How AB 3018 Affects California Design Professionals Performing Covered Work

By D. Creighton Sebra / Mar 18, 2019

In recent years, there has been a legislative push designed to make it more difficult for non-union contractors and design professionals, engineers, and land surveyors to compete for certain public works (construction) contracts. AB 3018 is another such example. This memorandum will explain the reasoning and rationale pertaining to the application of AB 3018 and requirements for compliance when design professionals are performing covered work, potential applicable exceptions to AB 3018, as well as recommendations for handling and dealing with this new law.

Existing statutes impose skilled and trained workforce requirements on various types of construction projects by public agencies, requiring that a certain percentage of the skilled journeypersons employed to perform work on a contract or project by every contractor, design professionals (assuming it is covered work) and each of its subcontractors or subconsultants at every tier are graduates of an apprenticeship program for the applicable occupation. The percentage required in 2019 will be 50 percent and will rise to 60 percent in 2020. AB 3018 also imposes new penalties on contractors, subcontractors, and design professionals who fail to meet the skilled and trained workforce requirements. For initial violations, penalties up to $5,000 per month may be imposed, with a second or subsequent violation within a three-year period resulting in penalties up $10,000 per month. A contractor, subcontractor, or design professional performing covered work found by the Labor Commissioner to be in violation with intent to defraud is also subject to disbarment from public works for a period of one to three years. In the event monthly reports of skilled and trained workforce compliance are not provided as required, AB 3018 also provides that public agencies shall withhold an amount equal to 150 percent of the value of the monthly billing for the entity that failed to comply.

What Does The 30% Requirement Mean?

Previously, in order to comply with the skilled workforce requirements, 30 percent of skilled journeypersons had to be graduates of an apprenticeship program, except for certain listed trades which were exempt from the apprenticeship percentage requirement. AB 3018 eliminates this exception for the listed occupations and requires 30 percent of all trades to be comprised of apprenticeship program graduates. However, in both instances, the revised exemption will carry forward in that those occupations specifically listed in the Code will now need to comply with the requirement that 30 percent of its skilled journeypersons be graduates of an apprenticeship program. These requirements apply to every contractor, design professional or land surveyor and each of its subcontractors or subconsultants (hereinafter collectively referred to as “Contractor” for ease of reference), regardless of tier.

Compliance With New Requirements

Contractors and design professionals on public works projects can meet the requirements of AB 3018 in one of two ways if, during a particular month, either:

1. The required percentage of the skilled and trained journeypersons on the project meet the percentage requirement; or
2. For the hours of work performed by skilled journeypersons on the project, the percentage of hours performed by skilled and trained journeypersons who met the graduation requirement is at least equal to the required graduation percentage.

An exemption to the graduation requirements applies to a contractor or subcontractor who, during a calendar month, employs skilled journeypersons to perform fewer than 10 hours of work on the project. There is a further exemption for subcontractors to comply with the graduation requirements where the subcontractor was not a listed subcontractor under §4104 of the Public Contract Code or was substituted for a listed subcontractor and the subcontract does not exceed one-half percent of the value of the prime contract.

Does AB 3018 Apply to Design Professionals?

Under California Prevailing Wage laws, prevailing wages must be paid to all covered employees of a public works project where a state, municipal, or local agency administers public funds for works of improvement which exceed $1,000. There are limited exclusions and for our purposes, we will assume that the project meets the threshold requirements and does not fall into one of the very limited exemptions to be subject to California Prevailing Wage laws.

California Labor Code sections 1720 and 1771 define public works as:

1. Construction (includes work performed during the design and preconstruction phases of construction including but not limited to, inspection and land surveying work)
2. Alteration
3. Demolition
4. Installation
5. Repair work
6. Maintenance work

California Labor Code further defines “construction” to include work performed during the design and preconstruction phases of construction, including,

but not limited to, inspection and land surveying work and work performed during the post-construction phases of construction, including, but not limited to, all cleanup work at the jobsite.

Generally, workers such as the following would be covered trades:

1. Operating engineer (heavy equipment operator)
2. Surveyor
3. Carpenter
4. Cement mason
5. Electrician
6. Laborer

The following types of workers usually would NOT be covered trades entitled to payment of prevailing wages:

1. Engineer
2. Project superintendent / construction manager / project manager
3. Architect
4. Planner
5. Computer programmer

However, California Prevailing Wage requires the payment of prevailing wage for Building/Construction Inspector, Field Soils, and Materials Tester Classifications. The covered work for these classifications can be for services related to both visual, physical and non-destructive testing and inspection that is done at a jobsite. On-site lab, fabrication site (yard), or off-site lab, are generally excluded from coverage as well, but the actual testing whether visual or otherwise would be considered covered work. Engineers, architects, project managers, and off-site lab workers would be excluded from coverage as long as they do not perform any work or services as a Construction Inspector. Further, a civil engineer or geotechnical engineer providing direction, plan interpretation and engineering-type decisions working with a Construction Inspector or Soils & Materials Tester also would be excluded from coverage. Additional documents from the Operators Engineers Union, are provided regarding information related to the Union's position and most likely the Department of Industrial Relations's [DIR] position concerning inspections, field soils, and materials tester.

One thing to keep in mind as well is that a worker's title or status with the employer is not determinative of an individual's coverage by the prevailing wage laws. What is determinative is whether the duties performed by the individual on a public works project constitute covered work. An individual who performs skilled or unskilled labor on a public works project is entitled to be paid the applicable prevailing wage rate for the time the work is performed, regardless of whether the individual holds a particular status such as partner, owner, owner-operator, independent contractor or sole proprietor, or holds a particular title with the employer such as president, vice-president, superintendent or foreman. For example, a "working" foreman or a "working" superintendent – one who performs labor on the project in connection with supervisorial responsibilities – is entitled to compensation at not less than the prevailing rate for the type of work performed. Of course, if the person holding the status or titles as listed above does not actually perform covered work on a project, his or her presence alone does not trigger the prevailing wage requirement.

Therefore, because certain field operations are covered work under the Scope of Work Provisions for Operating Engineer, design professionals performing covered work will be required to comply with AB 3018.

If AB 3018 Only States "Contractors" Then Why Does this Apply to the Design Professional Community?

AB 3018 does not define the meaning of "Contractor" & "Subcontractor." The Labor Code also does not define these terms. AB 1701, which modified Labor Code section 217.8, did however provide some references to these definitions.

AB 1701 references a term called "direct contractors" and the projects that would be applicable for this law are "for the erection, construction, alteration, or repair of a building, structure, or other work." Subsection "g" of 218.7 provides: "[f]or purposes of this section, 'direct contractor' and 'subcontractor' have the same meanings as provided in Sections 8018 and 8046, respectively, of the Civil Code." Civil Code section 8018 provides: "'Direct contractor' means a contractor that has a direct contractual relationship with an owner. A reference in another statute to a 'prime contractor' in connection with the provisions in this part means a 'direct contractor.'" Section 8046 has a similar definition but for subcontractors.

The "direct contractor" term is still a little ambiguous, but based on the statutory language and the definitions provided in Labor Code section 218.7, AB 1701 does not apply to design professionals. However, these definitions do not apply to AB 3018, and they would be controlling or persuasive in convincing the DIR that AB 3018 does not apply to design professionals. The DIR and the Division of Labor Standards Enforcement [DSLE] frequently look to expand the reach and application of the Labor Code, and AB 3018 is no different.

What Does "Skilled and Trained Workforce" Mean for Design Professionals Performing Covered Work?

As detailed in Labor Code section 2601(d), a skilled and trained workforce is defined below:

"'Skilled and trained workforce' means a workforce that meets all of the following conditions:

(1) All the workers performing work in an apprenticeable occupation in the building and construction trades are either skilled journeypersons or apprentices registered in an apprenticeship program approved by the chief."

Furthermore, section 2601 further defines "skilled and trained workforce" to mean the following:

"For work performed on or after January 1, 2017, at least 30 percent of the skilled journeypersons employed to perform work on the contract or project by every contractor and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation…

"For work performed on or after January 1, 2018, at least 40 percent of the skilled journeypersons employed to perform work on the contract or project by every contractor and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation, except that the requirements of subparagraph (A) shall continue to apply to work performed in the following occupations: acoustical installer, bricklayer, carpenter, cement mason, drywall installer or lather, marble mason, finisher, or setter, modular furniture or systems installer, operating engineer, pile driver, plasterer, roofer or water proofer, stone mason, surveyor, teamster, terrazzo worker or finisher, and tile layer, setter, or finisher."

Essentially, when a professional is performing covered work on a public works project, the firm will need to maintain at least 30 percent of its "journeypersons" to be graduates from an approved apprenticeship program. Given the fact that many firms are not members of the Union, compliance seems to be an impossibility. However, there is some light at the end of the tunnel, and Section 2601(e) provides an on the job experience exemption to the requirements.

Section 2601(e) states:

"'Skilled journeyperson' means a worker who either:

"(1) Graduated from an apprenticeship program for the applicable occupation that was approved by the chief or located outside California and approved for federal purposes pursuant to the apprenticeship regulations adopted by the federal Secretary of Labor.

"(2) Has at least as many hours of on-the-job experience in the applicable occupation as would be required to graduate from an apprenticeship program for the applicable occupation that is approved by the chief."

This exemption seems to be the best route for compliance with AB 3018 for design professional firms. Many firms have experienced employees that would qualify under section 2601(e) and this would seem the best way to be in compliance as it will be very difficult to secure trained apprentices or journeymen from the union hall. Recall that firms only need to have 30 percent of their work force on prevailing wage projects to meet the "skilled and trained workforce" requirement. Therefore, firms should be able to still meet the requirements of AB 3018 as long as they are able to show that "on-the-job experience" for the employee is at least equal to or more than what is required by the apprenticeship program for the application occupation.

Additional Potential Exemption To The 30 Percent Requirement

Section 2601(D)(3) provides another potential exemption to the 30 percent "skilled and trained" requirement. This section provides as follows:

"For an apprenticeable occupation in which no apprenticeship program had been approved by the chief before January 1, 1995, up to one-half of the graduation percentage requirements of paragraph (2) may be satisfied by skilled journeypersons who commenced working in the apprenticeable occupation before the chief's approval of an apprenticeship program for that occupation in the county in which the project is located."

To the extent an established apprenticeship program for the applicable crafts related to member firms was not established prior to January 1, 1995, then the exemption would potentially apply. However, this exemption would not completely remove the skilled and trained requirement but would reduce the requirement by one-half or from 30 percent to 15 percent.

Compliance with AB 3018

Members of the design professional community will still have the same issues of securing journeymen and apprentices from the local union halls. Even unions periodically have had a difficult time finding sufficient program graduates to meet the statutory requirements, including in 2017 and 2018 when the graduate percentage was lower. As a result, the requirements recently were amended and currently exempt certain occupations from the graduation percentage requirement, such as bricklayers, carpenters, drywall installers, roofers, and surveyors. Even with this amendment, the busy construction marketplace makes it difficult for many contractors to locate sufficient program graduates to satisfy the graduate percentage.

The difficulty finding sufficient program graduates to meet statutory percentages is exacerbated in more rural areas. On some rural government contracts, the requirements dramatically and unnecessarily increase the costs of public construction and harm local contractors and construction workers. The requirements may force government contractors to "import" labor in order to meet the graduation standards, by utilizing graduates from other areas. Some rural public entities can use only the more traditional design-bid-build method of construction contracting and must forego the benefits of early government contractor engagement.

California contractors and design professionals used to face limited consequences for non-compliance with the state's skilled and trained workforce requirements on public works projects. The Code re-defines what constitutes a skilled/trained workforce by eliminating existing exemptions, strengthens monthly reporting guidelines and agency oversight, and empowers the Labor Commissioner and public agencies with enforcement tools that include

monetary penalties and debarment. Design professionals and contractors who fail to institute a program to comply with AB 3018's reporting requirements will be potentially subject to the penalties outlined in the new law.

In order to comply with this new law, the following items are suggested:

- **Modify and strengthen contracts:**

  To protect themselves, professionals should consider modifying the contract to include the following:

  (1) List the skilled and trained workforce requirements within the body of any subconsultant agreements;

  (2) attach full copies of Labor Code sections 2601-2603 to subconsultant agreements;
  (3) strengthen indemnity provisions to ensure that subconsultant will indemnify for any violation of the new statute.

- **Continue to serve Division of Apprenticeship [DAS] 140 & 142 as previously required:**

  The Union rarely is able to provide apprentices in the crafts that many firms practice. However, this does not absolve the member firm from these requirements. Failure to submit these forms are violation of the Labor Code in and of themselves.

- **Continue to register with the DIR pursuant to SB 854:**

  In 2015, the California legislature adopted SB 854, a bill which revised the California Labor Code regarding the monitoring of California public works projects through the DIR. SB 854 creates a new public works monitoring scheme for the DIR and created a registration program to fund the DIR's monitoring and enforcement of prevailing wage laws. Registration and renewal fees will go into the State Public Works Enforcement Fund, which is earmarked for the administration of contractor registration, monitoring and enforcement of prevailing wage laws, and the enforcement of Labor Code violations on public works projects by the DIR.

  Specifically, firms working on a public works project and performing covered work for any type of public agency in California (state, counties, general law cities and special districts) are subject to annual registration.

- **Monitor compliance through the payment process:**

  Require each subcontractor/subconsultant to provide with each payment application a declaration from the subcontractor, signed under penalty of perjury, that the subcontractor has met the skilled and trained workforce requirements.

Conclusion

AB 3018 imposes penalties on contractors, subcontractors, and design professionals who perform covered work and who fail to comply with "skilled and trained workforce" requirements. It also requires the awarding body to forward a monthly report to the California Labor Commissioner for issuance of a civil wage and penalty assessment, if a contractor, subcontractor, or design professional has failed to comply with skilled and trained workforce requirements.

Those failing to comply with skilled and trained workforce requirements can be penalized by the Labor Commissioner up to $5,000 per month (first violation) and up to $10,000 per month (additional violations). The awarding body may withhold any progress payment from a direct contractor for failure by the contractor or its subcontractor(s) to be substantially compliant.

However, even though these penalties seem harsh and compliance difficult, most firms should be able to meet skilled and trained workforce requirements, by utilizing the on-the-job experience exemption. Moreover, it is reasonable to assume that the second available exemption (Section 2601(D)(3)) is most likely going to apply, but this would depend on the individual apprenticeship programs. Clark Hill will be providing an update to this memo, which will include a guidance document related the numbers of hours required to meet the 2601(e) exception as well as when applicable apprenticeship programs were started related to the 2601(D)(3) exception.