

JARET & JARET

ATTORNEYS AT LAW

900 FIFTH AVENUE, SUITE 201
SAN RAFAEL, CALIFORNIA 94901

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

SAN FRANCISCO OFFICE
351 CALIFORNIA STREET, 7TH 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 31, 2002

Re: 2002 California Public Contract Code Revisions

Dear Clients and Colleagues:

Please take note of the following revisions to the California Public Contract Code as a result of legislation enacted last year. There are some entirely new Code provisions, as well as material changes or revisions to existing Code.

In this client courtesy letter, I have selected those provisions which seem particularly significant to common public contracting issues, and obviously the inclusions in this letter are not exclusive, and not necessarily dispositive to any particular issue which may arise. However, these changes seem particularly relevant.

I. Public Contract Code Revisions

PCC §3400 — Bids on public works; specification by brand or trade names not permitted; exception. This statute has been significantly modified in a more practical and useful manner. Until now, specifications were required to provide a period of time prior to the award of contract for submission of data substantiating a request for a substitution of "an equal" item. The statute now provides that the specifications shall provide a period of time prior to "or after, or prior to and after, the award" of the contract for submission of data substantiating the request. Be advised, however, that if no time period is specified, data may be submitted by the contractor "any time within 35 days after the award of the contract." However, a product may be designated by a specific brand or trade name: (1) in order that a field test or experiment may be made to determine the

product's suitability for future use, or (2) in order to match other products in use on a particular public improvement, either completed or in the course of completion.

The upshot of this is that you will want your specifications to require that substitutions be submitted for approval as soon as possible (and before the award of contract), rather than allowing the 35 day time period to prolong the process and potentially delay performance due to the delayed architectural review and approval.

PCC §10116 — Report on level of participation of business enterprises. This is a new statute that has been added under the section for minority and women business participation goals for State contracts. Under this new statute, on January 1 of each year, each awarding department is required to report to the Governor and the Legislature on the level of participation of business enterprises by race, ethnicity, and gender of owner, in contracts for the fiscal year beginning July 1 and ending June 30. In addition, the report shall contain the levels of participation of business enterprises, by race, ethnicity, and gender of owner, for the following categories of contracts:

1. Construction.
2. Purchases of materials, supplies or equipment.
3. Professional services.
4. All contracts for a dollar amount of less than twenty-five thousand dollars (\$25,000).

The statute provides that awarding departments are prohibited from using the data compiled under this section to discriminate or provide a preference in the awarding of any contracts, and that contractors are prohibited from using information compiled under this section to discriminate or provide a preference in the solicitation or acceptance of bids for subcontracting, or for materials or equipment, on the basis of race, color, sex, ethnic origin, or ancestry.

PCC §10129 — Bids limited to one concern or specific brand or trade name. This statute is substantially similar to PCC §3400, as discussed *infra*, and involves the same changes as noted therein.

PCC §22032 — Contracting procedures; dollar amount limitations. For those public agencies whose governing board has by resolution elected to become subject to the uniform construction cost accounting procedures, the threshold contract limits have increased this year. Public projects of \$25,000 or less may be performed by the employees of a public agency by force account, by negotiated contract, or by purchase order. Public projects of \$100,000 or less may be let to contract by informal procedures as set forth in PCC §22030, *et seq.* (an increase from \$75,000). Public projects of more than \$100,000 are required to be let to contract by formal bidding procedures.

As you are aware, the Education, Government and Labor Codes also affect public works contracting laws. I have not had an opportunity to review all revisions in those rather substantial codes, but may inform you of significant relevant modifications at a later date.

II. Attorney General Opinions

Ops. Atty. Gen. No. 01-214 (August 17, 2001) — Under Section 10410 (Conflict of Interest, State Officers or Employees), the Attorney General advises that the spouse of a State employee may contract to provide goods or services to the employee's department if the employee neither participates in the department's decision to enter into the contract, nor engages in the spouse's business.

III. New Cases

Louis C. Nelson & Sons, Inc. v. Clovis Unified School District, 01 C.D.O.S. 5381 (2001). The Fifth Appellate District held that a public entity may be held liable for prejudgment interest on an unliquidated debt owed by a public entity. (In that case, the district had erroneously contended that because the contractor's damages were unliquidated, the award of interest would violate the spirit of the government claims and was not authorized by law.)

Lujan v. G & G Fire Sprinklers, Inc. (No. 9556639p - 07/02/01) 121 S.Ct.1446, 2001, Daily Journal D.A.R. 3701 (2001). This Ninth Circuit decision held that a public agency does not violate due process requirements by withholding wages and penalties without first conducting a hearing. Public agencies are required to withhold from progress payment wages and penalties that have been forfeited for failure to pay prevailing wages; if sums are withheld from the prime contractor because of a subcontractor's failure to pay prevailing wages, the prime contractor may withhold such sums from the subcontractor. The California Labor Code provides for a method in which the contractor may bring suit against the public agency within 90 days of the completion of the contract and acceptance of the work to potentially recover the wages and penalties withheld. (See Labor Code §§1727, 1729, 1731-1732.)

The Ratcliff Architects v. Vanir Construction Management, Inc., 88 Cal.App.4th 595, 106 Cal.Rptr.2d 1 (2001). It was held in this case that a construction manager has no duty to protect the project architect against an economic loss sustained on a project. This action involved an architect filing a cross-complaint against the construction manager on a public works project for indemnity, negligence, breach of contract, declaratory relief, contribution and comparative equitable indemnity. Essentially for policy reasons, the court refused to "expand tort liability" to include a duty of care from the construction manager to the project architect.

Morton Engineering & Construction, Inc. v. Patscheck, 87 Cal.App.4th 712, 104 Cal.Rptr.2d 815 (2001), held that the penalties for failure to make prompt payment on a public works contract

January 31, 2002

Page 4

are recoverable in a civil action. Before this decision, there had been some confusion as to whether the 2% per month penalty provided under Public Contract Code §7108.5 on the progress payment, and by §7107 on the retention, would be recoverable in a civil action, as opposed to only in a disciplinary proceeding of the Contractors State License Board. The court held that the fact that the 2% per month penalty and the attorney's fees provisions appearing in separate sentences, does not indicate legislative intent to allow recovery of the 2% penalty only in a disciplinary proceeding. The legislative history supports the conclusion that the 2% penalties are recoverable in a civil action.

Hopefully the enclosed information will be of use to you. If you have any questions, or need further information, please do not hesitate to call.

Sincerely,

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

PHILLIP A. JARET

PAJ:dda

\\j&j\code revision - 2002\Born1