



- Recent California Legal Decisions -

Janette G. Leonidou · A. Robert Rosin · Patricia Walsh
C. Andrew Gibson · Roger F. Liu · David L. Ashby

Leonidou & Rosin, Professional Corporation

777 Cuesta Drive, Suite 200

Mountain View, California 94040

T: (650) 691-2888

F: (650) 691-2889

www.lrconstructionlaw.com

LEONIDOU & ROSIN WINS SIGNIFICANT COURT OF APPEAL VICTORY AGAINST THE UNIVERSITY OF CALIFORNIA

Leonidou & Rosin recently won a significant victory in the California Court of Appeal, with a published ruling that the University of California (“UC”) violated the Public Contract Code when awarding a construction contract with a value in excess of \$30 million. The case was tried in Superior Court by Janette Leonidou and was briefed and argued by Bob Rosin in the Court of Appeal.

The Court determined that UC’s actions **“undermined the goal of stimulating competition in a manner conducive to sound fiscal practices, and compromised the integrity of the selection process by failing to ensure procedural and substantive fairness.”** The

Court of Appeal ruled that UC violated Section 10506.4 of the Public Contract Code by using procedures that allowed UC to influence the selection of which companies would be awarded work. According to the Court, UC’s procedures failed to ensure that the selection of bidders would be impartial.

The Court condemned UC’s use of secret criteria, not disclosed in advance to bidders, that determined which “bid packages” of work would be awarded. According to the Court, UC’s actions deprived bidders of material information necessary to assess how to bid the work. The Court further found that UC’s use of overlapping “bid packages,” which UC had called alternates, “offers

- Recent California Legal Decisions -

an easy means of circumventing” competitive bidding laws. Because of the lack of safeguards in UC’s procedures, the use of alternates in this instance violated California public policy.

The Court therefore ruled that the contract UC had awarded to Schram’s competitor was invalid. The Court ordered UC to publish a new solicitation, consistent with the Court’s ruling, calling for rebids of the work.

This case was argued in the Court of Appeal in June 2010. Subsequent to the argument, UC had settled with Schram conditioned on the Court of Appeal not issuing an opinion. Although the parties had requested the Court of Appeal stay the case and not issue an opinion, the Court of Appeal took the unusual step of issuing an opinion in a settled case, stating that “this case presents issues of continuing public interest that are likely to recur.”

Schram Construction, Inc. v. Regents of the University of California, 2010 Cal. App. LEXIS 1471 (Aug. 24, 2010).

Additional California Legal Decisions

Public Works Contractors May Use Common Law Measures Of Damages (“Best Evidence”) To Establish Compensation For Changed Work, Including Engineering Estimates, The Total Cost Method, And The Modified Total Cost Method. *Dillingham-Ray Wilson v. City of Los Angeles*, 182 Cal. App. 4th 1396 (2010). Dillingham/Ray/Wilson (“DRW”) obtained an award against the City of Los Angeles in excess of \$36 million for delays, unpaid contract retention, prompt pay penalties, prejudgment interest and attorney’s fees. Prior to entry of the judgment, however, the trial court granted in limine motions and excluded \$25 million of DRW's claims on the theory that it could not document its actual costs as required by contract, and it was not permitted to prove damages with engineering estimates, and it was not entitled to prove damages using a modified total cost theory. The appellate court reversed, concluding that the change order provision was ambiguous and that extrinsic evidence of the parties' course of dealing and of custom and practice in the public works industry entitled the contractor to have the ambiguity resolved by the jury. Moreover, the Court found the change order provision did not specify the method of calculating breach of contract damages; thus, the contractor could prove its damages with engineering estimates where that was the best evidence available. In addition, the contractor

was entitled to benefit of the bargain damages even if the amount was difficult to ascertain, and therefore a modified total cost theory was permissible.

Superior Knowledge Doctrine Applied To Public Entities Where Information Is Not Disclosed to Bidders. *Los Angeles Unified School District v. Great American Insurance Company*, 49 Cal. 4th 739 (2010). A contractor submitted a bid to complete a school project begun by another contractor that had been terminated. During construction, the contractor sought extra compensation for correcting undisclosed defects. The Supreme Court adopted the superior knowledge doctrine, under which a contractor on a public works contract may be entitled to relief for the public entity's nondisclosure: (1) where the contractor submitted its bid or undertook to perform without material information that affected performance costs; (2) where the public entity was in possession of the information and was aware the contractor had no knowledge of, nor any reason to obtain, such information; (3) where any contract specifications or other information furnished by the public entity to the contractor misled the contractor or did not put it on notice to inquire; and (4) where the public entity failed to provide the relevant information.

As A Result of Lapse In Licensure, Contractor Was Required To Disgorge All Monies Received; Owner's Knowledge Of Non-Licensure Is Not A Defense. *Alatrisme v. Cesar's Exterior Designs, Inc.*, 183 Cal. App. 4th 656 (2010). Esaul Alatrisme paid Cesar's Exterior Designs, Inc. (Cesar's Designs) \$57,500 for landscaping work at his home. Alatrisme sued Cesar's Designs seeking reimbursement of the \$57,500 under Business & Professions Code Section 7031(b), which allows a party to recover "all compensation paid to [an] unlicensed contractor." Alatrisme obtained a judgment awarding Alatrisme \$57,500 plus attorney's fees and costs. Cesar's Designs conceded it was unlicensed when it began the landscape work, but contended it had defenses/offsets based upon Cesar's Designs' partial licensure and/or the owner's knowledge of Cesar's Designs' license lapse. The Court held that (1) Alatrisme's prior knowledge of Cesar's Designs' unlicensed status did not bar his reimbursement claim; (2) Alatrisme was entitled to recover the total amount paid even though Cesar's Designs was licensed during a portion of the work; and (3) Alatrisme was entitled to recover payments for materials retained by him (in addition to labor payments). The Court declined to state whether disgorgement would be available if the homeowner had a fraudulent scheme all along to have work done and then to seek disgorgement.

Contractor's Obligation To Repay Amounts Received, As A Result of Lack of Licensure, Could Be Discharged In Bankruptcy. *In re Sabban*, 600 F.3d 1219 (9th Cir. 2010). A homeowner signed a remodeling contract with a contractor, who failed to maintain its contractor's license. The homeowner sued to recover compensation paid and obtained an award of \$123,000 under the disgorgement provisions of Business & Professions Code Section 7031(b), as well as a \$500 penalty and attorney's fees under Business & Professions Code Section 7160. The Contractor filed for bankruptcy and the bankruptcy and appellate courts ruled the \$123,000 monetary award under Business &

Professions Code Section 7031 was dischargeable in bankruptcy because it was not a debt for money obtained by fraud within the definition of the Bankruptcy Code (unlike the \$500 penalty, which was not dischargeable).

Disassociation Of The Licensed Partner In A Three Man Partnership Prior To Contracting Automatically Cancelled The Contractor's License, Thus Awarding The Owner Reimbursement Of Monies Paid. *Oceguera v. Cohen*, 172 Cal. App. 4th 783 (2009). A three man partnership's licensed partner disassociated from the partnership prior to it signing a construction contract with Cohen. The Court observed that the qualification of a partnership for a license requires the presence of a licensed general partner or responsible managing employee pursuant to Business & Professions Code Section 7068(b)(2), and that the cancellation of a partnership license upon such person's disassociation is automatic under Section 7076(c). Thus, the partnership was unlicensed when the work was performed. The two unlicensed partners could not claim substantial compliance because they individually were never licensed and knew that the partnership did not have a licensed partner when the work was performed. The partnership had to reimburse the Owner the \$32,000 paid for construction work.

A Contractor's License Qualifier Must Be A Bona Fide Officer Or Employee Actively Engaged In The Work Encompassed By The License. *White v. Cridlebaugh*, 178 Cal. App. 4th 506, 517-519 (2009). The individual who was identified as the qualifier on a corporation's license was not actively engaged in its construction business and had never been replaced with a new qualifier. The corporation's license therefore was suspended by operation of law (after a 90 day grace period). Because the corporation's license was suspended during a construction project, it had to disgorge all monies it had received for work performed. The Court also rejected the contractor's claimed

- Recent California Legal Decisions -

offsets, holding an unlicensed contractor cannot reduce the owner's reimbursement recovery by asserting claims of offset arising out of the unlicensed work.

Duty To Defend Under Indemnity Provision Arises At The Time Of Tender Despite The Lack Of A Finding Of Negligence.

UDC-Universal Development, L.P. v. CH2M Hill, 181 Cal. App. 4th 10 (2010). A consultant contracted to provide engineering and environmental planning services to a developer in connection with a residential condominium complex. Under an indemnity provision in the consultant's contract, the developer tendered a lawsuit that had been filed by a third entity, a homeowners association. The Court found that the contract between the parties called for a defense when any claim against the developer implicated the consultant's performance of its role in the project. That defense obligation arose when the homeowners association alleged harm resulting from deficient work that was within the scope of the services for which the developer had retained the consultant. The Court further found that the indemnity provision in question did not require an underlying claim of negligence directed specifically against the consultant in order to trigger a defense obligation and that the obligation was not excused by virtue of the jury's exoneration of CH2M Hill on the negligence claim.

Claim By Worker Who Stepped Through Guardrails Of A Catwalk Was Subject To Four Year Statute Of Limitations For Patent Defects.

Luckman Partnership, Inc. v. S.C.A., 184 Cal. App. 4th 30 (2010). A construction worker stepped between the guardrails of a catwalk and fell when stepping unto a false ceiling. The Court ruled that the four year statute of limitations for patent defects applied because the danger of climbing through the guardrails was patent. The worker's claim therefore was barred by the statute of limitations. The Court further found that the installation of a suspended ceiling where a contractor's employee had fallen

constituted a superseding cause, and the original architect could not be held liable for the "plywood" appearance of the false ceiling because the subsequent work modified how it had been designed by the original architect.

Provision In Subcontractor's Insurance Policy Requiring That Subcontractor Itself Pay For Deductible ("SIR") Defeats Additional Insured's Claim For Coverage Under Policy.

Forecast Homes, Inc. v. Steadfast Ins. Co., 181 Cal. App. 4th 1466 (2010). An insurer issued general liability insurance policies to several subcontractors. A developer contractually required the subcontractors to add it as an additional insured to the subcontractors' general liability insurance policies. The policies contained a provision that required the subcontractors to pay a "self insured retention" as a condition of coverage of any claim. Because the subcontractors themselves had not paid the SIR, even though the developer had incurred expenses in excess of the SIR amount, the insurer owed no obligation to the developer.

A Surety That Issued A Payment And Performance Bond To A Contractor And Subcontractor On The Same Construction Project Could Not Allocate The Loss From The Subcontractor's Failure To Pay A Materials Supplier Between The Bonds.

First National Insurance Company v. Cam Painting, Inc. 173 Cal. App. 4th 1355 (2010). Because a surety's liability is commensurate with that of a principal (the person on whose behalf the bond is issued), the trial court erred in granting contractual award of attorney's fees to obligee against principal only; surety and principal were jointly and severally liable for such an award.

A Subcontractor Working At Multiemployer Site Has A Duty, Based On OSHA Regulations, To Warn General Contractor Of Unsafe Conditions Of Which Subcontractor Was Aware.

Suarez v. Pacific Northstar Mechanical, Inc., 180 Cal. App. 4th 430 (2010). A subcontractor's employee, working at a

- Recent California Legal Decisions -

multiemployer construction site, was slightly injured by pre-existing hazard. The hazard was not obvious and had not been created by the subcontractor's work. The employee told his foreman, but the subcontractor did not warn the general contractor. A short time later, two employees of the general contractor were injured by the same hazard. The Court ruled that neither the common law nor the contract between the general contractor and the subcontractor required the subcontractor to warn the general contractor. The Court found, however, that the subcontractor did have a duty to report the hazard to the general contractor based on applicable workplace statutes and regulations requiring a subcontractor to report hazards to which its workers were exposed.

entity's denial of its bid as "nonresponsive." The public entity based its rejection of Great West's bid on a contention that Great West failed to disclose, in response to a question on the bid form, that it had operated, and was apparently continuing to operate, under license numbers additional to the one disclosed on the bid forms. Following *D.H. Williams Construction, Inc. v. Clovis Unified School Dist.*, 146 Cal.App.4th 757 (2007), the Court ruled that a public entity cannot reject the bid of the lowest bidder on a public works contract on the theory that the bid was "nonresponsive" when, in substance, the real reason for the rejection was that the public entity believed the lowest bidder was "not responsible." Accordingly, Great West should have been accorded a hearing when its bid was rejected.

Stop Notice Claim Valid Where Subcontractor Served Preliminary Notice On Company That Was Identified As The Lender By General Contractor And Owner.

Force Framing, Inc. v. Chinatrust Bank (U.S.A.), 2010 Cal. App. LEXIS 1524 (Aug. 31, 2010). The Court held that a stop notice claimant reasonably relying in good faith upon information provided by the owner and general contractor of a construction project, when serving its preliminary notice, is not required to search the county records to ascertain the actual identity of a construction lender.

Bidder on Public Works Contract Entitled To Hearing Where Its Bid Was Rejected As "Nonresponsive" But Actual Reason For Rejection Was That Agency Considered Bidder To Be Not Responsible.

Great West Contractors, Inc. v. Irvine Unified School District, 2010 Cal. App. LEXIS 1521 (Aug. 31, 2010) The Court held that the low bidder on a public contract was entitled to a hearing on the public

Copyright © 2010 Leonidou & Rosin Professional Corporation

This newsletter contains general information only;
it should not be relied upon as legal advice.