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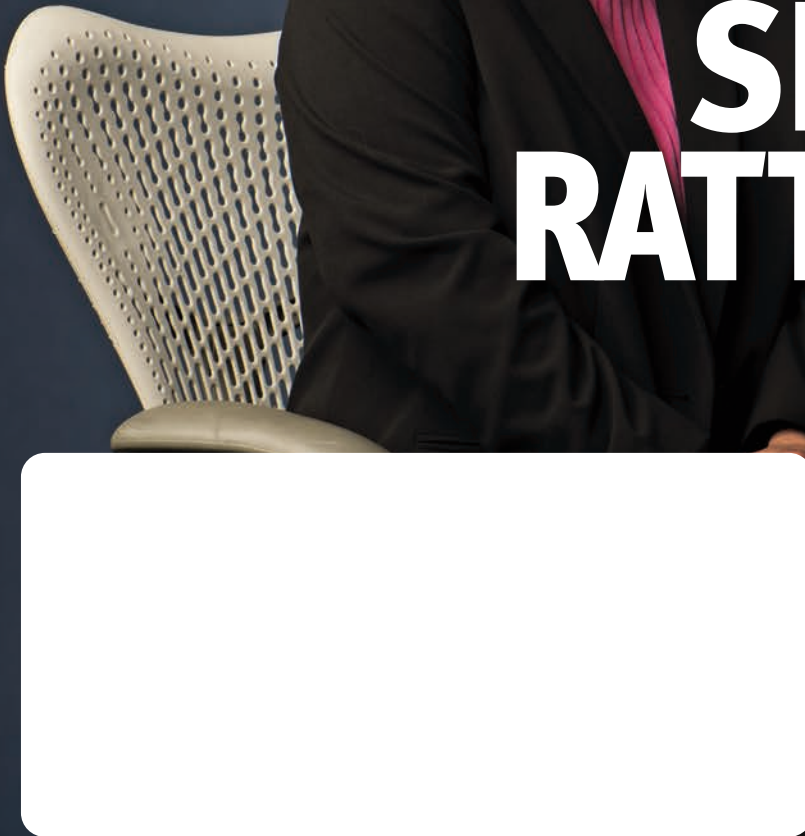
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## SHAKE, RATTLE, and ROLL

Los Angeles lawyers Jean M. Boylan and Barbara R. Gadbois discuss public works contracting procedures and how they vary when local or state agencies declare emergencies

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by JEAN M. BOYLAN and BARBARA R. GADBOIS

# SHAKE, RATTLE, and ROLL

The emergency exemption to competitive bidding to expedite construction on behalf of the public is especially important in California where natural disasters are increasing

**TODAY,** numerous public and private construction projects are underway in California, with tower cranes becoming part of every downtown skyline. When a natural disaster strikes, many of the repair and rebuilding projects are public works projects, awarded by state and local public agencies, which typically require adherence to competitive bidding rules that can be quite cumbersome. It can take years to prepare design and bidding documents, advertise the project, evaluate bids and bidders, respond to bid protests, and complete the contract award prior to construction commencing. In the event of an emergency or natural disaster, however, California law recognizes the need to award contracts quickly pursuant to the “emergency exception” to the competitive bidding process in order to rebuild a community

in an expedited manner.<sup>1</sup> Thus, it is important to understand both the standard public works competitive bidding process as well as how the process varies when an emergency is declared by a state or local agency.

The basic rules for public works competitive bidding are set forth in the Public Contract Code.<sup>2</sup> While the administrative provisions of the Public Contract Code apply to all “public entities”<sup>3</sup> and all “public works contracts” for the erection, construction, alteration, repair or improvement of any public structure, building, road, or other public improvement of any kind,<sup>4</sup> each state agency, county, city, school district, or similar entity, is governed by distinct provisions of the Public Contract Code. In fact, much of the underlying document drafting and bid disputes involve determining which code provisions apply to a particular

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public entity. Also, the California Constitution gives cities (and counties) the power to become charter cities (and counties).<sup>5</sup> If a city's charter or ordinance concerning emergency contracting conflicts, the Public Contract Code provisions will not apply.<sup>6</sup>

"The purposes of competitive bidding procedures are to guard against favoritism, improvidence, extravagance, fraud, and corruption; to prevent the waste of public funds; to obtain the best economic result for the public; and to stimulate advantageous market place competition."<sup>7</sup> Moreover, "[c]ompetitive bidding provisions are strictly construed by the courts, and will not be extended beyond their reasonable purpose."<sup>8</sup> The competitive bidding requirement is based upon established public policy to protect taxpayers from fraud and corruption.<sup>9</sup> The purpose is to guard taxpayers from favoritism and to secure the best work at the lowest price practicable.<sup>10</sup> All bidders should be on equal footing to preserve fairness throughout the bidding process and spend tax dollars effectively.<sup>11</sup>

### Bidding Process

When initiating a public construction project with a dollar value that exceeds the agency's threshold for competitive bidding,<sup>12</sup> a government agency is typically required to complete comprehensive plans and specifications prepared by an in-house engineer or outside consultant, then publicly advertise an invitation to bid, and award the contract to the lowest monetary bidder<sup>13</sup> who is qualified to perform the work and whose bid is responsive to the instructions to bidders. The bidding process (excluding design) usually takes approximately three to eight months from the time the public entity advertises the project until the time a contract award is made.<sup>14</sup>

Specifically, when initiating a public works project, the agency will issue bid documents and must advertise the contract for at least the minimum period of time as specified by state statute or local ordinance for the particular agency.<sup>15</sup> The agency's method of obtaining bids depends on the type of work required and whether enabling legislation exists to permit award of the contract to be based on factors other than the lowest bid price. For example, an invitation for bid (IFB) is typically used for simple, routine services and awarded on the basis of a low bid, while a request for proposal (RFP) is used for complex services in which professional expertise is needed due to different approaches or methods that may be used during performance of the contract.<sup>16</sup>

The contractor is also bound by statutory procedural requirements in submitting

a bid to the agency. For example, the Subletting and Subcontracting Fair Practices Act governs contracts for public works.<sup>17</sup> Each bidder is required to list the name, location of the place of business, California contractor license number, and public works contractor registration number<sup>18</sup> of each subcontractor who will perform work in an amount in excess of one-half of 1 percent of the prime contractor's total bid. Moreover, bids must conform to the instructions provided in the bid documents or, in other words, be responsive.<sup>19</sup> A bid is responsive if it promises to do what the bidding instructions require.<sup>20</sup> Usually, whether a bid is responsive can be determined from the face of the bid without outside investigation or information.<sup>21</sup> If the bid does not materially conform to the IFB or RFP, it can be rejected as nonresponsive; however, a bid that substantially conforms to the IFB or RFP may be accepted if a minor variance does not affect the amount of the bid or give a bidder an unfair advantage.<sup>22</sup>

It is important to recognize that competitive bidding is not required for architectural, engineering, land surveying, or construction management contracts. Government Code Sections 4525 et seq. specifically govern these design professional service contracts, which set forth selection procedures that are mandatory for state agencies and are discretionary for local agencies. In addition, some public agencies avoid the competitive bidding laws by invoking enabling statutes for particular projects, such as revenue-producing infrastructure projects pursuant to Government Code Sections 5956 et seq., or a judicial exception to competitive bidding when it is undesirable or impossible to award on a low-bid basis.<sup>23</sup> Moreover, if there is an emergency, the competitive bidding procedures may not be required, due to the need to expedite rebuilding and to serve the public interest.

Award of public works contracts are often delayed by protests from unsuccessful bidders, taxpayers, or others with "beneficial interest" or "public interest" standing.<sup>24</sup> There are no uniform rules governing bid protests on California public works—each entity uses its own informal practices or established administrative procedures. A bid protest is usually initiated by a letter from a disappointed bidder to the public agency, alleging that the bid recommended for award is not responsive to the IFB, a bidder is not responsible to perform the work, or that competitive bidding laws have been ignored or circumvented in the bid evaluation process. In the case of a bid that varies from the IFB or RFP, the protest-

ing bidder generally must prove that the variance in the bid proposed for award is material to the bid. This is usually based on a review of the submitted bid documents without the need for further factual investigation and is determined by the awarding agency without the need for a hearing.

An attorney representing the low bidder can anticipate that he or she will need to defend the fact that the lowest monetary bidder submitted a responsive bid in all material terms. An attorney who is consulted by one of the disappointed bidders must investigate to see if the low bidder submitted a responsive bid that complies with the material requirements of the IFB or RFP and determine if a bid protest is in order. In any event, the determination of responsiveness will need to be made. Typically, the "material" terms of a bid are those that could affect price, quantity, quality, or delivery, and those terms that are clearly identified by the IFB. The test of whether a bid fails to materially comply with the bid documents is whether the non-compliance gives the bidder a "substantial economic advantage or benefit" not enjoyed by the other bidders.<sup>25</sup> The bidder's lack of intent to gain an unfair advantage is irrelevant.

A bid may also be rejected because of a technicality if there is a theoretical possibility that the bidder will otherwise obtain an unfair advantage. Giving the bidder a second chance after bid opening to decide whether (and possibly in what terms) he or she wants the contract is considered an unfair advantage.

Although full compliance with each provision of the IFB is always preferred, an immaterial IFB requirement may be waived without prejudicing consideration of the bid. A "minor irregularity" is the failure to meet an IFB requirement that in no way bears on the bidder's commitment to perform the contract, either because 1) the requirement is merely procedural; 2) the requirement is substantive but is satisfactorily met, although not in the precise manner contemplated by the IFB; or 3) the requirement not met is one calling for information that relates not to the promise to perform but to independently verifiable facts regarding the bidder's status. In addition, the failure to meet an IFB requirement may be deemed a minor irregularity if the bid is affected only in a trivial way.

The case of *Menefee v. County of Fresno*<sup>26</sup> illustrates the application of these rules to bidding on public works projects. In *Menefee*, Brewer-Kalar was the low bidder on a contract for the construction of water, sewer, and street repairs. Brewer-Kalar's bid was deemed nonresponsive

because of Brewer-Kalar's failure to sign the bid proposal sheet. However, Brewer-Kalar's principals initialed the bid elsewhere on the bid form, and the bid bond was properly signed. The court upheld award of the contract to Brewer-Kalar on the basis that it did not matter where the bid was signed, so long as the appropriate parties signed it. Accordingly, the court concluded that because Brewer-Kalar gained no advantage from the defect, a waiver of this immaterial defect by the public agency should be permitted. The facts of each procurement need to be thoroughly evaluated. It is possible that under different facts, the failure to properly sign a bid bond would be considered material. The key is whether the low bidder could have avoided entering into the contract and gained an unfair advantage by the mistake.

It is important that an attorney who is advising a public agency makes certain that the public agency specifically reserves the right under the contract to "waive discrepancies or errors." In that event, the public agency will be given a certain amount of discretion to determine whether the error or discrepancy is material on a case-by-case basis.

The accepted bidder is not always the lowest bidder in competitively bid public contracts. Public contract statutes require that the bid go to the "lowest responsive responsible bidder."<sup>27</sup> The responsibility determination allows government agencies to consider the trustworthiness, competence, and capacity of the bidder.<sup>28</sup> Typical factors used by the public agency to evaluate responsibility are financial resources, construction experience, and insurance capacity.<sup>29</sup> A public agency cannot find that one bidder is "more responsible" than another. Once the contract requirements are met, that bidder should be awarded the contract. There is no basis for awarding on "relative superiority."<sup>30</sup>

A contractor who wants to protest the award of a public contract must first pursue all remedies available at the agency level before seeking judicial relief. In other words, the contractor must scrutinize the bid documents or any applicable agency regulations, or a combination of both, that provide for specific procedures to protest award of the contract. Upon final decision from the awarding authority, a contractor may then seek judicial relief. There are various forms of relief that a court might award, including, but not limited to, ordering an injunction to halt the construction or ordering that the entity reconsider the bids.

In the case of an emergency, state and local agencies can bypass standard competitive bidding rules and avoid bid protests.

The Public Contract Code prescribes unique statutes for each category of state and local agencies that allow award of public works contracts without complying with public bidding laws when there is an emergency. Various Public Contract Code sections specifically exclude contracts from competitive bidding requirements in the case of an emergency, including, but not limited to: 10340(b)(1) (State agency), 20113 (K-12 school district), 20134(a) (counties), 20168 (cities), 20813 (fire protection districts), 20205.1 (public utility district), 20213 (transit districts), 20567 (irrigation districts), 20586 (water storage districts), 20654 (community college districts), and 22050 (listed public agency actions).

### Emergency Exemption

According to the administrative provisions of the Public Contract Code, which must be read into each of the agency-specific sections listed above,<sup>31</sup> an emergency is defined as "a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services."<sup>32</sup> This includes natural disasters such as floods, fires, and earthquakes. These types of emergencies are exemptions to the bidding process in order to enable agencies to expedite construction and protect public safety.<sup>33</sup> The goal of the emergency exemption is to allow the governing agency to expedite construction to assist the public with a prompt response to the disaster. The individual or agency responsible for proclaiming an emergency depends on whether the emergency is state or local; however, the governor has the broadest power, which is established in Government Code Sections 8550 et seq., the California Emergency Services Act.

The California Emergency Services Act<sup>34</sup> authorizes the governor, chief executives, and governing bodies of local agencies to "proclaim the existence of conditions of disaster or of extreme peril to the safety of persons and property...caused by such conditions as air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease,...an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy, which are or are likely to be beyond the control of the services, personnel, equipment, and facilities of that political subdivision and require the combined forces of other political subdivisions to combat..."<sup>35</sup> While a local emergency may be proclaimed by the governing body of a city or county (e.g.,

city council or county board of supervisors), the governor has broader powers and can proclaim either a local or state emergency. These acts authorize the undertaking of extraordinary police powers, rescue, and cleanup. They also activate emergency purchasing and contracting procedures. Similarly, but at a local level, the California Disaster Assistance Act<sup>36</sup> authorizes emergency contracting for repair, restoration or replacement of buildings, levees, flood control works, channels, irrigation works, streets, roads, bridges, highways, and other public works damaged or destroyed by a disaster (fire, flood, storm, tidal wave, earthquake, terrorism, epidemic, or other similar public calamity that the governor determines presents a threat to public safety).<sup>37</sup>

The emergency exemption to competitive bidding was used in Los Angeles after the 1994 Northridge earthquake. Under the exemption, the Santa Monica Freeway was built on an expedited schedule without standard competitive bidding requirements. The west side of Los Angeles was disconnected from downtown due to the collapse of the Santa Monica Freeway. City officials declared an emergency, dispensed the competitive bidding requirements of the Public Contract Code, and awarded the cost-plus-a-fee contract to a contractor based upon expedited bidding procedures and schedule requirements. The freeway damage was repaired in record time, and the contractor was paid approximately \$30 million under the emergency exception. In addition to this project, several other demolition contracts resulting from the earthquake were awarded without competitive bidding. Two of the contracts awarded to a single firm had an estimated cost of \$2.2 million.

While the Emergency Services Act and the Disaster Assistance Act primarily focus on what constitutes an "emergency" and who can proclaim an emergency at state and local levels, the Public Contract Code sets forth emergency contracting procedures that vary based on the entity involved.<sup>38</sup> The acts tell us how and when to declare an emergency, but the Public Contract Code outlines what to do to move forward with contracting. For example, under Public Contract Code Section 22050, in case of an emergency, a public agency taking emergency action pursuant to one of 95 separate enabling statutes may, pursuant to a four-fifths vote of its governing body, repair or replace a public facility, take any directly related and immediate action required by that emergency, and procure the necessary equipment, services, and supplies for those purposes, without giving

notice for bids to let contracts. Though competitive bidding is waived, there is no exception regarding contract approval.<sup>39</sup> “The basic policy is to respond to the emergency as circumstances demand and then to obtain the formal approval(s) as soon as practicable.”<sup>40</sup> Before the project commences, however, the contract must be verbally approved by someone with authority at the agency.<sup>41</sup>

Emergency repair projects that require continuing or extensive development may be structured in two parts. The first part is focused on matters that need immediate attention to ensure public safety. The second part consists of remaining repairs that are not urgent, and therefore, the standard bidding process is utilized. For example, in February 2017, the State of California declared an emergency when a series of events led to erosion of the Oroville Dam emergency spillway. Due to high inflows to Lake Oroville, a crater developed in the main spillway of the Oroville Dam. As lake levels rose, the emergency spillway was prepared for use for the first time since the dam’s construction in 1968. Water was successfully diverted; however, the emergency spillway began to erode quicker than anticipated and 180,000 surrounding residents were forced to evacuate. The repairs made to ensure stability of the Oroville Dam emergency spillway were conducted under state emergency public works contracting procedures. Pursuant to Public Contract Code Section 22050(c)(3), the standard competitive bidding process was utilized for the remaining repairs, and the Oroville Dam is currently undergoing construction by Kiewit Infrastructure West Company with the assistance of the U.S. Army Corps of Engineers.

Before a governing body takes any emergency action, however, it must make a finding based on substantial evidence set forth in the minutes of its public meeting that the emergency will not permit a delay resulting from a competitive solicitation for bids and that the action is necessary to respond to the emergency. If the governing body orders emergency action, the governing body must review the emergency action at its next regularly scheduled meeting and at every regularly scheduled meeting thereafter until the action is terminated to determine by a four-fifths vote that there is a need to continue the action. If the governing body meets weekly, it may review the emergency action in accordance with Public Contract Code Section 22050(c)(1) every 14 days. It must terminate the action at the earliest possible date that conditions warrant so that the remainder of the emergency action may be completed by giving

public notice for bids to let contracts. If contracts are awarded when there is no true emergency, the court may set aside the award to ensure proper bidding procedures take place.<sup>42</sup>

Additionally, under Public Contract Code Section 20168, relating to cities, “[i]n case of an emergency, the legislative body may pass a resolution by a four-fifths vote of its members declaring that the public interest and necessity demand the immediate expenditure of public money to safeguard life, health, or property.”<sup>43</sup> Upon adoption of the resolution, the awarding body does not need to comply with the standard bidding procedures outlined above.<sup>44</sup> In other words, emergency contracts are exempt from the standard advertising and competitive bidding requirements.<sup>45</sup> A public agency, however, cannot escape the procedures of competitive bidding by artificially creating its own emergency.<sup>46</sup>

An emergency can be declared in a county when “repair or replacements are necessary to permit the continued conduct of county operations or services.”<sup>47</sup> When an emergency is declared within a county, the board of supervisors, by majority consent, “may proceed at once to replace or repair any and all structures without adopting the plans, specifications, strain sheets, or working details or, subject to the specified statute, giving notice for bids to let contracts.”<sup>48</sup> Emergencies declared by counties typically relate to overcrowding in structures such as jails, juvenile facilities, or courtrooms.<sup>49</sup>

### Public School Standards

Emergency repairs at public schools require different voting standards. According to Public Contract Code Section 20113, “[i]n an emergency when any repairs, alterations, work, or improvement is necessary to any facility of public schools to permit the continuance of existing school classes, or to avoid danger to life or property, the board may, by unanimous vote, with the approval of the county superintendent of schools... [m]ake a contract in writing... without advertising for bids.”<sup>50</sup> Furthermore, the same definition of “emergency” applies for public schools and local agencies.<sup>51</sup>

Public Contract Code Section 20314 provides an exemption from obtaining bids for jail facilities when “the sheriff certifies that the inmate capacity of the county jail system is exceeded by more than 20 percent and that the overpopulation is likely to continue and poses a threat to public safety.”<sup>52</sup> Section 20314 also provides exemptions for court and juvenile facilities.

To ensure proper use of taxpayers’ money, some Public Contract Code provi-

sions establish monetary caps and other cost limits for emergency public works contracts. For example, under Section 20314(a), relating to counties, emergency work done wholly or in part by contract must be paid at “the actual cost of the use of machinery and tools and of material, and labor and of workers’ compensation insurance expended by [the contractor] doing the work, plus not more than 15% to cover all profits and administration.” To avoid price gouging by contractors, “no more than the lowest current market prices shall be paid for materials whenever possible.”<sup>53</sup>

When damages caused by an emergency are so catastrophic that local and state agencies need further assistance, the governor can submit a presidential disaster declaration to the president of the United States through the Federal Emergency Management Agency (FEMA). The Stafford Act<sup>54</sup> authorizes FEMA to provide assistance to local and state agencies in such cases. Sections 403 (Essential Assistance), 406 (Repair, Restoration, and Replacement of Damaged Facilities), 407 (Debris Removal), and 421 (Fire Management Services) of The Stafford Act apply to major disaster assistance programs and declarations.

In order to obtain FEMA support, the state must make a request within 30 days of the disaster.<sup>55</sup> The public assistance grant program of FEMA provides grants to state, tribal, territorial, and local governments, and certain types of private nonprofit organizations so that communities can quickly respond to and recover from major disasters or emergencies.<sup>56</sup> Through the program, the state can receive federal assistance of “not less than 75 percent of the eligible cost” for “debris removal, life-saving emergency protective measures, and the repair, replacement, or restoration of disaster-damaged publicly owned facilities, and the facilities of certain private nonprofit organizations.”<sup>57</sup> The state then determines how the remaining 25 percent is paid. Federal support typically includes general resources such as utilizing, lending, or donating federal equipment, supplies, facilities, and personnel.<sup>58</sup> Requests for disaster relief can be made through [www.fema.gov](http://www.fema.gov). While FEMA funding requires certain federal-aid contract provisions and procedures, state and local agencies must follow the contracting procedures set forth in the Public Contract Code.

The purpose behind the emergency exemption to competitive bidding is to expedite construction to protect the public in a true emergency or disaster. This is a preliminary checklist for lawyers when handling a public works emergency contract:

- Confirm that the public agency has



declared an emergency in accordance with the law and its procedures by requesting a copy from the contracting officer, reviewing governing body meeting minutes or, if necessary, through a Public Records Act<sup>59</sup> request. If an emergency is declared, lawyers need to ensure the declaration is made in accordance with Public Contract Code Section 1102 and other emergency exemption statutes applicable to the public entity.

- Once the emergency is declared and it is legally appropriate, be aware of the timelines for bidding issues. In most cases, due to the emergency, the bidding process will be very quick (one or two weeks versus three or more months under standard competitive bidding), and work can commence upon verbal contract from someone with authority within the applicable agency.

- Ensure that projects are structured so that only true emergency work is awarded without competitive bidding and follow-on work complies with standard competitive bidding requirements.

- Include audit provisions with the right to recoup overpayments in the contracts so that only authorized and allowable costs are paid for and do not exceed monetary caps or reimbursement limits from funding agencies.

- Do not abandon good contracting practices. Even though contracts may be awarded on an expedited basis, awarding bodies should perform a due diligence investigation of contractors before award, and ensure that adequate insurance, payment and performance bonds, warranty and correction obligations, and clear payment, withholding, change order and final completion and project closeout requirements are included in the contract. Although competitive bidding procedures will not apply, the overarching policy of preventing waste of public funds still applies.

- Be aware of any changes with the public contracting process.<sup>60</sup> It is vital to stay current with local, state, and federal statutes and regulations regarding emergency procedures, as failure to comply could invalidate the contract, leading to project delays and added costs.

- Review the FEMA application process and qualifying emergencies so local and state agencies can timely seek federal assistance as necessary to offset some of the financial burden of emergency projects. ■

20145), Counties of 500,000 or Less Population (§§20150–20150.14), Boards of Supervisors–County Highways (§§20390–20398), Boards of Supervisors–County Bridges or Subways (§§20400–20409), and Alternative Procedures For Public Agencies Adopting Uniform Construction Cost Accounting Procedures (§§22000–22045); Arbitration of Public Works Contract Claims (§§22200–22201); Withheld Contract Funds (§22300); and Year 2000 Problem (§§22350–22355).

<sup>3</sup> The California Public Contract Code broadly defines “public entity” as the state, county, city, city and county, district, public authority, public agency, municipal corporation, or any other political subdivision or public corporation in the state. PUB. CONT. CODE §1100.

<sup>4</sup> PUB. CONT. CODE §1101. The Uniform Public Construction Cost Accounting Act defines “public agency” and “public project” differently, and specifically excludes “maintenance work” as defined. PUB. CONT. CODE §22000 *et seq.*

<sup>5</sup> CAL. CONST. art. XI §3(a).

<sup>6</sup> PUB. CONT. CODE §1100.7.

<sup>7</sup> HARRY D. MILLER & MARVIN B. STARR, 4 CAL. REAL EST. DIGEST 3D PUBLIC WORKS AND CONTRACTS 3D (2002) [hereinafter MILLER & STARR]; *see also* PUB. CONT. CODE §100.

<sup>8</sup> Domar Elec., Inc. v. City of Los Angeles, 9 Cal. 4th 161, 173 (1994).

<sup>9</sup> *See* Miller v. McKinnon 20 Cal. 2d 83, 88 (1942).

<sup>10</sup> Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth., 1 P. 3d 63, 68 (Cal. 2000).

<sup>11</sup> *See* PUB. CONT. CODE §100.

<sup>12</sup> University of California, California State University, school districts, counties, cities, and special districts have unique dollar thresholds for triggering competitive bidding. *See, e.g.*, PUB. CONT. CODE §20162 for cities.

<sup>13</sup> For professional services, such as civil engineering or architecture, the public agency does not have to choose the lowest bidder due to the quality of service that may be required. *See e.g.*, Los Angeles Unified Sch. Dist. v. Great Am. Ins. Co., 78 Cal. Rptr. 3d 99 (2008), *review granted and opinion superseded*, (Sept. 17, 2008) (emergency procedures as applied to public school project).

<sup>14</sup> Bid protests may delay the process by one to three months.

<sup>15</sup> *E.g.*, 10 days for cities. PUB. CONT. CODE §20164.

<sup>16</sup> CAL. DEPT. OF GEN. SERVS., STATE CONTRACTING MANUAL, <http://www.dgs.ca.gov/ols/Resources/StateContractManual.aspx> (last visited Mar. 1, 2018) [hereinafter STATE CONTRACTING MANUAL].

<sup>17</sup> PUB. CONT. CODE §§4100 *et seq.*

<sup>18</sup> LAB. CODE §1725.5.

<sup>19</sup> Taylor Bus. Serv., Inc. v. San Diego Bd. of Educ., 195 Cal. App. 3d 1331, 1341 (1987).

<sup>20</sup> MILLER & STARR, *supra* note 7.

<sup>21</sup> MCM Const., Inc. v. City & County of San Francisco, 66 Cal. App. 4th 359, 368 (1998).

<sup>22</sup> Konica Bus. Mach. USA v. Regents of Cal., 206 Cal. App. 3d 449 (1988); Valley Crest Landscape, Inc. v. City Council, 41 Cal. App. 4th 1432 (1996).

<sup>23</sup> *See* Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348 (1930); Graydon v. Pasadena Redevelopment Agency, 104 Cal. App. 3d 631 (1980).

<sup>24</sup> *See* SJJC Aviation Servs., LLC v. City of San Jose, 12 Cal. App. 5th 1043 (2017).

<sup>25</sup> Valley Crest Landscape v. County of Fresno, 163 Cal. App. 3d 1175 (1985).

<sup>26</sup> Menefee v. County of Fresno, 163 Cal. App. 3d 1175 (1985).

<sup>27</sup> *See, e.g.*, PUB. CONT. CODE §20921.

<sup>28</sup> *See* Boydston v. Napa Sanitation Dist., 222 Cal. App. 3d 1362, 1368 (1990).

<sup>29</sup> PUB. CONT. CODE §1103.

<sup>30</sup> *See* City of Inglewood-Los Angeles County v.

Superior Ct. 7 Cal. 3d 861 (1972).

<sup>31</sup> Marshall v. Pasadena Unified Sch. Dist., 119 Cal. App. 4th 1241 (2004).

<sup>32</sup> PUB. CONT. CODE §1102.

<sup>33</sup> *See* Paul Jacobs, *Earthquake Lifelines of LA*, L.A. TIMES (Feb. 16, 1994) at 56.

<sup>34</sup> GOV'T. CODE §8550-8668.

<sup>35</sup> GOV'T. CODE §8558.

<sup>36</sup> GOV'T. CODE §§8680-92.

<sup>37</sup> GOV'T. CODE §§8680.3, 8680.4.

<sup>38</sup> California's procedures are similar to other states. For example, in New York, the public contract statutes allow one agency to declare an emergency when the emergency impacts public buildings or public property. N.Y. GEN. MUN. LAW §103(4). In Louisiana, all public bidding is required if the contract exceeds \$100,000. However, there is an exception for emergency when an emergency is declared by a public official, competitive bidding laws do not apply. LA. REV. STAT. §38:2212.

<sup>39</sup> STATE CONTRACTING MANUAL, *supra* note 16, at 27.

<sup>40</sup> *Id.* at 44.

<sup>41</sup> *See id.* at 113.

<sup>42</sup> Marshall v. Pasadena Unified Sch. Dist., 119 Cal. App. 4th 1241 (2004).

<sup>43</sup> PUB. CONT. CODE §20168.

<sup>44</sup> *Id.*

<sup>45</sup> STATE CONTRACTING MANUAL, *supra* note 16, at 27.

<sup>46</sup> *See* Marshall, 119 Cal. App. 4th 1241, 1245. (School district's decision to terminate construction contract with a company, and then to award that contract to a second company without public bidding, did not constitute an “emergency.”).

<sup>47</sup> PUB. CONT. CODE §20134.

<sup>48</sup> PUB. CONT. CODE §20134(a).

<sup>49</sup> *See* PUB. CONT. CODE §20134.

<sup>50</sup> PUB. CONT. CODE §20113; *see also* Los Angeles Unified Sch. Dist. v. Great Am. Ins. Co. (2008) 49 Cal. 4th 739 (holding that award of construction contract without competitive building was lawful because prior contractor's sudden default was proper declaration of emergency).

<sup>51</sup> Marshall, 119 Cal. App. 4th at 1245.

<sup>52</sup> *See* PUB. CONT. CODE §20134(a) relating to counties.

<sup>53</sup> PUB. CONT. CODE §20134.

<sup>54</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§5121–5208 (2007).

<sup>55</sup> 44 C.F.R. § 206.40; *see also* FEMA, PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE (April 2017), *available at* [https://www.fema.gov/media-library-data/1496435662672d79ba9e1edb16e60b51634af00f490ae/2017\\_PAPPG\\_2.0\\_508\\_FINAL\(2\).pdf](https://www.fema.gov/media-library-data/1496435662672d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL(2).pdf) [hereinafter PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE].

<sup>56</sup> Public Assistance: Local, State, Tribal and Private Non-Profit, FEMA, <https://www.fema.gov/public-assistance-local-state-tribal-and-non-profit> (last visited Sept. 5, 2017).

<sup>57</sup> PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE, *supra* note 55.

<sup>58</sup> 42 U.S.C. §5170(a).

<sup>59</sup> GOV'T. CODE §6250 *et seq.*

<sup>60</sup> For example, some states such as New Jersey have included limitation on the emergency exemption. This includes limiting the amount of the contract and withholding payment until the service has been provided. N.J. STAT. ANN. §40A:11-6. In Oklahoma, the legislature added a monetary limit that can be spent under the emergency exception. OKLA. STAT. ANN. tit. 61, §130. In California, currently, the only limitation on the emergency exception is that a majority vote by the agency in charge is required before a void of the contract and the governing body must meet regularly to continually confirm by vote that there is a need to continue the emergency action. PUB. CONT. CODE §22050.

<sup>1</sup> PUB. CONT. CODE §22050.

<sup>2</sup> The Public Contract Code currently is divided into the following major sections: Purpose and Preliminary Matters (§§100–102); Administrative Provisions (§§1100–9203); Contracting by State Agencies (§§10100–19102); Contracting by Local Agencies (§§20100–22109), including Counties (§§20120–