

*California*

**PUBLIC  
CONTRACT  
LAW**

## Book at a Glance

CHAPTER 1	
<b>Basic Principles of Contract and Civil Law</b> . . . . .	<i>page 1</i>
CHAPTER 2	
<b>Special Requirements Applicable to Public Contracts</b> . . . . .	<i>page 23</i>
CHAPTER 3	
<b>Elements of a Public Contract</b> . . . . .	<i>page 87</i>
CHAPTER 4	
<b>Major Civil and Criminal Prohibitions Against Abuse of the Public Contracting Process</b> . . . . .	<i>page 103</i>
APPENDIX A	
<b>Some Useful, Free Legal Research Sites on the Internet</b> . . . . .	<i>page 169</i>
APPENDIX B	
<b>Some Useful Public Contract Code and Public Utilities Code Provisions</b> . . . . .	<i>page 171</i>

# Contents

Introduction . . .	xiii
About the Author . . .	xvi

## CHAPTER I

### Basic Principles of Contract and Civil Law / 1

<b>I. Important Sources of Contract Law in California</b> . . . . .	1
A. California Civil Code . . . . .	1
B. California Commercial Code . . . . .	1
C. The California Public Contract Code . . . . .	2
<b>II. Important Commentaries on Contract Law</b> . . . . .	2
A. American Law Institute Restatements of Contracts/ Other Treatises on Contracts . . . . .	2
B. Witkin’s Summary of California Law . . . . .	2
C. California Jurisprudence . . . . .	3
D. American Jurisprudence . . . . .	3
<b>III. Twenty-Five Basic Principles</b> . . . . .	3
A. What Is a “Contract” Anyway? . . . . .	3
B. Basic Conditions for a Contract . . . . .	4
1. Parties capable of contracting . . . . .	4
2. Their consent to the contract . . . . .	4
3. A lawful object for the contract . . . . .	4
4. Sufficient cause or consideration for the contract . . . . .	4
C. Who Can/Must/Cannot Be a Party to a Contract? . . . . .	4
1. At least two parties required . . . . .	4
2. Party must have legal capacity to make a contract . . . . .	4

<b>D. Consent to the Contract</b> . . . . .	4
1. When consent is not “free”. . . . .	4
2. Mutual consent . . . . .	6
3. How to communicate consent. . . . .	6
4. Revoking proposal before acceptance . . . . .	6
5. “Fixing” consent. . . . .	7
<b>E. Contract Must Have Lawful and Feasible Object</b> . . . . .	7
• Effect of illegal objective . . . . .	7
<b>F. Parties’ Conduct May Imply a Contract, Even If No Express Contract Exists</b> . . . . .	7
1. Contracts implied in fact . . . . .	7
2. Contracts implied in law (“quasi-contracts”) . . . . .	8
<b>G. When Must a Contract Be in Writing? The Statute of Frauds.</b> . . . . .	9
<b>H. When a Contract Is Signed, What Happens to “Pre-contract” Notes and Correspondence: The Parol Evidence Rule</b> . . . . .	10
<b>I. Unlawful Contracts</b> . . . . .	10
<b>J. Unconscionable Contracts.</b> . . . . .	11
<b>K. Contracts Void as Contrary to Public Policy</b> . . . . .	11
1. Courts balance interests for and against enforcing contract term . . . . .	11
2. Examples of contract terms contrary to public policy . . . . .	12
3. Severability of unenforceable terms from enforceable ones. . . . .	13
4. Effect of unenforceable conditions on party’s right to restitution . . . . .	14

## Contents

<b>L. Contracts Require Consideration (Mutual Promises)</b>	14	<b>P. Rescission of a Contract</b>	19
1. What is good consideration?	15	1. What is rescission?	19
2. Existing legal obligations as consideration	15	2. When may a contract be rescinded?	19
3. Consideration must be lawful.	15	3. Cannot waive (surrender) right to rescind because of fraud or material mistake	20
4. Executed (present) versus executory (future) consideration	15	4. Must give notice of rescission.	20
<b>M. Modification of Contracts</b>	16	<b>Q. Breach of Contract and Remedies for Breach</b>	20
1. Modifying an oral contract.	16	1. When is a contract breached?	21
2. Modifying a written contract	16	2. Choice of remedies for breach of contract	21
3. Effect of destruction of contract.	16	3. Liquidated (pre-arranged) damages.	21
<b>N. Contracts for Benefit of Third Parties Are Enforceable</b>	16	<b>IV. Some Basic Maxims of Jurisprudence</b>	21
<b>O. Some General Rules for Interpreting Contracts</b>	16		
1. Same standard of interpretation for public contracts as for private ones.	17		
2. Interpret contract as fulfilling parties' intent	17		
3. Contract should be interpreted with an eye towards the whole	17		
4. Interpretation must be lawful and workable.	17		
5. If contract is silent, infer a reasonable time for performance	17		
6. Interpret contract language according to "plain meaning"; special rule for technical jargon	18		
7. Local law and custom generally control	18		
8. Construe ambiguities against drafter	18		
9. Language actually drafted by parties takes precedence over "boilerplate" (form) language.	18		
10. Promises jointly and severally bind all who agree to them	18		
11. Special rule for real property contracts Under the Uniform Vendor and Purchaser Risk Act	18		

### CHAPTER 2

## Special Requirements Applicable to Public Contracts / 23

<b>I. Public Contracts Are Matters of Public Interest—and Thus of Public Record</b>	24
<b>II. Most—Though Not All—Public Contracts Must Be Awarded Through Competitive Bidding</b>	25
<b>A. State Contract Act Competitive Bidding Procedure.</b>	25
1. State agency issuing the contract must first prepare plans and specifications	25
2. Agency then advertises for bids	28
3. Interested individuals and firms submit their bids	29
4. Agency reviews bids and selects winning bidder	32
5. Public agency awards the contract	33

# Contents

B. Local Agency Public Construction Act— Special Procedure re Certain Contracts Awarded by Transportation Agencies . . . . .	34
1. To what agencies does it apply? . . . . .	34
2. Requests for Proposal (except for proprietary information) are available to the public . . . . .	35
3. Restrictions on persons who can evaluate proposals . . . . .	35
4. No ex parte (private) communications between agency/persons awarding contract and bidder . . . . .	35
5. Staff recommendation must be made available to public . . . . .	35
6. Agency must keep, and make available, its bidding process and standards used therein . . . . .	35
7. Competitive negotiation . . . . .	35
8. Special procedures for purchase contracts for technology . . . . .	36
<b>III. Alternative Procedure for Bid Protests: The Alternative Protest Process . . . . .</b>	<b>38</b>
A. General Provisions . . . . .	38
1. Scope of the program . . . . .	38
2. Participation by state contracting agencies . . . . .	39
3. Alternative procedures for bid protests . . . . .	39
4. Limits on protests: Limited to participating bidders; limits on grounds for protest . . . . .	39
B. Criteria for Major Information Technology Acquisitions . . . . .	40
C. Criteria for Other Procurements . . . . .	40
D. State Office of Administrative Hearings Procedures for Conducting Protests Under the Alternative Protest Process . . . . .	40
E. Sunsets in 2011 . . . . .	40
<b>IV. Relieving Bidders from Their Bids . . . . .</b>	<b>40</b>
A. Definitions . . . . .	40
B. Generally: Relief of Bidder Because of Mistake; Suit to Recover Amounts Forfeited; Agreement to Relieve the Bidder . . . . .	41
C. Filing and Service of the Suit . . . . .	41
D. Bidder Has Burden of Proving Mistake . . . . .	41
E. No Claim Requirement. . . . .	41
F. Bidder Cannot Participate in Further Bidding on the Project . . . . .	42
G. Contract May Be Awarded to Next Lowest Bidder . . . . .	42
H. Courts Must Give Preference to Suits Set for Hearing. . . . .	42
I. Challenging Award of Contract That Was Competitively Bid . . . . .	42
<b>V. Emergency Contracting Procedures . . . . .</b>	<b>43</b>
A. Generally. . . . .	43
B. Invoking the Procedure. . . . .	43
C. Delegation of Authority to Local Unelected Officials . . . . .	43
D. Governing Body Must Review Emergency Action. . . . .	44
E. Two-thirds Vote Needed for Above Actions . . . . .	44
<b>VI. Protection of Subcontractors: The Subletting and Subcontracting Fair Practices Act . . . . .</b>	<b>44</b>
A. Purpose . . . . .	44
B. Definitions . . . . .	45
C. No Diminution of Rights and Remedies. . . . .	45
D. Bid/Offer Must List Subcontractors . . . . .	45

## Contents

E. Deadline for Bids . . . . .	46	<b>IX. Public Entities Can Go Only So Far in Contracting Out the Performance of Their Duties and Functions . . . . .</b>	83
F. Cannot Circumvent Listing Requirement . . . . .	46	A. State Legislature Cannot Delegate Local Decision-making Power to Private Entities . . . . .	83
G. Effect of Failure to Identify Subcontractor . . . . .	46	B. Local Agencies Cannot Contract Away Their Authority to the Point of “Surrender” of That Authority . . . . .	83
H. Restrictions on and Effects of Substituting, Assigning, or Subletting Contract . . . . .	46	<b>X. Public Contracting Manuals . . . . .</b>	84
I. Special Rules Regarding Subcontracting by Carpeting Subcontractor . . . . .	48		
J. Effect of Errors in Listing Subcontractors . . . . .	48		
K. Payment of Hazardous Waste Haulers . . . . .	49		
L. Civil Code Provisions Regarding Stop Notices for Public Work . . . . .	49		
<b>VII. Resolution of Claims and Other Disputes Over Public Contracts . . . . .</b>	57		
A. Introduction: Some Different Ways to Resolve Contract Disputes . . . . .	57		
B. Some Statutory Provisions Regarding Resolution of Claims and Disputes . . . . .	59		
1. State Contract Act provisions for arbitration of contract claims. . . . .	59		
2. Resolution of contract claims under the Local Agency Construction Act. . . . .	62		
<b>VIII. Affirmative Action in Public Contracting: When Is It Constitutional? Where Is It Still in Force? . . . . .</b>	66		
A. The Affirmative Action Debate . . . . .	67		
B. History of Affirmative Action: Will It Be Declared Unconstitutional?. . . . .	69		
C. California Public Contract Code Provisions Relating to Affirmative Action . . . . .	75		
• Laws regarding certification of Minority Business Enterprises and Women’s Business Enterprises. . . . .	76		
		<b>CHAPTER 3</b>	
		<b>Elements of a Public Contract / 87</b>	
		<b>Overview . . . . .</b>	87
		<b>Model Contract . . . . .</b>	88
		Contract No. 04-0001	
		Agreement Between CITY OF MULHOLLAND, CALIFORNIA and ABC CONSULTING SERVICES, INC. for Preparation of a Traffic Study	
		<b>CHAPTER 4</b>	
		<b>Major Civil and Criminal Prohibitions Against Abuse of the Public Contracting Process / 103</b>	
		<b>I. Laws Against Misrepresentation . . . . .</b>	104
		A. Perjury and Suborning (Soliciting) Perjury from Another. . . . .	104
		B. Destruction, Alteration, or Falsification of Government Documents. . . . .	105
		C. Embezzlement of Public Funds. . . . .	107

# Contents

<p><b>D. Misappropriation of Public Funds</b> . . . . . 109</p> <p><b>E. False Claims Against Public Agencies</b> . . . . . 111</p> <p>    Federal False Claims Act . . . . . 111</p> <p>    Reduced penalties in cases of cooperation . . . . . 112</p> <p>    What is a claim? . . . . . 113</p> <p>    When does someone knowingly submit a false claim? . . . . . 113</p> <p>    False claims may also result in civil suits by the Attorney General or by private parties. . . . . 113</p> <p>    California False Claims Act . . . . . 114</p> <p>    Interpreting the California False Claims Act . . . . . 117</p> <p><b>II. Laws Against Favoritism and Self-Dealing</b> . . . . . 118</p> <p><b>A. Bribery and “Gratuities”</b> . . . . . 118</p> <p>    Bribery of federal officials . . . . . 118</p> <p>    Bribery of state and local executive officials . . . . . 120</p> <p>    Bribery of legislators. . . . . 121</p> <p>    Bribery of judges and judicial officers . . . . . 122</p> <p>    State may suspend contractors convicted of bribery and similar offenses . . . . . 123</p> <p>    Kickbacks . . . . . 124</p> <p><b>B. California’s Conflict-of-Interest Laws: Govt. Code Sections 1090 et seq., 1125 et seq., and 87100 et seq.</b> . . . . 128</p> <p><b>C. Govt. Code Section 1090 et seq.: Prohibiting Financial Interests by Government Officials in Public Contracts</b> . . . . . 129</p> <p>    General restriction . . . . . 129</p> <p>    Specific prohibition re placement of insurance. . . . . 129</p>	<p>When is an officer truly “interested” in a contract?. . . . . 129</p> <p>When is an officer’s interest remote? . . . . . 129</p> <p>Even if one’s interest is remote, public officer must still not influence other public officers to enter into contract . . . . . 131</p> <p>Other exceptions to interest. . . . . 131</p> <p>Effect of failure to disclose interest . . . . . 133</p> <p>Exceptions . . . . . 133</p> <p>Contracts made in violation of these restrictions are voidable, except by the interested official. . . . . 134</p> <p>Exception for certain agreements regarding real property. . . . . 134</p> <p>Restriction on use of warrants and evidence of indebtedness for personal use . . . . . 134</p> <p>Audits: Certifications under penalty of perjury . . . . . 135</p> <p>Restriction on payment of warrants and evidence of indebtedness . . . . . 135</p> <p>Suspension of payment . . . . . 135</p> <p>Penalties for violation . . . . . 135</p> <p>Penalty for disclosure of confidential information for gain. . . . . 135</p> <p><b>D. Govt. Code Section 1125 et seq.—Incompatible Activities of Public Employees</b> . . . . . 136</p> <p>    General prohibition . . . . . 136</p> <p>    What activities are incompatible?. . . . . 136</p> <p>    Local agencies develop rules re incompatible activities . . . . . 137</p> <p>    Does not affect compensation in collective bargaining situation. . . . . 137</p> <p>    Activities deemed not incompatible. . . . . 137</p>
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

# Contents

<b>E. Govt. Code Section 87100 et seq.— Restrictions on and Reporting of Financial Interests</b>	138
Restrictions on participation in decisions and activities in which official has financial interest	138
Special restrictions applicable to state legislators	141
Special restrictions on high executive officers in the state government (elected state officers)	142
Restriction on state officials appearing or communicating as agent or attorney to influence agency action	143
<b>F. Reporting of Financial Interests</b>	143
<b>G. Conflict of Interest Codes</b>	143
<b>H. Filing of Statements Concerning Multiple Public Agencies</b>	143
<b>I. “Revolving Door” Prohibitions: Disqualification of Former Government Officers and Employees from Certain Subsequent Employment</b>	144
• State officials may not appear, for compensation, and on behalf of private parties, before courts or administrative agencies to influence certain proceedings in which they participated	144
• State officials also may not advise or counsel persons regarding such proceedings	144
• Exceptions	144
• Court may exclude violators from participating in proceedings	145
• “Grandfather” clause	145
<b>J. Other Disqualification Provisions for Former State Officers and Employees</b>	145
<b>III. Whistleblower Protection</b>	145
<b>A. Whistleblower Protection Under     the Federal False Claims Act</b>	146

<b>B. Whistleblower Protection Under the California False Claims Act</b>	146
• General provisions	146
• Penalties for violation	146
<b>C. Whistleblower Protection Act: Cannot Interfere with Right to Report Misconduct to Legislative Committees</b>	147
<b>D. California Whistleblower Protection Act—Protects Against Retaliation by State Employees</b>	147
• General restriction	148
• Effect on confidential information	148
• State auditor administers California Whistleblower Act	148
• Procedure for filing complaints	149
• Strict penalties for retaliation: Civil service discipline, fines, imprisonment, and civil liability	150
• Penalties not intended to prevent “legitimate” employee discipline	150
• Burdens of proof; defenses	150
• Collective bargaining agreements unaffected	151
• Special protections for University of California employees	151
• Special protections for California State University employees	152
<b>Notes</b>	155

<b>APPENDIX A</b> Some Useful, Free Legal Research Sites on the Internet	169
<b>APPENDIX B</b> Some Useful Public Contract Code and Public Utilities Code Provisions	171
<b>Table of Authorities</b>	175
<b>Index</b>	185
<b>List of Acronyms</b>	196