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January 31, 2011

**Re: 2011 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 2011 revisions to the California Public Contract Code (PCC) as a result of legislation enacted in 2010, other related California statutes, and recent court decisions concerning both public and private works contracts.

**I. PUBLIC CONTRACT CODE ADDITIONS**

**A. PCC §§2200-2208 – Iran Contracting Act of 2010**

This entire new chapter of the Public Contract Code has been added to severely restrict investment activities in Iran due to “its egregious violations of human rights, proliferation of nuclear weapons capabilities, and support for terrorism.” Under §2202.5, restrictions are placed on anyone providing goods, services, or credit in connection with the development of the Iranian energy sector of \$20 million or more. Under §2203, the threshold level is \$1 million or more in connection with all other investment activities. Penalties may be assessed under §2205 in an amount equal to the greater of \$250,000 or twice the amount of the contract, if a false certification was made under §2204.

**B. PCC §§3000-3010 – (Public School and Community College) Roofing Projects**

This also is an entirely new chapter of the PCC which addresses public school and community college roofing projects. The purpose of these new statutes is “to provide more oversight in bidding practices for school roofing projects ... and [address] the apparent lack of competitive bidding investigated and brought to light in the media.” In §3002, §3400(b) (specification by brand or trade name) is clarified and a material, product, thing, or service shall be considered “equal” if it is at least equal in quality, durability, design, and appearance, but not necessarily of an identical color; the item will perform the intended function at least equally well; and the item conforms substantially, even with deviations, to the detailed requirements contained in the specifications. The

statute states, however, that a substitute may be “unequal” if the resulting roof system would be substantially different than other equal or better systems in terms of performance and durability, but not merely different by virtue of the inclusion of proprietary products or a proprietary warranty.

In connection with these new statutes, disclosure of financial relationships under §3006 is now incumbent upon architects, engineers, or roofing consultants who provide professional services through the completion and signature of a required certification. An architect, contractor, engineer, materials manufacturer, roofing consultant, or vendor, who knowingly provides false information or fails to disclose a financial relationship pursuant to this section shall be liable to the district. This will be for any costs to the district that are reasonably attributable to excess or unnecessary costs, when compared to competing bids, incurred by the district as a result of the undisclosed financial relationship. In addition, any person who knowingly provides false information or fails to disclose a financial relationship in the disclosure, shall also be subject to a civil penalty in an amount of up to \$1,000.

However, under §3010, this article will not apply to any school district operating in accordance with §20113 or §20654 (which address emergency work).

**C. PCC §10111.2 – Electronic copy of contract documents  
PCC §20103.7 – Electronic copy of contract documents**

These new statutes require both state departments and local agencies to make electronic copies of project plans available at no charge to a contractor plan room upon request of a contractor plan service.

**D. PCC §10295.2 – Approval of vehicle acquisition request (Approval of State Contracts)**

This new statute requires that any vehicle acquisition request, purchase order, or new contract shall be approved by the Department of General Services for the purchase of a new vehicle only if the purchase is vital and mission critical for the agency or department.

**E. PCC § 20614 – Changes or additions by general manager; maximum amounts (Water Storage Districts)**

Identical to the changes and threshold amounts now allowed under PCC §20405 (see below), this new statute authorizes the Board of Supervisors and the Board of Directors of the District by ordinance, resolution, or Board order, to authorize the general manager or other District officer to order changes or additions to the work being performed under contracts.

**F. PCC §20998 – Changes or additions by the chief engineer; maximum amounts (Los Angeles County Flood Control District)**

The change order or additional work threshold amounts are increased to the same extent as

set forth in PCC §§20405 (see below) and 20614 with respect to any Board of Supervisors Ordinance, resolution, or Board order authorizing the chief engineer or other District officer to order changes or additions to the work performed under contracts.

## II. PUBLIC CONTRACT CODE REVISIONS

### A. PCC §10108 – Authorization of projects to be carried out by state agencies (State Contract Act)

This section has been amended to increase the threshold limit from \$400,000 to \$600,000 for work performed other than by the State agency. It further provides that any capital outlay project with a total value that does not exceed \$600,000 may be budgeted as a minor capital outlay project.

### B. PCC §10286.1 – State agency contracts with expatriate corporation or its subsidiaries prohibited (California Taxpayer and Shareholder Protection Act of 2003)

This statute has been amended to narrow the scope and definition of an “expatriate corporation”.

### C. PCC §10302 – Copies of solicitations furnished to vendors; posting of copy of solicitations (State Competitive Bidding and Other Acquisition Procedures)

This statute has been amended to require additional language in written solicitations furnished to vendors for contracts in excess of \$25,000 without the taking of bids, noting that it is unlawful to sell or use any article or product as a “loss leader” as defined in §17030 of the Business and Professions Code.

### D. PCC § 20133 – Alternative elective procedure for bidding on building construction projects in excess of two million five hundred thousand dollars; legislative intent; compliance fee; four step process for design-build projects; bonding; subcontractors; lists of subcontractors, bidders; and bid awards deemed public records; reporting (Contracting by Local Agencies - Counties)

This statute applying to counties and providing for alternate bidding procedures on projects in excess of \$2,500,000 by lowest responsible bidder, best value, or through design-build, added additional language requiring information of any instance in which the entity, or any of its members, owners, officers, or managing employees was, during the five years preceding submission of a bid pursuant to this section, determined by a court to have submitted, or legally admitted for purposes of a criminal plea to have submitted any claim to a public agency or official in violation of either the federal or California False Claims Act. Furthermore, information provided pursuant to this section is required to include the name and number of any case filed, the court in which it was filed, and the date on which it was filed.

The amendment to this section also now requires lists of subcontractors, bidders, and bid awards relating to the project within 14 days of the Award, with these documents deemed as public records and available for public inspection.

- E. PCC § 20175.2 – Alternative elective procedure for bidding on building construction projects in excess of one million dollars; legislative intent; compliance fee; four-step process for design-build projects; bonding; subcontractors; lists of subcontractors, bidders, and bid awards deemed public records; reporting (Contracting by Local Agencies - Cities)**

This section applicable to cities utilizing alternate procedures for bidding on construction projects in excess of \$1 million utilizing either the lowest responsible bidder, best value, or design-build contracts (except for transportation facilities, roads and bridges), added the same requirements as that added to PCC § 20133 (as noted above).

- F. PCC §20405 – Award of contract; bidder security; performance bond; modification of plans and specifications; changes or additions by road commissioner (Boards of Supervisors - County Bridges or Subways)**

This amended statute, concerning County bridges or subways, provides that the Board may authorize the road commissioner or a registered civil engineer under the direction of the County Director of Transportation, to execute changes or additions to the work for any contract made pursuant to this article if the amount does not exceed: \$5,000 on a \$50,000 project; 10% of any project between \$50,000-250,000; and on projects of \$250,000 or more, the amount of change or addition shall not exceed \$25,000 plus 5% of the amount of the cost of the original contract that is in excess of \$250,000, but in no event shall the change or addition exceed \$210,000.

- G. PCC §20688.6 – Design-build projects (Redevelopment Agencies)**

Last year's new code section applying to redevelopment agencies permitted an agency to use alternate procedures for bidding on projects in excess of \$1 million and awarding the project to the lowest responsible bidder or by best value which may include design-build. The statute authorizes an agency to develop as a building site "any real property owned or acquired by it" under §33421 of the California Health and Safety Code, and also "located inside or contiguous to the project area" under §33445 of the Health and Safety Code. This new amendment permits the zone to increase under Health and Safety Code §33445.1 to land "located outside and not contiguous to the project area, but ... located within the community."

- H. PCC §22037 – Notice inviting formal bids; information; publication (Public Projects – Uniform Construction Cost Accounting Procedures)**

This statute is amended to include electronic notification by public entities for notices inviting formal bids for contracts. It requires agencies to submit notification by fax or electronic mail, if available, to trade journals at least 15 calendar days before the opening date of bids.

### III. OTHER RELEVANT ADDED OR AMENDED CALIFORNIA STATUTES – PRIVATE WORKS

#### A. Civil Code §3084 – Claim of lien or mechanic’s lien; contents; recordation; service; failure to service

##### Civil Code §3146 – Lis pendens; notice

These Civil Code sections addressing mechanic’s liens have been substantially amended, effective January 1, 2011. Civil Code §3084 requires service of a mechanic’s lien on the owner of the property at the time it is recorded. If, however, the owner cannot be served with the mechanic’s lien, then the original contractor or lender can be served instead. The purpose is to provide the owner with notice that a mechanic’s lien has just been recorded and provide the owner with an opportunity to quickly address the situation. A proof of service affidavit is also required. Furthermore, the form of the mechanic’s lien document itself is also amended to include a “Notice of Mechanic’s Lien” which provides a brief explanation of the nature of the mechanic’s lien and what the property owner may do to address the situation.

Under Civil Code §3146, there is a requirement that a “Notice of Pending Action” be recorded within 20 days after the filing of the mechanic’s lien foreclosure action. This Notice of Pending Action is intended to provide notice to potential property purchasers, lenders, and others, that a lawsuit has been filed and that the property may be foreclosed upon.

#### B. CCP §325 – Adverse possession; claim of title not founded upon written instrument; judgment, or decree; possession and occupancy of land; payment of taxes

Existing law requires an individual claiming title in an action for adverse possession to establish that he/she has continuously occupied the land for five years and paid all taxes that have been levied and assessed. The amendment to this code section now requires the timely payment of those taxes and further provide that payment shall be established by certified records of the county tax collector.

#### C. Bus. & Prof. Code §7127 (Contractors’ Workers’ Compensation Insurance)

This new statute will enable CSLB to issue a “stop work” order to any licensed or unlicensed contractor who fails to carry workers’ compensation insurance coverage for all of his or her employees. Existing law requires private employers to secure the payment of compensation by obtaining and maintaining workers’ compensation insurance or to self-insure as an individual employer or as one employer in a group of employers. The Contractors’ State License Law requires every licensed contractor to have on file at all times with the Board a current and valid certificate of Workers’ Compensation Insurance or Certification of Self-Insurance, or a statement certifying that

he or she has no employees and is not required to obtain or maintain compensation insurance coverage. This new statute authorizes the registrar of contractors to issue a stop order to any unlicensed contractor who has failed to secure workers' compensation insurance coverage for his or her employees. The statute would make a failure to comply with the stop order a crime, thereby imposing a state-mandated local program. The potential penalty is a misdemeanor punishable by imprisonment in the county jail not exceeding 60 days or by a fine not exceeding \$10,000, or both.

**D. Labor Code §3722 – Penalty assessment order against uninsured employer (Workers' Compensation)**

This amended statute increases the potential penalty for failure to have a workers' compensation policy from \$1,000 to \$1,500 for each employee not covered. Fines are administered by the Director of the Department of Industrial Relations.

**E. Corporations Code §13401 – Definitions (Professional Corporations)**

**Business & Professions Code §§ 7025, 7028.5, 7029, 7065, 7065.1, 7065.5, 7068, 7068.1, 7068.2, 7069, 7071, 7071.8, 7071.9, 7071.11, 7071.17, 7072.5, 7075.1, 7076, 7076.2, 7085.6, 7090, 7090.1, 7096, 7121, 7121.1, 7121.5, 7121.6, 7122, 7122.1, 7122.2, 7122.5, 7137, 7138, 7152, 7159 and 7159.10 and 7071.6.5 and 7071.19 added; Corporations Code Section 22037 amended**

Effective January 1, 2012, a limited liability company (LLC) may now be licensed as a contractor under Contractors' State License Law. Although LLCs have been authorized under California since 1994, the Contractors' State License Board has now permitted LLCs to hold licenses. The LLC would be required to maintain liability insurance of between \$1 million and \$5 million and post \$100,000 surety bond in addition to the \$12,500 bond already required of all licensees. Past opposition to expanding the law to LLCs was the concern that an LLC could leave its construction employees without recourse for non-payment of wages. The LLC will be able to qualify for a license by examination of either a responsible managing officer, manager, member, or employee. Existing license numbers may also be transferred to an LLC under certain conditions which will enable existing licensees to take advantage of the LLC form of doing business. This statute takes effect January 1, 2011, and requires the Contractors' State License Board to begin processing applications for licenses from LLCs no later than January 1, 2012. However, the License Board is expected to begin processing applications prior to that date.

**F. CCP §580e – Deficiency judgment following short sale with consent of trustee or mortgage prohibited; exception for fraud; non-application when mortgagor is corporation or political subdivision**

Starting January 1, 2011, a seller's first trust deed lender cannot obtain a deficiency judgment against the seller after a short sale. Providing written consent to a short sale shall obligate the first trust deed lender to accept the sale's proceeds as full payment and discharge of the remaining amount owed on the loan. This law applies to first trust deeds secured by one to four residential units, but does not limit the lender from seeking damages for fraud or waste by the borrower.

#### IV. RELEVANT CALIFORNIA COURT DECISIONS RELATED TO PUBLIC WORKS CONTRACTS

##### A. California Public Entity Defenses

1. ***Dillingham-Ray Wilson v. City of Los Angeles* (2 Dist. 2010) 182 Cal.App.4th 1396, modified on denial of rehearing, review denied.**

This decision reversed a trial court decision and held that a public works contractor on a large wastewater treatment plant could pursue a modified total cost theory of proving damages for a city's breach of contract, if the contractor was not required by contract to document its actual costs on change orders as a condition of payment. The decision further held that a public works contractor was statutorily prohibited under Civil Code §3300 from seeking to recover anything more for change orders performed without a price than it was entitled to receive by contract. Thus the benefit the contractor would have received for change orders, if the city performed, was the measure of damages.

##### B. Bidding

1. ***Great West Contractors, Inc. v. Irvine Unified School Dist.* (4 Dist. 2010) 187 Cal.App.4th 1425, opinion supplemental on denial of rehearing.**

This decision held that a school district's rejection of a low bid on a school reconstruction project by the low bidder due to failure to disclose that certain associates had operated under other license numbers, was in legal effect for non-responsibility rather than nonresponsiveness. The issue of whether failure was due to inadvertence or was deliberate was a question of some complexity necessarily requiring due process and some administrative judgment. The court held that the answer was responsible on the face of the bid and required the District to go outside the bidding process to determine that the answer was false, and the problem was better suited to a hearing, fact finding, and administrative judgment, rather than summary rejection. There was great potential for an adverse impact on the low bidder's professional or business reputation, and the rejection of a bid for purportedly not disclosing associated licenses was particularly vulnerable to abuse. "A determination of non-responsibility entitles the bidder to a hearing where certain minimal elements of due process must be afforded before the contract can be awarded to the next-best bidder."

2. ***Los Angeles Unified School Dist. v. Great American Ins. Co.* (Cal. 2010) 49 Cal.4th 739**

In this decision concerning a public contractor's request for additional compensation in connection with a remedial work contract, the California Supreme Court held that a contractor on a public works contract may be entitled to relief for a public entity's nondisclosure in the following limited circumstances: (1) the contractor submitted its bid or undertook to perform without material information that affected performance costs; (2) the public entity was in possession of the information and was aware the contractor had no knowledge of, nor any reason to obtain, such information; (3) any contract specifications or other information furnished by the public entity to the

contractor misled the contractor or did not put it on notice to inquire; and (4) the public entity failed to provide the relevant information. The circumstances affecting recovery may include, but are not limited to, positive warranties or disclaimers made by either party, the information provided by the plans and specifications and related documents, the difficulty of detecting the condition in question, any time constraints the public entity imposed on proposed bidders, and any unwarranted assumptions made by the contractor. The public entity may not be held liable for failing to disclose information a reasonable contractor in like circumstances would or should have discovered on its own, but may be found liable when the totality of the circumstances is such that the public entity knows, or has reason to know, a responsible contractor acting diligently would be unlikely to discover the condition that materially increased the cost of performance.

**3. *Schram Const., Inc. v. Regents of the University of California* (1 Dist. 2010) 187 Cal.App.4th 1040, modified on denial of rehearing.**

This decision held that a state university failed to disclose bid package selection criteria in violation of the statute requiring the university to adopt and publish procedures and required criteria for competitive bidding under the “best value contractor” method. The University invited bids on six projects in “packages” as well as separately, and the university did not inform prospective bidders of the purported advantage of using fewer contractors to perform the work, and the purported advantage of using fewer contractors was the primary criterion on which the University relied in selecting the bid package. The Court further determined that the University’s selection procedure “permitted the University to manipulate the bid selection in favor of or against particular bidders.”

**C. Payment Disputes**

**1. *Martin Bros. Const., Inc. v. Thompson Pacific Const., Inc.* (3d Dist. 2009, as modified December 14, 2009) 179 Cal.App.4th 1401.**

This decision held that a general contractor who withheld payment for disputed extra work performed by its subcontractor did not violate the prompt payment statute. Martin Brothers Construction, Inc., a subcontractor employed to work on a public works project, sued the general contractor, Thompson Pacific Construction, Inc. and its surety and bonding companies for monies owed at the end of the project, including penalties, interest and attorney fees for alleged late progress and retention payments. By the time of trial, however, Thompson Pacific had paid Martin Brothers all amounts owed except for the disputed penalties, interest and attorney fees and the matter proceeded to a court trial solely on those issues. The trial court concluded Thompson Pacific had not violated the applicable prompt payment statutes and entered judgment for Thompson Pacific. The court awarded defendants \$150,000 in attorney fees. The Court of Appeal affirmed the judgment. Although PCC §7107 allows for a penalty of 2% per month interest for an improperly withheld amount, subdivision (e) allows the general contractor to withhold from a subcontractor its portion of the retention proceeds if a bona fide dispute exists. The court held that §7107(e) applies to disputes over change order work, specifically protecting the general contractor where there is a good faith dispute. Further in this decision with regard to progress payments under PCC §7108.5, to the extent that the subcontractor agreed to a subcontract agreement which provided that payment is not due until subcontractor has furnished all applicable administrative documentation required by



the contract documents in applicable releases pursuant to Civil Code §3262, the general contractor did not violate the progress payment requirements insofar as the statute authorizes contractual variation from the statute's payment requirements.

## V. RELEVANT CALIFORNIA AND FEDERAL COURT DECISIONS RELATED TO PRIVATE WORKS CONTRACTS

### A. Licensure

#### 1. *UDC-Universal Development v. CH2M Hill* (6<sup>th</sup> Dist. 2010) 181 Cal.App.4th 10

This decision held that an unlicensed contractor may maintain an action against an engineer for indemnity. A homeowners' association had employed the developer, UDC, in connection with a residential condominium complex. UDC employed CH2M Hill to provide engineering and environmental planning services. Subsequently, the homeowners' association filed an action against UDC seeking damages for soil instability, erosion, settling, and drainage problems. UDC cross-complained against CH2M Hill, asserting various causes of action for equitable, comparative, and express contractual indemnity. CH2M Hill filed a summary judgment motion asserting that UDC was not a properly licensed contractor and therefore had no standing. The superior court denied the motion that argued that Bus. & Prof. Code §7031(a) precluded actions by unlicensed contractors to recover compensation, holding that the cause of action did not seek compensation for construction work beyond the scope of Bus. & Prof. Code §7031, but rather was for indemnity and therefore not within the scope of §7031.

#### 2. *Esaul v. Cesar's Exterior Designs, Inc.* (4<sup>th</sup> Dist. 2010) 183 Cal.App.4th 656

This is another in a string of recent decisions denying an unlicensed contractor recovery and requiring disgorgement of sums paid under Bus. & Prof. Code §7031(b). A homeowner had employed a landscaping contractor to perform landscaping services at a newly built home and after working for approximately five months, the landscaper stopped work due to non-payment. The homeowner sought to recover \$57,500 from the contractor for monies paid, despite the fact that the homeowner knew the landscaper was unlicensed at the time the work commenced. (The landscaper subsequently became licensed during the course of construction.) The court determined that §7031(a) was a complete defense for claims for any and all compensation made by the unlicensed contractor and the homeowner was entitled to recover all payments made.

#### 3. *In re Sabban* (U.S. Court of Appeals 9<sup>th</sup> Cir. 2010) 600 F.3d 1219

This decision is yet another case involving disgorgement of contractor compensation under Bus. & Prof. Code §7031(b). A homeowner entered into remodeling contract with a contractor who had falsely represented that he was licensed. The homeowner obtained a disgorgement award of \$123,000 and the contractor then filed for bankruptcy. The homeowner subsequently filed an action to determine whether the award was dischargeable in bankruptcy, and the court determined that it

indeed was and the bankruptcy code “fraud exception of §523(a)(2)(A), however, does not cover this case.”

## **B. Insurance**

1. ***Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co.* (1<sup>st</sup> Dist. 2010) 182 Cal.App.4th 23**

This decision held that an insurer’s subrogation action against a subcontractor based on a contractual indemnification claim is not barred by the good faith settlement in the underlying litigation. That litigation concerned a bodily injury claim on a construction site.

2. ***Clarendon America Ins. Co. v. Starnet Ins. Co.* (4<sup>th</sup> Dist. 2010) 186 Cal.App.4th 1397**

This decision held that an insurance general liability carrier had a duty to defend upon initiation of proceedings under the Calderon Act, Civil Code §1375, *et seq.*, which requires common interest development associations to give notice to a builder of construction or design defects before instituting a lawsuit. The court determined that the provision in a commercial general liability (CGL) insurance policy requiring the insurer to “defend the insured against any ‘suit’ seeking ... damages” to which the insurance applies includes the duty to defend the insured in proceedings under the Calderon Act. “Extending the duty to defend to the Calderon Process is therefore consistent with a hypothetical insured’s reasonable expectations.”

## **C. Liability**

1. ***Tverberg v. Fillner Construction, Inc.* (Cal. 2010) 49 Cal.4th 518**

This California Supreme Court decision held that the Doctrine of Peculiar Risk does not apply in favor of an injured independent contractor hired by a sub-subcontractor. The court held that an independent contractor, unlike any other employee, has authority to determine how the work is to be performed and has a responsibility to see that it is performed in a safe manner. A hired independent contractor who suffers injuries from risks inherent in the work, after having assumed responsibility for all safety precautions, is not a “hapless victim” of someone else’s improper conduct. Accordingly, the Doctrine of Peculiar Risk does not apply when an injured independent contractor hired by a sub-subcontractor seeks to hold the general contractor vicariously liable for injuries over which the independent contractor had, through the chain of delegation, been granted control.

## **D. Payment Disputes**

1. ***Martin Bros. Const., Inc. v. Thompson Pacific Const., Inc.* (3d Dist. 2009, as modified December 14, 2009) 178 Cal.App.4th 1401.**

(Repeated from Public Works cases above.) This decision held that a general contractor who withheld payment for disputed extra work performed by its subcontractor did not violate the prompt payment statute. Martin Brothers Construction, Inc., a subcontractor employed to work on a public

works project, sued the general contractor. Thompson Pacific Construction, Inc. and its surety and bonding companies for monies owed at the end of the project, including penalties, interest and attorney fees for alleged late progress and retention payments. By the time of trial, however, Thompson Pacific had paid Martin Brothers all amounts owed except for the disputed penalties, interest and attorney fees and the matter proceeded to a court trial solely on those issues. The trial court concluded Thompson Pacific had not violated the applicable prompt payment statutes and entered judgment for Thompson Pacific. The court awarded defendants \$150,000 in attorney fees. The Court of Appeal affirmed the judgment. Although PCC §7107 allows for a penalty of 2% per month interest for an improperly withheld amount, subdivision (e) allows the general contractor to withhold from a subcontractor its portion of the retention proceeds if a bona fide dispute exists. The court held that §7107(e) applies to disputes over change order work, specifically protecting the general contractor where there is a good faith dispute. Further in this decision with regard to progress payments under PCC §7108.5, to the extent that the subcontractor agreed to a subcontract agreement which provided that payment is not due until subcontractor has furnished all applicable administrative documentation required by the contract documents in applicable releases pursuant to Civil Code §3262, the general contractor did not violate the progress payment requirements insofar as the statute authorizes contractual variation from the statute's payment requirements.

**2. *Ted Jacob Engineering Group, Inc. v. The Ratcliff Architects* (1<sup>st</sup> Dist. 2010) 187 Cal.App.4th 945**

This decision held that a contractor properly continued to work while reserving the right to sue for additional compensation. Over \$1 million of additional compensation had been sought. The Ratcliff Architects provided design services under contract with the County of San Mateo for a hospital renovation and expansion project. Ratcliff subcontracted with Ted Jacob Engineering Group, Inc. (TJEG) for mechanical and electrical engineering services. The scope of the project increased over time. TJEG submitted claims for additional fees based on the increased basic scope of work and for additional services it alleged it was directed to perform by Ratcliff. Ratcliff paid some, but not all, of TJEG's claims. TJEG sued Ratcliff and prevailed in a jury trial. The appellate court held that in the absence of a negotiated agreement upon price, and assuming no contrary contractual provision applies, a subcontractor may still pursue a claim seeking a judicial determination of additional fees when it performs work demanded of it by the general contractor constituting a material change in the scope of work defined under the contract. If good faith negotiation between the parties fails to result in agreement on price, the subcontractor is not required to elect between abandoning the job and forfeiting its right of recovery if it elects to perform the required work.

**3. *Hinerfeld-Ward, Inc. v. Lipian* (2<sup>nd</sup> Dist. 2010) 188 Cal.App.4th 86**

This decision held that an oral contract for home improvements is voidable, not void. The contractor was awarded statutory interest and attorney's fees against homeowners who improperly withheld a progress payment. This case involved a replacement general contractor who took over the project after it was approximately 30% complete and operated under a memorandum of understanding rather than a home improvement contract. This fact specific decision concerned a project heavily supervised by an architect and sophisticated and highly educated homeowners

involving the concept of unjust enrichment and claims of nearly \$1 million. The court affirmed a jury decision in the contractor's favor as to the underlying amount owed and a violation of Civil Code §3260.1 with respect to both 2% interest and attorney's fees. The court held that "the legislative history of section 3260.1 demonstrates a legislative intent that both the monthly two percent charge and reasonable attorney fees are available to a party prevailing on an action under that statute."

**4. *Yassin v. Solis* (2<sup>nd</sup> Dist. 2010) 184 Cal.App.4th 524**

This decision involved a cross-complaint by homeowners for breach of contract under a home improvement contract. The trial court awarded the homeowners damages and attorney's fees under Civil Code §3260(g). The trial court had improperly concluded that at least \$7,500 of the final payment was a "retention amount" covered by §3260. The Appellate Court determined to the contrary, that the "final payment due at the completion of the work and issuance of a certificate of occupancy was not a retention payment contemplated by section 3260" and therefore §3260 with the 2% interest per month and attorney's fees were not applicable.

**VI. CONCLUSION**

We hope sections or portions of this information will be 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. Best regards for the New Year!

Sincerely,



PHILLIP A. JARET

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