



UNDER CONSTRUCTION

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Contractor May Recover Against Public Entity for Failure to Disclose Material Information Without Proving Fraud

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It has long been the rule in California that a contractor on a fixed price public works project generally cannot recover additional compensation simply because unanticipated difficulties are encountered. However, consistent with long-standing federal authority, *United States v. Spearin* (1918) 248 U.S. 132, a contractor may have an avenue for redress when its performance is more expensive than contemplated at bid time due to faulty plans and specifications or the public entity's failure to disclose material information regarding the project.

Until recently, there was much uncertainty in California about when and under what circumstances a contractor may recover based upon a non-disclosure theory. In *Los Angeles Unified School Dist. (LAUSD) v. Great American Insurance Co.* (2010) 49 Cal.4th 739, the California Supreme Court articulated the circumstances under which a contractor can maintain an action against a public entity for failure to disclose material information.

Prior to the *LAUSD* case, California courts of appeal were split on whether a contractor must show the public entity engaged in fraud to recover for non-disclosure — an extremely heavy burden for a contractor. In *Jasper Construction, Inc. v. Foothill Junior College Dist.* (1979) 91 Cal.App.3d 1, the court held a contractor must show the public entity affirmatively misrepresented or intentionally concealed material facts that rendered the furnished information at bid misleading. By contrast, in *Welch v. State of California* (1983) 139 Cal.App.3d 546, the court held that a contractor need not prove an affirmative fraudulent intent to conceal when disclosure would have eliminated or

materially qualified the misleading effect of facts disclosed. A third case, *Thompson Pacific Const. Co. v. City of Sunnvale* (2007) 155 Cal.App.4th 525, suggested the public entity's careless failure to disclose information may allow recovery if the public entity possessed superior knowledge inaccessible to the contractor.

In the *LAUSD* case, the California Supreme Court resolved the split in the decisions of the appellate courts by adopting virtually the same rationale recognized by the Federal Circuit and Court of Federal Claims on federal procurements — the so-called "superior knowledge" doctrine. The Supreme Court held that a contractor need not prove intentional misrepresentation to recover compensation for a public entity's failure to disclose material information.

Instead, under *LAUSD*, a contractor may recover from a public entity where: (1) the contractor submitted its bid or undertook to perform without material information that affected 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, the information, (3) contract specifications or information furnished by the public entity misled the contractor or did not put it on notice to inquire and (4) the public entity did not provide the relevant information. The Supreme Court further explained that a "public entity may not be held liable for failing to disclose information a reasonable contractor in like circumstances would or should have discovered on its own, but may be found liable when the totality of the circumstances is such that the public entity knows, or should know, a responsible contractor acting diligently would be unlikely to discover the condition that materially increased the cost of performance." According to the Supreme Court, "the circumstances affecting recovery may include, but are not limited to, positive warranties or disclaimers made by either party, the information provided by the plans and specifications and related documents, the difficulty of detecting the condition in question, any time constraints the public entity imposed on proposed bidders and unwarranted assumptions made by the contractor."

In sum, the decision in *LAUSD* significantly lowered the bar for non-disclosure claims against public entities. Although a contractor still faces many obstacles to recovery, it does not need to prove the public entity engaged in fraud.

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