**SEAN-THOMAS P. THOMPSON**

Attorney at Law

2500 Venture Oaks Way, Suite 150

Sacramento, CA 95833

(o) 916-993-4540

sean@otmklaw.com

**2017 Legal Year in Review**

**Infrastructure Funding**

1. SB 1 – Infrastructure Funding Plan: This bill, signed into law in 2017, is designed to generate over $5 billion per year for 10 years for California transportation projects. Highlights of the bill:
   1. Revenues are earmarked for specific types of state and local projects (such as road maintenance, transit operations, and bridge rehabilitation).
   2. Calls for performance Goals for the increased funding.
   3. Funding is to be constitutionally protected from “raiding” by other agencies.
   4. Currently under potential threat from referendum effort. Prospects of successful ballot measure to unwind SB1 are uncertain.
2. SB 30 – Border Wall: Aimed at barring the State from doing business with companies that participate in the construction of a border wall for the federal government. As currently amended, applies only to prime contractors with the federal government for a “wall, fence, or other barrier along California’s southern border.”
   1. Currently in Assembly Committee on Accountability and Administrative Review. Future of the bill is uncertain.
   2. There are several local ordinances seeking to accomplish the same objectives on a local level (Oakland, Berkeley, San Francisco, Santa Cruz).

**Indemnity**

1. SB 496 - Designer Indemnification:
   1. Design professionals’ duty to indemnify is limited to the extent of the designers’ fault in all contracts (not just contracts with public owners).
   2. Designers’ cost to defend cannot exceed their proportion of fault, except if other responsible parties cannot pay.
   3. Exceptions:
      1. Project-specific liability policies covering all project participants
      2. Written design-build “joint venture” agreements
      3. Contracts with state agencies
2. *City of Los Angeles v. AECOM, Tutor Perini Corp.* – ADA Liability:
   1. City sought indemnity from designer and builder of public transportation facility for liability the City faced for Americans with Disabilities Act (“ADA”) accessibility violations. The designer and builder argued that they could not be sued under state law since federal law controlled regarding ADA-connected liability.
   2. The court held that federal law did not preempt state law and that the City could sue the designer and builder under state law indemnity and breach of contract theories.
3. *Oltmans Construction Co. v. Bayside Interiors, Inc.* – Contractual Indemnity Obligations:
   1. Case involved a dispute over the scope of a subcontractor’s duty to indemnify a general contractor when the general contractor is partially negligent.
   2. Court ruled that when an indemnity provision states that the sub will indemnify the general contractor except to the extent of the general contractor’s active negligence, and the general contractor is actively negligent, the subcontractor’s indemnity obligation is not extinguished outright, but limited or reduced by the general contractor’s active negligence.
   3. This ruling extends to the interpretation of other indemnity agreements outside the general contractor v. subcontractor context.

**Labor/Prevailing Wage**

1. AB 1701 – Liability for Subcontractors’ Payment of Wages and Benefits:
   1. Makes prime contractors liable for any amounts owed by a subcontractor of any tier to its employees, or to a third party on the employees’ behalf (such as a union trust fund).
   2. Applies to prime and subcontracts entered into on or after 1/1/18.
   3. Applies to all projects, public and private.
   4. There is no liability for penalties or liquidated damages owed by subs, just the unpaid wages or benefits plus any interest.
   5. The prime contractor can require the sub to produce detailed payroll records to substantiate payment and can withhold payment if the payroll information is not provided.
   6. This liability is in addition to a contractor’s liability for subcontractors’ failures to pay prevailing wages on public projects. A public works contractor is liable for nonpayment or underpayment of prevailing wage by its subcontractors. And the contractor will be liable for penalties for nonpayment or underpayment unless it follows the safe harbor procedures of Labor Code section 1775 (including the relevant labor code provisions in its subcontract and monitoring the subcontractors’ payments).
2. AB 219 – Prevailing Wage for Ready-Mix Drivers: This law, which took effect in 2016 and required the payment of prevailing wage to ready-mix drivers delivering to public projects, was challenged in a federal court lawsuit in Southern California. The federal court stayed the implementation of the law briefly, but the 9th Circuit Court of Appeals has lifted that stay, and the law is in full enforcement by the State. The challenge is still pending and contractors and agencies are advised to comply with the law in spite of this legal challenge.
3. *Cinema West, LLC v. Baker* - Prevailing wage: Court held that movie theater built and paid for by private developer was a public work, and therefore subject to prevailing wage, because (1) adjacent parking lot and water improvements, paid for by City, were part of the same project and constituted a benefit to the private developer and (2) non-cash incentives to developer in the form of favorable loan terms and other provisions could also be considered “public funds.”

**Insurance and Defects**

1. *Energy Insurance Mutual Ltd. v. Ace American Ins. Co.* – Insurance Coverage for Professional Services:
   1. Arose out of Kinder Morgan pipeline explosion in Walnut Creek.
   2. Court held that professional services exclusion in commercial general liability policy defeated coverage for workers responsible for mapping and marking the pipeline.
2. *Estuary Owners Ass’n v. Shell Oil Company* – Statute of Repose for Construction Defects:
   1. The standard statutes of repose for construction defect actions (4 years from substantial completion for “patent” defects and 10 years from substantial completion for “latent” defects) do not apply to claims of soil contamination.
3. *Alvarez v. Seaside Transportation Services* – Liability for Injuries to Employee of Independent Contractor:
   1. This case reaffirms the so-called “Privette Doctrine,” which holds that someone who hires an independent contractor is not liable for the injuries to that contractor’s employees except under certain identified circumstances.
   2. One of those circumstances is where the hirer retains control over the work. Here, in the context of a construction project, a contractor or owner can be liable when it "is actively involved in, or asserts control over, the manner of performance of the contracted work … Such an assertion of control occurs, for example, when the principal employer directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished.”
4. *Gilotti v. Stewart* – Residential Construction/Right to Repair Act:
   1. A homeowner must comply with the procedures and remedies applicable to the Right to Repair Act for claims against builders on residential construction projects, and cannot maintain common law actions for negligence for claims covered by the Right to Repair Act.
   2. Defects covered by the Right to Repair Act include not only damage to the buildings and structures, but to improvements such as driveways and landscaping.

**Public Bidding**

1. *SJJC Aviation Services v. City of San Jose*:
   1. On bid dispute over the award of a lease and operating agreement, a disgruntled bidder did not have standing to challenge the City’s award to a competitor, because the aggrieved bidder had submitted a nonresponsive proposal and therefore could not have obtained the contract even if the City did not award to the other contractor.
   2. Reinforces the rule that, in order to successfully challenge the award of a public contract, the challenger must be eligible to receive the contract.
2. *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.:* 
   1. 2nd low bidder claimed that it lost many public works contracts because its competitor submitted deflated bids facilitated by nonpayment of prevailing wage and required overtime to employees. Sued competitor for intentional interference with prospective economic advantage.
   2. Court ruled that the losing bidder on a public works contract cannot state a cause of action for intentional interference with prospective economic advantage against the winning bidder because the prospect of obtaining a public works contract is not certain, given the many constraints on the public bidding process and discretion given to public agencies to reject all bids.
3. *California Taxpayers Action Network v. Taber* (Lease-Leaseback Contracts):
   1. This is a case decided under the Lease-Leaseback (“LLB”) statutes prior to their amendment on January 1, 2017, in response to the decision in *Davis v. Fresno Unified School District*. The *Davis* case suggested that that (1) LLB contracts needed to have a contractor financing component to be valid and (2) contractors could be subject to conflict of interest claims if they had preconstruction services contracts with school districts prior to receiving a LLB contract.
   2. The court in *Taber* held that the former LLB statutes did not require a contractor financing component.
   3. However, the court echoed *Davis’s* ruling that a contractor who provides preconstruction services under a separate contract before getting the LLB contract is susceptible to a claim for conflict of interest under Gov. Code section 1090, which could invalidate the LLB contract.
   4. The new LLB statutes do not necessarily solve the conflict of interest problem if the contractor had a separate, prior preconstruction services contract. The new law provides a suggested way around this – by awarding the preconstruction services as part of the LLB contract.

**Contractor Licensing**

1. *Phoenix Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp.:*
   1. Contractor was not properly licensed during performance of construction work. The contract arguably called for both construction and non-construction work.
   2. Court determined that, at least in the pleading stage, the contractor could attempt to recover for the work for which a license was not required (i.e. the non-construction work).
   3. This ruling is in conflict with other California cases, which hold that a contractor cannot recover any compensation for work on a contract for which a license is required for any portion of the work.