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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

**DAVIS MORENO CONSTRUCTION,
INC. ,**

Plaintiff,

v.

**FRONTIER STEEL BUILDINGS
CORP. ,**

Defendant.

1:08-cv-00854-OWW-SMS
MEMORANDUM DECISION ON THE
PARTIES' CROSS-MOTIONS FOR
SUMMARY JUDGEMENT

I. INTRODUCTION.

Plaintiff Davis Moreno Construction, Inc. ("Plaintiff") proceeds with this diversity action for damages against Defendant Frontier Steel Buildings Corp. ("Defendant").

Plaintiff filed a motion for summary judgment and motion to dismiss Defendant's counterclaim on May 17, 2010. (Doc. 91). Defendant filed opposition to Plaintiff's motion for summary judgment on August 16, 2010. (Doc. 101). Defendant also filed a cross-motion for summary judgment on August 16, 2010. (Doc. 100).

Plaintiff filed a reply to Defendant's opposition on August 23, 2010. (Doc. 102).

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1 **II. FACTUAL BACKGROUND.**

2 This action concerns a contract between Plaintiff and
3 Defendant related to a public works project for the Kern Unified
4 School District for the construction of its Records Retention
5 Facility (the "Project") in Kern County, California. Plaintiff
6 submitted a bid to the School District and was awarded the prime
7 contract in connection with the Project. As the prime contractor,
8 Plaintiff engaged subcontractors and suppliers, including
9 Defendant.

10 On October 8, 2007, Defendant submitted a bid to Plaintiff
11 quoting a price for delivery of "the steel structure for the KUSD
12 Office Record Retention Facility." (Stephen Davis Decl., Ex. A.).
13 The facsimile was addressed to "contractors/estimators" and
14 contained a representation by Defendant that "all components in our
15 bid will meet or exceed your specifications and codes for this
16 project." (Id.). The price quoted by Defendants for the steel
17 structure was \$145,494.00. (Id.). Defendant's bid also stated "We
18 can assist you in erecting this structure for this price \$
19 70,750.00." (Id.). The last page of the bid contained a design
20 drawing. Defendant's bid also contained the following provision
21 under the heading "Standard Notes and Conditions:"

22 6. Quotation is not a contract, but an offer to
23 sell, which can only be accepted by a timely
execution of a purchase order contract.

24 (Id.).

25 By letter dated December 6, 2007, Plaintiff notified Defendant
26 of its intent to award Defendant a contract for the steel
27 structure. Plaintiff's letter stated: "It is the intent of Davis
28 Moreno Construction, Inc. to issue a subcontract to Frontier Steel

1 Building Corp. in the amount of \$145,494.00 for Pre-Engineered
2 Metal Building in accordance with the Plans and Specifications by
3 BFGC Architects Planners Inc., and Addendums No. 1 thru 5. You
4 should receive a contract within the next ten (10) days." (Id., Ex.
5 B).

6 On or about December 11, 2007, Plaintiff sent Defendant a
7 Purchase Order for pre-fabricated steel to be used in constructing
8 the Project. (Id., Ex. C). Defendant sent Plaintiff a facsimile
9 on January 10, 2008 which contained a version of Plaintiff's
10 purchase order modified by interlineation as well as a separate
11 purchase order authored by Defendant. (Id., Ex. D).¹ Plaintiff
12 responded to Defendant's modified Purchase Order in a letter dated
13 January 10, 2008 that indicated which provisions of the modified
14 Purchase Order Plaintiff was agreeable to. (Id., Ex. E).
15 Plaintiff's letter was accompanied by a copy of Defendant's
16 modified Purchase Order signed on behalf of Plaintiff; the signed
17 purchased order contained a handwritten notation which incorporated
18 Plaintiff's January 10, 2008 letter into the agreement. (Id).

19 Pursuant to the Purchase Order signed by Plaintiff, Defendant
20 agreed to generate "anchor bolt and structural drawings," "shop
21 drawings and engineering calculations," "fabrication drawings," and
22 to deliver the fabricated materials to the job site within time
23 periods specified in the Purchase order. (Id., Ex. E). The
24 materials Defendant agreed to provide included primary and
25 secondary steel, roof panels, steel framing, and other materials.
26 The Purchase Order contains a provision which states:

27
28 ¹ The date on Defendant's letter is January 10, 2007--this appears to be a
typographical error in light of the sequence of the parties' correspondence.

1 the supplying of sealed engineering and drawings by FSBC
2 does not imply or constitute an agreement that FSBC or
3 its building design team is acting as the engineer of
4 record or the design professional for any construction
5 project.

6 (Id. at 3). The Purchase Order further provides:

7 It is the building purchaser's responsibility to obtain
8 experienced personnel, proper tools, and equipment to
9 erect this building in a safe competent and professional
10 manner.

11 (Id. at 4). The Purchase Order also contains the following
12 provision:

13 Any corrections of mis-fabrication or material purchases
14 for shortened material must be approved by and/or
15 performed as directed by FSBC in writing prior to work
16 being done or material being purchased. FSBC may, at its
17 option, authorize the work to be performed or material
18 purchased by the metal building purchaser or it may
19 perform the work or provide the material itself.

20 (Id.).

21 Defendant performed various obligations under the contract,
22 and Plaintiff made several payments to Defendant. In total,
23 Plaintiff paid Defendant \$168,025.90.

24 **III. LEGAL STANDARD.**

25 Summary judgment/adjudication is appropriate when "the
26 pleadings, the discovery and disclosure materials on file, and any
27 affidavits show that there is no genuine issue as to any material
28 fact and that the movant is entitled to judgment as a matter of
law." Fed. R. Civ. P. 56(c). The movant "always bears the initial
responsibility of informing the district court of the basis for its
motion, and identifying those portions of the pleadings,
depositions, answers to interrogatories, and admissions on file,
together with the affidavits, if any, which it believes demonstrate

1 the absence of a genuine issue of material fact." *Celotex Corp. v.*
2 *Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265
3 (1986) (internal quotation marks omitted).

4 Where the movant will have the burden of proof on an issue at
5 trial, it must "affirmatively demonstrate that no reasonable trier
6 of fact could find other than for the moving party." *Soremekun v.*
7 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). With
8 respect to an issue as to which the non-moving party will have the
9 burden of proof, the movant "can prevail merely by pointing out
10 that there is an absence of evidence to support the nonmoving
11 party's case." *Soremekun*, 509 F.3d at 984.

12 When a motion for summary judgment is properly made and
13 supported, the non-movant cannot defeat the motion by resting upon
14 the allegations or denials of its own pleading, rather the
15 "non-moving party must set forth, by affidavit or as otherwise
16 provided in Rule 56, 'specific facts showing that there is a
17 genuine issue for trial.'" *Soremekun*, 509 F.3d at 984. (quoting
18 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct.
19 2505, 91 L. Ed. 2d 202 (1986)). "A non-movant's bald assertions or
20 a mere scintilla of evidence in his favor are both insufficient to
21 withstand summary judgment." *FTC v. Stefanichik*, 559 F.3d 924, 929
22 (9th Cir. 2009). "[A] non-movant must show a genuine issue of
23 material fact by presenting affirmative evidence from which a jury
24 could find in his favor." *Id.* (emphasis in original). "[S]ummary
25 judgment will not lie if [a] dispute about a material fact is
26 'genuine,' that is, if the evidence is such that a reasonable jury
27 could return a verdict for the nonmoving party." *Anderson*, 477
28 U.S. at 248. In determining whether a genuine dispute exists, a

1 district court does not make credibility determinations; rather,
2 the "evidence of the non-movant is to be believed, and all
3 justifiable inferences are to be drawn in his favor." *Id.* at 255.

4 **IV. DISCUSSION.**

5 **A. Summary Judgment on Plaintiff's Second Cause of Action**

6 **1. Legislative Framework**

7 California's Contractors' State License Law ("CSLL")
8 establishes a comprehensive legislative scheme governing the
9 construction business in California. See CAL. BUS. & PROF. CODE §
10 7000 *et seq.*; *Alatrisme v. Cesar's Exterior Designs, Inc.*, 183 Cal.
11 App. 4th 656, 664 (Cal. Ct. App. 2010). The CSLL requires
12 contractors performing construction work to be licensed at all
13 times during the performance of such work. See, e.g., *MW Erectors,*
14 *Inc. v. Niederhauser Ornamental & Metal Works Co.*, 36 Cal. 4th 412,
15 425 (Cal. 2005) (contractor violates CSLL if, "at any time during
16 performance of an agreement for contractor services, he or she was
17 not duly licensed.") (emphasis in original). The CSLL defines
18 "contractor" in pertinent part as follows:

19 'Contractor,' for the purposes of this chapter, is
20 synonymous with 'builder' and, within the meaning of this
21 chapter, a contractor is any person who undertakes to or
22 offers to undertake to, or purports to have the capacity
23 to undertake to, or submits a bid to, or does himself or
24 herself or by or through others, construct, alter,
25 repair, add to, subtract from, improve, move, wreck or
demolish any building, highway, road, parking facility,
railroad, excavation or other structure, project,
development or improvement, or to do any part thereof,
including the erection of scaffolding or other structures
or works in connection therewith, or the cleaning of
grounds or structures in connection therewith

26 CAL. BUS. & PROF. CODE § 7026 (2010). Section 7026.1(b) provides that
27 the term "contractor" includes:
28

1 Any person, consultant to an owner-builder, firm,
2 association, organization, partnership, business trust,
3 corporation, or company, who or which undertakes, offers
4 to undertake, purports to have the capacity to undertake,
or submits a bid, to construct any building or home
improvement project, or part thereof

5 CAL. BUS. & PROF. CODE § 7026.1(b) (2010).

6 The CSLL is intended to protect the public by providing
7 "minimal assurance that all persons offering contractor services in
8 California have the requisite skill and character, understand
9 applicable local laws and codes, and know the rudiments of
10 administering a contracting business." *Alatraste*, 183 Cal. App.
11 4th at 664. Because of the strength and clarity of the policy
12 interests underlying the CSLL, *Hydrotech Systems, Ltd., v. Oasis*
13 *Waterpark*, 52 Cal. 3d 988, 995 (Cal. 1991), the California Supreme
14 Court has given a broad, literal interpretation to the CSLL's
15 enforcement provisions, *White v. Cridlebaugh*, 178 Cal. App. 4th
16 506, 518 (Cal. Ct. App. 2009) (citation omitted).

17 The CSLL shields a person who utilizes the services of an
18 unlicensed contractor from lawsuits by that contractor to collect
19 payment for unlicensed work. *E.g. White*, 178 Cal. App. 4th at 518.
20 Section 7031(a) provides:

21 Except as provided in subdivision (e), no person engaged
22 in the business or acting in the capacity of a
23 contractor, may bring or maintain any action, or recover
24 in law or equity in any action, in any court of this
25 state for the collection of compensation for the
26 performance of any act or contract where a license is
27 required by this chapter without alleging that he or she
28 was a duly licensed contractor at all times during the
performance of that act or contract, regardless of the
merits of the cause of action brought by the person,
except that this prohibition shall not apply to
contractors who are each individually licensed under this
chapter but who fail to comply with Section 7029.

1 CAL. BUS. & PROF. CODE § 7031(a). The Legislature complemented the
2 shield created by section 7031(a) by adding a sword that allows
3 recovery of all compensation paid to a contractor for performing
4 unlicensed work. *Id.* at 519. Section 7031(b) provides in
5 pertinent part:

6 a person who utilizes the services of an unlicensed
7 contractor may bring an action in any court of competent
8 jurisdiction in this state to recover all compensation
9 paid to the unlicensed contractor for performance of any
10 act or contract.

11 CAL. BUS. & PROF. CODE § 7031(b) (2010). "Section 7031(b) was
12 designed to treat persons who have utilized unlicensed contractors
13 consistently, regardless of whether they have paid the contractor
14 for the unlicensed work." *White*, 178 Cal. App. 4th at 520.

15 The language contained in section 7031 embodies an "all-or-
16 nothing" philosophy aimed at deterring persons from offering or
17 providing unlicensed contractor services for pay. *E.g. MW*
18 *Erectors*, 36 Cal. 4th at 426, 430. Section 7031 does not permit an
19 unlicensed entity to recover partial compensation by narrowly
20 segmenting the licensed and unlicensed portions of their
21 performance. *MW Erectors*, 36 Cal. 4th at 426. Where applicable,
22 section 7031 bars a person from recovering or retaining
23 compensation for any work performed in connection with an agreement
24 for services requiring a contractor's license unless proper
25 licensure was in place at all times during such contractual
26 performance. *See White*, 178 Cal. App. 4th at 518 (discussing
27 section 7031(a) (citation omitted)).

28 **2. Defendant's Status Under the CSLL**

Whether an entity performed or undertook to perform the work
of a contractor depends in part on the nature and scope of

1 contractual obligations the entity assumed in connection with a
2 project. See *The Fifth Day, LLC v. Bolotin*, 172 Cal. App. 4th 939,
3 948 (Cal. Ct. App. 2009) (reviewing contract's terms to determine
4 whether entity was a contractor for purposes of the contract); see
5 also *WSS Industrial Construction, Inc. V. Great Western*
6 *Contractors, Inc.*, 162 Cal. App. 4th 581, 590 n.6, 592
7 (2008) (same); *Banis Restaurant Design, Inc. v. Serrano*, 134 Cal.
8 App. 4th 1035, 1044 (Cal. Ct. App. 2005) (same); *Scientific Cages,*
9 *Inc. v. Banks*, 81 Cal. App. 3d 885, 888 (Cal. Ct. App. 1978 (same)).
10 Acts performed by an entity outside of, but related to, a contract
11 are also relevant to the issue of whether the entity performed or
12 undertook to perform the work of a contractor. See *Nash v. Taylor*,
13 327 Fed. Appx. 718, 720 (9th Cir. 2009) (unpublished) (evaluating
14 "parties' conduct, including the course of negotiations" in order
15 to determine whether section 7031(a) applied); see also *MW*
16 *Erectors*, 36 Cal. 4th at 427-28) (noting that "parties do sometimes
17 operate without, or beyond the boundaries of, a formal contractual
18 arrangement" and affirming that "the CSLL does not require
19 contractors to operate exclusively by formal contract; it simply
20 seeks to deter them from offering or performing unlicensed services
21 for pay").

22 It is beyond doubt that Defendant was a contractor as defined
23 by sections 7026 and 7026.1 when it submitted its initial bid to
24 Plaintiff on October 8, 2007, as the bid offered to "assist
25 [Plaintiff] in erecting this structure for this price: \$70,750.00."
26 (Plaintiff's MSJ, Ex. A at 3); CAL. BUS. & PROF. CODE §§ 7026, 7026.1
27 ("a contractor is any person who...submits a bid to...construct,
28

1 ...any building...or part thereof").² Whether Defendant was a
2 contractor for the purposes of performance of the parties' ultimate
3 contractual agreement presents a separate question, because the
4 contract indicates that Plaintiff is responsible for erecting the
5 structure. (Plaintiff's MSJ, Ex. E).

6 Contract interpretation on undisputed facts is a question of
7 law. *E.g. The Fifth Day*, 172 Cal. App. 4th at 946. "A contract
8 must be so interpreted as to give effect to the mutual intention of
9 the parties as it existed at the time of contracting." Cal. Civ.
10 Code. § 1636. A contract's meaning must be ascertained from the
11 contract's language if it is clear and explicit. Cal. Civ. Code.
12 § 1638. Unless the parties have indicated a special meaning, the
13 contract's words are to be understood in their ordinary and popular
14 sense. Cal. Civ. Code. § 1644; *Crawford v. Weather Shield Mfg.,*
15 *Inc.*, 44 Cal. 4th 541, 552 (Cal. 2008). Language in a contract
16 must be construed in the context of the instrument as a whole and
17 in light of all the circumstances between the parties. *E.g. Bay*
18 *Cities Paving & Grading v. Lawyers' Mutual Ins. Co.*, 5 Cal. 4th
19 854, 867 (Cal. 1993).

20 The parties' contract is comprised of a purchase order, bill
21 of values, and a letter Plaintiff returned with the executed
22 purchase order and bill of values purporting to clarify the
23 agreement. See CAL. COM. CODE § 2207 (2010) (additional terms
24 included in an acceptance become part of the contract unless (1)
25 offer expressly limited acceptance to terms of offer; (2) terms

26
27 ² Although Defendant's bid did not create a contractual obligation, under
28 California law, the bid was irrevocable, and Plaintiff could have held Defendant
to its offer to erect the building for the specified price. *Norcross v. Winters*,
209 Cal. App. 2d 207, 216 (Cal. Ct. App. 1962).

1 materially alter the contract; (3) notification of objection to the
2 terms is given within a reasonable time). The bill of values
3 provides the following payment schedule:

- 4 1. 8% of building cost due upon receipt of anchor bolt
and structural drawings
- 5 2. 10% of building cost due upon approval of shop
drawings and engineering calculations
- 6 3. 8% of building cost upon delivery of detail
fabrication drawings to manufacturer
- 7 4. COD payment due upon delivery of building materials to
job site.

8
9 (Stephen Davis Decl., Ex. E). The purchase order indicates that
10 Defendant promised to provide design engineering for the Project
11 and to provide the following materials:

- 12 1. Primary and Secondary Steel
- 13 2. Standing Seam Roof Panels
- 14 3. Metal Panels at the Roof Mechanical Screen
- 15 4. Steel Framing for Mechanical Screen
- 16 5. Mansard Rigid Frames
- 17 6. Softfit Structure at Overhangs
- 18 7. Metal Stud and Parapet Framing
- 19 8. Internal Gutters
- 20 9. Gutters and Downs
- 21 10. Full Trim Package

22 (Id.). The purchase order also sets forth additional terms and
23 conditions; these terms and include, *inter alia*, the following:

24 ¶10- Special field inspections may be required, these
25 inspections must be done by a third independent third
26 [sic] party

27 ¶11- Purchaser is to review the shipping manifest with
28 the truck driver at the time of delivery and is
responsible at that time to verify all material received
is correct as to type and quantity listed on the shipping
manifest...if FSBC has not shipped all items indicated on
the shipping manifest; or if some items necessary to
provide the building system as approved and released to
fabricate in writing were not provided or were not listed
on the shipping manifest, then FSBC will provide these
items at no charge, F.O.B. jobsite

¶13- Any corrections of mis-fabrication or material
purchases for shorted material must be approved by and/or
performed as directed by FSBC in writing prior to work

1 being done or material being purchased. FSBC may, at its
2 option, authorize the work to be performed or material
3 purchased by the metal building purchaser or it may
4 perform the work or provide the material itself. FSBC is
not liable for any consequential damages incurred due to
mis-fabrication, shorted material or delays in schedules
caused by other agencies.

5 ¶14- It is the building's purchaser's responsibility to
6 obtain experienced personnel, proper tools and equipment
7 to erect this building in a safe [sic] competent and
professional manner

8 (Id.). The letter Plaintiff sent with the executed purchase order
9 and bill of values clarified that "the basis of this purchase order
10 is that Frontier Steel will provide all the components required of
11 specification section 13122 metal building systems." (Id.).

12 Plaintiff cites *WSS Industrial* for the proposition that
13 Defendant's submission of shop plans was sufficient to bring
14 Defendant within the purview of section 7026. (MSJ at 8). In *WSS*
15 *Industrial*, a general contractor accepted a steel subcontractor's
16 bid to perform steel work on a construction project. 162. Cal.
17 App.4th at 585-86. The steel subcontractor's bid entailed, among
18 other tasks, preparation of shop drawings and procurement of anchor
19 bolts. At the time the steel subcontractor prepared the shop
20 drawings and ordered the anchor bolts, it was unlicensed. The
21 steel subcontractor later obtained a license. The trial court
22 denied the general contractor's motion for nonsuit pursuant to
23 section 7031, holding that the work performed while the steel
24 subcontractor was unlicensed- preparation of the shop drawings and
25 procurement of the anchor bolts -did not require a license. *Id.* at
26 585. The California Court of Appeal reversed, holding that it was
27 improper for the trial court to segregate the steel subcontractor's
28 completion of shop drawings and ordering of anchor bolts from the

1 overall purpose of the contract, which unquestionably required a
2 contractor's license. *Id.* at 592-93. Defendant distinguishes *WCC*
3 *Industrial* on the grounds that, in addition to preparing shop
4 drawings, the steel subcontractor in *WCC Industrial* also contracted
5 to build the structures depicted in the drawings. See *WCC*
6 *Industrial*, 162 Cal. App. 4th at 592-93.

7 *WCC Industrial* did not concern the threshold question of
8 whether the plaintiff was a "contractor" for purposes of the
9 project. Rather, the central issue in *WCC Industrial* was whether
10 work the plaintiff performed before it obtained its contractor's
11 license was severable from the tasks which required licensure and
12 thus compensable notwithstanding section 7031. Contrary to
13 Plaintiff's assertion, *WCC Industrial* does not resolve the issue of
14 whether shop drawings for structural components of a building
15 require a contractor's license.

16 Although *WCC Industrial* does not establish that completing
17 shop drawings, without more, is sufficient to establish that an
18 entity is a "contractor," the *WCC Industrial* Court's reasoning and
19 the authorities cited in the opinion suggest that an entity that
20 prepares shop drawings pertaining to a building's structural
21 composition and fabricates materials purportedly fit for erecting
22 the structure in compliance with a project's engineering
23 specifications and applicable state laws meets the definition of a
24 contractor. The *WCC Industrial* Court reasoned that "the public has
25 a right to expect the party designing [shop drawings]...will, at a
26 minimum, have the qualifications required and to possess a valid
27 contractor's license;" this language recognizes that the policy
28 interest underlying the CSLL would be thwarted if unlicensed

1 entities are permitted to design buildings and provide custom-
2 fabricated materials purportedly in compliance with relevant
3 California building codes. *Id.* at 593.

4 *WCC Industrial's* citations to *Banis Restaurant Design, Inc. v.*
5 *Serrano*, 134 Cal. App. 4th 1035, 1044 (Cal. Ct. App. 2005) and
6 California Business and Professions Code sections 6737.3 and 6731
7 focused on design services, not physical erection of the building.
8 In *Banis*, the California Court of Appeal held that an entity that
9 prepared shop drawings and provided building materials, but did not
10 perform or offer to perform any physical construction tasks, was
11 acting as a contractor within the meaning of section 7026:

12 Plaintiff's complaint and contract describe work that
13 comes within the statutory definition of a contractor.
14 According to plaintiff's complaint, it provided more than
15 \$ 1.7 million of labor, materials, equipment, and
16 services to defendant Serrano for its restaurant project.
17 The contract specified this work as including drawings
18 for electrical and plumbing plans, drawing plans for a
19 reflected ceiling, and coordination of the architect,
electrical engineers, mechanical engineers and structural
engineers. Through its own efforts and those of others,
plaintiff thereby undertook to "construct," "alter," "add
to," "subtract from" and/or "improve" defendant's
project. (See § 7026.) In short, plaintiff was a
contractor, and section 7031 bars plaintiff's suit for
compensation.

20 134 Cal. App. 4th at 1044. *WCC Industrial* cited *Banis* for the
21 proposition that design services "reflect[] coordination of the
22 architect and engineers" and thus constitute the work of a
23 contractor. 162 Cal. App. 4th at 591-92.³

24 Similarly, *WCC Industrial's* reference to California's
25 engineering statutes shows that Court's focus was on design

27 ³ Subsequent to *Banis*, the California Court of Appeal held that certain
28 construction management services do not require a contractor's license. See
Bolotin, 172 Cal. App. 4th at 948.

1 services. *WCC Industrial* noted that, pursuant to California
2 Business and Professions Code section 6730 *et seq.*, design drawings
3 for buildings generally must be prepared by licensed engineers.
4 CAL. BUS. & PROF CODE. §§ 6730, 6731 (civil engineering), 6731.5
5 (electrical engineering), 6731.6 (mechanical engineering).⁴
6 Section 6737.3 permits licensed contractors to prepare shop
7 drawings without obtaining the requisite mechanical or electrical
8 engineering licenses in certain situations. CAL. BUS. & PROF CODE.
9 § 6737.3.⁵ As the *WCC Industrial* Court's citation to section
10 6737.3 implies, it would be anomalous for California law to permit
11 an entity that is neither a licensed engineer nor a licensed
12 contractor to design structures that the public relies on to be
13 safe.⁶

14 The reasoning and analysis of *WCC Industrial* and *Banis* suggest
15 that an entity that contracts to prepare shop drawings depicting a
16 building's structural design and to fabricate building materials
17 that are designed to be incorporated into a structure in compliance
18 with the requisite architectural and engineering specifications of
19

20 ⁴ At oral argument, Defendant represented that a licensed engineer prepared the
21 design drawings for the Project. There is no record evidence of this assertion.
22 Defendant cites no authority for the proposition that an entity that is a
licensed engineer is exempt from the licensure requirements of the CSLL where the
entity also meets the definition of a contractor.

23 ⁵ An exemption for civil engineering tasks is conspicuously absent from section
24 6737.3. In *WCC Industrial*, the contractor's preparation of shop drawings
25 constituted the practice of civil engineering. See Cal. Bus. & Prof. Code 6731
("Civil engineering embraces...the preparation or submission of designs, plans,
and specifications" in "connection with fixed works for framed and homogenous
structures [and] buildings").

26 ⁶ *WCC Industrial's* suggestion that Section 6737.3 provides exemptions for civil
27 engineering tasks is curious, as section 6737.3 only contains express references
28 to mechanical and electrical engineering tasks. No published California
authority holds that section 6737.3 exempts licensed contractors from licensing
requirements related to civil engineering tasks.

1 the project is a contractor within the meaning of section 7026.
2 *But see Steinbrenner v. J. A. Waterbury Constr. Co.*, 212 Cal. App.
3 2d 661, 665-65 (Cal. Ct. App.) (entity that prepared shop drawings
4 and manufactured custom doors, trim, and cabinets held exempt from
5 licensure pursuant to Cal. Bus. & Prof. Code § 7052: "This chapter
6 does not apply to any person who only furnishes materials or
7 supplies without fabricating them into, or consuming them in the
8 performance of, the work of the contractor").⁷ Assuming *arguendo*
9 that something more is required in order for an entity hired to
10 prepare structural shop drawings and manufacture custom steel
11 framing components to be considered a contractor, the record
12 demonstrates that Defendant's rights and obligations under the
13 parties' contractual agreement establish that Defendant was acting
14 as a contractor on the Project.

15 Pursuant to paragraph 13 of the purchase agreement, in the
16 event "any corrections of mis-fabrication" were required, Defendant
17 had the right to "perform the work...itself" or to authorize
18 Plaintiff to perform the work. (Stephen Davis Decl., Ex. E)
19 (emphasis added). Further, the contract *required* that any
20 corrections of mis-fabrication be approved by Defendant in writing
21 and "performed as directed" by Defendant prior to the work being
22 done. Affording the words of this provision their ordinary
23 meanings, Defendant retained broad authority to perform repairs to
24 the Project's structure and to direct performance of such work by

25
26 ⁷ Defendant belatedly contends, in its supplemental brief ordered by the court
27 on a discrete issue, that it is entitled to the exemption embodied in section
28 7052. (Supplemental Brief at 12-13). As discussed below, the parties' agreement
establishes that Defendant contracted to "perform work" in connection with "any
corrections of mis-fabrication" and thus is not entitled to the exemption
provided in section 7052.

1 others. See *California State Auto. Asso. Inter-Insurance Bureau v.*
2 *Warwick*, 17 Cal. 3d 190, 195 (Cal. 1976) (“the word ‘any’ is broad,
3 general, and all embracing”). By retaining broad authority to
4 perform work or direct the performance of work on the Project,
5 Defendant undertook by contract to alter, repair, or improve
6 portions of a building within the meaning of the CSLL. CAL. BUS. &
7 PROF. CODE § 7026 (2010). Defendant’s contractual authority to
8 effect alterations or repairs to the materials it provided was not
9 merely incidental to the parties’ agreement, as a fundamental
10 purpose of the contract was for Defendant to provide materials fit
11 for constructing the building in compliance with the Project’s
12 engineering specifications. Compare *WSS Industrial*, 162 Cal. App.
13 4th at 592-93 (holding that preparation of shop drawings and
14 procurement of materials before contract were tasks integrally
15 related to purpose of construction contract and could not be
16 severed) with *Johnson v. Mattox*, 257 Cal. App. 2d 714, 719 (Cal.
17 Ct. App. 1968) (sale of tractors and mowers provided in
18 construction contract held incidental to fundamental purpose of the
19 contract and thus severable). As Defendant lacked a contractor’s
20 license at the time it performed work under a contract which
21 required licensure, Plaintiff is entitled to recover all
22 compensation it paid to Defendant for such work. CAL. BUS. & PROF.
23 CODE § 7031(b). Plaintiff’s motion for summary judgment on the its
24 cause of action for disgorgement under section 7031(b) is GRANTED.

25 **B. Summary Judgment on Defendant’s Counterclaim**

26 Defendant’s counterclaim seeks compensation for amounts owed
27 for “design and engineering services” rendered by Defendant to
28 Plaintiff in connection with the Project. (Doc. 89 at 8-9).

1 Because, as discussed above, Defendant entered into a contract that
2 required a contractor's license, and because it is undisputed that
3 Defendant was not a duly licensed contractor at all times relevant
4 to this action, Plaintiff is not entitled to recover any
5 compensation. CAL. BUS. & PROF. CODE § 7031(a). Accordingly,
6 Defendant's motion for summary judgment on its counterclaim is
7 DENIED, and Plaintiff's motion for summary judgment on the
8 counterclaim is GRANTED.

9
10 **ORDER**

11 For the reasons stated, IT IS ORDERED:

12 1) Plaintiff's motion for summary judgment on Plaintiff's
13 second cause of action pursuant to section 7031(b) is
14 GRANTED;

15 2) Plaintiff's motion for summary judgment on Defendant's
16 counterclaim is GRANTED;

17 3) Defendant's motion for summary judgment is DENIED; and

18 4) Plaintiff shall submit a form of order consistent with
19 this Memorandum Decision within five (5) days of entry of
20 this order.

21
22 IT IS SO ORDERED.

23 **Dated: November 2, 2010**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE