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January 28, 2013

Re: 2013 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 2013 revisions to the California Public Contract Code (PCC) as a result of legislation enacted in 2012, other related California statutes, and recent court decisions concerning both public and private works contracts.

We hope this information will be of value to you. Previous year-end Public Contract review letters for the past several years 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 §2503 – Charter provisions, initiatives, or ordinances limiting the use of project labor agreements; effect on state funding or financial assistance

This new statute provides that if a charter provision, initiative, or ordinance of a charter city prohibits, limits, or constrains in any way the governing board's authority or discretion to adopt, require, or utilize a project labor agreement that includes specified taxpayer protection provisions for some or all of the construction projects to be awarded by the city, then state funding or financial assistance may not be used to support any construction projects awarded by the city as specified. (This statute is not applicable until 2015 if the charter provision was in effect prior to November 2011.)

B. PCC §6700 – Alternate procurement procedures for certain transportation projects; intent of legislature; legislative findings and declarations

This entire new chapter of the Public Contract Code, entitled "Construction Manager/General Contractor Authority; Department of Transportation" (PCC §6700-6708), provides for an alternate procurement procedure for certain transportation projects performed by the Department of Transportation. It establishes a pilot program to test the utilization of a Construction Manager/General Contractor method as a cost-effective option for constructing transportation projects, including the potential for partnering with local entities to deliver projects on the state highway system.

The Construction Manager/General Contractor method allows the Department to engage a construction manager during the design process to provide input on the design. During the design phase, the construction manager provides advice including, but not limited to, scheduling, pricing and phasing to assist the Department to design a more constructable project.

C. PCC §6701 – Authorization to use Construction Manager/General Contractor method; limitations; reports

As part of §6700 above, this method is to be tested out on no more than six projects, at least five of which have construction costs greater than $10 million.

D. PCC §6703 – Procedural requirements

As part of §6700 above, this new section sets forth the request for qualifications (RFQ) procedures to be followed.

E. PCC §6950 – Legislative findings and declarations

This entire new chapter of the Public Contract code, entitled "Alternative Project Delivery Program: Construction Manager/General Contractor Authority" (PCC §§6950-6958), has been added to allow the San Diego Association of Governments to utilize alternate project delivery methods for public transit projects within the jurisdiction of the San Diego Association of Governments. The "alternate project delivery method" means either Construction Manager/General Contractor method or design sequencing. The CMGC method is a project delivery method using a best value procurement process in which a construction manager is procured to provide pre-construction services during the design phase of the project, and construction services during the construction phase. The execution of the design and the construction of the project may be in sequential or concurrent phases. "Construction Manager" means a partnership, corporation, or other legal entity that is able to provide appropriately licensed contracting and engineering services as needed pursuant to the CMGC contract. "Design sequencing" means a method of project delivery that enables the sequencing of design activities to permit each construction phase to commence when the design for that phase is complete, instead of requiring design for the entire project to be completed before commencing construction.

F. PCC §6952 – San Diego Association of Governments; utilization of alternate project delivery methods for public transit projects; alternate project delivery methods contracts; conditions

Under this new approved methodology set forth in §6950 above, the San Diego Association of Governments must make a written finding that the use of the alternate project on a specific project under consideration will accomplish one or more of the following objectives: reduce project costs, expedite the project's completion, or provide features not achievable through the design-bid-build method. In the alternative project delivery method proposal, the written findings shall be included as part of any application for state funds.

G. PCC §6954 – Preconstruction services contracts; contents; award of contracts for construction services; percentage of work performed by construction manager; work to be bid to subcontractors

If a contract for CMGC services is entered into pursuant to this new §6950 chapter and includes preconstruction services by the construction manager, the San Diego Association of Governments is required to enter into a written contract with the construction manager for preconstruction services. The scope and specifics of the preconstruction services contract is set forth in this new statute.

H. PCC §10507.8 – Best value bid evaluation methodology; policies and guidelines; criteria; discrimination prohibited; procurement of goods, materials, or services

This new code section in connection with contracting by state agencies, applies specifically to the University of California. It allows for the lowest responsible bidder selected on the basis of best value to the University which means the most advantageous balance of price, quality, service, performance, and other elements, as defined by the University, achieved through methods in accordance with this section and determined by objective performance criteria that may include price, features, long-term functionality, life-cycle costs, overall sustainability, and required services. This lengthy statute sets forth various specific evaluative criteria, and provides for reporting to the Legislative Analyst's Office with respect to the policies and procedures adopted.

I. PCC §12140 – Contracts for services by call centers; certification that workers are employed in California; violations, penalties; right to terminate contracts for non-compliance; exceptions, grounds; contracts exempt from requirements; compliance with federal law

A new Chapter 3.7 has been added to the statutes, entitled "Prohibition of the Offshoring of State Public Benefits Contracts". This new law provides that any state agency authorized to enter into contracts relating to public benefit programs shall only contract for services provided by a call center that directly serves applicants for, recipients of, or enrollees in, those public benefit programs with a contractor that certifies in his bid for the contract that the services provided under the contract and any subcontract performed under that contract, to applicants for, recipients of, or enrollees in, those public benefit programs, will be performed solely with workers employed in California.

A "public benefit program" means California Work Opportunity and Responsibility to Kids (CalWORKs), CalFresh, Medi-Cal, Healthy Families, and the California Healthcare Eligibility, Enrollment, and Retention System.

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

This new statute, applicable to contracting by local agencies under the school districts section addresses the prequalification questionnaire and financial statement for the prime contractor and all electrical, mechanical, and plumbing subcontractors. Under existing law, the governing board of the school district may require each prospective bidder for specified contracts to submit a standardized questionnaire and financial statement, including information relating to financial ability and experience in performing public works. Existing law further requires a school district requiring the above information to adopt and apply a uniform system of rating bidders on the basis of these submissions. This new law, effective until January 1, 2018, will require the questionnaire and uniform system of rating bidders to cover, at a minimum, the issues covered by the standardized questionnaire and model guidelines for rating bidders developed by the Department of Industrial Relations. This law applies only to projects involving a projected expenditure of $1 million or more and does not apply to a school district with an average daily attendance of less than 2,500. It applies only to contracts awarded on or after January 1, 2013.

K. PCC §20651.7 – Best value bid evaluation methodology; criteria; notice of intent; public announcement of award; discrimination prohibited; contracts for purchase of equipment, material, supplies, and services

This new code section applicable to community college districts now allows for the "best value" bid evaluation methodology for purchasing of equipment, material, supplies, and services. "Best value" is defined as the most advantageous balance of price, quality, service, performance, and other elements, as defined by the governing board, achieved through methods in accordance with this section and determined by objective performance criteria that may include price, features, long-term functionality, life-cycle costs, overall sustainability, and required services.

Fairly extensive reporting by the community college district is, however, required to be made to the Legislative Analyst on or before July 1, 2016.

L. PCC §20751.2 – Ventura Port District; use of federal bidding process; dredging contract

The Board of the Ventura Port District may now award a contract for the performance of dredging work without competitive bidding, provided that: (a) the dredging contractor was selected through a federal competitive bidding process for a federal dredging project then underway in the County of Ventura; and (b) the Board makes written findings, based on substantial evidence in the record, that the contract awarded pursuant to this section is likely to cost less than a contract pursuant to contract award pursuant to competitive bidding.

II. PUBLIC CONTRACT CODE REVISIONS

A. PCC §7202 – Progress payments; withholding retention proceeds prohibited

This statute, which prohibits the Department of Transportation from withholding retention proceeds when making progress payments to a contractor for work preformed on a transportation project, has now been extended from 2014 to 2020.

B. PCC §10111 – Report on contracting activities; contents

Under the State Contract Act "whether the business is a lesbian, gay, bisexual, or transgender owned business" is now included within the reporting requirements for state contracts.

C. PCC §10140 – Publication of notice

In the advertisements for bids section of the contracting by State Agencies sections, with respect to the Department of Transportation, in lieu of the standard public notice requirements, the public notice requirement may now instead be met by publishing the notice electronically on the department's Internet Website.

D. PCC §10167 – Presentation of bids under sealed cover; bidder's security; compliance with Section 1601

With respect to the expansion of bidder's security methods under the section dealing with contracting by State agencies, all bids presented under sealed cover may now have one of the following forms of bidder's security: (1) an electronic bidder's bond by an admitted surety insurer submitted using an electronic registry service approved by the department advertising the contract;

(2) a signed bidder's bond by an admitted surety insurer received by the department advertising the contract; (3) cash, a cashier's check, or certified check received by, and made payable to, the director of the department advertising the contract.

E. PCC §20311 – Contract bids, construction of facilities and works, purchase of supplies, equipment, and materials

This amended section applicable to the Golden Empire Transit District provides that the purchase of all supplies, equipment, and materials, when the expenditure exceeds $100,000, shall be by contract let to the lowest responsible bidder, or in the District's discretion to the responsible bidder that submitted a proposal that provides for best value. "Best value" means the overall combination of quality, price, and other elements of a proposal that, when considered together, provide the greatest overall benefit in response to the requirements described in the solicitation documents. For those equipment, materials, and supply contracts in the $2,500 to $100,000 range, the board shall seek a minimum of three quotations.

F. PCC §20919 – Legislative findings and declarations

This code section dealing with job order contracting, applicable only to the Los Angeles Unified School District, now provides that job order contracts be competitively bid and awarded to the bidder providing the "most qualified" responsive bid. The language was changed from "the lowest responsive bid".

G. PCC §20919.1 – Definitions

Similarly, in connection with PCC §20919 above, the job order contract means "a contract awarded to the "most qualified bidder". It had previously been defined as "a competitively bid contract."

H. PCC §20919.4 – Bidding

This statute, concerning bidding for job order contracts for unified school districts also does away with the "lowest responsible" bidder requirement, and now allows for a determination "to be the most qualified based upon preestablished criteria made by the unified school district." The prequalified bidder is required to be in compliance with the unified school district's project stabilization agreement, and have no more than three violations on any unified school district project within the last three years. The prequalified job order contractor must also have an acceptable safety record as determined by the unified school district.

I. PCC 20919.5 – Contract amount; contract length

In conjunction with job order contracting in PCC 20919.4 above, the job order issued to the job order contractor shall not commence for seven days from the time the job order was issued, and the job order contractor is required to provide a minimum of seven days notice for the addition of any subcontractor or substitution of any subcontractor.

J. PCC §20919.6 – Subcontractors

In connection with job order contracting, PCC §§20919.4 and 20919.5, above, various criteria are set forth requiring the primary job order contractor to notify the unified school district which subcontractor was selected, including every subcontractor for all tiers, and must establish an authorized subcontractor list for the job order. The notification requires identification of the scope of the work to be performed by each subcontractor to the job order, broken down by craft. Specific substitution criteria is also set forth.

K. PCC §20919.9 – Employment of apprentices

This statute, in conjunction with job order contracting, PCC §§20919.4, 20919.5 and 20919.6 above, requires that for the purposes of employment of apprentices on job order contracts when the individual job order involves more than $30,000 or 20 working days, all general contractors or subcontractors shall at all times be in compliance with §1777.5 of the Labor Code with respect to apprenticeship standards.

L. PCC §20919.12 – Report

In connection with job order contracting, PCC §§20919.4, 20919.5, 20919.6 and 20919.9 above, the unified school district must then file an extensive report concerning all contracts to various state governmental agencies, on or before December 31, 2019.

III. OTHER RELEVANT ADDED OR AMENDED CALIFORNIA STATUTES

A. Business and Professions Code §7026.1 – Contractor as including person who services air-conditioning, heating or refrigeration equipment, builder, home improvement construction person, tree remover, and water well driller

This amended statute now also defines a contractor to include a person who provides or oversees a bid for a construction project, arranges for and sets up work schedules for contractors and

subcontractors, or maintains oversight of a construction project. Construction managers will now meet the definition of "consultant" and will require contractor licensure.

B. Business and Professions Code §7106.5 – Jurisdiction to discipline

This code section now provides that the expiration, cancellation, forfeiture, revocation, or suspension of a contractor's license by operation of law or by order or decision of the Registrar or a court of law, or the voluntary surrender of a license by a licensee, shall not deprive the regulatory agency from proceeding with any investigation of or action or disciplinary proceeding against the license, or to render a decision suspending or revoking the license. Thus, the revocation of a contractor's license does not deprive the board of continuing jurisdiction.

C. Civil Code §845 – Easements; maintenance; agreements; snow removal

Existing law requires that the owner of any easement in the nature of a private right-of-way, or any land to which such an easement is attached, to maintain the easement and repair, and if the easement is owned by more than one person, requires the cost of repair to be shared by each owner pursuant to the terms of an agreement entered into by the parties for that purpose. This new law now authorizes an owner of the easement, or land to which the easement is attached, to bring an action against any other owner who refuses or fails after demand in writing to pay that owner's share of the cost of maintenance, or for specific performance or contribution. Amended law authorizes a superior court action to be brought before, during, or after performance of the maintenance work.

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

As noted in last year's letter, effective January 1, 2013, there have been substantial modifications made to this code section which addresses indemnity and outlaws Type I indemnity agreements for both public and private works. Please be advised of the following: (1) Any provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract with a public agency on or after January 1, 2013 that purport to impose on the contractor, or relieve the public agency from, liability for the active negligence of the public agency are void and unenforceable. (2) Any provisions, clauses, covenants or agreements contained in, collateral to, or affecting any construction contract with a public agency entered into on or after January 1, 2013 with the owner of privately owned real estate to be improved and as to which the owner is not acting as a contractor or supplier of materials or equipment to the work, that purport to impose on any contractor, subcontractor, or supplier of goods or services, or relieve the owner from, liability are

enforceable to the extent of the active negligence of the owner, including that of its employees. (3) This statute does not apply to a homeowner performing a home improvement project on his own, or his own single family dwelling.

E. Education Code §81378.1– Letting of property in the name of district

This statute has been amended to remove the threshold requirement that a lease not exceed $25,000 per year in connection with the leasing by community college districts specified property not needed for academic activities.

F. Education Code §§88600, et seq. – Principles; Mission (California Community College Economic and Workforce Development Program)

These statutes have been recast and revised with respect to provisions governing the California Community Colleges Economic and Workforce Development Program that was to be repealed on January 1, 2013 (now extended to January 1, 2018). Existing law provides for the awarding of grants for this program, and provides that this program shall only be implemented during the fiscal years for which funds are appropriated for these purposes. Existing law requires the Board of Governors of the California Community Colleges, as part of the program, to assist economic and workforce regional development centers and consortia to improve linkages and career-technical education pathways between high schools and community colleges. The intent is to improve the quality of career exploration and career outreach materials.

G. Education Code §§17250.10, 17250.25, 81700, and 81703 (School facilities: design-build contracts)

Existing law authorizes, until January 1, 2014, a school district governing board or community college district governing board to enter into a design-build contract for both the design and construction of a school facility or community college facility, if specified requirements are met. These amendments extend the design-build authority until January 1, 2020. There is also a declaration of legislative intent under Education Code §81700 that design-build procurement does not replace or eliminate competitive bidding.

H. Government Code §§12650; 12651; 12652; 12653; 12654; 12654.5 (False Claims Actions)

There have been significant amendments made to the California False Claims Act. It provides that a person who commits any one of several enumerate acts relating to the submission to the state

or a political subdivision of the state a false claim for money, property, or services, as specified, shall be liable to the state or political subdivision for certain damages and for a civil penalty, as specified. Existing law authorizes a person to bring a civil action for damages resulting from fraudulent claims against the state or a political subdivision, and to share in the recovery. Existing law prohibits employers from engaging in certain acts that prevent employees from disclosing information to the government or law enforcement agency from acting in furtherance of a false claims action. Existing law requires that a civil action for a false claim be filed within a specified time period.

The amendments define the term obligation for purposes of these provisions and expand the definition of a claim. It increases the range of civil penalties for each violation ($5,500 to $11,000). It authorizes a court to award a person who planned and initiated a violation, as specified, a reduced share of the proceeds of the action. It provides for reinstatement and damages to any employee, contractor, or agent that is, among other things, discharged, demoted, suspended, or in any other manner discriminated against in the terms and conditions of his or her employment. It modifies the statute of limitations of certain civil actions, to three, six, or ten years, as specified.

I. Labor Code §1720 – "Public works" defined; "paid for in whole or in part out of public funds" defined; exception for private residential projects; exclusions

Existing law defines the term "public works" for purposes of requirements requiring the payment of prevailing wages. Existing law generally defines "public works" to include construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or part out of public funds. This statute has been amended to modify the definition of "installation" to include the assembly and disassembly of freestanding and affixed modular office systems.

J. Labor Code §1730 – Posting on Internet specified information relating to prevailing rate of per diem wage requirements

This new statute requires that the Director of Industrial Relations shall post a list of every California code section and the language of those sections that relate to the prevailing rate of per diem wage requirements for workers employed on a public work projects on the Internet Website of the Department of Industrial Relations on or before June 1, 2013, and shall update that list each February 1st thereafter.

K. Labor Code §1773.1 – Per diem wages; what employer payments are included therein; credits for employer payments; computation of credits; filing of collective bargaining agreements; (Amended); Labor Code §1773.8 – Increased employer contribution resulting in lower taxable wage (Added)

This amended statute provides that increased employer payment contribution that results in a lower hourly straight time or overtime wage is not considered to be a violation of the applicable prevailing wage determination, so long as specified conditions are met. Likewise, under the new statute (§1773.8) an increased employer payment contribution that results in lower taxable wages is not a violation of the applicable prevailing wage determination, provided specified conditions are met.

L. California Revised Uniform Limited Liability Company Act (An act to amend Sections 9653.6, 17900, and 23405.2 of the Business and Professions Code, to amend Section 708.310 of the Code of Civil Procedure, to amend Sections 171.03, 171.3, 1113, 1152, 1157, 2113, 6019.1, 8019.1, 12540.1, 15911.03, 15911.08, 16903, 16908, 16911, and 25005.1 of, to add Section 17657 to, to add Title 2.6 (commencing with Section 17701.01) to, and to repeal Title 2.5 (commencing with Section 17000) of, the Corporations Code, to amend Sections 12190, 12197, and 12262 of the Government Code, to amend Section 1192.95 of the Insurance Code, to amend Sections 17941, 17947, 19141, and 23332 of the Revenue and Taxation Code, and to amend Section 1116 of the Unemployment Insurance Code, relating to limited liability companies)

Existing law authorizes a limited liability company to engage in any lawful business activity, as specified, and governs the formation of limited liability companies, including requiring the members to enter into an operating agreement that shall be in writing or oral and to execute and file articles of organization with the Secretary of State.

Effective January 1, 2014, the California Revised Uniform Limited Liability Company Act, will recast provisions governing the formation and operation of limited liability companies.

The new law will distinguish between a manager-managed limited liability company and a member-managed limited liability company for purposes of defining the scope of a member's agency and imposing fiduciary duties only on persons in control of a limited liability company. It will also authorize the establishment of classes of members.

This new law will also authorize the Secretary of State to issue a certificate of registration with respect to a foreign limited liability company. It will also provide for the filing of specified records and will further provide that an individual who signs such a record affirms under penalty of perjury that the information in the record is accurate. It will also allow a limited liability company to be subject to the nonexclusive jurisdiction of courts in another state or the exclusive jurisdiction of California courts, and also allow a member to consent to arbitration, as specified. It will also specify when a member would be dissociated from a limited liability company and the effects of dissociation on the member.

Additionally, this new law revises and recasts provisions that establish capital contribution standards and liability of members, and regulates the allocation of profits and losses, distributions of money and property, withdrawal of membership, assignment of interests, and dissolution of limited liability companies. Existing law requires the registration of foreign limited liability companies, as defined, with the Secretary of State, and prohibits the transaction of business in this state by an unregistered foreign limited liability company, subject to specified penalties. Existing law also regulates the merger of a limited liability company with one or more limited liability companies or other business entities, as specified, including requiring an agreement of merger and protection of the rights and liabilities of limited liability companies, creditors, and dissenting members.

IV. RECENT CALIFORNIA SUPREME AND APPELLATE COURT DECISIONS

A. Public Works Cases

1. Charter City ordinances supercede state law and need not comply with California prevailing wage requirements

- ***State Building and Construction Trades Council v. City of Vista* (2012) 54 Cal.4th 547**

This case involves a dispute concerning the issue of whether a charter city must comply with California's prevailing wage law in connection with the construction of its public buildings, notwithstanding local ordinances stating otherwise. The California Supreme Court agreed with the City that this was a municipal matter and therefore governed by its local ordinances, and then under the State Constitution, the ordinances of charter cities supersede state law with respect to "municipal affairs".

2. **Subcontractor required to serve public owner with preliminary 20 day notice otherwise barring labor and material payment bond recovery**

- ***California Paving & Grading Co., Inc. v. Lincoln General Ins. Co.* (2012) 206 Cal.App.4th 36**

This case involved a paving subcontractor's lawsuit against the surety, Lincoln General, on a labor and material payment bond that the project developer had filed with a city. The Court of Appeal affirmed the trial court's judgment of dismissal in favor of the surety where the subcontract was for a work of improvement contracted for by a public entity, and thus the action was governed by the statutory scheme pertaining to payment bonds for public works, and plaintiff failed to allege and duly serve the city with a preliminary 20-day notice before filing suit on the bond, as required by Civil Code §§3098 and 3252.

3. **General contractor entitled to recover for extra work on two projects, first involving eventually written change orders, second involving misleading plans and specifications**

- ***G. Voskanian Construction, Inc. v. Alhambra Unified School Dist.* (2012) 205 Cal.App.4th 981**

This case involved a suit by a general contractor to recover for extra work performed on two public works projects, affirming the trial court's decision. As to the first contract, the relocation contract, plaintiff was entitled to recover its extra work because the District eventually issued written change orders authorizing the extra work. As for the second contract, the fire alarm contract, despite a lack of a written change order, the Court affirmed that Plaintiff was entitled to recover for the extra work that was required because its bid was based on misleading plans and specifications issued by the District. Finally, the court held that because the District prosecuted a cross-complaint to enforce the performance bonds against plaintiff and the bonding company, and specifically requested attorney's fees on the third and fourth causes of action for enforcement of the performance bonds, it concluded that plaintiff and the bonding company were the prevailing parties on the District's performance bond claims and were therefore entitled to recover attorney's fees pursuant to the fee provision in the performance bonds.

4. District not entitled to attorneys fees on stop notice case in absence of interpleading funds

- ***Tri-State, Inc. v. Long Beach Community College District* (2012) 204 Cal.App.4th 224**

This case involved an electrician's action to enforce a stop notice to recover the reasonable value of labor and materials furnished on a project owned by a community college district. The appellate court reversed an award of attorney's fees to the District where Civil Code §3186 does not authorize an attorney fee award in favor of a public entity, and the District did not interplead the funds and therefore was not entitled to recover its attorney's fees under CCP §386.6(a) or any other statute. By way of background, the general contractor obtained a release bond in the amount of 125% of the claim. The District agreed to accept the release bond in exchange for a dismissal from the action. The parties stipulated and the trial court entered an order on the stipulation. The District then moved for an award of its attorney's fees, claiming an entitlement to fees under Civil Code §3186 as the prevailing party. The subcontractor plaintiff opposed the motion, arguing that this Civil Code section did not authorize a fee award. The trial court granted the District's motion, awarding it its requested fees and the court later entered a judgment of dismissal, which included the attorney's fees as costs. The appellate court reversed, holding that the public entity was merely a disinterested stakeholder in the action to enforce the stop notice, and acting as a custodian of the disputed funds, and unless the public entity asserted an affirmative claim to some of the funds withheld and interplead the funds, it was not entitled to attorney's fees.

5. Architect not liable for third-party personal injuries after project acceptance

- ***Neiman v. Leo A. Daly Co.* (2012) 210 Cal.App.4th 962**

Plaintiff filed a personal injury lawsuit after she fell on stairs at a theater on the campus of Santa Monica Community College. The Court of Appeal affirmed the trial court's judgment in favor of the architect, holding that once the work had been completed and accepted by the owner, the contractor is not liable to third-parties for patent defects, and the defendant met its burden of summary judgment of establishing the affirmative defense of the completed and accepted doctrine. Once work has been completed and accepted by the owner, the contractor is not liable to third-parties for patent defects.

B. Private Works Cases

1. Triable issues of fact exist as to whether plaintiff was a duly licensed contractor with standing to sue given discrepancies in document names

- ***Montgomery Sansome LP v. Zhian Z. Rezai*** **(2012) 204 Cal.App.4th 786**

This case involved an action seeking payment for repair work performed at a building owned by the defendants and the trial court's grant of summary judgment and an attorney fee award in favor of the defendants. The Court of Appeal reversed the trial court decision and held that there were triable issues of material fact which existed as to whether the entity that contracted with the defendants was not a licensed contractor and therefore not entitled to sue, as a separate entity from the plaintiff, which was a licensed entity. The court noted that documents in the record provide support for a finding that despite discrepancies in the names used on different documents, there is just one Montgomery Sansome entity: the records of the CLSB and the Secretary of State use slightly different names to refer to what appears to be a single limited partnership, including "Montgomery-Sansome, LP," "Montgomery Sansome Ltd." and "Montgomery Sansome LP." Furthermore, the CLSB records included documents using the same license number and the same Millbrae address for both the Ltd. and the LP.

2. Construction lender must be served with 20 day preliminary notice for mechanic's lien to be enforceable against lender

- ***Shady Tree Farms, LLC v. Omni Financial, LLC*** **(2012) 206 Cal.App.4th 131**

This case involved a $1.9 million mechanic's lien by a tree grower/seller after it was unpaid. It failed to provide a preliminary 20 day notice, arguing that it did not have to and that it was in direct contract with the owner, Granite Park. The court held that the plaintiff did not provide the construction lender with the 20-day notice required by Civil Code §3097(b) and the fact that the company had a direct contract with the owner and not required to give notice to the lender under §3097 did not excuse the failure to provide with subsection (b) which expressly applies to companies who have directly contracted with the owner.

3. **Homeowners required to serve notice of construction defect claim under Civil Code §910(a) before they can compel builder to produce documents under Civil Code §912(a)**

- ***Darling v. Superior Court (Western Pacific Housing, Inc.)* (2012) 211 Cal.App.4th 69**

This appellate court decision involved the question of whether homeowners must serve notice of a construction defect claim under Civil Code §910(a) for a builder to be obligated to respond to its request for documents under Civil Code §912(a). Based on the language of the statute and the statutory scheme, as well the statutory purpose and relevant legislative history, the court concluded that a homeowner must serve a notice of a construction defect claim under Civil Code §910(a) to commence the statutory pre-litigation procedure, and until such service is effectuated, the builder has no obligation to respond to a request for documents under Civil Code §912(a). Accordingly, the writ of mandate petition was denied.

4. **Arbitration clause binding on owner's association even though it did not exist when CCR's were drafted**

- ***Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (2012) 55 Cal.4th 223**

This case involved a construction defect lawsuit by an owner's association against a condominium developer, seeking to recover damages to its property and damage to the separate interests of the condominium owners. The developer filed a motion to compel arbitration, based on a clause in the recorded declaration of covenants, conditions, and restrictions, providing that the association and the individual owners may agree to resolve any construction dispute with the developer through binding arbitration. The court of appeal determined that the arbitration clause was binding and not unconscionable. Even though the association did not exist as an entity independent of the developer when the CC&Rs were drafted and recorded, it was settled under statutory and decisional law pertaining to common interest developments that the covenants and terms in the recorded declaration reflect written promises and agreements that are subject to enforcement against the association. Thus, the arbitration clause was binding and not unconscionable.

5. Seller's motion to compel buyer to arbitrate denied

- ***Lindemann v. Hume* (2012) 204 Cal.App.4th 556**

This case involved a multi-party dispute over the sale of an allegedly defective home by a real estate trust acting on behalf of the actor Nicholas Cage. The Court of Appeal held that the trial court did not err in denying the seller's motion to compel the buyer to arbitrate, because under CCP §1281.2(c), the buyer was a party to a pending court action with a third-party arising out of the same transaction or series of related transactions, and there was a possibility of conflicting rulings on a common issue of law and fact.

6. Binding mediation with specific dollar award in plaintiff's favor upheld by court

- ***Bowers v. Raymond J. Lucia Companies, Inc.* (2012) 206 Cal.App.4th 724**

Although a "binding mediation" might seem paradoxical, it is a recognized form of dispute resolution. The Court concluded that both parties had agreed to the procedure (which resulted in a $5 million award in plaintiff's favor); it was not uncertain; and it is not a constitutionally or statutorily prohibited means of waiving jury rights where the parties agreed to settle their dispute in a non-judicial forum.

7. Insurance broker owes no duty to apprise subcontractor later added as an insured under the policy of the insurance company's subsequent insolvency

- ***Pacific Rim Mechanical Contractors, Inc. v. Aon Risk Ins. Services West, Inc.* (2012) 203 Cal.App.4th 1278**

This was a case of first impression in California as to whether an insurance broker, after procuring a policy of insurance for a developer on a construction project, owes a duty to apprise a subcontractor that was later added as an insured under the policy, of the insurance company's subsequent insolvency. The Court of Appeal concluded that absent the assumption of a contractual duty to do so, insurance brokers owe no such duty. The Court also considered public policy and agreed with Aon that imposition of a duty requiring insurance brokers to inform an insured of "any adverse changes in the carrier's financial capability" post-issuance of the insured's policy, would

have to be a function of the Legislature because it would (a) fundamentally alter the nature and corresponding duties of insurance brokers, and would (b) increase the cost of procuring insurance.

8. Design professionals have third-party tort liability

- ***Beacon Residential Community Assn. v. Skidmore Owings & Merrill LLP* (December 30, 2012) A134542**

In a homeowners association lawsuit for construction defects in connection with a 595 unit San Francisco condominium project, the trial court's judgment sustaining demurrers and dismissals of the project architect were reversed and remanded by the Court of Appeal. It found that there is a common law policy rationale for imposing third-party tort liability on design professionals and the plain language of Senate Bill No. 800 (the Right to Repair Act) provides that a design professional who, as the result of a negligent act or omission, causes, in whole or in part, a violation in the standards set forth in §896 for residential housing may be liable to the ultimate purchasers for damages, and the legislative history confirms the Legislature's intent.

9. Attorney's fees recoverable by subcontractor in defeating general contractor's breach of contract claim

- ***Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230**

This decision involved a general contractor's lawsuit against a subcontractor for breach of contract and promissory estoppel where the trial court denied the defendant's motion for an award of attorney's fees where the defendant defeated a claim for breach of contract but lost a related claim for promissory estoppel. The Court of Appeal held that the defendant is entitled to recover the attorney's fees reasonably incurred in defeating the breach of contract claim when the contract provided that the prevailing party in any dispute shall recover such fees. Thus, to the extent that the defendant subcontractor defended against factual or legal issues common to plaintiff's contract and non-contract claims, it was entitled to recover the attorney's fees incurred in defense against those issues, but the subcontractor was not entitled to fees incurred in defending against factual or legal issues unique to plaintiff's non-contract claim for promissory estoppel.

10. Attorney's fees awarded to only one prevailing party

- ***Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515**

This case involved a dispute between a homeowner and a home builder, and the trial court's order on attorney's fees awarding the homeowner fees of $125,000 as the prevailing party on the home builder's first petition to compel arbitration. The court held that under Civil Code §1717, there may be only one prevailing party entitled to attorney's fees on a given contract in a given lawsuit, thereby reversing the attorney's fee award made to plaintiff. The court held that attorney's fees should be awarded to the party who prevails on a petition to compel arbitration only when the resolution of that petition terminates the entire action on the contract.

11. Plaintiff entitled to pre-judgment interest between time of arbitration award in its favor vacated and then reinstalled by appellate court

- ***Tenzera, Inc. v. Osterman* (2012) 205 Cal.App.4th 16**

This is a case involving a contract to install tile, stone, and marble in the plaintiff's home, in which plaintiff was successful in having the trial court order which vacated (set aside) the arbitration award in their favor, reversed as to the company (but not the individual owners). The Court of Appeal held that the plaintiffs were entitled to prejudgment interest between the time the trial court partially vacated the arbitration award in their favor, and the appellate court's reinstatement of the award. The Court of Appeal reasoned that the plaintiffs' right to damages was a fixed liability as of the date of the final arbitration award, and the "prevented by law" exception to accrual of interest under Civil Code §3287 did not apply.

12. General contractor not liable for injuries to subcontractor's employee under Privett-Toland Doctrine

- ***Brannan v. Lathrop Construction Associates, Inc.* (2012) 206 Cal.App.4th 1170**

This decision involved a slip and fall action by a worker against a masonry subcontractor at a school construction who slipped on wet scaffolding and injured his back. He sued the general contractor, alleging that the injuries were caused by the general contractor's negligence in sequencing and coordinating construction work at the site, and failing to call a "rain day" to protect

workers from dangerous conditions caused by slippery surfaces. The case was dismissed via summary judgment under the Privett-Toland Doctrine, and the Court of Appeal affirmed it. (This decision is consistent with a long line of cases holding that, subject to certain exceptions, when a general contractor hires a subcontractor, the general contractor is not liable for injures that occur to the subcontractor's employees.)

13. Issue of affirmative contribution may give general contractor liability to subcontractor's injured employee

- ***Tverberg v. Filnner Construction, Inc.*** **(2012) 202 Cal.App.4th 1439**

This is an ongoing case that was previously before the Supreme Court and then back up to the Court of Appeal, and involves a suit brought by a husband and wife based on injuries sustained after the husband, an independent contractor, was injured on a work site on which the defendant was operating as the general contractor. The Court of Appeal has now reversed the judgment against the plaintiffs, holding that (1) the trial court properly granted the defendant's motion for summary judgment on a breach of a regulatory duty theory of recovery, as the defendant delegated its obligation to comply with Cal-OSHA workplace regulations to plaintiff; but (2) the trial court erred in granting the defendant's motion for summary judgment on plaintiffs' retained control theory of direct liability, since the plaintiffs offered sufficient evidence of a triable issue on affirmative contribution. Plaintiffs had claimed that the affirmative contribution was demonstrated by evidence that the general contractor failed to cover construction holes where he was injured after plaintiff twice asked the contractor to do so. When plaintiff made his first request to cover the holes, the defendant general contractor representatives stated that the equipment necessary to comply with this request was not available. Plaintiffs reasoned that this evidence raised an inference that the defendant intended to cover the subject bollard holes when the needed equipment became available and thus, it agreed to undertake a safety measure and did not do so. As such, the court reasoned that this presents a closer case on the issue of affirmative contribution, and found that this evidence could allow a reasonable jury to infer that defendant agreed to cover the holes and failed to meet this responsibility.