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NEWS RELEASE

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ASA Victory Before California High Court: Public Entities Can't Withhold Project Information Affecting Costs from Bidders

ALEXANDRIA, Va. — On July 12, 2010, the American Subcontractors Association and ASA of California celebrated a major legal victory for subcontractors when the California Supreme Court [ruled](#) that a public entity “may be required to provide extra compensation if it knew, but failed to disclose, material facts that would affect the contractor’s bid or performance,” even when the failure to disclose information isn’t fraudulent. The decision describes a four-prong test for the circumstances under which a contractor may seek relief again public entities for failing to disclose relevant project information.

In *Los Angeles Unified School District v. Great American Insurance Company and Hayward Construction Company*, contractor Hayward signed a guaranteed-maximum-price contract to complete punch list work on an elementary school left unfinished by a terminated contractor. After starting work, the contractor notified the district that the unfinished work required an additional \$2 million, which the school district approved. After completion, the school district sued to recover \$1 million from the contractor and its surety on the basis that the punch list covered the change order work. Hayward contended that the school district could not recover because it failed to share information about the project (including defects in the original construction) impacting the scope and costs of Hayward’s work. A lower court sided with the school district, but an appeals court partially agreed with the contractor.

On April 30, 2009, ASA, ASAC and 11 other California specialty trade groups filed an *amici curiae*, “friends of the court,” brief in the case. The brief pointed out that undermining a contractor’s right to rely on the information provided by the owner to bidders would have “a direct and profound impact on the fiscal atmosphere in California’s public works industry and on

the ability of subcontractors, including ASA and ASAC's members, to conduct their subcontracting businesses.”

The high court noted that California law limits contractors' rights to pursue “relief” for mistakes caused by “careless bidding practices.” However, “protection against careless bidding practices does not require that we allow contractor's damaged by a public entity's misleading nondisclosure to recover only on a showing the public entity harbored a fraudulent intent.”

In it's ruling, the court said: “We hold that a contractor on a public works contract may be entitled to relief for a public entity's nondisclosure in the following limited circumstances: (1) the contractor submitted its bid or undertook to perform without material information that affected performance costs; (2) the public entity was in possession of the information and was aware the contractor had no knowledge of, nor any reason to obtain, such information; (3) any contract specifications or other information furnished by the public entity to the contractor misled the contractor or did not put it on notice to inquire; and (4) the public entity failed to provide the relevant information.”

The California law firm of Crawford & Bangs LLP, prepared the brief for ASA and ASA of California. ASA tapped its Subcontractors Legal Defense Fund to pay the fees associated with its filing in this case. The SLDF supports ASA's critical legal activities to protect the interests of all subcontractors, and is funded solely by contributions. SLDF funds are invested in precedent-setting cases across the country. To learn more about this case and the SLDF, visit www.sldf.net.

Founded in 1966, ASA amplifies the voice of, and leads, trade contractors to improve the business environment for the construction industry and to serve as a steward for the community. ASA's vision is to be the united voice dedicated to improving the business environment in the construction industry. The ideals and beliefs of ASA are ethical and equitable business practices, quality construction, a safe and healthy work environment, and integrity and membership diversity.

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