

## Whose side is the architect on?



### Construction Law

By PAMELA J. SCHOLEFIELD

**Question:** We are a developer specializing in strip retail centers. Because of the soft construction market, we have had quite a number of unfamiliar general contractors bid on projects.

These new players are hungry for work and often submit bids that are extremely competitive. We always go with the low bidder and have had no problems until now.

The general contractor on our most recent project has been getting approval for questionable change orders, many of which could easily qualify as being part of the original scope of work, and has received payment for the percentage of work that we feel has not been done yet. This is a problem for us as we believe he is taking advantage of the architect because the architect is able to make independent decisions on the project. To make things worse, the architect that we hired seems to side with the contractor quite a bit when we have a disagreement with the contractor.

The architect has worked with this contractor in the past, and we used the architect's recommendation in our final decision to award the work to this contractor.

It is frustrating to pay for the expertise of an architect, only to see

him defend the failings of the general contractor. The expression "bite the hand that feeds you" seems to sum up our relationship with the architect.

The project is barely halfway completed and we are almost at the point of firing the architect for his lack of loyalty. Is there anything we can do to get our architect to see things our way without derailing the project?

**Answer:** Before you point the finger at your architect, you need to understand what the architect's role is. You seem to have hired the architect to design the project and then to stay involved with the project during construction in a contract administration capacity.

The architect is acting as your agent when approving change orders and pay applications.

And, for this project, it seems you have also given the architect the responsibility to resolve disputes between you and the contractor.

In that capacity, the architect is considered a quasi-judicial officer, or in simpler terms, an arbitrator between you and the contractor to resolve disputes.

In all of these roles, the architect must always act in good faith and be careful not to act negligently either in the providing of plans, or approving the contractor's pay requests.

If there is negligence, then the architect risks being liable not only to the owner, but also the contractor, or even the contractor's surety in cases where the approved pay application

exceeds the actual value of work done. The architect may also be liable to the contractor for causing the contractor increased costs and delays due to excessive time to review submittals or provide responses to critical requests-for-information.

And, much to your dismay, when making decisions as to who is correct in a dispute between the owner and contractor, the architect's duty is not just to the owner.

The architect must also consider the interests of the contractor as well. Even though the architect has no direct contractual relationship with the contractor, he owes a duty to the contractor to be fair and impartial when resolving a dispute. Thus, the architect has to walk a fine line between the owner and the contractor.

Keep in mind that just because you have paid the architect's fee, you cannot demand that the architect do only what you want it to do if doing so violates the architect's legal obligations.

By the facts you have provided, it does not seem to be a wise move to terminate the architect solely for his lack of loyalty to you.

You could be in breach of contract by doing so, and your worries about whether or not the project will be completed "on-time and within budget" will be replaced with worries about the cost of litigation, which is where everything would probably end up.

In the future, you may consider not having the architect play such an

involved role during construction. Your own project manager can decide whether or not to approve a change order submitted, or deny a claim for extra money or time, as well as approve the pay applications. However, I am guessing that you wanted to have the architect be actively involved during construction in order to relieve your company of additional administration work.

But, as you are finding out, it sometimes comes with mixed results — especially when you want to be in control.

If you would like to keep the architect involved during construction, you can have a contract provision with the contractor as to how to handle the dispute if one of the parties does not agree with the architect's decision. There are also contract provisions you can use that would make the architect's decisions on change orders and pay application subject to final approval by the owner.

That way, all the parties, including the architect, have a clear guide in how to handle these issues.

A reader (in response to last week's article "Liquidated damages —who do they protect?") asked: "If LDs are imposed, would it also be acceptable/advisable for the GC to propose performance bonuses in the event the project timeline is ultimately shortened?"

Answer: There is nothing wrong with asking for a bonus for reducing

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## California Division of Apprenticeship Standards gives high praise to ABC and its programs

By NICOLE N. PINER  
ABC San Diego

The Department of Industrial Relations (DIR), Division of Apprenticeship Standards (DAS) honors apprentices every year in conjunction with the anniversary of the Shelley-Maloney Act that established the basic features of California's apprenticeship program in 1939.

"California is today offering young workers golden opportunities through apprenticeship programs as a way to establish themselves in lifelong, satisfying careers," said DIR Director John Duncan. "We have more than \$43 billion worth of public works infrastructure projects to complete over the next

10 years and not enough workers to fill all those jobs that will be created due to the retirement of huge numbers of baby boomers."

The State of California Division of Apprenticeship Standards recently audited the ABC San Diego Apprenticeship program in August 2007. The DAS is the state department assigned to oversee all apprenticeship programs in California. State Apprenticeship Consultant Karen Belcher said, "the audit team did not find any program deficiencies. San Diego ABC programs meet or exceed all apprenticeship legal requirements."

Belcher continued to praise our

teaching programs: "The programs are exemplary with regard to their file and record keeping systems and execution of the programs in general. The auditor found that the programs have excellent, well-documented processes and procedures in place to facilitate the selection, indenture and training of all apprentices, and the programs follow the procedures consistently with a focus on continuous improvement. The attention to detail, one-on-one interaction with the apprentices and the enthusiastic dedication of the professional staff help to make these programs successful. No formal recommendations that require follow-

up were made. Congratulations to the ABC program staff on their demonstrated commitment to excellence and their focus on continuous improvement."

We give our thanks to the state of California and Belcher for her thorough assessment of our programs. ABC San Diego Training Trust, our apprentices and our member contractors have always been confident that our programs are second to none. This report only confirms that belief.

*Piner is director of communications and workforce development for ABC San Diego.*

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# Construction on ECR Corporate Center has begun

By PRITISH BEHURIA  
The Daily Transcript

Construction has begun for the Smith Consulting Architects-designed ECR Corporate Center, which will house a 63,000-square-foot Tri-City Wellness Center and a 27,000-square-foot medical office building, to be located at 6250 and

6260 El Camino Real in Carlsbad. San Marcos-based Lusardi Construction is the general contractor for the project, which is slated for completion in November 2008.

Smith Consulting Architects designed the two new two-story concrete tilt-up shell buildings of the ECR Corporate Center, which is a

joint development between Carlta Company and Finest City Realty Advisors Inc.

Construction costs for the building are estimated to be in excess of \$20 million, while the building spans 90,000 gross square feet in area.

The Tri-City Wellness Center is a

health club and rehab facility that will offer lap, exercise and therapy pools, spas, a walking and running track, exercise studios, locker rooms and physical therapy rooms. The medical office building will be managed by Tri-City Medical Center and later re-leased to medical specialists.

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the project schedule. What ultimately will dictate whether the owner agrees to it or not depends on the type of project.

For example, an industrial project where there is going to be machinery that has a long lead time, or where tenants have leased the building on a certain date will probably not benefit by finishing early.

On the other hand, if your portion of the work is on the critical path, and

it will be apparent that the owner will benefit by being up and running earlier than originally planned, you may be able to attract interest in a bonus for early completion.

Some public works projects, like those through Caltrans, can have substantial early completion bonuses in their contracts, making it very lucrative for a savvy contractor to find ways to complete the project early.

Do you have a construction ques-

tion? Submit it to: 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: 20080411tca

## CONSTRUCTION CALENDAR

### OTHER EVENTS

#### TUESDAY, APR 15 - SEMINAR

##### SYSTEM DUCT DESIGNS: ADVANCED

This seminar will teach participants how to recognize, analyze and overcome advanced air distribution problems that most HVAC contractors either miss or simply don't understand. **Organization:** SDGE Seminars **Information:** (800) 613-8970 www.sdge.com/training **Cost:** No Cost **When:** Hours: 6:00 PM - 9:00 PM **Where:** San Diego Energy Resource Center (SDERC), 8690 Balboa Ave., Suite 100, San Diego, 92123

#### TUESDAY, APR 15 - DINNER MEETING

##### GENERAL MEMBERSHIP MEETING

For more information, contact the ASPE. **Organization:** American Society of Professional Estimators **Information:** (619) 749-1890 asped4@cox.net **Cost:** No Details Available **When:** Starts: 5:30 PM **Where:** The Butcher Shop Steakhouse, 5255 Kearny Villa Rd., San Diego, 92123, Venue Phone - (858) 565-2272

#### TUESDAY, APR 15 - TOUR

##### SITE TOUR OF McMAHON STEEL CO.

After the site tour, there will be a dinner at the Marina Gallery. Those not attending the Site Tour can register at the Gallery at 6:30pm and enjoy a short social hour. **Organization:** ASPE San Diego Chapter **Information:** 619.583.7331 www.aspetech.com **Cost:** \$10.00- \$32.00 **When:** Starts: 5:00 PM **Where:** McMahon Steel Co., 6795 Calle De Linea, San Diego

#### WEDNESDAY, APR 16 - DISCUSSION

##### I-805 AND SR-52 CORRIDOR UPDATES

Please join us today to discuss the latest design and construction developments along the I-805 and SR-52 corridors. **Organization:** ASCE San Diego Section **Information:** (619) 588-0641 sdcivil@asce-sd.org **Cost:** \$10.00- \$25.00 **When:** Starts: 11:45 AM **Where:** Best Western Seven Seas, 411 Hotel Circle South, San Diego, 92108

#### FRIDAY, APR 18 - SPECIAL EVENTS

##### EGCA AFFILIATES GOLF TOURNAMENT

Come out to the EGCA Affiliates Golf Tournament and enjoy a day of golf and networking with other construction and contracting professionals. **Organization:** EGCA **Information:** 619-692-0760 www.egca.org **Cost:** \$160.00 **When:** Starts: 11:00 AM **Where:** Pala Mesa Golf Resort, 2001 Old Highway 395, Fallbrook, 92028, Venue Phone - 760-728-5881

#### SATURDAY, APR 19 - CLASSES

##### TRAFFIC/FLAGGER CONTROL

This course is an introduction to the basic principles of temporary work zone traffic control and traffic control flagging. **Organization:** EGCA **Information:** 619-692-0760 www.egca.org **Cost:** \$175.00- \$200.00 **When:** Hours: 8:00 AM - 5:00 PM **Where:** National University, 9388 Lightwave Ave., San Diego, 92123

#### SATURDAY, APR 19 - DISCUSSION

##### PHILOSOPHY OF DESIGN

Three speakers will present various topics this morning, including the practical and emotional philosophy of design, and a presentation of a design for a medical clinic in Peru. **Organization:** Friends of San Diego Architecture **Information:** (619) 287-0050 www.friendsofsdarch.com **Cost:** \$5.00 **When:** Hours: 9:30 AM - 11:30 AM **Where:** NewSchool of Architecture & Design, 1249 F St., San Diego

#### SATURDAY, APR 19 - ANNUAL EVENTS

##### BLACK CONTRACTORS ASSOCIATIONS 26TH ANNIVERSARY

Save the date... for the Black Contractors Association's Platinum Plus Anniversary Gala. Featuring surprise speakers, sports stars and political personalities. **Organization:** Black Contractors Association Inc. **Information:** Janiece Hammed (619) 263-9791 **Cost:** No Details Available **Where:** Anthology, 1337 India St., San Diego, 92101, Venue Phone - (619) 595-0300

#### WEDNESDAY, APR 23 - MEETING

##### DELEGATES MEETING

The San Diego-Imperial Counties Labor Council will meet tonight. **Organization:** Imperial Counties Labor Council **Information:** www.unionyes.org **Cost:** No Details Available **When:** Starts: 5:30 PM **Where:** Machinists Hall, 5150 Kearny Mesa Road, San Diego

#### THURSDAY, APR 24 - PRESENTATION

##### BUILDING CODE UPDATE

This is a great opportunity for product exhibitors to showcase their products lines to San Diego County designers, specifiers, contractors and building officials. **Organization:** Construction Specifications Institute (CSI) **Information:** (619) 401-6733, (877) 401-6733 sdcisi@cox.net **Cost:** \$15.00- \$35.00 **When:** Hours: 5:30 PM - 7:30 PM **Where:** Admiral Baker Club, 2400 Admiral Baker Road, San Diego, 92120



A complete listing of the Construction Calendar is available at San Diego Source — www.sddt.com/realestate. Send notices about upcoming events to robin.scott@sddt.com for a free listing. —Compiled by Robin Scott