations about the draft bill. These concerns were accepted by the CLRC and the bill was amended accordingly.

Obviously, ML’s protect our businesses. We must defend our members in this issue. ASAC helped organize the “*SB 189 – Trade Contractor Legal Analysis Group*”, recruited other associations to the cause, and helped fund the work done by the attorneys. SB 189, was signed by Governor Schwarzenegger in September 2010 and became law with a much needed implementation delay to July of 2012. That date gives the organizations time to educate members so they can comply with the ML law from the start.

▪ **Owner Implied Warranty - Amicus Brief in Great American v. LAUSD (2010):** Owners implied warranty of plans. ASA submitted Amicus Brief in support of contractors in this case and it resulted in a published opinion supporting contractors.

▪ **Insurance - Amicus Brief in Vandenberg v. Superior Court (1999):** Insurance obligation in CGL insurance policy, may provide an insured coverage for losses pleaded as contractual damages (as opposed to only if plead as negligence claim). ASA submitted Amicus Brief in support of contractors in this case and it resulted in a published opinion supporting contractors.

▪ **Payment Protection (1997):** In 1997 ASA formed SLDF and wins first case – eliminating pay-if-paid clauses in California. The California Supreme Court Declares A Pay If Paid Clauses Are Void: The leading opinion on pay if paid clauses in California contracts was issued by the Supreme Court of California in 1997 for the case *Wm. R. Clarke Corp. v. Safeco Insurance Company* (15 Cal.4th 882).

## CALIFORNIA CHAPTERS

### San Francisco Bay Area



### Los Angeles/Orange County



### ASA National

