

Public Works Update

May 8, 2019

Presented by
Maggie W. Stern



Welcome!

- Introductions
- Overview
 - Statutory Updates
 - Case Law Updates
 - Contract Template Hygiene



Ca. Uniform Public Construction Cost Accounting Act

- CUPCCAA is codified at Public Contract Code section 22000.
- CUPCCAA is a tool by which local public agencies may adopt higher bid thresholds in exchange for increased oversight by the Uniform Construction Cost Accounting Commission.

Ca. Uniform Public Construction Cost Accounting Act

- CUPCCAA's bid thresholds apply to “public projects”
 - Construction, alteration, repair of public facilities
 - Painting and repainting of public facilities
- Excludes maintenance
 - Routine, recurring, and usual work for the preservation of facilities
 - Minor repainting
 - Resurfacing of roads at less than 1 inch
 - Landscape maintenance

Ca. Uniform Public Construction Cost Accounting Act

- AB 2249 – Increase in solicitation thresholds:
 - Agencies may self-perform projects of \$60,000 or less
 - Projects of \$200,000 or less may be let by CUPCCAA's informal solicitation procedures
 - Projects of more than \$200,000 must be let by formal solicitation procedures
- Effective January 1, 2019

Ca. Uniform Public Construction Cost Accounting Act

- In the event a CUPCCAA agency receives bids in excess of \$200,000 in response to an informal bid solicitation, the agency may award a contract of up to \$212,500 upon:
 - 4/5 vote of the legislative body
 - And a finding that the agency's cost estimate for the project was reasonable

Ca. Uniform Public Construction Cost Accounting Act

PRACTICE POINTER: You may need to review your city's purchasing policy or ordinances to see if any revisions are necessary to update the solicitation thresholds.

Local Preference

- Under Public Contract Code section 2002, where responsibility and quality are equal, a city may apply a local small business preference to allow local contractors to compete effectively.
- This preference may be applied to contracts for construction, professional services, and goods.

Local Preference

- AB 2762 amends Public Contract Code section 2002, as follows:
 - Authorizes an increase to the local preference granted in construction and other procurements from 5% to 7%
 - Sets a cap on total value of local preference to \$150,000

Local Preference

- AB 2762 also enacted Public Contract Code section 2003, which established a pilot program for local agencies in 11 counties to also apply a disabled veteran business or social enterprise preference in awarding contracts.
 - *Alameda, Contra Costa, Lake, Los Angeles, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma*

Local Preference

- Collectively, preferences for small businesses, disabled veteran business, and social enterprise businesses may not exceed 15% of the lowest bid or a maximum of \$200,000.
- The pilot program for disabled veteran business and social enterprise preferences is set to run through 2024.

Local Preference

PRACTICE POINTERS:

1. If your city uses a small business local preference, you may want to evaluate whether to increase the preference to 7%.
2. If you are in an eligible county, evaluate whether to adopt a disabled veteran business preference or social enterprise preference.

Bidding

- *West Coast Air Conditioning Co. Inc. v. California Department of Corrections* (2018) 21 Cal.App.5th 453
- The CDCR issued an invitation to bid on an HVAC project for its Ironwood Prison in February 2015.
- The call for bids stated that the “[a]ward of the contract, if it will be awarded, will be to the lowest responsible bidder whose proposal complies with all requirements prescribed.”

Bidding

- Trial Court:
 - West Coast alleges that Hensel Phelps' bid was defective:
 - Failed to list the license numbers of 17 subcontractors
 - Typographical and mathematical errors
 - Revisions made to Hensel Phelps' bid after the deadline
 - West Coast sought an injunction and alleged a cause of action for promissory estoppel based on CDCR's promise to award, if at all, to the lowest responsive responsible bidder.

Bidding

- Trial Court:
 - West Coast successfully moves to set aside the contract award but CDCR issues a notice to proceed anyway
 - Ultimately, West Coast gets a preliminary injunction to stop the work

Bidding

- Appeal:
 - Fourth District Court of Appeal affirms the award of \$250,000 in bid preparation costs after concluding that the injunction alone does not provide adequate relief to West Coast

Bidding

PRACTICE POINTERS:

1. If you receive a bid protest for a project, note any deficiencies in the protesting party's bid in your response to the protest to preserve the argument in the event of litigation.
2. If a court finds that you improperly awarded a project, stop work immediately.
3. If you have awarded a project improperly, award the project to the next lowest bidder.

Subcontractor and Subletting Fairness Act

- *JMS Air Conditioning & Appliance Service, Inc. v. Santa Monica Community College District* (2018) 30 Cal.App.5th 945
 - Prime HVAC contractor attempts to substitute out its subcontractor JMS after contract award
 - Second District Court of Appeal affirms substitution

Subcontractor and Subletting Fairness Act

- Substitutions of subcontractors on competitively bid projects are governed by Public Contract Code section 4107. As pertinent in the JMS case, under Section 4107(a)(3) an agency may consent to the substitution of a subcontractor in the event the subcontractor fails or refused to perform the work. Further, under Section 4107(a)(6) an agency may consent to the substitution of a subcontractor; the subcontractor is not licensed under the contractor's license law.

Subcontractor and Subletting Fairness Act

- Appeal:
 - Hearing officer had authority to hear the appeal
 - Substitution was proper because the subcontractor was not properly licensed to perform the boiler work on the project

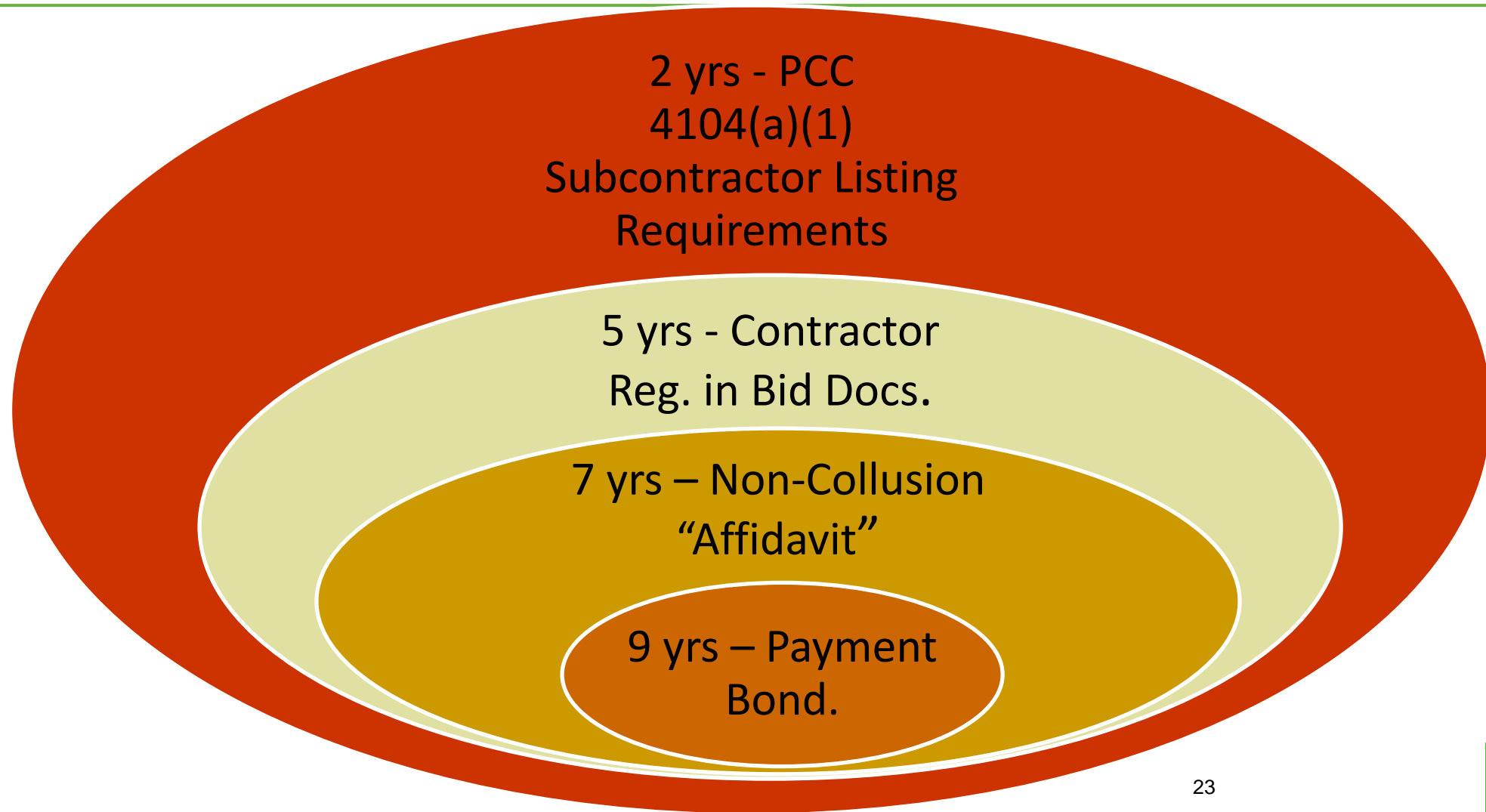
Subcontractor and Subletting Fairness Act

- *Synergy Project Management v. the City and County of San Francisco* (2019) 33 Cal.App.5th 21
 - City of San Francisco exercises contractual provision authorizing it to direct the removal of a subcontractor

Subcontractor and Subletting Fairness Act

- *Synergy Project Management v. the City and County of San Francisco* (2019) 33 Cal.App.5th 21
 - City may initiate substitution proceedings

Reading the Rings of your Public Works Contracts



Thank You!



For more information, please visit us at
www.kmtg.com.

