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Re: 2019 California Public Contract Code Additions and Revisions

Dear Public Work Construction Colleagues:

Please take note of the following 2019 revisions to the California Public Contract Code (PCC) as a result of legislation enacted in 2018.

Community college clients will also receive a second highlighted copy more directly pertinent to their concerns.

Previous year-end Public Contract review letters 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.

Best regards for the New Year!

Sincerely,



PHILLIP A. JARET

PAJ:dda

I. AMENDED STATUTES

PCC § 2002 – Facilitation of contract awards to small businesses; exceptions to lowest responsible bidder requirements

This amended statute modifies the existence preference levels. Existing law authorizes a local agency in facilitating contract awards to small businesses to provide for a small business preference of 5% in construction, the procurement of goods, or the delivery of services, and establishes a subcontracting participation goal for small businesses on contracts with a 5% preference for those bidders who meet the goal. Existing law authorizes each local agency to define a small business for the purposes of these preferences and goals. This amended statute increases the above described preference for small business to 7%. The statute limits the value of a preference to a maximum of \$150,000 under these provisions. The law also authorizes a prime contractor, with the approval of the local agency, and subject to meeting specified conditions, to substitute another subcontractor for the purpose of meeting specified goals. (See also new PCC §2003.)

PCC § 2602 – Enforceable agreement to use skilled and trained workforce; monthly report; incomplete report; failure to comply; withholding of monthly payments; compliance plan

This statute has been modified. The existing statute provides that if a contractor, bidder, or other entity fails to provide the monthly report required by this section, or provides a report that is incomplete, the public agency or other awarding body shall withhold further payments until a complete report is provided. This amended statute now provides that if a monthly report is incomplete due to the failure of a subcontractor to timely submit the required information to the contractor, bidder, or other entity, the public agency or awarding body shall only withhold an amount equal to 150% of the value of the monthly billing for the relevant subcontractor. (Other similar scenarios are detailed in this amended code section.)

PCC § 10507.8 – Best value bid evaluation methodology; policies and guidelines; criteria; discrimination prohibited; procurement of goods, materials, or services

This amended statute, applicable to the University of California, extends the sunset of this law indefinitely. Existing law requires the Regents to let specified contracts involving an expenditure of more than \$100,000 to the lowest responsible bidder meeting certain specifications, or else reject all bids. It provides the bid evaluation and selection for these contracts to be determined by the “best value” for the University of California, and in addition to deleting the January 1, 2019 repeal date applicable to best value procurement authority, deletes the references to the extensive reporting requirements specified in the prior statute.

PCC § 20111.6 – Prequalification questionnaire and financial statements; requirements for certain projects; system of rating bidders; standardized proposal form; process for prequalifying prospective bidders; application

This amended statute applicable to school districts, repeals the January 1, 2019 sunset date, and continues indefinitely the requirement that bidders submit a prequalification questionnaire and financial statement in connection with bidding on public school construction projects receiving funds under the Leroy F. Greene School Facilities Act of 1998, or receiving funds from any future state school bond for a public works project involving a projected expenditure in excess of \$1 million.

PCC § 20146 -- Construction manager at-risk contracts; utilization for county construction projects; subcontractors; public inspection of contract; retention proceeds

This existing statute applicable to counties, now extends construction manager at-risk construction contracts to also include infrastructure, excluding roads, and including, but not limited to, buildings, utility improvements associated with buildings, flood control, and underground utility improvements, and bridges, owned or leased by the county.

PCC § 20651.7 -- Best value bid evaluation methodology; criteria; notice of intent; public announcement of award; discrimination prohibited; contracts for purchase of equipment, material, supplies, and services

This amended statute, applicable to community college districts, extends the sunset of this law indefinitely. Existing law requires the governing board of any community college district to let specified contracts involving an expenditure of more than \$50,000 to the lowest responsible bidder meeting certain specifications, or else reject all bids. It provides the bid evaluation and selection for these contracts to be determined by the “best value” for the community college district, and in addition to deleting the January 1, 2019 repeal date applicable to best value procurement authority, deletes the references to the extensive reporting requirements specified in the prior statute.

PCC § 22032 – Contracting procedure; dollar amount limitations

PCC § 22034 – Informal bidding ordinance

These amended statutes, with respect to the Uniform Public Construction Cost Accounting Act, which addresses construction delivery methods, has increased the threshold limits. The law had authorized public projects of \$45,000 or less to be performed by employees of a public agency, authorized public projects of \$175,000 or less to be let to contract by informal procedures, and required public projects of more than \$175,000 to be let to contract by formal bidding procedures. Furthermore, in the event all bids received were in excess of \$175,000, the public agency could award the contract at \$187,500 or less to the lowest responsible bidder if it determined the cost estimate of the public agency was reasonable. Now, the statute authorizes public projects of \$60,000 or less to be performed by employees of the public agency, authorizes public projects of \$200,000 or less to be let to contract by informal procedures, and requires public projects of more than \$200,000 to be let to contract by formal bidding procedures. In the event all bids received for the performance of the project are in excess of \$200,000, the contract can be awarded up to \$212,500 or less to the lowest responsible bidder if the agency determines the cost estimate was reasonable.

Currently over 50 community college districts now participate in UPCCAA.

II. NEW STATUTES

PCC § 2003 – Facilitation of contract awards to small businesses, disabled veteran businesses, or social enterprises; specific counties; exceptions to lowest responsible bidder requirements

Similar to the amended § 2002, this new statute increases the maximum value of a small

business procurement preference from 5% to 7% and sets a maximum financial value of \$150,000. The bill also authorizes local agencies in the counties of Alameda, Contra Costa, Lake, Los Angeles, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma to establish a disabled veteran business preference and social enterprise preference combined with a small business preference to a maximum percentage value of no more than 15%, and a maximum financial value of no more than \$200,000.

PCC § 2603 – Failure to use skilled workforce; civil penalty; assessment; liability of prime contractor; corrective action; declaration; notice of violation; ineligibility of contractor in violation of this chapter; list of contractors

This new code section under Chapter 2.9, Skilled and Trained Workforce Requirements (§§ 2600-2603), provides that if the Labor Commissioner determines after an investigation that a contractor or subcontractor failed to use a skilled and trained workforce in accordance with this chapter, the contractor or subcontractor responsible for the violation shall forfeit, as a civil penalty to the state, up to \$5,000 per month of work performed in violation of this chapter. If a contractor or subcontractor commits a second or subsequent violation within a three-year period, it shall forfeit up to \$10,000 per month of work performed in violation of this chapter.

Article 3.1 – TASK ORDER CONTRACTING FOR SCHOOL DISTRICTS

PCC § 20118.5 – Legislative Intent.

PCC § 20118.6 – Task order procurement contracts for repair and renovation of school buildings and grounds.

PCC § 20118.7 – Task order procurement contracting method; report to Legislature.

PCC § 20118.8 – Best value procurement method in relation to governing board requirements for contracts.

PCC § 20118.9 – Duration of article.

This new article of the code, applicable to school districts, provides that the governing board of a school district may award multiple task order procurement contracts for the repair and renovation of school buildings and grounds not to exceed \$3 million each, through a single request for bid. The task order procurement contracts may include, but are not limited to, services, repairs, including maintenance, and construction paid for with monies from the school district's general fund. Contracts shall be awarded to the lowest responsible bidder, and based primarily on plans and specifications for typical work. However, this pilot program is only applicable to the Los Angeles Unified School District through January 1, 2024.

PCC § 22162.6 – Orange County; authorization to use design-build contracting process for certain projects; responsibilities of county; limitations on use

This new statute authorizes Orange County to use the design-build project delivery method for infrastructure projects of flood protection improvements; harbor and beach improvements; and bike way improvements. However, the County is limited to no more than one project per year in excess of \$5 million.

PCC § 22162.7 – Orange County Flood Control District; authorization to use design-build contracting process for certain projects; responsibilities of district; limitations on use

Similar to PCC § 22162.6, this new law applicable to the Orange County Flood Control District, allows for the design-build contracting process to award contracts for flood protection improvements. However, the District is limited to no more than 12 projects in excess of \$5 million through January 1, 2025.

III. PUBLIC CONTRACT CODE CASES

***West Coast Air Conditioning Company, Inc. v. Dept. of Corrections and Rehabilitation* (2018) 21 Cal.App.5th 453.**

This decision by the California Court of Appeal, Fourth District, held that a contractor was entitled to recover its bid preparation costs from a public entity on a promissory estoppel theory after it had obtained an injunction to stop the low bidder from proceeding with the work, and yet not receiving the award of the contract itself by court order. Plaintiff West Coast Air Conditioning Company, Inc. (West Coast) was awarded its bid preparation costs in the amount of \$250,000 (in connection with preparation of its \$98 million bid), after it successfully challenged the award of a public works contract by the Department of Corrections and Rehabilitation (CDCR) to the \$98 million low bidder Hensel Phelps Construction Co. (HP). The lower court had found that HP's bid to update the Ironwood State Prison HVAC system was illegal and nonresponsive as a matter of law. It had failed to list approximately 17 subcontractors and submitted a revised bid after the deadline, which materially affected HP's bid price. As a result, the court granted West Coast's request for a permanent injunction, thereby preventing HP from performing any additional work on the subject project after it had actually begun construction activities and completed about 8% of the scope. The Court of Appeal concluded that the lower court properly exercised its broad equitable authority in awarding West Coast its bid preparation costs. However, the court rejected CDCR's argument that West Coast was, as a matter of law, not entitled to recover such costs because West Coast Beach had obtained a permanent injunction by the lower court without any additional relief. The Court of Appeal concluded that "the issuance of a permanent injunction in favor of West Coast, the lowest responsible bidder, *without* either an award of the public works contract to it *or* in award of damages equal to its bid preparation costs, would result in an inadequate remedy to West Coast. Indeed, West Coast prepared its bid and incurred \$250,000 costs in reliance on CDCR's representation that if a contract was awarded, which turned out to be the case, it would be the lowest responsible bidder, which turned out *not* to be the case."

Public entity Facilities and Purchasing personnel are encouraged to read this decision in its entirety, as it provides a good overview and direct references to the current law with respect to issues of bid responsiveness, bid defects, bid preparation damages case law, and other related matters when an award is disputed or protested.