



## School Business Law Update

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### **DISTRICT LIABLE FOR FAILURE TO SECURE PAYMENT BOND**

The California Court of Appeal for the Second District recently concluded that the Los Angeles Unified School District was liable to a subcontractor for failing to secure a payment bond. In the case entitled *Electrical Electronic Control, Inc. v. Los Angeles Unified School District* (2005 DJDAR 1542), the District awarded a public works contract and permitted the contractor to begin work without having submitted a payment bond as required by the contract and Civil Code section 3247. The contractor failed to pay its subcontractors, and the District terminated the contractor. The contract was assigned to a replacement contractor several months later, who did post a bond. An unpaid subcontractor sued the District for negligence in failing to secure a payment bond from the original contractor, and for attorney's fees. The District argued that it satisfied its duty when it secured a payment bond from the replacement contractor.

The Court noted that a public entity is required by statute to ensure that a contractor on a public works job provides a payment bond when the contract price exceeds \$25,000. The Court observed that the District failed altogether to secure a payment bond from the initial contractor, but examined the bond submitted by the replacement contractor to determine whether it would provide relief for the unpaid subcontractor. The Court held that a bond could be worded so as to have retroactive effect and even to cover breaches that occurred prior to submission of the bond. However, in the case before it, the Court found no evidence the bond submitted by the replacement contractor was intended to cover prior claims of subcontractors for work performed for the initial contractor.

The Court reversed an \$80,000 award of attorney's fees to the plaintiff on the grounds that the situation did not qualify plaintiff to invoke the "tort of another" theory.

This case continues the judicial trend in California to hold school districts responsible when they fail to ensure that payment bonds have been submitted or fail to evaluate the status of the surety and sufficiency of the bond. On multi-prime construction management projects, this may require monitoring and evaluation of dozens of bonds. Districts need to be aware of who has the responsibility on a project for handling this. Depending upon contractual arrangements, it may be the responsibility of the project architect, construction manager, or the District. Similar rationale was used in a recent opinion by the Court of Appeal for the First District in a case involving San Mateo County, *N.V. Heathorn, Inc. v. County of San Mateo* (2005) 126 Cal.App.4<sup>th</sup> 1526.

If you have any questions about this topic, don't hesitate to contact our office.

—Grant Herndon

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