

## Part 2

# Two conflicting payment laws — how do you deal with it?



## Construction Law

By PAMELA J. SCHOLEFIELD

### Question:

My sister and I are partners in a general contracting firm that does tenant improvements mostly for restaurants.

We have a dispute with a painter that has been ongoing for over 18 months. It all started when the painter we had used for almost 10 years retired to Arizona right when we were slammed with more projects than we had ever handled.

Out of desperation, we hired a painter that happened to come by one of the jobsites. He claimed he was currently working for another general contractor in Vista on a high-end house remodeling project that was coming to an end, and the work he was doing there was similar to what we needed for this project.

His business card had a contractor's license number on it and we thought someone in our office had confirmed it. One night soon after the new painter first came by, one of our superintendents went by the house this new painter said he was finishing up and just as we were told, was a brand new, high-end home, which looked to be almost completed.

So, believing he was a legitimate licensed painting subcontractor, we hired him for one of our restaurant projects.

As it turned out, he was horrible. He could never get his act together to completely finish his work and he was belligerent when our superintendent pushed him to finish in the

timeframe he promised in his subcontract.

He was also not able to pull off the faux marble look that was required on some of the columns and the walls around the bar area.

Needless to say, we ended up paying him only part of the value of his subcontract, about \$8,000 out of \$18,000, because we had to redo much of his work, and the owner of the restaurant held back \$9,000 from what we were owed (\$3,000 for each of the three weeks we were late due to the painter).

About a month after we completed the project, the painter was still pressuring us for the amount still due under his subcontract (\$10,000) and he ended up recording a mechanic's lien, even though we found out later that he was not licensed.

He never filed suit on it, though, and our attorney was able to get it released through the court because the lien had expired.

During this time, we found out that the license number the painter had on his business card did not belong to him, but belonged to a friend of his.

Our attorney told us that under the Contractors' State License Law we don't have to pay him any more under the subcontract and we could, in fact, easily get back the \$8,000 that we paid him since he wasn't licensed.

Plus, we could sue him for damages due to his bad work and delays. But we decided the hassle and cost are not worth it because our attorney said our subcontract did not have anything about the prevailing party getting back their attorney fees.

We thought the issue had died a natural death, but now, out of the

blue, we got a letter from the painter claiming that, per Labor Code section 2750.5 he is an employee, and, unless we pay him the \$10,000 left on his contract within 30 days, he is going to file a complaint with the Labor Board.

If he does that, he claims that we will have to pay him overtime and penalties on top of the \$10,000. I have friends who are business owners and I know that they have had to pay steep penalties for violating labor laws. Also, I looked up section 2750.5, and it does say that a person who doesn't have a license cannot be an independent contractor — so he's an employee.

This guy caused us so much grief on the jobsite, and he is still making life difficult, is there something we can say to convince him to back off? How can the Contractors' State License Law allow us to not pay him because he is not licensed, while the Labor Code seems to require us to pay him as an employee?

### Answer:

You have a very good question and this issue has come up in California courts.

And, the answer is pretty straightforward. As you know, when an individual works for you, he is either an independent contractor such as your subcontractors, or an employee.

The Contractors' State License Law that prohibits your unlicensed independent contractor painter from collecting money for work he did is Business & Professions Code, section 7031(a). And, section 7031 (b) allows you to get back all the compensation you paid to him.

On the other hand, Labor Code section 2750.5 states that a person

cannot be considered an independent contractor unless they are licensed.

Thus, under the Labor Code, your painter would be considered an employee, and you would be subjected to paying him overtime for any hours he worked over eight in a day, or over 40 in a week, plus potential penalties. But, our courts have recognized this conflict and have ruled that if the Labor Code prevailed in a situation such as yours, then Business & Professions Code section 7031 would be rendered useless.

Thus, courts have decided that the Business & Professions Code prevails and an unlicensed person cannot bring a claim to recover payment for work that requires a license.

If you have a construction question, submit it to: [info@construction-laws.com](mailto:info@construction-laws.com)

### Disclaimer

*The information in this article is based upon California law and is for general information only. Any information or analysis presented here is intended solely to inform and educate the reader on general issues. Nothing presented or referenced to, regarding facts, documents or applicable laws, constitutes legal advice. Before acting or relying on any information, including any information presented here, consult with a qualified attorney for your specific situation.*

*Scholefield holds an active PE license in Colorado, an undergraduate engineering degree from the University of Florida, and received her JD from the University of San Diego.*

Source Code: 20080523tca

# Chula Vista releases report on Proposition E

By NATALIE WARDEL  
*The Daily Transcript*

The Independent Fiscal Analysis of Proposition E, an initiative that would require resident approval to construct high-rises in some parts of Chula Vista, was released Friday.

The report concluded that the proposition would "limit the city's development potential and related development activity" and the "loss of development potential would have related fiscal (municipal revenue) effects."

Chula Vista residents will vote June 3 to approve or deny Proposition E, which would require developers to hold an election above 84 feet — eight stories — if the developer wants to build a high-rise outside of the three urban areas designated in the city's general plan.

The urban areas are near the trolley stations at E and H streets, and a new location known as the Eastern Urban Core next to state Route 125 are designated high-rise areas.

The proposition would also limit

buildings on Third Avenue between E and G streets to 45 feet.

Consultant Walter Keiser, managing principal of **Economic & Planning Systems**, the company that did the analysis, will hold a public meeting Thursday at 6 p.m. in the Chula Vista Police Department's Community Room. Keiser will present his findings and discuss the contents of his independent analysis on the economic and fiscal implications of Proposition E.

Keiser is the author of the well-received Independent Financial

Review, which provided findings and recommendations addressing a city budget imbalance during 2007.

According to the report, the loss of development potential along Third Avenue, along with forgoing about \$1.6 million of net annual property tax increment funding and about \$700,000 of sales tax and population-based subvention revenue annually would prevent the Chula Vista Redevelopment Agency (RDA) to

See **Prop E** on 31B