

AB 626 Creates New Procedural Requirements for Public Works Claims

On January 1, 2017, most public works projects in California will be subject to new procedural requirements applicable to claims from contractors. AB 626, approved by the Governor on September 29, 2016, created a new Public Contract Code Section 9204, which defines a claim as a "separate demand by the contractor sent by registered mail or certified mail" for a time extension, payment by the public entity of money to which the claimant is not otherwise entitled, or payment of an amount disputed by the public entity. For purposes of Section 9204, the term "public entity" is defined to exclude certain public agencies, such as the Department of Transportation, the Department of Water Resources and the High-Speed Rail Authority, to name a few.

New Procedural Requirements

Section 9204 sets forth the following new procedural requirements for claims submitted by a contractor on a public works project.

- 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 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 **non-binding mediation.**"



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- 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.**

Observations for Public Entities

Section 9204 will require most California public entities to revise their public works contract claims procedures. The most significant of these new procedures will be the 45-day time period within which a public entity must provide a written statement responding to the claim. For most public entities, this new requirement will necessitate a more proactive and expedited review of claims submitted on their projects, so as to avoid the 7% interest on a claim that is wrongfully denied.

Section 9204 also presents several nuances that public entities should be aware of. First, Section 9204 did not repeal existing statutory claims procedures that apply to public works projects. Specifically, for local agencies, the requirements of Public Contract Code Section 20104-20104.6 remain in effect. Thus, a public entity's claims procedures must account for and harmonize the requirements of both the new and old statutes.

Second, what must a contractor submit to the agency in terms of "reasonable documentation to support the claim?" Presumably, this would include a full time impact analysis if the contractor seeks a time extension for the completion of its work. Moreover, can a public entity reject a claim on the basis of insufficient documentation to support the claim?

Third, Section 9204 is silent on contractual timing requirements that apply to the contractor's time to submit a claim. Presumably, this means that a public entity is free to include and impose strict contractual deadlines for the submission of a claim.

Other questions regarding the requirements of Section 9204 are sure to arise.

Observations for Contractors

From the contractor's perspective, there are a number of positive aspects to Section 9204. First, from a big picture perspective, Section 9204 expressly states that it is in the best interests of the State of California and its citizens for public entities to pay for undisputed work in full, in a timely manner. While this may seem obvious, it is helpful for contractors to have this public policy set forth in a statute.

Second, 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. This language will encourage public entities to pay for all undisputed work in a timely manner as the project progresses without attempting to leverage a lower price on disputed work.

Third, the rights granted by Section 9204 cannot be waived, by contract or otherwise, and any attempt to do so is contrary to public policy and void. The only exceptions are that the parties may agree to extend the time within which the public entity must provide a written response, or to bypass mediation. Moreover, a public entity may draft change order, claim and dispute resolution procedures that are reasonable and do not conflict with Section 9204.

Finally, Section 9204 establishes an even-handed dispute resolution process. The contractor must submit reasonable documentation to support its claim. The public entity must promptly conduct a reasonable review of the claim. The parties must meet and confer regarding any remaining disputed portions of the claim. Any remaining dispute after the meet and confer session must be submitted to mediation before an independent third party. This requires all public entities subject to Section 9204 to do what the most sophisticated public entities already do – engage in open communication regarding claims, require the contractor to substantiate its position, evaluate claims in a fair and reasonable manner, and seek to resolve disputes as early as possible. This benefits not only the contractor, but the public entity, as well.

Conclusion

Section 9204 establishes new procedures for construction claims on public works projects, and presents challenges for both public entities and contractors. There are many questions regarding how Section 9204 is to be interpreted that ultimately will be answered through litigation, not the least of which is the meaning of "reasonable" in the various parts of the statute. In the meantime, we stand ready to assist clients on both sides with these new challenges.

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