



Licensing of Construction Managers

By Gordon Hunt, Esq.

A question has often arisen as to whether or not Construction Managers need to be licensed under the Contractors License Law. The question was partially answered in the case of *The Fifth Day LLC v. Bolotin* 72 Cal.App.4th 939. The owner of certain real property entered into an agreement with The Fifth Day LLC on May 5, 2003, which was entitled “Development Management Agreement for the Construction of the Campus at CIC” (the DMA). The owner was referred to as the Owner and the plaintiff Construction Manager was referred to as the “Development Manager.”

The DMA provided that the owner wished to undertake the development of the property. To do so, the owner desired to have “Professional Development and Construction Management Services” to assist the owner. The DMA further stated that the plaintiff Construction Manager (CM) was experienced in industrial real estate development and construction project management and was willing to provide the owner with those services. The CM was to be paid a fixed development fee of \$100,000 as a non-refundable advance against a project incentive fee of 34 percent of the profit from the sales of the building.

The DMA provided that the CM was to perform duties as the owner would direct including:

- identify critical and high priority matters and promptly reporting them to the owner;
- provide advice or opinion with respect to the development of an overall strategic plan for the management and administration of the project;
- coordinate and direct the activities of the design professionals hired by the CM;
- obtain building and special permits;
- provide advice or opinions with respect to budgeting for the project;
- provide opinions or advice on administrative and management matters that relate to the coordination of work among and between the contractors, subcontractors, disbursement agent, owner and design professionals;

- assist the general contractor in developing bidders’ interest in the project;
- establish bidding schedules;
- assist the owner in preparing construction contract document packages;
- assist the general contractor and the subcontractor bidding process to insure that the general contractor performs its duties with respect to bids from subcontractors and material suppliers;
- receive and review required certificates of insurance from the design professionals and contractors.

Further, the CM warranted and represented that it was experienced, competent and qualified to perform this work; that it had and would maintain sufficient facilities, expertise, staff, assets and resources to perform its duties; that it held and would hold all licenses, permits or other certifications necessary to perform its duties; and the owner would have full knowledge and involvement in the project.

The owner entered into a separate agreement with a contractor to construct buildings on the property. The CM was designated in the contractor agreement as the owner’s representative. The CM performed the services required of it under the DMA and the project was completed and certificate of occupancies were issued.

The CM sued for the fees that it was due under the contract in the amount of approximately \$1.8 million. The CM sued for breach of contract and common counts for money had and received and for services rendered. The trial court sustained a Demurrer to the Complaint with leave to amend on the ground that the CM had failed to allege that it was a licensed contractor and was therefore barred from bringing suit by Section 7031 of the Business and Professions Code. The CM filed a First Amended Complaint that omitted the common count for services rendered and recast the CM’s cause of action for breach of contract to allege a breach of the “Partnership Agreement” and sought additional remedies of rescission and restitution.

The owner demurred again under Section 7031, contending that the CM had to be licensed as a contractor, and the trial court overruled the Demurrer holding that the CM had alleged facts that, if true, avoided the Section 7031 bar. The owner moved for Summary Judgment on the ground that Section 7031 barred the CM’s suit. The trial court granted the Motion for Summary Judgment, concluding that the facts established that the CM was a contractor within the meaning of Section 7026 of the Business and Professions Code, and because the CM was unlicensed, its action was barred by Section 7031.

The Appellate Court reversed the decision of the trial court in a two to one decision. The court stated that the central question on appeal was whether an entity that provides “construction management services” to a private owner developing commercial real property is required to be licensed under the Contractors State License law. The court notes that the license law itself does not identify Construction Managers as entities requiring licensure. The court notes that the word “contractor” is a term synonymous with “builder” according to Section 7026 of the Business and Professions Code and is required to hold one of three categories of contractors licenses: General Engineering Contractor, General Building Contractor, or Specialty Subcontractor.

Section 7026 defines a contractor as any person who undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to or does himself or by or through others construct, alter or repair, add to, subtract from, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement or any part thereof, whether or not the performance of the work involves the addition to or fabrication into any structure project, development or improvement of any material or article of merchandise.

The court stated that provisions of the DMA revealed that the plaintiff was to assist the owner in coordinating the activities of the various workers on the project to enable them to complete their tasks in an organized and efficient manner and on time and on budget, to maintain records such as insurance certificates, as well as financial books and records for the project, to keep the owner apprised of the status of the project, to be the onsite point person to respond to issues as they arose and to generally act as the owner’s agent with respect to the various parties connected with the development of the project.

The court stated that the CM had no responsibility or authority to perform any construction work on the project or to enter into any contract or subcontract for the performance of that work. The court stated that it was undisputed that the CM did not contract with the owner to perform any of the activities listed in Section 7026’s definition of a contractor. The court notes that the owner entered into a separate construction contract with a contractor to do the construction work and that contractor hired all the subcontractors.

The court concluded that in no way did the DMA contemplate that the CM was to perform any construction services or assume the general contractor’s responsibilities under the construction contract. The court notes that Section 7057 of the B&P Code did not make the CM a contractor. The court concluded that the CM did not perform services as a contractor and therefore was not required to be licensed.

The court stated in dictum that the legislature provided that Construction Managers on public works projects must be licensed architects, engineers or general contractors, citing Government Code Section 4525(e). The court stated that because the legislature determined that licensure was required for public works projects, it enacted a statute to that effect. The court concluded that the fact that a similar statute applicable to privately-owned real estate development projects was not enacted strongly suggested that the legislature determined that licensure of Construction Managers was not necessary in that arena. This dictum would seem to indicate that at least this particular appellate court believed that Construction Managers on public works projects would have to be licensed either as architects, engineers or general contractors.

There was a strong dissent by Justice Mosk, holding that the Construction Management services described in the contract were those of a contractor that would require a license. Justice Mosk would have barred the plaintiff Construction Manager from recovering under the provisions of Section 7031.

It is the understanding of the author that a petition for hearing in the California Supreme Court has been filed, but has not been ruled upon. This case may be taken by the California Supreme Court because it raises an important issue with regard to construction law which has not yet been addressed by the courts in California. [CM](#)



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