



Construction Law Update

Legal Alert: New Legislation Signed By Governor Brown Affecting Prime Contractors, Subcontractors, Suppliers and Public and Private Owners

By V. Blair Shahbazian and Lisa D. Nicolls
Murphy Austin Adams Schoenfeld LLP

*Governor Jerry Brown recently signed two new bills, SB 293 and SB 474, which will dramatically change California's laws relating to timing for payment to subcontractors, notice for payment bond claims, retention on public works projects, and indemnity provisions in construction contracts. **It is imperative that owners, contractors, subcontractors and suppliers familiarize themselves with these new provisions and consult with counsel to avoid unknowingly waiving claims, subjecting themselves to prompt payment penalties, or executing contracts with illegal and unenforceable provisions.** Below is a very brief summary of some of the most important substantive changes. For more information regarding the specific details of the changes, contact legal counsel.*

SB 293

Payments to Subcontractors (Public and Private Works)

Under existing law, a prime contractor or subcontractor must pay each subcontractor not later than 10 days after receipt of each progress payment the amount attributable to that subcontractor's work, unless otherwise agreed to in writing. **Beginning January 1, 2012, these amounts must be paid not later than 7 days after receipt of each progress payment (again, unless otherwise agreed in writing).**

Payment Bond Claims – Changes in the Notice Requirements (Public and Private Works)

SB 293 makes significant changes to the notice requirements for payment bond claims, a change which is intended to decrease substantially the number of claimants who can serve a notice on the payment bond surety *after* project completion. Under existing law, if a payment bond claimant failed to serve a preliminary 20-day notice, that claimant could still make a claim against a

contractor's payment bond if the claimant served a notice on the payment bond surety within 15 days of recordation of the project's notice of completion or 75 days after completion (if no notice of completion is filed).

Under the new law, **which applies to all contracts entered into on or after July 1, 2012**, payment bond claimants *cannot* rely upon this later notice (as opposed to a preliminary 20-day notice) if: (1) they are a laborer; or (2) they are a first tier subcontractor and all progress payments, except those disputed in good faith, have been made to the subcontractor. In other words, a subcontractor can only serve a payment bond claim notice after completion if at least a portion of a subcontractor claimant's claim is for *undisputed* sums due.

Retention to be Withheld by Owners of Public Works/Progress Payments on Public Works

Under existing law, the percentage of retention proceeds withheld in public works contracts could not exceed the percentage specified in the prime contract. Existing law also required the owner to withhold not less than 5% of the contract price until final completion and acceptance of the work.

Effective **January 1, 2012**, contractual retention on public works projects cannot exceed 5%. This limitation does not apply to contracts where the contractor notifies the subcontractor that a bond is required, and the subcontractor fails to furnish the contractor with a bond, or if the public body makes a finding prior to bid that the project is "substantially complex," and the public body includes both this finding and the actual retention amount in the bid documents. Retention percentages in subcontracts and sub-subcontractors still cannot exceed the percentage specified in the prime contract. Also, there is no longer a *requirement* that owners or contractors on public works projects withhold any amounts until final completion.

Note that, by its terms, this new law will remain in effect only until January 1, 2016, and as of that date is repealed, unless subsequent legislation deletes the sunset provision or extends the new law. Public entities who are

considering using the “substantially complex” finding should consult with counsel as the requirements for making such a finding depend upon the type of agency involved and the ramifications of making such a finding could ripple beyond the issue of retention alone.

SB 474

Indemnity Provisions in Commercial Construction Contracts

Existing law prohibits provisions in some commercial construction contracts that require one party to indemnify the other party for the sole negligence or willful misconduct of that other party (or its agents, including for defects in design furnished by said agents).

SB 474 makes unenforceable, with respect to contracts entered into **after January 1, 2013**, that are not a direct contract with the owner of private property, provisions that require a subcontractor to insure or indemnify (including cost to defend) a general contractor, construction manager, or other subcontractor, for claims for bodily injury, property damage, or other loss to the extent the claims relate to the active negligence or willful misconduct of that general contractor, construction manager, or other subcontractor, or their agent, or for defects in design furnished by said agents, or to the extent the claims do not arise out of the scope of work of the subcontractor.

With respect to contracts between the private owner and the prime contractor (provided the private owner is not acting as a contractor, construction manager, or supplier), provisions that require a contractor, subcontractor or supplier to indemnify the owner from liability are unenforceable to the extent of the active negligence of the owner, including that of its employees. SB 474 exempts from these provisions a homeowner performing improvement projects on his or her own single family dwelling.

The new law will apply regardless of any choice of law provision contained in the subcontract but does not apply to certain contractual provisions and types of insurance (check with counsel for more details). In addition, waiver of the new law is void and unenforceable.

Indemnity Provisions in Public Works Contracts

Existing law prohibits provisions in contracts with public agencies (except contracts with professional engineers, among others) that require an entity to indemnify the public agency for its active negligence. SB 474 provides that, with respect to such contracts entered into **after January 1, 2013**, provisions that require a contractor, subcontractor or supplier to indemnify the public agency

for the public agency’s active negligence are void and unenforceable.

We reiterate that this is only a summary of the substantive changes contained in SB 293 and SB 474. For more specifics, please consult with legal counsel.



V. Blair Shahbazian
916.446.2300, Ext. 3095
bshahbazian@murphyaustin.com



Lisa D. Nicolls
916.446.2300, Ext. 3074
lnicolls@murphyaustin.com

V. Blair Shahbazian and Lisa D. Nicolls are construction attorneys who represent owners (both public and private), general contractors, subcontractors, sureties, suppliers, insurers, design professionals, construction managers and forensic laboratories in construction disputes. Blair Shahbazian is the managing partner and Lisa Nicolls is an associate at Murphy Austin Adams Schoenfeld LLP, a business law firm located in Sacramento, California.



Murphy Austin Adams Schoenfeld LLP's Construction Law Team was awarded Tier One Rankings in the U.S. News & World Report - Best Lawyers "Best Law Firms" 2010 and 2011 reports. The firm was also named a Top Ranked Law Firm in the Martindale-Hubbell® - Fortune Magazine 2012 Ranked Law Firms™ list.

Please be assured that we make every effort to make certain that the information contained in this article is current at the time the article was prepared. Because laws and legislation are constantly changing, please contact us if you are unsure whether this material is still current. Nothing contained herein is meant to be legal advice. Please contact us to answer any questions you may have.