

# JARET & JARET

ATTORNEYS AT LAW

1016 LINCOLN AVENUE  
SAN RAFAEL, CALIFORNIA 94901

TELEPHONE: (415) 455-1010  
FACSIMILE: (415) 455-1050

SAN FRANCISCO OFFICE  
351 CALIFORNIA STREET, 7<sup>TH</sup> FLOOR  
SAN FRANCISCO, CALIFORNIA 94104  
TELEPHONE (415) 362-3435

SAN CLEMENTE OFFICE  
105 AVENIDA DE ESTRELLA, SUITE 2B  
SAN CLEMENTE, CALIFORNIA 92672  
TELEPHONE (949) 366-6677  
FACSIMILE: (949) 366-6262

January 18, 2012

**Re: 2012 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 2012 revisions to the California Public Contract Code (PCC) as a result of legislation enacted in 2011, other related California statutes, and recent court decisions concerning both public and private works contracts.

One major development is a recodification of the various Civil Code construction payment statutes into an entirely “new and improved” Works of Improvement section of the Civil Code starting with §8000, Private Works of Improvement starting with §8160, and Public Works of Improvement starting with §9000. These changes have dramatically increased the normal length of this annual newsletter. For those interested in these Civil Code changes, they can be found at pages 9 through 23.

We hope sections or portions of this information will be of value to you. Previous year-end Public Contract review letters for the past several 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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## **I. PUBLIC CONTRACT CODE ADDITIONS**

### **A. PCC §2500 – Use of project labor agreements by public entities; required taxpayer protection provisions; definitions**

This entire new chapter of the Public Contract Code has been added to allow for the use of project labor agreements by public entities under certain circumstances, and provided that certain requirements have been met. Section 2500 provides that a public entity may use, enter into, or require contractors to enter into, a project labor agreement for a construction project only if the agreement includes all of the following taxpayer protection provisions: (1) the agreement prohibits discrimination based on race, national origin, religion, sex, sexual orientation, political affiliation, or membership in a labor organization in hiring and dispatching workers for the project; (2) the agreement permits all qualified contractors and subcontractors to bid for and be awarded work on the project without regard to whether they are otherwise parties to collective bargaining agreements; (3) the agreement contains an agreed-upon protocol concerning drug testing for workers who will be employed on the project; (4) the agreement contains guarantees against work stoppages, strikes, lockouts, and similar disruptions of the project; and (5) the agreement provides that disputes arising from the agreement shall be resolved by a neutral arbitrator.

When signing the bill into law, Governor Brown stated that “this bill does not require any local government to adopt a PLA ... This bill preserves the right of all sides to debate what obviously is a hotly contested issue. Seems fair to me – even democratic.”

### **B. PCC §2501 – Local public entity governing boards; majority vote regarding use and funding of project labor agreements**

Part of this new chapter includes this new statute which provides that the members of the governing board of a local public entity may choose by majority vote whether to use, enter into, or require contractors to enter into a project labor agreement that includes all of the taxpayer provisions of Section 2500 for specific project or projects, and whether to allow funding of a specific project covered by such an agreement. This statute further provides that a charter provision, initiative or ordinance shall not prevent the governing board of a local public entity, other than a charter city, from exercising this authority on a project-specific basis.

### **C. PCC §2502 – Charter provision, initiative, or ordinance prohibiting consideration of project labor agreement; effect on use of state funding or financial assistance**

The third statute in this new chapter provides that if a charter provision, initiative, or ordinance of a charter city prohibits the governing board’s consideration of a project labor agreement that includes all of the taxpayer protection provisions of Section 2500 for a project to be awarded by the city, or prohibits the governing board from considering whether to allocate funds to a city-funded project covered by such an agreement, then state funding or financial assistance shall not be

used to support that project. Note, however, that this section will not be applicable until January 1, 2015 for charter cities in which a charter provision, initiative or ordinance in effect prior to November 1, 2011, would disqualify a project from receiving state funding or financial assistance.

**D. PCC §7201 – Public works of improvement contracts between public entity and original contractor; original contractor and subcontractor, and between all subcontractors thereunder entered into on or after Jan. 1, 2012; limits on retention proceeds; waiver**

This new statute provides that all public works contracts entered into after January 1, 2012 between a public entity and the original contractor, as well as the original contractor and subcontractors and any sub-subcontractors, may not allow for retention in excess of 5%. This reduction from the usual and customary industry standard of 10% does, however, have some exceptions. If a subcontractor is unable to furnish a performance and payment bond as requested by the contractor, it will not apply. Also, if the awarding body views the project as “substantially complex” and therefore requires a higher retention amount than 5 percent, the awarding body must include both this finding and the actual required retention amount in the bid documents. The “finding” must be made during a properly noticed and normally scheduled public hearing and prior to bid, and the finding and the actual retention amount must both be set forth in the bid documents. However, this section does not limit the ability of a public entity to withhold 150% of the value of any disputed work from the final payment. (This section/requirement does not apply to private works projects.)

**E. PCC §10295.4 – Contractors included on tax delinquency lists; contracts void and unenforceable**

With respect to any contract executed on or after July 1, 2012, a state agency shall not enter into any contract for the acquisition of goods or services with a contractor whose name appears on the list of the 500 largest tax delinquencies of either Section 7063 or 19195 of the Revenue and Taxation Code. Any contract entered into in violation of this subdivision is void and unenforceable.

**F. PCC §10304.1 – Contracts for the acquisition of specialized equipment notwithstanding Sections 10301, 10302, and 10304**

This new section applies to the Department of Water Resources, which now may award contracts under established conditions for any contract in excess of \$25,000 without the competitive bidding process. The purpose of this statute is to expedite operations and maintenance work to reduce the risk of the loss of water or power to the State Water Resources Development System.

**G. PCC §10389.2 – Disposition of State surplus computers; requirements**

This new statute provides for policies and procedures regarding the disposition of State surplus computers, laptops, monitors, and related computer equipment to non-profit entities, and requires that this equipment include a certification that all confidential, sensitive, and personal information was removed from the computers prior to disposition.

**H. PCC §§19201, 19202, 19203, 19204, 19205, 19206, 19207, 19208, 19209, 19210  
– Contracting by judicial branch entities**

These 10 statutes have been newly enacted and address the contracting by judicial branch entities. The purpose of this new section of the Public Contract Code is because the “Legislature finds and declares that placing all public contract provisions for judicial branch entities in one part will make that law clearer and easier to find.” It requires that all judicial branch entities comply with the provisions of this code that are applicable to state agencies and departments related to the procurement of goods and services, including information technology goods and services. Of particular significance are all contracts with total cost estimates at more than \$1,000,000, which require notification by the judicial branch entity to the State auditor in writing of the existence of such contracts within 10 business days of entering the contract. (§19204(a)). Furthermore, all administrative and infrastructure information technology projects with total cost estimated at more than \$5,000,000 shall be subject to the reviews and recommendations of the California Technology Agency (§19204(a)). Excepted is procurement and contracting by judicial branch entities that are related to trial court construction, including, but not limited to, the planning, design, construction, rehabilitation, renovation, replacement, lease, or acquisition of trial court facilities (§19204(c)).

**II. PUBLIC CONTRACT CODE REVISIONS**

**A. PCC §6804 – Labor compliance programs; cost reimbursement; deposit of moneys collected and use of funds; election to continue operating preexisting approved program**

This amended statute, under the design-build (transit agency) demonstration program chapter of the Code, requires the awarding entity to reimburse the Department of Industrial Relations for its reasonable and directly related costs in performing prevailing wage monitoring and enforcement on public works projects pursuant to rates established by the Department, with all monies collected pursuant to this subdivision deposited in the State Public Works Enforcement Fund to be used only for enforcement of prevailing wage requirements on those projects. This amended statute further provides that in lieu of reimbursing DIR, the transportation entity may elect to continue operating an existing, previously approved labor compliance program if it has either not contracted with a third-party to conduct its labor compliance program and requests and receives approval from the Department to continue its existing program, or enters into a collective bargaining agreement that binds all contractors performing work on the project and that includes a mechanism for resolving disputes about the payment of wages.

**B. PCC §7106 – Noncollusion declaration; form**

The form required in connection with a “Noncollusion Declaration to Be Executed by Bidder and Submitted with Bid” has been significantly modified. All public entities should download a copy of this revised section, which contains the new form language. The basic content and intent remain the same, however.

**C. PCC §10262 – Payments to subcontractors**

This code section has been significantly modified, now requiring that a contractor shall pay its subcontractors within seven (7) days of receipt of a progress payment, whereas in the past it had been ten (10) days. (This statute does not apply to private works projects.)

**D. PCC §10262.5 – Progress payments to subcontractors; time for payment; remedies; withheld payments; report**

Similarly, this statute has been significantly modified to change the payment period from contractors to subcontractors from ten (10) days down to seven (7) days. This code section continues to provide for a penalty of 2% of the amount due per month for every month the payment is not made, and also provides for prevailing party attorney's fees and costs.

**E. PCC §10506.4 – Bidding details of pilot program**

This statute, under the Best Value Construction Contract Pilot Program of the code, pertains to a pilot program for the University of California, and now with respect to all projects of over \$1,000,000 on all U.C. campuses. This statute provides that the lowest responsible bidder may be selected on the basis of best value to the University, provided that the required guidelines for evaluating the qualifications of the bidders are followed to ensure that best value selections by the University are conducted in a fair and impartial manner.

**F. PCC §10506.5 – Definitions**

In connection with PCC §10506.4, "best value" has been more specifically defined to mean a procurement process whereby the lowest responsible bidder may be selected on the basis of objective criteria "for evaluating the qualifications of bidders" with the resulting selection representing the best combination of price and qualifications. A similar change was made to PCC §10506.6 (awarding best value contracts; requirements), and in connection with PCC §10506.7 (selection of best value contractor).

**G. PCC §20133 – Alternative elective procedure for bidding on building construction projects in excess of two million five hundred thousand dollars; legislative intent; labor compliance program; cost reimbursement; four-step process for design-build projects; bonding; subcontractors; lists of contractors, bidders, and bid awards deemed public records; reporting**

Applicable to counties, this code section has been modified with respect to the reimbursement to the Department of Industrial Relations in connection with costs of performing prevailing wage monitoring and enforcement on public works projects, along similar lines as noted earlier in §6804.

- H. PCC §20175.2 – Alternate elective procedure for bidding on building construction projects in excess of one million dollars; legislative intent; labor compliance program; cost reimbursement; four-step process for design-build project; bonding; subcontractor; lists of subcontractors, bidders, and bid awards deemed public records; reporting**

Applicable to cities, this code section has been modified with respect to the reimbursement to the Department of Industrial Relations in connection with costs of performing prevailing wage monitoring and enforcement on public works projects, along similar lines as noted earlier in §6804.

- I. PCC §20193 – Alternate procedure on bidding on projects in excess of \$2,500,000; design-build projects; performance criteria and design standards; reporting requirements**

Applicable to a “qualified entity” in connection with waste and recycling facilities, with only 20 design-build projects authorized under this article, the same Department of Industrial Relations reimbursements are applicable, as referenced earlier in §6804.

- J. PCC §20209.7 – Design-build projects; progress and three-step process**

Applicable to transit design-build contracts, the same Department of Industrial Relations reimbursements are applicable as referenced in §6804.

- K. PCC §20395 – Authorization for work to be done; options for purchasing and contracting; changes**

This code section, which applies to county highways, has raised the threshold level from \$150,000 to \$210,000 for changes or alterations to the original contract amount.

- L. PCC 20688.6 – Alternate elective procedure for bidding on building construction projects in excess of one million dollars; number of design-build projects; legislative intent; labor compliance program; cost reimbursement; four-step process; bonding; subcontractor; performance criteria and design standards; retention proceeds; reporting**

This code section, under Redevelopment Agencies, has been similarly modified like the other sections noted herein concerning the reimbursement to the Department of Industrial Relations for the monitoring and enforcement of prevailing wage requirements, as referenced in §6804.

**M. PCC §20919.3 – Labor compliance program; cost reimbursement; deposit of moneys collected and use of funds; election to continue operating preexisting approved program; execution plan; interim report**

This code section under Job Order Contracting has similarly been amended concerning the reimbursement to the Department of Industrial Relations for the monitoring and enforcement of prevailing wage requirements, as referenced in §6804.

**N. PCC §22031 – Alternative procedures; applicable requirements; declaration of intentions**

This section, under Public Projects: Alternate Procedure, has been substantially modified. It now provides that on or after January 1, 2013, a board of supervisors or county road commissioner shall not be prohibited from utilizing, as an alternative to the procedures set forth in this article and Article 25 (County Highways), for: (1) maintenance and emergency work; and (2) new road construction and road reconstruction as long as the total annual value of the new road construction and the road reconstruction performed under the procedures set forth herein does not exceed 30% of the total value of all work performed by forced account other than maintenance. It further provides that on or after January 1, 2013, for a county with a population of less than \$50,000, this article shall not prohibit a board of supervisors or a county road commissioner from utilizing as an alternative to the procedures set forth in this article, the procedures set forth in §20390 (County Highways).

**O. PCC §22032 – Contracting procedures; dollar amount limitations**

This section, under Public Projects: Alternate Procedure, has increased the threshold amount from \$30,000 to \$45,000 for projects to be performed by employees of a public agency by force account, by negotiated contract, or by purchase order. It has further increased the threshold amount from \$125,000 to \$175,000 for projects to be let by informal procedure, and has increased the threshold level from \$125,000 to \$175,000 for projects to be let by contract by formal bidding procedure.

**P. PCC §22034 – Informal bidding ordinance**

This section, effective for public agencies that have elected to become subject to the uniform construction accounting procedures, provides that if all bids received are in excess of \$175,000 (formerly \$125,000), the public agency may adopt a resolution by a four-fifths vote, award the contract, at \$187,500 or less (formerly \$137,500), to the lowest responsible bidder if it determines the cost estimate of the public agency was reasonable.

### III. OTHER RELEVANT ADDED OR AMENDED CALIFORNIA STATUTES

**A. Business & Professions Code §7108.5 – Prime building contractors and subcontractors; payment to subcontractors; withholding payment; violation; penalty**

This amended statute reduced from 10 days to 7 days the number of days by which a direct contractor or upper tier subcontractor must pay a subcontractor after receiving a progress payment, unless otherwise agreed in writing. This statute applies to both public and private work.

**B. Civil Code §2782 – Construction contracts; void and unenforceable in indemnification provisions; agreements between subcontractors, builders, or general contractors**

There have been substantial modifications made to this code section which addresses indemnity. Please be advised of the following: (1) Any provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract with a public agency on or after January 1, 2013 that purport to impose on the contractor, or relieve the public agency from, liability for the active negligence of the public agency are void and unenforceable. (2) Any provisions, clauses, covenants or agreements contained in, collateral to, or affecting any construction contract with a public agency entered into on or after January 1, 2013 with the owner of privately owned real estate to be improved and as to which the owner is not acting as a contractor or supplier of materials or equipment to the work, that purport to impose on any contractor, subcontractor, or supplier of goods or services, or relieve the owner from, liability are enforceable to the extent of the active negligence of the owner, including that of its employees. (3) This statute does not apply to a homeowner performing a home improvement project on his own, or his own single family dwelling.

**C. Civil Code §2782.05 – Construction contracts; void and unenforceable indemnification provisions; agreements between general contractors; construction managers, or subcontractors**

This new code section, also addressing indemnity, is significant. Any construction contract and amendments thereto entered into on or after January 1, 2013 that purport to insure or indemnify, including the cost to defend, a general contractor, construction manager, or other subcontractor, by a subcontractor against liability for claims of death or bodily injury to persons, injury to property, or any other loss, damage, or expense are void and unenforceable to the extent the claims arise out of, pertain to, or relate to the active negligence or willful misconduct of that general contractor, construction manager, or other subcontractor, or other agents, other servants, or other independent contractors who are responsible to the general contractor, construction manager, or other subcontractor, or for defects in design furnished by those persons, or to the extent the claims do not arise out of the scope of work of the subcontractor pursuant to the construction contract. The statute further provides that this section shall not be waived or modified by contractual agreement, act, or omission of the parties.



This section, however, does not apply to: (1) contracts for residential construction that are any part of Title 7 (requirements for actions for construction defects – Civil Code §895, *et seq.*); (2) direct contracts with a public agency that are governed by subdivision (b) of §2782; (3) direct contracts with the owner of privately owned real property to be improved that are governed by subdivision (c) of §2782; (4) any wrap-up insurance policy or program; (5) a cause of action for breach of contract or warranty that exists independently of an indemnity obligation; (6) a provision in a construction contract that requires the promissor to purchase or maintain insurance covering the acts or omissions of the promissor, including additional insurance endorsements covering the acts or omissions of the promissor during ongoing and completed operations; (7) indemnify provisions contained in loan and financing documents, other than construction contracts to which the contractor and a contracting project owner’s lender are parties; (8) general agreements of indemnity required by sureties as a condition of execution of bonds for construction contracts; (9) the benefits and protections provided by the workers’ compensation laws; (10) the benefits or protections provided by the governmental immunity laws; (11) provisions that require the purchase of any of the following: (a) owners and contractors protective liability insurance; (b) railroad protective liability insurance; (c) contractors all-risk insurance; (d) builders all-risk or named perils property insurance; (12) contracts with design professionals; and (13) any agreement between a promissor and an admitted surety insurer regarding the promissor’s obligations as a principal or indemnitor on a bond.

This statute does not prohibit a subcontractor and a general contractor or construction manager from mutually agreeing to the timing or immediacy of the defense and provisions for reimbursement of defense fees and costs, so long as the agreement does not waive or modify the provisions of this statute. A written tender of the claim with relevant information concerning the subcontractor’s scope of work and claims associated with it are required, as well as how the share of fees and costs are to be reasonably allocated and determined.

This statute is not to be construed to affect the obligation, if any, of either a contractor or construction manager to indemnify, including defending or paying the cost to defend, a public agency against any claim arising from the alleged active negligence of the public agency under §2782(b), or to defend, including defending or paying the cost to defend, an owner of privately owned real property to be improved against any claim arising from the alleged active negligence of the owner under §2782(b).

This statute does not appear to extend the same protections afforded subcontractors to suppliers.

This is a long, somewhat convoluted new statute, and those affected by it are encouraged to read and review it in its entirety, and consult with counsel as to its interpretation.

#### **D. Civil Code §2783 – “Construction contract” defined**

With respect to the indemnity requirements/provisions contained in Civil Code §§2782 and 2782.5, the definition of “construction contract” has been expanded to include renovation, and construction also now includes work associated with a water line, sewer line, oil line, gas line,

electrical utility transmission or distribution line, appurtenances to structures, electrical power line clearing, tree trimming, vegetation maintenance, and moving, lifting, crane and rigging.

**E. Civil Code §§8000-8050 — WORKS OF IMPROVEMENT**

Effective July 1, 2012, Civil Code §§8000-8050 contains the following new code sections:

- 8000. Construction of part.
- 8002. Admitted surety insurer defined.
- 8004. Claimant defined.
- 8006. Construction lender defined.
- 8008. Contract defined.
- 8010. Contract price defined.
- 8012. Contractor defined.
- 8014. Design professional defined.
- 8016. Direct contract defined.
- 8018. Direct contractor defined.
- 8020. Funds defined.
- 8022. Labor, service, equipment, or material defined.
- 8024. Laborer defined.
- 8026. Lien defined.
- 8028. Material supplier defined.
- 8030. Payment bond defined.
- 8032. Person defined.
- 8034. Preliminary notice defined.
- 8036. Public entity defined.
- 8038. Public works contract defined.
- 8040. Site defined.
- 8042. Site improvement defined.
- 8044. Stop payment notice defined.
- 8046. Subcontractor defined.
- 8048. Work defined.
- 8050. Work of improvement defined.

This is an entirely new section of the Civil Code which was prepared largely by the California Law Review Commission with the intent to modernize, simplify, and clarify the lien laws. It will be effective on July 1, 2012. Some of the more significant additions, changes, modifications, and changes in terminology are noted as follows:

**1. Civil Code §8018 – Direct contractor defined**

The term “direct contractor” is now being used in place of the term “prime contractor” or “original contractor”.

## **2. Civil Code §8036 – Public entity defined**

“Public entity” is used to mean the State of California, Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation of the state.

## **3. Civil Code §8044 – Stop payment notice defined**

The term “stop payment notice” will now mean the same thing as a “stop notice”. A bonded stop notice or an unbonded stop notice will now be referred to as a “bonded stop payment notice” and an “unbonded stop payment notice”.

## **4. Civil Code §8046 – Subcontractor defined**

A “subcontractor” now generically means a contractor that does not have a direct contractual relationship with an owner and includes a contractor that has a contractual relationship with a direct contractor or with another subcontractor.

### **F. Civil Code §§8052-8066**

Civil Code §§8052-8066 have similarly been re-codified, effective July 1, 2012, and contain the following code sections:

- 8052. Operative date and effect.
- 8054. Transactions excluded from application of part.
- 8056. Application of Code of Civil Procedure
- 8058. Day defined.
- 8060. Filing or recording with county recorder; satisfaction of provisions; procedure; charge and collection of fees.
- 8062. Construction of good faith and compliant acts.
- 8064. Acts on behalf of co-owner.
- 8066. Acts by agents.

### **G. Civil Code §8100-8118**

The notice provisions of the Civil Code have been standardized, and similarly re-codified under §§8100-811. These sections control the contents of notice, the manner of serving the notice, when notice is deemed complete, and proof of service, as follows:

- 8100. Written notice.
- 8102. Information to be included in notice.
- 8104. Failure to pay laborer full compensation; additional information required.
- 8106. Manner of giving notice.
- 8108. Location for giving notice.
- 8110. Notice by mail.

- 8114. Posting of notice; conspicuous location.
- 8116. Completion of notice; time deemed given.
- 8118. Proof of notice; declaration.

**1. Civil Code §8102 – Information to be included in notice**

Basic notice information is set forth in this new statute concerning the obvious parties to the contract and description of the site, work provided, and claimant’s demand. The statute does provide that the notice will not be invalid due to a variance from the requirements of this section “[i]f the notice is sufficient to substantially inform the person given notice of the information required by this section and other information required in the notice.”

**H. Civil Code §§8120-8138 – Waiver and Release**

The waiver and release portion of the Civil Code has been re-codified and create new forms under Chapter 3 between §§8120 and 8138 as follows:

- 8120. Application of chapter.
- 8122. Waiver or impairment of rights prohibited; exception.
- 8124. Release from lien or claim; conditions.
- 8125. Estoppel or impairment of lien or claim; conditions.
- 8128. Stop payment notice; reduction or release.
- 8130. Accord and satisfaction; effect of article.
- 8132. Conditional waiver and release on progress payment; form.
- 8134. Unconditional waiver and release on progress payment; form.
- 8136. Conditional waiver and release on final payment; form.
- 8138. Unconditional waiver and release on final payment; form.

**1. Civil Code §8124 – Release from lien or claim; conditions**

Civil Code §8124 provides that a claimant’s waiver and release does not relieve the owner, construction lender, or surety on a payment bond from a lien or claim unless both of the following conditions are satisfied: (a) the waiver and release is in substantially the form provided in this article and is signed by the claimant; and (b) if the release is a conditional release, there is evidence of payment to the claimant. Evidence of payment may be either of the following: (1) the claimant’s endorsement on a single or joint payee check that has been paid by the financial institution on which it was drawn; or (2) written acknowledgment of payment by the claimant.

**2. Civil Code §8128 – Stop payment notice; reduction or release**

Civil Code §8128 provides that a claimant may reduce the amount of, or release in its entirety, a stop payment notice. The reduction or release shall be in writing and may be given in a form other than a waiver and release form provided in this article. The writing shall identify whether it is a reduction of the amount of the stop payment notice, or a release of the notice in its entirety. If the writing is a reduction, it shall state the amount of the reduction, and the amount to remain

withheld after the reduction. A claimant's reduction or release of a stop payment notice has the following effect: (1) the reduction or release releases the claimant's right to enforce payment of the claim stated in the notice to the extent of the reduction or release; (2) the reduction or release releases the person given the notice from the obligation to withhold funds pursuant to the extent of the reduction or release; (3) the reduction or release does not preclude the claimant from giving a subsequent stop payment notice that is timely and proper; and (4) the reduction or release does not release any right of the claimant other than the right to enforce payment of the claim stated in the stop payment notice to the extent of the reduction or release.

**3. Civil Code §8132 – Conditional waiver and release on progress payment; form**

This statutory form remains largely intact, but that has been recast for greater clarity, and with added language relating to progress payments covered by previous releases that have not been paid.

The new form should be obtained all by private and public works general contractors and subcontractors.

**4. Civil Code §8134 – Unconditional waiver and release on progress payment; form**

Similarly, this form is substantially the same but has been recast for greater clarity. The new form should be obtained by all private and public works general contractors and subcontractors.

**5. Civil Code §8136 – Conditional payment and release on final payment; form**

Likewise, this form has been recast for greater clarity, but does add a line for identification of the waivant's customer. The new form should be obtained by all private and public works general contractors and subcontractors.

**6. Civil Code §8138 – Unconditional waiver and release on final payment; form**

Again, the fourth in this series of four forms has been recast for greater clarity, and a new form should be obtained by all private and public works general contractors and subcontractors.

**I. Civil Code §§8150-8154 – Bonds**

Chapter 4, "Bonds", has been re-codified through Civil Code §§8150-8154 as follows:

- 8150. Application of Bond and Undertaking Law.
- 8152. Acts not releasing surety from liability on bond given under this part.
- 8154. Construction of bond; liability of surety; condition for recovery on bond.

**J. TITLE 2: PRIVATE WORKS OF IMPROVEMENT**

Title 2 of this new section now codifies “Private Works of Improvement” under the following Chapters:

Chapter	Section
1. General Provisions .....	8160
2. Preliminary Notice .....	8200
3. Design Professionals Lien .....	8300
4. Mechanics Lien .....	8400
5. Stop Payment Notice .....	8500
6. Payment Bond .....	8600
7. Security for Large Project .....	8700
8. Prompt Payment .....	8800

Within Chapter 1 are the “General Provisions” which are now set forth as follows:

Article	Section
1. Application of Title .....	8160
2. Construction Documents .....	8170
3. Completion .....	8180

Within Article 2, “Construction Documents”, are the following sections:

- 8170. Written direct contracts; contents.
- 8172. Building permits; application form; information regarding construction lenders.
- 8174. Construction trust deed; contents.

Under Article 3, “Completion”, are the following new sections:

- 8180. Acts signifying completion.
- 8182. Notice of completion; recording; contents.
- 8184. Acceptance and recoding of notice of completion.
- 8186. Multiple contracts; notice of completion for portion of work of improvement.
- 8188. Notice of cessation; recording; contents.
- 8190. Notice of completion or cessation; copies to be provided.

**1. Civil Code §8180 – Acts signifying completion**

With respect to a public entity, the Law Revision Commission Comments state that acceptance refers to acceptance pursuant to a legislative enactment of the public entity and not to inspection and approval or issuance of a certificate of occupancy under building regulations.

**2. Civil Code §8182 – Notice of completion; recording; contents**

This new section re-states the former §3093 without substantive change, except that the 10 day period for recording a notice of completion is extended to 15 days.

**3. Civil Code §8186 – Multiple contracts; notice of completion for portion of work of improvement**

Section 8196 continues the substance of former §3117, but eliminates the 10 day period for recordation of a notice of completion of a contract for a portion of a work of improvement. When there are multiple direct contractors, owners are now permitted to file separate Notices of Completion for each portion of the work.

**4. Civil Code §8190 – Notice of completion or cessation; copies to be provided**

Section 8190 restates former §3259.5, replacing the notice of recordation with a copy of the notice that the owner files for recordation, and expanding the manner of notice. The notice may no longer be given by regular mail.

**K. Chapter 2 – Preliminary Notice**

Within Chapter 2, are the following sections:

- 8200. Preliminary notice; persons to receive; necessity of compliance with this section; exceptions.
- 8202. Notice to property owner.
- 8204. Time for giving preliminary notice.
- 8206. Single or multiple preliminary notice.
- 8210. Additional construction loans; information to be provided to persons giving preliminary notice.
- 8212. Waiver of rights void and unenforceable.
- 8214. Filing of preliminary notice; mailing of notification; destruction of documents; purpose of filing pursuant to this section.
- 8216. Subcontractors; failure to given notice as grounds for disciplinary action.

**1. Civil Code §8200 – Preliminary notice; persons to receive; necessity of compliance with this section; exceptions**

Section 8200 re-states the introductory clauses in parts of subdivisions (a) and (b) of former §3097. Some repetitive detail is omitted in reliance on defined terms and other substantive provisions. However, subdivision (e)(2) makes clear that all direct contractors must give preliminary notice to the construction lender or reputed construction lender, if any. The intent is to resolve a possible ambiguity in former §3097(b).

**2. Civil Code §8202 – Notice to property owner**

The contents of the Preliminary Notice remain largely the same. It is suggested, however, that this new form be used in place of any older edition.

**3. Civil Code §8204 – Time for giving preliminary notice**

Subdivision (a) of §8204 continues former §3097(d) without substantive changes.

**L. Chapter 3. Design Professionals Lien**

Within Chapter 3 are the following sections:

- 8300. Design professional defined.
- 8302. Circumstances giving rise to lien; amount.
- 8304. Entitlement to lien; conditions.
- 8306. Creation of lien; expiration; satisfaction.
- 8308. Application of part.
- 8310. Availability of mechanics lien.
- 8312. Time for recording claim of lien.
- 8314. Additional remedies.
- 8316. Priority of lien.
- 8318. Exemptions.
- 8319. Conversion of design professional lien to mechanics lien.

Within these various sections, the following should be noted. Most of these statutes previously existed in the Civil Code but have now been moved to this chapter. A licensed landscape architect is also now included within the category of design professionals who may claim a lien under this chapter. (As referenced in Civil Code §8014.)

**1. Civil Code §8304 – Entitlement to lien; conditions**

Section 8304 re-states former §3081.3, with the clarification that a lien under this chapter is unavailable if construction has commenced.



**2. Civil Code §8306 – Creation of lien; expiration; satisfaction**

Section 8306 re-states former §3081.4. On expiration of the lien, as a result of commencement of the work of improvement, the design professional may obtain a lien under §8400 (mechanics lien). Mechanics lien rights under §8310 are not affected.

**3. Civil Code §8319 – Conversion of design professional lien to mechanics lien**

This section allows the design professional to convert a recorded design professional lien to a mechanics lien if the design professional lien expires pursuant to §8306(b)(1), the design professional remains fully or partly unpaid, and within 30 days of the expiration of the design professional lien the design professional records a mechanics lien for the amount of the unpaid design professional lien. The recorded mechanics lien must state that it is a converted design professional lien. It does not require a preliminary notice.

**M. Chapter 4. Mechanics Lien**

Article	Section
1. Who is entitled to Lien . . . . .	8400
2. Conditions to Enforcing a Lien . . . . .	8410
3. Amount of Lien . . . . .	8430
4. Property Subject to Lien . . . . .	8440
5. Priorities . . . . .	8450
6. Enforcement of Lien . . . . .	8460
7. Release Order . . . . .	8480
9. Removal of Claim of Lien from Record . . . . .	8490

**1. Civil Code §8404 – Work authorized for work of improvement or site improvement**

Work authorized by a “project manager” has now been added to the list that includes the direct contractor, subcontractor, architect, or other person having charge of all or part of the work of improvement or site improvement.

**2. Civil Code §8416 – Written statement; contents; form; recording; service**

The general requirements of a mechanics lien remain generally the same, however, there is a new form which should be utilized which contains mandatory language. All lien claimants should now use a current form.

**3. Civil Code §8422 – Erroneous information**

Subdivision (b) (1) expands the bases for invalidity of a claim of lien to include intent to slander title.

**4. Civil Code §8424 – Lien release bond**

Subdivisions (a) - (c) of §8424 restate former §3143, reducing the required amount of the lien release bond to 125% of the amount of the recorded claim of lien.

**5. Civil Code §8430 – Direct liens; amount**

Section 8430 restates former §3123(a)-(b) and a part of former §3110. The provision of former §3123(c) that required an owner to give notice of a change of 5% or more is not continued and has been deleted.

**6. Civil Code §8432 – Work included in claim; filing of contract or modification as constructive notice**

“Direct contractor” is substituted for the previously undefined term “contractor”. The concept of “authorize” is substituted for “employed”.

**7. Civil Code §8460 – Time for commencement of action; exception for extension of credit**

Subdivision (b) of this new statute makes clear that the owner must be a party to the extension of credit (which extends the otherwise mandatory 90 day lawsuit foreclosure period), and allows for late recording of the extension of credit.

**8. Civil Code §8462 – Dismissal**

The discretionary dismissal time period in which to bring a mechanics lien foreclosure action to trial is two years. A cross-reference to Code of Civil Procedure §583.420 (discretionary dismissal) has been made to make clear that this section modifies the general three year period for discretionary dismissal contrary to CCP §583.420.

**9. Civil Code §8480 – Release order; other actions or claims; joinder of claims**

Subdivision (c) of this new section provides a limited exception to the last sentence of former §3154(h), allowing the petition to be joined with a pending action to enforce the claim of lien that is the subject of the petition.

**10. Civil Code §8482 – Time for petition; notice**

This entirely new section provides that an owner of property may not petition the court for a release order (to release a stale lien) under this article unless at least 10 days before the filing of the petition the owner gives the claimant notice demanding that the claimant execute and record a release of the claim of lien. The owner is further required to state the grounds for the demand.

**11. Civil Code §8484 – Verified petition; contents**

There is now a reference made to including the “book and page number or series number of the place in the official records where the claim of lien is recorded” in a petition for a release order.

**12. Civil Code §8486 – Hearing date; service**

Section 8486 re-states former §3154(c) - (d), and the first sentence of §3154(e), increasing the time for serving a copy of the petition and notice of hearing to 15 days, and adding a requirement that the court act no later than 60 days after the petition is filed.

**13. Civil Code §8488 – Hearing; burden of production; burden of proof; affect of judgment; attorneys fees**

Subdivision (a) of §8488 re-states the last sentence of former §3154(b)(5) and the last two sentences of former §3154(e) without substantive change, except that language is added to clarify the burden of production and the burden of proof. Also, subdivision (c) re-states former §3154(g), however, the \$2,000 attorney fee limitation to the prevailing party has now been deleted.

**N. Chapter 5. Stop Payment Notice**

This chapter becomes effective July 1, 2012.

Article	Section
1. General Provisions . . . . .	8500
2. Stop Payment Notice to Owner . . . . .	8520
3. Stop Payment Notice to Construction Lender . . . . .	8530
4. Priorities . . . . .	8540
5. Enforcement Claim Stated in Stop Payment Notice . . . . .	8550

**1. Civil Code §8500 – Exclusive remedy**

This entire section of the code, beginning with §8500, is limited to private work. Stop notices (now called “Stop Payment Notices”) within a public works context are contained within the chapter beginning at 9000, and specifically 9350. Once again, the reference to a “direct” written contract has been revised to avoid confusion with the term “direct contract”.

**2. Civil Code §8502 – Requirements; contents; amount claimed**

Section 8502 supercedes subdivisions (a) through (d) of the former §3103. A stop payment notice may be executed by the claimant’s agent. Subdivision (c) is drawn from the last sentence of former §3159(a)(3) and provides a special rule that supplements the requirement of §8102(a)(6)(c) (demand of claimant).

### **3. Civil Code §8510 – Release bond**

Section 8510 restates former §3171, eliminating the restrictions on the persons and the conditions under which a release bond may be given, and requiring the bond to be given by an admitted surety insurer.

### **4. Civil Code §8536 – Withholding of sufficient funds; exception**

Section 8536 restates former §§3159(a)(1)-(2) and 3162(a)(1)-(2). The requirement in former §3162(a) that the lender withhold sufficient funds to pay any claim of lien that may be recorded therefor is omitted; any amount paid pursuant to a stop payment notice reduces the claim of lien. The reference of recordation of a payment bond “in the office of the county recorder where the site is located” is omitted from subdivision (b)(2) as unnecessary.

## **O. Article 5. Enforcement of Claim Stated in Stop Payment Notice**

### Section

- 8550. Time for commencement of action; notice.
- 8552. Multiple claimants.
- 8554. Dismissal for want of prosecution.
- 8556. Dismissal or judgment; effect.
- 8558. Attorney fees; prevailing party.
- 8560. Interest.

### **1. Civil Code §8554 – Dismissal for want of prosecution**

Section 8554 makes a cross-reference to §583.42 of the Code of Civil Procedure to make it clear that this section modifies the general three year period for discretionary dismissal for failure to bring to trial, down to two years.

## **P. Chapter 6. Payment Bond**

### Section

- 8600. Application; restriction of lien enforcement.
- 8602. Bond or other security.
- 8604. Lending institutions; objections to bond.
- 8606. Nature of bond; principal; enforcement.
- 8608. Work done for direct contractor on bond; claim.
- 8609. Invalidity of provisions limiting actions.
- 8610. Bonds recorded before improvements completed; actions against sureties.
- 8612. Preliminary notice required; notice to surety and bond principal extension; exceptions.
- 8614. Notice requirements.

**1. Civil Code §8604 – Lending institutions; objections to bond**

Section 8604 supersedes former §3237. It makes clear that the lender may not object to the bond if given by an admitted surety insurer. It was noted that this section is not intended to either ratify or abrogate the holding of *Azusa Western, Inc. v. City of West Covina* (1975) 45 Cal.App.3d 259, requiring a public entity in an appropriate case to ensure that the surety on a stop payment notice release bond is not the surety that issued a payment bond on the project. (Absent in these Law Revision Commission Comments was reference to a later case holding just the opposite, *Cal-Pacific Materials Co. v. Redondo Beach City School District* (1979) 94 Cal.App.3d 652.)

**Q. Chapter 7. Security for Large Project**

Article	Section
1. Application of Chapter . . . . .	8700
2. Security Requirement . . . . .	8710
3. Form of Security . . . . .	8720

**1. Civil Code §8702 – Chapter not applicable to specified works of improvement**

Section 8702 restates former §3110.5(e) without substantive change, except to omit reference to a public work. This part does not apply to a public work project.

**R. Chapter 8. Prompt Payment**

Article	Section
1. Progress Payment . . . . .	8800
2. Retention Payment . . . . .	8810
3. Stop Work Notice . . . . .	8830

**1. Civil Code §8800 – Progress payments; good faith disputes; liability of owner**

Section 8800 re-states former §3260.1 (concerning good faith dispute, wrongful withholding penalties), adding that the attorney’s fees must be “reasonable”.

**2. Civil Code §8802 – Payments to subcontractors; liability of direct contractor; additional remedies**

Section 8802 re-states former §3262.5 also adding a reasonableness limitation on attorney’s fees. (“Reasonable.”) The reference to 15 “working days” is converted to 21 “days”, consistent with the remainder of the mechanics lien law.

**3. Civil Code §8810 – Scope of article (retention payment)**

Section 8810 restates former §3620(b) without substantive change. This title is limited to a private work of improvement.

**4. Civil Code §8818 – Failure to make payment within required time; liability**

Section 8818 re-states former §3260(g) without substantive change, except to add a reasonableness limitation on the attorney’s fees. (“Reasonable.”)

**S. Article 3. Stop Work Notice**

Section

- 8830. Stop work notice defined.
- 8832. Conditions for stop payment notice.
- 8834. Additional notice with stop work notice.
- 8836. Copy of notice to be given to construction lender.
- 8838. Liability for delay or damage; limitations on liability.
- 8840. Resolution of claim or cancellation of stop work notice; posting of notice.
- 8842. Other remedies.
- 8844. Expedited proceeding.
- 8846. Waiver against public policy.
- 8848. Application of article.

**1. Civil Code §8830 – Stop work notice defined**

Section 8830 restates a part of the first sentence of the former §3260(a) without substantive change. The term “stop work notice” replaces the term “10-day stop work order”. This article is limited to a private work of improvement.

**2. Civil Code §8844 – Expedited proceeding**

Subdivision (a) of §8844 re-states former §3260.2(d) without substantive change, except to additionally allow an owner to seek a judicial determination of liability for the amount due in an expedited proceeding.

**T. Title 3. PUBLIC WORK OF IMPROVEMENT**

Chapter	Section
1. General Provisions .....	9000
2. Completion .....	9200
3. Preliminary Notice .....	9300
4. Stop Payment Notice .....	9350
5. Payment Bond .....	9550

**1. Civil Code §9000 – Application of title**

This title applies to a work of improvement contracted for by a public entity and the Section 3100 and 3179 statutes have now been moved to this part of the code.

**2. Civil Code §9100 – Persons who may give stop payment notice or assert claim against payment bond**

Section 9100 restates the former §3181, and parts of former §§3110, 3111, and 3112. The reference to an “express trust fund” in former §3111 is replaced by a reference to a generalized category of persons or entities included within the definition of “laborer”.

**3. Civil Code §9200 – Time of completion**

Section 9200 restates former §3086 to the extent it applied to a public work of improvement, but extends the period of continuous cessation of labor necessary to constitute completion from 30 days to 60 days.

**4. Civil Code §9204 – Notice of completion; recording; requirements and contents**

Section 9204 restates former §3093 to the extent it applied to a public works contract, extending the 10 day period for recordation of a notice of completion under the former law to 15 days.

**U. Chapter 4. Stop Payment Notice**

Article	Section
1. General Provisions . . . . .	9350
2. Summary Proceeding for Release of Funds . . . . .	9400
3. Distribution of Funds Withheld . . . . .	9450
4. Enforcement of Payment of Claim Stated in Stop Payment Notice . . . . .	9500

**1. Civil Code §9350 – Rights of persons furnishing work pursuant to public works contract**

Section 9350 restates former §3264 to the extent it applied to a public works contract. Under §9350, the term “fund” has a meaning distinct from the term “funds” as defined in §8020. Consistent with former §3264, “fund” refers to the source of payment of construction costs, not the form of payment itself.

**2. Civil Code §9352 – Stop payment notice; requirement; contents; amount claimed**

Section 9352 supercedes former §3103(a)-(d). A stop payment notice may be executed by the claimant's agent. Section 9352(c) provides a special rule that supplements the requirements of §8102(a)(5)(C) (demand of claimant), that the amount claimed in the notice may include only the amount due the claimant for work provided through the date of the notice.

**3. Civil Code §9362 – Notice of time for commencing action to enforcement payment of claim**

Section 9362 restates former §3185. However, the \$2.00 fee is increased to \$10.00 in recognition of a change in the value of the dollar since the fee's enactment.

**V. Article 2. Summary Proceeding for Release of Funds**

Section

- 9400. Release of funds; grounds.
- 9402. Affidavit; service on public entity; contents.
- 9404. Affidavit; service of copy on claimant.
- 9406. Counteraffidavit; service on public entity; release of funds if not served within time stated in public entity's notice.
- 9408. Action for declaration of rights of parties; commencement; notice of hearing; time for hearing.
- 9410. Affidavit and counteraffidavit to constitute pleadings; burden of proof.
- 9412. Findings not required; continuance of hearing; order at conclusion of hearing; service of copy of order on public entity.
- 9414. Determination not res judicata.

**1. Civil Code §9412 – Findings not required; continuance of hearing; order at conclusion of hearing; service of copy of order on public entity**

Section 9412 re-states former §3203. However, the right to a jury under the former §3204 no longer exists, and the proceedings under this title are to be tried by a judge, not to a jury.

**W. Article 4. Enforcement of Payment of Claim Stated in Stop Payment Notice**

Section

- 9500. Claim filing procedures for actions against public entities.
- 9502. Commencement of action.
- 9504. Notice of commencement of action.
- 9506. Multiple claimants.
- 9508. Dismissal.
- 9510. Effect of dismissal or judgment.



## 1. Civil Code §9508 – Dismissal

Section 9508 restates former §3212. There was a cross-reference to Code of Civil Procedure §583.420 that has been added to make clear that this section modifies the general three-year period for discretionary dismissal, which is two years under this section.

## X. Chapter 5. Payment Bond

### Section

- 9550. Necessity of bond; inclusion in call for bids; original and supplementary contracts.
- 9552. Payment bond not given and approved.
- 9554. Amount of bond; provisions regarding surety's obligation; conditioned for payment in full; subcontractor bond to indemnify contractor.
- 9558. Commencement of action to enforce liability on bond; limitations.
- 9560. Claim against payment bond; preliminary notice required; notice to surety and bond principal; extension; exceptions.
- 9562. Notice to principal and surety; requirements.
- 9564. Maintenance of action without filing stop notice or suing public entity or officer; attorney fees.
- 9566. Work done for direct contractor on bond; claim.

### 1. Civil Code §9554 – Amount of bond; provisions regarding surety's obligation; conditioned for payment in full; subcontractor bond to indemnify contractor.

Section 9554 restates former §3248, and supercedes former §3096. Section 9554(a) restates part of Code of Civil Procedure §995.311(a), which provides that a payment bond required on a public works contract shall be executed by an admitted surety insurer.

## IV. RECENT CALIFORNIA SUPREME AND APPELLATE COURT DECISIONS

### A. Approval of extra work without Board approval.

- *Mepco Services, Inc. v. Saddleback Valley Unified School District* (2010) 189 Cal.App.4th 1027 [Certified for Partial Publication]

This California Court of Appeal, Fourth Appellate District decision found that a public works contractor may recover for extra work despite the fact that the public entity's governing board did not, in fact, approve such work, and further where the terms were inconsistent regarding whether the Board's or the Board's authorized representative must first approve the extra work.

**B. No verbal change orders enforceable against public agencies.**

- ***P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332**

This public works decision enforced a provision that the contractor would not be paid for extra work without a written change order. A civil engineering firm brought an action against the City for breach of contract and other causes of action seeking to recover for services related to the redesign of a municipal golf course. The contract, which contained an integration clause, provided that there could be no amendments or waivers of contract terms without a written agreement between the parties. Notwithstanding, for five prior amendments, the City's project manager had authorized the contractor to start extra work before receipt of the signed amendment. The Court held that whether a claimed modification is oral, or through conduct, a public contractor is charged with knowledge of public contracting laws, and it is well settled that when a written change order requirement is not met, a contractor cannot prevail against a public agency on an implied in law or quasi contract theory.

**C. Good faith dispute defense to prompt payment claim.**

- ***FEI Enterprises, Inc. v. Kee Man Yoon* (2011) 194 Cal.App.4th 790**

This case involved a payment dispute between a general contractor and subcontractor in connection with purported installation delays by the subcontractor installing low voltage systems. Although the court determined that the subcontractor did not delay, the evidence supported the trial court's conclusion that there was a good faith dispute and as such, the 2% penalties per month for interest for failure to make prompt payment under Bus. & Prof. Code §7108.5 and retention under Civil Code §3260(e) was inapplicable as there was a good faith dispute over the amounts owed and the trial court properly denied the request for penalties.

**D. Court rejects bank's attempt to abrogate contractor's stop notice rights**

- ***Zakskorn Construction Company v. East West Bank* (2011), Superior Court of Alameda County, California, Case No. RG 09-440355**

This is an interesting trial court decision. Plaintiff Zakskorn Construction Company entered into a construction agreement with Apgar Development Corporation to construct a condominium project in Berkeley. Apgar entered into a loan agreement with East West Bank to finance the project, and thereafter Apgar defaulted on the loan. Zakskorn was owed \$383,661.66 and submitted a bonded stop notice for its claim to East West Bank, which refused to acknowledge Zakskorn's entitlement to the payment, contending that it had structured its loan with Apgar in such a way that it was not subject to California's stop notice statutes and procedures. It also argued that because Apgar was in default on the loan, it was excused from honoring Zakskorn's stop notice rights. The Appellate Court agreed with the lower court, holding that California authorities have consistently safeguarded stop notice claimants' rights above other debts and claims, even in the face of lending agreements intended to protect the interests of the lenders. The Appellate Court rejected East West Bank's various set off claims and held that upon receipt of the bonded stop notice, it was obligated

as a matter of law to withhold funds sufficient to answer the claim. At the operative time point, the Bank had continued to hold at least \$320,014.49 in undisbursed construction loan funds earmarked solely for construction hard costs intended to benefit the plaintiff general contractor and its subcontractors.

**E. Failure to follow claim procedures barred recovery.**

- ***Greg Opinski Construction, Inc. v. City of Oakdale* (2011) 199 Cal.App.4th 1107 [Certified for Partial Publication]**

This appellate decision held that liquidated damages on this public works projects were properly assessed against the prime contractor, which claimed that the liquidated damages were improper because the public entity was responsible for its delays in completing the project. The court held that the contractor failed to follow the procedures in the contract for claiming additional time for completion. The court held that the *Peter Kiewit* decision (59 Cal.2d 241) was superseded by a 1965 amendment to Civil Code §1511, which allows parties to specify in a contract that a party intending to avoid the effect of its failure to perform by asserting that the other party's act caused the failure, must give written notice of this intention within a reasonable time. The court held in the *Opinski* decision that the contractual provisions requiring certain procedures to be followed by a party requesting an extension of time amounted to the type of specification contemplated by the amendment to Civil Code §511. Since *Opinski* did not follow those procedures to claim an extension of time, it cannot rely on *Peter Kiewit* and the trial court was correct in enforcing the procedural requirements of the contract.

**F. All redevelopment agencies in California dissolved.**

- ***California Redevelopment Association v. Matosantos* (2011) 1222911 case S194861**

The California Supreme Court recently upheld the "Redevelopment Dissolution" bill and invalidated the "Voluntary Payment" bill. As a result, effective February 1, 2012, all redevelopment agencies in California will be dissolved. The Court refused to uphold the measure that would have permitted cities and counties to continue the operation of their local redevelopment agencies by agreeing to make specified payments for the benefit of schools and special districts.

**G. New construction (SB800) prelitigation procedures.**

- ***Anders v. Superior Court* (2011) 192 Cal.App.4th 579 [Certified for Partial Publication]**

This private work case involved a home buyer's action for construction defects under SB800. Petitioners, owners of 54 homes, filed a complaint seeking damages for construction defects, and the builder filed a motion seeking to compel plaintiff's to comply with pre-litigation procedures set forth in their contracts. The home builder moved in the trial court to require the procedure it had prescribed in its home sales contracts. However, the trial court found that the particular procedure

set out in the contracts was unconscionable and unenforceable, yet the Court found it appropriate to require the homeowners to comply with the statutory pre-litigation procedures set forth in Civil Code §§895-945.5 that included a non-adversarial pre-litigation procedure requiring home purchasers to provide the builder notice of the claimed defects and an opportunity to investigate and repair prior to the institution of litigation. Section 914(a) allows the builder to provide in the home purchase contract an alternative procedure to that provided by statute, provided that the alternative procedure is “fair and enforceable.” The builder recorded a “Notice of Certain SB800 and Related Procedures” and moved to compel subsequent owners to comply with those procedures. The Court held that Civil Code §914(a) applies to subsequent purchasers in the same manner as to the original purchasers. The builder’s election was binding and the builder could not require those purchasers to comply with the statutory pre-litigation procedures, holding that the trial court’s order compelling purchasers to comply with SB800 pre-litigation procedures is contrary to the statute.

#### **H. Builder can opt out of SB800 prelitigation procedures.**

- ***Baeza v. Superior Court (2011)(Fifth District) (F061594)***

This appellate decision held that a builder who walks out of the SB800 Right to Repair Act’s prelitigation procedure in favor of its own prelitigation procedures is not subject to the Act’s disclosure requirements. Section 914 of the Act allows a builder to essentially opt out of the Act’s prelitigation procedures, and at the time of the initial sale of the home, contract for an alternative non-adversarial prelitigation procedure. Section 912 of the Act requires the builder to provide certain disclosures regarding the Act and its prelitigation requirements to the home buyers at the time of the initial sale, otherwise the builder is not entitled to the protections of the Act.

#### **I. Arbitration agreement in CC&Rs.**

- ***Villa Vicenza Homeowners Assn. v. Nobel Court Development, LLC (2011) 191 Cal.App.4th 963 [Certified for Partial Publication.]***

This case involved a construction defect dispute between a developer and a homeowners association. The dispute involved arbitrability and recognizing that both federal and state law favor the enforcement of arbitration agreements. The Court of Appeal held that the recorded CC&Rs were a binding agreement between the association and the homeowners, but that standing alone, they are not a contract between the developer and the homeowner association, which only came into existence after the CC&Rs were recorded. As such, there was no showing that the association entered into a binding arbitration.

#### **J. Vicarious liability to employee of subcontractor.**

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

In this California Supreme Court decision, a Privette personal injury action (hirer of independent contractor is not vicariously liable to the contractor’s employee who sustains on-the-job-injuries resulting from a special or peculiar risk inherent in the work) alleging negligence and

premises liability involved an injured sub-subcontractor who fell into a bollard hole during construction. The holes were four feet wide and four feet deep. Essentially it is an action brought by an independent contractor against a general contractor for personal injury sustained on a job site under which the California Court of Appeal found that there was a triable issue of fact as to whether the general contractor may be directly liable to the independent contractor on the theory that it had retained control over safety conditions at the job site and that its control had affirmatively contributed to the independent contractor's injuries. The Court of Appeal also addressed whether the trier of fact could conclude that the general contractor affirmatively contributed to the independent contractor's injuries by breaching a non-delegable regulatory duty and thus could be held directly liable for the independent contractor's personal injuries. This ruling may potentially expand the potential direct liability of general contractors for construction site injuries since most general contractors are responsible for Cal-OSHA compliance at construction sites. It also potentially places a general contractor at greater risk of direct liability to independent contractors hired by subcontractors if the general contractor is involved with the independent contractor's work.

**K. Insurance additional payment endorsement not triggered until rebuilding occurs.**

- *Minich v. Allstate Ins. Co. (2011) 193 Cal.App.4th 477*

This insurance decision held that an endorsement authorizing an additional payment for rebuilding a home did not increase the policy limit payable immediately. The court held that the insurer did not breach the "Building Structure Reimbursement Extended Limits" endorsement in the fire insurance policy in connection with this home destroyed by fire, by delaying payment under the endorsement, where the payment on the endorsement was conditioned on rebuilding. The insurer had paid the full amount provided for in the endorsement one month after the insurer was given an opportunity to inspect the foundation of the new home, and the insurer also paid 100% of the amount provided for in the endorsement approximately three months before the insured's new home was even 50% completed.