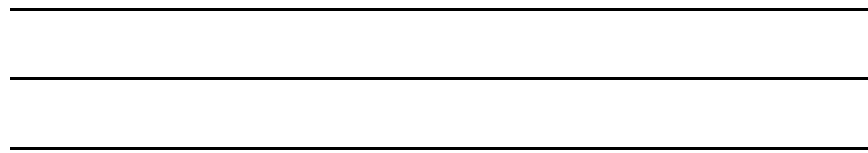


THE LAW OFFICES OF
BERGMAN & DACEY, INC.



CONSTRUCTION LITIGATION

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CONSTRUCTION LITIGATION

Bergman & Dacey, Inc. provides ongoing advice and counseling to our clients. Our firm has significant experience handling multi-million dollar construction matters on behalf of both plaintiffs and defendants. The matters we handle in both the threatened and actual litigation phases of a construction project include: contract and change-order disputes, delay, disruption and acceleration claims, performance and payment bond disputes, patent and latent construction defect claims, indemnification claims, general foreclosure actions, professional design errors, omissions and liability claims, and review of prime contracts, architect contracts, construction management contracts, inspector contracts, and pre-qualification documentation for risk management and litigation prevention purposes.

Bergman & Dacey, Inc. achieves each client's goals by relying on over two decades of extensive experience representing public and private construction project owners, general contractors, subcontractors, and sureties.

HOW BERGMAN & DACEY, INC. CAN ASSIST YOU

A. Dismissal of a Lawsuit

Bergman & Dacey, Inc. repeatedly extricates clients from lawsuits involving private and public works construction projects before they have to respond to a lawsuit. We write strongly worded demand letters, containing well-reasoned arguments explaining why a complaint is without merit, which often results in dismissal of the lawsuit before a responsive pleading is due.

B. Early Case Resolution Through Mediation

Bergman & Dacey, Inc. has resolved hundreds of construction matters, both private and public works, by getting the other side to an early mediation. At mediation, we strategically gain leverage to obtain economically, favorable settlements for our clients. Early resolution through mediation frequently results in significant savings in potential attorney fees and costs.

C. Contractors Stipulate To Judgments to Avoid Trial

Bergman & Dacey, Inc. often obtains stipulated judgments against defendant contractors who wish to avoid trial. We negotiated such settlements in areas as diverse as a freeway project, a U.S. Navy Housing project, high school projects, and a museum project. These types of settlements may include up-front amounts, payment schedules, and an executed stipulated fraud judgment held in trust to be filed in the event of nonpayment.

D. Earthquake Repairs and Insurance Related Litigation

Bergman & Dacey, Inc. represented several general contractors who were actively engaged in the repair of structures damaged in the 1994 Earthquake, including multi-unit residential and government owned buildings. **Bergman & Dacey, Inc.** obtained an \$8 million

settlement reached during an informal mediation on behalf of one of these general contractors.

E. Statutory Hearings and Public Contract Code Penalties

Bergman & Dacey, Inc. successfully represents public entity owners and general contractors in administrative hearings in connection with issues ranging from bid protests, substitution of listed subcontractors, contractor licensing, assignment of subcontract, prevailing wage violations, and penalties for alleged statutory violations of the Public Contract Code, the Labor Code and the Business and Professions Code. Our vast experience on behalf of clients on both sides of these issues makes us extremely effective.

F. Prevailing Wage Issues

Bergman & Dacey, Inc. has extensive experience representing public entities and private contractors in disputes arising under the California Labor Code's provisions governing the payment of prevailing wages on public works construction projects. Our experience includes assisting public entity labor compliance officers in their investigation of Labor Code compliance, the determination, recovery, and disbursement of back wages and statutory penalties, and the representation of public entities in review hearings before the Department of Industrial Relations and writ proceedings at the trial and appellate court levels.

BERGMAN & DACEY INC.'S REPRESENTATIVE CASES

PUBLIC ENTITIES

Bergman & Dacey, Inc. represents multiple school and college districts, and various fire districts, sanitary districts, water districts, cities, and counties within the State of California. We handle a wide variety of matters on behalf of our clients, including contractor licensing, bidding, and substitution of subcontractor issues, stop notice enforcement actions, claims for breach of contract, delay, disruption, acceleration, wrongful termination, contractor abandonment, fraud, false claims, prevailing wage violations, statutory penalties and interest, and other statutory claims. Our efforts to limit the public entity's litigation expenses, while providing the necessary services, are designed to protect our client's interests. We aggressively advocate our clients' interests, while always remaining vigilant in seeking settlement opportunities.

The following matters are representative of the results we routinely achieve for our public entity clients:

1. **Bergman and Dacey, Inc.** successfully assisted our client, a public entity, to favorably resolve over 100 cases pending against it through negotiation, mediation, arbitration, and trial. Although these cases posed a potential exposure in excess of \$80 million, **Bergman and Dacey, Inc.** was able to obtain resolutions resulting in a net gain of \$3 million to our client, who paid a total of \$1.7 million, but collected \$4.7 million from these same contractors and their performance bond sureties.

2. **Bergman and Dacey, Inc.** successfully petitioned the California Court of

Appeal to allow our client, a public entity, to retain over one million dollars in settlement funds that a contractor had sought to recoup under a theory that the public entity breached the settlement agreement. Initially, the trial court overruled our objection that it lacked jurisdiction to enforce the settlement. In response to our petition, however, the Court of Appeal issued a *Palma Letter* ordering the trial court to either rule in our client's favor or file a substantive opposition to our petition. Under this ruling by the Court of Appeal, the trial court issued a new order in favor of our client.

3. **Bergman & Dacey, Inc.'s** client, a public entity owner, settled a lawsuit brought against three construction management firms and one engineering firm hired by the public entity client. The case had been hotly litigated for two years and settled very favorably for our client.

4. A general contractor walked off two public works projects contending **Bergman & Dacey, Inc.'s** client, the public entity owner, materially breached both contracts. The general contractor filed suit seeking in excess of \$3,000,000.00 in damages. **Bergman & Dacey, Inc.'s** client cross-complained seeking approximately \$1,500,000.00 in damages. Multiple settlement conferences were held. After successfully convincing the court that the general contractor and its performance bond surety had waived trial by jury, the court granted **Bergman & Dacey, Inc.'s** client's motion to try legal issues first. Our client won nine of the nine legal issues tried to the court. The general contractor and its performance bond surety requested the court to set a mandatory settlement conference with another sitting judge. The case settled within three days with the general contractor receiving nothing. **Bergman & Dacey, Inc.'s** client obtained a settlement from the general contractor and its performance bond surety worth approximately \$1,200,000.00, which was paid within ten days.

5. A general contractor claimed that it had finished a \$10,000,000.00 plus public works project and then filed suit against **Bergman & Dacey, Inc.'s** client, the public entity owner, seeking in excess of \$12,000,000.00 in damages. Our client cross-complained contending that the project was not substantially complete and that the general contractor materially breached the contract causing substantial damage to the public entity. The action was consolidated with other related cases and litigated. Formal settlement attempts stalled. **Bergman & Dacey, Inc.** then proposed an out of the ordinary settlement vehicle to the general contractor and its performance bond surety, the cross-defendants on the public entity's cross-complaint. A settlement was reached where under the public entity agreed to release a reduced amount of the retention if the general contractor waived its entire claim against **Bergman & Dacey, Inc.'s** client and return to the site, under new payment and performance bonds, and successfully finish the project.

6. A general contractor walked off a public works construction project contending that **Bergman & Dacey, Inc.'s** client, the public entity owner, materially breached the contract for failing to make progress payments. The general contractor sought damages in excess of \$5,000,000.00. Our client cross-complained against the general contractor and its performance bond surety. The litigation grew into a consolidated action with approximately 45 parties. Formal settlement conferences were ordered by the court and extended over an eight month period. No positive results were reached. **Bergman & Dacey, Inc.** then proposed a settlement vehicle to the general contractor and performance bond surety that resulted in a settlement of the action. As a result, **Bergman & Dacey, Inc.'s** client paid nothing and received a settlement payment in excess of \$1,200,000.00.

7. In a series of consolidated lawsuits involving eight construction projects, which undoubtedly would have entailed thousands of attorney hours to investigate, prepare, and proceed to trial, **Bergman & Dacey, Inc.** was able to convince the only defendant that had sued its public entity client for contribution and indemnification to dismiss it in exchange for a tolling agreement, thereby avoiding an unnecessary lengthy trial (estimated to take sixty days) and the extensive costs and disruption accompanying such proceedings.

8. **Bergman & Dacey, Inc.** represents a school district in assisting with its negotiation of takeover agreements with performance bond sureties for the completion of projects upon the original contractors default and material breach of contract.

9. **Bergman & Dacey, Inc.** represents a school district in lawsuits brought by general contractors challenging the school district's procedure for pre-qualification of bidders and the school district's finding that certain general contractors are non-responsible bidders.

10. **Bergman & Dacey, Inc.** represented a school district and various administrators in a multi-million dollar lawsuit brought by a subcontractor seeking to overturn an administrative determination that the subcontractor failed to pay prevailing wages to its workers on a school project. **Bergman & Dacey, Inc.** successfully obtained dismissal of all claims against the district and its administrators as affirmed in a published opinion by the California Court of Appeal in *Mobley v. Los Angeles Unified School District*, 90 Cal.App.4th 1221, 109 Cal.Rptr.2d 591 (2001).

11. **Bergman & Dacey, Inc.** represented a school district with the sudden liquidation of a national surety company. A large number of the school district's construction projects involved bonds previously issued by the now insolvent surety company. **Bergman & Dacey, Inc.** successfully handled the economic and legal fallout from the sudden liquidation, and secured all the necessary replacement bonds from the contractors and from the replacement surety companies.

12. **Bergman & Dacey, Inc.** represented a school district in litigation with contractors who are also the subject of criminal prosecutions for bid-rigging and violations of the Cartwright Act. **Bergman & Dacey, Inc.** successfully opposed one of the contractor's ex parte efforts seeking immediate release of contract funds through a Petition for Writ of Mandate, then filed a cross-complaint on behalf of the school district to recover damages for contractor's defective work on the project.

13. **Bergman & Dacey, Inc.** represented a school district in a dispute over the construction of a \$40 million high school. We successfully convinced the plaintiff to dismiss the school district from five stop notice lawsuits by demonstrating stop notice release bonds were posted. We also negotiated a settlement with the general contractor on behalf of the school district which enabled the project to be completed.

14. A contractor brought an action for breach of contract and various torts arising from the expansion of a water filtration plant against a public agency who furnishes water throughout Southern California. In representing the public agency, **Bergman & Dacey, Inc.** was successful in dismissing several causes of action brought by the contractor. **Bergman & Dacey, Inc.**'s aggressive discovery strategy and presentation of the public agency's case during a three-day mediation forced the contractor and its subcontractors to reconsider the alleged merits of their case.

Shortly after the mediation, we settled the case, with the result that our public agency client returned the retention funds, and did not owe anything else.

15. **Bergman & Dacey, Inc.** represented a school district in a lawsuit brought by the general contractor for sums allegedly owed from the construction of a baseball field. Although the contractor sued for over \$9 million in damages, **Bergman & Dacey, Inc.** successfully resolved the lawsuit after the first few days of trial for close to the amount of retention funds being withheld on the project.

16. **Bergman & Dacey, Inc.** represented a school district on a classroom relocation project in a suit brought by an electrical subcontractor who filed a stop notice claim. **Bergman & Dacey, Inc.** successfully brought the punch list to completion, while the general contractor agreed to waive unpaid change orders in exchange for the release of the retention funds. The electrical subcontractor agreed to release its stop notice claims and dismiss the district from the lawsuit since the remaining retention money was placed in a trust account and secured by a bond, thereby entitling the electrical subcontractor, if it prevailed on its action against the general contractor, to recover these sums.

17. **Bergman & Dacey, Inc.** recently settled a dispute on behalf of a school district over portable classrooms after convincing opposing counsel most of the manufacturer's claims were time barred.

18. **Bergman & Dacey, Inc.** recently extricated a school district client from a subcontractor-general contractor dispute arising from a public works project within 30 days of the district being served with the Summons and Complaint. We sent a demand letter to opposing counsel demonstrating, with citations to case law and applicable statutes, that maintaining the cause of action against the school district would subject the plaintiff and their counsel to monetary sanctions in the form of attorney's fees and costs. A dismissal of the district was received within six days of the letter being sent.

19. **Bergman & Dacey, Inc.** helped resolve a twenty-year dispute concerning the use of \$100 million in funds for the construction of housing and business developments in geographic areas affected by the construction of an interstate freeway.

20. **Bergman & Dacey, Inc.** settled litigation on behalf of a large school district client in an action against a general contractor. The contractor had obtained final inspection and had notices of completion filed on two separate public works projects. However, given past experience with the contractor, **Bergman & Dacey, Inc.** had a team of forensic experts inspect the sites. It was determined that numerous defects in the work existed. The school district sued the contractor and its performance bond surety. The contractor's primary defense was that the school district had accepted the jobs and that the bond was exonerated upon the filing of the notices of completion. **Bergman & Dacey, Inc.** disagreed. The defects were discovered within the general warranty period and the school district's complaint was timely filed. **Bergman & Dacey, Inc.** then convinced the contractor to settle as the defects existed and the contractor's and surety's defenses had no merit. The contractor did settle and paid **Bergman & Dacey, Inc.**'s school district client \$2,000,000.00.

21. **Bergman & Dacey, Inc.** resolved two separate stop notice claims on behalf of a school district client in lawsuits arising out of a modernization project. In one action,

Bergman and Dacey, Inc. convinced the plaintiff, through a strongly worded demand letter citing to applicable authority, that its stop notice claim was procedurally defective as against the school district. The plaintiff in that action immediately dismissed all of its claims against our client. In the second stop notice action, we negotiated a stipulation with the other parties whereby the district interpleaded with the court a portion of the funds withheld pursuant to the stop notice in exchange for a dismissal with prejudice from the action. We negotiated the stipulation in such a way as to allow the district to use a portion of the withheld funds to cover all of the attorneys' fees and costs it incurred in defending the stop notice action.

22. **Bergman & Dacey, Inc.** handled a complex breach of contract case on behalf of a school district client involving claims by a general contractor on a modernization and safety and technology project. The general contractor sought damages in excess of \$3,300,000.00 for progress payments, retention, and alleged delays, disruptions, and acceleration of its work. **Bergman & Dacey, Inc.** filed a cross-complaint on behalf of the school district against the contractor and its performance and license bond sureties seeking damages related to the contractor's failure to complete the project. Utilizing the leverage we had developed during the hard-fought litigation, we structured a favorable settlement whereby the school district would receive a completed project and a dismissal of the contractor's entire \$3,300,000.00 claim in exchange for payment by the school district of less than \$280,000.00.

23. One of **Bergman and Dacey, Inc.**'s school district clients terminated a general contractor's right to proceed with work when the general contractor could not properly manage, supervise, coordinate, and construct the project. **Bergman & Dacey, Inc.** was brought in to convince the general contractor's performance bond surety to take over the project. It did so, and the project was successfully completed at no further cost to the school district. The general contractor ultimately sued the school district. The school district cross-complained against the general contractor and performance bond surety for damages sustained before the surety took over. The performance bond surety also sued the general contractor. During litigation, **Bergman & Dacey, Inc.** convinced the surety company to defend, indemnify and hold the school district harmless against the general contractor's claim in exchange for the school district assigning its claims against the contractor to the surety. In doing so, the school district avoided the expense and risks of attending a jury trial.

24. **Bergman and Dacey, Inc.** settled a public works construction litigation where a contractor claimed damages for, among other things, delay, lost profit, and failure of the public entity owner to follow the contractual dispute resolution procedures. At the mediation, **Bergman and Dacey, Inc.** pushed the contractor to back up its numbers with factual support and asserted various legal arguments. Because the contractor was unable to rebut the legal arguments or provide the level of back-up requested, the case settled at an amount favorable to our client, the public entity owner.

PRIVATE CLIENTS

In addition to representing public entities in the area of construction, **Bergman & Dacey, Inc.** handles a wide variety of matters on behalf of private clients, including general contractors, subcontractors and owners. The following matters are representative of the types of matters we handle, and the results we routinely achieve for our private clients:

1. When a private construction company began to experience delay and disruption issues on a \$400 million Southern California private university project, it called **Bergman & Dacey, Inc.** Our client's goals were to avoid litigation and ensure its rights were fully protected while keeping the project on schedule. We fully evaluated our client's rights and obligations, interfaced with project site personnel, and developed a plan of operation to have the project completed. Despite the project experiencing numerous impacts, and running a year and a half over schedule, preventative risk counseling from **Bergman & Dacey, Inc.** and exceptional project management under extremely challenging site conditions, produced only one lawsuit. A subcontractor sued the general contractor seeking in excess of \$250,000.00 for alleged extras supposedly incorporated into the project. **Bergman & Dacey, Inc.** convinced the plaintiff that it could not prove its case with certainty. A nuisance value, less than cost of defense, settlement was reached within six weeks of a pending trial date.

The same client utilized **Bergman & Dacey, Inc.** in connection with several different projects: the Junipero Serra State Office Building in downtown Los Angeles, the Howard Hughes Entertainment Center, and The Rivers, a commercial development in Rancho Mirage, California.

2. A general contractor client of **Bergman & Dacey, Inc.** recently bid on a \$10,000,000.00 plus public works engineering project for a local city. Our client was the third lowest bidder but reported certain deficiencies that it was aware of in the two low bids and the bid process overall. **Bergman & Dacey, Inc.** assisted the client in drafting a bid protest contending bid irregularities and that the city's conducting of the bid (use of two different bid clocks) created an unfair competitive advantage for some of the bidders. The city reviewed the bid protest, found it to be meritorious, and rejected all bids. The project was to be re-bid.

3. **Bergman & Dacey, Inc.**'s client, a structural steel subcontractor on a hotel and casino project, recently obtained a \$2 million settlement from the general contractor's payment bond surety shortly before the case was set to begin trial.

4. **Bergman & Dacey, Inc.**'s client, a general contractor, recently had an owner on a private commercial office building project drop an alleged \$2 million damage claim against the contractor just before trial. Rather, the owner made an affirmative cash payment in six figures to **Bergman & Dacey, Inc.**'s general contractor client

5. A general contractor client of **Bergman & Dacey, Inc.** recently sued a city concerning a historical preservation project, seeking damages for delay, penalties for late progress payments, penalties for wrongfully withholding retention, and other damages. While the general contractor had performed successfully, it suffered significant impacts from the city changing the available hours of construction after award of the contract. **Bergman & Dacey, Inc.** successfully argued that a change order that the city contended fully compensated for the hours change was not binding on the contractor and that the city's belated reasons for withholding retention were contrived and in bad faith. The case settled with the city making a settlement payment to **Bergman & Dacey Inc.**'s client five weeks before a pending trial date.

6. Construction of the State of California's new Museum of Science and Industry in Exposition Park near downtown Los Angeles, ran thirteen months beyond the original completion date. **Bergman & Dacey, Inc.** became involved during the early stages of the Museum of Science and Industry project. We worked with project personnel to help organize their records to document ongoing problems and issues for later use in litigation. However, only three lawsuits

were filed.

We first represented our client in an administrative hearing under the Public Contract Code when the structural steel subcontractor sued for \$2.5 million after being removed from the project. Our client and its surety cross-complained against the steel subcontractor and its performance bond surety. The case settled eleven days before trial with our clients receiving \$750,000.00 and paying out nothing.

Bergman & Dacey, Inc. also successfully handled two separate trials arising from the Museum of Science and Industry project. When the subcontractors initiated actions against our client seeking delay, disruption, and acceleration damages, (with the assistance of consultants and experts) we objectively evaluated and assessed both cases. In the first trial, the plaintiff sought over \$3.3 million and was awarded only \$131,000.00. By way of post-trial motions, our client was awarded \$511,000.00 in attorneys' fees and associated costs. After deducting plaintiff's award, a new judgment of \$380,000.00 was entered in our client's favor. We obtained a similar result for our client in the second trial. Seeking \$1.8 million against our client, the plaintiff recovered only \$69,000.00. Through post-trial motions, our client was awarded \$350,000.00 in attorneys' fees and costs, resulting in a new judgment of \$281,000.00 entered in our client's favor.

7. **Bergman & Dacey, Inc.** represented a general contractor in a dispute regarding the Roosmoor Leisure World Project. We were able to defeat the defendant's Motion for Summary Judgment (the defendant claimed that the general contractor's claims were barred by the statute of limitations) by demonstrating the new claims related back to the previously filed claims.

8. In a breach of statutory duty/fraudulent conveyance action arising out of a construction project, **Bergman & Dacey, Inc.** obtained an assignment of rights on behalf of our client and successfully pursued the causes of action on behalf of our client against a bank. Our client recovered monies it was not aware it had any right to pursue.

9. **Bergman & Dacey, Inc.** successfully resolved a construction defect litigation dispute on a multi-building project by obtaining a dismissal of the general contractor from the action by way of a motion for sanctions against the subcontractor's frivolous pleading.

10. In a construction contract dispute involving a subcontractor's stop notice claim against the owner, **Bergman & Dacey, Inc.** negotiated a settlement on behalf of the owner wherein our client received reimbursement for all of its attorney's fees incurred in the stop notice action, even though the contract between the owner and the general contractor did not have an attorney's fees provision.

11. **Bergman & Dacey, Inc.** successfully resolved an indemnity claim made by a private owner's title insurance company against our client, the general contractor, by cross-complaining against the title company and the owner for rescission and/or reformation of the indemnity agreement.

12. **Bergman & Dacey, Inc.** obtained judgments on behalf of a general contractor against three separate subcontractors, all based on promissory estoppel causes of action. Each of the three subcontractors submitted bids on which the prime contractor relied, and then refused to sign subcontracts with the general contractor. We successfully recovered the difference

between the bids and the replacement subcontracts for the general contractor.

13. **Bergman & Dacey, Inc.** settled two separate actions to foreclose mechanics' liens brought on behalf of our client who had construction contracts with lessees of commercial property. In each case, after the lessee breached its lease with the property owner, **Bergman & Dacey, Inc.** recovered against the property owner despite the fact that the property owner posted Notices of Non-Responsibility.

14. **Bergman & Dacey, Inc.** obtained two defense verdicts and a successful resolution for one of its general contracting clients and its bonding companies when a subcontractor sought recovery of damages against the payment and stop notice release bond sureties. **Bergman & Dacey, Inc.** obtained defense verdicts as to both surety companies, received a defense verdict on the quantum meruit cause of action, and prevailed on a trial motion which knocked out \$500,000.00 in alleged "cost of borrowing" damages.

15. **Bergman & Dacey, Inc.** recovered several hundred thousand dollars from a subcontractor on behalf of our client, a joint venture general contractor regarding a Federal Navy Housing Project in San Diego which was presented as a breach of contract action. **Bergman & Dacey, Inc.** filed suit on behalf of the general contractor and shortly thereafter moved for summary judgment. The subcontractor then agreed to a stipulated judgment and a payment plan before the summary judgment motion was heard by the court.

16. **Bergman & Dacey, Inc.** successfully enforced a "pay if paid" clause in favor of a general contractor against claims made by one of its subcontractors when the owner of a housing project refused to pay for certain extra work and release the contract balance to the general contractor. The subcontractor claimed it was entitled to payment from the general contractor for extra work even though the owner had not paid. **Bergman & Dacey, Inc.** convinced the court that the general contractor's "pay if paid" clause made payment from the owner a condition precedent to the general contractor's obligations to pay the subcontractor. (This case was decided before the California Supreme Court decision in Wm. R. Clarke v. Safeco.)

17. **Bergman & Dacey, Inc.** successfully convinced a court to sustain a demurrer to a complaint, without leave to amend, on a claim against the payment bond. The court agreed with **Bergman & Dacey, Inc.**'s position that the plaintiff failed to provide the preliminary notice required by statute. Therefore, the plaintiff did not preserve its right to sue on the bond. The court also awarded our client attorneys' fees and costs.

18. In a private works, high-end remodel construction project, **Bergman and Dacey, Inc.** was able to obtain a 100% recovery on behalf of the general contractor against the owner in an arbitration for an award of \$370,655.58. Although the owner put forth many defenses, including over-billing, delay in progress of the work, and that the contract was modified by conduct, **Bergman and Dacey, Inc.** was able to obtain a ruling from the Arbitrator finding in our client's favor on each of those defenses. **Bergman and Dacey, Inc.** has filed post-award briefs seeking costs, attorneys' fees as the prevailing party, statutory penalties, and interest.