

# MTA Attacks Contractor Associations

*By Bernard S. Kamine, Kamine Ungerer, LLP, ECA Legal Counsel*

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The Los Angeles County Metropolitan Transportation Authority recently filed court papers impugning the motives and integrity of both ECA and SCCA. It is strange conduct for an agency that is literally begging contractors to bid on its projects.

In the summer of 2001, the trial judge in *Tutor-Saliba-Perini, J.V. v. Los Angeles County Metropolitan Transportation Authority*, Los Angeles Superior Court No. BC123559, barred Tutor from submitting evidence of its own claims or in defense against MTA's cross-claim. He then ordered the jury to deliver a verdict in favor of MTA. After attorney fees and interest, the final judgment was around \$100 million.

Tutor and its surety appealed. There are dozens of issues presented by the appeal, but the false claims and unfair competition issues are of particular interest to everyone who performs public works contracts. As a result, ECA and SCCA teamed up to file a friend of the court brief addressing those issues.

The brief argues that the false claims act is designed to stop people from fraudulently obtaining money from public agencies; whereas, most of the complaints against Tutor were "non-monetary, regulatory infractions" for which MTA suffered no monetary damages.

Further, though the regulations express important public policies, the penalties in the regulatory schemes are designed to enforce those policies. Adding enormous false claims penalties distorts the purposes of both the regulations and the false claims act. Further, the threat of such penalties would catastrophically distort the risk allocations in the competitive bidding process.

In response to that brief, MTA has falsely charged the associations with being paid off by Tutor to make arguments for it. ECA replied with the following letter to the court:

ECA Letter to the Court

This association co-authored an amicus brief in the case referred to above. Respondent MTA has replied to that brief with defamatory statements impugning the motives and integrity of this association. They cannot be left unanswered.

MTA falsely alleges that this association was paid by appellant Tutor to file an amicus brief supporting positions contrary to the best interests of the members of the association. That is not true. The specific allegations are:

1) [T]he ACB [amicus curiae brief] reveals itself to be nothing more than a TSP motivated (and undoubtedly funded) attempt to further argue the issues under a veil of alleged impartiality. [MTA br., p. 10]

2) The Amici are well aware that they are not truly speaking for their members, but rather for this wealthy and influential group of appellants . . . [MTA br., p. 13]

3) How the Senator supposedly knows this [i.e., that abuses of the false claims act, like those of MTA in this case, will reduce the pool of contractors willing to undertake public projects] (much like Amici, never publicly crediting TSP) is unexplained . . . [MTA br., p. 18, n.3]

4) These [arguments that MTA's false claims abuses are unprecedented] again reveal the true "author" of the ACB [amicus curiae brief]. [MTA br., p. 30]

Neither Tutor, nor any of its joint ventures, has ever been a member of this 28 year old association. No money of any kind has ever been given by Tutor to this association, except maybe to buy a ticket to one of our industry events from time to time.

This association has previously filed amicus briefs and letters in:

1) *Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal. 4th 228 [cardinal change, abandonment, total cost claim];

2) *BRH-Garver, Inc. and Seaboard Surety Co. v. City of San Diego* (2004) 4th District No. D03945 [Pub. Cont. Code § 7104, differing site condition statute sponsored by ECA];

3) *Kajima Engineering and Construction, Inc. v. City of Los Angeles* (2002) 2d District No. B149642 [false claims];

4) *West Coast General Corporation v. City of Carlsbad* (1998) 4th District No. D028177 [Pub. Cont. Code § 4100 et seq., the subcontractor listing law]; and

5) *National Identification Systems, Inc v. State Board of Control* (1993) 3d District No. Civ. C010634 [bid protest].

As we pointed out in each of those cases, this association is composed of over 200 firms who are involved in either constructing public works of improvement or providing services to contractors who build those projects. The association is the local chapter of the National Utility Contractors Association for the geographical area from Kern County to the Mexican border, except San Diego County. One or more ECA members is involved in the installation of most of the water, sewer and storm drain pipelines and many of the treatment plants constructed in this area. As the issues noted in the list of amicus cases indicates, the association is vitally interested in the development of the law affecting public works. This association has never accepted consideration from anyone for any of the amicus briefs it has filed.

Besides our amicus filings, the association has also obtained the following legislation:

Civil Code § 3186 (1998 amendment). Authorizes agencies to withhold money on stop notice claims from retention, instead of progress payments; also clarifies that the purpose for withholding more than the stop notice amount is to cover the agency's costs, not the stop notice claimant's costs.

Government Code § 12652 (1998 amendment). Makes agencies liable for attorney fees if they pursue frivolous false claims actions.

Public Contract Code § 100 (1990 amendment). Describes the purposes of competitive bidding, including providing "all qualified bidders with a fair opportunity to enter the bidding process" and eliminating "favoritism, fraud, and corruption in the awarding of public contracts."

Public Contract Code § 1601 (2002). Allows agencies to experiment with "methods and procedures to receive bids on public works or other contracts over the Internet."

Public Contract Code §§ 3400 and 10129 (2001 and 2003 amendments). Spells out the only four circumstances in which an agency can sole-source products or services, and, for the agency to do so, requires a notice in the invitation for bids or request for proposals that no equal product or service will be considered.

Public Contract Code § 4107 (2003 amendment). Requires prime contractor to list a subcontractor "for the scope of work specified in the subcontractor's bid and at the price specified in the subcontractor's bid."

Public Contract Code § 7104 (1989). Requires local agencies to include a clause in their contracts involving excavations to compensate contractors for extra costs resulting from differing site conditions.

Public Contract Code § 7106 (1988). Requires public works contracts to have a noncollusion affidavit.

Public Contract Code § 9201 (2002 amendment). Requires agencies to give contractors notice of the receipt of third-party claims before settling them.

Public Contract Code §§ 10126, 10780.5 and 20103.8 (2000 & 2002 amendments). Establishes procedures for the state, CSU, and local agencies, respectively, to use alternates in their bids in a way that prevents manipulating the selection of alternates after bid day to affect who is the lowest responsible bidder.

The decision to file the amicus brief in this case, as in all cases, was approved by the board of directors of the association. It was done to give the court context for this case, with a broad view from the industry, to contrast with the parochial, and therefore often distorted, perspective of the litigants. We are not a mouthpiece for Tutor.

Very truly yours,

**William I. Shubin**, President  
*Engineering Contractors' Association*