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January 16, 2007

**Re: 2007 California Public Contract Code Additions and Revisions, and Recent Public Contract Cases and Relevant Attorney General Opinions**

Dear Colleagues:

Please take note of the following 2007 revisions to the California Public Contract Code as a result of legislation enacted in 2006, as well as recent court decisions related to public contracts. In this letter, we have selected those technical provisions which are significant to common public contracting issues.

**I. PUBLIC CONTRACT CODE ADDITIONS**

**A. PCC § 10506.4 – Bidding details of pilot program (University of California competitive bidding)**

This new statute provides for a program for U.C. when awarding construction contracts, applicable only to a single U.C. campus located in the City and County of San Francisco. It allows for rejection of lowest bids and shall allow the U.C. to award contracts “on the basis of the best value to the university.” This may include factors such as preference to a disadvantaged business enterprise, a women business enterprise, or a disabled veteran business enterprise. The Regents may consider demonstrated management competency, financial condition, apprenticeship and prevailing wage compliance, safety record relevant experience, and the same criteria may apply to designated subcontractors.

**B. PCC § 10506.5 – Definitions (bidding details of pilot program - U.C. competitive bidding)**

This companion statute sets forth various definitions with respect to § 10506.4. Among other things, it defines “best value” as a procurement process whereby the lowest responsible bidder may be selected on the basis of objective criteria with the resulting selection representing the best combination of price and qualifications.

**C. PCC § 10506.6 – Awarding best value contracts; requirements (U.C. competitive bidding)**

This third related statute sets forth various procedures for the solicitation of bids and contract award, including a procedure to pre-qualify bidders.

**D. PCC § 10506.7 – Selection of best value contractor (U.C. competitive bidding)**

The selection of the “best value contractor” is to be made based on a mathematical computation and a “qualifications score.”

**E. PCC § 10506.8 – Report; contents (U.C. competitive bidding)**

On or before January 1, 2010, the Regents of U.C. shall submit a report concerning this pilot program which is required to assess project performance, including a summary of any delays or cost increases. Note, this pilot program remains in effect until January 1, 2012, pursuant to PCC § 10506.9.

**II. PUBLIC CONTRACT CODE REVISIONS**

**A. PCC § 7104 – Contracts for digging trenches or excavations; notice on discovery of hazardous waste or other unusual conditions; investigation; change orders; affect on contract**

Section 7104 provides that any public works contract of a local agency which requires excavations that extend deeper than four feet below the surface shall contain a clause providing that the contractor shall notify the public agency in writing of subsurface physical conditions differing from those indicated, and that the agency shall investigate, and if it finds that conditions materially differ, shall issue a change order. Section 7104 is amended by adding the requirement that the contractor not only notify the agency in writing of conditions differing from those indicated, but give notice of said conditions before the bid date.

**B. PCC § 10502 – Public notice (University of California competitive bidding)**

This statute addressing public notice of the project to bidders by publication has been amended to require that it be given “twice within the 60-day period” preceding the day set for receiving of bids.

**C. PCC § 20175.2 – Cities in Solano and Yolo Counties and the City of Victorville; alternate procedure for bidding on building construction projects; design-build contracts; reporting requirements**

This amended section provides an alternative procedure for bidding building construction projects applicable in cities in the Counties of Solano and Yolo, and the City of Victorville, upon approval of the appropriate City Council.

**D. PCC § 22032 – Contracting procedures; dollar amount limitations (public projects: alternate procedures)**

This statute, applying only to a public agency whose governing board has by resolution elected to become subject to the uniform construction cost accounting procedures, has increased the threshold limit to \$30,000 or less for projects which may be performed by employees of the public agency by force account, by negotiated contract, or by purchase order. Public projects of \$125,000 or less may be let to contract by informal procedures as set forth in this article. Public projects of more than \$125,000 shall be let by otherwise formal bidding procedure. (The requirements of the informal bidding ordinance is set forth in PCC § 22034.)

**III. OTHER RELEVANT AMENDED OR ADDED STATUTES**

**A. Business and Professions Code § 7071.9**

The amount of the contractor's bond has now increased from \$10,000 to \$12,000. This is the bond that all California licensed contractors are required to have.

**B. Business and Professions Code § 7121.6**

This statute is added to the Business and Professions Code with the intention of preventing a person who participated in a violation of the license law from getting a supervisory job with another licensed contractor. The new law applies not only to persons who participated in license law violations, but also to any person who acted as responsible managing officers (RMO's) or employees, whether or not they had knowledge of the violations. The related B&P Code § 7121.65 requires such persons to give written notice to prospective employers of the license law violation, and B&P Code § 7121.7 prohibits a licensee from knowingly employing an individual who participated in a license law violation. Violations are misdemeanors which include fines and jail time.

**C. Business and Professions Code § 7145.5(a)**

This statute provides that the Registrar may suspend a license for failure to pay State income taxes or fees and penalties assessed by the Department of Industrial Relations, the Employment Development Department, or the Contractors License Board. As amended, effective January 1, 2007, the suspension is extended to the license of any contractor with any of the same personnel of record with the suspended licensee.

**D. Code of Civil Procedure § 1281.12**

The time for commencement of arbitration may be tolled. Even if an arbitration agreement provides that arbitration proceedings must be commenced within a particular time, the time for commencing the arbitration is tolled by litigation of the dispute covered by the arbitration clause.

**E. Civil Code § 2782.8 – Indemnity (design professionals)**

Effective January 1, 2007 for all contracts with a public agency for design professional services, all provisions that purport to indemnify, including the cost to defend the public agency by a design professional against liability for claims against the public agency are unenforceable, “except for claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional.” Essentially, Type I indemnity clauses (that shift almost all liability to the indemnitor) are prohibited, and Type II (comparative liability) clauses should be utilized.

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

**A. *Golden State Boring & Pipe Jacking, Inc. v. Orange County Water District* (2006) 143 Cal.App.4th 718, 49 Cal.Rptr.3d 447**

This decision held that a subcontractor that refused to provide a payment and performance bond was properly substituted out pursuant to PCC § 4107. Although PCC § 4108 requires that a prime contractor in a written or published request for sub-bids specify the bond requirements, the court apparently did not require strict enforcement of section 4108 requirements in order to reach its decision.

**B. *North Bay Construction, Inc. v. City of Petaluma* (2006) 143 Cal.App.4th 552**

This decision held that a subcontractor cannot assert mechanic’s lien rights against a municipal property, despite the fact that the City of Petaluma leased property to a developer for construction of a sports complex. The Court strictly interpreted Civil Code § 3109, which provides that the mechanic’s lien remedy does not apply to public works projects, indicating that the subcontractor could have utilized the bonded stop notice procedures under Civil Code §§ 3159 and 3162. The court further held that the subcontractor could also not recover in quantum meruit.

**C. *Armenta Ex. Rel. City of Burbank v. Mueller Co.* (2006) 142 Cal.App.4th 636, 47 Cal.Rptr.3d 832**

The court held that passive beneficiaries may also be liable for false claims violations. This case involved a pipes, valves, and fittings distributor who had represented that its materials conformed to specific AWWA metals standards, which it did not. The company marketed its products to governmental agencies and to contractors employed by them. The court held that liability may be imposed under Government Code § 12651 on third persons who did not actually submit the false claims themselves.

**D. *Thomas v. Duggins Construction Company, Inc.* (2006) 139 Cal.App.4th 1105, 44 Cal.Rptr.3d 66**

In this decision, the court held that an intentional tortfeasor is not entitled to protection under Proposition 51. Proposition 51, adopted in 1986 (Civil Code. §§ 1431-1431.5), provides that

liability of a tortfeasor for non-economic damages shall be several, and not joint. Thus, a person with a small portion of liability (but one from whom money can be recovered), is not responsible for paying 100% of the non-economic damages. The court in this decision held that Proposition 51 did not apply to a judgment for fraud, and one who committed fraud could be held liable for 100% of the non-economic damages. The court opined that the voters of California did not intend to protect an intentional wrongdoer at the expense of those parties who were merely negligent.

**E. *Consulting Engineers and Land Surveyors of California, Inc. v. Professional Engineers in California Government* (2006) 140 Cal.App.4th 466, 44 Cal.Rptr.3d 687**

This decision affirmed that State agencies are free to assign work to private architects and engineers. California voters approved Proposition 35 in 2000 to allow the State to contract with private entities for architectural and engineering services for public works.

**F. *Michael v. Denbeste Transportation, Inc.* (2006) 137 Cal.App.4th 1082, 40 Cal.Rptr.3d 777**

The court held that the Privette Doctrine applies to independent contractors as well as to employees. The Privette Doctrine holds that an employee of a contractor may not sue the hirer of the contractor under the peculiar risk doctrine unless the hirer's exercise of retained control affirmatively contributed to the injuries. The court extended the Privette Doctrine to cover independent contractor/plaintiffs as well as employee/plaintiffs.

**G. *Sully-Miller Contracting Co. v. California Occupational Safety and Health Appeals Board* (2006) 138 Cal.App.4th 684, 41 Cal.Rptr.3d 742**

This decision held that both the primary and secondary employers are responsible for safety training under Title 8 of the California Code of Regulations. The injured worker was in a situation of dual employment. Under Labor Code § 6401.7, both the primary and secondary employers are responsible for safety training.

**H. *Tutor-Saliba Corporation v. Dennis J. Herrera* (2006) 136 Cal.App.4th 604, 39 Cal.Rptr.3d 21**

The court ruled that San Francisco City Attorney Herrera's after dinner speech criticizing Tutor-Saliba for bidding improprieties and false claims in processing change orders was protected speech under Civil Code § 47(a) as a "privileged publication or broadcast ... made in the proper discharge of an official duty." The court held that the alleged defamatory statements related to the policy-making that Herrera must necessarily perform as City Attorney, and were within the scope of his duties.

**I. *Violante v. Communities Southwest Development and Construction Co.* (2006) 138 Cal.App.4th 972, 41 Cal.Rptr.3d 673**

The court held in this decision that employees of a subcontractor who failed to pay prevailing wages on a public works project cannot state a cause of action against the general contractor for

either failure to pay prevailing wages, breach of contract, or unfair business practices.

**J. *Atkinson v. Elk Corporation of Texas* (2006) 142 Cal.App.4th 212, 48 Cal.Rptr.3d 247**

The court held that shingles purchased by a roofer to re-roof a home are considered “consumer products” under the Magnuson-Moss Act, which allows plaintiff to pursue consumer goods remedies. The court opined that if the products are purchased in order to add them to an existing dwelling, then the products are consumer products. If the projects are purchased as part of a larger real estate sales contract or a contract for a substantial addition to a home, they are not.

**K. *The Stonegate Homeowners Association v. T.A. Staben* (2006) 144 Cal.App.4th 740**

The court held that a contractor’s failure to provide a subcontractor with detailed instructions on how to perform the job, did not relieve the subcontractor of its duty to perform the job with skill and care. This case involved inadequate waterproofing and drainage work on retaining walls which were not installed correctly and produced wet soil and boggy conditions. The subcontractor maintained that it had not been given sufficient instructions in connection with waterproofing the walls, but the court held that the subcontractor’s work fell below the standard of care in the construction industry, and the failure to provide it with detailed instructions did not relieve it of liability.

**L. *Howard S. Wright Construction Co. v. BBIC Investors, LLC* (2006) 136 Cal.App.4th 228**

This decision held that a contract was considered to be “complete” because of an anticipatory breach of contract by the owner, so a mechanic’s lien filed by the contractor shortly after the anticipatory breach was not prematurely filed.

**M. *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 39 Cal.Rptr.3d 437**

The court in this decision addressing arbitrability held that CCP § 1281.2(c) permits the court to refuse to enforce an arbitration agreement if a party to the agreement is also a party to related litigation with a third party, creating a risk of conflicting rulings. The Federal Arbitration Act under the Construction Industry Rules of the American Arbitration Association does not deal with such considerations.

**V. ATTORNEY GENERAL OPINIONS**

**A. Factory-Built Modular Building Components  
Opinion Attorney General No. 05-405 (January 24, 2006)**

The Attorney General has opined that a school district may not, without advertising for bids, contract with another public agency to acquire factory-built modular building components for

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installation on a permanent foundation. The Local Agency Public Construction Act (PCC §§ 20100 to 20920) requires that school construction projects be awarded to the lowest responsible bidder. Section 20118 allows a school district to purchase or lease data processing equipment, materials, supplies, vehicles, and other personal property from cities, counties or other school districts without competitive bidding. However, the Attorney General opined that this Public Contract Code section does not apply to factory-built modular building components to be installed on a permanent foundation, which requires competitive bidding.

**B. Geology and Soils Reports  
Opinion Attorney General No. 05-1004 (February 28, 2006)**

The Attorney General has issued an opinion that geology and soils reports submitted by property owners to a building department in connection with an application for permit, are subject to inspection and copying by members of the public. California Public Records Act, Government Code § 6250 - 6276.48.

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](http://www.jaretlaw.com). 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

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