



Trial *Style*

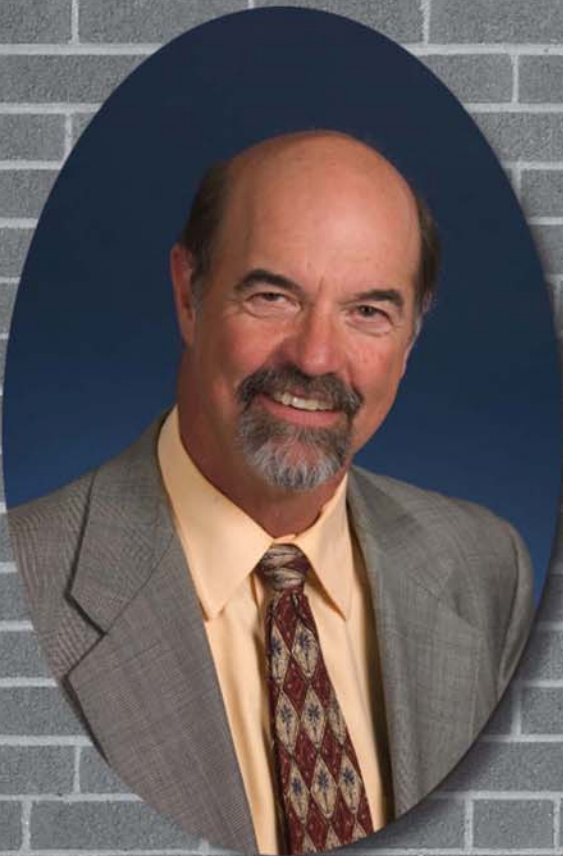
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BUILDING on Success

Style Star:
Paul A. Lax

Featured Matter:
Building a Case



Trial Lawyer
Paul A. Lax Wins
\$2 Million Plus
Attorneys' Fees
for School District
Contractors





Foundation of Expertise

Lax & Stevens Focuses on Construction Conflicts from Start to Finish

By Staff Reports

When it comes to litigating nuts and bolts, construction industry insiders know whom to call. Paul A. Lax, member of the construction litigation law firm Lax & Stevens, has more than 28 years' experience in the legal industry. And his trial track record shows why that's so.

Mr. Lax focuses his practice on representing general contractors in government claims cases, as well as litigation on behalf of owners alleging defective construction, litigation involving terminated construction contracts, claims involving sureties, and litigation between general contractors and subcontractors. Lax & Stevens won the largest award ever made to a contractor in an Office of Administrative Hearings proceeding.

"Disputes are a part of construction," Mr. Lax says. "Our goal is to make them less of a disruption and expense for our clients."

Mr. Lax has handled hundreds of contractor claims, and provided assistance to many more contractors who have encountered other legal issues.

He regularly represents contractor clients in disputes with public agencies such as Caltrans, California Department of Corrections and Rehabilitation, University of California, school districts, and cities and counties as well as private projects.

"Lax & Stevens believes in 'preventive lawyering,'" Mr. Lax says.

His litigation experience includes trials in both state and federal courts, the California Office of Administrative Hearings, United States Court of Federal Claims, and Boards of Contract Appeals. His practice includes arbitrations as well.

"The services we provide include pre-construction meetings with project staff - a legal orientation to the requirements of the contract, which can be vital to the success of the project," Mr. Lax says. "On some large projects, we have even created form letters for use in complying with contract obligations concerning notice of events or potential change order situations."

According to Mr. Lax, the recent school district litigation was especially challenging. The projects were numerous and complex, and opposing counsel David M. Huff pressed every advantage.

"We're particularly proud of our planning and strategy in this case," Mr. Lax says. "It allowed our client to take advantage of a provision of the Public Contract Code allowing a successful claimant to recover attorneys' fees."

LAX AT A GLANCE

Education:

Juris Doctorate, University of California at Los Angeles School of Law, 1980

Admissions:

State of California, all United States District Courts in California, the Ninth Circuit Court of Appeals, the United States Court of Federal Claims

Affiliations:

State Bar of California, Los Angeles County Bar Association, Associated General Contractors of America

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FEATURED

Building a Case

Paul A. Lax Wins Millions From School District for Construction Manager

By Staff Reports

Contractors face a difficult task when they are adverse to a public entity.

Many public works contracts specify that disputes are to be heard under the authority of the California Office of Administrative Hearings, a statutory creation that administers the arbitration process on many public projects.

According to trial lawyer Paul A. Lax, that forum has its own problems, not the least of which is the expense.

Where there is no arbitration requirement in a public contract, the dispute will ultimately have to be resolved by a court. And often, that means a jury trial. No matter how conscientious a juror may be, or how many admonitions the judge may give, somewhere in the juror's mind is the concern that the contractor is after public taxpayer dollars. But it didn't stop Mr. Lax from winning more than \$2 million in court for his contractor client.

"The current news on the schools and the economy only make this more significant," Mr. Lax, name partner with Los Angeles' Lax & Stevens, says.

Lax & Stevens recently faced this challenge on a large scale. The client had performed construction management services for a Southern California school district in connection with both new construction projects and modernization work to existing facilities. At the conclusion of its work, there were unpaid invoices. Lots of them.

Opposing counsel David M. Huff, of Los Angeles' Ohrbach, Huff & Suarez, represented the defendants in the matter. He stated that the court has yet to rule on post-trial motions concerning the verdict, and until it does, any further comment is premature. However, he was pleased with the outcome of the trial.

"Although the District was disappointed by the verdict, the District was nevertheless gratified that the verdict was well over a million dollars less than what [they] sought at the outset of the trial as well as almost a million dollars less than [the] last settlement offer," Mr. Huff says.

According to Mr. Lax, the school district had received the benefit of the bargain, but would not pay on its own obligation.

"The new construction work was completed," Mr. Lax says. "The district representatives had only good things to say about the quality of the work."

The modification work was more than 90 percent complete when the work had to be stopped; the district had run out of money with which to pay the contractors. The construction manager was the last man out, relying on repeated promises from the district personnel, including the contractually designated representative of the district, that their outstanding invoices would be paid shortly. When the construction manager finally left the location, the district owed the construction company more than \$2 million.

"This was a challenge from the beginning. We knew we were up against the nightly news," Mr. Lax, who tried the case, says. "Everyone has heard of the budget problems of school districts and we didn't want to be seen as trying to take books away from students."

To complicate matters, the district was represented by a firm that specialized in school district work. This gave opposing counsel a distinct advantage.

"A major problem was navigating the labyrinth of legislation dealing with school districts and what they can and cannot do," he says. "A completely innocent contractor can do the right thing throughout on a

● M A T T E R

school district project and still end up with no compensation if the district can find a statute that limits its power to pay."

Mr. Lax discussed these and other issues with the client early in the process and devised strategies to address the concerns. This was an important key to the success of the litigation.

"Starting a lawsuit without a plan for bringing it to a successful conclusion is a lot like starting a construction project without a clear idea of what you are going to build," Mr. Lax says. "The facts are what they are and you have to work with them, but if you identify the potential obstacles at the outset, you can pick the most advantageous way to present those facts."

Having identified the strengths and weaknesses of the case by the time the complaint was filed, it was possible to gear the case around those strengths. This helped focus the entirety of the litigation.

"By identifying our discovery objectives and getting our depositions done early, we locked in a lot of people's stories of the projects before the district's counsel had really decided how they were going to defend the case," Mr. Lax says. "We deposed all the key players from the district in rapid succession to commit them to their versions of events."

Not surprisingly, the district filed a cross-complaint alleging that it had been damaged by poor construction management work on the modernization projects. It estimated its damages at more than \$6 million.

The school district's retained expert witness spent, according to pre-trial discovery, a quarter of a million dollars inspecting the work, compiling his list of

deficient work and preparing his estimate of the damages. The parties scheduled a mediation, but the district held to its cross-complaint and never made an offer of settlement. Up to the time of trial, the closest to an offer of settlement that the district made was a suggestion by the district's counsel that his client "might" agree to a walk-away settlement.

"The three most important depositions in the case were those of the district's expert, the district's chief facilities officer who oversaw the work, and one of the district's construction inspectors, a man with 26 years' experience in the trades and inspection," he says. "What became apparent in the depositions of the district's facilities personnel was that the lawyers had apparently not talked to those people before they filed the cross-complaint."

Mr. Lax said that by the end of the deposition, the damage number for the cross-complaint had officially dropped to about \$400,000. But the expert conceded at the end of the day that, in fact, the district had no damage because it was holding retention on the contractors that exceeded the amounts of their contract balances plus their extra work claims. By the time of opening statement, the damage claim had dropped to the neighborhood of \$250,000. After the expert testified and was cross-examined, the district's counsel in closing argument asked for only \$37,000 on the cross-complaint.

"By the time we finished the deposition of their expert, we knew that the pressure was off on the cross-complaint," Mr. Lax, a graduate of

the University of California at Los Angeles School of Law says. "I met with the client the next day and we decided not to attempt any further settlement discussions."

From the outset, Mr. Lax's strategy was to portray the district as knowingly trying to avoid paying for work that it had directed the construction manager to do,

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and work that it knew was properly managed. He assigns a lot of the credit for the successful result to the cross-complaint strategy.

"It must be part of the 'Owners 101' course in litigation that defendants cross-complain when they get sued," he says. "But this project had gone on for more than five years and the district personnel who were most closely involved had nothing negative to say about the client's performance."

To compound the defendant's problems, and to the plaintiff's benefit, the expert retained by the district to bolster their cross-complaint had never spoken to any of the district personnel involved in the projects.

"Knowing this going in, and knowing that the district personnel were already on record as being satisfied with our client's management, we began the process of discrediting the expert in our opening statement," Mr. Lax says.

"By the time he came on to testify, the jury pretty much knew that his opinions were seriously suspect."

The district significantly pared down its case from its pre-trial list of witnesses. When it became apparent that the district was not going to call its own facilities personnel, Lax & Stevens subpoenaed those witnesses for trial. By carefully following the questions from the deposition, Mr. Lax elicited very favorable testimony from the district witnesses who knew the most about the issues being tried. The district was then left to rely on its statutory defenses.

The defendant essentially was forced to concede that the work was done, and was done in a competent manner, but nevertheless, the district had no liability.

These defenses were based on:

- The Government Code requirement for a claim filed with the district as a prerequisite to suit
- Whether the work was properly authorized
- Whether Lax & Stevens' client was the correct plaintiff

The first two had been anticipated from the beginning of the case. The third one was a bit of a surprise, according to Mr. Lax.

"It had us off-balance for a bit, but we were able to put our client's vice president on the stand in rebuttal to explain that there was an identity between the entity that signed the contracts in 2000 and the entity that brought suit in 2007," he says. "A reorganization of the corporate structure in 2005 did not change the performance or the identity of the company."

The Government Code claim and the proper authorization of the work were arguments that both counsel and client knew were coming from the first time they looked at this case.

"These are pretty typical for public entity defendants, especially school districts," he says.

Counsel prepared the claim with the Government Code issue in mind.

According to Mr. Lax, the challenge is to say enough to satisfy the statute but not so much that the plaintiff limits itself in the presentation of damages evidence. The brief with citations to cases that would support the sufficiency of the claim, prepared in advance of trial, convinced the judge that the claim was sufficient. The early critical analysis of the case, which concentrated on recognizing and dealing with the statute of limitations issue early, yielded valuable results in the eventual verdict.

"The one-year statute for filing was my primary concern from the first day," Mr. Lax says. "The firm's paralegal staff had been directed from the first document reviews to collect anything that looked like a promise to pay or a plea for patience by the district on the issue of when payment would be made."

Between the client's documents and the district's documents, an impressive collection of representations by the district that payment would be forthcoming was available to rebut the district's arguments that the statute had run before the claim was filed.

The district's challenge to whether all of the work for which the plaintiff was attempting to collect had been properly authorized was also anticipated, and the response prepared pre-trial to a great extent. Rather than rely on one response, Lax & Stevens prepared and presented two separate responses to this defense.

First, the work was in the nature of professional services. The scope of work never changed, but a few more sites came within the scope of the management contracts. These professional services contracts had compensation tied to the total of the work under management, so no change orders or similar mechanisms were required when an additional project was brought under management.

A further response dealt with ratification of the directions of its facilities chief by the governing board. Evidence of payment of invoices was introduced to show a ratification by the board.

"Perhaps most importantly, I pointed out in final argument that the district had not brought a single

board member to testify about what resolutions were passed or approved by the board," he says. "While the client had substantial circumstantial evidence of approval, the district had no evidence on the subject, even though it would seem to be the simplest thing for them to prove."

In the end, the early preparation and the aggressive discovery with clearly identified objectives paid off. And the decision to portray the school district in a light that emphasized their overreaching was vindicated.

Following trial, more than one of the jurors commented that they were hesitant to take money away from the school district, but that the district had treated the contractor poorly. And they determined that the claim was on time and the work was properly within the scope of the agreements. The jury awarded approximately 95 percent of the total requested in closing argument.

Between the costs recovered and the pre-judgment interest, the judgment is expected to be in the neighborhood of \$3 million.

Lax & Stevens specializes in legal representation for general contractors and large subcontractors. We are known in the industry for serving our clients with a degree of personalized attention that larger firms are often unwilling or unable to provide.

The legal team at Lax & Stevens has extensive experience in construction claims litigation and employment issues, as well as in litigation brought by owners in such issues as:

- Defective construction
- Terminated construction contracts
- Claims involving sureties

We have a strong record of success with large and complex cases, including major public works litigation.