

PUBLIC CONSTRUCTION AND CONTRACTING LAW UPDATE 2022-2023



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TODAY'S GOAL:

- Update you on recent developments in California public contracting and construction law
- Emphasize importance of early legal advice on construction matters, from beginning to end

COURSE OVERVIEW

**CONSTRUCTION
ZONE**

**PROCEED AT
OWN RISK**



CONSTRUCTION ALERTS!

COURSE OVERVIEW

- **Federal Construction Bills Eff. 2023**
- **State Construction Bills Eff. 2023**
 - COVID-19
 - Public Works
 - Project Procurement / Delivery
 - Licensing
 - Prequalification
 - Retention
 - Worker's Compensation
 - Environmental Protection
 - Digital Construction Management

COURSE OVERVIEW

- **Notable Construction Cases**
- **State Construction Bills Effective 2022**
 - AB 1023 – Electronic Records for Contractors and Subcontractors
 - SB 727 – Direct Contractor Liability on Private Works
 - AB 1551 – Property Assessed Clean Energy (PACE) Program
 - SB 572 – Enforcement of Liens on Real Property
 - SB 807 – Retention Period of Employee Personnel Records

**FEDERAL
CONSTRUCTION BILLS
EFFECTIVE 2023**

Infrastructure Investment and Jobs Act

- U.S. Congress approved Infrastructure Investment and Jobs Act in November 2021
- Bill carries a price tag of \$1.2 trillion:
 - \$550 billion for transportation, broadband and utilities
 - \$110 billion for roads, bridges and other major infrastructure projects
 - \$40 billion for repair and replacement of bridges
 - Allocates \$65 billion for power infrastructure, including \$29 billion for electricity grid
- Aims to meet goal of decarbonizing power sector by 2035

Infrastructure Investment and Jobs Act

- Expected to help alleviate U.S. inflation and supply chain concerns
- Aims to:
 - Expand domestic preference procurement policies for public work infrastructure,
 - Enhance domestic content requirement of construction materials sold to the federal government under the Buy America Act, and
 - Allow for greater transparency in government contracting decisions

2023 Military Construction, Veterans Affairs and Related Agencies Bill

- Provides \$314.1 billion including:
 - \$150.5 billion discretionary funding for programs such as veterans' health care and military construction
- Rebuilds infrastructure with strong investments to construct critical facilities on military installations, including family housing and childcare centers, and build, repair and retrofit Veterans Affairs facilities

**STATE
CONSTRUCTION BILLS
EFFECTIVE 2023**

COVID-19 Infection Prevention

- AB 685 – Requires Employers to provide written notice to employees of any potential exposures, COVID-19-related advantages and protections, and any cleaning or safety precautions that will be implemented due to the potential exposure.
- From January 1, 2021, to January 1, 2023, Cal/OSHA may issue an Order Prohibiting Use (OPU) to close a whole worksite or a particular sector of a worksite that puts employees in danger of an impending COVID-19 hazard.
- From January 1, 2021, to January 1, 2023, Cal/OSHA will not need to give employers a 15-day warning before issuing citations for major COVID-19 infractions.

Public Works

- AB 1851 – Expands definition of “public works” and requirement of payment of prevailing wages to include on-hauling of materials used for paving, grading and fill onto a public works site if the individual driver’s work is integrated into the flow process of construction.
- SB 1192 – Permits architects, engineers, land surveyors, construction project managers and providers of environmental services to substitute securities in lieu of retention withheld by a public agency.

Public Works

- AB 1867 – Requires school districts, county offices of education and charter schools that intend to seek state funding pursuant to the Greene Act for school modernization projects for school facilities constructed before January 1, 2012 to include as part of the modernization project faucet aerators and water-conserving plumbing fixtures in all bathrooms.
- AB 2232 – School HVAC Requirements: this bill requires school districts community college districts and Cal State University to ensure their facilities have HVAC systems that meet specified requirements

Public Works

- AB 2446 – Carbon Emissions Construction Materials: Requires State by 7/1/25 to develop framework for measuring and reducing 2030 by 20% and by 2035 by 40% average carbon intensity of materials used in construction of new buildings

Prevailing Wages

- AB 1851 expanded the definition of Public Works under the Labor to code to include:
 - Hauling of refuse from the jobsite, which does not include recycling
 - Hauling of materials to the jobsite if the materials are incorporated into the project
- AB 1717 effective 1/1/24 (1/1/25 for non-profits) expands Labor Code definition of Public Works to include Fuel Reduction work, i.e. clearing of brush, etc.
- AB 2463 extends California Conservation Corps exemption from prevailing wage requirements until 1/1/31
- SB 954 requires DIR to create a database for certified payroll records to allow trust funds access to view the records

Worker's Compensation Insurance

- SB 216 – Worker's Compensation Insurance Mandatory for All Active, Licensed Contractors Whether or Not They Have Employees. As of 7/1/23, certain contractors must have worker's compensation insurance, whether or not they have employees:
 - C-8 concrete contractors,
 - C-20 warm-air heating, ventilation, and air-conditioning contractors,
 - C-22 asbestos abatement contractors,
 - C-39 roofing contractors, and
 - D-49 tree service contractors.
- As of 1/1/26, all contractors, regardless of classification, must maintain workers' compensation insurance—whether or not they have employees.

Retention

- AB 2173 - “Substantially Complex” retention up to 10% extended indefinitely allowing public agencies to withhold up to 10% retention from payment to contractor, and by contractor from any subcontractor, when findings are approved prior to bid that the project is substantially complex and requires a higher retention and the findings and retention amount are included in the bid documents.

Project Procurement

- AB 1833 – Increases contracting thresholds for San Diego Metropolitan Transit Development Board and North County Transit District to \$150,000, when contracting for architectural, landscape architectural, engineering, environmental, land surveying, and construction project management services.
- AB 1845 – Authorizes Metropolitan Water District of Southern California to use design-build, progressive design-build and construction manager/general contractor procurement process for certain regional recycled water projects or other water infrastructure projects.

Project Procurement

- AB 1932 – County Authority to use Construction Manager at Risk procurement approach extended to 1/1/29 for contracts for erection, construction, alteration, repair, or improvement of any infrastructure, owned or leased by a county with a value in excess of \$1 million.
- AB 2789 – Design-Build authority for Certain Park and Open Space Districts made permanent:
 - Midpeninsula Regional Open Space District and
 - Santa Clara Valley Open-Space Authority
- Exempts East Bay Regional Park District from \$1 million minimum project threshold requirement.

Project Procurement

- SB 674 – Establishes High Road Jobs in Transportation-Related Public Contracts and Grants Pilot Program requiring contractors and certain subcontractors to meet “high road job standards” and enter PLA’s for employment for DGS and DOT projects involving acquisition of zero-emission transit vehicles or electric vehicle supply equipment valued at \$10 million or more.
- SB 991 – Local Agencies may now use progressive design-build procurement process for water projects over \$5 million including production, storage, supply, treatment, or distribution of any water from any source for up to 15 public works projects valued in excess of \$5 million each.

Project Delivery

- SB 1271 – State agencies must report to Joint Legislative Budget Committee terms and conditions of any proposed renewal or extension of goods or services contract entered into on or after 1/1/23 with a value of \$75 million or more that was awarded without competitive bidding
- SB 1354 – Local Agencies may now use Design-Build for new and remodel construction needed to satisfy accessibility standards.

Project Delivery

- SB 1422 – Pilot Program Authorizes DGS and state and local agencies to use alternative no-bid contracting procedures for purchase and/or installation of carpet, resilient flooring, synthetic turf and lighting fixtures provided such work is not performed in connection with new construction.

Prequalification of Contractors

- SB 978 - Wildfire Debris Cleanup and Removal Contractors Must Now Prequalify with CalRecycle. Agencies used for wildfire debris cleanup and removal by Office of Emergency Services must prequalify contractors before entering into contracts for wildfire debris cleanup and removal work.

Licensing Issues

- AB 1747 – Contractors Who Violate Permit Requirements May Be Fined Up to \$30,000. Existing law provides for CSLB discipline (fines up to \$30K) for disregard/violation of various state building, labor, and safety laws. New law broadens discipline to violation of any state or local law relating to the issuance of permits.

Licensing Issues

- AB 2105 - Veterans Supported by Expedited Application Processing and License Fee Discount. Department of Consumer Affairs is required to grant 50% fee reduction for initial license or registration fee and expedite and assist in initial licensure process for veterans including National Guard or Reserve components not dishonorably discharged.
- AB 2916 - Time of Public Disclosure of Letters of Admonishment Extended from One Year to Two Years. CSLB is required to disclose complaints against a licensee, except those complaints resolved in favor of the licensee. Citations against licensees are disclosed for five years.

Environmental Protection

- AB 661: Requires state agencies to purchase equal recycled products instead of non recycled products whenever recycled products are available at no more than 10% greater total costs than non recycled products. Includes building insulation and panels, soil amendments and toppings, erosion control products, windows, construction blocks, plastic lumber, fencing, building products, paint, rebar, pipe, and plumbing fixtures.
- AB 1445: Beginning 1/1/25, requires cities and counties when adopting general plan for physical development, to consider evacuation route capacity, wildfire risk, sea level rise, and other impacts caused by climate change.

Environmental Protection

- AB 1642 – Until 1/1/28, exempts from CEQA well projects that meet certain requirements including designation by State Water Resources Control Board as high risk or medium risk in the Board's drinking water needs assessment.
- AB 1738 – Requires California Building Standards Commission, beginning with next edition of California Building Standards Code, to adopt mandatory building standards for installation of electrical vehicle charging stations with low power level 2 or higher electric vehicle chargers in existing multifamily dwellings, hotels, motels and nonresidential development during certain retrofits, additions and alterations to existing parking facilities.

Environmental Protection

- AB 1811 – Requires local agencies when preparing local flood protection plan to include planning for climate change and rainwater and stormwater management.
- AB 1902 – Authorizes resource conservation districts, with consent of owner, to construct on privately or publicly owned lands any necessary works for the protection, conservation, restoration, or enhancement of natural resources, the improvement or enhancement of adaption or resilience to climate change, or the mitigation or sequestration of carbon emissions, and to develop and implement projects and programs for the conservation, enhancement, restoration, adaption and resilience of soil, water and biodiversity and related natural resource conservation.

Environmental Protection

- AB 2075 – Requires California Building Standards Commission, as part of each triennial California Building Standards Code rule making cycle after 1/1/23, to convene a collaborative process on electric vehicle charging infrastructure standards.
- AB 2446 – Requires State Air Resources Board to establish a framework for measuring and reducing average carbon intensity of materials used in construction of new buildings, including those for residential uses, by 7/1/25. Framework is to include a strategy to achieve a 40% net reduction in greenhouse gas emissions of building materials with interim target of 20% net reduction by 12/31/30.

Environmental Protection

- AB 2322 – Requires State Fire Marshall, prior to next triennial edition of the California Building Standards Code, to research, develop and propose mandatory building standards for fire resistance based on occupancy risk categories in very high, high and moderate California fire severity zones in state responsibility areas, local responsibility areas, and in land designated as a Wildland Urban Interface Area.
- SB 379 – Requires cities, counties to implement online, automated permitting platform that verifies code compliance and issues permits in real time for residential solar energy systems no larger than 38.4 kilowatts.

Digital Construction Management

- AB 1037 – CalTrans must develop plan to implement digital construction management technologies for infrastructure projects by 7/1/29. Requires DOT to develop implementation plan for use and integration of digital construction management technologies for use on transportation infrastructure projects from preconstruction to asset life cycle. This measure sunsets on 1/1/32.

NOTABLE CONSTRUCTION CASES

Application of B&P Section 7031

- In *Kim v. TWA Construction, Inc.*, Case No. H045900 (May 13, 2022), the 6th District Court of Appeals finally addressed the issue of whether B&P Section 7031 bars a licensed contractor from seeking compensation for work performed by an unlicensed subcontractor. The Court of Appeals concluded that section 7031 bars a licensed contractor from seeking compensation for work performed by an unlicensed subcontractor.

Cell-Crete Corporation v. Federal Ins. Co.

- In 2022, the 4th District Court of Appeal examined whether a payment bond surety, who prevails in a claim against the payment bond, is entitled to statutory attorneys' fees when the party actually incurring the attorneys' fees was the general contractor, pursuant to its defense and indemnity obligations, as opposed to the surety itself.
- The surety argued on appeal that it was entitled to recover its costs in the plain language of CCP 1032 in any action or proceeding.
- The Court of Appeal explained that a judge must award reasonable attorney's fees to the prevailing party regardless of whether the prevailing party ultimately is responsible to pay for the fees.
- For payment bond sureties and their principals, this case clarifies that prevailing payment bond sureties, even if defended by their principals pursuant to a defense and indemnity agreement, are entitled to recover the attorneys' fees incurred in defending against claims against the payment bond.

City of Los Angeles Department of Airports v. Specialty Insurance Company

- The surety on a performance bond is not the “prevailing party” in litigation in which the City of Los Angeles sued it and the contractor whose performance it was guaranteeing for \$3.4 million and obtained a judgment for only \$1, the Court of Appeal for this district has held.

Clark Bros. Inc. v. North Edwards Water Dist.

- Earthshaking decision in favor of public works subcontractors: Subcontractors may now recover all amounts earned from Payment Bond before direct contractor may complete recovery from Owner, and perhaps even before Project is complete or retention is due.
- Late progress payments are not considered a material breach of contract because the prompt payment act provides a contractor with right to recover penalties and interest for those payments.

**STATE
CONSTRUCTION BILLS
EFFECTIVE 2022**

State Construction Bills Eff. 2022

- AB 1023 – Electronic Records for Contractors and Subcontractors: changed monthly requirements for contractor reporting certified payroll to DLSE to become weekly subject to noncompliance fine of \$100 per day to \$5K max
- SB 727 – Direct Contractor Liability on Private Works: Amends current law (holding direct contractors responsible for any subcontractors' unpaid salaries and benefits of their workers under private construction contracts if the subcontractor refuses to do so) to enforce joint liability for penalties and punitive damages.

State Construction Bills Eff. 2022

- AB 1551 – Property Assessed Clean Energy Program: to motivate more individuals to use clean energy in their homes, this assists homeowners with financing installation of renewable energy technologies.
- SB 807 – Retention of Employee Personnel Records: Retention period increased from 2 to 4 years

State Construction Bills Eff. 2022

- SB 572 – Enforcement Liens on Real Property: Expands Labor Code to allow Labor Commissioner to place a lien on real estate to protect any unpaid sums owed under any final citations, outcomes, or judgments relating to employee complaints about wage payments and other employment-related concerns, including nonpayment of wages, extra hours, or paid holidays.
- A lien lasts 10 years after created until paid in full or released, and might be extended a further 10 years before it expires.

YOU DID IT!

