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Public Contract Code 9204 – A New Mandatory Claims Process for Contractors and Subcontractors – and a Possible Trap for the Unwary

New California legislation affecting public works contractors was adopted pursuant to Assembly Bill 626, sponsored by the Union Trade Contractors Association of California and endorsed by various trade and contractor associations including the AGC. AB 626, which was intended to assist contractors in presenting claims against public agencies, affords new opportunities, and some potential pitfalls, to contractors and subcontractors submitting claims to public owners.

The legislation, codified at California Public Contract Code (PCC) section 9204, is effective for public works contracts entered into after January 1, 2017. All public entities (including the CSUS and the UC system), other than certain Departments of the State (CalTrans, High-Speed Rail Authority, Water Resources, Parks and Recreation, Corrections and Rehabilitation, General Services and the Military) are bound by the provisions of PCC Section 9204. PCC 9204 establishes a mandatory pre-litigation process for all claims by contractors on a public works project. It is an attempt to address the reluctance of public owners to promptly and fairly negotiate change orders on projects, putting some teeth to the mandate of existing law under PCC Section 7104, which precludes public owners from shifting to the contractor the risk of addressing differing subsurface and/or concealed hazardous site conditions.

PCC 9204 specifies a mandatory step-by-step claims submission and evaluation process as a precondition to legal action by contractors upon disputed claims. First, the claimant contractor must submit, via registered or certified mail, the claim to the public entity. The claim must be supported by “reasonable documentation.” Within 45 days of receipt, the public entity must provide the contractor with a written statement, identifying what portion of the claim is disputed and what portion is undisputed. For any undisputed portion of a claim, the public entity must make payment within 60 days.

Second, for any remaining disputed claim or portion thereof (or if the public entity does not respond to the claim within 45 days), the contractor can demand a meet and confer settlement “conference” to resolve the dispute. The conference must be scheduled within 30 days of the request. Within 10 days following the conference, the public entity must provide the contractor with a written statement identifying what portion of the claim is still disputed and what portion is undisputed. For any undisputed portion, the public entity must make payment within 60 days.

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Third, any remaining disputed claim, or portion thereof, shall be submitted to mediation, unless the parties agree to waive the requirement of mediation in writing, in which case the parties can avail themselves of a civil action or binding arbitration, as applicable. Within 10 business days of the contractor's writing identifying portions of the claim still in dispute, the public entity and contractor must mutually agree to a mediator. If they cannot agree to a mediator, each party selects a mediator and the mediators are to select a qualified, neutral third party to serve as mediator. In lieu of mediation, the contractor and the public entity can utilize any other non-binding process including, but not limited to, neutral evaluation or a dispute review board.

If mediation is unsuccessful, the parts of the claim remaining in dispute shall be subject to any applicable procedures outside this section, such as litigation or arbitration.

While Section 9204 mimics some the provisions of California's Tort Claims Act (Gov. Code Section 910 et seq., and confirms existing statutory provisions under PCC Section 10240 et seq., what is unclear is how Section 9204 will impact a contractor's rights under these existing provisions and whether a public owner may decide to use Section 9204's requirement to delay a claim, potentially impacting the validity of a claim also governed by the limitations periods of the Tort Claims Act and Section 10240 of the PCC.

Although PCC 9204 is a mandatory multi-layered provision, its dispute resolution mechanisms do not explicitly interact with, or toll, the provisions of the Tort Claims Act or PCC 10240, which may cause unsuspecting contractors to run afoul of the requirements of these latter provisions, resulting in their claims potentially being time barred.

Impact

The aim of PCC Section 9204 is to facilitate a prompt claim presentation and evaluation process for disputed work performed by public works contractors. However, Section 9204 falls short in forcing the resolution of such claims and should not be misread to override other related law. It has the potential to curtail significant claim and litigation costs by mandating that public entities meaningfully engage in an alternative dispute resolution mechanism, where a third-party neutral could make reasoned recommendations regarding resolving claims independent of political considerations, but does not require that the public owner resolve the claim.

One particularly helpful aspect of Section 9204 applies to disputes concerning differing site conditions, which are governed by PCC Section 7104. Contracts for public works in California are sometimes issued with provisions that purport to preclude a contractor from seeking additional compensation for delays and cost increases resulting from unknown site conditions. Section 7104 renders ineffective such provisions and specifically requires the public owner to compensate the contractor for delays caused by the different or hazardous site conditions

However, Section 7104 can also be argued to require the contractor to continue work on a project pending resolution of the dispute. The net result under PCC 7104 is that public owners are not incentivized to promptly resolve legitimate claims for differing site conditions. Public Owners

may take the position that contractors can be forced, at least temporarily, to absorb potentially significant additional costs and become reluctant financiers of a public project until such time as the public owner compensates the contractor. The mandatory claims presentation process under PCC 9204 provides a vehicle for contractors to force public owner to informally, but promptly and seriously, address such claims.

Contractors should also note that nothing in PCC Section 9204 gives a contractor relief from having to comply with other statutory requirements, such as having to present claims within one year of accrual under PCC 20104.2 or Gov. Code Section 911.2. Likewise, follow-on requirements such as a public entity requiring additional documentation within 30 days of receipt of a claim under PCC 20104.2, and other dates for initiation of claims, remain in effect.

Recommendations

To prevent the possibility that this new mandatory pre-litigation alternative dispute resolution process under PCC 9204 unwittingly causes a contractor to waive its legitimate contract claims, claimants need to ensure compliance with both PCC 9204's requirements and other applicable statutes and laws. Nothing in PCC 9204 precludes the claimants notice to serve a dual function: notice under the new legislation, as well as notice under prior existing statutes. Keeping track of the different statutory triggers, however, will be critical to ensuring timely assertion of litigation or arbitration rights in the event a mediated resolution under the new claims submission process of PCC 9204 is not achieved.

If you have any questions about PCC 9204, please contact Alex Baghdassarian or Joe Sestay at Peckar & Abramson, P.C.

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