Required Contract Terms and Requirements for All Construction Contracts and Claims Arising Therefrom

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Published on www.lorman.com - May 2020
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REQUIRED CONTRACT TERMS AND REQUIREMENTS FOR ALL CONSTRUCTION CONTRACTS AND CLAIMS ARISING THEREFROM

- WHAT'S NEW? §9204.

Public Contract Code section 9204 became effective January 1, 2017 and requires that construction contracts of all local agencies and certain state agencies contain a statutory claims procedure for processing contractor claims, paying undisputed amounts, and requiring mediation of disputed amounts. All public entities subject to Section 9204 must include in their bid documents either the text of the statute or an accurate summary. Any waiver of rights granted by the statute is void.

- WHAT'S NEW? §7203.

All delay damages must be liquidated. "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."

A. Overview Of Section 9204

1. Definition of Claim

Section 9204 defines a "claim" very broadly as a separate demand by a contractor sent by registered mail or certified mail with return receipt requested, for one or more of the following:

- A time extension, including, without limitation, for relief from damages or penalties for delay assessed by a public entity under a contract for a public works project.
- Payment by the public entity of money or damages arising from work done by, or on behalf of, the contractor pursuant to the contract for a public works project and payment for which is not otherwise expressly provided or to which the claimant is not otherwise entitled.
- Payment of an amount that is disputed by the public

2. How is it triggered?

The statute defines a "claim" broadly (section 9204(c)(1)), but to trigger the procedures, the contractor must send the "claim" to the public entity by registered mail or certified mail with return receipt requested.

3. What documentary support must the Claimant Submit? And when?

Section 9204 provides that: "The claimant shall furnish reasonable documentation to support the claim." Section 9204 (d)(1)(B). From the location of this language in the statute,

however, it is unclear when the claimant must submit this documentation – with the claim, or later when the public entity proceeds to review the claim.

4. What exactly is the section 9204 procedure?

The basic steps is section 9204 are found in sections 9204(d)(1) and 9204(d)(2), which set forth three basic steps:

(a) Step One: Claim Review and Initial Decision

Step one is stated in section 9204(d)(1)(A): "Upon receipt of a claim pursuant to this section, the public entity to which the claim applies shall conduct a reasonable review of the claim and, within a period not to exceed 45 days, shall provide the claimant a written statement identifying what portion of the claim is disputed and what portion is undisputed. Upon receipt of a claim, a public entity and a contractor may, by mutual agreement, extend the time period provided in this subdivision."

If necessary, "up to three days following the next duly publicly noticed meeting of the governing body after the 45-day period, or extension, expires to provide the claimant a written statement identifying the disputed portion and the undisputed portion."

(b) Step Two: Meet and Confer

Step one is stated in section 9204 (2) (A): "If the claimant disputes the public entity's written response, or if the public entity fails to respond to a claim issued pursuant to this section within the time prescribed, the claimant may demand in writing an informal conference to meet and confer for settlement of the issues in dispute. Upon receipt of a demand in writing sent by registered mail or certified mail, return receipt requested, the public entity shall schedule a meet and confer conference within 30 days for settlement of the dispute."

(c) Step Three: Mediation, DRB or Neutral Facilitator

Step three is stated in section 9204(B): "Within 10 business days following the conclusion of the meet and confer conference, if the claim or any portion of the claim remains in dispute, the public entity shall provide the claimant a written statement identifying the portion of the claim that remains in dispute and the portion that is undisputed. Any payment due on an undisputed portion of the claim shall be processed and made within 60 days after the public entity issues its written statement. Any disputed portion of the claim, as identified by the contractor in writing, shall be submitted to nonbinding mediation, with the public entity and the claimant sharing the associated costs equally."

Section 9204(C) defines mediation: "For purposes of this section, mediation includes any nonbinding process, including, but not limited to, neutral evaluation or a dispute review board, in which an independent third party or board assists the parties in dispute resolution through negotiation or by issuance of an evaluation. Any mediation utilized shall conform to the timeframes in this section."

5. OK, Then What?

Section 9204 provides two options either in lieu of or on completion of the three-step procedure.

Option 1 (requires mutual agreement): Go straight to litigation/arbitration. Option one is to mutually waive the meet and confer and proceed immediately to litigation or arbitration. Section 9204(f)(1) provides that "upon receipt of a claim, the parties may mutually agree to waive, in writing, mediation and proceed directly to the commencement of a civil action or binding arbitration, as applicable." This option seems straightforward, however, in practice it may raise issues on the scope of authority of the person waiving rights on each side.

Option 2 (applies absent mutual agreement): Complete the three-step procedure and then follow "applicable procedures outside this section." Section 9204(d)(1)(B), last sentence, provides that: "If mediation is unsuccessful, the parts of the claim remaining in dispute shall be subject to applicable procedures outside this section." The statute does not define the "other procedures."

6. Where do Government Code Section 910 and Government Code Section 930.2 fit in to all this?

If Government Code section 910 and section 930.2 apply at all, and how, appear to depend on which option the parties choose and what if any claim additional procedures the public entity places in its bid documents. It may also depend on whether the contracting entity is a charter city or county.

If the parties choose Option 1 then the question appears answered. Under Option 1 above, the parties may "mutually agree to waive, in writing," the meet and confer and mediation requirements, and proceed immediately to litigation or arbitration. The statute says nothing about Government Code section 910 *et seq.*, or Government Code section 930.2. The statute leaves to the parties who can make the agreement and leaves unanswered what constitutes a "writing" or if anything substitutes for a writing.

If the parties choose Option 2 and complete the procedures, then "the dispute shall be subject to applicable procedures outside this section" -- on first impression, this means the Government Code procedures for a statutory claim. Although the Legislative History appears to presume that section 9204 supplants the Government Code, section 9204 does not contain an express statement.

Nonetheless, without permitted additions to the claim procedures (below), however, a court may find the statutory process an effective substitute for a Government Code Claim either as a matter of statutory interpretation of section 9204 or on the basis it is a "claim procedure by agreement" under Government Code section 930.2.

7. Can a Public Entity Require a Dispute Review Board, Facilitated

Dispute Resolution, Project Neutral, or Other Dispute Resolution Procedure In Lieu of a Section 9204 Mediator?

The answer to this question is yes. Section 9204(d)(2)(C) provides:

> For purposes of this section, mediation includes any nonbinding process, including, but not limited to, neutral evaluation or a dispute review board, in which an independent third party or board assists the parties in dispute resolution through negotiation or by issuance of an evaluation. Any mediation utilized shall conform to the timeframes in this section.

Although the construction industry often uses a single project-neutral or mediator to help resolve disputes at the project level, there are many options for employment of project neutrals. The independent project-neutrals hear disputes at meetings, render recommendations, and if authorized, may issue written reports on contract disputes between the public entity and contractors. Public projects let by local public agencies (cities, counties, special districts), have not traditionally employed project neutrals; however, with section 9204, they may begin to evaluate these procedures.

The cost and administration required for Dispute Review Board procedures and for active project neutrals have often limited their use to larger projects. There are, however, many exemplars available from state and local agencies of programs for smaller projects. For example, for projects with a total bid of $3 million to $10 million, Caltrans has procedures and flow charts for a Dispute Resolution Advisor (DRA).

As the statute is written, it is conceivable that either the claimant or the public entity could take the position that a different mediator hear each separate claim. If this becomes an issue in implementing the statute is undetermined.

B. What Are The Drafting And Practice Issues?

As public entities assemble bid packages and conduct bidding of projects under the new statute, a couple of practice points are arising with frequency.

1. Additional or Pre-Existing Change Order, Claim, and Dispute Resolution Procedures

Although Section 9204 is long and detailed, it is not comprehensive. Public entities may prescribe additional change order, claim, and dispute resolution procedures, provided they do not conflict with the statute. A late senate floor amendment to the statute, now set forth in Section 9204(f)(2), makes this clear:

> [A] public entity may prescribe reasonable change order, claim, and dispute resolution procedures and requirements in addition to the provisions of this section, so long as the contractual provisions

do not conflict with or otherwise impair the timeframes and procedures set forth in this section.

This final amendment to the statute appears to permit the continued use by public entities of contract procedures defining categories of recoverable costs, requiring time delay analysis and evidence of actual costs, requiring notice of potential claims, timely documentation of potential claims, and requirements for jobsite negotiations of disputes that may become claims.

The more difficult issue concerns how the statute applies to contract notice of claim requirements that include claim waiver features, or that otherwise pre-decide or render moot a later statutory claim and public entity decision. Section 9204(f)(2) was literally a "last minute" amendment and is not well coordinated with the rest of the statute. For now, it is safe to say that advance claim waivers present a different set of issues that are unsettled and upon which reasonable minds could differ.

It seems reasonable, however, that contract managers choosing claim provisions for new bid packages may want to consider alternatives to self-executing claim waiver clauses. One example is the progressive "claim information" requirements inventoried at project closeout used in the 2015 Edition of the State of California Standard Specifications, more commonly known as the "Caltrans specs." While these provisions impose claim waivers in certain circumstances, they are not predetermined during the course of the work.

In any event, whatever claim procedures the contract manager selects will need to comply with Section 9204's prohibition against impairments to the statutory claim review, payment and meet and confer procedures. The statute's stated purpose is to ensure timely payment of undisputed amounts, which may serve as a litmus test for assessing additional claim procedures and Section 9204 compliance.

An additional drafting challenge posed by Section 9204 pertains to the continued effect, if any, of the claim procedure by agreement provisions of Government Code section 930.2. Although the legislative history of Section 9204 indicates the lawmakers assumed the new claim procedure would supplant the Government Code procedures, the statute is silent about the Government Code and contains several provisions that could imply the opposite. The bottom line is that the interplay of Public Contract Code Section 9204 and the Government Code claim procedures is an open question. Consequently, the contract manager choosing claim provisions may reasonably elect to add express recitals about Government Code Section 930.2 and procedures that follow in the event of an unsuccessful mediation.

2. Mediation procedures

Section 9204 provides that for any claim remaining unresolved, the parties must agree upon a mediator, mediators or other facilitated dispute resolution procedure. The statute provides that mediation is non-binding, but otherwise does not address the specifics of confidentiality, mediator qualifications, time or place. More importantly, the statute appears susceptible to an interpretation that either party may require a different mediator for different claims.

Up until 2017, the majority of local public entity construction contracts did not contain procedures for a project neutral, dispute review board, mediator or other dispute management procedure. For smaller projects, the cost of even a mediator may seem high. There are, however, procedures available for small and moderate sized projects. An example is again found in the Caltrans practices, which have a process for a project neutral on projects as small as $3 Million. Procedures for a project neutral can also be found in the current forms of contracts published by the American Institute of Architects and ConsensusDOCS, and on the JAMS website.

In any event, mediation or some form of project neutral is now the norm for California public works, and public entities will need to develop their own policies and procedures for its implementation.

C. Public Contract Code Section 7203.

Section 7203 provides that a public works contract entered into on or after January 1, 2016, that contains a clause expressly requiring a contractor to be responsible for delay damages, as defined, is not enforceable unless the delay damages have been liquidated to a set amount and identified in the public works contract. A public agency may include 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. The effect is to limits the scope of consequential damages arising from a breach of a public works contract to cover only "delay damages," defined as damages incurred by a 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.

Section 7203, however, does not apply to state departments.

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