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January 22, 2014

Re: 2014 California Public Contract Code Additions and Revisions; Other Relevant Added or Amended Public and Private Works Statutes; and Relevant Public and Private Works Court Decisions

Dear Colleagues:

Please take note of the following 2014 revisions to the California Public Contract Code (PCC) as a result of legislation enacted (over 800 bills) in 2013, other related California statutes; and recent court decisions concerning both public and private works contracts. Please review the Table of Contents for those statutes and cases that may be of greatest interest to you.

Community college clients and construction managers will also receive a second highlighted copy more directly pertinent to their concerns.

Previous year-end Public Contract review letters can be found on our website at www.jaretlaw.com. If you have any questions, or need further information, please do not hesitate to call.

Best regards for the New Year!

Sincerely,

PHILLIP A. JARET

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These new statutes apply to the California Department of Transportation, a regional transportation agency, a transportation planning agency, a County transportation commission, any other local or regional transportation entity designated as a regional transportation entity, a joint exercise of powers authority, a local transportation authority designated under the Public Utilities Code, the Santa Clara Valley Transportation Authority, empowering all to use the design-build procurement method. This method can be based either on best value or lowest responsible bid.

However, a city, county, or city and county, shall not be entitled to utilize the design-build method of procurement under this chapter, and a regional transportation agency shall not use the design-build method of procurement on behalf of a city, county, or city and county. The specifics of the procurement process is set forth in § 6824. Under § 6826, all construction subcontractors identified in the design-build request for proposals shall be publicly bid; subcontracts awarded that were not listed in the request for proposals may be done either on a best value basis or to the lowest responsible bidder.

B. PCC § 10299.1 – Natural Gas Services Program; operation by director; authority of director and department; agency use for noncore gas purchases of natural gas; payment transfers when Budget Act has not been approved; funds from prepaid long-term natural gas supplies; Department of General Services Natural Gas Services Program Fund; funding

Existing law authorizes the Department of General Services to contract with suppliers to obtain materials, supplies, equipment, and services in connection with natural gas. This new statute would require the director to operate the Natural Gas Services Program, pursuant to which the Director of General Services would make the services of the department with respect to the acquisition of natural gas and related services available, under agreed upon terms and conditions, to any city, county, city and county, district, or other local governmental body, and to non-profit hospitals and educational institutions that expend public funds, and would enter into inter-agency agreements for acquisition of natural gas and related services. It requires that agencies that are in the executive branch of state government, except the Department of Water Resources, use the department's Natural Gas Services Program for noncore gas purchases of natural gas.

C. PCC § 10508.5 – University of California; contract for goods, services, or information technology; award to certified small business or disabled veteran business enterprise

This new statute, applicable only to the University of California, provides that a contract may be awarded for the acquisition of goods, services, or information technology that has an estimated value of greater than $100,000 but less than $250,000 to a certified small business, including a microbusiness, or to a disabled veteran business enterprise, if the University of California obtains price quotations from two or more certified small businesses, including microbusinesses, or from two or more disabled veteran business enterprises.

D. PCC § 20146 – Construction manager at-risk contracts; utilization for county construction project; subcontractors; public inspection of contract; retention proceeds

This new code section under Article 3.5 Counties chapter, provides that a county with approval of the board of supervisors, may utilize construction manager at-risk construction contracts for the erection, construction, alteration, repair, or improvement of any building owned or leased by the county. This delivery method may only be used for a project in a county in excess of $1 million and may be awarded using either the lowest responsible bidder or best value method to a construction manager at-risk entity that possesses or obtains sufficient bonding to cover the contract amount for construction services and risk and liability insurance as may be required.

E. PCC § 20651.2 – Governing board of a community college district; contract for goods, services, or information technology; award to certified small business or disabled veteran business enterprise

This new section, applicable to community college districts, provides that a community college district may award a contract for the acquisition of goods, services, or information technology that has an estimated value of greater than $5,000, but less than $250,000, to a certified small business, including microbusiness, or to a disabled veteran business enterprise, if the community college district obtains price quotations from two or more certified small businesses, including microbusinesses, or from two or more disabled veteran business enterprises.

II. PUBLIC CONTRACT CODE REVISIONS

A. PCC § 4104 – Contents of bids or offers

There is a significant change to this section, which becomes operative on July 1, 2014. This code section (which is the basic listing requirement for subcontractors who will perform more than ½ of 1%, or $10,000, of the prime contract, whichever is greater) will now require prime contractors to list the license number of each subcontractor on the public agency bid forms. It provides a 24 hour "grace period" to comply by correcting an inadvertent omission or error in listing the subcontractor's license number within the requisite 24 hour period after bid opening. (Thus, there will not be grounds for filing a bid protest on the basis of bid non-responsiveness if the corrected contractor's license number is submitted within this initial 24 hour time period.)

Also, note that existing law provides that if there is any additional information requested by the public entity beyond the subcontractor's name, location of business, and California contractor license number, it may be submitted by the prime contractor up to 24 hours after the deadline established for receipt of bids.

B. PCC § 10295.5 – Surface mining operation products

This statute has been amended in conjunction with § 2717 of the Public Resources Code and § 2774.1, and the addition of § 2717 to the Public Resources Code. Existing law, the Surface Mining and Reclamation Action of 1975, prohibits, with certain exceptions, a person from conducting a surface mining operation unless, among other things, a reclamation plan has been submitted to and approved by the lead agency for the operation. These laws with regard to mined materials a state agency may acquire or utilize, would remove the condition that the surface mining operation meets certain requirements, and instead require that the mined material be produced from a surface mining operation on an approved list that meets certain requirements. It further requires that the list identify surface mining operations whose reclamation plan has been approved and is in compliance with the Act, whose mining operation is in compliance with the approved reclamation plan or an order to comply, and whose mining operation has an approved financial assurance.

Governor Brown issued the following signing message, dated September 28, 2013: "I am signing Senate Bill 447, which allows mining operators to continue selling materials to the state if they have entered into a stipulated order to comply with the lead agency or the department to correct any violations. This interim leniency is only acceptable as we take the time to reform the Surface Mining and Reclamation Act – from top to bottom."

C. PCC § 10351 – Contracts exempt from approval requirements; conditions; requests; legislative intent

This section, under the state agency contracts for services chapter, raises the threshold amount from $75,000 to $150,000 for contracts exempt from approval requirements under certain specified conditions listed in the statute which revolve around designation of a responsible contracting officer and established written policies and procedures.

D. PCC § 12100 – Legislative findings; contracts for the acquisition of information technology projects; procurement policies and procedures (SB 71 amends Sections 10351, 12100, 12100.5, 12100.7, 12101, 12101.2, 12101.5, 12102, 12103, 12103.5, 12104, 12104.5, 12105, 12106, 12108, 12109, 12112, 12120, 12125, 12126, and 12128 of, to add Sections 12102.1 and 12102.2 to, and to repeal Section 12121 of, the Public Contract Code, as well as various sections of the Public Resources Code, Public Utilities Code, Revenue and Tax Code, Vehicle Code, and Welfare and Institutions Code)

These various amended statutes, among other things, provide that all contracts for the acquisition of information technology projects shall be made by or under the supervision of the Department of Technology. It shall have final authority in the determination of technology procurement procedures and policies applicable to acquisitions of information technology projects under the Department of General Services. However, the Regents of the University of California, the Trustees of the California State University, and the Board of Governors of the California community colleges shall not be subject to these procedures except that they shall develop policies and procedures maintained in their policy manuals that further the legislative policies for contracting expressed in this chapter, but without the involvement of the Director of Finance, the Director of General Services, the Department of Finance, the Department of General Services, the Director of Technology, or the Department of Technology.

By way of background, the Department of General Services has statutory responsibility under PCC § 12100, *et seq.*, for the procurement of all information technology (IT) goods and services, including approval of the acquisition methods used and the establishment and interpretation of various related procedures. IT is defined as all computerized and auxiliary automated information handling, including systems designed and analysis, conversion of data, computer programing, information storage and retrieval, voice, video, data communications, requisite systems controls, and simulation.

E. PCC § 20133 – Alternate elective procedure for bidding on building construction projects in excess of two million five hundred dollars; legislative intent; labor compliance program; cost reimbursement; four-step process for design–build projects; bonding; subcontractors; list of subcontractors, bidders, and bid awards deemed public records; reporting

Existing law, until July 1, 2014, had authorized counties to use alternate procedures, known as "best value", including design-build for bidding on specified types of construction projects in the County in excess of $2,500,000, in accordance with specified procedures. It is the intent of the Legislature to enable counties to utilize design-build for buildings and county sanitation waste water treatment facilities, but not for other infrastructure such as streets and highways, public rail transit, or water resources facilities and infrastructures. These provisions are now extended until July 1, 2016.

F. PCC § 20652 - Purchase through public corporations without advertising for bids; drawing warrant for payment of invoice; purchase under existing contract

This amended section applicable to community college districts now provides that alternatively, if there is an existing contract between a public corporation or agency and a vendor for the lease or purchase of the personal property, a community college district may authorize the lease or purchase of the personal property directly from the vendor by contract, lease, requisition, or purchase order and make payment to the vendor under the same terms that are available to the public corporation or agency under the contract.

III. OTHER RELEVANT ADDED OR AMENDED CALIFORNIA STATUTES

A. Expansion of Whistleblower Protections:

Government Code § 905.2 – Claims for money or damages against state filed with California Victim Compensation and Government Claims Board; filing fee; reimbursement; surcharge to state entity; application

Government Code § 8547.15 – Action for damages not subject to claims presentation requirements of Government Claims Act

Business & Professions Code § 494.6 – Reporting or threatening to report immigration status

Labor Code § 98.6 – Discharge or discrimination, retaliation, or adverse action against employee or applicant for conduct delineated in this chapter or because employee or applicant has filed complaint or claim, instituted or caused to be instituted any proceeding under or relating to his or her rights or testified relating to the same on behalf of that person or another; reinstatement and reimbursement; penalties; employment entitlement for applicant; severability; applicability

Labor Code § 98.7 – Persons allegedly discharged or otherwise discriminated against in violation of law; filing of complaint; investigation; report; remedies; dismissal; appeals; exhaustion of administrative remedies

Labor Code § 1024.6 – Employee updates to personal information; discharge, discrimination, retaliation or adverse action by employer prohibited

Labor Code § 1102.5 – Employer or person acting on behalf of employer; prohibition of disclosure of information by employee to government or law enforcement agency; suspected violation or noncompliance to federal or state law; retaliation; civil penalties

Labor Code § 1103 – Violations; misdemeanor; penalty

SB 496, which amends the above-referenced statutes, along with SB 66 and AB 263, has expanded the protections for whistleblowers in the State of California by significantly altering California Labor Code § 1102.5, which is California's general whistleblower statute. Previously, Labor Code § 1102.5 already prohibited employers from retaliating against employees who reported what they reasonably believed to be violations of state or federal laws, rules, or regulations, to a government or law enforcement agency. SB 496 now extends this protection to employees who report suspected illegal behavior internally to "a person with authority over the employee" or another employee with authority to "investigate, discover or correct" the reported violation; or externally to any "public body conducting an investigation, hearing, or inquiry."

Furthermore, SB 496 makes it unlawful for any employer's rule, regulation, or policy that prevents the disclosure of reasonably believed violations of local (in addition to state and federal) laws, rules, or regulations. Liability also now becomes imposed where any person acting on the employer's behalf retaliates against an employee who engages in protected whistleblowing activity. Employers and persons acting on their behalf may not retaliate against an employee for disclosing such information, or because the employer believes the employee has disclosed or may disclose the information either externally or internally.

SB 496 additionally provides that the protection of whistleblowers applies regardless of whether disclosing such information is part of the employee's job duties. Thus, a company's compliance officer is protected under § 1102.5 for disclosing purported illegal activity even though his or her job duties may require him or her to report such activity externally or internally.

B. Prevailing Wage Law Amended Statutes:

1. Labor Code § 1741 – Determination of violations; civil wage and penalty assessments; service interest on due and unpaid wages; list of violators

This section of the Labor Code has been amended to extend the deadline from 180 days to 18 months for the Labor Commissioner to issue a civil wage and penalty assessment against either a public works contractor or subcontractor for prevailing wage violations.

2. Labor Code § 1776 – Payroll records; retention; inspection; redacted information; agencies entitled to receive nonredacted copies of certified records; noncompliance penalties; rules

This Labor Code section was amended to require that any certified payroll records made available to a joint labor-management committee must delete only the workers' social security numbers, but their names and addresses must be provided. The copies made available to multi-employer trust funds must delete only the individual workers' full social security numbers, but must provide the last four digits.

3. Labor Code § 1773.5 – Rules and Regulations; determination of project as public work; administrative appeal

This Labor Code section is amended to require the DIR to issue public works coverage determinations within 60 days of receipt of the last support or opposition letter relating to that project or type of work, and for projects or types of work that are otherwise private development ones receiving public funds, within 120 days of receipt. An administrative appeal of that determination is to be made within 30 days of the date of the determination and require the director to issue a determination on an appeal within 120 after receipt of it. The amended statute also makes coverage determinations quasi-legislative and provides that a final determination on any appeal is subject to judicial review. It further exempts the determinations, and determinations relating to the general prevailing wage rate of per diem wages and for holiday, shift, and overtime work, from the Administrative Procedure Act.

4. Labor Code § 1741.1 – Tolling of period for service of assessments; duration of tolling; notice

This Labor Code section is added to toll the statute of limitations for the Labor Commissioner to issue a civil wage and penalty assessment or for a joint labor-management committee to file a lawsuit, for the period of time required by the DIR to make a coverage determination of whether the project is a public work. It also tolls those periods for the period of time that a contractor or subcontractor fails to provide certified payroll records pursuant to a request from the Labor Commissioner, a joint labor-management committee, or an approved labor compliance program. Furthermore, it requires that a Notice of Completion must be provided to the Labor Commissioner and requires the awarding body or political subdivision accepting the public work to provide to the Labor Commissioner notice of that acceptance within five days. It further tolls the period for service of assessments and for commencing an action brought by a joint labor-management committee for the length of time notice is not provided to the Labor Commissioner.

5. Labor Code § 1773.1 – Employer payments included in per diem wages

This Labor Code section is amended to allow an employer to take credit against its obligation to pay the general prevailing wage rate for specified employer payments for bona fide fringe benefits, even if those payments are not made during the same pay period for which credit is taken, as long as the employer regularly makes payments on no less than a quarterly basis. However, it prohibits credit from being granted from employer payments made to monitor and enforce laws relating to public works, if those payments are not required by an operative collective bargaining agreement.

6. Labor Code § 1775 – Penalties for violations

This amended Labor Code section now provides a "safe harbor" for a prime contractor's liability for penalties arising from a subcontractor's prevailing wage violations if it did not have knowledge of them. However, the prime contractor is required to comply with the following requirements: the subcontract agreement includes a copy of the provisions of Labor Code §§ 1771, 1775, 1776, 1777.5, 1813, and 1815; the contractor monitors payment of prevailing wages by periodic review of the certified payroll records of the subcontractor; upon becoming aware of nonpayment, the contractor takes diligent corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds from the subcontractor; and prior to making final payment to the subcontractor, the contractor obtains an affidavit signed under penalty of perjury from the subcontractor that it has paid the specified general prevailing rates of per diem wages and any amounts due pursuant to § 1813.

7. Labor Code § 1777.7 – Violations of § 1777.5; civil penalty; denial of right to bid on contracts; procedure; violation by subcontractors

This amended Labor Code section also provides a "safe harbor" for the prime contractor's liability for penalties arising from a subcontractor's apprenticeship violations. The prime contractor is not liable for any penalties unless it had knowledge of the subcontractor's failure to comply with the provisions of § 1777.5, or unless it fails to comply with any of the following requirements: the subcontract agreement includes a copy of the provisions of §§ 1771, 1775, 1776, 1777.5, 1813, and 1815; the contractor continually monitors a subcontractor's use of apprentices required to be employed, including, but not limited to, a periodic review of the certified payroll; upon becoming aware of a failure of the subcontractor to employ the required number of apprentices, it takes corrective action, including, but not limited to, retaining funds owed the subcontractor for work performed until the failure is corrected; and prior to making final payment to the subcontractor, it obtains a declaration signed under penalty of perjury from the subcontractor that it has employed the required number of apprentices.

C. Government Code § 5956.6 – Agreements with private entities; provisions

Existing law permits a governmental agency to solicit proposals and enter into agreements with private entities for the design, construction, or reconstruction by, and may lease to, private entities, for specified types of fee-producing infrastructure projects. It requires certain provisions to be included in the lease agreement between the governmental agency undertaking an infrastructure project and a private entity. This new law would require a lease agreement between a governmental agency undertaking an infrastructure project, and a private entity, to include performance bonds as security to ensure the completion of construction, and payment bonds to secure the payment to those supplying labor or materials.

D. Labor Code § 1782 – Charter cities; use of state funding or financial assistance for construction projects; compliance with article; list of approved charter cities

This new law prohibits a charter city from receiving or using state funding or financial assistance for a construction project if the city has a charter provision or ordinance that authorizes a contractor to not comply with prevailing wage provisions on any public works contract. It prohibits a charter city from receiving or using state funding or financial assistance for a construction project

if the city has awarded, within the prior two years, a public works project without requiring the contractor to comply with prevailing wage provisions. It authorizes charter cities to receive or use state funding or financial assistance if the city has a local prevailing wage ordinance, applicable to all of its public works contracts, that includes requirements that are equal to or greater than the state's prevailing wage requirements. It excludes contracts for projects of $25,000 or less for construction work, or projects of $15,000 or less for alteration, demolition, repair, or maintenance work. It requires the Department of Industrial Relations (DIR) to maintain a list of charter cities that may receive and use state funding or financial assistance for their construction projects. The operative date is January 1, 2015.

E. Civil Code § 2782 – Construction contracts; void and unenforceable indemnification provisions; agreements between subcontractors, builders, or general contractors

This statute has been amended to eliminate entirely Type 1 indemnity agreements in private commercial or public works construction contracts, and any indemnity obligations arising out of active negligence for wilful misconduct of the indemnified party are void and unenforceable. These indemnity obligations were already prohibited in residential construction contracts except for homeowners improving their single family dwelling.

There are, however, a few exemptions to the new law. Owners and public entities are only restricted from requiring indemnity from their "active negligence".

The new law also does not apply to design professionals, does not have any effect on additional insured (AI) obligations, and does not apply to owner controlled insurance programs (OCIPs or WRAPs). The new law also does not affect Type II indemnity clauses in which a party is indemnified for its passive negligence.

Prior to this change, California law had already prohibited public entities from utilizing Type 1 agreements.

F. Civil Code § 841 – Maintenance of boundaries, monuments, and fences; responsibilities of adjoining landowners; definitions

Existing law (the repealed old version of §841) provided that coterminous owners were equally bound to maintain the boundaries between their properties. This new law instead requires adjacent land owners to share equally the responsibility for maintaining the boundaries and monuments between them. It establishes a presumption that adjacent land owners share an equal benefit from any fence dividing their properties and, absent a lawful agreement to the contrary, are equally responsible for the reasonable cost of construction, maintenance, and necessary replacement of the fence.

IV. RECENT CALIFORNIA SUPREME AND APPELLATE COURT DECISIONS

A. Public Works Cases

1. A one-year debarment from bidding or working on public projects is not violative of a fundamental vested right.

- ***Ayodeji A. Ogundare v. Department of Industrial Relations*** **(2013) 214 Cal.App.4th 822**

This Appellate Court decision of the Fifth District involved the upholding of a one-year debarment of a contractor from being permitted to bid on public works due to a fraudulent prevailing wage certification submission, as determined by the DIR. This general engineering construction company that performed concrete flat work and underground water, soil, and sewer construction work, received a determination by DIR that it had willfully and with intent to defraud, violated the public works laws in not paying prevailing wages to a laborer and not paying prevailing overtime to two other laborers. The certified payroll records were at great variance with the check stubs and other evidence presented. The Appellate Court determined that the contractor's one-year debarment from being able to bid or work on public projects did not implicate a "fundamental vested right," since it was not prevented from bidding or working on all construction projects, but only from certain kinds of work, *i.e.* public projects. The court held that the trial court applied the wrong standard and should have reviewed DLSE's administrative decision under the substantial evidence test rather than under the independent judgment standard of review. The Appellate Court applied the substantial evidence standard, and despite the contractor's arguments of clerical error and a lack of intent to defraud, remanded the matter to the trial court to affirm the debarment. (It is interesting to note that 99% of projects undertaken by the contractor were reportedly public works contracts.)

2. CalTrans' Disadvantaged Business Enterprise (DBE) Program upheld as constitutional.

- ***Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation*****, 713 F.3d 1187 (9th Cir. 2013)**

The Ninth Circuit Court of Appeals affirmed a U.S. District Court ruling that upheld the constitutionality of the CalTrans 2009 Disadvantaged Business Enterprise Program (DBE) that provided both race and sex based preferences to African American, Native American, Asian-Pacific American, and women-owned firms, in connection with certain transportation contracts. The AGC San Diego Chapter had challenged the program as being an unconstitutional affirmative action program that failed to meet the constitutional standard of strict scrutiny. The Court held that CalTrans' substantial statistical and anecdotal evidence had provided a strong basis of evidence of discrimination against the four named groups, and furthermore the program was narrowly tailored to benefit only those groups. The Court further determined that AGC did not identify any of its members that would be harmed by CalTrans' affirmative action program, and it therefore failed to establish standing.

3. Offsite landscaping work is not necessarily part of a public works project and subject to full recovery on a payment bond.

- ***Nissho of California, Inc. v. Bond Safeguard Insurance Company* (2013) 220 Cal.App.4th 974**

This Fourth District Court of Appeal decision is interesting because it held that just because a payment bond has been furnished does not necessarily mean that it is a public works project. Plaintiff Nissho performed landscaping work under a contract with a developer. When the developer failed to pay, a suit was filed to collect under the payment bonds issued in connection with this subdivision improvement project between the developer and the City of Palm Springs. The developer had issued a payment bond for offsite landscaping improvements on property owned by the City of Palm Springs. The Court of Appeal found that the plaintiff was not entitled to recover its attorney's fees and that its payment bond recovery is limited to the face amount of the payment bond only because the offsite landscape work was not considered to be a public works project under Civil Code § 9550, *et seq.* The Court determined that even though the City required the developer to furnish a payment bond, the offsite landscaping work was not a public works project because: the plaintiff did not pay prevailing wages which would indicate that its work was pursuant to a public works contract; the developer was not contractor performing work under a public works contract with the City of Palm Springs, but rather, furnished the performance bonds under the terms of a subdivision improvement agreement; and the subdivision improvement agreement did not refer to the offsite landscaping improvements as being "public improvements" or similar verbiage to indicate the offsite landscaping work was a public works project pursuant to Civil Code § 9550, *et seq.*

4. Plaintiff and other property owners were not intended third-party beneficiaries to enforce the terms of a road improvement agreement and performance bond.

- ***The H. N. and Frances C. Burger Foundation v. Perez* (2013) 218 Cal.App.4th 37**

This Court of Appeal decision of the Fourth District confirmed a trial court decision that the plaintiff foundation was neither a party to, nor an intended third-party beneficiary, of a road improvement agreement or performance bonds when a developer defaulted on its obligations. The trial court had denied a writ of mandate to compel defendants and respondents Juan C. Perez, as Director of the County of Riverside Transportation Department, County of Riverside, and Travelers Casualty and Surety Company of America to enforce the terms of the specific road improvements. Plaintiff was not a named party, nor an intended signatory, or even expressly identified in any capacity, let alone as a third-party beneficiary. The court held that the agreements and bonds did not reflect the intent of the contracting parties to confer any of the rights or impose any of the obligations of the contract to anyone or any group or class other than themselves, their successors, or assigns.

B. Private Works Cases

1. The United States Supreme Court upheld a challenge to the enforceability of a forum selection clause holding that such clauses should be enforced unless extraordinary circumstances unrelated to the convenience of the parties clearly favor a transfer.

- ***Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas*, 134 S.Ct. 568 (2013)**

This United States Supreme Court decision involved a forum selection clause which provided that all disputes would be litigated in Virginia. The clause was contained in a subcontract agreement between the general contractor, Atlantic Marine, which was headquartered in Virginia, and its subcontractor J-Crew Management, Inc., which was headquartered in Texas, and involved a federal project for the U.S. Army Corps of Engineers in Fort Hood, Texas. This decision, favorable for large general contractors with more bargaining leverage in contract negotiations, set forth three standards to be applied by district courts, which strongly support the enforceability of forum selection clauses: (1) the party objecting to a forum selection clause bears the burden of proof; (2) the inconvenience of the party contesting a forum selection clause is of no weight; and (3) the law of the selected forum applies when determining to transfer a case. This decision has no real applicability to cases brought in state court, as most construction cases are brought in state court and not federal court. Furthermore, it does not apply to forum selection clauses in arbitration, and those clauses are already strongly enforced. The decision does address whether it applies to Miller Act claims, since those cases are required under the Miller Act to be brought either in federal court in the state in which the project is located, or where the contract was entered. The decision also does not address the effect of state law requiring that construction lawsuits be brought in the state where the project is located.

2. An arbitration award denying the disgorgement of profits under Business and Professions Code § 7031 must be reviewed *de novo* by the trial court as a matter of public policy because the State of California strongly prohibits unlicensed contractors from profiting from work performed.

- ***Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21**

This Court of Appeal decision of the Second District overruled a trial court's decision which concluded that an arbitrator's decision was not reviewable, thus denying a petition to vacate the arbitration award. The court held that the trial court should have conducted a *de novo* review of the evidence to determine whether disgorgement of compensation for the unlicensed general contractor's construction work was required by Business and Professions Code § 7031. The court held that the arbitrator's findings that the general contractor did not function as a general contractor on the project, who held himself out as a licensed contractor, was not binding on the trial court. The appellate court held that the trial court "must independently consider" Business and Professions Code § 7031 defense to the claim to determine whether this section was applicable.

3. SB800 (Right to Repair Act) does not establish exclusive remedies for claims for actual damages for construction defects and time barred claims under SB800 may still be pursued under common law.

- ***Liberty Mutual Insurance Company v. Brookfield Crystal Cove LLC* (2013) 219 Cal.App.4th 98**

A construction defect claim was brought after the expiration of the applicable statute of limitation under the Right to Repair Act (SB800) had expired. Liberty Mutual filed its suit against developer Brookfield to recover relocation expenses it had paid on behalf of its insured homeowner after a pipe in the home's sprinkler system burst and caused significant damage. The Court of Appeal for the Fourth District in analyzing the legislative history of the act concluded that it does not expressly or impliedly support an argument that it mandates an exclusive remedy, and does not undermine common law claims otherwise recognized by law. Thus, Liberty Mutual's subrogation claims were not time barred for failing to comply with the Act.

4. Sophisticated contract parties have the right to abrogate or waive the delayed discovery rule concerning latent construction defects and substitute an accrual from the date of substantial completion.

- ***Brisbane Lodging, L.P. v. Webcor Builders, Inc.* (2013) 216 Cal.App.4th 1249**

The Court of Appeal for the Fourth District concluded that public policy principles applicable to the freedom to contract afford sophisticated contracting parties the right to abrogate or waive by agreement the delayed discovery rule. The agreement had provided for claims to run upon substantial completion, and the underlying lawsuit was brought more than four years after the agreed upon accrual date, which was outside the applicable limitation period. The subject contract was between Brisbane and Webcor and was for the design and construction of a 210 room, 8 story hotel known as The Sierra Pointe Radisson Hotel. The appellate court upheld and enforced standard AIA contract language which effectively shortened to 4 years the 10 year statute of limitation for bringing claims for latent construction defects. In so doing, the court held that a waiver of the delayed discovery review and shortening of the statute of limitation is permitted where there are two sophisticated parties in a commercial context that occupied equal bargaining positions.

5. Appellate Court upheld trial court decision that homeowner's policy precluded damages recovery resulting from constant or repeating gradual, intermittent, or slow release of water or infiltration of presence of water over a period of time.

- ***Leroy Brown v. Mid-Century Insurance Company* (2013) 215 Cal.App.4th 841**

The Court of Appeal for the Second District upheld a lower trial court decision denying the plaintiff homeowner's recovery against their homeowners' insurance carrier for damage which resulted from a long term water leak. The court held that the policy language was very specific and it excluded coverage for damage that was a result of a gradual release of water over time. The type

of water discharge was not sudden under the plain meaning of the policy or under California law, and the efficient proximate cause doctrine was inapplicable.

6. Policy language must be unambiguous when an insurer seeks to limit its obligations under an insurance policy concerning the duty to defend in connection with a self-insured retention (SIR).

- ***American Safety Indemnity Company v. Admiral Insurance Company* (2013) 220 Cal.App.4th 1**

This Court of Appeal Decision for the Fourth District affirmed a lower court decision concerning the applicability of a self-insured retention (SIR) in relationship to the duty to defend. The case had involved underlying subsidence litigation and the subject SIR clause did not expressly make payment of the SIR a condition of the insurer's broader obligation to provide a defense for a potentially covered claim. Rather, the SIR clause expressly applied only as a limitation on the insurer's duty to indemnify the insured for covered damages for which the insured is found liable. Although some liability insurance policies contain SIR clauses that expressly and unambiguously make payment of an SIR obligation a condition of any obligation under the policy, including any duty to defend, this one did not.