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January 31, 2001

Re: 2001 California Public Contract Code Revisions

Dear Clients and Colleagues:

You may wish to 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. Also noted are related Government, Education and Labor Code revisions and new case law.

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 issue which may arise. Be that as it may, please note the following:

### **I. Public Contract Code Revisions**

**PCC §6106.5 — State agencies; contractors; solicitations and contracts; securities eligible for investment; escrow agreement form.** Now, retentions for architectural, engineering, and construction project management services shall include a provision allowing the retention to be placed in escrow with interest payable to the provider. This arrangement is similar to the one in place for the last several years with respect to prime contractors. A copy of this new statute is enclosed herewith.

**PCC §7103 — Contracts by State entities for public works in excess of \$5,000, necessity of payment bonds by contractors.** This Code Section has been modified to do away with the existing sliding scale formula for the payment bond based on the size of the contract. For example, previously the amount of the payment bond for a \$5 million contract was 100% of the contract price, but a payment bond for a \$6 million contract was 50% of the contract price. Section 3248 of the Civil Code has been amended to remove this anomaly and now requires that the payment bond be 100% of the contract price in all instances. Under the amended PCC §7103, the new provisions also apply to State contracts. A copy of this amended statute is enclosed herewith.

**PCC §10126 — Approval of estimate of cost with alternatives contemplating additions to or deletions from base bid; conditions.** This statute has been substantially amended and sets forth a number of specific requirements that must be met when a bid solicitation calls for alternatives. Determining the lowest bid is problematic when apples are not being compared to apples. This statute attempts to set forth a methodology to follow. Public agencies are given four alternative ways to deal with alternatives:

1. The lowest responsible bidder shall be the one with the lowest bid price on the base contract without taking alternatives into consideration;
2. The lowest bid shall be the lowest total price for the base contract plus all alternatives;
3. Alternatives will be selected according to a list of priorities published in the Invitation to Bid;
4. The lowest bid shall be determined after a "blind" selection of alternatives so that the identities of the bidders are unknown to the persons who select the alternatives.

Note that if the agency fails to specify the methodology for identifying the low bidder, the low bidder will be the contractor who submits the lowest price on the base contract. A copy of this amended statute is enclosed herewith.

**PCC §10129 — Bids limited to one concern or specific brand or trade name.** This statute has been added and addresses the problem of a particular brand or trade name specified in the bid documents. The statute suggests that two brands or trade names of comparable quality or utility be specified, however, if only one will do, the awarding body may list only one. Specifications shall provide a time period for submission of data substantiating a request for a substitution of "an equal" item. However, if no time period is specified, this information may be submitted anytime within 35 days after the award of contract (which is consistent with prior law). A copy of this new statute is enclosed herewith.

**PCC §10295 — Approval of contracts for acquisition of goods, textbooks, or services; exceptions.** Community colleges are now exempted from approval requirements for State contracts, effective January 1, 2001. Section 10295 of the Public Contract Code otherwise provides that all contracts, including construction contracts, entered into by any State agency are to be transmitted with all papers, estimates, and recommendations to the Department of General Services, to become effective when and if approved by that Department.

**PCC §10301 — Contracts and purchases; amounts; award to lowest bidder; sales tax.** This statute has been substantially modified and, except in cases where the awarding body specified that only one article will properly meet the needs of the agency, contracts for the acquisition or lease

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of goods in an amount of \$25,000, or a higher amount as established by the director (not including sales tax), shall be made or entered into with the lowest responsible bidder meeting specifications. A copy of this statute is enclosed herewith.

**PCC §10302 — Copies of solicitations furnished to vendors; posting of copy of solicitation; public record.** This statute has been substantially modified and provides for advertising and solicitation of bids as per §10301 above. A copy of this statute is enclosed herewith.

**PCC §10335.5 — Consulting services contract; definition.** This is a new statute which defines what a consulting services contract is and what is included or exempt from the requirements of the advertising and bidding requirements. A copy of this statute is enclosed herewith.

**PCC §10345 — Procedure when contract not awarded to low bidder; notice.** This statute has been substantially modified and provides for notice to the low bidder not awarded the contract, a stay on the award of the contract, and procedures related to any bid protest. A copy of this statute is enclosed herewith.

**PCC §20103.8 — Additive and deductive items.** This statute is similar to PCC §10126 and allows a local agency to require a bid for public works contract to include prices for items that may be added to, or deducted from, the scope of work. The bid solicitation shall specify which of the following methods will be used to determine the lowest bid. A copy of this statute with this criteria is enclosed herewith.

**PCC §20133 — Alternate bidding procedures; building construction projects in excess of \$10,000,000 in specified counties; legislative intent; four-step process in design-build projects.** This is a new Public Contract Code section which deals with projects in excess of \$10 million to be built in the counties of Alameda, Contra Costa, Sacramento, Santa Clara, Solano, Sonoma, and Tulare. It further provides for design-build on projects in excess of \$20 million. Should you build a project of that large size, please review the enclosed five page statute in detail.

## **II. Other Statutory Changes**

**Education Code §17307.5 — Construction work on public schools; issuance of stop work orders; liability.** **Education Code §81133.5 — Construction work on community colleges; issuance of stop work orders; liability.** **Health and Safety Code §16017.5 — Construction work on essential service facilities; issuance of stop work orders; liability.** On school construction, the State may stop projects it believes violate seismic safety requirements. The Department of General Services is authorized to issue a stop work order when a public school, a community college, or an essential services facility is not being constructed in accordance with seismic safety requirements. The public agency responsible for the work shall not be held liable to the prime contractor for damages for delay, except to the extent that an error or omission by the public agency is the basis for the issuance of the stop work order. Copies of these statutes are enclosed herewith.

**Education Code §17316 — Contracts with structural engineers or architects; required provision making plans, specifications, and estimates the property of the school district.** School districts may now be required to pay an outside architect or structural engineer to reuse their plans and specifications on another project. Before the enactment of this amendment to §17316 of the Education Code, the plans and specifications prepared for a school district would belong to the school district. Although the school district may use the plans and specifications for repair, maintenance, modernization, additions and alignments, the architect or structural engineer retains all common law, statutory and copyright and other contractual rights. If the district proposes to reuse the plans, then the design professional contract shall specify the terms and conditions for reuse. A copy of this statute is enclosed herewith.

**Government Code §4451 — Buildings and facilities to which this chapter is applicable; standards and specifications; exceptions. Government Code §4454 — Approval of plans and specifications; filing fees; consultation. Government Code §4459 — Accessibility requirements; use of fees.** These various Government Code Sections expand handicap access requirements for certain public buildings. Copies of these code sections are attached.

**California Constitution Article XXII, Government Code §§4529.10-4529.20 (Proposition 35).** Private architects and engineers may now work on public projects without previous restrictions as a result of Proposition 35, which was adopted on November 11, 2000. The State of California and all other governmental entities are allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement. This will include architectural, landscape architectural, environmental, engineering, land surveying, and construction project management services.

**Labor Code §1727 — Withholding to satisfy wage and penalty assessments.** The Legislature has adopted hearing procedures for determining violations of wage and hour requirements on public projects. A copy of this code section is enclosed herewith.

### **III. New Cases**

You should also be aware of several important construction-related Court decisions which came down last year. Perhaps the most significant is Aas v. Superior Court (2000) 101 Cal.Rptr.2d 718, which held that plaintiffs in construction defect lawsuits may not recover under a negligence cause of action for monetary damages for cost of repair or diminished value attributable to construction defects that have not actually caused property damage. Thus, although a building may have been constructed not in accordance with the plans and specifications and/or in a non-code compliant fashion, unless these "defects" have resulted in actual damage (such as water intrusion, an electrical fire, cracking of walls, or the like), the claim is not actionable. However, regular contract remedies remain. The upshot of this, from a public entity standpoint, is that a full forensic investigation should be conducted on all of your new structures within the four year breach of contract statute of limitation, rather than relying on the 10 year statute of limitation for latent defects, which may never become actionable, in the absence of physical damages.

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Another case of significance is Walt Rankin & Associates, Inc. v. City of Murrieta (4<sup>th</sup> Dist. 2000) 84 Cal.App.4th 605, which held that a city can be held liable to a subcontractor for failure to investigate the financial condition of a surety on a payment bond. When the surety company became insolvent, leaving the contractor without recourse, the Court of Appeal held that the City had a mandatory duty to investigate the qualifications of the surety, and the City's failure to investigate the solvency of the surety was the proximate cause of the subcontractor's loss. If you do not already do so as a matter of procedure, I would suggest that you check the Best's rating and not approve any surety company with a rating less than an A-.

Another important decision is Kajima/Ray Wilson v. L.A. Co. Metro Transportation Authority (2000) 23 Cal.4th 305, which held that bid preparation costs, but not lost profits, are recoverable against a public entity for the mis-award of a public contract. Thus, if you make what ultimately proves to be a bad decision in not awarding a contract to the lowest responsible bidder, your measure of damages will be capped at the bid preparation cost, rather than potential lost profits which could be considerably more on a sizable contract.

Hopefully, this information will be of some value to you. If you need further information, please do not hesitate to call.

Sincerely,



PHILLIA A. JARET

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Enclosures

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