



VOL_XLV NO_10

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Reminder:

Copy deadline for the November 2005 issue is October 1, 2005; copy deadline for December 2005 issue is November 1, 2005.



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Los Angeles Section

Monthly: Est. 1913

ORANGE / SAN_BERNARDINO/RIVERSIDE / SAN_LUIS_OBISPO / SANTA_BARBARA/VENTURA / DESERT / SOUTHERN SAN_JOAQUIN / METROPOLITAN LOS ANGELES

"Experience is a hard teacher because she gives the test first, the lesson afterwards."

— Unknown

PRESIDENT'S MESSAGE

New Section President

Rich Haller, P.E.



Indeed it is an honor and pleasure to assume the role of Los Angeles Section President. It promises to be an exciting year and I hope the LA Section Board of Directors and I can fulfill your expectations. We are very fortunate to have the 2005 ASCE Annual Civil Engineering Conference in Los Angeles October 27 – 29th. This conference has an incredible program focusing on visionary leadership skills for projects of the future. Friday's program includes a visionary leaders forum followed by transportation and water breakout forums focusing on planning, financing, and delivering projects; Saturday features tours of leading edge projects in the greater Los Angeles area! I encourage you to sign up now at www.asce.org/conferences/annual05 I hope to see you there!

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Just prior to the Annual Conference, the LA Metro Branch will present an updated Los Angeles County Infrastructure Report Card. Building upon the national Report Card for America's Infrastructure (www.asce.org/reportcard/2005/index.cfm), and report cards for Orange and San Bernardino/Riverside counties (www.asce.org/reportcard/2005/index.cfm), grades in a variety of infrastructure categories (bridges, dams, drinking water, flood control, parks, ports, schools, solid waste, streets and highways, transit, urban runoff, wastewater) will be presented. Report cards are a very effective tool in communicating the status of our infrastructure. Watch for the results!

Another exciting event is the formation of the four Sections within California (San Diego, LA, San Francisco, Sacramento) into Region 9 of ASCE under the leadership of a Board of Governors. With this new focus, the Region will advance two existing programs that will directly affect and benefit you, the **Statewide Legislative Program** and the **Disaster Preparedness Program**. Mike Thornton, P.E., M. ASCE (mthornton@tkeengineering.com) is coordinating our 2nd Annual Legislative Day in Sacramento February 22nd. In addition to volunteers for the February 22nd Legislative Day, Mike is seeking members to assist with an Ambassador Program coordinating with the local office of each legislature within the Section. One of the major focuses of the program is infrastructure funding. The Disaster Preparedness Program, headed up by Jack Ralston, P.E., M. ASCE (818-345-9199 or 818-345-5283 (fax)) is seeking Professional Engineer volunteers to receive CA Office of Emergency Services Disaster Service Worker training and to respond in the event of a major natural disaster. In light of the unfolding aftermath of hurricane Katrina, this is something we should all seriously think about.

You will be receiving your membership renewal notices from ASCE National soon. Please renew your membership by paying both National and Section/Branch dues. The entire ASCE team is working hard to provide you the highest value for your membership through programs such as the infrastructure report cards, Statewide Legislative Program, the Disaster Preparedness Program and your local Branch programs.

I am writing this message just days after Hurricane Katrina. Look for updates from ASCE National on how the society is helping and how you might get involved. I hope you will consider making a donation to your favorite charity. Certainly, there will be numerous lessons learned for American society and the civil engineering community. I look forward to working with you to improve our preparedness for and response to natural disasters.

Our Privilege to Serve

The ASCE Los Angeles Section hosts this month ASCE delegates and guest from around the nation and the world for the 2005 National Conference. As you have probably been reading about in your newsletter in the past couple of issues, there is a lot in store for you and your guests as attendees. For our part, we are dedicating two issues of our newsletter: this one which we will call as the "Pre-2005 National Conference Issue" and the November 2005 issue as the "2005 National Conference Issue". What's the difference between these two issues and the rest of the issues?

In this issue and the next we are adopting the conference logo on the front cover of the newsletters. Obviously, you will read about the conference. Then for the 2005 National Conference Issue, we will be printing the same in color and on a different paper. I want to give you our readers a head's up of that one time change in the formatting of our newsletter. In December, we go back to our old efficient and austere publication.

Why the sudden and dramatic change for one issue? We thought it would be of greater service to our national, international, and of course local membership to enhance the Los Angeles Section Newsletter one time and accommodate the 2005 National Conference theme instead of creating a separate publication specific to the conference for conference attendees. This suggestion (which came from our venerable Fellow Chuck Rendall) was both cost-effective and of greater value for our end users. A greater challenge it is for us, your newsletter staff, to produce but we're up to it. Please don't be spoiled though and ask for the colored version of the newsletter once you see it. By spending more in that issue, we are saving much more by combining the Section Newsletter with National Conference information. The colored effort will not be locally sustainable over time.

I would like to thank our readers who have sent in their feedback regarding the newsletter delivery. Members were able to receive their copies prior to the end of the month in most cases. I do not want to harp on this issue for so long but our successful restaffing was the key to this success. We can control whatever element of this newsletter operation we can control. We will strive to keep this initial success hold, especially during the holidays. You know how that can be a mess!

Finally, we welcome our new set of Section Officers led by Rich Haller, P.E. I do agree with him that we foresee this year to be more exciting and productive.

Enjoy reading your newsletter. It is our privilege to serve!

- Dr. Cris B. Liban, P.E.

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The Basics of Disputes, Claims and Construction Law - Part 3

By
Tony Antich, P.E.
City Engineer
City of Santa Monica, California

This is the sixteenth in a series of articles dealing with keys to successful project management. The Project Manager should be knowledgeable in the area of construction law in order to be effective and protect the interest of the client or agency.

MORE THINGS YOU SHOULD HAVE KNOWN BEFORE YOU HAVE A DISPUTE OR CLAIM

The listing below continues with the list provided in Part 2 which covers most things that may go wrong for a Contractor. If you get a claim, it will typically fall into one of the following categories:

10. **Maladministration.** This is based on the implied warranty that the City will not, by actions or inactions, unreasonably interfere with the Contractor's right to develop and enjoy least-cost performance. Examples of maladministration are untimely responses, over-inspection, improper rejections, etc.
11. **Misrepresentation.** Similar to superior knowledge (see number 14 below) - the distinction is that misrepresentation occurs after the bid phase.
12. **Owner-Furnished Items.** Assume you accept an obligation to furnish certain items and are unable to do so (either to do so at all, or in a timely manner). If so, the Contractor would be entitled to recover from the resulting damages. Weather and strikes are sometimes interpreted as an excusable delay (time only) in the City's favor when they prevent furnishing of promised items.
13. **Strikes.** Strikes entitle the Contractor only to a time extension unless the Contractor's actions precipitated the strike, in which case the Contractor is due nothing.
14. **Superior Knowledge.** This involves the City withholding, during the bid phase, "specific" data on matters of "substance". The key words are "specific" and "substance."
15. **Suspension.** Suspension is a directive that work be stopped on a part or the whole of the contract documents. Some contract documents allow an amount of latitude in suspending the work for a short duration. However, whenever possible, a suspension order should contain a defined duration and prudent suggestions as to mitigation of costs. Also, to the extent possible, you as the project manager should follow up to determine if it is being pursued. If it is not being pursued you need to know why.
16. **Termination.** There are two types of termination:
 - a. Termination for convenience resulting from factors outside the Contract gives the Contractor entitlement to all reasonable costs to the point of termination, plus clerical termination expenses and profit on reasonable costs.
 - b. Termination for default when the Contractor's performance is not acceptable. Examples of reasons to default a Contractor are bankruptcy, failure to start or complete, or abandonment of the work. This is a serious matter which can have consequential expenses (project delays) and often results in lawsuits.

Use of termination by the city should not be ignored. Even the threat (this requires sound solid judgment and experience), along with notice to the Contractor's bonding company, is often very persuasive in curing a Contractor's failings. Be certain the termination, if it must be, is in strict accordance with the contract documents; consult with the City Attorney before terminating a Contractor.

17. **Unjust Enrichment.** This is defined as one party to a contract document profiting inequitably at the other's expense. Examples of this are an honest bid error or omissions which would not change the best bidder's standing. Entertainment of this issue is usually based on the City's sense of fair play and the Contractor's clear demonstration that the item in question is nowhere in the bid proposal.
18. **Weather.** Weather entitles the Contractor only to a time extension (no monetary compensation), provided the conditions vary substantially from the norm. For example, a Contractor would get additional time for a snowstorm in July. If the contract provides time for any adverse weather, the Contractor would be entitled to a time extension. Practically, many construction managers recommend granting the Contractor weather delays even for marginal requests, because the Contractor cannot use those days again for a reimbursable delay argument. Weather delays may become compensable, however, if you (the project manager) delay the Contractor's weather-susceptible work and cause that work to be performed in a later time period where adverse weather arises.

FALSE CLAIMS

A contractor may be subject to the California False Claims Act or the United States False Claims Act depending on the nature of work, funding source and owner. In the legal world this is known as Qui Tam (a Latin phrase) which allows for private citizens to sue a contractor on behalf of a government agency and receive a percentage of the amount recovered – which can range between 15% and 50% depending on a number of legal factors. In California a prime contractor can be sued even when a subcontractor submits a false claim to the prime. In the real world, contractor staff is sometimes lazy and simply passes through the subcontractors' costs to the owner. Others with no scruples or moral compass will act recklessly by submitting a "pass through claim" from a subcontractor without performing the necessary due diligence.

If you believe you have received a false claim contact your legal counsel for good sound advice on how to proceed. Remember, mistakes can be made on both sides – city and contractor.

California Government Code Section 12650 addresses False Claims. You should be aware that any person who commits any of the following acts shall be liable to the public agency for three times the amount of damages which the agency sustains because of the act of that person. A person who commits any of the following acts shall also be liable to the agency for legal costs, and may be liable to the agency up to ten thousand dollars (\$10,000) for each false claim:

1. Knowingly presents or causes to be presented to an officer or employee of the agency, a false claim for payment or approval.
2. Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the agency.
3. Conspires to defraud the agency by getting a false claim allowed or paid by the agency.

4. Has possession, custody, or control of public property or money used or to be used by the agency and knowingly delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt.
5. Is authorized to make or deliver a document certifying receipt of property used or to be used by the agency and knowingly makes or delivers a receipt that falsely represents the property used or to be used.
6. Knowingly buys, or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property.
7. Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the agency.
8. Is a beneficiary of an inadvertent submission (i.e. a subcontractor claim or invoice) of a false claim to the agency, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the agency within a reasonable time after discovery of the false claim.

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ARTICLE

Is your posted speed limit legal?

Hamid Bahadori, PE

Principal Transportation Engineer, AAA

Member, California Traffic Control Devices Committee (CTCDC)

There has been a recent change in standards and legal requirements for establishing speed zones in California that affects all jurisdictions in the state. Upon the adoption of the 2003 MUTCD as amended with the California Supplement on May 20, 2004, the following language was incorporated in the California Supplement regarding speed limits:

*"The speed limit should be established at the **nearest** 10 km/h (5 mph) increment to the 85th percentile speed. However, in matching existing conditions with the traffic safety needs of the community, engineering judgment may indicate the need for a further reduction of 10km/h (5 mph)." (California Supplement, p.51, last paragraph)*

This is a change from the old Traffic Manual provision (replaced by the California Supplement) that allowed establishing a posted speed limit at the nearest 5 mph increment **below** the 85th percentile speed, and then allowing an additional 5 mph reduction for other traffic safety related considerations.

The new standard has already resulted in a legal challenge in Orange County where a Superior Court judge issued an opinion invalidating a citation issued on a street with a posted speed limit of 35 MPH where the 85th percentile was 44.2 MPH (Superior Court of California, County of Orange; People vs. Perez, Rebecca Dolores; Case No. FL727253; August 4, 2005). Referring to the above-mentioned section of the California Supplement, the court decided that the 85th percentile of 44.2 MPH should result in a posted speed limit of 45 MPH (nearest 5 mph increment) which then may be reduced by another 5 mph to a 40 MPH speed limit (based on written and documented engineering justifications). However, the involved jurisdiction had used the old language arriving at 40 MPH (5 mph increment below the 85th percentile speed), and then had even further reduced it by another 5 mph resulting in the posted speed limit of 35 MPH. The court, referring to the above-mentioned section of the California Supplement, found in favor of the defendant as in the judge's opinion the 85th percentile speed of 44.2 MPH should have been rounded to the nearest 5 mph increment which is 45 MPH, and then it might have been reduced another 5 mph using "documented" traffic safety consideration. However, in this case, the judge also raised concern that the involved jurisdiction had also failed "to show justification for the downward adjustments of more than 5 miles per hour as discussed in People v. Goulet 1992, 13 Cal App 4th Supp 17".

Although there is concern that this opinion might have failed to consider that the engineering and traffic survey (ETS) for this highway segment was done prior to May 20, 2004 (the date of adoption of the new California Supplement) and the new standards should not be required retroactively; nonetheless, it has raised awareness among municipalities about the new standards and legal requirements for establishing speed zones.

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ASCE's release of LA Infrastructure Report Card

Hold that date! October 27, 2005

The ASCE LA Section will be releasing its Los Angeles County Infrastructure Report Card on October 27, 2005.. the same morning that the ASCE national conference convenes in Los Angeles (at 3 pm) . The event will be free of charge to all attendees (including parking and continental breakfast) and will take place between 7:30 am and noon at the Davidson Conference Center on the campus of USC. We are currently putting the program together and will have more information on speakers in a few weeks.

A Great Idea From the Life Members

The ASCE Life Members' Public Image Committee request that members take their (to be discarded) Civil Engineering magazines to their doctor's office or barber shop and merge them with the stack of magazines. We feel that this will be an effective way to make the general public more aware of what civil engineers do.

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Department of Civil Engineering

323-343-4459 or rpurasi@calstatela.edu

Retirement of Two Civil Engineering Faculty Members at Cal State LA

Dr. Anjan Bhaumik (Structural Engineering) and Dr. Young Kim (Coastal and Hydraulics Engineering) have just retired. There are two retirement dinner parties to honor their distinguished services to the campus and to the civil engineering community, as follows.

For Dr. Bhaumik (Saturday November 5 th, 2005).

For Dr. Kim (In Winter 2006 -date to be determined).

For information of these events please contact Dr. Rupa Purasinghe, Chair, Department of Civil Engineering, 323-343-4459 or rpurasi@calstatela.edu

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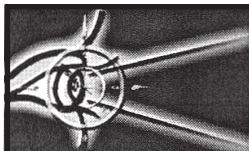
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