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April 29, 2005

Re: 2005 California Public Contract Code Additions and Revisions, and Recent Public Contract and Related Court Decisions

Dear Clients and Colleagues:

Please take note of the following 2005 revisions to the California Public Contract Code as a result of legislation enacted in 2004, as well as recent court decisions related to public contracts. In this courtesy letter, we have selected those provisions which are significant to common **public contracting issues**.

I. PUBLIC CONTRACT CODE REVISIONS

A. PCC § 10303 — Standards for Rating Bidders; List of Qualified Bidders

The time period of this statute has been changed to allow the department to remove a bidder who has demonstrated a lack of reliability in complying with and completing previously awarded contracts with the State for a period of not less than six months, but not to exceed 36 months. Also, the period under which a bidder temporarily removed may be returned to the list of qualified bidders, has been reduced to six months.

B. PCC § 10760 — Requirement of Sworn Statement of Financial Ability and Experience

The \$400,000 contract threshold level has been withdrawn, and the amended statute now allows for trustees to require, from prospective bidders, answers to questions contained in a standard form of questionnaire and financial statement “on contracts the estimated cost of which exceeds the value of a minor capital outlay project.”

C. PCC § 12101.5 — Intent of Legislation; Use of Multiple Awards; Authority of

Agencies

Section (d) has been added to this statute, and provides in full as follows:

- (d) For contracts related to information technology integration or development projects that generate revenues or achieve savings over a quantifiable baseline of existing costs, state agencies shall consider and may incorporate performance-based share-in-savings contract terms to manage risks and create incentives for successful contract performance. Performance-based or share-in-savings contracts may have the following characteristics, among others:
- (1) Contract terms that specify business outcomes to be achieved, not the solution to be provided.
 - (2) Contract terms that structure the contract to maintain maximum vendor commitment to project success and minimize risk to the state by sharing risk with the private sector.
 - (3) Utilization of “best value” evaluation methods, which means to select the solution that will achieve the best result based on business performance measures, not necessarily the lowest price.
 - (4) Contract terms that base payments to the vendor primarily on achieving predefined performance measures.

D. PCC § 12102 — Mandatory Bidding Procedures; Exceptions

This statute has been slightly modified in subsection (j) to change the period of supplier exclusion from the bid process not to exceed 36 months for any one determination of unsatisfactory performance. However, any supplier excluded in accordance with this section shall be reinstated as a qualified supplier at any time during this 36 month period, upon demonstrating to the department’s satisfaction that the problems that resulted in the supplier’s exclusion have been corrected.

E. PCC § 20112 — Notice for Soliciting Bids

This statute was amended to allow the governing board of the district to accept a bid that was submitted either electronically or on paper.

F. PCC §§ 20209.12, 20209.13, 20209.14 – Design-Build Projects

The authority of agencies that build transit projects to utilize design-build is now extended until January 1, 2007.

II. OTHER RELEVANT AMENDED STATUTES

A. Business and Professions Code § 7071.9

Effective January 1, 2007, the qualifying individual's contractor's license bond will be increased from \$7,500 to \$12,500.

B. Labor Code §§ 2699-2699.5

The "sue your employer" law has been rolled back. No action shall now be brought by an aggrieved employee for violation of a posting, notice, agency reporting, or filing requirement of the code, except where the requirement relates to mandatory payroll or workplace injury reporting. Employers are now given an opportunity to cure violations.

C. Labor Code § 1735

This section has been amended to also prohibit discrimination based on age or sexual orientation. A contractor who violates a non-discrimination requirement can be subjected to a penalty assessment after an investigation by the Labor Commissioner. Previously existing labor law prohibited discrimination in employment by public contractors based on race, religion, color, national origin, ancestry, physical disability, mental disability, mental condition, marital status, or sex.

III. RECENT COURT DECISIONS RELATED TO PUBLIC CONTRACTS

A. *N. V. Heathorn, Inc. v. County of San Mateo*, (2005) 126 Cal.App.4th 1526

This decision held that the County could be liable to an unpaid subcontractor for failure to require a prime contractor to post a payment bond. Under Civil Code § 3251, it is illegal for a public agency to pay a contractor unless the contract or has filed a payment bond. This is a mandatory duty under Civil Code § 3247. The County was subsequently held liable for the work performed by the subcontractor when the prime contractor went bankrupt.

B. *County of Solano v. Lionsgate Corporation*, (2005) 126 Cal.App.4th 741

This decision held that claims under the False Claims Act (Government Code § 12650, *et seq.*) are subject to arbitration, and that an arbitrator has jurisdiction to award damages for such. This decision is particularly significant for public entities who may now raise False Claims Act violations, if applicable, when contractor payment disputes are arbitrated.

C. *Reclamation District No. 684 v. State Department of Industrial Relations, (2005) 125 Cal.App.4th 1000*

This decision held that the placement of fill on a levy was a public work project subject to prevailing wage payment requirements. Labor Code § 1720 defines public works as “construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or part out of public funds.” The work performed under the subject contract was determined by the court to be a public works project and the exception for irrigation or drainage systems does not apply.

D. *Diede Construction, Inc. v. Monterey Mechanical Co., (2004) 125 Cal.App.4th 380*

The court held that the doctrine of promissory estoppel applies, and that a subcontractor, as opposed to a prime contractor, may not seek to be relieved of its bid pursuant to Public Contract Code §§ 5101 and 5103. These Public Contract Code sections only permit a prime contractor to request relief from its bid for errors in its own bid, and not errors in the bid of a subcontractor. The prime contractor was then allowed to successfully pursue monetary relief, based on the difference in the bid and cost paid to a replacement subcontractor, against the subcontractor who withdrew its bid.

E. *Lewis Jorge Construction Management, Inc. v. Pamona Unified School District, (2004) 34 Cal.4th 960*

This case held that alleged profits lost on future jobs because of loss of bonding capacity, are not recoverable as damages for breach of contract. The California Supreme Court held that a contractor who has been terminated from a project may not recover, as general damages, potential lost profits that might have been earned on future construction contracts. The court followed the settled legal principle that a party is only liable for those injuries which are foreseeable and contemplated at the time of contracting. A contrary decision in this case could theoretically have exposed public entities to broad liability on all bonded projects, and affected their option of terminating poorly performing contractors, if otherwise exposed to potentially unlimited liability for alleged lost profits.

F. *City of Long Beach v. Department of Industrial Relations, (2004) 34 Cal.4th 942*

The court held that prevailing wage requirements do not apply to design, insurance, and legal services. The case arose from an SPCA facility that was partly funded with a grant from the City, expressly limited to project development and other pre-construction expenses. The prevailing wage laws did not apply because no publicly funded construction was actually involved.

G. *Arntz builders v. Superior Court, (2004) Cal.App.4th 1195*

This case held that the waiver of right to transfer an action to a neutral county is unenforceable. In this contract dispute, the general contractor, Arntz, entered into a public works contract with Contra Costa County to build an addition to a juvenile hall. Although the contract provided that Contra Costa County would be the venue for any litigation, and further provided that

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the general contractor waive statutory removal provisions, the Court of Appeal held that the code section providing for a neutral county may not be waived because its purpose was to guard against local bias.

H. *Marshall v. Pasadena Unified School District, (2004) 119 Cal.App.4th 1241*

This case held that absent an emergency, a school district must follow the competitive bidding procedures. Although Public Contract Code § 20113 provides that a school district may dispense with competitive bidding requirements in an emergency to permit the continuance of existing school classes or to avoid danger to life or property, the term “emergency” is narrowly construed, and the district’s decision to terminate a prior contract for convenience does not constitute an “emergency”.

Hopefully this information is of value to you. If you have any questions, or need further information, please do not hesitate to call.

Sincerely,

A handwritten signature in cursive script, appearing to read "Phillip Jaret".

PHILLIP A. JARET