

### California Statutes and Legal Update for 2008

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It is hard to believe that a year has come and gone since our last California statutes and case law update. But it has, and the Legislature and the courts have been busy passing laws and deciding cases that impact EGCA members. Here is a summary of some of the legislation effective Jan. 1 and some of the cases decided in 2007.

#### LEGISLATION

##### General Construction

###### SB 161 – Public works contracts: Internet submissions

Authorizes public entities to receive supporting materials submitted pursuant to a public works contract over the Internet and requires the public entities to provide an electronic receipt to the contractor either by immediate transmission or by providing access to the contractor to an electronic file that contains the receipt.

##### California State Licensing Board

###### SB 354 – Contractors: aiding unlicensed persons

Authorizes the registrar of contractors to order a licensee to pay a specified sum to an injured party if the registrar finds that a licensee has aided an unlicensed person in evading the Contractor's State License Law or allowed an unlicensed person to use his or her license.

##### Insurance

###### SB 138-Construction contracts: indemnity

Clarifies that any provisions in a contract or agreement for residential construction between a builder and subcontractor that purports to require indemnification of the builder for its own negligence or the negligence of the builder's other agents, servants or independent contractors, by a subcontractor, against liability for construction defects, are unenforceable.

##### Environmental

###### AB 1488 – Air pollution. Smog check program: diesel-powered vehicles

Starting Jan. 1, 2010, diesel-powered vehicles manufactured after the 1997 model-year that have a gross vehicle weight rating of less than 8,501 pounds will be included in the biennial smog check program.

##### Workers' Compensation

###### AB 813 – Workers' compensation: audits

Provides that if an employer fails to provide for access by the insurer or its authorized representative to its records, to en-

able the insurer to perform audit, the employer shall be liable to pay to the insurer a to-premium for the policy equal three times the insurer's then-current estimate of the annual premium on the expiration date of the policy.



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#### CASE LAW

##### Licensing and Bidding

###### Right of listed subcontractor to perform change order work

In this public works case, the general contractor listed a subcontractor to perform certain tunnel boring work. During the work, the contractor proposed a value engineering alternative that resulted in the tunneling work being changed to "open face shield tunneling" instead of the use of a tunnel boring machine (resulting in \$3,000,000 in savings to the owner).

The subcontractor, who was listed, contended that it was entitled to perform the work. The court held that the subcontractor has no right to perform change order work despite being listed for the work in question. *Affholder, Inc. v. v. Mitchell Engineering, Inc.*, 63 Cal. Rptr. 3d 121 (2007).

###### Boring logs and differing site conditions

In this public works case, the general contractor relied on two boring logs provided by the public agency.

The logs were accompanied by the standard language stating that the contractor assumed the sole responsibility to make its own technical assessment of the subsurface soil conditions.

The contract further provided that the contractor would be entitled to no additional compensation if it failed to determine existing conditions, and the district made no representations concerning the soils condition. The contractor encountered soils that were significantly harder than that represented in the two boring logs.

The contractor won \$1,265,000 at trial. On appeal, the appellate court confirmed that the position of the district was inappropriate and contrary to law.

The rock samples were selected by the district as those "most competent" and, thus, the conduct of the contractor in relying on

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the same was reasonable. *Condon-Johnson & Associates, Inc. v. Sacramento Mun. Utility Dist.*, 2007 WL 1153772 (Cal. App. 3d Dist. 2007).

## Attorney's Fees and Costs

### When Given the Opportunity, You Better Negotiate in Good Faith.

A general contractor on a public works project sued the City of Sunnyvale alleging that the plans and specifications were defective, that the city delayed in the issuance of change orders and that the city wrongfully withheld payment for work performed.

The matter proceeded to trial and the city prevailed. In part, it was found that the general contractor had failed to negotiate in good faith to close out the project.

There was evidence that city staff spent a great deal of time trying to reach a resolution with the contractor, had to deal with stop notices filed, and had to finish the contractor's work.

The ultimate result was a small award in favor of the city of \$30,000.

In addition, the city was awarded attorney's fees of \$377,000. *Thompson Pacific Const., Inc. v. City of Sunnyvale*, 2007 WL 27430099 (Cal. App. 6th Dist. 2007).

## Insurance

### Is a contractor liable for fraud when he lies about

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### insurance coverage?

In this case, a licensed contractor, acting as a construction manager, represented that his company had liability insurance. After a leak from a fire head broken during construction caused significant damage, it was determined that the contractor had lied. He had no insurance.

The matter proceeded to trial and the contractor was found liable for payment of compensatory damages. Additionally, he was ordered to pay punitive damages; however, this portion of the judgment was later reversed as the plaintiff did not present adequate evidence of defendant's net worth. *Kelly v. Haag*, 52 Cal. Rptr. 3d 126 (4th App. Dist. 2006).

## Damages

### Liquidated damages for a contractor?

Most public works contracts have a clause providing for the payment of liquidated damages (a fixed, pre-agreed sum) by the general contractor to the owner should the contractor fail to timely complete its work. Sometimes, the contract will also set forth a fixed sum to be paid to the contractor if its work is delayed by the owner. In this case, the prime contract provided for a payment of \$250 per day to the contractor if delay were suffered.

The contractor contended that this amount was "unconscionably" inadequate. Reminding the court that the contract was drafted by the school district, and that it was not subject to

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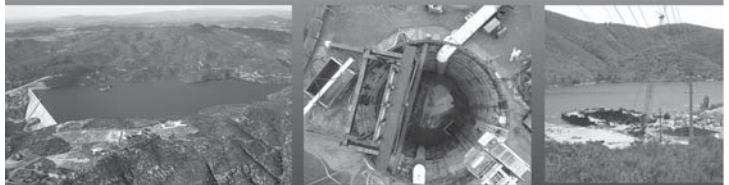


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negotiation, the contractor claimed that the clause was unreasonable and thus unenforceable.

The court rejected this argument finding that the contractor had a choice to bid the work or not. Further, the clause was not "one-sided" and did not "shock the conscience" of the court. *Begl Construction Co., Inc. v. Los Angeles Unified School Dist.*, 2007 WL 2446858 (Cal. App. 2nd Dist. 2007).

### Miscellaneous

#### Right of court to order private mediation

A court cannot order a party in litigation to participate in private mediation. In *Jeld-Wen, Inc. v. Superior Court*, 2007 WL 16068 (4th App. Dist. 2007), the court ordered all parties in a multiparty construction case to participate in private mediation, with the cost thereof to be shared by the parties. Jeld-Wen refused.

On appeal, the appellate court held that mediation is a voluntary process where self determination is involved. Thus, a court cannot order a party to attend and pay for private mediation.

#### Can a California subcontractor be forced to mediate and arbitrate in Nevada?

A subcontractor filed suit against a general contractor in California for breach of contract and prompt pay penalties. The general contractor sought to have the suit dismissed as the subcontract expressly called for mediation in Nevada, with binding arbitration in Nevada to follow. The appellate court ruled that such clauses were unenforceable pursuant to Cal. Code of Civil Procedure Sec. 410.42, rendering such clauses void and unenforceable. *Templeton Development Corp. v. Superior Court*, 144 Cal. App. 4th 1073.

#### Illegal aliens are entitled to protection under prevailing wage laws

A group of welders sued a general contractor and its surety company alleging that they had not been paid prevailing wages by their employer on public works of improvement. The defendants contended that the employees did not have standing to sue as they were undocumented workers.

The appellate court concluded that the prevailing wage statutes set a minimum wage which is mandated to be paid to all despite immigration status. *Reyes v. Van Elk, Ltd.*, 56 Cal. Rptr. 3d 68 (Cal. App. 2d Dist. 2007).

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