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January 21, 2015

Re: 2015 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 2015 revisions to the California Public Contract Code (PCC) as a result of legislation enacted in 2014, 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 district clients 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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I. PUBLIC CONTRACT CODE ADDITIONS

A. PCC § 10186 – Fair Chance Employment Act

This new statute, effective January 1, 2015, provides that any person submitting a bid to the State on a contract involving onsite construction related services shall certify that the person will not ask an applicant for onsite construction related employment to disclose orally or in writing information concerning the conviction history of the applicant on or at the time of an initial employment application. This new statute does not apply to a situation where the person or the State is otherwise required by state or federal law to conduct a conviction history background check, or to any contract position with a criminal justice agency. Also, this new section does not apply to a person to the extent that he or she retains workers from a hiring hall pursuant to a bona fide collective bargaining agreement.

B. Article 6. State Agency Design-Build Projects

PCC § 10187 – Authorization of design-build method of project delivery; legislative intent

PCC § 10187.5 – Definitions

PCC § 10188 – Procurement of design-build contracts for public works projects; conflict-of-interest policy

PCC § 10190 – Method of selecting design-build entity; notification

PCC § 10191 – Design-build project procurement process; request for qualifications; enforceable commitment to use skilled and trained workforce; competitive sealed proposals; low bid and best value bidding processes

PCC § 10192 – Payment and performance bonds provided by design-build entity; errors and omissions insurance coverage

PCC § 10193 – Identification of specific types of subcontractors in request for proposals; subcontract award process

PCC § 10194 – Limit on retention proceeds

PCC § 10195 – Remedies

PCC § 10196 – Duration of article

These new statutes authorize the use of the design-build method of project delivery (using a best value procurement methodology) on all state agency projects except for projects on the state

highway system. *These laws repeal and consolidate seven design-build authorization sections affecting state and local public agencies into the new PCC § 10187 applicable to state public agencies, and § 22160 applicable to local public agencies.* The new statutes are effective January 1, 2015 through January 1, 2025. Under § 10188, design-build contracts may be procured for those projects in excess of $1 million, awarding a contract using either the low bid or best value. The specifics of the design-build project procurement process, including request for qualifications, enforceable commitment to use skilled and trained workforce, competitive sealed proposals, low bid and best value bidding processes are set forth in detail in § 10191. Bonding and insurance coverage requirements are set forth in § 10192. The identification of specific types of subcontractors in requests for proposals and the listing of subcontracts with a value exceeding one-half of 1% of the contract price, and other related subcontract requirements, are set forth in § 10193. Section 10194 places a limit on retention proceeds at 5%. However, a greater percentage may be withheld from a subcontractor who was requested to bond but was unable or refuses to furnish a bond to the design-build entity.

C. PCC § 10326.2 – Acquisition of heavy mobile fleet vehicles; use by Department of Transportation; best value procurement

This new statute (under Article 3, Competitive Bidding and Other Acquisition Procedures, applicable to state agencies) provides that a best value procurement may be used by the Department of Transportation to purchase and equip heavy mobile fleet vehicles and special equipment. The total value of vehicles and equipment purchased through best value procurement pursuant to this section is limited to $20 million annually. The best value procurement procedures are set forth in subsections (c) and (d).

D. PCC § 20147 – San Diego County; regional communications system infrastructure; procurement

This new statute (applicable to the County of San Diego) provides that in connection with any regional communications system infrastructure to be used by public safety agencies and emergency responders located in the counties of Imperial and San Diego, the County may use any competitive procurement method including best value procurement.

E. Chapter 4: Local Agency Design-Build Projects

PCC § 22160 – Authorization of design-build method of project delivery; legislative intent

PCC § 22161 – Definitions

PCC § 22162 – Procurement by local agency of design-build contracts for public works projects in excess of one million dollars; contract for acquisition and installation of technology applications or surveillance equipment; conflict-of-interest policy

PCC § 22164 – Design-build project procurement process; required documents; request for qualifications; enforceable commitment to use skilled and trained workforce; elements of request for proposals; low bid and best value selection processes

PCC § 22165 – Payment and performance bonds to be provided by design-build entity; errors and omissions insurance coverage

PCC § 22166 – Specific types of subcontractors identified by local agency to be included in the design-build entity statement of qualifications and proposal; subcontract award process

PCC § 22167 – Limit on retention proceeds withheld by local agencies, design-build entities, and subcontractors

PCC § 22168 – Rights and remedies

PCC § 22169 – Duration of chapter

These new statutes apply to local agencies defined as:

(1) A city, county, or city and county;

(2) A special district that operates wastewater facilities, solid waste management facilities, water recycling facilities, or fire protection facilities;

(3) Any transit district, included transit district, municipal operator, included municipal operator, any consolidated agency, as described in Section 132353.1 of the Public Utilities Code, any joint powers authority formed to provide transit service, any county transportation commission created pursuant to Section 130050 of the Public Utilities Code, or any other local or regional agency, responsible for the construction of transit projects.

For a local agency defined in paragraph (1) "project" means the construction of a building or buildings and improvements directly related to the construction of a building or buildings, county sanitation wastewater treatment facilities, and park and recreational facilities, but does not include the construction of other infrastructure, including, but not limited to, streets and highways, public rail transit, or water resources facilities and infrastructure. For a local agency defined in paragraph (1) that operates wastewater facilities, solid waste management facilities, or water recycling facilities, "project" also means the construction of regional and local wastewater treatment facilities, regional and local solid waste facilities, or regional and local water recycling facilities.

For a local agency defined in paragraph (2), "project" means the construction of regional and local wastewater treatment facilities, regional and local solid waste facilities, regional and local water recycling facilities, or fire protection facilities.

For a local agency defined in paragraph (3), "project" means a transit capital project that begins a project solicitation on or after January 1, 2015. A "project," as defined by this paragraph, that begins with the solicitation process before January 1, 2015, is subject to article 6.8 (commencing with section 20209.5 of Chapter 1. "Project," as defined by this paragraph, does not include state highway construction or local street and road projects.

These statutes, effective January 1, 2015 through January 1, 2025, authorize the use of design-build method of project delivery for local agencies, except for projects on the state highway system. It applies to projects in excess of $1 million. The procurement process is set forth in detail in § 22164. Payment and performance bonds and insurance requirements are set forth in § 22165. The awarding of subcontracts on either best value basis or lowest responsible bidder is set forth in § 22166. Retention is limited to 5% pursuant to § 22167 unless the design-build entity requires a subcontractor to secure a performance bond and it is unable or refuses to furnish it, then the retention may be at a higher percentage.

II. PUBLIC CONTRACT CODE REVISIONS

A. PCC § 6953 – Public works projects subject to certain Labor Code provisions

The former § 6953, which was added by 2012 statutes, and related to the reimbursement of costs of performing prevailing wage monitoring and enforcement on public works projects by the San Diego Association of Governments, was repealed in 2014. It now provides that any public works project that is contracted for pursuant to this chapter (Chapter 6.6 Alternate Project Delivery Program) shall be subject to the requirements of § 1771.4 of the Labor Code. (DIR compliance monitoring.)

B. PCC § 7201 – Public works of improvement contracts between public entity and original contractor, original contractor and subcontractor, and between all subcontractors thereunder entered into on or after Jan. 1, 2012; limits on retention proceeds; waiver.

This statute (under Chapter 7, Contract Clauses) now provides that if a project requires more than 5% retention, it must be noted in the bid documents which explains the basis for the finding and the actual retention amount. This must be done on a project-by-project basis. Furthermore, any finding by a public entity that a project is substantially complex shall now include a description of the specific project and why it is a unique project that is not regularly, customarily, or routinely performed by the agency or licensed contractors.

C. PCC § 10261 – Payments upon contracts; progress payments; withholding of percentage of contract price; warrants; electronic transfer

This statute (under Article 8, Modifications; Performance; Payment) has been modified in a manner similar to the modifications made to § 7201, as previously discussed. It requires that if a project requires a retention amount greater than 5%, that the department include in the bid documents details explaining the basis for the finding and the actual retention amount. Furthermore, any finding by the director a department that a project is substantially complex shall include a description of the specific project and why it is a unique project that is not regularly, customarily, or routinely performed by the agency or licensed contractors.

D. PCC § 10340 – Bid or proposal; minimum number; exceptions; documentation of solicitation

Under this amended section (which is under Article 4, Contract for Services) ordinarily state agencies are required to secure at least three competitive bids or proposals for each contract. However, three competitive bids or proposals are not required in a number of situations, which now also includes contracts entered into by the Commission on Peace Officer Standards and Training or the Office of Emergency Services solely for the services of instructors for public safety training.

E. PCC § 10502 – Public notice

This amended section (under Chapter 2.1, University of California Competitive Bidding) addresses the public notice requirements to bidders by publication, and now provides that it may be either in one newspaper of general circulation and one trade paper, or electronically on the Internet Website of the university.

F. PCC § 10504.5 – Solicitation of bids; procedure for rating bidders

This amended section (under Chapter 2.1, University of California Competitive Bidding) makes significant revisions to the code section. It sets forth the requirements for projects not exceeding $640,000 by which a procedure to qualify and rate bidders for work is established through a qualification questionnaire and uniform system of rating bidders. Upon the award to the lowest responsible bidder, each campus or facility is required to publicly post on its Internet Website a brief description of the project along with the name of the contractor who is the lowest responsible bidder.

G. PCC § 10511 – Public notice of sale of property

This amended section (under Chapter 2.1, University and California Competitive Bidding) raises the threshold amount (from $500,000) to $1 million net to the seller in connection with the requirement for providing public notice to bidders of the sale of University of California real property situated in California.

H. PCC § 10512 – Opening of sealed bids

This amended statute (under Chapter 2.1, University of California Competitive Bidding and related to § 10511 above) requires that the Regents shall accept in public the bid or proposal it deems to offer the best combination of price, terms, and bidder's qualifications to the university, or reject all bids or proposals. A bidder's qualifications may include factors other than price and terms, such as the bidder's ability to complete the transaction or secure development entitlements.

I. PCC § 10513 – Applicability of provisions

This amended statute (under Chapter 2.1, University of California Competitive Bidding and related to §§ 10511 and 10512 above) includes additional types of property which are not applicable to the provisions of the statutes, and now also include property acquired through foreclosure, deed in lieu of foreclosure, transactions when property is accepted in settlement of a defaulted mortgage, or through a legal settlement.

J. PCC § 10726 – Several public works as a single project

This amended section (applicable under Chapter 2.5, California State University Contract Law) provides that the trustees may receive bids for the construction of several public works projects at the California State University as a single project. Before, it was limited to just one campus.

K. PCC § 10742 – Public notice when estimated cost above $15,000

This amended statute (applicable under Chapter 2.5, California State University Contract Law) provides that notice to bidders regarding an estimated contract price exceeding $15,000 may also now be provided electronically on the California State University's Internet Website.

L. PCC § 12203 – Minimum percentage of recycled products purchased; applicable purchases; contracts

This amended statute (under Chapter 4, State Assistance for Recycling Markets – Article 4, Recycled Materials, Goods and Supplies) now requires that each state agency shall ensure before January 1, 2020 at least 50% of reportable purchases are recycled products; on or after January 1, 2020, at least 75% of reportable purchases are recycled products, except for paint, antifreeze, and tires; and on or after January 1, 2020, at least 50% of reportable purchases of paint, antifreeze, and tires are recycled products.

M. PCC § 20111.6 – Prequalification questionnaire and financial statement; requirements for certain projects; system of rating bidders; standardized proposal form; process for pre-qualifying prospective bidders; application

This amended statute (under contracting by Local Agencies and applicable to School Districts under Article 3) sets forth various prequalification questionnaire requirements applicable to projects of greater than $1 million awarded on or after January 1, 2015.

N. PCC § 20209.7 – Design-build projects; progress in three-step process

This amended statute (applicable under Article 6.8, Transit Design-Build Contracts) provides that contracts awarded prior to January 1, 2012 shall be administered pursuant to a labor compliance program under Labor Code § 1771.5, and those contracts awarded after January 1, 2012 shall be subject to the requirements of § 1771.4 of the Labor Code. (DIR compliance monitoring.)

O. PCC § 20919.3 – Labor compliance program; execution plan; interim report on job order contract projects

This statute (under Article 60.3, Job Order Contracting applicable to local agencies) was amended in a similar fashion to that of § 20209.7 in that for projects awarded prior to January 1, 2012, the unified school district is required to establish and enforce for job order contracts a labor compliance program containing the requirements outlined in § 1771.5 of the Labor Code and, for those projects awarded after January 1, 2012, the project shall be subject to the requirements of § 1771.4 of the Labor Code. (DIR compliance monitoring.)

III. REPEALED STATUTES

A. PCC § 20175.2 – Alternative elective procedure for bidding on building construction projects in excess of one million 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

Applicable to cities, the statute has been repealed effective January 1, 2015.

B. PCC §§ 20360 to 20369

These statutes, under Article 22, Los Angeles County Transportation Commission, applying to rail transit facilities contracts, have been repealed effective January 1, 2015.

C. PCC § 20688.6 – Alternative elective procedure for bidding on building construction projects in excess of one million dollars; number of design-build projects; legislative intent; labor compliance program; cost reimbursement; four-step process; bonding; subcontractors; performance criteria and design standards; retention proceeds; reporting

This statute, under Article 43.1, Redevelopment Agencies, has been repealed effective January 1, 2015.

IV. OTHER RELEVANT ADDED OR AMENDED CALIFORNIA STATUTES

A. Labor Code § 1720 – "Public works" and "paid for in whole or in part out of public funds" defined; exemptions from chapter; ordinances requiring payment of prevailing wages

This amended statute broadens the definition of "construction" for purposes of determining what constitutes "public works". Under the new definition, "construction" now also includes work performed during the post-construction phases of construction, including, but not limited to, all cleanup work at the job site. The previous definition included work performed during the design and pre-construction phases, but did not refer to the post-construction phase. It revises the definition of "public works" to also include infrastructure project grants from the California Advanced Services Fund pursuant to § 291 of the Public Utilities Code.

B. Labor Code § 1771.1 – Violations with intent to defraud; willful violations

The section of this Labor Code section addressing public works apprenticeship programs has been amended. It now provides that in the event a contractor or subcontractor is determined by the Labor Commissioner to have knowingly committed a "serious violation" of any provision of law relating to apprentices, the Labor Commissioner may also deny to the contractor or subcontractor the right to bid or be awarded or perform work on any public works contract for a period of up to one year for the first violation, and a period of up to three years for a subsequent violation. (Two or more separate willful violations.) The circumstances of a "serious" violation are not set forth by category.

C. Labor Code § 1784 – Action to recover from the hiring party for increased costs; exceptions; time to bring action; notification

This new Labor Code section authorizes a contractor to bring a legal action to recover from the hiring party that the contractor contracts with, any increased costs, including labor costs, penalties, and legal fees incurred as a result of any subsequent decision by the Department of Industrial Relations, the Labor Workforce Development Agency, or a court that classifies the project or any part thereof, as a public work. The authorization does not apply if (1) the developer of a construction project or its agent had expressly advised the contractor that the work to be covered by the contract would be a "public work", or (2) the party with whom the contractor has a direct contract expressly advised the contractor that the work would be a "public work". In order to be entitled to

recovery of increased costs, the contractor is required to notify the party with whom it has a direct contract and the developer within 30 days after receipt of the notice of decision. These provisions do not apply if the conduct of the contractor caused the project to be a "public work" or the contractor has actual knowledge that the work is a "public work".

D. Labor Code § 2810.3 – Sharing of liability with labor contractor; notification of violations; retaliation; construction of section

This new section of the Labor Code defines the duties and responsibilities of a client employer and a labor contractor. It provides that a client employer (workforce of at least 25 employees and more than 5 labor contractor supplied employees) shall share with a labor contractor all civil responsibility and civil liability for (1) the payment of wages to workers provided by a labor contractor, and (2) failure to secure valid workers' compensation coverage.

V. RECENT CALIFORNIA SUPREME AND APPELLATE COURT DECISIONS

A. PUBLIC WORKS

1. *Bay Cities Paving & Grading v. City of San Leandro* (2014) 223 Cal.App.4th 1181

- **Public Agency's Right to Waive an Inconsequential Bid Defect Affirmed (Omitted First Page of Bid Bond Form)**

The Court of Appeal for the First Appellate District affirmed a lower court decision which waived a bid defect holding that the City of San Leandro did not abuse its discretion by accepting an immaterial deviation in connection with the low bidders' bid bond. The project was for the BART Pedestrian Interface, and the low bidder, whose bid was accepted, was Gallagher & Burke, Inc. The bid package that the low bidder had submitted was missing the first page of its bid bond form. The bid package did, however, include the second page of the bond, which had the signatures of both the surety and the low bidder's president, as well as notary certificates for both signatures. Bay Cities, which was approximately $500,000 higher in its bid, submitted a bid protest challenging the omission by the low bidder, claiming that the error rendered the bid non-responsive. This decision reinforced the well-established rule that a bid which substantially conforms, though not strictly responsive, may be accepted if the variance did not affect the amount of the bid or give a bidder an advantage or benefit not provided to other bidders. The City's waiver of the defect was proper since no mistake occurred that would have allowed the low bidder, Gallagher & Burke, to withdraw its bid without penalty. Citing heavily to the seminal decisions in *Valley Crest*, *MCM*, and *Ghillotti*, the Court concluded that the appellant second low bidder, Bay Cities, "failed to establish that the City abused its discretion by waving the deviation in [the low bidders' bid] as inconsequential."

2. ***Golden State Boring and Pipe Jacking, Inc. v. Eastern Municipal Water District* (2014) 228 Cal.App.4th 273**

- **Timeliness of payment bond filing**

This decision, decided in July by the California Court of Appeals, Fourth District, was decertified by the California Supreme Court in November, so it cannot be cited as legal precedent. The Court of Appeal had upheld a lower court's granting of summary judgment against a project subcontractor, Golden State Boring & Pipe Jacking, Inc., which had sued Safeco Insurance Company for unpaid contract amounts pursuant to a project payment bond issued by Safeco. At the trial level and on appeal Safeco had successfully argued that Golden State Boring's action on the payment bond was time-barred by former California Civil Code § 3249 (now § 9558) because it had been filed more than six months after the period in which stop notices may be filed, as set forth by Civil Code § 3184 (now §9558). This decision was criticized concerning the deadlines for filing a claim on a bond and it appeared that the minority at the Court of Appeal was more correct. The dissenting opinion in the Court of Appeal apparently held correctly as follows, which appears to capture the correct state of the law:

> In viewing the statutes together, a suit against a surety must be filed within six months of the time for the filing of a stop notice. Under former section 3184, the stop notice must be filed within 30 days of the recordation of the notice of completion or notice of cessation. In a case which neither a notice of completion or notice of cessation is recorded, the stop notice must be filed within 90 days of the actual cessation or completion of the work. In the absence of a recording of either of these notices, a public work of improvement is deemed completed when there has been a cessation of labor for a continuous period of 30 days.
>
> Here, the notice of completion was recorded on October 9, 2008. Plaintiff, Golden State Boring & Pipe Jacking, Inc. (GSB), had until May 9, 2009, in which to file its action. The action was filed on July 3, 2008, more than 10 months before the running of the limitations period. Thus, it was timely filed under former section 3184, subdivision (a).

The decertification removed a decision that added to the confusion as to when a payment bond action is timely filed.

3. ***R&R Pipeline, Inc. v. Bond Safeguard Insurance Company* (2014) 223 Cal.App.4th 438.**

- **Project determined by Court to be private not public work, and therefore longer 4 year statute of limitation applied to labor and material payment bond.**

The California Court of Appeal, Second District, reversed a lower court's summary judgment finding in favor of the defendant insurer in connection with the enforcement of a labor and material bond issued for a subdivision project to develop a golf course and residences. The appellate court held that the trial court had erred in applying the statute of limitation applicable to enforcement of labor and material bonds on "public work" projects; the work performed under its contract with the developer was a "private work" of improvement even though the work was required by a subdivision agreement with a public entity; and therefore the four-year statute of limitation to enforce written contracts apply to the plaintiff action to enforce the bonds under the circumstances of the of this case. Thus, the trial court had erred in applying a shorter statute of limitation applicable to public works of improvement. The underlying facts of the case are noteworthy and dispositive in that R&R was a contractor hired by the developer, Los Valles, to install a storm drain, sanitary sewers, and other improvements for a project consisting of a golf course, 209 residential lots, and public subdivision improvements. The appellate court noted that the Multiple Agreement between the County and Los Valles was not a contract for public work as contract is defined in former sections 3088 and 3100, "because the County was not an owner of the property being developed and Los Valles is not an original contractor. Under former section 3100, the County did not contract for any work, but instead it required the work as a condition of approval of a project on private land." The court further noted that "[t]he Los Valles development was a private work of improvement, which at some point contemplated dedication of sewers and storm drains upon approval of the County but until dedication of the improvements was accepted, R&R's work was private and not subject to the statutory notice requirements and limitations periods applicable to public work."

4. ***Gilbane Building Co. v. Superior Court of San Diego* (2014) 223 Cal.App.4th 1527.**

- **Taxpayer lawsuits not dependent on public agency refusing to take action**

This appellate decision by the Court of Appeal, Fourth District, upheld a lower court decision which denied Gilbane's demurrer to plaintiff (San Diegans for Open Government) complaint which sought to disgorge all monies that Gilbane and other construction companies received in connection with construction of the Sweetwater Union High School District. It was alleged that Gilbane and other companies provided gifts to the District's officials and their family members in exchange for construction contracts worth several million dollars. The lawsuit sought declaratory relief, imposition of a constructive trust on all monies received by Gilbane, judgment that all consideration be returned to the District, and an injunction to prevent Gilbane from dispersing monies received from the contracts. The court held that the plaintiff had alleged sufficient facts to invoke associational

standing to pursue taxpayer suits under CCP § 526(a), and that a demand to this school district and refusal was not a prerequisite before plaintiff could initiate its action. The court noted that if it were to construe the refusal requirement as Gilbane suggested and require an actual refusal "a public agency could prevent taxpayer initiated litigation simply by failing to respond to any demand. ... [and] this result would not comport with the policy supporting taxpayer actions."

5. ***Sheet Metal Workers' International Association, Local 104 v. John C. Duncan (Russ Will Mechanical, Inc.)* (2014) 229 Cal.App.4th 192**

- **Off-site fabrication is not covered by California prevailing wage laws**

The Court of Appeal for the First District held that a contractor need not pay prevailing wages for offsite fabrication of materials to be used on a public works project if that fabrication takes place at a permanent, offsite manufacturing facility that is not exclusively dedicated to the project. NLRB administrative decisions have long held that fabrication work performed at a permanent, offsite facility is not covered by prevailing wage law, whereas fabrication work performed at a temporary facility dedicated to a project is covered. This dispute has been ongoing for several years with uncertainty as to the applicability to prevailing wages in connection with offsite fabrication, and the Court of Appeal, in recognizing a need for certainty and clarity, issued this decision. The state of the law is best summarized by the conclusion at the end of the decision:

> Off-site fabrication is not covered by the prevailing wage law if it takes place at a permanent, offsite manufacturing facility and the location and existence of the facility is determined wholly without regard to the particular public works project. Because the offsite fabrication at issue here was conducted at Russ Will's permanent offsite facility, and that facility's location and continuance in the operation were determined wholly without regard to the project, the work was not done "in the execution" of the contract within the meaning of section 1772.

B. PRIVATE WORKS

1. ***Brewer Corp. v. Point Center Financial, Inc.* (2014) 223 Cal.App.4th 831; 223 Cal.App.4th 1424f (petitions for rehearing denied)**

- **Court interprets bonded stop notice rules and requirements and offset on construction lender.**

In a dispute concerning payments associated with a condominium project located in San Diego adjacent to Balboa Park, the Court of Appeal for the Fourth District ruled that a judgment in favor of the plaintiff stop notice complainant is provisionally reversed as to plaintiff Dynalectric, and the matter remanded for further proceedings on a potentially factually dispositive issue of the

existence of a factual excuse for not serving a preliminary 20-day notice on the defendant construction loan lender; affirmed in part as to the remaining plaintiffs where the trial court correctly held that a construction lender must make available to stop notice claimants those amounts the lender has already dispersed to itself on the construction loan. One stop notice claimant's failure to serve a preliminary 20-day notice under Civil Code § 3097 prevented it from recovering under its bonded stop notice, and one stop notice claimant's failure to give the lender a notice of commencement of the stop notice action under Civil Code § 3172 did not bar the stop notice claimant from recovering where the lender suffered no prejudice.

The case was modified and denied rehearing on February 27, 2014 (223 Cal.App.4th 1424f).

2. *E.J. Franks Construction, Inc. v. Bhupinder K. Sahota* (2014) 226 Cal.App.4th 1123

- **B & P Code § 7031 bar to recovery not applicable to licensed contractor who incorporated his company during course of construction.**

This Court of Appeal decision of the Fifth District affirmed a lower court decision concerning the non-applicability of Business and Professions Code § 7031 regarding quantum meruit recovery. Edward J. Franks, II , became a licensed general contractor in 1995 and operated a sole proprietor ship under the name the E.J. Franks Construction. During the course of constructing a home for the defendants, Franks incorporated his company under the name E. J. Franks Construction, Inc. On April 12, 2005 his contractor's license was reissued to the corporation. Defendant sought to block a recovery of quantum meruit damages against them because Franks was purportedly an unlicensed contractor at the time the construction contract was entered into, and therefore was not licensed "at all times" during the performance of the contract. The appellate court held that § 7031 "does not apply to the unique situation here because to do so would not advance the statute's goal of precluding unlicensed contractors from maintaining actions for compensation."

3. *Burch v. Superior Court of Los Angeles County (Premier Homes, LLC)* (2014) 223 Cal.App.4th 1411

- **Right to Repair Act (Civil Code § 895, *et seq.*) does not provide the exclusive remedy for a homeowner seeking damages for construction defects that have resulted in property damage.**

This California Court of Appeal, Second District, decision involved interpretation of the Right to Repair Act (Civil Code § 895, *et seq.*). Custom Homebuilders, a general contractor, built a single family residence in the Pacific Palisades area of Los Angeles under a written construction contract with Premier Homes. The residence was not specifically built for the plaintiff Burch, but instead was built to be marketed to the general public, and Burch purchased it from Premier Homes pursuant to a written sales contract. The trial court's order granting summary judgment in favor of the defendant builders was reversed and remanded in this construction defect action alleging

negligence and breach of implied warranty. The Court of Appeal ruled that the Right of Repair Act does not provide the exclusive remedy for a homeowner seeking damages for construction defects that have resulted in property damage, and furthermore concluded that defendants Custom Home Builders, Warren, and Sahar, failed to negate a duty of care provided to Burch as a prospective purchaser and failed to negate an implied warranty in favor of Burch as a third-party beneficiary of the construction contract.

4. ***KB Home Greater Los Angeles, Inc. v. Superior Court of Los Angeles County (Allstate Insurance Company)* (2014) 223 Cal.App.4th1471**

- **Right to Repair Act (Civil Code §895, *et seq.*) requires that notice be given to a builder before repairs are made to the home subject to the Act.**

The California Court of Appeal, Second District, held that the Right to Repair Act (Civil Code § 895, *et seq.*) requires that notice be given to a builder before repairs are made to a home subject to the Act. It granted the defendant-builder's petition for a writ of mandate and instructed the trial court to enter summary judgment in favor of the defendant builder. The underlying case involved the purchase by a homeowner of a new home from KB in 2004 with a right to repair addendum to the purchase agreement, including information where notice of defect claims were to be sent. The vacant property experienced a water leak and a mitigation company was hired by the property manager to remove excess water, and dry damaged drywall and carpet. The insurer Allstate repaired the property, and then sought subrogation from KB. Allstate was found to have not complied with the Right to Repair Act. "The failure to give KB Home timely notice and an opportunity to inspect and offer to repair the construction defect excuses KB Home's liability for damages under the Act."

5. ***Talega Maintenance Corporation v. Standard Pacific Corporation* (2014) 225 Cal.App.4th 722**

- **Denial of anti-SLAPP CCP § 425.16 motion by developer appointed HOA members affirmed.**

This Court of Appeal, Fourth District decision affirmed the denial of the defendants anti-SLAPP motion pursuant to CCP § 425.16. Plaintiff Talega Maintenance Corp., a homeowners association (HOA), sued two developers for construction defects. The developers, who developed the residential community itself, also developed certain trails adjacent to the housing community. The trails were badly damaged during rains and flooding in 2005 and again in 2010, allegedly due to construction defects. The HOA also sued three former employees of the developers, who sat on the Board. The defendants filed an anti-SLAPP motion to strike the fraud, negligence, and fiduciary duty claims, contending that they arise from protected statements made at the Association board meetings. The Court held that homeowners association meetings constitute a public forum, and the issue boiled down to whether the alleged fraudulent statements were in connection with an issue of public interest. The court noted that the definition of public interest within the meaning of anti-

SLAPP statute has been broadly construed to include not only governmental matters "but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity." However, the defendants failed to meet their burden to show the challenged causes of action arose from protected activity.

6. ***The McCaffrey Group, Inc. v. The Superior Court of Fresno County (Jesus Cital)* (2014) 224 Cal.App.4th 1130**

- **Right to Repair Act (Civil Code § 895, *et seq.*) required subdivision homeowners to comply with contractual procedures of claim notice, opportunity to repair and correct, and mediation.**

This California Court of Appeal, Fifth District decision determined that the trial court had erred in denying defendant's motion to compel alternate dispute resolution of plaintiff's defective construction claims, where (1) provisions in the home purchase contracts required the homeowners to submit their construction defect claims to non-adversarial pre-litigation procedures before proceeding with a lawsuit; and (2) said provisions are enforceable because there is nothing in the Right to Repair Act that requires the builder who elects to use contractual procedures to provide a particular procedure or to comply with deadlines contained in Chapter 4 of the Act, and the contractual provisions are not unconscionable. Petitioner The McCaffery Group, Inc. had constructed single-family homes in a Fresno development and the real parties in interest owned 24 homes within the development. The court found that "all of the real parties in interest must comply with the contractual procedures in their contracts with McCaffery, which include providing notice of the claim, giving McCaffery an opportunity to repair and correct, and participating in nonbinding mediation."

7. ***Regional Steel Corporation v. Liberty Surplus Insurance Corporation* (2014) 226 Cal.App.4th 1377**

- **Defective tie hooks installed during construction that need to be removed and replaced for code compliance do not constitute recoverable property damage under a general liability policy.**

This Court of Appeal decision, Second District, affirmed a lower court decision that the defendant insurer did not have duty to defend the plaintiff insured against claims brought by the general contractor arising out of the plaintiff subcontractor's installation of defective steel framing in an apartment building. The subject project was an apartment building under construction in North Hollywood in 2004, consisting of 14 stories, including retail space on the ground floor, four floors of parking, and 180 residential units on the upper floors. The general contractor GSM filed a cross-complaint against Regional Steel Corporation contending that Regional Steel failed to comply with the subcontract and Building Code when it installed horizontal reinforcement for the parking garage by installing 90° tie hooks, and as a result GSM was required by the City to make repairs that required it to open up numerous locations in the concrete walls, welder enforcements to the steel placed by Regional Steel, and otherwise strengthen the inadequate installation. The Court determined

that there was no duty to defend or indemnify because: (1) the Wrap Endorsement on the project did not eliminate the requirement that the claim occur during the applicable retroactive period; (2) the defective tie hooks did not constitute "Property Damage" for purposes of coverage analysis; and (3) the Impaired Property exclusion bars the possibility of coverage, because under that exclusion, there is no coverage for property damage to property that has not been physically injured arising out of Regional Steel's negligent failure to perform its contractual obligations based on installation of defective tie hooks. The case is very interesting from the perspective of a thorough analysis of the State of California coverage law with regard to the interpretation of a standard general liability policy and case law concerning defective workmanship. The court noted that the "only allegations JSM made against Regional were that it failed to install the proper tie hooks, and its failure to do so necessitated demolition and repair of the affected areas – allegations squarely within the ambit rule of *F&H Construction* that this type of repair work is not covered under a CGL policy."

8. ***North Counties Engineering, Inc. v. State Farm General Insurance Co.* (2014) 224 Cal.App.4th 902**

- **Insurer had duty to reimburse insured for expenses connected with insurer's original refusal to defend which was based on an inapplicable declarations page.**

The California Court of Appeals, First Appellate District, reversed and remanded a directed verdict for the defendant- insurer in an action brought by the plaintiff -insured against the defendant seeking unreimbursed expenses for defendant's original refusal to defend plaintiff in the underlying construction disputes, along with other damages. North Counties Engineering, Inc., an engineering company, and Gary Ackerstrom, its President, were sued in 2004 in two lawsuits that sought property damage arising out of the construction of a dam completed in 1999. State Farm rejected the tender of defense, a position it maintained for several years, until September 2007, when State Farm recognized that its position had been based on a policy declarations page first effective in 2001, and thus a policy not applicable to the claims in the lawsuits. State Farm then agreed to provide a defense from September 2007 forward, leaving the unreimbursed sum of $504,000 in expenses incurred prior to that date. Appellants then sued State Farm seeking the unreimbursed expenses from its original refusal to defend, along with other damages. In rendering its decision, the court among other things noted that there was "much more evidence that supported a possible duty to defend, including the fact that once the proper declarations page was located and reviewed, State Farm agreed to defend. While we agree with State Farm that in general a decision by an insurer to defend under a reservation of rights cannot by itself be used to support a duty to defend, here it can." State Farm was then required to reimburse the insureds.

9. ***Beacon Residential Community Association v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568**

- **California Supreme Court affirms appellate decision that project architect owes duty of care to future homeowners.**

The California Supreme Court affirmed the Court of Appeal decision holding that an architect owes a duty of care to future homeowners in the design of a residential building where, as here, the architect is a principal architect of the project by providing professional design services, and is not subordinate to other design professionals. The court held that the duty of care extends to such architects even when they do not actually build the project or exercise ultimate control over construction activities. This duty of care is owed to homeowners under both common-law and under the Right to Repair Act (Civil Code § 895, *et* seq.). The underlying allegations included negligent architectural design work resulting in various construction defects, including extensive water infiltration, inadequate fire separations, structural cracks, and other safety hazards. Additionally, one of the principal defects alleged was of solar heat gain and according to the Complaint defendant architect approved the use of defective windows and designed a defective ventilation system, all of which created conditions that made the homes uninhabitable for portions of the year. The Court noted that, pursuant to the allegations in the Complaint, defendants were paid more than $5 million, provided original design services and remained active throughout the construction process.

10. ***Delon Hampton &Associates, Chtd. v. The Superior Court of Los Angeles County (Los Angeles County Metropolitan Transportation Authority)* (2014) 227 Cal.App.4th 250**

- **Court determines that defects relating to stairs and guard rails are patent defects to which CCP statutes of limitation apply.**

This Court of Appeal decision, Second District, involves the dismissal by way of demurrer to a cross-complaint against a design entity in connection with a personal injury action. In 2011, plaintiff Madrigal fell on a stairwell at the Los Angeles County Metropolitan Transportation Authority rail station at Fourth Street and Hill in Los Angeles. MTA cross-complained against Delon Hampton & Associates, which performed design and/or construction services at the station. Hampton demurred to the first amended cross-complaint based on CCP §337.1, which contains a four year statute of limitation period for patent defects. The court concluded that the defects alleged were patent and upheld the trial court's ruling, sustaining the demurrer without leave to amend. Plaintiff had fallen on a stairwell at the station alleging that the stairwell as "too small" and that is banister was "too low". The court concluded that defects involving stairs and guardrails have been found to be patent defects, as well as the spacing between guardrails. The court noted that "[i]n addition to the to the defects being visually accessible, simple use of the stair well would inform the average consumer whether the bannister was too low or the stair well was too narrow. The alleged defects were therefore patent."

11. ***Decon Group, Inc. v. Prudential Mortgage Capital Company, LLC* (2014) 227 Cal.App.4th 665**

- **Foreclosure after acceptance of a deed in lieu of foreclosure eliminates all junior liens and gives third-party purchaser clear title.**

This Court of Appeal, Second District decision involved a foreclosure of a mechanic's lien suit filed to foreclose on a lien that had been eliminated by property foreclosure. AZ Wellesley Plaza, LLC, owned real property in Los Angeles subject to a first deed of trust and a junior mechanic's lien. Wellesley defaulted on a loan secured by the trust deed. Faced with foreclosure on that senior debt, Wellesley gave the trust deed beneficiary title to the Property by means of a grant deed in lieu of foreclosure. The grantee/beneficiary then foreclosed, eliminating all junior liens. The grantee/beneficiary also bought the Property at the foreclosure sale and later sold it to a third party. The holder of the mechanic's lien filed suit to foreclose its lien, arguing that the lien was not eliminated by the foreclosure. The holder of the mechanic's lien contended that when the trust deed beneficiary accepted the deed in lieu of foreclosure, those two interests (as beneficiary under the trust deed and as guarantee under the trust deed in lieu) merged, and the merger destroyed the senior lien, so the purported foreclosure on the lien was a sham. The trial court agreed, and ordered foreclosure on the mechanic's lien. The trust deed beneficiary, the third-party buyer, and another related party, appealed and the Court of Appeal reversed. It held that "[u]nder well-established California law, the senior beneficiary's lien and title ordinarily do not merge when a deed in lieu of foreclosure is given if there are junior lienholders of record. The foreclosure after acceptance of the deed was therefore valid and eliminated all junior liens, including plaintiff's mechanic's lien." The court determined that the third-party now owns the Property free of all such junior encumbrances.

12. ***James E. Zalewski, Draftics, Ltd. v. Cicero Builder Dev., Inc., et al.* , 754 F.3d 95 (2nd Cir. 2014)**

- **Colonial home design reuse by builders does not amount to copyright infringement.**

This United States Court of Appeal, Second Circuit decision addressed alleged copyright infringement and violations of the Digital Millennium Copyright Act (DMCA) against numerous defendants involved in the construction and sale of homes built with architectural plans allegedly copied from plaintiff's designs. The District Court had dismissed plaintiff's claims against some defendants, granted summary judgment in favor of the remaining defendants, and granted attorney's fees to two defendants for costs incurred defending against plaintiff's first and second amended complaint. The district court orders were affirmed in part, where any copying of plaintiff's designs extended only to unprotected elements of his works, and plaintiff failed to plead a violation of the DMCA, but vacated in part and remanded, where the district court applied the incorrect legal standard in awarding attorney's fees. In the 1990s, plaintiff Zalewski was self-employed as an architect and granted defendants T. P. Builders and Cillis Builders licenses to use several colonial home designs he had created. After the licenses expired, T. P. Builders hired others to customize his

designs for their customers and continued marketing his designs, or customized versions thereof, without his consent. The Court after reviewing the designs in question, concluded that even if defendants copied Zalewski's plans, "they copied only the unprotected elements of his designs." The Court noted that the plaintiff's principal argument is that defendants' designs are so close to his that defendants must have infringed, noting that "[h]e is correct that the designs are, in many respects, quite close, but that's not enough. It proves at most copying, not wrongful copying." The Court noted further that most of the similarities between plaintiff's and defendants' designs are features of all colonial homes, or houses generally "[s]o long as Plaintiff was seeking to design a colonial home, he was bound to certain conventions. He cannot claim copyright in those conventions." The court also noted that plaintiff's and defendants' layouts are different in many ways, with the exact placement and sizes of doors, closets, and countertops often differ as do the arrangements of rooms. Finally, the court noted that although plaintiff undoubtedly spent many hours on his designs, and although there is certainly something of plaintiff's own expression in his work "as long as Plaintiff adhered to a pre-existing style his original contribution was slight – his copyright very thin. Only very close copying would have taken what actually belonged to Plaintiff."