

Contractors win one

By Andrew Carlton

California contractors may recover attorneys' fees under new case law

Every experienced litigant knows that unless there is an avenue to recover attorneys' fees, litigation is a dangerous undertaking. Litigation costs to take a matter from complaint to judgment, even if it's a simple single issue, can cost tens of thousands, if not hundreds of thousands, of dollars. More often than should be the case, the issues often become secondary to the issue of recovering attorneys' fees.

That said, there is good news for contractors in California on public works projects requiring a bond: The opportunity to recover attorneys' fees was increased by the appellate court's recent ruling in *Mepco Services Inc. v. Saddleback Valley Unified School District* (2010) 189 Cal. App. 4th 1027.

Mepco Services, a general contractor, and the Saddleback Valley Unified School District entered into a contract for \$1.64 million for modernization of the Esperanza Special Education School in Orange County. Subsequently, Mepco filed suit against the district, claiming it was entitled to payment for multiple change orders and delay damages, all of which were the result of insufficient plans and drawings and the district's failure to approve and pay for change order work in a timely manner.

Mepco alleged it was owed \$681,086.55, which was Mepco's final progress payment, a 10 percent retention payment, unpaid change orders, and delay damages for extended overhead. The district filed a cross-complaint against Mepco and its performance bond surety, claiming Mepco was at fault for the delays and that, as such, the district was entitled to \$1,000 per day in liquidated damages, for a total of \$198,000. The contract did not have an attorneys' fees clause, but the performance bond contained a one-sided clause that said the district could recover attorneys' fees in the event of a dispute.

After three weeks of trial, the jury awarded Mepco 100 percent of the damages sought and rejected the district's cross-claim in its entirety. After the verdict, Mepco filed a motion arguing that the performance bond Mepco was required to provide under the contract, though separate from the contract, was part and parcel of the agreement. The lower court agreed and awarded Mepco 100

percent of its attorneys' fees. The district appealed.

In its ruling November 2, 2010, the appellate court said the district "...sought to enforce the bond by way of its cross-complaint. It was Saddleback, not Mepco or Hartford, that invoked the bond by raising the bond in its cross-complaint. Saddleback named both Mepco and Hartford as defendants in the cross-action...Further, Saddleback specified in its cross-complaint that it was seeking to recover its attorney fees pursuant to the bond. We conclude that if Saddleback had prevailed on its claim for breach of the performance bond, it would have been entitled to recover the attorney fees that it incurred in prosecuting this action. Therefore...Mepco and/or Hartford are entitled to the attorney fees that they incurred in defending against Saddleback's performance bond claim." Mepco at 1047-1048.

This ruling is significant in that public works contracts rarely, if ever, contain an attorneys' fees provision. In light of the Mepco case, where there is a bond that includes an attorneys' fees provision, which is often the case, contractors have a further avenue to collect their attorneys' fees.

Public contract lawyers will argue that unless the public entity makes a claim against the contractor's bond, the attorneys' fees provisions in those bonds are not triggered. Construction lawyers, on the other hand, will argue that an attorneys' fees provision in a bond is part and parcel of the contract document and, as such, it is not necessary that the public entity pursue a claim on the bond in order for a contractor to seek recovery of its attorneys' fees under the attorneys' fees provision of the bond.

A further outcome of the ruling, which may work to the benefit of contractors, is that public agencies, which often make claims against a contractor's performance bond in order to gain leverage in the litigation, whether or not there is any merit to the claim, may be reluctant to do so knowing they will be subject to the attorneys' fees provision of the bond.

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