

# ProNetwork News

## Risk Management Tools for the Design Professional



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### Matthew D. Peng

Matthew D. Peng is an associate in the Construction practice group of Gordon & Rees Scully Mansukhani LLP. Mr. Peng represents a diverse field of companies in the construction industry, including general contractors, design professionals, and developers. He has represented his clients in construction-related matters in litigations and arbitrations. Mr. Peng also counsels his clients on issues related to public contracting, public records, and complying with administrative procedures. Mr. Peng graduated from the University of California at Davis, School of Law, where he was a senior member of the Law Review.

### Learning from the Mistakes of Others: Follow the Claims Procedure in Public Contracts

*Matthew D. Peng, Gordon & Rees Scully Mansukhani LLP*

It is not every day that a court throws a \$10 million dollar lawsuit out of court on procedural grounds. Unfortunately, that's what happened to a Northern California prime contractor. The Alameda Superior Court granted Defendant's (the "City") Summary Judgment Motion (the "Motion") as to the Contractor's First Amended Complaint, effectively terminating the Contractor's \$10 million dollar claim against the City.

The City awarded the Contractor a construction contract for improvement work on various city streets in 2010 (the "Project"). The Contractor completed work on the Project in spring of 2014, filed its initial complaint for breach of contract against the City in May of 2015, and amended that complaint in July of 2015. The Contractor sought an award of more than \$10 million. The crux of the Contractor's allegations was that the City owed it more than \$10 million dollars for work and materials that were outside of the scope of the contract, as reflected in numerous change order requests. The Contractor also alleged that the City's "incompetence or lack of diligence" caused numerous construction delays and the Contractor should be reimbursed for the costs associated with those delays.

The City paid the Contractor over \$11 million dollars in negotiated changes to the scope of the work, but the Contractor contended that the payments were not sufficient. However, the focus of the Motion was not on the merits of the Contractor's request. Rather, the City's Motion focused on the discrete issue of whether the Contractor complied with the administrative procedure pursuant to California Government Code sections 930.2 and 930.4 before filing the action. In other words, did the Contractor follow the claims process set forth in its contract with the City?

The Court found the answer to be an unequivocal "no." The Court noted that Section 9-1.04 of the contract between the parties unambiguously required the Contractor to present its claims against the City for additional payment by using Caltrans Forms

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CEM-6201 A, 6201 B, and 6201 C. The specifications also contained language that directed the Contractor to review the claims procedure outlined in Section 9-1.04. However, the Contractor never followed this process before making the claim. In fact, the Court found that the Contractor's project manager admitted during his deposition that the Contractor did not substantially comply with the Section 9-1.04 procedure.

The Court did not spend much time considering the Contractor's arguments, shutting down all five of them in half a page. Two of those arguments were purely procedural issues that are unrelated to construction issues. Of the remaining three arguments, the Court disposed of the Contractor's attempt to liken this matter to the issue in *G. Voskanian Construction, Inc.*, noting that unlike the matter at issue, the claims procedure was followed in the *Voskanian* case. The Court then dismissed the Contractor's last two arguments—that the claims procedure section in the contract was eliminated and the doctrines of waiver and estoppel allowed the Contractor to not comply with the claims procedure—without much discussion.

The Court's decision is only two pages long, but it conveyed one point with crystal clarity: if you have a contract with a public entity, the best practice is to strictly follow that contract. The Court's holding in that regard is both direct and blunt:

"[T]hose who do business with public entities must know the ground rules and are charged with the knowledge of the provision of their own contract."

This nugget from the Court is equally applicable to design professionals as it is to contractors that do business and have direct contracts with California public entities. If a design contract includes provisions that require the compliance of administrative procedures, like conforming to California Government Code sections 930.2 and 930.4, it is best served to scrupulously and strictly adhere to those provisions.

Nevertheless, experienced contractors, seasoned design professionals, and construction attorneys understand that this is easier said than done when faced with contract documents that are hundreds of pages long, filled with convoluted legalese, and sometimes call for notice of claims and delays to be given before it could reasonably ascertain the existence or magnitude of either. However, the benefits of following the Court's advice cannot be overstated, and in this case, the Contractor's failure to strictly adhere to the contractual claims procedure cost the Contractor a chance to fight for \$10 million dollars. One way to ensure compliance is get a legal professional that is familiar with public contracts involved early and involved throughout the public project. The upfront legal cost will not only buy you a piece of mind, but might also buy you a day in court.

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#### The Keys to Keeping a Project On Track



I understood, as the traditional casebooks teach in law school, that appellate decisions in commercial cases tend to focus on determining where something went wrong and deciding who should be blamed. Liability was the proverbial 'hot potato', something to be avoided at all cost. As a result, lawyers teach and are trained to concentrate on anticipating potential liability and finding ways to avoid or transfer it so their clients are not caught in its web.

### [Guest Essays](#)

#### Benefits of a Succession Plan for Your Business



You've worked hard to establish your business and plan to stay actively involved in its future success. So, why would you plan your exit from it now? Because, as the saying goes, if you fail to plan, plan to fail. You won't lead your company forever, and statistics show most businesses don't make it past the second generation of ownership due to the lack of a proper and thorough succession plan.

### [The ProNet Blog](#)

#### Winners of 2017 a/e ProNet AIA Scholarships Announced



Each year, we partner with the AIA to present two \$5,000 awards to architecture students who demonstrate a particular interest in the principles of management in architecture practice. We're proud to announce that the following students have won the 2017 David W. Lakamp a/e ProNet Scholarship. [Continue reading...](#)

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