

## ROGERS JOSEPH O'DONNELL

To: AGC CA-LAC Members  
From: Tyson Arbuthnot  
Date: April 12, 2010  
Re: New Case Summaries through April 9, 2010

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1. *Dillingham-Ray Wilson v. City of Los Angeles*  
10 C.D.O.S. 3481, docket No. B192900 [Cal. App. 2d Dist.] (March 18, 2010)

**Contractors are entitled to use best evidence to prove damages under a public contract, including using engineering estimates or a “modified total cost theory.”**

Plaintiff Dillingham-Ray Wilson (“DRW”) was awarded a public contract by the City of Los Angeles to retrofit a wastewater treatment plant. During construction, the City issued over 300 change orders containing more than 1,000 changes to the plans and specifications. On rare occasions, the City directed DRW to perform changes on a time and materials basis. In general, the City requested an estimate of the cost of work, told DRW to commence work and agreed the parties would negotiate a lump sum payment at a later date. Though the parties agreed on the compensation payable for some of the time and materials change orders and lump sum change orders, not all the change orders were settled. When DRW completed the project, it asked for an equitable adjustment to compensate it for work performed without a price, and for the expenses and losses incurred due to the City's interference and delays. The City refused.

DRW sued the City to, *inter alia*, obtain an equitable adjustment based on the change orders. The City asserted that the contract provided that DRW could only recover on a time and material basis under change orders for which the parties did not reach agreement on a lump sum, and that DRW could only prove its damages with documentation of actual costs and not engineering estimates or any other method. The City claimed that case law and Public Contracts Code section 7105 limited DRW's proof of damages to the methods provided in the public contract. DRW disputed this interpretation of the contract, and alleged that section 7105 only limited the measure of damages and not the method of proof. Section 7105(d)(2) states that the compensation payable to a public contractor for amendments and modifications has to be determined as provided in the contract. The trial court found that the contract did restrict DRW to time and material recovery, and it excluded proof of damages through engineering estimates. It also barred DRW from proving its damages based on a “modified total cost theory.”

The Court of Appeal reversed. It found that the contract was ambiguous as to restrictions on the proof and measure of damages, and remanded the case for a further trial on the interpretation of

the contract. It also found that section 7105 and applicable case law only restrict the measure of damages, and not the method of proving damages (e.g., engineering estimates versus actual costs). The Court of Appeal stated that if, after remand, the trial court or jury interpret the contract and conclude that it does not require DRW to document actual costs on the change orders, and if engineering estimates are the best evidence of damages available, then DRW can offer those estimates to prove its claims. The court also found there is no prohibition on proving damages under a public contract using a modified cost theory (i.e., total cost of performance, minus contract amount, minus any unreasonable costs). Thus, DRW would also be allowed to pursue this method of proof on remand if the contract does not require it to document its actual costs.

2. *Alatriste v. Cesar's Exterior Designs, Inc.*  
10 C.D.O.S. 4310, docket No. D054761 [Cal. App. 4th Dist.] (April 6, 2010)

**Homeowner's prior knowledge of contractor's unlicensed status no defense to claim for reimbursement of all money paid, even if license obtained partway through performance of work.**

Plaintiff contracted with defendant Cesar's Exterior Design, Inc. to perform landscaping work at his home. He then sued to recover the money he paid defendant, because it turned out that defendant did not have a valid contractor's license. Business & Professions Code section 7031(b) is a "sword provision," which provides that "a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract." The trial court granted summary judgment in Plaintiff's favor, and Defendant appealed.

Defendant conceded that it was unlicensed when it began the work, but contends that this claim is barred because Plaintiff knew about its unlicensed status. The Court of Appeal rejected this contention. The California Supreme Court had previously held that the "shield provision" of the licensing requirement under section 7031(a), which provides a complete defense to a claim for payment from an unlicensed contractor, applies even when the customer knew the contractor was unlicensed. The Court of Appeal held that this rationale applies equally to the "sword provision," so that the knowledge of unlicensed status does not provide a defense to the customer's claim for reimbursement of payments made for unlicensed work.

Defendant also claimed that it is entitled to retain payment for the work it performed after it obtained its license. The Court of Appeal similarly rejected this claim. It found that section 7031(b) provides a reimbursement right for all amounts paid to an unlicensed contractor if the contractor was unlicensed at any time during the performance, unless the contractor can show substantial compliance with the licensing requirements during that time. Here, Defendant could

not show substantial compliance because it did not even attempt to obtain its license until after the work had commenced.

3. **Stockton Citizens for Sensible Planning v. City of Stockton**  
10 C.D.O.S. 4079, docket no. S159690 [Cal. Sup. Ct.] (April 1, 2010)

**Flaws in decision-making process did not prevent triggering of 35-day limitations period for filing of challenge to agency approval of CEQA-exempt project.**

The City of Stockton approved the construction of a Wal-Mart Supercenter, under the authority of its Master Development Plan. It filed a public notice announcing the projects exemption from the California Environmental Quality Act, Public Resources Code § 21000, *et seq.* (“CEQA”). A “ministerial project” whose approval involved little or no exercise of discretion by the public agency is exempt from CEQA.

Nearly six months later, plaintiffs filed a lawsuit challenging the Wal-Mart approval. The City argued that the challenge was time-barred. An action or proceeding alleging “that a public agency has improperly determined that a project is not subject to” CEQA must be commenced “within 35 days from the date of the filing” of the Notice of Exemption (“NOE”).

Plaintiffs argued that because the City’s approval was invalid and ineffective for various procedural reasons, the NOE was void and could not trigger the 35-day time-bar. The trial court and Court of Appeal agreed. However, the California Supreme Court disagreed, and reversed the judgment in favor of the plaintiffs.

The Supreme Court explained that flaws in the decision-making process underlying a facially valid and properly filed NOE do not prevent the NOE from triggering the 35-day period to file a lawsuit challenging the agency's determination that it has approved an exempt project. By describing the project in question, setting forth the agency's action or decision, and detailing the reasons for the exemption finding, this notice tells the public that the brief period within which a CEQA challenge to the propriety of the noticed action or decision may be commenced has begun to run.

The Court found that plaintiffs' claim that an NOE can trigger the 35-day limitations period only if it announces a *valid* project approval runs counter to the principle that limitations periods apply regardless of the merits of the claims asserted, and do not depend on whether a timely action would have been successful. It also contravenes the purpose of notice-based statutes of limitations, as well as the Legislature's intent under CEQA that suits claiming an agency has “improperly determined” a project to be exempt must be brought within 35 days after an NOE that complies with CEQA requirements is filed.

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Hence, plaintiffs' claims that the Director's approval action was procedurally flawed, and substantively mistaken, cannot delay commencement of the 35-day statute of limitations triggered by City's filing of the NOE. Plaintiffs were free to claim, in a lawsuit, that the underlying approval process failed to comply with CEQA, *but only if they commenced such litigation within 35 days after the NOE was filed.*