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NEW CALIFORNIA LAW PROVIDES CONTRACTORS AND SUBCONTRACTORS WITH ADDITIONAL RIGHTS ON LOCAL AND SOME STATE PUBLIC WORKS PROJECTS

Governor Brown recently signed AB 626, a new law that was passed by the legislature to provide contractors and subcontractors on local and some state public projects with additional rights. AB 626 was sponsored by United Contractors. Bob Rosin of our firm assisted United Contractors and testified at legislative committee meetings in support of the new law.

Summary

AB 626 adds section 9204 to the Public Contract Code, which requires local and certain state departments and agencies to respond to claims, to meet and confer regarding unresolved portions of claims, to pay undisputed portions of claims, and if claims still are not resolved, to mediate. Section 9204 requires these agencies to pay interest at 7% per year on undisputed amounts that are not paid.

Section 9204 also confirms the right of contractors to present pass-through claims for subcontractors, and allows subcontractors to request that claims be passed through. A

general contractor is not required to pass through claims to the owner; however, if the general contractor decides not to do so, it must write the subcontractor to explain why it has not presented a claim on the subcontractor's behalf.

Key Facts

- ***When does the law take effect?*** AB 626 applies to construction contracts entered into on or after January 1, 2017.
- ***To whom does the law apply?*** Contractors and owners on state and local construction projects, except for projects for the Departments of Transportation (Caltrans), Parks & Recreation, Corrections & Rehabilitation, Military, General Services, and the High Speed Rail Authority. AB 626 specifically applies to charter cities, charter counties, the California State University system, and the University of California.
- ***What is a claim for purposes of the law?*** Claims include time extension requests, requests for relief from damages or penalties assessed by the owner (e.g., backcharges and liquidated damages), and requests for payment of money, such as change order requests.
- ***What duties are owed to subcontractors?*** Contractors can present claims on behalf of subcontractors and lower tier subcontractors. Subcontractors can request, in writing, that their claims be presented. A subcontractor requesting that a claim be presented is required to furnish reasonable documentation to support the claim. Within 45 days of a request by a subcontractor that the general contractor present a claim to the owner, the contractor must notify the subcontractor in writing as to whether the contractor has presented the claim to the owner, and if it did not, then it must provide a written statement of reasons for not doing so. Lower-tier subcontractors can pass claims up through the party that hired them.
- ***How does the law fit with other procedures?*** Contractors and owners on projects subject to AB 626 still must comply with other change order, claim, and dispute resolution procedures so long as the provisions do not conflict with or impair the timeframes and procedures in the statute.

Overview of Procedures under Public Contract Code Section 9204

Public Contract Code section 9204, as enacted by AB 626, requires local and many state agencies to respond in a timely manner to change order requests, time extension requests, and claims. Previously, many local and state agencies failed to respond in a timely manner to such requests and to claims.

A contractor triggers the procedures of AB 626 by sending the owner a claim in writing. The claim must be sent by registered or certified mail – return receipt requested. The contractor also must furnish reasonable documentation to support its claims.

The owner must then conduct a reasonable review and respond in writing to the claim, identifying those portions it agrees with and those portions it disputes. The owner must provide its written response within 45 days after it receives the claim. This 45 day period of time can be extended by mutual agreement. In addition, if the owner has a governing board, and that board does not meet within the 45 days (or any extended period established by mutual agreement), then the owner must provide its response within 3 days after the governing board holds its next publicly noticed meeting.

The owner's written response must identify what portion of the claim is disputed and undisputed. Within 60 days after the owner provides its written response, it must pay the undisputed portion.

If the owner fails to approve all of the claim, then within 30 days after the contractor's request, the owner must hold a meet and confer session. Within 10 days after the meet and confer session, the owner must issue a written statement identifying the portion of the claim it does not dispute and the portion that it does. The owner must pay the undisputed portion within 60 days of issuance of its written statement following the meet and confer session.

If the owner fails to respond to a claim, or fails to issue written statements as required, then the contractor's claim is deemed to have been denied. If a portion of the claim still remains in dispute, then within 10 business days after the owner issues its written statement after the meet and confer session, the parties must choose a mediator. In the event that the parties cannot agree on a mediator, then each of them chooses its own mediator, who then jointly select the mediator that will hear the issue. Each party bears its own share of the mediation costs.

Section 9204 also confirms the right of contractors to present pass-through claims for subcontractors, and allows subcontractors to request that claims be passed through. A general contractor is not required to pass through claims to the owner; however, if the general contractor decides not to do so, it must write the subcontractor why it has not presented a claim on the subcontractor's behalf.

Agencies must pay interest at 7% per year on amounts that Section 9204 requires to be paid (for example, undisputed amounts).

The following flowchart provides a summary of the process established by Section 9204 (AB 626)

