Construction Law Update: What You Need to Know

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AB 805: County of San Diego: Transportation Agencies

- **Amends** Public Utilities Code §§ 120050.2, 120051.6, 120102.5, 125102, 132351.1, 132351.2, 132351.4, 132352.3, 132354.1, 132360.1, and 132362; adds Public Utilities Code §§ 120221.5, 125222.5, 132354.7, §§ 120480, et seq.; and **repeals** Public Utilities Code §§ 120050.5 and 120051.1
- This bill makes changes to the governance of the San Diego Association of Governments (SANDAG) and two area transit districts: the San Diego Metropolitan Transit System (MTS), and the North County Transit District (NCTD).
- **Makes changes** to the voting structure of SANDAG by providing that all acts of the board require an affirmative vote of the majority of the members present
- Requires that all SANDAG contractors and subcontractors use a skilled and trained workforce, or that a project labor agreement be in place that covers all SANDAG work
- Requires board members to make an annual report to their agencies at a public meeting that includes a summary of SANDAG’s activities, program developments, project updates and other information
- Creates an independent auditor and audit committee to review SANDAG’s financial projections
- **Authorizes** MTS and NCTD to impose transaction and use taxes in order to raise revenues for public transit purposes
AB 994: Health Care Districts: Design-Build

- **Adds and repeals** Health and Safety Code § 32132.9
- Existing law authorizes local agencies to invite bids for construction projects and then award contracts under the design-build project delivery system.
- Provides that “local agency” includes the Beach Cities Health District (BCHD) and its board, allowing BCHD and its board to use the design-build procurement process to construct medical facilities in their district (Hermosa Beach, Manhattan Beach & Redondo Beach)

AB 1523: San Bernardino County Transportation Authority: Design-Build

- **Adds** Public Utilities Code § 130828 and 130828.1
- Authorizes the San Bernardino County Transportation Authority (SBCTA), upon approval of its board of directors, to use design-build for the construction of the Mt. Vernon Avenue Viaduct project in the city of San Bernardino
- The purpose is to accelerate the SBCTA’s ability to eliminate safety concerns regarding the Mt. Vernon Avenue Viaduct as much as a year earlier than if done through traditional procurement methods.
SB 373: Public Contracts: Design-Build: Stanislaus Regional Water Authority

- **Amends** Public Contract Code § 22161
- Authorizes the Stanislaus Regional Water Authority to use the design-build procurement method for its Regional Surface Water Supply Project
- Purpose of the Water Supply Project is to provide cities in the region with a long-term, reliable water source, avoid further over-drafting of the groundwater supply and help meet projected future drinking water demands

SB 0793: Design-Build Extended to Peninsula Health Care District, Midpeninsula Regional Open Space District and the Santa Clara Valley

- **Adds** and **repeals** Health & Safety Code § 32132.95; **amends** Public Contract Code § 20155 and 20155.1; **adds** and **repeals** Public Resources Code § 35160
- Extends the ability that various counties and cities have to use the design-build method to construct buildings and related improvements and other specified types of public works that cost more than $1 million to the Peninsula Health Care District, the Midpeninsula Regional Open Space District and the Santa Clara Valley Open-Space Authority until January 1, 2023
- The $1 million minimum project limitation does not apply to the Midpeninsula Regional Open Space District and the Santa Clara Valley Open-Space Authority.
- Authorizes the County of San Mateo to select a bidder on the basis of vest value for construction projects in excess of $1 million (joining the counties of: Alameda, Los Angeles, Riverside, San Bernardino, San Diego, Solano and Yuba)
Skilled & Trained Workforce

SB 418: Revises Definition of “Skilled and Trained Workforce” for Certain Trades

- **Amends** Public Contract Code § 2601
- Definition applies when a statute/regulation requires a public entity to obtain an “enforceable commitment” that a bidder, contractor or other entity will use a “skilled and trained workforce” on a project
- Sets the cap at 30 percent graduation requirements for work performed on or after January 1, 2017
- What building and construction trades does it apply to?
“Skilled and Trained Workforce” – Definition Used In:

- Public Contract Code § 20155.4 (determination of “best value contractor” for local agency contracts)
- Public Contract Code § 10506.6 (determination of “best value contractor” for University of California contracts)
- Education Code § 17407.5 (school district governing board contracts for construction of building to be used by district)
- Government Code § 66201 (city, county, or city and county contracts for housing sustainability district)
- Public Utilities Code § 132354.7 (San Diego Transportation contracts over $1 million)
- Public Utilities Code § 120221.5 (Transit Development contracts over $1 million)
- Public Utilities Code § 125222.5 (NCTD contracts over $1 million)

Payment
AB 0092: Five Percent Retention for Public Works Extended

- Amends Public Contract Code §§ 7201 and 10261
- Extends to January 1, 2023 the sunset date on existing statutes limiting to five percent the amount of money a public agency may retain from a contractor or subcontractor prior to completion of a public works project
- Applies to contracts between a public entity and an original contractor, contracts between an original contractor and a subcontractor, and between all subcontractors thereunder, relating to construction of any public work or improvement
- The only identified exception to the five percent retention limit is when a public entity deems that a project is substantially complex during a properly noticed and regularly scheduled public meeting prior to bidding the project. In that case, retention proceeds may exceed five percent. Whether a project is substantially complex must be analyzed and approved on a project-by-project basis. The finding and the designated retention amount must be included in the project’s bid documents.

AB 1223: Subcontractors Empowered to Enforce the Prompt Payment Laws

- Adds Public Contract Code § 10261.7
- Empowers subcontractors to enforce the prompt payment laws
- On contracts of $25,000+, public entity must post on its website, within 10 days following payment, the following:
  1) The project for which the payment was made;
  2) The name of the construction contractor or company paid;
  3) The date the payment was made or the date the state agency transmitted instructions to the controller or other payer to make the payment;
  4) The payment application number or other identifying information; and
  5) The amount of the payment.
AB 1701: Direct Contractors Liable for Subcontractor’s Failure to Pay Wages

- Adds Labor Code § 218.7
- All direct contractors who make or take a contract in California for the "erection, construction, alteration, or repair of a building, structure" must assume and be liable for debt owed to a wage claimant, or third party acting on behalf of the wage claimant, by the contractor’s subcontractor.
- It applies to wages incurred by the subcontractor for the wage claimant’s performance of labor included in the subject of the original contract between the contractor and the owner. It applies only to unpaid wages, fringe benefits or other benefit payment or contribution, including interest. It does not apply to penalties or liquidated damages.
- The Labor Commission may bring a civil action or an action under Labor Code § 98 or 1197.1 to enforce a contractor’s liability under Labor Code § 218.7. The limit of a contractor’s liability is unpaid wages, including interest owed. A third party who is owed fringe or other benefits and joint labor-management cooperation committees have the ability to bring a civil action to enforce a contractor’s liability under this section. If the action is brought by a joint labor-management cooperation committee, the prevailing plaintiff is entitled to its reasonable attorneys’ fees and costs, including expert witness fees. Prior to bringing suit, the committee must provide thirty (30) days notice to the contractor.
- Contractors are now authorized to request that their subcontractors provide payroll records to ensure the subcontractor is current on its payments for wage, fringe and other benefits. The contractor may also request that the subcontractor provide an estimate of journeyman and apprentice hours for that particular project, among other things. If a subcontractor does not provide the requested information, the contractor is able to withhold as “disputed” all sums owed to the subcontractor. Labor Code § 218.7 does not limit a contractor’s ability to enforce any lawful remedies it may have against a subcontractor it hires for liability it incurs by the subcontractor’s nonpayment of wages.

SB 330: Building Permit Fees: Waiver

- Adds Health and Safety Code § 17951.5
- Authorizes cities and counties to waive all building permit fees in the case of a veteran who has a service-related disability and is making improvements to his or her home to accommodate that disability.
- The bill is discretionary; cities and counties are not required to waive fees in all cases.
Relating to Schools

AB 1424: University of California: Best Value Construction

- **Amends** Public Contract Code §§ 10506.4, 10506.5 and 10506.6; **adds** Public Contract Code § 10506.8; and **repeals** and **adds** Public Contract Code § 10506.9
- Makes the Best Value Construction Pilot Program for the Regents of the University of California permanent
- Authorized to use best value contracting for construction projects
- Prohibits a best value contractor from being prequalified or shortlisted unless the certain requirements are met
AB 262: Buy Clean California Act

- Department of General Services must establish and publish a maximum acceptable global warming potential for each category of materials used in state public works projects.
- Purpose is to ensure there is a mechanism for the state to recognize clean manufacturers when the state prepares to procure commodities used in infrastructure.
AB 1455: The California Public Records Act

- Amends Government Code § 6254
- Exempts from the required disclosure any local agency records related to activities governed by the Meyer-Millas-Brown Act (MMBA) that reveal a local agency’s deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy, or that provide instruction, advice, or training to employees who do not have full collective bargaining and representation rights under that chapter
- Also provides that this exemption shall not be construed to limit the disclosure duties of a local agency with respect to any other records relating to the activities governed by the MMBA.

AB 634: Real Property: Solar Energy Systems

- Amends Civil Code §§ 714.1, 4600; adds Civil Code § 4746
- Prohibits homeowner’s associations (HOAs) from requiring approval of the membership of the common interest development (CID) when an owner wishes to install a solar energy system on the roof of the building in which he resides
- When reviewing a request to install a solar energy system on a multifamily common area roof shared by more than one homeowner, this bill requires an HOA to do both of the following:
  1) Notify each owner of a unit in the building on which the installation will be located of the application to install a solar energy system; and
  2) Require the owner and each successive owner to maintain a homeowner liability coverage policy at all times and provide the association with the corresponding certificate of insurance within 34 days of approval of the application and annually thereafter.
- Also allows the HOA to impose other specified conditions on the owner when reviewing a request to install a solar energy system on a multifamily common area roof shared by more than one homeowner.
AB 132: 2028 Olympic Games and Paralympic Games Act

- Authorizes California’s Governor to execute “support contracts” related to the site selection process for the City of Los Angeles to host the 2028 Olympic Games and Paralympic Games
- The support contracts would accept financial liability to provide the state security for amounts owed by the Organizing Committee for the Olympic Games.
- Establishes the Olympic Games Trust Fund in the State Treasury
AB 657: State Government: Small Business Liaisons

- Amends Government Code § 11148.5
- Requires a state agency that significantly regulates or impacts small business to provide various departments in the Governor’s Office of Business and Economic Development with that agency’s small business liaison's contact information on or before March 1, 2018
- Also requires these agencies give vacancy notices

AB 1303: Vehicles: Window Tinting

- Amends Vehicle Code § 26708
- Authorizes a clear, colorless, and transparent material to be installed, affixed, or applied to the windshield, side, or rear windows of a motor vehicle if:
  - The material has a minimum visible light transmittance of 88 percent;
  - Meets specified Federal Motor Vehicle Safety Standards;
  - Is designed and manufactured to enhance the ability of existing window glass to block the sun's harmful UV rays;
  - The material is removed or replaced if damaged; and
  - The driver has in his possession a certificate signed by a licensed dermatologist certifying that the person should not be exposed to UV rays because of a medical condition, as specified.
- Intended to provide people suffering from diseases that cause severe UV sensitivity with sufficient protection
SB 496: Indemnity: Design Professionals

- Amends Civil Code § 2782.8
- Provides that a design professional only has the duty to defend an indemnitee for claims against the indemnitee that arise out of, pertain to, or relate to, the negligence, recklessness, or willful misconduct of the design professional
- All provisions, clauses, covenants, and agreements that purport to require a design professional to indemnify or defend claims against an indemnitee except as specified above are unenforceable.
- Specifies that a design professional's cost to defend an indemnitee shall not exceed the design professional's proportionate percentage of fault
- In the event one or more defendants is unable to pay its share of defense costs, the design professional shall meet and confer with the other parties regarding unpaid defense costs.
- Does not apply to contracts where a project-specific general liability policy insures all project participants or to written design-build joint venture agreements
- "Indemnitee" does not include any agency of the State of California.

AB 851: Local Agency Contracts

- Extends the sunset date on counties' authority to use CM at-risk contracting until January 1, 2023
- Allows San Diego to use CM at-risk contracting for the erection, construction, alteration, repair, or improvement of any building owned or leased by San Diego provided the project exceeds $25 million.
- Allows the Santa Clara Valley Water District (SCVWD) to use the design-build procurement method when contracting for improvements directly related to the construction of a building or buildings.
- Authorizes the SCVWD to use design-build for flood protection improvements, habitat restorations or enhancements, groundwater recharge or storage facilities, water treatment facilities, and, the retrofit, repair, or expansion of existing surface water storage facilities.
New Case Law


- Insurance coverage under CGL policy for delay damages
Flintco Pacific, Inc. v. TEC Management Consultants, Inc. (2016) 1 Cal.App.5th 727

- Subcontractor Bid and Promissory Estoppel
- Need to pay close attention to all Terms and Conditions in Bid


- Construction of a movie theater in Hesperia, California qualified as a “public work” under California’s Prevailing Wage Law because theater accepted public funds for the construction of an adjacent parking lot and various off-site improvements
- Held the theater construction was completely integrated with the parking lot and the related off-site improvements and therefore was subject to prevailing wage requirements

1. “The parties agree that the decision of the arbitrator and the findings of fact and conclusions of law shall be reviewed on appeal to the trial court and thereafter to the appellate courts...”

2. Makes clear that parties can validly draft an arbitration provision in a construction contract requiring the arbitration to be conducted in accordance with the substantive law of a state or the Federal government.

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1. Appellate case significantly expands a subcontractor’s potential indemnification obligation to a general contractor.

2. Active negligence or willful misconduct does not preclude a general contractor from obtaining indemnification from a subcontractor.

3. To get around this, an indemnity provision needs to expressly state that any active negligence by the general contractor precludes it from obtaining any indemnification from the subcontractor.
<table>
<thead>
<tr>
<th>Date</th>
<th>Case Name</th>
<th>Citation</th>
<th>Summary</th>
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<tbody>
<tr>
<td>Jan. 19, 2018</td>
<td>McMillin Albany LLC v. Superior Court</td>
<td>(2018) 2018 WL 456728</td>
<td>The California Right to Repair Act provides the exclusive remedy for homeowner's claims of construction defects and resulting property damage. Homeowner’s must comply with the Act’s pre-litigation procedures if their complaint alleges property damage arising from construction defects.</td>
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<tr>
<td>2016</td>
<td>Picerne Construction Corp. v. Castellino Villas</td>
<td>(2016) 244 Cal.App.4th 1201</td>
<td>Drop dead date for recording California mechanic’s lien is 90 days from completion of “actual” work, not “substantial completion”.</td>
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QUESTIONS?

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