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OPINION	:	No. 80-213
	:	
of	:	<u>June 19, 1980</u>
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SUBJECT: PAYMENT BONDS—Architects or engineers who enter into contracts with the state to provide architectural or engineering services to the state in connection with the state’s building construction program are required to file a payment bond pursuant to Civil Code section 3247 only if the architectural or engineering contract provides for work which constitutes a work of improvement within the meaning of the Mechanics’ Lien Law.

The Honorable David E. Janssen, Director, Department of General Services, has requested an opinion on the following question:

Are architects or engineers who enter into contracts with the state to provide architectural or engineering services to the state in connection with the state’s building construction program required to file a payment bond pursuant to Civil Code section 3247?

CONCLUSION

Architects or engineers who enter into contracts with the state to provide architectural or engineering services to the state in connection with the state’s building

construction program are required to file a payment bond pursuant to Civil Code section 3247 only if the architectural or engineering contract provides: for work which constitutes a work of improvement within the meaning of the Mechanics' Lien Law.

ANALYSIS

In 62 Ops. Cal. Atty. Gen. 753 (1979) (Opinion No. CV 78/88, hereinafter referred to as "CV 78/88"), we reviewed a contract between a flood control district and an engineering firm wherein the engineering firm was engaged to examine a dam owned by the flood control district to determine if the dam had been damaged by an earthquake, and if so, what work would be required to repair the damage. Further, if the damage did require remedial measures in order for the dam to operate safely, the engineering firm would be responsible for the design of those 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.

The issue presented by CV 78/88 was whether the engineering firm was required by the provisions of Civil Code section 3247(a)¹ to file a payment bond under the contract as outlined. That section provides:

"(a) 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.

"A public entity shall state in its call for bids for any such contract that such bond is required in the case of such an expenditure."

After thorough study of chapter 7 of Title 15 (payment bonds for public works) and its relationship to the Mechanics' Lien Law (§ 3082 *et seq.*), we concluded that to the extent the services contracted for consist of conducting investigations and surveys to determine whether construction of a work of improvement should be undertaken, one contracting with the public entity need not post the payment bond required by section 3247. To the extent, however, the services referred to consist of designing the work of improvement and supervising the work to insure compliance with such design, that contracting party is required to post a section 3247 payment bond.²

¹ All section references are to the Civil Code unless otherwise specified.

² CV 78/88 also concluded that if a payment bond as required under the circumstances presented, it must be posted prior to the time such design and supervision services are commenced.

We are now asked to reconsider that option and to determine whether the payment bond requirement of section 3247 is applicable to architects and engineers who enter into contracts with the State Architect pursuant to Government Code section 4525 *et seq.* to furnish architectural and engineering services to the State of California in connection with the state's construction program. After a review of CV 78/88, and the Mechanics' Lien Law, we have determined that the analysis and one conclusion of that opinion should be modified. Thus, we conclude that while an architect's or engineer's contract with a public agency may under some circumstances require the contractor to post a payment bond, each such contract must be reviewed to ascertain whether it involves a "work of improvement" within the meaning of the Mechanics' Lien Law. If it does not, no section 3247 payment bond is required, even if it involves physical work such as soil testing or core drilling on the public property.

In CV 78/88, we traced the background of section 3247, noting that California law has long protected those who bestow labor or materials upon real property and create improvements on such property through the mechanism of mechanics' liens. (Cal. Const., art. XIV, § 3; *Connelly Development, Inc. v. Superior Court* (1976) 17 Cal. 3d 803, 825–826.) Such lien rights, however, do not extend to public works (*John A. Artukovich Sons, Inc. v. American Fidelity Fire Ins. Co.* (1977) 72 Cal. App. 3d 940, 946), so the Legislature has created the payment bond requirement of section 3247 and its predecessor, Government Code section 4200 *et seq.*, as a substitute for mechanics' liens on public property as a protection for laborers, materialmen and others who would be entitled to use the lien mechanism if the project were private. (*Sukut-Coulson, Inc. v. Allied Cation Co.* (1978) 85 Cal. App. 3d 648, 653–654.)

For purposes of this discussion, the three key features of the prerequisites for filing a payment bond pursuant to section 3247 are: That the contract be (1) awarded by a public entity, (2) to an "original contractor," and (3) for a public work.³ The State Architect awarding a contract on behalf of the state is certainly acting on behalf of a public entity. Section 3099 defines "public entity" to mean, among other governmental agencies, the state.

On the question of who qualifies as an "original contractor," as we noted in CV 78/88:

" . . . 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

³ A fourth requirement not relevant here is that the contract involve an expenditure an excess of 515,000.

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.” (62 Ops. Cal. Atty. Gen. at 756.)

This interpretation is consistent with the use of the term “original contractor” throughout the entire Mechanic’s Lien Law. (See, e.g., §§ 3115, 3116, 3117, 3140, 3181.)

It has been suggested that “original contractor” refers only to general or construction contractors and excludes architects or engineers. In CV 78/88, we dismissed any equating of the term “original contractor” with the definition of “contractor” used in the Contractors’ State Licensing Law (Bus. & Prof. Code, § 726), noting the purposes of the Mechanics’ Lien Law required a broader definition. That definition, contained in section 3095 states:

“‘Original contractor’ means any contractor who has a direct contractual relationship with the owner.”

We noted that architects and engineers are entitled to the protection of the Mechanics’ Lien Law (§ 3110; *Design Associates, Inc. v. Welch* (1964) 224 Cal. App. 2d 165, 172; *Nolte v. Smith* (1961) 189 Cal. App. 2d 140, 144), and the courts have recognized that a contract between a property owner and an architect which results in labor and material being provided for the project on a subcontract with the architect subjects the property to mechanics’ lien liability. (*Hornlein v. Boblig* (1918) 37 Cal. App. 646, 647; engineering design prepared under employment by architect who had contract with owner; lien upheld.) It is also apparent that laborers and materialmen may well supply labor or materials to an architect or engineer who is performing work for an owner, whether it be to install permanent monuments, soil testing, core drilling, designs or plans or the like. We conclude that an architect or engineer can be an original contractor within the meaning of section 3247.

It is also suggested that, as relates to state projects, since architects and engineers are now employed pursuant to authority contained in chapter 10 of division 5 (Public Works and Public Purchases) of the Government Code (§ 4525 *et seq.*), which provisions contain no reference to payment bonds in contrast to the State Contract Act (Gov. Code, § 14250 *et seq.*) which does require the posting of a performance bond by the contractor (Gov. Code, § 14371), the Legislature did not intend section 3247 to apply to architects and engineers. This argument is buttressed by the fact that Government Code section 4528 permits negotiated contracts rather than competitive bids, and section 3247(a), set forth above, requires a public entity to “. . . state in its call for bids for any such contract that such [payment] bond is required”

The purpose of chapter 10, which was added by Statutes 1974, chapter 1434, of course, was to remove contracts for architectural or engineering services with public agencies from competitive bidding requirements so that such contracts will be awarded on a competence, not an economic basis. (Gov. Code, § 4526.) There is no indication, however, that by the enactment of chapter 10 the Legislature intended to relieve architects or engineers of the requirements of section 3247. The scope of the work performed by architects and engineers is unchanged by chapter 10, and section 3247 would remain applicable if the contract otherwise qualified thereunder.

Moreover, the provisions of chapter 10 relating to contracts for architectural or engineering services do not apply to counties of other local governmental agencies (62 Ops. Cal. Atty. Gen. 332 (1979)), while the provisions of section 3247 apply to all public entities, including counties, cities and districts. (§ 3099.) If the Legislature had intended the requirements of section 3247 to be supplanted as regards architects or engineers, it would undoubtedly have done so as to all public entities, not just the state. State agencies can obviously comply with the mandate of the last sentence of section 3247(a) concerning giving notice of the performance bond requirement in the call for bids by inserting the requirement in the contract offered to the architect or engineer.

We turn then to the final requirement of section 3247, that the contract be “for any public work.” Public work is defined in section 3100 as “any work of improvement contracted for by a public entity.” Thus, section 3247 requires a payment bond “for any work of improvement contracted for by a public agency.” In turn, the Legislature has defined “work of improvement” as follows:

“‘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.” (§ 3106.)

The statutory definition is not a model of precision. Its specific provisions all describe some physical alteration of the land or its appurtenances. The definition, however, commences “‘Work of improvement’ includes but is not restricted to and ends with the statement that the term “means the entire structure or scheme of improvement as a whole.” Does this language add the efforts of those who contribute to the end result but which efforts make no physical alteration to the land or its

appurtenances to the concept of “work of improvement” as defined in section 3106? We think not.

The rule of construction known as *ejusdem generis* asserts that when general words are used with particular words, the general words take color from the particular words. (*City of Los Angeles v. Superior Court* (1934) 2 Cal. 2d 138, 140; *Scally v. Pacific Gas & Electric Co.* (1972) 23 Cal. App. 3d 806, 819; § 3534.) We think this rule is applicable to the introductory language of section 3106 that ‘work of improvement’ includes but is not restricted to” Since other items are not specified, the words used provide no limitation whatever to the inclusion of any item within the definition of work of improvement. Thus the work of the financial firm that designed and secured the financing for the project, and the attorney who provided advice relating to the legal problems associated with the project constitutes valuable efforts necessary to the end result. If we construe the introduction of section 3106 to include the preparation of plans by the architect as part of the “work of improvement,” by what logic do we exclude the efforts of the financial advisor or attorney? Applying the rule of *ejusdem generis* we look to the specific items mentioned for common characteristics and assume that the other items which the general words were meant to include are limited to such items having the same common characteristics unless this violates the legislative purpose manifested in some other way. (*Miller v. McKinnon* (1942) 20 Cal. 2d 83, 94.) The common characteristic we see in the specific language of section 3106 is a physical alteration of the land or its appurtenances. We believe the Legislature did not intend to include in its definition of “work of improvement” any effort unless it involves some alteration of the land or its appurtenances of the kind mentioned specifically in its definition of the term.

In *Walker v. Lytton Sav. & Loan Assn.* (1970) 2 Cal. 3d 152 an architect prepared plans and specifications for the construction of a building, but a deed of trust executed after the contract with the architect was entered into was foreclosed before construction commenced. The issue is whether the architect had a lien which had priority over the deed of trust. The court held the deed of trust prevailed, stating:

“As plaintiffs point out, [former C.C.P.] section 1182 declares that except as otherwise provided ‘work of improvement’ means ‘the entire structure or scheme of improvement as a whole.’ Nevertheless, section 1181, *supra*, specifies that services giving rise to a mechanic’s lien are those bestowed on or contributing to the construction of any building or other work of improvement. Thus the general rule is that such a lien does not attach unless and until construction has been undertaken by the doing of actual visible work on the land or the delivery of construction materials thereon.” (*Id.* at 156–157.)

This indicates that while an architect's services in preparing plans are protected by a lien which attaches when the work of improvement commences, it cannot be said that the work of improvement starts with the drawing of the plans, or that the drawing of plans is a "work of improvement" as that term is defined and used in the Mechanics' Lien Law.

We conclude, then, that the preparation of plans by an architect is not a "work of improvement" as defined in section 3106.

We recognize the argument that since the payment bond is designed to act as a substitute for a mechanics' lien system, the bond should be required for any contract where, if it were a private project, materialmen and subcontractors would be authorized to file a lien. From this, it is reasoned that since architects or engineers who prepare plans and designs or other work which alone may not involve any physical improvement to the property can qualify for a mechanics' lien (*Nolte v. Smith, supra*; *Hornlein v. Boblig, supra*), an architect or engineer should be required to post a payment bond.

We think this argument begs the question. The statutory requirement is that the bond be posted "for any public work." The contract must be for a work of improvement, and although it does not take much physical work to qualify as such (compare *Nolte v. Smith, supra*, 189 Cal. App. 2d at 147; *Frank Pisano & Associates v. Taggart* (1972) 29 Cal. App. 3d 1, 20; and *Howard A. Deason & Co. v. Costa Tierra Ltd.* (1969) 2 Cal. App. 3d 742, 752–753; with *South Bay Engineering Corp. v. Citizens Sav. & Loan Assn.* (1975) 51 Cal. App. 3d 453, 457–458 and *Tracy Price Associates v. Hebard* (1968) 266 Cal. App. 2d 778, 784–785), the definition itself requires some. Indeed, as noted, even to qualify for a lien, some physical work must have commenced. *Walker v. Lytton Sav. & Loan Assn., supra*.) To state, however, that architects and engineers may qualify to file a lien, does not answer the question of whether a particular contract with an architect or engineer is for a work of improvement. Although it may be difficult at times to draw the line between preparatory work and a work of improvement, it is our judgment that each contract must be separately reviewed to determine whether the contract itself calls for work or services which will qualify as a work improvement.⁴ A contract calling only for the preparation of plans and

⁴ Although not directly in issue in this opinion, request, we note that for purposes of filing mechanics' liens, work performed on or for the benefit of a "site improvement" will qualify. (§ 3112.) Site improvement is defined in section 3102:

"'Site improvement' means the demolishing or removing of improvements, trees, or other vegetation located thereon, or drilling test holes or the grading, filling, or otherwise improving of any lot or tract of land or the street, highway, or sidewalk in front of or adjoining any lot or tract of land, or constructing or installing sewers or other public utilities therein, or constructing any areas, vaults, cellars, or rooms under said sidewalks or making any improvements thereon."

specifications, or for consulting, and not involving any physical work on the project is not, in our judgment, a work of improvement, and thus does not require the posting of a payment bond under section 3247. We note again, however, that a contract with an architect or engineer can be for a public work, that is a work of improvement if the architect or engineer is called upon to perform work or services which do constitute physical work in connection with the project. (*Hornlein v. Boblig*, *supra*, 37 Cal. App. at 647.)

Finally, we note that, at least as concerns contracts let by state agencies such as the State Architect, the Department of Transportation and the Department of Water Resources, those agencies have never required an architect or engineer who contracts for the preparation of plans or designs, or who acts as the consultant to the agency, to post a payment bond under section 3247 or its predecessor, Government Code section 4200. Administrative construction of a statute by those entrusted with its enforcement is normally to be given great weight in determining the meaning of the statute. (*Rivera v. City of Fresno* (1971) 6 Cal. 3d 132, 140; *Richfield Oil Corp. v. Crawford* (1952) 39 Cal. 2d 729, 736.) We believe this rule of statutory construction is applicable here, particularly since in 1969 the Legislature restated the Mechanics' Lien Law (Stats. 1969, ch. 1362) and moved the payment bond provisions from the Government Code into the Mechanics' Lien Law in the Civil Code.

“Reenactment of a provision which has a meaning well established by administrative construction is persuasive that the intent was to continue the same construction previously recognized and applied. (*Cal. M. Express v. Sr. Bd. of Equalization* (1955) 133 Cal. App. 2d 237, 239–240; and see *Richfield Oil Corp. v. Crawford*, *supra*; *Wotton v. Bush* (1953) 41 Cal. 2d 460, 468.)

Section 3247 mentions only a payment bond for a public work which is defined in terms of a work of improvement, and does not mention site improvement. Section 3248, however, which sets forth the requisite provisions of the payment bond, requires us subdivision (b) that the bond “. . . [p]rovide that if the original contractor or his subcontractor fails to pay any of the persons named in Section 3181 . . .,” the surety or sureties will pay on the bond. Section 3181 in turn authorizes certain persons to use the stop notice procedure on public works, including those mentioned in section 3112, that is, lien claimants on site improvements. Also, section 3135 provides: that if a site improvement is the subject of a contract separate from the main construction contract, the site improvement shall be considered a separate work of improvement. We conclude from this, that the payment bond requirement of section 3247 applies to any contract for a work of improvement or a site improvement as defined. The cases delineating what does or does not constitute a site improvement then become relevant. See *Howard A. Deason & Co. v. Costa Tierra Ltd.*, *supra*, and the cases cited in the text of this opinion.

We concluded in CV 78/88, as noted, that the testing and examining to determine whether any remedial work was necessary under a contract between a flood control district and an engineering firm was not a contract for a work of improvement within the meaning of section 3247 since at that point there was no “work of improvement” as defined in section 3106. We reaffirm that conclusion. We also concluded in CV 78/88 that to the extent the contract with the engineering firm consisted of designing the work of improvement and supervising the actual construction work, the contract was for a work of improvement, and required the posting of a bond. To the extent that that contract calls for no physical work to be performed by that contractor on the remedial work on the dam, but only called for preparation of plans and designs and for supervision of another contractor who performed the physical work, we herein change that conclusion.

We turn briefly to the typical contract entered into between the State Architect and an architect or engineer for state construction projects. Entitled “Project Agreement Between State of California . . . and Architect or Engineer,” the contract, as relevant here, requires the architect or engineer (described as a “consultant”) to provide specified services “incident to the design and construction of an [identified] improvement” These services in short, are to provide consultation and advice to the state, prepare schematic designs of the project, prepare design development documents, prepare construction documents, and provide construction support. The consultant is authorized to hire or contract for other consultants (art. 5a (6)), and is required to visit the site during construction on a designated schedule. (Art. 5f (6).) The consultant, however, is not responsible for the actual construction; that is done by a general contractor (or conceivably several such contractors) under the supervision of the State Architect. Thus, the architect or engineer prepares project plans and designs, and is available to give advice and consultation to the owner. It may well be that the consultant would be entitled to lien the job if it were a private project (§ 3110; *Nolte v. Smith, supra*), but that factor alone does not convert the consulting contract into a contract for a work of improvement requiring a payment bond under section 3247. We conclude, therefore, that the services required to be performed under the contract submitted to us are not for a work of improvement and therefore do not constitute a contract for a public work within the meaning of section 3247.

To the extent that the conclusion and analysis herein are Inconsistent with Opinion CV 78/88 (62 Ops. Cal. Atty. Gen. 753), this opinion supersedes CV 78/88, particularly as to the conclusions and analysis relating to the second question therein.⁵

⁵ We recognize that our conclusion could theoretically result in some subcontractors or materialmen who provide labor and materials to an architect or engineer remaining unprotected on a public work, since they could not claim against the payment bond posted by the general contractor. (§§ 3248, 3267.) We believe that that problem, if significant, should be addressed to the Legislature.