

ADR process to help ensure contractors get paid

By André Campbell

The California Legislature has enacted Public Contract Code Section 9204, which mandates a dispute resolution process while the project is ongoing for public works subject to the statute. The purpose of the statute is to ensure the “timely and complete payment of contractors for public works projects.” As with many statutes, Section 9204 is not as simple as it appears on the surface.

Section 9204 begins with a declaration of public policy: “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.” Cal. Pub. Contr. Code Section 9204(a). These are not mere empty words — because of the declaration, with limited exceptions, “a waiver of the rights granted by this section is void and contrary to public policy.” Section 9204(f).

To Whom Does Section 9204 Apply?

Section 9204 does not apply to private projects — its scope is limited to public works.

However, Section 9204 does not apply to all public works because the term “public entity” is defined in Section 9204 in a way that is different from how it is commonly understood. On the one hand, the general definition of “public entity” is broad, and even includes charter cities and charter counties. On the other, the Legislature has carved out from the definition of “public entity” seven exceptions which would ordinarily be considered to be public entities, including Caltrans, the Department of Water Resources and the High Speed Rail Authority. Section 9204(c)(3).

There is a temporal limitation in Section 9204 as well, in that it only applies to contracts entered into on or after Jan. 1. Section 9204(g).

What Does Section 9204 Require?

Section 9204 is notable in that it requires “public entities” to address contractor claims while the project is ongoing. It sets forth the following new procedural requirements (Section 9204(d)):

- A contractor must furnish “reasonable documentation to support the claim.”
- Upon receipt of a claim, a public entity must conduct a “reasonable review” and provide a written statement to the contractor within 45 days of receipt of the claim.
- For any undisputed portion of a claim, a public entity must make payment within 60 days of the public entity’s issuance of the written statement.
- If the contractor disputes the public entity’s



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written statement, or if the public entity fails to respond, the contractor may demand “an informal conference to meet and confer for settlement of the issues in dispute.”

- The public entity must schedule the meet and confer conference within 30 days of the demand.
- Within 10 business days following the meet and confer conference, the public entity must provide a written statement identifying the portion of the claim that remains in dispute. Any payment due on an undisputed portion of the claim must be made within 60 days of the meet and confer conference.
- After the meet and confer conference, any disputed portion of the claim shall be submitted to “nonbinding mediation.”
- If mediation is unsuccessful, the parts of the claim that remain in dispute shall be subject to applicable procedures outside Section 9204 (statutory and contractual).
- Failure of a public entity to respond to a claim within the time periods described in Section 9204 “shall result in the claim being deemed rejected in its entirety.”
- Amounts not paid in a timely manner shall bear interest at 7 percent per year.

What Questions Remain Unanswered?

While Section 9204 sets forth detailed claims procedures, a number of questions still remain, including the following:

- “How ‘reasonable’ must the contractor and public entity be?” The contractor must submit “reasonable documentation” to support its claim, and the public entity must conduct a “reasonable review.” It is anyone’s guess what “reasonable” means in this context, although presumably it

means acting with good faith, at the absolute minimum.

• “To what extent may public entities ‘draft around’ the requirements of section 9204?” As noted above, the general rule is that attempts to waive the rights granted by Section 9204 are contrary to public policy and void. However, an exception to this general rule is that “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.” (Emphasis added.) Section 9204(f). The meaning of the word “reasonable” will be subject to a fact-specific analysis, and courts will have to determine how far contractual provisions may go before they conflict with or impair the rights granted by Section 9204.

• “How can all these requirements be harmonized?” Finally, it should be noted that Section 9204 did not repeal any existing statutes that impinge upon the claims or dispute resolution process. While Section 9204 applies “[n]otwithstanding any other law,” this simply means that unless they conflict with Section 9204, existing statutes still apply. Therefore, determining what requirements must be met necessitates a multi-layered analysis of other applicable Sections of the Public Contract Code (e.g., Sections 10240, 19100 or 20104), the Government Claims Act (Cal. Gov’t. Code Section 810 et seq.), Section 9204, and any applicable contract provisions.

Bottom Line

Section 9204 creates a process that, once a contractor submits a claim, requires the public entity to promptly determine whether some or all of the claim is undisputed, and timely pay the undisputed portion. It also establishes an even-handed dispute resolution process that will incentivize the parties to deal with project issues as they arise, instead of “kicking the can down the road” until the end of the project. However, there are still many unanswered questions.



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