

2012 California Construction Law Update

12/19/2011

With the new year comes a host of changes to laws impacting the construction industry in California. Addressed below are some of the most important new laws to be aware of. Unless otherwise noted, all of these laws take effect on January 1, 2012.

Changes to Mechanics Lien Laws

A. **SB 189 (Passed in 2010) & SB 190 (Passed in 2011)**

SB 189 and SB 190 were passed as part of an effort to modernize and simplify California's mechanics lien laws spearheaded by the California Law Revision Commission. The majority of the changes brought by SB 189 and 190 are minor and are intended to be non-substantive, but a few key changes warrant discussion. These changes take effect on July 1, 2012.

Much of the terminology regarding mechanics liens has changed. For example, under the new laws, "direct contractor" is used in place of the somewhat ambiguous "original contractor," and is defined as "a contractor that has a direct contractual relationship with an owner." Civ. Code § 8016. Similarly, "materialman" has been replaced with "material supplier."

Under the new laws, all notice requirements have been standardized and relocated to a new subdivision. Civ. Code §§ 8100 – 8118. These sections govern the contents of notice, the manner of serving the notice, when notice is deemed complete, and proof of service.

The new laws create new waiver and release forms, which must be used. Civ. Code §§ 8120 – 8138.

The new laws make several changes with respect to completion. Under the new laws, "acceptance by the owner" is no longer included as a means of achieving completion. Civ. Code § 8180. Also owners will now have 15 days to record the Notice of Completion instead of the previous 10-day period. Civ. Code § 8182. Lastly, when there are multiple direct contractors, owners are now permitted to file separate Notices of Completion for each portion of the work. Civ. Code § 8186.

The new laws generally do not change the requirements of preliminary notice. However, under the new laws, direct contractors are required to give preliminary notice only to construction lenders. Civ. Code § 8200(e)(2).

Under Civil Code section 8424, mechanics lien release bonds are only required to be equal to 125% of the claim, rather than 150%, as they previously were.

The new laws provide a new procedure for judicially releasing liens, which was not previously included. Civ. Code § 8480. Included in these new procedures is a requirement that at least 10 days before petitioning for a release of lien the owner gives the claimant notice and demands a release of lien. Civ. Code § 8482. Additional new provisions include formal burden of proof requirements and the elimination of a cap on the recovery of attorney's fees for petition for a release of lien. Civ. Code § 8488.

B. **AB 456 (Passed in 2011)**

AB 456 clarifies the requirements of the proof of service affidavit regarding service of the notice of mechanics lien. This law clarifies that the affidavit is required to show the name of the owner or reputed owner of the property, and the title or capacity in which the person or entity was served. Civ. Code §§ 3084, 8416.

C. **SB 424 (Passed in 2011)**

SB 424 provides a means for converting a recorded design professional lien to a mechanics lien. The new law provides that "[a] design professional may convert a recorded design professional lien" provided certain enumerated requirements are met. This law takes effect on July 1, 2012. Civ. Code. § 8319.

Contractor's Licenses for Limited Liability Companies (LLCs)

A. SB 392 (Passed in 2010)

Passed in 2010, SB 392 requires that the Contractors State License Board ("CSLB") begin processing applications by LLCs for contractor's licenses before January 1, 2012. Although the CSLB is not currently accepting applications for LLC licenses, we expect that it will do so shortly.

SB 392 also sets out several additional requirements for LLCs wishing to obtain contractor's licenses. Included in these additional requirements is a \$100,000 surety bond in addition to the \$12,500 contractor bond, and liability insurance with the minimum aggregate limit of \$1 million and an aggregate limit as high as \$5 million, depending on the number of personnel of record. Bus. & Prof. Code §§ 7071.6.5, 7071.19. Also, every person who is an officer, member, responsible manager, or director must be listed as personnel of record on LLC applications. Bus. & Prof. Code §§ 7065.

An LLC may be a part of a licensed joint venture. Bus. & Prof. Code §§ 7029.

Prompt Payment, Payment Bonds, Public Contract Retention

A. SB 293 (Passed in 2011)

SB 293 mandates a number of important changes. First SB 293 reduces from 10 to 7 the number of days by which a prime contractor or upper tier subcontractor must pay a subcontractor after receiving a progress payment, unless otherwise agreed in writing. Bus. & Prof. Code §§ 7108.5. This rule applies to public and private contracts.

SB 293 also requires that preliminary notice be given before making claims on payments bonds. Civ. Code §§ 3252, 8612, 9560. This law also provides that if notice was required to be given, but was not, "a claimant may enforce a claim by giving written notice to the surety and the bond principal within 15 days after recordation of a notice of completion. If no notice of completion has been recorded, the time for giving written notice to the surety and the bond principal is extended to 75 days after completion of the work of improvement." If the preliminary notice was required to be given by a person who has no direct contractual relationship with the contractor, and who did not give the required notice, that person may enforce a claim by giving notice to the surety and bond principal within 15 days after recording a notice of completion. If no notice of completion was recorded, the time for giving written notice is extended to 75 days after completion of the work. This provision does not apply if either: 1) all progress payments, except for those disputed in good faith, have been made to a subcontractor who has a direct contractual relationship with the general contractor to whom the claimant has provided materials or services; or 2) the subcontractor who has a direct contractual relationship with the general contractor to whom the claimant has provided materials or services has been terminated from the project pursuant to the contract, and all progress payments, except those disputed in good faith, have been made as of the termination date. These sections do not apply to laborers.

SB 293 also impacts public contracting by capping retention at five percent. SB 293 applies to all contracts entered into after January 1, 2012 between a public entity and an original contractor, between an original contractor and a subcontractor, and all subcontracts thereunder, relating to the construction of any public work of improvement. Pub. Contract § 7201. SB 293 provides that the retention proceeds withheld from any payment by a public entity from the original contractor, by the original contractor from any subcontractor, and by a subcontractor from any subcontractor thereunder shall not exceed five percent of the payment, and in no event shall the total retention proceeds withheld exceed five percent of the contract price. Pub. Contract § 7201(b)(1). Under limited circumstances retention may exceed five percent, if certain requirements are met, including a finding by the department director that the project is "substantially complex." Pub. Contract § 7201(b)(3)-(4). This provision sunsets on January 1, 2016, unless it is extended.

Public Works

A. **SB 136 (Passed in 2011)**

SB 136 expands the definition of “public works” and the resulting prevailing wage requirements to certain private works related to renewable energy. Specifically, any construction, alteration, demolition, installation, or repair work done under private contract that satisfies the following conditions will be subject to prevailing wage rates: (a) The work is performed in connection with the construction or maintenance of renewable energy generating capacity or energy efficiency improvements; (b) The work is performed on the property of the state or a political subdivision of the state; and (c) either (1) more than 50 percent of the energy generated is purchased or will be purchased by the state or a political subdivision of the state; or (2) the energy efficiency improvements are primarily intended to reduce energy costs that would otherwise be incurred by the state or a political subdivision of the state.

B. **SB 835 (Passed in 2011)**

SB 835 extends and expands the Best Value Construction Contract Pilot Program to all University of California campus construction projects over \$1,000,000. Previously only the University of California at San Francisco was authorized to use a best value determination in awarding construction contracts. This law sunsets on January 1, 2017, unless it is extended.

Type I Indemnity Agreements

A. **SB 474 (Passed in 2011)**

SB 474, does not take effect until January 1, 2013, but because it is an important change to California construction law, it warrants discussion. SB 474 prohibits “Type I” indemnity agreements that purport to require indemnification by subcontractors of general contractors for the latter’s active negligence or willful misconduct. Specifically, SB 474 provides that construction contracts “that purport to insure or indemnify, including the cost to defend, a general contractor, construction manager, or other subcontractor, by a subcontractor against liability for . . . loss, damage, or expense are void and unenforceable to the extent the claims arise out of, pertain to, or relate to the active negligence or willful misconduct of that general contractor, construction manager, or other subcontractor, or their other agents, . . . or for defects in design furnished by those persons, or to the extent the claims do not arise out of the scope of work of the subcontractor pursuant to the construction contract.” Civ. Code § 2782.05. This section does not apply to, among other things, wrap-up insurance programs, additional insured endorsements; or contracts with design professionals. Civ. Code § 2782.05(b).

SB 474 also provides that construction contracts entered into on and after January 1, 2013, with a public agency, that purport to impose on any contractor, subcontractor, or supplier of goods or services, or relieve the public agency from, liability for the active negligence of the public agency are void and unenforceable. Civ. Code § 2782.(b)(2). Likewise, SB 474 provides that construction contracts entered into with the owner of privately owned real property that purport to impose on any contractor, subcontractor, or supplier of goods or services, or relieve the owner from, liability are unenforceable to the extent of the active negligence of the owner, including that of its employees. Civ. Code § 2782.(c)(1). However this provision does not apply to a homeowner performing a home improvement project on his or her own single family dwelling. Civ. Code § 2782.(c)(3).

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