

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

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Re: 2003 California Public Contract Code Additions and Revisions; Recent Public Contract Court Decisions

Dear Clients and Colleagues:

Please take note of the following additions and revisions to the California Public Contract Code as a result of legislation enacted in 2002. 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 are 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 or concern your particular client, construction company, or public entity. However, overall these changes seem particularly relevant.

I. PUBLIC CONTRACT CODE ADDITIONS

A. PCC §1601 — Adoption of methods and procedures to receive bids on public works or other contracts over the internet

This new code section provides for the adoption of methods and procedures that a public entity may employ to receive bids on public works projects over the internet, “but only if no bid can be opened before the bid deadline and all bids can be verified as authentic.”

B. PCC §10426 — Intentional disclosure of proprietary information obtained in negotiation, execution, or performance of consulting services contract or information technology contract; prosecution and punishment; definition of “proprietary information”; disclosure pursuant to legal requirement

This new statute makes it unlawful for anyone to intentionally disclose proprietary information obtained in the negotiation, execution, or performance of a consulting services contract, or an information technology contract, with a state agency, when the contracting party knew or should have known that the disclosure was likely to cause harm. Violation of this section is a criminal misdemeanor. “Proprietary information” shall include any information agreed by the

contracting parties to be proprietary, or any information that is designated by a contracting state agency to be proprietary. The contracting state agency is required to specifically identify in the contract any information that is considered to be proprietary. However, the state agency shall make this designation only in cases where the state agency has reason to believe that the release of this information “poses an immediate threat to the health, safety or welfare of the public or the state agency has reason to believe that the contracting party intends to sell the information.” If, however, the state agency makes a designation of proprietary information subsequent to the execution of the contract, the state agency shall make a good faith effort to amend the contract to incorporate the subsequent designation of proprietary information. The contracting state agency is then required to provide written notification to a contracting party of any information that, subsequent to the execution of the contract, is identified to be proprietary.

C. PCC §10515 - Persons awarded consulting services contract; prohibited actions; exemptions

This new statute provides that no person, firm, or subsidiary thereof who has been awarded a consulting services contract may submit a bid for, nor be awarded a contract on or after January 1, 2003, for the provision of services, procurement of goods or supplies, or any other related action that is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract. This conflict of interest statute does not apply to any person, firm or subsidiary thereof who is awarded a subcontract of a consulting services contract that amounts to no more than 10% of the total monetary value of the consulting services contract.

D. PCC §10520 — Contracts in violation this chapter; void

Every contract or other transaction entered in violation of any provision of PCC §10515 is void, unless the violation is technical or non-substantive.

E. PCC §10525 — Violations of other provisions; misdemeanor

Willful violation of any other provision of PCC §10515 “shall constitute a misdemeanor”.

F. PCC §§12400-12404, et seq. — Environmentally preferential purchasing

These new PCC sections have been enacted to promote “environmentally preferable purchasing”, which means the procurement or acquisition of goods and services that have a lesser or reduced effect on human health and the environment when compared with competing goods or services that serve the same purpose. The new statutes provide that this comparison shall take into consideration, to the extent feasible, raw materials acquisition, production, manufacturing, packaging, distribution, reuse, operation, maintenance, disposal, energy efficiency, product performance, durability, safety, the needs of the purchaser, and cost.

Under §12401, the Department of General Services, in consultation with the California Environmental Protection Agency, members of the public, industry and public health and environmental organizations, shall provide state agencies with information and assistance regarding environmentally preferable purchasing, including, but not limited to, the following:

- (a) The promotion of environmentally preferable purchasing.
- (b) The development and implementation of a strategy to increase environmentally preferable purchasing. This may include the development of statewide policies, guidelines, programs, and regulations.
- (c) The coordination with other state and federal agencies, task forces, workgroups, regulatory efforts, research and data collection efforts, and other programs and services relating to environmentally preferable purchasing.
- (d) The development and implementation, to the extent fiscally feasible, of training programs designed to instill the importance and value of environmentally preferable purchasing.
- (e) The development, to the extent fiscally feasible, of an environmentally preferable purchasing best practices manual for state purchasing employees.

PCC §12401.5 provides for a single point of contact for state agencies, suppliers and other interested parties to contact someone at that department regarding environmentally preferable purchasing issues.

PCC §12403 does not require the acquisition of goods or services that do not perform adequately for their intended use, exclude adequate competition, or are not available at a reasonable price in a reasonable period of time.

II. PUBLIC CONTRACT CODE REVISIONS

A. PCC §4104.5 — Invitation to bid; closing of submissions date; extensions

The wording of this statute has been substantially modified in some material respects. It requires local and state agencies to specify in the bid invitation, the place and deadline for receiving bids. If the agency issues any material changes to the invitation, the time shall be extended by no less than 72 hours. Tardy bids shall be returned unopened. The full statute now reads as follows:

- (a) The officer, department, board or commission taking bids for construction of any public work or improvement shall specify in the bid invitation and public notice the place the bids of the prime contractors are to be received and the time by which they shall be received. The date and time shall be extended by no less than 72 hours if the officer, department, board, or commission issues any material changes, additions, or deletions to the invitation later than 72 hours prior to the bid closing. Any bids received after the time specified in the notice or any extension due to material changes shall

be returned unopened.

(b) As used in this section, the term “material change” means a change with a substantial cost impact on the total bid as determined by the awarding agency.

(c) As used in this section, the term “bid invitation” shall include any documents issued to prime contractors that contain descriptions of the work to be bid or the content, form, or manner of submission of bids by bidders.

B. PCC §9201 — Authority to compromise or settle claims; notification of receipt of third-party claims; recovery of notification costs

This code section has been substantially modified, which should result in a change to the language in your boilerplate prime contract. It now requires a public entity to include in a public works contract a provision for timely notification of the contractor of the receipt by the agency of any third-party claim relating to the contract. The modified statute now reads as follows:

(a) A public entity shall have full authority to compromise or otherwise settle any claim relating to a contract at any time.

(b) The public entity shall include provisions in a public works contract for timely notification of the contractor of the receipt of any third-party claim, relating to the contract.

(c) The public entity shall be entitled to recover its reasonable costs incurred in providing the notification required by subdivision (b).

C. PCC §10126 — Approval of estimate of cost with alternates contemplating additions to or deletions from base bid; conditions

The wording of this statute addressing the determination of the lowest bid, has been substantially altered in significant ways. The complete and amended statute now reads as follows:

Notwithstanding the provisions of Section 10125, the estimate of cost may be approved by the director, which includes alternates contemplating additions to, or deletions from, the base bid, provided that all of the following requirements are met:

(a) Estimates are made for each contingency and, in the aggregate, the alternates do not exceed 10 percent of the estimated cost for the project.

(b) The available funds are at least sufficient to cover the filed

estimate for the base project.

(c) Whenever additive or deductive items are included in a bid, the bid solicitation shall specify which one of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided by paragraph (1) will be used:

(1) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(2) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(3) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that, when taken in order from a specifically identified list of those terms in the solicitation, and added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the department before the first bid is opened.

(4) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders or proposed subcontractors or suppliers from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

(d) The contract is awarded to the lowest bidder, as determined by the method prescribed in subdivision (c).

(e) A responsible bidder who submitted the lowest bid as determined by this section shall be awarded the contract, if it is awarded. This section does not preclude the department from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined.

(f) Nothing in this section shall preclude the prequalification of subcontractors.

D. PCC §10264 — Partial payments for mobilization costs; limitations; partial payments for projects over water requiring marine access with contracts in excess of a specified amount; limitations

This code section relates to PCC §10261, which addresses payments upon contracts; progress payments; withholding of percentage of contract price; warrants. The statute has been substantially modified and now reads as follows:

(a) With the exception of projects over water requiring marine access, and which have a contract amount greater than twenty-five million dollars (\$25,000,000), in addition to the provisions for partial payment made in Section 10261, the department may make partial payments for the mobilization costs of a contract subject to this chapter, not to exceed the following:

(1) When 5 percent of the original contract amount is earned, 50 percent of the amount bid for mobilization, or 5 percent of the original contract amount, whichever is lesser, may be paid.

(2) When 10 percent of the original contract amount is earned, 75 percent of the amount bid for mobilization, or 7.5 percent of the original contract amount, whichever is lesser, may be paid.

(3) When 20 percent of the original contract amount is earned, 95 percent of the amount bid for mobilization, or 9.5 percent of the original contract amount, whichever is lesser, may be paid.

(4) When 50 percent of the original contract amount is earned, 100 percent of the amount bid for mobilization, or 10 percent of the original contract amount, whichever is lesser, may be paid.

(5) Upon completion of all work on the project, payment of any amount bid for mobilization in excess of 10 percent of the original contract amount will be paid.

(b) For projects over water requiring marine access, and with a contract amount greater than twenty-five million dollars (\$25,000,000)...

E. PCC §10265 — Limitation of action on claims after determination of rights by hearing officer

This statute has been slightly modified to change the commencement of legal action time period from a time period within “six months after final decision of the department” (as per the old §10265) to “180 days after the date of service in person or by mail on the claimant of the final written decision by the department on the claim” as per PCC §10240.1.

F. PCC §10359 — Consulting services contracts: report, contents

This code section has been modified to include information that is required of a state agency in its annual report of consulting contracts. Most significantly, the additional information requires the “justification for entering into each consulting services contract”, and the date when the initial contract was signed, and the date when the work began and was completed.

G. PCC §10780.5 — Award of contracts: additive and deductive items

This important statute addressing the breakout in bids has been significantly modified. The revised statute (similar to PCC §10126) reads as follows:

The trustees may require a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted. Whenever additive or deductive items are included in a bid, the bid solicitation shall specify which one of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided by subdivision (a) will be used:

(a) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(b) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(c) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that, when taken in order from a specifically identified list of those items in the solicitation, and added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the trustees before the first bid is opened.

(d) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders or proposed subcontractors or suppliers from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

A responsible bidder who submitted the lowest bid as determined by this section shall be awarded the contract, if it is awarded. This section does not preclude the trustees from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined.

(e) Nothing in this section shall preclude the prequalification of subcontractors.

H. PCC §19100 — Claims and disputes: actions on contracts; limitations

This statute has been modified to exempt proceedings under PCC §10240.1 (arbitration of contract claims) from the six month commencement of action requirement contained in this code section.

I. PCC §20103.8 — Award of contracts: additive and deductive items

This statute, similar to PCC §§10126 and 10780.5, *supra*, has been substantially modified, and now reads as follows:

A local agency may require a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted. Whenever additive or deductive items are included in a bid, the bid solicitation shall specify which one of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided by subdivision (a) will be used:

(a) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(b) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(c) The lowest bid shall be the lowest total of the bid

prices on the base contract and those additive or deductive items taken in order from a specifically identified list of those items that, when in the solicitation, and added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the local agency before the first bid is opened.

(d) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders or proposed subcontractors or suppliers from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

A responsible bidder who submitted the lowest bid as determined by this section shall be awarded the contract, if it is awarded. This section does not preclude the local agency from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined.

(e) Nothing in this section shall preclude the prequalification of subcontractors.

III. NEW EDUCATION CODE STATUTE — Education Code §§81700, et seq. (Certain community college districts and cities are authorized to award design build contracts)

Chapter 3.5, commencing with §81700, is added to Part 49 of the Education Code to authorize certain community college districts to award contracts on a design build basis. Design build authority is given to Los Angeles, San Jose-Evergreen, and San Mateo Community College Districts (and for up to five other projects selected by the Chancellor). This authority is granted because the legislature has determined that the benefits of a design build project delivery system would include accelerated completion, cost containment, reduction of construction complexity, and a shifting of liability and risk to the design build entity. If this section applies to your district, please review it carefully, insofar as it provides for various procedures that must be followed.

IV. RECENT COURT DECISIONS RELATED TO PUBLIC CONTRACTS

A. Amelco Electric v. City of Thousand Oaks (2002) 27 Cal.4th 228

This case held that the abandonment theory of liability does not apply against a public entity, and thus, a public contractor may not recover the reasonable value of its work on a theory of an abandoned contract. The Court held that allowing it to do so is fundamentally inconsistent with the purpose of the competitive bidding statutes. Under the “abandonment doctrine”, once the parties ceased to follow the contract’s change order process, and the final project has become materially different from the project contracted for, the entire contract, including its notice, documentation, changes, and cost provisions, is deemed inapplicable or abandoned, and the plaintiff may recover the reasonable value for all work.

The Court did approve the use of a total cost approach on claims against public agencies, but set forth some rules for proving damages that will be difficult for any contractor to meet. Essentially, the contractor must assign costs to specific breaches of contract, and then prove that those costs were caused by the public entity, and not by the contractor or its subcontractors.

B. National Technical Systems v. Superior Court (2002) 97 Cal.App.4th 415

This case held that a surety is not bound by a judgment against the principal, but is, however, liable for attorney's fees as provided by the subcontract agreement and for prompt payment penalties under Business & Professions Code §7108.5. The court held that the construction contract is supported by a "surety bond" and therefore the subcontractor may recover attorney's fees as provided in the subcontract agreement, provided that the total recovery does not exceed the penalty amount of the bond. Interest and the 2% per month penalty established by Business & Professions Code §7108.5 are clearly a part of the subcontractor's claim against the principal (the prime contractor) and therefore the obligation of the surety is commensurate.

C. American Building Company v. Bay Commercial Construction, Inc. (2002) 99 Cal.App.4th 1193

In order to recover from the surety on a public works payment bond, a materials supplier must serve a preliminary 20 day notice on the prime contractor and the public entity, within 20 days after first supplying materials to the project. (Civil Code §3098.) If the claimant fails to give the notice within the prescribed time period, it may still recover on its claim if it provides a notice to the principal and the surety on the bond, within 15 days after the recording of the Notice of Completion, or if no Notice of Completion has been recorded, within 75 days after the completion of the entire work of improvement. (Civil Code §3252.)

In this case, although the claimant's preliminary 20 day notice was tardy within the context of Civil Code §3098, it was valid in the context of a 15-75 day notice under Civil Code §3252.

D. Barden v. City of Sacramento, 292 F.3d 1073 (9th Cir. 2002)

Plaintiffs filed an action against the City of Sacramento alleging the City violated the ADA by failing to install curb ramps and failing to maintain existing sidewalks so as to ensure accessibility by persons with disabilities. The Court held that city sidewalks are subject to ADA requirements under 421 U.S.C. §12132, and reasoned that to exclude a disabled person from a sidewalk would be to exclude that person from the services and activities of the agency, which is subject to ADA requirements.

E. Landeros v. California Department of Corrections (2002) 99 Cal.App.4th 271

This case held that construction workers on a public project cannot sue the public agency to recover prevailing wages. In this case, construction workers brought an action under a payment bond statute against the Department of Corrections to seek payment of prevailing wages on a prison construction project. The Court held that the Department could not be held liable for failure to discharge a mandatory duty because the Department performed its statutory duty to require a

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payment bond, and the non-payment of prevailing wages did not fit the definition of "injury" actionable under the Tort Claims Act.

**F. Road Sprinkler Fitters Local Union No. 669 v. G&G Fire Sprinklers, Inc. (2002)
(C035386)**

This case held that a union may recover prevailing wages and penalties on behalf of its members. It was determined that the action was not preempted by the National Labor Relations Act. The union has standing to assert its members' claims against the contractor, since the workers assigned their statutory right to the union for enforcement, and the workers had a private statutory right to recover prevailing wages under Labor Code §§1774 and 1775. Since the prevailing wage law is a minimum wage law, the workers also had statutory rights under Labor Code §1194. Ordinarily the DLSE (Department of Labor Standards Enforcement) brings suit to collect wages and penalties.

Hopefully this information has been of some value 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 Jaret", with a long horizontal flourish extending to the right.

PHILLIP A. JARET

PAJ:dda