

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

JARET & JARET
ATTORNEYS AT LAW
1016 LINCOLN AVENUE
SAN RAFAEL, CALIFORNIA 94901
TELEPHONE: (415) 455-1010
FACSIMILE: (415) 455-1050

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

January 19, 2018

Re: 2018 California Public Contract Code Additions and Revisions

Dear Public Work Construction Colleagues:

Please take note of the following 2018 revisions to the California Public Contract Code (PCC) as a result of legislation enacted in 2017.

Only those statutes that have statewide effect and are applicable to Northern California public entities will be addressed.

Community college and school district clients will also receive a second highlighted copy more directly pertinent to their concerns.

Previous year-end Public Contract review letters 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.

Best regards for the New Year!

Sincerely,



PHILLIP A. JARET

PJ:dda

I. AMENDED STATUTES

A. Chapter 2.9 – SKILLED AND TRAINED WORKFORCE REQUIREMENTS PCC § 2601 – Definitions

This amended chapter of the PCC, which last year encompassed three new sections requiring that a public entity obtain an enforceable commitment that a bidder, contractor, or other entity will use a skilled and trained workforce to complete a contract or project, it utilize all workers that are either skilled journeypersons or apprentices registered in an apprenticeship program. This requirement now shall not apply to work performed in the following occupations: acoustical installer, bricklayer, carpenter, cement mason, drywall installer or lather, marble mason, finisher, or setter, modular furniture or systems installer, operating engineer, pile driver, plasterer, roofer or waterproofer, stone mason, surveyor, teamster, terrazzo worker or finisher, and tile layer, setter, or finisher.

B. PCC § 7201 – Public Works of improvement contracts between public entity and original contractor, original contractor and subcontractor, and between all subcontractors thereafter entered into on or after January 1, 2012; limits on retention proceeds; waiver

This amended statute extends from January 1, 2018 to January 1, 2023, the sunset or expiration date on existing statutes limiting to 5% the amount of money a public agency may retain from a prime contractor or subcontractor prior to project completion. The statute remains the same with respect to the exception to the 5% retention limit, when a public entity deems that a project is substantially complex during a properly noticed and regularly scheduled public meeting in advance of bidding. In such a case, the retention amount may exceed 5%, however, projects must be analyzed by the public entity on a project by project basis, and the finding and designated retention amount included in the project bid documents.

C. PCC § 10261 – Payments upon contracts; progress payments; withholding of percentage of contract price; warrants; electronic transfer; complex projects requiring higher retention amount

Similar to the amendment to PCC § 7201, the same amendment is made with respect to extension of the sunset or expiration date to January 1, 2023, with respect to state agency design-build projects and the 5% retention limitation and substantially complex project exception.

D. Chapter 2.1 UNIVERSITY OF CALIFORNIA COMPETITIVE BIDDING – BEST VALUE CONSTRUCTION CONTRACTING

PCC § 10506.4 – Bidding details of program

PCC § 10506.5 – Definitions

PCC § 10506.6 – Awarding best value contracts; commitment to using skilled and trained workforce; requirements

PCC § 10506.8 – Definitions; requirements to be considered a skilled and trained workforce

PCC § 10506.9 – Enforceable commitment that a skilled and trained workforce will be used; compliance report

This former pilot program for the University of California system for projects over \$1 million is now a permanent program with respect to best value contracting. Utilization of a skilled and trained workforce is required pursuant to § 10506.8. All of the workers performing work in an apprenticeship occupation in the building and construction trades are required to be either skilled journeypersons or apprentices registered in an apprenticeship program. For work performed on or after January 1, 2017, at least 30% of the skilled journeypersons are required to be graduates of an apprenticeship program; for work performed on or after January 1, 2018, there is a 40% requirement; for work performed on or about January 1, 2019, there is a 50% requirement; and for work performed after January 1, 2020, a 60% requirement. Similar to the prior referenced PCC § 2601, this requirement shall not apply to work performed in the following occupations: acoustical installer, bricklayer, carpenter, cement mason, drywall installer or lather, marble mason, finisher, or setter, modular furniture or systems installer, operating engineer, pile driver, plasterer, roofer or waterproofer, stone mason, surveyor, teamster, terrazzo worker or finisher, and tile layer, setter, or finisher.

E. PCC § 20146 – Construction manager at-risk contracts; utilization for county construction projects; subcontractors; public inspection of contract; retention proceeds

This amended statute, applicable to counties, utilizing construction manager at-risk construction contracts on projects in excess of \$1 million, requires that the construction manager at-risk entity shall not be prequalified or shortlisted or awarded a contract unless it provides an enforceable commitment to the county that it and its subcontractors will use a skilled and trained workforce to perform all work on the project with an apprenticeship occupation, unless the county has otherwise entered into a project labor agreement (PLA) that already binds its contractors/subcontractors to use such skilled and trained workforce. The authorization of this section is extended to January 1, 2023.

F. Article 3.7 – BEST VALUE CONSTRUCTION CONTRACTING FOR COUNTIES PILOT PROGRAM

PCC § 20155 – Pilot program for construction projects; best value construction contracting method

This amended article has now been extended to include San Mateo County for construction projects in excess of \$1 million. Furthermore, the counties to which this statute applies (Alameda, Los Angeles, Riverside, San Bernardino, San Diego, Solano, Yuba, and now San Mateo) may use the best value construction contracting method to award individual annual contracts which shall not exceed \$3 million for work to be done according to unit prices. Annual contracts may be extended or renewed for two subsequent annual terms, and a maximum \$6 million over the subsequent two terms of the contract.

G. PCC §20662 – Chancellor contracts with districts; district performing services or acting as fiscal agent

This amended section, applicable to Community College Districts, now provides that the Chancellor of the California Community Colleges is authorized to enter into a contract or other agreement with the governing board of any community college district whereby the district performs services or acts as a physical agent on behalf of the California Community Colleges,

without advertising for or inviting bids for contracts or other agreements that are no more than \$20 million. For existing contracts or other agreements that the Chancellor of the California Community Colleges has entered into with the governing board of any community college district pursuant to this section, the contract or other agreement may be renewed without advertising or inviting bids regardless of the amount. This section is operative until July 1, 2022, at which time a new section 20662 replaces this one and there are no monetary restrictions.

II. NEW STATUTES

A. **Article 5 – BUY CLEAN CALIFORNIA ACT**

PCC § 3500 – Short Title

PCC § 3501 – Definitions

PCC § 3502 – Establishment and publication of maximum acceptable global warming potential for categories of materials; report to Legislature; review and adjustment

PCC § 3503 – Submission of Environmental Product Declaration by successful bidder; specification for bids

PCC § 3504 – Goal of awarding authority

PCC § 3505 – Report to Legislature; obstacles and effectiveness

These new laws require the Department of General Services, by January 1, 2019, publish in the State Contracting Manual a maximum acceptable global warming potential, as measured by greenhouse gas emissions, for each category of eligible materials in accordance with requirements set forth. These new standards would be incorporated into certain public contracts entered into after July 1, 2019. Eligible materials initially will include carbon steel rebar, flat glass, mineral wool board installation, structural steel, as well as products that include these materials. These new statutes apply to most public entities and the UC and State College systems.

In connection with these new laws, Governor Brown stipulates that “State agencies shall take climate change into account in their planning and investment decisions and employ full life-cycle cost accounting to evaluate and compare infrastructure investments and alternatives.”

B. **PCC § 10261.7 – Construction contract payment; posting on Internet Web site; exceptions**

This new code section with respect to state agency contracting, requires that a state agency that maintains an Internet Web site shall post on its site, information with respect to project, contractor identity, and payments made for all projects valued above \$25,000.

This new law empowers subcontractors to help enforce the prompt payment requirements by providing information as to when the Contractor has been paid.

C. Chapter 3.9 OFFSHORING UNIVERSITY OF CALIFORNIA AND CALIFORNIA STATE UNIVERSITY CONTRACTS

PCC § 12147 – Requirements for contractors and subcontractors; expenditure of funds on training; training of contracts; violation; application of chapter

This new statute, effective January 1, 2018, requires that neither the University of California nor the California State University may contract for services with a contractor or subcontractor unless that contractor/subcontractor follows specific criteria for utilization of work that will be performed by workers outside of the United States.

D. PCC § 20155.2 – Cost-plus-time bidding procedure

This new statute, applicable to best value construction contracting for counties, provides that a county may utilize the “cost-plus-time” bidding procedure, also known as “A+B Bidding”. Cost-plus-time bidding is defined as a competitive procurement process that uses a cost parameter (A) and a time parameter (B) to determine a bid value.

E. Article 41.5. JOB ORDER CONTRACTING FOR COMMUNITY COLLEGE DISTRICTS

PCC § 20665.20 – Legislative findings and declarations

PCC § 20665.21 – Definitions

PCC § 20665.22 – Application of article

PCC § 20665.23 – Use of job order contracting; execution plan for modernization projects

PCC § 20665.24 – Bidding for job order contracts

PCC § 20665.25 – Maximum total dollar amount award under single job order contract; contract term; job orders

PCC § 20665.26 – Primary job order contractor; use of subcontractors

PCC § 20665.27 – General conditions of job order contract

PCC § 20665.28 – Willful violation of Section 20665.26

PCC § 20665.29 – Employment of apprentices on job order contracts

PCC § 20665.30 – Violation of provisions involving employment of apprentices; civil penalty

PCC § 20665.31 – Prevention of fraud, waste, and abuse

PCC § 20665.32 – Payment resolution process

PCC § 20665.33 – Duration of article

This new Article 41.5 applicable to community college districts, now provides for the utilization of job order contracting. The Legislature had previously authorized the use of this alternate and optional procedure only for school districts. It is the intent that CCDs now be able to utilize cost-effective options for the delivery of public works projects, in accordance with the national trend, which include authorizations in California, to allow public entities to utilize job order contracts as a project delivery method. The Legislature believes that the benefits of a job order contract delivery system include accelerated completion of the projects, cost savings, and

reduction of construction contracting complexity. It will not preclude the use of traditional methods of project delivery if a traditional method would result in higher cost savings. Furthermore, it is the intent of the Legislature that job order contracts be competitively bid and awarded to bidders providing the most qualified responsive bids. It is further the intent of the Legislature that districts use the job order contract process pursuant to this article only if the district has entered into a project labor agreement that meets the requirements of section 2500 for all its public works projects. The statute is effective January 1, 2018.

Section 20665.21 sets forth a variety of definitions. “Job order” means a firm, fixed priced, lump-sum order issued by the school district to a job order contractor for a definite project scope of work as compiled from the unit price catalog to be performed pursuant to a job order contract. And, a “Job order contract” means a contract, awarded to the most qualified bidder in which the contract agrees to a fixed period, fixed-unit price, and indefinite quantity contract that provides for the use of job orders for public works or maintenance projects.

With respect to the use of job order contract, § 20665.23 provides that a community college district shall prepare an execution plan for all modernization projects that may be eligible for job order contracting. The community college district shall select from that plan a sufficient number of projects to be initiated as job order contracts during each calendar year, and shall determine for each selected project that job order contracting will reduce the total cost of that project. Job order contracting shall not be used if the community college district finds that it will increase the total cost of the project.

Section 20665.24 sets forth the various conditions under which prequalified job order contractors shall bid one or more adjustment factors to the unit prices listed in the unit price catalog based on the job order contract technical specifications. Awards shall be made to the prequalified bidders that the community college district determines to be the most qualified based on preestablished criteria made by a community college district. A standard questionnaire is required to be utilized by the district that requires detailed disclosure by the contractor.

The dollar amounts of the job order contracts are set forth in § 20665.25. The maximum total dollar amount that may be awarded under a single job order contract shall not exceed \$5 million in the first term of the job order contract and, if extended or renewed, a maximum of \$10 million over the subsequent two terms of the job order contract. Subsequent job orders to the job order contractor may be awarded. No single job order may exceed \$1 million.

Section 20665.26 addresses the use of subcontractors. If subcontractors will be used, the primary job order contractor is required to verify that the subcontractors possess the appropriate licenses and credentials. A primary job order contractor may use subcontractors that are not listed at the time the job order is issued, if the work to be performed under that job order is less than \$10,000. If the primary job order contractor chooses to use a subcontractor that is not listed at the time of bid, all of the following apply:

1. The primary job order contractor shall provide public notice of the availability of work to be subcontracted by trade.
2. The primary job order contractor shall take sealed bids from the subcontractors solicited for the proposal and these bids shall be publicly opened at a prescribed time and place.
3. The notification shall identify the scope of the work to be performed by each subcontractor, broken down by craft. If a subcontractor performs multiple crafts, the job order contractor shall identify the work of each craft to be performed.

4. The notification shall include every subcontractor for all tiers and shall establish the authorized subcontractor list for the job order.

Section 20665.27 addresses the general conditions of a job order contract. The payment of prevailing wages is required. The community college district shall designate one individual to act as a monitor to inspect job sites for labor compliance violations at the request of the designated labor representative in its projected labor agreement.

Section 20665.29 addresses the utilization of apprentices on job order contracts. When an individual job order involves more than \$30,000 or 20 working days, all general contractors or subcontractors are required to be in compliance with Section 1777.5 of the Labor Code with regard to journeymen/apprentice ratios.

With respect to the prevention of fraud, waste, and abuse, § 20665.31 requires that a community college district adopting job order contracting shall do all of the following: Prepare for each individual job order developed under a job order contract an independent community college district estimate. If the contractor's proposal for a given job order is found to be unreasonable, not cost effective, or undesirable, the community college district is under no obligation to issue the job order to the job order contractor and may instead utilize any other available procurement procedures. The community college district shall not issue a job order until the job order has been reviewed and approved by the appropriate level of management.

A payment resolution process is provided for in § 20665.32 requiring the community college district that adopts job order contracting to adopt a payment resolution process which may include, but not be limited to, the convening of a payment resolution committee.

This entire Article, effective January 1, 2018, remains in effect until January 1, 2022. Community college districts are requested to review with great care the specific provisions in detail.