

Construction & Infrastructure Law Blog

New Legal Developments In The Construction & Infrastructure Industry

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General Contractors' Liability to Subcontractors' Employees On Public Infrastructure Projects

By *[Edward B. Lozowicki](#)*

As residential and commercial construction markets evaporate and contractors fight for survival, new opportunities are appearing in the form of public infrastructure projects. The federal government is pouring money into public infrastructure and construction projects, to the tune of about \$143 billion in total. Of that total, about \$14 billion is designated for the California market. In addition, the State continues to fund projects from Proposition 1B and 1C bonds, and gas tax revenues. Much of the money will fund infrastructure projects awarded by the state and local government agencies. These new opportunities, however, come with new risks. One such risk is a general contractor's liability for its subcontractors' unpaid or under-paid employees on public infrastructure projects.

Liability For Unlicensed Subcontractors' Employees

One such scenario where a general contractor can incur liability is when an unlicensed subcontractor does not pay its employees earned wages. For example, in the recent case of *Sanders Construction Company, Inc. v. Cerda*, a general contractor was placed on the hook for unpaid wages to a subcontractor's employees.¹[1] The appellate court held, under California Labor Code § 2750.52², that employees of the unlicensed subcontractor were also "statutory employees" of the general contractor.³[3] Accordingly, the general contractor shared and inherited the wage debts of the unlicensed subcontractor.⁴[4] And it appears the general

contractor did not have sufficient retention to set off against the wage claim. To limit this risk, general contractors should verify licensure of their subcontractors at bid time by searching the website of the Contractors State License Board.

Prevailing Wage Liability

Both general contractors and subcontractors working on a public works project for a state or local government agency must pay their employees at or above the prevailing wage rate.^{5[5]} The prevailing wage rate is determined by the Department of Industrial Relations.^{6[6]} While a general contractor is liable for failing to pay its own workers at or above the minimum prevailing wage rate, the general contractor is also jointly and severally liable to a subcontractor's employees for any wage rate deficiencies unpaid by the subcontractor.^{7[7]} Just like the general contractor, its subcontractors must pay their employees at the prevailing wage rates. If they fail to do so, the general contractor inherits the liability.

To enforce this law, the Labor Commissioner is authorized to pursue a general contractor for wages unpaid to a subcontractor's employee, because a subcontractor's employees individually cannot maintain a suit against the general contractor based on prevailing wage rate violations.^{8[8]} While the Labor Commissioner must exhaust all reasonable remedies to collect amounts due from the subcontractor prior to pursuing a claim against the general contractor, the general contractor is still exposed to this liability if, for example, the subcontractor closes its doors or files for bankruptcy.^{9[9]} In addition, an awarding public agency, upon determining a violation has occurred, can then withhold contract payments from the contractor found to be in violation.^{10[10]} In effect, the general contractor becomes the guarantor of proper wages paid to the subcontractors' employees.

Penalties

In addition to wage assessments, monetary penalties of up to \$50 per worker, per day^{11[11]} may also be assessed against the general contractor based on the subcontractor's conduct. Those circumstances under which a general will be liable include instances when the general knew the subcontractor failed to pay prevailing wages to the subcontractor's workers, or the contract between the general and the subcontractor fails to provide for the payment of prevailing wages; the general fails to monitor the subcontractor's payments by reviewing the subcontractor's payroll

records; and the general fails to obtain an affidavit from the subcontractor stating legal wages were paid.¹²[12] Finally, a contractor may be debarred from bidding public works projects for willful¹³[13] or fraudulent violations.¹⁴[14]

Payroll Records

Still another obligation unique to public works projects is that a general contractor and its subcontractors are obligated to maintain certified payroll records and make them available upon request.¹⁵[15] In particular, a contractor must provide certified payroll records including the worker's name, address, social security number, work classification, straight time and overtime hours worked for each day and for each week, and the actual per diem wages paid. Failure to adhere to recordkeeping and record availability regulations subjects the contractor or subcontractor to a penalty of \$25 per worker, per day.¹⁶[16] The general contractor should require compliance with certified payrolls in its subcontract terms, and verify that the subcontractor submissions are timely and complete.¹⁷[17]

Protective Measures

The general contractor can manage these risks. In addition to checking the license status of its subcontractors, the general contractor should require weekly certified payrolls from its subcontractors and use them to verify prevailing wage compliance. If the subcontractor's employees are union members, then the general contractor can contact the union to verify that the subcontractor is paying the required fringe benefits. Finally, the general contractor can and should withhold retention from each progress payment as security for any failure of the subcontractors to pay its employees according to law. Retention can be held until the contractor confirms prevailing wage compliance during the project close-out process.

Conclusion

Contractors who are bidding or securing public works contracts must be aware of the potential liability to subcontractors' employees for unpaid wages, whether it be with state or local public agencies. Unlike private projects, contracting for public infrastructure entails the added obligations and liabilities for payment of prevailing wages and keeping and making available the required payroll records. These risks can be mitigated by providing subcontract terms which require compliance, and most importantly, policing compliance through use of certified payrolls and other methods described above.

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18[1] *Sanders Construction Co., Inc. v. Cerda* (June 29, 2009) 175 Cal.App.4th 430.

19[2] Cal. Lab. Code § 2750.5(c).

20[3] *Sanders Construction Co., Inc.*, at [2–7].

21[4] *Id.* at [7].

22[5] *See, e.g.*, Cal. Lab. Code § 1771.

23[6] Cal. Lab. Code § 1770.

24[7] Cal. Lab. Code § 1743(a).

25[8] *Violante v. Communities Southwest Development and Construction Co.* (2006) 138 Cal.App.4th 972, 979 (rev. den'd, July 12, 2006) (employees of subcontractor sued general contractors of a public works project for the subcontractor's failure to pay its employees according the prevailing wage laws; court dismissed suit for lack of standing, holding section 1774 does not create a private right of action for a subcontractor's employees to sue the general contractor for prevailing wage rate violations.). A subcontractor's employee has standing to

maintain an independent action against the subcontractor for a violation of their rights under California's Unfair Competition Laws (Bus. & Prof. Code, § 17204) or the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.).

26[9] Cal. Lab. Code § 1743(a).

27[10] Cal. Lab. Code § 1727(a).

28[11] Cal. Lab. Code § 1775(a)(2)(a) (establishes factors Labor Commissioner must consider when determining the penalty).

29[12] Cal. Lab. Code § 1775(b); see also *Violante* 138 Cal.App.4th at 979.

30[13] Cal. Lab. Code § 1777.1(c).

31[14] Cal. Lab. Code §§ 1777.1(a)–(b). On federal construction projects, contractors must also pay their workers a prevailing wage rate. 40 U.S.C. § 3142. A failure to do so can result in the general contractor losing a portion of the project or the entire project. 40 U.S.C. § 3143.

32[15] Cal. Lab. Code § 1776(a)–(f).

33[16] Cal. Lab. Code § 1776(g).

34[17] Cal. Lab. Code § 1775(b)(2)
