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PUBLIC ENTITIES MUST PAY CONTRACTORS FOR NON-DISCLOSED CONDITIONS THAT REQUIRE EXTRA WORK

Public works contractors in California have often been denied change order compensation for extra work necessitated by unexpected conditions on the project that could not have been anticipated during bidding. In the past, courts have been unsympathetic to the contractors' plight, limiting recovery to approved change orders or circumstances where the public entity was intentionally deceptive in preparing bid packages to dupe unwary bidders. This week, however, the California Supreme Court has sided with contractors and allowed recovery where the public entity knew the contractor was unaware of the site conditions that later caused increased costs of performance and failed to disclose that information to bidders.

Previous California cases have allowed contractors to recover for added costs when the public entity's plans and specifications were defective and it was impossible to complete the project according to the defective plans. Now, however, the Court has given contractors another tool in litigation over differing site conditions that impact the cost to complete a job.

In siding with a takeover contractor hired to complete the defective work of the original contractor terminated by the school district, the Court held that the LA Unified School District would be liable to the takeover contractor for additional costs to correct latent defective work if the defects were known to the district, but not disclosed on punchlists or other bid documents for the takeover of the project. The Court reasoned that the public entity is responsible where it "possesses superior knowledge inaccessible to the contractor" and fails to disclose the information in the bidding process. While this particular case involved a takeover contractor, the Court's reasoning will apply to any public works project where the public entity knows there will be additional costs associated with site conditions that are unknown to the bidders.

Our Supreme Court held in L.A. Unified School District v. Great American Ins. Co.:

. . . a contractor on a public works contract may be entitled to relief for a public entity's nondisclosure in the following limited circumstances: (1) the contractor submitted its bid or undertook to

perform without material information that affected performance costs; (2) the public entity was in possession of the information and was aware the contractor had no knowledge of, nor any reason to obtain, such information; (3) any contract specifications or other information furnished by the public entity to the contractor misled the contractor or did not put it on notice to inquire; and (4) the public entity failed to provide the relevant information.

In allowing the contractor to recover, the Court explained, “as between a truly blameless contractor and the non-disclosing public entity that received the benefit of the contractor’s work, requiring the public entity to pay for that benefit is hardly unjust.”

This letter is provided for informational purposes only and should not be relied upon for legal advice. You should contact a qualified, licensed professional about your specific questions.

Lanak and Hanna, P.C. limits its practice almost exclusively to the representation of contractors, suppliers, and sureties in the construction industry and welcomes referrals. Please contact us or have your referral contact us at (714) 550-0418 ext 302 or by email.

We hope the above is of some use to you or your client/customer.

Sincerely,

Frank J. Lanak
flanak@lanak-hanna.com

Eric N. Kibel
ekibel@lanak-hanna.com