



Practical Tips for Reviewing Public Works Contracts

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**Gary Bell, City Attorney, Auburn, Town Attorney, Yountville,
Assistant City Attorney, Novato, Shareholder, Colantuono, Highsmith & Whatley**

**Matthew Summers, City Attorney, Barstow, Calabasas and Ojai,
Shareholder, Colantuono, Highsmith & Whatley**

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**LEAGUE OF CALIFORNIA CITIES
CITY ATTORNEYS PROGRAMMING
FALL 2022 CONFERENCE**

**PUBLIC CONTRACTING: KEY TIPS FOR
REVIEWING PUBLIC WORKS CONTRACTS**

Gary B. Bell, Shareholder

GBell@chwlaw.us

Matthew T. Summers, Shareholder

MSummers@chwlaw.us

COLANTUONO
HIGHSMITH
WHATLEY, PC

333 UNIVERSITY AVENUE, SUITE 200, SACRAMENTO, CALIFORNIA 95825 | (916) 400-0370

GRASS VALLEY | PASADENA | SACRAMENTO | SOLANA BEACH | SONOMA

I. INTRODUCTION

A “public works contract” is governed by public contract law, a disjointed array of statutes found throughout the state codes, municipal charters and codes, and local policies. Determining which requirements apply and advising clients accordingly makes reviewing these contracts tedious, at times, and replete with potential pitfalls. And the consequences for missteps are significant: contracts beyond the City’s power to make, e.g., that fail to follow statutory, charter, or municipal code procedures, are void (not voidable), cannot be ratified, and no estoppel to deny their validity can be invoked against the City.¹ Nor can a contractor providing services under a void contract recover in quasi-contract for work performed.² These rules flow from an axiom of public contract law: “Where the statute prescribes the only mode by which the power to contract shall be exercised, the mode is the measure of the power.”³

Accordingly, a City Attorney’s review of a public works contract is important. This paper provides tips for reviewing these contracts, an overview of the statutes applicable to this review, and a checklist that can be used and expanded upon. This paper is not intended as an exhaustive review of all things the City Attorney might consider when reviewing these contracts. For example, there are often unique requirements for federally funded projects, special rules under a charter or local ordinance, and that might apply to private projects funded with public funds, all of which are beyond the scope of this paper. We focus on requirements applicable to a “public project” as that term is defined in the Public Contract Code for general law cities including those that have voluntarily become subject to the Uniform Public Construction Cost Accounting Act.

As a disclaimer, we offer this overview of the requirements of California law without exploring the various regulations specific to a local agency. We recommend you evaluate each local agency and each specific project for their compliance with local requirements, as well as the restrictions or requirements imposed by California and other law.

¹ See, e.g., *Miller v. McKinnon* (1942) 20 Cal.2d 83, 88.

² *Ibid.*

³ *Id.* at pp. 91-92.

II. REVIEWING A PUBLIC WORKS CONTRACT

“Give me six hours to cut down a tree and I will spend the first four sharpening my axe,” or so the sixteenth President reportedly said.

The City Attorney should, if possible, carefully review and edit the entire bid package or “notice inviting bids” for compliance with statutory and local requirements governing public works project contracts. In practice, once bids are submitted, it may be too late to correct omissions without inviting a bid protest. And many of the statutory requirements in the attached checklist apply to the notice inviting bids as well as to the contract itself. This early review can ensure legal requirements are met and the client’s preferences, to the extent permissible, are accurately reflected in bid packages. Changing contract provisions after bids are submitted might give an unfair advantage to one bidder or another, or at least arguably so, thus increasing the likelihood of costly and lengthy disputes.

A bid package typically consists of:

- a notice inviting bids and describing the project,
- instructions to bidders,
- the contract,
- general conditions (e.g., the Greenbook or CalTrans specifications,
- special conditions), and
- various forms (e.g., workers’ compensation certification, bonds, insurance certificates, etc.).

a. WHAT LAW APPLIES?

Consider the following questions to determine the scope of your review:

1. Is the contract for a “public project”? For example, staff will sometimes mistakenly determine a “public work” under the prevailing wage provisions of the Labor Code is a “public project” under the Public Contract Code. While these provisions overlap, they are not coextensive. Generally, more projects are subject to the Labor Code, requiring payment of prevailing wages, than are subject to the bidding and other requirements of the Public Contract Code.
2. Is the contract with the City or an affiliated agency? The City Attorney is sometimes asked to review public works contracts for a Housing Authority, dependent special district, or City-created nonprofit. Different laws apply

depending on which agency is making the contract and sometimes competitive bidding is not required, although prevailing wages is generally required whenever public monies pay for all or part of a project.

3. Do the generally applicable provisions of Public Contract Code section 20160 et seq. apply, or has the City voluntarily become subject to Public Contract Code section 22000 et seq. (the Uniform Public Construction Cost Accounting Act “UPCCAA”)? Different bidding thresholds apply to these two statutory schemes. Do unique charter, municipal code, or policy provisions apply to a contract? The required procedures depend on the value of the contract (e.g., \$200,000 or above). Must the contract be approved by the City Council or another legislative body? Or can staff do so?
 - a. If the City has not opted into UPCCAA, then any public project contract over \$5,000 requires formal bidding and can only be let to the lowest responsive and responsible bidder — unless one of several exceptions applies.⁴ In addition to UPCCAA and its higher thresholds for formal bidding, informal bidding, and force account work, other laws allow alternative bidding and contracting procedures in specific situations, e.g. for qualifying renewable energy / energy efficiency projects, certain federal funds projects, via design-build contracts, or certain cooperative purchasing programs. In each of these cases, we recommend a City Attorney consult early and throughout the process with the City’s staff, as each of these special rules has specific rules regarding their application .
4. How will the project be funded — federal grant funds, state or local bond proceeds, others? Often funding sources impose specific requirements (e.g., incorporation of federal contracting provisions or restricted uses of bond proceeds). Additional requirements may apply if the project is a P3 (public-private partnership) contract — including carefully assessing who is the contracting entity and any applicable bond or financing covenants.
5. Has the client complied with CEQA and/or NEPA for the project? Do environmental mitigation measures or other agencies’ (BCDC, Coastal Commission, etc.) permitting requirements apply? These can and often should be included in the contract and are sometimes incorporated by reference.

⁴ Public Contract Code, § 20162.

6. Is the project part of a capital improvements program for which the City has considered General Plan consistency via the planning agency, typically the Planning Commission.⁵

b. REVIEWING THE CONTRACT

A “public works contract” — i.e., a contract for a “public project” as defined in the Public Contract Code — is subject to provisions of the Public Contract Code, the Government Code, the Civil Code, the Code of Civil Procedure, the Labor Code, the Business and Professions Code, the Health and Safety Code, and the Public Resources Code. While the Public Contract Code contains substantive and procedural requirements for these contracts, these other codes impose other substantive requirements. If another public agency is involved, additional requirements are likely as well. And federal funding almost always imposes federal contracting requirements and use of bond proceeds usually imposes additional restrictions, too. We recommend the following review steps to review a public works contract.

1. Ensure the bid package and contract are complete and include all documents: e.g., a project description, any special specifications [any unique materials or project components], any provisions putting the contractor on notice of unique or special rules for the project. Examples of needed special provisions include citing a certified EIR for an environmentally sensitive site with adopted mitigation measures to protect special-status species or a local ordinance prohibiting construction on weekends or grading during the rainy season.
2. Ensure the contract is internally consistent and consistent with all documents it incorporates by reference. Are defined terms used consistently? Do the contract and specifications conflict? The “Green Book” is typically used in Southern California and the Caltrans “Standard Specifications” is more commonly used in Northern California.
3. Does the contract include everything to which the contractor is to be bound? Ensure that any applicable local ordinances or special requirements derived from the project’s funding are stated in the bid package.
4. Is the bid sheet accurate and does it comply with the “instructions to bidders”?

⁵ Government Code, §§ 65401–65402.

5. Are subcontractors properly listed, with all the information required by the Subletting and Subcontracting Fair Practices Act?
6. Does the contract comply with the statutory provisions in the attached Public Contract Review checklist?

c. SPECIAL SITUATIONS

I) FEDERALLY FUNDED PROJECTS

Cities often accept federal grants for public works projects. If so, they are typically required to comply with federal laws and regulations governing how funds may be spent and documentation of expenditures.⁶ For instance, funds under the American Rescue Plan Act, which provided funds to state, local, and tribal government to respond to and recover from the COVID-19 public health emergency and resulting fiscal crisis are subject to specific requirements. The U.S. Department of the Treasury released a Final Rule for the Act, providing that funds could be used for projects that reduce energy consumption of public-owned treatment facilities, including installing energy efficient lighting, HVAC, and electronic equipment.

The Final Rule also noted that whether cities may spend money on public works projects “which enhance environmental quality, remediate pollution, promote recycling or composting, or increase energy efficiency or electrical grid resilience[,]” depends on whether these projects respond to the disproportionate impacts of the pandemic on certain communities and on the specific issue the projects address and a project’s connection to the pandemic’s public health and economic impacts.

The U.S. Department of Energy also supports a number of grant, loan, and financing programs that aid state and local governments.

The federal Office of Management and Budget (“OMB”) has issued guidance for use of federal funds by local agencies. These regulations are entitled Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, which has been termed the “Super Circular.” The Super Circular can be found at 2 Code of Federal Regulations Part 200. The Super Circular was updated in 2020 and 2021 and the citations in the California Municipal Law Handbook may not yet be current.

⁶ (Gov. Code, § 53702).

All procurement contracts involving federal money must be conducted so as to provide “full and open competition” consistent with the applicable federal procurement rules.⁷ A city may use any of five methods of procurement for a federally funded project:

- 1) Micropurchases;
- 2) Small purchase procedures;
- 3) Sealed bids (formal advertising);
- 4) Competitive proposals;
- 5) Noncompetitive negotiation.

a) FEDERALLY FUNDED CONTRACTS: MICROPURCHASES

A micropurchase is the acquisition of supplies or services using a simplified acquisition procedure. Generally, this procurement method is limited to purchases of \$10,000 or less.⁸ This amount is updated every five years for inflation via an updated federal regulation.⁹ Cities may award contracts for micropurchases without soliciting competitive quotes if it can document with research, experience, purchase history, or other information that the price paid is reasonable.¹⁰ Cities can also authorize use of the micropurchase method for contracts up to \$50,000 by ordinance, but must maintain documentation available to federal auditors explaining why it did so and documentation of any of the following:

- 1) A qualification as a low-risk auditee;¹¹
- 2) An annual internal institutional risk assessment;¹² or
- 3) For public agencies, a threshold consistent with state law.¹³

b) FEDERALLY FUNDED CONTRACTS: SMALL PURCHASE PROCEDURES

⁷ (2 C.F.R. § 200.319 (2022)).

⁸ (48 C.F.R. part 2, subpart 2.1).

⁹ 41 U.S.C. § 1908 [requiring adjustment of the threshold every year evenly divisible by 5].

¹⁰ (2 C.F.R. § 200.320(a)(1)(ii)).

¹¹ A “low-risk auditee” is an agency that meets the requirements in 2 C.F.R. § 200.520 for the preceding two audit cycles, such that an annual audit was performed and the auditor did not identify any deficiencies in internal controls or report a substantial doubt about the auditee’s ability to continue as a going concern.

¹² The CFR does not define “annual internal institutional risk assessment.”

¹³ (2 C.F.R. § 200.320(a)(1)(iv)).

A small purchase is of property, supplies, or services for a price greater than the micropurchase threshold but less than \$250,000.¹⁴ This amount is also updated every five years for inflation via an updated federal regulation.¹⁵ Cities may also establish a small purchase threshold less than \$250,000 based on internal controls, and evaluation of risk, and documented procurement procedures. Cities can use “small purchase procedures” for such purchases. Small purchase procedures require a city to get price or rate quotations from an adequate number of qualified vendors.¹⁶ Cities are still required to comply with state or local small-purchase dollar limits if they develop their own small purchase threshold.

c) FEDERALLY FUNDED CONTRACTS: SEALED BIDS

Sealed bids allow a city to publicly solicit bids and award a firm fixed-price contract (lump sum or unit price) to the lowest responsible bidder whose bid conforms with all material terms and conditions of the invitation for bids.¹⁷ For sealed bidding to be feasible, the following conditions should be present:

- 1) A complete, adequate, and realistic specification or purchase description;
- 2) Two or more responsible bidders are willing and able to effectively compete for the contract; and
- 3) The project is suitable for a firm fixed price contract and the selection of the successful contractor can be made primarily based on price.¹⁸

Cities that use the sealed bidding procurement method must formally advertise the invitation to bid and abide by these requirements:

- 1) Cities must publicly advertise and solicit bids from an adequate number of qualified sources and give these sources sufficient time to respond before the bids are opened;
- 2) The invitation for bids must include specifications and attachments allowing bidders to properly respond;

¹⁴ (2 C.F.R. § 200.320(a)(2)).

¹⁵ 41 U.S.C. § 1908 [requiring adjustment of the small purchase, aka “simplified acquisition threshold,” every year evenly divisible by 5].

¹⁶ (2 C.F.R. § 200.320(a)(2)(i)).

¹⁷ (2 C.F.R. § 200.320(b)).

¹⁸ (2 C.F.R. § 200.320(b)(1)(i)).

- 3) The bids must be publicly opened at the time and place specified in the invitation for bids; and
- 4) Payment discounts may only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of.¹⁹

Cities may reject any or all bids if they can demonstrate a sound reason. (*Id.*).

d) FEDERALLY FUNDED CONTRACTS: COMPETITIVE PROPOSAL PROCUREMENT

The competitive proposal procurement method is typically used when conditions are not appropriate for sealed bids.²⁰ Under this procurement method, cities publish a request for proposal and award a fixed-price or cost reimbursement contract to the lowest, responsive bidder. Use of this method is subject to four requirements:

- 1) The requests for proposals must be publicized and identify all evaluation factors and their relative importance. Proposals must be solicited from an adequate number of qualified offerors. Any response to publicized requests for proposals must be considered to the maximum extent practical;
- 2) The city must have a written method for conducting technical evaluations of the proposals received and making selections;
- 3) Contracts must be awarded to the responsible offeror whose proposal is most advantageous to the city, with price and other factors considered; and
- 4) The city may use competitive proposal procedures for qualifications-based procurement of architectural/engineering professional services, where an offeror's qualifications are evaluated and the most qualified offeror is selected, subject to negotiation of fair and reasonable compensation.²¹

Price can only be excluded as a selection factor for architectural/engineering professional services, often referred to as "qualifications-based procurement." Qualifications-based procurement cannot be used to purchase other types of services, even if provided by a typical architectural/engineering firm. By way of example, this

¹⁹ (2 C.F.R. § 200.320(b)(1)(ii)).

²⁰ (2 C.F.R. § 200.320(b)(2)).

²¹ (2 C.F.R. § 200.320(b)(2)(i)-(iv)).

contracting approach, excluding price as a selection factor, cannot be used to purchase prevailing wages compliance services from an architectural/engineering firm.

e) FEDERALLY FUNDED CONTRACTS: NONCOMPETITIVE NEGOTIATION

Noncompetitive negotiation or noncompetitive procurement allows a city to solicit a proposal from a single source or from multiple sources.²² Noncompetitive negotiation can only be used for federally funded projects in five specific circumstances:

- 1) The property or service sought is does not exceed the micropurchase threshold of \$10,000;
- 2) The property or service sought is only available from a single source;
- 3) An emergency exists that will not allow the city to suffer the delay required for a competitive solicitation;
- 4) The city receives written permission from the federal agency that awarded the funding;
- 5) The city deems competition inadequate after soliciting bids.²³

2) DESIGN-BUILD CONTRACTS – FOR PROJECTS OVER \$1 MILLION

Design-build contracts are public works contracts in which both design and construction services are contracted from a single entity. Design-build contracts are possible with any funding source. In the traditional design-bid-build method, the design and construction aspects of a public works project are conducted and bid by two different firms: a design firm and a construction firm. The rationale behind the design-build procurement method is that this method of contracting should be used when a contractor can combine functions and reduce project costs and complete the project more quickly. The design-build method reduces the risk cities face as to “delay claims” that arise out of contractors’ delay claims arising from the “city’s” plans (developed by the design professionals).

Cities may only use design-build contracts for public works projects valued at more than \$1 million.²⁴ Cities must also design a conflict-of-interest policy for such contracts.²⁵

²² (2 C.F.R. § 200.320(c)).

²³ (2 C.F.R. § 200.320(c)(1)–(5)).

²⁴ (Pub. Contract Code, § 22162, subd. (a)).

²⁵ (Pub. Contract Code, § 22162, subd. (c)).

Cities wishing to enter into a design-build contract must follow a four-step process.²⁶ **First**, the city must prepare documents stating the scope and estimated price of the project as well technical plans and specifications covering the quality of materials and equipment to be used. The plans must be prepared by a licensed design professional.

Second, the city issues a request for qualifications (RFQ) to create a shortlist of qualified design-build entities for the project.

Third, the city determines which companies have the experience, capability, and financial capacity to complete the project. The RFQ must include information about how the agency intends to evaluate proposed design-build entities.

Fourth, the city issues an RFP for final selection of a bidder based on competitive bidding or best value, including price, design, expertise, life-cycle costs, labor force availability, and safety record. Then the city awards the contract. Design-build entities cannot be prequalified unless they provide an enforceable commitment that they, along with all their subcontractors, will use “a skilled and trained workforce.”²⁷ This requirement does not apply, however, when the city has a project labor agreement governing the work.²⁸

City attorneys should be familiar with design-build contracts, especially because many solar-power and energy efficiency projects are design-build projects. The advantage of design-build contracts is that a city only has to contract with one bidder, making it easier for city staff to coordinate, especially if there are changes to the design of the project. Work may also be started sooner with the initial design of the project. The disadvantage of design-build contracts is that the city may find it difficult to evaluate different design proposals, especially with regard to their constructability and site suitability. And you get only what your specifications call for. One city built a city hall without specifying a drop ceiling to conceal wiring and plumbing work in the ceiling and, of course, had to pay extra to get that necessary component of the work.

3) COOPERATIVE PURCHASING — “PIGGYBACKING”

Under a local purchasing ordinance, cities may—without prior competitive bidding—contract with suppliers who have been awarded contracts by the state or other local agencies for the purchase of goods, information technology, and services. This is

²⁶ Pub. Contract Code, § 22164.

²⁷ (Pub. Contract Code, § 22164, subd. (c)).

²⁸ Project labor agreement means a “prehire collective bargaining agreement that establishes terms and conditions of employment for a specific construction project or projects and is an agreement described in Section 158(f) of Title 29 of the United States Code.” (Pub. Contract Code, § 2500).

often called “piggybacking” or intra-government purchasing.²⁹ The idea is that cities do not need to conduct their own competitive bidding process since one has already been conducted and doing so would be duplicative.

Such state contracts typically take the form of master agreements, price schedules, or multiple award schedules that allow the state to take advantage of leveraged pricing that can be obtained through the state’s buying power. The local agency may make these purchases directly from the vendors or the state may provide assistance to local agencies in making such acquisitions.³⁰

4) ENERGY CONSERVATION CONTRACTS

To promote energy conservation and use of renewable energy, the Legislature has adopted special contracting procedures for such projects. The Government Code defines the qualifying projects, such as those for energy conservation facilities, alternate energy equipment—such as solar, biomass, wind, geothermal, hydroelectric—and conservation measures and services.³¹

The Government Code also sets out a separate contracting procedure for these contracts. Cities can use future cost avoidance and savings from these energy projects to pay for the upfront costs of energy efficient measures through a guaranteed savings program (i.e., borrow to build the project and repay the loan from future energy savings). This contracting method is authorized by the Energy Conservation Contract statutes.³²

The law gives cities broad latitude to make these energy conservation contracts. As Government Code section 4217.18 states:

“The provisions of this chapter shall be construed to provide the greatest possible flexibility to public agencies in structuring agreements entered into hereunder so that economic benefits may be maximized and financing and other costs associated with the design and construction of alternate energy projects may be minimized. To this end, public agencies and the entities with whom they contract under this chapter should have great latitude in characterizing components of energy conservation facilities as personal or real property and in granting security interests in leasehold interests and components of the alternate energy facilities to project lenders.”

²⁹ (Pub. Contract Code, § 10298(a)).

³⁰ (See Pub. Contract Code, §§ 10298–10299, 12100–12113).

³¹ Gov. Code, § 4217.11 [“Energy conservation facility” means alternate energy equipment, cogeneration equipment, or conservation measures located in public buildings or on land owned by public agencies.].

³² Gov. Code, § 4217.10–4217.18.

Care must be taken to document the required findings and present them in the required public hearing. Such contracts are often done on a design-build basis and have the strengths and weaknesses of such contracts.

a) HEARING REQUIREMENT

To employ this contracting method, a city must hold a public hearing noticed two weeks in advance.³³ The public agency can use an RFP to select a qualified provider or can choose from a pool of qualified providers.

b) FINDINGS REQUIREMENT

Competitive bidding is not required for renewable energy and energy efficiency contracts. Instead, renewable energy and energy efficiency projects may be sole-sourced or procured through either a formal or informal request for proposals process under Government Code § 4217.10 *et seq.* if the city council is able to make two findings at a regular Council meeting, following a public hearing:

1. "That the anticipated cost to the public agency for thermal or electrical energy or conservation services provided by the energy conservation facility under the contract will be less than the anticipated marginal cost to the public agency of thermal, electrical, or other energy that would have been consumed by the public agency in the absence of those purchases.
2. "That the difference, if any, between the fair rental value for the real property subject to the facility ground lease and the agreed rent, is anticipated to be offset by below-market energy purchases or other benefits provided under the energy service contract."³⁴

"Conservation measures", "Conservation services" [meaning energy savings resulting from the imposition of conservation measures, "Energy conservation facility", and "Energy service contract" are defined by subsections (c) through (f) of Government Code § 4217.12.

No published case describes what constitutes sufficient findings. However, the statute gives cities broad authority as Government Code section 4217.18, quoted above, states. In making the necessary findings regarding the expected cost savings from the energy conservation services, as against the default price of regular energy, a City can rely on rate information from a consultant's study or rate projections from a public utility,

³³ (Gov. Code, § 4217.12).

³⁴ *Ibid.*

the Public Utilities Commission, the State Energy Resources Conservation and Development Commission, or available state energy rates projections.³⁵

Finally, the regular meeting at which the public hearing will be held (and the findings made) must be publicly noticed for at least 2. The resulting contract—whether a design-build contract, power purchase agreement, or other energy services contract—may be on the terms that are deemed to be in the best interest of the city.³⁶

Cities may separately enter into contracts and leases for energy conservation projects in any other manner authorized by law.³⁷

III. CONCLUSION

City Attorneys should consider these tips and issues when reviewing public works projects contracts. A successful contracting process begins with carefully evaluating what laws govern a project, whether and what kind of formal, informal, or other bidding is required, whether prevailing wages are required, and whether any additional, special requirements apply. Once the universe of applicable requirements is identified, then the City Attorney can use this memo and the attached checklist to ensure that each is met.

³⁵ (Gov. Code, § 4217.15).

³⁶ (Gov. Code, § 4217.13).

³⁷ (Gov. Code, § 4217.17).

PUBLIC CONTRACT REVIEW CHECKLIST

(Current as of 08/10/2022)

As a disclaimer, we offer this overview checklist of the requirements of California law without regards for the specific regulations that vary in each local agency. We recommend that each local agency and each specific project be evaluated separately for their compliance with local conditions, as well as the restrictions or requirements imposed by California and other applicable law. This checklist is not intended to be and should not be relied upon as a legal opinion or guarantee regarding public contracting requirements. As always, we recommend consulting your City Attorney.

I. **Elements of Contract:** A public works contract commonly consists of the following components:

1. Invitation for Bids
2. Instruction to Bidders
3. Bid Proposal and Bid Schedule
4. Agreement Form (may be very short)
5. Standard Specifications (may refer to Green Book or Caltrans Standard Specs)
6. Special Provisions
7. Mandatory Forms (i.e. non-collusion affidavit, worker's comp acknowledgment)
8. Insurance Certificates
9. Bonds

When reviewing any contract, it is important to make sure that all of the contract elements are provided as some mandatory statutory provisions are required to be in some of the documents and not others. Further it is necessary to determine whether the different elements are consistent with each other.

II. **Definition of Public Contract:** There are various definitions of what constitutes a public works contract within the California Codes. Do not assume that a project will be a public work for one statute merely because it is a public work for a different statute. The obligations that flow from one code section differ based on the definition used (i.e. competitive bidding requirements flow from the definition of a public work found in the Public Contracts Code whereas prevailing wage requirements flow from the definition found in the Labor Code). Generally, the factors which determine whether a particular contract is a public works contract, are (1) the dollar amount of the contract, and (2) the type of work to be performed.

A. The Public Contracts Code (“PCC”)

Essentially, the provisions of the PCC require formal bidding and a variety of specific contracting provisions or restrictions.

1. Dollar Amount.

- a. PCC § 20162 requires that a contract estimated to be worth more than \$5,000 for a public works project, must be awarded to the lowest responsible bidder. For general law cities, the PCC limits the city’s ability to award contracts based on preferences for local vendors or local residency requirements. Charter cities, on the other hand, may have provisions that expand the basis for a contract award.
- b. If the agency adopted the Uniform Public Construction Cost Accounting Act (UPCCAA) procedures, the agency could set the threshold for public bidding requirements under the PCC higher, as follows:
 1. Public projects of sixty thousand dollars (\$60,000) or less may be performed by the employees of a public agency by force account, by negotiated contract, or by purchase order.
 2. Public projects of two hundred thousand dollars (\$200,000) or less may be let to contract by informal procedures as set forth in this article.
 3. Public projects of more than two hundred thousand dollars (\$200,000) shall, except as otherwise provided in this article, be let to contract by formal bidding procedure (PCC § 22032)

Check the following link to determine if the agency has adopted the Uniform Public Construction Cost Accounting Act:

https://www.sco.ca.gov/Files-ARD-Local/participating_agencies_-_general.pdf

Notice Inviting Informal Bids - For contracts over \$60,000 and not more than \$200,000, the agency must provide a notice to contractors inviting informal bids, including the following:

- (i) Notice to contractors shall be provided in accordance with either paragraph (1) or (2) below, or both:
 - (1) The public agency shall maintain a list of qualified contractors, identified according to categories of work. Minimum criteria for development and maintenance of the contractors list shall be determined by the commission. All contractors on the list for the category of work being bid shall be mailed, faxed, or emailed a notice inviting informal bids unless the product or service is proprietary. All mailing of notices to contractors pursuant to this

subdivision shall be completed not less than 10 calendar days before bids are due.

- (2) The public agency may elect to mail, fax, or email a notice inviting informal bids to all construction trade journals specified in Section 22036.

- (ii) The notice inviting informal bids shall describe the project in general terms and how to obtain more detailed information about the project and state the time and place for the submission of bids.

If all informal bids received are more than two hundred thousand dollars (\$200,000), the governing body of the public agency may, by adoption of a resolution by a four-fifths vote, award the contract, at two hundred twelve thousand five hundred dollars (\$212,500) or less, to the lowest responsible bidder, if it determines the cost estimate of the public agency was reasonable. (PCC § 22034).

Monitoring Costs by Agency Forces - Under the UPCCAA, the agency must use the Uniform Public Construction Cost Accounting Procedures for tracking costs for work performed by an Agency's own forces on a "project" as defined by the Act (§ 22002(c)). These procedures are intended to capture and record all direct and indirect labor, materials, equipment, subcontractors, and supervision costs, as well as the appropriate overhead costs for the public agency associated with each "project" it performs with its own forces. Sample forms are available in the CUCCAC Cost Accounting Policies and Procedures Manual at http://www.sco.ca.gov/Files-ARD-Local/CUCCAC_Manual.pdf (*UPCCAA Frequently Asked Questions, Cal. State Controller, Sept 2019*).

Adoption - To utilize the higher bidding limits of the UPCCAA, the agency must elect by resolution to become subject to the Act and must file a copy of the approved resolution with the State Controller's Office (§ 22030). Sample documents are available at: http://www.sco.ca.gov/ard_cuccac.html

(*UPCCAA Frequently Asked Questions, Cal. State Controller, Sept 2019*).

2. Type of Work.

- a. General Definition: PCC § 1101 defines a "Public works contract" as "an agreement for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind."
- b. For Cities and other Local Agencies (PCC §§ 20100 – 20929), PCC § 20161 defines "public project" as:¹

¹ See also Title 8 CCR section 16000 which defines "maintenance" as including landscape maintenance generally.

- (a) A project for the erection, improvement, painting, or repair of public buildings and works.
 - (b) Work in or about streams, bays, waterfronts, embankments, or other work for protection against overflow.
 - (c) Street or sewer work except maintenance or repair.
 - (d) Furnishing supplies or materials for any such project, including maintenance or repair of streets or sewers.
- c. For purposes of the bidding requirements (PCC §§ 22000 – 22045), PCC § 22002(c) defines “public project” as;

- (1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.
- (2) Painting or repainting of any publicly owned, leased, or operated facility.
- (3) In the case of a publicly owned utility system, “public project” shall include only the construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

“Public project” does not include “maintenance work” which includes all of the following: (1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or operated facility; (2) minor repainting; (3) resurfacing of streets less than one inch; (4) landscape maintenance; (5) work performed to keep, operate, or maintain publicly owned water, power, or waste disposal systems.

1. Exceptions to competitive bidding requirements:

- Government Code §§ 5956-5956.10: public-private development projects that are fee producing are exempt.
- Government Code § 4526: competitive bidding is not required for “professional services”
- Government Code §§ 37103, 53060: “special services” in “financial, economic, accounting, engineering, legal, or administrative matters” do not require bidding.
- PCC § 22050: The Emergency Exception .

B. The Labor Code

1. Dollar Amount: The Labor Code applies to projects valued at \$1000 or more. The minimum contract amount is increased up to \$25,000 if the public agency elects to initiate and enforce a labor compliance program or \$15,000 or less when the project is for alteration,

demolition, repair or maintenance work, if the awarding body has been approved by the DIR to enforce a labor compliance program (See Labor Code § 1771.5).

2. The Labor Code requires that prevailing wages are paid to workers who are employed on public works projects, and further requires certain provisions be included in all public works projects. The definition of “public works” triggering Labor Code compliance can be found in §§ 1720 and 1771. Note that the Labor Code requires careful consideration of the source of funds for the project. The Labor Code applies to:

- Agreements for the construction, alteration, demolition, installation, or repair work done under contract and **paid for in whole or in part out of public funds**. Note that the payment of public funds can take many forms, including waiver of fees or bond requirements. Double-check to make sure that the Agency is not indirectly paying for improvements.
- Work performed during the **design and preconstruction** phases of construction including, but not limited to, inspection and land surveying work.
- Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof.
- **Maintenance work**, including routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired
- Installation includes assembly and disassembly of freestanding and affixed modular office systems.

While an awarding body has a variety of responsibilities designed to help ensure that workers are paid the prevailing wage on public works, the awarding body cannot be sued under Government Code § 815.6 for violating its duties under the prevailing wage laws. Still, the awarding contract will be considered void and the awarding body will be responsible to pay the contractor the reasonable cost, excluding profit, of the labor, equipment, materials, and services furnished by the contractor prior to the date of the determination of invalidity.

C. **The Government Code**

1. Dollar Amount: There is no applicable dollar amount for the majority of Government Code sections. For Government Code section 8546.7 (examination and audits) the threshold is \$10,000.

2. Type of Work: The Government Code defines “public works” as:

“construction of any bridge, road, street, highway, ditch, canal, dam, tunnel, excavation, building or structure within the State by day’s labor or force account.” Govt. Code § 4002.

and

“public project ... shall include the erection, construction, alteration, repair, or improvement of any structure, building, road, railway, or other improvement, and the procurement of any other goods or services that are manufactured specifically, designed specifically, or produced specifically, pursuant to a contract with a public agency.” Govt. Code § 53069.85.

D. The Civil Code

The Civil Code states that a “public work means any work of improvement contracted for by a public entity.” Civ. Code § 3100.

E. Examples of Code Interplay

The many different definitions can be confusing to apply. In many instances, a project can be deemed to be a “public project” for purposes of the Labor Code but not for the PCC. Below are some examples:

Landscape Maintenance: Although it appears that landscape maintenance is not considered a “public project” under the PCC, it does appear that such maintenance is considered a “public project” in terms of the Labor Code. Thus even though a contract for landscape maintenance does not need to be competitively bid, it does need to require the payment of prevailing wages if the contract is estimated to be worth more than the statutory minimum. See also California Code of Regulations § 16000.

Street Paving: Depending on the scope of services to be provided, a contract for street paving may require competitive bidding and the payment of prevailing wages. Although street maintenance and repair is not considered a public work pursuant to Public Contract Code § 20161, taken in conjunction with § 22002, such maintenance and repair may be limited to less than one inch of pavement. See also California Code of Regulations § 16000.

Street Lighting: All construction work done pursuant to the Street Lighting Act (Streets and Highways Code section 18300 et seq.) is required to be awarded after receipt of competitive bids.

Engineering and Design for Construction: The Labor Code applies to the design and engineering phase, so use a PSA with Prevailing Wages. The design work need not be competitively bid, however. The actual construction phase must comply with all codes.

III. Important Issues for Review:

Insurance: In reviewing a public works contract, it is important to make sure that the amount of insurance called for by the contract actually is provided in the certificates of insurance. If we are not provided with the certificates, we should notify the agency that our approval of the contract as to form does not confirm that the contractor has obtained the required level of insurance because we have not been provided with the necessary documents.

Standard Specifications: The “Standard Specifications” section of our standard form contract used to incorporate by reference the specifications set out in the 2006 Edition of the "Green Book," Standard Specifications for Public Works Construction (SSPWC), and provided amendments to the provisions of SSPWC. We updated our forms in January 2014 to incorporate “the latest edition” of the Greenbook, except for Part 1, which is now replaced with a new series of paragraphs which represent the 2006 language plus all subsequent amendments. Be careful to review the Standard Specifications for this important change. Occasionally, agencies will modify this section to refer to some other standard specifications, without modifying the rest of the section. Therefore, in reviewing a public works contract, it is important to ensure that the language is current, and there is no contradictory language added without our approval.

IV. Mandatory Requirements:

Key:

B = Bidding Packet

K = Agreement

- B ○ Public Contract Code §§ 2600 – 2602: Requires a certain percentage of skilled
K journeypersons employed to perform work on the contract or project by every contractor and each of its subcontractors at every tier are graduates of an apprenticeship program, progressively increases the percentage each year. Requires notice in bid documents and construction contracts when subject to this requirement. Authorizes a public agency to require a contractor to use a skilled and trained workforce, even if state law does not require it.
- B ○ Public Contract Code § 3300: Requires a public agency to specify the type of contractor’s license required in the plans and the invitation for bids. The determination of the type of license required is the responsibility of the public agency.
- B ○ Public Contract Code § 4104: Mandates that the bid specifications require the bidder to list subcontractors who will perform work in excess of ½% of the total bid, or in the case of streets or highways, ½% or \$10,000, whichever is greater. Effective 6/27/2017, the bid must also state the license number for all listed subcontractors.

- B ○ Public Contract Code § 4104.5: This section requires (1) that the notice inviting bids to specify the place and time bids are to be received; (2) that bids received after the time specified in the notice be returned unopened; and (3) an extension of bid opening for at least 72 hours if there are any material changes, additions, or deletions to the invitation for bids within 72 hours of the scheduled bid opening time.
- K ○ Public Contract Code § 6109: Requires a contract provision prohibiting a contractor from performing work with a subcontractor who is debarred pursuant to Labor Code §§ 1777.1 or 1777.7.
- K ○ Public Contract Code § 7103.5: Requires that the contract specifications provide for the assignment of unfair business practices claims (Clayton Act and Cartwright Act) from the contractor to the public agency. (Previously identically numbered § 7103 with current § 7103.)
- K ○ Public Contract Code § 7104: Requires contract provisions requiring the contractor to give notice of hazardous materials and certain changed conditions in jobs involving trenching more than four feet deep. (Previously identically numbered § 7104 with current § 7105; amended by SB 1605 (2006) to require written notice of conditions different from conditions made available to bidders prior to submitting bids)
- K ○ Public Contract Code § 7106: Requires that a public works contract contain a Noncollusion Affidavit in the statutory form set forth in this section. **NOTE:** The required language for the Noncollusion Affidavit was changed per SB 944 (2011). Check to make sure that your forms accurately reflect the new language.

(Public Contract Code §§ 9201 and 9203 regarding claims and disputes have been repealed)

- K ○ Public Contract Code § 9204: requires contractors and local governments to follow a claims resolution process for public works contract disputes. **NOTE:** Existing law was set to sunset on January 1, 2020, but AB 456 (2019) extended the resolution process until January 1, 2027.
- K * ○ Public Contract Code § 20103.5: Requires, for contracts involving federal funds, a reference to the requirement that bidder hold a contractor's license at the time of contract award and that failure to be so licensed may result in legal penalties.
- K * ○ Public Contract Code § 20103.6: Requires disclosure of indemnity requirements in architects' contracts in excess of \$10,000.

- B ○ Public Contract Code § 20103.8: A local agency *may* require a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted. Whenever additive or deductive items are included in a bid, the bid solicitation *shall* specify which method will be used to determine the lowest bid. (The code section lists 4 options, the first of which is a default.)

- K ○ Public Contract Code § 20104: Requires a contract reference to Article 1.5 mandatory provisions for the resolution of construction claims under \$375,000 except where the agency has elected statutory arbitration procedures under § 20104.

- K ○ Public Contract Code § 20104.50: Requires a contract reference to Article 1.7 provisions requiring the public agency to make timely payment to contractor of all progress payments property due under the contract and to pay interest on any late payments.

- B ○ Public Contract Code § 20170: Prescribes the forms of city bidder's security that must be required by a city.

- B ○ Public Contract Code § 20171: Mandates that bid security must be 10% of the bid price (cash, cashier's or certified check, or admitted surety bid bond)

- (Public Contract Code § 20175.1 was repealed)*

- B ○ Public Contract Code § 22300: Mandates that provisions permitting the contractor to substitute securities for retainage funds are included in the invitation for bids and contract documents and sets forth an escrow form for such substitutions.

- B ○ Labor Code § 1072: for contracts awarded on or after January 1, 2017, local government agencies that let a service contract for public transit services, or for the exclusive collection and transportation of solid waste, must give a ten percent bid preference to any bidder who agrees to retain the employees of the prior contractor or subcontractor.

- B ○ Labor Code § 1773.2: Requires that the invitation for bids, the bid specifications and the contract documents specify the prevailing wage rates applicable to the contract (Prevailing wages apply to jobs over \$1,000 per § 1771, unless the agency is using a labor compliance program under § 1771.5, in which case the limit is \$15,000.)

- K ○ Labor Code § 1775: Requires a contract provision stating that the statutory provisions for penalties for failure to pay prevailing wages will be enforced. (\$200/day as of 2011)

- K ○ Labor Code § 1776: Requires the contract to mandate compliance with the statutory requirements relating to certified copies of payroll records.
- K ○ Labor Code § 1777.5: Requires the contract to mandate compliance with the statutory requirements relating to the employment of apprentices, including payment of prevailing wages for required pre-employment training or testing. (Does not apply to contracts for less than \$30,000 or other specialty contracts.)
- K ○ Labor Code § 1810: Requires a contract provision stating that eight hours labor constitutes a legal day's work.
- K ○ Labor Code § 1813: Requires a contract provision stating that the statutory provisions for penalties for failure to comply with wage and hours laws will be enforced.
- K/B ○ Labor Code § 1725.5: CONTRACTOR and any subcontractor must be registered with the California Department of Industrial Relations for any bid proposal submitted on or after March 1, 2015, and for any contract for public work entered into on or after April 1, 2015. **NOTE:** SB 96 (2017) imposes various civil penalties for failure to register.
- K ○ Labor Code § 1860: Requires the contract to state that the contractor will be required to secure the payment of worker's compensation to its employees.
- K ○ Labor Code § 1861: Requires the contractor to sign and file a statement acknowledging its obligation to secure the payment of workers compensation to its employees before commencing work.
- K * ○ Labor Code § 6705: Requires a clause mandating that the contractor submit a detailed plan of the shoring and bracing for trenches five feet deep or more for contracts in excess of \$25,000.
- K * ○ Labor Code § 6707: Requires a separate bid item for the construction of a pipeline, sewer, sewage disposal system, boring and jacking pits, or similar trenches or open excavations, which are five feet or deeper.
- K * ○ Government Code § 4215: Requires contract provisions that compensate the contractor for main and trunkline utilities relocation work that was not shown on plans and specifications. The contract must also specify that the contractor will not be assessed liquidated damages for delay cause by agency's failure to provide for removal or relocation of such facilities.

- K ○ Government Code § 8546.7: every contract involving the expenditure of public funds in excess of ten thousand dollars shall contain a provision stating that the contracting parties shall be subject to examination and audit by state controller for three years after final payment under the contract.

- B ○ Government Code § 53068: Requires the notice inviting bids to specify the place and time where bids are to be received. Requires bids received after the time specified in the notice to be returned unopened.

- B ○ Government Code § 53069.85: Permits liquidated damages unless the amount was manifestly unreasonable at the time the contract was made. It also permits bonus for early completion. It also applies to the procurement of goods and services if specially manufactured. The liquidated damages and bonus provision must be clearly set forth in the bid specifications. (See also Public Contract Code § 7101 regarding sharing cost savings with the contractor.)

- B ○ Civil Code § 9550: Requires the invitation for bids to state that a payment bond is necessary for every project estimated to be in excess of \$25,000.00. See also Public Contract Code § 7103 (for state entities). See also CCP § 995.311 regarding admitted surety; CCP § 995.660 regarding mandatory duty to determine sufficiency of bond.

- B ○ Business & Professions Code §7028.15(e): Requires a public agency to verify that the contractor was properly licensed at the time it submitted its bid, prior to awarding a contract. Provides for a citation of any public officer or employee of a public entity who knowingly awards contract or issues a purchase order to an unlicensed contractor.

V. **Key Bid and Contract Prohibitions:**

- K ○ Public Contract Code §1104: Prohibits any contract provision requiring the contractor to warrant the completeness and accuracy of the plans and specifications.

- B ○ Public Contract Code §6109: Provides that if a contractor or subcontractor is
K ineligible to bid or work on a public works project pursuant to Labor Code § 1777.1 or § 1777.7, no public agency may permit them to bid or perform such work. Contracts between contractors and a debarred subcontractor are void as a matter of law, and any funds paid thereon must be returned to the public agency.

- K ○ Public Contract Code §7100: Prohibits provisions providing that acceptance of a payment from the public agency is a waiver by the contractor of all claims. Prohibits provisions that require the submission of a release of all claims as a precondition to any payment.

- B ○ Labor Code § 1735, Government Code § 12940: Prohibits employment
K discrimination in public works contracts and generally. **NOTE:** AB 3364 amended Government Code § 12940 to clarify that the Fair Employment and Housing Act (“FEHA”) prohibits discrimination against individuals who either are veterans *or* because of the individual’s military status, instead of veteran *and* military status.

- K ○ Labor Code § 1771: Requires the payment of prevailing wages on all public works projects greater than \$1,000.00. (But see also §1771.5 where agencies having a labor compliance program pursuant to 1771.5 have a higher limit of \$15K when the project is for alteration, demolition, repair, or maintenance work, and \$25K when the project is for construction work.)

- K ○ Labor Code § 1777.6: Prohibits employment discrimination against apprentices in public works contracts.

- B ○ Government Code § 4420: Prohibits requiring a bidder to apply to, furnish information to, or obtain a bond or insurance policy from a specific company, agent or broker.

- K ○ Business & Professions Code §7108.5: Unless otherwise agreed in writing, a prime
* contractor or subcontractor shall pay to any subcontractor or sub-sub not later than 7 days after the receipt of each progress payment. Failure to do so is a disciplinary offense, and results in a 2% per month penalty and right to collect attorneys’ fees.

- K
* ○ Business & Professions Code §7108.6: Unless otherwise agreed in writing, a prime contractor or subcontractor shall pay to any dump truck operator not later than the 20th of the month. Failure to do so is a disciplinary offense, and results in a 2% per month penalty and right to collect attorneys' fees.

- K ○ Civil Code §2782: Prohibits indemnity provisions in public construction contracts that purport to indemnify the public agency against its own sole negligence, willful misconduct, or active negligence.

- K ○ Civil Code §2782.8: Prohibits indemnity provisions in all contracts, and amendments thereto, between a public agency and a provider of design professional services (as defined) that purport to indemnify (including the cost to defend) the public agency by a design professional against liability for claims against the public agency, except for claims that arise out of or relate to the negligence, recklessness, or willful misconduct of the design professional. Separates duty to provide defense deposit from duty to indemnify. Limits the share of the defense costs to the design professional's share of fault.

V. **RECOMMENDED LANGUAGE**

Public Contract Code § 4104: “Pursuant to California Public Contracts Code Section 4104, any subcontractor doing work in excess of one-half of one percent (1/2%) of the total bid shall be designated in the bidder’s proposal and state the license number of all licensed subcontractors.”

Public Contract Code § 6109: “This contract is subject to the following provision of California Public Contracts Code § 6109, and the undersigned contractor hereby offers and agrees to comply with the provisions therein and as follows:

The successful bidder shall be prohibited from performing work on this project with a subcontractor who is ineligible to perform work on the project pursuant to §§ 1777.1 or 1777.7 of the Labor Code.”

Public Contract Code § 20104: “This contract is further subject to the provisions of Article 1.5 (commencing at Section 20104) of Division 2, Part 3 of the California Public Contract Code regarding the resolution of public works claims of less than \$375,000. Article 1.5 mandates certain procedures for the filing of claims and supporting documentation by the contractor, for the response to such claims by the contracting public agency, for a mandatory meet and confer conference upon the request of the contractor, for mandatory nonbinding mediation in the event litigation is commenced, and for mandatory judicial arbitration upon the failure to resolve the dispute through mediation. This contract hereby incorporates the provisions of Article 1.5 as though fully set forth herein.”

Public Contract Code § 20104.50: “This contract is further subject to the provisions of Article 1.7 (commencing at Section 20104.50) of Division 2, Part 3 of the California Public Contract Code regarding prompt payment of contractors by local governments. Article 1.7 mandates certain procedures for the payment of undisputed and properly submitted payment requests within 30 days after receipt, for the review of payment requests, for notice to the contractor of improper payment requests, and provides for the payment of interest on progress payment requests which are not timely made in accordance with this Article. This contract hereby incorporates the provisions of Article 1.7 as though fully set forth herein.”

Public Contract Code § 22300(a): “At any time during the term of the Contract the Contractor may, at its own expense, substitute securities for funds otherwise withheld as retention (or the retained percentage) in accordance with Public Contract Code § 22300.”

Public Contract Code § 7103.5: “In entering into a public works contract or a subcontract to supply goods, services, or materials pursuant to a public works contract, the contractor or subcontractor offers and agrees to assign to the awarding body all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, services, or materials pursuant to the public works contract or the subcontract. This assignment shall be made and become effective at the time the awarding body tenders final payment to the contractor, without further acknowledgment by the parties.”

Public Contract Code § 7104: “This contract is further subject to California Public Contract Code § 7104 with regard to trenches deeper than 4’ involved in the proposed work as follows:

Contractor shall promptly, and before the following conditions are disturbed, notify the City, in writing, of any:

(1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, which is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.

(2) Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids.

(3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

City shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or involve hazardous waste, and cause a decrease or increase in the contractor’s cost of, or the time required for, performance of any part of the work, the City shall issue a change order under the procedures described in the contract.

In the event that a dispute arises between the City and the contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor’s cost of, or time required for, performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties.”

Public Contract Code § 7106: See attached form of “Non-Collusion Affidavit”

Public Contract Code § 22300: Notice Inviting Bids Language: “To the extent applicable, at any time during the term of the Agreement for the proposed project, the successful bidder, may at its own expense, substitute securities equivalent to the amount withheld as retention (or the retained percentage) in accordance with Public Contract Code section 22300.”

Contract Language: “At the request and expense of the contractor, securities equivalent to the amount withheld shall be deposited with the public agency, or with a state or federally chartered bank in this state as the escrow agent, who shall then pay those moneys to the contractor. Upon satisfactory completion of the contract, the securities shall be returned to the contractor.

Labor Code §§ 1773.2, 1775: “This contract is further subject to prevailing wage law, including, but not limited to, California Labor Code Sections 1773.2 and 1775 as follows:

The Contractor shall pay the prevailing wage rates for all work performed under the Contract. When any craft or classification is omitted from the general prevailing wage determinations, the Contractor shall pay the wage rate of the craft or classification most closely related to the omitted classification. The Contractor shall forfeit as a penalty to City \$200.00 or any greater penalty provided in the Labor Code for each Calendar Day, or portion thereof, for each worker paid less than the prevailing wage rates for any work done under the Contract employed in the execution of the work by Contractor or by any Subcontract under Contractor in violation of the provisions of the Labor Code. In addition, the difference between such prevailing wage rates and the amount paid to each worker for each Calendar Day, or portion thereof, for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the Contractor.”

Labor Code § 1776: “Pursuant to Labor Code § 1776, each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

- (1) The information contained in the payroll record is true and correct.
- (2) The employer has complied with the requirements of Labor Code §§ 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

The payroll records enumerated under subdivision (a) shall be verified and shall be available for inspection at all reasonable hours as required by Labor Code § 1776.”

Labor Code § 1810: “This contract is further subject to 8-hour work day and wage and hour penalty law, including, but not limited to, California Labor Code Sections 1810 and 1813 as follows:

The Contractor shall strictly adhere to the provisions of the Labor Code regarding the 8-hour day and the 40-hour week, overtime, Saturday, Sunday and holiday work and nondiscrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex or sexual orientation, except as provided in Section 12940 of the Government Code. Pursuant to the provisions of the Labor Code, eight hours’ labor shall constitute a legal day’s work. Work performed by the Contractor’s employees in excess of eight hours per day, and 40 hours during any one week, must include compensation for all hours worked in excess of eight hours per day, or 40 hours during any one week, at not less than one and one-half times the basic rate of pay. The Contractor shall forfeit as a penalty to City \$25.00 or any greater penalty set forth in the Labor Code for each worker employed in the execution of the work by the Contractor or by any Subcontractor of the Contractor, for each Calendar Day during which such worker is required or permitted to the work more than eight hours in one Calendar Day or more than 40 hours in any one calendar week in violation of the provisions of said Labor Code.”

Labor Code § 1860: “This contract is further subject to Workers’ Compensation obligations, including, but not limited to, California Labor Code §§ 1860 and 1861 as follows:

Contractor shall take out and maintain, during the life of this contract, Worker’s Compensation Insurance for all of Contractor’s employees employed at the site of improvement; and, if any work is sublet, Contractor shall require the subcontractor similarly to provide Worker’s Compensation Insurance for all of the latter’s employees, unless such employees are covered by the protection afforded by Contractor. Contractor and any of Contractor’s subcontractors shall be required to provide City with a written statement acknowledging its obligation to secure payment of Worker’s Compensation Insurance as required by Labor Code § 1861; to wit: ‘I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers’ compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract.’ If any class of employees engaged in work under this contract at the site of the Project is not protected under any Worker’s Compensation law, Contractor shall provide and shall cause each subcontractor to provide adequate insurance for the protection of employees not otherwise protected. Contractor shall indemnify and hold harmless City for any damage resulting from failure of either Contractor or any subcontractor to take out or maintain such insurance.”

Labor Code § 6705: “To the extent that the work requires trenches in excess of 5’, prior to any excavation, contractor must provide and City, or a registered civil or structural engineer employed by the City to whom authority to accept has been delegated, must accept a detailed plan showing the design of shoring, bracing, sloping, or other provisions to be made for worker protection from the hazard of caving ground during the excavation of such trench or trenches. If such plan varies from the shoring system standards, the plan shall be prepared by a registered civil or structural engineer. Nothing in this section shall be deemed to allow the use of a shoring, sloping, or protective system less effective than that required by the Construction Safety Orders.”

Labor Code § 6706: “To the extent that the proposed work requires the construction of a pipeline, sewer, sewage disposal system, boring and jacking pits, or similar trenches or open excavations, in excess of five (5) feet, Contractor, pursuant to California Labor Code section 6707, is required to submit a separate bid, subject to the same provision herein, for such work.”

Government Code § 4215: “In compliance with and pursuant to Government Code § 4215, City shall assume the responsibility, between the parties to the contract, for the timely removal, relocation, or protection of existing main- or trunk-line utility facilities located on the site of any construction project that is a subject of the contract, if such utilities are not identified by the City in the plans and specifications made a part of the invitation for bids. The contract documents shall include provisions to compensate the contractor for the costs of locating, repairing damage not due to the failure of the contractor to exercise reasonable care, and removing or relocating such utility facilities not indicated in the plans and specifications with reasonable accuracy, and for equipment on the project necessarily idled during such work. Contractor shall not be assessed liquidated damages for delay in completion of the project, when such delay was caused by the failure of the City or the owner of the utility to provide for removal or relocation of such utility facilities.”

Civil Code § 9550: “Pursuant to California Civil Code section 9550, a payment bond is required to be submitted for all projects estimated in excess of \$25,000.00”

Government Code § 53069.85: “It is agreed by the parties to the contract that in case all the work called for under the contract is not completed before or upon the expiration of the time limit as set forth in these specifications, damage will be sustained by the City, and that it is and will be impracticable to determine the actual damage which the City will sustain in the event of and by reason of such delay; and it is therefore agreed that the Contractor will pay to the City the sum of Five Hundred Dollars (\$500) per day for each and every day's delay beyond the time prescribed to complete the work; and the Contractor agrees to pay such liquidated damages as herein provided, and in case the same are not paid, agrees that the City may deduct the amount thereof from any money due or that may become due the Contractor under the contract.

It is further agreed that in case the work called for under the contract is not finished and completed in all parts and requirements within the time specified, the City Council shall have the right to extend the time for completion or not, as may seem best to serve the interest of the City; and if it decides to extend the time limit for the completion of the contract, it shall further have the right to charge to the Contractor, his heirs, assigned, or sureties, and to deduct from the final payment for the work, all or any part, as it may deem proper, of the actual cost of engineering, inspection, superintendence, and other overhead expenses which are directly chargeable to the contract, and which accrue during the period of such extension, except that the cost of final surveys and preparation of final estimate shall not be included in such charges.

The Contractor shall not be assessed with liquidated damages nor the cost of engineering and inspection during any delay in the completion of the work caused by acts of God or the public enemy, acts of the City, fire, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather or delays of subcontractors due to such causes; provided, that the Contractor shall within ten (10) days from the beginning of any such delay notify the City Engineer in writing of the causes of delay, who shall ascertain the facts and the extent of delay, and his findings of the facts thereon shall be final and conclusive.”

Public Contract Code, § 9204: requires contractors and local governments to follow a claims resolution process for public works contract disputes. The full text or a summary law must be included in the plans, or specifications for any public works project (not the contract itself). We recommend including the full text of the law in a public works contract’s standard specs or general provisions.

The full text of the law is:

- (a) The Legislature finds and declares that it is in the best interests of the state and its citizens to ensure that all construction business performed on a public works project in the state that is complete and not in dispute is paid in full and in a timely manner.
- (b) Notwithstanding any other law, including, but not limited to, Article 7.1 (commencing with Section 10240) of Chapter 1 of Part 2, Chapter 10 (commencing with Section 19100) of Part 2, and Article 1.5 (commencing with Section 20104) of Chapter 1 of Part 3, this section shall apply to any claim by a contractor in connection with a public works project.

(c) For purposes of this section:

(1) “Claim” means 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) 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.

(B) 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.

(C) Payment of an amount that is disputed by the public entity.

(2) “Contractor” means any type of contractor within the meaning of Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code who has entered into a direct contract with a public entity for a public works project.

(3) (A) “Public entity” means, without limitation, except as provided in subparagraph (B), a state agency, department, office, division, bureau, board, or commission, the California State University, the University of California, a city, including a charter city, county, including a charter county, city and county, including a charter city and county, district, special district, public authority, political subdivision, public corporation, or nonprofit transit corporation wholly owned by a public agency and formed to carry out the purposes of the public agency.

(B) “Public entity” shall not include the following:

(i) The Department of Water Resources as to any project under the jurisdiction of that department.

(ii) The Department of Transportation as to any project under the jurisdiction of that department.

(iii) The Department of Parks and Recreation as to any project under the jurisdiction of that department.

(iv) The Department of Corrections and Rehabilitation with respect to any project under its jurisdiction pursuant to Chapter 11 (commencing with Section 7000) of Title 7 of Part 3 of the Penal Code.

(v) The Military Department as to any project under the jurisdiction of that department.

(vi) The Department of General Services as to all other projects.

(vii) The High-Speed Rail Authority.

(4) “Public works project” means the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind.

(5) “Subcontractor” means any type of contractor within the meaning of Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code who either is in direct contract with a contractor or is a lower tier subcontractor.

(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.

(B) The claimant shall furnish reasonable documentation to support the claim.

(C) If the public entity needs approval from its governing body to provide the claimant a written statement identifying the disputed portion and the undisputed portion of the claim, and the governing body does not meet within the 45 days or within the mutually agreed to extension of time following receipt of a claim sent by registered mail or certified mail, return receipt requested, the public entity shall have 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.

(D) 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. If the public entity fails to issue a written statement, paragraph (3) shall apply.

(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.

(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. The public entity and claimant shall mutually agree to a mediator within 10 business days after the disputed portion of the claim has been identified in writing. If the parties cannot agree upon a mediator, each party shall select a mediator and those mediators shall select a qualified neutral third party to mediate with regard to the disputed portion of the claim. Each party shall bear the fees and costs charged by its respective mediator in connection with the selection of the neutral mediator. If mediation is unsuccessful, the parts of the claim remaining in dispute shall be subject to applicable procedures outside this section.

(C) 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.

(D) Unless otherwise agreed to by the public entity and the contractor in writing, the mediation conducted pursuant to this section shall excuse any further obligation under Section 20104.4 to mediate after litigation has been commenced.

(E) This section does not preclude a public entity from requiring arbitration of disputes under private arbitration or the Public Works Contract Arbitration Program, if mediation under this section does not resolve the parties' dispute.

(3) Failure by the public entity to respond to a claim from a contractor within the time periods described in this subdivision or to otherwise meet the time requirements of this section shall result in the claim being deemed rejected in its entirety. A claim that is denied by reason of the public entity's failure to have responded to a claim, or its failure to otherwise meet the time requirements of this section, shall not constitute an adverse finding with regard to the merits of the claim or the responsibility or qualifications of the claimant.

(4) Amounts not paid in a timely manner as required by this section shall bear interest at 7 percent per annum.

(5) If a subcontractor or a lower tier subcontractor lacks legal standing to assert a claim against a public entity because privity of contract does not exist, the contractor may present to the public entity a claim on behalf of a subcontractor or lower tier subcontractor. A subcontractor may request

in writing, either on their own behalf or on behalf of a lower tier subcontractor, that the contractor present a claim for work which was performed by the subcontractor or by a lower tier subcontractor on behalf of the subcontractor. The subcontractor requesting that the claim be presented to the public entity shall furnish reasonable documentation to support the claim. Within 45 days of receipt of this written request, the contractor shall notify the subcontractor in writing as to whether the contractor presented the claim to the public entity and, if the original contractor did not present the claim, provide the subcontractor with a statement of the reasons for not having done so.

(e) The text of this section or a summary of it shall be set forth in the plans or specifications for any public works project that may give rise to a claim under this section.

(f) A waiver of the rights granted by this section is void and contrary to public policy, provided, however, that (1) 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; and (2) 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.

(g) This section applies to contracts entered into on or after January 1, 2017.

(h) Nothing in this section shall impose liability upon a public entity that makes loans or grants available through a competitive application process, for the failure of an awardee to meet its contractual obligations.

(i) This section shall remain in effect only until January 1, 2027, and as of that date is repealed, unless a later enacted statute that is enacted before January 1, 2027, deletes or extends that date.

BID BOND
CITY PROJECT NAME
SPECIFICATION NO. XX-XX-XX
IN THE CITY OF _____, CALIFORNIA

KNOW ALL MEN BY THESE PRESENTS that Bidder _____, as PRINCIPAL, and _____, as SURETY, are held and firmly bound unto the City of _____ as _____ AGENCY, in the penal sum of _____ dollars (\$ _____), which is ten percent (10%) of the total amount bid by PRINCIPAL to AGENCY for the above stated project, for the payment of which sum, PRINCIPAL and SURETY agree to be bound, jointly and severally, firmly by these presents.

The SURETY, for value received, hereby stipulates and agrees that the obligations of said SURETY and its BOND shall be in no way impaired or affected by any extension of the time within which the AGENCY may accept such Bid; and said SURETY does hereby waive notice of any such extension.

THE CONDITIONS OF THIS OBLIGATION ARE SUCH that, whereas PRINCIPAL is about to submit a bid to AGENCY for the above stated project, if said bid is rejected, or if said bid is accepted and a contract is awarded and entered into by PRINCIPAL in the manner and time specified, and PRINCIPAL provides the required payment and performance bonds and insurance coverages to AGENCY, then this obligation shall be null and void, otherwise it shall remain in full force and effect in favor of AGENCY.

IN WITNESS WHEREOF the parties hereto have set their names, titles, hands, and seals this ____ day of _____, 20__.

PRINCIPAL* _____

SURETY* _____

*Provide BIDDER and SURETY name, address and telephone number and the name, title, address and telephone number for their authorized representatives. Power of Attorney must be attached. Signatures must be notarized.

**BID GUARANTEE
CITY PROJECT NAME
SPECIFICATION NO. XX-XX-XX
IN THE CITY OF _____, CALIFORNIA**

Note: The following statement shall be used if other than a bid surety bond accompanies bid.

“Accompanying this proposal is a money order*, certified check*, cashier’s check*, cash*, payable to the order of the City of _____ in the amount of _____ Dollars (\$ _____) which is at least ten percent (10%) of the total amount of this bid. The proceeds of this bid guarantee shall become the property of the City of _____ provided this bid is accepted by said City, through action of its legally constituted contracting authorities, and the undersigned fails to execute a contract and furnish the required bonds and insurance within the stipulated time. Otherwise, the proceeds of this bid guarantee shall be returned to the undersigned.”

NAME OF BIDDER: _____

MAILING ADDRESS: _____

AUTHORIZED SIGNATURE: _____

TITLE: _____

DATE: _____

(*Delete the inapplicable words. Signatures must be notarized.)

MAINTENANCE BOND
CITY PROJECT NAME, SPECIFICATION NO. XX-XX-XX
IN THE CITY OF _____, CALIFORNIA

KNOW ALL PERSONS BY THESE PRESENTS THAT WHEREAS, the City of _____, as AGENCY has awarded to CONTRACTOR's Business Name, as CONTRACTOR, a contract for the above-stated project.

AND WHEREAS, CONTRACTOR is required to furnish a bond in connection with the contract guaranteeing maintenance thereof;

NOW, THEREFORE, we, the undersigned CONTRACTOR and SURETY, are held firmly bound unto AGENCY in the sum of [describe verbally, 50% of total contract amount here] **DESCRIBE VERBALLY; 50% OF TOTAL CONTRACT AMOUNT—TO BE INSERTED BY CONTRACTOR** Dollars (\$_____), which is fifty percent (50%) of the total contract amount for the above-stated project to be paid to AGENCY, its successors and assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITIONS OF THIS OBLIGATION ARE SUCH that if CONTRACTOR shall remedy without cost to AGENCY any defects which may develop during a period of one (1) year from the date of recordation of the Notice of Completion of the work performed under the contract, provided such defects are caused by defective or inferior materials or work, then this obligation shall be void; otherwise it shall be and remain in full force and effect. In case suit is brought upon this bond, SURETY will pay reasonable attorneys' fees to the AGENCY in an amount to be fixed by the court.

IN WITNESS WHEREOF the parties hereto have set their names, titles, hands, and seals this ____ day of _____, 20__.

CONTRACTOR*	CONTRACTOR's Signer's Name, Title CONTRACTOR's Business Name Mailing Street Address City, State, Zip Code Telephone #
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Surety* _____

*Provide CONTRACTOR and SURETY name, address and telephone number and the name, title, address and telephone number for the respective authorized representatives. Power of Attorney must be attached. Signatures must be notarized.

(EXECUTE IN DUPLICATE)

NON-COLLUSION AFFIDAVIT

The undersigned declares:

I am the _____ of _____, the party making the foregoing bid.

The bid is not made in the interest of, or on behalf of, any undisclosed person, partnership, company, association, organization, or corporation. The bid is genuine and not collusive or sham. The bidder has not directly or indirectly induced or solicited any other bidder to put in a false or sham bid. The bidder has not directly or indirectly colluded, conspired, connived, or agreed with any bidder or anyone else to put in a sham bid, or to refrain from bidding. The bidder has not in any manner, directly or indirectly, sought by agreement, communication, or conference with anyone to fix the bid price of the bidder or any other bidder, or to fix any overhead, profit, or cost element of the bid price, or of that of any other bidder. All statements contained in the bid are true. The bidder has not, directly or indirectly, submitted his or her bid price or any breakdown thereof, or the contents thereof, or divulged information or data relative thereto, to any corporation, partnership, company, association, organization, bid depository, or to any member or agent thereof, to effectuate a collusive or sham bid, and has not paid, and will not pay, any person or entity for such purpose.

Any person executing this declaration on behalf of a bidder that is a corporation, partnership, joint venture, limited liability company, limited liability partnership, or any other entity, hereby represents that he or she has full power to execute, and does execute, this declaration on behalf of the bidder.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed on the ___ day _____, 20__ at _____, California.

CONTRACTOR's Signer's Name

CONTRACTOR's Signer's Title

CONTRACTOR's Business Name

Business Address:
CONTRACTOR's Business Name
Mailing Street Address
City, State, Zip Code
Telephone #

WORKERS' COMPENSATION INSURANCE CERTIFICATE

The CONTRACTOR shall execute the following form as required by the California Labor Code, Sections 1860 and 1861:

I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract.

DATE: _____

CONTRACTOR's Business Name

By: _____
(Signature)

(Title)

Attest:

By: _____
(Signature)

(Title)

NOTE: See Section 7 "RESPONSIBILITY OF THE CONTRACTOR", Paragraph 7-3 of the Standard Specifications for insurance carrier rating requirements.