



# CLIENT NEWS BRIEF

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## AN ATTORNEY'S FEE CLAUSE IN A PERFORMANCE BOND CAN BE ENFORCED AGAINST A PROJECT OWNER

A recent case has highlighted the need for public agency owners to review the terms of any performance bond for a construction project to guard against the risk that a contractor or surety may be able to successfully pursue attorneys' fees for disputes implicating the bond – even where the underlying construction contract does not allow for attorneys' fees. In Mepco Services, Inc. v. Saddleback Valley Unified School District (2010) 189 Cal.App.4th 1027, the Court awarded attorneys' fees to the contractor based on the attorneys' fees provision in the performance bond even though the provision in the bond appeared to be limited to recovery of fees by the school district against the surety.

In this case, disputes arose during construction of a public works project and the contractor sued the school district. The school district filed a cross-complaint against the contractor for breach of contract and against the surety to enforce the performance bond. The jury awarded a verdict in favor of the contractor on the complaint and ruled against the District on its cross-complaint.

The underlying construction contract between the contractor and the school district did not contain an attorneys' fees provision, but the performance bond, upon which the school district had sued the surety, did include such a provision. The trial court concluded that the contractor should be awarded attorneys' fees on the entire action based upon the rule of reciprocity set forth in Civil Code section 1717, subsection (a), which states, in relevant part:

In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

(Emphasis added.)

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The fees spent by the surety and the contractor defending the performance bond claim also related to the defense of the alleged breach of contract by the contractor and the contractor's claims against the school district. Since under the performance bonds' language the school district would have been able to recover all of its attorneys' fees had it prevailed in the case, under the rule of reciprocity, the contractor and the surety were entitled to recover all of their attorneys' fees in the matter, including those for prosecution of the contractor's underlying complaint.

This case highlights the need for public agencies to carefully review all aspects of their construction documents, including the specific provisions of the bonds, to consider potential implications of such documents in the event of a future dispute.

If you have any questions regarding performance bonds or document review, please do not hesitate to contact one of our [eight offices](#) located statewide or consult our [website](#).

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