

California Contractor's License Law Does Not Require Construction Managers to Be Licensed on Private Projects

In a case decided in March, the California Court of Appeal confirmed that a construction manager on a private work of improvement is not required to hold a contractor's license. *The Fifth Day, LLC v. Bolotin*, 172 Cal.App.4th 939 (2009). In that case, the plaintiff, The Fifth Day, LLC ("Fifth Day"), entered into a contract entitled "Development Management Agreement for the Construction of The Campus at Chino Industrial Commons" (DMA) with the defendant, Industrial Real Estate Development Company (the "Owner"), which owned the campus (the "Project"). The DMA required the Owner to pay Fifth Day a Project Incentive Fee based on a share of the profits on the sale of the Project buildings.

Fifth Day was designated the "Development Manager" under the DMA, which required Fifth Day to perform numerous responsibilities, some of which are typically performed by general contractors. The responsibilities included:

- identifying "critical and high priority matters and promptly report[ing] the same to Owner" and "mak[ing] recommendations for a short-term contingency plan to minimize Owner's exposure to loss or damage";
- providing "advice or opinions with respect to the development of an overall strategic plan for the management and administration of the Project";
- coordinating and directing the activities of the designers Fifth Day would hire;
- advising or providing opinions regarding the development of the construction budget, controlling the budget and keeping the Project moving forward on time and on budget;
- updating the budget, including comparing actual and anticipated expenses;
- providing "cost and performance evaluations of alternative materials and systems";
- providing a Project development schedule with a "good faith estimate of how long the regulatory and construction phases of the Project will last";
- holding preconstruction meetings with the Owner;

- advising and opining “on administrative and management matters that relate to the coordination of work among and between the Contractors, Subcontractors, Disbursement Agent, Owner and the Design Professional(s)”;
- assisting the general contractor with bidding, preparing bidding schedules and assisting the Owner with construction contract documents;
- receiving and reviewing certificates of insurance from Project participants;
- using “commercially reasonable efforts to achieve satisfactory performance from each of the Contractors and Subcontractors”;
- inspecting and reviewing construction daily;
- providing summaries and documenting change order proposals and change orders;
- reporting monthly to the Owner on Project status;
- maintaining financial books and records for the Project;
- reporting cash disbursements; and
- coordinating “the completion and correction of the work” and “assisting the designer(s) with final inspections.”

After entering into the DMA, the Owner entered into a construction contract with a general contractor and sold three of the seven Project buildings upon completion of construction. The Owner paid Fifth Day \$785,000 for those sales, and Fifth Day later sued the Owner and its principals for failing to pay \$1.8 million in Project Incentive Fees from the sale and lease of the remaining buildings.

The trial court granted the Owner summary judgment finding Fifth Day was acting as an unlicensed contractor and thus barred by the Contractor’s State License Law from maintaining its action for damages. *See, Bus. & Prof. Code § 7031*. The Court of Appeal reversed the trial court, finding Fifth Day was a construction DMA manager and therefore did not need a contractor’s license to perform the services under the DMA.

The court emphasized that the Owner retained a general contractor and Fifth Day “had no responsibility or authority to perform any construction work on the [P]roject, or to enter into any contract or subcontract for the performance of such work.” Thus, the court concluded Fifth Day did not qualify as a “contractor,” which the License Law defines 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 herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement” *Bus. & Prof. Code § 7026*.

The court also rejected the defendants' argument that, by superintending the work, the Contractor's License Law designated Fifth Day a "general building contractor." The License Law defines a "general building contractor" as "a contractor whose principal contracting business" includes superintending the whole or a part of a construction project. *Bus. & Prof. Code § 7057*. This definition, the court noted, did not pertain to any person or entity—only a contractor—and thus did not cover *Fifth Day*.

The court further reasoned that, by expressly requiring construction managers on public works of improvement to carry an architectural, engineering or general contractor's license under Government Code § 4525(e), the legislature did not require a license on private works of improvement. In a lengthy dissent, Justice Mosk argued that that requirement "does *not* imply that construction managers on private projects need not be licensed contractors." He noted that Fifth Day was performing many of the functions general contractors perform, like coordination of work and supervision of licensed contractors. Based on that fact, he concluded the majority's holding rejecting licensure established a "loophole" for unqualified and unscrupulous unlicensed individuals to facilitate their illicit activities simply by calling themselves "construction managers."

Given the logical reasoning of the majority and dissenting opinions, the *Fifth Day* case demonstrates the need for the legislature to clarify the distinction between construction management and construction contracting and exactly when a contractor's license is required on private projects. Until the legislature provides additional legislation, it appears that, under *Fifth Day*, an owner's consultant need not be licensed if he or she (1) merely superintends work without the obligation or responsibility to deliver a project, (2) does not perform physical construction work and (3) does not contract directly with the licensed contractor(s) that perform the work.

If you would like to receive future *Construction Advisories* electronically, please forward your contact information including e-mail address to construction.advisory@alston.com. Be sure to put “**subscribe**” in the subject line.

If you have any questions, please contact your Alston & Bird attorney or any member of the Construction group.

Members of Alston & Bird’s Construction and Government Contracts Group

Atlanta

John I. Spangler, III
Practice Group Leader
404.881.7146
john.spangler@alston.com

Jeffrey A. Belkin
404.881.7388
202.756.3065
jeff.belkin@alston.com

Donald G. Brown
404.881.7865
donald.brown@alston.com

Steven Campbell
404.881.7869
steven.campbell@alston.com

Deborah Cazan
404.881.7667
debbie.cazan@alston.com

Los Angeles

Kevin S. Collins
213.576.1184
kevin.collins@alston.com

J. Andrew Howard
404.881.4980
andy.howard@alston.com

Stephanie A. Jones
213.576.1136
stephanie.jones@alston.com

Washington, D.C.

Jamil E. Nasir
202.756.3192
jamil.nasir@alston.com

Daniel F. Diffley
404.881.4703
dan.diffley@alston.com

A. McCampbell Gibson
404.881.7769
mac.gibson@alston.com

William H. Hughes, Jr.
404.881.7273
bill.hughes@alston.com

Thu Trinh H. Huynh
404.881.4397
trinh.huynh@alston.com

Kyle A. Ostergard
213.576.1036
kyle.ostergard@alston.com

G. Christian Roux
Practice Group Leader
213.576.1103
chris.roux@alston.com

Katherine L. Miller
404.881.7947
kate.miller@alston.com

Julie R. Ross
404.881.7648
julie.ross@alston.com

Mike H. Shanlever
404.881.7619
mike.shanlever@alston.com

Aaron Vandiver
404.881.4949
aaron.vandiver@alston.com

Jessica L. Sharron
213.576.1164
jessica.sharron@alston.com

Nathan D. Sinning
213.576.1134
nathan.sinning@alston.com

ATLANTA

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404.881.7000

CHARLOTTE

Bank of America Plaza
Suite 4000
101 South Tryon Street
Charlotte, NC 28280-4000
704.444.1000

DALLAS

Chase Tower
Suite 3601
2200 Ross Avenue
Dallas, TX 75201
214.922.3400

LOS ANGELES

333 South Hope Street
16th Floor
Los Angeles, CA 90071-3004
213.576.1000

NEW YORK

90 Park Avenue
New York, NY 10016-1387
212.210.9400

RESEARCH TRIANGLE

Suite 600
3201 Beechleaf Court
Raleigh, NC 27604-1062
919.862.2200

SILICON VALLEY

Two Palo Alto Square
Suite 400
3000 El Camino Real
Palo Alto, CA 94306-2112
650.838.2000

VENTURA COUNTY

Suite 215
2801 Townsgate Road
Westlake Village, CA 91361
805.497.9474

WASHINGTON, D.C.

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202.756.3300

www.alston.com

© Alston & Bird LLP 2009