

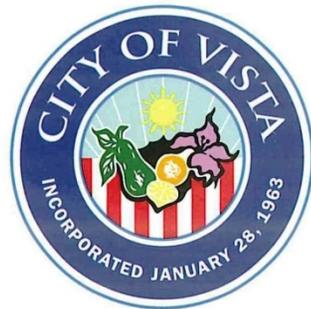
# Public Works Law and Litigation: New Developments in 2011

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Public Works Officers Institute  
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San Jose, CA  
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## LEGISLATION

# Contractor Licensing

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- AB 397 (Monning) (Chap 546, Stats of 2011)
  - Business & Professions Code § 7125.5
    - Evidence of workers' compensation coverage must be provided at time of license renewal
      - Recertify an existing exemption
      - Provide valid certificate of insurance or self-insurance
    - Does not impose any new duties on public agency employers

# Contractor Licensing

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- AB 1091 (Morrell) (Chap 168, Stats of 2011)
  - Business & Professions Code § 7068.2
    - Failure to replace the Responsible Managing Officer, Employee, Member or Manager within 90 days of disassociation results in an automatic suspension of the contractor's license
    - The CSLB can grant one 90-day extension for specific reasons only (formerly "good cause")
    - Does not impose any new duties on public agency employers

# Contractor Licensing

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- AB 1307 (Skinner) (Chap 734, Stats of 2011)
  - Business & Professions Code § 7145.5
    - Contractor's license can be refused or suspended for unresolved liabilities with the State Board of Equalization
    - Does not impose any new duties on public agency employers

# Contractor Licensing

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- SB 543 (Steinberg) (Chap 448, Stats of 2011)
  - Business & Professions Code § 490
    - Requires fingerprinting of applicants for boards of Professional Engineers, Land Surveyors, and Geologists
    - Does not impose any new duties on public agency employers

# Bids

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- SB 944 (Committee) (Chap 432, Stats of 2011)
  - Public Contract Code § 7106
    - The noncollusion affidavit is now a noncollusion declaration
    - Signed under penalty of perjury
    - Notarization is no longer required

# Retention

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- SB 293 (Padilla) (Chap 700, Stats of 2011)
  - Public Contract Code §§ 7201 & 10261
    - Retention cannot exceed 5%
      - Formerly 10%
      - Governing body can increase above 5% in the case of a “substantially complex” project
        - Must be in a “properly noticed and normally scheduled public hearing”
        - Finding and percentage must be in bid docs
        - Purports to apply to charter cities
      - Retention percentage for subcontractors cannot exceed that applicable to the prime contractor

# Uniform Construction Cost Accounting Act

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- ❑ AB 720 (Hall) (Chap 683, Stats of 2011)
- ❑ AB 943 (Williams) (Chap 110, Stats of 2011)
  - Public Contract Code § 22010 et seq.
    - ❑ Changes contracting limits under the UCCAA
    - ❑ Force account raised from \$30,000 to \$45,000
    - ❑ Informal procedures from \$125,000 to \$175,000
    - ❑ When bids exceed maximum, up to \$187,500 can be approved with a 4/5 vote without going to formal bidding

# Contractor Liability

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- SB 474 (Evans) (Chap 707, Stats of 2011)
  - Civil Code § 2782 et seq.
    - Revises contractor indemnity regulations
      - Currently cannot require contractor indemnification for sole or active negligence or willful misconduct
      - Now expanded to subcontractors and suppliers
      - Now applies to private non-residential construction contracts
      - Expands the definition of construction to include utilities
      - Subcontractor liability limited to subs scope of work
      - Effective January 2, 2013

# Labor Legislation

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- AB 436 (Solorio) (Chap 378, Stats of 2011)
  - Implements the 2009 Padilla legislation
    - SBx2 9 (Padilla) (Chap 7, Stats of 2009)
    - Labor Code § 1771.5
      - [http://www.dir.ca.gov/DLSE/CMU/CMU\\_Notice.pdf](http://www.dir.ca.gov/DLSE/CMU/CMU_Notice.pdf)
      - On January 1, 2012, requires awarding bodies undertaking certain public works projects to undergo direct prevailing-wage compliance monitoring by the new Compliance Monitoring Unit of the DLSE
      - Contracts for public works projects awarded on or after January 1, 2012, that use funds derived from any state-issued public works bonds...

# Labor Legislation

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- AB 514 (Hernández) (Chap 676, Stats of 2011)
  - Labor Code § 1720.3
    - Expands the definition of refuse hauling
      - Was formerly construction debris (*i.e.*, landfill bound material)
      - Now includes “soil, sand, gravel, rocks, concrete, asphalt, excavation materials”
      - Excludes recyclable metals separated prior to transportation to be sold at FMV
    - Refuse hauling requires the payment of prevailing wages

# Labor Legislation

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- AB 551 (Campos) (Chap 677, Stats of 2011)
  - Labor Code § 1775 et seq.
    - Expands penalties for prevailing wage violations
      - Daily penalty from NTE \$50 to NTE \$200
      - Minimum from \$10 to \$40
      - "Priors" w/in 3 yrs. from \$20 to \$80
      - Willful from \$30 to \$120
    - Two willful violations to produce certified payroll records within 3 years debars a contractor for 1-3 years as general or subcontractor on a public works project

# Energy Service Contracts

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- Last year's presentation:
  - SB 118 (Yee) (Current session, not yet enacted)
    - Government Code § 4217.12
      - Current law permits negotiated contracts for energy service contracts (conservation retrofits)
      - If this bill is adopted, these contract would be required to be competitively bid
- SB 118 was amended to deal with the State Controllers office, but...

# Labor Legislation

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- SB 136 (Yee) (Chap 405, Stats of 2011)
  - Labor Code § 1720.6
    - Adds work performed in connection with the construction or maintenance of renewable energy generating capacity or energy efficiency improvements to the definition of “public work” if
      - More than 50 percent of the energy generated is purchased or will be purchased by the state or a political subdivision of the state.
      - The improvements are primarily intended to reduce energy costs that would otherwise be incurred by the state or a political subdivision of the state

# Labor Legislation

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- SB 922 (Steinberg) (Chap 431, Stats of 2011)
  - Public Contract Code § 2500 et seq.
    - Authorizes project labor agreements
      - Prohibits discrimination generally, permits all contractors to bid, requires drug testing protocol
      - Must guarantee against work stoppages, strikes, lockouts, and similar disruptions
      - Requires disputes be resolved by a neutral arbitrator
    - Prohibits local charter/ordinances prohibitions on PLAs
      - If prohibited by charter, state funding is denied for the project after January 1, 2015

# Labor Legislation

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- AB 766 (Monning) (Chap 481, Stats of 2011)
  - Labor Code § 1776
    - Certified payroll records must currently be redacted for personal information (name, address and social security number)
    - Now the Joint Enforcement Strike Force on the Underground Economy and any law enforcement agency receive unredacted records
    - The public continues to receive redacted records

# Labor Legislation

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- AB 1236 (Fong) (Chap 691, Stats of 2011)
  - Labor Code § 2881 et seq.
    - “The Employment Acceleration Act of 2011”
    - No public agency can require the use of the federal E-Verify system (unless required by federal law) as:
      - A condition of receive a government contract
      - As a condition of receiving a business license
      - As a penalty for violating licensing or other similar laws

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## LITIGATION

# Charter City Litigation

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## SBCTCC v City of Vista

- Facial challenge to charter city exemption from prevailing wages
- Vista won in the trial court
- Vista won in the Court of Appeal
- Case is presently in the California Supreme Court
  - Case no. S173586
- Will be argued April 4, 2012

# Contractor License Classification

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- *Pacific Caisson & Shoring v. Bernards Brothers*, (8/19/2011) 198 Cal.App.4th 681
  - A subcontractor who holds a Class A license is able to perform excavation and support work on a project that requires a Class C-12 specialty license
  - Prime contract with the County of Ventura required a Class C-12 license
  - Court says § 7059 permits awarding authority to specify a license, but then holds that only applies to the original contract, not to a subcontractors license

# Claims Procedures

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- *Greg Opinski Construction v. City of Oakdale*  
(10/6/2011) 199 Cal.App.4th 1107
  - City sued for liquidated damages for late completion
  - Contractor sued for additional work
  - Contract provided changes in time/price require change order with mutual agreement or decision by project engineer
  - Contractor claims city caused delays but did not follow the claims procedure in the contract
    - Change order was required to get contract extension or price increase
    - Civil Code § 1511: parties may require written notice

# Trivial Defect

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- ❑ *Cadam v. Somerset Gardens Townhouse HOA*  
(09/28/2011) 200 Cal.App.4th 383
  - Trip and fall on sidewalk defect
    - ❑ Three-fourths to seven-eighths inch in depth
    - ❑ Noon on a sunny day, view was not obstructed
    - ❑ No jagged separation, shadows or debris obscuring defect
    - ❑ No protrusions from the separation
    - ❑ No one else had fallen there
  - Held, defect was trivial as a matter of law; no recovery
    - ❑ Lesson: be a private HOA, not the government?

# Payment Bond

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- *Eggers Indus. v. Flintco Co.* (12/5/2011) 201 Cal.App.4th 536
  - Flintco subcontracted with ASP for custom doors for Robert Mondavi Institute for Wine & Food Science
  - ASP subcontracted with Eggers who actually manufactured the doors; ASP was not required to install doors under contract; ASP did not pay Eggers
  - A material supplier to a material supplier is not covered by the payment bond but Eggers won
  - ASP was a subcontractor, not a materialman: it's what ASP agreed to do, not what it actually did, that determines whether it's a sub or a supplier

# Retention Escrows

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- *Westamerica Bank v. City of Berkeley*  
(12/5/2011) 201 Cal.App.4th 598
  - Arntz Builders had escrowed retention funds
  - Arntz objected to bank when city demanded funds and threatened to sue if bank released funds
  - Bank filed an interpleader action against city and Arntz and city demurred
  - Court sustained demurred; city had clear right to funds under the escrow agreement (which is dictated by statute—Pub. Con. Code § 22300)

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## LABOR COMPLIANCE

# Unified Projects

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## □ Prevailing Wages apply

- *Hensel Phelps Const. v. San Diego Unif. Port Dist. (7/26/2011) 197 Cal.App.4th 1020*
- *Oxbow Carbon & Minerals v. DIR (3/24/11) 194 Cal.App.4th 538*

# Tree Trimming

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- *Reliable Tree Experts v. Baker* (10/7/2011) 200 Cal.App.4th 785
  - Caltrans contract for ROW tree pruning and removal of diseased trees
  - Caltrans and DIR determined it was maintenance work and therefore subject to prevailing wages
  - Held, even though the majority of the work was tree removal, that is still maintenance work that must be done on a routine, recurring and usual basis

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