

Construction Managers – Consultants or Contractors?

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The typical construction Project Manager is a jack of all trades. In any one day, a Project Manager can be required to coordinate, direct, assist, advise, facilitate, estimate, receive, review, report...and the list could go on and on. Still, there is generally one group of tasks that Project Managers do not perform – the physical building of the work of improvement. So, is a construction Project Manager a consultant or a contractor? The answer is not just a lesson in semantics either. If contractors, Project Managers would be subject to a multitude of rules and regulations that do not affect consultants, namely those set forth by the Contractors State License Board.

So, what is the answer – contractor or consultant? Unfortunately, as is the case with many modern laws, there is no one single answer. For public works projects, the California Legislature has made the law fairly straightforward by passing Government Code section 4525, subd. (e), which provides that construction Project Managers on public works projects must be licensed architects, engineers or general contractors. For private projects however, the Legislature has yet to make the law so clear, thus leaving Courts to figure out whether a construction Project Manager on a private project is a contractor or not – which is exactly what the Court of Appeals did in the recent case of *The Fifth Day, LLC v. James Bolotin* (2009) 172 Cal. App. 4th 939.

The facts of the case are fairly simple – The Fifth Day, LLC and James Bolotin entered into an agreement whereby The Fifth Day would act as a Project Manager in the development and construction of a commercial office park project on property owned by Bolotin. The Project Manager performed the services required of it under its contract – coordinating the work of various trades, maintaining records, appraising the Owner of the status of the project, and generally acting as the Owner's agent with respect to the many issues that arose in the development on the project. A licensed general contractor was hired to perform construction services, and the general contractor thereafter entered into subcontracts for the construction of various other trades on the project. The office park was completed and certificates of occupancy were issued. However, after the Owner failed to pay the Project Manager under the terms of the contract, the Project Manager sued. The Owner argued that the Project Manager performed the services of a contractor while holding no contractors license, thus barring the Project Manager from bringing suit.

After the Owner won at trial, the Project Manager appealed. The Court of Appeals found that the services of the Project Manager in this case were those of a consultant and *not* those of a contractor. The Court held that, because the Legislature clearly required construction managers on public works projects to be licensed, the absence of similar requirements for private projects strongly suggested that the Legislature determined such requirements not to be necessary.

So, while *The Fifth Day* decision will likely enable the majority of Project Manager's to continue to operate free from the rules and regulations of the Contractors State License Board on private projects, the extent of this freedom is unknown. *The Fifth Day* decision was based on facts specific to that case – the contract between The Fifth Day, LLC and James Bolotin, the project itself, and the services actually rendered by The Fifth Day, LLC. As no two contracts, projects, or managers are exactly like, Project Managers should remain cautious not to perform or assume any services or responsibilities reserved for contractors.

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