

## **Construction Manager not Required to Have Contractor's License**

Where a construction manager is working in an agency relationship to assist the project owner, coordinating the activities of the various contractors and workers, but is not performing any construction work itself or through subcontractors, it is not required to have a state contractor's license.

In *Fifth Day, LLC v. Bolotin*, 172 Cal. App. 4<sup>th</sup> (2009), the construction manager sued the project owner for the balance of its fee and the owner responded with a summary judgment motion to dismiss the action based on the failure of the CM to have a contractor's license. The trial court agreed and dismissed the CM's complaint. This was reversed on appeal because the appellate court determined that the CM not an at-risk CM but was serving only in an agency capacity with no responsibility for performing construction activities. The court pointed out that the state licensing law does not identify CMs as workers requiring licensure. The owner argued, however, that various decisions of the California Supreme Court made it clear that an entity that provides supervision or management services for any construction project must be licensed as a general building contractor so as to protect the public from dishonesty and incompetence in the administration of the contracting business. In rejecting this argument, the court concluded: "Defendants' position is untenable." According to the court:

A review of Plaintiff's duties under the [agreement] reveals that it was to assist, on behalf of the Owner, in coordinating the activities of the various workers to enable them to complete their assigned tasks in an organized and efficient manner, on time and on budget; to maintain records such as insurance certificates, as well as the financial books and records for the project; to keep the Owner apprised of the status of the project; to be the on-site 'point person' to respond to issues as they arose; and generally to act as the Owner's agent with respect to the various parties connected with the development of the project. [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 such work.

**Comment:** In a lengthy dissenting opinion, one judge strongly disagreed with the majority opinion and stated that he would find the CM was required to hold a contractor's license, even though not performing construction work, because it was performing construction services, including supervising the work of other licensed construction workers. The judge believed the licensing statute was broad enough to require a license for such services. If the dissenting opinion were adopted it might lead to interesting questions concerning what insurance policy would then apply to cover the CM for its acts, errors and omissions in the performance of its services. If the services are of the nature that would require a contractor's license, does this mean the commercial general liability (CGL) policy would have to cover damages arising out of the CM's services? It

is generally assumed that a CM serving in an “agency” capacity is performing professional services, and would be covered for its professional acts, errors and omissions under a professional liability policy instead of its CGL policy. The CGL typically contains an exclusion for damages arising out of professional services. (Interestingly, the CM is not typically required to have a professional license to perform these services – but the services nevertheless fall within the definition of professional services found in most professional liability policies for design professionals.)