

# JARET & JARET

ATTORNEYS AT LAW

1016 LINCOLN AVENUE  
SAN RAFAEL, CALIFORNIA 94901

TELEPHONE: (415) 455-1010  
FACSIMILE: (415) 455-1050

SAN FRANCISCO OFFICE  
351 CALIFORNIA STREET, 7<sup>TH</sup> FLOOR  
SAN FRANCISCO, CALIFORNIA 94104  
TELEPHONE (415) 362-3435

SAN CLEMENTE OFFICE  
105 AVENIDA DE ESTRELLA, SUITE 2B  
SAN CLEMENTE, CALIFORNIA 92672  
TELEPHONE (949) 366-6677  
FACSIMILE: (949) 366-6262

January 25, 2010

**Re: 2010 California Public Contract Code Additions and Revisions, Other Relevant Added or Amended Public and Private Works Statutes, and Relevant Public and Private Works Court Decisions**

Dear Colleagues:

Please take note of the following 2010 revisions to the California Public Contract Code (PCC) as a result of legislation enacted in 2009, other related California statutes, as well as recent court decisions concerning both public and private works contracts.

**I. PUBLIC CONTRACT CODE ADDITIONS**

**A. PCC §§ 6800-6813 – The design-build demonstration program (Local Transportation Agencies)**

This entire new chapter of the PCC has been added to implement a demonstration program to allow for careful examination of the benefits and challenges of design-build contracting on a limited number of local transportation agency projects. As stated in the new § 6800, “The Legislature hereby finds and declares all of the following: the design-build method of procurement authorized under this chapter should be evaluated for the purpose of exploring whether the potential exists for reduced project cost, expedited project completion, or design features that are not achievable through the traditional design-bid-build method.”

Under PCC § 6802, a local transportation entity may utilize the design-build method of procurement for up to five projects that may be for local street or road, bridge, tunnel or public transit projects within the jurisdiction of the entity. If authorized, the department may utilize design-build method of procurement for up to 10 state highway, bridge or tunnel projects.

Under PCC § 6803, only 15 design-build projects are authorized and the projects selected shall vary in size, type and geographical location. PCC § 6803 goes on to describe the methodology under which the 15 eligible projects are considered for selection.

Under the new PCC § 6804, a labor compliance program is required to be implemented unless the transportation entity or design-build entity has entered into a collective bargaining agreement that binds all contractors performing work on the project.

Under PCC § 6805, the procurement process for the design-build projects is described in great detail, and is initiated through a request for proposals for interested parties to submit competitive sealed proposals in the manner prescribed by the transportation entity.

Under PCC § 6806, payment and performance bonds are required, as well as errors and omissions insurance coverage for the design elements of the project.

Under PCC § 6807, addressing subcontract agreements, the transportation entity in each design-build request for proposals may identify specific types of subcontractors that must be included within the statement of qualifications and proposal. In awarding subcontracts not listed in the request for proposals, the design-build entity is required to provide notice of availability of work to be subcontracted in accordance with publication requirements applicable to the competitive bidding process of the transportation entity; provide a fixed date and time on which the subcontracted work will be awarded; establish reasonable qualification criteria and standards; and provide that the subcontracted construction work shall be awarded either on a best value basis, or to the lowest responsible bidder. All subcontractors awarded subcontracts under this chapter are afforded all of the protections of Chapter 4, which addresses subletting and subcontracting requirements.

Under PCC § 6813, it is provided that this chapter shall remain in effect only until January 1, 2014, unless extended.

**B. PCC § 20615 – Contracts for private architectural, landscape architectural, professional engineering, environmental, land surveying, construction management services, and special services (County Waterworks Districts)**

This is a new statute that allows county waterworks districts to officially allow for contracts for private architectural, professional engineering, environmental, land surveying, and construction management services, to be let “by the board or any officer authorized by the board pursuant to Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.”

Contracts by the district for special services, as provided in Section 3100 of the Government Code, may be let by the board or any officer authorized by the board pursuant to Section 3100 of the Government Code.

**C. PCC § 20688.6 – Design-build projects (Redevelopment Agencies)**

This new code section applies to redevelopment agencies and permits an agency to use alternate procedures for bidding on projects in excess of \$1 million and awarding the project to the lowest responsible bidder or by best value which may include design-build. Only 10 design-build projects are authorized under this section. This new statute also incorporates the labor compliance fee as adopted in other statutes this year, as will be discussed in greater detail in Section II of this letter under the Public Contract Code Revisions section. This code section also describes in great

detail the various criteria and procedures to be used in a four-step process in connection with design-build projects.

**D. PCC § 20916.1 – Purchase of supplies, equipment and materials by District; requirements (Bridge and Highway Districts)**

This new code section, applicable to bridge and highway districts, requires that in the purchase of all supplies, equipment and materials by the Golden Gate Bridge Highway & Transportation District, when the expenditure required exceeds \$100,000, the purchase shall be by contract let to the lowest responsible bidder, or in the District's discretion, to the lowest responsible bidder who submitted a proposal that provides the best value to the District on the basis of the factors identified in the solicitation. "Best value" means the overall combination of quality, price and other elements of a proposal that, when considered together, provide the greatest overall benefit and response to the requirements described in the solicitation documents. This new statute further requires that the District, to the extent practicable, obtain a minimum of three quotations, either written or oral, that permit prices and terms to be compared whenever the expected expenditure for the purchase of supplies, equipment or materials exceeds \$2,500 but does not exceed \$100,000. Finally, the section specifically applies only to the procurement of supplies, equipment and materials, and not to construction contracts.

**II. PUBLIC CONTRACT CODE REVISIONS**

**A. PCC § 3400 – Legislative findings and declarations; bids on public works; specifications by brand or trade name not permitted; exception (Preference for Materials)**

This statute, under the Preference for Materials section of the code, has been amended to include the following precatory language under the new subsection (a), which reads as follows: "The Legislature finds and declares that it is the intent of this section to encourage contractors and manufacturers to develop and implement new and ingenious materials, products, and services that function as well, in all essential respects, as materials, products, and services that are required by a contract, but at a lower cost to taxpayers."

**B. PCC § 4107 – Prime contractor whose bid is accepted; prohibitions (Subletting and Subcontracting)**

This code section authorizing substitution of listed contractors has been amended under subsection (2) and the language that formerly read, "[w]hen the listed subcontractor becomes bankrupt or insolvent", and now reads, "[w]hen the listed subcontractor becomes insolvent or the subject of an order for relief in bankruptcy."

**C. PCC § 10105 – Project: total cost limit (Contracting by State Agencies)**

This specific statute, under the Contracting By State Agencies chapter, raises the threshold limit from \$100,000 to \$250,000 in connection with the erection, construction, alteration, repair or improvement of any state structure, building, road, or other state improvement of any kind that will exceed a total cost calculated pursuant to this new threshold amount, and are not subject to this part

of the code.

**D. PCC § 10115.2 – Contracts to low bidder; response of bidder to minority, women, and disabled veteran business enterprise goals (Minority and Women Business Participation Goals for State Contracts)**

This statute has been substantially modified by the Legislature, in that contractors who are required to meet the disabled veterans' business enterprise goals, no longer need to comply with the former provisions of this statute by documenting that they have made a good effort to do so. The statute now reads, "In awarding contracts to the lowest responsible bidder, the awarding department shall consider the efforts of a bidder to meet minority business enterprise, women business enterprise, and disabled veteran business enterprise goals set forth in this article. The awarding department shall award the contract to the lowest responsible bidder meeting these goals."

**E. PCC § 10115.15 – Utilization plan; approval criteria (Contracting by State Agencies)**

Similarly, this minority/women/disabled veteran business enterprise utilization statute has been amended to remove the words "or make a good faith effort to do so" in connection with the contractor's requirement to document its efforts to meet the stated goals.

**F. PCC § 10302 – Copies of solicitations furnished to vendors; posting of copy of solicitation; public record (Contracting by State Agencies)**

This existing Contracting by State Agencies statute was amended to include specific requirements in the document on record required to be maintained in instances which a non-emergency contract in excess of \$25,000 is awarded, without taking bids. The accepted solicitations on the record are now required to acknowledge that the article or product is not a "loss leader", and basic and standard language in the solicitation is mandated to be provided in connection with any solicitation.

**G. PCC § 10344 – Request for proposal procedure; contents of request; ineligible proposals; methods of valuation and award (Contracting by State Agencies)**

Similarly, this Contracting by State Agencies statute which authorizes the utilization of requests for proposals (RFP's), has added the same language that was added to PCC § 10302, as noted above, in connection with the requirements of the statement accompanying each solicitation.

**H. PCC § 10430 - Exemptions (Contracting by State Agencies)**

Added to this exemptions section in connection with the Contracting by State Agencies, applicable to the Regents of the University of California and the Trustees of the California State University, among others, the 2009 amendment was made to exempt "a contract that is part of a single competitive procurement conducted in more than one stage for information technology goods or services." It must first be determined that there is no conflict of interest, and it is in the best interest of the State to utilize this procurement method. Disclosure requirements are further set forth in this amended code section. "Information technology" was defined to mean information

technology goods or services, or both, as appropriate.

**I. PCC § 10472 – Responsiveness of bidder to participation goals (Contracting by State Agencies – Minority Business Participation)**

This State Agencies Contracting statute, under the minority business participation section, has now removed the following language, in connection with the public entity's requirement to consider the responsiveness of a bidder to a minority business enterprise and women business enterprise goals. It now excludes this language: "If a bidder fails to demonstrate a good faith effort in attaining these goals, the awarding department shall award the contract to the next lowest responsive and responsible bidder." This change to the code section was made similarly in connection with PCC §§ 10115.2 and 10115.15, as noted above.

**J. PCC § 12104.5 – Rules and requirements governing requests for proposals for information technology acquisition; written communication to vendors; public posting; addendums (Contracting by State Agencies)**

Similarly, this statute under the acquisition of information technology goods and services section of the State Agency's section of the code, contains the same request for proposals statement (RFP) now required to be utilized in PCC §§ 10302 and 10344 concerning the "loss-leader" prohibition.

**K. PCC § 12112 – Special contracts with State not suitable for sale to others; progress payments; performance bonds; acquisition of information technology risk analysis; reporting requirements; inoperative date (Contracting by State Agencies)**

In this Contracting by State Agencies section dealing with any contract for information technology goods or services to be manufactured or performed by the contractor especially for the State, the normal 10% retention amount may be reduced by discretion to 5% for contracts of \$10 million or more, and down to 3% for contracts of \$10 million or less.

**L. PCC § 20133 – Alternative procedure on bidding on building construction projects in excess of two million five hundred thousand dollars in specified counties; legislative intent; compliance fee; four step process for design-build projects; reporting (Contracting by Local Agencies - Counties)**

This statute applying to counties and providing for alternate bidding procedures on projects in excess of \$2,500,000 by lowest responsible bidder, best value, or through design-build, added additional language requiring a compliance fee assessment to be paid to the DIR for prevailing wage/labor compliance enforcement, or fee waiver for an in-place labor compliance program.

**M. PCC § 20175.2 – Alternative procedure for bidding on building construction projects; design-build contracts; reporting requirements (Contracting by Local Agencies – Cities)**

This section applicable to cities utilizing alternate procedures for bidding on construction projects in the city in excess of \$1 million utilizing either the lowest responsible bidder, best value, and/or design-build contracts (except for transportation facilities, roads and bridges) added the same language added to PCC § 20133 (as noted above) for a compliance fee assessment to be paid to DIR for prevailing wage/labor compliance enforcement, or a fee waiver for an in-place labor compliance program.

**N. PCC § 20193 – Alternate procedure on bidding on projects in excess of \$2,500,000; design-build projects; performance criteria and design standards; reporting requirements (Contracting by Local Agencies - Municipal Utility Districts)**

This amended section applicable to waste and recycling facilities now has the same DIR fee assessment language as contained in PCC §§ 20133 and 20175.2 noted above, in connection with bidding on projects in excess of \$2.5 million by cities, counties and special districts for waste water facilities, solid waste management facilities, or water recycling facilities.

**O. PCC § 20209.7 – Design-build projects; progress in three-step process (Contracting by Local Agencies – Transit Design-Build Contracts)**

Similarly, the same DIR fee assessment language as PCC §§ 20133, 20175.2 and 20209.7 noted above, has now been added to this statute which applies to design-build projects in connection with transit design, and a three-step process required to be followed.

**P. PCC § 20209.24 – Implementation of labor compliance program; compliance fee (Contracting by Local Agencies – Transit Design-Build Contracts)**

This statute under the transportation design-build contracts section has expanded upon the labor compliance and labor monitoring requirements as monitored through DIR, a labor compliance program, a third-party labor compliance program, and/or through collective bargaining agreement(s) with the same DIR fee assessment language as per the other PCC sections as noted above.

**Q. PCC § 20211 – Contracts over specified amount; bids; minimum quotation; award; advertisement; rejection and re-advertisement (Transit Districts – Alameda and Contra Costa Counties)**

This code section applying to transit districts in Alameda and Contra Costa Counties, which formerly required the purchase of supplies and equipment in excess of \$25,000 and construction in excess of \$10,000, to be only awarded to the lowest responsible bidder, now allows the following: The equipment purchase threshold value has been raised to \$100,000, and also allows the district in its discretion to utilize “best value” on the basis of the factors identified in the solicitation. “Best

value” means the overall combination of quality, price, and other elements of a proposal that, when considered together, provide the greatest overall benefit in response to the requirements described in the solicitation documents. The statute further provides that to the extent practicable, the district shall obtain a minimum of three quotations, either written or oral, that permit prices and terms to be compared whenever the expected expenditure required for the purchase of supplies, equipment or materials exceeds \$2,500 but does not exceed \$100,000. The construction threshold requiring competitive bidding on public works in excess of \$10,000 remains the same. Furthermore, the statute was amended to require the notice requesting bids published at least once in a newspaper of general circulation “and on the district’s procurement internet web site” at least 10 days before bids are received.

**R. PCC § 20301 – Purchases exceeding specified amount; bids; award; best value; minimum quotations; advertisement; authority to reject and re-advertise; application (Santa Clara Valley Transportation Authority)**

This section of the Public Contract Code applying only to the Santa Clara Valley Transportation Authority, similarly increased the threshold amount from \$25,000 to \$100,000 in connection with the purchase of supplies, equipment and materials, and allows for proposals providing for “best value.” It also contains the same language concerning the number and manner of proposals and advertising on the authority’s procurement internet web site as contained in PCC § 20211 as noted above. Similarly, this statute does not apply to construction contracts.

**S. PCC § 20341 – Construction Contracts, bids; award; emergencies (Contracting by Local Agencies – Transit Development Boards)**

This statute under the Transit Development Board’s section of the code, requiring contracts in excess of \$50,000 to be awarded to the lowest responsible bidder, formerly did not apply to the Los Angeles County Metropolitan Transportation Authority, but now does.

**T. PCC § 20919.3 – Labor compliance program; compliance fee; execution plan; interim report (Contracting by Local Agencies – Job Order Contracting)**

This amended statute, applicable only to job order contracting by the Los Angeles Unified School District, adds the same DIR assessment fee language in connection with labor compliance enforcement, as contained in PCC §§ 20133, 20175.2, 20209.7 and 20209.24, as noted above.

**III. OTHER RELEVANT ADDED OR AMENDED CALIFORNIA STATUTES – PRIVATE WORKS**

**A. Civil Code § 1375 – Actions for damages against common interest development builders, developers, or general contractors**

This existing statute sets forth a series of steps required before an Association may file a complaint for damages against a builder, developer, or general contractor of a common interest development based on a claim for defects in design or construction. It has been amended to extend its expiration date until July 1, 2017.

**B. Civil Code § 3084 – Claim of lien; contents; recordation**

Effective January 1, 2010, Civil Code § 3084 has been amended to provide that a mechanic's lien claimant, at the time of recording its claim of lien, must serve on the property owner or reputed owner a Notice of Mechanic's Lien in which specified language informs the owner or reputed owner that the property is subject to a legal action seeking foreclosure and that an action must be filed within 90 days of the recording date. The Notice must inform the owner that the foreclosure action may affect its ability to borrow against, refinance, or sell the property. Service can be made by registered, certified, or first class mail, and failure to serve the Notice shall cause the Mechanic's Lien to become unenforceable.

**C. Civil Code § 3146 – Notice of Lis Pendens**

Civil Code § 3146 has been amended to require that a Notice of Lis Pendens be recorded within 20 days after the filing of a mechanic's lien foreclosure action.

**D. CCP § 1281.85 – Compliance with ethics standards for arbitrators**

The ethics standards for arbitrators adopted by the Judicial Council, are non-negotiable and shall not be waived pursuant to CCP § 1281.85, as amended with the addition of subsection (c). The existing statute provides that the standards shall address the disclosure of interests, relationships, or affiliations that may constitute conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity, disqualifications, acceptance of gifts, and establishment of future professional relationships.

**E. Business and Professions Code §§ 7028 and 7028.16 – Contracting without license, second and subsequent offenses, limitation of actions**

**Business and Professions Code § 7028.16 – State of Emergency; acting as contractor without license; penalty**

It is currently a misdemeanor for a person to engage in the business or act in the capacity of a contractor without having a license. These new laws increase the penalty for acting as a contractor without a license. A first conviction is punishable by a fine not exceeding \$5,000 or by imprisonment in a county jail for no more than six months as specified, or both. The fine for a second conviction is the greater of 20% of the contract price, 20% of the aggregate payments made to, or at the direction of, the unlicensed contractor, or \$5,000. In addition, a third or subsequent conviction is punishable by both a fine and imprisonment in a county jail, as specified, and requires that the fine be no less than \$5,000 and no more than the greater of \$10,000, 20% of the contract price, or 20% of the aggregate payments made to, or at the direction of, the unlicensed contractor. Furthermore, a person who used the services of an unlicensed contractor is a victim of a crime and eligible for restitution for economic losses, regardless of whether that person had knowledge that the contractor was unlicensed.



**F. CCP §§ 703.150 and 704.730 – Amount of homestead exemption**

These CCP amendments change the statutory homestead exemptions. Previously the base exemption was \$50,000 for a single person, \$75,000 for a member of a family unit, and there is at least one member of the family unit who owns no interest to the homestead, or whose only interest is a community property interest in the homestead, \$150,000 for a person who is (1) 65 years of age or older, (2) physically or mentally disabled and unable to work, or (3) 55 years of age or older and has a gross annual income of \$15,000 or less (or \$20,000 or less if married). These amendments increase the homestead exemptions to \$75,000, \$100,000, and \$175,000, respectively.

**G. Business and Professions Code § 10166.01 – Mortgage licenses**

A new Business and Professions Code law requires a new real estate license endorsement from DRE in order to engage in a business as a “mortgage loan originator”. A “mortgage loan originator” is an individual who takes a mortgage loan application or negotiates terms of a residential mortgage loan for compensation or gain. An individual real estate licensee acting within the meaning of B&PC §10131(d) is a mortgage loan originator for purposes of this law with respect to activities involving “residential mortgage loans” as defined.

**H. Health & Safety Code § 116875 – Introduction into commerce, sales, and use of lead materials; prohibitions**

Effective January 1, 2010, this Health & Safety Code section is amended to mandate that any pipe, pipe fittings and plumbing fittings and fixtures used to convey or dispense water for human consumption have no more than 0.25% lead in wetted surfaces as determined by a weighted average. Existing law had defined lead free as not more than 8% lead when used with respect to pipes and fittings, and not more than 4% by dry weight with respect to plumbing fittings and fixtures.

**IV. RELEVANT CALIFORNIA AND FEDERAL COURT DECISIONS RELATED TO PUBLIC WORKS CONTRACTS**

**A. Federal Claims**

*Daewoo Engineering and Construction Co., Ltd. v. United States* (2009) 557 F.3d 1332 (Fed. Cir. 2009)

The Court of Federal Claims found that a \$64 million certified claim by a contractor alleging defective specifications and that the government breached its duty to cooperate and disclose superior knowledge, was based on false testimony, unsupportable, and pursued with fraudulent intent. The Court of Federal Claims found that the certified claim was a negotiating ploy and that claimant “did not honestly believe that the government owed it the various amounts stated when it certified the claim” and awarded the government \$10,000 under the False Claims Act, and \$50 million under the Contract Disputes Act.

**B. California Public Entity Defenses**

***Alvis v. County of Ventura* (2<sup>nd</sup> Appellate Dist. 2009) 178 Cal.App.4th 536**

This Appellate Court decision held that where a public entity approves a design that contemplates a specific change of physical conditions that may affect a public work, the public entity will retain its design immunity under Gov. Code § 830.6 if a change of condition occurs and causes injury, provided that the public entity can demonstrate that it anticipated the changed conditions, whether or not it modified its plan or design because of the anticipated changed conditions. The case involved a wall failure causing a landslide because of the soil buildup (a changed condition) that related directly to the factors that the governmental entity considered in making its design choices.

**C. Prevailing Wages**

***State Bldg. and Const. Trades Council of California, AFL-CIO v. City of Vista* (4<sup>th</sup> Dist. 2009) 173 Cal.App.4th 567**

This decision held that Vista, a charter city, is not required to enforce state prevailing wage laws under Labor Code §§ 1773.2, 1776, and 1777.5. The court reasoned that prevailing wage requirements are not a matter of statewide concern. The prevailing wage statute is not designed to raise or set local wages, but rather to keep state contracting from undermining wages established through local labor markets. Since matters addressed by the prevailing wage law are not matters of statewide concern, charter cities therefore “retain the power to determine” whether the prevailing wage statute provisions will be required as part of their public works contracts.

**D. Mediation/Arbitration**

**1. *Coffman Specialties, Inc. v. Dept. of Transportation* (4 Dist. 2009) 176 Cal.App.4th 1135**

An engineering contractor brought action against Caltrans, seeking declaratory judgment that the arbitration provisions in the State Contract Act are unconstitutional, contending that these provisions (PCC § 10240, *et seq.*) on their face and as applied, violated its constitutional rights to a neutral arbitrator and equal protection. The Court of Appeal confirmed the trial court’s dismissal of the action, finding no support for the contractor’s arguments that the public works arbitration system necessarily resulted in biased arbitrators. To the contrary, “the broad disclosure and disqualification protections provided by the State Contract Act, and its implementing regulations, that incorporate the Ethics Standards, as well as the disclosure rules of the Code of Civil Procedure § 1281.9, provide assurance that an arbitrator who ultimately presides over a public works arbitration hearing will be neutral and acceptable to both parties.”

2. *U.S. v. Park Place Associates, Ltd.* (9<sup>th</sup> Cir. 2009) 563 F.3d 907

This case held that an arbitration clause cannot be enforced against the United States due to the doctrine of sovereign immunity, holding the Court of Federal Claims as “the only forum in which its contract claims may plausibly be said to belong.” The case involved a \$93 million award against the United States after a proceeding in which the United States declined to participate, and an underlying dispute over management of a seized card club.

V. **RELEVANT CALIFORNIA COURT DECISIONS RELATED TO PRIVATE WORKS CONTRACTS**

A. **Licensure**

1. *Oceguera v. Cohen* (Cal.App.2d 2009) 172 Cal.App.4th 783

In this decision, the court held that a defendant contractor must return money paid for construction work performed while it was unlicensed pursuant to Business & Professions Code § 7031 and 17200. The licensed general partner and responsible managing employee had disassociated from a construction partnership before the contract was formed, some two months prior to entering into the construction contract with the owner. The court held that the substantial compliance provisions of Bus. & Prof. Code § 7031(e) were therefore inapplicable.

2. *The Fifth Day, LLC v. Bolotin* (Cal.App.2d 2009) 172 Cal.App.4th 939

This case held that a construction manager on a private works job who had no responsibility or authority to perform any construction work or to enter into any contract or subcontract for the performance of the work was not required to be licensed. This is in contrast to public works projects which do require licensure under Government Code § 4525 for construction managers.

3. *White v. Criddlebaugh* (Cal.App.5th Dist. 2009) 175 Cal.App.4th 1535

The Court held that an unlicensed contractor must disgorge all monies it received under Bus. & Prof. Code § 7031, and that subsection (b) does not set forth any pleading requirements under general principles of pleading, a prayer for such other relief as the court may deem just is sufficient to support disgorgement as a remedy. Holding that the pleading sufficiently stated a claim for disgorgement, the Court of Appeal held that disgorgement cannot be reduced by offsets for materials and services provided or by claims for indemnity and contribution.

B. **Insurance**

1. *Food Pro International, Inc. v. Farmers Ins. Exchange* (6<sup>th</sup> Dist. 2008) 169 Cal.App.4th 976

This decision held that the “professional services” exclusion under a CGL policy was inapplicable to the insurer’s duty to defend. The case involved an injured employee of an electrical contractor who fell through an inappropriately covered opening. The court held that the insured’s

professional services did not extend to the creation of the hole, the safety of the site, or the direction of the employee and the subcontractor's crew. Since the insured was not providing supervisory or engineering services or any specialized skill in relation to the accident, there was a duty by the insurer to defend the action.

**2. *Freedman v. State Farm Ins. Co.* (2<sup>nd</sup> Dist. 2009) 173 Cal.App.4th 957**

A contractor remodeling a bathroom drove a nail through a pipe, and years later, corrosion occurred around the leak resulting in extensive water damage. The Court of Appeal affirmed the trial court's decision that the third-party negligence provisions of the insuring policy excluded coverage for third-parties' negligent conduct and defective workmanship whenever they interact with an excluded peril, in this case continuous or repeated seepage or leakage of water.

**C. Payment Disputes**

***United Rentals Northwest, Inc. v. Snider Lumber Products, Inc.* (5<sup>th</sup> Dist. 2009) 174 Cal.App.4th 1479**

This Appellate Court decision reversed a trial court opinion that the dismantling of lumber drying kilns was not a "work of improvement" under Civil Code § 3106, because it did not benefit the defendant's property. The Court of Appeal held that Civil Code § 3106 defining "work of improvement" includes "the demolition of buildings, and the removal of buildings" and therefore the removal of kilns fell within this definition since the two-story metal structures attached to concrete foundations with windows, doors, and staircases were "buildings."

**D. Wages**

***Sanders Const. Co., Inc. v. Cerda* (4<sup>th</sup> Dist. 2009) 175 Cal.App.4th 430**

The Court of Appeal held that a prime contractor is responsible for the wages of workers employed by an unlicensed subcontractor in connection with worker filed wage claims with the State Labor Commissioner under Labor Code §§ 98.1, 202 and 203.

**E. Disclosure**

***Calemine v. Samuelson* (Cal.App.2d 2009) 171 Cal.App.4th 153**

The court held that a seller of real estate has a common law and statutory duty to disclose awareness of any lawsuit by or against the seller, which includes resolved matters and not just lawsuits then pending.

## F. Litigation

### *Standard Pacific Corp. v. Superior Court* (4<sup>th</sup> Dist. 2009) 176 Cal.App.4th 828

This decision held that a builder's failure to carry the burden of proving that it complied with the disclosure requirements releases the homeowners from the obligation to follow the required statutory pre-litigation procedures under § 910 of the Civil Code.

## G. Mediation/Arbitration

### 1. *Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2<sup>nd</sup> Dist. 2009) 173 Cal.App.4th 1040

This case involved the holder of easements in a lease dispute recording a Notice of Lis Pendens. The property owner filed an action for slander of title. The Court of Appeal reversed the trial court's decision that this recording was privileged under Civil Code § 425.16, because a Notice of Lis Pendens can only be recorded when a state or federal action is pending, and not when an arbitration is pending.

### 2. *Gilbert Street Developers, LLC v. La Quinta Homes, LLC* (4<sup>th</sup> Dist. 2009) 174 Cal.App.4th 1185

The Court of Appeal affirmed a trial court decision vacating an arbitration award. At the time the agreement was signed in 1998, the American Arbitration Association had no rule providing that arbitrators had jurisdiction to determine their own jurisdiction. That was later changed in 2000 when AAA adopted Rule R-8(a) that provided that the arbitrators could rule on their own jurisdiction. Since the arbitration clause provided that it excluded from the arbitration agreement "matters which are expressly in the discretion of the members", the arbitrators had no authority to determine their own jurisdiction and therefore the underlying award was invalid.

### 3. *Parada v. Superior Court* (Cal.App.4th 2009) 176 Cal.App.4th 1554

The Court of Appeal held that to require a panel of three arbitrators was unconscionable because the JAMS fee for three arbitrators would exceed \$12,000 per day, and these costs were prohibited for the amount of money in dispute. Thus, the Court, rather than the arbitration panel, should determine whether an arbitration agreement is unconscionable, and Civil Code § 1670.5(a) states that the court may refuse to enforce an unconscionable contract.

## H. Statute of Limitations

### 1. *Pine Terrace Apartments, L.P. v. Windscape, LLC* (5<sup>th</sup> Dist. 2009) 170 Cal.App.4th 1

This multi-unit construction defect/water intrusion case involving a question over the applicability of the 10 year CCP § 337.15 statute of limitation held that the willful misconduct

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exemption in subdivision (f) of that statute applies to cross-complaints for indemnity that allege willful misconduct. Since the cross-complaint effectively alleged willful misconduct against subcontractors by incorporating reference to the first amended complaint, they were not time barred.

2. ***Gundogdu v. King Mai, Inc.*** (Cal.App. 1<sup>st</sup> Dist. 2009) 171 Cal.App.4th 310

In another construction defect case in which the 10 year statute of limitations for latent construction defects was implicated, the court held that passive ownership of the subject property prior to its sale does not thwart the statute of limitation defense or otherwise toll it during the period of ownership.

VI. **CONCLUSION**

I hope sections or portions of this information will be of value to you. Previous year-end Public Contract review letters for the past five years can be found on our website at [www.jaretlaw.com](http://www.jaretlaw.com). If you have any questions, or need further information, please do not hesitate to call. Best regards for the new year.

Sincerely,

A handwritten signature in black ink, appearing to read "Phillip A. Jaret", written in a cursive style.

PHILLIP A. JARET

PAJ:dda

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