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OPINION	:	No. CV 78-88
of	:	December 7, 1979
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SUBJECT: PAYMENT BONDS—If the services contracted for consist of conducting investigations and surveys to determine whether or not construction of a work of improvement should be undertaken, one contracting with a public entity to provide such services need not post the payment bonds required by Civil Code section 3247. If the services contracted for consist of designing and supervising the work of improvement, a payment bond must be posted prior to the time such services commence.

The Honorable Kenneth Cory, State Controller, has requested an opinion on the following questions:

1. Where a provider of architectural or engineering services and a public entity enter into an agreement for consulting services solely for the purpose of assisting the public entity in preparing for an actual "work of improvement," must that provider post the payment bond required by Civil Code section 3247?

2. Is a payment bond required where such an agreement also includes services to be performed once the actual "work of improvement" has commenced?

3. If your response to the second question is yes, and the term of the agreement spans the commencement of the actual physical "work of improvement, at what point must the provider post the approved payment bond?

The conclusions are:

1. To the extent that the services referred to in question 1 consist of conducting investigations and surveys to determine whether or not construction of a work of improvement should be undertaken, one contracting with a public entity to provide such services need not post the payment bond required by Civil Code section 3247.

2. To the extent that the services referred to in question consist of designing the work of improvement and supervising the work to the extent necessary to ensure compliance with such design, one contracting with a public entity to provide such services is required to post a payment bond as required by Civil Code section 3247.

3. Such bond must be posted prior to the time such design and supervision services commence.

ANALYSIS

Section 3247 (a) of the Civil Code[1] provides:

> "Every original contractor to whom is awarded a contract by a public entity involving an expenditure in excess of fifteen thousand dollars ($15,000) for any public work shall, before entering upon the performance of the work, file a payment bond with and approved by the officer or public entity by whom the contract was awarded. . . ."

The present opinion request raises the question of whether that section's bond filing requirement is applicable in the specified circumstances to firms providing architectural or engineering services.

The material provided to us by the State Controller's Office in connection with the opinion request indicates that the present question arose out of the following facts:

An earthquake occurred near a dam owned by a flood control district. The district entered into a contract with an engineering firm engaging into examine the dam to determine if it had been damaged and to determine what remedial work would be required

[1] Hereafter all section references are to the Civil Code unless otherwise specified.

to repair the damage if any was found to have been sustained. Under this contract if the examination determined that damage was in fact sustained by the dam and that it was of a nature that required remedial measures in order for the dam to operate safely, the engineering firm was to be responsible for the design of the remedial measures and for the periodic field checking and review of the work as it progressed to assure that such work was in compliance with the design.

In light of this factual background we assume that the phrase, 'preparing for an actual work of improvement," as used in question 1 of the opinion request, refers to the pre-design examination to determine the necessity for and the nature of any required remedial work. We further assume in this light that the phrase, "services to be performed," as used in question 2, refers to the designing of the remedial work and the supervision necessary to assure compliance with the design.

For purposes of clarity, it appears desirable to consider first the issues presented by question 2 of the request. In determining whether section 3247's requirement of filing a payment bond applies to the provider of the services contemplated in this question, we consider first the rationale for this requirement.

As a basic proposition, one who bestows labor or materials upon real property and thereby has created an improvement on such property has a right to secure his claim to compensation for such labor or materials with a lien on the property so improved. (*Humboldt Lumber Mill v. Crisp* (1905) 146 Cal. 686, 687; *Connally Development, Inc. v. Superior Court* (1976) 17 Cal. 3d 803, 825–826; *Nolte v. Smith* (1961) 189 Cal. App. 2d 140, 144.) The right to this so-called mechanic's lien is established in the State Constitution (art. XIV, § 3) and by statute (§ 3110). These provisions expressly afford the protection of lien rights to "[m]echanics, materialmen, contractors, subcontractors, lessors of equipment, artisans, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters, and draymen, and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services on, or furnishing materials or leasing equipment to be used or consumed in or furnishing appliances, teams, or power contributing to a work of improvement. . . ." (§ 3110.)

However, this lien right does not extend to public works. (§ 3109; *John A. Artukovich Sons, Inc. v. American Fidelity Fire Ins. Co.* (1977) 72 Cal. App. 3d 940, 946; *California Elec. Supply Co. v. United Pac. Life Ins. Co.* (1964) 227 Cal. App. 2d 138, 144.) Thus, as a substitute for the protection to laborers, materialmen and others that would otherwise have been afforded them by their right to a lien, had public property not been involved, the statutory obligation to file a payment bond on public works contracts was established. (*John A. Artukovich Sons, Inc. v. American Fidelity Fire Ins. Co., supra,* 72 Cal. App. 3d at 946; *California Elec. Supply Co. v. United Pac. Life Ins. Co., supra*, 227

Cal. App. 2d at 144; *Powers Regulator Co. v. Seaboard Surety Co.* (1962) 204 Cal. App. 2d 338, 346; 38 Ops. Cal. Atty. Gen. 143, 144–145 (1961).)

Having considered the reason for the payment bond requirement, the question that now arises is, who must file such bond under section 3247?

As set forth above, the section specifies that the "original contractor" must file such a bond. The term "original contractor" is defined to mean "any contractor who has a direct contractual relationship with the owner." (§ 3095.)[2]

As can be seen, this definition affords little indication of the type of contractor that is comprehended by the term "original contractor." However, more specificity in the content of the term, as it is used in section 3217, may be derived from the statute's purpose. As stated in *People v. Navarro* (1972) 7 Cal. 3d 248, 273: "A statute must be construed in light of the legislative purpose and design." (See also *Scientific Cages, Inc. v. Banks* (1978) 81 Cal. App. 3d 885, 889.)

As already noted, the purpose of section 3247 was to provide protection on public projects to those who would otherwise have been entitled to liens. Thus, in light of this purpose, it may be concluded that an "original contractor" under section 3247 is one who enters into a contract with a public entity which requires work (or materials) of the type that would ordinarily entitle those performing the work (or providing the materials) to a lien on the property if such property were not publicly owned.[3]

Thus we reach the question of whether the work contemplated in the contract pertinent to the present opinion request is of that type that would give rise to liens.

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[2] In contrast to section 3095, which defines "original contractor," section 3104 defines a "subcontractor" as "any contractor who has no direct contractual relationship with the owner." Sections 3095 and 3104 are among the definitional sections set forth to govern the construction of the title (tit. 15) in which section 3247 appears. (See § 3082.)

[3] We note that there is a definition of the term "contractor" in the Contractors' State License Law. However, that definition (Bus. & Prof. Code § 7026) is supplied for a purpose distinct from that of the payment bond statute, and is thus not controlling upon the construction of the term "original contractor" as used in that statute. Considering virtually this same point, the court in *Scientific Cages, the. v. Banks, supra*, 81 Cal. App. 3d at 889–890, stated: "'The mechanic's lien Law . . . has a different objective from the Contractors' Licensing Law. It is a truism of statutory construction that a statute is to receive an interpretation consistent with its own purpose. . . . In *Theisen* the "subcontractor" concept received a broad interpretation, consistent with the [mechanics' lien] law's purpose to provide financial security to suppliers . . . . The contractors' law has a different objective, protection of the public from incompetent and unreliable contractors. Interpretation of one statute supplies no talisman for defining the other.'"

In this regard section 3110, which enumerates those who are entitled to mechanic's liens, expressly specifies "architects" and "registered engineers"[4] as among those so entitled to such liens. See *Design Associates, Inc. v. Welch* (1964) 224 Cal. App. 2d 165, 172; *Nolte v. Smith, supra*, 189 Cal. App. 2d at 143–144. The Supreme Court in *Myers v. Alta Construction Co.* (1951) 37 Cal. 2d 739, concluded that one who provided surveying and engineering services on a building project was entitled to claim a lien (*id*. at p. 743) and stated that the lien law includes:

> ". . . 'laborers of every class,' skilled as well as unskilled, those who toil with their brains as well as those who work with their hands-in short, persons performing work of any kind. Nowhere in the section does the term 'manual laborers' appear, and there can be no justification for reading it into the statute in place of the word 'laborers.'" (*Id*. at p. 742.)

The question of whether engineering services entitled one to a lien was also considered in *Hornlein v. Boblig* (1918) 37 Cal. App. 646. In that case an engineer was employed by an architectural firm to provide engineering designs to be used in the construction of a building. In response to the assertion that engineering services were not the type of work covered by the lien statutes, the court stated:

> "An engineering expert employed for a single and specified purpose in the construction of a building, even though he may not be classed as an architect, comes, we think, within the provisions of section 1183 of the Code of Civil Procedure [now section 3110], as one bestowing skill to be used in the construction of the building." (*Id*. at p. 647.)

Finally, in this same vein the court in *Nolte v. Smith, supra*, 189 Cal. App. 2d at 147, held that a civil engineer's work in performing land surveys "was as much a part of the scheme of improvement as if the work of a carpenter or other craftsman whose skill is bestowed upon a building. . . ."

It would thus appear to be clear that to the extent that they involve the design and necessary supervision of dam repairs, the architectural or engineering services contemplated in the contract under consideration here constitutes "bestowing the skill or other necessary services" on the project and is thus the type of work that, under the statute, would give rise to a lien. (§ 3110.)

[4] For purposes of this opinion we assume that the provider of engineering services referred to in the present question is a "registered engineer."

In reaching this conclusion we are aware of those cases which have ruled adversely to the lien claims of architects and engineers, such as *Walker v. Lytton Sav. & Loan Assn.* (1970) 2 Cal. 3d 152; *South Bay Engineering Corp. v. Citizens Sav. & Loan Assn.* (1975) 51 Cal. App. 3d 453; *Tracy Price Associates v. Hebard* (1968) 266 Cal. App. 2d 778; *Design Associates, Inc. v. Welch, supra*, 224 Cal. App. 2d 165. However, these cases deal not with the question of whether architects or engineers perform the type of work that entitles them to liens, but with the question of whether such liens have priority over other asserted interests in the property, or with the related question of when the asserted lien attaches to the property. (See *Walker v. Lytton Sav. & Loan Assn., supra*, 2 Cal. 3d at 156–157; *South Bay Engineering Corp. v. Citizens Sav. & Loan Assn., supra*, 51 Cal. App. 3d at 456.) Indeed, these cases specifically acknowledge that the work of architects and engineers is of the type that does give rise to a lien. As stated by the Supreme Court in one of these cases, *Walker v. Lytton Sav. & Loan Assn., supra*: "Architects 'bestowing skill or other necessary services on . . . or . . . contributing to, the construction . . . of, any building, structure, or other work of improvement' are included among those whom. . . [section 3110] provides 'shall have a lien upon the property upon which they have bestowed labor. . . .'" (2 Cal. 3d at 155.) (See also *Tracy Price Associates v. Hebard, supra*, 266 Cal. App. 2d at 784, and *Design Associates, Inc. v. Welch, supra,* 224 Cal. App. 2d at 172, 174.)

We are further aware of the rule that a mechanic's lien may not attach until actual physical construction begins. (*Walker v. Lytton Sav. & Loan Assn., supra*, 2 Cal. 3d at 156–157.) However, this does not negate the fact that the nonphysical work of the architect or engineer nonetheless qualifies for such a lien. Its operation is merely deferred until the physical construction does commence. (*Walker v. Lytton Sav. & Loan Assn., supra*, 2 Cal. 3d at 156–157; *McDonald v. Filice* (1967) 252 Cal. App. 2d 613, 617.) As stated in *Connolly Development, Inc. v. Superior Court, supra*, 17 Cal. 3d at p. 808: "The [mechanics'] lien is subordinate to recorded encumbrances antedating the commencement of the work of improvement . . . but takes priority over all subsequent encumbrances. . . ."

Concluding that architectural and engineering services are within that type of work contemplated by section 3247, we next note that one of the specified requisites for the application of that section is that the contract in question be for a "public work."[5] The term "public work" is defined in the applicable definitional section as "any work of improvement contracted for by a public entity." (§ 3100.) 'Work of improvement" is in turn defined in section 3106 as follows:

[5] Under section 3247 the contract must also involve "an expenditure in excess of fifteen thousand dollars." We are assuming in this opinion that the contract pertinent to the present factual situation involves such an expenditure.

> "'Work of improvement' includes but is not restricted to the construction, alteration, addition to, or repair, in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or road, the seeding, sodding, or planting of any lot or tract of land for landscaping purposes, the filling, leveling, or grading of any lot or tract of land, the demolition of buildings, and the removal of buildings. Except as otherwise provided in this title, 'work of improvement' means the entire structure or scheme of improvement as a whole."

It has been urged that because, under that definition, a "work of improvement" involves "the construction, alteration, addition to, or repair" of the specified structures, a contract for architectural or engineering services would not constitute a "work of improvement" or a "public work" because that definition requires the performance of physical work on the structure in question, and architectural or engineering services are not tantamount to such physical work. However, a number of declarations by both the Supreme Court and the Courts of Appeal to the effect that the designs of the architect and engineer contribute to the construction process, just as do the artisans who physically execute the design, require the rejection of this contention. For example, in *Nolte v. Smith, supra*, 189 Cal. App. 2d at 147, the court stated that the services of an engineer "was as much a part of the scheme of improvement as is the work of a carpenter or other craftsman whose skill is bestowed upon a building. . . ." Similarly *in Walker v. Lytton Say. & Loan Assn., supra,* 2 Cal. 3d at 155, architects were viewed as "'bestowing skill or other necessary services on . . . or . . . contributing to, the construction . . . of, any building, structure, or other work of improvement'. . . ." And in *Hornlein v. Boblig, supra,* 37 Cal. App. at 647, the court held that an engineer comes within the provisions of the lien law "as one bestowing skill to be used in the construction of the building.

We thus conclude that designing the necessary repairs of a dam and appropriately supervising the implementation of that design, as contemplated in the contract in question here, is a "public work" within the meaning of section 3247.

Another argument, which is based upon a provision in section 3110, has been raised against the applicability of the bonding requirements of section 3247 to one contracting to provide architectural or engineering services.

As noted above, section 3110 enumerates those who are entitled to liens for their contributions to a particular work of improvement. That section also provides: that "[f]or purposes of this chapter, every contractor, subcontractor, sub-subcontractor, architect, builder, or other person having charge of a work of improvement or portion thereof shall he held to be the agent of the owner.

From this clause it is urged that an architect or engineering firm contracting to merely provide the designs for a project does not "have[ ] charge of a work of improvement or portion thereof." Thus such firm, so the argument goes, is not an "agent of the owner," and the claims arising from the work under its contract cannot therefore subject the owner's property to liens.

However, this argument must also be rejected. We have already noted the cases which view the preparation of plans and designs by an architect or engineer as an integral part of the construction process. (See *Nolte v. Smith, supra*, 189 Cal. App. 2d at 147; *Hornlein v. Boblig, supra*, 37 Cal. App. at 647.) In construing what is now section 3110, the Supreme Court in *Theisen v. County of Los Angeles*, 54 Cal. 2d 170, 183, regarded a subcontractor as having "'charge of the construction' of that part of the work of improvement" which was comprehended by the subcontractor's "agree[ment] with the prime contractor to perform a substantial specified portion of the work of construction which is the subject of the general contract

Since one who agrees with a prime contractor to perform "a substantial specified portion of the work of construction" is deemed, for purposes of section 3110, to have "charge," it would clearly appear to follow that one (such as the engineering firm in the present situation) who agrees *directly with the owner* to perform a crucial part of "the work of improvement" (preparing the designs for the work) has "charge," as that term is used in section 3110, of that "portion of the "work of improvement" he has agreed to perform. (See also *Hornlein v. Boblig, supra,* 37 Cal. App. 646, which allowed one performing engineering services pursuant to a contract with an architectural firm to recover on a lien against the property of the owner, therefore impliedly holding that the architect was the "agent of the owner" and thus had "charge" of the work.)

We therefore conclude that because performance of architectural or engineering design work and related supervision on a project to repair a dam is work that would be entitled to a lien if the affected property were privately owned, a firm contracting with a public agency to perform such work on public property is required by section 3247 to file a payment bond for the protection of those who will perform such work pursuant to that contract.

We shall consider now the issue raised in the first question of the opinion request. It has already been noted above that in addition to providing the designs end appurtenant supervision for the necessary remedial measures to be carried out on the dam, the contract in question also required the engineering firm to initially conduct a comprehensive examination of the dam to determine if remedial repair measures were necessary and, if so, the extent of such measures. The question thus is whether work under this examination phase of the contract was subject to the bond filing requirements of section 3247.

There is a significant distinction between this examination phase of the contract and the design phase previously considered. Unlike the design phase of the contract which involved the performance of work that was an integral part of the construction process, the work comprehended in the examination phase was to be utilized merely for the process of deciding whether construction was in fact to be undertaken.

In a number of cases the courts have had occasion to consider whether architectural or engineering work preceding the decision to actually engage in construction is entitled to lien rights. They have concluded that such work does not give rise to a lien. As stated by the Supreme Court in *Walker v. Lytton Say. & Loan Assn., supra*, 2 Cal. 3d at 156: "section . . . [3110] . . . specifies that services giving rise to a mechanic's lien are those bestowed on or contributing to the construction [court's emphasis] of any building or other work of improvement." The court then noted (at p. 159) that:

> "'. . . the preparation of plans is often necessary as a preliminary, merely to assist an owner in determining whether he shall build, and, if so, how. While the project remains in this stage, the work cannot be said to be of a structural character. . . .'"

See also *McDonald v. Filice, supra*, 252 Cal. App. 2d 613, 618–619. And see *Design Associates, Inc. v. Welch, supra,* 224 Cal. App. 2d at 174, where the court stated:

> "Since, in California, architects who perform services for 'the construction, alteration, addition to, or repair . . . of, any building, structure, or other work of improvement shall have a lien upon the property upon which they have bestowed labor,' (Code Civ. Proc., § 1181 [now § 3110]) such an express legislative mandate must not be given a construction so narrow as to defeat its purpose. Nevertheless, its application cannot be strained to encompass 'pre-preliminary' work intended principally as a prospectus for a public stock-selling campaign. . . ."

We therefore conclude that the engineering work performed pursuant to the examination phase of the contract, which proceeded, and was to be utilized for, the subsequent determination of whether or not actual construction was to be undertaken, was not the type of work that would give rise to a lien and thus would not come within the bond filing requirements of section 3247.

Returning again to that phase of the contract which does involve work requiring the filing of a payment bond under section 3247, we consider the final question in the opinion request. This question concerns the time at which such a payment bond must be filed. We have already noted that the purpose of the bond required by section 3247

is to afford financial security in lieu of liens to workers and others contributing to the construction of a public work. Since it is directed to the protection of those working on the project, it follows that such security would have to be in effect at the time such work is commenced. (See 38 Ops. Cal. Atty. Gen. 143, 146 (1961).) Accordingly, it is provided in section 3247 that the contractor "shall, *before entering upon the performance of the work,* file a payment bond. . . ." (Emphasis added.)

We therefore conclude that one contracting to provide architectural or engineering services in the situation being considered here must file a payment bond prior to undertaking that phase of the contract which involves the type of work ordinarily entitled to lien protection; viz., the designing of the remedial work and the supervision of that design's implementation.

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