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OPINION	:	No. 80-408
	:	
of	:	<u>August 12, 1980</u>
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SUBJECT: WATER DISTRICT PAYMENTS—A municipal water district is not barred from making payments under architectural or engineering contracts entered into after January 1, 1971, even though contractor failed to post payment bond.

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

Is a municipal water district barred from making payments under architectural or engineering contracts where the contractor did not post a payment bond under section 3247 of the Civil Code?

CONCLUSION

A municipal water district is not barred, by virtue of the failure of the contractor to post a payment bond under section 3247 of the Civil Code, from making payments under architectural or engineering contracts entered into after January 1, 1971.

ANALYSIS

The inquiry presented is whether a municipal water district is barred from making payments under architectural or engineering contracts where the contractor did not post a payment bond under Civil Code section 3247. Subdivisions (a) and (b) of that section provide as follows:

“(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.

“(b) A payment bond filed and approved in accordance with this section shall be sufficient to enter upon the performance of work under a duly authorized contract which supplements the contract for which such payment bond was filed, if the requirement of a new bond is waived by the public entity.”

Section 3251 of said code provides:

“Unless a payment bond is filed and approved as provided in this chapter, no claim in favor of the original contractor arising under the contract shall be audited, allowed or paid by the public entity awarding the contract or any officer thereof. Claimants shall receive payment of their respective claims in the manner provided by Chapter 4 (commencing with Section 3179) upon complying with the provisions thereof.

“This section shall become operative on the 181st day after it becomes effective.”

Sections 3247, subdivisions (a) and (b), and 3251, *supra*, added by the Statutes of 1969, chapter 1362, section 2, operative January 1, 1971, restate the substance of and supersede former sections 4200 and 4201, and 4208, respectively, of the Government Code. Based upon these predecessor statutes, we concluded, in 38 Ops. Cal. Atty. Gen. 143 (1961), that a contractor subject to the provisions thereof who failed to file the required bond during the time the work was in progress could not recover on the contract or for the reasonable amount of labor and materials furnished, although the project had been completed to the

satisfaction of the contracting agency and all claims for labor and material had been paid. Thus, we determined that a contractor for any public work (involving an expenditure in excess of designated limits not pertinent to this discussion) who failed to file the required bond was precluded from recovery *ex contractu* or in *quantum meruit*. (38 Ops. Cal. Atty. Gen. 143, *supra*.)

On numerous occasions thereafter, Civil Code section 3251 was amended so as to preclude its operation in specifically circumscribed instances and for specifically limited periods, where the failure to file a payment bond was “the result of inadvertence or excusable neglect.” Such an amendment (Stats. 1971, ch. 1721, § 1) pertaining to “any airport contract” entered into on or after August 6, 1968 and thereafter performed on or before December 31, 1970, expired by its own terms on March 5, 1972: Such an amendment (Stats. 1972, ch. 227, § 1) pertaining to contracts entered into by a community college district on or after March 14, 1969 and thereafter performed on or before December 31, 1970, expired by its own terms on September 3, 1972. Such an amendment (Stats. 1972, ch. 600, § 1) pertaining to contracts entered into by a municipal water district for storm damage restoration work on or after July 23, 1969, and thereafter performed on or before June 1, 1972, expired by its own terms on March 8, 1973. Such an amendment (Stats. 1974, ch. 147, § 1) pertaining to “any airport contract” entered into on or after July 1, 1971, and thereafter performed on or before June 30, 1973, expired by its own terms on October 2, 1974.

Where the Legislature undertakes to amend a statute which has been the subject of judicial construction, it is presumed that the Legislature was fully cognizant of such construction, and when substantial changes are made in the statutory language it is usually inferred that the lawmakers intended to alter the law in those particulars affected by such changes. (*Palos Verdes Faculty Assn. v. Palos Verdes Penin. Unif. Sch. Dist.* (1978) 21 Cal. 3d 650, 659.) On the other hand, the failure to make changes in a given statute in a particular respect when the subject is before the Legislature, and changes are made in other respects, is indicative of an intention to leave the law unchanged in that respect. (*Orr v. Superior Court* (1969) 71 Cal. 2d 220, 226.) In this regard, it must be presumed that an interpretation of the Attorney General has come to the attention of the Legislature, and if it were contrary to the legislative intent that some corrective measure would have been adopted in the course of many enactments on the subject in the meantime. (*California Correctional Officers’ Assn. v. Board of Administration* (1978) 76 Cal. App. 3d 786, 794.) In accordance with these precepts, and in view of the numerous amendments to Civil Code section 3251 in specific, limited respects, and in the absence of any corrective measure which would have altered or modified the interpretation and conclusions set forth in 38 Ops. Cal. Atty. Gen. 143, *supra*, we now expressly reaffirm the principles therein expressed.

In 63 Ops. Cal. Atty. Gen. 501 (No. 80–213, June 19, 1980) we concluded, upon extensive analysis, that 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 (Civ. Code, § 3109 *et seq.*)¹ Thus, we expressed our view that an architect or engineer can be an “original contractor” within the meaning of Civil Code section 3247, and 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.” It would follow, in the absence of additional factors, that a municipal water district is barred from making payments under architectural or engineering contracts where the contractor did not post a payment bond “before entering upon the performance of the work” (*Cf.* 62 Ops. Cal. Atty. Gen. 753, 761 (1979))² only if the architectural or engineering contract provides for work which constitutes a “work of improvement.”

However, on July 1, 1980, Civil Code section 3247 was amended (Stats. 1980, ch. 293) to add subdivision (c) as follows:

“For purposes of this section, providers of architectural, engineering, and land surveying services pursuant to a contract with a public entity for any public work shall not be deemed an original contractor and shall not be required to post or file the payment bond required in subdivisions (a) and (b). This subdivision shall apply to all contracts entered into subsequent to January 1, 1971.

“The amendment to this section made during the 1980 portion of the 1979–80 Regular Session of the Legislature does not constitute a change in, but is declaratory of, existing law.”

We examine first the nature, force, and effect of the recital contained in the last sentence of the amendment. While the legislative interpretation of a statute is entitled to consideration and supplies an indication of legislative intent which may be considered

¹ In so concluding, we expressly modified a former opinion, 62 Ops. Cal. Atty. Gen. 753 (1979), to the extent of inconsistency, pertaining to architectural or engineering contracts with a local public entity.

² It is our understanding that the work under the Davis-Grunsky Act grant contracts (*cf.* Wat. Code § 12880 *et seq.*) which are the subject of the present inquiry, was completed prior to July 1, 1980.

together with other factors in arriving at the true meaning of an enactment, it is not binding upon the courts. If such an interpretation is erroneous, it goes for naught; if correct, it is surplusage. (*West Pico Turn. Co. v. Pac. Finance Loans* (1970) 2 Cal. 3d 594, 609–610; *City of Los Angeles v. Pac. Elec. Ry. Co.* (1959) 168 Cal. App. 2d 224, 234; *Western Mobilehome Assn. v. County of San Diego* (1971) 16 Cal. App. 3d 941, 949.) Thus, it has been held that a declaration by the Legislature that an amendment does not constitute a change in, but is declaratory of, preexisting law, is a factor to be considered in construing an ambiguous statute, but is not binding on the courts. (*Learner Co. v. County of Alameda* (1965) 234 Cal. App. 2d 278, 285.) The ultimate interpretation of a statute is an exercise in judicial power, and it is the duty of the court to determine its true meaning finally and conclusively. (*People ex rel. Dept. Pub. Wks. v. Ryan Outdoor Advertising, Inc.* (1974) 39 Cal. App. 3d 804, 810.) In doing so, the “courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under the solemn duty to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.” (*In re Dees* (1920) 50 Cal. App. 11, 19.)

As previously noted, we have recently determined, upon considerable premises, that architects or engineers who enter into contracts with a public entity to provide architectural or engineering services were (prior to July 1, 1980) required to file a payment bond where such contracts provide for work which constitutes a work of improvement. Thus, in our view, a court would affirm the legislative recital with respect to those contracts which do not provide for a work of improvement. In such a case, a municipal water district would not be barred, by virtue of the failure to post a bond, from making payments under such architectural or engineering contracts. However, a court would reject the interpretation of preexisting law where such contracts provide for a work of improvement. To the extent, therefore, that the 1980 amendment of Civil Code section 3247 operates retroactively³ to exclude from the requirements of section 3247 and from the impediment of section 3251 architectural or engineering contracts, it effects a substantial change by virtue of which such contractors, previously barred from payment upon failure to file a band, are now entitled, assuming the validity of said amendment, to payment under such contracts. It remains to be determined whether the retroactive extension of the substantive change effected by the amendment is constitutionally sufficient.

We turn to the constitutional dimension. California Constitution, article IV, section 17 provides:

“The Legislature has no power to grant, or to authorize a city, county,

³ The usual arguments against retroactivity do not apply where, as here, the legislative intent that the statute be so construed is expressly declared. (*Gordon H. Ball, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1972) 26 Cal. App. 3d 162, 168–170.)

or other public body to grant, extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or to authorize the payment of a claim against the State or a city, county, or other public body under an agreement made without authority of law.”.

California Constitution, article XI, section 10, subdivision (a) provides:

“A local government body may not grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or pay a claim under an agreement made without authority of law.”⁴

Thus, the constitution proscribes both the grant of extra compensation to a contractor after a contract has been entered into and performed, and the payment of a claim under an agreement made without authority of law. A contract made without authority of the law in force at the time it is made is void (*Pac. Inter-Club Yacht Assn. v. Richards* (1961) 192 Cal. App. 2d 616, 619) and may not be ratified or validated by subsequent enactments. (Cf. *Los Angeles City Sch. Dist. v. Landier Inv. Co.* (1960) 177 Cal. App. 2d 744, 755; 38 Ops. Cal. Atty. Gen. 143, 145, *supra*.) Nor does estoppel lie. (*Pac. Inter-Club Yacht Assn. v. Richards, supra*, and see *Longshore v. County of Ventura* (1979) 25 Cal. 3d 14, 28.) It is assumed, however, in the absence of any contrary indication, and for purposes of this analysis, that the contracts in question are fully authorized (see fn. 2, *supra*) and made in accordance with the procedures procribed by law. (Cf. 38 Ops. Cal. Atty. Gen. 143, 145, *supra*.) The question-remains whether the effect of the 1980 amendment is to grant extra compensation or extra allowance to a contractor under a contract which has been entered into and wholly performed.⁵

⁴ A municipal water district is clearly a ‘local government body’ within the meaning of article XI, section 10. (Cf. 59 Ops. Cal. Atty. Gen. 166 (1976).)

⁵ California Constitution, article XVI, section 6 provides that ‘The Legislature shall have no power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever’ For purposes of this analysis, the gift clause, under the ‘public purpose’ test, does not pose the critical problem. (Cf. *California Emp. etc., Com. v. Payne* (1947) 31 Cal. 2d 210, 216; *Gordon H. Ball, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1972) 26 Cal. App. 3d 162, 170–171.) Nor does any other constitutional objection exist to the retroactive operation of a civil statute in the absence of any impairment of a vested right or obligation of contract (*Id.*, at p. 168; Cf. *Coast Bank v. Holmes* (1971) 19 Cal. App. 3d 581, 593–597.)

The term “extra compensation” has been defined as “compensation over and above that fixed by contract for the work to be done. It would, either in a legal or equitable sense, be in the nature of a gratuity.” (*Gordon H. Ball, Inc. v. State of California ex ret. Dept. Pub. Wks.* (1972) 26 Cal. App. 3d 162, 172.) Hence, any payment in excess of that previously fixed by the contract in question for the services rendered would be proscribed. (Cf. *San Joaquin County Emp. Assn., Inc. v. County of San Joaquin* (1974) 39 Cal. App. 3d 83, 88; 59 Ops. Cal. Atty. Gen. 166, 170–172 (1976). The 1980 amendment of Civil Code section 3247, however, does not authorize any payment in excess of that previously fixed by contract. It simply removed a purely statutory impediment to the payment of an amount to which the contractor would otherwise have been clearly entitled. The general rule that the rights of an employee or contractor are set by the law applicable at the time compensable services are rendered (*Longshore v. County of Ventura, supra*, 25 Cal. 3d at p. 23) does not, in our view, apply to the removal of a statutory forfeiture where the amount to be paid was fixed in accordance with the applicable law at the time the contractual obligation was incurred, and where the work has been satisfactorily performed and completed. Thus, the constitutional concern is not to enforce a forfeiture of payment on an otherwise valid obligation due to the failure of a statutorily prescribed condition, but rather to assure that an amount in excess of that contracted or established by law shall not be awarded for work or services rendered.

The constitutional bar against “extra compensation” was added to the California Constitution in 1879 as article IV, section 32, which was the substantive equivalent of article IV, section 17.⁶ A dominant theme in the convention of 1879 was the distrust of legislative largesse to individuals making unauthorized claims.⁷ In *Miller v. Dunn* (1887) 7 Cal. 462, for example, the California Supreme Court traced the reasons behind the addition of article IV, section 32 (now art. IV, § 17) to the California Constitution of 1879:

“There was a feeling, which had been long-suffering, that there should be some inhibition to prevent the legislature from allowing the payment of extra compensation to officers who, subsequent to their election or appointment, discovered that the regular salary was insufficient, and also to prevent relief bills in favor of those who had dealt with state and municipal officers, acting without express authorization from any source, or under palpably unauthorized and invalid contracts, and who were constantly asking the legislature to consider their misfortunes in pity, and regard them as deserving subjects of public benevolence” (Emphasis added.)

The intent of the gift and extra compensation prohibitions of the constitution is

⁶ The section was shortened and renumbered in a 1966 constitutional revision measure which intended no substantive change. (Voter’s Pamphlet, General Election, Nov. 8, 1966.)

⁷ Sargent, *The California Constitutional Convention of 1878–9*, 6 Cal. L. Rev, 1, 8.12.

found in *Stevenson v. Colgan* (1891) 91 Cal. 649, 651, decided 12 years after the Convention of 1879:

“Section 31 of article IV of the constitution provides that the legislature shall have no power ‘to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual,’ and section 32 of the same article also declares: ‘The legislature shall have no power to grant or authorize any county or municipal authority to grant any extra compensation or allowance to any public officer, agent, servant, or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part.’

“By these provisions of the constitution, there is denied to the legislature the right to make direct appropriations to individuals *from general considerations of charity or gratitude, or because of some supposed moral obligation* resting upon the people of the state, and such as a just and generous man, although under no legal liability so to do, might be willing to recognize in his dealings with others. It was because of abuses which had crept into legislation by reason of the unlimited power theretofore exercised by the legislature in determining what individual claims should be recognized by private statute, and to relieve in some degree legislators from the importunities of persons interested in securing such appropriations, that the power of the legislature was thus limited by the present constitution of this state.” (Emphasis added.)

The contractual claims which are the subject of the present inquiry are not predicated upon any “supposed moral obligation” or sense of gratitude.

It is concluded that a municipal water district is not barred, by virtue of the failure of the contractor to post ,a payment bond under section 3247 of the Civil Code, from making payments under architectural or engineering contracts entered into after January 1, 1971, whether or not such contracts provide for work which constitutes a work of improvement.⁸

⁸ The conclusion herein expressed is dispositive of the remaining inquiries, whether the failure municipal water district to state that a hand was required in its call for bids for such contracts obviates the requirement of filing such bond as a condition of payment, and whether, if such payments under such contracts are barred, the municipal water district may compensate the contractor for the reasonable value of labor and materials.