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Re: 2009 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 2009 revisions to the California Public Contract Code as a result of legislation enacted in 2008, other related California statutes, as well as recent court decisions concerning both public and private works contracts. In this letter we have selected those technical code provisions which are significant primarily to common public contracting issues, but also to private works.

I. PUBLIC CONTRACT CODE ADDITIONS

A. PCC § 7202 – Progress Payments; withholding retention proceeds prohibited

This new code section provides that the Department of Transportation is now prohibited from withholding retention proceeds when making progress payments to a contractor for work performed on a transportation project.

B. Darfur Contracting Act of 2008: PCC § 10475 – Legislative findings and declarations; §10476 “Scrutinize company” defined; § 10477 – Bidding by scrutinized companies; § 10478 – Certification regarding scrutinized company status; § 10479 – False certification; Penalties; § 10480 – Repeal; Recommended causes for repeal; § 10481 – Invalid provisions of Act; Severability

These statutes implement federal law enacted in 2007 authorizing state and local governments to adopt policies to divest from, and prohibit, contracts with problematic companies operating in Sudan’s oil, power, mineral, and military sectors. Governor Schwarzenegger stated, “Divesting will show our defiance of a government that murders,” when signing Assembly Bill 2941 into law, enabling the nation’s two largest pension funds to divest from investments in Sudan.

C. PCC § 20194 – Authority for design-build projects as new and independent; legislative intent regarding use of design-build procurement method for waste and recycling facilities

This new statute establishes a pilot project for cities, counties, and special districts to utilize the design-build procurement method for regional or local water or waste water facilities, regional or local solid waste facilities, and regional and local water recycling facilities. However, this enactment does not authorize the design-build procurement method for other infrastructure, including, but not limited to, streets and highways, public rail transit, or other types of water resource facilities.

II. PUBLIC CONTRACT CODE REVISIONS

A. PCC § 20175.2 - Alternate procedure for bidding on building construction projects; design-build contracts; reporting requirements

In this statute that permits design-build contracts, this amended section provides that before January 1, 2011, the project limitation of \$1 million as set forth in subdivision (a) shall not apply to any city in the Counties of Solano or Yolo, or to the Cities of Stanton and Victorville.

B. Public Contract Code § 7103 – Contracts by state entities for public works in excess of \$25,000, necessity of payment bonds by contractors

Effective January 1, 2009, the amount is raised from \$5,000 to \$25,000 with respect to the contract threshold limits that require payment bonds.

III. OTHER RELEVANT ADDED OR AMENDED CALIFORNIA STATUTES – PUBLIC WORKS

A. Education Code § 17282.5 (Added)

This statute requires the Department of General Services' (DGS) Division of State Architect (DSA) on or before January 1, 2010, to develop uniform criteria for precheck approval process for solar design plans, including structural plans and calculations, for school facility projects' compliance with existing law and regulations.

B. Labor Code § 1742.1 (Added), and § 1742 (Repealed)

This statute allows contractors and/or subcontractors who have received a wage and penalty assessment under public works law as an alternative to becoming automatically liable for liquidated damages in specified circumstances, to deposit the full amount of the assessment for the Department of Industrial Relations to hold in escrow, pending review and distribution.

C. Health & Safety Code §§ 18930.5, 18931.6, 18931.7, and 18938.3 (Added)

These added statutes require the Building Standards Commission, in instances where no State agency has authority or expertise for particular occupancies, to approve, adopt, codify, publish and update green building standards for those occupancies. It requires every city and county to require a fee of \$4.00 per \$100,000.00 in valuation from every applicant for a building permit for the purpose of funding the development of building standards with emphasis on the development of and educational efforts associated with building standards, including green building standards.

D. Streets and Highways Code § 136.6 (Added)

This statute allows the Department of Transportation to enter into contracts not exceeding \$25,000 for the leasing or renting of operated heavy highway equipment for State highway maintenance purposes without requiring the Department of Transportation to put the contract out for bid.

E. Government Code § 66007

This statute authorizes a local agency to defer the collection of one or more fees or charges on a residential development for the construction of public improvements or facilities up to the close of escrow.

F. Government Code Amended §§ 65080, 65400, 65583, 65584.01, 65584.02, 65584.04, 65587, and 65588, and Added §§ 14522.1, 14522.2, and 65080.01; Public Resources Code Added § 21159.28

These statutory additions and revisions require metropolitan planning organizations to include sustainable communities strategies in their regional transportation plans for the purpose of reducing greenhouse gas emissions, aligns planning for transportation and housing, and creates specified incentives for the implementation of these strategies.

IV. OTHER RELEVANT ADDED OR AMENDED CALIFORNIA STATUTES – PRIVATE WORKS

A. Health and Safety Code § 19825

This section is added to the Health and Safety Code to require certain forms and declarations be submitted by contractors and property owners to public agencies, as a condition to issuance of a building permit. The form of application must include the following elements:

- Name and address of owner and licensed design professional in charge of the project.
- Declaration by contractor that the contractor is properly licensed.
- Acknowledgment by owner-builder that the law prohibits construction by an owner-builder of a property that is for sale.

- Certification that owner-builder provides workers compensation insurance.
- Identification of construction lender.
- Acknowledgment that homeowner's insurance may not provide coverage for workers compensation claims.
- Acknowledgment that owner-builder knows protection may be obtained by hiring a licensed contractor.
- Acknowledgment that if owner-builder is considered an "employer" under state law, owner-builder must withhold payroll taxes, provide workers compensation disability insurance, and contribute to unemployment compensation.
- Acknowledgment that owner-builder may be liable for construction defects.
- Acknowledgment that owner-builder is responsible to verify proper licensing of contractors employed on the project.

B. Government Code §§ 66452.6 and 66463.5 (Amended), and § 66452.21 (Added)

These statutory amendments/changes extend the expiration date by 12 months for specified subdivision maps that will expire before January 1, 2011, and for any legislative, administrative or other approval by a State agency relating to a development project in a subdivision, and increases the time for local discretionary extensions for tentative subdivision maps from five years to six years.

C. Civil Code §§ 2782.9, 2782.95, and 2782.96 (Amended)

Civil Code § 2782 is amended to provide for and specify the application of wrap-up insurance policies in the context of residential construction projects and their relationship to indemnification and defense obligations in residential construction projects.

D. Labor Code § 206.5

This statute prohibits an employer from requiring an employee to execute a time sheet containing false statements of actual hours worked as a condition of being paid. Specifically, this law defines "execution of a release" to include requiring an employee, as a condition of being paid, to execute a statement of the hours he or she worked during a pay period which the employer knows to be false.

E. Business & Professions Code § 7137 (Amended); Labor Code § 3099.2 (Amended)

These amended statutes authorize specified disciplinary action for failure to comply with existing law related to the certification of electricians.

F. Business & Professions Code §§ 7051.5, 7071.10, and 7071.11 (Amended); Code of Civil Procedure § 116.220 (Amended)

These statutory revisions expand and clarify the time period for consumers to file a claim against a bond when the license of a contractor was inactivated, cancelled or revoked, makes changes to the portion of the bond that is available in a small claims action for a person (claimant) against the contractor's bond from \$4,000 to \$6,500, and clarifies that a home or property owner no longer has to prove that a license law violation by a contractor was willful and deliberate when filing for a claim on their bond.

V. RELEVANT CALIFORNIA COURT DECISIONS RELATED TO PUBLIC WORKS CONTRACTS

A. Bidding

1. *Titan Electric Corp. v. Los Angeles Unified School District* (2008) 160 Cal.App.4th 188

This decision involved a situation in which the prime contractor petitioned the awarding body under PCC § 4107 to replace an electrical contractor with another, and a hearing conducted by the awarding body, but after the replacement electrical subcontractor had completed work on the project. The court held that § 4107 contemplates that the awarding authority's consent to substituting out a listed subcontractor, and substituted in a proposed replacement, will occur before the prime contractor permits the replacement to perform any work. However, the court held, a deviation from this chronology is permissible so long as the procedure used actually complies with the substance of the reasonable objectives of the statute: namely, the prevention of bid-peddling and bid shopping after the award of the public works contract, and the providing of an opportunity to the awarding authority to investigate the proposed replacement subcontractor before consenting to substitution.

2. *Los Angeles Unified School District v. Great American Ins. Co.* (2008) 163 Cal.App.4th 944

This decision upheld the authority of a district to issue a declaration of emergency under Public Contract Code § 20113 allowing the district to contract for completion of a project without advertising for competitive bids. After a contractor ceased work on a public works job that was 93% complete, the School District retained a replacement contractor on a cost plus 10% basis with a guaranteed maximum. Although the court held that a contractor may maintain an action for breach of contract against a public agency based on non-disclosure of material information if the agency knew material facts concerning the project that would have affected the contractor's bid or

performance and failed to disclose those facts, the District's emergency declaration under PCC § 20113 was a valid basis for excepting the completion agreement from otherwise required statutory competitive bidding requirements.

3. *Zumbrun Law Firm v. California Legislature* (2008) 165 Cal.App.4th 1603

This appellate decision held that the California Legislature has the power to award construction contracts and need not comply with competitive bidding requirements. The California Legislature had awarded a contract for the Capital Park Safety & Security Improvements Project without competitive bidding and contrary to the requirements of the State Contract Act, PCC § 10100, *et seq.*, which required that the work be performed by union contractors. The appellate court held that the "contract did not violate the separate of powers doctrine of Article III, section 3 of the Constitution because under Article IV, section 7, the Legislature retains powers necessary to its law making functions including the power to protect the safety and security of the Legislature, its members, and any buildings and grounds use by the Legislature."

B. Claims Procedures

***Arntz Builders v. City of Berkeley* (2008) 166 Cal.App.4th 276**

The Court of Appeal determined that the claims procedure established by contract between the public entity and the prime contractor took the place of the claims procedure established by Government Code § 910. This action involved a dispute on a \$20 million library contract involving punch list, delay and LD and subcontractor claims. The contractor complied with the claims procedures in ¶ 12 of its agreement, but then later the public entity asserted that the contractor's failure to comply also with Gov. Code § 900, *et seq.*, was a bar to recovery. The Court of Appeal held that public agencies are allowed to establish different claims procedures by contract, and sometimes such provisions amount to a claims procedure that takes the place of the Government Code claims statute. The court held that the contract did not require the contractor to present both a claim in accordance with ¶ 12 of the contract, and also present another claim in accordance with Government Code § 910.

C. Prompt Payment

***S&S Cummins Corp. v. West Bay Builders, Inc.* (2008) 159 Cal.App.4th 765**

This decision involved a public elementary school that suffered substantial delays. The prime contractor refused to release to the electrical subcontractor its share of retention funds on the ground that the subcontractor had contributed to the delays. After the trial court entered judgment in favor of the electrical subcontractor, the prime contractor contended that the court erroneously concluded that the 2% per month interest charge set forth in PCC § 7107 applied on an annual basis rather than compounded, and that it should not cease accruing upon entry of judgment. The Appellate Court held that the statutory prompt payment charges imposed under PCC § 7107(f) ceased to accrue upon entry of judgment and are not compounded on a monthly basis.

D. Project Stabilization Agreements

1. *Trustees of Southern Cal. IBEW-NECA Pension Trust Fund v. Flores* (9th Cir. 2008) 519 F.3d 1045

This case involved a subcontractor working on a Los Angeles Unified School District project, under which it signed a Subscription Agreement with a Local of the IBEW in which it agreed to make pension trust fund contributions on behalf of its employees. The obligation to make such contributions was also set forth in a Project Stabilization Agreement to which it became bound by accepting the award. The Agreements required the subcontractor to hire all project workers from the Union unless the Union failed to fulfill a request for workers within 48 hours. The Union did not supply workers until later, but in the meantime the electrical subcontractor used its own workforce of non-union employees and made no contribution to the pension fund. The trustee sued to collect delinquent trust fund contributions under section 301(a) of the Labor Management Relations Act, and section 502(e)(1) of the Employee Retirement Income Security Act. The Ninth Circuit Court of Appeal held that the Agreements were not ambiguous and the term “covered employees” is not limited to workers actually supplied by the Union.

VI. RELEVANT CALIFORNIA COURT DECISIONS RELATED TO PRIVATE WORKS CONTRACTS

A. Licensure

1. *Great West Contractors, Inc. v. WSS Indus. Const., Inc.* (2008) 162 Cal.App.4th 581

This is another appellate court decision denying a contractor recovery under Business & Professions Code § 7031 due to incomplete licensure at the outset of a job. At the time the subcontractor submitted its bid for the work, it had not yet obtained a contractor’s license. The license was issued some four months later. The trial court ruled in favor of the subcontractor and the decision was reversed on appeal. The Court of Appeal held that the Contractor State License law provides that a contractor may not sue to collect compensation for work performed requiring a license without alleging proper licensure “at all times during the performance of that act or contract.” Recovery is prohibited, regardless of the merits of the underlying claim. The Legislature determined that the importance of deterring unlicensed contracting outweighs any harshness or inequality, and the sole exception permits the court to find substantial compliance with licensure requirements if it is shown that the claimant was duly licensed prior to the performance of the work and acted reasonably and in good faith to maintain proper licensure. The Court of Appeal held that because the subcontractor was unlicensed during its initial performance, it is barred from maintaining the action if any of the work required licensure, and in this case involved the preparation of shop drawings and ordering materials. This decision was particularly harsh since those activities occurred before the execution of the subcontract and the Court of Appeal still determined that these tasks were done “in the performance of” the subcontract, since Bus. & Prof. Code § 7031 applies not only to formal agreement, but governs “any act or contract for which a license is required.” The court rejected the judicial doctrine of substantial compliance.

2. *Goldstein v. Barak Const. (2008) 164 Cal.App.4th 845*

This is another appellate court decision denying contractor compensation in the absence of licensure during all times of its performance. This dispute involved a home remodel contract in which the contractor was not licensed until three months after the contract was signed. After substantial payments to the contractor, it abandoned the job. The homeowner sought to recover all sums paid to the contractor under Bus. & Prof. Code §7031, which provides that a person who utilizes the services of an unlicensed contractor may bring an action to recover all compensation paid to the unlicensed contractor. The court held that the contractor was not entitled to compensation for work performed after the license was acquired, and that § 7031 provides that a contractor may not recover compensation at all unless duly licensed at all times during performance.

B. Mediation/Arbitration

1. *Otay River Constructors v. San Diego Expressway (2008) 158 Cal.App.4th 796*

This decision held that the prevailing party on a petition to compel arbitration is entitled to recover its attorney's fees. The court held that Civil Code § 1717 provides that the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. In this situation, the contractor petitioned to compel arbitration under a coordination agreement arbitration and the court held that the provision was not controlling, and denied the petition to compel. The Court of Appeal reversed the trial court's decision and then awarded attorney's fees to the successful party.

2. *Best Interiors, Inc. v. Miliee and Severson, Inc. (2008) 161 Cal.App.4th 1320*

This appellate decision involved a petition to compel arbitration which was denied where there was danger of conflicting rulings. The underlying case involved an action against the general contractor alleging that more than \$1.2 million of contract work remained unpaid and also the assertion of claims for extra work, delay and disruption in excess of \$2 million. The trial court denied a petition to compel arbitration after concluding that the claims to be judicially determined and those subject to arbitration overlapped, and that parallel proceedings would therefore lead to potential inconsistent results. The court held that the Federal Arbitration Act does not preempt California Code of Civil Procedure § 1281.2. The appellate court held that the trial court properly reviewed the considerations that led it to conclude that the action should be litigated in a single forum.

3. *Thompson v. Toll Dublin, LLC (2008) 165 Cal.App.4th 1360, 81 Cal.Rptr.3d 736*

This decision involves the enforceability of an arbitration clause between the condominium developer and the purchasers. The purchase agreement essentially provided for an arbitration of all claims. The Court of Appeal found that the arbitration agreement was unconscionable and unfairly one-sided because virtually every claim the plaintiff might raise against the defendant would be subject to arbitration. Because of the pervasiveness of the unconscionable provisions and the fact

that the purported scope of the arbitration provisions exceeded the plaintiffs' reasonable expectations, there were no isolated provisions that could be severed and the arbitration provisions were found as a whole to be unenforceable. The Court of Appeal appeared to go out of its way to find the arbitration provisions unenforceable as to fraud claims, in particular, providing a warning to companies and their lawyers to try to incorporate the benefits of broad arbitration provisions into their contracts.

4. *Lange v. Schilling* (2008) 163 Cal.App.4th 1412

This appellate decision held that where the buyer and seller signed the standard California residential purchase agreement (which bars attorney's fees for a party that starts litigation first without attempting to mediate) and the buyer later filed a lawsuit without first offering mediation, the buyer was not entitled to an award of attorney's fees even though he was the prevailing party.

C. Prompt Payment

***Brawley v. J.C. Interiors, Inc.* (2008) 161 Cal.App.4th 1126**

This decision held that under Civil Code § 3260 (the prompt payment statute), the trial court has discretion to determine that there is no "prevailing party." Civil Code § 3260 provides that a project owner pay retention to the original contractor within 45 days after project completion, subject to an interest charge of 2% per month on any improperly held amount, and that in an action for collection of wrongfully withheld retention funds, the "prevailing party shall be entitled to his or her attorney's fees and costs." The appellate court held that the trial court has discretion, however, to find that there is no "prevailing party" even though the statute does not expressly say so.

D. Insurance

***Great Western Drywall, Inc. v. Interstate Fire & Cas. Co.* (2008) 161 Cal.App.4th 1033**

This appellate decision addressed an insurance policy cross-suits exclusion. After a drywall subcontractor and the general contractor filed cross-actions over performance and payment issues on a condominium project, the insurance company refused to pick up the defense of the subcontractor. The court held that the general contractor's cross-complaint cannot be characterized as an action for indemnity or apportionment, and therefore the trial court correctly determined that the exception to the exclusion was inapplicable. The cross-complaint did not allege third-party property damage, and neither the general contractor nor the subcontractor was "sued for a covered loss." The insuring provision of the policy required a third-party suit to trigger the duty to defend; not a dispute between a general contractor and a subcontractor under a CGL policy.

E. Release Bonds

***T.O. IX LLC v. Superior Court* (2008) 165 Cal.App.4th 140**

This appellate decision held that one mechanic's lien release bond to release nine separate

mechanic's lien claims was sufficient. The contractor had built a street through a nine home subdivision and claimed a balance due, and then recorded mechanic's lien claims against each of the nine lots. Each claim of lien was in the full amount of the balance owed. The Court of Appeal determined that the developer could post a single surety bond for 1.5% of the claim to release the nine mechanic's lien claims.

F. Job Safety

Padilla v. Ponomo College (2008) 166 Cal.App.4th 661

This decision under the Privette rule held that an owner and general contractor could effectively delegate responsibility for jobsite safety to a subcontractor. A worker was demolishing a cast iron pipe when a section of pipe came loose, fell, struck and broke a pressurized PVC pipe, resulting in a gusher that knocked the worker off a ladder. The injured worker then filed an action against the college and the general contractor. He asserted that they violated their common law and statutory duties to ensure that there was no water pressure in the pipes in the area where he was working. The plaintiff's employer had contractually agreed to maintain a safe workplace, and the trial court found that the owner and prime contractor had delegated the task of making the work site safe to his employer and did not exercise any retained control in a manner that affirmatively contributed to the plaintiff's injuries. The Court of Appeal held that under Privette, the defendants could and did delegate safety measures to the subcontractor.

VII. CONCLUSION

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

Sincerely,



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