

WHAT'S NEW FOR 2010?

This chapter discusses some of the more timely matters that concern contractors.

A. The Contractors' State License Board

Sam Abdulaziz typically goes to all Contractors' State License Board board meetings. He has been following the meetings for more years than he will admit. Indeed, many of the Contractors' State License Board members seek the aid and advice of Sam Abdulaziz. The information in this section about the CSLB has been written almost exclusively by Sam.

Under the leadership of Registrar Steve Sands, the Contractor's Board has instituted a number of new and more efficient ways to do business. He has passed this on to his senior staff. The Board operates through committees and meets regularly.

What is significant is that the CSLB has had to reduce its staff significantly as a result of the present financial conditions of the country, particularly California. In addition to the staff reduction, the budget crunch has the CSLB losing days of work because they are dealing with a mandatory work furlough. Because of this furlough, the CSLB is closed the first, second, and third Friday of every month. This furlough is supposed to continue through at least June of 2010.

Partnering

The CSLB has partnered with various other agencies, and most specifically, agencies dealing with consumer protection.

With respect to the partnering, as a result of the outreach by the CSLB, partners have jumped on board and many other agencies are now doing the same thing as the CSLB. They have instituted new task forces.

The CSLB's responses to wild fires has also exceeded all expectations.

Based on our review, we believe that the most significant thing the Registrar and his staff has done is their sting operations. The Board has a number of ways to conduct sting operations. A good example is where two CSLB deputies will get in touch with some others and ask if they can use their house for a sting operation. When that is done, two members of the CSLB, typically a male and a female, will seek contractors to do work for them. The contractors that they find will quite often be unlicensed contractors. These unlicensed contractors will then look at the house, make recommendations, etc., and ask to do the work. Now the contractor has solicited work as an unlicensed contractor and has given evidence of how these unlicensed contractors work. The unlicensed contractors are then handcuffed and taken away to be charged.

Further, along with the stings, the License Board's Public Affairs system will publicize all of these unlicensed contractor activities. The whole idea is to scare all of these unlicensed contractors from doing unlicensed work.

Hiring

One of the most problematic issues with hiring is that given the present hiring freeze and laying off of employees, the people that are laid off will have to completely reapply once the freeze is finally lifted. We suspect that many people will not be rehired, which can create a real problem.

Fingerprinting

The fingerprinting program started January 2005, the CSLB receives numerous transmittals from the Department of Justice. Of the applicants who have been fingerprinted, the CSLB's criminal background unit received criminal offender record information on a number of applicants, which means that the Department of Justice and the FBI reported that the individual had a criminal conviction in the past.

Enforcement

David Fogt, Chief of Enforcement of the CSLB, has stated that his group conducted their own audit of how certain things are being done. He noted that they have been very successful in their full sting operations. However, they had been less successful in checking leads. They thought that it would be wise to work with industry in this regard.

They are actually meeting with association people to get help with respect to unlicensed contractors and other offenders. Associations will provide help in providing sting opportunities. They will work with the media and newsgroups dealing with print ads and get leads from trade association members. The construction trade associations have helped.

They will continue to do many sting operations.

Unlicensed operators who take advantage of unsuspecting consumers are a major concern. Some of these unlicensed individuals pass themselves off as "consultants" who promise to guide the homeowner through the permit process for free. Instead of saving money, the homeowner is often left with construction or legal problems, and the added costs of repairing substandard work or damage. Many consumers are simply unaware that building permits may have to be pulled. Many times homeowners who agree to represent themselves as owner-builder on building and construction permits are unaware that they are increasing their own risk and responsibility for the completion of the project.

The purpose of the law is to make property owners contemplate the financial difficulties that could result from contracting with unlicensed individuals.

Licensing

The Licensing Division has done wonders to reduce the time it was taking for licensing. In the past, it may have taken months to obtain a license, now it is taking two to three weeks to process an application or a waiver application.

The call center has also been revamped substantially. With respect to the criminal background check, wherein it initially took five or six months for review, they are now pulling the applications within one month.

The licensing area has started to look at proactive work. Workers' Compensation fraud is one example of that.

The Intake Mediation Center

From July 2008 through July 2009, there were over 22,000 complaints closed. The Intake Mediation Center helped in closing the complaints by closing the average complaint within 40 days of receipt. The Intake Mediation Center also obtains restitution funds for California consumers.

B. Taxes, Taxes, Taxes

Although we make it a point not to discuss taxes throughout this book, a few developments warrant mentioning. You should contact your tax attorney and/or accountant regarding these issues.

One Percent Sales Tax Increase

It is important to remember that effective April 1, 2009, the sales tax increased by one percent (1%). This increase applied to all taxable items and affects all contracts regardless of when they were signed. Many construction trade associations are co-sponsoring a bill in the Legislature that will provide relief to the construction industry of this one percent (1%) increase. Until then, make sure that you collect the additional one percent (1%) sales tax on all materials purchased for any job on or after April 1, 2009.

Sales Tax Crackdown

The state, in its current economic turmoil, is cracking down wherever it can in order to bring more money into its bank accounts. The sales tax crackdown has apparently been happening to contractors on the jobsite. Many contractors are not aware that either sales or use tax applies to construction contracts, materials, fixtures, equipment, services, and even labor. Because these contractors may not be aware of how extensive the taxes that they should be paying the state are, they are now getting audited by the State Board of Equalization and discovering that they owe a large sum of retroactive taxes.

New Use Tax Registration Requirements

California has had a use tax law since 1935. The use tax is the same rate as sales tax for any location within California and must be paid when an out-of-state vendor does not collect the California tax on purchases. Generally, the use tax is owed when individuals or businesses use, consume, give away or store tangible personal property in California that was purchased for an out-of-state vendor. In other words, since the out-of-state vendor does not pay California sales tax when you make a purchase from them, you, as the purchaser may be liable to pay the use tax, so that the state of California can still collect its taxes.

The new part regarding use tax is the registration requirement. New legislation was recently enacted that will require a qualified purchaser to register with the California State Board of Equalization (BOE), report and pay any use tax owed for purchases made in the preceding year, beginning with the 2009 calendar year. Returns will also need to be filed wherein all purchases subject to the use tax from the previous calendar year are to be reported.

A qualified purchaser (those that need to register) is a business that meets all of these tests:

1. Is not required to hold a seller's permit with the BOE;
2. Is not required to be registered or otherwise register with the BOE;
3. Is not a holder of a use tax direct payment permit; and
4. Receives at least \$100,000 in gross receipts per year from business operations.

Keep in mind, that even if you do not meet the criteria of a qualified purchaser, you may still be required to report and pay use tax, even if you are not required to register with the BOE.

For more information and to make sure that you are in complete compliance, visit www.boe.ca.gov or call the Taxpayer Information Center at 1-800-400-7115.

C. Legislation

The following are some thumbnail sketches of new cases, legislation, statutes, etc. 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 and the Governor and are now laws. Following are some new laws of interest.

AB 31 (Price) Public contracts: Small Business Procurement and Contract Act

This law changes “The Small Business Procurement and Contract Act” and increases the maximum amount a state agency can award a contract for goods, services, or information technology with \$250,000 to a certified small business without complying with specified competitive bidding requirements.

AB 210 (Hayashi) Green building standards

This deals with the California Building Standards Law. The new law provides for approval of building standards by state agencies that adopt or propose adoption of any building standard, to submit the building standard to the California Building Standards Commission for approval and adoption.

Basically what this law says is that the requirements and regulations that cities or counties are authorized to change or rework include, but are not limited to, green building standards.

Existing law also provides that specified building standards do not limit the authority of a city and/or county to establish more restrictive building standards. The law now also states that the adopted and established standards include, but are not limited to, green building standards.

AB 361 (Lowenthal) Workers’ Compensation: treatment authorization

This law provides that, regardless of whether an employer has established a medical provider network or entered into a contract with a health care organization, an employer that authorizes medical treatment shall not rescind or modify the authorization for the portion of the medical treatment that has been provided after that treatment has been provided for any reason, including, but not limited to, the employer's subsequent determination that the physician who treated the employee was not eligible to treat that injured employee.

This law provides that its provisions shall not be construed to expand or alter the benefits available under, or the terms and conditions of, any contract, including, but not limited to, existing medical provider network and health care organization contracts.

The law also provides that its provisions shall not be construed to impact the ability of the employer to transfer treatment of an injured employee into a medical provider network or health care organization.

The law further provides that its provisions shall not be construed to establish that a provider of authorized medical treatment is the primary care physician for specified purposes.

AB 370 (Eng) Unlicensed contractors

This new law changes the punishment imposed on unlicensed contractors. The prior law had a first conviction fine of not to exceed \$1,000 and/or no more than 6 months in jail. The new law calls for a first conviction fine of not to exceed \$5,000.

Prior law had a second time offender convicted with a penalty of 20% of the contract price, \$4,500, or 90 days in county jail. Under the new law, a second conviction is punishable by a fine of 20% of the price of the contract under which the unlicensed person performed contracting work, 20% of the aggregate payments made to, or at the direction of the unlicensed contractor, or \$5,000.00, whichever is greater and imprisonment in a county jail for not less than 90 days.

The third and subsequent convictions will now be punishable by a fine of no less than \$5,000 nor more than \$10,000 or 20% of the contract price or 20% aggregate payment made to, or at the direction of the unlicensed contractor (whichever is greater), and imprisonment in a county jail for not more than one year nor less than 90 days.

The person who used the unlicensed contractor will now be considered a victim of a crime and eligible for restitution for economic losses, even if that person knew that the contractor was unlicensed.

AB 395 (Fuentes) Employment: apprenticeship programs

This law provides that an awarding body that implements an approved labor compliance program may, upon mutual agreement with the Chief of the Division of Apprenticeship Standards and at his or her discretion, assist the director in the enforcement of prevailing rate wage laws and other requirements that apply to apprenticeships in public works projects through the operation of that approved labor compliance program under terms and conditions prescribed by the Chief of the Division of Apprenticeship Standards.

The law allows a contractor to appeal the result of a labor compliance program enforcement action related to apprenticeships in public works projects through specified procedures.

The law also provides that, if the involvement of the Chief of the Division of Apprenticeship Standards in a labor compliance program enforcement action is limited to a review of an assessment and the matter is resolved without litigation, the awarding body that has implemented the labor compliance program shall enforce any applicable penalties and shall deposit any penalties and forfeitures collected in its general fund.

AB 457 (Monning) Liens

In general, there are new deadlines, procedures and forms that will become required in order for a contractor, subcontractor, or supplier to successfully collect on a Mechanic's Lien claim. This is an important issue for the construction industry. The law becomes effective January 1, 2011.

Our office along with two or three other construction attorneys worked on drafting the legislation. Under present law, there is no requirement that a Mechanic's Lien claimant inform the property owner that it has recorded a Mechanic's Lien on the owner's property.

There is also no requirement that a Mechanic's Lien Claimant explain what a lien is or inform the property owner that they will likely be sued within ninety days to foreclose on a Mechanic's Lien and sell the property to pay an unpaid debt. The new law will require service of a Mechanic's Lien on the owner of the property at the time the Mechanic's Lien is recorded. If the owner cannot be served, then the original contractor or

construction lender can instead be served. The form of a Mechanic's Lien document itself is also amended to include a "Notice of Mechanic's Lien" which provides a brief explanation of the nature of the Mechanic's Lien and what the property owner might do to address the situation.

A failure to serve the Mechanic's Lien, including the Notice of Mechanic's Lien, would make the Mechanic's Lien unenforceable as a matter of law.

These are just highlights of this new law.

AB 927 (Calderon) Common interest developments: construction defects

This law changes the expiration date of certain common interests developments from July 1, 2010 to July 1, 2017.

It amends the Davis-Stirling Common Interest Development Act, which is an act that provides for the making and governing of common interest developments. This new law changes the expiration date for certain requirements to be satisfied before an association files a complaint for damages against the builder, developer, or general contractor for the development based upon a claim for defects in the design or construction of the development.

AB 1084 (Adams) Local planning: development projects: fees

This law supports new residential and commercial development by ensuring that development impact fees are transparent and reflect the current cost to cities and counties to construct such facilities more closely.

AB 1085 (Mendoza) State Air Resources Board: regulations

This law improves government transparency by requiring the California Air Resources Board to make available to the public all methodologies, inputs, assumptions and other information used in developing a proposed regulation.

AB 1086 (Miller) Public contracts: bids

The current existing law deals with public contracts and bidding. The current existing law prohibits a state or local governmental agency or entity responsible for letting a public works contract from drafting bid specifications for a contract in a manner that limits the bidding to any one concern or product, unless the specification is followed by the words "or equal." They also have to give related data. The intent of the new law is to encourage contractors and manufacturers to develop new and ingenious materials.

AB 1196 (Blumenfield) The False Claims Act

This law defines terms for purposes of these provisions, expands the definition of a claim, and requires the imposition of a civil penalty on a person found liable for a violation. This law excludes from these provisions specified claims to the Commissioner of Insurance.

This law also requires the written consent of the Attorney General or prosecuting authority of a political subdivision, or both, as appropriate under the allegations of the civil action, to dismiss an action filed by a qui

tam (“whistleblower”) plaintiff, and would prohibit the waiver or release of specified claims except as part of a settlement of a civil action filed under these provisions.

The law also modifies the statute of limitations to commence on the date of discovery by the Attorney General or prosecuting authority of a political subdivision.

This law also modifies when a court is authorized to award a defendant reasonable attorney's fees and expenses to when the court finds the claim was brought primarily, rather than solely, for purposes of harassment.

This law also states that the Attorney General or prosecuting authority of a political subdivision has a duty to investigate specific violations of the act.

AB 1364 (Evans) Public contracts: state bonds: grant agreements.

This law allows state agencies, with the consent of a grant recipient, to renegotiate the deadlines and timetables for deliverables of a grant agreement in any case where a state agency or grant recipient may not be able to meet such terms due to the suspension of programs by the Pooled Money Investment Board.

SB 95 (Corbett) California Car Buyers’ Protection Act of 2009

This law enacts the California Car Buyers' Protection Act of 2009. The law imposes certain requirements when a dealer purchases or obtains a vehicle in trade in a retail sale or lease transaction and the vehicle is subject to a prior credit or lease balance, relating to the discharge of the credit or balance. The law increases dealer's license and renewal fees to \$175 and \$125, respectively. The law increases autobroker's endorsement and renewal fees to \$100 and \$75, respectively.

SB 147 (DeSaulnier) California State University: career technical education courses

This law, notwithstanding any other provision of law, on or before January 1, 2014, requires the trustees to develop and implement a procedure for allowing a student to satisfy the completion of a general elective course requirement for the purposes of admission to the university by completing a high school career technical education course that meets either (1) specified criteria that the law requires the trustees to establish, or (2) model academic standards for high school courses adopted by the California State University pursuant to existing law.

SB 283 (DeSaulnier) Department of Water Resources: recycled water systems

This new law will extend the time that the Department of Water Resources has to adopt and submit regulations to provide design standards to safely plumb buildings with potable and recycled water systems from July 1, 2008, to December 31, 2009. Better late than never.

SB 407 (Padilla) Property transfers: plumbing fixtures replacement

This law establishes requirements for residential and commercial real property built and available for use on or before January 1, 1994, for replacing plumbing fixtures that are not water conserving, as defined as noncompliant plumbing fixtures.

Starting on January 1, 2014, this new law requires, for all building alterations or improvements to single-family residential real property, as defined, that water-conserving plumbing fixtures replace other noncompliant plumbing fixtures as a condition for issuance of a certificate of final completion and occupancy or final permit approval by the local building department. By creating a new duty to inspect for local officials, this law imposes a state-mandated local program. The law requires, on or before January 1, 2017, that all noncompliant plumbing fixtures in any single-family residential real property shall be replaced by the property owner with water-conserving plumbing fixtures.

The law also requires, on or before January 1, 2019, that all noncompliant plumbing fixtures in multifamily residential real property and commercial real property, as defined, be replaced with water-conserving plumbing fixtures. The law requires, on and after January 1, 2014, for specified building alterations or improvements to multifamily residential real property and commercial real property, that water-conserving plumbing fixtures replace other noncompliant plumbing fixtures as a condition for issuance of a certificate of final completion and occupancy or final permit approval by the local building department. By creating a new duty to inspect for local officials, this law imposes a state-mandated local program.

The law also requires, starting January 1, 2017, that a seller or transferor of single-family residential real property, multifamily residential real property, or commercial real property disclose to a purchaser or transferee, in writing, specified requirements for replacing plumbing fixtures, and whether the real property includes noncompliant plumbing. The law requires, on and after January 1, 2017, a seller of certain residential real property to make a specified disclosure in this regard.

The law also permits an owner or the owner's agent to enter rental property for the purpose of installing, repairing, testing, and maintaining water-conserving plumbing fixtures, as specified, and would require, on and after January 1, 2019, that the water-conserving plumbing fixtures prescribed by the law operate at the manufacturer's rated water consumption at the time that a tenant takes possession, as specified. The law provides that the application of its requirements may be postponed up to one year, as specified, with respect to a building for which a demolition permit has been issued.

The law also permits a city or county or retail water supplier to enact a local ordinance or policy that promotes compliance with the law's provisions or that will result in greater water savings than otherwise provided by the law. The law provides that any city, county, or city and county that has adopted an ordinance requiring retrofit of noncompliant plumbing fixtures prior to July 1, 2009, is exempt from its requirements so long as the ordinance remains in effect.

This law provides that no reimbursement is required by state to local agencies and school districts for certain costs mandated by the state for a specified reason.

SB 640 (Hancock) Regional occupational centers and programs: employer advisory boards

This new law requires an employer advisory board to recommend measures, criteria, and methods to evaluate a student's skills and knowledge. The law also requires an employer advisory board to create college scholarships as well as assist a regional occupational center or program in identifying scholarships.

In addition, the new law puts an end to the redirection of daily attendance funding for regional occupational centers or programs that had previously entered into a corrective action plan to other centers or programs. The new law will serve additional secondary students for up to three years, while the regional occupational program is in corrective action.

SB 821 (Committee on Business, Professions and Economic Development) Consumer Affairs: professions and vocations

This law will rename the Office of Examination Resources to the Office of Professional Examination Services.

This law will also now require an out-of-state landscape architect licensee to submit proof of job experience equivalent to that required of California applicants in order to waive the written examination.

This law will make various non substantive changes to the Contractors' License Law. In addition, this law will delete the prohibition of obtaining a contractor's license for one year when a person who violates the law by engaging in work as an owner-builder without a contractor's license or an exemption from licensure.

This law will also make numerous changes to other items dealing with various Boards and Bureaus of the Department of Consumers Affairs that do not relate to construction.

SB 827 (Wright) South Coast Air Quality Management District: CEQA:permits.

This law prevents the loss of thousands of jobs and keeps businesses in California by reestablishing the South Coast Air Quality Management District's credit bank.

Some Bills That Were Vetoed

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

AB 527 (Fuentes) Employee complaints: proceedings: payroll records

This bill would have provided that if the Labor Commissioner found that there was a pattern of falsification of the payroll records submitted for any pay period relating to any claim or complaint brought pursuant to the commissioner's authority, all payroll records relating to that claim or complaint would have presumed to be false.

AB 793 (Jones) Employment: discrimination

This bill would have specified when a cause of action for unlawful discrimination or unlawful employment practice with respect to compensation accrues for determining whether a complaint was filed within statutory deadlines.

AB 828 (Lieu) Green building standards

This bill would have required the State Energy Resources Conservation and Development Commission to require the Commission or any state agency proposing green building standards, to seek the input of other state agencies and consult with representatives from specified groups, as prescribed.

AB 943 (Mendoza) Employment: credit reports

This bill would have prohibited an employer, with the exception of certain financial institutions, from obtaining a consumer credit report for employment purposes unless the information is (1) substantially job-related, meaning that the position of the person for whom the report is sought has access to money, other assets, or confidential information, and (2) the position of the person for which the person is sought is a position in the state Department of Justice, a managerial position, a position in a city, county, or both city and county, that of a sworn peace officer or other law enforcement position, or a position for which the information contained in the report is required to be disclosed by law or to be obtained by the employer.

SB 45 (Padilla) Public works: payment of prevailing wage: violations

This bill would have provided that if a contractor or subcontractor, performing a public works project was found by the Labor Commissioner to be in violation of the Public Works Law with intent to defraud, for the first time, is ineligible to bid on or be awarded a contract for a public works project for a specified period of time, with prescribed exceptions related to apprenticeship requirements.

SB 242 (Yee) Civil rights: language restrictions

This bill would have made it a violation of the Unruh Civil Rights Act, to adopt or enforce a policy that requires, limits, or prohibits the use of any language in or with a business establishment, unless the policy is justified by a business necessity, that the language restriction or requirement is necessary for the safe and efficient operation of the business and that an equally effective, but less discriminatory, alternative practice does not exist.

The bill would have also provided for an award of damages, and attorney's fees as may be determined by the court, for a violation of its provisions.

SB 789 (Steinberg) Labor representatives: elections

This bill would have allowed agricultural employees to select their labor representatives by submitting a petition.

SB 802 (Leno) Works of improvement: progress payments: notice: retention proceeds

This bill would have required that for private and public works of improvement, and in a public works contract, a prime contractor or subcontractor pay to any subcontractor, not later than seven (7) days after receipt of each progress payment.

This bill, with regard to a contract entered into on or after January 1, 2010, would have required that the written notice to be given to the surety and the bond principal be given prior to the completion, as defined, of the project, or recordation of a notice of completion.

This bill would have prohibited retention proceeds from exceeding five percent (5%) of the payment, as specified, for those contracts entered into on or after January 1, 2010, between a public entity, as defined, and an original contractor, between an original contractor and a subcontractor, and between all subcontractors thereunder.

This bill, until December 31, 2013, would have prohibited progress payments upon these contracts from being made in excess of 100% of the percentage of actual work completed, and would require the Department of General Services to withhold not more than five percent (5%) of the contract price until final completion and acceptance of the project.

Legislative Bills That Never Even Got To The Governor

We thought it would be interesting to show some bills that never made it to the Governor's desk. These are bills that did not make it out of one of the houses (either the Senate or the Assembly). The following is a list of such bills.

AB 649 (Nestande) Contracts: University of California

This bill would have required specific procedures when a contractor files a change order with the Regents of the University of California pursuant to an existing contract as well as specific procedures for arbitration.

AB 1074 (Conway) Contractors: fraudulent license numbers

This bill would have provided that it is a crime if a person willfully and intentionally uses, with the intent to defraud, any number that does not correspond to the number on a currently valid contractor's license held by that person.

SB 189 (Lowenthal) Mechanic's Liens

This bill would have revised statutory provisions as well as make substantive and technical changes regarding the Mechanic's Lien laws. Although this bill did not get out of the Senate, we expect to see it again as this is actually the bill sponsored by the California Law Revision Commission after their review this past decade on the constitutionality of the California Mechanic's Lien.

SB 258 (Oropeza) Contractors: public works

This bill would have required contractors to have a public works certification from a certifying public agency in order to work on any state project. The certifying agency would have had to establish and validate standards for qualification for said qualification.

SB 392 (Florez) Contractors: limited liability companies

This bill would have allowed Limited Liability Companies to hold a contractors license just as a corporation now does.