



END OF LEGISLATIVE ROUND ONE ... ROUND TWO STARTS SOON

September marked the end of the first half of the two year legislative session (2009-2010). The Governor acted on several hundred bills. (Imagine the paperwork!)

Of utmost concern to ASAC was SB 802 which capped retentions in public works at 5%. It also addressed "late bond claims" per an amendment requested by AGC and tightened up payment schedules. Unfortunately, as you have probably already heard, SB 802 was vetoed. Here is the Governor's veto message:

" VETOED" DATE: 10/12/2009

To the Members of the California State Senate:

I am returning Senate Bill 802 without my signature.

Under current law, public entities, at a minimum, must retain 5percent of a payment to a contractor completing a public works project. This bill would restrict the State's ability to retain more than 5 percent of payment and no more than 5 percent of the public work contract price.

When a contractor fails to complete a public works project, the public entity needs recourse to ensure that the project gets completed. Public works contracts have a higher level of risk as public entities usually have to accept the low bidder. Though there are options available to the State to go after a contractor who fails to complete the terms of a public works contract, retaining portions of payment to the contractor provides incentive for the contractor to complete the project. While I am sympathetic with the concerns of subcontractors, the State's responsibility is to protect the taxpayer to make certain that public works projects are completed correctly and within budget; limiting the retention amount hampers the State's ability to do that.

For these reasons, I am returning this bill. Sincerely,

Arnold Schwarzenegger"

While we assess where this leaves the subcontractor industry we are also weighing the fate of our own Senate Bill 629 which caps retention in private works at 5%. Our bill is pending action in January or February. We also have Assembly Bill 1119 alive which makes the prompt pay statutes more consistent in several sections of various codes.



We all really appreciate the personal effort ASAC members put into helping SB 802 and SB 629 by writing letters. If you faxed a copy of your letter to the ASAC office, your name appears below. We'll have more info later this year.

Skip Daum

President, Capitol Communications Group A Professional Advocacy Firm Established in 1974.
Legislative Advocate for American Subcontractors Association California Inc.



Thank YOU Letter Writers for SB 802

Unfortunately the Governor also wrote a letter.....(see VETO Letter above) and as you know, his packs the biggest wallop!

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UNDERGROUND ECONOMY TASK FORCE

By Sam K. Abdulaziz, Abdulaziz, Grossbart & Rudman

As many of you know, the Contractors State License Board and other public entities have started an enforcement program that would target contractors, both licensed and unlicensed, who are suspected of illegal activity in ten counties that have District Attorneys funded by the Premium Insurance Fraud Task Force. David Fogt, Chief of Enforcement, gave us an update.

Prior to this time, the CSLB had targeted unlicensed contractors with an average of 45 undercover sting operations conducted each year throughout the state.

The new program will redirect ten of those stings in counties with Pilot Proactive Enforcement Programs. This is funded by prosecutors, to include licensed and unlicensed contractors suspected of workers compensation, insurance, payroll and or withholding violations.

We will keep you informed as to any news.

Attorney Sam Abdulaziz of Abdulaziz, Grossbart & Rudman has been practicing construction law for over 30 years. He has written a book called "California Construction Law" which is updated annually. He represents numerous construction trade associations and contractors. He appears at Contractors State License Board meetings and has argued a number of cases before the appellate courts, including the California Supreme Court dealing with the "Pay-If-Paid Clause." Abdulaziz, Grossbart & Rudman provides this information as a service to its friends & clients. This document is of a general nature and is intended to highlight areas of the subject matter being discussed and may not contain all of the information; it should not be used as a substitute for legal advice. This document does not create an attorney-client relationship, or protect any confidential information until a written agreement is signed. You should seek the aid and advice of a competent attorney, accountant and/or other professional instead of relying on the presentation and/or documents. Sam Abdulaziz can be reached at Abdulaziz, Grossbart & Rudman, P.O. Box 15458, North Hollywood, CA 91615-5458; (818) 760-2000, Facsimile (818) 760-3908; or by E-Mail at info@agrlaw.net <mailto:info@agrlaw.net> . On the Internet, visit our Website at www.agrlaw.net <http://www.agrlaw.net>.

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AN OVERVIEW OF THE ADDITIONAL LEGAL EXPOSURE A CONTRACTOR MAY ENCOUNTER IN CONSTRUCTING A GREEN BUILDING

By William C. Last, Jr., Attorney at Law



In recent years there has been an increasing governmental and public focus on the use of “green building” in the construction industry. Green buildings can be designed to include any of the following goals: (1) achieving a LEED certification; (2) setting energy performance consumption levels; (3) use of recycled materials; (4) self-generation of energy; (5) water use reduction; (6) indoor environmental quality including air quality; and (7) operation and manufacturing green standards. Some green buildings may be designed to simply incorporate sustainable goods and recycled building materials into the project. While other buildings are designed to obtain both sustainable goals as well as cost saving goals such as a reduction in usage of energy and other natural resources. These high performance buildings are intended to obtain measureable improved energy savings.

Disputes concerning the outcome of a green building project can result when the project owner has an expectation of how the building will perform which is different than that of the design team or the contractor. They can also result when the materials and products incorporated into the project do not perform as expected.

The remainder of this article will provide an overview of the green building concept and unique legal issues that impact a green building project.

What are benefits of green building?

Aside from the environmental benefits there are financial benefits to the owner of a green building. Typically, the costs of designing, engineering, commissioning and certifying a green building are greater than a traditional building. However, those up-front costs are expected to be more than offset by an energy cost savings over the life of the building. Furthermore, there are a number of financial incentives in the form of tax credits, exemptions and grants which are available to green buildings. These include municipal grants, project permit fast tracking, solar tax credits, utility incentives and rebates. Furthermore, green buildings can provide further benefits to the owner and developers in terms of utility rate savings and public relations benefits. Due to the aforementioned incentives it is important that the “as-built” green building performs in the manner that was intended by the designer.

How is a green building certified?

Before discussing the certification process it must be noted that a building does not have to be certified in order to be a green building. Any building that is sustainable and has a beneficial or mitigated affect on the environment can be determined to be a green building.

Since there are very few if any governmentally adopted building codes for green buildings the standards and

certifications are being set by non-profit organizations. The primary organizations are U.S. Green Building Council (USGBC) which created the Leadership in Energy and Environmental Design (LEED®) Green Building Rating System. The LEED program established a certification program for green buildings.

The LEED rating system allots a certain number of points in the design process and is primary concerned with environmental and human health. LEED projects are certified on four levels. The level is based on the total points that are accumulated. The levels are: (1) Basic; (2) Sliver; (3) Gold; and (4) Platinum. In order to apply for certification a LEED project must have at least one designated LEED accredited professional involved in the project. For a professional to obtain LEED accreditation that person must apply for accreditation and pass an examination administered by USGBC.

There are other rating programs that are being used in the United States. The Building Research Establishment Environmental Assessment Method (BREEAM) Has created another rating system that is referred to as the Green Globes Rating System. Their system is web-based and is primarily used in Canada and the United Kingdom. The Green Building Initiative (GBI) is a nonprofit organization to help home builders promote the National Association of Home Builders established the Model Green Home I Guidelines GBI as licensed the use of

Green Globe system for use in the United States. Other organizations that have green building programs include, but are not limited to, International Organization for Standardization (ISO 14000), Energy Star and California Green Builder.

Are there specific regulations that apply to green builders?

Yes. There are regulations on the federal, state and local levels. On the federal level there is Executive Order No. 13423, as well as performance standards that have been established by the Department of Energy. Executive Order No. 13423 requires: (1) new construction and major renovation to comply with Guiding Principles for Federal Leadership in High Performance and Sustainable Buildings; and (2) by 2015, 15% of the existing federal buildings must incorporate sustainable practices. The DOE's standards can be found at 10 CFR §§ 433.1-435.306.

California's energy regulations are found in the following locations: (1) Assembly Bill 4420 (1988); (2) Executive Order No. S-20-04 "The Green Building Initiative" which concerns energy reduction in State buildings and sets certain LEED standards for design and construction of new buildings; (3) California Energy code (Title 24 at 24 Cal Regs Part 6) which has standards for the building envelope and mechanical systems; (4) the California Green Building Standards Code (24 Cal Code Regs Part 11) which seeks to reduce greenhouse gas emissions; (5) Global Warming Solutions Act of 2006 which requires the California Air Resources Board (CARB) to regulate air quality and set greenhouse emission standards to 1990 levels by the year 2020 has resulted in CARB starting to set energy efficient standards for green buildings; and (6) new supplements, addendums and practices that are designed to work with USGBC LEED Standards for certification. In addition to California statewide statutes and regulations that apply to green buildings a number of lesser public entities have adopted regulations and ordinances that apply to green buildings, as well as promote green building projects. The California Department of Justice has a directory of Local Government Green Building Ordinances in California that can be found at http://www.ag.ca.gov/globalwarming/pdf/green_building.pdf.

What additional liability exists in constructing a green building?

a. Exposure associated with the project delivery method.

The primary exposure that a contractor can have in building a green building flows from the project delivery method. There are three primary methods: (1) the owner

retains a designer who prepares a complete set of plans and descriptive/method specifications upon which the contractor bids and builds the project (design-bid-build); (2) the owners design team prepares a general set of plans and project performance specifications and/or end result specifications from which the contractor bids and then takes on the responsibility for designing a building that meets the performance criteria or alternatively the contractor takes on all the design and construction obligations (design-build) and; (3) a construction manager is retained (either at risk or not at risk) to build the project. When the contractor takes on some or all the design responsibility for a green building its risk substantially increases.

When a contractor is provided with a complete set of plans and descriptive/method specifications that set forth the full scope of the work the primary source of dispute will concern whether or not the plans and specifications were complete and accurate. Generally, if the contractor builds in accordance with the plans and specifications and the system doesn't work as designed the contractor has little if any liability. However, many contracts contain clauses intended to make the contractor responsible for a poorly designed project (e.g. requiring review of plans and specifications, requiring compliance with all applicable building codes and advances). A contractor whose intention it is to simply follow the descriptive/method specifications should review the contract to ensure that it does not include clauses that shift some of the design, outcome (e.g. certification) and/or performance risk to the contractor.

When a project is "design-build" the contractor takes on the liability for ensuring that the completed project performs in accordance with the performance specifications. If the performance specifications include a requirement that the completed building is to achieve LEED certification, then the contractor's liability is increased.

b. Exposure associated with the certification process.

In addition to liability that may flow from project delivery system, a contractor can also be liable if it fails to comply with green building practices. For example LEED certification awards points for green construction practices. Those practices that may be added to a contractor's responsibilities includes: (1) managing construction waste; (2) meeting storm water prevention requirements; (3) selection and use of green building materials (e.g. recycled materials); (4) use of materials with low level volatile organic compounds; and (5)

providing the owner with documentation necessary to get LEED certification.

Since documentation of the project is critical to obtaining certification, delays in obtaining those documents or not being able to obtain them can result in LEED certification being lower than planned.

c. Exposure associated with using new products and materials.

Since many green buildings include the use of new and innovative products and materials, there is typically additional uncertainty about whether the products will fail to perform as advertised or be incompatible with other materials used in the project. This uncertainty results in an increased risk of liability for product or material failures. Over the years there have been numerous construction defect cases that are attributable to new materials that failed to perform as marketed by the manufacturer. Plaintiffs in such cases typically assert that any person in the chain of distribution from the manufacturer to the contractor.

d. Exposure associated with misrepresentation of the outcome.

Designers and contractors must be careful not to oversell the benefits of the green aspects of the project. If there are affirmative misrepresentations as to the outcome of the project a party whose expectations are not satisfied may proceed with a fraud and/or negligent misrepresentation claim or a claim under various consumer protection statutes. A party's expectation could concern such issues as the energy savings that may result from building a green building, the health benefits of such a building, or other sustainability claims. It is also conceivable that prior to the completion of the building the owner has entered into a lease with a tenant that is based on energy savings. If the building doesn't meet the representations the tenant could possibly sue the owner. The liability from the lessor of a green building all the way down to claims made by a subcontractor to the general contractor.

e. The damages that can be awarded can be greater for a green building.

The damages an owner may recover from a contractor for a failed green building project may be greater than those awarded in a traditional project. Primarily the potential consequential damages (e.g. cost of reconstruction process, loss of tax credits, loss of goodwill, added energy costs, and diminution in value since non-compliant) will be greater.

For the foregoing reasons the contractor must review its prime contract and subcontracts to determine if the risks associated with a green building project are limited and, if not, a least clearly set forth.

What additional legal exposure does an architect/engineer have in a green building project?

An architect's exposure flows from whether or not the architect/engineer has committed to a specific performance standard. If the architect/engineer commits to designing a project to obtain a specific LEED certification he/she will likely have exposure if the project fails to meet that outcome. As such, architects and engineers should be wary of contractual or implied guarantees that the project will achieve a specific certification. If the architect/engineer fails to meet its contractual obligations it can be sued by both the owner and the contractor (the contractor will assert it is the third party beneficiary of the architect/engineers contract with the owner). Additionally, a design professional holding himself out as qualified to perform this work may be held to a higher standard of knowledge and skill.

What are some Do's and Do Not's for a green building project?

- (1) Do not increase the owner's expectations relative to the outcome of the project.
- (2) Do modify your standard prime contract so that it anticipates the legal and economic risks associated with a green building project, and do include flow down clauses in your subcontracts.
- (3) Do anticipate and include all the additional administrative expenses and other expenses associated with obtaining certification in your bid and contract.
- (4) Do choose and review selected products and materials to determine if they will perform as marketed by the manufacturer.
- (5) Do not make excessive representations about your experience and/or the outcome of the project.
- (6) Do ensure that you understand all the applicable building codes and regulations that impact a green building project.
- (7) Do ensure that you have on staff or access to personnel who understand green building practices and the pitfalls associated with such projects.
- (8) Do not rely on assumptions based on experience with standard products. Read and follow all manufacturer-

supplied instructions for installation and obtain written approval of any deviations from them.

- (9) Do seek to limit your warranty liability, especially on new products to the same level afforded by the manufacturer.
- (10) Do review the risks associated with green buildings with your insurance broker to determine if you should add any endorsements or coverage to your liability insurance coverage.

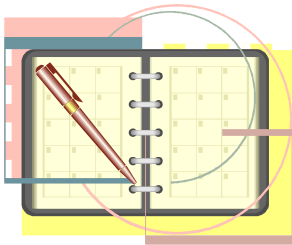
Conclusion

Green building practices will become widespread in coming years. The law is evolving relative to green building requirements and the exposure for failing to build a compliant building. Before entering into a contract to provide design services and/or construction services for a green building it is important to contractually set forth what risks are being accepted. The use of standard or unmodified contracts should be avoided when a green building as the end result.

©2009 William C. Last, Jr. wrote this article. Mr. Last is an attorney who has been specializing in Construction Law for over 29 years. In addition to belonging to a number of construction trade associations, Mr. Last holds a California "A" and "B" license. He can be contacted at 415-764-1990 or 650-696-8350. A number of his past articles can be found on his website (lhconstructlaw.com). This bulletin is published periodically to provide general information about current legal issues. The articles are not intended to be a substitute for the advice of an attorney as to a specific problem. If you have a specific legal question or need legal advice, you should contact an attorney.

SAVE THE DATE:

ASA BUSINESS FORUM AND CONVENTION 2010 IN SAN DIEGO, CALIFORNIA



The ASA Business Forum & Convention 2010 will take place March 4-6, 2010, at the San Diego Marriott La Jolla in San Diego, Calif. This annual event will offer dozens of education sessions, multiple networking opportunities and FASA's annual golf outing. Register by Feb. 2 and ASA will discount your registration fees to \$775 for members and \$950 for non-members. ASA members will pay \$875 and non-members will pay \$1,050 for registrations received after Feb. 2. As an added bonus, receive a \$75 discount for each additional person who registers from your company. Space is limited and will fill quickly. ASA convention participants will also receive a special hotel rate of \$179 per night by making reservations before Feb. 2. Call (888) 236-2427 and mention ASA to take advantage of the reduced room block rate. *To access a printable registration form, click "Register for a Meeting" on the ASA home page (www.asaonline.com), or call ASA at (703) 684-3450, Ext. 1304.*

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CONSTRUCTION CHANGE DIRECTIVES

In today's market, it's more important than ever to use documentation as a tool to protect your profits. As a service to our fellow ASA members, eSUB provides educational articles and webinars to assist you in spending more time on your work and less time on your paperwork. This month we're addressing Construction Change Directives, otherwise known as CCDs. The best way to protect yourself from these Owner Friendly stipulations to your contract is to proactively issue correspondence to outline the terms and protect your rights to fair payment **BEFORE** you perform the work.

According to the AGC Contract Documents Handbook, "Contract Construction Change Directive is a written instrument prepared by the Construction Manager and signed by the Owner directing a change in the Trade Contract Work and stating a proposed adjustment, if any, in the Trade Contract Price or Trade Contract Time or both. A Trade Contract Construction Change Directive shall be used in the absence of agreement on the terms of a Trade Contract Change Order."

What does this mean in layman's terms? It means that even if you're at an impasse with the Owner on what the Change is going to cost, you're still mandated by contract documents to perform the work.

Certain contracts have language that is friendlier to Subcontractors than others. For instance, beware of AIA A201 General Conditions where the Architect has the right to decide the amount of the contract change. You may have the right to dispute the decision, but if you do, you also run the risk of having to fund the entire cost of the change until the dispute is resolved.

On the flip side, the ConsensusDOCS are much more favorable to the Contractor and stipulate that the Owner must pay 50% of the estimated cost to perform the work during the dispute resolution process.

Take heed of section 14.1.3 of the AGC Contract Documents Handbook which states, "The Trade Contractor shall evaluate the proposed adjustment... and respond, **in writing**, to the Construction Manager stating the Trade Contractor's acceptance or rejection of the proposed adjustment and the reasons therefore."

To protect yourself, eSUB is offering such a letter which you can download by visiting www.esubinc.com and clicking on the "Free Project Correspondence" button in the middle of our Home Page. The letter is titled "Construction Change Directives. By pro-actively issuing this piece of correspondence, you're taking the initiative to outline the terms instead of the other way around.

If you're interested in learning more strategies to protect your profits, please contact our educational director, Benny Baltrotsky at bbaltrotsky@esubinc.com to register for one of our educational webinars, offered at no cost to ASA members.

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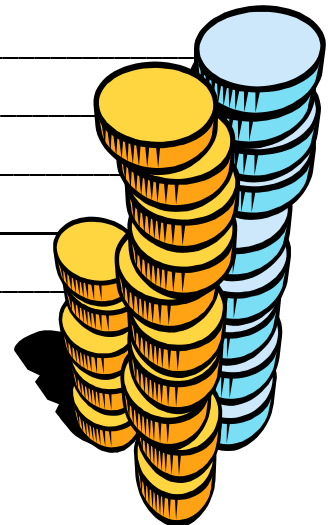
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GET A CLUE!



ASA's Regular Legal Column by Michaelbrent Collings

Your Friendly Neighborhood Shark Bloodsucker Lawyer

Here's your clue: MAKE SURE YOUR CHANGE ORDER IS A CHANGE ORDER!

Changing Horses Midstream

A change order comes when the owner (or higher tier contractor) determines that some kind of work needs to be done that is outside the scope of the contractor's work. You've read my articles, and so you knew to carefully review the contract scope of work to make sure it said what you wanted it to say. Now you have the GC over a barrel because they desperately need this work to be done.

"Sure, I can do it," you say, yawning to hide the fact that your pupils have just been replaced by little green "dollar" signs. "It'll cost a little extra, though."

The GC's representative says, "Okay, go ahead." You do the work. The project ends. You submit invoices for the extra work.

You don't get paid.

If you hadn't guessed, you did several things wrong in this case: 1) you failed to comply with notice requirements in the contract, and 2) the person who ordered the work wasn't authorized to do so.

See, that's a cute little gotcha that a lot of contracts have in them: they say there is one – and only one person authorized to issue and sign off on change order work, or to order extra work to be done in the field. You must deal with that person, or even timely submitted change order requests may be rejected as nonconforming documents. Sound fair? No. Sound evil? Yes. Sound like it happens? ALL THE TIME.

Change orders can add significantly to the contractor's bottom line in a project. They can also be devastating when mishandled. The wily contractor will put a system together for dealing with change orders, one that includes a) assessing beforehand who is entitled to issue them on behalf of the higher-tier contractor, both per the contract and according to any applicable federal, state, or local laws; b) documenting the changes as they are ordered by the GC/higher-tier contractor, including having the proper rep sign off on the order and the sum to be paid (if lump sum); and c) documenting the time and materials used – in detail – to meet the change order requirements, if the change order is to be paid on a time and materials basis.

Generally, this last includes keeping materials invoices and time sheets that document exactly who worked on the extra work for exactly what period of time. Merely providing a sheet of paper that says "This extra work cost me \$2 million, just trust me" is usually frowned upon by the GC as being less than trustworthy.

Again, change orders can be great. Especially in today's economy, they mean more work when work is scarce. But they can also mean a huge headache if mishandled. Figure out a plan for handling them. Talk it over with your lawyer. Make sure your employees know the plan (you'd think this would be obvious, but I could tell you stories...). And then implement that plan. Adjust it if parts don't work. But don't just think change orders are something you can handle "on the fly." Because you'll fly right into arguments, legal disputes, and disaster.

And next month (I'm like a tick that just won't go away!) we'll be talking about signing subcontracts on public works jobs. There are a few things you might want to know. Tune in, enjoy.

Or don't. I don't want to pressure you.



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ASAC MISSION STATEMENT

ASA of California's mission is to present a united front for construction subcontractors and suppliers and to advocate before all branches of government on issues impacting the construction industry.



WORKERS COMPENSATION INSURANCE RATING BUREAU OF CALIFORNIA

From WCIRB California – September 2, 2009 →

The ASAC Insurance Committee suggested you might find this information valuable. You may have already received it from your broker, but just in case you haven't, here it is.

ASAC Insurance Committee Members are available for your questions:

- Bill Olmo, FEDCO CONST., Committee Chair; 707-586-0500
- Marcus Norton, ALLIED NORTH AMERICA CORP.; 510-578-2000
- Chris Pennock, CHRIS PENNOCK INSURANCE SERVICES; 415-978-3803
- Ken Wagner, IOA INSURANCE SERVICES; 916-361-6527
- Anne Wright, SIOUX MUNYON INSURANCE SERVICES; 619-463-2773
- Gregg Wright, RPW / UNITED AGENCIES; 562-861-5335

WORKERS COMPENSATION INSURANCE DUAL WAGE CONSTRUCTION CLASSIFICATIONS

By letter dated July 15, 2009, the Workers' Compensation Insurance Rating Bureau of California (WCIRB) provided notice of recommended changes to the *California Workers' Compensation Uniform Statistical Reporting Plan— 799S (USRP)* rules pertaining to the wage thresholds for all dual wage construction classifications. These recommended changes included the increase by \$1.00 of the hourly wage thresholds for all dual wage classifications effective January 1, 2010.

At its meeting of August 12, 2009, the Governing Committee of the WCIRB determined that the wage thresholds for the dual wage classifications should not be changed effective January 1, 2010. Hence, no change to the wage thresholds for the dual wage classifications will be recommended to the Insurance Commissioner at this time.

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Call **1-800-423-0303** and ask for Jack Turnier for details. Mention group #12 ASAC / PDCC Rated "A"

ASA CHAMPIONS ACADEMY 2009 — ASAC MEMBERS WERE THERE!



Enjoying the events and camaraderie at the ASA Champions Academy 2009, held recently in Arlington, Virginia, were Capital City Chapter Executive Director Angela Gomes, ASAC Insurance Committee Chair and ASA Immediate Past President Bill Olmo of FEDCO Construction in Santa Rosa, and San Diego County Chapter Executive Director Nancy Grimes. Grimes is currently serving as chair of the ASA Executive Directors Council.

This annual national conference is part education and part legislative advocacy. The event kicked off with the President's Reception which was hosted by ASA President Darlene East. Each day was filled with meetings and educational workshops tailored to associations and leadership skills. Topics included Executive Director SHARE, membership growth, strategic planning and business cycles. Participants met board members, officers and executive directors from other ASA chapters, as well as the ASA National staff.

ASA Champions Academy is a great way to network, get educated about ASA and spend some time on Capitol Hill.

ASA has a strong advocacy program and part of the Champions Academy includes visits to Legislators. After a briefing on the issues, ASAC members went to Capitol Hill and met with staff from Rep Doris Matsui (D- CA 5th District), Rep Daniel Lungren (R- CA 3rd District) and Senator Barbara Boxer (D- CA). ASA was lobbying on 3 issues (Note: these are very brief summaries of these issues please go to www.asaonline.com for a complete explanation):

- Bid listing on Federal Construction Contracts (H.R. 3492) – When bidding on federal construction projects of \$1,000,000+, would require General Contractors to list subcontractors doing \$100,000+ of work. It provides a penalty if that subcontractor is replaced except under certain circumstances. This is intended to deter bid shopping and bid peddling.
- Repeal of the 3% Tax withholding Requirement (H.R. 275 and S. 292)- In 2005, Congress enacted, as part of the Tax Increase Prevention and Reconciliation Act a provision that requires federal, state and local governments to withhold 3 percent from vendors for all types of goods and services, including construction, for potential tax liabilities. ASA supports the repeal.
- Immigration Reform (no bill currently) - ASA asked legislators to support comprehensive Immigration Reform. ASA's position has many points, including the creation of a guest worker program and an effective employment verification system that doesn't burden employers.

RETIREMENT PLAN: ASAC has established a retirement plan in which you as a member can participate. The retirement plan is custom designed to meet your needs. 401K, Pension, SEP and Defined Benefit Plans are all available.

We offer most major no load funds in our pension and 401k plans. Whether you have an existing retirement plan or are considering establishing a plan, ASAC can help. Please contact our Benefits Administrator David Hodges. **1-800/743-6975**

ASAC ENJOYS THE SUPPORT OF NCDCA

Northern California Drywall Contractors Association (NCDCA) once again has come through for ASA California with a large grant to support ASAC Government Relations efforts. “We have been supportive of ASA legislative work for several years,” said Ben Duterte, who serves as NCDCA liaison to the ASA California Board of Directors. “It makes sense to us to involve our members in government relations work through ASAC because we believe in their ability to get this type of work accomplished. And by sending our monetary support and actively responding to ASAC legislative alerts we increase the effectiveness of our sister organization on behalf of subcontractors.”

“It takes an incredible budget to do legislative work at the California state capitol, and the money NCDCA gives us is greatly appreciated,” Jordi Grant, ASAC Executive Director commented. “We also need the support of the letter writing and phone responses when we ask for a grassroots movement for or against a bill. NCDCA has supported us for years in this regard, and we truly are thankful to the organization and its members.”



NCDCA MEMBERS:

ADERHOLT SPECIALTY COMPANY INC.
ALLEN SPECIALTIES INC.
ALLSTATE DRYWALL
ALTIMA CONTRACTING LTD. INC.
ANNING-JOHNSON CO.- HAYWARD
BASCO DRYWALL & PAINTING CO.
BAYSIDE INTERIORS INC.
BERGER BROTHERS INC.
BEST DRYWALL INTERIORS INC.
BOYETT CONSTRUCTION INC.
BRADY COMPANY / CENTRAL CALIFORNIA INC.
CALIFORNIA DRYWALL COMPANY
CONCORD DRYWALL INC.
CULBERSON DRYWALL
CUSTOM DRYWALL INC.
D & R PAQUETTE DRYWALL INC.
DALEY'S DRYWALL & TAPING
DASCO CONSTRUCTION & DRYWALL INC.
DENHAM CONTRACTING INC.
EAST BAY DRYWALL INC.
ERIC STARK INTERIORS INC.
EXPERT DRYWALL SYSTEMS INC.
FREDERICK MEISWINKEL INC.
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R.B. DRYWALL INC.
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S & R DRYWALL INC.
SAINZ DRYWALL INC.
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SUPERIOR WALL SYSTEMS INC.
SURBER DRYWALL CONSTRUCTION
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A Review of "Pay if Paid"

[REPRINTED FROM THE AUGUST 1997 ISSUE OF ASACALIFORNIA]

"If" or "When"

What a Difference a Word Makes

By WILLIAM J. CRAWFORD and THERESA CRAWFORD TATE
Crawford & Bangs, West Covina, California

Over the past twenty years, a great deal of confusion has developed as to the difference between the terms "Pay if Paid" and "Pay when Paid." In fact, the two phrases are used interchangeably to such an extent, very few contractors or subcontractors are able to distinguish between the two. Following the California State Supreme Court decision in WM. R. Clarke Corp. v. Safeco Ins. Co. of America, (June 26, 1997) 15 Cal4th 882, it is imperative that everyone understand the difference between these two provisions and their relationship to construction contracts.

Pay when paid

Twenty five years ago, in Yamanishi v. Bleily & Collishaw, Inc., (1972) 29 Cal.App.3d 457, the California Appellate Court upheld the "Pay when Paid" clause as enforceable. However, the court clearly stated the **contractor may avoid payment for a reasonable period of time only.** In the Yamanishi case, the contract contained a clause which indicated that the subcontractor would be paid when the general contractor was paid by the owner. The court analyzed this clause as determining the timing of payment to the subcontractor rather than completely voiding the payment obligation if the owner never paid the general contractor.

The question of what is a reasonable amount of time in which payment may be delayed is a question of fact which depends upon the circumstances of each contracting

situation. While many subcontractors would like to have the question of reasonableness quantified more precisely, and frequently ask whether 60 days, 180 days or even one year could be considered reasonable, this term simply defies black and white answers and will be decided by the factual situation and arguments available in each case. The important point is - once a reasonable time has passed, the contractor must pay the subcontractor regardless of his receipt of funds from the owner.

The Yamanishi court indicated that a condition precedent clause which actually barred the right to payment by the subcontractor unless the general contractor was paid by the owner, would require clear and express language to this effect in the contract. Thus, the condition precedent or "Pay if Paid" wording frequently used today replaced the

"Pay when Paid" clause. This development was based on a belief that these more clearly worded clauses were approved or sanctioned by the Yamanishi opinion.

Pay if Paid (also known as Condition Precedent)

On June 27, 1997, the California State Supreme Court invalidated "Pay if Paid" clauses in construction subcontracts in California. To quote the court:

"a general contractors liability to a subcontractor for work performed may

not be made contingent on the owners payment to the general contractor..."

"We...conclude that a pay if paid provision is void because it violates public policy that underlies the antiwaiver provisions of the mechanic's lien laws."

As a result, the language frequently seen in construction subcontracts, that payment to the general contractor is a condition precedent to the general contractor's obligation to pay the subcontractor for work performed, is no longer enforceable in California. Additionally, the court ruled that a payment bond surety may not claim the failure of the owner to pay the general contractor for work, as a basis for nonpayment to the subcontractor on the payment bond.

As quoted above, the basis for the court's holding that 'Pay if Paid' clauses in construction subcontracts are against public policy and unenforceable stems from the indirect waiver or forfeiture of lien rights in the event of nonpayment by the owner. This contractual

waiver is prohibited by Civil Code §3262 which forbids the waiver of mechanic's lien rights without payment and use of the proper statutory waiver and release form.

The net effect of this recent California State Supreme Court decision is **the contractor must pay the subcontractor whether or not the owner pays the contractor and regardless of what is in the contract.**

Conclusion

All of the above can be stated simply: "Pay if Paid" or "Condition Precedent" clauses which would relieve the general contractor of its obligation to pay the subcontractor if the owner failed to pay the general contractor are currently void and unenforceable. The "Pay when Pay" clause is valid and allows the general contractor to delay payment to the subcontractor for a "reasonable" time while awaiting payment from the owner.

This article is intended to provide the reader with general information regarding current legal issues. It is NOT to be construed as specific legal advice or as a substitute for the need to seek competent legal advice on specific, legal matters. For questions about this article, contact Theresa Tate at Crawford & Bangs LLP, 626-915-1641.

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