Public Works Procurement Update

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PUBLIC WORKS
PROCUREMENT UPDATE 2019

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PUBLIC WORKS PROCUREMENT UPDATE 2019

The following is a summary of legislation and case law issued between January 1, 2018 and March 25, 2019 relevant to public contracting for California cities, organized by topic.

I. CALIFORNIA UNIFORM PUBLIC CONSTRUCTION COST ACCOUNTING ACT

A. AB 2249 – Increase in CUPCCAA Solicitation Thresholds

The California Uniform Public Construction Cost Accounting Act ("the Act") has been amended by the Legislature to increase its solicitation thresholds. Assembly Bill ("AB") 2249 was enacted on August 20, 2018 and took effect on January 1, 2019. The bill amended the Act, which only applies to agencies, including cities, whose governing boards have elected, by resolution, to become subject to uniform construction cost accounting procedures located at Public Contract Code section 22030 et seq.

The Act previously authorized public projects of $45,000 or less to be performed by the employees of a public agency, authorized public projects of $175,000 or less to be let to contract by informal procedures, and required public projects of more than $175,000 to be let to contract by formal bidding procedures.

AB 2249 amended the Act to increase the thresholds for the solicitation. The Act now authorizes public projects of $60,000 or less to be performed by the employees of a public agency, authorizes public projects of $200,000 or less to be let to contract by informal

procedures, and requires public projects of more than $200,000 to be let to contract by formal bidding procedures. In the event all bids received for the performance of a public project, which was informally solicited, are in excess of $200,000, the city may award the contract at $212,500 or less to the lowest responsible bidder if it determines the cost estimate of the public agency was reasonable.

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.

II. LOCAL PREFERENCE

A. AB 2762 – Increase Authority for Small Business Local Preference

Public Contract Code section 2002 authorizes local agencies to give a preference to local small business enterprises in the award of construction, goods procurement, and service contracts. AB 2762 was enacted on September 21, 2018, and became effective on January 1, 2019. The bill increases the preference to be afforded small local businesses, and adds a pilot program for two new categories of preference.

In the floor analysis, the authors of the bill noted that "[p]ublic procurement represents a significant source of potential business revenue. A growing number of local agencies are

seeking ways to leverage these ongoing government expenditures with public procurement policies that result in reinvestments in local communities. The authors have introduced this measure to increase the number of small businesses, disabled veteran-owned businesses, and social enterprises participating in public contracting."

More particularly, AB 2762 amended Section 2002 to increase the maximum value of a small business procurement preference used by a local agency when awarding a contract based on the lowest responsible bidder from 5% to 7% of the lowest responsible bidder and set a maximum financial value of $150,000.

The bill also authorizes a pilot project to allow local agencies with the counties of Alameda, Contra Costa, Lake, Los Angeles, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma to establish a disabled veteran business preference and/or a social enterprise preference for use in public contracts for construction, goods or services awarded to the lowest responsible bidder. This pilot program has been codified at Public Contract Code section 2003. Under Section 2003(a)(1)(B), when more than one preference is applied to a bid package, the maximum percentage value of multiple preferences shall be no more than 15% of the lowest responsible bidder and a maximum financial value of multiple preferences at no

more than $200,000. The pilot program will be effective January 1, 2019, through January 1, 2024.

PRACTICE POINTER: If your city uses a small business local preference, you may want to evaluate whether to increase the preference to 7%.

III. BIDDING

A. *West Coast Air Conditioning Co. Inc. v. California Department of Corrections & Rehabilitation*

In *West Coast Air Conditioning Co. Inc. v. Department of Corrections & Rehabilitation* (2018) 21 Cal.App.5th 453, California's Fourth Appellate District Court of Appeal considered whether a bidder was entitled to recover bid preparation costs under a promissory estoppel theory, after successfully challenging the award of a contract.

1. Background

In February 2015, the California Department of Corrections & Rehabilitation ("CDCR") published an invitation to bid for an HVAC project at its Ironwood Prison. The project involved building a new central plant to provide air conditioning for the prison and to reroof the prison. The work was to occur while the prison was fully operational and occupied.

In May 2015, CDCR awarded the contract to Hensel Phelps Construction Co. ("HP") for approximately $88 million after finding that HP was the lowest bidder. West Coast Air Conditioning Co. Inc. ("West Coast") was the next lowest bidder with a bid of about $98 million.

West Coast challenged the award of the contract by filing a petition for writ of mandate on the grounds that HP's bid "suffered from myriad defects, including failing to list the license numbers of about 17 subcontractors among other missing subcontractor information […]; submitting a bid containing 'typographical/arithmetical errors'; and submitting a revised bid after the deadline that included substantial alterations to the percentages of work that HP's subcontractors would perform." (*West Coast Air Conditioning Co. Inc. v. Department of Corrections & Rehabilitation* (2018) 21 Cal.App.5th 453, 456.) The petition also sought, in pertinent part, "'general damages in an amount sufficient to reimburse West Coast for its bid preparation costs' and interest." (*Ibid*.)

Despite the pending action, CDCR issued the notice to proceed to HP in July 2015, and HP commenced work. On September 11, 2015, the trial court granted West Coast's motion to set aside the contract, and also ruled that the contract should have been awarded to West Coast. On September 16, 2015, West Coast sent CDCR a demand that they cease work and requested that the project be awarded to West Coast. However, CDCR and HP proceeded with

work until West Coast finally obtained a temporary injunction on October 6, 2015. The permanent injunctions were granted to West Coast on December 11, 2015. In its December 11, 2015 order, the court agreed with CDCR's argument that the court could not compel CDCR to exercise its discretion to award the project to West Coast.

Prior to the trial of the Promissory Estoppel Cause of Action in May of 2016, the parties stipulated to the following:

> a. The bid documents published by CDCR for the Project stated a contract for the Project would be awarded to the lowest responsible bidder"; "b. CDCR received bids for the Project on April 30, 2015"; "c. CDCR awarded the Project contract to HP and on July 7, 2015, issued a notice to HP to proceed with the Project contract"; "d. Work on the Project began in July 2015"; "e. Pursuant to the temporary restraining order issued on October 6, 2015, CDCR and HP halted all work on the Project and have not recommenced any work"; "f. CDCR may endeavor to prove the amount of work completed by HP on the Project through declaration and documents"; and "g. West Coast's reasonable costs to prepare its bid submitted to CDCR on April 30, 2015 for the Project were and are in the sum of $250,000.

(*West Coast Air Conditioning Co. Inc. v. Department of Corrections & Rehabilitation, supra,* 21 Cal.App.5th 453, 457-458.)

At trial, CDCR argued for the first time that West Coast's bid was non-responsive. The court rejected this contention and, after finding that CDCR refused to award the contract to

West Coast, awarded West Coast $250,000 in bid preparation costs. CDCR appealed to California's Fourth District Court of Appeal.

2. Decision in the Court of Appeal

The Court of Appeal considered two issues, including whether West Coast's bid was responsive, and whether monetary damages may be awarded to a bidder who successfully challenges a contract award in the event injunctive relief is insufficient to achieve justice.

On the first issue, the Court found that there was overwhelming evidence in the record that West Coast's bid was responsive and lambasted CDCR for waiting until trial to allege that West Coast's bid was non-responsive.

PRACTICE POINTER: 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.

On the second issue, CDCR argued that West Coast obtained effective relief by obtaining the injunction in the trial court. In support of its argument, CDCR exclusively relied on *Kajima/ Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* ("*Kajima*") (2000) 23 Cal.4th 305, 308. The Court distinguished *Kajima*, notating that:

> *Kajima* makes clear that damages generally will not be available under a promissory estoppel theory **unless it is possible both to set aside the misawarded contract and to award the contract instead to the lowest responsible bidder**. Here, the HP contract was set aside by ordinary writ of mandate, thus satisfying the first

> "element" of *Kajima*. The difficulty in the instant case is the second "element"—awarding the contract to the next lowest responsible bidder. As noted ante, CDCR refused to award West Coast the contract to construct the subject project even after the writ of mandate issued.

(*West Coast Air Conditioning Co. Inc. v. Department of Corrections & Rehabilitation, supra,* 21 Cal.App.5th 453, 466 [emphasis added].)

Since CDCR refused to award the contract to West Coast, the Court of Appeal concluded that "the issuance of a permanent injunction in favor of West Coast, the lowest responsible bidder, without either an award of the public works contract to it or an award of damages equal to its bid preparation costs, would result in an inadequate remedy to West Coast." (*West Coast Air Conditioning Co. Inc. v. Department of Corrections & Rehabilitation, supra,* 21 Cal.App.5th 453, 468.) The Court also stated that "West Coast prepared its bid and incurred $250,000 in costs in reliance on CDCR's representation that if a contract was awarded, which turned out to be the case, it would be to the lowest responsible bidder, which turned out not to be the case," and was thus entitled to recover its bid preparation costs.

The Court went on to state that "[a]llowing West Coast to recover its bid preparation costs under the circumstances of this case will further the important public policies underlying the competitive bidding laws of 'encouraging proper challenges to misawarded public contracts

by the most interested parties, and deterring government misconduct." (*West Coast Air Conditioning Co. Inc. v. Department of Corrections & Rehabilitation, supra,* 21 Cal.App.5th 453, 468.)

IV. PREVAILING WAGES

A. *Allied Concrete & Supply Co. v. Baker*

In *Allied Concrete & Supply Co. v. Baker* (2018) 904 F.3d 1053, 1057, the Ninth Circuit Court of Appeals decided a case involving the question of whether California Labor Code section 1720.9, which requires the payment of prevailing wages to ready-mix concrete drivers on public projects, violates the Equal Protection Clause of the U.S. Constitution. As a federal case, *Allied Concrete* is not precedential in California, but the issue was interesting and the analysis was persuasive, so I share it with you here.

Allied Concrete & Supply Co., et al. (a group of ready-mix suppliers) ("Allied") challenged Section 1720.9 on the ground that it singled out ready-mix drivers for the payment of prevailing wages, while not requiring prevailing wages for other types of drivers, and thus violated the Equal Protection Clause.

The parties agreed that the rational basis test applied for the resolution of this issue. Under the rational basis test:

> non-suspect classifications are constitutionally valid if there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

(*Allied Concrete & Supply Co. v. Baker* (9th Cir. 2018) 904 F.3d 1053, 1060, *citing Armour v. City of Indianapolis* (2012) 566 U.S. 673, 681, (2012) [internal quotation marks omitted].)

The Court noted that one purpose of prevailing wages is to benefit and protect workers on public projects, and "the legislature could have rationally decided that the delivery of ready-mix to a public work is part of the 'flow of construction' and should be compensated as such." (*Allied Concrete & Supply Co. v. Baker, supra,* 904 F.3d 1053, 1062.) At one of the hearings on the bill to adopt Section 1720.9, a representative for the International Brotherhood of Teamsters stated:

> These workers are part of the construction process. That's what's different and unique about this from any other material coming to the job site. You can . . . it's not dumping a load of lumber or a bag of nails or whatever and leaving. They bring this commodity—which is perishable—and [it] has to be incorporated immediately and the driver participates in the incorporation process with the workers. They are part of it. They move the truck. They operate levers and equipment that moves the concrete and the rate of flow in conjunction with the construction workers. They are integral to the process.

The legislative records show that the legislators considered the above statement, and that it influenced their decision-making. One legislator offered in response, "I will be supporting the bill today. I do get the distinction between the product we're talking about and delivering in effect, dumping a delivery of pipes or paint or steel. This is a different commodity." (*Allied Concrete & Supply Co. v. Baker, supra,* 904 F.3d 1053, 1062.)

The Court also found that the legislature could have had a rational basis to believe that requiring the payment of prevailing wages for ready-mix drivers could help ensure superior projects, because the quality of ready-mix drivers is more important than the quality of other drivers for public works projects. The Court determined that the legislature could have rationally believed that "ready-mix drivers have unique responsibilities that are more important to the success of a public works project; and that ready-mix is more often used in 'structural' projects." (*Id*. at 1063.) In addition, the Court determined that the legislature could have rationally believed that the application of prevailing wages to ready-mix drivers on public projects would protect from underbidding, and allow union contractors to compete with union contractors for public contracts, and thereby ensure a certain standard of worker on public projects.

The Court concluded that the California Legislature had a rational basis for finding that ready-mix drivers are more integral to public works projects than other drivers. Thus, there is a rational governmental basis for Labor Code section 1720.9's treatment of ready-mix drivers as different from other drivers on public works projects, and thus Section 1720.9 does not violate the Equal Protection Clause of the U.S. Constitution.

V. SUBCONTRACTOR AND SUBLETTING FAIRNESS ACT

A. *JMS Air Conditioning & Appliance Service, Inc. v. Santa Monica Community College District*

JMS Air Conditioning & Appliance Service, Inc. v. Santa Monica Community College District (2018) 30 Cal. App. 5th 945 was filed on December 17, 2018 by the Second Appellate District. The Santa Monica Community College District ("District") entered into a construction contract with Bernards Bros., Inc. ("Bernards") for a new facility. Bernards listed JMS Air Conditioning & Appliance Service, Inc. ("JMS") as a subcontractor on the project, which was designated to install the HVAC system for the facility. After the contract was awarded, Bernards contacted the District to request permission to substitute out JMS as a subcontractor on the grounds that JMS has "failed or refused to perform its subcontract obligations and may not be properly licensed for portions of its work pursuant to the contractor's license law." (*JMS Air*

Condition & Appliance Service, Inc. v. Santa Monica Community College District (2018) 30 Cal. App. 5th 945, 952.)

Substitutions of subcontractors on competitively bid projects are governed by Public Contract Code section 4107, which sets forth the conditions under which substitutions may be made. As pertinent to this 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.

The District forwarded Bernards' request to JMS, who objected, and thus triggering a Labor Code section 4107 substitution hearing. The District set the hearing date and designated the Santa Monica Community College facilities manager as the hearing officer.

At the heart of the matter, Bernards stated that there was plumbing and boiler work required for the job, which JMS could not perform without specialty licenses for those trades.

At the hearing Bernards presented an expert (a former Contractor's State License Board attorney) who opined that JMS was not properly licensed to perform the work under the contract, and in particular, that JMS's C-20 HVAC contractor license was not sufficient for the boiler work called for in the contract and that such work required a C-4 Boilers license.

Bernards' expert did not opine on whether plumbing work could be performed under JMS's C-20 license.

Following the hearing, the hearing officer sent out a letter approving Bernards' substitution request on grounds that JMS has failed to perform the work under the subcontract, and because JMS was not properly licensed for the boiler or plumbing work. The hearing officer's letter also stated that the boiler and plumbing work was not incidental or supplemental to the HVAC work and thus could not be covered by JMS's C-20 HVAC license, and those categories of work.

JMS challenged the hearing officer's decision by filing a writ of mandamus in the superior court. JMS argued that the hearing officer lacked jurisdiction to hold the substitution hearing, that it was denied due process, and that the hearing officer's decision was not supported by the evidence.

On appeal to the California's Second District Court of Appeal, the Court found that the hearing officer had authority to hear the appeal. JMS argued that in every other place in Section 4107, where the statute refers to the "awarding authority" it includes, "or its duly authorized officer." However, where the statute requires a hearing under Section 4107(a)(9), the statute only states that the "awarding authority" shall make the decision, and omits the phrase "or its

duly authorized officer." On those grounds, JMS argued that the legislature only intended for the legislative body of the District to be able to hold a substitution hearing.

The Court rejected this argument by JMS, finding instead that the overarching purpose of the Subcontracting and Subletting Fairness Act is to prevent bid shopping and bid peddling, and that allowing the District to have its authorized officer conduct the substitution hearing would facilitate that goal. The Court also rejected JMS's due process claims, noting that a substitution hearing did not concern a vested or fundamental right and that JMS has other legal recourse under its contract with Bernards to address its rights.

VI. BONUS TIPS – READING THE RINGS OF YOUR PUBLIC WORKS CONTRACTS

Just like an arborist can tell how old a tree is by looking at its rings, I can tell how out of date your public contract template is by reading its metaphorical rings as well. Here's a few things I look for when I first glance though a clients' public works front-end documents, in order to "date" the template:

1. **2 Years Out of Date** – If your subcontractor listing form does not include a space for the contractor to include the subcontractor's DIR registration numbers, then your contract documents may be 2 years, or more, out of date. Public Contract Code section 4104(a)(1) was updated effective June 27, 2017 to require that DIR contractor registration numbers be provided on all subcontractor forms submitted with bids.

2. **5 Years Out of Date –** If your notice inviting bids does not include a statement requiring contractor registration, then your contracts may be 5

years, or more, out of date. Labor Code section 1771.1 was added in 2014 and requires notice in all bid invitations that contractors must be registered pursuant to Labor Code section 1725.5 to be qualified to bid on a public project.

3. **7 Years Out of Date** – If your contract references a "Non-Collusion Affidavit," then your construction contract documents may be 7 years, or more, out of date. Public Contract Code section 7106 was updated in 2012, changing the name of the attestation to a "Non-Collusion Declaration" and providing new mandatory statutory language.

4. **9 Years Out of Date** – If your Payment Bond references Civil Code section 3181, your contracts may be 9 years, or more, out of date. The Legislature renumbered all the bond code sections in 2010, including moving Civil Code section 3181 to 9100.