

**COLLINS COLLINS
MUIR + STEWART_{LLP}**

Skilled & Trained Workforce, Update in Indemnity Law & Risk Management Strategies for Engineering Firms

Presented to ACEC – San Diego

Christie B. Swiss | April 16, 2019

Justin D. Witzmann

**COLLINS COLLINS
MUIR + STEWART_{LLP}**

WARNING

**LAWYERS
AHEAD**

Disclaimer: This is intended to be a general overview of legal issues. Nothing in this presentation is intended to be legal advice as to any specific person, company, or situation. The most important part of any legal issue is the specific facts, and you should consult with an attorney about your specific situation before directly acting on the information gained in this seminar.

Bio Page

Christie Bodnar Swiss is the managing partner of the firm's San Diego office. Her practice focuses on general civil litigation; public entity liability; civil rights; architect, engineer, and lawyer professional liability; construction law; business litigation; employment law; and appeals.

She has represented public entities in civil rights, police excessive force, false arrest, malicious prosecution, inmate civil rights, wrongful death, design defect, probation, personal injury, and child abuse and child death cases. She has represented design professionals in all areas of their practice, including negligence and contract claims. In employment law, she has handled sexual harassment, wrongful termination, social security, age, and gender discrimination, and class action litigation. She has tried multiple cases to verdict in both state and federal courts.

Ms. Swiss is currently a member of several professional organizations, including the San Diego and North County Bar Associations. She is an affiliate member of The American Institute of Architects San Diego and Palomar Chapters and an affiliate member of the American Council of Engineering Companies San Diego Chapter. She has authored numerous articles on subjects involving her work and is a frequent lecturer for the local chapters of many architectural, engineering, and public entity risk management organizations.

Ms. Swiss received her Juris Doctor cum laude from Indiana University McKinney School of Law, her Master's degree in French literature from Bryn Mawr College, and her Bachelor's of Business Administration in Marketing and French from the University of Notre Dame.



Christie. B. Swiss

Bio Page

Justin Witzmann is a trial attorney at the firm's San Diego office. Mr. Witzmann's practice focuses on professional liability, public entity liability, employment law, personal injury, general liability, and general business litigation.

Mr. Witzmann's professional liability practice includes representation of professionals such as architects, engineers, lawyers and brokers in litigation and contract matters. In employment law, he has represented clients in harassment, wrongful termination and Department of Fair Employment & Housing claims. Mr. Witzmann has represented public entities in employment, destruction of property and personal injury claims. Mr. Witzmann practices in both state and federal court.

Mr. Witzmann is currently a member of several professional organizations, including the North San Diego County Bar Association. He is an affiliate member of The American Institute of Architects San Diego and Palomar Chapters and an affiliate member of the American Council of Engineering Companies San Diego Chapter. He has lectured for some of these organizations and has written publications on several issues germane to his professional clients, including multiple articles on California's recent passage of Senate Bill-496, which will significantly lessen the impact of contractual indemnity and duty to defend provisions on design professionals in the future.

Mr. Witzmann received his Juris Doctor from Loyola Law School in Los Angeles. He received his Bachelors of Business Administration in Finance from Charleston Southern University where he also played football.



Justin D. Witzmann

About AB 3018



- Effective January 1, 2019
- Reflects a legislative push by unions to employ more of their members on certain public works projects
- Updates “Skilled & Trained Workforce” requirements on certain public projects provided per amendments to Public Contracts Code sections 2601-2602 & addition of section 2603
- Increases percentages of Skilled & Trained Workforce required on a stepped up basis to be graduates of approved programs &
- Strengthens monthly reporting guidelines and agency oversight, and empowers the Labor Commissioner and public agencies with enforcement tools that include monetary penalties and debarment

Brief History Of The “Skilled & Trained Workforce”



- SB 54 (2012) The “Skilled and Trained Workforce” imposed on oil refineries
- SB 693 (2016) Lays groundwork for later expansion of “skilled and trained workforce” requirements into numerous “public contracts” and contracts entered into under Public Contracts, Public Utilities, Government and Education Codes.
 - Allows public entities to mandate use of “skilled and trained workforce” regardless of whether the public entity is required to do so by a statute or regulation.
- AB 73, SB 35 (2017) – Made “skilled and trained workforce applicable to construction in “Housing Sustainability Districts,” and where “streamlined” permitting of multi-family housing allowed

Primary Projects Where Skilled & Trained Workforce

Requirements Apply (Law-Pre AB 3018)

- **Design-Build Contracts (Public Contract Code §§ 10191 and 22164)**
 - Prequalification/shortlisting requires commitment to skilled and trained workforce
- **Lease-Leaseback and Design-Build Contracts for Schools (Education Code §§ 1048, 17407.5 & 17250.25)**
- Best Value Contracts (Public Contract Code §§ 20155.4 and 20119.1)
- Construction Manager At-Risk Contracts (Public Contract Code § 20146)
- Streamlined Affordable Housing Projects (Gov. Code § 65913.4)
- Housing Sustainability Districts (Gov. Code § 66201)

Public Contracts Code Sections 2601-2603 Only

Refers to "Contractors & Subcontractors"

- Public Contracts Code sections 2601-2603 do not define contractors or subcontractor
- AB 3018 does not change to whom these Skilled & Trained Workforce requirements apply
 - No new language regarding applicable entities, trades, persons etc.
- Application to Design Professionals?
 - Likely only in limited circumstances when performing certain field operations.
 - Clear regulations needed to further define when applicable to certain design professionals and for particular types of work
 - See ACEC Guidance Document and future publications for further guidance & consult with counsel

The “Skilled & Trained Workforce”

Requirement (PCC § 2601(d)-(e))

To qualify as “Skilled & Trained Workforce” must be performing an “apprenticeable occupation” defined by The Department of Industrial Relations (“DIR”) and be either:

1. A skilled journeyman OR
 - Graduated from approved apprenticeship program for applicable occupation OR
 - Has at least as many hours of on-the-job experience in the applicable occupation as required to graduate from an approved program. (PCC § 2601 (e)(2).)
2. Registered apprentices in a program approved by the Chief of the CA Div. of Apprenticeship Stds.

**Increased Percentage Required to be
Graduates of Approved Apprenticeship
Program Starting in 2018 (PCC § 2601(d))**

2017: 30%

2018: 40%

Exceptions to 30%: acoustical installer, bricklayer, carpenter, cement mason, drywall installer or lather, marble mason, finisher, or setter, modular furniture or systems installer, operating engineer, pile driver, plasterer, roofer or waterproofer, stone mason, surveyor, teamster, terrazzo worker or finisher, and tile layer, setter, or finisher.

2019: 50%

2020: 60%

AB 3018: New More Clearly Defined Penalties For Non-Compliance

- If monthly compliance report does not show compliance then agency can withhold an amount up to 150% of value of monthly billing
- Creates a system of penalties for failure to comply with Skilled and Trained Workforce Requirements.
 - \$5,000 per month in violation of requirements
 - \$10,000 per month for subsequent violations in a three year period
- Grants Labor Commissioner jurisdiction to enforce through Civil Wage and Penalty Assessments
- Imposes sub-contractor monitoring requirements on contactors
- Possible debarment under Labor Code section 1777.1 procedures.

Vicarious Liability for Prime Contractor

PCC § 2603(f)(1)-(4)

- Prime Contractor not vicariously liable for subcontractor violations **UNLESS** prime contractor had knowledge of the subcontractor's failure to comply **OR** **UNLESS** Prime Contractor failed to comply with **ANY** of the following:
 1. For contracts after 1/1/19 attaching a copy of the statute
 2. Contractor shall “periodically monitor” the sub’s work
 3. Upon discovery of violation Prime Contractor shall take corrective action including retaining 150% of amount due until failure corrected.
 4. Prior to making final payment obtaining a signed declaration.

Takeaways

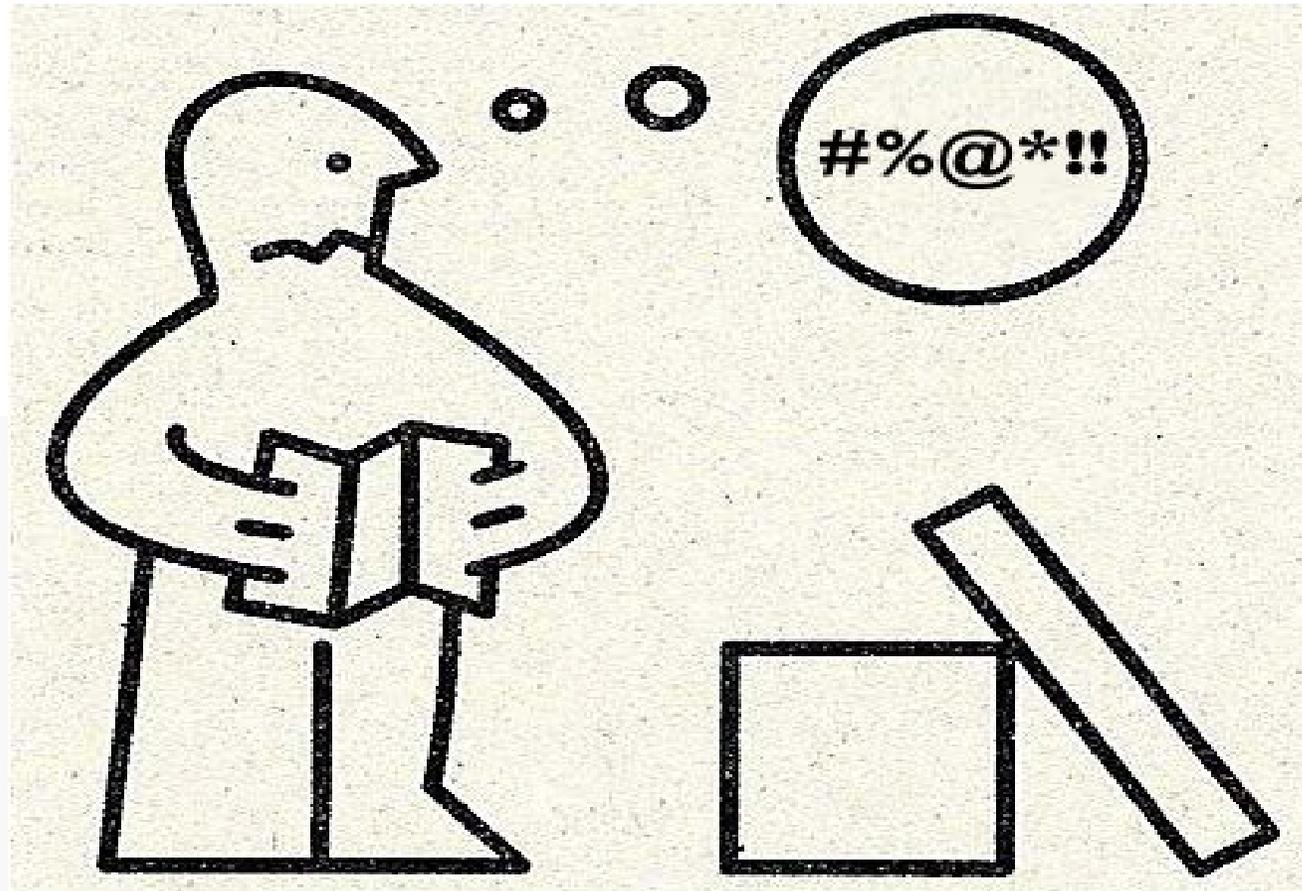


- No requirement that Public Agency provide notice -
 - ❖ So be aware!
- Compliance is the responsibility of the bidder, general contractor and subcontractors
- Institute a program to comply with reporting requirements and avoid penalties
- Modify Subconsultant Agreements
 - List S&TW Requirements in body
 - Attach PCC Code sections 2601-2603
 - Require subcontractor compliance declarations with payment apps
- Consult with your attorney if any question whether performing covered work

INDEMNITY

- Often in Contracts – whether we like it or NOT!
- Brief Refresher
- Centex Homes v R-Help –update in indemnity law

INDEMNITY IS A FOUR LETTER
WORD!



EVEN WORSE...

...THE DUTY TO DEFEND



INDEMNITY IN CA DEFINED BY STATUTE

California Civil Code Section 2772

Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.

A very, very old concept and statute...

BRIEF REVIST TO SB 496!

- Expands Civil Code 2782.8 protections to private contracts (and most public contracts) entered into after January 1, 2018
- Intends to limit duty to defend to comparative fault
- 4-5 years for judicial clarity
- Culmination of years of legislative lobbying – Thank you ACEC!!

Centex Homes v. R-Help Construction, Inc.

Relevant Facts:

- Developer Centex Homes (“Centex”) contracted with subcontractor R-Help Construction Company, Inc. (“R-Help”) to install utility boxes for a construction project.
- The subcontract required that R-Help indemnify Centex for all claims arising out of or relating to R-Help’s work.
- A personal injury Plaintiff sued Centex and R-Help. Centex then tendered and cross-complained against R-Help for indemnity.
- Centex filed a motion for summary adjudication to enforce R-Help’s duty to defend under the indemnity agreement.
- The trial court denied the motion allowing the matter to be submitted to the jury.
- After trial Centex appealed.

Centex Homes v. R-Help Construction, Inc.

Appellate Court Holdings:

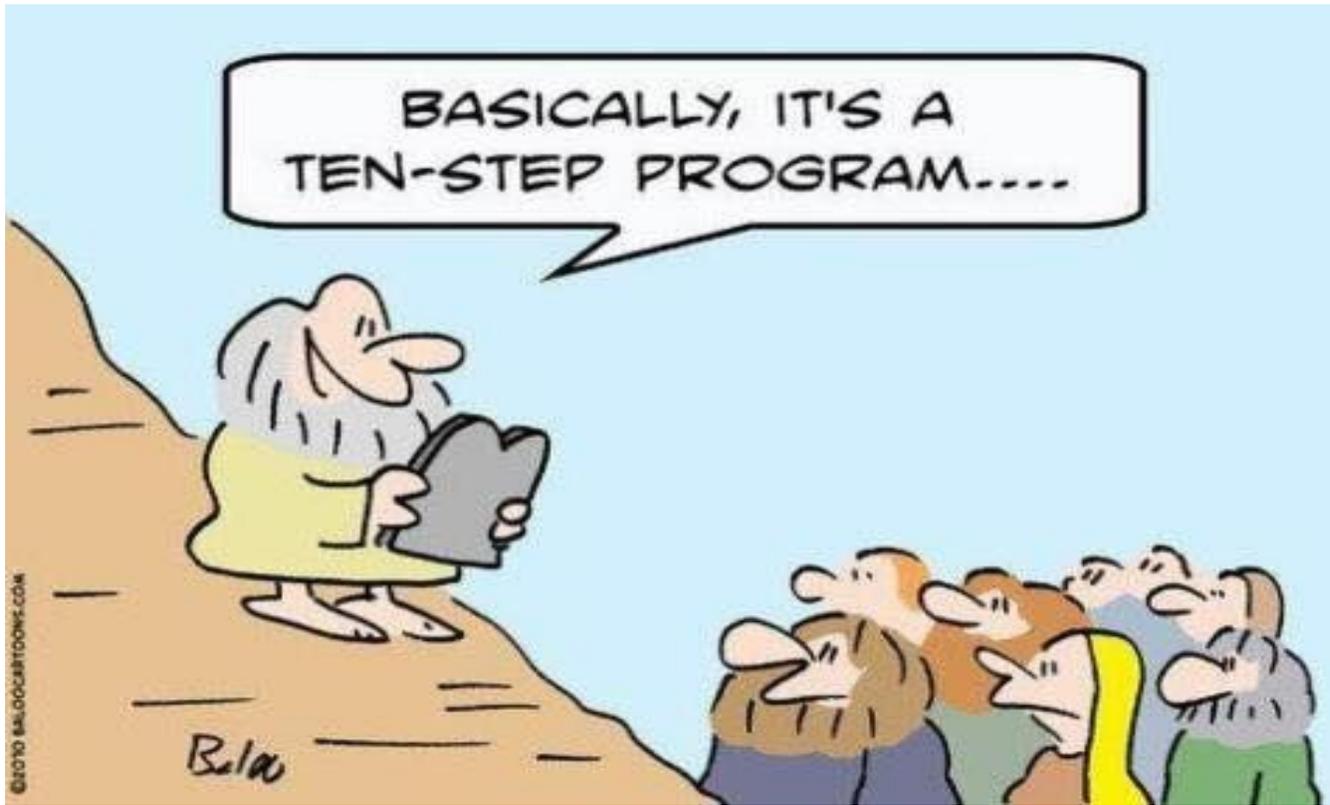
1. Plaintiff's "allegation that the utility box was within the scope of work R-Help performed for it is alone sufficient to require R-Help to defend."
2. Duty to Defend is a Question of Law for the Judge to Determine
3. Indemnitee can show duty to defend should not continue if a party conclusively shows by undisputed facts that the claims were not embraced by the indemnity agreement
 - E.g. undisputed evidence shows the work claimed was not performed.
 - Difficult Standard!
 - But Design Professionals afforded SB-496 protection!

PRACTICAL IMPLICATIONS FOR DESIGN

PROFESSIONALS

- Because the duty to defend is one for the court to decide, and not the jury, parties can try to resolve these issues early in a case by way of pre-trial motion.
- *Centex* makes clear that the allegations in a complaint give rise to the duty to defend
 - But Design Professionals afforded SB-496 protection!
- The duty to defend continues until the claim ends or *conclusive undisputed* evidence shows that the indemnity agreement does not cover the claim

Overall Risk Management Strategies for Engineering Firms - A Few Tips Regarding Contracts



Clearly Define Your Scope of Services

The scope of services should be well defined without ambiguity and include a detailed list of services not to be performed. A scope of services that attempts to avoid obligations without specifically removing them is more likely to create a dispute.

A risk assessment should also be performed when drafting the scope of services, ask yourself the following questions:

- (1) Does the scope include areas of service that is new to the firm?
- (2) Has enough time and money been allocated to a particular task (consider shop drawing review and site visits)?
- (3) Has circumstances for which the firm should be entitled to additional compensation been defined (consider construction phase services and value engineering).
- (4) Just say no to scope-creep.

Understand the Standard of Care

The standard of performance for which a design professional is judged is typically defined as “usual and customary performance as compared to similar professionals performing similar services on similar projects at the same time and in the same region”. A negligent act occurs when a design professional fails to meet the industry standard of performance or care.

The standard of care is NOT a standard of perfection. The following terms and those similar should be removed from all contracts:

- 1) Professional shall deliver a 100% complete design documents.
- 2) Documents shall be free from all defects.
- 3) The Professional shall perform to the highest standard of care.
- 4) Professional warrants to meet all laws, codes and regulations.

What is negligent per se?

Make Certain Your Consultants are Living by The Same Rules

A consultant's proposal often includes their scope of services and their terms and conditions. The terms and conditions of the consultant will almost most certainly conflict with the terms and conditions of the Prime Agreement. Be particular aware that the consultant should be tied to the following clauses in the Prime Agreement:

- 1) Ownership of Documents
- 2) Dispute Resolution
- 3) Duties and Responsibilities for Site Visits
- 4) Payment Provisions
- 5) Indemnity
- 6) Timeliness of Performance

Avoid Scope Creep & Favors

You want a raise...? Say “no” to favors!

It is important to remember, the contract **should not** be ignored after the project starts. After making a contract, adhere to its terms and modify it only by written amendment. If you have a client asking for a favor, remind the client of the agreement (they signed it too) and always point to the scope of work that was agreed upon.

Remember, a well negotiated contract will include sections for “services not performed” and “payment for additional services”. Make someone in the office “the bad guy” for requiring payment for additional services.

Eight Ways to Minimize Chances of Litigation

Remember -It's Easier to Avoid a Lawsuit Than it is to Win One!

1. Client Expectations... Help guide your client towards realistic and achievable expectations.	5. Get Your Lawyer or Insurance Agent Involved before things get out of Control...
2. Do not Over Promise...	6. Don't Take a Fee / Choose a Fee...
3. Check Your Emotions... If you get emotional, so will your client.	7. Don't Take a Project / Select a Project...
4. Following the Contract and Point to the Contract...	8. Don't Take an Owner / Select an Owner.



Thank You!

Christie B. Swiss

Justin D. Witzmann

2011 Palomar Airport Rd., Suite 207

Carlsbad, CA 92011

T 760-274-2110

F 760-274-2111

ccmslaw.com | jwitzmann@ccmslaw.com

**COLLINS COLLINS
MUIR + STEWART^{LLP}**

**NORTHERN CALIFORNIA
(510) 844-5100**

**LOS ANGELES COUNTY
(626) 243-1100**

**SAN DIEGO COUNTY
(760) 274-2110**

**INLAND EMPIRE
(909) 581-6100**

**ORANGE COUNTY
(714) 823-4100**

www.ccmslaw.com