Study H-821 April 24, 2007

First Supplement to Memorandum 2007-11

Mechanics Lien Law: Private Work of Improvement (Analysis of Comments on Tentative Recommendation)

This supplement analyzes the following comments on matters discussed in CLRC Memorandum 2007-11:

Issues in this memorandum that require discussion have been marked with the following symbol: ☞.

All other issues in this memorandum are presumed to be noncontroversial "consent" issues. The staff does not intend to separately discuss any consent issue, unless a Commission member or member of the public expresses a question or concern about the issue.

Unless otherwise indicated, all citations to statutes in this memorandum are to the Civil Code.

CLAIMANTS ON A PAYMENT BOND

The California State Council of Laborers Legislative Department, and the Construction Laborers Trust Funds for Southern California (hereinafter jointly referred to as "Laborers Group"), suggest that proposed Section 7608, governing who may make a claim against a direct contractor's payment bond, is superfluous and should be deleted from the proposed law. Exhibit pp. 5-7.

As discussed at pages 16-19 of CLRC Memorandum 2007-11, proposed Section 7608 would continue a statutory ambiguity in existing law regarding who may make a claim against a payment bond.

The section would provide that a claimant may not recover on a direct contractor's payment bond unless "the claimant provided work to the direct

contractor or *one of the direct contractor's subcontractors* **….**" The ambiguity concerns whether the phrase "direct contractor's subcontractor" includes lower tier subcontractors, who do not have a direct contractual relationship with a direct contractor. If the phrase does *not* include such subcontractors, a contributor to a work of improvement that worked for one of those subcontractors would be barred from making a claim against a payment bond.

After analyzing relevant law, the staff recommended that proposed Section 7608(a) be revised, to explicitly provide that a "direct contractor's subcontractor" includes subcontractors at every level:

> (a) This part does not give a claimant a right to recover on a direct contractor's payment bond given under this chapter unless the claimant provided work to the direct contractor ~~or one of the direct contractor's subcontractors~~, either directly or through one or more subcontractors, pursuant to a contract between the direct contractor and the owner.

Laborers Group supports the staff's interpretation of this provision in existing law. Exhibit pp. 5-7.

However, the group goes on to suggest that there is no need for Section 7608 in the proposed law at all, in light of proposed Section 7144(c):

> **§ 7144. Construction of bond**
>
> 7144. (a) ….
>
> (c) Except as otherwise provided by statute, the sole conditions of recovery on the bond are that the beneficiary is a person described in Article 1 (commencing with Section 7400) of Chapter 4 and has not been paid the full amount of the claim.
>
> **Comment.** Section 7144 restates former Section 3226 without substantive change. ….

The staff respectfully disagrees. Proposed Section 7144(c) would govern who may make a claim against a payment bond generally. Section 7608 is still needed to state who may make a claim against a *specific direct contractor's* bond — only those that provide work for that contractor.

The staff continues to recommend that **proposed Section 7608 be revised as indicated in CLRC Memorandum 2007-11, pp. 18-19.**

Laborers Group vigorously objects to the staff's recommended revision to proposed Section 7612, governing the advance notice required prior to enforcing a payment bond claim. Exhibit pp. 2-5.

As indicated pages 21-25 of CLRC Memorandum 2007-11, proposed Section 7612 may be ambiguous as to whether certain claimants must give any notice as a precondition of enforcing a payment bond claim in court. The ambiguity is based on the section mandating that a claimant satisfy either of two "conditions" relating to notice, the first indicated below in italics:

> **§ 7612. Notice prerequisite to enforcement**
>
> 7612. A claimant may not enforce the liability on a payment bond unless any of the following conditions is satisfied:
>
> (a) *The claimant has given preliminary notice to the extent required by Chapter 2 (commencing with Section 7200).*
>
> (b) The claimant has given notice to the principal and surety within the earlier of 75 days after completion of the work of improvement or 15 days after recordation of a notice of completion. The notice shall comply with the requirements of Article 4 (commencing with Section 7100).

As certain payment bond claimants (primarily laborers) are not required by Chapter 2 (or any other part of the proposed law) to give preliminary notice, the question arises whether those claimants automatically satisfy the condition in subdivision (a), simply by virtue of their status. If so, these claimants would then also appear to be excused from complying with subdivision (b), and could enforce a bond claim in court without having given either of the two specified notices.

As discussed at page 22 of CLRC Memorandum 2007-11, proposed Section 7612 may change existing law, which in existing Section 3242 appears to require all payment bond claimants to affirmatively give either preliminary notice, or an alternative notice of the payment bond claim within a specified time period.

That reading of existing law is supported by Miller & Starr, *California Real Estate* (3rd edition), § 28.105, p. 320 (2006), and Marsh, *California Mechanics Lien Law* (6th edition), § 4.166 (2007). Neither treatise specifically addresses laborer notice, but both generally provide that any payment bond claimant must give either preliminary notice or the second alternative notice (often referred to as a "post-completion notice").

A third treatise expresses a contrary view: A laborer "probably" *doesn't* have to give the post-completion notice. Hunt, *California Mechanics Lien and Related Construction Remedies* § 3.60A, pp. 159-160 (Cal. Cont. Ed. Bar 3d ed. 2006). However, the treatise goes on to state that existing law is ambiguous, and recommends that laborers give the post-completion notice as the "better practice," if for no reason other than to ensure the penal sum of the bond isn't exhausted by other claims.

The staff has located no appellate opinion interpreting this aspect of the provision in existing law, which was enacted in 1994.

The staff solicited input from practitioners on the issue. However, the staff recommended, in the absence of consensus to the contrary, that the Commission revise proposed Section 7612 to make explicit that a payment bond claimant must give either preliminary notice or the post-completion notice described in subdivision (b).

Opposition to Staff Recommendation

Laborers Group asserts, for several reasons, that laborers should not be required to give the post-completion notice.

The group first argues that existing law does not require a laborer to give this second alternative notice prior to enforcing a payment bond claim. However, the group offers no legal authority for this assertion.

The group also offers several policy reasons why laborers should not be required to give any notice prior to enforcing a claim against a payment bond.

The group notes that it is more difficult for laborers on a construction project to pursue mechanics lien remedies than it is for other contributors to the work of improvement. Not only do laborers typically not have any organizational structure in place to acquire the information necessary to give various required notices, but they often move from job to job so frequently they are provided little more information about the job than when and where to report to work.

Requiring a laborer on a project to provide the post-completion notice specified in proposed Section 7612(b) would first require the laborer to determine, as soon as 15 days after the recordation of a notice of completion, whether a payment bond had been *issued* on a project. (There is no provision in either existing or the proposed law requiring that a claimant be given notice when a payment bond is issued.)

The time the laborer has to act may be further affected by considerations related to "substantial completion," which constitutes "completion" under the proposed law. Section 7150. To a laborer not well versed in the intricacies of mechanics lien law, a project that is only "substantially complete" may look as if there is work remaining to be done (meaning the time to give notice of a payment bond claim has not yet run).

Compliance with the time requirement of proposed Section 7612(b) may be particularly difficult for laborers who provide work near the end of a project. By the time a laborer in this situation realizes that a last paycheck will not be forthcoming, much or all of the allowed time period for giving the post-completion notice could have expired.

Laborers Group also argues the situation is even more onerous for laborers benefit funds that receive a direct contribution from the laborer's paycheck (and are eligible, as "laborers," to make a payment bond claim). This contribution is usually not made until the middle of the month after work is performed.

Competing Policy Considerations

On the other hand, if laborers are not required to give timely notice as a precondition to enforcement of a payment bond, bond claims could trickle in even years after a job is complete. (The statute of limitation for bringing the action to enforce a payment bond claim can be as long as four years. Proposed Section 7610; Code Civ. Proc. § 337(1).)

The staff assumes there would be an administrative cost to sureties to keep bond files open for that long. However, the more significant burden would fall on direct contractors.

In the typical payment bond situation, the direct contractor is the principal on the bond. This means that the direct contractor can be sued directly on the bond by a payment bond claimant. It also means the direct contractor will be contractually liable to the surety for reimbursement, if the surety has to pay on a payment bond claim.

This can create a double payment problem for the direct contractor, in a case in which a laborer pursuing a payment bond claim was employed by a subcontractor. In this situation, the direct contractor may have already paid the subcontractor for the work that is the basis for the payment bond claim. If a payment bond claim is allowed as much as four years after work is done, the

passage of time could further prevent the direct contractor from pursuing or even locating the defaulting subcontractor for redress.

Laborers Group argues there are procedures available to direct contractors to guard against this double payment problem, such as taking over all payroll on a job, or making use of joint checks. However, engaging in these procedures would increase a direct contractor's administrative costs, perhaps substantially.

Recommendation

The staff believes there are relatively strong policy arguments on all sides of this issue**.** There also appears to be no simple solution to the problem presented, at least one that would not involve significant substantive changes in existing law.

Even slightly expanding the time deadlines in proposed Section 7612(b) for laborers could provoke opposition, from both direct contractors *and* laborers (as the provision then would explicitly require laborers to give a post-completion notice).

In light of the competing interests, the staff believes the Commission's best option would be to revise proposed Section 7612 to more closely track the language of existing law, which provides as follows:

> 3242. (a) With regard to a contract entered into on or after January 1, 1995, in order to enforce a claim upon any payment bond given in connection with a private work, a claimant shall give the 20-day private work preliminary notice provided in Section 3097.
>
> (b) If the 20-day private work preliminary notice was not given as provided in Section 3097, a claimant may enforce a claim by giving written notice to the surety and the bond principal as provided in Section 3227 within 15 days after recordation of a notice of completion. If no notice of completion has been recorded, the time for giving written notice to the surety and the bond principal is extended to 75 days after completion of the work of improvement.

Revising Section 7612 in this manner would allow all parties to continue to make their best arguments as to whether laborers must give a post-completion notice. The proposed law would not have prejudged any side's position.

The staff therefore recommends that **proposed Section 7612 be revised as follows**:

§ 7612. Notice prerequisite to enforcement

7612. ~~A claimant may not enforce the liability on a payment bond unless any of the following conditions is satisfied:~~

~~(a) The claimant has given preliminary notice to the extent required by Chapter 2 (commencing with Section 7200).~~

~~(b) The claimant has given notice to the principal and surety within the earlier of 75 days after completion of the work of improvement or 15 days after recordation of a notice of completion. The notice shall comply with the requirements of Article 4 (commencing with Section 7100).~~ (a) In order to enforce a claim against a payment bond under this part, a claimant shall give the preliminary notice provided in Chapter 2 (commencing with Section 7200).

(b) If preliminary notice was not given as provided in Chapter 2 (commencing with Section 7200), a claimant may enforce a claim by giving written notice to the surety and the bond principal within 15 days after recordation of a notice of completion. If no notice of completion has been recorded, the time for giving written notice to the surety and the bond principal is extended to 75 days after completion of the work of improvement.

ESCROW ACCOUNT AS SECURITY FOR LARGE PROJECTS

Gibbs, Giden, Locher & Turner LLP ("GGLT"), a law firm in Los Angeles, has written to clarify its previous suggestion that the holder of the escrow account established under proposed Section 7726 should not be included within the definition of "construction lender" in proposed Section 7004. Exhibit p. 1; CLRC Memorandum 2007-11, pp. 27-28. (The portion of GGLT's comment relating to this issue has been excerpted from an email also commenting on several other subjects.)

GGLT had argued that such a construction of the relevant sections would make the holder of this account subject to stop payment notices. GGLT believes that would be undesirable.

In its clarification, GGLT no longer appears to be asserting that the proposed law as drafted would change existing law. Rather, GGLT appears to be advocating that existing law be changed so as to afford these escrow accounts special treatment relating to stop payment notices.

GGLT asserts that the special security in this account is intended to be the direct contractor's security, and should be immune from stop payment notices from other claimants. GGLT points out that the other types of security that an owner would be permitted to provide pursuant to proposed Section 7726 — an

irrevocable letter of credit or a payment bond — are not subject to a stop payment notice.

It could be that reasons exist for some type of nuanced treatment of this special escrow account with regard to stop payment notices. (The issue is complicated by the fact that an owner is also required to deposit other funds into this same account.)

However, balancing the multiple policy considerations involved in creating new substantive law in this very narrow and somewhat technical subject area would be quite complicated. Moreover, as existing Section 3110.5 was only enacted in 2001, the staff believes sufficient time has not yet passed to determine whether the interrelationship of these provisions represents anything other than a theoretical problem.

The staff continues to recommend that **the proposed law relating to this issue remain as drafted.**

Respectfully submitted,

Steve Cohen
Staff Counsel

Exhibit

COMMENTS OF JOHN F. HEUER

From: JHEUER@gglt.com
Subject: California Law Revision Commission/Supplemental Comments
Date: April 16, 2007
To: scohen@clrc.ca.gov

….

Finally, as to your inquiry to clarify an issue relative to our firm's original submission, specifically the reference to security for large projects and the exposure of that security to stop notice claims, I agree that our comment was a bit ambiguous. I think this stems in part from the fact that Section 3110.5 is quite lengthy and, itself, a bit ambiguous. I believe our problem with the concept of defining a construction lender and excluding the escrow holder of "construction security escrow" funds is that these funds are purportedly being set aside to, at some level, guaranty the owner's ability to pay the general contractor, its subcontractors and vendors for work performed. The funds are set aside, in lieu of a payment bond or irrevocable LOC, to provide that level of security. Although Section 3110.5 also makes reference to depositing retention or retainage into the "construction security escrow account" in addition to the funds already deposited to secure the owner's payment obligations, I personally think that this is a mistake as it commingles funds that should be separated because of their very nature - i.e., the construction security escrow account existing to guaranty the owner's performance while the retention/retainage funds are established to guaranty the contractor's performance. Permitting the commingling of these funds blurs the line between these two funds, a line that shouldn't be blurred unless of course the funds in the construction security escrow account are needed to be drawn upon to pay for work performed. So, our comment was really directed toward the exposure of the funds guaranteeing the owner's performance as opposed to retention monies. In the event those two funding sources are commingled, I believe that the only funds that should be exposed to stop notices are those retention monies that have been deposited in the escrow account, again, unless the escrow account is funding payments for work performed because of a default by the owner.

I hope these comments help to clarify previously submitted comments or, alternatively, provide further commentary helpful to the Commission. Thank you again for the opportunity to participate in this process. John.

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April 19, 2007

Via E-Mail and Overnight Delivery

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Palo Alto, CA 94303-4739

Comments from California State Council of Laborers Legislative Dept. and Construction Laborers Trust Funds for Southern California on Tentative Recommendation for Mechanics Lien Law - MEMORANDUM 2007-11

Dear Members of the Commission:

The following comments to Memorandum 2007-11, to be considered at your April 26, 2007 meeting, are made on behalf of the California State Council of Laborers Legislative Department (Laborers), and the Construction Laborers Trust Funds for Southern California (Laborers Funds). The Laborers Funds are multi-employer employee benefit plans in the construction industry; what are referred to in your Tentative Recommendations as "express trusts" and "laborers compensation funds." They provide a variety of benefits to laborers in the construction industry, the persons for whose benefit the mechanic lien law was enacted before California was even admitted as a state in the United States.

We note that each of the provisions discussed below have equivalent provisions applicable to public works. Because the law as to public works has always, and should remain, the same as for private works, except where expressly provided otherwise, our comments below apply to the equivalent public works provisions as well.

Proposed Civil Code § 7612

Proposed Section 7612, based on current Civil Code § 3242, requires additional notice as a condition for enforcing bonds. As discussed below, laborers are exempt from this requirement under existing law.

The Laborers **OPPOSE the Staff recommendation to change proposed § 7612**, regarding the additional notice requirements for a bond claim. The Laborers also **OPPOSE the changes put forth by other commentators**: deleting subsection (b) or making both subsections (a) and (b) mandatory. The Laborers would *not* oppose deleting the section altogether.

As noted by staff, the current Civil Code § 3242 can be read to allow labor claimants to enforce a bond without any prior notice. *That is precisely how we read the current statute; that is precisely what is meant by the current statute; and we oppose any change to that interpretation.*

Under current Civil Code § 3097(a), "one performing actual labor for wages as described in subdivision (a) of Section 3089, or a person or entity to whom a portion of a laborer's compensation is paid as described in subdivision (b) of Section 3089" is excepted from the requirement of providing a preliminary notice. This exception is repeated in § 3097(b), and is reflected in the proposed new Civil Code §7202(a), as modified in Memorandum 2006-43, approved at the October 27, 2006 Meeting: "(a) A laborer is not required to give preliminary notice."

We believe the original proposed § 7612 embodies the same effect as the current § 3242. The proposed Staff change, however, would seem to add a notice requirement for labor claimants, which is not present in current law.

Under current law, "a claimant shall give the 20-day private work preliminary notice provided in Section 3097." Civil Code § 3242(a). The extra notice is not required, unless "the 20-day private work preliminary notice was not given as provided in Section 3097, ..." Civil Code § 3242(b). Since § 3097 (twice) "provides" that laborers are not required to give preliminary notice, they are similarly not required to give the extra notice.

The proposed Civil Code § 7612 changes the structure of the statute to provide that a payment bond may not be enforced unless "any of the following conditions is satisfied:" In the original proposal, the first is that a "claimant has given preliminary notice to the extent required by" the preliminary notice provisions. Since laborers are not required to give preliminary notice "to the extent required" by those provisions, they automatically meet this condition. The Staff proposes to change this to "A claimant has given the preliminary notice described" in the preliminary notice provisions. By removing the "to the extent required" this would become a mandate to provide preliminary notice, as a precondition to making a bond claim, unless the alternative notice is given. The proposed Staff change would thus change existing law to require laborers to either give a preliminary notice, or the alternative notice, as a precondition to a bond claim, when existing law does not so require.

There is a good reason why laborers are exempt from the requirement of a preliminary notice. It is the same reason why they are also exempt from the alternative notice of this section. Laborers are both the most vulnerable players in the construction industry, and the least able to assert the rights originally meant for their protection. While a supplier or subcontractor can withstand non-payment as part of the cost of doing business, the loss of wages or benefits for

workers can mean the difference between homelessness, or even life. Laborers are also the least likely to have the information and skills necessary to give preliminary notice and perfect their rights. They typically move between many jobs in the course of their employment, and are not provided information on any of their jobs, other than the location to show up for work. Protection of laborers' wages and benefits is currently the highest priority in our statutes, and should remain so. "The mechanic's lien is the only creditors' remedy stemming from constitutional command and our courts 'have uniformly classified the mechanics' lien laws as remedial legislation, to be liberally construed for the protection of laborers and materialmen.'" Betancourt v. Storke Housing Investors, 31 Cal.4th 1157, 8 Cal.Rptr.3d 259, 82 P.3d 286 (2003), *quoting* Wm. R.Clarke Corp. v. Safeco Ins. Co. 15 Cal.4th 882, 889,64 Cal.Rptr.2d 578, 938 P.2d 372 (1997). It was agitation by workers which passed the first mechanic lien law, and had the law placed in the California Constitution in 1871. *See generally*, Sackman, Lien On: The Story of the Elimination and Return of Mechanic Lien, Stop Notice and Bond Remedies for Collection of Contributions to Employee Benefit Funds, 20 BERK. J. EMP. & LAB. L. 254-85 (1999) (*Lien On*); Lucile Eaves, A HISTORY OF CALIFORNIA LABOR LEGISLATION, 233-243 (UC Press 1910).

Requiring extra notice would be more than an extra burden to laborers. It could make enforcement of their rights impossible. Workers performing labor at the end of the project may not know their final paychecks are unpaid until close the deadline for giving this extra notice. At that point, they probably do not have the information to give the notice, and by the time they find an attorney to do this for them it will probably be too late. The situation is worse for benefit contributions. Those benefit payments are usually made in the middle of the month following the month in which work is performed. This means that there may not even be a delinquency in payment until *after* the time limit to give notice has passed. All of this is exacerbated by the fact that the doctrine of "substantial completion" may start the clock ticking even before some of the final labor is performed.

Responsible general contractors can take steps to make sure they do not face the potential double liability of late claims on their bonds. They can require copies of payroll and benefit payments from their subcontractors (such as the certified payroll required by law on public works). If there is a problem, they can issue joint checks for the payments in exchange for a release, or even take over the payroll themselves. These methods are commonly used by *responsible* general contractors.

Irresponsible general contractors, however, will use the time limitations of the bond claims to avoid paying altogether. They are the ones most likely to hire *irresponsible* subcontractors in the first place. It is no secret that private construction is one of the largest users of the underground economy: paying workers in cash, at less than even the minimum wage, with no work protections at all. An *irresponsible* general contractor who uses one of these *irresponsible* subcontractors because of their low bid price, has nothing to complain about when

some of these workers may find their way to an attorney who makes a claim on their bond.

I have a case currently in which the general contractors are intentionally using this time limit to avoid payment altogether. We have sued an irresponsible subcontractor for massive wage and hour violations on numerous projects. When we subpoenaed job and bond information from the general contractors, they refused to provide it. They will eventually be required to produce these documents, but they know that the clock is ticking on their bond claims. If they can delay long enough, the statute of limitations will pass, and they can avoid claims on their bonds altogether.

Irresponsible behavior should not be rewarded. It is difficult enough under current law to gather information in time to make claims on bonds for unpaid workers. **The Laborers strongly opposes any change which would make this even more difficult.**

Proposed Civil Code § 7606 and § 7608

These sections both state the conditions for recovery on a bond. Proposed Section 7606 is based on current Civil Code § 3096; proposed Section 7608 is based on current Civil Code § 3267. They are based on provisions in current law which refer to *both* private and public works. The Laborers concur with the Staff recommendations as being consistent with current law. We additionally suggest that Section 7608 be eliminated entirely, as being redundant.

What is not discussed in the Staff Report, or by other commentators, is the relation of these provisions to other provisions in current and proposed law relating to bonds. In particular, Proposed § 7144, which is based on current Civil Code §3226, provides:

> "(a) A bond given under this part shall be construed most strongly against the surety and in favor of the beneficiary.
> (b) A surety is not released from liability to the beneficiary by reason of a breach of the contract between the owner and direct contractor or on the part of the beneficiary.
> (c) The sole conditions of recovery on the bond are that the beneficiary is a person described in Article 1 (commencing with Section 7400) of Chapter 4 and has not been paid the full amount of the claim."

Current Civil Code § 3226 provides:

> "Any bond given pursuant to the provisions of this title will be construed most strongly against the surety and in favor of all persons for whose benefit such bond

> is given, and under no circumstances shall a surety be released from liability to those for whose benefit such bond has been given, by reason of any breach of contract between the owner and original contractor or on the part of any obligee named in such bond, but the sole conditions of recovery shall be that claimant is a person described in Section 3110, 3111, or 3112, and has not been paid the full amount of his claim."

This provision, by its terms, applies to *all* bonds "under this part." The structure of the current law is that *all* provisions relating to bonds, public or private, refer back to the claimants and claims of mechanic liens. *See* Southern California IBEW-NECA Trust Funds v. Standard Industrial Electric, 247 F.3d 920, 928-29 (9th Cir. 2001) (remedies for public and private works part of the same "integrated statutory scheme". We think that this structure should be maintained, consistent with the Constitutional mandate from which all of these remedies arise. Cal. Const. Art. 14, § 3. If any clarification is needed, it should be made in the original sections defining the basic rights of mechanic liens, not in separate sections.

We agree with the Staff and other commentators that, under current law, suppliers of labor or materials to contractors of any tier are entitled to make a claim on the bond. Union Asphalt, Inc. v. Planet Ins. Co., 21 Cal.App.4th 1762, 27 Cal.Rptr.2d 371 (2nd Dist. 1994). Since the statute itself applies to both private and public works bonds, there is no basis for the argument that the Union Asphalt decision applies only to public works. If there was any such argument, it was put to rest when the California Supreme Court confirmed this holding, in a case involving a private works:

> "When a general contractor executes a statutory labor and material payment bond as principal, the obligation on the bond is not limited to the subcontractors and material suppliers with which the general contractor has executed valid contracts, but extends also to lower tier subcontractors and material suppliers with which the general contractor has no privity of contract, and to which the general contractor owes no payment obligation apart from the bond, provided only that they have valid lien claims for that project." Wm. R. Clarke Corp. v. Safeco Ins. Co., 15 Cal.4th 882, *896, 938 P.2d 372, 64 Cal.Rptr.2d 578 (1997).

The Union Asphalt decision also contrasted California law with the federal Miller Act, 40 U.S.C. § 270a, which has been interpreted to allow claims only to suppliers of labor and material to the second-tier contractors. Clifford F. MacEvoy Co. ex. rel. U.S., 322 U.S. 102, 64 S.Ct. 890, 88 L.Ed.1163 (1944). Since mechanic liens in California are not limited to "second tier materialmen and subcontractors . . . the only reasonable construction" of this section is that it is similarly for the benefit of claimants "of any tier." Union Asphalt, 21 Cal.App.4th 1762, 1766. So any contrary interpretation of the statute would be a change in existing law, and possibly

contrary to the mandate of the California Constitution.

Given this, there seems little point to Proposed Section 7608 at all. The Court in *Union Asphalt* posited that the purpose of current § 3267 was "to make certain that persons who do not perform pursuant to the construction contract have no right of action on the bond" such as "architects, engineers and land surveyors who perform work prior or otherwise outside the scope of the construction contract . . . ." 21 Cal.App.4th 1762, 1766.

If there is any need to clarify this in the proposed law, it should be done in the provisions as to who is entitled to a mechanic lien (Proposed § 7400). This approach is in line with one of the purposes of these revisions: to streamline what is currently a cumbersome set of statutes.

Thank you for your consideration.

Sincerely,

J. David Sackman, of
Reich, Adell, Crost & Cvitan

cc: Mike Quevedo, Southern California District Council of Laborers
Jose Mejia, Cal. State Council of Laborers
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