

## II.

### WHAT'S NEW?

This chapter is intended to discuss some of the more timely matters that concern contractors. It is basically a brief recap of changes that have occurred over the previous year, as well as changes affecting the upcoming year.

#### **1. Changes on Indemnification in Contracts Effective January 1, 2013**

SB 474 modified *Civil Code* section 2782. For all contracts entered into on or after January 1, 2013, it prohibits a public entity from enforcing a clause in a contract that would require a direct contractor, subcontractor, or material supplier to indemnify the public entity from its own active negligence. The new modifications also prohibit an owner of a privately owned construction project, other than a Home Improvement Contract, from enforcing a clause which would require a contractor to indemnify an owner for its own active negligence, including that of its employees.

The changes in SB 474 do not modify other provisions of *Civil Code* section 2782, which allow for indemnity provisions that require the subcontractor to defend the direct contractor or builder, even though the ultimate liability may be limited to the actual harm caused by that direct contractor or subcontractor. Put another way, this provision continues the enforcement of indemnity provisions that shift the defense costs to the direct contractor, subcontractor, or others involved in the construction contract.

This right to defend is so significant that the Legislature has now added *Civil Code* section 2782.05, which will apply to construction contracts entered into on or after January 1, 2013. At first glance, in many circumstances, it appears to limit the obligation to indemnify. However, it then reinforces the obligation to defend. The following is a summary of *Civil Code* section 2782.05:

A subcontractor and a direct contractor or construction manager can mutually agree to the timing or immediacy of the defense and provisions for reimbursement of defense fees and costs as long as that agreement does not waive or modify the provisions of *Civil Code* section 2782.05(a).

A subcontractor shall owe no defense or indemnity obligation to a direct contractor or construction manager for a claim unless and until the direct contractor or construction manager provides a written tender of the claim to the subcontractor that includes the information provided by the claimant or claimants relating to claims caused by that subcontractor's scope of work.

The direct contractor or construction manager shall provide a written statement regarding how the reasonable allocated share of fees and costs was determined.

The written tender shall have the same force and effect as a notice of commencement of a legal proceeding.

If a direct contractor or construction manager tenders a claim to a subcontractor in the manner specified, the subcontractor shall elect to perform either of the following:

Subcontractor can perform (Option One):

- Defend the claim with counsel of its choice.
- The subcontractor shall maintain control of the defense for any claim to which the defense obligation applies.
- The subcontractor shall provide written notice of the election to the direct contractor or construction manager within a reasonable time period following receipt of the written tender (no later than 30 days following that receipt).
- The defense by the subcontractor shall be a complete defense of the direct contractor or construction manager of all claims to the extent alleged to be caused by the subcontractor. This is to include any vicarious liability claims against the direct contractor or construction manager resulting from the subcontractor's scope of work, but does not include claims resulting from the scope of work, actions, or omissions of the direct contractor, construction manager or any other party.
- Any vicarious liability imposed upon a direct contractor or construction manager for claims caused by the subcontractor shall be directly enforceable against the subcontractor by the direct contractor, construction manager, or claimant.
- All information, documentation, or evidence, if any, relating to a subcontractor's assertion that another party is responsible for the claim shall be provided by that subcontractor to the direct contractor or construction manager that tendered the claim.

Subcontractor can perform (Option Two):

- Pay, within 30 days of receipt of an invoice from the direct contractor or construction manager, no more than a reasonable allocated share of the direct contractor's or construction manager's defense fees and costs, on an ongoing basis during the claim including any amounts reallocated upon final resolution of the claim by settlement or judgment.
- The direct contractor or construction manager shall allocate a share to itself to the extent a claim is alleged to be caused by its work, actions, or omissions, and a share to each subcontractor to the extent a claim is alleged to be caused by the subcontractor's work, actions, or omissions, regardless of whether the direct contractor or construction manager actually tenders the claim to any particular subcontractor, and regardless of whether that subcontractor is participating in the defense.

- Any amounts not collected from any particular subcontractor may not be collected from any other subcontractor.

The performance of either of the above shall be deemed to satisfy the subcontractor's defense obligation to the direct contractor or construction manager.

If a subcontractor fails to timely perform its obligations, the direct contractor or construction manager shall have the right to pursue a claim against the subcontractor for any resulting compensatory damages, interest on defense and indemnity costs, consequential damages, and reasonable attorney's fees incurred to recover these amounts.

The direct contractor or construction manager shall bear the burden of proof to establish both the subcontractor's failure to perform.

If a subcontractor requests that a direct contractor or construction manager reallocate defense fees to subcontractors and it is not done within 30 days following final resolution of the claim, the subcontractor shall have the right to pursue a claim against the direct contractor or construction manager for any resulting compensatory damages.

The subcontractor shall bear the burden of proof to establish both the failure to reallocate the fees and any resulting damages.

Nothing in this section shall prohibit the parties from mutually agreeing to reasonable contractual provisions for damages if any party fails to elect for or perform its obligations as stated in this section.

This new provision is contradictory in some cases and it is yet to be determined how it will affect or change construction contracts.

## **2. The Use of "Salesperson" for Activities Other Than Sales**

A number of our clients utilize registered salespersons on Home Improvement Projects for more than just sales. Indeed, it is becoming more common in the industry that these salespersons, who are the first interaction between the customer and the contractor, continue on the project by acting in the manner of a construction manager. Many of these salespersons coordinate the subcontracts, supervise or inspect the work, and negotiate change orders and payments with the customer.

For some time, there has been a controversy in the Home Improvement industry as to whether salespersons can be independent contractors. The Contractors' Board has declared that a salesperson almost never can be an independent contractor, and requires workers' compensation insurance to be obtained by the contractor for their salespeople. The Employment Development Department and IRS each have factors that they use in determining whether a person may be deemed an independent contractor or an employee. It does seem to be possible that a pure salesperson, who only negotiates that sale, and nothing more, could possibly fall within the definition provided by the taxing authorities of an

independent contractor notwithstanding the opinion of the Contractors' Board. However, when that person who is not an employee of the contractor does anything that would require a contractor's license, we now get into a gray area that can complicate the entire transaction.

*Business and Professions Code* sections 7026 and 7026.1, among other laws, define the activities of a contractor. The statute is inclusive:

“...any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith, or the cleaning of grounds or structures in connection therewith, or the preparation and removal of roadway construction zones, lane closures, flagging, or traffic diversions, or the installation, repair, maintenance, or calibration of monitoring equipment for underground storage tanks, and whether or not the performance of work herein described involves the addition to, or fabrication into, any structure, project, development or improvement herein described of any material or article of merchandise. “Contractor” includes subcontractor and specialty contractor. “Roadway” includes, but is not limited to, public or city streets, highways, or any public conveyance.” (emphasis added)

Recently, the Legislature passed AB 2237. It amended *Business and Professions Code* section 7026.1, which adds to the definition of a contractor on Home Improvement Contracts to include the term “consultant” as a person who: (1) provides or oversees a bid for a construction project, or (2) arranges for and sets up work schedules for contractors and subcontractors and maintains oversight of a construction project. The result of this change makes it crystal clear that a person who undertakes such tasks must either themselves be licensed as a contractor or be an employee of a contractor. Thus, if you classify a salesperson as an independent contractor and then have them perform these tasks, you are contracting with an unlicensed contractor to do these tasks and face the possibility of discipline as well as the inability to collect for the portion of work that they do.

It is a simple task (although perhaps not so easy economically) to make every salesperson an employee of your company. We recommend this to avoid potential ramifications and difficulties in the future.

### **3. Preventing Work Related Falls – OSHA Requirements**

Some of the most common causes for serious work related injuries and even deaths are from falls. It is the employers' responsibility to make sure that the jobsite is set up to prevent employees from falling off of elevated work stations or overhead platforms and even into holes that may be in the floors or walls.

OSHA requires employers to:

- Provide working conditions that are free of known dangers.
- Keep floors in work areas clean and (as far as possible) dry.
- Select and provide required personal protective equipment at no cost to workers.
- Train workers about job hazards in a language that they understand.

In order to prevent employees from being injured from falls, employers must:

- Guard every hole into which a worker can accidentally walk into (by using a railing and toe-board or a hole cover).
- Provide a guard rail and toe-board around every elevated open sided platform, floor or runway.
- Regardless of height, if a worker can fall into or onto dangerous machines or equipment, employers must provide guard rails and toe-boards to prevent workers from falling and getting injured.
- Other means of fall protection that may be required on certain jobs include safety harness and line, safety nests, start railings and hand rails.

Effective March 15, 2012, OSHA rules require all construction companies to have a Fall Protection Plan (FPP) for each project/jobsite. The construction industry is required to have the FPP for six foot elevations. Are you complying with OSHA's FPP? OSHA can address concerns from both employers and employees at 1-800-321-OSHA (6742).

#### **4. Off-Road Diesel Vehicles Regulation**

The California Air Resources Board (CARB) is now enforcing some provisions of the regulations for off-road diesel vehicles. Not all regulations are being enforced yet as the United States Environmental Protection Agency has not approved everything. Make sure that your fleet vehicles are in compliance by visiting [www.arb.ca.gov](http://www.arb.ca.gov).

#### **5. Lead Paint Rules**

The Toxic Substance and Control Act required regulation on renovation and remodeling activities on pre-1978 target housing, public buildings and commercial buildings that would create lead-based paint hazards. The Environmental Protection Agency (EPA) postponed the timeline on the proposal for the Lead Renovation, Repair and Painting Rule (LRRP) for the exterior of commercial and public buildings until July 1, 2015 and any final rule to December 31, 2016. This postponement will give the EPA enough time to completely research the possible lead hazards that can occur on these renovations.

The EPA will be having a public meeting to gather information on renovation and lead hazards in commercial buildings. To stay on top of this topic or to participate in the meeting visit their website at [www.epa.gov](http://www.epa.gov).

## 6. Green Building Standards

The California Green Building Standards Code was updated with changes effective July 1, 2012. The following are highlights of the changes that went into effect taken directly from CalGreen's website at [www.bsc.ca.gov](http://www.bsc.ca.gov).

### Planning and Design

#### Site Development

- Stormwater soil loss prevention plan → Stormwater pollution prevention BMP\*
- Bicycle parking → Delete UC reference\*
- Designated parking → Clarify stall marking\*
- Light pollution reduction → IES 2011 BUG Ratings mandatory as of
  - o Voluntary on April 20, 2011 July 1, 2012
- Grading and paving → Coordinate BMP with HCD\*

#### Energy Efficiency

- Regulated by the California Energy Commission

### Water Efficiency and Conservation

#### Indoor Water Use

- Separate water submeters for high water use → Separate water submeters for subsystems\*
- 20% reduction in indoor water use
  - o Prescriptive and performance standards → Clarify prescriptive and performance methods, showerheads and tables\*

#### Outdoor Water Use

- Water budget → No change\*
- Separate submeter for outdoor potable water use → Minor clarifications\*
- Weather or soil moisture-based irrigation controllers → Minor clarifications\*

### Material Conservation and Resource Efficiency

#### Weather Resistance and Moisture Management

- Exterior weather protection by Title 24 or local ordinance → No change\*
- Design for moisture control
  - o Sprinklers
  - o Entries and openings → No change\*

## Construction Waste Reduction, Disposal and Recycling

- Construction waste reduction of 50%
- Waste management plan required, or meet local ordinance
- Exception for isolated jobsites
- Recycle or reuse 100% of land clearing debris
- No change\*
- Same; add options for\*
  - Waste management company
  - Waste stream reduction
- No change\*
- Same; add exception for contaminated debris\*

## Building Maintenance Operation

- Recycling by occupants
- Building commissioning for new buildings 10,000 square feet and over
- Clarifies application to additional alteration\*
- Testing and adjusting for buildings less than 10,000 square feet
  - HVAC balancing
- Minor clarifications; add exceptions for
  - Dry warehouses
  - Some tenant improvements
  - Appendix A6 for Sample Compliance Forms & Templates
- Minor clarification\*

## Environmental Quality

### Pollutant Control

- Fireplaces
- Temporary construction ventilation (Voluntary)
- Covering of duct openings and protection of equipment during construction
- Indoor air quality
  - Finish materials
  - Filters
  - Environmental tobacco smoke
- Indoor moisture control (other codes)
- Indoor air quality (energy code)
  - Ventilation
  - CO<sub>2</sub> monitoring
- Environmental Comfort
  - Exterior noise transmission
  - Interior sound plans
- Outdoor air quality
  - Ozone depleting chemicals
- No Change\*
- If HVAC is used for temporary construction ventilation (replace filters)\*
- Minor clarifications\*
  - Referenced standards
  - Exception for small, H.E. ductless unit filters
  - Clarification of authority to regulate
- Editorial changes\*
- Significant changes\*
  - Align with HCD in CBC & general plans added performance & prescriptive methods
- No Change\*

\*Also applies to additions and alterations

## 7. The Contractors' State License Board

A member of Abdulaziz, Grossbart & Rudman typically goes to all Contractors' State License Board meetings. The CSLB meetings are held at various locations across the state throughout the year. These meetings give the public the chance to attend and discuss items that are on the agenda or other issues that they may bring up.

Under the leadership of Registrar Steve Sands, the Contractors' Board has instituted a number of new and more efficient ways to do business, even with the staff reduction as a result of the financial conditions of the country, particularly California. This has made it harder to see how efficient the CSLB was running. Fortunately, the hiring freeze was lifted in November of 2011 and the CSLB has been working hard to fill all vacant positions.

### Licensure

There is a decline in the number of applications received due to the economy. Original applications are down 8% from the overall average.

CSLB's application and renewal processing schedule routinely has around two days of backlog because of cashiering and image-scanning tasks. Since the 2008-09 fiscal year, the Licensing division has only used a minimal amount of overtime compared to previous years, even with a reduction in staff hours due to furloughs. They have kept acceptable processing times which can be attributed to the decrease in applications.

Eight applications have been revised to reflect new fees due to the fee increases. Some of the fee increases include the Application for Original Contractor License (20% increase), Application to Add a Supplemental Classification or to Replace RMO or RME on an Existing License (50% increase), Initial License Fee (20%), and Home Improvement Salesperson Registration Fee (50% increase) to name a few.

The current wait time for examinations throughout the state is three weeks. However, applicants have a very good chance of obtaining a seat in any CSLB testing center on a walk-in basis.

### Call Center

Call wait times increased in the first quarter of 2012 due to an increase in the volume of calls. This was seasonal due to a backlog of workers' compensation certificates which created additional calls. There are also longer wait times during the lunch hours when lack of agents play a role, even with staggered lunch times. CSLB has added two additional full-time call center agents and retained two retired annuitants who work during the peak lunch time hours.

A call center processing e-mail address has been set up as a full-service resolution program for licensees who need their licenses updated to satisfy a suspension or to avoid suspension. In addition, the call center will soon cross-train with other units to increase their knowledge of policies and procedures.

### Loss of Resources

CSLB resources have diminished over the past decade but its responsibilities have increased. Ten years ago the CSLB had a permanent staff of 471, now they have only 399. Five retired annuitants that were identified as non-mission critical were eliminated on June 30, 2012. The CSLB Licensing division has utilized 13 student assistants to handle new application processes, license maintenance, and license information. Because of the budget, the student assistant positions have been cut as of August 30, 2012. This has caused the workload to fall back on the staff. The CSLB is in the process of hiring seasonal employees with hopes that some of the experienced student assistants will qualify for those positions.

### SWIFT

The Statewide Investigative Fraud Team (SWIFT) is responsible for receiving complaints made by consumers, building officials, and legitimately licensed contractors against unlicensed contractors. In addition to taking in the complaints, SWIFT also handles the CSLB stings and blitzes.

SWIFT was responsible for a multi-state blitz that targeted illegal contractors that solicit through advertisements on Craigslist. More than 100 suspects were arrested in California alone because of this blitz. Although Craigslist has steps where the advertisers have to indicate whether they are licensed or not, unlicensed operators have found a way around that. The CSLB is attempting to get Craigslist to address the fact that the unlicensed operators are getting around this safeguard. In this mean time, there are links at the top of Craigslist's "Skilled Trade Services" page where visitors can obtain license information and view the Department of Consumer Affairs website.

### Senior Scam StopperTM

Seniors are vulnerable and very often taken advantage of by unlicensed or unscrupulous contractors. The Senior Scam StopperTM seminars are offered throughout the state in cooperation with legislators, state and local agencies, law enforcement, district attorneys and community organizations. These seminars not only provide information about construction related scams and how seniors can protect themselves when hiring contractors, but also present information on identity theft, auto repairs, investments, etc.

A promotional/informational brochure and letter was sent to each legislator in September of 2011 about the Senior Scam StopperTM seminars. Because of this, there has been increased interest in holding more of these seminars. Even though there are still travel restrictions in place for all non-enforcement activities (including Senior Scam StopperTM seminars), the CSLB has put in for travel exemptions in order to deliver these seminars. So far, all requests have been approved.

### Workers' Compensation Suspension Program

April 2011 saw the implementation of the Intake/Mediation Center notifying Licensing staff about complaints against licensees who have employees but no workers' compensation policy. The CSLB has the authority to automatically suspend their license according the *Business and Professions Code* section 7125.2. The CSLB sends a notice to the licensee the licensee 30 days to prove that there is a valid

workers' compensation policy or else the license will be suspended. So far, the Intake/Mediation Center has mailed 547 "Intent to Suspend" letters out which has resulted in 179 previously uninsured contractors obtaining new workers' compensation insurance policies.

In 2012, there were close to 300 Stop Orders issued to licensed and unlicensed contractors that have employees on site but no valid workers' compensation insurance.

#### Telephone Disconnect Program

Unlicensed operators often advertise for construction work even though they do not have a valid contractor's license. When possible, the CSLB will disconnect the telephone number of the unlicensed contractors who advertise.. The Intake/Mediation Center staff screens the illegal advertisements to obtain information through the Consolidated Lead Evaluation and Reporting (CLEAR) database so an administrative citation can be issued. The citation includes a correction order to disconnect any telephone number that is linked to the unlicensed contractor. The California Public Utilities Commission will disconnect a number once the citation becomes a final order. From January 2011, more than 1,000 unlicensed contractors were investigated, 100 advertising citations were issued, and 68 numbers were disconnected.

#### LLC's

CSLB has implemented the new LLC program. Due to concerns over laborer's rights working for LLC's which have not been addressed in the courts, an additional \$100,000 bond is required for the benefit of workers relative to payment of wages and fringe benefits. This is to ensure workers are protected despite the absence of case law dealing with LLC's. This bond is in addition to the \$12,500 contractor bond. LLC's are also required to have \$1,000,000 in liability insurance when five or fewer persons are listed as personnel, with an additional \$100,000 required for each additional personnel, not to exceed \$5,000,000.

#### Get the News

Don't forget that you should sign up by email on the CSLB's website for Industry Bulletins, Newsletters, Press Releases and Consumer Alerts, Public Meeting Notices and Agendas by going to the Contractors' State License Board's website at [www.cslb.ca.gov](http://www.cslb.ca.gov) and clicking on the "Sign up to receipt e-mail alerts" icon that is on the right of the page. The information that is sent out is invaluable to those in the industry. Although the CSLB is part of the Consumer Protection Agency, they are responsible for educating contractors as well. So take advantage of that! If you decide you are no longer interested in a particular topic, you can then unsubscribe.

You can also visit the CSLB's Facebook or Twitter pages to stay abreast of what is going on in the industry.

## Summary

Please note that information about what is going on with the CSLB is quite extensive and this was just meant to be a highlight of some of the more pertinent items. Please visit their website at [www.cslb.ca.gov](http://www.cslb.ca.gov) for additional information.

## **8. Important New Cases Affecting Contractors**

In the past year, there have been a few cases affecting Preliminary Notices, Mechanic's Liens, Bonds, Stop Payment Notices and Public Works. The following cases are worth mentioning because of the decisions made at the Court of Appeal level, which can be used as case law in future lawsuits.

### Preliminary Notices

A person under contract with an owner still must give a Preliminary Notice to the lender. In this case, a landscape company delivered 959 trees to a development. It was under contract with the owner, but did not serve a Preliminary Notice on the construction lender. The landscape supplier argued that if they were exempt from having to give the Preliminary Notice to the owner, they did not need to give the Preliminary Notice to the lender. The Court of Appeal disagreed and held that the two different provisions of the Preliminary Notice statute applied in different circumstances and are not alternatives. The Mechanic's Lien was therefore invalid.

### Standing to Attack Mechanic's Liens and Stop Payment Notices in Court Proceedings

An owner of real property may bring a motion to remove the Mechanic's Lien or Stop Payment Notice that is alleged to be overstated, untimely, or improper. However, a construction lender cannot use such an expedited process to attack the Mechanic's Lien, which would deprive the contractor of its right to trial on its Stop Payment Notice claim. The courts allow for this expedited process to allow owners to quickly protect their property rights and challenge the validity or amounts of a lien claim, but such rights do not flow to the lender, who has other means of protecting itself.

### Attorneys Fees on a Stop Payment Notice Action

In this case, a subcontractor served a Stop Notice (now called a Stop Payment Notice) upon a public entity in the amount of \$1,134,998.06. It then filed suit on the Stop Payment Notice against the Community College District, in addition to other claims against the direct contractor. The direct contractor obtained a Stop Payment Notice Release Bond, which allowed for the release of the funds and the dismissal of the Community College District. The Community College District then claimed that it was entitled to attorneys fees as the "prevailing party" in the action. The trial court awarded attorneys fees under the statute that requires the public entity to withhold sufficient funds to cover the amount of the Stop Payment Notice and to provide for the public entities reasonable cost of any litigation.

The Stop Payment Notice claimant appealed, and the Court of Appeal reversed the award. The Court of Appeal held that the statute requires withholding the funds but does not authorize an attorneys fees award.

### Bond Notice on Public Works Projects

As part of a residential development, paving work had to be performed by the developer on the public streets. As a condition to doing the work in the streets, a subdivision labor and material payment bond had to be obtained for the benefit of the City. The direct contractor hired California Paving to perform its work. California Paving did the work but was not paid. Both the developer and direct contractor filed for bankruptcy and California Paving made a claim on the bond. The surety contended that the paving subcontractor did not provide a bond claim or a bond notice. The first notice the surety had of the claim was when the lawsuit was filed, which was roughly 14 months after the project was completed.

The trial court granted a demurrer which essentially threw out the claim. The Court of Appeal upheld that decision; the first issue before the court was whether the work done was a “public work.” The court held that because the developer “contracted” with the public entity (City of Los Angeles) to perform the work in the street as part of its development, it was a public work. Having determined it was a public work, the Court of Appeal held that California Paving was required to serve the Preliminary Bond Notice. Although the complaint alleged that a Preliminary Notice under the private works statute was served, and it was argued that that was substantially the same, the Court of Appeal disagreed because the public entity was not served with that Preliminary Notice (rather than or instead of the contractor and developer). Having not served a Preliminary Bond Notice on the surety, the court held that all other issues were moot and it need not decide whether the lawsuit itself was timely filed.

## **9. Changes from 2012 – Still Important**

### **A. Mechanic’s Lien, Stop Notice and Payment Bond Changes**

The California Law Revision Commission and the Legislature have been working for years to revamp the entire Mechanic’s Lien, Stop Notice and Payment Bond scheme as set forth in California statutes. The statutes renumber and recast every statute pertaining to Mechanic’s Liens, Stop Notices, and Payment Bonds, among other statutes relating to recovery by contractors.

There are some changes that deal with more than the renumbering of the *Civil Code* section. These changes are not substantive as far as how Mechanic’s Lien, Stop Notice and Payment Bonds are handled but are very important to be carried out starting July 1, 2012, on all of the forms and processes that they affect. Remember, there is no grace period on compliance.

### **B. Definitions**

SB 189 revised some common terms and form names in the construction industry.

1. Material supplier - previously materialman
2. Design professional - a licensed landscape architect is considered a design professional
3. Direct contractor - previously original contractor or prime contractor
4. Direct contract - an agreement between an owner and any original contractor providing for the work of improvement, or any part thereof
5. Contract - an agreement that provides for all or part of a work of improvement; but does not get into specifics regarding the contractor
6. Preliminary Notice – previously Preliminary 20-Day Notice
7. Stop Payment Notice - previously Stop Notice

C. Preliminary Notice

SB 189 makes some changes to the Preliminary Notice as follows:

1. Notice to Property Owner on the private works Preliminary Notice has been re-written.
2. *Civil Code* section references to section 3097 on the Preliminary Notice for private works should reference the new *Civil Code* sections 8034, 8102, 8116 and 8200 et seq. and the references to *Civil Code* section 3098 on the Preliminary Notice for public works should reference the new *Civil Code* sections 8034 and 9300 et seq.
3. Attachment “A” to California Preliminary Notice as required by *Civil Code* section 3097 requires a contractor who employs a laborer, but fails to pay that laborer, to include on the Preliminary Notice the identity and address of any laborer and any express trust fund to whom employer payments are due. Reference to *Civil Code* section 3097 will need to be changed to reference *Civil Code* section 8202(b) on this Attachment “A” to the Preliminary Notice for private works.

D. Notice of Mechanics Lien

The required notice per *Civil Code* section 8416 (previously *Civil Code* section 3084) called “Notice of Mechanics Lien” had some slight alterations to it with respect to the notice and the proof of service affidavit as to whom is served wherein the affidavit should indicate “the owner or reputed owner” that is being served. Although these are minimal changes they are important to comply with or the lien might be unenforceable as a matter of law.

- E. Mechanics Lien Warning has been slightly altered and there are completely different warnings for Home Improvement Contracts and New Residential Construction Contracts.
- F. Home Improvement Contract Statement Regarding Down Payments will be required to have the words “Down Payment” as one word “Downpayment.”
- G. Information about the Contractors’ State License Board (CSLB)  
SB 944 added one word to the Notice required by *Business and Professions Code* section 7030(b), “Information about the Contractors’ State License Board (CSLB).” The use of the word “Internet” is added in the contact information for the CSLB.
- H. Both the Three-Day Right to Cancel and the Seven-Day Right to Cancel that are to be a part of the Home Improvement Contract has been slightly altered.
- I. Home Improvement Contract Statement Regarding Release which references *Civil Code* section 3114 should refer to *Civil Code* sections 8400 and 8404.
- J. Lien Releases and Waiver of Lien Rights have been completely re-written. Although the statute indicates that what is written in them is a guideline, we believe it is better to be safe rather than risk the waivers and releases being unenforceable and use the exact same language as provided in the statute which is *Civil Code* sections 8122-8138.

K. Notice of Extension of Credit will refer to *Civil Code* section 8460. The revised *Civil Code* section 8460 also provides explicitly that both the contractor and owner must sign the Notice of Extension of Credit and also gives a little bit more leeway as a Notice of Extension of Credit must either be filed within 90 days of the recording of the original Mechanic's Lien (when that lien would expire), or if recorded later than that time, it must be recorded before any purchaser or encumbrancer for value acquires rights (i.e., the property is transferred or sold, or a loan is recorded against the property).

L. Notice of Time to Enforce Payment of Claim. A public entity shall give notice to a claimant that has given a Stop Payment Notice of the time within which an action to enforce payment of the claim stated in the Stop Payment Notice must be commenced if the claimant paid the public entity ten dollars (\$10) at the time of giving the Stop Payment Notice rather than the previous \$2 fee.

M. Completion - *Civil Code* section 3086 included that acceptance by the owner for a private work of improvement would constitute completion. As of July 1, 2012, *Civil Code* section 8180 (which replaced *Civil Code* section 3086) no longer recognizes acceptance by the private works owner as an event that constitutes completion. However, if a work of improvement is subject to acceptance by a public entity, completion occurs on acceptance as *Civil Code* section 9200 indicates that completion on works of improvement in the public works realm occurs upon acceptance of the work of improvement by the public entity.

N. Notice of Completion had the following changes:

- a. An owner now has 15 days to record the "Notice of Completion" rather than the previous 10 days.
- b. If the Notice of Completion contains an erroneous statement of the date of completion, it does not affect the effectiveness of the Notice of Completion if the true date of completion is 15 days or less before the date of recordation of the Notice of Completion rather than the previous 10 days.
- c. A public entity may record a Notice of Completion on or within 15 days after the date of completion of a work of improvement, rather than the previous 10 days.

O. Bond Claim

As you may or may not be aware, if a Preliminary Notice was required to be given on either public or private works by a subcontractor or material supplier but they did not give that notice, they may still have a second chance to enforce their claim. This second chance allowed the subcontractor or material supplier to enforce their claim by giving written notice to the surety and the bond principal within 15 days after recordation of a notice of completion. If there had been no notice of completion, the time within which the written notice could be given was extended to 75 days after completion of the work of improvement. SB 293 limits this second chance bond claim by listing circumstances that shall not apply.

P. Progress Payments from Public Utilities.

The direct contractor will now have 21 days within which to pay the subcontractor on a project performed for a public utility rather than the current 15 days.

Q. Progress Payments

SB 293 changed the time within which a contractor has to pay a subcontractor (or a subcontractor pay a subcontractor) progress payments from ten (10) days to seven (7) days after receipt of each progress payment unless otherwise agreed to in writing on all private works and on certain public works.

R. Retention

SB 293 also limited retention between the public entity and an original contractor to five percent (5%) of the contract price, except in instances where the public entity has specifically made a finding that was noticed prior to putting the project out for bid that the project is substantially complex and therefore requires a higher retention amount than the five percent (5%). As between the direct contractor and its subcontractors, the new law limits that right of the contractor to withhold more retention from its subcontractor than is withheld by the owner of the project. This is not true if prior to the bid time, the contractor has notified potential subcontractors that bonds are required from the subcontractors and the subcontractor is unable or refuses to furnish the contractor with a performance and payment bond issued by an admitted surety. In that instance, the limitation on retention does not apply.

S. Independent Contractor

SB 459 amended the *Labor Code* with respect to independent contractors. The penalties and potential disciplinary action against a contractor for purposefully misclassifying an employee as an independent contractor now has fines from \$5,000 to \$15,000 per violation for a first offense. An employer who has engaged in a pattern of these violations can be subject to penalties between \$10,000 and \$25,000 per each violation, in addition to other penalties or fines permitted by law. The CSLB is also required to initiate a disciplinary action against the contractor, who is also disbarred from bidding projects based on violations of the Labor Law. Contractors need to make sure that their independent contractors really can be classified as independent contractors.

## **10. Legislation**

The following are some condensed summaries of a few pieces of legislation that may be of interest to those in the construction industry. They are not intended to be all-inclusive. They are just the highlights.

### Chaptered Bills

Chaptered bills are bills that have passed through the Legislature as well as the Governor and are now laws. Following are some new laws of interest:

*AB 812 (Ma) Solid waste: recycled asphalt*

This new law adds Public Resource Code section 42704 which authorizes the Department of Transportation to establish specifications for the use of reclaimed asphalt pavement of up to 40% for hot mix asphalt mixes by January 1, 2014.

*AB 890 (Olsen) Environment: CEQA exemption: roadway improvement*

This new law revised Public Resources Code section 21080.37 by exempting from the California Environmental Quality Act (CEQA) repair, maintenance, and minor alterations of existing roadways, provided the project is carried out by a city or county to improve public safety, does not cross a waterway, and involves negligible or no expansion of an existing use. The exemption sunsets January 1, 2016.

*AB 1492 (Committee on Budget) Forest resource management*

This new law will **charge consumers a one percent tax on lumber products starting in January, 2013** and restricts damages landowners pay for sparking wildfires. **Caution is urged for all contractors! This adds one cent to ALL lumber costs! Be particularly careful with your fixed-price contracts!**

*AB 1565 (Fuentes) Public contracts: school districts: bidding requirements*

This new law changes Public Contract Code section 20111.6. The changes affect public projects where funds received from the Leroy F. Greene School Facilities Act of 1998 or future state school bonds projected at over \$1 million are used. Bidders will be required to complete and submit a standardized prequalification questionnaire and financial statement, among other things.

*AB 1588 (Atkins) Professions and vocations: reservist licensees: fees and continuing education*

This new law adds Business and Professions Code section 114.3 which extends benefits for members of the Armed Force. This will waive the renewal fees, continuing education requirements and other renewal requirements for any licensee or registrant who is called for active duty into the Armed Forces. However, that licensee or registrant would not be allowed to engage in activities requiring a license while the waiver is in effect.

*AB 1598 (Buchanan) Public contracts: public works: installation*

Existing law defines the term "public works" for purposes of requirements regarding the payment of prevailing wages. This new law will modify the definition of installation to include the assembly and disassembly of freestanding and affixed modular office systems.

*AB 1612 (Lara) Administrative Practices*

This new law requires state agencies, when submitting a notice to the Office of Administrative Law (OAL) proposing the adoption, amendment, or repeal of a building standard regulation, to include with

the Initial Statement of Reasons (ISOR), the estimated cost and benefits of compliance and the related assumptions used in determining that estimate, if the proposed building standard regulation impacts housing, and requires the agencies to make this information publicly available.

*AB 1671 (Huffman) Department of Transportation: retention: proceeds: State Contract Act: bids: bidder security*

This new law amends *Public Contract Code* sections 7202 and 10167 and will allow as acceptable forms of bidder's security, an electronic bidder's bond by an admitted surety insurer, a signed bidder's bond by an admitted surety insurer, and cash, a cashier's check, or certified check, as provided until January 1, 2020.

*AB 1750 (Solorio) Rainwater Capture Act of 2012*

This new law amends *Business and Profession Code* section 7027.5 and adds *Water Code* sections 10570 through 10574. These amendments authorize the Rainwater Capture Act of 2012 and provide that the use of rainwater collected from rooftops does not require a water right permit from the state board. It also authorizes landscape contractors to contract as the direct contractor for the construction of a rainwater capture system that is used exclusively for landscape irrigation or as a water supply for a fountain, pond, or similar decorative water feature in the landscaping project.

*AB 1783 (Perea) Public contracts: small business preferences*

This new law will revise the small business certification procedure (which gives small businesses a 5% preference in contracts for construction, the procurement of goods, or the delivery of services) to provide that the Department of General Services has the sole responsibility for certifying and determining eligibility of small businesses and will provide that local agencies have access to the department's list of certified small businesses.

*AB 1794 (Williams) Unemployment insurance: use of employer reports: reporting and payroll: enforcement*

This new law amends *Unemployment Insurance Code* section 1088.5. This law authorizes the Employment Development Department to provide new "employee information" to the Joint Enforcement Strike Force on the Underground Economy, the CSLB and the State Compensation Insurance Fund until 2019. The purpose is to aid in prosecuting violations of tax and cash-pay reporting laws.

*AB 1904 (Block) Professions and vocations: military spouses: expedited licensure*

This new law adds *Business and Professions Code* section 115.5 which requires a board within the Department of Consumer Affairs to expedite the licensure process for any applicant who holds a license in the same profession in another jurisdiction and is married to or in a legal union with an active duty member of the Armed Forces that is stationed in California.

*AB 2103 (Ammiano) Employment: wages and hours: overtime*

This new law provides further clarity as to what hours and rate of pay a salaried employee is being compensated for when receiving his/her payment. Specifically, this law provides that payment of a fixed salary to a nonexempt employee shall be deemed to provide compensation only for the employee's regular, non-overtime hours, notwithstanding any private agreement to the contrary.

*AB 2114 (Smyth) Swimming pool safety*

This new law amends the Health and Safety Code and enacts a new construction permit requirement for swimming pools, spas, or public wading pools.

*AB 2181 (Galgiani) State government: prompt payment claims*

The California Prompt Payment Act dictates that a state agency that fails to make a timely payment for goods or services acquired pursuant to a contract with a specified business or organization is subject to a late payment penalty. This new law will include, within the list of specified businesses and organizations, state-certified small businesses working on the development, design, and construction of California's high-speed rail system under the California High-Speed Rail Act.

*AB 2219 (Knight) Contractors' workers' compensation insurance coverage*

This new law amends Business and Professions Code section 7125 and Insurance Code section 11665 and mostly extends the operation of provisions that were only to be in effect until 2013 to be indefinite. C-39 roofing contractors will indefinitely be required to maintain workers' compensation insurance even if they have no employees. They will be required to have a current and valid Certificate of Workers' Compensation Insurance of Certification to be in the applicant's or licensee's business name. That Certificate must also be sent to the Registrar. However, if it is not, then the license will have their C-39 classification removed. If it is also discovered that there are employees, the licensee will be suspended. Lastly, the insurer of the C-39 licensee needs to perform annual payroll audits as well as compile statistical data and report to the commissioner to include the number of employees, total payroll, total losses, losses per \$100 and reported in annual payroll ranges. The audit will also include an in-person visit to the place of business to verify that the number of employees reported by the roofing contractor is accurate.

*AB 2237 (Monning) Contractors: definition*

This new law amends Business and Professions Code section 7026.1 by amending the definition of "contractor" for home improvement contracts to include the term "consultant" as a person who (1) provides or oversees a bid for a construction project or (2) arranges for and sets up work schedules for contractors and subcontractors and maintains oversight of a construction project. The term consultant does not include a public agency or an owner of a private works of improvement. This was a CSLB sponsored bill.

*AB 2249 (Buchanan) Solar Water Heating and Efficiency Act of 2007*

This new law amends the *Public Utilities Code* and expands the definition of a solar water heating system and revises exclusions from the definition of a solar water heating system by requiring investor owned gas utilities to implement solar water heating incentive program and prescribing criteria to qualify for the solar water heating incentive program.

*AB 2339 (Williams) Energy: geothermal technologies*

This new law adds to the *Public Resources Code* and requires state regulators and those involved in the heat pump and geothermal heating and cooling industries to evaluate policies and develop infrastructure for wider use of these technologies.

*AB 2440 (Lowenthal) Los Angeles County Metropolitan Transportation Authority: contracting.*

This new law amends the *Public Utilities Code* and makes changes that impact those contracting for public works projects within the Los Angeles County Metropolitan Transportation Authority.

*AB 2498 (Gordon) Department of Transportation: Construction Manager/General Contractor project method*

This new law authorizes Caltrans to use Construction Manager/General Contractor (CM/GC), which is said to be an emerging project delivery method that potentially combines the best of both design-bid-build and design-build, for up to four projects as a pilot to ascertain its viability. Using CM/GC, Caltrans will be able to engage a design and construction management consultant (construction manager) to act as the department's consultant during the pre-construction phase and as the general contractor during construction. During the design phase, the construction manager acts in an advisory role, providing constructability reviews, value engineering suggestions, construction estimates, and other construction-related recommendations. Later, Caltrans and the construction manager can agree that the project design has progressed to a sufficient enough point that construction may begin. The two parties then work out mutually agreeable terms and conditions for the construction contract, and, if all goes well, the construction manager becomes the general contractor and construction on the project commences, well before design is entirely complete.

*AB 2554 (Berryhill) Contractors*

This new law amends *Business and Professions Code* sections 7011.4 and 7106.5 and renames the enforcement unit as the enforcement division as well as specifying that the revocation of a license does not deprive the board of that jurisdiction. This was a CSLB sponsored bill.

*AB 2570 (Hill) Licenses: settlement agreements*

This new law adds *Business and Professions Code* section 143.5 which roughly states that no licensee that is regulated within the Department of Consumer Affairs (which the CSLB is a part of, thereby, this applies to contractors) can settle a civil dispute and prohibit the other party from filing a

complaint with or withdraw a complaint from the agency. For instance, if a contractor is sued in a civil claim by a homeowner that it was doing work for and they decide to settle the matter, the settlement agreement cannot include a provision indicating that the homeowner cannot file a complaint with the CSLB or withdraw a complaint. This type of provision will be considered void and is also subject to a disciplinary action by the agency.

In addition, if the agency takes disciplinary action against a licensee based on a complaint received, the agency cannot require the licensee to pay additional sums to the plaintiff of a civil action if the civil matter was already settled for monetary damages.

*AB 2654 (Morrell) Mining liens: definitions*

This new law, which took effect immediately as an urgency measure, clarifies the definition of the term "mine" under California's mining lien statute to include real property worked on as a mine, including, but not limited to, any quarry or pit from which rock, gravel, or any other mineral-containing property is extracted by a mining operation.

This law also expresses the Legislature's intent to supersede the holding of *Sukut Construction v. Rimrock CA LLC* (2011) 199 Cal. App. 4th 817.

*AB 2677 (Swanson) Public works: wages: fringe benefit contributions*

This new law amends *Labor Code* sections 1773.1 and 1773.8 which provides that an increased employer payment contribution that results in a lower hourly straight time, overtime wage or taxable wage is not considered a violation of the applicable prevailing wage determination as long as certain conditions are met.

*SB 691 (Lieu) Unemployment insurance: compensation*

This new law amends *Unemployment Insurance Code* section 1095 and adds the Contractors' State License Board to the list of approved agencies to receive workers' compensation insurance information from the Employment Development Department.

*SB 829 (Rubio) Public contracts: public entities: project labor agreements*

This new law adds *Public Contract Code* section 2503 and 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, state funding or financial assistance may not be used to support any construction projects awarded by the city, as specified

*SB 863 (De Leon) Workers' compensation*

This new law amends the Government Code. This makes significant reforms to workers' compensation insurance. The intent is to lower costs and rates as well as give improved care for workers that are injured. Changes will be made to medical provider networks, independent medical review, independent bill review, liens, fee schedules, medical care and permanent disability benefits.

*SB 1092 (De Leon) Vehicles: brokers of construction trucking services: surety bonds*

This new law amends the Vehicle Code and requires brokers of construction trucking services to demonstrate evidence annually of a valid surety bond.

*SB 1099 (Wright) Regulations*

This new law amends Government Code sections 11343, 11343.4 and 11344 as well as Health and Safety Code section 116064 and modifies the Administrative Procedures Act, which are the requirements for the adoption, publication, review and implementation of regulations by state agencies. The modifications provide that each state agency will now have to post on their website in an easily marked and identifiable location any regulation that has been posted with the Secretary of State within 15 days of that posting. These regulations are to then be left on the agencies website for at least 6 months. The effective date of regulations is also changed to four times annually versus the current 30 days.

*SB 1280 (Pavley) Public contracts: University of California and community college districts: competitive bidding: best value*

Current law requires the Regents of the University of California to let all contracts involving an expenditure of more than \$100,000 annually for goods and materials or services to the lowest responsible bidder meeting certain specifications, or to reject all bids. Current law requires the governing board of any community college district to let specified contracts involving an expenditure of more than \$50,000 to the lowest responsible bidder meeting certain specifications, or else to reject all bids. This new law provides that, before January 1, 2018, the bid evaluation and selection for these contracts may be determined by the best value for the University of California or community college district.

*SB 1370 (Berryhill) Prevailing wages: public works: director: code list*

This new law adds Labor Code section 1730 which requires the Director of Industrial Relations to post a list of every California Code section and the language of those sections that relate to the prevailing wage rate requirements for workers employed on a public work project on the Internet website of the Department of Industrial Relations on or before June 1, 2013, and update that list each February 1 thereafter.

*SB 1509 (Simitian) School facilities: design-build contracts*

Current 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, respectively, if specified requirements are met. This new law will extend this design-build authority until January 1, 2020.

*SB 1549 (Vargas) Transportation projects: alternative project delivery methods*

This new law adds to the *Public Contract Code* and will change public works contract bidding in the San Diego region.

*SB 1576 (Committee on Business, Professions and Economic Development) Professions and vocations*

This new law amends the *Business and Professions Code* and will enable the CSLB to take administrative action if a licensee files a false complaint against another licensee.

Some Bills That Were Vetoed

The following are some bills of interest that the Governor did not sign. These did not become law, but we thought it was of interest to know what is going on in the Legislature. The following are just a few of the vetoed bills:

*AB 1145 (Cedillo) Workers' compensation: permanent disability benefits*

This bill was vetoed. A portion of the Governor's veto message stated:

"I commend the author for his hard work on this measure to more effectively re-train injured workers and improve return to work rates. I note that the provisions in this measure are included in the recently enacted comprehensive workers' compensation reform legislation - making a second measure unnecessary at this time."

*AB 1687 (Fong) Workers' compensation*

This bill was vetoed. A portion of the Governor's veto message stated:

"The recently enacted landmark comprehensive workers' compensation reform legislation makes this measure unnecessary."

*AB 2389 (Lowenthal) Contractor disclosure requirements*

This bill was vetoed. A portion of the Governor's veto message stated:

"This is a bill that ultimately is about the growing practice of subcontracting in the service industry. I agree that this is a topic that requires greater scrutiny and more detailed information. It is not clear to me that requiring logos on uniforms and vehicles solves any problems, but it may spawn confusion and some costs. I think we need to know more before prescribing practices such as those suggested by this bill."

*SB 975 (Wright) Professions and vocations: regulatory authority*

This bill was vetoed. A portion of the Governor's veto message stated:

"This bill attempts to address the increasing trend of state, regional and local governments' use of short courses as a means of increasing regulatory compliance. Specifically, this bill provides that the California Architects Board and the Board of Professional Engineers, Land Surveyors, and Geologists are the sole state authorities for regulating in any way their respective professions.

I agree that more 8-hour courses are often not a good form of compliance.

I am directing the Water Board, the Air Board and the Energy Commission to review other methods of ensuring compliance."

