CMAA CONSTRUCTION LAW UPDATE: 2019

San Diego, California

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CMAA – San Diego Chapter
Presenter Introductions:

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Prompt Payment
California’s Prompt Payment Statutes

• Private Projects
  – An owner must pay a direct contractor within 30 days after receipt of a demand for payment pursuant to the contract
  – If the owner has withheld retention from a direct contractor, it must pay the direct contractor within 45 days after completion of the improvement
  – A direct contractor must pay its subcontractor within seven days of receipt of each progress payment that represents, in part, payment for the subcontractor’s work
  – A direct contractor that has withheld retention from a subcontractor (because the owner has withheld retention from the direct contractor) must pay its subcontractor the subcontractor’s portion of the retention within 10 days after receiving all or a portion of the retention

• Penalties For Failure To Comply
  – An owner that fails to make timely payment, or wrongfully withhold retention, faces penalties of 2 percent per month on the improperly withheld amount (instead of interest), and attorney’s fees and costs if the contractor prevails.
  – A direct contractor that fails to make timely payment, or wrongfully withholds retention faces the same penalties, in addition to discipline by the California Contractors State License Board, if the subcontractor prevails.
California’s Prompt Payment Statutes

• Public Works Projects
  – State and local agencies must pay a direct contractor its progress payment within 30 days after receipt of an undisputed payment request
  – California State University must pay its direct contractors within 39 days after receipt of an undisputed payment request
  – Retention proceeds held by a public agency for a contractor on a public works project must be released within 60 days of completion of the work of improvement
  – A direct contractor must pay its subcontractors within seven days after receiving a progress payment that represents, in part, payment for the subcontractor’s work
  – A direct contractor in a public project that has withheld retention from a subcontractor must pay its subcontractor the subcontractor’s portion of the retention within seven days (as opposed to 10 days with private projects) after receiving all or a portion of retention

• Penalties For Failure To Comply
  – If a public entity wrongfully withholds payment, or retention, it faces penalties of 2 percent per month of the improperly withheld amount (instead of interest), and attorney’s fees and costs if the contractor prevails
  – A direct contractor that fails to make timely payment, or wrongfully withholds retention faces the same penalties, in addition to discipline by the California Contractors State License Board, if the subcontractor prevails
Good Faith Disputes

• If a good faith dispute exists, the owner/direct contractor may withhold from the progress payment/retention an amount not to exceed 150 percent of the amount in dispute

• Until recently, courts were split on the definition of the term “amount in dispute”
United Riggers & Erectors, Inc. v. Coast Iron & Steel Co., 4 Cal.5th 1082 (2018)

• Background:
  – In 2010, Universal City Studios LLP entered agreements to build a new ride at its theme park.
  – Coast Iron & Steel Co. was retained as the direct contractor to design, furnish, and install metal work.
  – Universal agreed to pay Coast Iron on a monthly basis for amounts billed, minus a 10 percent withholding as protection against nonperformance and potential liens.
  – Coast Iron retained United Riggers & Erectors, Inc., which was responsible for installing the metal work Coast Iron fabricated and supplied.
  – United Riggers completed its work to Coast Iron’s satisfaction and, once all work on the project was finished, demanded additional amounts for change order requests and delays. Coast Iron refused payment.
  – Universal paid out the 10 percent withheld as a retention to Coast Iron, which in turn owed $149,602.52 of that amount to United Riggers. Although United Riggers requested payment, Coast Iron declined to pay forward any part of the retention.
  – In response, Coast Iron paid the retention owed.

• Result:
  – Even though Coast Iron ultimately paid the retention owed, the Court found for United Riggers
  – Coast Iron could not use the parties’ dispute over delays to justify withholding United Riggers’ portion of the retention.
United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.,
4 Cal.5th 1082 (2018)

• Takeaways:
  – California’s prompt payment statutes allow a withholding only when there is a dispute directly relevant to the specific payment that would otherwise be due.
  – A direct contractor is not permitted to withhold amounts that are unrelated to the specific dispute.
  – Penalties will be assessed regardless of whether the contractor seeking payment is ultimately paid.
Design

- Design Immunity (Government Code section 830.6):
  - Elements:
    - Causal relationship between plan/design and the accident;
    - Discretionary approval of plan/design prior to construction; and
    - Substantial evidence of the reasonableness of the plan/design.

- Holding: A public entity is not entitled to design immunity any time an employee with authority signs off on a plan and another employee or engineer attests the plan is reasonable. Rather, where, as here, an employee with discretionary authority signs off on a plan that includes the injury-producing feature, and it was reasonable to do so, design immunity applies. The injury-producing feature—the absence of rumble strips—was part of the plan. Since Rodriguez conceded that Caltrans established both a causal relationship between the plans and the accident, and the reasonableness of those plans, the trial court properly determined Caltrans had established, as a matter of law, the affirmative defense of design immunity.

• Background:
  – BBC, the prime contractor in this action entered into a design-build contract to perform work at Camp Pendleton
  – Prior to being awarded the project, BBC provided design documents to a subcontractor, Bonita Pipeline, Inc. (Bonita), to solicit its bid
  – The design documents were designated as incomplete when they were provided to Bonita
  – Bonita and BBC agreed that the plans and specifications would be further refined as the design developed and that Bonita knowingly assumed the risk of further refinement and would not be entitled to additional change orders. Additionally, the Subcontract provided that Bonita was not entitled to increase the contract price, even for increases in the scope of work related to the plans and specifications, unless the Owner requested such changes.
  – Following the completion of the project, Bonita sought declaratory judgment that a contractor should not be permitted to shift legal responsibility for defective plans and specifications onto its subcontractor.

• Holdings:
  – The Court ruled in favor of Bonita and held that the responsibility to provide correct plans and specifications ‘is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work – even in design build contracts
Environmental Compliance

- CEQA (California Environmental Quality Act); Public Resources Code section 21000, et al.
  
  • An Environmental Impact Report (EIR) is the “heart” of CEQA
  
  • All local agencies shall prepare or cause to be prepared an EIR on any project that may have a significant effect on the environment.
    
    - Fair Argument Standard applied to a local agency’s decision not to require an EIR.
  
- Holding: Application of design guidelines by a county review board does not insulate a project from CEQA process at initial study phase under the fair argument standard. Comments by members of public are sufficient to create fair argument and require EIR.
Protect Niles et al., v. City Of Fremont et al., 25 Cal.App.5th 1129 (2018)

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  - An Environmental Impact Report (EIR) is the “heart” of CEQA
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    - Fair Argument Standard applied to a local agency’s decision not to require an EIR.

- Holding: A project’s visual impact on a surrounding officially-designated historical district is an appropriate aesthetic impact review under CEQA. Substantial evidence supported fair argument that the project would have an adverse aesthetic impact on the city historic overlay district.
Agency Perspective: Selected Issues

- Progressive Design Build Process and Issues
- Standardization of Dispute Resolution
- Impact of West Coast Air Conditioning
Potential Issues and Pitfalls

- Buyoff from community and policymakers
- Who gets to drive?
- Other essential staff
COMMUNITY INPUT AND BUYOFF

COMMUNITY

- Location
- Project
- Aesthetics
- Stakeholders
- Fiscal Impacts
- Communication
- Other Unique Concerns

POLICYMAKERS

- Interests and Concerns
- Impact to Constituents
- Location
- Fiscal Impacts
- Community Outreach
- History of Projects
- Confusion and Understanding of the Process
WHO GETS TO DRIVE?

GMP

- Phasing
- Lump sum
- Timing
- Authority

“OPEN BOOK”

- Pricing
- Markups
- Timing
- Authority
OTHER CITY STAFF

PLANNING/BUILDING
Unique concerns or requirements concerning the use or building of the project

COMMUNICATIONS
Community liaison or some other staff or stakeholder that has insight for the area

LEGAL
In house or potentially outsourced legal department

MANAGEMENT
Other staff that have authority or influence over approval
Government Contracts

- Conflicts of Interest - Government Code section 1090
- Competitive Bidding – Government Code section 4525
- Facts: A school district employee persuaded the district to convert her position from employee to independent contractor.
  - Employee was making $113K/Year
  - LLC formed by employee (as sole owner) entered into $1.3m/year contract with district and later award a $13m no bid contract.
  - District later declared contracts void in violation of Government Code section 1090 and 4525.
  - LLC sued district for damages. Jury awarded LLC over $20m. The Court of Appeal reversed.
Insurance
Travelers Property Casualty Company Of America et al., v. Engel Insulation, Inc, 240 Cal.Rptr.3d 623 (2018)

- Contractor’s insurance carrier filed an action against subcontractor to recover attorney fees and costs incurred in defending against construction defect action.

- Contractor status as a corporation was suspended.

- Holding: Insurer could not bring it own action against a subcontractor based on subrogation, given contractor’s status as a suspended corporation.
Labor and Employment

- The Privette doctrine

- Exception: “Retained control doctrine”

- Takeaway: Hirers must be extremely cautious when preparing defense and indemnity clauses
Mechanic’s Lien
Mechanic’s Liens and Arbitration

Code of Civil Procedure section 1281.5

(a) Any person who proceeds to record and enforce a claim of lien by commencement of an action pursuant to Chapter 4 (commencing with Section 8400) of Title 2 of Part 6 of Division 4 of the Civil Code, does not thereby waive any right of arbitration the person may have pursuant to a written agreement to arbitrate, if, in filing an action to enforce the claim of lien, the claimant does either of the following:

• (1) Includes an allegation in the complaint that the claimant does not intend to waive any right of arbitration, and intends to move the court, within 30 days after service of the summons and complaint, for an order to stay further proceedings in the action.

• (2) At the same time that the complaint is filed, the claimant files an application that the action be stayed pending the arbitration of any issue, question, or dispute that is claimed to be arbitrable under the agreement and that is relevant to the action to enforce the claim of lien.

(b) Within 30 days after service of the summons and complaint, the claimant shall file and serve a motion and notice of motion pursuant to Section 1281.4 to stay the action pending the arbitration of any issue, question, or dispute that is claimed to be arbitrable under the agreement and that is relevant to the action to enforce the claim of lien. The failure of a claimant to comply with this subdivision is a waiver of the claimant’s right to compel arbitration.

(c) The failure of a defendant to file a petition pursuant to Section 1281.2 at or before the time the defendant answers the complaint filed pursuant to subdivision (a) is a waiver of the defendant’s right to compel arbitration.
Miscellaneous

- Right to Repair Act

- Bar against class actions

- Condo owners brought a proposed class action against manufacturer of plumbing components alleging that pressure balancing valves and mixer caps were defectively designed and manufactured.

- Holding: The Right to Repair Act does not permit class claims except when those claims address solely the incorporation into the home of defective component other than a product that is completely manufactured offsite.

- **Background:** Property owner brought an action against a general contractor for negligence, misrepresentation and breach of contract. The owner signed a purchase agreement that included a release of claims, including claims arising from construction errors, omissions or defects.

- **Holdings:** Owner’s claim was barred by the release.

- Civil Code section 1668: All contracts which have for their object, directly or indirectly, to exempt anyone from his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.
  
  - Only applies to concurrent or future torts or violations.
NEW LAWS FOR 2019
Permits

- (AB 2913) - Doubles the statutory period for the expiration of building permits. Previously, work must have been commenced within 6 months after issuance of a permit. However, effective September 21, 2018, AB2913 provides that if work on a job site is authorized by a permit, that it remains valid if work is commenced within 12 months after its issuance (unless of course, the work was abandoned). This bill also allows permittees to request (in writing) extensions up to 180 days upon demonstration of justifiable cause. In the ever evolving construction labor market, this bill provides some relief to developers and owners who need to make revisions to their plans.
Building Codes
Building Codes

(SB 721) - Requires the inspection of exterior elevated elements, including balconies, decks, porches, stairways, walkways, and elevated entry structures, of multifamily buildings with three or more dwelling units by an architect, engineer or contractor with a Class A, B or C-5 license by January 1, 2025 and by January 1st every six years thereafter. Elements posing an immediate threat to the safety of occupants, or which prevent occupant access or emergency repairs, are required to be repaired immediately. Elements not posing an immediate threat to the safety of occupants, or which do not prevent occupant access or emergency repairs, are required to be repaired within 180 days.
Licensing
Licensing

- (AB 2138) - Effective July 1, 2020, the bill prohibits an applicant from being denied a license solely because the applicant has been convicted of a felony if the applicant has obtained a certificate of rehabilitation or if the applicant has been convicted of a misdemeanor if the applicant has met all applicable requirements of the criteria of rehabilitation. The bill also permits a license to be denied if an applicant has been convicted of a crime within the preceding seven years from the date of application that is substantially related to the qualifications, functions, or duties of the business or profession for which the application is made.

- (AB 2371) - Requires the Contractors State License Board (CSLB) to confer with the Department of Water Resources and California Landscape Contractor’s Association before updating or revising the landscape contractor examination.

- (AB 2705) - Increases the statute of limitation for prosecuting a contractor that has failed to obtain workers’ compensation insurance to two years (formerly one year).
Licensing

• (AB 3126) - Eliminates the option of posting a cash deposit with the CSLB in lieu of a contractor’s license bond, bond of qualifying individual, or disciplinary bond.

• (SB 1042) - Permits unlicensed contractors and salespersons to contest a citation issued by the CSLB by either: (1) requesting an administrative hearing within 15 days after service of the citation; and/or (2) requesting an informal citation conference within 15 days after service of the citation.

• (SB 1465) - Requires contractors and insurers to report to the CSLB final civil judgments, settlements, and arbitration awards involving damage claims more than $1 million for construction defects in multifamily residential structures.
Alternative Project Delivery
Alternative Project Delivery

- (AB 2654) - Authorizes the County of Orange to utilize the design-build project delivery method for infrastructure projects limited to no more than one project per year in excess of $5 million and the Orange County Flood Control District to utilize the design-build project delivery method for flood protection improvements with a limit of no more than 12 projects in excess of $5 million through January 1, 2025.

- (SB 914) - Existing law authorizes counties to use the construction manager at-risk (CM at-risk) project delivery method for public works projects involving the erection, construction, alteration, repair, or improvement for any building owned or leased by the county with construction costs in excess of $1 million through January 1, 2023. The bill expands the authority to public entities on which members of the county board of supervisors make up the governing body of the public entity. The bill also expands the types of projects in which the CM at-risk project delivery method may be utilized to include buildings, utility improvements associated with buildings, flood control and underground utility improvements and bridges, but excludes roads.
(SB 1262) - Removes the cap on the number of public works projects in which the Department of Transportation is authorized to use the Construction Manager/General Contractor (CM/GC) project delivery method. However, it maintains the requirement that the CM/GC project delivery method be limited to projects with construction costs greater than $10 million. The bill requires CalTrans to use department employees or consultants to perform project design and engineering services on at least two-thirds of CM/GC projects and requires CalTrans to submit an interim report on the CM/GC project delivery method by July 1, 2021 and a final report by July 1, 2025.
Public School Projects
Public School Projects

– (AB 618) – Existing law authorizes school districts that have entered into project labor agreements (PLA) to use job order contracting for public works in excess of $25,000 through January 1, 2022. The bill would revise the restriction to permit both school districts and community college districts that have entered into PLAs to use job order contracting for all public works irrespective of value through January 1, 2022.

– (AB 2031) – Repeals the January 1, 2019 sunset date and continues indefinitely the requirement that bidders submit a prequalification questionnaire and financial statement under oath when bidding on public school construction projects receiving funds under the Leroy F. Greene School Facilities Act of 1998 or receiving funds from any future state school bond for a public project that involves a projected expenditure of $1 million or more.

– (AB 2488) – Establishes a pilot project in which the Los Angeles Unified School District is authorized to award multiple annual task order procurement contracts not exceeding $3 million for services, repairs, maintenance and construction through January 1, 2024.
STANDARDIZATION OF DISPUTE RESOLUTION

- Effective January 1, 2017 and expires January 1, 2020
- Three step process
  - Written Claim and Response
  - Meet and Confer and Response
  - Non-binding mediation
- No waiver
- Seven percent (7%) interest on untimely payments
COMPARISON AND OVERLAP §§ 9204 & 20104

SIMILARITIES

- Broad definition of “claims”
- Both cannot be waived
- Response by public agency in writing
- Both must be summarized or provided verbatim in the specifications
- Both require non-binding mediation prior to proceeding with a lawsuit

DIFFERENCES

- No monetary limitation v Applies to claims under $375,000
- No additional time on a request for additional documentation v Tolling of response until 15 days after receipt of information
- Interest of 7% v Interest at legal rate
- Sunsets in 2020 v No automatic repeal
- 45 day response time v. Various time periods based on the amount of the claim
COMPARISON AND OVERLAP

INTERPLAY

• Which process takes precedence?
• Mediation process under Section 9204 excuses mediation requirement under Section 20104

TAKEAWAY

Practical and most efficient utilization is to use the more restrictive requirements for handling claims

FACTS

- May 2015 an $88 million bid awarded to HP
- West Coast filed a writ of mandate to challenge the bid award
- Among other deficiencies, HP’s bid contained material mathematical errors
- Notice to proceed July 2015
- September 2015, trial court found HP’s bid was nonresponsive and set aside the contract
- West Coast sent agency a letter requesting that work stop and the contract be awarded to West Coast which was rejected by the agency
- Trial court granted permanent injunction and bid preparation costs
TAKEAWAYS

• Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority (2000) 23 Cal.4th 305
  • Expansion of disappointed bidder’s ability to recover under a promissory estoppel theory
    o Higher bidder’s challenge
    o Injunctive relief
  • Award of contract
  • Invalidation of contract
PRACTICAL RESULTS

HEIGHTENED RISK
Expanded potential for recovery in litigation now provides an additional incentive to protest bids, even if meritless
Observed increase in bid protests

REJECT ALL BIDS
May see an increase in the rejection of all bids and readvertisement.
Ensure reject all bids language is included
Public Works Projects
Public Works Projects

- (AB 3018) – Establishes monthly penalties for violating the skilled and trained workforce requirements in AB 566 (2015). Under the previous requirements, all journeypersons on applicable lease-leaseback and design-build public contracts must be skilled and trained. Beginning in January 2019, half of the journeypersons on jobs to which the requirements apply must be graduates of a certified apprenticeship program. Contract bidders must provide monthly reports demonstrating compliance. Entities entering into “Project Labor Agreements” – i.e., union contracts – are exempt from having to conduct regular compliance reporting.

- (AB 2249) – Increases the monetary limits under the Uniform Public Construction Accounting Act by: (1) permitting public employees to construct public projects valued at $60,000 or less (formerly $45,000 or less); (2) permitting public agencies to award public projects through informal procedures if the project is valued at $200,000 or less (formerly $175,000 or less); and (3) if a public project is bid through informal procedures but all bids are in excess of $200,000, permits the public agency to award a contract at $212,500 or less (formerly $187,500 or less) to the lowest responsible bidder, if the agency determines that the cost estimate of the agency was reasonable.

- (AB 2762) – Increases the authority of local agencies to provide a small business preference of 7% (formerly 5%) in construction, the procurement of goods, or the delivery of services with a maximum financial value of $150,000. The bill also provides for special small business preferences for local entities located in the Counties of Alameda, Contra Costa, Lake, Los Angeles, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano and Sonoma, through January 1, 2014, by permitting local agencies in those counties to provide a maximum small business preference of 7% for an individual preference and up to 15% for a single bid having two or more preferences. The bill also permits a prime contractor, with the approval of the local agency, to substitute a subcontractor with another small business, provided that subcontractors be afforded all the protections of the Subletting and Subcontracting Fair Practices Act.

- (AB 1654) – Provides that the Private Attorneys General Act (PAGA) will not apply to employees of the construction industry covered by a collective bargaining agreement provided that the agreement (1) provides for a regular hourly pay rate of not less than 30% more than the minimum wage and a premium wage for overtime hours; (2) expressly waives PAGA requirements; (3) prohibits all violations that would be redressable under PAGA; (4) includes a grievance and binding arbitration procedure; and (5) authorizes the arbitrator to award remedies available under the Labor Code.
Employment
Employment

- (AB 1565) - Effective September 19, 2018, the bill revises last year’s Labor Code section 218.7, which made direct contractors liable for unpaid wages, fringe, or other benefit payments or contributions, including interest owed, but excluding penalties or liquidated damages, owed by a subcontractor of any tier to their workers for contracts entered into beginning January 1, 2018. The bill: (1) clarifies that direct contractors are only liable for unpaid wages, fringe, or other benefit payments or contributions, including interest owed, but strikes the original language that stated such liability “is in addition to any other existing rights and remedies”; and (2) provides that for contracts entered into on or after January 1, 2019, in order to withhold payments under Labor Code section 218.7, the direct contractor must specify in its subcontract the specific documents and information that a direct contractor will require the subcontractor to provide.
Design Professionals
Design Professionals

- (SB 920) - Extends the law permitting design professionals to form registered limited liability partnerships and foreign limited liability partnerships so long as they maintain security of no less than $2 million arising out of the partnership’s professional practice from January 1, 2019 to January 1, 2026.
Conclusion, Any Questions?