

# 2018 Legal Update

Presented by

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## Legal Update | Overview

- California Statutes
- California Case Law
- Federal “Super Circular”
- Consultant Conflicts

# California Statutes

## California Statutes | Overview

- SB 496 – Design Professional Duty to Defend
- AB 626\* – Construction Claims Procedure
- AB 92 – Extends 5% Retention Limit
- SB 693 – Skilled and Trained Workforce
- SB 96\* – Prevailing Wages
- AB 1066 & AB 199 – Tree Removal and Residential Projects
- SB 672 – Traffic-Actuated Signals
- AB 367, SB 330, AB 549 – Building Permits

## California Statutes

### SB 496 – DESIGN PROFESSIONAL DUTY TO DEFEND:

- Amends Civil Code § 2782.8 on indemnity
- Architect, Landscape Architect, Engineer, Land Surveyor
- Duty to defend limited to proportionate fault

**TAKEAWAY:** Design professional indemnity clause must comply with § 2782.8, or will be void and unenforceable.

## California Statutes

### AB 626\* - CONSTRUCTION CLAIM PROCEDURES:

- Adds Public Contract Code § 9204: Mandatory pre-litigation construction claim procedures
- Contracts entered into on or after January 1, 2017
- Expires January 1, 2020

**TAKEAWAY:** Claim procedures must comply with PCC § 9204.

## California Statutes

**AB 92 – EXTENDS 5% RETENTION LIMIT:**

- Extends 5% retention limit for 5 years (Public Contract Code § 7201)
- From January 1, 2018 to January 1, 2023

**TAKEAWAY:** Continue limiting retention to 5%.

## California Statutes

**SB 693 – SKILLED AND TRAINED WORKFORCE (STW):**

- Adds new PCC §§ 2600-2602 with STW requirements
- Applies to any STW requirements—not just design-build
- Monthly compliance report required

**TAKEAWAY:** Design-Build procurements must comply with new STW requirements.

## California Statutes

### SB 96\* - PREVAILING WAGES:

- Modifies and expands SB 854 requirements
- Adds penalties for local agencies
- Registration and CPR exemptions for small contracts

*TAKEAWAY:* Adopt and enforce internal procedures for DIR compliance and monitoring.

## California Statutes

### AB 1066 & 199 – TREE REMOVAL & RESIDENTIAL PROJECTS:

- Public project tree removal (Labor Code § 1720(a)(8))
- Successor agency private residential projects (Labor Code § 1720(c))
- Effective October 9, 2017, may be subject to prevailing wages

*TAKEAWAY:* Ensure that qualifying tree removal and successor agency projects comply with prevailing wage requirements.

## California Statutes

### SB 672 – TRAFFIC-ACTUATED SIGNALS:

- Eliminates sunset for Vehicle Code § 21450.5
- First placement of traffic-actuated signal or replacement of loop detector
- Install and maintain to detect bicycles and motorcycles

**TAKEAWAY:** Continue complying with VC § 21450.5.

## California Statutes

### BUILDING PERMITS:

- AB 367 - Amends Water Code § 106.4 to allow post-fire or disaster rebuild permit with transported water
- SB 330 - Adds H&S Code § 17951.5 to allow waiver or reduction of permit fees for disabled veterans
- AB 549 - Adds Govt. Code § 50031 to require notice to fire department of electric fence permit

**TAKEAWAY:** Update city code and train building permit staff as needed.

## California Case Law

## California Case Law | Overview

TWO 2015 CASES:

- *De Silva Gates v. Dept. of Transportation* – Failure to acknowledge addendum
- *East West Bank v. Rio School District* – Improper withholding of retention

## California Case Law

*DeSilva Gates v. Dept. of Transportation* (2015) 242 Cal.App.4th 1409:

- Improperly waived bidder's failure to acknowledge receipt of an addendum
- Improperly provided post-bid opportunity to acknowledge receipt of addendum
- Bidder had option to have bid disqualified without risking bid security

**TAKEAWAY:** Cannot waive or cure bidder's failure to acknowledge receipt of an addendum.

## California Case Law

*East West Bank v. Rio School District* (2015) 235 Cal.App.4th 742:

- Limits withholding "disputed" retention (PCC § 7107)
- *Proper use:* stop payments, completion of work, defect repair
- *Improper use:* withholding due to contractor's claim for additional compensation

**TAKEAWAY:** Retention cannot be withheld because of contractor claims for additional compensation.



## Federal “Super Circular”

### Federal “Super Circular” | Overview

“UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS | POST FEDERAL AWARD REQUIREMENTS PROCUREMENT STANDARDS” (2 CFR §§ 200.317-200.326)

- Applies to ALL federally-aided procurements, including FEMA funding
- Must comply by end of city’s fiscal year

## Federal “Super Circular”

### CITY ELIGIBILITY FOR FEDERAL FUNDING REQUIRES:

- Written procurement procedures
- Procedures must comply with state and local laws
- Procedures must “conform to applicable Federal law” and Super Circular standards

## Federal “Super Circular”

### WRITTEN PROCUREMENT PROCEDURES:

- Oversight requirements
- Standards of conduct
- Avoid unnecessary/duplicative expenditures
- Federal “responsibility” standards
- Records of procurement history

## Federal “Super Circular”

### WRITTEN PROCUREMENT PROCEDURES (CONT'D):

- Fair and open competition requirements
- No “geographical preferences”
- Clear descriptions and specifications
- Encourage MBE/WBE vendors
- “Appendix II” provisions in contracts

## Federal “Super Circular”

**TAKEAWAY:** Ensure City has written procurement procedures that comply with Super Circular by end of fiscal year.

# Consultant Conflicts

## Consultant Conflicts | Overview

NO SELF-DEALING WITH PUBLIC CONTRACTS (GOVT. CODE § 1090):

- Public agency officers and employees “shall not be financially interested in any contract made by them in their official capacity....”
- Consequences: Void contract, fines, and criminal liability
- Prohibition can also apply to consultants

## Consultant Conflicts

A CONSULTANT MAY BE SUBJECT TO § 1090 IF:

- Performing a “public function”
- Potential to exert “considerable influence over contracting decisions”
- Potential for financial gain

## Consultant Conflicts

2017 FPPC OPINION:

Architect that prepared preliminary study for planned new jail could not have contract amended to add *designing* the new jail because of the architect’s involvement in “making” the *design* contract.

## Consultant Conflicts

Construction contract may be void under § 1090 if the contractor was involved with “pre-construction services” for the project (including preparation of plans and specifications for the project).

*California Taxpayers Action Network v. Taber Construction, Inc.* (2017) 12 Cal.App.5th 115

*McGee v. Balfour Beatty Construction, LLC* (2016) 247 Cal.App.4th 235

*Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261

## Consultant Conflicts

**TAKEAWAY:** A consultant involved in preliminary activities that affect a contract or who is in a position to exert influence over contracting decisions should not be awarded the resulting contract. (*Avoid becoming the 2018 case!*)

## Wrap Up

## Key Takeaways

- Ensure design professional indemnity clause complies with Civil Code § 2782.8.
- Update construction contract templates to comply with AB 626 construction claim procedures.
- Adopt written procurement procedures to comply with Super Circular requirements by end of fiscal year.
- Avoid potential consultant/contractor conflict of interest.

Questions...??

Thank You!!

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