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Re: 2004 California Public Contract Code Additions and Revisions, and Recent Public Contract Court Decisions

Dear Clients and Colleagues:

Please take note of the following 2004 additions and revisions to the California Public Contract Code as a result of legislation enacted in 2003. There are some entirely new code provisions, as well as material changes or revisions to existing code.

In this courtesy letter, we 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. However, overall these significant changes seem particularly relevant. We have also provided you with some new or amended Education, Civil, Labor, and Code of Civil Procedure statutes; new Attorney General's opinions; and recent case law developments.

I. PUBLIC CONTRACT CODE ADDITIONS

A. PCC § 5110 — Contracts for construction, alteration, repair or improvement of structures, buildings or roads; invalid contracts; defects in bidding process; conditions for payment to contractor

This new code section is intended to pay a contractor the reasonable cost, specifically excluding profit, of labor, equipment, materials, and services that were rendered under a contract that was competitively bid, challenged, but subsequently determined to be invalid, in order to avoid unjust enrichment of the public entity, and an unlawful taking of the contractor's property.

B. PCC § 6611 — Negotiation process to procure goods, services, information technology and telecommunications; authority of Department; procedures and guidelines

This new code section (operative until July 1, 2006) allows the Department of General Services to avoid the competitive bidding process relative to contracts for goods, services, information technology and telecommunications through a negotiation process, under a variety of conditions. These conditions are largely centered around business needs or purposes, and appear to effectively bypass the competitive bidding process.

C. PCC § 10115.9 — Certification as a disabled veteran business enterprise

This new code section, under the Minority and Women Business Participation Goals for State Contracts section, allows for the certification of a limited liability company as a disabled veteran business enterprise, provided that the limited liability company is wholly owned by one or more disabled veterans.

D. PCC § 10286, et seq. — California Taxpayer and Shareholder Protection Act of 2003

These new sections of the PCC (10286 and 102861.1) are directed toward expatriated United States companies that have moved in name and on paper only, to a tax haven country and have no substantial business activities in the country of reincorporation. The purpose of the statute is to safeguard the rights of shareholders, protect the state's pension funds and other state investments, ensure a fair business climate, and guarantee that similarly situated companies doing business in California pay their fair share of taxes.

The statute applies to a "state agency" which means every state office, department, division, bureau, board, commission, and a California State University, but does not include the University of California, the Legislature, the courts, or any agency in the judicial branch of government. On or after January 1, 2004, all state agencies shall, as a condition of contract, require any vendor that is offered a contract to do business with the state to submit a declaration stating that the vendor is eligible to contract with the state pursuant to this section. This will affect all contracts entered into on or after April 1, 2004, and will result in a misdemeanor for knowingly made false statements. The statute addresses and defines at length what is regarded as an "expatriate corporation."

E. PCC § 10290.3 — Reverse auctions

This new code section, under the sections dealing with state acquisition of goods and services, allows for the utilization of "reverse auctions" for the acquisition of goods and services. A "reverse auction" is defined as a "competitive online solicitation process for fungible goods or services in which vendors compete against each other online in real time in an open and interactive environment." Note, however, that the reverse auction process may not be used for bidding on

public works construction contracts.

F. PCC § 12101.7 — Reverse auctions; exclusion from sealed bidding provisions

Consistent with PCC § 10290.3, reverse auctions may also be utilized for the acquisition of information technology. For purposes of this section, “reverse auction” means a competitor online solicitation process for a fungible information technology in which vendors compete each other online in real time in an open and interactive environment.

G. PCC § 10295.1 — Contracts for purchase of tangible personal property; California seller’s permit or certificate of registration requirement; compelling state interest exemption; definitions

This new code section requires that a state department or agency may not contract for the purchase of tangible personal property from a vendor, contractor, or an affiliate of a vendor or contractor, unless that vendor, contractor and all of its affiliates that make sales for delivery into California are holders of a California seller’s permit issued pursuant to the Revenue and Taxation Code.

After January 1, 2004, each vendor, contractor, or affiliate of a vendor or contractor that is offered a contract to do business with a state department or state agency shall submit to that state department or agency a copy of that retailer’s seller’s permit or certificate of registration. A state agency or department may be exempt from the provision of this section, provided that it meets a compelling state interest, such as ensuring the provision of essential services, public health, safety and welfare, or responding to an emergency.

H. PCC §10295.3 — Contracts for acquisition of goods or services between state agency and contractor; discrimination against employees with domestic partners; definitions; application of section; conditions; confidentiality; waiver of section requirements; violation of section

This new statute prohibits any state agency from entering into any contract for the acquisition of goods or services in the amount of \$100,000 or more with a contractor who, in the provision of benefits, discriminates between employees with spouses and employees with domestic partners, or discriminates between the domestic partners and spouses of those employees. Contractors must certify their compliance.

I. PCC §10326.1 — Requirements for persons operating 15-passenger vans

This new code section under the competitive bidding and other acquisition procedures requires that a campus or a facility of a California community college or a campus or a facility of the California State University, that owns, leases, or otherwise has possession or control of a 15-passenger van, may not on or after January 1, 2005 authorize the operation of that van for the purpose of transporting passengers unless the person driving or otherwise operating that van has both a valid class B driver’s license, and an endorsement for operating a passenger transportation

vehicle issued by the DMV.

The Legislature was concerned with the safety of these vehicles which result in a greater number of rollover crashes than other passenger vehicles, and has therefore required the holding of a commercial driver's license to operate them.

J. PCC §§ 10510.4; 10510.5; 10510.6; 10510.7; 10510.8; and 10510.9 — Contracts with private architects, engineering, environmental, land surveying, and construction management firms

These new code sections apply only to the University of California competitive bidding process. They address the selection by the University of California for professional services of private architectural, landscape, architectural, engineering, environmental, land surveying, real property development services, or construction project management firms, and address issues of demonstrated competence and professional qualifications required. The procedures appear to be directed toward prohibiting practices that might result in unlawful activity, including, but not limited to, rebates, kickbacks, or other unlawful consideration, and prohibit University employees from participating in the selection process when those employees have a relationship with a person or business entity seeking a contract under these sections. For each proposed project, the University is required to conduct discussions with no less than three firms, and only applies to contracts with a value exceeding \$100,000.

K. PCC §§ 10830; 10831; 10832; 10833 — California State University Contract Law: Conflict of Interest

These new code sections, applicable only to the California State University system, address various potential conflicts of interest.

Section 10830 prohibits the awarding of consulting service contracts on or after July 1, 2003, for the provision of services, the 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. However, this section does not apply to a consulting services contract when it amounts to no more than 10% of the total monetary value of the consulting services contract.

Section 10831 provides that no officer or employee of the CSU shall engage in any employment, activity, or enterprise for which the officer or employee receives compensation or in which the officer or employee has a financial interest in that employment, activity, or enterprise is sponsored or funded, or sponsored and funded, by any state university department through or by a state university contract, unless the employment, activity, or enterprise is within the course and scope of the officer's or employee's regular CSU employment. It further prohibits the officer or employee from contracting on his or her own individual behalf as an independent contractor with any CSU department to provide services or goods. However, this section does not apply to officers or employees of the CSU with teaching or research responsibilities.

Section 10832 provides that no retired, dismissed, separated, or formerly employed person

of the California State University employed with the CSU or otherwise appointed to serve in the CSU may enter into any contract in which he or she engaged in any of the negotiations, transactions, planning, arrangements, or any part of the decisionmaking process relevant to the contract while employed in any capacity by any CSU department. The prohibition of this subdivision shall apply to a person only during the two-year period beginning on the date the person left CSU employment. The statute also applies to a 12 month prohibition on the CSU employee entering into a contract in the general subject area except as an expert witness in a civil case, or to a contract for the continuation of an attorney's services on a matter he or she was involved with prior to leaving CSU. The section, however, does not prohibit the re-hire or re-employment of CSU employees after retirement, consistent with CSU administrative policies, nor does it apply to inventors and authors of intellectual property licensed under technology transfer agreements.

Section 10833 provides that each contractor who enters into a contract with a CSU campus for \$10,000 or more shall be assigned an identification number by the president of the CSU campus, and is required to be listed on each contract it enters into with CSU.

L. PCC §§ 20919; 20919.1; 20919.2 to 20919.15 — Job order contract process for the Los Angeles Unified School District

These new code sections apply only to the Los Angeles Unified School District, and allow for the utilization of job order contracts as an alternative to the traditional contract method. It applies only to projects that do not exceed \$1 million in value. It further requires utilization of a labor compliance program; requirements concerning the listing of subcontractors; and the requirement of payment of prevailing wages; and employment of apprentices.

The procedures contained in these job order contract code sections are long and detailed, and anyone contracting with the Los Angeles USD is encouraged to study them in detail.

II. PUBLIC CONTRACT CODE REVISIONS

A. PCC § 3400 — Bids on public works; specifications by brand or trade names not permitted; exception

This existing code section has been expanded to include three additional exceptions to the general prohibition against specifications by brand name or particular trade name that are not followed by the words "or equal." Please note all five exceptions:

(1) In order that a field test or experiment may be made to determine the product's suitability for future use.

(2) In order to match other products in use on a particular public improvement either completed or in the course of completion.

(3) In order to obtain a necessary item that is only available from one source.

(4)(A) In order to respond to an emergency declared by a local agency, but only if the declaration is approved by a four-fifths vote of the governing board of the local agency issuing the invitation for bid or request for proposals.

(B) In order to respond to an emergency declared by the state, a state agency, or political subdivision of the state, but only if the facts setting forth the reason for the finding of the emergency are contained in the public records of the authority issuing the invitation for bid or request for proposals.

B. PCC § 4107 — Prime contractor whose bid is accepted; prohibitions

This code section, addressing illegal bid substitution, has been expanded and clarified to cover a situation allowing for substitution where the subcontractor fails or refuses to execute a written contract “for the scope of work specified in the subcontractor’s bid and at the price specified in the subcontractor’s bid.” The purpose of this revision is to tighten up the language of this code section to make it more difficult for a prime contractor to replace a subcontractor.

Under existing law, an awarding authority may consent to the substitution of a subcontractor when the listed subcontractor fails to sign a contract based upon the general terms, plans and specifications for the project or the terms of the subcontractor’s written bid. Public Contract Code § 4107 is now amended to require the prime contractor to present to the subcontractor a written contract for the scope of work and at the price specified in the subcontractor’s bid.

C. PCC § 6108 — Sweat-free procurement policy and code of conduct; compliance; sanctions; investigation; contractor responsibility program; penalties

This existing statute has been substantially modified. It establishes a statewide policy for all state agencies and establishes a “sweat-free” procurement policy and code of conduct that ensures that apparel, garments, and corresponding accessories, equipment, materials and supplies purchased by the state, its agencies, or its employees through contracts, purchase orders, or uniform allowances or voucher programs, be produced in workplaces free of sweatshop conditions.

D. PCC § 10129 — Bids limited to one concern or specific brand or trade name

This statute, under the Plans and Specifications section, similar to PCC §3400, has been modified to include two additional exceptions to the brand or trade name prohibition. Please note all four exceptions:

(1) In order that a field test or experiment may be made to determine the product’s suitability for future use.

(2) In order to match other products in use on a particular

public improvement either completed or in the course of completion.

(3) In order to obtain a necessary item that is only available from one source.

(4) In order to respond to an emergency declared by the state, a state agency, or political subdivision of the state, but only if the facts setting forth the reasons for the finding of the emergency are contained in the public records of the authority issuing the invitation for bid or request for proposals.

E. PCC 10222 — Amount of bonds

This code section, under contract requirements for state contracts, has included additional language for bond amounts. This statute has always provided that each bond shall equal at least one-half of the contract price. The revised statute addresses Department of Transportation projects in which the contract price is greater than \$250,000, allowing the Department of Transportation to have discretion to specify that the payment bond shall equal not less than one-half of the contract price or \$500 million, whichever is less.

F. PCC §20103.8 — Additive and deductive items

This existing statute provides guidelines for determining the lowest bid when there are additive and deductive items. A wording change of importance was made to subsection (c) which now reads as follows:

(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 local agency before the first bid is opened.

G. PCC § 22038 — Rejection of Bids; failure to receive bids; options

This existing statute allows for a public agency to reject any bids presented, and after the first invitation for all bids are rejected, provides the public agency with the option of either abandoning the project, re-advertising for bids, or having the project done by force account. The revision may be mistakenly worded. It appears to be intended to provide the agency with greater latitude to reject bids if it believes the project can be more economically performed by its own employees, and provides for a two day notice requirement to the apparent low bidder of its intent to reject the bid.

However, the statute as amended, appears to be inadvertently more restrictive by premising the bid rejection on the apparent ability of the public entity to do the work with its own forces for less money, rather than simply abandoning the project or re-advertising for bids in its discretion.

III. AMENDED EDUCATION CODE STATUTE — Education Code § 17250.35
Performance criteria and design standards

School districts are authorized to enter into design-build contracts for school facilities costing more than \$10 million. Under existing law, the school district governing board must employ the project inspector. Education Code § 17250.35 is amended to provide that the project inspector shall act under the direction of either the Director of the Department of General Services, or a competent, qualified agent of the school district.

IV. AMENDED CIVIL CODE STATUTE — Civil Code § 714 — Unenforceability of deeds, contracts or instruments prohibiting or restricting installation or use of solar energy system

Under the existing code section, any covenant, condition, etc. that prohibits or restricts the installation of a solar energy system is void and unenforceable. Civil Code § 714 is amended to provide that public agencies must now comply with solar energy requirements.

V. AMENDED LABOR CODE STATUTES — Labor Code § 1726 --Cognizance of violations in execution of contracts; reports; withholding procedures

Section 1726 of the Labor Code is amended to permit a contractor to recover damages from a public agency that misrepresented to the contractor that a job was not a “public work,” provided that it was given written notice by the DIR that it was.

Similarly, Section 1781 is also added to the Labor Code to allow a contractor to bring an action against the awarding body for damages if it was identified a public work for the first time after bidding.

A. Labor Code § 1741 - Determination of violations; civil wage and penalty assessments; service

This Labor Code section is amended to increase penalties for prevailing wage violations. Existing law requires a contractor to pay a penalty of not more than \$50 per day for violation of prevailing wage requirements. Section 1741 of the Labor Code is amended to impose a penalty for each calendar day for each worker. The amount of the penalty is set by the Labor Commissioner: not less than \$10 per day unless the failure was a good faith mistake promptly corrected; not less than \$20 per day if the contractor was assessed penalties within the previous three years; and not less than \$30 per day if the violation was willful. It also provides that interest shall accrue on all due and unpaid wages.

B. Labor Code § 1773.1 — Per diem wages; scope; determination

Section 1773.1 is amended to expand the definition of “per diem wages” to include payments to worker protection programs and the administrative fees of industry advancement funds and

collective bargaining agreements.

VI. NEW CODE OF CIVIL PROCEDURE STATUTE — CCP § 340.8

Section 340.8 is added to the Code of Civil Procedure extending the statute of limitation to two years after plaintiff becomes aware of, or reasonably should become aware of, the physical injury caused by hazardous material or toxic substance.

VII. RECENT CALIFORNIA ATTORNEY GENERAL'S OPINIONS CONCERNING PUBLIC CONTRACTS

Op.Atty.Gen. No. 02-1012 (June 3, 2003) states as follows:

A public entity is permitted to accept a bid for the construction of a public works project that does not specify the business location of each listed subcontractor but does provide the state contractor's license number of each listed subcontractor from which the business location may be ascertained upon further inquiry.

Op.Atty.Gen. No. 02-1006 (April 28, 2003) states as follows:

California Public Contract Code sections 10507.7 and 10509 control competitive bidding for the procurement of goods and services by the University of California and the University is required to comply only with the provisions of those sections with respect to the procurement of goods or services.

VIII. RECENT COURT DECISIONS RELATED TO PUBLIC CONTRACTS

A. Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp (App. 4 Dist. 2003) 4 Cal.Rptr.3d 655, 111 Cal.App4th 1328

This case held that a city, as project owner, had no obligation under a prime contract to pay a subcontractor's pass-through claim for cost overruns, and thus was not liable in implied contractual indemnity to the prime contractor for the subcontractor's cost overruns. The prime contractor assumed any potential liability for cost overruns when it agreed that changes would have no cost impact on the prime contract and requested the changes, notwithstanding the subcontractor's warning that it anticipated manufacturing problems as a result of the redesign.

B. Brutoco Engineering & Construction, Inc. v. Superior Court (App. 4 Dist. 2003) 132 Cal.Rptr.2d 866, 107 Cal.App.4th 1326, review denied.

This case decision, dealing with the resolution of contract claims, held that the arbitrator selection regulation, permitting parties to agree to nominate persons not on a list of arbitrators certified by the Public Works Contract Arbitration Committee contrary to the Public Contract

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Code's arbitration statute, does not permit the court to select a non-certified person as an arbitrator when the parties cannot agree on either a certified or non-certified arbitrator.

C. Emma Corporation v. Inglewood Unified School Dist., (2004) 114 Cal.App.4th 1018

This recent decision held that a public entity was estopped from enforcing a contract and claiming a bid bond made by a bidder who refused to perform on a public works contract, after discovering a mistake in its bid and submitting an inadequate bid withdrawal notice, where the public entity had deliberately misled the mistaken bidder from timely complying with the bid withdrawal statutes. Thus, the court will not enforce a bid that was fraudulently accepted by a school district.

D. Betancourt v. Storke Housing Investors (2003) 31 Cal.4th 1157

This California Supreme Court case now holds that ERISA does not preempt a mechanic's lien action brought by laborers to recover unpaid trust fund contributions. It essentially reverses the 1991 holding in Carpenters v. El Capitan Development Co. which held that ERISA preempted trust fund mechanic's lien foreclosure actions.

Hopefully this information is of 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 A. Jaret", with a long horizontal flourish extending to the right.

PHILLIP A. JARET