

# CONTRACTORS: IT'S SMART TO SPEAK UP -- *OR IT MAY COST YOU BIG*



Two recent California jury verdicts have confirmed what we all know is true: Contractors, it's smart to speak up - or your company may be facing millions in damages. When faced with safety issues, or when there is a lack of positive protection in a work zone, demand the necessary safety measures that will save lives and eliminate injuries.

Over the past ten years, various movable concrete, movable steel and highly mobile barriers have been refined and developed to provide safety and minimize public interruption by reopening lanes as quickly as possible. It's time to call for the State DOTs to reimburse for the use of positive protection in the work zones. Your efforts may save a life, and most assuredly will help to reduce or eliminate your liability when those inevitable accidents occur.

The California jury verdicts issued in February 2017 have highlighted the role of contractors in saving their companies from paying millions in damages -- because they spoke up and identified a work zone safety concern.

- On February 2, 2017, a California jury issued a verdict against the Department of Transportation for the State of California ("CalTrans") for \$59.2 million. Jurors assigned 100 percent responsibility to Caltrans for the work zone accident, but found the contractor All Phase Excavating was not negligent.

According to reports, the site was unsafe because Caltrans denied a request from the contractor to close a traffic lane near the work zone. Caltrans then told the contractor to remove a backhoe from the shoulder where it had been placed to protect workers. Caltrans also adjusted a work light tower such that its glare blinded oncoming drivers.

An accident occurred when an Acura sedan entered the work zone and narrowly missed hitting one worker, but stuck another and dragged him

underneath the vehicle. The worker who was struck suffered severe brain injuries, while the other suffered “personal injuries.”

"Following this tragic event, Caltrans closed their file within seven hours, never held safety meetings for lessons learned, and no one from Caltrans was reprimanded for their actions," said the workers' attorney Russell Reiner of Reiner Slaughter & McCartney.

- A few days after this \$59.2 million jury verdict, another jury from Tehama County Superior Court found Caltrans liable for creating a dangerous condition that took the life of a truck driver and seriously injured his driving partner.

In the early morning hours of June 28, 2012, Chad Walker was driving a loaded tractor trailer through a Caltrans construction zone on I-5 in Tehama County. As he approached an overcrossing, the truck drifted to the right and struck the overpass's support structure. Mr. Walker was killed and his partner suffered injuries. The case went to trial against Caltrans and Tullis, Inc. – the contractor who won the bid to build the project.

It was reported that the contractor's vice president had voiced concerns to Caltrans of the danger of running truck traffic on the road's shoulder. The normal travel lanes are sloped at 2%, but the shoulders are sloped at 5% to facilitate drainage. By using the shoulder, the truck traffic was leaning in towards the overcrossing support structures.

Tullis, Inc. was found not to be responsible for the collision as a matter of law. Caltrans was found to be 100 percent liable.

These multi-million-dollar jury verdicts highlight the importance of contractors speaking out about safety in the work zones. The American public is unwilling to tolerate knowingly unsafe conditions, and will issue significant monetary damages to send a message to the industry.

Regrettably, despite tough talk over the past 15 years, little has been done by the Federal Highway Administration (“FHWA”) and many of the State Departments of Transportation (“DOTs”) to ensure safety, because they tend to blame the work zone accidents on distracted drivers. By doing so, they can continue to use the low bid approach for their projects, and require the contractors to indemnify them and take on liability for their negligent decisions.

This problem was addressed 16 years ago – on July 24, 2001 – by Vincent Schimmoller, Deputy Executive Director of FHWA. In his testimony before Congress about work zones, safety, and mobility issues, Schimmoller specifically talked about the dangers of the “low bid” approach.

Consideration of user and safety costs can counterbalance the 'low bid' approach. Nevertheless, the costs of delays and crashes due to work zones are real, and we must factor them into our work zone planning. ... It is difficult to change driver behavior in a work zone. Barrier separation between motorists and workers, increased use of truck mounted attenuators, and intrusion alarms could contribute to an improvement in safety for motorist and worker. **These practices cost money, but save lives.**

Instead of eliminating the low bid approach, and factoring the costs of safety, crashes, and delays in our planning as urged by Mr. Schimmoller, we have gone backwards. While positive protection can cost money, the cost benefits of using movable concrete, movable steel and highly mobile barriers far outweigh the cost of acquiring them.

Numerous studies show that barriers provide excellent protection because they reduce the severity of incidents. If a barrier saves one life, or prevents one serious injury, during its 20-year useful life, it pays for itself many times over. If a barrier streamlines the work and reduces the amount of collateral equipment otherwise required, the savings quickly add up.

The role of contractors is clear - speak up and demand safety in the work zones, including pushing the State DOTs to reimburse for the use of positive protection and barrier separation in the work zones. These practices will save you money, protect you against high jury verdicts, but more importantly, they will save lives.