

Memorandum 2005-43

---

**Mechanics Lien Law: Public Work Remedies**

---

This memorandum presents the next installment of our reworking of the mechanics lien law. This installment relates to remedies for a public work of improvement. Attached to this memorandum is a staff draft of the provisions.

This memorandum discusses substantive issues in the statutes governing public work remedies. A number of technical points are made in staff notes following various provisions in the staff draft.

LOCATION OF STATUTE

**Background**

The public work remedies are physically located in the mechanics lien law. This placement is confusing because the mechanics lien is not, in fact, a remedy for a public works contract dispute.

The principal remedies for a public works contract dispute are the stop payment notice and the payment bond. The mechanics lien law deals with stop payment notices and payment bonds for both private work and public work. But there is no commonality among the private work and public work statutes. Each statute governing each remedy, for each type of work, is *sui generis*.

At the time the public work remedies were originally incorporated into the mechanics lien law, that placement perhaps made some sense. But since then the Public Contract Code has been established, seeking to consolidate statutory material relating to public contracts, including public works contracts. That code was created in 1982, because “placing all public contract law in one code will make that law clearer and easier to find.” Pub. Cont. Code § 100.

The Public Contract Code contains substantial amounts of statutory material governing public works contracts, including payment bond requirements and prompt payment requirements. But it does not contain the core stop payment notice remedies, and the payment bond procedural provisions, which still reside in the mechanics lien law.

The staff draft relocates all of the public works contract remedial material from the mechanics lien law to the Public Contracts Code. This has the incidental effect of greatly simplifying the mechanics lien law itself. Simplification of the mechanics lien law was one of the major charges to the Commission in this assignment from the Legislature.

### **Arguments Against Relocation**

Gordon Hunt has written objecting to the proposed relocation:

The industry and their counsel all look to the Mechanic's Lien Law for all of their statutory remedies, to-wit, Mechanic's Liens, Stop Notices and bond remedies. It makes sense to leave all of those statutory remedies in the same code sections in the Civil Code.

This position carries quite a bit of weight, and was initially convincing to the staff, as well as to the Commission.

Unfortunately, leaving the public work remedies in the mechanics lien law will not leave all statutory remedies in one place in the codes. Essentially all of the prompt payment statutes are in the Public Contract Code. So is the main payment bond requirement applicable to all state agency construction contracts exceeding \$5,000 — Public Contract Code Section 7103. The main payment bond requirement applicable to all other public entity construction contracts exceeding \$25,000 remains in the mechanics lien law — Civil Code Section 3247. All of the provisions governing the contract terms and bidding process in a public works contract are in the Public Contract Code, but not the contractor and supplier remedies that go hand in hand with them.

While the industry and their counsel may all look to the mechanics lien law for their statutory remedies, it seems evident to the staff that public entities and their counsel must look primarily to the Public Contract Code for all the other law relating to bids, awarding the contract, conduct of performance, and the like.

A better argument for leaving the public works contract remedies in the mechanics lien law, in the staff's opinion, is this: If the public work remedies are removed to the Public Contract Code, it will be necessary either to duplicate or incorporate by reference a number of general provisions of the mechanics lien law in the Public Contract Code. For example, some definitions and general provisions on notice and proof of service, construction of bonds, completion, and the like, will either need to be duplicated in the Public Contract Code or incorporated by reference. In the staff draft we have duplicated them.

The amount of duplication required is not overwhelming but it is significant. This is tempered by the fact that many of the general provisions can be tailored to the circumstances of the public work remedies, and made more useful for that reason.

## **Conclusion**

The staff is not convinced that it is helpful to have the public works contract remedies enmeshed in the mechanics lien law. While it may be true that practitioners are used to finding them there, the staff predicts that practitioners will quickly adapt to the new location in the Public Contract Code. A practitioner that is not familiar with or does not look into that Code in connection with a public works contract, regardless of whether the stop payment notice and payment bond remedies remain in the mechanics lien law, runs the risk of missing some very important applicable law.

The staff is somewhat concerned about the duplication of general provisions that would be necessitated by relocation. On balance, we think the benefits of consolidating public contract law in one code outweigh the detriments of recreating some general provisions. However, **the staff recommends that the Commission work through the statute and the issues raised, and get a feel for the new location, before coming to a final judgment on the matter.**

## GENERAL PROVISIONS

### **Jurisdiction and Venue**

The jurisdiction and venue provisions of the existing mechanics lien law refer variously to the “proper court” (Civ. Code §§ 3144, 3146, 3154, 3210), “the appropriate superior court” (Civ. Code § 3201), “the court first acquiring jurisdiction” (Civ. Code §§ 3175, 3214), and “the superior court in the county in which the private work of improvement is located” (Civ. Code § 3260.2).

The references to the court “first acquiring jurisdiction” are evidently relics of the pre-unification era when jurisdiction under the mechanics lien law could be in the municipal court or the superior court, depending on the amount in controversy. We have not eliminated these provisions in the proposed law, since they arguably could still have relevance in the context of a work of improvement that straddles a county line. In that event the superior court in either county

could have jurisdiction. See proposed Pub. Cont. Code § 44440 (joinder, consolidation, and interpleader).

While a statute addressed to a work of improvement that straddles a county line may have limited applicability to a private work, it is conceivable to the staff that it could be a much more significant matter for a public work. Consider a road or highway, or a dam or waterway, that extends for some distance across county lines. Same parties, same contract, different counties.

Does it make any sense to attempt to centralize jurisdiction in such a case in Sacramento County? There could be a concern about divorcing the court proceeding from the land records, but this is not as critical in a public work as in a private work because the lien remedy is not available in a public work.

A greater concern with centralized jurisdiction is that it would remove the dispute to a perhaps inconvenient venue for the parties. This is likely to be particularly true in the case of a local agency project, as opposed to a state agency project.

The staff has not pursued the centralization concept in this draft. See proposed Pub. Cont. Code § 42040:

#### **§ 42040. Jurisdiction and venue**

42040. The proper court for proceedings under this part is the superior court in the county in which a public works contract, or part of it, is to be performed.

**Comment.** Section 42040 is a new provision included for drafting convenience. It generalizes a number of provisions of former law.

See also Section 41130 (“public works contract” defined).

#### **Notice**

As with private work remedies, the public work remedies contain notice requirements that vary perhaps unnecessarily with respect to contents of the notice, persons served, addresses, manner of giving notice, proof of service, etc. It is our intention to develop standardized notice provisions to replace the many variants, to the extent practicable. We have added Staff Notes throughout the draft flagging these for future attention.

## **Assignment**

A direct (or “original”) contractor is a person that contracts directly with a public entity on a public works contract, as opposed to a subcontractor. See proposed Pub. Cont. Code § 41040 (“direct contractor” defined).

Existing law indicates that a stop payment notice takes priority over a direct contractor’s assignment of receivables, but that a public entity may make payment to the direct contractor or assignee if payment is made before the public entity is served with a stop payment notice. Civ. Code §§ 3187, 3193.

These are the only instances in the statute where the direct contractor’s assignee is specifically referred to. Yet it is apparent that the statute should apply systematically to the direct contractor’s assignee as well as to the direct contractor. **The staff draft expands the definition of “direct contractor” to include an assignee.** See proposed Pub. Cont. Code § 41040:

### **§ 41040. Direct contractor**

41040. “Direct contractor” means a person that has a direct contractual relationship with a public entity. With respect to the amount due or to become due to a direct contractor, the term includes the direct contractor’s assignee.

**Comment.** Section 41040 supersedes former Civil Code Section 3095 (“original contractor”). A direct contractor is not limited to a builder, and may include a surveyor, engineer, material supplier, artisan, or other person that contracts directly with the public entity.

The definition generalizes provisions of former Civil Code Section 3187 relating to payment of the assignee of a direct contractor. See also Section 44340 (effect of assignment or garnishment).

See also Sections 41100 (“person” defined), 41120 (“public entity” defined).

We have examined usage of the term “direct contractor” throughout the statute, and this definition appears to work just fine.

## **Completion**

Completion is a key concept for exercise of public works contract remedies, as it is for private work remedies. Completion triggers time limits within which a claimant must act in order to exercise the stop payment notice and payment bond remedies.

The term is defined in Civil Code Section 3086:

### **Civ. Code § 3086. Completion**

3086. “Completion” means, in the case of any work of improvement other than a public work, actual completion of the work of improvement. Any of the following shall be deemed equivalent to a completion:

- (a) The occupation or use of a work of improvement by the owner, or his agent, accompanied by cessation of labor thereon.
- (b) The acceptance by the owner, or his agent, of the work of improvement.
- (c) After the commencement of a work of improvement, a cessation of labor thereon for a continuous period of 60 days, or a cessation of labor thereon for a continuous period of 30 days or more if the owner files for record a notice of cessation.

If the work of improvement is subject to acceptance by any public entity, the completion of such work of improvement shall be deemed to be the date of such acceptance; provided, however, that, except as to contracts awarded under the State Contract Act, Chapter 3 (commencing with Section 14250), Part 5, Division 3, Title 2 of the Government Code, a cessation of labor on any public work for a continuous period of 30 days shall be a completion thereof.

This provision presents a number of difficulties of interpretation in its application to a public works contract.

#### *Actual Completion or its Equivalent*

The first sentence of Section 3086 defines completion as “actual completion”, except in the case of a public work. The public work exception apparently also extends to the other grounds for completion (occupation or use, acceptance, and cessation of labor) set out in subdivisions (a)-(c) of the section, but this is far from clear. **This should be made clear** in the revision of the statute.

#### *Acceptance by a Public Entity*

The unnumbered paragraph at the end of Section 3086 does apply to a public work. The first clause — a work of improvement that is subject to acceptance by a public entity — applies to both a public work and a private work. A private work of improvement may well be subject to acceptance by a public entity, particularly where the private work is infrastructure that is to be conveyed to the public entity as an exaction for approval of a land development project.

With respect to a public work, the staff suspects that nearly all public work is subject to acceptance by the public entity. Thus completion of a public works contract will ordinarily occur on acceptance by the public entity.

### *Cessation of Labor*

There may be circumstances where completion of a public work is deemed to occur even though there has been no acceptance by the public entity. The second clause of the unnumbered paragraph at the end of Section 3086 deals with one such circumstance — cessation of labor. A cessation of labor on a public work for a continuous period of 30 days is considered completion for purposes of exercise of the stop payment notice and payment bond remedies. This should be compared with the rule for private work, where cessation of labor is not considered completion until 60 days have elapsed. Civ. Code § 3086(c).

Gordon Hunt argues that the 30 day cessation of labor rule for a public work is unnecessary and a trap for the unwary. On many public work projects there will be delays that exceed thirty days. In the case of *W.F. Hayward Co. v. Transamerica Ins. Co.*, 16 Cal. App. 4th 1101 (1993), a subcontractor lost its payment bond rights when the original prime contractor was terminated on a County of Los Angeles job and labor ceased for more than 30 days.

Mr. Abdulaziz agrees with this position. He sees no reason to treat a public work and a private work differently on this issue.

This proposal makes sense to the staff. It is also true, however, that the two statutes could be harmonized by shortening the private work cessation statute to 30 days rather than lengthening the public work cessation statute to 60 days.

It is not clear to us why the Legislature felt it necessary to establish a shorter period for a public works contract than for a private work of improvement. We are also concerned about the lack of balance in the changes we have tentatively agreed to in this study so far — The changes routinely favor claimants over others in a contract dispute. The staff's assessment is that an unbalanced proposal will have no chance of enactment by the Legislature. **We would seek input from public entities and other stakeholders** (such as surety companies) before adopting the proposal to lengthen the public work cessation period to 60 days.

### *Contract Awarded Under State Contract Act*

The second clause of the unnumbered paragraph at the end of Section 3086 excludes from the 30 day cessation rule a contract awarded under the State Contract Act. (The existing statutory reference to the Government Code is obsolete. The State Contract Act has been relocated, along with other statutes

affecting public works contracts, to the Public Contract Code. See Pub. Cont. Code § 10100 *et seq.*)

The scope of the State Contract Act is complex. The act covers major state construction projects, including those of the Departments of Water Resources, General Services, Boating and Waterways, Corrections, and Transportation. Many state projects are not covered by the act.

The net result is that the 30 day cessation rule applies to all local public works contracts and many, but not all, state public works contracts.

#### *Notice of Cessation*

In the case of a private work, cessation of labor for 60 days is deemed completion. But an owner may record a notice of cessation after labor has ceased for 30 days or more, and completion is deemed to have occurred at that time. Civ. Code § 3086(c). See also Civ. Code § 3092 (“notice of cessation” defined).

May a public entity — the “owner” of a public work — also record a notice of cessation under the statutory scheme? The staff does not believe these provisions were intended to apply to a public work. Nor would they seem to have much effect on a public work in any event, since the rule already is that completion is deemed to have occurred on a work stoppage of 30 days on most public works. Civ. Code § 3086 (unnumbered paragraph, 2d clause).

Nonetheless, Civil Code Section 3184(a) provides that a public work stop payment notice must be served within 30 days after the recording of a notice of cessation. It is not clear why a public entity would record a notice of cessation, since such a notice can only be recorded on or after 30 days of work stoppage, and by operation of law completion is deemed to have occurred on the 30th day.

What happens if the public entity records a notice of cessation on the 45th day of work stoppage. Do the statutes of limitation begin to run at that time, or do they still continue to run from the 30th day? The cases have not answered this question.

We do not know how frequently a public entity records a notice of cessation. We suspect that the ability to record a notice of cessation causes more problems than it solves. It is perhaps a useful tool for a contract awarded under the State Contract Act, to which the 30 day work stoppage rule does not apply.

The staff’s inclination would be to leave the provision in the draft for now, but to **solicit comment particularly from state agencies** as to its utility.

### *Notice of Completion*

Civil Code Section 3093 enables the owner of a work of improvement to record a notice of completion (other than by cessation of labor). Recordation of a notice of completion reduces the time in which a claimant on a private work may record a claim of lien from 90 days after completion to 60 days after recordation.

May a public entity record a notice of completion? Is there any reason to do so, given that a mechanics lien is unavailable on a public work?

The statutes allow a public entity to record a notice of completion. Civ. Code § 3184. This has the effect of reducing the time within which a claimant may give stop payment notice from 90 days after completion to 30 days after recordation.

Recordation of a notice of completion also triggers the 10 day period during which the public entity must notify a stop payment notice claimant of the time for enforcing the claim. Civ. Code § 3185. It is not clear how the timing on this duty works, however, since it is possible that the public entity will not receive a claimant's stop payment notice until 30 days after recordation of the notice of completion. See discussion of "Stop Payment Notice" below.

Finally, recordation of a notice of completion reduces the time for a claimant on a payment bond to notify the principal and surety on the bond from 75 days after completion to 15 days after recordation. Civ. Code § 3252(b).

The notice of completion thus appears to serve a useful purpose in the public work context and should be retained.

### *Notice of Acceptance*

Civil Code Section 3184 remarks parenthetically that a notice of completion is "sometimes referred to in public works as a notice of acceptance". (A parenthetical remark in a statute is rather unusual.) That is the only place the term is used in the mechanics lien law. Nor is it used in the Public Contract Code.

Presumably the term refers to notice of acceptance of a work of improvement by the public entity. The statute gives the notice of acceptance no legal effect, although a claimant notified by a public entity of its acceptance of the work of improvement would undoubtedly be entitled to rely on the notice under common law principles.

Notwithstanding the parenthetical remark in the statute, the staff questions whether a notice of completion and a notice of acceptance are indeed

synonymous. We can visualize a situation where a public works contract is substantially complete and the public entity decides to start limitations periods running by recording a notice of completion. But this does not necessarily mean that the public entity has accepted the work of improvement. There may be a number of items that need further work before the public entity will accept the work of improvement.

**The staff would eliminate the reference** to a “notice of acceptance” from the statute. Nor would we use the term “acceptance of completion” which likewise is used only in one provision. See Civ. Code § 3184. That term is evidently a longhand for “acceptance”.

*Staff Recommendation*

Pulling together the pieces of this discussion, the staff suggests the following provision:

**§ 41030. Completion (including acceptance and cessation)**

41030. “Completion” means the date of the earliest to occur of the following events:

- (a) Acceptance by the public entity.
- (b) Cessation of labor for a continuous period of 30 days. This subdivision does not apply to a contract awarded under the State Contract Act, Part 2 (commencing with Section 10100).
- (c) Recordation of a notice of cessation.
- (d) Recordation of a notice of completion.

**Comment.** Section 41030 generalizes provisions found in the public works contract statutes. See, e.g., former Civ. Code §§ 3086, 3185, 3252.

**Note.** The Commission seeks comment on the following issues:

- (1) Is the 30 day cessation of labor period too short? Should it be changed to 60 days for consistency with the rule applicable to a private work of improvement?
- (2) Is a notice of cessation ever recorded on a public work of improvement? If so, what should be the rule in case of a conflict between the time provided in subdivision (b) and the time provided in subdivision (c).

If we proceed along these lines, it will be necessary to provide detail concerning the notices of cessation and completion, such as their contents, who may execute and record them, etc. In our overhaul of the private work statutes, we have tentatively combined the two notices in one. We would undoubtedly do the same here.

## PRELIMINARY NOTICE

A claimant on a public works contract must give a preliminary notice to the public entity and the direct contractor as a prerequisite to exercise of the stop payment notice and payment bond remedies under the statute. See, e.g., Civ. Code 3098 (“preliminary 20-day notice (public work)” defined).

### **Contents of Preliminary Notice**

The public work preliminary notice is similar to the private work preliminary notice. Each requires the claimant to inform the person being notified of (1) the work provided by the claimant and (2) the person who contracted with the claimant for the work.

The private work preliminary notice also requires the claimant’s address and a description of the construction site sufficient for identification. This would seem to be useful information for a public work as well. Yet presumably the public work preliminary notice operates just fine the way it is. **Perhaps the private work preliminary notice can be simplified along the lines of the public work notice?**

### **Disciplinary Action for Failure to Give Preliminary Notice**

Existing law provides:

#### **Civ. Code § 3098. Preliminary notice**

(b) Where the contract price to be paid to any subcontractor on a particular work of improvement exceeds four hundred dollars (\$400), the failure of that contractor, licensed under Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, to give the notice provided for in this section, constitutes grounds for disciplinary action by the Registrar of Contractors.

Who is this statute designed to protect? If a subcontractor fails to give the required preliminary notice and ends up without a stop notice or payment bond remedy, the subcontractor has only itself to blame. Suppose the subcontractor does not wish to incur the administrative expense of giving a preliminary notice on a relatively small contract?

We have received at least one letter from a contractor that bears on this issue. That contractor states “my business of choice is handyman work. Many of my jobs are two hours to a few days. Filing a preliminary notice is not practical.”

Why add insult to injury by disciplining a subcontractor that chooses not to give a preliminary notice? Possibly the subcontractor's employees have an interest in seeing payment, and that may be the origin of this provision.

In any event, the provision is somewhat antiquated. The licensing and disciplinary authority is no longer the Registrar of Contractors but the Contractors' State License Board. The \$400 trigger point was set in 1968; adjusted for inflation, it would be around \$2,000 today.

**Should this provision be preserved at all, and if so should its amount be increased?**

### **Transitional Provision**

The existing statute includes a transitional provision from a decade ago when, for a year, the preliminary notice was required to be given to a subcontractor:

#### **Civ. Code § 3098. Preliminary notice**

(e) The failure to provide, pursuant to Chapter 974 of the Statutes of 1994, a written preliminary notice to a subcontractor with whom the claimant has contracted shall not affect the validity of any preliminary notice provided pursuant to this section.

This transitional rule is probably no longer necessary. **In the interest of simplification, the staff proposes to eliminate it in our proposed draft.** Our new statute would not be operative before 2008 at the earliest, by which time any violation of the old law that was repealed in 1995 would likely be moot.

## STOP PAYMENT NOTICE

### **Terminology**

We have redesignated the public work stop notice as a "stop payment notice" consistent with our usage in the private work portion of the mechanics lien law. See proposed Pub. Cont. Code § 41140 ("stop payment notice" defined).

Practitioners have indicated to us that this terminological change would add clarity to the statute.

### **Notification of Stop Payment Claimant**

Existing law provides that within 10 days after completion of a public works contract, the public entity must notify each person that has given a stop payment notice of the expiration of "such period":

### **Civ. Code § 3185. Notification of stop payment notice claimant**

3185. No later than 10 days after the filing of a notice of completion or after the cessation of labor has been deemed a completion of the public work or after the acceptance of completion, whichever is later, the public entity shall give notice of the expiration of such period to each stop notice claimant by personal service, or registered or certified mail. When service is by registered or certified mail, service is complete at the time of the deposit of the registered or certified mail in a United States post office, addressed to the claimant at the address shown upon his stop notice claim. No such notice need be given unless the claimant shall have paid to the public entity the sum of two dollars (\$2) at the time of filing his stop notice.

#### *Notification of What?*

Just what period the expiration is of which stop payment claimant is to be notified is unclear. *J.H. Thompson Corp. v. DC Contractors*, 4 Cal. App. 4th 1355, 7 Cal. Rptr. 2d 1355 (1992), assumes “such period” refers to the period for enforcement of a stop payment notice, as do various treatises on mechanics lien law. This would make some sense out of the provision, and we have revised it accordingly in the staff draft. See proposed Pub. Cont. Code § 44180 (notification of claimant).

#### *Notification Fee*

The notification statute also provides that “No such notice need be given unless the claimant shall have paid to the public entity the sum of two dollars (\$2) at the time of filing his stop notice.” Is the \$2 fee a prerequisite for the public entity’s duty to give notice, or only for the duty to give notice by registered or certified mail? The statute is ambiguous.

The \$2 fee was enacted in 1969. It would amount to about \$10 in today’s buying power.

Should the \$2 fee be modernized? Even at \$10, it probably would cost a public entity more to handle and process the payment than the payment is worth. As a practical matter, the fee statute is probably more valuable to a public entity as a means to avoid compliance with a stop payment notice on a technicality.

On the other hand, if the fee were eliminated, that would undoubtedly add a cost factor to the bill that would cause it to be killed in the Legislature.

**On balance, the staff recommends that the Commission consider increasing the amount of the fee consistent with the change in the value of the dollar since the fee's enactment.**

### **Summary Release Procedure**

The law provides a summary procedure by which the direct contractor may obtain release of funds withheld pursuant to an improper stop payment notice. The matter is determined by the court sitting without a jury, based on affidavits of the parties.

The summary procedure statute notes that "Nothing in this article shall be construed to deprive any party of the right to a trial by jury in any case where such right is given by the California Constitution, but a jury trial may be waived in like manner as in the trial of an action." Civ. Code § 3204.

The California Constitution states that "Trial by jury is an inviolate right and shall be secured to all." Cal. Const. art. I, § 16. It is generally accepted that this provision codifies the right to jury trial as it existed at common law in 1850, when the Constitution was adopted.

Because the mechanics lien law remedies generally, and the summary release procedure for a stop payment claim specifically, were unknown to the common law and are equitable in nature, there would ordinarily be no constitutional right to a jury trial. However, if the defendant in a mechanics lien enforcement proceeding raises a contract defense, that may entail legal issues for which there is a right to jury trial. See, e.g., *Selby Constructors v. McCarthy*, 91 Cal. App. 3d 517, 154 Cal. Rptr. 164 (1979).

The staff draft of the jury trial provision reads:

#### **§ 44280. Jury trial**

44280. Nothing contained in this article shall be construed to deprive a party of the right to trial by jury in a case where the right is given by the California Constitution.

**Comment.** Section 44280 restates former Civil Code Section 3204. Jury trial may be waived in the same manner as in the trial of an action. Section 42050 (rules of practice).

Nonetheless, the summary release procedure for funds withheld pursuant to a stop payment notice does not appear to implicate the loss of any rights for which a jury trial would be required. Moreover, we cannot by statute eliminate a right to jury trial given by the Constitution, so this section adds nothing to the

law. We do not think this provision serves a useful purpose; **we would delete it from the draft.**

#### **“Extras”**

“No assignment by the original contractor of any money due or to become due to the original contractor under the contract, or for ‘extras’ in connection therewith whether made before or after the service of a stop notice, takes priority over a stop notice.” Civ. Code § 3193. Although the grammatical construction of this provision is confusing, presumably the provision intends to say that a stop payment notice has priority over an assignment of an amount due for extras.

Just what “extras” means in this context is unclear. The statutory waiver and release forms refer in two places to extras furnished before or after the release date and in one place to a disputed claim for extra work. Otherwise, the mechanics lien law does not refer to “extras”.

In our redraft of the mechanics lien law, we attempt to standardize terminology by referring to “contract changes”. We also plan to address in a future memorandum whether a reference in a statute to a “contract” or to an “amount due under a contract” should be construed to include contract changes as a general matter.

**Meanwhile, the staff suggests that we be consistent here with terminology we have used elsewhere in the staff draft.** A stop payment notice should take priority over an assignment by the direct contractor “of any amount due or to become due under the contract, including contract changes.”

## PAYMENT BOND

### **Scope of Payment Bond Statute**

#### *Existing Law*

The existing payment bond statutes are confusing. It appears on the surface that a payment bond is required in a state public works contract exceeding \$5,000 (Pub. Cont. Code § 7103) and in a local agency public works contract exceeding \$25,000 (Civ. Code § 3247).

However, this reading is far from clear because the two governing statutes cross-refer to each other in a sort of endless loop:

### **Pub. Cont. Code § 7103. Payment bond in state entity contract**

7103. (a) Every original contractor to who [sic] is awarded a contract by a state entity, as defined in subdivision (d), involving an expenditure in excess of five thousand dollars (\$5,000) for any public work shall, before entering up [sic] the performance of the work, file a payment bond with and approved by the officer or state entity by who [sic] the contract was awarded. ...

(d) For purposes of this section, "state entity" means every state office department, [sic] division, bureau, board, or commission, but does not include the Legislature, the courts, any agency in the judicial branch of government, or the University of California. All other public entities shall be governed by the provisions of Section 3247 of the Civil Code.

...

### **Civ. Code § 3247. Payment bond requirement**

3247. (a) Every original contractor to whom is awarded a contract by a public entity, except as provided in subdivision (d) of Section 7103 of the Public Contract Code, involving an expenditure in excess of twenty-five thousand dollars (\$25,000) for any public work shall, before entering upon the performance of the work, file a payment bond with and approved by the officer or public entity by whom the contract was awarded. ...

See also Civ. Code § 3099 ("public entity" means state, Regents of University of California, etc.).

Assuming these statutes mean, as they appear to, that a state contract over \$5,000 requires a payment bond and a local contract over \$25,000 requires a payment bond, that could be stated much more simply and directly.

#### *Legislature, Judiciary, and University of California*

What rule applies to the Legislature, the courts, any agency in the judicial branch of government, and the University of California? See Pub. Cont. Code § 7103(d). Is it intended that those entities be exempt from the payment bond requirement completely, or that they be subject to the Civil Code Section 3247 payment bond requirement?

Unfortunately, there is no judicial interpretation of this provision, nor is there any apparent evidence of legislative intent concerning it.

Gordon Hunt argues that the Legislature did not intend that the state agencies singled out by Section 7103(d) should be exempt from the payment bond requirement altogether:

The Memorandum states that it is probably intended that the legislative and judicial branches of State government and the University of California not be subject to any payment bond requirement. I believe that that is not the intent of the Legislature and that all public works projects should be bonded. The Courts have continually held that where a public entity fails to bond a project, they can be sued for negligence. See *Walt Rankin & Associates, Inc. v. City of Murrieta*, 84 Cal.App.4th 60-5 (2000) and *N.V. Heathorn, Inc. v. County of San Mateo*, 126 Cal.App.4th 126 (2005). Thus, it is clear that all public entities should provide payment bonds on their projects.

Mr. Hunt also argues from public policy that it should be the law that these state entities are not exempt. He notes that a person that improves a public work has no lien remedy. The payment bond substitutes for the lien remedy in a public works contract. "Since the parties who improve public works do not have lien rights, they must, in fact, have bond rights as a substitution for the Mechanic's Lien. Without the bond right, the claimants would be left with only the Stop Notice remedy. As a result, all claimants assume that all public works projects are bonded. That should be the law."

This position makes theoretical sense to the staff, although it is perhaps overstated. A claimant that does not have a bond right is not bereft of remedies. The claimant will not have the special advantages of the various garnishment and bond remedies provided by statute for a public works contract. But the claimant will have all the breach of contract remedies of a general unsecured creditor, with the full power and mechanism of the judicial system to enforce them.

It is quite possible that Mr. Hunt is correct that all parties to a public works contract assume that it will be bonded, apart from possible technical readings of the statute excusing a bond. We will seek to obtain more information about this by the time of the Commission meeting.

We do note, however, that it is not unusual for a statute to exempt the Legislature, the Judiciary, and the University of California from its operation, for both political and constitutional reasons.

Take the University of California. Under Article IX, Section 9, of the California Constitution the operations of the university are independent, subject to limited legislative control. That control includes "such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts."

Does the competitive bidding exception impliedly preclude other legislative constraints, such as a payment bond requirement? That issue has not been judicially determined. Under general case law, one test for whether the Legislature may intrude on the university's independence is that the legislative constraint affects a matter of statewide concern not involving internal university affairs. Application of this standard to the payment bond remedy could be argued either way.

Assuming the Legislature does have power to regulate the university in this area, and in fact intends to apply Civil Code Section 3247 to the university as Mr. Hunt suggests, does the application of Section 3247 to the university make any sense? A construction project on a university campus costing between \$5,000 and \$25,000 would require a payment bond if done on a California State University campus but not if done on a University of California campus. What would be the rationale for this?

A related question that the staff is unable to answer at present is how the State Contact Act (Pub. Cont. Code § 10100 *et seq.*) interacts with these provisions. That statute requires a payment and performance bond in "every contract". Pub. Cont. Code §§ 10221-10225.

### *Conclusion*

The law could benefit from clarification. Until we can figure out the intention of existing law, however, **the staff would leave it as is**, in its current ambiguous state. See proposed Pub. Cont. Code § 45010 (payment bond requirement). We would flag this provision for further input from interested and knowledgeable parties.

### **Preliminary Notice as Prerequisite**

Under Civil Code Section 3098(d), a claimant may recover against a payment bond only for labor, service, equipment, or material (1) provided within 20 days before giving a preliminary notice and (2) provided at any time after giving a preliminary notice. See also Civ. Code § 3252(a).

But this rule is undercut by subdivision (b) of Civil Code Section 3252, enacted in 1994:

#### **Civ. Code § 3252. Notification of surety and principal**

(b). If the 20-day public work preliminary bond notice was not given as provided in Section 3098, a claimant may enforce a claim by giving written notice to the surety and the bond principal as

provided in Section 3227 within 15 days after recordation of a notice of completion. If no notice of completion has been recorded, the time for giving written notice to the surety and the bond principal is extended to 75 days after completion of the work of improvement.

An obvious question is whether the preliminary notice any longer serves a useful purpose with respect to recovery against a payment bond? In fact, it appears that if the claimant failed to give a preliminary notice until more than 20 days after commencing work, the claimant would be better off simply not giving the preliminary notice at all, but relying on the written notice provision of Civil Code Section 3252(b).

In fact, that's just what happened in *American Buildings Co. v. Bay Commercial Construction*, 9 Cal. App. 4th 1193, 121 Cal. Rptr. 2d 539 (2002), only the claimant made the mistake of giving both a preliminary notice and the Section 3252(b) notice. The Court of Appeal concluded that the claimant's untimely preliminary notice under Civil Code Section 3098(d) did not preclude the claimant from obtaining full recovery against the payment bond after completion of the work of improvement by using the alternate notice procedure of Section 3252(b).

Given that state of affairs, does the old statutory language to the effect that preliminary notice is a prerequisite to recovery against a payment bond serve a useful purpose? The staff thinks **the Commission should consider eliminating the old language**. It is incorrect, and possibly misleading.

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

## Contents

PUBLIC CONTRACT CODE .....	3
§§ 41010-45090 (added). Public Works Contract Remedies .....	3
PART 4. PUBLIC WORKS CONTRACT REMEDIES .....	3
CHAPTER 1. DEFINITIONS .....	3
§ 41010. Application of definitions .....	3
§ 41020. Claimant .....	3
§ 41030. Completion (including acceptance or cessation) .....	3
§ 41040. Direct contractor .....	3
§ 41050. Express trust fund .....	4
§ 41060. Funds .....	4
§ 41070. Labor, service, equipment, or material .....	4
§ 41080. Laborer's compensation fund .....	4
§ 41090. Payment bond .....	4
§ 41100. Person .....	5
§ 41110. Preliminary notice .....	5
§ 41120. Public entity .....	5
§ 41130. Public works contract .....	5
§ 41140. Stop payment notice .....	6
CHAPTER 2. GENERAL PROVISIONS .....	6
§ 42010. Application of part .....	6
§ 42020. Relation to other statutes .....	6
§ 42030. Who may use remedies .....	7
§ 42040. Jurisdiction and venue .....	7
§ 42050. Rules of practice .....	7
§ 42060. Written notice .....	7
§ 42070. Mailed notice .....	7
§ 42080. Agency .....	8
§ 42090. Liability of surety .....	8
CHAPTER 3. PRELIMINARY NOTICE .....	9
§ 43010. Preliminary notice prerequisite to remedies .....	9
§ 43020. Persons to be given preliminary notice .....	9
§ 43030. Contents of preliminary notice .....	9
§ 43040. Giving preliminary notice .....	10
§ 43050. Effect of preliminary notice .....	10
§ 43060. Disciplinary action for failure to give notice .....	10
CHAPTER 4. STOP PAYMENT NOTICE .....	11
ARTICLE 1. GENERAL PROVISIONS .....	11
§ 44110. Stop payment notice exclusive remedy to reach construction funds .....	11
§ 44120. Contents of stop payment notice .....	11
§ 44130. Giving of stop payment notice .....	11
§ 44140. Time for giving notice .....	12
§ 44150. Duty to withhold funds .....	12
§ 44160. Payment notwithstanding stop payment notice .....	12
§ 44170. Notification of claimant .....	13
ARTICLE 2. SUMMARY PROCEEDING FOR RELEASE OF FUNDS .....	13
§ 44210. Grounds for summary proceeding .....	13
§ 44220. Contractor's affidavit and demand for release .....	14

§ 44230. Notification of claimant .....	14
§ 44240. Claimant's counteraffidavit .....	14
§ 44250. Commencement of action .....	15
§ 44260. Pleadings and burden of proof.....	15
§ 44270. Court determination .....	15
§ 44280. Jury trial .....	16
§ 44290. Summary determination not res judicata .....	16
ARTICLE 3. PRIORITIES .....	16
§ 44310. Release bond.....	16
§ 44320. Distribution of funds withheld pursuant to stop payment notice .....	17
§ 44330. Stop payment notice remedy not exclusive .....	17
§ 44340. Forfeiture for false notice .....	17
§ 44350. Effect of assignment or garnishment.....	17
ARTICLE 4. ENFORCEMENT OF STOP PAYMENT NOTICE .....	18
§ 44410. Prerequisites for enforcement of notice .....	18
§ 44420. Time for enforcement of stop payment notice .....	18
§ 44430. Notice of action .....	18
§ 44440. Joinder, consolidation, and interpleader .....	19
§ 44450. Dismissal of enforcement action for lack of prosecution .....	19
§ 44460. Dismissal of action or judgment against claimant .....	19
§ 44470. Claim filing procedures inapplicable .....	19
CHAPTER 5. PAYMENT BOND .....	19
§ 45010. Payment bond requirement .....	19
§ 45020. Consequences of failure to give bond .....	20
§ 45030. Bond requirements .....	20
§ 45040. Construction of bond.....	21
§ 45040. Statute of limitations .....	21
§ 45060. Preliminary notice required .....	21
§ 45070. Notice to principal and surety.....	22
§ 45080. Action on bond .....	23
§ 45090. Limitation on chapter .....	23

---

## PUBLIC CONTRACT CODE

## **§§ 41010-45090 (added). Public Works Contract Remedies**

3 SEC. \_\_\_\_\_. Part 4 (commencing with Section 41010) is added to Division 2 of the  
4 Public Contract Code, to read:

## PART 4. PUBLIC WORKS CONTRACT REMEDIES

## CHAPTER 1. DEFINITIONS

## **§ 41010. Application of definitions**

9       41010. Unless the provision or context otherwise requires, the definitions in this  
10      chapter govern the construction of this part.

**Comment.** Section 41010 supersedes former Civil Code Section 3082.

## **§ 41020. Claimant**

13       41020. "Claimant" means a person that gives a stop payment notice or asserts a  
14      claim against a payment bond.

**Comment.** Section 41020 restates former Civil Code Section 3085, omitting as unnecessary the reference to the claimant's "entitlement" and to the combination of remedies. For persons having the right to give a stop payment notice or assert a claim against a payment bond, see Section 42030 (who may use remedies).

19 See also Sections 41090 (“payment bond” defined), 41100 (“person” defined), 41140 (“stop  
20 payment notice” defined).

## **§ 41030. Completion (including acceptance or cessation)**

22 41030. "Completion" (including acceptance or cessation) and "notice of  
23 completion" (including notice of acceptance or cessation) mean:

[See discussion in Memorandum 2005-43 of completion, acceptance, and cessation, and notice of those events.]

**Comment.** Section 41030 generalizes provisions found in the public works contract statutes. See, e.g., former Civ. Code §§ 3086, 3185, 3252.

## **§ 41040. Direct contractor**

41040. "Direct contractor" means a person that has a direct contractual relationship with a public entity. With respect to the amount due or to become due to a direct contractor, the term includes the direct contractor's assignee.

**Comment.** Section 41040 supersedes former Civil Code Section 3095 (“original contractor”). A direct contractor is not limited to a builder, and may include a surveyor, engineer, material supplier, artisan, or other person that contracts directly with the public entity.

The definition generalizes provisions of former Civil Code Section 3187 relating to payment of the assignee of a direct contractor. See also Section 44350 (effect of assignment or garnishment).

1      See also Sections 41100 (“person” defined), 41120 (“public entity” defined).

2      **§ 41050. Express trust fund**

3      41050. “Express trust fund” means a laborer’s compensation fund to which a  
4      portion of a laborer’s total compensation is to be paid under an employment  
5      agreement or a collective bargaining agreement for the provision of benefits,  
6      including, but not limited to, employer payments described in Section 1773.1 of  
7      the Labor Code and implementing regulations.

8      **Comment.** Section 41050 continues a portion of former Civil Code Section 3111 without  
9      substantive change.

10     See also Section 41080 (“laborer’s compensation fund” defined).

11     ~~☒~~ **Staff Note.** The term defined is used in only one provision of this part. We have kept the  
12     definition here, for now, rather than incorporating it with the provision in which it is used, in  
13     order to maintain parallelism with the mechanics lien law.

14     **§ 41060. Funds**

15     41060. “Funds” means warrant, check, money, or bonds (if bonds are to be  
16     issued in payment of the public works contract).

17     **Comment.** Section 41060 is a new definition. It is included for drafting convenience. It  
18     generalizes provisions of former Civil Code Sections 3186, 3187, and 3196.

19     See also Section 41130 (“public works contract” defined).

20     **§ 41070. Labor, service, equipment, or material**

21     41070. “Labor, service, equipment, or material” includes but is not limited to  
22     labor, skills, services, material, supplies, equipment, appliances, transportation,  
23     power, surveying, construction plans, and construction management provided for a  
24     public works contract.

25     **Comment.** Section 41070 is a new definition. It is included for drafting convenience. The  
26     phrase is intended to encompass all things of value provided for a work of improvement, and  
27     replaces various phrases used throughout the former law, including “labor or material,” “labor,  
28     services, equipment, or materials,” “appliances, teams, or power,” “provisions, provender, or  
29     other supplies,” and the like.

30     See also Section 41130 (“public works contract” defined).

31     **§ 41080. Laborer’s compensation fund**

32     41080. “Laborer’s compensation fund” means a person, including an express  
33     trust fund, to which a portion of the compensation of a laborer is paid by  
34     agreement with the laborer or the collective bargaining agent of the laborer.

35     **Comment.** Section 41080 continues the first sentence of former Civil Code Section 3089(b)  
36     without substantive change. See also Section 3082.410 (standing to enforce laborer’s rights).

37     See also Sections 41050 (“express trust fund” defined), 41100 (“person” defined).

38     **§ 41090. Payment bond**

39     41090. “Payment bond” means a bond given under any of the following  
40     provisions:

- 1       (a) Section 7103.
- 2       (b) Chapter 5 (commencing with Section 45010).
- 3       (c) Another provision of this code that provides for a payment bond.

4       **Comment.** Section 41090 supersedes former Civil Code Section 3096.

5       **§ 41100. Person**

6       41100. “Person” means an individual, corporation, public entity, business trust,  
7       estate, trust, partnership, limited liability company, association, or other entity.

8       **Comment.** Section 41100 is a new definition. It is included for drafting convenience.

9       See also Section 41120 (“public entity” defined).

10      **§ 41110. Preliminary notice**

11      41110. “Preliminary notice” means the notice required by Chapter 3  
12     (commencing with Section 43010) as a prerequisite to use of the remedies  
13     provided in this part.

14      **Comment.** Section 41110 supersedes former Civil Code Section 3098. The substantive  
15     requirements for a preliminary notice have been relocated to Chapter 3 (commencing with  
16     Section 43010).

17      **§ 41120. Public entity**

18      41120. (a) “Public entity” has the meaning provided in Section 1100 and  
19     includes all of the following:

- 20       (1) The Regents of the University of California.
- 21       (2) An officer authorized to act for a public entity.

22      (b) A reference in this part to a public entity means the public entity that  
23     awarded the public works contract.

24      **Comment.** Subdivision (a) of Section 41120 restates former Civil Code Section 3099. This  
25     part does not apply to a public works contract governed by federal law. See Section 42010  
26     (application of part). The reference to an officer of the public entity is included for drafting  
27     convenience. Cf. former Civ. Code §§ 3247, 3250, 3251 (public entity or officer).

28      Subdivision (b) is new; it is intended for drafting convenience. Cf. former Civ. Code §§ 3247,  
29     3250, 3251.

30      See also Section 41130 (“public works contract” defined).

31      **☒ Staff Note.** We have added a reference to an “officer” to simplify redrafting of provisions that  
32     currently refer to a contract awarded by a public entity “or officer”. This addition is probably  
33     unnecessary, but we have preserved it because people may be used to seeing it here.

34      Under Section 1100, “public entity” means the state, county, city, city and county, district,  
35     public authority, public agency, municipal corporation, or any other political subdivision or  
36     public corporation in the state.

37      **§ 41130. Public works contract**

38      41130. “Public works contract” has the meaning provided in Section 1101.

39      **Comment.** Section 41130 supersedes former Civil Code Section 3100 (“public work” defined).  
40     This part does not apply to a public works contract governed by federal law. See Section 42010  
41     (application of part).

**☒ Staff Note.** Under Section 1101, “public works contract” means an agreement for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind.

## **§ 41140. Stop payment notice**

41140. "Stop payment notice" means a notice given under Chapter 4 (commencing with Section 44110).

**Comment.** Section 41140 supersedes former Civil Code Section 3103.

## CHAPTER 2. GENERAL PROVISIONS

## **§ 42010. Application of part**

42010. (a) This part applies to a public works contract awarded by a public entity.

(b) This part does not apply to any of the following:

(1) A public works contract governed by federal law.

(2) A transaction governed by Sections 20457 to 20464, inclusive (street work bond).

**Comment.** Subdivision (a) of Section 42010 restates former Civil Code Section 3100.

Paragraph (1) of subdivision (b) is new.

Paragraph (2) of subdivision (a) restates former Civil Code Section 3266(b). This provision updates the former cross-reference to Streets and Highways Code Sections 5290-5297, which were repealed in 1982 when the Public Contract Code was created. See 1982 Cal. Stat. ch. 465, § 56. The repealed sections were superseded by Public Contract Code Sections 20457-20464. See 1982 Cal. Stat. ch. 465, § 11. The new sections apply to bonds in “street work” projects under Division 2 (commencing with Section 1600) (general provisions) of the Public Contract Code. See Pub. Cont. Code § 20457.

See also Sections 41120 (“public entity” defined), 41130 (“public works contract” defined).

## **§ 42020. Relation to other statutes**

42020. (a) This part does not limit, and is not affected by, improvement security provided under the Subdivision Map Act, Division 2 (commencing with Section 66410) of Title 7 of the Government Code.

(b) The Bond and Undertaking Law, Chapter 2 (commencing with Section 995.010) of Title 14 of Part 2 of the Code of Civil Procedure, applies to a bond given under this part.

**Comment.** Subdivision (a) of Section 42020 is new. It clarifies the interrelation between this part and the Subdivision Map Act. For relevant provisions of that act, see Gov't Code §§ 66499-66499.10 (improvement security).

Subdivision (b) is new. It is a specific application of Code of Civil Procedure Section 995.020 (application of Bond and Undertaking Law).

**☞ Staff Note.** A provision like subdivision (b) is not strictly necessary, since the Bond and Undertaking Law applies by its own terms. But the cross-reference may be helpful to nonattorneys having occasion to use this statute.

1      **§ 42030. Who may use remedies**

2      42030. (a) Except as provided in subdivision (b), any of the following persons  
3      that has not been paid may give a stop payment notice to the public entity or assert  
4      a claim against a payment bond:

5      (1) A person that provides labor, service, equipment, or material properly  
6      authorized for the public works contract.

7      (2) An express trust fund, to the extent of the compensation agreed to be paid to  
8      the express trust fund for labor on that public works contract only.

9      (3) A person described in Section 4107.7.

10     (b) A direct contractor may not give a stop payment notice or assert a claim  
11    against a payment bond under this part.

12     **Comment.** Section 42030 restates former Civil Code Section 3181. The former references to  
13    site improvement work and to provisions, provender, or other supplies are included within the  
14    meaning of subdivision (a). See Section 41070 (“labor, service, equipment, or material” defined).

15     See also Sections 41040 (“direct contractor” defined), 41050 (“express trust fund” defined),  
16    41070 (“labor, service, equipment, or material” defined), 41090 (“payment bond” defined), 41100  
17    (“person” defined), 41120 (“public entity” defined), 41130 (“public works contract” defined),  
18    41140 (“stop payment notice” defined).

19      **§ 42040. Jurisdiction and venue**

20     42040. The proper court for proceedings under this part is the superior court in  
21    the county in which a public works contract, or part of it, is to be performed.

22     **Comment.** Section 42040 is a new provision included for drafting convenience. It generalizes  
23    a number of provisions of former law.

24     See also Section 41130 (“public works contract” defined).

25      **§ 42050. Rules of practice**

26     42050. Except as otherwise provided in this part, Part 2 (commencing with  
27    Section 307) of the Code of Civil Procedure provides the rules of practice in  
28    proceedings under this part.

29     **Comment.** Section 42050 continues the first sentence of former Civil Code Section 3259  
30    without substantive change. The second sentence of former Civil Code Section 3259 is not  
31    continued; this part does not include special provisions relating to new trials or appeals.

32      **§ 42060. Written notice**

33     42060. Notice under this part shall be in writing.

34     **Comment.** Section 42060 generalizes various provisions of former law. See, e.g., former Civ.  
35    Code §§ 3092 (notice of cessation), 3093 (notice of completion), 3098 (preliminary notice), 3103  
36    (stop notice).

37      **§ 42070. Mailed notice**

38     42070. The following provisions apply to notice given by mail under this part:

39     (a) Notice shall be given by registered or certified mail or by another method of  
40    delivery providing for overnight delivery.

1       (b) Notice is complete when deposited in the mail or with an express service  
2 carrier in the manner provided in Section 1013 of the Code of Civil Procedure.

3       (c) Proof that the notice was given in the manner provided in this section shall  
4 be made by (1) a return receipt or a photocopy of the record of delivery and receipt  
5 maintained by the United States Postal Service, showing the date of delivery and  
6 to whom delivered, or in the event of nondelivery, by the returned envelope itself  
7 (2) proof of mailing certified by the United States Postal Service, or (3) a tracking  
8 record or other documentation certified by an express service carrier showing  
9 delivery of the notice.

10     **Comment.** Section 42070 is a new provision included for drafting convenience. It generalizes  
11 a number of provisions of former law, expands the methods of proof to include a certification of  
12 the mailing by the United States Postal Service, and expands the methods of giving notice to  
13 include delivery by express service carrier.

14     **☞ Staff Note.** It is our intention to develop all-purpose notice and proof of notice provisions for  
15 use both under this part and the mechanics lien law. In this connection, we will look at service as  
16 well as notice provisions. An issue throughout is whether notice or service is complete on deposit  
17 or on receipt. This may vary depending on the substantive provision. Attention will also be given  
18 to standardization of the address of notices (e.g., an address “reasonably calculated to give actual  
19 notice” v. an address stated in a document).

20     **§ 42080. Agency**

21     42080. An act that may be done by or to a person under this part may be done by  
22 or to the person’s agent to the extent the act is within the scope of the agent’s  
23 authority.

24     **Comment.** Section 42080 generalizes a provision of former Civil Code Section 3103. It makes  
25 clear that an agent’s authority is limited to the scope of the agency. Thus to the extent a direct  
26 contractor is deemed to be the agent of the principal for the purpose of engaging a subcontractor,  
27 the scope of the agency does not include other acts, such as compromise of litigation.

28     See also Section 41100 (“person” defined).

29     **§ 42090. Liability of surety**

30     42090. None of the following releases a surety from liability on a bond given  
31 under this part:

32       (a) A change to a contract, plan, specification, or agreement for a public works  
33 contract or for labor, service, equipment or material provided for a public works  
34 contract.

35       (b) A change to the terms of payment or an extension of the time for payment  
36 for a public works contract.

37       (c) A rescission or attempted rescission of a contract, agreement, or bond.

38       (d) A condition precedent or subsequent in the bond purporting to limit the right  
39 of recovery of a claimant otherwise entitled to recover under a contract,  
40 agreement, or bond.

41       (e) In the case of a bond given for the benefit of claimants, the fraud of a person  
42 other than the claimant seeking to recover on the bond.

43     **Comment.** Section 42090 restates former Civil Code Section 3225.

1        See also Sections 41020 (“claimant” defined), 41070 (“labor, service, equipment, or material”  
2        defined), 41100 (“person” defined), 41130 (“public works contract” defined).

3                    **CHAPTER 3. PRELIMINARY NOTICE**

4        **§ 43010. Preliminary notice prerequisite to remedies**

5        43010. (a) Except as otherwise provided by statute, preliminary notice is a  
6        necessary prerequisite to the validity of a stop payment notice or a claim against a  
7        payment bond under this part.

8        (b) A preliminary notice is not required of a laborer or a laborer’s compensation  
9        fund.

10      (c) A preliminary notice is not required of a claimant that has a direct  
11     contractual relationship with the direct contractor.

12      **Comment.** Subdivision (a) of Section 43010 restates part of the introductory clause of former  
13     Civil Code Section 3098. For a statutory exception to the preliminary notice requirement, see  
14     Section 45070 (notice to principal and surety).

15      Subdivision (b) restates former Civil Code Section 3098(c).

16      Subdivision (c) restates a portion of former Civil Code Section 3098(a).

17      See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41080  
18     (“laborer’s compensation fund” defined), 41090 (“payment bond” defined), 41110 (“preliminary  
19     notice” defined), 41140 (“stop payment notice” defined).

20      **§ 43020. Persons to be given preliminary notice**

21      43020. Before giving a stop payment notice or asserting a claim against a  
22     payment bond, a claimant that has provided labor, service, equipment, or material  
23     and has not been paid shall give a preliminary notice to the public entity and the  
24     direct contractor.

25      **Comment.** Section 43020 restates part of the introductory clause and subdivision (a) of former  
26     Civil Code Section 3098. Repetitive detail has been omitted, in reliance on defined terms and  
27     other substantive provisions.

28      See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41070  
29     (“labor, service, equipment, or material” defined), 41090 (“payment bond” defined), 41110  
30     (“preliminary notice” defined), 41120 (“public entity” defined), 41140 (“stop payment notice”  
31     defined).

32      **§ 43030. Contents of preliminary notice**

33      43030. A preliminary notice shall state with substantial accuracy all of the  
34     following:

35        (1) A general description of the labor, service, equipment, or material provided  
36     or to be provided.

37        (2) The name of the person that contracted for the labor, service, equipment, or  
38     material.

39      **Comment.** Subdivision (a) of Section 43030 restates part of the first sentence of former Civil  
40     Code Section 3098(a).

41      See also Section 41070 (“labor, service, equipment, or material” defined), 41100 (“person”  
42     defined), 41110 (“preliminary notice” defined).

1      **§ 43040. Giving preliminary notice**

2      43040. (a) A preliminary notice shall be given by mail or personal delivery.

3      (b) Notice to the direct contractor shall be addressed to the contractor at any  
4      place the contractor maintains an office or conducts business or at the contractor's  
5      residence.

6      (c) Notice to the Department of Transportation or the Department of General  
7      Services shall be addressed to the office of the disbursing officer of the department  
8      or delivered personally to the officer.

9      **Comment.** Subdivision (a) of Section 43040 restates the second and fourth sentences of former  
10 Civil Code Section 3098(a). See also Section 42070 (mailed notice).

11 Subdivision (b) restates the third sentence of former Civil Code Section 3098(a). The former  
12 reference to the Department of Public Works is replaced by a reference to Department of  
13 Transportation. See Gov't Code § 14001 (reference to Department of Public Works deemed to be  
14 Department of Transportation).

15 Subdivision (c) restates the fourth sentence of former Civil Code Section 3098(a).

16 See also Sections 41040 ("direct contractor" defined), 41110 ("preliminary notice" defined).

17      **§ 43050. Effect of preliminary notice**

18      43050. A claimant may give a stop payment notice or assert a claim against a  
19 payment bond only for labor, service, equipment, or material provided within 20  
20 days before giving a preliminary notice and at any time thereafter.

21      **Comment.** Section 43050 restates parts of subdivisions (a) and (d) of former Civil Code  
22 Section 3098.

23 See also Sections 41020 ("claimant" defined), 41070 ("labor, service, equipment, or material"  
24 defined), 41090 ("payment bond" defined), 41110 ("preliminary notice" defined), 41140 ("stop  
25 payment notice" defined).

26 **☒ Staff Note.** The language of this provision is radically simplified, but the staff believes it  
27 captures the essence of existing law.

28      **§ 43060. Disciplinary action for failure to give notice**

29      43060. A licensed subcontractor is subject to disciplinary action under the  
30 Contractors' State License Law, Chapter 9 (commencing with Section 7000) of  
31 Division 3 of the Business and Professions Code, if the contract price to be paid to  
32 the subcontractor exceeds \$400 and the subcontractor fails to give a preliminary  
33 notice.

34      **Comment.** Section 43060 restates former Civil Code Section 3098(b).

35 See also Section 41110 ("preliminary notice" defined).

1

## CHAPTER 4. STOP PAYMENT NOTICE

2

### Article 1. General Provisions

3

#### **§ 44110. Stop payment notice exclusive remedy to reach construction funds**

4

44110. (a) A person may not assert a legal or equitable right in funds for payment of construction costs, other than a right created by direct written contract between the person and the holder of the funds, except as provided in this chapter.

7

(b) This chapter provides the exclusive remedy of a person that provides labor, service, equipment, or material against funds for payment of construction costs.

9

**Comment.** Section 44110 restates former Civil Section 3264 to the extent it applied to a public works contract. See Section 42010 (application of part). For a comparable provision applicable to a private work, see Civ. Code § [to be provided].

12

See also Sections 41060 (“funds” defined), 41070 (“labor, service, equipment, or material” defined), 41100 (“person” defined).

14

#### **§ 44120. Contents of stop payment notice**

15

44120. (a) A stop payment notice shall be signed and verified by the claimant and shall state in general terms all of the following:

17

(1) The kind of labor, service, equipment, or material provided or agreed to be provided by the claimant.

19

(2) The name of the person to or for which the labor, service, equipment, or material was provided.

21

(3) The amount in value, as near as may be, of that already provided and of the whole agreed to be provided.

23

(4) The name and address of the claimant.

24

(b) A stop payment notice is not invalid by reason of any defect in form if it is sufficient to substantially inform the public entity of the information required.

26

**Comment.** Subdivision (a) of Section 44120 restates subdivisions (a)-(d) of former Civil Code Section 3103. See also Section 42080 (agency).

28

Subdivision (b) continues the third sentence of the first unnumbered paragraph of former Civil Code Section 3103.

30

See also Sections 41020 (“claimant” defined), 41070 (“labor, service, equipment, or material” defined) 41100 (“person” defined), 41120 (“public entity” defined), 41140 (“stop payment notice” defined).

33

#### **§ 44130. Giving of stop payment notice**

34

44130. A stop payment notice shall be given to the public entity by mailing or personally delivering the notice to the following person:

36

(a) In the case of a public works contract of the state, the director of the department that awarded the contract.

38

(b) In the case of a public works contract of a public entity other than the state, the office of the controller, auditor, or other public disbursing officer whose duty it is to make payment under the contract, or the commissioners, managers, trustees,

1 officers, board of supervisors, board of trustees, common council, or other body by  
2 which the contract was awarded.

3     **Comment.** Subdivision (a) of Section 44130 restates the second sentence of the first  
4 unnumbered paragraph of former Civil Code Section 3103.

5     Subdivision (b) restates the second unnumbered paragraph of former Civil Code Section 3103.  
6 See also Section 42070 (mailed notice).

7     See also Sections 41100 (“person” defined), 41120 (“public entity” defined), 41130 (“public  
8 works contract” defined), 41140 (“stop payment notice” defined).

9     ☒ **Staff Note.** It is our intention to develop all-purpose notice and proof of notice provisions for  
10 use both under this part and the mechanics lien law. In this connection, we will look at service as  
11 well as notice provisions. An issue throughout is whether notice or service is complete on deposit  
12 or on receipt. This may vary depending on the substantive provision. Attention will also be given  
13 to standardization of the address of notices (e.g., an address “reasonably calculated to give actual  
14 notice” v. an address stated in a document).

15     **§ 44140. Time for giving notice**

16     44140. A stop payment notice is not effective unless given before expiration of  
17 the earlier of the following times:

18       (a) Ninety days after completion, acceptance, or cessation.

19       (b) Thirty days after recordation of a notice of completion, notice of acceptance,  
20 or notice of cessation.

21     **Comment.** Section 44140 restates former Civil Code Section 3184. A notice of completion is  
22 sometimes referred to in a public works contract as a notice of acceptance.

23     See also Section 41140 (“stop payment notice” defined).

24     ☒ **Staff Note.** See discussion in Memorandum 2005-43 of completion, acceptance, and  
25 cessation, and notice of those events.

26     **§ 44150. Duty to withhold funds**

27     44150. (a) The public entity shall, on receipt of a stop payment notice, withhold  
28 from the direct contractor sufficient funds due or to become due to the direct  
29 contractor to pay the claim stated in the stop payment notice and to provide for the  
30 public entity’s reasonable cost of any litigation pursuant to the stop payment  
31 notice.

32       (b) The public entity may satisfy its duty under this section by refusing to  
33 release funds held in escrow pursuant to Section 10263 or 22300.

34     **Comment.** Section 44150 restates former Civil Code Section 3186. See also Section 42080  
35 (agency).

36     See also Sections 41040 (“direct contractor” defined), 41060 (“funds” defined), 41120 (“public  
37 entity” defined), 41140 (“stop payment notice” defined).

38     **§ 44160. Payment notwithstanding stop payment notice**

39     44160. (a) This chapter does not prohibit payment of funds to a direct contractor  
40 if a stop payment notice is not received before the disbursing officer actually  
41 surrenders possession of the funds.

42       (b) This chapter does not prohibit payment of any amount due to a direct  
43 contractor in excess of the amount necessary to pay the total amount of all claims

1 stated in stop payment notices received at the time of payment plus any interest  
2 and court costs that might reasonably be anticipated in connection with the claims.

3 **Comment.** Section 44160 restates former Civil Code Section 3187. Authority in this section  
4 for payment of a direct contractor includes payment of the direct contractor's assignee. See  
5 Section 41040 ("direct contractor" defined).

6 See also Sections 41040 ("direct contractor" defined), 41060 ("funds" defined), 41140 ("stop  
7 payment notice" defined).

8 **§ 44170. Notification of claimant**

9 44170. (a) Not later than 10 days after completion of a public works contract,  
10 the public entity shall notify each claimant that has given a stop payment notice of  
11 the time within which a stop payment notice must be must be enforced.

12 (b) Notice under this section shall be by personal delivery or by mail addressed  
13 to the claimant at the address shown on the stop payment notice.

14 (c) A public entity need not give notice under this section unless the claimant  
15 has paid the public entity two dollars (\$2) at the time of giving the stop payment  
16 notice.

17 **Comment.** Section 44170 restates former Civil Code Section 3185. See also 42070 (mailed  
18 notice). See also Section 44420 (time for enforcement of stop payment notice).

19 See also Sections 41020 ("claimant" defined), 41120 ("public entity" defined), 41130 ("public  
20 works contract" defined), 41140 ("stop payment notice" defined).

21 ~~☒~~ **Staff Note.** It is our intention to develop all-purpose notice and proof of notice provisions for  
22 use both under this part and the mechanics lien law. In this connection, we will look at service as  
23 well as notice provisions. An issue throughout is whether notice or service is complete on deposit  
24 or on receipt. This may vary depending on the substantive provision. Attention will also be given  
25 to standardization of the address of notices (e.g., an address "reasonably calculated to give actual  
26 notice" v. an address stated in a document).

27 Article 2. Summary Proceeding for Release of Funds

28 **§ 44210. Grounds for summary proceeding**

29 44210. A direct contractor may obtain release of funds withheld pursuant to a  
30 stop payment notice under the summary proceeding provided in this article on any  
31 of the following grounds:

32 (a) The claim on which the notice is based is not a type for which a stop  
33 payment notice is authorized under this chapter.

34 (b) The claimant is not a person authorized under Section 42030 to give a stop  
35 payment notice.

36 (c) The amount of the claim stated in the stop payment notice is excessive.

37 (d) There is no basis for the claim stated in the stop payment notice.

38 **Comment.** Section 44210 restates former Civil Code Section 3197.

39 See also Sections 41020 ("claimant" defined), 41040 ("direct contractor" defined, 41060  
40 ("funds" defined), 41100 ("person" defined), 41140 ("stop payment notice" defined).

1      **§ 44220. Contractor's affidavit and demand for release**

2      44220. The direct contractor shall serve on the public entity an affidavit,  
3      together with a copy of the affidavit, that includes all of the following information:

4      (a) An allegation of the grounds for release of the funds and a statement of the  
5      facts supporting the allegation.

6      (b) A demand for the release of all or the portion of the funds that are alleged to  
7      be withheld improperly or in an excessive amount.

8      (c) A statement of the address of the contractor within the state for the purpose  
9      of permitting service by mail on the contractor of any notice or document.

10     **Comment.** Section 44220 restates former Civil Code Section 3198. The grounds for release are  
11    provided in Section 44210.

12     See also Sections 41040 ("direct contractor" defined), 41060 ("funds" defined), 41120 ("public  
13    entity" defined).

14     **§ 44230. Notification of claimant**

15     44230. (a) The public entity shall serve on the claimant a copy of the direct  
16    contractor's affidavit, together with a notice stating that the public entity will  
17    release the funds withheld, or the portion of the funds demanded, unless the  
18    claimant serves on the public entity a counteraffidavit on or before the time stated  
19    in the notice. The time stated in the notice shall not be less than 10 nor more than  
20    20 days after service on the claimant of the copy of the affidavit.

21     (b) Service under this section shall be made either personally or by registered or  
22    certified mail, addressed to the last known address of the claimant. Proof of  
23    service shall be made by affidavit.

24     **Comment.** Section 44230 restates former Civil Code Section 3199. See also Section 42060  
25    (written notice).

26     See also Sections 41020 ("claimant" defined, 41040 "direct contractor" defined), 41060  
27    ("funds" defined), 41120 ("public entity" defined).

28     **☒ Staff Note.** It is our intention to develop all-purpose notice and proof of notice provisions for  
29    use both under this part and the mechanics lien law. In this connection, we will look at service as  
30    well as notice provisions. An issue throughout is whether notice or service is complete on deposit  
31    or on receipt. This may vary depending on the substantive provision. Attention will also be given  
32    to standardization of the address of notices (e.g., an address "reasonably calculated to give actual  
33    notice" v. an address stated in a document).

34     **§ 44240. Claimant's counteraffidavit**

35     44240. (a) A claimant that contests the direct contractor's affidavit shall serve  
36    on the public entity a counteraffidavit alleging the details of the claim and  
37    describing the specific basis on which the claimant contests or rebuts the  
38    allegations of the contractor's affidavit. The counteraffidavit shall be served  
39    within the time stated in the public entity's notice, together with proof of service  
40    of a copy of the counteraffidavit on the direct contractor.

41     (b) If no counteraffidavit with proof of service is served on the public entity  
42    within the time stated in the public entity's notice, the public entity shall  
43    immediately release the funds, or the portion of the funds demanded by the

1 affidavit, without further notice to the claimant. The public entity is not liable in  
2 any manner for releasing the funds.

3 (c) The public entity is not responsible for the validity of an affidavit or  
4 counteraffidavit under this article.

5 **Comment.** Section 44240 restates former Civil Code Section 3200.

6 See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41060  
7 (“funds” defined), 41120 (“public entity” defined).

8 **§ 44250. Commencement of action**

9 44250. (a) If a counteraffidavit, together with proof of service, is served  
10 pursuant to Section 44240, either the direct contractor or the claimant may  
11 commence an action for a declaration of the rights of the parties.

12 (b) After commencement of the action, either the direct contractor or the  
13 claimant may move the court for a determination of rights under the affidavit and  
14 counteraffidavit. The party making the motion shall give not less than five days’  
15 notice of the hearing to the public entity and to the other party.

16 (c) The court shall hear the motion within 15 days after the date of the motion,  
17 unless the court continues the hearing for good cause.

18 **Comment.** Section 44250 restates former Civil Code Section 3201. See also Sections 42040  
19 (jurisdiction and venue) and 42060 (written notice).

20 See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41120  
21 (“public entity” defined).

22 **§ 44260. Pleadings and burden of proof**

23 44260. (a) The affidavit and counteraffidavit shall be filed with the court by the  
24 public entity and shall constitute the pleadings, subject to the power of the court to  
25 permit an amendment in the interest of justice. The affidavit of the direct  
26 contractor shall be deemed controverted by the counteraffidavit of the claimant,  
27 and both shall be received in evidence.

28 (b) At the hearing, the direct contractor has the burden of proof.

29 **Comment.** Section 44260 restates former Civil Code Section 3202.

30 See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41120  
31 (“public entity” defined).

32 **§ 44270. Court determination**

33 44270. (a) No findings are required in a summary proceeding under this article.

34 (b) If the hearing is before the court sitting without a jury and no evidence other  
35 than the affidavit and counteraffidavit is offered, the court may, if satisfied that  
36 sufficient facts are shown, make a determination on the basis of the affidavit and  
37 counteraffidavit. If the court is not satisfied that sufficient facts are shown, the  
38 court shall order the hearing continued for production of other evidence, oral or  
39 documentary, or the filing of other affidavits and counteraffidavits.

40 (c) At the conclusion of the hearing, the court shall make an order determining  
41 whether the demand for release is allowed. The court’s order is determinative of

the right of the claimant to have funds further withheld by the public entity. The direct contractor shall serve a copy of the order on the public entity.

**Comment.** Section 44270 restates former Civil Code Section 3203.

See also Sections 41020 (“claimant” defined, 41040 (“direct contractor” defined), 41060 (“funds” defined), 41120 (“public entity” defined).

## § 44280. Jury trial

44280. Nothing contained in this article shall be construed to deprive a party of the right to trial by jury in a case where the right is given by the California Constitution.

**Comment.** Section 44280 restates former Civil Code Section 3204. Jury trial may be waived in the same manner as in the trial of an action. Section 42050 (rules of practice).

## **§ 44290. Summary determination not res judicata**

44290. A determination in a summary proceeding under this article is not res judicata with respect to a right of action by the claimant against either the principal or surety on a payment bond or with respect to a right of action against a party personally liable to the claimant.

**Comment.** Section 44290 restates former Civil Code Section 3205. The former reference to a “labor or material bond” is replaced by a reference to a payment bond.

See also Sections 41020 (“claimant” defined), 41090 (“payment bond” defined).

### Article 3. Priorities

## **§ 44310. Release bond**

44310. (a) If the direct contractor or a subcontractor disputes the correctness, validity, or enforceability of a stop payment notice, the public entity may, in its discretion, permit the direct contractor to give the public entity a release bond. The bond shall be executed by an admitted surety insurer, in an amount equal to 125 percent of the claim stated in the stop payment notice, conditioned for the payment of any amount the claimant recovers in an action on the claim, together with court costs, if the claimant prevails.

(b) On receipt of a release bond, the public entity shall not withhold funds from the direct contractor pursuant to the stop payment notice.

(c) The surety on a release bond is jointly and severally liable to the claimant with the sureties on any payment bond given under Chapter 5 (commencing with Section 45010).

**Comment.** Section 44310 restates former Civil Code Section 3196.

See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41060 (“funds” defined), 41090 (“payment bond” defined), 41120 (“public entity” defined), 41140 (“stop payment notice” defined).

1      **§ 44320. Distribution of funds withheld pursuant to stop payment notice**

2      44320. If funds withheld pursuant to a stop payment notice are insufficient to  
3      pay in full the claims of all persons that have given a stop payment notice, the  
4      funds shall be distributed among the claimants in the ratio that the claim of each  
5      bears to the aggregate of all claims for which a stop payment notice is given,  
6      without regard to the order in which the notices were given or enforcement actions  
7      were commenced.

8      **Comment.** Section 44320 restates former Civil Code Section 3190. Only valid claims, as  
9      determined in an enforcement action, are entitled to participate in the distribution. Cf. Idaho  
10     Lumber Co. v. Northwestern S. & L. Ass'n, 265 Cal. App. 2d 490, 71 Cal. Rptr. 422 (1968). The  
11     amount of the claim for which payment is required is determined pursuant to Article 4  
12     (commencing with Section 40410) (enforcement of stop payment notice).

13     See also Sections 41020 ("claimant" defined), 41060 ("funds" defined), 41100 ("person"  
14     defined), 41140 ("stop payment notice" defined).

15      **§ 44330. Stop payment notice remedy not exclusive**

16      44330. Nothing in this chapter impairs the right of a claimant to recover from  
17      the direct contractor or the contractor's sureties in an action on a payment bond  
18      under Chapter 5 (commencing with Section 3247) any deficit that remains unpaid  
19      after the distribution under Section 44320.

20      **Comment.** Section 44330 restates former Civil Code Section 3191.

21      See also Sections 41020 ("claimant" defined), 41040 ("direct contractor" defined), 41090  
22      ("payment bond" defined).

23      **§ 44340. Forfeiture for false notice**

24      44340. A person that willfully gives a false stop payment notice to the public  
25      entity or that willfully includes in the notice labor, service, equipment, or material  
26      not provided for the public works contract for which the stop payment notice is  
27      given, forfeits all right to participate in the distribution under Section 44320.

28      **Comment.** Section 44340 restates former Civil Code Section 3192.

29      See also Sections 41070 ("labor, service, equipment, or material" defined), 41100 ("person"  
30      defined), 41120 ("public entity" defined), 41130 ("public works contract" defined), 41140 ("stop  
31      payment notice" defined).

32      **§ 44350. Effect of assignment or garnishment**

33      44350. (a) A stop payment notice takes priority over an assignment by the direct  
34      contractor of any amount due or to become due under a public works contract, or  
35      for "extras" in connection with the contract whether made before or after the  
36      giving of a stop payment notice, and the assignment has no effect on the rights of  
37      the claimant.

38      (b) Any garnishment of an amount due or to become due under a public works  
39      contract by a creditor of the direct contractor pursuant to Article 8 (commencing  
40      with Section 708.710) of Chapter 6 of Division 2 of Title 9 of Part 2 of the Code  
41      of Civil Procedure and any statutory lien on that amount is subordinate to the  
42      rights of a claimant.

**Comment.** Section 44350 restates former Civil Code Section 3193.

See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41140 (“stop payment notice” defined).

#### **Article 4. Enforcement of Stop Payment Notice**

## **§ 44410. Prerequisites for enforcement of notice**

44410. A claimant may not enforce a stop payment notice unless the claimant has complied with all of the following conditions:

(a) The claimant has given a preliminary notice under Chapter 3 (commencing with Section 43010), if required by that chapter.

(b) The claimant has given the stop payment notice within the time provided in Section 44140.

**Comment.** Section 44410 restates former Civil Code Section 3183.

See also Sections 41020 (“claimant” defined), 41110 (“preliminary notice” defined), 41140 (“stop payment notice” defined).

## **§ 44420. Time for enforcement of stop payment notice**

44420. (a) The claimant shall commence an action against the public entity and the direct contractor to enforce a stop payment notice not earlier than 10 days after the date the claimant gives the stop payment notice and not later than 90 days after expiration of the time within which a stop payment notice must be given.

(b) An action under this section may not be brought to trial or judgment entered before expiration of the time provided in subdivision (a).

(c) If a claimant does not commence an action to enforce a stop payment notice within the time provided in subdivision (a), the notice ceases to be effective and the public entity shall release funds withheld pursuant to the notice.

**Comment.** Section 44420 restates former Civil Code Section 3210. See also Section 44140 (time within which stop payment notice must be given).

See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41060 (“funds” defined), 41120 (“public entity” defined), 41140 (“stop payment notice” defined).

## **§ 44430. Notice of action**

44430. Within five days after commencement of an action to enforce a stop payment notice, the claimant shall give notice of commencement of the action to the public entity in the same manner that a stop payment notice is given.

**Comment.** Section 44430 restates former Civil Code Section 3211. See Section 3101 (manner of giving stop payment notice).

See also Sections 41020 (“claimant” defined), 41120 (“public entity” defined), 41140 (“stop payment notice” defined).

**☒ Staff Note.** It is our intention to develop all-purpose notice and proof of notice provisions for use both under this part and the mechanics lien law. In this connection, we will look at service as well as notice provisions. An issue throughout is whether notice or service is complete on deposit or on receipt. This may vary depending on the substantive provision. Attention will also be given to standardization of the address of notices (e.g., an address “reasonably calculated to give actual notice” v. an address stated in a document).

## **§ 44440. Joinder, consolidation, and interpleader**

44440. If more than one claimant has given a stop payment notice:

(a) Any number of claimants may join in the same enforcement action.

(b) If claimants commence separate actions, the court that first acquires jurisdiction may order the actions consolidated.

(c) On request of the public entity the court shall require that all claimants be impleaded in one action and shall adjudicate the rights of all parties in the action.

**Comment.** Section 44440 restates former Civil Code Section 3214 without substantive change. See also Section 42040 (jurisdiction and venue).

See also Sections 41020 (“claimant” defined), 41120 (“public entity” defined), 41140 (“stop payment notice” defined).

## **§ 44450. Dismissal of enforcement action for lack of prosecution**

44450. The court may in its discretion dismiss an action to enforce a stop payment notice that is not brought to trial within two years after commencement.

**Comment.** Section 44450 restates former Civil Code Section 3212.

See also Section 41140 (“stop payment notice” defined).

## **§ 44460. Dismissal of action or judgment against claimant**

44460. A stop payment notice ceases to be effective, and the public entity shall release funds withheld, in either of the following circumstances:

(a) The action to enforce the stop payment notice is dismissed, unless expressly stated to be without prejudice.

(b) Judgment in the action is against the claimant.

**Comment.** Section 44460 restates former Civil Code Section 3213.

See also Sections 41020 (“claimant” defined), 41060 (“funds” defined), 41120 (“public entity” defined), 41140 (“stop payment notice” defined).

## **§ 44470. Claim filing procedures inapplicable**

44470. The claim filing procedures of Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code do not apply to an action under this article.

**Comment.** Section 44470 restates former Civil Code Section 3265.

## CHAPTER 5. PAYMENT BOND

## **§ 45010. Payment bond requirement**

45010. (a) Except as provided in subdivision (d) of Section 7103:

(1) A direct contractor that is awarded a public works contract involving an expenditure in excess of twenty-five thousand dollars (\$25,000) shall, before commencement of work, give a payment bond to and approved by the public entity.

1       (2) A public entity shall state in its call for bids that a payment bond is required  
2 for a public works contract involving an expenditure in excess of twenty-five  
3 thousand dollars (\$25,000).

4       (b) A payment bond given and approved under this section is sufficient to permit  
5 performance of work pursuant to a contract that supplements the contract for  
6 which the bond is given, if the requirement of a new bond is waived by the public  
7 entity.

8       (c) For the purpose of this section, a provider of architectural, engineering, or  
9 land surveying services pursuant to a public works contract is not deemed a direct  
10 contractor and is not required to give a payment bond.

11     **Comment.** Section 45010 restates former Civil Code Section 3247. The transitional provisions  
12 of the former section are omitted as obsolete. Section 7103(d) defines “state entity” for purposes  
13 of the payment bond requirement under that section.

14     See also Sections 41040 (“direct contractor” defined), 41090 (“payment bond” defined), 41120  
15 (“public entity” defined), 41130 (“public works contract” defined).

16     **§ 45020. Consequences of failure to give bond**

17     45020. If a payment bond is not given and approved as required by statute:

18       (a) The public entity awarding the contract shall not audit, allow, or pay a claim  
19 of the direct contractor pursuant to the contract.

20       (b) A claimant may receive payment of a claim pursuant to the stop payment  
21 notice procedure under Chapter 4 (commencing with Section 3179).

22     **Comment.** Section 45020 restates former Civil Code Section 3251. The former operative date  
23 provision is deleted as obsolete.

24     See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41090  
25 (“payment bond” defined), 41120 (“public entity” defined), 41140 (“stop payment notice”  
26 defined).

27     **§ 45030. Bond requirements**

28     45030. (a) A payment bond shall be in an amount not less than one hundred  
29 percent of the total amount payable under the contract.

30       (b) The bond shall provide that if the direct contractor or a subcontractor fails to  
31 pay any of the following, the surety will pay the obligation and, if an action is  
32 brought to enforce the liability on the bond, a reasonable attorney’s fee, to be fixed  
33 by the court:

34           (1) A person authorized under Section 42030 to assert a claim against a payment  
35 bond .

36           (2) Amounts due under the Unemployment Insurance Code with respect to work  
37 or labor performed under the contract.

38           (3) Amounts required to be deducted, withheld, and paid over to the  
39 Employment Development Department from the wages of employees of the  
40 contractor and subcontractors pursuant to Section 13020 of the Unemployment  
41 Insurance Code with respect to the work and labor.

1       (c) The bond shall by its terms inure to the benefit of any person authorized  
2 under Section 42030 to assert a claim against a payment bond so as to give a right  
3 of action to that person or that person's assigns in an action to enforce the liability  
4 on the bond.

5       (d) The bond shall be in the form of a bond and not a deposit in lieu of bond.

6       (e) The direct contractor may require that a subcontractor give a bond to  
7 indemnify the direct contractor for any loss sustained by the direct contractor  
8 because of any default of the subcontractor under this section.

9       **Comment.** Section 45030 restates former Civil Code Section 3248 and supersedes former  
10 Civil Code Section 3096.

11       See also Sections 41040 ("direct contractor" defined), 41090 ("payment bond" " defined),  
12 41100 ("person" defined).

13       **§ 45040. Construction of bond**

14       45040. (a) A payment bond shall be construed most strongly against the surety  
15 and in favor of the beneficiary.

16       (b) A surety is not released from liability to the beneficiary by reason of a  
17 breach of the contract between the public entity and the direct contractor or on the  
18 part of the beneficiary.

19       (c) The sole conditions of recovery on the bond are that the beneficiary is a  
20 person authorized under Section 42030 to assert a claim against a payment bond  
21 and has not been paid the full amount of the claim.

22       **Comment.** Section 45040 restates former Civil Code Section 3226.

23       See also Sections 41040 ("direct contractor" defined), 41090 ("payment bond" defined), 41100  
24 ("person" defined), 41120 ("public entity" defined).

25       Cf. Code Civ. Proc. § 995.130 ("beneficiary" defined).

26       **☒ Staff Note.** Although this section purports to be a general provision applicable to all bonds  
27 under the mechanics lien law, much of it appears to be aimed at the payment bond. We have  
28 restricted it accordingly in this draft.

29       **§ 45040. Statute of limitations**

30       45040. A claimant may commence an action against a surety to enforce the  
31 liability on a payment bond at any time after the claimant ceases to provide labor,  
32 service, equipment, or material, but not later than six months after the period in  
33 which a stop payment notice may be given under Section 44140.

34       **Comment.** Section 45040 restates former Civil Code Section 3249.

35       See also Sections 41020 ("claimant" defined), 41070 ("labor, service, equipment, or material"  
36 defined), 41090 ("payment bond" defined), 41140 ("stop payment notice" defined).

37       **§ 45060. Preliminary notice required**

38       45060. A claimant may not enforce the liability on a payment bond unless the  
39 claimant has given a preliminary notice pursuant to Chapter 3 (commencing with  
40 Section 43010).

1       **Comment.** Section 45060 restates former Civil Code Section 3252(a). The former limitation to  
2 a contract entered into on or after January 1, 1995, is omitted as obsolete. For an exception to the  
3 rule of this section, see Section 45070 (notice to principal and surety).

4       See also Sections 41020 (“claimant” defined), 41090 (“payment bond” defined), 41110  
5 (“preliminary notice” defined).

6       **☞ Staff Note.** See discussion in Memorandum 2005-43 of completion, acceptance, and  
7 cessation, and notice of those events.

8       **§ 45070. Notice to principal and surety**

9       45070. (a) A claimant that has not given a preliminary notice pursuant to  
10 Chapter 3 (commencing with Section 43010) is not precluded from enforcing the  
11 liability on a payment bond if the claimant gives the notice provided in this section  
12 to the principal and surety within 15 days after recordation of a notice of  
13 completion or, if a notice of completion is not recorded, within 75 days after  
14 completion of the public works contract.

15       (b) Notice to the principal and surety shall include all of the following  
16 information:

17           (1) The kind of labor, service, equipment, or material provided or to be provided  
18 by the claimant.

19           (2) The name of the person to or for which the labor, service, equipment, or  
20 material was provided.

21           (3) A statement of the claimant’s demand, after deducting all just credits and  
22 offsets, for the labor, service, equipment, or material already provided and for the  
23 whole amount agreed to be provided.

24           (c) Notice shall be given by mail, personal delivery, or service in the manner  
25 provided by law for the service of a summons in a civil action.

26           (d) Notice given by mail shall be at the following address:

27              (1) If given to the principal, at the principal’s last known address.

28              (2) If given to an admitted surety insurer, at the office of or in care of (i) the  
29 statutory agent of the surety in this state, (ii) an officer of the surety in this state, or  
30 (iii) the agent designated by the surety in the bond as the address at which notice is  
31 to be given.

32              (3) If given to a personal surety, at the surety’s residence or place of business, if  
33 known; or if not known, in care of the clerk of the county in which the bond is  
34 recorded.

35       **Comment.** Subdivision (a) of Section 45070 restates former Civil Code Section 3252(b).

36       Subdivisions (b)-(d) restate former Civil Code Section 3227. See also Sections 42060 (written  
37 notice), 42070 (mailed notice).

38       See also Sections 41020 (“claimant” defined), 41070 (“labor, service, equipment, or material”  
39 defined), 41090 (“payment bond” defined), 41100 (“person” defined), 41110 (“preliminary  
40 notice” defined), 41130 (“public works contract” defined).

41       Cf. Code Civ. Proc. §§ 995.130 (“beneficiary” defined), 995.170 (“principal” defined).

42       **☞ Staff Note.** This section appears directed primarily to the payment bond, and we have  
43 restricted its application accordingly.

1        See discussion in Memorandum 2005-43 of completion, acceptance, and cessation, and notice  
2 of those events.

3        It is our intention to develop all-purpose notice and proof of notice provisions for use both  
4 under this part and the mechanics lien law. In this connection, we will look at service as well as  
5 notice provisions. An issue throughout is whether notice or service is complete on deposit or on  
6 receipt. This may vary depending on the substantive provision. Attention will also be given to  
7 standardization of the address of notices (e.g., an address “reasonably calculated to give actual  
8 notice” v. an address stated in a document).

9        **§ 45080. Action on bond**

10      45080. (a) A claimant may maintain an action to enforce the liability of a surety  
11 on a payment bond whether or not the claimant has given the public entity a stop  
12 payment notice.

13      (b) A claimant may maintain an action to enforce the liability on the bond  
14 separately from and without commencement of an action against the public entity.

15      (c) In an action to enforce the liability on the bond, the court shall award the  
16 prevailing party a reasonable attorney’s fee.

17      **Comment.** Section 45080 restates former Civil Code Section 3250. The provision that a  
18 reasonable attorney’s fee is “to be taxed as costs” is deleted as surplus. See Code Civ. Proc. §  
19 1033.5(a)(10)(B) (attorney fees allowable as costs). See also Section 42050 (rules of practice).

20      See also Sections 41020 (“claimant” defined), 41090 (“payment bond” defined), 41120 (“public  
21 entity” defined), 41140 (“stop payment notice” defined).

22      ~~☒~~ **Staff Note.** We have deleted the provision that a reasonable attorney’s fee is “to be taxed as  
23 costs” as surplus. See Code Civ. Proc. § 1033.5(a)(10)(B) (attorney fees allowable as costs).

24        **§ 45090. Limitation on chapter**

25      45090. (a) A claimant does not have a right to recover on a payment bond unless  
26 the claimant provided labor, service, equipment or material to the direct contractor  
27 or one of the direct contractor’s subcontractors pursuant to a public works  
28 contract.

29      (b) Nothing in this section affects the stop payment notice rights of, and relative  
30 priorities among, architects, registered engineers, and licensed land surveyors.

31      **Comment.** Section 45090 restates former Civil Code Section 3267.

32      See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41070  
33 (“labor, service, equipment, or material” defined), 41090 (“payment bond” defined), 41130  
34 (“public works contract” defined), 41140 (“stop payment notice” defined).

---