

Enforcing the Contract on Public Works Claims

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ENFORCING THE CONTRACT ON PUBLIC WORKS CLAIMS

A. Public Contract Code Section 7105(d)(2)

Public Contract Code Section 7105(d)(2) provides in pertinent part:

Contracts of public agencies . . . required to be let or awarded on the basis of competitive bids . . . may be terminated, amended, or modified only if the termination, amendment, or modification is so provided in the contract or is authorized under provision of law other than this subdivision. The compensation payable, if any, for amendments and modification shall be determined as provided in the contract. The compensation payable, if any, in the event the contract is so terminated shall be determined as provided in the contract or applicable statutory provision providing for the termination. (Emphasis supplied).

California courts have given this statute a literal reading and a broad construction.³³⁶ The California Supreme Court relied on this statute to hold that the doctrine of “contract abandonment” does not exist on California public works projects.³³⁷ A California Court of Appeal relied on Public Contract Code section 7105(d)(2) to refuse to recognize a theory of implied contractual indemnity where the underlying public works construction contract did not have an express indemnity provision that would have covered the underlying claim, explaining: “To permit [the contractor] to recover here under the theory of implied contractual indemnity would be inconsistent with the cited public policy reflected in Pub. Cont. Code section 7105.”³³⁸

In a 2010 decision, the Second District Court of Appeal determined that the public contractor was entitled to a trial on contract interpretation to determine if the contract obligated the contractor to keep and maintain records of actual costs of damages.³³⁹ There, the Court of Appeal determined that Public Contract Code section 7105(d)(2) did not limit claims, such as implied warranty or total (or modified total) cost claims, if they were not otherwise subsumed in change orders because PCC section 7105(d)(2) did not limit the contractor’s theory of recovery.³⁴⁰

This more recent line of cases places a premium on contract interpretation.

B. Bid Document Interpretation

In general, the same basic contract principles apply to the interpretation of private

332. Public Contract Code section 7105.

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

334. Code of Civil Procedure section 394; *Kennedy/Jenks Consultants v. Superior Court* (2000) 80 Cal.App.4th 948.

335. Code of Civil Procedure section 394; *Ventura School Dist. v. Superior Court* (2001) 92 Cal.App.4th 811.

336. *Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228; *Schulster Tunnels/Pre-Con v. Traylor Brothers* (2003) 111 Cal.App.4th 1328.

337. *Id.*

338. *Schulster Tunnels/Pre-Con v. Traylor Brothers* (2003) 111 Cal.App.4th 1328, 1352. This same court left undecided if the theory of implied contractual indemnity may ever be asserted against a public entity.

339. *Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396.

340. *Id.*

contracts and public agency contracts.³⁴¹ Numerous statutes deal with the interpretation of contracts,³⁴² and the rules are purportedly “well-settled.”³⁴³ Basic principles include:

- “The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”³⁴⁴
- Courts must interpret contractual language in a manner which “gives force and effect to every provision, and not in a way which renders some clauses nugatory, inoperative or meaningless.”³⁴⁵
- Courts will “interpret [contracts] to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.”³⁴⁶
- “[Mutual] intent is to be inferred, if possible, solely from the written provisions of the contract.”³⁴⁷
- “In construing a contract which purports on its face to be a complete expression of the entire agreement, courts will not add thereto another term, about which the agreement is silent.”³⁴⁸
- In construing a contract, a court will consider a particular provision paramount over a general provision.³⁴⁹
- A court will consider evidence of custom and usage, so long as the contract does not express a contrary intention.³⁵⁰ Usage can be invoked only to interpret, not create contractual terms.³⁵¹ If the construction contract expresses a term “clearly and unambiguously,” usage or custom that would vary or contradict the term is not relevant.³⁵²

Thus, contract interpretation starts by reading the plain language of the contract using a dictionary to discern the meaning of the words used.³⁵³ Because public agencies usually prepare their contracts without negotiation, courts will often interpret ambiguous contract terms against the public agency as the drafting party, citing Civil Code Section 1654.³⁵⁴

341. Civil Code sections 1635, 1638, 1639; *M.F. Kemper Construction Co. v. City of Los Angeles* (1951) 37 Cal.2d 696, 704; *Pacific Arch. Collaborative v. State Of Calif.* (1979) 100 Cal.App.3d 110, 123

342. Civil Code sections 1636 – 1656.

343. See generally, *The Ratcliff Architects v. Vanir Construction Management, Inc.* (2001) 88 Cal.App.4th 595, 601-602.

344. Civil Code section 1641; see also *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473.

345. *City of Atascadero, supra*, 68 Cal.App.4th at p. 473; see also Code of Civil Procedure section 1858.

346. Civil Code section 1636.

347. *Culligan v. State Comp. Ins. Fund* (2000) 81 Cal.App.4th 429, 434.

348. *Southern Cal. Gas Co. v. Ventura Pipeline Const. Co.* (1957) 150 Cal.App.2d 253, 257.

349. Code of Civil Procedure section 1859.

350. Civil Code section 1655 provides that “Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which *the contract manifests no contrary intention.*” (Emphasis added.) As Witkin explains, “[u]sage and custom may be looked to, both to explain the meaning of language and to imply terms, where no contrary intent appears from the terms of the contract.” (1 Witkin, Summary of Cal. Law, (9th Ed.) Contracts, section 696, p. 629.)

351. *Id.* at p. 630.

352. *Varni Bros. Corp. v. Wine World, Inc.* (1995) 35 Cal.App.4th 880, 889.

353. Civil Code section 1638, 1639.

354. *McGuire & Hester v. City and County of San Francisco* (1952) 113 Cal.App.2d 186, 189-90.

C. Change Order Interpretation

The parties generally negotiate change orders. Most change order do not contain a “integration clause,” and even if they do, courts will generally admit evidence of negotiations and discussions of the change order in order to interpret, explain, or clarify the language used in the change order.³⁵⁵

D. Notice Of Claim Requirements

California statutes and caselaw support the enforceability of contract claims procedures,³⁵⁶ as does federal practice.³⁵⁷ Public works contracts often require prompt notice, and documentation and pricing of change orders and claims, on penalty of waiver of the claim. Courts enforce claim notice and documentation requirements.³⁵⁸ How these rules will apply to contracts subject to Public Contract Code § 9204 is undetermined, as discussed in prior sections of this manual.

In the federal courts, the rule is stricter, and should be cited by the public entity in support of its position.³⁵⁹ The United States Supreme Court has also held invalid all premature federal claims filed before completion of nonjudicial remedies.³⁶⁰ Under the Contract Disputes Act, obtaining a final decision is a jurisdictional prerequisite to any subsequent action before a Board of Contract Appeals or the trial court.”³⁶¹

E. Role Of Federal Case Authority

In construction matters, where California state precedent is lacking, California courts will often turn to federal construction law.³⁶² Decisions from all federal circuits may be cited, although California courts tend to cite decisions from the United States Court of Appeals for the Federal Circuit.³⁶³

355. *Pacific Gas and Electric Company v. G.W. Thomas Drayage & R.C.O.* (1968) 69 Cal.2d 33, 40.

356. Government Code Section 930.2; *Greg Opinski Construction, Inc. v. City of Oakdale* (2012) 199 Cal.App.4th 107, 1118; *Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887; *A. Teichert and Son, Inc. v. State of California* (3rd Dist. 1965) 238 Cal.App.2d 736; *Chas. L. Harney, Inc. v. State of California* (1963) 217 Cal.App.2d 77; *Bares v. City of Portola* (1954) 124 Cal.App.2d 813, 821.

357. *United States v. Holpuch* (1946) 328 U.S. 234.

358. *Greg Opinski Construction, Inc. v. City of Oakdale* (2012) 199 Cal.App.4th 1107, 1118; *Acoustics, Inc. v. Trepte Constr. Co.* (1971) 14 Cal.3d 887; but see *Weeshoff v. Los Angeles County Flood Control District* (1979) 88 Cal.App.3d 579 (public entity waived requirement by its conduct, there, ordering extra concrete work, observing and approving its installation).

359. *United States v. Holpuch* (1946) 328 U.S. 234.

360. *McNeil v. United States* (1993) 508 U.S. 106, 113.

361. *Raytheon Co. v. US* (Fed. Cir 2014) 747 F. 3d 1341, 1354.

362. *Pacific Arch. Collaborative v. State Of Calif.* (1979) 100 Cal.App.3d 110, 125; *State of California Ex Rel. Dept. of Transportation v. Guy F. Atkinson Company* (1986) 187 Cal.App.3d 25. For private contracts, see *C. Norman Peterson v. Container Corp. of America* (1985) 172 Cal.App.3d 628.

363. *Howard Contracting, Inc. v. G.A. McDonald Construction Co.* (1998) 71 Cal.App.4th 38. The District of Columbia Federal Circuit Court is considered the most prestigious federal appeals court, partly because it is where five Supreme Court justices served before presidents chose them for the high court. Current D.C. Circuit alumni on the Supreme Court are Chief Justice John Roberts, Clarence Thomas, and Ruth Bader Ginsburg.

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