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Shaping the Future of our Industry



It has been a busy start to 2017 and AGC members have been making their presence known. I would like to personally thank each of you who attended the Installation of

Officers Banquet and State Meetings in Napa in February.

The support from members, business colleagues, friends and family made for a wonderful and memorable event. In addition, thanks to all who attended AGC of America's Annual Convention in Las Vegas. AGC of California had over 200 attendees, accounting for more than 10 percent of the convention's total attendance. Way to go, California!

One thing you can always count on in California is change. As contractors, we face challenges and are evaluating risk on our current projects, projects we are pursuing, and with our businesses on a daily basis.

Once we think we have it all figured out, they change the rules. So, you ask, who are "they?" They are the legislators in Sacramento proposing new legislation they feel is necessary. On occasion (sometimes more often than not), we do not see things the same way. Fortunately for us and our industry, AGC of California has two well-connected and active committees: the Legislative Committee and the Legal Advisory Committee (LAC).

AGC of California's Legislative Committee, chaired by Past President Randy Douglas, held its first meeting of the year at the Unger office in Sacramento on March 15, 2017, to review some of the initial bills introduced this year that will potentially impact our industry. Along with our colleagues from AGC San Diego and our legislative advocates – Felipe Fuentes, Paul Gladfelty and Jamie Khan – we reviewed the draft language for almost 200 Assembly and Senate bills.

The committee provided direction for our legislative advocates to support, oppose

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or remain neutral on each bill. In addition, we shared our position in a collaborative effort with other construction industry associations so we have a louder collective voice about the impact of proposed legislation to the state's construction industry and business community.

Working hand-in-hand with the AGC Legislative Committee, the association's Legal Advisory Committee also plays a critical role in helping shape, influence and deciphering the impact of new laws, regulations and judicial decisions on our industry and businesses. In this annual legal edition of *California Constructor*, you will read about many of the current legal issues facing contractors today.

This year, AGC of California's LAC is chaired by Chris A. McCandless, partner at Diepenbrock Elkin Gleason, LLP in Sacramento. The LAC is comprised of more than 175 of the best and brightest construction law attorneys in California. In addition to analyzing legislation, they provide daily support to AGC and its members through an array of services. These services include drafting amicus briefs on significant legal cases, offering free legal advice to members through the legal hotline, preparing standard contracts, and much more.

The outreach and influence of the AGC Legal and Legislative Committees ultimately benefits the business interest of all who work in the construction industry in California. The construction industry is filled with problem solvers, and together we can collaborate with other construction associations, labor, and elected officials to overcome obstacles and build California.

In closing, I invite you to join me at this year's Legislative Summit on May 8-9, 2017, at the Sacramento Sheraton Grande Hotel. AGC events like this create the opportunity to engage with our association, share ideas, discuss the issues, collaborate with the elected officials, and ultimately, shape the direction of our association and industry for today and for generations to come.

Mike Mencarini
2017 AGC of California President



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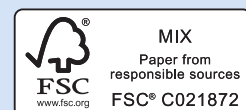
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ON THE COVER

The design-build team of AGC member Hensel Phelps and Fentress Architects is delivering the \$123 million, 196,000-sq.-ft. East County Hall of Justice facility in Dublin, CA. Turn to page 8 for more.

Photo by Stephanie Reveles.



California's World Leadership Demands Smart Thinking

By Felipe Fuentes, AGC Legislative Advocate

California is a world leader in every sense of the word – in the size of its population, as a leader of the innovation economy, as a global goods mover, and a producer of agriculture that helps feed the world, to name just a few. It is also a state with many pressing needs. Our crumbling infrastructure and the nation's worst housing crisis create immense public policy challenges for California and its elected leaders.

Despite the needs of our state, many elected officials are engaging in an ideological war with the federal government rather than battling the pressing issues here at home. The healthy competition of differing views and discourse of competing ideologies is what makes our democracy great. Recent legislative proposals, however, show that the construction community may be drawn into the crossfire of this ideological battle.

Unprecedented Proposals

In an attempt to thwart the federal government's plans on border security, some of our state's executive and legislative leaders have begun to fight these plans with unprecedented public policy proposals. One state legislative proposal would disqualify contractors that have performed any federal work on the border. Yet another would require that state public pension funds must divest from publicly traded companies that have contracted with the federal government on such projects.

The use of lawsuits based on environmental concerns has been suggested as another tool to block border project approval. Equally disconcerting are measures passed by a handful of local governments blacklisting contractors that bid on border security work.

Historically, policy debates and political differences have played out in a capitol committee room, local government chamber or on the

campaign trail. That's the way it should be. Our elected leaders should fight for their policy beliefs, but they should not use their constituents as leverage over their adversaries. To do so is to revert to times that stifled competition and in which favoritism reigned.

140 Years of Court Precedent

AGC opposes any legislation that penalizes contractors based on work that has been bid or performed on projects that elected officials deem politically unpopular. Prohibiting a contractor from bidding on a construction project because of a previous contract in which the contractor was lawfully engaged is simply discriminatory and unfair. Such proposals are contrary to more than 140 years of California Supreme Court precedent with regard to competitive bidding that focuses on the bidding process and not on what is being built.

Our elected leaders should fight for their policy beliefs, but they should not use their constituents as leverage over their adversaries. To do so is to revert to times that stifled competition and favoritism reigned.

The importance of competitive bidding is ingrained in the California Constitution to “eliminate favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous market place competition” (*Konica Business Machines U.S.A., Inc. v. Regents of University of California*, 206 Cal. App. 3d 449 (1988)).

Congress, the state Legislature and local governments lawfully have the

right to exercise which projects should or should not be funded. Likewise, contractors should be able to enjoy a comparable right to choose which projects they wish to bid on without fear of reprisal or discrimination. This is a fundamental right that should not be abridged or denied. Legislation that places a political judgement on a type of construction project is to pick indiscriminate winners and losers, not based on the merits of the construction job, but instead on the underlying construction project.

Promoting a Fair Construction Environment

The AGC works to promote a healthy and fair environment in construction for its members in the state of California. Our members bid on a multitude of private and public works on either a low-cost bid or alternative delivery basis. At times, these projects may cross geographic, policy and political lines. However, these projects are tendered and deemed necessary by those whom we elect to govern.

To prevent contractors from competing on bids for reasons other than performance or compliance is wrong and sets California on a slippery slope.

Fighting for Integrity in Bid Process

AGC will stand ready to protect the interests of its members when bid discrimination occurs. AGC will continue to advocate for objective bid procedures, integrity in bid selection and the elimination of abuses in the competitive bid process.

AGC members should not be the collateral damage of an ideological war but rather an ally to further good public policy such as competitive bidding. Our membership is willing and able to help California's elected leaders continue to make California a world leader. We can do so competitively, intelligent and fairly. ■



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Long-Sought Justice Facility Nears Finish Line

Hensel Phelps Approaching Completion of East County Hall of Justice Facility



Photos by Stephanie Reveles.

The 196,000-sq.-ft. East County Hall of Justice facility in Dublin, CA, comprises a five-story Courthouse building and a two-story County Building.

By Carol Eaton

In June 2017, the County of Alameda will welcome the completion of its brand new, state-of-the-art East County Hall of Justice facility, a long-sought court and judicial office complex that has been in the planning stage for well over a decade and under construction for the past two-and-a-half years.

Delivered by the design-build team of Hensel Phelps and Fentress Architects, the \$123 million, 196,000-sq.-ft. East County Hall of Justice facility is located on a 23-acre site in Dublin, CA. It comprises a five-story Courthouse building and a two-story County Building connected by a shared lobby and security screening area.

Thirteen criminal courtrooms and associated support spaces will be housed in the Courthouse building while the County building will provide space for the Public Defender, District Attorney and Probation Department. There are detention cells in the facility with room to house 90 inmates. The new justice facility consolidates courtroom capacities from three existing courthouses in Hayward, Pleasanton and Livermore.

Sustainable Design

Designed for LEED Silver certification, it includes an array of sustainable features such as radiant heat flooring, infrastructure for future solar panels and PV chargers, drought-resistant landscaping, energy-efficient mechanical and electrical systems and more.

The steel moment framed structure also incorporates extensive use of natural lighting. The five-story court building's main entryway is accessed at level two and opens up to a large four-story light well that feeds natural light into the six interior courtrooms. The remaining seven exterior courtrooms receive natural light through their windows.

Judges' chambers on the north side of the building are strategically positioned to offer specular views overlooking Mount Diablo, while

waiting areas outside the courtrooms on levels 2-5 provide expansive southward views of the tri-valley areas.

As the design-build contractor, Hensel Phelps holds a contract with the County of Alameda and also worked closely with the Judicial Council of California (JCC), the building's primary tenant. Other key design-build team members include Fentress Architects; Frank M. Booth, mechanical and plumbing subcontractor; Morrow Meadows, electrical and low voltage subcontractor; and Transbay, fire protection services.

Close Coordination Is Key

Hensel Phelps Project Manager John Petty said the project has involved close coordination and communication with a variety of different stakeholder and tenant groups, including the probation department, District Attorney's office, the Sheriff, courts and judges, among others.

"The goal is to ensure the space that the project stakeholders get at the end of the project is the space that they want," he said. "Everyone is really excited to take over their spaces in this building." The project is slated to complete this June, with courts to



Photos by Stephanie Reveles.

begin in early August.

Communication and collaboration among team members and stakeholders have been key drivers behind the project's success, according to Petty. "Open communication has definitely been a major factor. The project stakeholders are all pointing in the same direction, to bring in a highly successful project," he said. "The big picture goal is to provide a state-of-the-art facility for the residents of the County of Alameda, on time and within budget."

Design-Build Helps Push Project Forward

The county's decision to employ design-build as a delivery method has helped them achieve that overarching goal. It pushed the design and construction process forward despite early hurdles that included an unforeseen condition that precipitated \$1 million in asbestos removal from the site, which was formerly an old Army base.

The project broke ground August 1 of 2014, and foundation work got underway in February 2015, although final permitted design set wasn't fully signed off by the fire marshal until November of that year, Petty said. "Utilizing the design-build delivery method and having separate design packages, we were able to continue to design the building to make sure that features that stakeholders wanted were included by lengthening the design process but still meeting the construction start six months after award of the job."

The East County Hall of Justice project employed approximately 350 craftsmen on site at peak construction. Overseeing those workers on site is Hensel Phelps Project Superintendent Ciara Seger, who has risen through the ranks at the company for more than a decade since graduating with a degree in civil engineering from Brigham Young University. "Ciara is the driving force in providing the high-quality facility to the County of Alameda on time," Petty commented.

At A Glance: East County Hall of Justice Facility

- Owner: County of Alameda
- Primary Tenant: Judicial Council of California (JCC)
- Design-BUILDER: Hensel Phelps and Fentress Architects
- Others D/B members: Frank M. Booth, Morrow Meadows, Transbay.
- Design-Build Contract: \$123 million
- Building Size: 196,000-sq.-ft.
- Sustainable: Seeking LEED Silver
- Groundbreaking: August 1, 2014
- Scheduled completion: June 2017
- Unique Jobsite Program: Youth engagement program brought over 30 inner city youth to jobsite during two 6-week workshops

Engaging Local Youth

In addition to contributing well-paying jobs to the local economy, Hensel Phelps also used the project as an educational tool to engage local youth and introduce them to career opportunities in the construction industry. Hensel Phelps developed an innovative youth engagement program in concert with outreach and marketing consultancy partner, Redwood Resources.

Dubbed "Because of Construction, I Can..." the program was also run by Project Manager John Petty and brought more than 30 inner-city Oakland-area youth during two six-week workshops onto the active jobsite from June through mid-September 2016. The students participated in educational sessions and jobsite tours, where they were able to learn more about the industry and be exposed to career opportunities in the construction industry

For more on that innovative program, see the November/December 2016 issue of the AGC *California Constructor*. ■



Photos by Stephanie Reveles.

Bevy of Laws, Political Climate Affect California Contractors



By Chris A. McCandless
AGC Legal Advisory Committee Chair

By many metrics, California's construction industry finally has experienced long-awaited growth, a trend that many say is expected to continue through 2017 and beyond.

A healthy construction industry, however, depends on both private and public investment, and is affected by state and local government decisions, laws, and regulations. As lawyers, we counsel contractor clients on important changes and trends in the law, and we consider how legislative acts and policies impact contractors and their ability to successfully procure and perform work. As in years past, courts and government officials have given us a lot to consider in 2017. Additionally, this year, it is impossible to ignore how politically divided the nation has become and how that may impact contractors in California.

New Laws, Good and Bad, Impact Contractors

In 2017, contractors face a host of new laws enacted by the Legislature affecting their operations. Some laws protect contractors. For example, Business and Professions Code section 7031 has been amended to provide greater protection for a contractor whose license inadvertently lapses. Before the amendment, a lapse in licensure while performing a contract, even for a short period, could have been catastrophic.

With little exception, such a licensure lapse could have barred the contractor from recovering any compensation for its work. Moreover, it could have resulted in a court order requiring the contractor to repay all

compensation it had been paid to date for its work, even for work it performed while its license was fully operative.

The harshness of this law now has been mitigated so that diligent contractors who attempt to comply with licensing renewal requirements can be excused from the effect of Section 7031, so long as they are found to have substantially complied with the licensing law.

Promoting Open Competition

Other recent laws have been enacted to promote fair and open competition among public contractors. Specifically, Assembly Bill 2316 became law in 2017, and amended Education Code, sections 17400 *et seq.*, by eliminating a school district's authority to enter into a lease-leaseback agreement without using a competitive solicitation process.

As a result of AB 2316, school districts may continue to use the lease-leaseback procurement method, but it now requires the use of a competitive selection process, based on objective criteria published in a solicitation. This new law also provides some limited protections for contractors that may be found to have entered into invalid lease-leaseback agreements in the past.

Thank You LAC!

The *California Constructor* gives special thanks to the AGC Legal Advisory Committee, whose members prepared articles on a host of legal issues that are impacting the construction industry and your business. Additional legal articles will follow in coming months.

When it comes to public contracting, the California Legislature has longstanding policies reflected in Public Contract Code, section 100. Through that section, the Legislature expressed policies "[t]o provide all qualified bidders with a fair opportunity to enter the bidding process" and "[t]o eliminate favoritism, fraud, and corruption in the awarding of public contracts." This year, however, these important policies are competing with, and may even conflict with other social or political policies advanced by some lawmakers.

In response to the outcome of the 2016 national election and stated goals of the new administration, some state and local government officials have proposed laws that would negatively impact contractors involved in bidding or working on the proposed border wall between Mexico and the United States. The strongest proposals seek to outright ban contractors who bid to perform work on the wall from bidding on public works within their jurisdiction.

Contractors Caught in Political Crosshairs

Proponents of such legislation say that California should do everything possible to oppose the new administration's wall project, arguing it is expensive and ill-conceived, among other things. Opponents argue that these types of laws will diminish fair opportunities for qualified bidders and could diminish the integrity of competitive bidding because they preclude a contractor from bidding on or being awarded a public construction contract based on the contractor's

Continued on page 12

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Big Decision Favors Low Bidders on Public Works Projects

By Mary A. Salamone and Dan J. Bulfer, Atkinson, Andelson, Loya, Ruud & Romo

Competitive bidding laws generally require public entities to award contracts to the lowest responsible and responsive bidder on California public works of improvement.

In recent years, however, low bidders have been increasingly targeted by expensive and sometimes meritless litigation brought by unsuccessful bidders. As part of these actions, the unsuccessful bidder will allege a claim for interference with economic relations — that the low bidder interfered with its pre-existing relationship with the awarding agency by engaging in unlawful conduct, which changed

the outcome of the competitive bidding process. Depending on various factors, such as the risk-averseness of the awarding entity, such litigation has the potential to derail the project entirely for the low bidder.

On February 16, 2017, the California Supreme Court held that such claims were improper in *Roy Allan Slurry Seal, Inc. et al v. American Asphalt South, Inc.* American Asphalt South, Inc. (American) outbid its competitors on six public works contracts in Riverside County. The competitors sued American Asphalt for interference with economic advantage, alleging that American had improperly deflated its bids to obtain the contracts by failing to pay prevailing wages and overtime compensation.



The trial court sustained American's pleading challenge and dismissed the case. The Court of Appeal reversed the dismissal in a split decision. On review, the California Supreme Court held that the trial court's dismissal was proper.

Economic Relationship Not Shown

The Supreme Court noted that a claim of interference with economic advantage requires an economic relationship with a third party with a probability of future economic benefit to the plaintiff. It held that a disappointed bidder on a public works project cannot demonstrate this relationship, observing that "public contract law forbids" recognizing such a relationship when public entities are required by statute to award contracts to the lowest responsible bidder.

Further, because the purpose of competitive bidding laws is to guard against "favoritism, improvidence, extravagance, and corruption," the law requires that every bidder be treated as a stranger to the awarding entity.

Moreover, the competitors could not demonstrate any probability of future economic benefit, given that the awarding entity's solicitation for bids is merely a request for offers from interested parties. The Court noted that awarding entities retained the discretion to reject all bids under California law, and that all bids were sealed and received without negoti-

Bevy of Laws

Continued from page 10

political affiliation or willingness to work on a project proposed by those on the other side of the political aisle. Such laws may also raise important Constitutional questions.

As laws are enacted, we can expect that these questions and issues will be addressed in courts, challenged and defended by lawyers on both sides. In the meantime, however, as the political climate remains heated in 2017, so too it appears lawmakers in California may continue their opposition efforts against the new administration through laws that affect contractors and the industry. In this way, regardless of personal or political beliefs regarding such laws, California contractors now find themselves directly involved in the

national political discourse.

Not all lawyers will agree, that is certain. But as lawyers, we continue to advocate for our clients' best interests, as well as for fair and just laws that promote the continued growth and health of the construction industry. Hopefully, as we continue through 2017, lawmakers also will focus on the industry, growth and jobs, by creating and funding desperately needed public works projects in California, and avoiding controversial legislation that may affect contractors. ■

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ation. Against these facts, the Court held that submitting a bid to a public entity does not create an existing relationship, but rather the mere hope of one and a desire for future benefit.

Extensive Regulation Under Current Law

In reaching this conclusion, the Supreme Court was also cognizant of the extensive regulation to which public works contractors and awarding agencies are already subject under existing law. The Court observed that competitive bidding is already “governed by an extensive statutory scheme” that already provides disappointed bidders with the means to challenge the perceived wrongful award of a public works contract.

For similar reasons, the Court rejected the competitors’ arguments that such lawsuits were needed to deter prevailing wage violations. The area is already extensively regulated, and the aggrieved employees have an arsenal of contractual and statutory devices at their disposal that may be employed in aid of their prevailing wage rights. Significantly, none of these statutory schemes contemplated a private right of action by a disappointed bidder.

Big Decision for Public Works Contractors

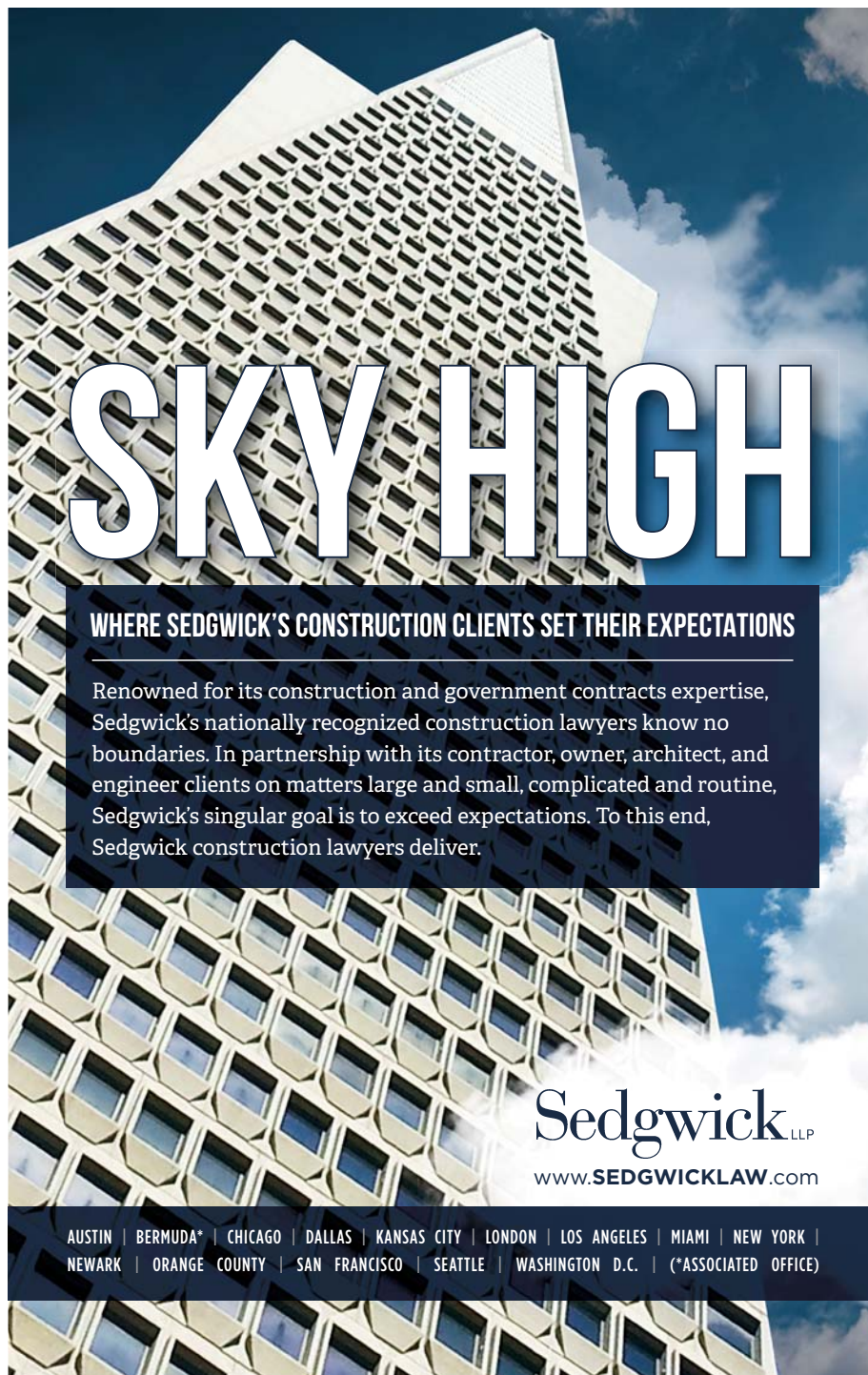
This is a tremendously important decision not only for contractors who bid on public works projects in California, but also for the public agencies who award these contracts and the citizens of California who ultimately pay for them. Competitive bidding only serves its intended purpose if it is open and bidders are not deterred from competing. The Supreme Court was deeply troubled by the public policy implications of expanding tort liability to cover tortious interference claims in the public works context, and this concern appears to have affected the Court’s holding as much as its legal analysis.

Opening the door to frivolous

litigation by second-lowest bidders had the potential to deter responsible bidders from participating in the process, thus undermining the Legislature’s goal of “stimulating competition in a manner conducive to sound fiscal practices” and exposing bidders, the awarding entity, and the public to various forms of collateral damage. As the Court recognized, these consequences do not justify the

recognition of what amounts to an unnecessary tort remedy. ■

Mary A. Salamone and Dan J. Bulfer are with Atkinson, Andelson, Loya, Ruud & Romo (AALRR). AALRR represented the prevailing party before the California Supreme Court. For more information, please visit their website at www.aalrr.com.



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Prevailing Wage Rules Impact Concrete Deliveries



By Deborah E.G. Wilder

On March 6, 2017, a California trial court ruled Labor Code Section 1720.9 unconstitutional and granted a motion for summary judgment. *Allied Concrete, et al. versus Brown, et al.* challenged the validity of AB 219 and the requirement to pay prevailing wages for concrete deliveries. The trial court agreed with the Plaintiffs, declaring the law unconstitutional and ordering a permanent injunction preventing enforcement of the Labor Code Section.

However, the Department of Industrial Relations is committed to appealing the matter and will seek an

order staying the injunction – meaning the concrete deliveries rules would stay in effect until the Appellate Court ruled. So, where does that leave contractors and concrete companies? At this juncture, the recommended course of action is to continue to abide by Labor Code Section 1720.9 until the Appellate Court rules.

Here is a brief outline of the obligations under Labor Code Section 1720.9:

Prevailing wage requirements apply to concrete deliveries for all contracts awarded on or after July 1, 2016. This means that concrete deliveries on existing project (awarded prior to July 1, 2016) are not covered by

the new law. However, the law is not as straightforward as it may appear, and a contractor ordering a concrete delivery may find themselves assuming additional liability if they are not careful:

- Prevailing wage applies to concrete deliveries for public works contracts awarded AFTER July 1, 2016.
- The concrete company must be provided a contract, in writing, informing the company that the delivery is subject to prevailing wages. (If not, the contractor ordering the concrete delivery will be liable for the prevailing wages to be paid to the delivery driver).
- Prevailing wages to be paid are

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Continued from page 14

based on the location of the batch plant, NOT the location of the project. This is counterintuitive for contractors who have always paid wages based on the location of the project. If a driver starts the day at a batch plant in one county and then goes to a batch plant in another county for additional deliveries, then the wage rates (if different between the counties) must be separately tracked and paid.

- Wage determinations can be found on the Department of Industrial Relation's website under Statewide determination under "Driver On/Off Haul to Construction Site" and then selecting Mixer Truck. Wage rates are issued by county. Link: <http://dir.ca.gov/OPRL/PWD/C-2K-List.htm>
- Because this work is now covered by prevailing wages, concrete companies are now required to be registered as "public works contractors" with the Department of Industrial Relations (DIR) and pay an annual \$300 BEFORE a bid is submitted. For more information on registration, go to the DIR's link: <http://www.dir.ca.gov/Public-Works/Contractors.html>.
- Failure to register before the bid date (or if no bid date, then before the contract is signed or delivery begins — whichever is first) will include a \$2,000 fine for late registration.
- Registration is required annually and runs from July 1-June 30.
- Certified payrolls must be submitted by the concrete company through the DIR's eCPR system. The system was suspended in January 2016 but reinstated August 1, 2016. Payrolls must be kept on a weekly basis and submitted to the DIR at least monthly.

Tips for Contractors: A contractor who typically orders concrete for construction projects should: establish a contract template and protocol for providing a written contract or special

bid form to concrete suppliers which includes specific prevailing wage contract language; be sure to check the "contractor registration" of all concrete suppliers; collect/review certified payrolls from the concrete supplier.

Tips for Concrete Companies:

Concrete companies are new to the arena of prevailing wage, and it would behoove owners to become familiar with the prevailing wage requirements in California. Prevailing wage is more than just paying a certain wage rate. It includes: understanding what is "covered work" (starting at the yard/plant and driving the truck under the hopper all the way through returning to the yard and cleaning the truck); that wage rates can change depending on the location of the batch plant; wage increases may occur during the course of a project; and how to calculate and take credit for fringe benefits. Concrete companies would also be wise to establish a protocol which includes asking /confirming with a customer

whether or not the work is subject to prevailing wage requirements.

A good rule of thumb is to remember that anytime work is being done on property owned by a public agency, prevailing wage will almost always apply. This includes a state agency, city, county water district, fire district, public park, special district or school district. Prevailing wage also applies to maintenance work with a public entity over \$1,000. In some instances, prevailing wages are also required on property where it may appear that the owner is not a public agency, but because of certain public funding or condition, prevailing wages are imposed. ■

Deborah Wilder is a licensed attorney and president of Contractor Compliance and Monitoring Inc. (CCMI). She is also the author of What Every Contractor Should Know about Prevailing Wages and AGC of America's Davis Bacon Compliance Manual. She can be reached at: dwilder@ccmilcp.com.

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A Look at the New Public Works Claims Resolution Statute



By Garret D. Murai
Wendel, Rosen, Black & Dean LLP

If you're a public entity or contractor involved in public works construction, you should be aware of a new law, AB 626, which took effect on the first of this year and establishes a new mandatory claims resolution process for disputes on public works projects. Here's what you need to know:

What is the new law and where is it codified?

AB 626 added new Public Contract Code section 9204 that – according to the bill's author, Assembly member David Chiu of San Francisco – establishes “a claim resolution process applicable to any claim by a contractor in connection with a public works project.”

The statute defines “claim” as: (1) “[a] time extension, including, without limitation, for relief from damages or penalties for delay assessed by a public entity under a contract for a public works project”; (2) “payment by the public entity of money or damages arising from work done by, or on behalf of, the contractor pursuant to the contract for a public works project and payment for which is not otherwise expressly provided or to which the claimant is not otherwise entitled”; and (3) “payment of an amount that is disputed by the public entity.”

The statute defines “public works project” as “the erection, construction, alteration, repair or improvement of any public structure, building, road, or other public improvement of any kind.”

What does the new law provide?

The new law provides for a mandatory three-step claim resolution process involving a contractor's submission of a claim and the public entity's response, informal resolution through a meet and confer process, and, finally, mediation or other non-binding dispute resolution process.

Does the new law apply to all public entities?

The new law applies to most, but not all, California public entities. Except as otherwise provided, the new law applies to state agencies, departments, offices, divisions, bureaus, boards and commissions; the California State University and the University of California; and local cities, charter cities, counties, charter counties, city and counties, charter cities and counties, districts, special districts, public authorities, political subdivisions, public corporations, and nonprofit transit corporations wholly owned by a public agency and formed to carry out the purposes of the public agency.

Public entities to which the new law does not apply are:

- The Department of Water Resources
- The Department of Transportation
- The Department of Parks and Recreation
- The Department of Corrections and Rehabilitation
- The Military Department
- The Department of General Services
- The High-Speed Rail Authority

Does the new law apply to all public works contracts after January 1, 2017?

No. While the new law took effect on January 1, 2017, it only applies to public works contracts entered into on or after January 1, 2017. Also, unless extended or repealed, the new law only remains in effect until January 1, 2020.

Can public entities waive or modify the requirements of the new law in their contract documents?

“No” to the first part, and “yes” to the second, with limitations. Public entities cannot waive the requirements of the new law and, if they do so, such waiver shall be deemed void and contrary to public policy. In addition, the text of the new law or summary of the new law must be set forth in the public entity's plans and specifications. However, public entities may prescribe reasonable change order, claim and dispute resolution procedures, and requirements in addition to those provided under the new law, so long as they do not conflict with or otherwise impair the timeframes and procedures set forth in the new law.

What if a public entity fails to comply with the deadlines set forth under the new law?

Failure by a public entity to comply with the deadlines set forth under the new law shall result in a claim being deemed denied in whole. A claim that is denied by reason of a public entity's failure to respond to a claim shall not constitute an adverse finding with regard to the merits of the claim or the

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SB 465 Has Major Impact on State's Construction Industry



By Eric Firstman, Meyers Nave

On January 1, 2017, Senate Bill 465, as signed by Governor Jerry Brown, became law in response to the June 2015 apartment balcony collapse in Berkeley, California that killed six students and injured seven more.

The law's purpose and its immediate and long-term impacts on the construction industry can best be understood in the context of the press release issued by its co-author, State Senator Jerry Hill. The release states that the new law "ensures that state agencies tasked with overseeing the construction industry are taking appro-

priate steps to identify bad actors and improve building standards."

For the construction industry, it is especially important to understand that SB 465, and its focus on "bad actors" and improving the building code, passed unanimously in the Assembly and Senate. As a result, the construction industry should take compliance very seriously and actively participate in the working group studies that the law mandates be completed by January 1, 2018. The purpose of these working group studies is to assess: (1) potential changes in related building codes and (2) possible self-reporting of judgments, arbitration awards and settlement payments of

negligent construction claims and other issues relevant to contractor licensing status.

We examine a few of the key impacts in this article.

Impact #1: Self-Reporting Convictions and Multi-Agency Reporting of Actions Against Contractors

Beginning January 1, 2017, licensed contractors must self-report, in writing and within 90 days of their first knowledge, to the Contractors' State License Board (CSLB) any conviction of the licensee for any felony or any other crime that is "substantially related to the qualifications, functions,

Legal Public Works

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responsibility or qualifications of the claimant.

What about claims by subcontractors?

If a subcontractor or lower-tiered subcontractor (e.g., second-tier subcontractor) has a claim, the direct contractor may present such claim on behalf of the subcontractor or lower-tiered subcontractor to the public entity. A subcontractor may request in writing, either on its own behalf or on behalf of a lower-tiered subcontractor, that a direct contractor present a claim for work that was performed by the subcontractor or a lower-tiered subcontractor on behalf of the subcontractor. Within 45 days of receipt of the request, the contractor shall notify the subcontractor in writing as to whether the direct contractor presented the claim to the public entity and, if the direct contractor did not present the claim, provide the subcontractor with a statement of the reasons for not having done so. ■

Garret Murai is a partner and construction attorney at Wendel, Rosen, Black & Dean LLP in Oakland, California. He is also the editor of the firm's California Construction Law Blog which can be found at www.calconstructionlawblog.com.



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and duties of a licensed contractor.” The legislation is unclear on the subject of its retroactive application. However, instead of stopping with this new reporting obligation, SB 465 further expanded this enforcement information tool in two important ways.

First, the new law requires California’s Department of Industrial Relations’ Division of Occupational Safety and Health (Cal/OSHA) to transmit to CSLB (and potentially other agencies) copies of any citations or other actions taken against any persons, licensed or not, working in the capacity of a contractor as defined in the Contractors’ State License Law.

Prior to the new law, Cal/OSHA was only required to transmit to CSLB copies of “reports made in any investigation” involving a licensed contractor. Under the new law, Cal/OSHA will do more than transmit investigation reports. Cal/OSHA will also transmit to CSLB citations, regardless of whether the contractor is guilty of a violation, and other actions taken by Cal/OSHA against a contractor.

Second, the law reaches out to other agencies by authorizing CSLB to enter into interagency agreements with other state or local agencies to receive “any information relevant to its priority to protect the public.” The new law is designed to provide CSLB with a comprehensive collection of data about contractors’ work in general as well as specific regulatory and legal actions taken against contractors by other agencies.

The law imposes increased accountability regarding disciplinary information on contractors and empowers CSLB to gather information about licensee behavior that it deems necessary to utilize in deciding when action must be taken. It is critical for contractors to know exactly what information is available – from all relevant agencies – to CSLB and to conduct their business in a way that is consistent with its professional license standards.

Impact #2: Working Group Studies and Recommendations for Building Code Changes

One key aspect of the law is designed to have a powerful impact by helping CSLB identify and take action against bad actors and bad behavior. However, another component could have even greater impact because it could lead to changes in state building standards and codes. The legislation directs a working group formed by the California Building Standards Commission to study recent failures of elevated elements on the exterior of buildings, such as balconies, to determine whether statutory changes or changes to the California Building Standards Code are necessary. The working group must submit its report on findings and recommendations by January 1, 2018.

The working group may solicit input from a wide range of public and private entity stakeholders, including “the building industry, the wood, steel and concrete industries, and any other interested parties.” It is important that all members of the construction industry participate immediately because the law states that the working group may “at any time” (prior to January 1, 2018) determine that changes to the California Building Standards Code “are needed as soon as possible in order to protect the public.”

All members of the construction industry should understand that the new law closes the door to the working group’s activity on January 1, 2018, but it encourages the working group to act as fast as possible prior to that date.

Impact #3: Potential Self-Reporting of Judgments, Arbitration Awards and Settlements of Claims

When initially proposed, the part of the law that generated the most controversy was mandating that contractors report judgments, arbitration awards and settlements. Opponents of the reporting requirement, including the California Building Industry Association, noted that settlements are often a means of avoiding even costlier litigation and provide no information on the merit of claims. Other opponents described

the litigious nature of construction and how construction defects may result from one of the many causes or actors in the chain of design and construction of the work shown on the plans and specifications.

Supporters, including Senator Hill, countered that “it is routine for other professional such as architects, accountants, and engineers to report settlements and judgments to their appropriate regulator.” Senator Hill described the contractor that built the failed Berkeley balcony as having “in previous years paid out \$26.5 million dollars in construction defect settlements.” However, without a reporting requirement in the current law, the CSLB had no opportunity to perform due diligence to ascertain the reason for the settlements.

As passed, the new law directs the CSLB to study judgments, arbitration awards, and settlements of construction defect claims on rental residential units and, by January 1, 2018, report its recommendation to the Legislature on the merits of requiring contractors to report such information.

Get involved

The photographs of the torn waterproofing membrane and dry rotted joist ends protruding from the exterior building face following the Berkeley balcony tragedy are compelling, and the personal losses are horrific. Regulatory changes are frequently generated by catastrophes, and SB 465 is a first step toward new regulations of the construction industry.

The SB 465 working group studies regarding further reporting requirements and potential building code changes will be completed this year, and additional legislation is likely to follow. All representatives of the construction industry should make their voices heard regarding the expected new regulations. ■

Eric Firstman is a Principal with Meyers Nave and the Chair of the Construction and Facilities Practice Group.

Even in 'Good' Times, Contractors Should Seek Protection from Performance Risk

By Jonathan J. Dunn, SMTD Law LLP

In this post “Great Recession” economy, contractors may be optimistic. But “good” economies bring other risks, including over-commitment, new entrants to the marketplace, shortages of qualified labor, and commodity price fluctuations, such that contractors should still be wary of non-performance from subcontractors and suppliers.

This article discusses various options of securing non-insurable contractual performance, including letters of credit (LCs), surety bonds and subcontract default insurance. Each has its distinct attributes, and one may not fit all circumstances. But performance assurance is an important risk tool for general contractors.

Bonds. Suretyship is one of the oldest forms of obligations, with references in the temple of Apollo at Delphi and Proverbs in the Bible. Medieval sureties were often relatives taken hostage. This led to legal and equitable defenses going back to 1215 and the Magna Carta. Over time, surety law developed special rights, defenses, and remedies not often found in the bond.

Surety Is Not Insurance. A surety is one who contracts to answer for the debt or default of another. The principal and surety obligation is joint, several, and primary to the obligee. As between principal and surety, the principal is primarily liable and the surety is secondarily liable. An insurance policy provides indemnity to the insured against loss from a fortuitous but statistically predictable event. It is a two-party contract. Regulators set premium based on the statistical certainty of loss, and insurers spread the cost among a group of insureds. A

surety bond is a three-party contract between principal, obligee and surety, with premium based on cost for an extension of credit.

Bond Cost and Enforcement.

Costs vary, but generally range between 0.5 and 1.5 percent of the contract amount. For this one premium, an obligee (owner, general contractor, etc.) can obtain a 100 percent performance, 100 percent payment, and often maintenance bonds. However, obligees should not always expect immediate performance where default is contested. Unlike LCs, bonds are typically conditioned upon default *and* the obligee’s performance. This has led to some criticism of surety claims, which may result in litigation. A definite benefit is a principal’s bankruptcy does not typically prevent enforcement.

Letters of Credit. LCs are decidedly different from bonds. LCs are premised on “pay now, argue later” and meant to be certain and mechanical. Despite Article 5 of the Uniform Commercial Code, many LCs are governed by international banking and commerce agreements.

The legal principles of “independence” and “strict compliance” govern, under which LCs are deemed independent from the transactions they secure, and unaffected by disputes regarding performance. Thus, banks don’t usually investigate the default, and pay on proper presentation.

Types of LCs. The most widely used LCs are “commercial” and “standby.” Commercial LCs facilitate sales of goods, particularly international sales, and serve as the payment mechanism. Standby LCs guard against non-performance on an underlying agreement. Issuing banks presume they will not pay under standby LCs, and only

about 0.03 percent end up as losses.

Comparatively, surety bonds and guarantees are secondary obligations, contingent upon default.

Thus, a surety or guarantor investigates the default and has no obligation until default is established. LCs are primary obligations depending solely on the beneficiary’s presentation of conforming documents, with proof of default being irrelevant absent fraud.

LCs may also be either revocable or irrevocable, clean or documentary. A revocable LC may be unilaterally amended or canceled prior to presentation; whereas irrevocable LCs may not be amended or canceled without consent until the term expires. Most standby LCs are also documentary, meaning certain documentation must accompany presentment. A clean LC is payable solely with presentation of a draft. Under all LCs, presentation must occur within the effective period, and must strictly comply in form and manner, regardless of whether the underlying obligation is delayed.

LC Cost and Enforcement. The fees and costs of LCs are annual and typically a small percentage (1 percent) of the amount of the LC. Nearly all applicants fully collateralize the issuer for the life of the LC. For this reason, LCs in construction are often a small percentage (i.e., 10 to 20 percent) of the underlying contract’s price. In rare instances a draw on an LC can be blocked through injunction based on fraud. Like surety bonds, the bankruptcy of the underlying applicant



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Labor Relations & The Art of Negotiation

By Sue Weiler-Doke, Director, Industrial Relations – Northern California

Negotiation is a fact of life. Everyone negotiates something every day. Many people believe that negotiations are “all or nothing,” and that there has to be one winner and one loser. That is just simply not true. Negotiation is a back-and-forth dialogue that is designed to help reach an agreement when you and the other side have some needs or issues in common and some needs or issues that are not in common. The fact is that the best deals combine terms and ideas from both parties.

While most negotiating seems like common sense, it is not uncommon for people to get caught up in the

emotion of the moment. Emotion has no place in a successful negotiation. It takes doing your homework and the discipline of attention, not emotion, to keep a negotiation moving forward. You need to keep your eye on the big picture at all times.

Communicate

There is no negotiation without good communication. Communication is not always an easy thing, even between people who have a lot in common or have shared similar experiences. Whatever you say, you should expect that the other side will most likely hear something different. You need to have a clear understanding of what you are saying, be clear when

you speak, and be sure that what you said is what they heard. The better the communication is the better the negotiation will be.

Listen

One of the most overlooked actions in a good negotiation is being an active listener. You need to be just as concerned with what others are saying as you are about what you are saying. The best negotiators listen first and talk second. They actively listen to what others have to say, follow that lead, and ask good questions. Good negotiators lean in to the conversation and use head nods to show interest and to let others know that their comments are understood. You also need to listen without distractions. Be sure to put away phones and computers to minimize the temptation to wander from the topic at hand. This may sound easy, but as we all know, undistracted listening isn't always easy. Communicating our ideas clearly, and hearing other's ideas in return, takes thought and practice.

Keep It Results-Oriented

Keep the focus of the negotiation results-oriented and always be looking for what would make the best long-term deal for both sides. Keep the emphasis of the negotiation on the facts and away from the people involved. By taking the emphasis off the people involved and keeping it on the facts, the negotiation is more likely to be amiable and not antagonistic.

Whether in the business environment or in your family life, people reach most decisions through negotiation. The best negotiators are patient as well as persistent. They look for the win-win.

For more information about AGC's Industrial Relations services, please visit our website at www.agc-ca.org/services/industrial/ or contact the IR Department South at (626) 608-5800 or North at (925) 827-2422. ■

Performance Risk

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does not generally affect enforcement against the issuer of the LC.

Subcontractor Default Insurance.

In 1995, Zurich established Subguard to protect against subcontractor defaults. Since then, Arch and XL Group have offered similar insurance products. Apparently available to owners and contractors, its target purchaser appears to be a general contractor with a high volume of subcontracted work in private projects.

The policy is first-party insurance and requires insureds to prequalify subcontractors. Contractors that can work with known subcontractors repeatedly, or that can quickly and efficiently prequalify, may be best suited. Contractors that use insurer-approved prequalification services may get discounts. Advocates contend it is an effective alternative to surety bonds in certain circumstances. There are limited actual real-cost comparisons.

Insurance Cost and Enforcement.

Cost is often negotiable based in part on loss experience, after insureds exhaust deductibles. Initial costs

are reportedly comparable to surety bond premiums (0.85 to 1.5 percent); however, such costs do not factor in deductibles or copayments, which can range into seven-figures. Sometimes insurers require minimum premiums over three to five years. Pay-out is after a declaration of default, notice, submission of proof of loss, and proof of payment of deductibles. Insurers are subrogated to the losses, and insureds must cooperate in recovery efforts. Payments are made with an express reservation of rights and reimbursable if the default is found in error.

Conclusion. Many contractors and lawyers have their opinions on these options, and each have their pros and cons. Regardless of the option selected, using some form of performance assurance is good practice, and certainly much better than braving performance risk entirely alone! ■

Jonathan J. Dunn is a senior partner at SMTD Law LLP and is the current vice-chair of the AGC-CA Legal Advisory Committee. For more information, go to www.smtdlaw.com.

California Members, Chapter Well-Represented at 2017 AGC National Convention

More than 2,500 people attended the AGC of America Annual Convention in Las Vegas in March 2017, and of those about 200 represented the AGC of California chapter.

The convention featured an array of educational seminars and opportunities to network. It also honored the nation's most impressive construction projects and the individuals and companies behind them. Several awards were presented to AGC member companies and their respective chapters throughout the week, and as usual the California Chapter was prominent among the list of award recipients.

Following is the list of AGC of California members presented with awards at this year's Annual Convention.

Alliant Build America Awards

The 2017 Alliant Build America Awards recognizes general and specialty contractors for their excellence in the construction industry. To evolve its showcase, the Alliant Build America Awards now includes a Partnering Excellence category to recognize those projects best epitomizing the principles of partnering. The Build America Award winners from AGC of California include:

- Hensel Phelps – Building Over



Blois Construction, Inc. received a first place award in the 2017 AGC Construction Safety Excellence Awards.



AGC of California leaders on hand during the AGCC reception at the 2017 AGC National convention include, from left, Immediate Past President Jaimie Angus, Past President Randy Douglas, Sr. Vice President Jerome Di Padova, 2017 AGC of America President Art Daniel, AGC of California President Mike Mencarini, Vice President Walt Johnson, and Treasurer Mike Blach.

\$100M New for their San Francisco International Airport Replacement Airport Traffic Control Tower and Integrated Facilities project.

- Kiewit/Manson, AJV & Caltrans – Marvin M. Black Partnering Excellence Merit Award for their SFOBB ESFR Phase 1 – Pier E3 Demo project

Construction Safety Excellence Awards (CSEA)

Several AGC of California members who participated in the California Construction Safety Excellence Awards were named finalists in the National AGC Construction Safety Excellence Awards (CSEA). The coveted national recognition of safety excellence is a great honor for those awarded. Congratulations to the following AGC of California nominations:

First Place

- Blois Construction, Inc. – Heavy Division, Under 200,000 Work Hour
- Unger Construction Company – Building Division, Under 150,000 work hours

Second Place

- Lyles Mechanical Co. – Specialty Division, Under 300,000 work hours
- Nova Group, Inc. – Heavy Division, 200,000 – 1 million work hours

Third Place

- B.T. Mancini Co., Inc. – Specialty Division, 500,000 – 750,000 work hours

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Unger Construction Company received a first place award in the 2017 AGC Construction Safety Excellence Awards.

California Legislators Approve Landmark Infrastructure Funding Plan

\$52.4 Billion Plan Will Fix Roads, Sustain Funding and Create Jobs

By Sophia Taft, Communications Manager

AGC of California, the construction industry and state of California scored a major win on April 6, 2017 when the California Legislature passed SB 1, the transportation funding bill that would generate more than \$5 billion annually over 10 years. The State Senate voted 27-11 and the Assembly voted 54-26, securing the two-thirds votes required to pass the bill. The bill was expected to be signed by Gov. Jerry Brown in early April as this issue went to press.

"We thank Transportation Chairs Senator Beall and Assemblymember Frazier, as well as Governor Brown for hearing our plea and carrying this bill

through," AGC of California Chief Executive Officer Tom Holsman said.

"This is a win to fix California roads," Holsman said. "We have been at the forefront of this nearly two-year 'Fix Our Roads' campaign and have fought for over a decade to encourage state legislators to find an adequate solution for the state's infrastructure woes."

"The passing of SB 1 pushes California in the right direction and moves the industry further along, specifically in job opportunities," he added.

In addition to fixing California roads, SB 1 could create thousands of jobs within the state. For every \$1 billion spent on infrastructure, 28,000

jobs are created or sustained. About 10,000 of those are direct construction jobs and is followed by a ripple effect on economic revenue to local businesses.

"The numbers speak for themselves," Holsman said. "The opportunities in construction and in the construction industry will flourish. The work picture will be very strong for the coming years."

AGC of California thanks its members who took the time to attend rallies and call their legislators to urge them to pass this important infrastructure funding plan. This bill would not have passed without their "voice." Its passing is a monumental industry victory. ■

National Convention

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AGC in the Community Awards

An initiative of AGC Charities Inc., the AGC in the Community Awards recognize chapter and member service projects. Herzog/Stacy & Witbeck – Joint Venture received an award in this category for Children's Center for the Visually Impaired – Sensory Garden. Additionally, Balfour Beatty Construction received the Merit Award for their 2016 Sharefest Golf Outing/Workday.

Student Chapter Awards

Multiple AGC of California student chapter members earned recognition at this year's Annual Convention. The AGC of America Education and Research Foundation



Mike and Carey Mencarini, AGC of California President and First Lady, are pictured with AGC of America President Art Daniel and First Lady Robbie.

awarded 11 scholarships to California college students, and AGC of California Student Chapter faculty member Philip Barlow of Cal Poly-San Luis Obispo was recognized with the

AGC of America Outstanding Educator Award. This marks the second-consecutive year a California educator has been honored with this prestigious award.

A California Tradition

AGC of America President-Elect Art Daniel, representing Texas, was installed as AGC of America's 2017 President at the close of Convention. Guests joined AGC of California President Mike Mencarini and First Lady Carey Mencarini for the President's Reception. In keeping with the longstanding California tradition, they presented the National President and First Lady with the California letterman jacket and First Lady pendant. ■



Cal Poly SLO Student Chapter Sends 12 to National Convention

AGC of California's Tri-Counties District has had a steadfast commitment to supporting and encouraging active participation from Cal Poly San Luis Obispo's Student Chapter. This support was evident by the sheer number of Cal Poly Student Chapter members who came to Las Vegas for the AGC of America Annual Convention. Made possible by a scholarship check presented by the Tri-Counties District board, Cal Poly

SLO sent 12 students chapter members to participate in the various education and training programs that National offered.

Cal Poly Student Chapter President Marco Maffioli expressed the chapter's gratitude, saying, "We had a once-in-a-lifetime experience attending this conference, and it is something that we will never forget. We learned so much from all the speakers, seminars, and industry professionals that we met. We would not have been able to attend if it weren't for the Tri Counties District and its generous donation to our Student Chapter."

Southern California's Kick-Off Event of the Year

The three Southern California Districts of Los Angeles, Orange County and Riverside/San Bernardino, came together on February 23, 2017 in Fullerton, CA to kick off the first regional networking event of 2017. With a registration record of over 280 members, the event was a big success and networking opportunity for all who attended.

Drawing a mix of AGC general contractors, subcontractors and associate members, this event continues to be one of the premier Southern California mixers. Pear Valley Winery



supplied an array of wines to satisfy even the sophisticated palate, and Stone Brewing Company came out to offer a variety of beers.

Giving Back to the Community

The Southern California Construction Leadership Council (CLC) came together to partner with the San Gabriel Valley Habitat for Humanity on Saturday, March 18th by assisting with the framing of six new homes in the Los Angeles area. Habitat for Humanity's commitment to "transforming lives and communities by bringing people together to build, renovate, and repair affordable homes for families in need" falls exactly in line with the projects that the SoCal CLC pledged to lend their time and energy to helping this year. In addition to the CLC, AGC's Student Chapters at CSU Fullerton and Long Beach also came out to donate their time to this great cause.



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