



**COMPETITIVE BIDDING**

**and**

**PUBLIC CONTRACTING**

# COMPETITIVE BIDDING AND PUBLIC CONTRACTING

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**Schools Legal Services  
Orange County Department of Education**

**Competitive Bidding and Public Contracting  
April 2016**

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## INTRODUCTION

Competitive bidding for public contracts is a widespread requirement in California. The reason for the statutory provisions governing bidding is to enhance competition and to prevent corruption and undue influence.<sup>1</sup>

The purpose of competitive bidding is to ensure fairness, efficiency, and security in the construction of public facilities.<sup>2</sup> Competitive bidding statutes were enacted for the benefit and protection of the public and not for the benefit of the bidders.<sup>3</sup> The purpose of competitive bidding statutes has been summarized as follows:

“The provisions . . . requiring competitive bidding . . . are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable and they are enacted for the benefit of property holders and taxpayers and not enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest.”<sup>4</sup>

The guiding principles of contract law (e.g., offer and acceptance, consideration) apply to contracts let under the competitive bidding process.<sup>5</sup> Bids are irrevocable offers given to the public agency involved.<sup>6</sup> A contract is complete and binding when a valid bid is accepted.<sup>7</sup>

A contract is void and unenforceable if the public agency failed to comply with the applicable competitive bidding statute. Companies and individuals doing business with public agencies are presumed to be knowledgeable of the competitive bidding laws and where the public agency violated the competitive bidding statutes, no payments may be made by the public agency to the contractor. When a public agency makes payments to a contractor in violation of the competitive bidding statutes, taxpayers may file suit to recover payment.<sup>8</sup>

However, the courts have not applied the rule in all circumstances and where it would be unfair or unjust to require the contractor to make restitution or repay the funds received to the public agency, the courts will not require restitution.<sup>9</sup> In Advance Medical Diagnostic Laboratories, a medical laboratory in its capacity as a taxpayer, sought a judicial declaration that

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<sup>1</sup> Miller v. McKinnon, 20 Cal.2d 83, 88 (1942), 124 P.2d 34, 37.

<sup>2</sup> Reams v. Cooley, 171 Cal.150 (1915).

<sup>3</sup> Judson Pacific-Murphy Corp. v. Durkee, 144 Cal.App.2d 377 (1956).

<sup>4</sup> McQuillin, Mun. Corp. (3d ed.) Section 29.29.

<sup>5</sup> Pacific Architects Collaborative v. State of California, 100 Cal.App.3d 110, 123 (1979).

<sup>6</sup> M.F. Kemper Construction Company v. City of Los Angeles, 37 Cal.2d 696, 700, 704 (1951).

<sup>7</sup> City of Susanville v. Lee C. Hess Company, 45 Cal.2d 684, 694 (1955).

<sup>8</sup> Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34 (1942).

<sup>9</sup> Advance Medical Diagnostic Laboratories v. County of Los Angeles, 58 Cal.App. 3d 263, 274 (1976), 129 Cal.Rptr. 723; City of Long Beach v. Mansell, 3 Cal.3d 462, 496-497 (1970), 9 Cal.Rptr. 23.

agreements between the County of Los Angeles and other laboratories were null and void because they violated the county's administrative regulations and the competitive bidding statutes that apply to counties which limit the contracting authority of the county purchasing agent to contracts not exceeding \$10,000. Contracts in excess of \$10,000 must be approved by the Board of Supervisors. The medical laboratory sought to compel Los Angeles County to seek a return of the funds paid to the other laboratories under the agreement.

The Court of Appeal ruled that the agreements should have been approved by the Board of Supervisors. However, the Court of Appeal reviewed the contractors' plea of equitable estoppel (i.e., it would be unfair and unjust to require the contractors to repay millions of dollars to the County of Los Angeles where the services had been provided satisfactorily) and held:

"The agreements before the court although void have expired and have been completely performed in all respects by the parties. Nothing in the record suggests corruption, favoritism, unreasonable pricing or lack of complete and quality performance in connection with the agreements. It is also clear that the County board of supervisors did have the general power to execute the agreements and did in fact appropriate funds with which to pay and permitted fulfillment of the agreements. Furthermore, the patent injustice and hardship that would result to RPIs if they were forced to return \$3.4 million is undeniable. There is no suggestion that County or Davis will not abide by and accept the judgment of this court. The execution by County purchasing agent of similar agreements is not likely to recur unless the current statutes are enlarged. There does not appear to be any frustration of public policy that would result if County were estopped from denying the agreements. Under the balancing test as set forth in Mansell, a chancellor in equity could find that County would be estopped to proceed. . . ." <sup>10</sup>

Districts, however, should not rely on the holding in Advanced Medical Diagnostic Laboratories as the courts will, most likely, apply it only in limited circumstances. Districts should attempt to strictly comply with all competitive bidding requirements to avoid the possibility of taxpayer suits and other costly litigation.

### **BIDDING REQUIREMENTS FOR SCHOOL DISTRICTS AND COMMUNITY COLLEGE DISTRICTS**

The Legislature amended provisions in the Public Contract Code relating to bid limits for community college districts and school districts in Senate Bill 429 (Polanco), effective January 1, 1996. <sup>11</sup>

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<sup>10</sup> Id. at 274.

<sup>11</sup> Stats.1995, ch. 897.

Public Contract Code sections 20111 and 20651 were amended to raise the bid limit to \$50,000 for the following:

1. The purchase of equipment, materials or supplies to be furnished, sold or leased to the district.
2. Services, except construction services.
3. Repairs, including maintenance as defined in Public Contract Code section 20115, except for public projects as defined in Section 22002.

The \$15,000 bid limit was retained for public projects and construction services. Public Contract Code section 22002(c) defines a public project as follows:

1. Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.
2. Painting or repainting of any publicly owned, leased, or operated facility.
3. In the case of a publicly owned utility system, “public project” shall include only the construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

The \$50,000 bid applies to maintenance work since the definition of public project set forth in Public Contract Code section 22002(d) does not include maintenance work. Public maintenance work includes:

1. Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.
2. Minor repainting.
3. Resurfacing of streets and highways at less than one inch.
4. Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.
5. Work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including,

but not limited to, dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

Maintenance has also been defined as ordinary upkeep or repair work such as replacements in kind, repainting, replastering and reroofing.<sup>12</sup>

Sections 20113 and 20654 were amended with respect to emergency repairs to clearly state that an emergency bid does not eliminate the need for any bonds or security otherwise required by law. Our office and most school attorneys were previously advising districts that bonds or security otherwise required by law should continue to be provided for emergency repairs.

Sections 20111(d) and 20651(d) provide that the Superintendent of Public Instruction and the Board of Governors of the California Community Colleges shall annually adjust the \$50,000 bid limit for inflation. The annual adjustments are rounded to the nearest \$100. The current bid limit is \$87,800 as of January 1, 2016.

The following questions are frequently asked by districts. The answers below should provide some guidance.

**Question:**

1. When do painting projects fall within the \$15,000 bid limit as opposed to the higher bid limit? Which bid limit applies to the painting of a single or wing of a building, the installation of fascia trim at several sites, and the upgrading, including painting of restrooms to comply with the Americans with Disabilities Act at all sites? Which bid limit applies if the work is part of a deferred maintenance program?

**Answer:**

1. As discussed above, Public Contract Code section 22002(c) defines a public project as the painting or repainting of any publicly owned, leased or operated facility. The \$15,000 bid limit applies to public projects. Section 22002(e) defines a facility as follows:

“For purposes of this chapter, ‘facility’ means any plant, building, structure, ground facility, utility system...real property, streets and highways, or other public work improvement.”

Public project does not include maintenance work or minor repainting, therefore, the \$84,100 bid limit applies to maintenance work and minor repainting. In order to determine which bid limit applies, it is necessary to draw a distinction between painting, repainting and minor repainting. In our opinion, minor repainting would include any painting which includes less than a whole facility or less than a whole plant, building, structure, ground facility, utility system, or real property. The painting of an entire school or an entire building or structure would fall under the definition of public project and the \$15,000 bid limit. The painting of a room,

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<sup>12</sup> Title 24, Section 4-314.

wing or portion of an entire building or structure would be minor repainting and come within the \$84,100 bid limit. Therefore, if the upgrading of restrooms involves the painting or repainting of an entire building or structure, it would fall within the \$15,000 bid limit. The same criteria would apply to painting as part of a deferred maintenance plan. The installation of fascia trim would fall under the \$15,000 limit if it were a work of improvement or an alteration to a facility. If the trim replaced existing trim (i.e., maintenance), the higher limit would apply.

**Question:**

2. When do roofing projects fall within the \$15,000 bid limit as opposed to the higher bid limit?

**Answer:**

2. With respect to roofing, the \$15,000 bid limit for public projects would apply if the entire or whole roof is removed and replaced since this would involve construction or reconstruction or the erection of a new roof. However, if a portion of the roof is replaced or repaired, the higher bid limit for maintenance work would apply since this would involve routine, recurring and usual work for the preservation or protection of the roof.

**Question:**

3. When do asphalt projects fall within the \$15,000 bid limit as opposed to the higher bid limit? Does the resurfacing of “streets & highways” at less than one inch include parking lots, access roads or the slurry coating of parking lots and access roads?

**Answer:**

3. There is no precise state statutory definition of streets and highways. Streets & Highways Code section 23 defines a highway as follows:

“As used in this code, unless the particular provision or the context otherwise requires, ‘highway’ includes bridges, culverts, curbs, drains, and all works incidental to highway construction, improvement, and maintenance.”

Vehicle Code section 590 states:

“‘Street’ is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Street includes highway.”

The term “public highways” includes streets in cities. Criswell v. Pacific Electric Railroad Company.<sup>13</sup> The word “street” in its usual and ordinary meaning denotes a public highway and does not include a private way. Loma Vista Investment, Inc. v. Roman Catholic

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<sup>13</sup> 48 Cal.App.2d 819 (1942).

Archbishop of Los Angeles.<sup>14</sup> A highway is a way publicly maintained and open to the use of the public for the purpose of vehicular traffic.<sup>15</sup> Webster's New World Dictionary (Third Edition) (1991) defines a "highway" as a road freely open to everyone, a public road, a main road or a thoroughfare. Webster's New World Dictionary defines "street" as a public road in a town or city.

Generally, parking lots and access roads maintained on school district property are not open to the public at all times, but may be fenced off or gated at night by school districts. Therefore, in our opinion, the exception for the resurfacing of streets and highways at less than one inch would not apply.

In our opinion, the same rule would apply to asphalt work as to roofing. The \$15,000 bid limit for public projects would apply if the entire asphalt parking lot or access road is removed and replaced since this would involve construction or reconstruction of a new parking lot or access road. However, if a portion of the asphalt is replaced or resurfaced (e.g., slurry coating), the \$58,900 bid limit for maintenance work would apply since this would involve routine, recurring and usual work for the preservation or protection of the parking lot or access road.

**Question:**

4. When do carpeting projects fall within the \$15,000 bid limit as opposed to the higher bid limit? Which limit applies to installation of carpeting in a wing of a building? Which limit applies when the District buys the carpet and district employees install the carpet?

**Answer:**

4. In our opinion, the same analysis would apply to carpeting as to asphalt and roofing work. The \$15,000 bid limit for public projects would apply if the entire carpet is removed and replaced since this would involve renovation, alteration or improvement of a publicly owned, leased or operated facility. However, if a portion of the existing carpet is replaced or repaired, the higher bid limit for maintenance work would apply since this would involve routine, recurring and usual work for the preservation or protection of the existing carpet. This analysis would apply whether the replacement involves a portion of a facility (e.g., wing of a facility) or an entire facility. The day labor and force account limits discussed in answer to question number seven would apply to the installation of carpeting by district employees.

**Question:**

5. When do electrical projects fall within the \$15,000 bid limit as opposed to the higher bid limit? Which limit applies to rewiring for a new phone system? To the replacement of old wiring?

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<sup>14</sup> 158 Cal.App.2d 58 (1958).

<sup>15</sup> Vazquez v. Pacific Grey Hound Lines, 178 Cal.App.2d 628 (1960).

**Answer:**

5. With respect to electrical, if the project involves replacement of existing wiring, or an existing electrical system that has failed, in our opinion, this would involve maintenance and would fall within the higher bid limit for maintenance work. However, if the rewiring involves upgrading or improving the existing system to handle additional equipment or the need for additional power, or the upgrading of a phone system or a new phone system, we believe it falls within the definition of public project as an alteration or improvement, and the \$15,000 bid limit would apply.

**Question:**

6. What are the bid limits with respect to transportation? Does the \$10,000 limit under the Education Code still apply or do the new limits under Public Contract Code apply? Does this limit apply to community college districts? If a district enters into a five year transportation contract, how many more times can it be renewed?

**Answer:**

6. Education Code section 39800 et seq. contain a number of specific provisions with respect to school buses and the provision of transportation to students in elementary and secondary schools. Similar provisions relating to community colleges, Education Code section 82300 et seq. were repealed in 1981. Therefore, the more general provisions of the Public Contract Code apply (the \$84,100 bid limit for services) to community colleges.

Education Code section 39802 requires bidding pursuant to the Public Contract Code whenever an expenditure of more than \$10,000 is involved for the furnishing of transportation to students. Education Code section 39803(a) states that contracts may not be made for a term of more than five years, and may be renewed at the end of each term of the contract. When the contract is renewed, it must include all of the terms and conditions of the previous contract other than rates, including any provisions for increasing rates based on increased costs.

Education Code section 39803(b) states that a school district may enter into continuing contracts for lease or rental of school buses, not to exceed five years, except that if such a lease or rental contract provides that the district may exercise an option either to purchase the buses or to cancel the lease at the end of each annual period during the period of contract, then such contract may be made for a term not to exceed ten years. Education Code section 39803(c) authorizes continuing contracts may be negotiated annually within the contract period when economic factors indicate that such negotiation is necessary to maintain an equitable pricing structure. Such renegotiation must be subject to the approval of both contracting parties.

In our opinion, these provisions take precedence over the more general provisions of the Public Contract Code, and therefore, the \$10,000 bid limit applies.

**Question:**

7. When may a district utilize day labor or force account? What effect do the day labor or force account provisions have on the \$15,000 and higher bid limit?

**Answer:**

7. Public Contract Code sections 20114 and 20655 state that school districts or community college districts may make repairs, alterations, additions or painting, repainting or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance by day labor or force account whenever the total number of hours does not exceed 350 hours. In school districts with an average daily attendance of 35,000 or more, or in community college districts with full time equivalent students of 15,000 or more, the governing board, in addition, may make repairs to school buildings, grounds, apparatus or equipment, including painting or repainting and perform maintenance by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours or when the cost of material does not exceed \$21,000.

These limits are limits separate and apart from the bid limits and may overlap on some occasions. In such circumstances, the school district or community college district may choose to use day labor or force account or go out to bid so long as the district does not exceed the limits set forth in Sections 20114 or 20655.

**ADVERTISING FOR BIDS**

Public Contract Code sections 20112 and 81641 require the governing board of a school district or community college district to advertise at least once a week for two weeks in a newspaper of general circulation published in the district, or if there is no such paper, then in a newspaper of general circulation in the county. Public Contract Code section 20112 states:

“For the purpose of securing bids the governing board of a school district shall publish at least once a week for two weeks in some newspaper of general circulation, circulated in the county, and may post on the district’s Web site or through an electronic portal, a notice calling for bids, stating the work to be done or materials or supplies to be furnished and the time when and the place and the Web site where bids will be opened. Whether or not bids are opened exactly at the time fixed in the public notice for opening bids, a bid shall not be received after that time. The governing board of the district may accept a bid that was submitted either electronically or on paper.”

Government Code section 6066 provides that publication for once a week for two weeks means two publications in a newspaper published once a week or more often, with at least five days intervening between the respective publication dates, not counting such publication dates, is sufficient.

The advertisement must state the work to be done, the materials and supplies required from the contractor, and the day and time the bids are due. The advertisement must also state the time and place where the bids will be opened and read to the public. While the bid is not required to be opened exactly at the time specified, bids may not be received after that time.

## **PREQUALIFICATION OF BIDDERS**

School districts may, pursuant to Public Contract Code section 20111.5, on contracts exceeding the competitive bidding amount, require bidders to provide answers to questions contained in a standard form of questionnaire and financial statement, including a complete statement of the prospective bidder's financial ability and experience in performing public works. When completed, the questionnaire and financial statement must be verified under oath by the bidder in the manner in which pleadings in civil actions are verified.

A uniform system of rating bidders on the basis of questionnaires and financial statements, with respect to the size of the contract on which each is qualified to bid, must be used. The information provided by a bidder is not to be made public at any time. Bids received from any person who has not submitted a complete questionnaire and financial statement at least five days prior to the date fixed for the public opening of sealed bids or who has not been prequalified at least one day prior to that date will not be accepted. The school district can establish a prequalification process on a quarterly basis and can authorize that the bidders be prequalified for up to one calendar year.

Bids must be presented on the standardized proposal form supplied to contractors by the school district. Bids not presented on this form will be rejected.<sup>16</sup> When the bidder presents his or her bid for consideration, he or she is required to furnish information to ensure that he or she qualifies to be awarded the contract.

The two key issues with respect to the prequalification questionnaire are, first, whether the financial statements are public records, and second, whether the district must apply a uniform system for rating bidders on the basis of completed questionnaires and financial statements. To assure uniformity, the process for rating the responses to the questionnaire must be followed carefully. A prequalification committee can be used to evaluate and rate the questionnaires. Our office recommends that the committee have legal counsel available to provide advice with respect to issues that arise during the process of rating the bidders.

Although the authority for the prequalification process is clearly set forth in Public Contract Code section 20111.5, there are no cases which have addressed some of the unanswered questions that have arisen. With the prequalification process, a contract let under mandatory competitive bidding statutes must be awarded to the lowest responsible bidder.<sup>17</sup> Thus, a contract ordinarily must be awarded to the lowest responsible bidder, unless it is found that the bidder is not responsible, (i.e., not qualified to do the particular work under consideration). The word "responsible" in the context of competitive bidding statutes is not necessarily employed in the sense of a bidder who is trustworthy so that a finding of nonresponsibility may not

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<sup>16</sup> Public Contract Code section 20111.5.

<sup>17</sup> Public Contract Code section 20111.

necessarily connote untrustworthiness. Although the term “responsible” includes the attribute of trustworthiness, it also refers to the quality, fitness and capacity of the low bidder to satisfactorily perform the proposed work.<sup>18</sup>

Determining whether a bidder is a responsible bidder is ordinarily a question of fact within the exercise of reasonable discretion by a governing board. However, prior to awarding a contract pursuant to competitive bidding to other than the lowest monetary bidder, a public body must notify the low monetary bidder of any evidence reflecting upon the low bidder’s responsibility received from others or adduced by independent investigation and afford that bidder an opportunity to rebut such adverse evidence and to present evidence that it is qualified to perform the contract.<sup>19</sup> When the staff recommendation is to reject the low bidder as nonresponsible, the bidder should be notified of the evidence reflecting upon the bidder’s responsibility and the bidder should be afforded an opportunity to present information to the board and have the board consider that information before the final decision is made to award the contract to another bidder.

The standard that applies to the prequalification process when a bidder is found not to be responsible as a result of the prequalification process is uncertain. We, therefore, recommend that bidders who have been disqualified and object to or question the disqualification be allowed to discuss the basis for the disqualification with the prequalification committee or a committee member. The bidder should be given an opportunity to respond to the information received by the committee or the committee member. Then the entire committee should consider any additional information provided and determine whether the bidder should remain disqualified.

### **PREQUALIFICATION OF BIDDERS ON PUBLIC PROJECTS**

Public Contract Code section 20111.6 requires that prospective bidders for construction contracts complete and submit to the school district a standardized prequalification questionnaire and financial statement if the project is a public project as defined in Public Contract Code section 22002(c) for which the governing board of the district uses funds received under the Leroy F. Greene School Facilities Act of 1998<sup>20</sup> or any funds from any future state school bond for a public project that involves a projected expenditure of one million dollars or more. Section 22002(c) defines a public project as follows:

“(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.

(2) Painting or repainting of any publicly owned, leased, or operated facility.

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<sup>18</sup> City of Inglewood - L.A. County Civic Center Authority v. Superior Court, 7 Cal.3d 861, 867 (1972).

<sup>19</sup> Id. at 871.

<sup>20</sup> Education Code section 17070.10 et seq.

(3) In the case of a publicly owned utility system, "public project" shall include only the construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher."

A public project does not include maintenance work. Maintenance work includes all of the following:

1. Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.
2. Minor repainting.
3. Resurfacing of streets and highways at less than one inch.
4. Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.
5. Work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including, but not limited to, dams, reservoirs, powerplants and electrical transmission lines of 230,000 volts and higher.<sup>21</sup>

The questionnaire and financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaires and financial statements shall not be public records and shall not be open to public inspection.<sup>22</sup>

The governing board of the district shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements.<sup>23</sup> The questionnaire and financial statement and the uniform system of rating bidders shall cover, at a minimum, the issues covered by the standardized questionnaire and model guidelines for rating bidders developed by the Department of Industrial Relations pursuant to Public Contract Code section 20101(a).<sup>24</sup>

Bids shall not be accepted from any person or other entity that is required to submit a completed questionnaire and financial statement for prequalification, or from any person or other entity that uses a subcontractor that is required to submit a completed questionnaire and financial statement for prequalification, but has not done so at least ten (10) business days prior to the date

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<sup>21</sup> Public Contract Code section 22002(d).

<sup>22</sup> Public Contract Code section 20111.6(b).

<sup>23</sup> Public Contract Code section 20111.6(c).

<sup>24</sup> Public Contract Code section 20111.6(d).

fixed for the public opening of sealed bids or has not been prequalified for at least five (5) business days prior to that date.<sup>25</sup>

The Governing Board of the district may establish a process for prequalifying prospective bidders on a quarterly or annual basis and a prequalification pursuant to this process shall be valid for one calendar year following the date of initial prequalification.<sup>26</sup> If a public project covered by Section 20111.6 includes electrical, mechanical or plumbing components that will be performed by electrical, mechanical or plumbing contractors, a list of prequalified general contractors and electrical, mechanical and plumbing subcontractors shall be made available by the district to all bidders at least five (5) business days prior to the date fixed for public opening of sealed bids.<sup>27</sup> Section 20111.6 applies only to contracts awarded on or after January 1, 2014.<sup>28</sup> Section 20111.6 becomes inoperative on January 1, 2019, and, as of July 1, 2019, is repealed.<sup>29</sup>

### **BID SPLITTING**

Public Contract Code sections 20116 and 20657 prohibit the splitting of a contract into smaller work orders or projects to avoid the requirement to competitively bid a project. Sections 20116 and 20657 provide in pertinent part as follows:

“It shall be unlawful to split or separate into smaller work orders or projects any work, project, service or purchase for the purpose of evading the provisions of this article requiring contracting after competitive bidding.”

Work or labor associated with the purchase of equipment or materials to be installed to improve an existing building should not be separated out from the equipment purchase for the purpose of avoiding the competitive bidding statutes.

In Advance Medical Diagnostic Labs v. County of Los Angeles,<sup>30</sup> a county purchasing agent issued various suborders below the \$10,000 limit and thereby avoided the requirements of Government Code section 25502.5 which permit county purchasing agents to enter into contracts for the county as long as the estimated aggregate cost of the contract does not exceed \$10,000. The Court of Appeal held that Section 25502.5 had been violated. The Court held that the test of the agreements was not the estimated cost of the individual suborders but the estimated cost of the total project.

A project may be split into several trade oriented contracts in order to keep project costs low provided the competitive bidding requirement has been met.<sup>31</sup> Also, contracts for related

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<sup>25</sup> Public Contract Code section 20111.6(f).

<sup>26</sup> Public Contract Code section 20111.6(g).

<sup>27</sup> Public Contract Code section 20111.6(j).

<sup>28</sup> Public Contract Code section 20111.6(m).

<sup>29</sup> Public Contract Code section 20111.6(o).

<sup>30</sup> Advance Medical Diagnostic Labs v. County of Los Angeles, 58 Cal.App.3d 263 (1976).

<sup>31</sup> 57 Ops.Cal.Atty.Gen. 417 (1974).

school improvements have been held to be individual contracts in instances where each contract was decided on separately and independently of others.<sup>32</sup>

## **RELIEF OF BIDDERS**

A contractor may, at any time prior to the scheduled closing for receipt of bids, withdraw his or her bid. After the scheduled closing time for bids, the contractor must seek relief from his or her bid by following the specific procedures of the Public Contract Code.<sup>33</sup> Prior to the enactment of the provisions in the Public Contract Code, the courts had allowed bidders to rescind their bids on much broader grounds.<sup>34</sup> A community college district or a school district may consent to relieve a bidder of a bid due to mistake following the preparation of a report in writing documenting the facts establishing the grounds for relief. The report shall be available for inspection as a public record and shall be filed with the State Board of Control.<sup>35</sup> The failure of the contractor to adhere strictly to the statutory procedures for bid withdrawal can result in a waiver of the right to relief.<sup>36</sup>

If the public agency refuses to consent to the withdrawal of the bid, the bidder may file an action in court within 90 days after the opening of the bid.<sup>37</sup> The grounds for relief authorizing the withdrawal of the bid are as follows:

1. A mistake was made.
2. The bidder gave the public entity written notice within five days after the opening of the bids of the mistake specifying in the notice in detail how the mistake occurred.
3. The mistake made the bid materially different than he or she intended it to be.
4. The mistake was made in filling out the bid, not due to error in judgment or to carelessness in inspecting the site of the work or in reading the plans or specifications.<sup>38</sup>

The bidder must establish all of the above elements to the satisfaction of the court to prevail. The mistake cannot be due to error in judgment or carelessness in reading the plans or specifications. If the contractor accepts the award of the contract despite the mistake, the contractor may not later seek rescission or modification, even for a clerical error.<sup>39</sup>

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<sup>32</sup> Brown v. Bozeman, 138 Cal.App. 133 (1934).

<sup>33</sup> Public Contract Code section 5100 et seq.

<sup>34</sup> M. F. Kemper Construction Company v. Los Angeles, 37 Cal.2d 696 (1951).

<sup>35</sup> Public Contract Code section 5101.

<sup>36</sup> Public Contract Code section 5103(d); White v. Berrenda Mesa Water District, 7 Cal.App. 3d 894 (1970).

<sup>37</sup> Public Contract Code section 5102.

<sup>38</sup> Public Contract Code section 5103.

<sup>39</sup> Lemoge Electric v. County of San Mateo, 46 Cal.2d 659 (1956).

A contractor who claims a mistake or who forfeits his or her bid security is prohibited from participating in further bidding on the project on which the mistake was claimed or security forfeited.<sup>40</sup> The prohibition from participating in further bidding applies to substantially similar projects as well.<sup>41</sup>

If the public entity deems it to be in the best interest of the district, it may, on refusal or failure of the successful bidder to execute the contract, award it to the second lowest bidder. If the second lowest bidder fails or refuses to execute the contract, the public entity may award it to the third lowest bidder. On the failure or refusal of the second or third lowest bidder to whom a contract is so awarded to execute it, their bidder security shall be forfeited.<sup>42</sup>

In Emma Corporation v. Inglewood Unified School District,<sup>43</sup> the Court of Appeal held that a school district could not enforce a contract for school construction against a contractor.

Emma Corporation was a licensed building contractor that submitted the low bid on a school construction project proposed by the Inglewood Unified School District. As required, Emma Corporation included a bond issued by Fidelity and Deposit Company of Maryland for 10% of the bid, which would be forfeited if Emma won the contract but refused to perform. After it submitted its bid, Emma Corporation discovered that it had failed to include its plumbing subcontractor's cost in its bid and that its bid was nearly \$800,000 too low.

Emma Corporation timely sent the district a letter withdrawing its bid. The district, but not Emma Corporation, realized that the letter did not provide all the information required by Public Contract Code sections 5101 through 5103 which authorize the withdrawal of competitive bids. The Court of Appeal found that as part of a deliberate strategy, the district told Emma Corporation that it would contact Emma Corporation if it needed more information but that the district did not do so. When the bid withdrawal period lapsed, the district claimed that Emma Corporation failed to comply with the bid withdrawal requirements and awarded Emma Corporation the contract at its original bid price.

Emma Corporation refused to perform the contract and the district gave the contract to the next lowest bidder. Emma Corporation then sued the district for rescission of the contract and exoneration of the bond. The school district cross-complained for breach of contract, seeking the difference between Emma Corporation's bid and the next lowest bid and payment of the bond.

The trial court found that Emma Corporation failed to substantially comply with the bid withdrawal statutes. However, the trial court also found that the district's conduct and response to Emma Corporation's attempted bid withdrawal estopped (i.e., prohibited or prevented) the district from enforcing the contract. The trial court entered judgment for the Emma Corporation and dismissed the school district's cross-complaint.

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<sup>40</sup> Public Contract Code section 5105.

<sup>41</sup> Columbo Construction Company, Inc. v. Panama Union School District, 186 Cal.Rptr. 463 (1982), 136 Cal.App. 3d 868.

<sup>42</sup> Public Contract Code section 5106.

<sup>43</sup> 114 Cal.App.4<sup>th</sup> 1018 (2004).

The school district appealed and the Court of Appeal affirmed the lower court's decision in favor of the Emma Corporation.

The Court of Appeal held that the common law doctrine of equitable estoppel may be asserted against government agencies by a private party if:

1. The party to be estopped was apprised of the facts.
2. The party to be estopped intended by conduct to induce reliance by the other party, or act so as to cause the other party reasonably to believe reliance was intended.
3. The party asserting estoppel was ignorant of the facts.
4. The party asserting estoppel suffered injury in reliance on the conduct.

In addition, the court held that the doctrine of equitable estoppel may be applied against a government agency if justice requires it.

The Court of Appeal held that in the Emma Corporation case, the district was statutorily empowered to permit Emma Corporation's bid withdrawal and that the district deliberately engineered an attempt to enforce a contract it knew was mistakenly low and that the district did so to try and extract the bid bond amount to cover the project's true cost.

For these reasons, the Court of Appeal upheld the trial court's decision and barred the school district from enforcing its contract with Emma Corporation.

In essence, the court held that where the facts of an individual case are egregious and the public entity did not act in a fair and equitable manner with respect to a bidder, the courts will not enforce the contract.

In Diède Construction, Inc. v. Monterrey Mechanical Co.,<sup>44</sup> the Court of Appeal held that a contractor on a public works project could not sue the public entity for a clerical mistake made by a subcontractor. The Court of Appeal held that the Public Contract Code<sup>45</sup> does not apply to a subcontractor's mistake. The Court of Appeal held that the contractor's failure to seek relief under the Public Contract Code based on the subcontractor's mistake did not negate reasonable reliance on the subcontractor's mistaken bid and the Court of Appeal remanded the matter back to the trial court to determine whether the contractor's reliance on the subcontractor's mistake was reasonable.<sup>46</sup>

In Bay Cities Paving & Grading, Inc. v. City of San Leandro,<sup>47</sup> the Court of Appeal held that the City of San Leandro properly awarded a bid to the lowest bidder and rejected a challenge

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<sup>44</sup> 125 Cal.App.4<sup>th</sup> 380, 22 Cal.Rptr.3d 763 (2004).

<sup>45</sup> Public Contract Code section 5103.

<sup>46</sup> Ibid.

<sup>47</sup> 223 Cal.App.4<sup>th</sup> 1181, 167 Cal.Rptr.3d 733 (2014).

from the second lowest bidder, who alleged that the city improperly awarded the contract to the lowest bidder because a missing page in the lowest bidder's bid was a material deviation from the contract specifications.

On September 4, 2012, the City of San Leandro approved plans and specifications for the construction of a pedestrian interface project along San Leandro Boulevard and called for bids on the project. Prospective bidders were notified of the project requirements, which included submitting a proposal and using a standard form provided by the city, along with a bid deposit securing the bidder's proposal. This security could be in the form of cash, a cashier's or certified check or a bidder's bond executed by an authorized surety company.<sup>48</sup>

On October 23, 2012, the city opened the bids it had received. All of the bidders submitted bid bonds as security for their bids. The lowest bid on the contract was submitted by G & B in the amount of \$4,846,700. Bay Cities submitted the second lowest bid in the amount of \$5,359,725. The bid package submitted by G & B was missing page 33, which was the first page of its bid bond. G & B's bid package did include the second page of the bond (page 34 of the entire bid), which contained the signatures of both the surety's attorney in fact and G & B's president, as well as notary certificates for both signatures. On October 23, G & B submitted the first page of its bid bond to the city after the sealed bids had been opened.<sup>49</sup>

On October 26, 2012, Bay Cities filed a bid protest with the city, arguing that G & B's bid was nonresponsive and its bid must be rejected because of the omitted page on G & B's bid bond. On October 30, 2012, G & B's attorney wrote the city stating that his client's initial failure to include the first page of the two page bid bond was due to an inadvertent error and requested that the city waive this irregularity and award the contract to G & B because the irregularity is minor and waivable by the city.<sup>50</sup>

On October 31, 2012, City Engineer Mark Goralka acknowledged receipt of the bid protest, but notified Bay Cities that the city had determined that G & B's bid was accompanied by an enforceable bond and that the omission of the cover page of the two page bid bond can be waived as an inconsequential bid defect. Goralka also advised that the city would proceed with awarding the contract to G & B.<sup>51</sup>

The Court of Appeal noted that it is a basic rule of competitive bidding that the bid must conform to specifications and that if a bid does not conform to the specifications, it may not be accepted. However, it is further well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential.<sup>52</sup>

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<sup>48</sup> *Id.* at 1184.

<sup>49</sup> *Id.* at 1185.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Id.* at 1187. See, Ghilotti Construction Company v. City of Richmond, 45 Cal.App. 4th 897, 904 (1996).

The Court of Appeal held that substantial evidence supported the city's contention that the second page of the two page bid bond, which was included in the low bidder's original sealed bid package provided sufficient information to assure the city that the low bidder had complied with the bid security requirement. The Court of Appeal concluded that the city properly determined that the defect was inconsequential and therefore, it was proper to waive the requirement.<sup>53</sup>

### **IDENTICAL BIDS**

If two or more bids are identical in all respects, the district may determine by lot which bidder will be awarded the contract.<sup>54</sup> This requirement applies to competitive bidding for the purchase, sale or lease of real property, supplies, materials, equipment, services, bonds or the awarding of any contract. Public Contract Code section 20117 states:

“Notwithstanding any other provision of law, in the event there are two or more identical lowest or highest bids, as the case may be, submitted to a school district for the purchase, sale, or lease of real property, supplies, materials, equipment, services, bonds or the awarding of any contract, pursuant to a provision requiring competitive bidding, the governing board of any school district may determine by lot which bid shall be accepted.”

Government Code section 53064 contains identical language and applies to community college districts.

### **LENGTH OF CONTRACTS**

Continuing contracts for work, services or apparatus or equipment may not exceed five years in length. Contracts for materials or supplies may not exceed three years.<sup>55</sup> There are several statutory provisions with respect to special types of contracts including legal services,<sup>56</sup> emergency security services,<sup>57</sup> energy services,<sup>58</sup> and pupil transportation.<sup>59</sup> Where specific statutory authority exists, the specific statute would control over the general statute.

### **LOWEST RESPONSIVE BIDDER AND COMPLIANCE WITH SPECIFICATIONS**

A bid will be deemed responsive if the bid promises to do what the bidding instructions demand. The term responsive refers to whether the bid, as submitted, complies with all of the requirements of the bidding documents. A determination of responsiveness can be made from the face of the bid.

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<sup>53</sup> *Id.* at 1199.

<sup>54</sup> Public Contract Code section 20117; Government Code section 53064.

<sup>55</sup> Education Code sections 17596 and 81644.

<sup>56</sup> Education Code sections 35041.5, 35204, 35205 (no maximum length of contract specified).

<sup>57</sup> Education Code section 38005.

<sup>58</sup> Education Code sections 81660, 81662 (maximum term of 15 years); Government Code section 4217.12.

<sup>59</sup> Education Code section 39803(a) (a term of 5 years which is renewable).

“Every element which enters into the competitive scheme should be required equally for all and should not be left to the volition of the individual aspirant to follow or disregard and thus to estimate his bid on a basis different from that afforded the other contenders, a common standard by which all bidders are to be measured being implied by the bidding law.”<sup>60</sup>

The goal of competitive bidding is to ensure fairness and efficiency. Therefore, a bid which fails to comply with substantive requirements, placing bidders on an unequal footing, must be rejected even if it is the lowest bid.<sup>61</sup>

A bidder held to be nonresponsive is entitled to notice of such findings and an opportunity to submit materials to rebut the findings.<sup>62</sup>

Award of a bid where the bidder failed to conform to specifications as called for in a request for bids can result in setting aside the contract as awarded. In Konica Business Machines v. University of California,<sup>63</sup> the University of California awarded a bid for copy machines to the low bidder even though its bid deviated from the specifications. The specifications required a copier which could produce at least 40 copies per minute and had zoom magnification and reduction. However, the low bidder bid two machines, one which had the zoom features, but made only 35 copies per minute, and another which did not have zoom features but made 50 copies per minute. The University argued that the equipment bid by the low bidder was acceptable to it.

The Court of Appeal reviewed the facts before it to determine whether the deviations from the bid specifications gave the low bidder an unfair competitive advantage by allowing it to make a lower bid than it would have been able to make without the deviations. The court noted that factors to consider in determining whether a deviation is a minor irregularity or a substantial departure include whether the deviation could be a vehicle for favoritism, affect the amount of the bid, influence potential bidders to refrain from bidding, or affect the ability of the public agency to make bid comparisons.

The Court of Appeal held that bidders were entitled to expect that bids which did not meet the University’s specifications would be rejected in favor of those which did, or that the contract would be rebid. Permitting the University to allow deviations from the advertised specifications in its public call for bids would leave bidders in the unfair position of having to guess what would satisfy the University’s needs.

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<sup>60</sup> McQuillin, Mun. Corp. (3d ed.) Section 29.44; See, Baldwin-Lima-Hamilton Corp. v. Superior Court, (1962) 208 Cal.App.2d 803.

<sup>61</sup> McQuillin, Mun. Corp. (3d ed.) Section 29.78.

<sup>62</sup> Taylor Bus Service, Inc. v. San Diego Board of Education, 195 Cal.App. 3d 1331, 1341 (1987).

<sup>63</sup> Konica Business Machines v. University of California, 206 Cal.App. 3d 449 (1988), 253 Cal.Rptr. 591.

Where it is found that no unfair advantage is given to a bidder, a district may waive a minor irregularity.<sup>64</sup> In Menefee, the Court of Appeal held that the low bidder's failure to sign the bid form (it was signed in other places and was accompanied by a signed bid bond) was a waiveable error and did not make the bid nonresponsive. The Court of Appeal reasoned that since the bidder was not attempting to avoid the contract due to the irregularity but was seeking to honor it, the bidder was not gaining an advantage over other bidders.<sup>65</sup>

In Valley Crest Landscape, Inc. v. City of Davis,<sup>66</sup> the city specified in its bid specifications that the subcontract work must be less than 50 percent of the project. The low bidder stated in his bid that 83 percent of the work would be subcontracted. The low bidder then requested that he be allowed to change his bid to state that 44.65 percent of the work would be subcontracted. The City approved the bidder's request waiving it as a minor irregularity and the second low bidder filed an action alleging that the low bid was nonresponsive and the City should not have approved the modification.

The Court of Appeal stated that in determining the validity of the bid, the issue was whether the contractor would be liable on its bond if it attempted to back out after the bid was accepted based upon the Public Contract Code provisions for relief of bidder from mistake. The court held that misstating the correct percentage of work to be done by a subcontractor is in the nature of a typographical or arithmetical error and under Public Contract Code section 5103, the low bidder could have sought relief by giving the City notice of the mistake within five days of the bid opening. Therefore, the low bidder had an unfair advantage over other bidders, since the low bidder could have withdrawn its bid. As a result, the low bidder had an unfair advantage over the second low bidder and the percentage of subcontracting work could not be corrected by waiving it as an irregularity. In addition, the Court of Appeal held that since the City specified that no more than 50 percent of the work could be done by subcontractors, it became a material element of the bid, and therefore, the City could not waive the requirement as an irregularity after receiving a nonresponsive bid from the low bidder.<sup>67</sup>

In most cases, a determination of nonresponsiveness can be determined from the face of the bid and does not depend on an outside investigation and does not affect the reputation of the bidder. For these reasons, the courts have held that a bidder determined to be non-responsive is entitled to notice of nonresponsiveness and an opportunity to submit materials to rebut the determination of nonresponsiveness. A district is not, however, required to conduct a formal public hearing or produce written findings.<sup>68</sup> If a finding of nonresponsiveness is to be based upon information or an outside investigation, the bidder should be given that information and also be given the opportunity to present information or meet with the district official responsible for making a recommendation to the governing board of the district.

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<sup>64</sup> Menefee v. County of Fresno, 163 Cal.App.3d 1175, 1180 (1985); see, also, Ops.Cal.Atty.Gen. No. 02-1012 (June 3, 2002) (A public entity may accept a bid that does not specify the business location of each listed subcontractor but does provide the state contractor's license number.)

<sup>65</sup> Ibid.

<sup>66</sup> Valley Crest Landscape, Inc. v. City of Davis, 41 Cal.App.4<sup>th</sup> 1432 (1996).

<sup>67</sup> Id. at 1443.

<sup>68</sup> Taylor Bus Service v. San Diego Board of Education, 195 Cal.App.3d 1331, 1343 (1987).

Generally, the following defects cannot be waived:

1. Failure to comply exactly with the publication requirements;
2. Failure to issue a notice inviting bids; and
3. Failure of the bidder to submit a bid which substantially conforms to the call for bids.

The failure to submit a bid bond may be waived and will not prevent the board from awarding the contract so long as:

1. Prior to the opening of the bids, the bidder had in good faith incurred the expense of providing the bid security and all related obligations so as not to have obtained a competitive advantage over other bidders and;
2. The bidder remedied the defect prior to award of the contract.<sup>69</sup>

The lack of the contractor's signature on a performance bond or payment bond may be waived if signed before the award.<sup>70</sup>

### **LOWEST RESPONSIBLE BIDDER**

A contract must be awarded to the lowest responsible bidder unless it is found that that bidder is not responsible (i.e., not qualified to do the particular work that is being bid). The word "responsible" in the context of the competitive bidding statutes, while it includes trustworthiness, it also refers to the quality, fitness and capacity of the low bidder to satisfactorily perform the proposed work.<sup>71</sup>

Whether a bidder is "responsible" is a question of fact within the exercise of reasonable discretion by the governing board. Prior to awarding a contract to the next lowest bidder, the board must notify the low bidder of any evidence reflecting upon the bidder's responsibility received from others or adduced by independent investigation and afford the bidder an opportunity to rebut the adverse evidence against the contractor at a public meeting of the governing board. Where the recommendation is to reject the low bidder as a nonresponsible bidder, the bidder should be notified of the evidence reflecting negatively upon the bidder's responsibility and the bidder should be afforded an opportunity to present information to the governing board before the final decision is made to award the contract to the second lowest

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<sup>69</sup> Cameron v. City of Escondido, 138 Cal.App.2d 311, 316 (1956).

<sup>70</sup> C. Gandahl Lumber Co. v. Thompson, 205 Cal. 354 (1928); Pacific M.&T. Company v. Bonding and Insurance Co., 192 Cal. 278 (1923).

<sup>71</sup> City of Inglewood – L.A. County Civic Center Authority v. Superior Court, 7 Cal.3d 861 (1972).

bidder. However, the Court of Appeal stated that a quasi-judicial administrative hearing prior to disqualification of the low bidder as nonresponsible was not required.<sup>72</sup>

A district may not reject a low bid because it considers the second low bidder more responsible. The rejection of a low bid must be based on a determination that the low bidder is not responsible.<sup>73</sup>

In D.H. Williams Construction, Inc. v. Clovis Unified School District,<sup>74</sup> the Court of Appeal held that a school district could not reject a public works bid as nonresponsive when the bidder listed an unlicensed subcontractor on the bid forms. The Court of Appeal held that the appropriate remedy was for the district to conduct a due process hearing before awarding the contract and determining whether the bidder was a responsible bidder.

The Clovis Unified School District was building a \$126 million dollar education center. Rather than soliciting bids for a single prime contract, the district retained a construction manager and solicited multiple prime contracts for various phases of the project. The bid that was declared nonresponsive was for the concrete and fencing work at the education center.

Five bidders submitted bids for the concrete and fencing work. D.H. Williams Construction, Inc. was the lowest bidder. On its bid form for designation of subcontractors, Williams listed Patch Master of Central California as a subcontractor for concrete, masonry, and sleeves. On February 28, 2005, Patch Master's contractor license had expired. The bids were submitted on or about March 3, 2005. The license had not been renewed at the time the bids were open.

On March 4, 2005, the district notified Williams that Patch Master did not have a current contractor license. Williams responded by faxing a letter from Patch Master to the district stating that it released any claims it may have had regarding the bid. Williams notified the district that it would perform the work of the subcontractor itself and that Patch Master would no longer be performing the work.<sup>75</sup>

On March 8, 2005, the district notified Williams that the governing board of the district would award the bid for concrete and fencing work at its meeting on March 9, 2005, and that the staff would recommend rejection of Williams' bid as nonresponsive. At the meeting on March 9, 2005, the governing board accepted the bid of the second lowest bidder and awarded the bid to Emmett's Excavation, Inc.

The trial court in D.H. Williams issued a judgment stopping all work by Emmett's Excavation, Inc. and requiring the contract be awarded to the lowest bidder, D.H. Williams. The

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<sup>72</sup> Supra. 7 Cal.3d 861 at 871.

<sup>73</sup> Boydston v. Napa Sanitation District, 222 Cal.App.3d 1362, 1368-1369 (1990).

<sup>74</sup> 146 Cal.App.4<sup>th</sup> 757, 53 Cal.Rptr. 3d 345 (2007).

<sup>75</sup> Williams invoked the provisions of Public Contract Code section 4107(a)(3) which permits the public agency to allow the substitution of a subcontractor when a listed subcontractor fails or refuses to perform his or her subcontract.

school district appealed and by the time the case reached the Court of Appeal, the work had been substantially concluded by the second lowest bidder.<sup>76</sup>

The Court of Appeal ruled that the bid had not been nonresponsive, but that the bidder had really been rejected for being nonresponsive. Therefore, the bidder was entitled to a due process hearing on the alleged nonresponsibility.<sup>77</sup> The court in D.H. Williams set forth five factors in determining whether the rejection of the bid was for nonresponsibility rather than nonresponsiveness. These factors were:

1. The complexity of the problem and the ensuing need for subtle administrative judgment;
2. The need for information received outside the bidding process;
3. Whether the problem is the sort that is susceptible to categorical, hard and fast lines, or whether it is better handled on a case-by-case basis;
4. The potential for adverse impact on the professional or business reputation of the bidder; and
5. The potential that innocent bidders are subject to arbitrary or erroneous disqualification from public works contracting.<sup>78</sup>

The Court of Appeal reviewed the case law on responsible bidders and responsive bids and noted that whether a low bidder is a responsible bidder is determined by the fitness, quality, and capacity to perform the proposed work satisfactorily. In making this determination, the public agency is required to afford a significant level of due process to the bidder, including notice and an opportunity to respond since a declaration of nonresponsibility may have an adverse impact on the professional or business reputation of the bidder.<sup>79</sup>

The Court of Appeal held that unless the district determined that listing the unlicensed subcontractor was intentional, or otherwise establishes that Williams was not a responsible bidder, no purpose would be served by excluding Williams' bid since the general contractor would do the work themselves and the district would receive the same product at the same price stated in the bid. The Court of Appeal stated that a case by case determination that a prime contractor is not responsible (e.g. because it has listed a subcontractor it has no intention of

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<sup>76</sup> Id. at 763, footnote 2. The trial court's decision was stayed pending the appeal.

<sup>77</sup> Id. at 772.

<sup>78</sup> Id. at 764-766.

<sup>79</sup> See, City of Inglewood – L.A. County Civic Center Authority v. Superior Court, 7 Cal.3d 861 (1972); Taylor Bus Service, Inc. v. San Diego Board of Education, 195 Cal.App.3d 1331 (1987).

actually using or the general contractor does not have a license to do the work) requires a due process proceeding which the district failed to offer.

The Court of Appeal concluded that a subcontractor is not required by the Business and Professions Code to have a contractor's license at the time it submits its bid to the contractor, "... although established law generally requires a license at the time the subcontractor executes its contract with a successful prime bidder."<sup>80</sup> The court further held that listing an unlicensed subcontractor in the bid of a properly licensed prime bidder does not render the bid nonresponsive.

The Court of Appeal noted that the district's bid packet did not require the subcontractor to be licensed at the time the bid is submitted. The court left unclear whether a district may include in its bid packet language that would make the bid nonresponsive if a prime contractor listed an unlicensed subcontractor in the bid at the time the bid was submitted. The court noted that under the Business and Professions Code section 7031(a), the subcontractor is required to be licensed at all times during the performance of the construction contract.<sup>81</sup>

The trial court canceled the contract between the district and Emmett and ordered the district to bar Emmett from further work and to present to Williams a contract for the remaining portion of the concrete and fencing work. While the Court of Appeal affirmed the trial court's decision against the district, it held that the remedy ordered by the trial court was inappropriate under the circumstances. Rather than cancel the contract, the Court of Appeal held that the district should have an opportunity to exercise its statutory discretion and conduct a due process hearing to determine whether Williams was a responsible bidder or whether it was nonresponsible and should be deprived of the contract. The Court of Appeal held that the district was entitled to make an informed determination if Williams was or was not a responsible bidder so long as it complied with the established requirements of due process.

The Court of Appeal ordered the trial court to order the district to offer a contract to Williams within 15 days of such order, unless before that date, the district provided notice to Williams that it was deemed not a responsible bidder and offered a due process hearing to Williams. The trial court was ordered to retain jurisdiction, to cancel and rescind the district's contract with Emmett and to order appropriate relief to Emmett if the district and Williams entered into a contract for the remainder of the concrete and fence work. The ruling in D. H. Williams Construction, Inc. will require districts to make a case by case determination as to

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<sup>80</sup> Id. at 768. See, M.W. Erectors, Inc. v. Niederhauser Ornamental and Metalworks Company, Inc., 36 Cal.4<sup>th</sup> 412, 436 (2005). In M.W. Erectors, Inc., the California Supreme Court held that a subcontractor is barred from recovering compensation for work performed for a general contractor under Business and Professions Code section 7031(a) if the subcontractor was not properly licensed at all times during the performance of the work called for under the contract. The court also held that if the subcontractor was properly licensed at all times during contractual performance, the subcontractor is not barred from recovering compensation solely because he or she was not properly licensed when the contract was executed. Id. at 419.

<sup>81</sup> Business and Professions Code section 7031(a) states in part, "... no person engaged in the business...of a contractor, may bring or maintain any action,... in any court in this state for the collection of compensation for the performance of any act or contract where a license is required... without alleging he or she was a duly licensed contractor at all times during the performance of that act or contract..."

whether a contractor, who has listed an unlicensed subcontractor on their bid, is a responsible bidder.

In Great West Contractors, Inc. v. Irvine Unified School District,<sup>82</sup> the Court of Appeal held that the Irvine Unified School District should have granted a hearing to a nonresponsible bidder. The Court of Appeal held that the school district mistakenly rejected the low bidder's bid as nonresponsive and did not provide the low bidder with a hearing. The Court of Appeal held that a public agency cannot reject the bid of the lowest bidder on a public works project on the theory that the bid was nonresponsive to the agency's request for bids when the facts indicate that the rejection was based on the perception that the lowest bidder is not responsible.

In March 2008, the Irvine Unified School District put out a call for bids, asking for contractor bids on two elementary school modernization projects, at Eastshore School and Northwood School. The bid process included a prequalification process pursuant to Public Contract Code section 20111.5. Great West went through the prequalification process and the district sent Great West a letter saying Great West was indeed qualified to bid on the two projects.<sup>83</sup>

On May 8, 2008, the bids were opened and Great West was the lowest bidder on both projects. On Eastshore School, JRH Construction, the eventual winner, was the third from lowest bidder. On Northwood School, Construct One, the eventual winner, was the third from lowest bidder. The difference between Great West's bid and JRH's bid on the Eastshore School project was about \$500,000. The difference between Great West's bid and Construct One's bid on the Northwood School project was about \$300,000.<sup>84</sup>

As part of the bid, Great West gave its license number. An item in the required bid package asked if the bidder had ever been licensed under a different name or license number. Great West responded that it had not ever been licensed under a different name or license number.<sup>85</sup>

On May 9, 2008, the day after the bids were opened, the vice president of Construct One sent the district a letter challenging the bids of Great West and the second lowest bidder on the Northwood School Project. The letter argued that the two lowest bidders had relied on an unreliable subcontractor and that Great West had failed to disclose they had previously operated under other licenses. The letter also asserted that Great West's president, Gary Wolfinger, was also listed under another license. The letter apparently prompted a staff review of Great West's bid, which resulted in a letter from the district's director of construction and facilities to Gary Wolfinger of Great West on May 6, 2008. The letter indicated that district staff was recommending that the district's board reject Great West's bid on the Northwood School Project as nonresponsive.<sup>86</sup>

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<sup>82</sup> 187 Cal.App. 4th 1425, 115 Cal.Rptr.3d 378 (2010).

<sup>83</sup> Id. 1431.

<sup>84</sup> Ibid.

<sup>85</sup> Id. at 1431-32.

<sup>86</sup> Ibid.

Great West pointed out to the Court of Appeal that the staff letter did not invite any response or suggest any opportunity for denial of the allegations. The board agenda for the May 20, 2008 meeting did not give the amounts bid by Great West and the second lowest bidders. Rather, it inserted the word “nonresponsive” where the monetary amount of the bid would otherwise have been listed. Great West did submit two letters in response, dated May 20, 2008, stating that Great West only operated and functioned as a business under the license number given in the bid, and that the other licenses were not functional licenses. Great West’s legal counsel, in its letter, argued that Great West’s bid was not nonresponsive, but the district staff’s reasons for rejection go to the question of Great West’s responsibility. Great West’s legal counsel’s letter also stated that no business was done under the other licenses.<sup>87</sup>

At the May 20, 2008 board meeting, two board members suggested delaying the decision pending clarification from legal counsel. Staff, however, reiterated that legal counsel had already validated the district’s position and a delay could jeopardize summer completion due to extremely tight timelines. On May 20, 2008, the district’s board awarded the Eastshore School contract to JRH Construction and awarded the Northwood School contract to Construct One.<sup>88</sup>

Great West filed a petition for writ of mandate in Superior Court on May 23, 2008. The district’s contract with JRH was signed on May 27. The contract with Construct One was signed on May 29. The district issued formal notices to proceed to both JRH and Construct One on May 28, 2008. The hearing on Great West’s request for temporary relief in Superior Court took place on June 3, 2008. Great West had not received JRH’s and Construct One’s bid documents in time for the hearing. Judge Horn issued a decision on June 12, 2008.<sup>89</sup>

A second hearing was held on July 3, 2008, and counsel for Great West raised the issue of the apparent discrepancy in treatment afforded Construct One and JRH. The school district’s counsel argued that any favoritism and corruption was not technically before the court, and argued that Great West could, if it wanted, bring a separate action and raise all those issues. The trial court ruled that the court would not consider the new material relating to favoritism. On July 15, 2008, the trial court ruled that Great West’s bid was nonresponsive and denied the petition for writ of mandate.<sup>90</sup>

Great West’s counsel then sought to amend its petition to include the favoritism allegations. On December 19, 2008, the trial court denied the request to amend the petition. On December 24, 2008, the trial court denied the petition for peremptory writ of mandate. A notice of appeal was filed on February 26, 2009.<sup>91</sup>

On appeal, the Court of Appeal first addressed the issue of mootness. The Court of Appeal held that the nonresponsive vs. the nonresponsible issue was a classic example of an issue capable of repetition, yet likely to evade review. In most cases, by the time the matter

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<sup>87</sup> Id. at 1433.

<sup>88</sup> Id. at 1433-34.

<sup>89</sup> Id. at 1434-35.

<sup>90</sup> Id. at 1436.

<sup>91</sup> Id. at 1436-37.

reaches the Court of Appeal, the public works project will be completed. The Court of Appeal held that the question of the difference between nonresponsive and a nonresponsible bidder was an issue of public interest. The Court of Appeal was concerned that by deeming something in a bid package to be nonresponsive, the public agency can circumvent public contracting statutes and do so without affording that bidder a hearing.<sup>92</sup>

The Court of Appeal noted that the trial court record gave rise to a reasonable inference of a systemic practice of favoritism. The Court of Appeal found that Construct One had access to Great West's bid information within 24 hours of the opening of all the bids, allowing Construct One to present a bid challenge almost immediately to the district. Based on the allegations that Great West had failed to disclose some licenses with which it or its principals had been associated, Construct One filed a protest.<sup>93</sup>

The Court of Appeal held that the governing statutes required the governing board of the school district to award a contract for a public project to the lowest responsible bidder.<sup>94</sup> The Court of Appeal held that in public works contracts, unlike service contracts (e.g., bus transportation) the governing statute is much more specific and limits the discretion of the governing board of the school district to awarding the contract to the lowest responsible bidder.

The definition of "responsible bidder" is set forth in Public Contract Code section 1103. Section 1103 states:

“‘Responsible bidder,’ as used in this part, means a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract.

The Legislature finds and declares that this section is declaratory of existing law.”

The Court of Appeal noted that Public Contract Code section 1103 is focused on the bidder, not the bid. The statute speaks in terms of personal qualities that have been demonstrated by the bidder. The Court of Appeal noted that the statutory definition is based on case law. In Raymond v. Fresno Unified School District,<sup>95</sup> the Court of Appeal held that the emphasis should be on the qualities of the bidder, not the bid, in determining whether a bidder was responsible. In Raymond, the school district was held to have validly rejected the lowest bidder's bid for a school building as coming from a nonresponsible bidder because the lowest bidder had already built a building for the district and that building had been the subject of many complaints.

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<sup>92</sup> Id. at 1444.

<sup>93</sup> Id. at 1445-46.

<sup>94</sup> Id. at 1450. See, Public Contract Code sections 20111, 22002.

<sup>95</sup> 123 Cal.App.2d 626 (1954).

The Court of Appeal noted that the California Supreme Court in City of Inglewood-LA County Civic Center Authority v. Superior Court<sup>96</sup> held that the personal qualities of the bidder were the key to determining responsibility. In City of Inglewood, the California Supreme Court used such words as “trustworthiness,” “quality,” “fitness,” and “capacity” in describing the qualities to look for in a responsible bidder. These terms were incorporated into the statutory definition.

In contrast, the Court of Appeal noted in Great West that the responsiveness of a bid can many times be determined from the face of the bid without outside investigation or information.<sup>97</sup> The Court of Appeal concluded, “In all of the cases where a public entity’s determination that a bid was nonresponsive was upheld, the determination of nonresponsiveness was readily ascertainable on the face of the bid.”<sup>98</sup>

The Court of Appeal cited the case of D.H. Williams Construction, Inc.<sup>99</sup> to illustrate the differences between nonresponsive and nonresponsible. The Court of Appeal in Great West applied the five factors set forth in D.H. Williams. First, the Court of Appeal held that the district’s concern in asking for all related and associated licenses went directly to a valid concern that contracts only go to the lowest responsible bidder. The question was asked so that the district could check up on the history of its bidders so it could see whether the bidder had a history of shoddy workmanship. The Court of Appeal held that whether Great West was hiding its past by answering “no” to the associated license question was a question of some complexity necessarily requiring some administrative judgment. The Court of Appeal noted that there is an obvious difference between an innocent contractor forgetting to list some joint venture that an employee might have been involved in years ago and the deliberate concealment of the fact that a license was yanked or suspended from this conduct. The Court of Appeal ruled that this issue requires some investigation and fact finding.<sup>100</sup>

Second, the Court of Appeal ruled that Great West’s answer was responsive on the face of its bid and that the district staff had to go outside the bidding process to determine whether the answer was false. The Court of Appeal noted, “Not to give Great West a responsibility hearing under those circumstances effectively made the staff’s initial determination the last word on the issue, and assumed the staff was infallible in its determination.”<sup>101</sup> Therefore, Great West should have been given a hearing on this issue.

Third, the Court of Appeal held that the problem of a purportedly false answer to a bid request as to associated licenses is quite different than the factual circumstances of nonresponsive bidding in the case law. The question did not involve requesting, for example, ten million dollars in insurance and the bidder substituting a different form of insurance than that that was requested. The Court of Appeal observed, “By contrast, the purported failure to

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<sup>96</sup> Id. at 1451. City of Inglewood-LA County Civic Center Authority v. Superior Court, 7 Cal.3d 861, 867 (1972).

<sup>97</sup> Id. at 1453; citing Valley Crest Landscape, Inc. v. City Council, 41 Cal.App.4th 1432, 1438 (1996); Taylor Bus Service, Inc. v. San Diego Board of Education, 195 Cal.App.3d 1331, 1342 (1987).

<sup>98</sup> Id. at 1454.

<sup>99</sup> 146 Cal.App.4th 757 (2007).

<sup>100</sup> Id. at 1455-56.

<sup>101</sup> Id. at 1457-58.

disclose an associated license (particularly any that were related to joint ventures or which go back over fifteen years and which may not substantively reflect on the bidder's conduct) is a matter much more suited to a hearing, fact-finding and administrative judgment, rather than summary rejection based on staff checking."<sup>102</sup>

Fourth, the court observed that the rejection of Great West's bid for dishonesty had an adverse impact on the professional and business reputation of the bidder. Therefore, a hearing should have been held.

Fifth, the Court of Appeal noted that rejection purportedly not disclosing associated licenses is, as to the facts of this case, particularly vulnerable to abuse. The Court of Appeal noted:

“While the question does reflect a valid public entity interest in ascertaining the history of any bidder (a fact which itself points toward responsibility, not responsiveness), it can readily serve as a trap for the unwary and a conduit for favoritism. Rejection on that basis without a hearing smells of a concerted effort by the district to find some reason, any reason, to reject the lowest bidder's contract. And particularly here, where there is at least the allegation (never squarely confronted by the district) that it used a double standard in evaluating Great West's bid and the winners' bids.”<sup>103</sup>

Based on these five factors, the Court of Appeal ruled that the school district was wrong in rejecting Great West's bid as nonresponsive and should have granted Great West a hearing to determine whether it was the lowest responsible bidder.

The Court of Appeal, having determined that the Irvine Unified School District incorrectly summarily dismissed Great West's bid as nonresponsive, went on to hold that the trial court erred in refusing to allow Great West to amend its petition for writ of mandate. The Court of Appeal stated:

“Great West was entitled to a hearing that it didn't get, and that hearing should have been afforded prior to the district not awarding it the contract. Under Kajima, Great West may be entitled to recover its bid preparation costs, depending, of course, on what the results of the hearing to which it was entitled would have been.”<sup>104</sup>

The Court of Appeal went on to state that the trial court should have allowed Great West to amend its petition to allege that the school district showed favoritism in awarding the bid. The

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<sup>102</sup> Id. at 1458.

<sup>103</sup> Ibid.

<sup>104</sup> Id. at 1458-59.

Court of Appeal held that the allegations of unequal treatment against Great West were relevant to the case. The Court of Appeal reversed the trial court's judgment and its order denying Great West's request to amend its petition to state a prayer for relief for its bid preparation costs under Kajima. The Court of Appeal remanded the case for further proceedings consistent with its opinion.

### **REJECTION OF ALL BIDS**

Public Contract Code sections 20111 and 20651 state that school districts and community college districts shall let contracts to the lowest responsible bidder who shall give security as the board requires or else reject all bids. The courts have held that even where statutory provisions do not specifically state that districts may reject all bids, districts may do so for any reason and at any time before it accepts a bid unless the district exercises that right in an arbitrary and capricious manner.<sup>105</sup>

### **BID SECURITY**

Public Contract Code sections 20111 and 20651 state that all bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bid security:

1. Cash,
2. A cashier's check made payable to the district,
3. A certified check made payable to the district,
4. A bidder's bond executed by an admitted surety insurer, made payable to the school district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

The purpose of a bid security is to guarantee that the successful bidder signs the contract after being awarded the bid. The bidder forfeits the bid security if the bidder fails to execute the contract.<sup>106</sup> Bids for materials and supplies may require bid security at the discretion of the district.

### **REQUESTS FOR PROPOSALS**

A request for proposals differs conceptually from the competitive bid process. In asking for proposals, a district asks vendors to submit proposals with suggested specifications that conform to general requirements. The proposals must explain how their product meets the

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<sup>105</sup> Universal By-Products, Inc. v. City of Modesto, 43 Cal.App.3d 145, 156 (1974); Laurent v. City and County of San Francisco, 99 Cal.App.2d 707, 710-11 (1950).

<sup>106</sup> 53 Cal.Jur.3d Section 22, Public Works and Contracts, p. 203.

general requirements and the advantages of their product to the district. When requesting proposals, the district may evaluate the proposals based upon the needs and desires of the district and award a contract based upon its determination of the best quality services and functions for the price. In many cases, the district will negotiate with one or more of the companies which made proposals with respect to the terms and conditions under which the equipment or services will be furnished and the price to be paid. Requests for proposals may be used by districts only when permitted by law or where competitive bidding is not required by statute.

Government Code section 4217.16 authorizes districts to request proposals from qualified persons with respect to the energy service contracts. After evaluating the proposals, the public agency may award a contract on the basis of the experience of the contractor, the type of technology employed by the contractor, the cost to the local agency and any other relevant considerations.

### **SPECIAL BIDDING REQUIREMENTS FOR SPECIFIED PRODUCTS AND SERVICES**

#### **A. Data Processing Systems and Supporting Software**

Public Contract Code section 20118.1 and Education Code section 81645 authorize districts to acquire computer hardware and software from one of the three lowest responsible bidders. Public Contract Code section 20118.1 states:

“The governing board of any school district may contract with an acceptable party who is one of the three lowest responsible bidders for the procurement or maintenance, or both, of electronic data-processing systems and supporting software in any manner the board deems appropriate.”

Education Code section 20118.2 states that due to the highly specialized and unique nature of technology, telecommunications, related equipment, software and services, rapid technological changes and in order to allow for the introduction of new technological changes into the operations of the school district, it is in the public’s best interest to allow a school district to consider, in addition to price, factors such as vendor financing, performance reliability, standardization, life cycle cost, delivery timetables, support logistics, the broadest possible range of competing products and materials available, fitness of purchase, manufacturers’ warranties, and similar factors in the award of contracts for technology, telecommunications, related equipment, software and services. Section 20118.2 applies only to a school district’s procurement of computers, software, telecommunications equipment, microwave equipment, and other related electronic equipment and apparatus. Section 20118.2 does not apply to contracts for construction or for the procurement of any product that is available in substantial quantities to the general public.

A school district may, after a finding is made by the governing board that a particular procurement qualifies, authorize the procurement of the product through competitive

negotiation.<sup>107</sup> Competitive negotiation includes, but is not limited to, all of the following requirements:

1. A request for proposals shall be prepared and submitted to an adequate number of qualified sources, as determined by the school district, to permit reasonable competition consistent with the nature and requirements of the procurement.
2. Notice of the request for proposals shall be published at least twice in a newspaper of general circulation, at least ten days before the date for receipt of the proposals.
3. The school district shall make every effort to generate the maximum feasible number of proposals from qualified sources and shall make the findings to that effect before proceeding to negotiate if only a single response to the request for proposals is received.
4. The request for proposals shall identify all significant evaluation factors, including price and their relative importance.
5. The school district shall provide reasonable procedures for the technical evaluation of the proposals received, the identification of qualified sources, and the selection for the award of the contract.
6. The award shall be made to the qualified bidder whose proposal meets the evaluation standards and will be most advantageous to the school district with price and all other factors considered.
7. If an award is not made to the bidder whose proposal contains the lowest price, the school district shall make a finding setting forth the basis for the award.<sup>108</sup>

The school district, at its discretion, may reject all proposals and request new proposals.<sup>109</sup> Provisions in any contract concerning utilization of small business enterprises that are in accordance with the request for proposals shall not be subject to negotiation with the successful proposer.<sup>110</sup>

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<sup>107</sup> Public Contract Code section 20118.2(c).

<sup>108</sup> Public Contract Code section 20118.2(d).

<sup>109</sup> Public Contract Code section 20118.2(e).

<sup>110</sup> Public Contract Code section 20118.2(f).

Education Code section 81645 (applicable to community college districts) authorizes the acceptance of competitive proposals or competitive bids, Public Contract Code section 20118.1 (applicable to school districts) does not. Education Code section 81645 states:

“The governing board of any community college district may contract with a party who submitted one of the three lowest responsible competitive proposals or competitive bids, for the acquisition, procurement or maintenance of electronic data-processing systems and equipment, electronic telecommunication equipment, supporting software, and related materials, goods and services, in accordance with procedures and criteria established by the governing board.”

The request for competitive proposals must be advertised in the same manner as competitive bids pursuant to Education Code section 81641. Education Code section 81645 also provides that a community college district may contract in accordance with procedures and criteria established by the governing board. These procedures and criteria, which the district will use to evaluate proposals and determine which of the three lowest bids or proposals will be accepted, should be established prior to the publication of a notice calling for bids or proposals. The established procedures and criteria should be included in the request for proposals along with a notice stating that the community college district may award to any one of the three lowest bidders or proposals meeting the district’s requirements.

## **B. Transportation Contracts**

Education Code section 39802 establishes a competitive bid limit of \$10,000 for transportation contracts let by school districts. A similar provision for community college districts was repealed. Therefore, the general bidding requirements of Public Contract Code section 20651 apply to community college districts.

Education Code section 39802 states:

“In order to procure the service at the lowest possible figure consistent with proper and satisfactory service, the governing board shall, whenever an expenditure of more than ten thousand dollars (\$10,000) is involved, secure bids pursuant to Sections 20111 and 20112 of the Public Contract Code whenever it is contemplated that a contract may be made with a person or corporation other than a common carrier or a municipally owned transit system or a parent or guardian of the pupils to be transported. The governing board may let the contract for the service to other than the lowest bidder.”

Even though the statute states that a school district may award a contract to a contractor other than the lowest bidder, the courts have held that a higher bid may not be accepted for the

same services.<sup>111</sup> However, if the school district first determines that the prevailing bidder could provide better service under the standards enunciated in the specifications in the bid, it may award to other than the lowest bidder.<sup>112</sup>

In addition, transportation contracts may be renewed for the same term and under the same terms and conditions.<sup>113</sup>

## **CONFLICT OF INTEREST**

Independent contractors who assist districts in preparing bid documents may not bid on the contract they prepared for the district. An independent contractor or consultant who bids on contracts prepared by that consultant would be violating Government Code section 1090 which prohibits conflicts of interest. Section 1090 states that governing board members and employees of a district shall not be financially interested in any contract made by them in their official capacity or by any body of which they are members. Contracts include preliminary discussions, negotiations, the drawing up of plans, specifications and solicitations for bids.<sup>114</sup> Contracts entered into in violation of Section 1090 are invalid and willful violations of Section 1090 are a criminal offense.<sup>115</sup>

The purpose of Government Code section 1090 is to ensure the absolute loyalty and undivided allegiance of a public officer or employee to the best interest of the public agency and to remove all direct and indirect influence of an interested officer or employee and to discourage deliberate dishonesty.<sup>116</sup> Under Government Code section 1090, no person can faithfully serve two masters.<sup>117</sup>

The California Attorney General has stated that an architect or structural engineer employed by a manufacturer, contractor or builder of portable structures violates Section 1090 when he or she also represents the school district as an agent to prepare plans, specifications and estimates to acquire relocatable structures and assist the school district in obtaining the required state approval for the relocatables while still in the employ of the manufacturer, contractor or builder of the portable structures.<sup>118</sup> Therefore, in our opinion, independent contractors and consultants who prepare plans and specifications for a district may not subsequently participate in submitting a bid on that same contract.

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<sup>111</sup> Educational and Recreational Services, Inc. v. Pasadena Unified School District, 65 Cal.App.3d 775 (1977).

<sup>112</sup> Id. at 783.

<sup>113</sup> Education Code section 39803.

<sup>114</sup> Stigel v. City of Taft, 58 Cal.2d 565, 569-571 (1962); Millbrae Association for Residential Survival v. City of Millbrae, 262 Cal.App.2d 222, 237 (1968).

<sup>115</sup> Government Code sections 1092 and 1097.

<sup>116</sup> Fraser-Yamor Agency, Inc. v. County of Del Norte, 68 Cal.App.3d 201, 215 (1977).

<sup>117</sup> Thompson v. Call, 38 Cal.3d 633, 637 (1985).

<sup>118</sup> 51 Ops.Cal.Atty.Gen. 135 (1968).

## UNIT BID PRICING

Districts may competitively bid for unit prices when the exact amount of work or materials that will be required is not known.<sup>119</sup> The advertisement for bids for unit prices should contain sufficient information regarding the work or materials to enable bidders to calculate their bids and to compete on an equal basis.<sup>120</sup> The time period of the unit price contract should be specified in the call for bids, an estimate of the number of units which may be required should be given, and if a certain number of units will be needed immediately, this information should also be included in the call for bids. The bid form or notice to bidders should also specify the basis for determining the low bidder.

District should be cautioned in the usage of unit bid pricing as a result of an Attorney General opinion, issued on January 9, 2001.<sup>121</sup> The Attorney General concluded that a school district may not enter into a job order contract (JOC) based upon unit prices for the performance of public works projects. A JOC was defined as a competitively bid, firm fixed price, indefinite quantity contract for the performance of minor construction as well as the renovation, alteration, painting and repair of existing public facilities. The Attorney General found that the unique features of a JOC, detailed repair and construction tasks including task descriptions, specifications, units of measurement and unit prices for each task, including the lack of information regarding specific projects at the time of submitting the competitive bids, was entirely inconsistent with the language of Public Contract Code section 20111.

## AWARD OF MULTIPLE CONTRACTS FROM ONE BID

Districts may bid for different portions of a project if called for in the notice to bidders.<sup>122</sup> Districts may not reserve the right to divide the work after the bids are received. Districts may however, call for the submission of alternative bids.<sup>123</sup> For example, where a contract may be performed in two sections, the advertisement for bids could call for bidders to submit either a single proposal for both sections or separate proposals for subsections or sections as the bidder might select and a bid which included three schedules (for the first section, for the second section and for both sections combined) would not be invalid.

If the advertisement for bids requests bids for the entire project, a bid for less than the entire project must be disregarded.<sup>124</sup> If the bid documents call for bids upon separate parts of a project, a bid upon the whole project must be rejected.<sup>125</sup>

A notice for bids may require alternate bids so that bidders may bid on several alternate propositions, thereby allowing a district the option of choosing or eliminating various items.<sup>126</sup>

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<sup>119</sup> Bent Brothers, Inc. v. Campbell, 101 Cal.App. 456, 466 (1929); McQuillin Municipal Corporations (3d ed.) Section 29.54.

<sup>120</sup> McQuillin, Mun. Corp. (3d ed.) Section 29.54.

<sup>121</sup> 84 Ops.Cal.Atty.Gen. 5 (2001)

<sup>122</sup> Id. at 29.76.

<sup>123</sup> Id. at 29.65.

<sup>124</sup> Stimson v. Hanley, 151 Cal. 379 (1907).

<sup>125</sup> McQuillin, Mun. Corp. (3d ed.) Section 29.49.

A notice to bidders requesting the submission of alternate bids which list several options with respect to the kind or quality of work and materials have been upheld.<sup>127</sup> The district then decides after all bids are received and reviewed which material to use and which alternative to choose. Once it decides which alternative, if any, to use, the bid must be awarded to the low bidder for that alternative. The notice to bidders should clearly state whether a bidder must bid on all items, the basis upon which the lowest responsible bidder will be determined and reserve to the district the authority to select the alternatives, additives or deductions it wishes to award.

### **BIDDING LIMITED TO A SPECIFIED PRODUCT OR MANUFACTURER**

When competitive bidding is required by statute, specifications cannot be drawn to limit bidding to one company, corporation or individual where others are engaged in the same business and can do the work or supply the materials.<sup>128</sup> A notice for bid should not restrict competition and should give all responsible bidders an opportunity to compete.<sup>129</sup>

Public Contract Code section 3400 prohibits a district from drafting specifications for bids in connection with the construction, alteration or repair of public works so as to limit the bidding directly or indirectly to any one specific concern or from calling for a designated material, product, or service by specific brand or trade name, unless at least two brand names or trade names of comparable quality are specified and followed by the words “or equal.” In cases involving a unique or novel product application required to be used in the public interest, or where only one brand or trade name is known to the district, it may list only one. The specifications must provide for a period of time prior to or after, or prior to and after, the award of the contract for submission of data substantiating a request for a substitution of “an equal” item. If no time period is specified, data may be submitted anytime within thirty-five (35) days after the award of the contract. The prohibition in Public Contract Code section 3400 is not applicable if the governing board or its designee makes a finding that is described in the invitation for bids or requests for proposals that a particular material, product, thing, or service is designated by specific brand or trade name for either of the following purposes:

1. In order that a field test or experiment may be made to determine the product’s suitability for future use, or
2. In order to match other products in use on a particular public improvement either completed or in the course of completion.

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<sup>126</sup> 18 Ops.Cal.Atty.Gen.1 (1951).

<sup>127</sup> McQuillin Mun. Corp. (3d ed.) Section 29.55.

<sup>128</sup> *Id.* at 29.49.

<sup>129</sup> *Id.* at 29.44.

The principle set forth in Public Contract Code section 3400 should also apply to the purchase of supplies, materials and equipment and specifications may not be drawn which would limit bidding to one product.<sup>130</sup>

### **CHANGE ORDERS AND CONTRACTS ENTERED INTO AFTER COMPETITIVE BIDDING**

The competitive bidding laws require districts to enter into contracts that are consistent with the notice given to bidders. The contract entered into must contain substantially the same terms and conditions as the terms and conditions specified in the bid documents.<sup>131</sup>

Slight variations or incidental changes in the proposed form of the contract will not require rebidding. Major changes in the terms and conditions or the substitution of terms and conditions favorable to the low bidder which were not included in the bid documents or specifications are void.<sup>132</sup> Changes in the contract amount, the date, time and place of performance, the method of payment, and in the number or relations of parties have been deemed to constitute a substantial or material change in the contract.<sup>133</sup>

The courts generally do not allow substantial changes from the bid documents and apply the general rules of contract law holding that bids are irrevocable offers or options given to the district involved and a contract is complete and binding upon the parties when a valid bid is accepted.<sup>134</sup> Therefore, additional or different contract terms cannot be negotiated after a bid is awarded.<sup>135</sup>

However, Public Contract Code sections 20118.4 and 20659 authorize the change or alteration of a contract after a bid is awarded without further bidding under certain circumstances. The cost must be agreed upon in writing between the district and the contractor. It may not exceed the bid amounts applicable to the original contract or 10 percent of the original contract price.

Pursuant to Public Contract Code sections 20118.4 and 20659, a contract may be increased or decreased after the bid is awarded due to changes that might arise during the course of the contract. These changes are limited to the bid limits or to 10 percent of the original contract price, whichever is greater. The purpose of Sections 20118.4 and 20659 was to allow some flexibility following the award of the bid, and to ensure that substantial changes were not made which would constitute the making of a new contract.<sup>136</sup> In effect, the change order provisions allow districts to negotiate changes to a contract provided the contract is not

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<sup>130</sup> Baldwin-Lima-Hamilton Corp. v. Superior Court, 208 Cal.App.2d 803, 821 (1962); 47 Ops.Cal.Atty.Gen. 158, 160 (1966).

<sup>131</sup> Warren v. Chandos, 115 Cal.382 (1896); Bent Brothers, Inc. v. Campbell, 101 Cal.App. 456, 469 (1929).

<sup>132</sup> 64 Am.Jur.2d, Public Works & Contracts, section 66.

<sup>133</sup> 3 Cal.Jur.3d, Alteration of Instruments, sections 24-38; Greer v. Hitchcock, 271 Cal.App.2d 334 (1969).

<sup>134</sup> M.F. Kemper Construction Company v. City of Los Angeles, 37 Cal.2d 696, 700, 704 (1951); City of Susanville v. Lee C. Hess Company, 45 Cal.2d 684, 694 (1955).

<sup>135</sup> 18 Ops.Cal.Atty.Gen. 1, 3 (1951); 73 Ops.Cal.Atty.Gen. 417, 423 (1990).

<sup>136</sup> 73 Ops.Cal.Atty.Gen. 423 (1990).

materially altered by the change order to such an extent that it would create a new project or contract which should be bid separately.

## **EXCEPTIONS TO COMPETITIVE BIDDING**

### **A. Joint Purchasing Agreements**

Pursuant to Government Code section 6500 et seq., community college districts and school districts may enter into joint powers agreements to exercise powers common to them by a Joint Powers Agency.<sup>137</sup> The districts may utilize the provisions of Government Code section 6500 et seq. to enter into joint powers agreements to establish a Joint Powers Agency to purchase equipment, materials and supplies. The governing board of each district must approve the formation of the joint powers agency.

Generally, joint powers agreements establish the manner in which the Joint Powers Agency will be administered. The purpose of the Joint Powers Agency, the relationship between each member district and the Joint Powers Agency, and the manner in which it will purchase equipment, materials and supplies should be set forth in the joint powers agreement. The agreement should also indicate how costs should be shared. However, Joint Powers Agencies may not delegate authority to a private company to purchase on behalf of the joint powers agency.<sup>138</sup>

### **B. Purchases Through Other Public Agencies**

Public Contract Code sections 20118 and 20652 authorize districts to lease data processing equipment, purchase materials, supplies, equipment, automotive vehicles, tractors, or other personal property without advertising for bids by utilizing another public agency's contract. These provisions do not authorize districts to "piggyback" on other public agency's service contracts.

In order for districts to purchase through another public agency's contract (not all contracts are awarded by public agencies) pursuant to Sections 20118 and 20652, the district should obtain all bid documents from the awarding public agency, not the vendor, and review the awarding public agency's bid carefully. The district should review the following:

1. Verification/affidavit of publication (not just a copy of the newspaper advertisement);
2. The public agency's bid documents, including the specific terms and conditions of the bid, in particular the clause which gave notice to potential bidders that other agencies may purchase/lease identical items at the same prices and upon the same terms and conditions;

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<sup>137</sup> 15 Ops.Cal.Atty.Gen. 108 (1950).

<sup>138</sup> 71 Ops.Cal.Atty.Gen. 266, 275 (1988).

3. The award of contract (copy of the agenda item explaining the award and minutes if another district) and to ensure that the award was made by a public agency and was made to the lowest responsible and responsive bidder;
4. A copy of the contract executed by the awarding public agency (which is normally the public agency's contract, not a contract drafted by the vendor).
5. Verification that the awarding public agency actually purchased/leased the personal property; and
6. Approval by the awarding public agency of extensions of the contract, if any. Extensions should not exceed the appropriate length of contracts set forth in Education Code sections 17644 and 17645.

Pursuant to Sections 20118 and 20652, the governing board must also determine that it is in the best interest of the district to enter into the contract, lease, requisition, or purchase order for the personal property based upon a “piggybacking” process. Upon receipt of the personal property, provided the property is (1) identical to the items awarded by the other public agency, (2) are being invoiced at the same prices and (3) complies with the specifications set forth in the contract, lease, requisition or purchase order, the district may draw a warrant directly to the vendor for the amount of the approved invoice under the same terms as the other public agency's contract.<sup>139</sup>

It should be noted that construction and/or installation services are not allowed under Section 20118 and 20652.

In the alternative, if there is an existing contract between a public corporation or agency and a vendor for the lease or purchase of the personal property, a school district may authorize the lease or purchase of personal property directly from the vendor by contract, lease, requisition or purchase order and make payment to the vendor under the same terms that are available to the public corporation or agency under the contract.<sup>140</sup>

In 2006, the Attorney General rendered an opinion stating that a school district may not, without advertising for bids, contract with another public agency to acquire factory built modular building components for installation on a permanent foundation.<sup>141</sup> The Attorney General stated that Public Contract Code section 20118 that permits a school district, without advertising for bids, to enter into a contract with another public agency under certain specified circumstances does not apply to the purchase of modular structural components for the installation of classrooms and other school buildings and facilities on permanent foundations. The Attorney General concluded that the Legislature did not intend to extend the provisions of Section 20118

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<sup>139</sup> Public Contract Code section 20118, Stats. 2006, Ch. 730. Stats. 2013, ch. 681.

<sup>140</sup> Ibid.

<sup>141</sup> 89 Ops.Cal.Atty.Gen. 1 (2006).

to construction contracts for school buildings on permanent foundations, and concluded that a school district may not, without advertising for bids, contract with another public agency to acquire factory built modular building components for installation on a permanent foundation.<sup>142</sup>

The following questions are frequently asked by districts regarding bidding, relocatable classrooms and Public Contract Code sections 20118 and 20652.

**Question:**

1. What are the bid limits for relocatable classrooms?

**Answer:**

1. Public Contract Code sections 20111 and 20651 set the bid limits at \$50,000 plus an inflation factor. Presently, the amount is \$84,100, effective January 1, 2014. This bid limit applies to the purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district. The bid limit for construction, reconstruction, alteration, or renovation is \$15,000. If the installation of relocatables includes extensive construction, reconstruction, alteration, or renovation, the \$15,000 bid limit would apply.

**Question:**

2. How does the district determine who is the lowest responsive bidder?

**Answer:**

2. A bid will be deemed responsive if the bid promises to do what the bidding instructions demand. The term “responsive” refers to whether the bid as submitted complies with all of the requirements of the bidding documents. A determination of responsiveness can be made from the face of the bid. Responsiveness sets a common standard by which all bidders are to be measured, ensuring fairness and efficiency. The award of the bid where the bidder failed to conform to specifications as called for in a request for bids could result in the setting aside of the contract as awarded.<sup>143</sup> Therefore, the bidder seeking to supply the district with relocatable classrooms in response to a bid must promise to do what the bidding instructions demand.

**Question:**

3. Following the award of the bid, may the district alter or change the terms and conditions set forth in the bid documents?

**Answer:**

3. No. The contract entered into must contain substantially the same terms and conditions as the terms and conditions specified in the bid documents. The competitive bidding laws require districts to enter into contracts that are consistent with the public notice provided to

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<sup>142</sup> Id. at 4.

<sup>143</sup> Konica Business Machines v. University of California, 206 Cal.App.3d 449 (1988).

bidders as set forth in the public advertisement. Slight variations or incidental changes in the proposed form of the contract will not require rebidding. Major changes in the terms and conditions or the substitution of terms and conditions favorable to the low bidder, which were not included in the bid documents or specifications, are void. Changes in the contract amount, the date, time, and place of performance, the method of payment, and in the number or relations of parties have been deemed to constitute a substantial or material change in the contract. Additional or different contract terms cannot be negotiated after a bid is awarded.<sup>144</sup>

However, Public Contract Code sections 20118.4 and 20659 authorize the change or alteration of a contract after a bid is awarded, without further bidding, under certain circumstances. The cost must be agreed upon in writing between the district and the contractor, and it may not exceed the bid amounts applicable to the original contract, or 10% of the original contract price. The change order provisions allow districts to negotiate changes to a contract due to changes arising after the contract is entered into, provided the contract is not materially altered by the change order to such an extent that it would create a new project or contract which should be bid separately.

**Question:**

4. What is the maximum length of time a school district or community college district may lease a relocatable?

**Answer:**

4. Education Code section 81526 (formerly Education Code sections 15557 and 15352) authorizes a community college district to lease a relocatable structure for a term not to exceed ten years. The corresponding statutory provision for school districts, Education Code section 39246, was repealed.<sup>145</sup> In repealing Section 39246 and other provisions, the Legislature stated:

“Whenever in this act a power, authorization, or duty of a school district governing board, county board of education, or county office of education, is repealed or otherwise deleted by amendment, it is not the intent of the Legislature to prohibit the board or office from acting as prescribed by the deleted provisions. Rather, it is the intent of the Legislature, that the school district governing boards, county boards of education, and county superintendents of schools, respectively, shall have the power, in the absence of other legislation, to so act under the general authority of Section 35160 of the Education Code.”<sup>146</sup> [Emphasis added.]

In 1986, former Section 39246 was amended to authorize the lease of relocatable structures for a period not to exceed twenty years. The Legislature clearly indicated at the time

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<sup>144</sup> 18 Ops.Cal.Atty.Gen. 1 (1951); 73 Ops.Cal.Atty.Gen. 417, 423 (1990).

<sup>145</sup> Stats.1987, ch. 1452, section 283.

<sup>146</sup> Stats.1987, ch. 1452, section 1.

of the repeal that it was not the intent of the Legislature to prohibit a school district from acting as prescribed by the deleted provisions. Rather, it was the intent of the Legislature to authorize school districts to have the power in the absence of other legislation to act under the general authority of the “permissive” Education Code section 35160. In addition, Education Code section 17575 authorizes the governing board of any school district, when leasing a building for housing of school district employees, to lease such building for any period as they deem necessary. Therefore, in our opinion, a school district could competitively bid for the lease of a relocatable structure for up to twenty years, and a community college district could competitively bid for the lease of a relocatable structure for up to ten years.

It should be kept in mind, as discussed above, if the bid specifications provide for a shorter lease term (e.g., 7 years) then districts piggybacking off that district’s bid may only lease the relocatables up to the maximum term specified in the original bid specifications since Sections 20118 and 20652 require that the “piggyback” be on the same terms and conditions as the original bid.

**Question:**

5. How should a district competitively bid for relocatables when it is uncertain how long it will need the relocatables?

**Answer:**

5. Districts may competitively bid for the lease of relocatables for up to a maximum of twenty years (ten years for community college districts), and include a clause which allows the district to terminate the lease at any time, upon written notice (e.g., 30 days, 180 days). Districts may also wish to include an option to purchase the relocatables since, when the lease term ends, the relocatables must be removed and returned to the manufacturer unless the district purchases the relocatables.

We would not recommend that a district enter into short-term leases for relocatables (e.g., three years, five years) without a purchase option if the district is not sure how long it will need the relocatables since, at the end of the lease term, the district may still need the relocatables and when the lease term expires, without a renewal clause or purchase option in the original bid documents, the relocatables would have to be returned to the manufacturer.

**C. Emergency Repair Contracts**

Public Contract Code sections 20113 and 20654 authorize districts to enter into a contract in writing for the performance of labor and furnishing of materials or supplies without advertising for or inviting bids. The emergency repairs, alterations or work of improvement to any public school facilities must be necessary to permit the continuance of existing school classes or to avoid danger to life or property. The governing board of the district, by unanimous vote, with the approval of the county superintendent of schools, must approve the emergency contract or authorize the use of day labor or force account to make a repair, alteration or work of improvement.

The Court of Appeal in Marshall v. Pasadena Unified School District,<sup>147</sup> held that the definition of emergency contained in Public Contract Code section 1102, limited the utilization of emergency resolutions to sudden unexpected occurrences that pose a clear and imminent danger and require immediate action to prevent or mitigate the loss or impairment of life, health, property or essential public services.

In Marshall, the Pasadena Unified School District publicly advertised for bids for a project to modernize Longfellow Elementary School in September 2000. B.F. Construction, Inc., submitted a bid for the project and was determined to be the lowest responsible bidder. On November 29, 2000, the district entered into a \$5.9 million dollar contract with B.F. Construction to do the work.

In January 2002, B.F. Construction advised the district that they were unable to proceed effectively and that the project should be terminated for convenience by the owner. On February 1, 2002, the district invoked its expressed contractual right to terminate its contract with B.F. Construction for the convenience of the district.

The contract between B.F. Construction and the district provided that in the event of a termination for convenience, B.F. Construction would be entitled to payment for work actually performed and in place as of the effective date of the termination. B.F. Construction submitted a claim to the district seeking payment of approximately \$1.7 million dollars. The district disputed the claimed amount.

On May 16, 2002, B.F. Construction assigned its claim against the district to Marshall and on July 31, 2002, Marshall sued the district.

On April 1, 2002, two months after the district terminated its contract with B.F. Construction, the district's Board of Education adopted an emergency resolution to award a contract for completion of the modernization project to Hayward Construction Company. The Los Angeles County Superintendent of Schools subsequently approved the emergency resolution.

The lawsuit filed by Marshall alleged that the district's award of the contract to Hayward was unlawful and that no emergency existed which would allow the district to avoid compliance with competitive bidding requirements. The lawsuit sought to prohibit the district from making any payments to Hayward and to require the district to advertise publicly for bids to complete the project and award the contract to the lowest responsible bidder.

The Los Angeles Superior Court ruled against the school district and held that the district failed to comply with the competitive bidding requirements set forth in the Public Contract Code. The trial court held that the district failed to present substantial evidence of an emergency as defined by Public Contract Code section 1102, and ordered the district to publicly advertise for bids to complete the work and to award the contract to the lowest responsible bidder.

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<sup>147</sup> 15 Cal.Rptr.3d 344 (2004).

Public Contract Code section 1102 was enacted by the Legislature in 1994 and states:

“‘Emergency,’ as used in this code, means a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property or essential public services.”

The Court of Appeal held that the definition of emergency in Section 1102 must be read into the provisions of Public Contract Code section 20113 which was enacted in 1985 and states in part:

“In an emergency when any repairs, alterations, work or improvement is necessary to permit the continuance of existing school classes, or to avoid danger to life or property, the board may, by unanimous vote, with the approval of the county superintendent of schools, do either of the following:

(a) Make a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing of materials or supplies for the purpose without advertising for or inviting bids.

(b) Notwithstanding Section 20114, authorize the use of day labor or force account for the purpose.”

The school district in Marshall contended that Section 20113 contained its own definition of emergency which should prevail over the definition contained in Section 1102. However, the Court of Appeal held that while Section 20113 may have conferred certain powers upon the school district in the event of an emergency and provided procedures for exercising those powers, Section 1102 became the controlling statute with respect to the definition of emergency when it was enacted in 1994. The Court of Appeal held that the use of the phrase “as used in this code” was unambiguous and was intended to define the term “emergency” for the entire Public Contract Code. Therefore, the definition of emergency in Section 1102 must be read into Section 20113.

To support its conclusion, the Court of Appeal noted that the legislative history shows that the Legislature intended to add a common definition of “emergency” in the Public Contract Code due to the previously conflicting requirements and definitions regulating emergency situations.<sup>148</sup> The Court of Appeal noted that the Legislature did not create an exemption for school districts when it enacted Section 1102 and that the clear language of Section 1102 (“as used in this code”) shows the Legislature sweeping intent to establish a common definition of “emergency” throughout the Public Contract Code.

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<sup>148</sup> See, Concurrence and Senate Amendments, Bill Analysis, AB 3348 (1993-94 Reg.Sess. as amended August 29, 1994).

The Court of Appeal further stated:

“Further, given the strong public policy favoring competitive bidding, an emergency exemption thereto should be strictly construed and restricted to circumstances which truly satisfy statutory criteria.”

The Court of Appeal reviewed the legislative history of Assembly Bill 3348<sup>149</sup> which enacted Public Contract Code section 1102 and noted that Section 1102 definition of emergency was derived from the California Environmental Quality Act (CEQA).<sup>150</sup> The definition of emergency under CEQA is extremely narrow and limits an emergency to an “occurrence” not a “condition” and the occurrence must involve a clear and imminent danger demanding immediate action.<sup>151</sup> In Los Osos, the Court of Appeal held that a City Council’s ordinance that declared an emergency during a drought and authorized the City to supply its residents with water drawn from the ground was invalid. The court found that no emergency existed and held that the City made a political choice over time. The court in Los Osos Valley Associates stated:

“The term ‘emergency’ . . . has long been accepted in California as an unforeseen situation calling for immediate action. . . . Not only must urgency be present, the magnitude of the exigency must factor. . . . Emergency is not synonymous with expediency, convenience, or best interest... and it imports more than merely a general public need. . . . Emergency comprehends a situation of ‘grave character and serious moment.’ It is evidenced by an imminent and substantial threat to public health or safety . . .”<sup>152</sup>

The Court of Appeal went on to conclude that the Pasadena Unified School District decision to terminate its contract with B.F. Construction for the district’s own convenience was not a sudden unexpected occurrence posing a clear and imminent danger requiring prompt action to protect life, health, property or essential public services. The Court of Appeal noted that the CEQA definition of emergency includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as a riot, accident or sabotage.<sup>153</sup>

#### **D. Work by Day Labor or Force Account**

Public Contract Code sections 20114 and 20655 authorize districts to make repairs, alterations, additions or painting, repainting or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings and perform maintenance by day labor or by force account whenever the total number of hours on the job does not exceed 350 hours. In districts having an average daily attendance of 35,000 or

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<sup>149</sup> Stats.1994, ch. 803.

<sup>150</sup> See Public Resources Code section 21060.3.

<sup>151</sup> See Los Osos Valley Associates v. City of San Luis Obispo, 30 Cal.App.4<sup>th</sup> 1617, 1682, 36 Cal.Rptr.2d 758 (1994).

<sup>152</sup> Id. at 1681.

<sup>153</sup> See, Public Resources Code section 21060.3.

greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus or equipment, including painting or repainting and perform maintenance by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours or when the cost of material does not exceed \$21,000. For purposes of Sections 20114 and 20655, day labor includes the use of maintenance personnel employed on a permanent or temporary basis.

### **E. Contracts for Special Services**

Government Code section 53060 creates an exception to the competitive bidding laws for special services and advice. Government Code section 53060 states in part:

“The legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the corporation or district special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.”

In order to qualify as special services under Government Code section 53060, the services must be provided by specially trained, experienced and competent persons. In Jaynes v. Stockton, the Court of Appeal stated:

“. . . [T]he services desired may be special services as far as the school district is concerned because they are in addition to those usually, ordinarily and regularly attainable through public sources, even though they are the usual, ordinary and regular services rendered by a person in the particular field of endeavor of which the desired services are a part . . .

“. . . [T]he services of a particular individual may be special in that, because of his outstanding skill, they may not be duplicated.”<sup>154</sup>

Generally, persons who are highly trained and technically skilled in the sciences or a profession (e.g., doctors, lawyers, engineers, architects) may be retained as independent contractors without competitive bidding.<sup>155</sup>

### **F. Contracts for Education Materials**

Public Contract Code section 20118.3 and Education Code section 81651 authorize districts to purchase supplementary textbooks, library books, educational films, audio-visual materials, test materials, workbooks, instructional computer software packages, or periodicals in

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<sup>154</sup> Janes v. Stockton, 193 Cal.App.2d 47, 52 (1961).

<sup>155</sup> Cobb v. Pasadena City Board of Education, 134 Cal.App.2d 93 (1955).

any amount needed for the operation of the schools without taking estimates or advertising for bids.

#### **G. Perishable Food Stuffs, Seasonable Commodities and Surplus Federal Property**

Public Contract Code section 20660 authorizes community college districts to purchase perishable food and seasonable commodities needed in the operation of cafeterias and food services without advertising for bids. Section 20660 states:

“Perishable foodstuffs and seasonal commodities needed in the operation of cafeterias and food services may be purchased by the community college district in accordance with rules and regulations for such purchase adopted by the governing board of said district notwithstanding any provisions of this code in conflict with such rules and regulations.”

A similar provision in the Public Contract Code relating to school district was repealed in 1996. However, Education Code section 38083 provides that:

“Perishable foodstuffs and seasonal commodities needed in the operation of cafeterias may be purchased by the school district in accordance with rules and regulations for such purchase adopted by the governing board of said district notwithstanding any provisions of this code in conflict with such rules and regulations.”

Education Code sections 17602 and 81653 authorize districts to purchase surplus property from the federal government or any agency of the federal government in any amount needed for the operation of the schools of the district without competitive bidding.

#### **H. Energy Conservation Contracts**

Government Code sections 4217.10 through 4217.18 authorize public agencies, including community college districts and school districts, to develop energy conservation, cogeneration and alternate energy supply source agreements without competitive bidding. Districts may enter into energy service contracts in a facility ground lease on terms and conditions which the governing board determines are in the best interest of the district. The governing board must make the determination at a regularly scheduled public hearing and give the public two weeks advance notice. The board must find:

1. That the anticipated cost to the district for thermal or electrical energy or for the conservation facility under the contract will be less than the anticipated marginal cost to the district of thermal, electrical or other energy that would have been consumed by the district in the absence of those purchases; and

2. That the difference, if any, between the fair rental value of the real property, subject to the facility ground lease and the agreed rent, is anticipated to be offset by below market energy purchase or other benefits provided under the energy service agreement.<sup>156</sup>

Government Code section 4217.13 authorizes districts to enter into facility financing agreements and facility ground leases on terms and conditions determined by the board to be in the best interest of the district. If the determination is made at a regularly scheduled public meeting, and if the governing board finds that the funds for the repayment of the financing or the cost of design, construction and operation of the energy conservation facility, or both, are projected to be available from revenues resulting from sales of electricity or thermal energy from the facility or from funding which otherwise would have been used for purchase of electrical, thermal or other energy required by the district in the absence of the energy conservation facility, or both, districts may enter into the contract. Districts may also enter into contracts for the sale of electricity, electrical generating capacity or thermal energy produced by the energy conservation facility.

In addition, Section 4217.16 authorizes the awarding or entering into an agreement or lease by seeking proposals from qualified persons. After evaluating the proposals, the district may award the contract on the basis of the experience of the contractor, the type of technology employed by the contractor, the cost of the local agency and any other relevant considerations.

Government Code sections 15814.10 and 15814.11 authorize districts to enter into energy conservation contracts for public buildings for the reduction of water use from established water sources or for equipment maintenance, meters, load management techniques and equipment or other measures to reduce energy or water use. Section 15814.12 authorizes districts to enter into agreements with the State Public Works Board for energy service contracts.

Education Code sections 81660 through 81662 authorize community colleges to enter into energy management agreements for energy management systems with the lowest responsible bidder considering the net cost or savings to the district for a term not to exceed fifteen years. Similar provisions applying to school districts were repealed effective January 1, 1988, as part of legislation to more fully implement the permissive code provisions of Education Code section 35160. Section 1 of the legislation, Statutes of 1987, Chapter 1452, states that whenever a provision was repealed by that legislation, it was not the intent of the Legislature to prohibit the school district from acting as prescribed by the deleted provisions. The legislative intent was to allow school districts to act under the general authority of Education Code section 35160. Therefore, in our opinion, school districts may also enter into energy management agreements for energy management systems with the lowest responsible bidder, considering the net cost or savings to the district. School districts, however, are not limited to a fifteen year term as are community college districts.

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<sup>156</sup> Government Code section 4217.12.

## **I. Completion of Construction Contracts Upon Default of Contractor**

Generally, competitive bidding statutes do not require districts to rebid projects when the contractor has failed to carry out the work and the contract provides the district shall have the right to complete the construction contract and deduct the amount expended from the agreed price of the contract. In such circumstances, the district may complete the contract in accordance with the terms of the contract without readvertising for bids.<sup>157</sup>

## **J. Sole Source**

As discussed earlier, the purpose of competitive bidding statutes are to protect the public from extravagant contracts and to exclude favoritism and corruption and to promote competition among bidders so as to ensure that all public contracts are entered into as the lowest possible price.<sup>158</sup> However, where competitive bidding proposals do not produce an advantage, the competitive bidding statutes do not apply. For example, competitive bidding is not required where there is one supplier of a needed commodity.<sup>159</sup>

In Hodgeman, the Court of Appeal held that only one type of parking meter was available to meet the needs of the City of San Diego. Therefore, the court stated:

“. . . There could have been no competitive bidding because but one meter could have been described and there could have been but one bidder under them. Under such circumstances, advertising for bids, was unnecessary . . .”<sup>160</sup>

Sole sourcing a particular vendor will require an opinion from an independent consultant with expertise regarding the particular product or service required by a District. The opinion should be obtained prior to an award of any contract. A sole source opinion should include the following:

1. A description of the consultant’s experience with the product or service and the sources of such product or service;
2. An analysis of the District’s proposed or current needs which can be performed by visiting the District (or specific school sites) and interviewing District staff;

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<sup>157</sup> Garvey School District v. Paul, 50 Cal.App. 75 (1920); Shore v. Central Costa Sanitary District, 208 Cal.App.2d 465 (1962).

<sup>158</sup> 64 Am.Jur.2d, Public Works & Contracts, section 37.

<sup>159</sup> Los Angeles Gas & Electric Corporation v. Los Angeles, 188 Cal. 307 (1920) (sole source for electrical power); Los Angeles Dredging Company v. Long Beach, 210 Cal. 348 (1930) (sole source when dredging pipes could only be rerouted by the onsite dredging company); Hodgeman v. City of San Diego, 53 Cal.App.2d 610 (1942) (sole source for a parking meter); County of Riverside v. Whitlock, 22 Cal.App.3d 863 (1972) (public utility).

<sup>160</sup> Id. at 618.

3. The method utilized by the consultant to render an opinion; and
4. The conclusion(s) clearly justified by the consultant's analysis which must specifically state that it is the opinion of the consultant that the "sole source" provider of the product and/or service is the specified vendor.

## **K. Contracts for Trash Collection**

Districts are not required to contract with trash collection companies that have exclusive contracts for trash collection in the cities in which they were located.<sup>161</sup> In Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc., the Court of Appeal held that school districts, as state agencies, are immune from the city's trash collection regulations and are, therefore, free to independently contract with other trash haulers pursuant to the competitive bidding provisions of Public Contract Code section 20111. This decision would apply to community colleges as well.

The Court of Appeal held that school districts are a political subdivision of the state and are independent and separate governmental agencies distinct from counties or cities. In Hall v. City of Taft,<sup>162</sup> the California Supreme Court held that school districts are agencies of the State for local operation of the state school system and are not subject to municipal building ordinances which are preempted by the state school building laws. The Court held that cities may not enforce local ordinances which conflict with state law.

Public Resources Code section 40059(a)(2) states that each district or other local governmental agency may determine whether solid waste handling services should be provided by means of nonexclusive franchise, contract, license, permit or otherwise, either with or without competitive bidding or if, in the opinion of the governing body, the public health, safety and well-being shall require, by partially exclusive or wholly exclusive franchise, contract, license, permit or otherwise.

Therefore, community college districts and school districts may competitively bid contracts for trash collection pursuant to Public Contract Code sections 20651 and 20111 or adopt a resolution authorizing the governing board of the district to contract by exclusive franchise or nonexclusive franchise with or without competitive bidding.

## **L. California Multiple Award Schedules (CMAS)**

School districts and community college districts can participate in the California Multiple Award Schedules (CMAS) for the acquisition of materials, equipment, and supplies, including electronic data processing or telecommunications goods and services, provided that such acquisitions are made by the Department of General Services and are upon the same terms,

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<sup>161</sup> Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc., 43 Cal.App.4<sup>th</sup> 630 (1996).

<sup>162</sup> Hall v. City of Taft, 47 Cal.2d 177.

conditions and specifications at a price lower than the districts can obtain through their normal acquisition procedures.<sup>163</sup>

Public Contract Code section 10298 specifically authorizes state and local agencies to contract with suppliers who are awarded CMAS contracts without further competitive bidding. The definition of contracts that may be awarded under CMAS has been expanded under Sections 10290, 10290.1, and 12100 to include information technology goods and services. Information technology is defined in Government Code section 11702 as including, but not limited to, all electronic technology systems and services, automated information handling, system design and analysis, conversion of data, computer programming, information storage and retrieval, telecommunications which include voice, video and data communications, requisite system controls, simulation, electronic commerce, and all related interactions between people and machines.

Public Contract Code section 10299 authorizes the Director of General Services to consolidate the needs of multiple state agencies for information technology goods and services and to establish contracts, master agreements, multiple award schedules, and cooperative agreements to leverage the state's buying power. Section 10299 specifically states that state agencies and local agencies may contract with suppliers awarded these contracts without further competitive bidding. Section 10299(b) states that the director may make the services of the Department of General Services available to any school district and that school districts may, without further competitive bidding, utilize contracts, master agreements, multiple award schedules, cooperative agreements, or other types of agreements established by the Department of General Services for use by school districts for the acquisition of information technology, goods, and services. Education Code section 17595 and Public Contract Code section 20653 authorize school districts and community college districts to purchase materials, equipment or supplies through the Department of General Services.

Pursuant to these statutory provisions, the Department of General Services has issued a statement regarding CMAS, stating that local agency purchase orders should be issued directly to the CMAS contractor on local agency forms. The Department of General Services has also issued general guidelines regarding CMAS procedures.

In order to utilize the CMAS procedures, the purchase must be made at a price lower than the district can obtain through its normal acquisition process. This finding or a finding that the CMAS purchase is in the best interest of the district (e.g., timelines, quality of the product or work, price, technical expertise, cost of developing specifications and coordination with existing infrastructure may be considered) should be made by the governing board of the district or by an employee who has been delegated the authority to make such a finding pursuant to Education Code sections 17604 or 81655. If the district delegates such authority to an administrator, the administrator's finding of lower price or best interest pursuant to Sections 17604 and 81655 requires the governing board to ratify the administrator's decision by a motion duly passed and adopted at a public meeting. Such ratification may be part of a motion which is duly passed to approve a consent calendar of a group of items. The administrator should submit documentation

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<sup>163</sup> Education Code section 17595; Public Contract Code section 20653.

with information to the governing board such as the price, name of CMAS vendor, services, materials, equipment or supplies being purchased, the CMAS contract number and the relevant findings made by the administrator.

In order to utilize a CMAS contract, districts should obtain and review the following:

1. Cover page with DGS logo and CMAS analyst's signature.
2. Ordering Instructions and Special Provisions.
3. CMAS Terms and Conditions.
4. Payee Data Record.
5. Supplements, if applicable.

It is important for the districts to confirm that the required products and services are included in the CMAS contract. The CMAS supplier can assist the districts by identifying the specific pages from the contract that include the required products, services and prices. The districts should obtain copies of the pages for their files. In addition, districts are encouraged to request lower prices since the prices listed are maximums.

Utilization of CMAS may include services such as installation of wiring or cabling. Civil Code section 3100 defines public works as, “. . . any work of improvement contracted for by a public entity.” Civil Code section 8050 defines a “work of improvement” as including, but not being restricted to, the construction, alteration, repair, demolition, or removal in whole or in part, or addition to, a building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad or road. Public Contract Code section 1101 defines a public works contract as “an agreement for the erection, construction, alteration, repair or improvement of any public structure, building, road or other public improvement of any kind.”

In our opinion, installation of wiring or cabling would be a public works which would require a payment bond if the cost of the project exceeds \$25,000. Therefore, where the installation of wiring or cabling is involved, the project exceeds \$25,000 and is not just an incidental part of the project, a payment bond is required.

#### **M. Lease-Leaseback Agreements**

In Los Alamitos Unified School District v. Howard Contracting, Inc.,<sup>164</sup> the Court of Appeal held that Education Code section 17406 exempts school districts from obtaining competitive bids when entering into what are known as Lease-Leaseback Agreements to improve school property. The Court of Appeal noted that more than 40 years ago, the California Attorney General concluded the language of the statute is plain, unambiguous, and explicit, and does not impose bid requirements on school districts.<sup>165</sup> Education Code section 17406(a) states:

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<sup>164</sup> 229 Cal.App.4<sup>th</sup> 1222 (2014).

<sup>165</sup> See, 56 Ops.Cal.Atty.Gen. 571 (1973).

“Notwithstanding Section 17417, the governing board of a school district, without advertising for bids, may let, for a minimum rental of one dollar (\$1) a year, to any person, firm, or corporation any real property that belongs to the district if the instrument by which such property is let requires the lessee therein to construct on the demised premises, or provide for the construction thereon of, a building or buildings for the use of the school district during the term thereof, and provides that title to that building shall vest in the school district at the expiration of that term. The instrument may provide for the means or methods by which that title shall vest in the school district prior to the expiration of that term, and shall contain such other terms and conditions as the governing board may deem to be in the best interest of the school district.”

In a 1973 Attorney General’s opinion, the Attorney General concluded that Education Code section 17406 permits a school district to lease property it owns for a minimal consideration to a contractor for the purpose of having the contractor construct school facilities on its property, and concluded that such an arrangement may be entered into by the school district on whatever terms it finds fair and reasonable without leasing from the lowest responsible bidder.

The Los Alamitos Unified School District filed an action to validate its lease-leaseback agreement with a contractor performing improvements on the track and athletic field of the district’s high school. Another contractor, Howard Contracting, Inc. filed an answer, claiming the lease-leaseback agreement was unconstitutional, illegal, and invalid because the district did not obtain competitive bids for the project. The trial court granted the district’s motion for summary judgment and the Court of Appeal affirmed the judgment in favor of the school district.

In Davis v. Fresno Unified School District,<sup>166</sup> the Court of Appeal overturned the dismissal of a taxpayer’s lawsuit against the Fresno Unified School District alleging that the district failed to comply with Education Code sections 17406 and 17417 which allow an exemption to the competitive bidding process for lease-leaseback arrangements. The lawsuit also alleged that the school district violated Government Code section 1090 which prohibits conflicts of interests involving contracts entered into by a district. The effect of the Court of Appeal decision is to allow the lawsuit to go forward in the trial court on most of the causes of action alleged by the Plaintiff.<sup>167</sup>

The Plaintiff alleged that the school district failed to comply with Education Code section 17406 because the agreement entered into by the school district was not a genuine lease but simply a traditional construction agreement. The lawsuit alleged that the agreement did not include a financing component for the construction of the project and did not allow for the use of the newly built facilities during the term of the lease as required by Education Code section

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<sup>166</sup> 237 Cal.App.4th 261 (2015).

<sup>167</sup> Id. at 270-271.

17406. The lawsuit also alleged that the school district violated Government Code section 1090 by entering into an agreement with the same company that provided consultation in the development of the lease-leaseback agreement. The lawsuit alleged that the contractor improperly participated in the making of the contract and subsequently became financially interested in that contract.<sup>168</sup>

The Court of Appeal reviewed the lease-leaseback agreement entered into by the school district and reviewed the history of Education Code section 17406. Under the lease-leaseback method, a school district leases land that it owns to a construction firm for a nominal amount and that construction firm agrees to build school facilities on that site. The construction firm builds the facilities and leases them back to the school district for a specified time at a specified rental amount. The construction firm acts as a landlord of the newly constructed facilities and the school district acts as the tenant. At the end of the lease, title to the new facilities vests in the school district.<sup>169</sup>

The Court of Appeal noted that under this financing method, the builder finances the project (usually with the assistance of a third party lender) and is paid over the term of the lease, which can last as long as forty years. The Court of Appeal noted that the Legislature devised this complicated lease-leaseback structure out of concerns that the California Constitution prohibits public agencies from incurring any indebtedness or liability exceeding the amount of one year's income without a two-thirds approval of the voters. The Legislature was aware that the California Supreme Court determined that leases do not create an indebtedness for the aggregate amount of all installments, but create a debt limited in amount to the installment due each year. As a result, the Legislature adopted the lease-leaseback structure to create a way for public agencies to pay for construction over time and avoid the constitutional limitation on debt.<sup>170</sup>

## GUIDING PRINCIPLES IN LEASE-LEASEBACK TRANSACTIONS

Based on its review of the history of Education Code section 17406, the Court of Appeal enunciated three basic principles:

1. **The leases in the leaseback arrangement must be genuine.** The Court of Appeal stated, "...the word 'lease' refers to the substance of the transaction and means more than a document designated by a lease by the parties. Moreover, to fulfill the primary statutory purpose of providing financing school of construction, the arrangement must include a financing component."<sup>171</sup>
2. **The lease-leaseback must include a financing component.** The Court of Appeal noted that in the Fresno

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<sup>168</sup> *Id.* at 273-274.

<sup>169</sup> *Id.* at 276-77; see, also, Education Code section 17406(a)(1).

<sup>170</sup> *Id.* at 278; See, City of Los Angeles v. Offner, 19 Cal. 2d 483 (1942).

<sup>171</sup> *Id.* at 279.

Unified School District transaction, the payments to the contractor were based on the progress of the construction. The final payment for the construction became due upon completion and acceptance of the construction. Once the final payment was made, both the facilities lease and the site lease were terminated. Thus, the court concluded there was no financing component.<sup>172</sup>

**The lease-leaseback agreement must provide for the district's use of facility during the term of the lease.** The Court of Appeal noted that once the final payment was made and the facilities lease and site lease terminated, the school district then took possession of the property and began the use of the facility. The Court of Appeal noted that Fresno Unified School District never occupied and used the project before making its final payment. As a result, the court concluded that the allegations in the lawsuit were sufficient to state a cause of action and the Court of Appeal remanded the matter back to the trial court to allow the lawsuit to continue.<sup>173</sup>

The Court of Appeal reviewed the provisions of Government Code section 1090(a) which prohibits members of a district board from being financially interested in any contract made by them in their official capacity. The prohibition is based on the rationale that a person cannot effectively serve two masters at the same time.<sup>174</sup>

The Court of Appeal then addressed the issue of whether the conflict of interest provisions of Government Code section 1090 extend to independent contractors and consultants who are involved in the contract process on behalf of the public entity and have an interest in the result of contract.<sup>175</sup> The Court of Appeal in Davis held that in the civil context as opposed to criminal prosecutions the provisions of Section 1090 apply to independent contractors and consultants. Therefore, the Court of Appeal allowed the lawsuit to proceed on the conflict of interest cause of action as well.<sup>176</sup>

In summary, districts should consult with legal counsel before developing and entering into lease-leaseback arrangements with construction firms or developers.

On August 17, 2015, Governor Brown signed Assembly Bill 566.<sup>177</sup> Assembly Bill 566 amended Education Code sections 17406 and 17407, and Public Contract Code section 20111.6 and added Education Code section 17407.5, effective January 1, 2016.

Education Code section 17406, as amended, states that lease-leaseback agreements containing provisions stipulating that contractors constructing buildings must comply with the

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<sup>172</sup> Id. at 279-80.

<sup>173</sup> Id. at 280.

<sup>174</sup> Lexin v. Superior Court, 47 Cal. 4<sup>th</sup> 1050, 1072 (2010).

<sup>175</sup> See, Hub City Solid Waste Services, Inc. v. City of Compton, 186 Cal.App.4<sup>th</sup> 1114, 1124-1125 (2010); California Housing Finance Agency v. Hannover/California Management and Accounting Center, Inc., 148 Cal.App.4<sup>th</sup> 682, 693 (2007).

<sup>176</sup> 237 Cal.App.4<sup>th</sup> 261, 297-301 (2015).

<sup>177</sup> Stats. 2015, ch. 214.

prequalifying procedures in the Public Contract Code regardless of the funding source for the public project. Section 17407(c), as amended, clarifies that bidders must be prequalified for projects.

Education Code section 17407.5 (effective January 1, 2016), requires the governing board of a school district to comply with certain requirements before entering into a lease-leaseback contract. These requirements are as follows:

1. As of January 1, 2016, at least 30% of the skilled journeypersons employed to perform work on the contract or project by the entity and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation. The requirement rises to 40% as of January 1, 2017, 50% as of January 1, 2018 and 60% as of January 1, 2019.
2. The contractor is required to report monthly while the project or contract is being performed, demonstrating that the entity and its subcontractors are complying with these requirements. The monthly report is a public record.

### **UNIFORM CONSTRUCTION COST ACCOUNTING PROCEDURES**

The Public Contract Code authorizes a public agency's governing board, by resolution, to elect to become subject to the Uniform Construction Cost Accounting Procedures after notifying the State Controller of that election.<sup>178</sup>

Under the Uniform Construction Cost Accounting Procedures, public projects of \$45,000 or less may be performed by the employees of a public agency by force account, by negotiated contract, or by purchase order. Public projects of \$175,000 or less may be awarded by informal procedures. Public projects of more than \$175,000 shall, except as otherwise provided, be awarded by formal bidding procedure.<sup>179</sup>

Under the Uniform Construction Cost Accounting Procedures, it is unlawful to split or separate into smaller work orders or projects any project for the purpose of evading the provisions of the Uniform Construction Cost Accounting Procedures, requiring work to be done by contract after competitive bidding.<sup>180</sup>

Each public agency that elects to become subject to the Uniform Construction Cost Accounting Procedures must enact an informal bidding ordinance to govern the selection of contractors to perform public projects. The ordinance must include all of the following:

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<sup>178</sup> Public Contract Code section 22030.

<sup>179</sup> Public Contract Code section 22032.

<sup>180</sup> Public Contract Code section 22033.

1. The public agency shall maintain a list of qualified contractors, identified according to categories of work. Minimum criteria for development and maintenance of the contractor's list shall be determined by the California Uniform Construction Cost Accounting Commission.
2. All contractors on the list for the category of work being bid or all construction trade journals specified in Section 22036, or all contractors on the list for the category of work being bid and all construction trade journals specified in Section 22036, shall be mailed a notice inviting informal bids unless the product or service is proprietary.
3. All mailing of notices to contractors and construction trade journals shall be completed not less than ten calendar days before bids are due.
4. The notice inviting informal bids shall describe the project in general terms and how to obtain more detailed information about the project, and state the time and place for the submission of bids.
5. The governing body of the public agency may delegate the authority to award informal contracts to the public works director, general manager, purchasing agent, or other appropriate person.
6. If all bids received are in excess of \$175,000, the governing board of the public agency may, by adoption of a resolution by four-fifths vote, award the contract, at \$187,500 or less to the lowest responsible bidder, if it determines the cost estimate of the public agency was reasonable.<sup>181</sup>

In cases of emergency when repair or replacements are necessary, the governing body may proceed at once to replace or repair any public facility without adopting plans, specifications, strain sheets, or working details, or giving notice for bids to let contracts. The work may be done by day labor under the direction of the governing body, by contractor, or by a combination of the two. In the case of an emergency, if notice for bids to let contracts will not be given, the public agency shall comply with Public Contract Code section 22050.<sup>182</sup>

Public Contract Code section 22050 states that in the case of an emergency, a public agency, pursuant to a four-fifths vote of its governing body, may repair or replace a public facility, take any directly related and needed action required by that emergency, and procure the necessary equipment, services, and supplies for those purposes, without giving notice for bids to

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<sup>181</sup> Public Contract Code section 22034.

<sup>182</sup> Public Contract Code section 22035.

let contracts. Before a governing body takes any action to declare an emergency, it shall make a finding, based on substantial evidence set forth in the minutes of its meeting, that the emergency will not permit a delay resulting from a competitive solicitation for bids, and that the action is necessary to respond to the emergency.<sup>183</sup>

The California Uniform Construction Cost Accounting Commission is required to recommend for adoption by the State Controller, Uniform Construction Cost Accounting Procedures for implementation by public agencies with respect to public projects. The California Uniform Construction Cost Accounting Commission consists of fourteen members, thirteen of whom are appointed by the State Controller.<sup>184</sup> The Uniform Construction Cost Accounting Procedures shall, to the extent deemed feasible and practicable by the Commission, incorporate, or be consistent with construction cost accounting procedures and reporting requirements utilized by state and federal agencies on public projects, and be uniformly applicable to all public agencies which elect to utilize the uniform procedures.<sup>185</sup> The State Controller, shall, upon receipt of the Commission's recommendations, review and evaluate the recommended procedures and either formally adopt or reject the recommended procedures within 90 days of submission by the Commission.<sup>186</sup>

Under the Uniform Construction Cost Accounting Procedures, notice inviting formal bids must state the time and place for the receiving and opening of sealed bids and distinctly describe the project. The notice shall be published at least fourteen calendar days before the date of opening the bids in a newspaper of general circulation, printed and published in the jurisdiction of the public agency. The notice inviting formal bids shall also be sent electronically, if available, and mailed to all construction trade journals. The California Uniform Construction Cost Accounting Commission is required to determine, on a county by county basis, the appropriate construction trade journals which shall receive mailed notice of all informal and formal construction contracts, being bid for work within the specified county.<sup>187</sup> The notice shall be sent at least fifteen calendar days before the date of opening the bids, in addition to notice required by the section, the public agency may give such other notice as it deems proper.<sup>188</sup>

In its discretion, the public agency may reject any bids presented, if the agency, prior to rejecting all bids and declaring that the project can be more economically performed by employees of the agency, furnishes a written notice to an apparent low bidder. The notice shall inform the bidder of the agency's intention to reject the bid and shall be mailed at least two business days prior to the hearing at which the agency intends to reject the bid. If after the first invitation of bids, all bids are rejected, after reevaluating its cost estimates of the project, the public agency shall have the option of either of the following:

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<sup>183</sup> Public Contract Code section 22050(a).

<sup>184</sup> Public Contract Code section 22010.

<sup>185</sup> Public Contract Code section 22017.

<sup>186</sup> Public Contract Code section 22018.

<sup>187</sup> Public Contract Code section 22036.

<sup>188</sup> Public Contract Code section 22037.

1. Abandoning the project or readvertising for bids in the manner described by the Uniform Construction Cost Accounting Procedures.
2. By the passage of a resolution by a four-fifths vote of its governing body, declaring that the project can be performed more economically by the employees of the public agency, may have the project done by forced account without further complying with the Uniform Construction Cost Accounting Procedures.<sup>189</sup>

If a contract is awarded, it shall be awarded to the lowest responsible bidder. If two or more bids are the same and the lowest, the public agency may accept the one it chooses. If no bids are received through the formal or informal procedure, the project may be performed by the employees of the public agency by force account, or negotiated contract without further complying with the Uniform Construction Cost Accounting Procedures.<sup>190</sup>

The California Uniform Construction Cost Accounting Commission must review the accounting procedures of any participating public agency where an interested party presents evidence that the work undertaken by the public agency falls within any of the following categories:

1. Is to be performed by a public agency after rejection of all bids, claiming work can be done less expensively by the public agency;
2. Exceeded the force account limits;
3. Has been improperly classified as maintenance.<sup>191</sup>

The request for Commission review shall be in writing, sent by certified or registered mail, received by the Commission postmarked not later than eight business days from the date the public agency has rejected all bids. The Commission must review the request immediately and conclude within the following number of days from the receipt of the request for Commission review the following:

1. Forty-five days for a review as to whether the public agency can perform the work less expensively.
2. Ninety days for a review that the public agency has exceeded the force account limits or has improperly classified the work as maintenance.<sup>192</sup>

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<sup>189</sup> Public Contract Code section 22038(a).

<sup>190</sup> Public Contract Code section 22038.

<sup>191</sup> Public Contract Code section 22042.

<sup>192</sup> Public Contract Code section 22043.

During the review of the project, the public agency shall not proceed on the project until a final decision is received by the Commission.<sup>193</sup> The Commission shall prepare written findings and if the Commission finds that the public agency failed to comply with the statutory provisions, the public agency has the option of either abandoning the project or awarding the project to the lowest responsible bidder. On those projects where it was alleged that the public agency exceeded the force account limits or improperly classified work as maintenance, the public agency is required to present the Commission's findings to its governing body, and that governing body must conduct a public hearing with regard to the Commission's findings within thirty days of receipt of the findings.<sup>194</sup>

If the Commission makes a finding that on three separate occasions within a ten year period that the work undertaken by a public agency violated the Uniform Construction Cost Accounting Procedures, the Commission shall notify the agency of that finding in writing by certified mail, and the public agency shall not use the bidding procedures provided by the Uniform Construction Cost Accounting Procedures for five years from the date of the Commission's findings.<sup>195</sup>

## **PUBLIC WORKS CONSTRUCTION CONTRACTS**

### **A. Definition of Public Works**

Civil Code section 3100 defines public works as, “. . . Any work of improvement contracted for by a public entity.” Civil Code section 8050 defines a work of improvement as follows:

“(a) ‘Work of improvement’ includes, but is not limited to:

(1) Construction, alteration, repair, demolition, or removal, in whole or in part, of, or addition to, a building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or road.

(2) Seeding, sodding, or planting of real property for landscaping purposes.

(3) Filling, leveling, or grading of real property.

(b) Except as otherwise provided in this part, ‘work of improvement’ means the entire structure or scheme of improvement as a whole, and includes site improvement.”

Public Contract Code section 1101 defines a “public works contract” as “an agreement for the erection, construction, alteration, repair or improvement of any public structure, building,

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<sup>193</sup> Public Contract Code section 22043(d).

<sup>194</sup> Public Contract Code section 22044.

<sup>195</sup> Public Contract Code section 22044.5.

road or other public improvement of any kind.”<sup>196</sup> For purposes of the prevailing wage laws, Labor Code section 1720 defines “public works” as any of the following:

“(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph ‘construction’ includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

“(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. “Public work” shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

“(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder’s charter or not.

“(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

“(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

“(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.”<sup>197</sup>

On September 30, 2014, Governor Brown signed Assembly Bill 2272,<sup>198</sup> effective January 1, 2015. Assembly Bill 2272 expands the definition of Labor Code section 1720 regarding the definition of “public works” for purposes of paying prevailing wages.

Assembly Bill 2272 expands the definition of “public works” contained in Labor Code section 1720(a) to include work performed during the postconstruction phases of construction, including, but not limited to, all cleanup work at the jobsite. Therefore, effective January 1,

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<sup>196</sup> See, also, Public Contract Code section 22002(d) which defines a “public project.” See, also, Civil Code section 8038.

<sup>197</sup> Labor Code section 1720 et seq.; see, also, *City of Long Beach v. Department of Industrial Relations*, 34 Cal.4<sup>th</sup> 942, 22 Cal.Rptr.3d 518 (2004), in which the California Supreme Court ruled that the 2000 amendments adding design and preconstruction to the definition of public works was not retroactive.

<sup>198</sup> Stats. 2014, ch. 900.

2015, the definition of “public works” for purposes of prevailing wages contained in Labor Code section 1720(a) will state as follows:

- “(1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph, ‘construction’ includes work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work, and work performed during the postconstruction phases of construction, including, but not limited to, all cleanup work at the jobsite. For purposes of this paragraph, ‘installation’ includes, but is not limited to, the assembly and disassembly of freestanding and affixed modular office systems.
- (2) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. ‘Public work’ does not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.
- (3) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder’s charter or not.
- (4) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.
- (5) The laying of carpet in a public building done under contract and paid for in whole or in part out of public funds.
- (6) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.
- (7)(A) Infrastructure project grants from the California Advanced Services Fund pursuant to Section 281 of the Public Utilities Code.

(8) For purposes of this paragraph, the Public Utilities Commission is not the awarding body or the body awarding the contract, as defined in Section 1722.”

On October 10, 2015, Governor Brown signed Assembly Bill 219<sup>199</sup>, which adds Labor Code section 1720.9 effective January 1, 2016.

Assembly Bill 219 expands the definition of public works to include concrete delivery and extends the prevailing wage requirements to individuals who deliver concrete.

Labor Code section 1720.9(a), effective January 1, 2016, states that public works also includes the hauling and delivery of ready-mixed concrete to carry out a public works contract, with respect to any political subdivision of the state. “Ready-mixed concrete” is defined as concrete that is manufactured in a factory or a batching plant, according to a set recipe, and then delivered in a liquefied state by mixer truck for immediate incorporation into a project. Hauling and delivery of ready-mix concrete to carry out a public works contract means the job duties for a ready mixer driver that are used by the director in determining wage rates and includes receiving the concrete at the factory or batching plant and the return trip to the factory or batching plant.

Labor Code section 1720.9(e) states that the entity hauling or delivering ready-mixed concrete to carry out a public works contract shall enter into a written subcontract agreement with the party that engaged the entity to supply the ready-mixed concrete. The written agreement shall require compliance with the public prevailing wage. The entity hauling or delivering ready-mixed concrete shall be considered a subcontractor solely for the purposes of paying prevailing wages.

The entity hauling or delivering ready-mixed concrete to carry out a public works contract shall submit a certified copy of the payroll records required under section 1776(a) to the party that engaged the entity and to the general contractor within three working days after the employee has been paid, accompanied by a written time card that shall be certified by each driver for the performance of job duties.

Section 1720.9(g) states that section 1720.9 applies to public works contracts that are awarded on or after July 1, 2016.

## **B. Public Works Bid Limits/Notice of Mandatory Pre-Bid Conference**

Public works projects and construction services have a bid limit of \$15,000 pursuant to Public Contract Code section 20111 and 20651. Public Contract Code section 6610 requires that all notices inviting bids for public works projects that include a requirement for any type of mandatory pre-bid conference, site visit or meeting must include the time, date and location of the mandatory pre-bid conference, site visit or meeting, and when and where project documents, including final plans and specifications will be available. Any mandatory pre-bid conference,

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<sup>199</sup> Stats. 2015, Ch. 739.

site visit or meeting cannot occur within five (5) calendar days from the publication of the initial notice inviting bids.

In addition, the school district or community college district seeking bids for public works projects must set forth in the bid invitation a date and time for closing of submission of bids by contractors. The date and time must be extended by no less than 72 hours in the event the school district or community college district issues any material change, addition or deletion to the bid within 72 hours prior to the bid closing.<sup>200</sup> Material change means a change with a substantial cost impact on the total bid as determined by the district.

Public Contract Code section 20103.7 requires local agencies taking bids for the construction of a public work or improvement to provide upon request from a contractor plan room service an electronic copy of a project's contract documents at no charge to the contractor plan room.

### **C. Licensing of Contractors**

Public Contract Code section 3300 states:

“(a) Any public entity, as defined in Section 1100, the University of California, and the California State University shall specify the classification of the contractor’s license which a contractor shall possess at the time a contract is awarded. The specification shall be included in any plans prepared for a public project and in any notice inviting bids required pursuant to this code.

“This requirement shall apply only with respect to contractors who contract directly with the public entity.

“(b) A contractor who is not awarded a public contract because of the failure of an entity, as defined in subdivision (a), to comply with that subdivision shall not receive damages for the loss of the contract.”

Districts may not lawfully award contracts to unlicensed contractors. Business and Professions Code section 7000 et seq. make it a misdemeanor for any person to engage in business or act in the capacity of the contractor without a license. Districts should determine prior to the award of a contract that the contractor to whom the contract is being awarded is licensed by state law.

In addition, Business and Professions Code section 7028.15 makes it a misdemeanor for any person to submit a bid to a public agency in order to engage in the business or act in the capacity of a contractor without having the appropriate license. Business and Professions Code section 7028.15 requires districts, before awarding a contract or issuing a purchase order, to verify that the contractor was properly licensed when the contractor submitted the bid. A bid

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<sup>200</sup> Public Contract Code section 4104.5.

submitted by a contractor who was not properly licensed must be considered nonresponsive and rejected by the district. Any contract awarded to a contractor who is not properly licensed is void.

Any officer or employee of a district who knowingly awards a contract or issues a purchase order to an unlicensed contractor may be cited and assessed civil penalties by the Contractor's State License Board. However, a public officer or employee is not subject to citation if the officer or employee made an inquiry to the Contractor's State License Board for the purpose of verifying a license status of any person or contractor and the State Contractor's License Board failed to respond to the inquiry within three business days.

In M.W. Erectors, Inc. v. Niederhauser Ornamental and Metalworks Co., Inc.,<sup>201</sup> the California Supreme Court held that a subcontractor is barred from recovering compensation for work performed for a general contractor under Business and Professions Code section 7031(a) if the subcontractor was not properly licensed at all times during the performance of the work called for under the contract. The court also held that if the subcontractor was properly licensed at all times during the contractual performance, the subcontractor is not barred from recovering compensation solely because he or she was not properly licensed when the contract was executed.<sup>202</sup>

In D.H. Williams Construction, Inc. v. Clovis Unified School District,<sup>203</sup> the Court of Appeal held that a school district could not reject a public works bid as nonresponsive when the bidder listed an unlicensed subcontractor on the bid forms. The Court of Appeal held that the appropriate remedy is for the district to conduct a due process hearing before awarding the contract and determining whether the bidder is a responsible bidder.

The Clovis Unified School District was building a \$126 million dollar education center. Rather than soliciting bids for a single prime contract, the district retained a construction manager and solicited multiple prime contracts for various phases of the project. The bids involved in litigation were for the concrete and fencing work at the education center.<sup>204</sup>

Five bidders submitted proposals for the concrete and fencing work. D.H. Williams Construction, Inc. was the lowest bidder. On its bid form for designation of subcontractors, Williams listed Patch Master of Central California as a subcontractor for concrete, masonry, and sleeves. On February 28, 2005, Patch Master's contractor license had expired. The bids were submitted on or about March 3, 2005. The license had not been renewed at the time the bids were open.<sup>205</sup>

On March 4, 2005, the district notified Williams that Patch Master does not have a current license. Williams responded by faxing a letter from Patch Master to the district stating that it released any claims it may have had regarding the bid. Williams notified the district that it

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<sup>201</sup> 36 Cal.4<sup>th</sup> 412, 436 (2005).

<sup>202</sup> Id. at 419.

<sup>203</sup> 146 Cal.App.4<sup>th</sup> 757, 53 Cal.Rptr.3d 345, 215 Ed.Law Rep. 964 (2007).

<sup>204</sup> Id. at 761.

<sup>205</sup> Ibid.

would perform the work of the subcontractor itself and that Patch Master would no longer be performing the work.<sup>206</sup>

On March 8, 2005, the district notified Williams that the governing board of the district would award the bid for concrete work at its meeting on March 9, 2005, and that the staff would recommend rejection of Williams' bid as nonresponsive. At the meeting on March 9, 2005, the governing board accepted the bid of the second lowest bidder and awarded the bid to Emmett's Excavation, Inc.<sup>207</sup>

The Court of Appeal reviewed the case law on responsible bidders and responsive bids and noted that whether a low bidder is a responsible bidder is determined by the fitness, quality, and capacity to perform the proposed work satisfactorily. In making this determination, the public agency is required to afford a significant level of due process to the bidder, including notice and an opportunity to respond since a declaration of nonresponsibility may have an adverse impact on the professional or business reputation of the bidder.<sup>208</sup>

The Court of Appeal held that unless the school district determined that listing the unlicensed subcontractor was intentional, or otherwise establishes that Williams was not a responsible bidder, no purpose would be served by excluding Williams' bid since the general contractor would do the work themselves and the district would receive the same product at the same price stated in the bid. The Court of Appeal stated that a case by case determination that a prime contractor is not responsible (e.g., because it has listed a subcontractor it has no intention of actually using or the general contractor does not have a license to do the work) requires a due process proceeding which the district failed to offer.

The Court of Appeal concluded that a subcontractor is not required by the Business and Professions Code to have a contractor's license at the time it submits its bid to the contractor, "... although established law generally requires a license at the time the subcontractor executes its contract with a successful prime bidder."<sup>209</sup> The court further held that listing an unlicensed subcontractor in the bid of a properly licensed prime bidder does not render the bid nonresponsive.

The Court of Appeal noted that the district's bid packet did not require the subcontractor to be licensed at the time the bid is submitted. The court left unclear whether a district may include in its bid packet language that would make the bid nonresponsive if a prime contractor

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<sup>206</sup> *Ibid.*; Williams invoked the provisions of Public Contract Code section 4107(a)(3) which permits the public agency to allow the substitution of a subcontractor when a listed subcontractor fails or refuses to perform his or her subcontract.

<sup>207</sup> *Id.* at 762.

<sup>208</sup> *Id.* at 763-764. See, City of Inglewood – L.A. County Civic Center Authority v. Superior Court, 7 Cal.3d 861 (1972); Taylor Bus Service, Inc. v. San Diego Board of Education, 195 Cal.App.3d 1331 (1987).

<sup>209</sup> *Id.* at 769. See, M.W. Erectors, Inc. v. Niederhauser Ornamental and Metalworks Company, Inc., 36 Cal.4<sup>th</sup> 412, 436 (2005). In M.W. Erectors, Inc., the California Supreme Court held that a subcontractor is barred from recovering compensation for work performed for a general contractor under Business and Professions Code section 7031(a) if the subcontractor was not properly licensed at all times during the performance of the work called for under the contract. The court also held that if the subcontractor was properly licensed at all times during contractual performance, the subcontractor is not barred from recovering compensation solely because he or she was not properly licensed when the contract was executed. *Id.* at 419. See, also, Great Western Contractors, Inc. v. WSS Industrial Construction, Inc., 162 Cal.App.4<sup>th</sup> 581, 76 Cal.Rptr.3d 8 (2008); Goldstein v. Barak Construction, 164 Cal.App.4<sup>th</sup> 845, 79 Cal.Rptr.3d 603 (2008).

listed an unlicensed subcontractor in the bid at the time the bid was submitted. The court noted that under the Business and Professions Code section 7031(a), the subcontractor is required to be licensed at all times during the performance of the construction contract.<sup>210</sup>

The trial court canceled the contract between the district and Emmett and ordered the district to bar Emmett from further work and to present to Williams a contract for the remaining portion of the concrete work. While the Court of Appeal affirmed the trial court's decision against the district, it held that the remedy ordered by the trial court was inappropriate under the circumstances. Rather than cancel the contract, the Court of Appeal held that the district should have an opportunity to exercise its statutory discretion and conduct a due process hearing to determine whether Williams was a responsible bidder or whether it was nonresponsible and should be deprived of the contract. The court held that the district was entitled to make an informed determination if Williams is or is not a responsible bidder so long as it complies with the established requirements of due process.<sup>211</sup>

The Court of Appeal ordered the trial court to order the district to offer a contract to Williams within 15 days of such order, unless before that date, the district provides notice to Williams that it is deemed not a responsible bidder and offers a due process hearing to Williams. The trial court was ordered to retain jurisdiction, to cancel and rescind the district's contract with Emmett and to order appropriate relief to Emmett if the district and Williams enter into a contract for the remainder of the concrete and fence work.<sup>212</sup>

The ruling in D. H. Williams Construction, Inc. will require districts to make a case by case determination as to whether a contractor, who has listed an unlicensed subcontractor on their bid, is a responsible bidder. Districts should consult legal counsel when faced with this situation.

#### **D. Noncollusion Declaration**

Public Contract Code section 7106 states that all public works contracts must include a noncollusion declaration under penalty of perjury in the form required by Public Contract Code section 7106 which is included in the Appendix.

#### **E. Designation of Subcontractors**

The Subletting and Subcontracting Fair Practices Act<sup>213</sup> sets forth the law to prevent bid shopping and bid peddling in connection with construction, alteration and repair of public improvements, since such practices often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors and lead to insolvencies, loss of wages to employees and

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<sup>210</sup> Id. at 769. Business and Professions Code section 7031(a) states in part, "... no person engaged in the business...of a contractor, may bring or maintain any action,... in any court in this state for the collection of compensation for the performance of any act or contract where a license is required... without alleging he or she was a duly licensed contractor at all times during the performance of that act or contract..."

<sup>211</sup> Id. at 771.

<sup>212</sup> Id. at 771-72.

<sup>213</sup> Public Contract Code section 4100 et seq.

other evils. Public Contract Code section 4104 requires prime contractors to submit with their bid a list of all subcontractors to whom it intends to subcontract work, including all fabrication and installation work for more than one half of one percent of the total bid. The prime contractor must give the name and location of the place of business of each subcontractor and the subcontractor's California Contractor license number. Any additional information required from the prime contractor may be submitted up to twenty four (24) hours after bid deadline. Only one subcontractor may be listed for each portion of the work as defined by the prime contractor in its bid. Therefore, if the prime contractor intends to use a subcontractor for any portion of the work in an amount in excess of one half of one percent of the total bid, then the prime contractor is required to list the subcontractor.<sup>214</sup>

If the prime contractor fails to list the subcontractor or list more than one subcontractor for the same portion of the work, the prime contractor agrees that the prime contractor is fully qualified to perform that portion of the work itself and that it will perform that portion.<sup>215</sup> The prime contractor may not subcontract any portion of the work in excess of one half of one percent of the initial bid if its original bid did not designate a subcontractor for that portion of the work except where a change order causes changes or deviations from the original contract.<sup>216</sup> In the event of an emergency, after a written finding by the district setting forth the facts constituting the emergency, the prime contractor may subcontract work where no subcontractor was listed on the original bid. The prime contractor may not circumvent the statutory requirements for listing subcontractors by listing another contractor who will, in turn, subcontract portions of the work constituting a majority of the work covered by the prime contract.<sup>217</sup>

Following the award of a bid, the prime contractor may not substitute another subcontractor for the listed subcontractor unless approved by the district for one of the following reasons:

1. The listed subcontractor failed or refused to execute a contract presented by the prime contractor;
2. The listed subcontractor became bankrupt or insolvent;
3. The listed subcontractor failed or refused to perform the subcontract;
4. The listed subcontractor failed or refused to meet the bond requirements of the prime contractor;

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<sup>214</sup> Public Contract Code section 4100 et seq. do not apply when a public agency issues a change order eliminating the need for the subcontractor's work. In such cases, the general contractor will not be held liable. See, Affholder, Inc. v. Mitchell Engineering, Inc., 153 Cal.App.4<sup>th</sup> 510, 63 Cal.Rptr.3d 121 (2007).

<sup>215</sup> Public Contract Code section 4106.

<sup>216</sup> Public Contract Code section 4107.

<sup>217</sup> Public Contract Code section 4105.

5. The prime contractor demonstrates to the district or its duly authorized officer that the name of the subcontractor was listed as a result of an inadvertent clerical error;
6. The listed subcontractor is not licensed pursuant to state law;
7. The awarding authority or its duly authorized officer determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial compliance with the plans and specifications or that the subcontractor is substantially delaying or disrupting the progress of the work.
8. The listed subcontractor is ineligible on a public works project pursuant to 1777.1 or 1777.7 of the Labor Code.
9. The awarding authority determines that a listed subcontractor is not a responsible contractor.<sup>218</sup>

The district, prior to approving a prime contractor's request to substitute a subcontractor, must give written notice by certified mail to the listed subcontractor of the request for substitution and the reasons for the request. The listed subcontractor has five working days within which to submit written objections to the district. Upon the filing of written objections, the district must give at least five working days' notice to the listed subcontractor of a public hearing by the awarding authority on the request for substitution. If the listed subcontractor does not file written objections to the prime contractor's request for substitution, the failure to file objections is deemed to be consent to the substitution.<sup>219</sup>

Where a prime contractor claims inadvertent clerical error in a listing of a subcontractor, the prime contractor shall, within two working days after the time of the prime bid opening by the district, give written notice to the district and copies of that notice to both the subcontractor he or she claims to have listed in error and the intended subcontractor who had provided a bid to the prime contractor prior to the bid opening. Any listed subcontractor notified by the prime contractor as to an inadvertent clerical error shall be allowed six working days from the time of the prime bid opening within which to submit to the district and to the prime contractor written objection to the prime contractor's claim of inadvertent clerical error. Failure of the listed subcontractor to file the written notice within six working days shall be primary evidence of his or her agreement that an inadvertent clerical error was made.<sup>220</sup>

The district shall, after a public hearing, consent to the substitution of the intended subcontractor if:

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<sup>218</sup> Public Contract Code section 4107.

<sup>219</sup> Ibid.

<sup>220</sup> Public Contract Code section 4107.5.

1. The prime contractor, the subcontractor listed in error and the intended subcontractor each submit an affidavit to the district along with such additional evidence as the parties may wish to submit that an inadvertent clerical error was in fact made, provided that the affidavits from each of the three parties are filed within eight working days from the time of the prime bid opening; or
2. The affidavits were filed by both the prime contractor and the intended subcontractor within the specified time, but that the subcontractor whom the prime contractor claims to have listed in error does not submit within six working days to the district and to the prime contractor, written objections to the prime contractor's claim of inadvertent clerical error.<sup>221</sup>

If the listed subcontractor files an affidavit, the district shall investigate the claims of the parties and shall hold a public hearing to determine the validity of those claims. Any determination made shall be based on the facts contained in the declaration submitted under penalty of perjury by all three parties and supported by testimony under oath and subject to cross-examination. The district may, on its own motion or that of any other party, admit testimony of other contractors, any bid registries or depositories, or any other party in possession of facts which may have a bearing on the decision of the district.<sup>222</sup>

If the prime contractor violates the laws relating to subcontracting, the district may, in its discretion, cancel the contract or assess the prime contractor a penalty of not more than 10 percent of the amount of the subcontract involved. The penalty must be deposited in the fund out of which the prime contract is awarded. If the contract is to be canceled or a penalty assessed against the prime contractor, the prime contractor must be given a public hearing within five days with five days prior notice of the time and place.<sup>223</sup> In addition, a violation of these provisions is grounds for disciplinary action by the Contractor's State License Board.<sup>224</sup>

A subcontractor who is wrongfully deprived of the benefit of a subcontract due to an invalid substitution may recover from the prime contractor the benefit of the bargain (i.e., profit) the subcontractor would have realized.<sup>225</sup> Districts, however, are not liable even if the district consented to the substitution.<sup>226</sup> A subcontractor may also recover even if the prime contractor made an excusable clerical mistake if the statutory procedures are not complied with.<sup>227</sup>

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<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

<sup>223</sup> Public Contract Code section 4110.

<sup>224</sup> Public Contract Code section 4111.

<sup>225</sup> Southern California Acoustics Company v. C.V. Holder, Inc., 71 Cal.2d 719, 727 (1969).

<sup>226</sup> Ibid.

<sup>227</sup> Coast Pump Associates v. Stephen Tyler Corp., 62 Cal.App.3d 421 (1976).

If the district approves the substitution of a subcontractor pursuant to Public Contract Code section 4107 or 4107.5, the subcontractor may file a writ of mandate action to challenge the district's decision. If the subcontractor is successful in overturning the district's decision, it may then pursue a cause of action for damages.<sup>228</sup>

In Titan Electric Corporation v. Los Angeles Unified School District,<sup>229</sup> the Court of Appeal held that the Los Angeles Unified School District and the general contractor, Kemp Brothers Construction, Inc., substantially complied with Public Contract Code section 4107. The Court of Appeal held that Section 4107 contemplated that the district would consent to the substitution prior to the new subcontractor completing the work, and that in the instant case, a deviation from this chronology was permissible so long as the procedure used actually complies with the substance of the reasonable objectives of the statute (i.e., the prevention of bid peddling and bid shopping after the award of a public works contract) and the procedure provides an opportunity to the awarding authority to investigate the proposed replacement subcontractor before consenting to substitution.

#### **F. Bonding of Subcontractors**

Public Contract Code section 4108 authorizes a general contractor to request a faithful performance and payment bond from a subcontractor. The general contractor's written or published request for subbids must specify the amount and requirements of the bond or bonds to be provided by the subcontractor. If the subcontractor fails to provide the requested faithful performance or payment bond, the general contractor may reject the subcontractor's subbid and make a substitution of another subcontractor.<sup>230</sup> If the general contractor fails to specify the bond requirements in the subbid documents, the general contractor is precluded from imposing bond requirements thereafter.<sup>231</sup>

Districts may, in their request for bids, require the general contractor to require that its subcontractors furnished payment and performance bonds. The district may require the general contractor to submit with its bid copies of its written or published requests for subbids specifying the amount and requirements of the bonds to be provided by its subcontractors.

#### **G. Workers' Compensation Insurance Coverage**

The general contractor is required by Labor Code section 3700 to provide workers' compensation insurance coverage for its employees. A workers' compensation certificate testifying to the fact that a general contractor maintains a policy of workers' compensation insurance should be provided to the district.

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<sup>228</sup> Code of Civil Procedure section 1094.5; Interior Systems, Inc. v. Del E. Webb Corp., 121 Cal.App.3d 312, 320 (1981).

<sup>229</sup> 160 Cal.App.4<sup>th</sup> 188, 72 Cal.Rptr.3d 733 (2008).

<sup>230</sup> Public Contract Code sections 4107 and 4108.

<sup>231</sup> Public Contract Code section 4108(c)(3).

## **H. Progress Payments and Retention**

Many public works' contracts pursuant to Education Code section 17603 provide for progress payments. The district is required to determine the method of payment for construction contracts and specify in the bid documents how payment will be made.

Public Contract Code section 9203 which affects payment on any contract for the creation, construction, alteration, repair or improvement of any public structure, building, road, or other improvement, of any kind exceeding a cost of \$5,000.00 requires districts to retain a minimum of 5 percent of any progress payment as well as withhold not less than 5 percent of the contract price until final completion and acceptance of a project. However, if at any time after 50 percent of the work has been completed, the governing board of the district finds that satisfactory progress has been made, it may make any of the remaining progress payments in full for actual work completed.<sup>232</sup>

Public Contract Code section 7107 which governs the ability of a district to withhold retention, allows a district to withhold from the final payment an amount not to exceed 150 percent of any disputed amount from the general contractor in a public works contract.

Public Contract Code section 7201, effective January 1, 2012, changed the amount of retention that a public entity can withhold from any payment by a public entity to a contractor on a public works project. The change to the law will remain in effect only until January 1, 2016, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2016, deletes and extends that date.

Public Contract Code section 7201 states that it will apply to all contracts entered into on or after January 1, 2012, between a public entity and an original contractor, between an original contractor and a subcontractor, and between all subcontractors thereunder, relating to the construction of any public work of improvement. Section 7201(b)(1) now limits the retention proceeds withheld from any payment by a public entity from the original contractor, by the original contractor from any subcontractor, and by a subcontractor from any subcontractor thereunder, to five percent (5%) of the payment. In no event shall the total retention proceeds withheld exceed five percent of the contract price.

On September 27, 2014, Governor Brown signed Assembly Bill 1705,<sup>233</sup> effective January 1, 2015. Assembly Bill 1705 amends Public Contract Code sections 7201 and 10261.

Public Contract Code section 7201 applies to all contracts entered into on or after January 1, 2012, between a public entity and an original contractor, between an original contractor and a subcontractor, and between all subcontractors thereunder, relating to the construction of any public work of improvement. Section 7201(a)(2) states that under no circumstances shall any provision of Section 7201 be construed to limit the ability of any public entity to withhold 150% of the value of any disputed amount of work from the final payment. Section 7201(b)(1) states that the retention proceeds withheld from any payment by a public

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<sup>232</sup> Public Contract Code section 9203.

<sup>233</sup> Stats. 2014, ch. 670.

entity shall not exceed 5% of the payment. In no event shall the total retention proceeds withheld exceed 5% of the contract price.

Public Contract Code section 7201(b)(3) allows for certain exceptions effective January 1, 2015. Section 7201(b)(4) allows the retention to exceed 5% on a project-by-project basis, if during a properly noticed and scheduled public hearing prior to bid the board makes findings that the project is substantially complex and therefore requires a higher retention amount than 5%, and the awarding entity includes in the bid documents details explaining the basis for the finding and the actual retention amount. Section 7201(d) extends the effective date of Section 7201 from January 1, 2016 to January 1, 2018.

Previously, a public entity had the flexibility to withhold payments in excess of five percent to ensure satisfactory and timely completion of public works projects. Section 7201(b)(4) now requires that before a public entity can withhold retention proceeds in excess of five percent (5%), the governing body of the public entity or designee must make a finding during a properly noticed and normally scheduled “public hearing” prior to the bid that the project is “substantially complex” and therefore requires a higher retention amount than five percent. The public entity must include this finding and the actual retention amount in the bid documents. Unfortunately, Section 7201 does not define a “substantially complex” project.

The governing board of a district should proceed as it normally would when conducting any other public hearing required by the board. A resolution setting forth the basis for a finding that a project is “substantially complex” justifying a higher retention should be prepared for the public hearing. The resolution should be prepared by the “designee” of the board and approved by the governing board of the district at the public hearing held at a regularly scheduled board meeting.

Whenever bid documents require the retention of a percentage of the contract price by a district, the district must include provisions in any invitation for bid and in the contract documents to permit the substitution of securities for any monies withheld by the district. With the exception of certain federal contracts, at the request and expense of the contractor, securities equivalent to the amount withheld shall be deposited with the public agency or with a state or federally chartered bank in California as the escrow agent who shall pay those monies to the contractor. Upon satisfactory completion of the contract, the securities shall be returned to the contractor.<sup>234</sup>

In the alternative, the contractor may request and the owner shall make payment of retentions earned directly to the escrow agent at the expense of the contractor. At the expense of the contractor, the contractor may direct the investment of the payments into securities and the contractor shall receive the interest earned on the investments upon the same terms provided for securities deposited by the contractor. Upon satisfactory completion of the contract, the contractor shall receive from the escrow agent all securities, interest and payments received by the escrow agent from the owner pursuant to the terms of Public Contract Code section 22300. The contractor shall pay to each subcontractor, not later than 20 days of receipt of the payment,

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<sup>234</sup> Public Contract Code section 22300.

the respective amount of interest earned, net of costs attributed to retention withheld from each subcontractor, on the amount of retention withheld to insure the performance of the contractor.<sup>235</sup>

The securities eligible for investment under Public Contract Code section 22300 are those listed in Government Code section 16430: bank or savings and loans certificates of deposit; interest-bearing demand deposit accounts; stand-by letters of credit and any other security mutually agreed to by the contractor and the public agency. The contractor shall be the beneficial owner of any securities substituted for monies withheld and shall receive any interest thereon. Failure to include these provisions in bidding contract documents voids any provisions for performance retentions in a public agency contract.<sup>236</sup> Public Contract Code section 22300(e) sets forth the form of the Escrow Agreement for Security Deposits in Lieu of Retention and this form is included in the Appendix.

In S.S. Cummins Corp. v. West Bay Builders, Inc.,<sup>237</sup> the Court of Appeal held that an electrical subcontractor on an elementary school construction project was entitled to damages against the general contractor after the general contractor refused to release retention proceeds which the public agency paid to the general contractor following the school's completion. The court held that the statutory two percent (2%) per month charge on retention proceeds was not compounded on a monthly basis and that the two percent (2%) per month charge did not continue to accrue after entry of judgment.

In Thompson Pacific Construction, Inc. v. City of Sunnyvale,<sup>238</sup> the Court of Appeal held that under Public Contract Code section 7107, where a contractor brought an action for wrongfully withholding retention funds, a prevailing public entity need not prove that the contractor's action to recover the funds was frivolous in order to recover its attorneys' fees and costs. The Court of Appeal held that the public agency is entitled to attorneys' fees and costs as a matter of law if it is the prevailing party and the trial court must award attorneys' fees.

In Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc.,<sup>239</sup> the Court of Appeal held:

1. The statute authorizing a general contractor to withhold disputed amounts from retention proceeds applied to a dispute over change order work;
2. The statutory form for waiver and release of construction lien rights did not require the general contractor to release retentions before disputed claims were resolved;
3. The statutory requirement of prompt payment to subcontractors after each progress payment was waivable; and

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<sup>235</sup> Public Contract Code section 22300(b).

<sup>236</sup> Public Contract Code section 22300.

<sup>237</sup> 159 Cal.App.4<sup>th</sup> 765, 71 Cal.Rptr.3d 828, 228 Ed.Law.Rptr. 856 (2008).

<sup>238</sup> 155 Cal.App.4<sup>th</sup> 525, 66 Cal.Rptr.3d 175 (2007).

<sup>239</sup> 179 Cal.App.4<sup>th</sup> 1401, 102 Cal.Rptr. 3d 419 (2009).

4. The statutory requirement of prompt payment to subcontractors after each progress payment was waived by contractors.

Martin Brothers Construction, Inc. was a subcontractor employed to work on a public works project. Martin Brothers sued the general contractor for the project, Thompson Pacific Construction, Inc. and its surety and bonding companies for monies owed at the end of the project, including penalties, interest and attorneys' fees for alleged late progress and retention payments. By the time of trial, Thompson Pacific had paid Martin Brothers all amounts owed, except for the disputed penalties, interest and attorneys' fees, and the matter proceeded to a court trial solely on those issues. The trial court concluded, Thompson Pacific had not violated the applicable prompt payment statutes and entered judgment for Thompson Pacific. The court awarded defendants \$150,000 in attorneys' fees. The Court of Appeal affirmed.<sup>240</sup>

The underlying facts were that Thompson Pacific was the general contractor for a public works project of the Elk Grove Unified School District to construct a high school and a middle school in the city of Elk Grove. Thompson Pacific entered into two subcontracts with Martin Bros. for specified site clearing, grading and paving work. The parties treated the two contracts as one.<sup>241</sup>

The subcontracts provided that Thompson Pacific would make monthly progress payments to Martin Brothers of 95 percent of labor and materials which had been placed in final position and for which the right to payment had been properly documented pursuant to the terms of the subcontract. An incorporated addendum to the subcontracts provided that the subcontractor agreed that payment was not due until the subcontractor had finished all applicable administrative documentation required by the contract documents and the applicable releases. The documentation required included lien releases, certified payroll, union letters verifying payment of prevailing wages, and proof of insurance. The required lien releases included conditional lien releases for Martin Bros. for the current progress payment, and unconditional lien releases for prior payments. The final payment of contract retention required conditional final releases from Martin Brothers and unconditional releases for all of Martin Brothers subcontractors and suppliers, plus an affidavit verifying compliance with prevailing wage laws.<sup>242</sup>

Martin Brothers commenced the work in April 2002. During the course of this work, a number of issues arose regarding the work that was being done, or extra work that Martin Brothers was directed to do by Thompson Pacific. Some of the extra work was reflected by approved change orders, but Martin Brothers claimed entitlement to additional compensation for other work. For example, Martin Brothers claimed a right to additional payments because it was unable to utilize for infill a stockpile of dirt that was on the property when construction was started. Thompson Pacific disagreed with the claim for additional payment and the trial court found the evidence supported Thompson Pacific's position.<sup>243</sup>

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<sup>240</sup> *Id.* at 1405.

<sup>241</sup> *Id.* at 1406.

<sup>242</sup> *Ibid.*

<sup>243</sup> *Id.* at 1406-07

Thompson Pacific also disputed Martin Brothers' claim for additional payment for extra costs relating to the use of a different kind of sand when the specific sand called for in the contract was not available. Thompson Pacific's project manager testified Martin Bros. also submitted numerous other payment requests for extra work, some of which were not extra because the work was included in the original subcontracts. The project manager testified Martin Brothers submitted double invoices for costs a few times.<sup>244</sup>

Martin Brothers substantially finished its work in the later months of 2003. It concluded its punch list work on February, 2004. The last progress payment was made to Martin Brothers on March 15, 2004. At that time, Martin Brothers still had a number of disputed claims for additional payment. On March 22, 2004, Martin Brothers submitted a pay request application for extra work on change orders in the amount of \$398,564.60, plus retention. Later in March, 2004, its request was reduced to \$356,586.20, plus retention. Thereafter, there was a series of communications relating to documentation related to Martin Brothers' claims.<sup>245</sup>

In June 2004, Martin Brothers executed a stop notice claiming there was owed \$427,326.03, apparently including retention. The stop notice resulted in the district withholding from Thompson Pacific's payment 125 percent of the amount included in the stop notice.<sup>246</sup>

In July, 2004, Thompson Pacific's proposal to resolve the disputes ended with Martin Brothers rejecting Thompson Pacific's proposal in August, 2004. Thompson Pacific then obtained a stop notice release bond that was filed with the district, resulting in the release of the monies being held by the district pursuant to the stop notice. Thompson Pacific was paid these monies at the end of August, 2004.<sup>247</sup>

In October and November 2004, Thompson Pacific asked for and received a breakdown of Martin Brothers' claims. At the end of November, 2004, Martin Brothers provided a breakdown, claiming \$394,193.26.<sup>248</sup>

On December 27, 2004, Martin Brothers filed the initial complaint in this case seeking \$938,183.40 in damages, interest, penalties and attorneys' fees. On December 28, 2004, Martin Bros. submitted a revised claim to Thompson Pacific for \$737,223.27, plus retention. After attempts to compromise failed, Thompson Pacific paid the sum of \$632,792.36 in 2005. Martin Bros. received and accepted the payment without objection. At trial, Martin Brothers sought only statutory late payment penalties, interest and attorneys' fees. The trial court denied the requested relief and entered judgment for Thompson Pacific.<sup>249</sup>

At trial, Martin Brothers claimed that Thompson Pacific violated the prompt payment requirements of Business and Professions Code section 7108.5 and Public Contract Code section 7107. Section 7107 is applicable to contracts for the construction of any public work of

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<sup>244</sup> Id. at 1407.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

<sup>247</sup> Id. at 1408.

<sup>248</sup> Ibid.

<sup>249</sup> Ibid.

improvement and governs the payment of retention proceeds by the public entity owner and by the general contractor. The statute requires the public entity to pay retentions to its general contractor within 60 days after the date of completion. The statute requires the general contractor to then pay its subcontractors their respective shares of the retention proceeds within seven days after receiving the proceeds from the public entity. If the general contractor fails to pay the retention timely, the subcontractor may recover a penalty in the amount of two percent per month on the improperly withheld amount in lieu of any interest otherwise due. In any action for the collection of funds wrongfully withheld, the prevailing party is entitled to attorneys' fees and costs.<sup>250</sup>

The obligation of the general contractor to pay its subcontractors within seven days is expressly subject to an exception which allows the general contractor to withhold from a subcontractor its portion of the retention proceeds if a bona fide dispute exists between the subcontractor and the general contractor. The amount withheld from the retention payment shall not exceed 150 percent of the estimated value of the disputed amount. The trial court found this exception applicable and excused Thompson Pacific's failure to pay Martin Brothers when it received payment from the district in August 2004. The Court of Appeal agreed with the trial court's decision.<sup>251</sup>

The Court of Appeal rejected Martin Brothers' argument that the dispute language includes disputes over change orders. The Court of Appeal held that the language of Section 7107 applies to all disputes.<sup>252</sup>

Business and Professions Code section 7108.5 provides that a prime contractor or subcontractor shall pay to any subcontractor, not later than ten days of receipt of each progress payment, unless otherwise agreed to in writing the respective amounts allowed the contractor on account of the work performed by the subcontractors, to the extent of each subcontractor's interest therein. The Court of Appeal interpreted the language in Section 7108.5 as allowing the general contractor and subcontractor to agree to a different payment schedule. The subcontract entered into between Thompson Pacific and Martin Brothers clearly stated that payment is not due until Martin Brothers had finished all applicable administrative documentation required by the contract documents and the applicable releases. The Court of Appeal concluded that Thompson Pacific did not violate Section 7108.5 because there was no violation of the statute to trigger the statute's penalty provision.<sup>253</sup>

## **I. Sureties**

A district may not require a bidder on a public works contract to make application to or furnish financial data to or obtain or procure any surety bond or contract of insurance specified in the bid documents from a particular surety, insurance company, agent or broker.<sup>254</sup> In addition,

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<sup>250</sup> Id. at 1409.

<sup>251</sup> Id. at 1409-10.

<sup>252</sup> Id. at 1410.

<sup>253</sup> Id. at 1414-17. Business and Professions Code section 7108.5 has since been amended. See, Stats. 2010, ch. 328 (S.B. 1330); Stats. 2011, ch. 700 (S.B. 293).

<sup>254</sup> Government Code section 4420(a).

no district or any person acting on behalf of a district, shall negotiate, apply for, obtain or procure any surety bond or contract of insurance which can be obtained by the bidder, contractor or subcontractor except contracts of insurance for builder's risk or owner's protective liability.<sup>255</sup> Districts, however, may approve the form, sufficiency or manner of execution of the surety bonds or contracts of insurance furnished by the surety or insurance company selected by the bidder to underwrite the bonds or contracts of insurance.<sup>256</sup>

Based upon Walt Rankin & Associates, Inc. v. City of Murrieta,<sup>257</sup> school districts and community college districts now have a mandatory duty to investigate the sufficiency of a surety prior to approving a faithful performance bond and/or payment bond. Only California admitted surety insurers will be acceptable for the issuance of bonds. "Admitted" means that a surety insurer is permitted by the State Department of Insurance (DOI) to issue surety bonds in California. To be an "admitted insurer" in California, the surety must submit periodic financial audits and be subject to specific reserve requirements that meet DOI standards.

District must verify the status of the surety by one of the following ways:

1. Printing out information from the website of the California Department of Insurance confirming the surety is an admitted surety insurer and attaching it to the bond, or
2. Obtaining a certificate from the county clerk for the county in which the district is located that confirms the surety is an admitted surety insurer and attaching it to the bond.<sup>258</sup>

If the admitted surety insurer still appears questionable, then districts may impose certain requirements upon sureties. These requirements include:

1. The original, or a certified copy, of the unrevoked appointment, power of attorney, bylaws, or other instrument entitling or authorizing the person who executed the bond to do so, within ten calendar days of the insurer's receipt of a request to submit the instrument;
2. A certified copy of the certificate of authority of the insurer issued by the insurance commissioner within ten calendar days of the insurer's receipt of a request to submit the copy;
3. A certificate from the clerk of the county in which the court or officer is located that the certificate of authority of the insurer has not been surrendered, revoked, canceled, annulled, or suspended, or in the event that it has, that

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<sup>255</sup> Government Code section 4420(b).

<sup>256</sup> Government Code section 4421.

<sup>257</sup> Walt Rankin & Associates, Inc. v. City of Murrieta, 84 Cal.App.4<sup>th</sup> 605 (2000).

<sup>258</sup> Code of Civil Procedure section 995.311.

renewed authority has been granted, within ten calendar days of the insurer's receipt of the certificate; and

4. Copies of the insurer's most recent annual statement and quarterly statement filed with the Department of Insurance within ten days of the insurer's receipt of the request to submit the statements.<sup>259</sup>

If the surety submits the required documents and it appears that the bond was properly executed, if the insurer is authorized to transact surety business in the State of California and if its assets exceed its liabilities in an amount equal to or in excess of the amount of the bond, then the insurer is sufficient and must be accepted or approved as surety on the bond unless the insurer's liability on the bond exceeds 10 percent of its capital and surplus as shown by its last statement on file in the office of the Insurance Commissioner.<sup>260</sup>

## **J. Payment Bonds and Faithful Performance Bonds**

The contractor must provide a payment bond for all public works projects which exceed \$25,000.00 before beginning the performance of the work.<sup>261</sup> Architects, engineers and land surveyors providing professional services for public works are not required to file a payment bond.<sup>262</sup>

The purpose of a payment bond is to ensure that laborers' and materialmen's claims against the contractor and subcontractors for work done or materials furnished in connection with the public works project will be paid. The payment bond must provide that the surety shall pay all amounts if the original contractor or subcontractor fails to pay any person furnishing labor or materials or fails to pay amounts due under the Unemployment Insurance Code with respect to labor or work performed under the contract and fails to pay any amounts required to be deducted, withheld and paid over to the Employment Development Department from the wages of employees of the contractor and subcontractors.<sup>263</sup> A general contractor who fails to file a payment bond with the district cannot be paid even when the job is completed satisfactorily and all claims for labor and materials have been satisfied. The failure to file the bond is a breach of a broad public policy.<sup>264</sup>

The payment bond must be 100 percent of the contract price.<sup>265</sup> The general contractor may require subcontractors to provide a payment bond to indemnify the general contractor for any loss sustained by the original contractor because of any default by the subcontractor.<sup>266</sup>

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<sup>259</sup> Code of Civil Procedure section 995.660.

<sup>260</sup> Code of Civil Procedure section 995.660(a)(3).

<sup>261</sup> Civil Code section 3247; 52 Ops.Cal.Atty.Gen. 8 (1969); 38 Ops.Cal.Atty.Gen. 143(1961).

<sup>262</sup> Civil Code section 3247(c).

<sup>263</sup> Civil Code section 3248.

<sup>264</sup> 38 Ops.Cal.Atty.Gen. 143 (1961).

<sup>265</sup> Civil Code section 3248.

<sup>266</sup> Civil Code section 3248.

In Electrical Electronic Control Inc. v. Los Angeles Unified School District,<sup>267</sup> the Court of Appeal held that where the school district fails to require a contractor, in a public works contract, to obtain a payment bond, the school district cannot assert that the replacement contractor's payment bond (after the first contractor's default) covered the subcontractors of the original contractor.

Civil Code section 3247 requires public agencies to obtain a payment bond from a contractor in all public works contracts in excess of \$25,000. In Electrical Electronic Control, Inc., the contract documents required the contractor to provide a payment bond for the protection of its subcontractors. The contractor did not provide a payment bond. The contractor began working on the project and failed to pay its subcontractors. The public entity subsequently terminated the contractor from the project, and the public works contract was assigned, with the consent of the public entity, to a replacement contractor.<sup>268</sup>

A subcontractor who had not been paid by the initial contractor brought suit against the Los Angeles Unified School District, alleging that the public entity was liable due to its negligence in allowing the initial contractor to commence work without having furnished a payment bond. The school district acknowledged the initial contractor did not furnish a bond. However, the school district sought judgment in its favor on the basis of a payment bond furnished by the replacement contractor.<sup>269</sup>

The trial court concluded that the school district had failed to establish the replacement contractor's payment bond applied to claims of subcontractors when the initial contractor had failed to pay. The Court of Appeal affirmed the decision of the trial court with respect to the \$500,000 damages award and reversed the trial court's award of \$80,000 in attorneys' fees.<sup>270</sup>

The Court of Appeal reviewed the language of the payment bond and concluded that there was nothing in the language of the payment bond which suggested that it was intended to have retroactive application and apply to the subcontractors of the original contractor.<sup>271</sup>

Districts should make sure that in all public works contracts over \$25,000 that a payment bond has been furnished by the general contractor as required by the Civil Code section 3247. If the general contractor fails to provide the payment bond and later fails to pay its subcontractors, the district, as in Electrical Electronic Control Inc., can be held liable for damages, (although not for attorneys' fees).

Faithful Performance Bonds (100%) are not required by law but are strongly recommended in projects over \$25,000. A faithful performance bond requires a surety to complete a project in the event the contractor defaults.

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<sup>267</sup> 126 Cal.App.4<sup>th</sup> 601, 24 Cal.Rptr.3d 316 (2005).

<sup>268</sup> Id. at 606.

<sup>269</sup> Id. at 608.

<sup>270</sup> Id. at 609.

<sup>271</sup> Id. at 612-13.

## **K. Damages for Breach of Construction Contracts**

In Lewis Jorge Construction Management, Inc. v. Pomona Unified School District,<sup>272</sup> the California Supreme Court ruled that a general contractor may not recover damages for potential lost profits which the general contractor claimed would have been earned on future construction contracts but did not due to the contractor's impaired bonding capacity. The California Supreme Court held that potential profits from future contracts were not a proper item of general damages in an action for breach of contract and ruled that the contractor did not prove special damages in this particular case. The ruling in Lewis Jorge should be beneficial to school districts in future cases.

In 1994, the Pomona Unified School District solicited bids for building improvements at one of its elementary schools. The district awarded the contract to Lewis Jorge Construction Management, Inc., the low bidder. The contractor did not complete the project on the specified day and the district withheld payments to the contractor. On June 5, 1996, the district terminated the contract and made a demand on the contract as surety to finish the project under the performance bond the surety had provided for the project. The surety then hired another contractor to complete the school project.<sup>273</sup>

Lewis Jorge sued the district, alleging the school district breached the contract by declaring Lewis Jorge in default and terminating it from the construction project. At trial, Lewis Jorge presented evidence from its bonding agent, that its bonding limit of \$10 million per project with an aggregate limit of \$30 million for all work in progress was reduced to \$5 million per project with an aggregate limit of \$15 million. Lewis Jorge contended that some time in 1998, due to the loss of bonding capacity, it ceased bidding on public projects and eventually went out of business.<sup>274</sup>

At trial, Lewis Jorge's expert witness testified that Lewis Jorge lost approximately \$3,148,107 as a result of the loss of bonding capacity. The jury ruled in favor of Lewis Jorge, finding the district liable for \$362,671 owed on the school construction contract, and awarded \$3,148,197<sup>275</sup> in profits Lewis Jorge did not realize due to the loss or reduction of its bonding capacity. The school district did not appeal the ruling that it breached the contract with Lewis Jorge but appealed the award of damages for future profits.<sup>276</sup>

The California Supreme Court reversed the award of damages of future projects by the trial court and the Court of Appeal. The California Supreme Court held that the damages awarded to an injured party for breach of contract are supposed to be equivalent to the benefit of the plaintiff's contractual bargain. The damages cannot exceed what it would have received if the contract had been fully performed on both sides.<sup>277</sup>

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<sup>272</sup> 34 Cal.4th 960, 22 Cal.Rptr.3d 340 (2004).

<sup>273</sup> Id. at 965-66.

<sup>274</sup> Id. at 966.

<sup>275</sup> The jury returned an award ninety dollars greater than the lost profit sum calculated by the expert witness.

<sup>276</sup> Ibid.

<sup>277</sup> Id. at 967.

The court noted that contractual damages fall into two categories: general damages or direct damages, and special damages or consequential damages. The court defined general damages as those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. The court defined general damages as a natural and necessary consequence of a contract breach that are within the contemplation of the parties and are predictable at the time the contract was entered into.<sup>278</sup>

The court defined special damages as those losses that do not arise directly and inevitably from a similar breach of any similar agreement. Special damages are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties. Special damages are recoverable if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party, or were matters of which the breaching party should have been aware at the time of contracting. A party assumes the risk of special damages liability for unusual losses arising from special circumstances only if the party was advised of the facts concerning special harm which might result from the breach. Damages beyond the expectation of the parties are not recoverable as special damages. Special damages for breach of contract are limited to losses that were either actually foreseen or were reasonably foreseeable when the contract was formed.<sup>279</sup>

The California Supreme Court held that in the Lewis Jorge case, the facts do not support an award of general damages or special damages for loss of profits on future contracts. The court held that the district's termination of the school construction contract did not directly or necessarily cause Lewis Jorge's loss of potential profits on future contracts. The loss resulted from the decision of the surety at the time of the breach to cease bonding Lewis Jorge. The court also held that the future lost profits could not be awarded as special damages because there was insufficient proof and the claims of Lewis Jorge were uncertain and speculative. The court held that at the time the school district entered into a contract with Lewis Jorge, it did not know what Lewis Jorge's bonding capacity was or how the surety would evaluate Lewis Jorge's bonding limits.<sup>280</sup>

The California Supreme Court reversed the lower court's award of \$3,148,197 for lost profits.

Based on the Lewis Jorge case, it will be difficult for general contractors to recover potential lost profits in future cases against school districts and community college districts.

## **L. Changes to Public Works Contracts**

In Katsura v. City of Buenaventura,<sup>281</sup> the Court of Appeal held that a consulting engineer could not be awarded a judgment for extra work he performed that was not specified in the contract but was purportedly authorized orally by a City employee and an agent of the City.

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<sup>278</sup> Id. at 968-69.

<sup>279</sup> Ibid.

<sup>280</sup> Id. at 977.

<sup>281</sup> 155 Cal.App.4th 104, 65 Cal.Rptr.3d 762 (2007).

The Court of Appeal held that the public works contract could not be amended orally, but could only be amended in writing as required by statute and the City charter.

Under the terms of the contract, the maximum amount the City would pay for the services rendered by Katsura was \$18,485.00. The contract required that any modifications were only to be made by mutual written consent to the parties. The contract was signed by the City's public works director and Katsura.<sup>282</sup>

The contract also stated that the public works director is authorized to make payments up to \$1,850.00 for special items of work not included in the project's scope. Payments for special work will only be made after issuance of a written notice to proceed signed by the city engineer for the specific special tasks.<sup>283</sup>

Katsura submitted his first invoice to the City for \$2,943.25 and the City paid the invoice in full. Katsura submitted a second invoice to the City for \$12,625.75 for work performed and the City paid that invoice in full. Ten months after the completion of the project, Katsura submitted his final invoice for \$23,743.75. The City refused to pay the invoice because it was beyond the maximum contract price and included work that was not authorized by the contract.<sup>284</sup>

The trial court ruled in favor of the City and the Court of Appeal affirmed the lower court's decision. The court noted that the mode of contracting, as prescribed by law is the measure of the power to contract and a contract made in disregard of the prescribed mode is unenforceable.<sup>285</sup> Public works contracts are the subject of intensive statutory regulation and lack the freedom of modification present in private party contracts. Persons dealing with the public agency are presumed to know the law with respect to the agency's authority to contract.<sup>286</sup> The Court of Appeal held that the alleged oral statements by the associate city engineer and project manager were insufficient to bind the City and that an oral contract with a city not expressly authorized by statute is unenforceable.<sup>287</sup> The Court of Appeal also rejected Katsura's argument that there was a implied-in-law or quasi contract since such agreements are prohibited by statute. The Court of Appeal concluded:

“However, Katsura was not the victim of an innocent mistake. He admitted that, at the time he performed the extra work, he knew it was outside the scope of the contract. Moreover, he had actual knowledge of the process for obtaining authorization for extra work. He acknowledged that he had a previous contract with the City involving the same project and submitted written requests

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<sup>282</sup> Id. at 106.

<sup>283</sup> Ibid.

<sup>284</sup> Id. at 106-107.

<sup>285</sup> Id. at 109. See, also, Amelco Electric v. City of Thousand Oaks, 27 Cal.4<sup>th</sup> 228, 242 (2002).

<sup>286</sup> Amelco Electric v. City of Thousand Oaks, 27 Cal.4<sup>th</sup> 228, 234, 242 (2002).

<sup>287</sup> Id. at 109-110.

authorizing extra work in compliance with the provisions of the contract.”<sup>288</sup>

As indicated by the court, contractors and districts should adhere closely to the requirements of the public works statutes and utilize written change orders for modifications to a public works contract and for extra work.

In G. Voskian Construction, Inc. v. Alhambra Unified School District,<sup>289</sup> the Court of Appeal ruled in favor of the construction company against the school district, with respect to extra work and written change orders.

In the first contract, the relocation contract, the court held that Voskian was entitled to recover for its extra work, because the district eventually issued written change orders authorizing the extra work. As for the second contract, the fire alarm contract, notwithstanding the lack of written change orders, Voskian was entitled to recover for the extra work that was required because its bid was based on misleading plans and specifications issued by the school district.<sup>290</sup>

In June 2006, following competitive bidding, Voskian and the district entered into a written contract under which Voskian was to serve as general contractor for the district and provide certain improvements as part of a project known as the Moorefield Program Relocation for compensation of \$989,000 (the first contract, or the relocation contract). Pursuant to the relocation contract, Voskian was to move numerous portable buildings to the site of the Moorefield campus.<sup>291</sup>

The relocation contract, as well as the fire alarm contract, provided that the agreement and other project documents can only be modified by an amendment in writing, signed by both parties, and pursuant to action of the district’s governing board. The district’s Assistant Superintendent of Business Services was authorized to approve change orders.<sup>292</sup>

During the course of the relocation contract, the Assistant Superintendent of Business Services directed Voskian to deal with BRJ and Associates, the construction manager, to finalize change orders with them, and then she would approve whatever they agreed to. Due to time constraints caused by students returning to school in early September, the work could not be halted for months until the district’s board formally approved each change order. The district required the extra work to be completed immediately and then the change orders would be bunched together to be processed by the district.<sup>293</sup>

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<sup>288</sup> Id. at 111.

<sup>289</sup> 204 Cal.App. 4th 981, 139 Cal.Rptr. 3d 286 (2012).

<sup>290</sup> Id. at 984. See, Souza and McCue Construction Company v. Superior Court, 57 Cal. 2d 508, 510 (1962). Los Angeles Unified School District v. Great American Insurance Company, 49 Cal.4<sup>th</sup> 739, 112 Cal.Rptr. 3d 230 (2010) (a public agency’s failure to disclose information in its possession that materially affects the cost of performance on a public contract may entitle contractor to additional compensation).

<sup>291</sup> Id. at 983-84.

<sup>292</sup> Id. at 984.

<sup>293</sup> Ibid.

During the course of the relocation contract, the district and its representatives asked Voskanian to make changes to remedy errors made by the district's architect when preparing the plans, to resolve problems that arose because the site condition did not match what was contained in the plans, and because the district wanted work outside the scope of the plans. It also became clear the architect neglected to include a fire alarm system for the relocated portable buildings. Therefore, the district prepared new plans and solicited bids for a new fire alarm project.<sup>294</sup>

Voskanian's bid for the fire alarm contract was the lowest. Voskanian and the district then entered into the second contract, the \$55,000 fire alarm contract, wherein Voskanian was to serve as the general contractor for the fire alarm project.<sup>295</sup>

In accordance with the two contracts, Voskanian obtained performance bonds from Fidelity and Deposit Company of Maryland. In soliciting bids for the fire alarm system for the portable buildings that were part of the fire alarm project, the district required bidders to submit their bids based on the plans and specifications provided at the time of bidding. During the bidding process, Voskanian participated in a job walk arranged by the district, to ascertain the interior configurations of the buildings for the fire alarm project. However, because the job walk occurred while classes were in session, bidders were allowed to view only two of the 16 buildings, and from the doorways only. Bidders were given a set of plans only after the job walk, and therefore, did not have the benefit of the plans while conducting the job walk.<sup>296</sup>

After Voskanian was awarded the fire alarm contract, it discovered that many of the portable buildings had more rooms than shown on the plans, thus requiring more alarm devices, conduit and wiring. For example, one of the buildings was shown on the plans as a single room with no interior walls. However, the building had six interior rooms. Due to the error in the plans, Voskanian requested that the district approve a change order for the extra devices that would be needed for the rooms not shown on the plans.<sup>297</sup>

Upon completion of the work, the district refused to pay Voskanian the full amount due. In accordance with the contracts, Voskanian submitted a claim to the district pursuant to Government Code section 910 et seq. Voskanian asserted that on the relocation contract, it was owed \$206,367, including \$106,225 in unpaid retention, and \$100,142 for extra work that was unpaid. Voskanian also sought \$94,777 on the fire alarm contract, consisting of the entire contract amount of \$55,000 plus \$39,777 for extra work on that contract.<sup>298</sup>

On September 11, 2007, the district rejected the claim. On September 28, 2007, Voskanian filed suit against the district for breach of written contract and recovery of statutory penalties. The district filed a cross complaint against Voskanian for breach of contract. The district's cross complaint also named Fidelity and Old Republic, seeking to enforce the terms of

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<sup>294</sup> Ibid.

<sup>295</sup> Ibid.

<sup>296</sup> *Id.* at 984-85.

<sup>297</sup> *Id.* at 985.

<sup>298</sup> Ibid.

the two performance bonds issued by Fidelity and a contractor's license bond issued by Old Republic.<sup>299</sup>

Commencing July 28, 2009 through August 11, 2009, the matter was tried to a jury. The jury returned a special verdict awarding Voskanian \$419,756, including penalties and interest, the precise amount Voskanian had requested at trial. The special verdict included the following findings:

1. A portion of the relocation contract between the district and Voskanian was modified by an oral agreement.
2. The oral modification was the designation of BRJ and James Courteau as designee of the district.
3. The district breached the relocation contract by failing to pay Voskanian for work done and by failing to pay retention amounts due.
4. Voskanian was entitled to recover \$301,190 against the district on the relocation contract.
5. The district also breached the fire alarm contract. Its breach consisted of nonpayment for work done by Voskanian and failing to respond to requests for information within a reasonable time.
6. Voskanian was entitled to recover \$118,566 from the district on the fire alarm contract.<sup>300</sup>

The district appealed the verdict and on March 24, 2010, the trial court granted Voskanian's motion for attorneys' fees. On April 20, 2010, the trial court entered an amended judgment which included the award to Voskanian of attorneys' fees in the sum of \$207,295 as well as \$79,506 in costs.<sup>301</sup>

The Court of Appeal held the change orders for extra work must be in writing. In the absence of a waiver or modification, no recovery can be had for alterations or extra work performed without compliance with such provision.<sup>302</sup>

However, the Court of Appeal held that with respect to the relocation contract, the change orders were put in writing and ultimately were approved by the district's governing board after

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<sup>299</sup> *Id.* at 985-86.

<sup>300</sup> *Id.* at 986.

<sup>301</sup> *Ibid.*

<sup>302</sup> *Id.* at 987. See, Healy v. Brewster, 251 Cal.App. 2d, 541 (1967); Katsura v. City of Buena Ventura, 155 Cal.App. 4th 104 (2007); P & D Consultants, Inc. v. City of Carlsbad, 190 Cal.App. 4th 1332 (2010).

the work was completed. Therefore, the Court of Appeal held that Voskanian was entitled to be paid for the extra work. The Court of Appeals stated:

“In sum, irrespective of the timing of the change orders, the district in fact issued written change orders for the relocation contract. Therefore, Voskanian was entitled to recover for the extra work performed in conjunction with the relocation contract. Upon the district’s approval of the change orders for the relocation contract, the extra work on the relocation contract was supported by written authorization from the district. Because the district eventually issued written change orders for the relocation contract, we reject the district’s contention said extra work by Voskanian was unauthorized.”<sup>303</sup>

The Court of Appeal held with respect to the fire alarm contract, that Voskanian was entitled to recover for extra work because its bid was based on the district’s supplying it with incorrect plans and specifications. The Court of Appeal held that even though the district did not issue written change orders for the fire alarm contract, Voskanian was entitled to recover for the extra work performed in connection with the contract because the extra work on the fire alarm contract was necessitated by incorrect plans and specifications issued by the district. The Court of Appeal noted that previous case law had held that a contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made, may recover in a contract action for extra work or expenses caused by the conditions being other than as represented.<sup>304</sup>

The Court of Appeal also upheld the award of attorneys’ fees against the school district. The Court of Appeal noted that the school district filed a cross complaint against the bonding company under the performance bond agreement and sought to recover attorneys’ fees. The Court of Appeal held that where a school district seeks enforcement of the performance bond such that it would have been able to recover attorneys’ fees under the bond’s attorneys’ fees provision, if the contractor prevails, then the contractor is entitled to attorneys’ fees against the school district.<sup>305</sup>

#### **M. Liability to Contractor for Delay by District**

Public Contract Code section 7102 prohibits districts from limiting the recovery of damages by a general contractor or subcontractor due to delays in construction caused by the district. Section 7102 specifically states that contract provisions limiting such damages are void.<sup>306</sup>

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<sup>303</sup> Id. at 293-94.

<sup>304</sup> Id. at 294-95. In Souza & McCue Construction Company v. Superior Court, 57 Cal.2d 508, 510-11 (1962); Los Angeles Unified School District v. Great American Insurance Company, 49 Cal. 4th 739, 744 (2010).

<sup>305</sup> Id. at 297-98. Mepco Services, Inc. v. Saddleback Valley Unified School District, 189 Cal.App.4th, 1027 (2010).

<sup>306</sup> Public Contract Code section 7102.

## **N. Prevailing Wage Rates**

Districts must pay the prevailing wage rate established by the Director of the Department of Industrial Relations on public works projects if the project exceeds the amount specified by statute.<sup>307</sup> When contracting for public works, districts must obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the work is to be performed for each craft classification or type of workman needed to execute the contract from the Director of the Department of Industrial Relations.<sup>308</sup> Districts must specify in any contract for public works and in the call for bids for the contract and the bid specifications, the general rate of per diem wages due or include a statement that copies of the prevailing rate of per diem wages are on file at the district office and shall be made available to any interested parties upon request. The district is also required to post a copy of the prevailing wage rate at each job site.<sup>309</sup>

Public works for purposes of prevailing wage rates include construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds. Construction includes work performed during the design and pre-construction phases of construction including, but not limited to, inspection and land surveying work. Installation includes, but is not limited to, the assembly and disassembly of freestanding and affixed modular office systems. The laying of carpet done under a building lease maintenance contract and paid for out of public funds and the laying of carpet in a public building done under contract and paid for in whole or in part out of public funds are also considered public works for purposes of the payment of prevailing wages.<sup>310</sup> If there is any uncertainty regarding the appropriate general prevailing rate of per diem wages, then Districts may wish to request an advisory opinion from the Chief of the Division of Labor Statistics and Research (DLSR) or the Director of the Department of Industrial Relations.

On June 20, 2014, Governor Brown signed Senate Bill 854<sup>311</sup> effective June 20, 2014. Senate Bill 854 amends numerous provisions of state law relating to public works and the payment of prevailing wages.

Beginning June 20, 2014, the cost for prevailing wage enforcement will shift to contractors who must pay required fees to the Department of Industrial Relations. Effective July 1, 2014, contractors who wish to bid or work on public works projects are required to register with the Department of Industrial Relations and pay the required annual fee. A contractor must also comply with certain minimum requirements to be properly registered with the Department of Industrial Relations. The fees paid by contractors will be used to underwrite the cost of enforcement activities by the Department of Industrial Relations.<sup>312</sup>

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<sup>307</sup> Labor Code section 1770 et seq.

<sup>308</sup> Labor Code section 1773.

<sup>309</sup> Labor Code section 1773.2.

<sup>310</sup> Labor Code section 1720.

<sup>311</sup> Stats. 2014, ch. 28.

<sup>312</sup> See, Labor Code sections 1725.5, 1771.1, 1771.3, 1771.4, 1771.5, 1771.6, 1776.

Effective January 1, 2015, local agencies must include in their bid documents provisions that state that the project is subject to compliance monitoring and enforcement by the Department of Industrial Relations. Effective March 1, 2015, all bid proposals must require all contractors and subcontractors to prove compliance with these new requirements, including appropriate registration with the Department of Industrial Relations. Effective April 1, 2015, no public works contract shall be awarded to a contractor who has not registered with the Department of Industrial Relations, and no contractor shall perform work on a public works project unless the firm is properly registered with the Department of Industrial Relations.<sup>313</sup>

The legislation also requires the awarding agency to file with the Department of Industrial Relations a notice of award of the contract for all public works projects within five days of the award, utilizing Form PWC100, effective June 20, 2014. These new requirements apply to all public works contracts.<sup>314</sup>

On September 30, 2014, Governor Brown signed Senate Bill 266,<sup>315</sup> effective January 1, 2015. Senate Bill 266 amends Labor Code section 1741.1, relating to the process for determining the payment of prevailing wages.

Labor Code section 1741.1(b) requires the body awarding the contract for a public work to furnish, within 10 days after receipt of a written request from the Labor Commissioner, a copy of the valid notice of completion for the public work filed in the office of the county recorder, or a document evidencing the awarding body's acceptance of the public work on a particular date, whichever occurs later, by first-class mail addressed to the office of the Labor Commissioner that is listed on the written request. If, at the time of receipt of the Labor Commissioner's written request, a valid notice of completion has not been filed by the awarding body in the office of the county recorder and there is no document evidencing the awarding body's acceptance of the public work on a particular date, the awarding body shall so notify the office of the Labor Commissioner that is listed on the written request. Thereafter, the public agency shall furnish copies of the applicable document within 10 days after filing a valid notice of completion with the county recorder's office, or within 10 days of the awarding body's acceptance of the public work on a particular date.

The stated purpose of Senate Bill 266 is to streamline the process for determining whether a project is a public work and subject to enforcement of the public works law and prevailing wages. The Legislature made findings that the current process has created unacceptable delays.

In Plumbers and Steamfitters, Local 290 v. Duncan,<sup>316</sup> the Court of Appeal held that the renovation of a building by a private company was a public work which required the payment of prevailing wage when more than fifty percent of the building would be leased to the County of Humboldt.

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<sup>313</sup> Labor Code section 1771.4.

<sup>314</sup> Labor Code section 1773.3.

<sup>315</sup> Stats. 2014, ch. 916.

<sup>316</sup> 157 Cal.App.4<sup>th</sup> 1083, 69 Cal.Rptr.3d 184 (2007).

The underlying facts were undisputed. In April, 2000, Kramer Properties, Inc. purchased a professional building at 507 “F” Street in Eureka, California. On January 14, 2003, Kramer leased to the County of Humboldt 63 percent of the total assignable square footage of the building. The County agreed to pay \$1.79 per square foot in monthly rent, \$.30 cents of which was earmarked for compliance with the prevailing wage.<sup>317</sup>

On March 28, 2003, Kramer entered into two separate contracts with Cruz Plumbing, Inc., to make plumbing improvements to the property. On January 6, 2004, at the request of Local 290, the former Director of the Department of Industrial Relations issued a public works coverage determination finding that the contract related to public works under Labor Code section 720.2 and that Cruz Plumbing was required to pay prevailing wages for work performed under the contract. Kramer appealed the coverage determination on June 8, 2005, and the then Acting Director issued a decision on administrative appeal reversing the prior determination.<sup>318</sup>

Local 290 filed a petition for a writ of mandate and the trial court granted the petition and Local 290’s motion for attorney’s fees. The Court of Appeal affirmed the trial court’s decision.<sup>319</sup>

The Court of Appeal held that under Labor Code section 1720.2, the definition of public works includes any construction work done under private contract when all of the following conditions exist:

1. The construction contract is between private persons.
2. The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the State or political subdivision for its use.<sup>320</sup>

Either of the following conditions exist if the lease agreement between the lessor and the State or political subdivision was entered into prior to the construction contract or the construction work is performed according to plans, specifications, or criteria furnished by the State or political subdivision, and a lease agreement between the lessor and the State or political subdivision, as lessee, is entered into during, or upon completion of, the construction work.<sup>321</sup>

The Court of Appeal held that Section 1720.2 applies to “any construction work” done under private contract. Therefore, all the plumbing improvements to the entire building would be a public work subject to payment of prevailing wages which would include the space leased by the County of Humboldt. The Court of Appeal stated:

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<sup>317</sup> *Id.* at 1086-87.

<sup>318</sup> *Id.* at 1087.

<sup>319</sup> *Ibid.*

<sup>320</sup> *Id.* at 1088; Labor Code section 1720.2.

<sup>321</sup> *Id.* at 1088-90.

“Both the language and the legislative history of the provision thus confirm a legislative determination that construction work performed on a property that is mostly leased by a public agency should be considered public work for purposes of the prevailing wage law.”<sup>322</sup>

The Court of Appeal noted that if the tenancy has expired, the prevailing wage law will not apply to subsequent construction work contracted for after the public agency no longer occupies the space. The Court of Appeal also affirmed the trial court’s order of attorney’s fees under Code of Civil Procedure section 1021.5.

The Court of Appeal decision may be appealed to the California Supreme Court. We will keep you informed of any further developments in this case.

Districts should be aware of the holding in this case in the event districts contract with owners of private property to make improvements to property and then lease the property from the private owner. In such cases, the private owner would be required to pay the prevailing wage to contractors who perform the work of improvement.

In Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations,<sup>323</sup> the Court of Appeal held that under Labor Code section 1720 if a public works project is funded in part by public funds prevailing wages must be paid.

Oxbow leased property from the City of Long Beach at the Port of Long Beach. In order to comply with South Coast Air Quality Management District Rule 1158, Oxbow was required to modify the structure that it leased from the City of Long Beach to make it usable. Oxbow entered into an amendment to the lease on December 15, 2004 in which the City of Long Beach would reimburse part of the cost of conveyors while Oxbow would pay for the entire cost of constructing the roof in order to comply with Rule 1158.<sup>324</sup>

Oxbow entered into a New Conveyors Erection Contract with Bragg Investment Co., Inc., for the erection of the new conveyor system and entered into a separate Petroleum Coke Enclosure Design and Erection Contract with W.B. Allen Construction, Inc., for the construction of the roof. The Enclosure Contract was paid for with private funds.<sup>325</sup>

In January 2006, the Iron Workers Union Local No. 433 requested a determination from the Department of Industrial Relations as to whether construction of the building enclosing the conveyors was a public work under Section 1720. On October 12, 2007, the Director of the Department of Industrial Relations issued a public works coverage determination that found that the replacement conveyor and enclosure improvement work was a single integrated public works

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<sup>322</sup> Id. at 1091.

<sup>323</sup> 194 Cal.App.4<sup>th</sup> 538, 122 Cal.Rptr.3d 879 (2011).

<sup>324</sup> Id. at 542.

<sup>325</sup> Id. at 543.

project subject to prevailing wage requirements. An administrative appeal was filed with the Department of Industrial Relations. On administrative appeal, the initial decision was affirmed.<sup>326</sup>

On September 2, 2008, Oxbow filed a petition for writ of mandate in the Superior Court seeking an order requiring the Department of Industrial Relations to determine the enclosure improvement was not a public work subject to California's prevailing wage law. The trial court denied the petition and upheld the administrative decision. The trial court's judgment was appealed.<sup>327</sup>

On appeal, the Court of Appeal noted that Labor Code section 1720(a)(1) states that "public works" means construction, alteration, demolition, installation, or repair work done under contract or paid for in whole or in part out of public funds. The parties did not dispute that the work done under the Conveyors Contract was paid for partly out of public funds and subject to the prevailing wage law. The question before the Court of Appeal was whether the work done under the Enclosure Contract was also subject to the prevailing wage law.<sup>328</sup>

The Court of Appeal indicated that if the enclosure work fell within the scope of construction paid for in whole or in part out of public funds then it also fell within the definition of public works and was subject to the prevailing wage requirements. The Court of Appeal concluded because the conveyor and enclosure work turned an unusable structure into a functioning coke receiving and storage facility, both contracts constituted construction and since the construction was paid for in part out of public funds, it was a public work. The Court of Appeal concluded, "The work performed under both the Conveyors Contract and the Enclosure Contract therefore was subject to the prevailing wage requirements."<sup>329</sup>

The Court of Appeal noted that the definition of "construction" in the dictionary is defined as the act of putting parts together to form a complete integrated object, the action of framing, devising, or forming by the putting together of parts, erection, building. The Court of Appeal held that inherent in these definitions of construction is the concept that construction is the creation of a complete integrated object which is composed of individual parts.<sup>330</sup>

The Director of the Department of Industrial Relations found that the conveyor and enclosure improvements constituted parts that are put together to form a complete integrated object, a petroleum coke handling and storage facility and the trial court relied on a similar analysis to hold the entirety of the work was construction paid in part out of public funds. The Court of Appeal agreed with this approach and held that it was consistent with the use of the term "construction" throughout Labor Code section 1720. The Court of Appeal further held that a broad interpretation of public work in the context of construction paid for in whole or in part

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<sup>326</sup> *Id.* at 544.

<sup>327</sup> *Ibid.*

<sup>328</sup> *Id.* at 546.

<sup>329</sup> *Id.* at 548.

<sup>330</sup> *Id.* at 548-549.

out of public funds was consistent with the Supreme Court's decision in Lusardi Construction Company v. Aubry.<sup>331</sup>

In Lusardi, the California Supreme Court held that the obligation to pay prevailing wages may not be based solely on contractual provisions, but that the obligation flowed from the statutory duty embodied within the prevailing wage law.<sup>332</sup> The Lusardi court reasoned that an awarding body and a contractor often have strong incentives to avoid the prevailing wage law and thus may structure their contracts to circumvent it. The court held that allowing such a circumvention would undermine the Legislature's intent in passing the prevailing wage laws.

The Court of Appeal noted that the construction and conveyance work occurred at the same site and at or near the same time. The Enclosure Contract specifically noted that the other work would be interfacing to or in close proximity to the enclosure work and that Oxbow was required to assist the Enclosure Contractor in coordinating its work with the work to be performed by the Conveyors Contractor. The Court of Appeal noted that in order for the facility to be functional, it needed to incorporate both a method of enclosing the coke and of moving the coke into the facility. The Court of Appeal concluded:

“We therefore find that since the construction of the lawful and functional coke receiving and storage facility was paid for in part by public funds, it was a ‘public’ work, and the work performed under both the Enclosure Contract and Conveyors Contract was subject to the prevailing wage law.”<sup>333</sup>

## **O. Alternates**

Effective January 1, 2001, Assembly Bill No. 2182<sup>334</sup> adds provisions to the Public Contract Code which specify the procedure for alternative bids. The legislation puts limits on the use of alternative bids.

Assembly Bill No. 2182 adds Public Contract Code section 20103.8, which authorizes a local agency to let a bid for public works to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted. The legislation requires that whenever additive or deductive items are included in a bid, the bid solicitation must specify which of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided in No. 1 may be used:

1. The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

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<sup>331</sup> 1 Cal.4<sup>th</sup> 976,987-88 (1992).

<sup>332</sup> Id. at 986-88.

<sup>333</sup> Id. at 551.

<sup>334</sup> Stats.2000, ch. 292, Public Contract Code sections 10126, 10780.5, 20103.8.

2. The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified and the bid solicitation is being used for the purpose of determining the lowest bid price.
3. The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items taken in order from a specifically identified list of those items, depending on available funds as identified in the solicitation.
4. The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

A responsible bidder who submitted the lowest bid as determined using one of the methods above shall be awarded the contract if it is awarded. Once the contract has been awarded, adding to or deducting from the contract any of the additive or deductive items is not prohibited. The purpose of the legislation, as stated by the Legislature, is to limit the selective use of additive and deductive bid items to determine the lowest responsible bidder.

**P. Disabled Veteran Business Enterprises**

On July 19, 1999, the Governor approved a new Section 17076.11 to the Education Code, which requires that any school district using funds allocated pursuant to the Leroy F. Greene School Facilities Act of 1998 for the construction or modernization of a school building shall have a participation goal of at least 3% per year of the overall dollar amount expended each year by the school district Disabled Veteran Business Enterprise (DVBE). The intent of this section was to ensure applicability of the DVBE requirements under the new facilities act.

**Q. Criminal Record Check**

Education Code section 45125.1 provides that if the employees of any entity that has a contract with a school district may have any contact with pupils, those employees shall submit or have submitted their fingerprints in a manner authorized by the Department of Justice together with a fee determined by the Department of Justice to be sufficient to reimburse the Department for its costs incurred in processing the application.

The Department of Justice shall ascertain whether the individual whose fingerprints were submitted to it has been arrested or convicted of any crime insofar as that fact can be ascertained from information available to the Department. When the Department of Justice ascertains that an individual whose fingerprints were submitted to it has a pending criminal proceeding for a violent felony listed in Penal Code section 1192.7(c), or has been convicted of such a felony, the Department shall notify the employer designated by the individual of the criminal information

pertaining to the individual. The notification shall be delivered by telephone and shall be confirmed in writing and delivered to the employer by first-class mail.

The contractor shall not permit an employee to come in contact with pupils until the Department of Justice has ascertained that the employee has not been convicted of a violent or serious felony. The contractor shall certify in writing to the governing board of the school district that none of its employees who may come in contact with pupils have been convicted of a violent or serious felony.

Penal Code section 667.5(c) lists the following “violent” felonies: murder; voluntary manslaughter; mayhem; rape; sodomy by force; oral copulation by force; lewd acts on a child under the age of 14 years; any felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant inflicts great bodily injury on another; any robbery perpetrated in an inhabited dwelling; arson; penetration of a person’s genital or anal openings by foreign or unknown objects against the victim’s will; attempted murder; explosion or attempt to explode or ignite a destructive device or explosive with the intent to commit murder; kidnapping; continuous sexual abuse of a child; and carjacking.

Penal Code section 1192.7 lists the following “serious” felonies: murder; voluntary manslaughter; mayhem; rape; sodomy by force; oral copulation by force; a lewd or lascivious act on a child under the age of 14 years; any felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant personally inflicts great bodily injury on another, or in which the defendant personally uses a firearm; attempted murder; assault with intent to commit rape or robbery; assault with a deadly weapon on a peace officer; assault by a life prisoner on a noninmate; assault with a deadly weapon by an inmate; arson; exploding a destructive device with intent to injure or to murder, or explosion causing great bodily injury or mayhem; burglary of an inhabited dwelling; robbery or bank robbery; kidnapping; holding of a hostage by a person confined in a state prison; attempt to commit a felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant personally uses a dangerous or deadly weapon; selling or furnishing specified controlled substances to a minor; penetration of genital or anal openings by foreign objects against the victim’s will; grand theft involving a firearm; carjacking; and a conspiracy to commit specified controlled substances offenses.

## **R. Delegation of Authority**

Frequently, the issue of how much authority a governing board may delegate to a school administrator arises. Education Code section 35161 states:

“The governing board of any school district may execute any powers delegated by law to it or to the district of which it is the governing board, and shall discharge any duty imposed by law upon it or upon the district of which it is the governing board, and may delegate to an officer or employee of the district any of those powers or duties. The governing board, however, retains ultimate

responsibility over the performance of those powers or duties so delegated.”

Education Code section 70902 authorizes the governing board of a community college district to adopt a rule delegating any power not expressly make nondelegatable by statute to the district’s chief executive officer or any other employee the governing board may designate.

While Sections 35161 and 70902 contain broad provisions allowing the delegation of authority, other provisions in the Education Code place limitations on the delegation of authority with respect to contracting for the purchase of supplies, materials, equipment and services.

Education Code sections 17604 and 81655 allow the governing board of a district by a majority vote to delegate the power to contract to its district superintendent who may in turn designate an employee of the district to perform certain duties. The delegation to contract may be limited by the governing board with respect to time, money or subject matter or it may provide for a broad authorization. However, no contract made by designated employees is valid or enforceable unless and until it has been approved or ratified by the governing board.<sup>335</sup> In Persh, a landowner sought to enforce a contract against a school district for the purchase of land for a junior high school. The court held that although the deputy superintendent and the landowner reached an agreement, the contract was held invalid because the contract had not been approved or ratified by the governing board of the district.<sup>336</sup>

In addition, Education Code sections 39657 and 81656 authorize governing boards to delegate to employees of the district the authority to purchase supplies, materials, apparatus, equipment and services up to the bid limits. Any purchase above the bid limits would require competitive bidding and the prior approval of the governing board. The officer or employee invested with the authority to contract for purchases can be held personally liable for any misconduct or wrongdoing in office and may be held personally liable for any and all district funds paid out as a result of such misconduct or wrongdoing.<sup>337</sup>

## **S. Maintenance Plan**

The Leroy F. Greene School Facilities Act of 1998 (Greene Act) provides funding to school districts to finance the construction and modernization of school facilities. Effective January 1, 2002, any school district applying for funding pursuant to the Greene Act must annually review its maintenance plan, update it as needed, and certify that it is in compliance with the plan.<sup>338</sup> School districts must certify that its maintenance plan includes prescribed criteria identifying the major maintenance needs of the school district and a schedule for completion of the major maintenance. The plan must include the following components:

1. Identification of the major maintenance needs.

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<sup>335</sup> Santa Monica Unified School District v. Persh, 5 Cal.App.3d 945 (1970).

<sup>336</sup> Ibid.

<sup>337</sup> Education Code sections 39656 and 81655; Education Code sections 39657 and 81656.

<sup>338</sup> Education Code section 17070.77.

2. Specification of a schedule for completing the major maintenance.
3. Specification of a current cost estimate for the scheduled major maintenance needs.
4. Specification of the school district's schedule for funding a reserve to pay for the scheduled major maintenance needs.
5. Review of the plan annually as a part of the school district's annual budget process and update, as needed, the major maintenance needs, the estimates of expected costs, and any adjustments in funding of the reserve.
6. Availability for public inspection of the original plan, and all updated versions of the plan at the office of the superintendent of the school district during the working hours of the school district.

## **T. Delay Damages**

On October 2, 2015, Governor Brown signed Assembly Bill 552<sup>339</sup> effective January 1, 2016. Assembly Bill 552 added Public Contract Code section 7203. Section 7203(a) states that a public works contract entered into on or after January 1, 2016 that contains a clause that expressly requires a contractor to be responsible for delay damages is not enforceable unless the delay damages have been liquidated to a set amount and identified in the public works contract.

Public Contract Code section 7203(b) defines “delay damages” as meaning damages incurred by the public agency for each day after the date on which the work was to be completed by the Contractor pursuant to the public works contract. Delay damages shall not include damages incurred by a public agency after the filing of a notice of completion or, in the absence of a notice of completion, the acceptance by the public agency of the public work as complete.

Public Contract Code section 7203(c) defines public agency as including community college districts, school districts, county offices of education and any other political subdivision or public corporation of the state. Section 7203(d) states that Section 7203 shall not be construed to limit a right or remedy that the public agency has to enforce the express terms of the public works contract, except for a clause that expressly requires a contractor to be liable for delay damages. Section 7203(e) states that Section 7203 shall not be construed to preclude a public agency from including more than one clause for delay damages for specified portions of work when the delay damages have been liquidated to a set amount for each individual clause and identified in the public works contract.

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<sup>339</sup> Stats. 2015, ch. 434.

## STOP PAYMENT NOTICES IN GENERAL

### A. Legislation

Senate Bill 189<sup>340</sup> made numerous changes to state law with respect to public works stop notices effective **July 1, 2012**. The legislation added Civil Code sections 8000 through 8050 and Civil Code sections 9100 through 9510.

The legislation listed 28 provisions of the Civil Code that were new or substantively different from the former law.<sup>341</sup> The legislation changed the following terms that are generally used in public works: (1) “stop notice” was changed to “stop payment notice”; (2) “preliminary twenty day notice” was changed to “preliminary notice”; (3) “original contractor” was changed to “direct contractor”; and (4) “material men” was changed to “material supplier”.

### B. Purpose of the Law

The purpose of the stop payment notice provisions is to allow those who furnish labor services, equipment or materials on a public works project a statutory remedy designed to reach unexpended construction funds held by a public entity owner. The statutory scheme provides for a written notice signed and verified by the claimant or its agent and delivered to the public entity. The public entity is custodian of the funds.

### C. Persons Who May File a Stop Payment Notice

Civil Code section 9100 states that any of the following persons that have not been paid in full may give a stop payment notice to the public entity or assert a claim against a payment bond:

1. A person that provides work for a public works contract, if the work is authorized by a direct contractor, subcontractor, architect, project manager, or other person having charge of all or part of the public works contract.
2. A laborer.
3. A person described in Section 4107.7 of the Public Contract Code.

A direct contractor may not give a stop payment notice or assert a claim against a payment bond.<sup>342</sup>

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<sup>340</sup> Stats. 2010, ch. 697.

<sup>341</sup> See, Civil Code sections 8014, 8064, ch. 2 (commencing with Section 8100) of Title I of Part 6 of Division 4, Section 8122, 8128, 8132, 8182, 8186, 8190, 8200, 84240, 8460, 8482, 8486, 8488, 8510, 8604, 8606, 8610, 8800, 8834, 8844, 9200, 9204, 9362, 9408, 9550, and 9558.

<sup>342</sup> Civil Code section 9100(b).

#### **D. Content of Stop Payment Notice**

Notice with respect to stop payment notices and actions on payment bonds must be in writing.<sup>343</sup> Notice shall, in addition to any other information required by statute for that type of notice, include all of the following information to the extent known to the person giving the notice:

1. The name and address of the owner or reputed owner.
2. The name and address of the direct contractor.
3. The name and address of the construction lender, if any.
4. A description of the site sufficient for indemnification, including the street address of the site, if any. If a sufficient legal description of the site is given, the effectiveness of the notice is not affected by the fact that the street address is erroneous or is omitted.
5. The name, address, and relationship of the parties to the person giving the notice.
6. If the person giving the notice is a claimant, a general statement of the work provided, the name of the person to or for whom the work is provided and a statement or estimate of the claimant's demand, if any, after deducting all just credits and offsets.<sup>344</sup>

Notice is not valid by any reason of any variance from the requirements of this section if 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.<sup>345</sup>

#### **E. Contractor's Failure to Pay Laborer**

A direct contractor or subcontractor on a work of improvement that employs a laborer and fails to pay the full compensation due the laborer, including prevailing wages, shall not later than the date the compensation became delinquent, give the laborer, the laborer's bargaining representative, if any, the construction lender or reputed construction lender, if any, and the owner or reputed owner, notice that includes all of the following information, in addition to the information required by Section 8102:

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<sup>343</sup> Civil Code section 8100.

<sup>344</sup> Civil Code section 8102(a).

<sup>345</sup> Civil Code section 8102(b).

1. The name and address of the laborer, and any persons or entities to which employer payments are due.
2. The total number of straight time and overtime hours worked by the laborer on each job.
3. The amount then past due and owing.<sup>346</sup>

Failure to give the notice required constitutes grounds for disciplinary action under the contractor's state license law.<sup>347</sup>

#### **F. Requirements for Providing Stop Payment Notice**

Except as otherwise provided by statute, a stop payment notice shall be given by personal delivery, mail (by registered or certified mail, express mail or overnight delivery by an express service carrier), or leaving the notice and mailing a copy in the manner prescribed in Section 415.20 of the Code of Civil Procedure for service of summons and complaint in a civil action.<sup>348</sup>

Except as otherwise provided, stop payment notice shall be given to the person to be notified at the person's residence, the person's place of business, or at any of the following addresses:

1. If the person to be notified is an owner other than a public entity, the owner's address shown on the direct contract, the building permit, or a construction trustee.
2. If the person to be notified is a public entity, the office of the public entity or another address specified by the public entity in the contract or elsewhere for service of notices, papers and other documents.
3. If the person to be notified is a construction lender, the construction lender's address shown on the construction loan agreement or construction trust deed.
4. If the person to be notified is a direct contractor or a subcontractor, the contractor's address shown on the building permit, on the contractor's contract, or on the records of the Contractors State License Board.
5. If the person to be notified is a claimant, the claimant's address shown on the claimant's contract, preliminary

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<sup>346</sup> Civil Code section 8104(a).

<sup>347</sup> Civil Code section 8104(b).

<sup>348</sup> Civil Code section 8106.

notice, claim of lien, stop payment notice, or claim against a payment bond, or on the records of the Contractors State License Board.

6. If the person to be notified is a surety on a bond, the surety's address shown on the bond for service of notices, papers, and other documents or on the records of the Department of Insurance.<sup>349</sup>

Proof that a stop payment notice was given to a person in the manner required shall be made by a proof of notice declaration that states all of the following:

1. The type or description of the notice given.
2. The date, place and manner of notice, and facts showing that notice was given in the manner required by statute.
3. The name and address of the person to whom notice was given, and, if appropriate, the title or capacity in which the person was given notice.<sup>350</sup>

If the notice is given by mail, the declaration shall be accompanied by one of the following:

1. Documentation provided by the United States Postal Service showing that payment was made to mail the notice using registered or certified mail, or express mail.
2. Documentation provided by an express service carrier showing the payment was made to send the notice using an overnight delivery service.
3. A return receipt, delivery confirmation, signature confirmation, tracking record, or other proof of delivery or attempted delivery provided by the United States Postal Service, or a photocopy of the record of delivery and receipt maintained by the United States Postal Service, showing the date of delivery and to whom delivered, or in the event of nondelivery, by the returned envelope itself.
4. A tracking record or other documentation provided by an express service carrier showing delivery or attempted delivery of the notice.<sup>351</sup>

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<sup>349</sup> Civil Code section 8108.

<sup>350</sup> Civil Code section 8118(a).

## **G. Timelines for Filing a Stop Payment Notice**

The timelines for filing a stop payment notice are generally determined by the date of the completion of a work of improvement. The completion of a work of improvement occurs at the earliest of the following times:

1. Acceptance of the work of improvement by the public entity.
2. Cessation of labor on the work of improvement for a continuous period of sixty days.<sup>352</sup>

A public entity may record a notice of cessation if there has been a continuous cessation of labor for at least thirty days prior to the recordation that continues through the date of recordation.<sup>353</sup> The notice shall be signed and verified by the public entity or its agent. The notice shall comply with the requirements of Civil Code section 8100 et seq. and shall include the date on or about which labor ceased and a statement that the cessation has continued until the recordation of the notice.

A public entity may record a notice of completion on or within 15 days after the date of completion of a work of improvement. The notice shall be signed and verified by the public entity or its agent. The notice shall comply with the requirements of Civil Code section 8100 et seq. and it shall also include the date of completion. An erroneous statement of the date of completion does not affect the effectiveness of the notice if the true date of completion is within 15 days or less before the date of recordation of the notice.<sup>354</sup>

A notice of completion in otherwise proper form, verified and containing the information required shall be accepted by the recorder for recording and is deemed duly recorded without acknowledgment.<sup>355</sup>

### **PRELIMINARY NOTICE**

Before giving a stop payment notice or asserting a claim against a payment bond, a claimant shall give preliminary notice to the public entity and the direct contractor to which the claimant provided work. A laborer is not required to give preliminary notice. A claimant that has a direct contractual relationship with a direct contractor is not required to give preliminary notice. Preliminary notice is a necessary prerequisite to the validity of a stop payment notice. Preliminary notice or notice to principal and surety is a necessary prerequisite to the validity of a claim against a payment bond.<sup>356</sup>

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<sup>351</sup> Civil Code section 8118(b).

<sup>352</sup> Civil Code section 9200.

<sup>353</sup> Civil Code section 9202.

<sup>354</sup> Civil Code section 9204.

<sup>355</sup> Civil Code section 9208.

<sup>356</sup> Civil Code section 9300.

A preliminary notice shall be given in compliance with the requirements of Civil Code section 8100 et seq.<sup>357</sup> The preliminary notice shall comply with the requirements of Section 8102 and shall also include a general description of the work to be provided and an estimate of the total price of the work provided and to be provided.<sup>358</sup>

A claimant may give a stop payment notice or assert a claim against a payment bond only for work provided within 20 days before giving preliminary notice and at any time thereafter.<sup>359</sup> If the contract of any subcontractor on a particular work of improvement provides for payment to the subcontractor of more than \$400, the failure of that subcontractor, licensed under state law, to give a preliminary notice constitutes grounds for disciplinary action.<sup>360</sup>

## **STOP PAYMENT NOTICE**

### **A. Filing of Stop Payment Notice**

The rights of all persons furnishing work pursuant to a public works contract, with respect to any fund for payment of construction costs, are governed exclusively by Civil Code section 9000 et seq. and no person may assert any legal or equitable right with respect to that fund, other than a right created by direct written contract between the person and the persons holding the fund.<sup>361</sup>

A stop payment notice shall comply with the requirements of Civil Code section 8100 et seq. and shall be signed and verified by the claimant. The notice shall include a general description of work to be provided, and an estimate of the total amount in value of the work to be provided. The amount claimed in the notice may include only the amount due the claimant for work provided through the date of the notice.<sup>362</sup>

A stop payment notice shall be given to the public entity by giving notice to the office of the controller, auditor or other public disbursing officer whose duty it is to make payments pursuant to the contract, or the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by which the contract was awarded.<sup>363</sup>

A stop payment notice is not effective unless given before the expiration of whichever of the following time periods is applicable:

1. If a notice of completion, acceptance or cessation is recorded, 30 days after that recordation.

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<sup>357</sup> Civil Code section 9302(a).

<sup>358</sup> Civil Code section 9303.

<sup>359</sup> Civil Code section 9304.

<sup>360</sup> Civil Code section 9306.

<sup>361</sup> Civil Code section 9350.

<sup>362</sup> Civil Code section 9352.

<sup>363</sup> Civil Code section 9354.

2. If a notice of completion, acceptance or cessation is not recorded, 90 days after cessation or completion.<sup>364</sup>

## **B. Receipt of Stop Payment Notice**

The public entity shall, on receipt of a stop payment notice, withhold from the direct contractor sufficient funds due or to become due to the direct contractor, to pay the claim stated in the stop payment notice, and to provide for the public entity's reasonable cost of any litigation pursuant to the stop payment notice. The public entity may satisfy its duty under this section by refusing to release funds held in escrow under Section 10263 or 22300 of the Public Contract Code.<sup>365</sup>

These provisions do not prohibit payment of funds to a direct contractor or a direct contractor's assignee if the stop notice is not received before the disbursing officer actually surrenders possession of the funds. These provisions do not prohibit payment of any amount due to a direct contractor or a direct contractor's assignee in excess of the amount necessary to pay the total amount of all claims stated in stop payment notices received by the public entity at the time of payment, plus any interest and court costs that might be reasonably anticipated in connection with the claims.<sup>366</sup>

Not later than ten days after each of the following events, the public entity shall give notice to a claimant that has given a stop payment notice of the time within which an action to enforce payment of the claim stated in the stop payment notice must be commenced:

1. Completion of a public works contract, whether by acceptance or cessation.
2. Recordation of a notice of cessation or completion.<sup>367</sup>

A public entity need not give notice under this section unless the claimant has paid the public entity \$10 at the time of giving the stop payment notice.<sup>368</sup>

## **C. Release Bond**

A public entity may, in its discretion, permit the direct contractor to give the public entity a release bond. The bond shall be executed by an admitted insurer, in an amount equal to 125 percent of the claim stated in the stop payment notice, conditioned for the payment of any amount the claimant recovers in an action on the claim, together with court costs if the claimant prevails. On receipt of a release bond, the public entity shall not withhold funds from the direct

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<sup>364</sup> Civil Code section 9356.

<sup>365</sup> Civil Code section 9358. Public Contract Code sections 10263 and 22300 authorize the Contractor to substitute securities for any money withheld by a public agency to ensure performance under a contract by entering into an Escrow Agreement For Security Deposits in Lieu of Retention.

<sup>366</sup> Civil Code section 9360.

<sup>367</sup> Civil Code section 9362(a).

<sup>368</sup> Civil Code section 9362(c).

contractor pursuant to the stop payment notice. The surety on a release bond is jointly and severally liable to the claimant with the sureties on any payment bond.<sup>369</sup>

## **SUMMARY PROCEEDING FOR RELEASE OF FUNDS**

### **A. Grounds for Release of Funds**

A direct contractor may obtain release of funds withheld pursuant to a stop payment notice under the summary proceeding on any of the following grounds:

1. The claim on which the notice is based is not a type for which a stop payment notice is authorized.
2. A claimant is not a person authorized under Civil Code section 9100 to give a stop payment notice.
3. The amount of the claim stated in the stop payment notice is excessive.
4. There is no basis for the claim stated in the stop payment notice.<sup>370</sup>

### **B. Affidavit From Direct Contractor**

The direct contractor shall serve on the public entity an affidavit that includes all of the following information:

1. An allegation of the grounds for release of the funds and a statement of the facts supporting the allegation.
2. A demand for the release of all or the portion of funds that are alleged to be withheld improperly or in an excessive amount.
3. A statement of the address of the direct contractor within the state for the purpose of permitting service by mail on the contractor of any notice or document.<sup>371</sup>

The public entity shall serve on the claimant a copy of the direct contractor's affidavit, together with a notice stating that the public entity will release the funds withheld, or the portion of the funds demanded, unless the claimant serves on the public entity a counteraffidavit on or

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<sup>369</sup> Civil Code section 9364.

<sup>370</sup> Civil Code section 9400.

<sup>371</sup> Civil Code section 9402.

before the time stated in the notice. The time stated in the notice shall not be less than ten days nor more than twenty days after service on the claimant of the copy of the affidavit.<sup>372</sup>

### **C. Counteraffidavit From the Claimant**

A claimant may contest the direct contractor's affidavit by serving on the public entity a counteraffidavit alleging the details of the claim and describing the specific basis on which the claimant contests or rebuts the allegations of the direct contractor's affidavit. The counteraffidavit shall be served within the times stated in the public entity's notice, together with proof of service of a copy of the counteraffidavit on the direct contractor. The service of the counteraffidavit on the public entity and the copy of the affidavit on the direct contractor shall comply with the requirements of Civil Code section 8100 et seq.<sup>373</sup>

If no counteraffidavit with proof of service is served on the public entity within the time stated in the public entity's notice, the public entity shall immediately release the funds, or the portion of the funds demanded by the affidavit, without further notice to the claimant, and the public entity shall not be liable in any manner for their release.<sup>374</sup> In addition, the public entity is not responsible for the validity of an affidavit or counteraffidavit.<sup>375</sup>

### **D. Action for Declaration of Rights**

If a counteraffidavit, together with proof of service, is served, either the direct contractor or the claimant may commence an action for the declaration of the rights of the parties. After commencement of the action, either the direct contractor or the claimant may move the court for a determination of rights under the affidavit and counteraffidavit. The party making the motion shall give not less than five day notice of the hearing to the public entity and to the other party. The notice of hearing shall comply with the requirements of Civil Code section 8100 et seq. Notwithstanding Civil Code section 8116, when notice of the hearing is made by mail, the notice is complete on the fifth day following deposit of the notice in the mail. The court shall hear the motion within fifteen days after the date of the motion, unless the court continues the hearing for good cause.<sup>376</sup>

The affidavit and counteraffidavit shall be filed with the court by the public entity and shall constitute the pleadings, subject to the power of the court to permit an amendment in the interests of justice. The affidavit of the direct contractor shall be deemed controverted by the counteraffidavit of the claimant, and both shall be received in evidence. At the hearing, the direct contractor has the burden of proof.<sup>377</sup>

No findings are required in a summary proceeding. If at the hearing no evidence other than the affidavit and counteraffidavit is offered, the court may, if satisfied that sufficient facts

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<sup>372</sup> Civil Code section 9404.

<sup>373</sup> Civil Code section 9406(a).

<sup>374</sup> Civil Code section 9406(d).

<sup>375</sup> Civil Code section 9406(c).

<sup>376</sup> Civil Code section 9408.

<sup>377</sup> Civil Code section 9410.

are shown, make a determination on the basis of the affidavit and counteraffidavit. If the court is not satisfied that sufficient facts are shown, the court shall order the hearing continued for production of other evidence, oral or documentary, or the filing of other affidavits and counteraffidavits. At the conclusion of the hearing, the court shall make an order determining whether the demand for release is allowed. The court's order is determinative of the right of the claimant to have funds further withheld by the public entity. The direct contractor shall serve a copy of the court's order on the public entity in compliance with the requirements of Civil Code section 8100 et seq.<sup>378</sup> A determination in a summary proceeding is not res judicata with respect to a right of action by the claimant against either the principal or surety on a payment bond or with respect to a right of action against a party personally liable to the claimant.<sup>379</sup>

## **DISTRIBUTION OF FUNDS WITHHELD**

### **A. Insufficient Funds**

If funds withheld pursuant to a stop payment notice are insufficient to pay in full the claims of all persons who have given a stop payment notice, the funds shall be distributed among the claimants in the ratio that the claim of each bears to the aggregate of all claims for which a stop payment notice is given, without regard to the order in which the notices were given or enforcement actions were commenced.<sup>380</sup> Nothing in these provisions impairs the right of a claimant to recover from the direct contractor or the direct contractor's sureties in an action on a payment bond any deficit that remains unpaid after the distribution.<sup>381</sup> A person that willfully gives a false stop payment notice to the public entity or that willfully includes in the notice work not provided for the public works contract for which the stop payment notice is given, forfeits all right to participate in the distribution.<sup>382</sup>

### **B. Priority of Stop Payment Notice**

A stop payment notice takes priority over an assignment by a direct contractor of any amount due or to become due pursuant to a public works contract, including contract changes, whether made before or after giving a stop payment notice, and the assignment has no effect on the rights of the claimant. Any garnishment of an amount due or to become due pursuant to a public works contract by a creditor of a direct contractor and any statutory lien on that amount is subordinate to the rights of a claimant.<sup>383</sup>

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<sup>378</sup> Civil Code section 9412.

<sup>379</sup> Civil Code section 9414.

<sup>380</sup> Civil Code section 9450.

<sup>381</sup> Civil Code section 9452.

<sup>382</sup> Civil Code section 9454.

<sup>383</sup> Civil Code section 9456.

## **ENFORCEMENT OF PAYMENT OF CLAIM STATED IN STOP PAYMENT NOTICE**

### **A. Procedure for Enforcement**

A claimant may not enforce payment of the claim stated in a stop payment notice unless the claimant has complied with all of the following conditions:

1. The claimant has given preliminary notice to the extent required.
2. The claimant has given the stop payment notice within the time period provided in Civil Code section 9356.<sup>384</sup>

The claimant shall commence an action against the public entity and the direct contractor to enforce payment of the claim stated in a stop payment notice at any time after ten days from the date the claimant gives the stop payment notice. The claimant shall commence an action against the public entity and the direct contractor to enforce payment of the claim stated in the stop payment notice not later than 90 days after the expiration of the time within which a stop payment notice must be given. An action may not be brought to trial or judgment entered before expiration of the time periods provided (i.e., not later than 90 days after expiration of the time within which a stop notice must be given). If a claimant does not commence an action to enforce payment of the claim stated in a stop payment notice within 90 days after the expiration of the time within which a stop payment notice must be given, the stop payment notice ceases to be effective and the public entity shall release funds withheld pursuant to the notice.<sup>385</sup>

Within five days after commencement of an action to enforce payment of the claim stated in a stop payment notice, the claimant shall give notice of commencement of the action to the public entity in the same manner that a stop payment notice is given.<sup>386</sup> If more than one claimant has given a stop payment notice, any number of claimants may join in the same enforcement action. If claimants commence separate actions, the court that first acquires jurisdiction may order the actions consolidated. On request to the public entity, the court shall require that all claimants be impleaded in one action and shall adjudicate the rights of all parties in the action.<sup>387</sup>

### **B. Failure to Bring Enforcement Action**

If an action to enforce payment of the claim stated in a stop payment notice is not brought to trial within two years after commencement of the action, the court may in its discretion

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<sup>384</sup> Civil Code section 9500(a). The tort claim filing procedures in Government Code section 900 et seq. do not apply to a stop payment action.

<sup>385</sup> Civil Code section 9502.

<sup>386</sup> Civil Code section 9504.

<sup>387</sup> Civil Code section 9506.

dismiss the action for want of prosecution.<sup>388</sup> A stop payment notice ceases to be effective and the public entity shall release funds withheld, in either of the following circumstances:

1. An action to enforce payment of the claim stated in the stop payment notice is dismissed, unless expressly stated to be without prejudice.
2. Judgment in an action to enforce payment of the claims stated in the stop payment notice is against the claimant.<sup>389</sup>

## **PAYMENT BOND**

### **A. Requirement to Provide Payment Bond**

A direct contractor that is awarded a public works contract involving an expenditure in excess of \$25,000 shall, before commencement of work, give a payment bond to and approved by the officer or public entity by whom the contract was awarded. A public entity shall state in its call for bids that a payment bond is required for a public works contract involving an expenditure in excess of \$25,000. A payment bond given and approved will permit performance of and provide coverage for work pursuant to a public works contract that supplements the contract for which the bond is given, if the requirement of a new bond is waived by the public entity. For purposes of this section, a design professional is not deemed a direct contractor and is not required to provide a payment bond.<sup>390</sup>

If a payment bond is not given and approved as required, neither the public entity awarding the public works contract nor any officer of the public entity shall audit, allow, or pay a claim of the direct contractor pursuant to the contract. However, a claimant shall receive payment of a claim pursuant to a stop payment notice in the manner prescribed.<sup>391</sup>

A payment bond shall be in an amount not less than 100 percent of the total amount payable pursuant to the public works contract. The bond shall be in the form of a bond and not a deposit in lieu of a bond. The bond shall be executed by an admitted surety.<sup>392</sup>

### **B. The Purpose of the Payment Bond**

The payment bond shall provide that if the direct contractor or a subcontractor fails to pay a person authorized to assert a claim against a payment bond, amounts due with respect to work or labor performed pursuant to the public works contract, or amounts required to be deducted, withheld and paid over to the Employment Development Department from the wages of employees of the contractor and subcontractors with respect to the work and labor, then the

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<sup>388</sup> Civil Code section 9508.

<sup>389</sup> Civil Code section 9510.

<sup>390</sup> Civil Code section 9550.

<sup>391</sup> Civil Code section 9552.

<sup>392</sup> Civil Code section 9554(a).

surety will pay the obligation and, if an action is brought to enforce the liability on the bond, a reasonable attorneys' fees, to be fixed by the court.<sup>393</sup>

The payment bond shall be conditioned for the payment in full of the claims of all claimants and by its terms inure to the benefit of any person authorized under Civil Code section 9100 (a person who provides work for a public works contract or a laborer) to assert a claim against a payment bond so as to give a right of action to that person or that person's assigns in an action to enforce the liability on the bond. The direct contractor may require that a subcontractor give a bond to indemnify the direct contractor for any loss sustained by the direct contractor because of any default of the subcontractor.<sup>394</sup>

### **C. Action Against a Payment Bond**

A claimant may commence an action to enforce the liability on the payment bond at any time after the claimant ceases to provide work, but not later than six months after the period in which a stop payment notice may be given.<sup>395</sup> In order to enforce a claim against a payment bond, a claimant shall give the preliminary notice as required.<sup>396</sup> If preliminary notice was not given as required, a claimant may enforce a claim by giving written notice to the surety and the bond principal within 15 days after recordation of a notice of completion. If no notice of completion has been recorded, the time for giving written notice to the surety and the bond principal is extended to 75 days after completion of the work of improvement.<sup>397</sup>

Such notice shall not apply in either of the following circumstances:

1. All progress payments, except for those disputed in good faith, have been made to a subcontractor who has a direct contractual relationship with the general contractor to whom the claimant has provided materials or services.
2. The subcontractor who has a direct contractual relationship with the general contractor to whom the claimant has provided materials or services has been terminated from the project pursuant to the contract, and all progress payments, except those disputed in good faith, have been made as of the termination date.<sup>398</sup>

Written notice to the bond principal and surety shall comply with the requirements of Civil Code section 8100 et seq.<sup>399</sup> A claimant may maintain an action to enforce the liability of a surety on a payment bond whether or not the claimant has given the public entity a stop payment

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<sup>393</sup> Civil Code section 9554(b).

<sup>394</sup> Civil Code section 9554(d).

<sup>395</sup> Civil Code section 9558.

<sup>396</sup> Civil Code section 9560(a).

<sup>397</sup> Civil Code section 9560(b).

<sup>398</sup> Civil Code section 9560(d).

<sup>399</sup> Civil Code section 9562.

notice.<sup>400</sup> A claimant may maintain an action to enforce the liability on the bond separately from and without commencement of an action against the public entity by whom the contract was awarded or against any officer of the public entity.<sup>401</sup> In an action to enforce the liability on the bond, the court shall award the prevailing party a reasonable attorney's fee.<sup>402</sup>

A claimant does not have a right to recover on a payment bond unless the claimant provided work to the direct contractor either directly or through one or more subcontractors pursuant to a public works contract.

In Tri-State, Inc. v. Long Beach Community College District,<sup>403</sup> the Court of Appeal held that the Long Beach Community College District was not entitled to an award of attorneys' fees under Civil Code section 3186. The Court of Appeal reversed the lower court and held that Civil Code section 3186 does not authorize an attorney fee award in favor of a public entity against a stop notice claim.

Tri-State, doing business as Journey Electrical Technologies, performed work as a subcontractor on a construction project owned by the district. Taisei Construction Company was the general contractor. Tri-State delivered a stop notice to the district in August 2009, stating that \$1,134,988.06 of the total contract price of \$6,504,714.45 remained unpaid and was due and owing.<sup>404</sup>

Tri-State filed a complaint against Taisei, the district and others in March 2010, alleging the reasonable value of labor and materials furnished in enforcement of the stop notice. Tri-State also alleged several other counts against Taisei and payment bond sureties. The district answered the complaint with a general denial.<sup>405</sup>

Taisei obtained a release bond in an amount equal to 125% of the claim. The district agreed to accept the release bond in exchange for its dismissal from the action. The parties so stipulated and the trial court entered an order on the stipulation in November 2010.<sup>406</sup>

The district then moved for an award of \$10,974.50 in attorneys' fees claiming an entitlement to fees under Civil Code section 3186 as the prevailing party in the action. Tri-State opposed the motion arguing that Civil Code section 3186 did not authorize an attorney fee award. The trial court granted the district's motion, awarding \$10,974.50 in attorneys' fees pursuant to Civil Code section 3186. The Court of Appeal reversed.<sup>407</sup>

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<sup>400</sup> Civil Code section 9564(a).

<sup>401</sup> Civil Code section 9564(b).

<sup>402</sup> Civil Code section 9564(c).

<sup>403</sup> 204 Cal.App.4<sup>th</sup> 224, 138 Cal.Rptr.3d 529 (2012).

<sup>404</sup> Id. at 226.

<sup>405</sup> Ibid.

<sup>406</sup> Ibid.

<sup>407</sup> Id. at 230-31.

## BID RIGGING AND FRAUD

### A. The Conviction

In United States v. Green,<sup>408</sup> the Ninth Circuit Court of Appeals upheld the conviction of Judy Green, a former public school teacher on eleven counts of wire fraud, nine counts of bid rigging, one count of conspiracy to commit bid rigging, and one count of conspiracy to commit wire and mail fraud. The Court of Appeals concluded that Green's actions amounted to fraud on the federal government and affirmed her conviction.

The underlying facts of the case involved the defrauding of the Federal Communication Commission's (FCC) Universal Service Program known as the Schools and Libraries Program, or E-Rate for short. Green was convicted of defrauding the federal government out of almost \$60 million and received a 7.5 year sentence in federal prison.<sup>409</sup>

### B. The E-Rate Program

The Federal Communication Commission's Universal Service Program known as the Schools and Libraries Program or E-Rate is funded by a Universal Service fee placed on telecommunications providers which is generally passed on to consumers and is designed to promote telecommunications access for low income, rural, high cost or otherwise underserved communities. E-Rate uses its portion of Universal Service funding to finance telecommunications projects at schools and libraries.<sup>410</sup>

The School and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) is charged with distributing E-Rate's annual budget of \$2.25 billion. SLD accepts applications from schools for technology projects and subsidizes those projects on a sliding scale. SLD funds 20 to 90 percent of the project's cost, depending upon the percentage of the school's students that participate in the National School Lunch Program.<sup>411</sup> SLD is required to give funding priority to applications for the provision of telecommunications services, voice mail and Internet access.<sup>412</sup> The most economically disadvantaged schools have priority for the remainder of the funds.

E-Rate is governed by a complicated set of rules and regulations. The regulations govern what equipment and services may be purchased with E-Rate funds, but in general, SLD will subsidize the purchase and installation of equipment needed to establish a school's connectivity. End user devices that are needed to actually make use of that connectivity, such as computers, telephones, or fax machines, are not eligible for a subsidy by SLD. Under the E-Rate regulations, these categories are referred to as "eligible" and "ineligible" equipment.<sup>413</sup>

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<sup>408</sup> 592 F.3d 1057, 252 Ed. Law Rep. 608 (9th Cir. 2010).

<sup>409</sup> Id. at 1060.

<sup>410</sup> Id. at 1061. See, 47 U.S.C. Section 254.

<sup>411</sup> Ibid. 47 C.F.R. Section 54.505.

<sup>412</sup> Ibid. 47 C.F.R. Section 54.507(g)(1).

<sup>413</sup> Ibid.

E-Rate only subsidizes a portion of the cost of eligible equipment and services. A school district must have the ability to cover the remaining balance of an E-Rate project's costs. In effect, the school district must be able to obtain any ineligible equipment that is necessary to make use of the project. The school district must also have the ability to cover that portion of the project's costs that will not be covered by the E-Rate subsidy.<sup>414</sup>

When a school district wants to apply for E-Rate funds, it must first fill out an FCC form, identifying the technology project for which it seeks funding. The school provides this form to SLD, which posts it on a website to solicit bids from vendors. After the bidding is complete, the school district selects the winning bid. Based upon its chosen bid, the school district submits a detailed application for E-Rate funding to SLD, specifying the equipment and services to be purchased from each successful bidder. The application requires the school district to set out the total cost of the project, the amount of eligible and ineligible equipment included in that cost, the E-Rate subsidy rate for which the school district qualifies, and the amount of funding the school district seeks from SLD. SLD reviews the application to ensure that it is in compliance with E-Rate regulations. Once it has completed its review, SLD either approves or denies the district's funding request.<sup>415</sup>

### **C. The Fraudulent Scheme**

Green left teaching after thirty years as a public school teacher in New York City and Los Angeles, and set up a consulting business to help guide schools and school districts through the E-Rate application process. Green marketed her services to the poorest of schools and almost all of her clients were eligible for the maximum 90 percent E-Rate funding.<sup>416</sup>

According to the undisputed evidence introduced at trial, Green obtained most of her clients by approaching school administrators at conferences held by the National Alliance of Black School Educators. At these conferences, Green, or one of her co-defendants, promised to help school districts obtain E-Rate funding for significant technology projects. Green and her associates promised that the schools would be forgiven their ten percent co-pay, and that the contractors would donate to the school district thousands of dollars in bonus equipment, including end user equipment, that was ineligible for E-Rate funds.<sup>417</sup>

Once hired as a consultant, Green helped her client design their technology projects and filled out the SLD forms to solicit project bids from contractors. Green approached potential contractors to assemble a team capable of performing the projects to her specifications. Green decided what services and equipment the contractors would supply, dictated the bonus items that

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<sup>414</sup> Ibid.

<sup>415</sup> Ibid.

<sup>416</sup> *Id.* at 1062. Among Green's clients in California were West Fresno Elementary School District, San Francisco Unified School District, Luther Burbank School District, and Temple City Unified School District. Among those indicted were: Judy Green of Temecula, co-owner of ADJ, Allan Green of Temecula, co-owner of ADJ, George Marchelos of Saratoga, CA, a former sales representative of VNCI, Steve Newton of San Juan Capistrano, a former Vice President of Premio Computer, and Earl Nelson of Sonora, CA, a former branch manager for Inter-Tel Technologies.

<sup>417</sup> Ibid.

contractors were required to provide at no charge (to the school), and informed the contractors that the schools would not be paying their share of the project's costs. The contractors then submitted bids based upon Green's specifications.<sup>418</sup>

After receiving the bids, the school district chose Green's pre-selected contractors to implement their technology projects. Because Green had arranged the bids in advance, her chosen contractors had inflated their bids to cover the costs of the "bonus" equipment and services Green required them to provide. One witness employed by a school district testified that the bid Green arranged, and the bid the school district ultimately selected, was three to four times higher than the other bids that the school district received.<sup>419</sup>

The Court of Appeals noted that when the school district submitted their funding request to SLD, Green took steps to ensure that SLD would not ask questions about the projects. If SLD did ask questions, Green took steps to ensure that it would be provided with answers that minimized the chances it would follow up with further review. For example, Green wrote equipment lists to hide the fact that potentially ineligible equipment was included within the project's scope. Green instructed the school districts to tell SLD that they planned on paying their share of the project's costs even though they did not. Green altered the school budget information to show that the schools could afford their copayments.<sup>420</sup>

Green's conduct was eventually discovered by USAC. She was later indicted in a 22 count indictment. The first 20 counts charged Green with wire fraud and bid rigging in connection with the completed E-Rate projects at 11 school districts across the country. The final two counts were conspiracy counts based upon uncompleted technology projects at an additional 15 school districts.<sup>421</sup> Following a 19 day trial, a jury convicted Green of all charges against her. The district court sentenced her to 7.5 years of imprisonment. Green then appealed to the U.S. Ninth Circuit Court of Appeals.<sup>422</sup>

#### **D. The Wire Fraud Convictions**

On appeal, the Court of Appeals rejected Green's argument that in order to convict her of wire fraud, the prosecutor must prove a violation of state law. The Court of Appeals held that there are three elements in wire fraud:

1. A scheme to defraud.
2. Use of the wires in furtherance of the scheme.
3. A specific intent to deceive or defraud.<sup>423</sup>

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<sup>418</sup> Ibid.

<sup>419</sup> Ibid.

<sup>420</sup> Ibid.

<sup>421</sup> *Id.* at 1063.

<sup>422</sup> Ibid.

<sup>423</sup> Ibid.; citing *United States v. Shipsey*, 363 F.3d 962, 971 (9th Cir. 2004).

The Court of Appeals thus concluded that wire fraud does not require proof that defendant's conduct violated a separate federal or state law or regulation. The scheme to defraud must only include an affirmative material misrepresentation.<sup>424</sup> The Court of Appeals held that the government needed only to prove a scheme to defraud. It was not required to establish that the scheme separately violated the E-Rate regulations.<sup>425</sup>

Green's co-conspirators, as well as representatives from the school districts Green worked with, testified that the school districts were promised that the entire project would be paid for out of E-Rate funds, and that school districts would obtain substantial "bonus" items for free. These promises were never revealed to the federal government. Further, Green testified about her own role in the scheme and admitted to much of the charged conduct. Green admitted to editing equipment lists to prevent SLD from learning that the projects included potentially ineligible equipment. Green also acknowledged that she took steps to conceal from SLD the fact that the school districts would not be paying their copayments.<sup>426</sup>

The Court of Appeals rejected Green's contention that there was an "innocent explanation" for her conduct. Green contends that she was helping impoverished schools by getting contractors to donate equipment and to waive the portion of the contract price that the school was required to pay. Green contends that she was merely exploiting loopholes in the E-Rate application process and that her conduct was not criminal. The Court of Appeals stated, "Even accepting that her ultimate motives were laudable, she concealed material facts from the federal government in an attempt to induce it to fund her projects. That, standing alone, is fraud."<sup>427</sup>

The Court of Appeals observed that Green's fraudulent scheme led the federal government to believe it was funding something other than what it was actually funding. The applications Green helped to prepare did not disclose the true nature of the agreement she had reached with the contractors. Instead, the applications distorted the full scope of the projects, concealing the added cost and the "bonus" equipment the school districts would receive. The Court of Appeals held that these facts supported a conviction for wire fraud.<sup>428</sup>

## **E. Conspiracy to Commit Mail and Wire Fraud**

The Court of Appeals noted that in order to convict Green of conspiracy to commit mail and wire fraud, a jury had to find:

1. An agreement to engage in criminal activity,
2. One or more overt acts taken to implement the agreement,  
and

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<sup>424</sup> *Ibid.*; citing United States v. Shipsey, 363 F.3d 962, 971 (9th Cir. 2004); United States v. Benny, 786 F.2d 1410, 1418 (9th Cir. 1986).

<sup>425</sup> *Id.* at 1064.

<sup>426</sup> *Ibid.*

<sup>427</sup> *Id.* at 1065-66.

<sup>428</sup> *Id.* at 1066.

3. A requisite intent to commit the substantive crime.<sup>429</sup>

In a conspiracy charge, the agreement does not need to be explicit. It is sufficient if the conspirators knew or had reason to know of the purpose of the conspiracy and that their own benefits depended on the success of the venture. The conspiracy agreement may be inferred from circumstantial evidence.<sup>430</sup>

The conspiracy count in the Green case was based upon Green's relationship with Richard Favara. Favara was the owner of Expedition Networks, a technology company that worked with Green to bid on E-Rate projects. He was also the founder of the American Educational Alliance, a nonprofit started with the goal of providing computers to underprivileged schools.<sup>431</sup>

Favara testified that in 2002, he worked with Green to secure 15 E-Rate projects for Expedition Networks. As part of this process, Favara agreed to allow Green to become Director of Grants for the American Educational Alliance, despite the fact that it had no assets. Green intended to use the Alliance to award bogus grants to schools to strengthen their applications for E-Rate funding. Under this scheme, the Alliance would purport to make a grant to a poor school district so the district could claim that it had assets to make its copayment. Green would ensure that the school district selected Expedition Networks to perform the project. Favara would then funnel a portion of the contract payments from Expedition Networks to the Alliance, which would use the money for the grant it had awarded to the school district. Those funds would eventually be returned to Expedition Networks in the form of the school district's copayment.<sup>432</sup>

To help Green convince the school districts to hire her, Favara agreed to let Green post on the Alliance's website a falsified financial overview of the nonprofit. According to Favara, Green wanted to post this information to make the nonprofit look stronger when she was talking to school districts. Favara testified that he agreed to Green's request because Expedition Networks needed the business.<sup>433</sup>

Favara's testimony established that both Green and Favara were committed to the common goal of obtaining the 15 E-Rate contracts, and that both agreed to utilize false financial information to achieve that goal. The Court of Appeals ruled that this was sufficient evidence for the jury to find an agreement existed.<sup>434</sup>

The Court of Appeals also held that there was sufficient evidence that Green had the intent to defraud. The evidence introduced at trial established that Green knew that the Alliance had no assets, but that she nonetheless had Favara post the false financial information on its website. Further, Green proposed to make grants to schools to cover their copayments out of the

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<sup>429</sup> *Id.* at 1067. United States v. Montgomery, 384 F.3d 1050, 1062 (9th Cir. 2004).

<sup>430</sup> *Ibid.* United States v. Hubbard, 96 F.3d 1223, 1226 (9th Cir. 1996).

<sup>431</sup> *Id.* at 1066-68.

<sup>432</sup> *Id.* at 1068.

<sup>433</sup> *Ibid.*

<sup>434</sup> *Id.* at 1067-68.

inflated profits that Expedition Networks would receive from the E-Rate contracts it received. Green submitted falsified letters to the federal government informing it of grants that the Alliance had awarded, even though no such grants had been made. These documents were sufficient to support the jury's finding of intent to defraud.<sup>435</sup>

## **F. Bid Rigging**

The Court of Appeals ruled that the evidence at trial easily supported the jury's finding that Green participated in multiple bid rigging conspiracies. The Court of Appeals cited Section 1 of the Sherman Act, which provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or the foreign nations, is declared to be illegal."<sup>436</sup> Agreements that always or almost always tend to restrict competition and decrease output are held to be unreasonable restraints of trade.<sup>437</sup>

Conspiracies to submit collusive, noncompetitive, rigged bids are per se violations of the Sherman Act.<sup>438</sup> Green claims that she did not engage in bid rigging because the agreements she organized were legitimate teaming agreements among companies that were not competitive. However, the Court of Appeals ruled that the evidence at trial established that Green controlled the bidding process. Green informed contractors in advance that they would be selected for E-Rate projects, dictated the contents of their bids, and orchestrated matters so that school districts would award their contracts to her pre-selected vendors. These actions went beyond merely arranging a team of contractors to create a legitimate bid. Green's actions encouraged that team to fashion its bid without regard to the competition. By interfering with the competitive bidding process in this way, the Court of Appeals held that there could be little doubt that Green's actions fell within the heart of the anti-competitive conduct prohibited by the Sherman Act.<sup>439</sup>

The Court of Appeals noted that the government's evidence also established that Green did more than just arrange teams. Green routinely interfered with arm's length negotiations between contractors, dictating which members would act as subcontractors and what portions of the project they would perform.<sup>440</sup>

The Court of Appeals noted that for a project for the West Fresno School District, Green explicitly told two vendors that they would act as subcontractors to a chosen contractor, as well as what portions of the project both vendors would perform. Representatives from both subcontractors testified that their companies had planned to bid on portions of the project directly to the school district until Green told them to act as subcontractors. Thus, these companies were at least potential, if not actual, competitors. The Court of Appeals held that the jury could conclude that Green's actions were meant to subvert the competition between these vendors.<sup>441</sup>

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<sup>435</sup> *Id.* at 1068.

<sup>436</sup> *Ibid.* 15 U.S.C. Section 1.

<sup>437</sup> *Id.* at 1068.

<sup>438</sup> *Ibid.* United States v. Rose, 449 F.3d 627, 630 (5th Cir. 2006); United States v. Reicher, 983 F.2d 168, 170 (10th Cir. 1992).

<sup>439</sup> *Id.* at 1069.

<sup>440</sup> *Ibid.*

<sup>441</sup> *Ibid.*

Green also was involved in an agreement executed between two vendors where the larger, NEC, would act as prime contractor, and the smaller, VNCI, as subcontractor, on all bids the two acquired. The evidence at trial showed that VNCI served as the prime contractor on at least one other E-Rate project and therefore was a competitor. From this evidence, the Court of Appeals concluded that a rational jury could have concluded that VNCI had the capability of serving as a prime contractor, and thus was a potential competitor, for this, as well as other projects and therefore there was a violation of the Sherman Act. The Court of Appeals stated, “The above evidence was more than sufficient for a rational trier of fact to convict Green of bid rigging. Accordingly, we affirm her conviction on those counts.”<sup>442</sup>

In summary, the Ninth Circuit Court of Appeals found there was ample evidence to support Green’s conviction and sentence.<sup>443</sup> This decision should serve as a reminder to districts to view with caution consultants and vendors who promise districts large discounts, gifts or free equipment as part of a grant or bid process. Vendors or consultants who promise districts that districts may circumvent federal or state laws requiring copayments or grant eligibility requirements as Green did in this case should be avoided. Particularly, in these difficult economic times, if districts are concerned about the legality or ethics of a consultant or vendor, districts should consult with their legal counsel.<sup>444</sup>

## MISCELLANEOUS

### A. Sale or Lease of Surplus Property

Education Code section 17453.1 states that notwithstanding any other provision of law, a school district may sell or lease Internet appliances or personal computers to parents of students within the school district for the purpose of providing access to the school district’s educational computer network, at a standard price, not to exceed the cost incurred by the school district in purchasing the Internet appliance or personal computer. A school district that elects to sell or lease Internet appliances or personal computers shall provide access to the school district’s educational network for those families that cannot afford access to the school district’s educational network. In conducting a sale or lease pursuant to Section 17453.1, a school district shall not be required to call for bids or to sell or lease Internet appliances or personal computers to the highest bidder. For purposes of Section 17453.1, an Internet appliance is a technological product that allows a person to connect to, or access, an online educational network.

### B. Community College Districts – Surplus Personal Property

Education Code section 81450.5 authorizes a community college district, without providing public notice and advertising in the newspaper, to exchange for value, sell for cash, or donate any personal property belonging to the community college district if all the following criteria are met:

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<sup>442</sup> *Id.* at 1069.

<sup>443</sup> *Id.* at 1069-72.

<sup>444</sup> *Id.* at 1069-72.

1. The district determines that the property is not required for school purposes that it should be disposed of for the purpose of replacement, or it is unsatisfactory or not suitable for school use.
2. The properties exchanged with, or sold or donated to, a school district or community college district that has had an opportunity to examine the property proposed to be exchanged, sold or donated.
3. The recipient of the property would not be inconsistent with any applicable districtwide or schoolsite technology plan of the recipient district.

In addition, Education Code section 81452 has been amended to allow the community college district, by unanimous vote of its governing board, to sell surplus personal property up to five thousand dollars (\$5,000) in value by private sale conducted by an employee.

### **C. Design Professional Services – Indemnification Provisions**

Civil Code section 2782.8 provides that all contracts and all solicitation documents, including requests for proposals, invitations for bids, and other solicitation documents between a public agency and a design professional are deemed to incorporate by reference the provisions of Section 2782.8. Civil Code section 2782.8 states that for all contracts, and amendments thereto, entered into on or after January 1, 2007, with a public agency for design professional services, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any such contract, and amendments thereto, that purport to indemnify, including the cost to defend, the public agency by a design professional against liability for claims against the public agency, are unenforceable, except for claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional. The provisions of Section 2782.8 cannot be waived or modified by contractual agreement, act, or omission of the parties. Contractual provisions, clauses, covenants or agreements not expressly prohibited by Section 2782.8 are reserved to the agreement of the parties.

Section 2782.8(b) defines a “design professional” as all of the following:

1. An individual licensed as an architect and a business entity offering architectural services.
2. An individual licensed as a landscape architect and a business entity offering landscape architectural services.
3. An individual registered as a professional engineer and a business entity offering professional engineering services.

4. An individual licensed as a professional land surveyor and a business entity offering professional land surveying services.

In effect, Section 2782.8 limits the liability of the design professional to claims that arise out of, or pertain to, or relate to the negligence, recklessness or willful misconduct of the design professional.

#### **D. Public Works – Roofing Projects**

Assembly Bill 635<sup>445</sup> added Public Contract Code sections 3000 through 3010 as an urgency measure effective September 29, 2010 and requires school districts and community college districts that are repairing or replacing a roof to require their architect, engineer, roofing consultant or other specified persons or entities to complete and sign a certification related to financial relationships in connection with the roof project and provide the signed certification to the school district or community college district. A copy of the required certification is attached in the Appendix.

Section 3004 states that the specifications for any roof project shall be designed to promote competition. Section 3002(a) states that for any roof project, a material, product, thing or service shall be considered equal if it meets all of the following requirements:

1. The item is at least equal in quality, durability, design and appearance, but not necessarily of an identical color.
2. The item will perform the intended function at least equally well.
3. The item conforms substantially, even with deviations, to the detailed requirements contained in the specifications.

Section 3002(b) states that a substitute may be unequal if the resulting roof system would be substantially different than other equal or better systems in terms of performance and durability, but not merely different by virtue of the inclusion of proprietary products or proprietary warranty.

Section 3006(a)(1) states that an architect, engineer or roofing consultant who provides professional services related to a roof project shall disclose any financial relationships by completing and signing the certification set forth in Section 3006(b) prior to the time professional services are engaged. A materials manufacturer, contractor or vendor involved in a bid or proposal for a roof project shall disclose any financial relationships by completing and signing the same certification when the award is made. The architect, engineer, roofing consultant, materials manufacturer, contractor or vendor shall provide the certification to the district.

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<sup>445</sup> Stats. 2010, ch. 438.

Section 3006(a)(2) states that an architect, engineer, roofing consultant, materials manufacturer, contractor or vendor shall not disclose a financial relationship in which that person or entity is a stockholder of a corporation, the stock of which is listed for sale in the general public on a national securities exchange and registered with the United States Security and Exchange Commission, if the person or entity holds less than ten percent of the outstanding stock entitled to vote at the annual meeting of the corporation. Therefore, if the architect, engineer, roofing consultant, materials manufacturer, contractor or vendor holds ten percent or more of the outstanding stock, he or she must disclose the financial interest.

Section 3006(a)(3) states that an architect, engineer, roofing consultant, materials manufacturer, contractor or vendor who knowingly provides false information or fails to disclose a financial relationship pursuant to Section 3006 shall be liable to the district for any costs to the district that are reasonably attributable to excess or unnecessary costs, when compared to competing bids, incurred by the district as a result of the undisclosed financial relationship.

Section 3006(c) states that any person who knowingly provides false information or fails to disclose a financial relationship in the certification shall be subject to a civil penalty in an amount up to \$1,000, in addition to any other available remedies. An action for a civil penalty under this provision may be brought by any public prosecutor in the name of the people of the State of California.

Section 3008 states that to report bid rigging involving local governmental agencies and employees, including but not limited to, county, city and school district employees and officials, an interested person may contact the Antitrust Law Section of the Office of the Attorney General, 300 S. Spring Street, Suite 1702, Los Angeles, California 90013, (800) 952-5225, or fill out the online complaint form on the Internet Website of the Office of the Attorney General (Consumer Complaint against a Business/Company) at [ag.ca.gov/contact/complaint\\_form.php?cmplt=CL](http://ag.ca.gov/contact/complaint_form.php?cmplt=CL). Section 3010 states that these provisions shall not apply to a school district (Section 20113) or a community college district (Section 20654) operating in an emergency situation.

# APPENDICES

# **NONCOLLUSION DECLARATION**

NONCOLLUSION DECLARATION TO BE EXECUTED BY  
BIDDER AND SUBMITTED WITH BID

The undersigned declares:

I am the \_\_\_\_\_ of \_\_\_\_\_, the party making the foregoing bid.

The bid is not made in the interest of, or on behalf of, any undisclosed person, partnership, company, association, organization, or corporation. The bid is genuine and not collusive or sham. The bidder has not directly or indirectly induced or solicited any other bidder to put in a false or sham bid. The bidder has not directly or indirectly colluded, conspired, connived, or agreed with any bidder or anyone else to put in a sham bid, or to refrain from bidding. The bidder has not in any manner, directly or indirectly, sought by agreement, communication, or conference with anyone to fix the bid price of the bidder or any other bidder, or to fix any overhead, profit, or cost element of the bid price, or of that of any other bidder. All statements contained in the bid are true. The bidder has not, directly or indirectly, submitted his or her bid price or any breakdown thereof, or the contents thereof, or divulged information or data relative thereto, to any corporation, partnership, company, association, organization, bid depository, or to any member or agent thereof, to effectuate a collusive or sham bid, and has not paid, and will not pay, any person or entity for such purpose.

Any person executing this declaration on behalf of a bidder that is a corporation, partnership, joint venture, limited liability company, limited liability partnership, or any other entity, hereby represents that he or she has full power to execute, and does execute, this declaration on behalf of the bidder.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed on \_\_\_\_\_[date], at \_\_\_\_\_[city], \_\_\_\_\_[state].

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name

**ESCROW AGREEMENT FOR  
SECURITY DEPOSITS  
IN LIEU OF RETENTION**

**ESCROW AGREEMENT FOR  
SECURITY DEPOSITS IN LIEU OF RETENTION**

This Escrow Agreement is made and entered into, as of \_\_\_\_\_, 20\_\_\_\_, by and between \_\_\_\_\_, whose address is \_\_\_\_\_, hereinafter called "DISTRICT," and \_\_\_\_\_, whose address is \_\_\_\_\_, hereinafter called "Contractor," and, \_\_\_\_\_, whose address is \_\_\_\_\_, hereinafter called "Escrow Agent."

For the consideration hereinafter set forth, the DISTRICT, Contractor, and Escrow Agent agree as follows:

(1) Pursuant to Section 22300 of the Public Contract Code of the State of California, Contractor has the option to deposit securities with Escrow Agent as a substitute for retention earnings required to be withheld by DISTRICT pursuant to the Agreement entered into between the DISTRICT and Contractor for \_\_\_\_\_ in the amount of \$ \_\_\_\_\_, dated \_\_\_\_\_ (hereinafter referred to as the "Agreement"). Alternatively, on written request of the Contractor, the DISTRICT shall make payments of the retention earnings directly to the Escrow Agent. When the Contractor deposits the securities as a substitute for retention earnings, the Escrow Agent shall notify the DISTRICT within ten (10) days of the deposit. The market value of the securities at the time of the substitution shall be at least equal to the cash amount then required to be withheld as retention under the terms of the Agreement between the DISTRICT and Contractor. Securities shall be held in the name of DISTRICT, and shall designate the Contractor as the beneficial owner.

(2) The DISTRICT shall make progress payments to the Contractor for those funds which otherwise would be withheld from progress payments, provided that the Escrow Agent holds securities in the form and amount specified above.

(3) When the DISTRICT makes payment of retentions earned directly to the Escrow Agent, the Escrow Agent shall hold them for the benefit of the Contractor until the time the escrow created under this Escrow Agreement is terminated. The Contractor may direct the investment of the payments into securities. All terms and conditions of this Escrow Agreement and the rights and responsibilities of the parties shall be equally applicable and binding when the DISTRICT pays the Escrow Agent directly.

(4) Contractor shall be responsible for paying all fees for the expenses incurred by Escrow Agent in administering the Escrow Account and all expenses of the DISTRICT. These expenses and payment terms shall be determined by the DISTRICT, Contractor and Escrow Agent.

(5) The interest earned on the securities or the money market accounts held in escrow and all interest earned on that interest shall be for the sole account of Contractor and shall be subject to withdrawal by Contractor at any time and from time to time without notice to the DISTRICT.

(6) Contractor shall have the right to withdraw all or any part of the principal in the Escrow Account only by written notice to Escrow Agent accompanied by written authorization from the DISTRICT to the Escrow Agent that DISTRICT consents to the withdrawal of the amount sought to be withdrawn by Contractor.

(7) The DISTRICT shall have a right to draw upon the securities in the event of default by the Contractor. Upon seven (7) days' written notice to the Escrow Agent from the DISTRICT of the default, the Escrow Agent shall immediately convert the securities to cash and shall distribute the cash as instructed by the DISTRICT.

(8) Upon receipt of written notification from the DISTRICT certifying that the Agreement is final and complete, and that the Contractor has complied with all requirements and procedures applicable to the Agreement, Escrow Agent shall release to Contractor all securities and interest on deposit less escrow fees and charges of the Escrow Account. The escrow shall be closed immediately upon disbursement of all monies and securities on deposit and payments of fees and charges.

(9) Escrow Agent shall rely on the written notifications from the DISTRICT and the Contractor pursuant to Sections (5) to (8), inclusive, of this Escrow Agreement and the DISTRICT and Contractor shall hold Escrow Agent harmless from Escrow Agent's release and disbursement of the securities and interest as set forth above.

(10) The names of the persons who are authorized to give written notice or to receive written notice on behalf of the DISTRICT and on behalf of Contractor in connection with the foregoing, and exemplars of their respective signatures are as follows:

On behalf of DISTRICT:

On behalf of Contractor:

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Address

\_\_\_\_\_  
Address

On behalf of Escrow Agent:

\_\_\_\_\_  
Title

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name

\_\_\_\_\_  
Address

At the time the Escrow Account is opened, the DISTRICT and Contractor shall deliver to the Escrow Agent a fully executed counterpart of this Escrow Agreement.

IN WITNESS WHEREOF, the parties have executed this Escrow Agreement by their proper officers on the date first set forth above.

DISTRICT

CONTRACTOR

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

ESCROW AGENT

\_\_\_\_\_  
Title

\_\_\_\_\_  
Name

\_\_\_\_\_  
Signature

# **DVBE CERTIFICATION**

**CERTIFICATION – PARTICIPATION OF  
DISABLED VETERAN BUSINESS ENTERPRISES  
IN ACCORDANCE WITH EDUCATION CODE SECTION 17076.11**

In accordance with Education Code section 17076.11, the \_\_\_\_\_ District has a participation goal for Disabled Veteran Business Enterprises of at least three percent (3%) per year of the overall dollar amount of funds allocated by the District by the State Allocation Board pursuant to the Leroy F. Greene School Facilities Act of 1998 for construction or modernization of school buildings and expended each year by the District. At the time of execution of the contract, the Contractor will provide a statement to the District of anticipated participation of Disabled Veteran Business Enterprises in the contract. Prior to, and as a condition precedent for final payment under the contract, the Contractor will provide appropriate documentation to the District identifying the amount paid to Disabled Veteran Business Enterprises pursuant to the contract, so that the District can assess its success at meeting this goal.

The Contractor may provide the anticipated participation of Disabled Veteran Business Enterprises in terms of percentage of its total contract or the dollar amount anticipated to be paid to Disabled Veteran Business Enterprises or by providing the names of the Disabled Veteran Business Enterprises that will participate in the contract. If there is a discrepancy between the anticipated goal and the actual goal at the completion of the contract or a failure to meet the anticipated goal or dollar amount, the District will require the Contractor to provide, at the completion of the contract, a detailed statement of the reason(s) for the discrepancy or failure to meet the anticipated goal or dollar amount.

I certify that I have read the above and will comply with the anticipated participation of Disabled Veteran Business Enterprises in this contract.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Typed or Printed Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Company

\_\_\_\_\_  
Address

\_\_\_\_\_  
City, State, Zip

\_\_\_\_\_  
Telephone

\_\_\_\_\_  
Fax

\_\_\_\_\_  
E-Mail

**CRIMINAL RECORD CHECK  
CERTIFICATION**

**SAMPLE**

**CERTIFICATION BY CONTRACTOR  
CRIMINAL RECORD CHECK  
AB 1610, 1612, 2102**

To the Governing Board of \_\_\_\_\_ School District:

I, \_\_\_\_\_ [Name of Contractor] \_\_\_\_\_, certify that:

1. I have carefully read and understand the Notice to Contractors Regarding Criminal Record Checks (Education Code section 45125.1) required by the passage of AB 1610, 1612, and 2102.
2. Due to the nature of the work I will be performing for the District, my employees may have contact with students of the District.
3. None of the employees who will be performing the work have been convicted of a violent or serious felony as defined in the Notice and in Penal Code section 1192.7 and this determination was made by a fingerprint check through the Department of Justice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at \_\_\_\_\_, California, on \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Typed or printed name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Address

\_\_\_\_\_  
Telephone

**CERTIFICATION  
PUBLIC CONTRACT CODE  
SECTION 3006**

**CERTIFICATION  
PUBLIC CONTRACT CODE SECTION 3006**

I, \_\_\_\_\_ [name], \_\_\_\_\_ [name of employer], certify that I have not offered, given, or agreed to give, received, accepted, or agreed to accept, any gift, contribution, or any financial incentive whatsoever to or from any person in connection with the roof project contract. As used in this certification, "person" means any natural person, business, partnership, corporation, union, committee, club, or other organization, entity, or group of individuals. Furthermore, I, \_\_\_\_\_ [name], \_\_\_\_\_ [name of employer], certify that I do not have, and throughout the duration of the contract, I will not have, any financial relationship in connection with the performance of this contract with any architect, engineer roofing consultant, materials manufacturer, distributor, or vendor that is not disclosed below.

I, \_\_\_\_\_ [name], \_\_\_\_\_ [name of employer], have the following financial relationships with an architect, engineer, roofing consultant, materials manufacturer, distributor, or vendor, or other person in connection with the following roof project contract:

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Name and Address of Building, Contract Date and Number

I certify that to the best of my knowledge, the contents of this disclosure are true, or are believed to be true.

\_\_\_\_\_  
Signature

Date: \_\_\_\_\_

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Print Name of Employer