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January 28, 2008

Re: 2008 California Public Contract Code Additions and Revisions, Recent Public Contract Cases, and Relevant Attorney General Opinions

Dear Colleagues:

Please take note of the following 2008 revisions to the California Public Contract Code as a result of legislation enacted in 2007, as well as recent court decisions related to public and private works contracts. In this letter we have selected those technical code provisions which are significant to common public contracting issues.

I. PUBLIC CONTRACT CODE ADDITIONS

PCC §20785 – Orange County Sanitation District; procedures for construction of projects in excess of six million dollars

This new statute allows the Orange County Sanitation District to use the procedures prescribed in PCC §20133 (alternate bidding procedures including design-build) for construction of projects in excess of $6 million, including, but not limited to, public waste water facilities.

II. PUBLIC CONTRACT CODE REVISIONS

A. PCC §20133 – Alternate procedure on bidding on building construction projects in excess of two million five hundred thousand dollars in specified counties; legislative intent; definition; four step process for design-build projects; reporting

This code section formerly provided for alternate procedures in bidding with respect to only specific counties listed. It has now been broadened to include any county, with the approval of the Board of Supervisors, which may utilize alternate bidding procedures on projects in excess of $2.5 million and may award the project using either the lowest responsible bidder, or by best value. The statute was modified to allow the counties to utilize "design-build for buildings" and for "county sanitation waste water treatment facilities." It is not the intent of the legislature to authorize this

procedure for "other infrastructure" including but not limited to "streets and highways, public rail transit, or water resource facilities and infrastructures."

B. PCC §20150.1 – Necessity of bidding procedures; law governing

This statute which applies to counties with populations of less than 500,000, now allows them to participate in the Uniform Public Construction Cost Accounting Act (UPCCAA).

C. PCC §20175.2 – Cities in Solano and Yolo Counties and the Cities of Stanton and 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, the City of Victorville, and now the City of Stanton, upon approval of the appropriate City Council.

III. OTHER RELEVANT AMENDED STATUTES

Civil Code §2782 – Construction contracts; indemnification of promisees against liability; contracts relieving public agencies from liability for active negligence

Subparagraph (e) was added to this code section to nullify the legal effectiveness of an indemnity agreement that requires a subcontractor to indemnify a prime contractor against liability for claims for construction defects, to the extent that the claims arise out of the negligence of the prime contractor or its agents or subcontractors, or arise out of design defects furnished to the prime contractor by agents or subcontractors, or to the extent that the claims did not arise out of the scope of work assigned to the subcontractor. Subparagraph (e) parallels subparagraph (c), which applies to builders and developers rather than general contractors. The provision applies only to residential construction contracts entered into after January 1, 2008.

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

A. Public Works Bidding

1. *Affholder, Inc. v. Mitchell Engineering, Inc.* (2007) 153 Cal.App.4th 510, 63 Cal.Rptr.3d 121

This decision held that a prime contractor was not liable under the Subletting and Subcontracting Fair Practices Act for failing to grant a subcontract to a tunneling subcontractor who was originally listed in its sewer and roadway project bid to a sanitation district. Even though the District accepted the bid with the subcontractor listed, the District subsequently granted a change order that eliminated the need for the tunneling work to be performed by a subcontractor, and the subcontractor did not thereafter challenge the District's decision through other administrative or judicial means. Generally, the Subletting and Subcontracting Fair Practices Act confers the right on a listed subcontractor to perform the subcontract work unless statutory grounds for a valid substitution exist. That right may be enforced by an action for damages against the prime contractor

to recover the benefit of the bargain the listed subcontractor would have realized, had it not been wrongfully deprived of the subcontract.

PCC §4107(c) recognizes that the prime contractor is not bound to utilize a listed subcontractor for the performance of change order work. The reason is that the change order work did not exist at the time of bidding the prime contract. Since the work performed was not included as a part of the work that was required at the time the bids were originally submitted, there was no "substitution" of a subcontractor.

2. *Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 66 Cal.Rptr.3d 175

This decision held that a trial court lacked jurisdiction to impose penalties for a contractor's violation of the Subletting and Subcontracting Fair Practices Act. The provisions of this Act permitting an awarding body to impose monetary penalties for each violation did not, however, allow the City, as awarding authority, to pursue a civil action for such penalties, and therefore the trial court lacked fundamental jurisdiction to impose such penalties by impermissibly delegating its judgment to the trial court.

3. *D.H. Williams Construction, Inc. v. Clovis Unified School District* (2007) 146 Cal.App.4th 757, 53 Cal.Rptr.3d 345

The issue before the court was whether a bid on a public contract can be declared nonresponsive by the public agency when the bidder has listed an unlicensed contractor on the bid forms. This decision held that the remedy for a District's improper rejection of a low bid on a school construction contract due to the low bidder's listing of a subcontractor whose license had expired, was for the District to conduct a due process hearing to determine the low bidder's responsibility rather than canceling the contract awarded the low bidder and awarding the contract to the next lowest one.

The low bidder had listed a subcontractor for concrete and masonry work. However, the designated subcontractor's license had expired three days before the bid date and after District notification to the prime contractor of same, it responded by providing a letter from the unlicensed subcontractor refusing the subcontract and waiving any claims. The prime contractor then informed the District that it would perform the work with its own forces or would request a substitution. The District determined that its bid was "non-responsive" and awarded the work to the second low bidder. The Court of Appeal held that the agency's decision that the plaintiff's bid was non-responsive was incorrect, insofar as the Subletting and Subcontracting Fair Practices Act (PCC §4010, *et seq.*) does not require bidders to list only licensed subcontractors. Furthermore, the Contractors State License law (Bus. & Prof. Code §7000, *et seq.*) does not prohibit inclusion on the bid list of unlicensed subcontractors. It was therefore wrong for the Agency to determine that the bid was non-responsive, and in effect declare that the plaintiff was a non-responsible bidder, without affording a due process hearing.

4. *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 44 Cal.Rptr.3d 663

This decision held that the Public Records Act does not require disclosure of competing proposals until after negotiations have been completed. The City of Los Angeles had issued a Request for Proposals (RFP) for leasing a seven acre parcel at Van Nuys Airport consisting of three hangers, two office buildings, and a fuel farm. The agency received eight proposals, and shortly thereafter a law firm submitted a request under the Public Records Act (Gov. Code §6250, *et seq*.) for copies of all proposals. The Court of Appeal, after reversing the trial court, held that the public interest is served by not disclosing the proposals, which clearly outweighs the public interest served by disclosure of the record. Public disclosure of competing proposals can properly await conclusion of the negotiation process.

5. *Begl Construction Co., Inc. v. Los Angeles Unified School District* (2007) 154 Cal.App.4th 970

This decision (later depublished) held that a contractor may recover profits it could have made on future jobs but for loss of bonding capacity when a District wrongfully terminated its contract. The court held that damages from lost bonding capacity are recoverable, especially damages if the evidence shows that such damages were foreseeable. This decision is not valid as cited law, but interesting nevertheless.

B. Public Works Payments Disputes/Claims

1. *Condon-Johnson & Associates, Inc. v. Sacramento Mun. Utility Dist.* (2007) 149 Cal.App.4th 1384, 57 Cal.Rptr.3d 849

This decision held that disclaimers in a contract between a municipal utility district and a contractor for boring holes into a hillside for foundational piers, which provided that the contractor had sole responsibility for determining subsurface conditions, violated the public contract statute requiring a change order when subsurface conditions at the excavation site materially differed from those "indicated" in the contract. Since the contract included soil boring information that was intended to make the bidder acquainted with information for the purpose of assessing costs, it had "indicated" subsurface conditions.

The Public Contract Code requires a public agency to pay for extra work caused by subsurface conditions different from those "indicated" in the contract. PCC §7104 requires that if a public work involves an excavation deeper than 4', the public agency shall issue a change order when subsurface conditions materially differ from those "indicated." The contract provided that the contractor was entitled to equitable adjustments if subsurface conditions differed materially from those indicated. Since the representations made in the contract specifications justified the contractor in inferring that such rock would be found at the job site and could be relied upon in making its bid, the public agency was required to pay for extra work caused by the differing subsurface conditions.

2. *Westcon Construction Corp. v. County of Sacramento* (2007) 152 Cal.App.4th 183, 61 Cal.Rptr.3d 89

This decision held that with respect to the claims requirements under PCC §20104.2, a county's final payment to a contractor effectively denied any Public Contract Code claims more than a year before the contractor submitted its Government Claims Act claim, and, thus, any tolling of the Government Claims Act claim while the parties attempted to resolve the Public Contract Code claim ended upon final payment. The contractor could not argue for the first time on appeal that its Public Contract Code claim was submitted in letters to the county, rather than in subsequent packets of documentation. The contractor's change in its factual theory raised a question as to whether the letter amounted to a claim within the meaning of the code, which depended on whether the accompanying documentation was sufficient to substantiate the claim, and this was not a pure question of law based on disputed an incurable evidence.

C. Prevailing Wages

***Reyes v. Van Elk Ltd.* (2007) 148 Cal.App.4th 604, 56 Cal.Rptr.3d 68**

This decision held that undocumented workers are also protected under California's prevailing wage laws. The court held that Labor Code §1171.5 provides that the rights and remedies of the state law are available to all individuals, regardless of immigration status. It determined that there is no conflict between the IRCA (Immigration Reform and Control Act of 1986, 8 U.S.C. §1101, *et seq*.) and the State's prevailing wage law. Since the ultimate goal of the IRCA is to control illegal immigration by prohibiting employment of unauthorized aliens, to allow employers to hire undocumented workers and pay less than prevailing wages, would otherwise create a strong incentive.

D. False Claims

1. *Fassberg Const. Co. v. Housing Authority of City of Los Angeles* (2007) 151 Cal.App.4th 267, 60 Cal.Rptr.3d 375

In this dispute between a Housing Authority and a contractor concerning payments in connection with the construction of 25 residential buildings, the Court (in an opinion that was later ordered depublished) narrowly construed the California False Claims Act (Gov. Code §12650, *et seq*.) to apply only to "claims." Thus, the 224 change order proposals (COP's) which ultimately never resulted in issued written change orders and no payments made to the contractor, were not deemed to be a "claim" insofar as a record or statement that is not a request for money is not a "claim." Furthermore, the Court held that each request for payment was a "claim" but the weekly payroll reports were not themselves considered to be claims, and the Authority was not entitled to a civil penalty either for each false payroll report or each misstatement in the payroll reports. As noted above, the decision was later depublished and is not valid as cited law, but interesting nonetheless.

2. *State Ex. Rel. Hinden v. Hewlett-Packard Co.* (2007) 153 Cal.App.4th 307, 62 Cal.Rptr.3d 762

This decision held that the statute of limitations under the California False Claims Act (Gov. Code §12650, *et seq*.) runs from knowledge by the public agency rather than from knowledge by the qui tam plaintiff. The court found that the three-year statute of limitations in Gov. Code §12654 was measured from discovery by the State or other public agency (the official of the state or political subdivision charged with responsibility to act), and therefore the relator's (qui tam plaintiff) knowledge of the relevant facts more than three years before the action was filed was irrelevant.

E. Mediation/Arbitration

1. *Jeld-Wen, Inc. v. Superior Court* (2007) 146 Cal.App.4th 536, 53 Cal.Rptr.3d 115

California courts routinely issue orders appointing mediators to serve in multi-party disputes. Jeld-Wen, Inc., an uninsured cross-defendant in a multi-party construction defect case with minimal monetary exposure, was ordered to participate in mediation and share in a proportionate cost of the mediator compensation. The Court held that voluntary participation is a fundamental principle of mediation, and the trial court had no power to order Jeld-Wen to attend and pay for private mediation.

2. *Templeton Development Corp. v. Superior Court* (2006) 144 Cal.App.4th 1073, 51 Cal.Rptr.3d 19

This Court decision held that a subcontractor who performed the work in California cannot be required to arbitrate or litigate the matter in another state. CCP §410.42 makes void a provision in a subcontract that requires disputes to be "litigated, arbitrated or otherwise determined outside of this state." The Court held that this statute applies to mediation as well as arbitration.

3. *Wagner Const. Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 58 Cal.Rptr.3d 434

The California Supreme Court held that a petition to compel arbitration under CCP §1281.2 has its own statute of limitations, which is four years after refusal to arbitrate. Although courts are authorized to determine whether a party has "waived" the right to arbitrate, the trial court did not make such a determination in the underlying proceeding, so the case was remanded to the lower court for determination.

4. *Shepard v. Edward Mackay Enterprises, Inc.* (2007) 148 Cal.App.4th 1092, 56 Cal.Rptr.3d 326

This California Appellate decision held that the Federal Arbitration Act, which makes valid and enforceable any arbitration provision in a contract "evidencing a transaction involving commerce" preempts California law (CCP §1298.7) allowing a purchaser of real property to bring an action in court for construction and design defects, notwithstanding an agreement to arbitrate. The Court reasoned that application of the FAA to construction defects case was consistent with the

Commerce Clause where products used in construction were manufactured outside California, even if those products were not the source of the alleged defects.

F. General Interest

1. *Collier v. City and County of San Francisco* (2007) 151 Cal.App.4th 1326, 60 Cal.Rptr.3d 698

The Court held that the transfer of building permit fees to the City and County of San Francisco Planning Department and Fire Department was not prohibited by the California Constitution or the San Francisco Charter.

2. *Opp v. St. Paul Fire & Marine Insurance Company* (2007) 154 Cal.App.4th 71

This decision held that where a construction contract is entered into by an unlicensed corporation, the corporation cannot sue to recover under the contract even though the corporate president had a valid contractors' license and put that license number on all the contract paperwork.

3. *Blackmore v. Powell* (2007) 150 Cal.App.4th 1593

The Court held that a grant deed conveyed an easement to an adjoining parcel owner for "parking and garage purposes." The successor in interest to the grantor argued that the grantee could not build a garage for his exclusive use since that would be contrary to the numerous cases holding that an exclusive use cannot be acquired by prescriptive easement. The Court distinguished the doctrine of easement by prescription from the facts of this particular case, which involve a grant deed which expressly provides the grantee rights short of fee ownership. The grantee was therefore entitled to build a garage on the easement appurtenant to his property.

V. ATTORNEY GENERAL OPINIONS

Op.Atty.Gen. 06102 (February 15, 2007)

This Attorney General Opinion stated that an agency may employ selection criteria to limit the number of qualified prospective contractors invited to bid a design-build project. Under the California State University contract law, CSU is permitted to utilize design-build contracting procedures. Under §10708 of the Public Contract Code, contractors bidding design-build work are required to design the project pursuant to the scope of services set forth in RFP's. CSU is allowed to utilize the selection criteria in order to limit the number of bidders invited to submit proposals, and is furthermore required to inform qualified prospective contractors what selection criteria will be utilized and how it will be weighted and evaluated. The requirements of the Subletting and Subcontracting Fair Practices Act apply to "design-build" projects once the subcontractors are listed by the prime contractor.

VI. CONCLUSION

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. If you have any questions, or need further information, please do not hesitate to call.

Sincerely,

PHILLIP A. JARET

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