

# Checklist of Public Contracting Statutes and Public Contract Code Based Claims Presentable Under Section 9204

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## CHECKLIST OF PUBLIC CONTRACTING STATUTES

The following checklist can be used to evaluate any public procurement:

### A. Determine What Laws Apply To The Procurement

1. *Type of Entity*
  - a. Charter city or county with contracting code or ordinance – start there
  - b. All other types
    - i. Enabling legislation
    - ii. Public Contract Code
    - iii. Government Code
2. *Type of Procurement*
  - a. Construction – Start with the Public Contract Code and Enabling Legislation
  - b. Materials and supplies – Start with the Government Code and Public Contract Code
  - c. Professional services – Start with the Government Code
  - d. Non-construction services – N/A
  - e. A combination of the above – Probably construction; Start with Public Contract Code and Enabling Legislation

### B. Determine If Statutory or Common Law Exemptions Apply

1. *Exemptions from Competitive Procedures*
  - a. Force account/day labor (e.g., PCC § 22031)
  - b. Emergencies (Pub. Contract Code, § 10101(b))
  - c. Failure to receive bids (PCC § 22038(c))
  - d. Sole source standards (PCC § 3400)
  - e. Bidding impractical or impossible (*Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631, 635-636)
  - f. Circumstances that make it impossible or useless to advertise for public bidding. (See e.g., *Los Angeles Dredging Co. v. City of Long Beach* (1930) 210 Cal. 348, 353)
  - g. Energy management contracts (Government Code sections 4217.10-16).
2. *Exemptions for Procurement of Supplies, include*
  - a. CMAS (PCC §§ 10290, 12101.5)
  - b. Piggyback (Educ. Code section 17595; Public Contract Code sections 20118, 20652, 20653; Gov't Code section 14931)

### C. Developing the Procurement and Contract Documents

1. *RFP for Design Build (PCC § 22160)*
  - a. Prerequisites
    - i. Eligible “project” (PCC § 22161)
    - ii. Conflict of interest policy (PCC § 22164(a)(2))
  - b. Prequalification: Standard Template for Statement of Qualifications (PCC §

22164(b)(3))

- i. Experience with projects of similar size, scope, or complexity
- ii. Proposed key personnel have sufficient experience
- iii. Financial statement that ensures that the design-build entity has the capacity to complete the project

c. RFP

- i. Scope definition (bridging documents) (PCC § 22164(a)(1))
- ii. Expected cost range (Public Contract Code § 22164(a)(1))
- iv. Significant factors that the local agency reasonably expects to consider in evaluating proposals (PCC § 22164(d)(2))
- iv. Procedure for final selection (PCC § 22164(b)(1))
- v. Reserve the right to request proposal revisions and hold discussions and negotiations with responsive proposers (PCC § 22164(b)(4))

- d. Shortlist requires enforceable commitment to use a skilled and trained workforce (PCC § 22164(c)(1))

2. *RFP for Construction Management at Risk*

- a. Prequalify
- b. “Best value” determined by objective criteria related to
  - i. The experience of the entity and project personnel,
  - ii. Project plan,
  - iii. Financial strength of the entity,
  - iv. Safety record of the entity, and
  - v. Price.

3. *IFB Common Requirements*

- a. Advertise or solicit bids
  - i. To pre-qualified pool
  - ii. Newspaper / web portal
  - iii. Describe the work
- b. Detailed plans and specifications (PCC § 22039)
- c. Identify date, time, and place bids are due (PCC §4104.5; Govt. Code § 53068)
- d. Required Contractor’s License(s) (PCC § 3300)
- e. Prequalification requirements (Generic - PCC § 20101)
- f. Form and delivery requirements for bids
  - i. Bid security (e.g., PCC §§ 20111, 20128, 20192, 20564.5, 20642.5, 20651)
  - ii. Required certificates (Workers Compensation Certificate, Drug-Free Workplace Certification, Non-Collusion Affidavit, Asbestos and Lead Based Paint Certification, Iran Contracting Act Certification, Anti-Discrimination)
  - iii. Payment bond (Civil Code §9554)

- g. Prevailing wages
    - i. Mandatory DIR registration – prime contractors and subcontractors (Labor Code § 1725.5; 1771.5))
    - ii. Contractor direct filing of certified payroll with DIR (Labor Code § 1771.4 (a)(3))
    - iii. Notice of Labor Code requirements per § 1771.5(b)(1)
  - h. Mandatory information and terms
    - i. Bid alternates (PCC § 20103.8)
    - ii. Substitution right and time periods (PCC § 3400)
    - iii. Sole source justifications (PCC § 3400)
    - iv. Subcontractor listing law / subcontractor list (PCC § 4110 et seq.)
    - vi. Substitution of Securities For Retention (PCC § 22300)
    - vi. Notice of retention percentages and justification (PCC § 7201)
4. *Contract Requirements*
- a. Statutory requirements
    - i. Liquidated damages for all damages (PCC § 7203; Government Code Section 53069.8)
    - ii. Mandatory 100% payment bonds (Civil Code § 9554(a); sometimes, performance bond)
    - iii. Subcontractor list with license number and DIR registration number (PCC § 4104(a)(1))
    - iv. Bidder DIR Registration (Labor Code § 1725.5; 1771.5))
    - v. Contractors must submit certified payroll records to the DIR (Labor Code § 1771.4 (a)(3))
    - vii. Prevailing wage enforcement, Labor Code requirements, Apprenticeship programs (LC § 1777), hours of work (LC § 1810)
    - viii. Modified Claims Procedure to Conform to § 9204 (Charter cities may consider opting out or drafting Govt. Code § 930.2 procedures)
    - viii. Site conditions
      - 1. PCC §7104 – differing site conditions
      - 2. GC §4215 – mainline utilities
    - ix. Act of God limitation (PCC §7105)
    - x. Iran Contracting Act Certification (PCC § 2202)
    - xi. Substitution Of Securities For Retention (PCC § 22300). California Government Code Section 16430 lists specific securities eligible for investment in lieu of retention
    - xii. Clayton and Cartwright Act Assignments
    - xiii. Immigration Reform and Control Act of 1986
    - xiv. Special requirements (i.e., fingerprinting workers per Ed Code § 45125.2.)
    - xv. Assignment of Antitrust claims (Public Contract Code Section 7103.5(b))
    - xvi. State Audit Right (Government Code Section 8546.7)
    - xvii. Provisions Required by Law Deemed Inserted

5. *Statutory Requirements – Special Situations*
    - a. Liquidated damage measurement and scope
    - b. Conform contract close out to PCC 7107(c) (Prompt Payment Statute: Must release retention within 60 days of “completion” defined as acceptance; occupation; enjoyment; cessation of work for 100 days. Penalty: 2% per month, and attorney’s fees and costs)
      - i. Carefully structure close out sequence in contract to coordinate completion of work on site with completion of work
      - ii. Always remember *Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396, 1402 (\$12,369,880 in contract damages; \$15,035,533 in prompt payment penalties pursuant to Section 7107; \$3,799,048.74 in attorney fees expended to recover withheld retention funds)
    - c. PCC §9204 Claim Procedures
  6. *Choose Method for Prequalification*
    - a. All methods
      - i. Prequalification questionnaire and financial statement, including a statement of the bidder's
        1. Financial ability
        2. Experience in performing public works and the type of project described in IFB.
        3. May extend to key personnel (superintendents), subcontractors
      - ii. Adopt and apply a uniform system of rating bidders to determine the size of the contracts they are qualified to handle
      - iii. The documents submitted must be verified under oath
      - iv. Financial statements are not public records
    - b. Options
      - i. PCC 20101 – Generic
      - ii. Procurement specific (design build)
      - ii. Entity specific (i.e., schools)
      - iv. Entity custom (two-envelope)
        1. Prequalification program; or,
        2. two envelope procedure (price first, qualifications for low bidder only) or modified two step, pre-assessment; or
        3. SOQ with bid.
- D. Advertisement, Bidding and Award**
1. *Advertise or Solicit Bids and Proposals*
    - a. Publish a notice in a newspaper of general circulation published in the district, or if there is no such paper, then in a newspaper of general circulation (usually once a week for two weeks)
    - b. Mails copy of the IFB directly to interested bidders list



- c. “upon request from a contractor plan room service, must provide an electronic copy of a project’s contract documents at no charge to the contractor plan room” (PCC § 20103.7)
- 2. *Pre-Bid Administration*
  - a. Conduct Pre-Bid Conference and Pre-Bid Site (minimum 6th day after advertisement) (PCC § 6610)
  - b. Receive and act, by Addenda, to questions and requests for approved equals (outside 72 hours before bid) (PCC § 4104.5)
- 3. *Conduct public bid opening for proposal evaluation in conformance with statute*
  - a. Receive sealed bids at the place and by the time stated in the IFB or RFP. Bids received after the time stated shall be returned unopened. (PCC § 4104.5)
  - b. IFB – Low, responsive, responsible
  - c. RFP – Best Value, per statutory criteria
- 4. *Bidders may request relief from bid mistake (PCC § 5100)*
  - a. Bidder must show
    - i. A clerical mistake in calculations was made;
    - ii. The bidder gave written notice within five days to the District of the mistake specifying in the notice in detail how the mistake occurred;
    - iii. The mistake made the bid materially different than he or she intended it to be; and
    - iv. The mistake was made in filing out the bid and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans or specifications. (See PCC § 5103)
  - b. Public entity prepares a report in writing to document the facts establishing the existence of each element required to establish a basis for relieving the bidder of its bid. The contractor will be requested to produce physical evidence (e.g., bid preparation documents) that will reasonably allow the District to make a determination that a mistake was made.
- 5. *Public entity determines if the bidder is “responsible”*
  - a. Meaning: financial resources, judgment, skill, experience, trustworthiness, integrity and ability to fulfill successfully the requirements of the contract (PCC § 1102)
  - b. The four principal criteria used to determine a Bidder's responsibility are:
    - i. License and bonding;
    - ii. Financial strength from required SOQ;
    - iii. Skill, fitness, capacity and experience required by bid documents; and
    - iv. Prior conduct and performance.
- 6. *Contracting*
  - a. Contracting officer recommends award; governing body awards

- b. Contractor submits bonds and insurance policies
- c. Arranges for contract execution.
- d. Public entity submits PWC 100 form with DIR for every contract award

7. *Bid protests possible.*

## **PUBLIC CONTRACT CODE BASED CLAIMS PRESENTABLE UNDER SECTION 9204**

The legislative history to Section 9204 recites a long list of public contracting statutes subject to the new claims procedure. Public contracting statutes, particularly the Public Contract Code, require that public works contracts contain numerous terms and conditions. These provisions grant the contractor on a California public works project multiple statutory rights against the public entity not present on private works, a few of which are discussed below.

### **A. Statutes Authorizing Affirmative Recovery**

#### **1. Hazardous Material and Unforeseen Conditions**

Section 7104 of the Public Contract Code requires that public works contracts involving excavations deeper than four feet contain a clause regarding hazardous material, materially different site conditions, and latent physical conditions. The statute is deemed part of every local agency public works contract and is discussed in detail in the Differing Site Conditions Section of this manual.

Section 7104 grants the contractor significant rights. First, it codifies in California the traditional concepts of Type 1 and Type 2 differing site conditions. Second, upon encountering a differing site condition, the statute requires the contractor to notify the public entity, in writing, of any differing condition. The statute requires the public entity to then promptly investigate, give direction, and issue a change order, if necessary. Third, in event of a dispute, the contractor is not excused from any scheduled completion date, but must proceed with all work to be performed under the contract. The contractor, however, may file a change order request up to project substantial completion and retains rights given under the contract, or by law, for resolution of the dispute.

#### **2. Utility Relocation**

The Government Code authorizes claims for the extra cost of removal, relocation or protection of existing main or trunkline utility facilities, if not identified in the plans and specifications and made part of the invitation for bids.<sup>249</sup> This statute remains unmodified since its enactment in 1932 and provides contractors with a broad recovery right for utilities within its scope.

249. Government Code Section 4215 provides: “The contract documents shall include provisions to compensate the contractor for the costs of locating, repairing damage not due to the failure of the contractor to exercise reasonable care, and removing or relocating such utility facilities not indicated in the plans and specifications with reasonable accuracy, and for equipment on the project necessarily idled during such work. The contract documents shall include provisions that the contractor shall not be assessed liquidated damages for delay in completion of the project, when such delay was caused by the failure of the public agency or the owner of the utility to provide for removal or relocation of such utility facilities.” (Emphasis added.)



### **3. Invalidation of Retention – The Substitution of Securities for Retention Statute**

The Public Contract Code has provisions designed to protect the contractor's earned retention and to punish the public owner that violates the statute.

Under Public Contract Code Section 22300, in lieu of the owner's retaining a portion of progress payments due a contractor, the contractor may elect to deposit in an escrow account, qualifying securities equivalent to the amount to be withheld. Upon such deposit under an escrow agreement, the funds must be released.<sup>250</sup> The statute also provides rights to open a separate retention account, with the contractor enjoying the interest earned on the retention.<sup>251</sup>

The Public Contract Code specifies the exact form of escrow agreement<sup>252</sup> and requires that the statute, in substantial part, "shall be included in any invitation for bid and in any contract documents."<sup>253</sup> Noncompliance with the statute results in waiver of retention. The statute provides that a "failure to include these provisions in bid and contract documents shall void any provisions for performance retentions in a public agency contract."<sup>254</sup> Moreover, the escrow agreement for depositing such securities "shall be null, void, and unenforceable" unless it is substantially similar to the form set out in the code.<sup>255</sup>

### **4. Delay Damages Regardless of No-Damage-for-Delay Clause**

The Public Contract Code has a broad prohibition on "no-damage-for-delay clauses." Specifically, public works contracts may not make the contractor responsible for delays caused by the public agency, which delays are unreasonable and not within the contemplation of the parties.<sup>256</sup> Contract provisions which limit the contractor to an extension of time for such delays "shall not be construed to preclude the recovery of damages by the contractor or subcontractor."<sup>257</sup> Furthermore, the Public Contract Code provides:

No public agency may require the waiver, alteration, or limitation of the applicability of this section. Any such waiver, alteration, or limitation is void. This section shall not be construed to void any provision in a construction contract which requires notice of delays, provides for arbitration or other procedure for settlement, or provides for liquidated damages.<sup>258</sup>

A general effect of this statute is to invalidate the standard "no damage for delay clause." In *Howard Contracting Inc. v. G.A. MacDonald Construction Co., Inc.*, (1999) 71 Cal.App.4th

250. Public Contract Code section 22300.

251. *Id.*

252. Public Contract Code section 22300, subdivision (f).

253. Public Contract Code section 22300, subdivision (a) (emphasis added).

254. Public Contract Code section 22300, subdivision (c) (emphasis added).

255. Public Contract Code section 22300, subdivision (f) (emphasis added). Note, also, that the substitution of security statute grants the same substitution of securities right to subcontractors, regarding any monies withheld in retention by the contractor from the subcontractor.

256. Public Contract Code section 7102.

257. *Id.*

258. *Id.* (emphasis added).

38, the California Court of Appeals enforced this statute to permit recovery of damages for delay from a city despite a no-damages-for-delay clause. The court used relatively broad language that a contractor could argue precludes public entities from defining or limiting damages recoverable on project delays.

The statute leaves open, however, several questions. First, the statute leaves open the extent to which a public owner's change order calculations will apply in the event of a project delay, which another and more recently enacted section of the Public Contract Code indicates should remain enforceable.<sup>259</sup> Second, the statute leaves open the question of the enforceability of the industry standard that no damage or compensation shall be due on "concurrent delays," i.e., separate delay events, concurrent in time, each due to different parties. (Concurrent delays are discussed in the Delay Claim Section of this manual.)

## **5. Cost Differential Where Substitution Improperly Denied**

The Public Contract Code generally prohibits public construction specifications from limiting bidding to any one specific concern, or calling for a designated material or project by a specific brand or trade name, unless the specification lists at least two brands or trade names and is followed by the words "or equal."<sup>260</sup>

Contractors often base their bids on use of substitute items and then ask for a substitution after award, asserting the cost difference if the public entity denies the request. By statute, a contractor has the right to propose substitutions or "or equal" items for items designated by name or proprietary designation.<sup>261</sup> By statute, the contract specifications "shall provide a period of time prior to the award of the contract" for making the substitution request and submission of data substantiating a request for substitution of "an equal" item."

Compliance procedures and exceptions are set out in the statute and have changed several times since 1997. As of January 1, 2002, bidders may submit data substantiating a request for a "equal" substitution within 35 days after the award of the contract, if no time period for submitting the data is specified in the contract. In addition, if a public entity intends to sole source specify a particular material, equipment or service, by a brand name, then it should set forth that finding in the instructions to bidders.

## **6. Late Payment Interest Rate**

The California Public Contract Code grants contractors a right to claim statutory interest on unpaid progress payments, and 2% interest per month on retention withheld without good cause.

For progress payments, [a]ny local agency which fails to make any progress payment within 30 days after receipt of an undisputed and properly submitted payment request from a contractor on a construction contract shall pay interest to the contractor equivalent to the legal

259. See Public Contract Code section 7105(d)(2). See also *Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396 [finding that 7105(d)(2) limits a public contractors recovery on disputed change orders to the amount calculated pursuant to contract, but section 7105(d)(2) does not impact the permissible method of proof and allows recover of claims not subsumed within a change order].

260. Public Contract Code section 3400.

261. Public Contract Code section 3400, subdivision (a).

rate set forth in subdivision (a) of Section 685.010 of the Code of Civil Procedure.”<sup>262</sup> “Any payment request determined not to be a proper payment request suitable for payment shall be returned to the contractor as soon as practicable, but not later than seven days, after receipt. A writing the reasons why the payment request is not proper.”<sup>263</sup>

For retention, the public entity must pay undisputed contract amounts within 60 days of project “completion” as defined in the statute, otherwise the public entity withholding such amounts due is subject to interest at the rate of 2% per month on the improperly withheld amount, and payment of attorneys’ fees to recover the wrongfully withheld amounts.<sup>264</sup> The Public Contract Code does allow the public entity to withhold from final payment 150% of any disputed amount due on the contract.<sup>265</sup> For disputed claims, if the public entity loses in litigation, “the local agency shall pay interest at the legal rate” (that is, not limited to 7%) and that the interest shall begin to accrue “on the date suit is filed.”<sup>266</sup>

## **7. Bid Preparation Costs and Attorney’s Fees On a Successful Bid Protest**

If a public entity awards a contract to the second low bidder, without good cause, several court decisions allow the bidder to recover bid preparation costs and in some instances attorneys’ fees.<sup>267</sup>

### **B. Statutes Impacting Claims Administration**

#### **1. Release or Indemnification From Liability Arising from the Public Entity’s Active Negligence**

A broad right to contractors and designers is found in the Civil Code, which declares “void and unenforceable” any provision in any public works contract that purports “to impose on the contractor, or relieve the public agency from, liability for the active negligence of the public agency.”<sup>268</sup> California Civil Code Sections 2782 and 2782.5 further prohibit indemnification arising from the public entity’s sole negligence, intentional misconduct, and possibly, also, active negligence, while permitting the public entity and the contractor to allocate or limit their liability to each other.<sup>269</sup>

These statutes apply to contract indemnities in most applications. Courts have not,

262. Public Contract Code section 20104.50(b).

263. Public Contract Code section 20104.50(c).

264. Public Contract Code section 7107, subdivision (f).

265. Public Contract Code section 7107, subdivision (c).

266. Public Contract Code section 20104.6.

267. *Kajima / Ray Wilson v. Los Angeles County* (2000) 23 Cal.4th 305.

268. Civil Code section 2782, subdivision (b) (emphasis added). For construction contracts generally, Civil Code Section 2782, subdivision (a) disallows indemnification for “the sole negligence or willful misconduct of the promisee.” Civil Code section 2782, subdivision (b) immediately follows this section and, although this section does not expressly prohibit “indemnification” agreements extending to a public entity’s active negligence, may be interpreted to do so.

269. Compare Civil Code section 2782, subdivision (a), discussing indemnification provisions specifically, and Section 2782, subdivision (b), prohibiting public entities from imposing on contractors liability for their active negligence, but not referring specifically to “indemnification” provisions.



however, decided the extent these statutes may void the operation of an indemnity provision. Although caselaw would suggest these statutes would only limit and not invalidate an indemnity, a California court of appeal has yet to address this issue.

## **2. Absolute Power to Decide Disputes**

Public works contracts often reserve to the public entity a unilateral disputes decision and unilateral change order right. These types of provisions designating the agency, or its engineer, as the final arbiter of all disputes, and that the contractor is bound by the agency's or its engineer's decisions, applies during the project only and the issue is open for reexamination in subsequent arbitration or litigation. Civil Code Section 1670 provides:

Any dispute arising from a construction contract with a public agency, which contract contains a provision that one party to the contract or one party's agent or employee shall decide any disputes arising under that contract, shall be resolved by submitting the dispute to independent arbitration, if mutually agreeable, otherwise by litigation in a court of competent jurisdiction. (Emphasis added.)

## **3. Requirement of Waiver of Claims**

Provisions in public works contracts providing that acceptance of a payment otherwise due the contractor is a waiver or release of all other claims against the public entity are unenforceable. Such provisions "are against public policy and null and void."<sup>270</sup> The contract can only include a provision which provides that payment of undisputed amounts can be conditioned upon a release of all claims related to those amounts, with disputed claims being specifically excluded.<sup>271</sup>

## **4. Tidal Wave and Earthquake Liability**

Public works contracts cannot make the contractor responsible for repairing or restoring damage, in excess of five percent of the contract amount, caused by tidal waves or earthquakes over 3.5 on the Richter Scale.<sup>272</sup> The public agency can require the contractor to obtain insurance to indemnify the public agency for such damage if the insurance premium is a separate bid item. These prohibitions, however, are not applicable "to construction contracts financed by revenue bonds."<sup>273</sup> The statute, however, does not define the term "revenue bonds."

## **C. The Right To A Neutral County**

A contractor that has been sued by a public entity, or countersued by a public entity, has an absolute right to transfer the action from the county of the project to another "neutral" county.<sup>274</sup> If the contractor sues the public entity without a public entity counter-suit, or if a

270. Public Contract Code section 7100 (emphasis added).

271. *Id.*

272. Public Contract Code section 7105.

273. Public Contract Code section 7105, subdivision (a).

274. Cal. Code Civ. Pro. section 394; *Kennedy/Jenks Consultants v. Superior Court* (2000) 80 Cal.App.4th 948.

personal injury claim is brought against the public entity, then the neutral county right does not apply.<sup>275</sup>

275. Cal. Code Civ. Pro. section 394; *Ventura School Dist. v. Superior Court* (2001) 92 Cal.App.4th 811.

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