

Memorandum 2007-25

**Mechanics Lien Law: Public Work of Improvement
(Analysis of Comments on Tentative Recommendation)**

This memorandum begins a discussion of comments on the public works portion of the Commission’s tentative recommendation on *Mechanics Lien Law* (June 2006).

Most comments analyzed in this memorandum were attached as an exhibit to CLRC Memorandum 2006-39. The relevant portions of those comments are summarized and discussed in this memorandum, but the comments have not been republished.

We have also received the following email, attached as an Exhibit to this memorandum:

- Exhibit p.*
- California Department of Water Resources (9/26/06) 1

Comments supportive of a provision of the proposed law are not discussed in this memorandum, except when comments questioning the same provision have been received, or when the Commission has specifically solicited comment on the provision.

Issues in this memorandum that require discussion have been marked with the following symbol: ☞.

All other issues in this memorandum are presumed to be noncontroversial “consent” issues. The staff does not intend to separately discuss any consent issue, unless a Commission member or member of the public expresses a question or concern about the issue.

Sections of the proposed law reprinted in this memorandum are the latest draft versions of the section, incorporating any revisions approved by the Commission at previous meetings and any non-substantive technical corrections made by the staff.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

OVERVIEW

A contributor to a public work is precluded from asserting a mechanics lien claim against the improved public property, based on principles involving sovereign immunity. *North Bay Const., Inc. v. City of Petaluma*, 143 Cal. App. 4th 552, 49 Cal. Rptr. 3d 455 (2006).

A contributor other than direct contractor, however, may pursue a stop payment notice remedy, as well as a claim against a direct contractor's payment bond. (A direct contractor on a public work may not give a stop payment notice.)

Most of the provisions in the public work part of the proposed law relate in some way to either the stop payment notice remedy, or a claim against a direct contractor's payment bond.

Many of these provisions are similar to provisions relating to corresponding remedies available to contributors to a private work of improvement. A few differences also exist, as will be discussed in this and future memoranda.

CONSISTENCY BETWEEN PRIVATE AND PUBLIC WORK PROVISIONS

The existing mechanics lien statute, which governs both private and public work, is located entirely within the Civil Code. Many provisions in the existing statute are general provisions applicable to both types of work.

The proposed law would move all public work provisions into the Public Contract Code. General provisions in the existing statute that apply to both private and public work have been largely duplicated, in order to continue the provisions in two separate codes.

In creating these duplicate provisions, the Commission made an effort to use parallel language, to the extent appropriate. See CLRC Memorandum 2005-43, pp. 2-3; Minutes (November 2005), p. 4.

Nevertheless, several commenters have requested greater uniformity between the private and public work provisions. The commenters urge that uniformity would help to avoid uncertainty over the meaning or significance of inconsistent language, and would be more convenient for practitioners that do both private and public work.

Moreover, due to subsequent revisions of private work provisions after circulation of the tentative recommendation, additional inconsistency between similar provisions in the private and public work parts of the proposed law has arisen.

Therefore, this memorandum first presents a collection of recommended revisions that would more closely conform several public work provisions to the corresponding private work provisions.

None of the revisions should be controversial, so only a brief analysis of each is presented. However, the staff will be prepared at the Commission meeting to discuss any revision in more detail, if requested.

“Direct Contractor”

The Commission revised the definition of “direct contractor” in the private work part of the proposed law. Proposed Civ. Code § 7012. The revision was made to both conform to the definition in existing law, as well as to avoid abrogating an established common law principle providing that a *material supplier* is not a direct contractor. See CLRC Memorandum 2006-48, pp. 4-7.

The staff recommends **similar changes to the corresponding public work provision:**

§ 41040. Direct contractor

41040. “Direct contractor” means a ~~person~~ contractor 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” defined). ~~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 section also 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),~~ Section 41120 (“public entity” defined).

“Labor, Service, Equipment, or Material”

The Commission deleted several items from a newly created definition of “labor, service, equipment, or material” in the private work part of the proposed law. Proposed Civ. Code § 7016. The deleted items were not a part of existing law, and their meaning was somewhat ambiguous. See CLRC Memorandum 2006-48, pp. 7-9.

The staff recommends **similar changes to the corresponding public work provision:**

§ 41070. Labor, service, equipment, or material

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

Comment. Section 41070 is a new definition. It is included for drafting convenience. The phrase is intended to encompass all things of value provided for a public works contract, and replaces various phrases used throughout the former law, including "labor or material," "labor, services, equipment, or materials," "appliances, teams, or power," "provisions, provender, or other supplies," and the like.

See also Section 41130 ("public works contract" defined).

"Work"

The Commission added the new defined term "work" to the private work part of the proposed law, for drafting convenience. Proposed Civ. Code § 7045; see CLRC Memorandum 2006-43, p. 20.

The staff recommends **adding a corresponding provision to the public work part of the proposed law:**

§ 41170. Work

41170. "Work" means labor, service, equipment, or material provided pursuant to a public works contract.

Comment. Section 41170 is a new definition. It is included for drafting convenience.

See also Sections 41070 ("labor, service, equipment, and material" defined), 41130 ("public works contract" defined).

References in the public work part of the proposed law to "labor, services, equipment, or material" would be changed to use the new term "work." Those changes are not set out in this memorandum.

Relation to Other Statutes

The Commission previously made clarifying non-substantive revisions to a section addressing the interrelationship between the private work provisions and certain provisions in other codes. Proposed Civ. Code §§ 7062, 7140; see CLRC Memorandum 2006-43, pp. 27-28, pp. 50-51.

The staff recommends **similar changes to the public work part of the proposed law**. These changes are also specifically requested by the Association of California Surety Companies. See CLRC Memorandum 2006-39, Exhibit, p. 122.

§ 42020. Relation to other statutes

42020. (a) This part does not ~~limit, and is not affected by,~~ apply to or change 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, except to the extent this part prescribes a different rule or is inconsistent.

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).

Calculation of Time

The Commission added a provision to the private work part of the proposed law clarifying the meaning of the word "day." Proposed Civ. Code § 7055; see CLRC Memorandum 2006-43, p. 60.

The staff recommends **adding a corresponding provision to the public work part of the proposed law**:

§ 42055. Calculation of time

42055. For purposes of this part, the term "day" means a calendar day.

Comment. Section 42055 is new. A reference to the term "days" in a statute typically means calendar days, unless otherwise specifically indicated. *Iverson v. Superior Court*, 167 Cal. App. 3d 544, 548, 213 Cal. Rptr. 399 (1985).)

See also Civil Code Sections 10 (computing time), 11 (holidays).

Release Forms

The Commission made several non-substantive clarifying revisions of the private work provisions relating to waiver and release forms. Proposed Civ. Code §§ 7166, 7170-7176, see CLRC Memorandum 2006-48, pp. 26, 28-35.

The staff recommends **similar revisions to corresponding public work provisions:**

§ 42340. Reduction or release of stop payment notice

42340. (a) A claimant may reduce the amount of, or release in its entirety, a stop payment notice. The reduction or release shall be in writing and may be given in a form other than a ~~form of~~ waiver and release ~~prescribed~~ form provided in this article.

(b)

§ 42360. Conditional waiver and release on progress payment

42360. If a claimant is required to execute a waiver and release in exchange for, or in order to induce the payment of, a progress payment and the claimant is not, in fact, paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release shall be in substantially the following form:

CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

NOTICE. This document waives ~~the claimant's lien and other rights~~ certain rights of the claimant effective on receipt of payment. A person should not rely on this document unless satisfied that the claimant has received payment.

....

This document waives and releases stop payment notice and payment bond rights the claimant has for ~~work~~ labor, and service provided, and equipment, and material delivered to the customer on this job through the date of this document.

....

Exceptions

This document does not affect any of the following:

....

(3) The following progress payments for which the claimant has previously given a conditional waiver and release but has not received payment:

Date(s) of waiver and release: _____

~~Amount remaining~~ Amount(s) of unpaid progress payment(s): \$ _____

....

Signature

....

Date: _____

§ 42370. Unconditional waiver and release on progress payment

42370. If the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a progress payment and the claimant asserts in the waiver it has, in fact, been

paid the progress payment, the waiver and release shall be in substantially the following form:

....

Unconditional Waiver and Release

This document waives and releases stop payment notice and payment bond rights the claimant has for work provided to the customer on this job through the date of this document. The claimant has received the following payment:

The claimant has received the following progress payment:

\$ _____
Amount of payment: \$ _____

....

Signature

....
Date: _____

§ 42380. Conditional waiver and release on final payment

42380. If the claimant is required to execute a waiver and release in exchange for, or in order to induce the payment of, a final payment and the claimant is not, in fact, paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release shall be in substantially the following form:

CONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

NOTICE. This document waives ~~the claimant's lien and other rights~~ certain rights of the claimant effective on receipt of payment. A person should not rely on this document unless satisfied that the claimant has received payment.

....

This document waives and releases stop payment notice and payment bond rights the claimant has for ~~work~~ labor, and service provided, and equipment, and material delivered to the customer on this job through the date of this document.

....

Exceptions

This document does not affect any of the following:

....

(3) The following progress payments for which the claimant has previously given a conditional waiver and release but has not received payment:

Date(s) of waiver and release: _____
~~Amount remaining~~ Amount(s) of unpaid progress payment(s): \$ _____

....

Signature

....
Date: _____

§ 42390. Unconditional waiver and release on final payment

42390.

Signature

....

Date: _____

Preliminary Notice Provisions

The Commission combined two private work sections relating to preliminary notice into a single section, in order to clarify meaning and eliminate any arguable inconsistency between the two provisions. Proposed Civ. Code § 7200; see CLRC Memorandum 2006-48, Third Supplement to CLRC Memorandum 2006-48; p. 3.

Preliminary notice is also given on a public work. Although the recipients of the notice are different, the introductory provisions relating to preliminary notice in a private and public work are otherwise parallel.

The staff therefore recommends **similar revisions to the corresponding public work provisions, as follows:**

§ 43010. Preliminary notice prerequisite to remedies

~~43010. (a) Except as otherwise provided by statute, preliminary notice is a necessary prerequisite to the validity of a stop payment notice or a claim against a payment bond under this part before giving a stop payment notice or asserting a claim against a payment bond, a claimant shall give preliminary notice to the following persons:~~

~~(1) The public entity.~~

~~(2) The direct contractor to whom the claimant provides work.~~

~~(b) Notwithstanding subdivision (a):~~

~~(1) A laborer or a laborers compensation fund is not required to give preliminary notice.~~

~~(e) (2) A claimant that has a direct contractual relationship with a direct contractor is not required to give preliminary notice.~~

~~(c) Compliance with this section is a necessary prerequisite to the validity of a stop payment notice under this part.~~

~~(d) Compliance with this section or with Section 45070 is a necessary prerequisite to the validity of a claim against a payment bond under this part.~~

Comment. ~~Subdivision (a) of Section 43010 restates part of the introductory clause and subdivisions (a) and (c) of former Civil Code Section 3098. Repetitive detail is omitted, in reliance on defined terms and other substantive provisions. For a statutory exception to the preliminary notice requirement, see Section 45070 (notice to principal and surety of claim against payment bond).~~

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

The transitional provision of former Civil Code Section 3098(e) is not continued due to lapse of time.

See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), ~~41080 (“laborers compensation fund” defined),~~ 41090 (“payment bond” defined), 41110 (“preliminary notice” defined), 41120 (“public entity” defined), 41150 (“stop payment notice” defined)), 41160 (“subcontractor” defined).

~~§ 43020. Persons to be given preliminary notice~~

~~43020. Before giving a stop payment notice or asserting a claim against a payment bond, a claimant shall give preliminary notice to the public entity and the direct contractor.~~

In the private work part of the proposed law, the companion provision to Section 43010 (proposed Civil Code Section 7200) contains the following additional language (shown in italics):

(a) Except as otherwise provided by statute, before ... giving a stop payment notice, or asserting a claim against a payment bond, a claimant shall give preliminary notice to the following persons:

....

(2) The direct contractor *or reputed direct contractor* to whom the claimant provides work, *either directly or through one or more subcontractors.*

....

Who May Make Claim Against Construction Fund

The Commission revised a private work provision that limits claims against a construction fund. Proposed Civ. Code § 7500. The change was made in response to a commenter’s contention that the Commission’s proposed language could be interpreted as changing existing law relating to who has rights against a construction fund. See CLRC Memorandum 2007-08, pp. 2-4; First Supplement to CLRC Memorandum 2007-08, pp. 1-8. The revision restored the language used in existing law.

The staff recommends **a similar change to the corresponding public work provision, which continues the same provision of existing law:**

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

~~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.~~

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

The rights of all persons furnishing work pursuant to a public works contract, with respect to any fund for payment of construction costs, are governed exclusively by this chapter, and no person may assert any legal or equitable right with respect to such fund, other than a right created by direct written contract between such person and the person holding the fund, except pursuant to the provisions of this chapter.

Comment. Section 44110 restates former Civil Code Section 3264 to the extent it applied to a public works contract. See Section 42010 (application of part).

Conditions for Recovery on Bond

The Commission revised a private work provision specifying the conditions for recovery on a payment bond. Proposed Civ. Code § 7144. For clarity, the revision made explicit what was previously implied by the section — compliance with all other applicable statutory provisions is also a condition of recovery on the bond. See CLRC Memorandum 2006-43, pp. 53-54.

The staff recommends **the same change to the corresponding public work provision:**

§ 45040. Construction of bond

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

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

(c) ~~The~~ Except as otherwise provided by statute, the sole conditions of recovery on the bond are that the beneficiary is a person authorized under Section 42030 to assert a claim against a payment bond and has not been paid the full amount of the claim.

Comment. Section 45040 restates former Civil Code Section 3226.

....

Statute Of Limitations On Claim Against Payment Bond

Two provisions of existing law provide a special six month limitation period for commencing an action to enforce a payment bond claim, on a private work (existing Civ. Code § 3240) and on a public work (existing Civ. Code § 3249).

The circumstances that trigger the six month limitation in each provision differ. But both provisions — whether intentionally or inadvertently — make the six month limitation period applicable only when the action on the payment bond is brought *against the surety on the bond*. An action to enforce a payment bond claim, however, can also be brought against the *principal* on the bond (usually the direct contractor). Thus, existing law governing both private and public work provides for different limitation periods for an action to enforce a payment bond claim, depending on who is named as a defendant.

In an effort at simplification, in the private work part of the proposed law the Commission provided that the six month limitation would apply to *all* actions to enforce a claim against a private work payment bond. Proposed Civ. Code § 7610.

The staff recommends that **the payment bond statute of limitation in the public work provisions be similarly revised, as follows:**

§ 45050. Statute of limitations

45050. A claimant may commence an action ~~against a surety~~ to enforce the liability on a payment bond at any time after the claimant ceases to provide labor, service, equipment, or material, but not later than six months after the period in which a stop payment notice may be given under Section 44140.

Comment. Section 45050 restates former Civil Code Section 3249, and broadens it to cover enforcement of any liability on the bond, not limited to the liability of the surety. Code Civ. Proc. § 996.440 (judgment on bond against principal and sureties).

Notice Prior to Claim on Payment Bond

The Commission revised a private work provision relating to notice required prior to asserting a claim against a payment bond. Proposed Civ. Code § 7612. The change was made to address an arguable ambiguity relating to claimants that are not required to give preliminary notice. See First Supplement to CLRC Memorandum 2007-11, pp. 3-7. The revision generally restored the language used in existing law.

The staff recommends that **similar changes be made to the corresponding public work provisions:**

§ 45060. Notice prerequisite to enforcement of payment bond claim

~~45060. A claimant may not enforce the liability on a payment bond unless the claimant has given notice under one of the following provisions:~~

~~(a) Preliminary notice under Chapter 3 (commencing with Section 43010).~~

~~(b) Notice to the principal and surety under Section 45070.~~

(a) In order to enforce a claim against a payment bond under this part, a claimant shall give the preliminary notice provided in Chapter 3 (commencing with Section 43010).

(b) If preliminary notice was not given as provided in Chapter 3 (commencing with Section 43010), a claimant may enforce a claim by giving written notice to the surety and the bond principal 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.

Comment. Section 45060 ~~supersedes~~ restates former Civil Code Section 3252(a). The former limitation to a contract entered into on or after January 1, 1995, is omitted due to lapse of time.

See also Sections 41020 (“claimant” defined), 41090 (“payment bond” defined), 41110 (“preliminary notice” defined), 42210 (completion (including acceptance and cessation)), 42220 (notice of completion).

§ 45070. Notice to principal and surety

~~45070. (a) Whether or not the claimant has given preliminary notice under Chapter 3 (commencing with Section 43010), a claimant may enforce the liability on a payment bond if the claimant gives the notice provided in this section to the principal and surety within 15 days after recordation of a notice of completion or, if a notice of completion is not recorded, within 75 days after completion.~~

~~(b) Notice to the principal and surety under Section 45060 shall include all of the following information:~~

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

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

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

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

~~(d)~~ (c) Notice given by mail shall be at the address provided in the bond for service of notices, papers, and other documents.

Comment. ~~Subdivision (a) of Section 45070 restates former Civil Code Section 3252. See also 42210 (completion (including acceptance and cessation)).~~

Subdivisions ~~(b)-(d)~~ (a)-(c) of Section 45070 restate former Civil Code Section 3227, except that mailed notice to the principal or surety on a bond must be given at the address specified in the bond. See Code Civ. Proc. § 995.320. See also Sections 42060 (written notice), 42080 (mailed notice).

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

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

Claimants on a Payment Bond

The Commission revised a private work provision governing who may make a claim against a direct contractor’s payment bond. Proposed Civ. Code § 7608. The revision clarified that the phrase “direct contractor’s subcontractor” includes a subcontractor that does not have a direct contractual relationship with a direct contractor. See CLRC Memorandum 2007-11, p. 18-19.

The staff recommends a **similar revision to the corresponding public work provision:**

§ 45090. Limitation on chapter

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

(b) Nothing in this section affects the stop payment notice rights of, and relative priorities among, design professionals.

Comment. Section 45090 restates former Civil Code Section 3267, but clarifies that claimants providing work to subcontractors at every level have a right to recover against a direct contractor’s payment bond as provided in this section. See *Union Asphalt, Inc. v. Planet Ins. Co.*, 21 Cal. App. 4th 1762, 27 Cal. Rptr. 2d 371 (1994).

....

Notice of Completion

Provisions in both the private and public work parts of the proposed law relating to a notice of completion are derived from the same two sections of existing law (Civ. Code §§ 3092, 3093). However, a few provisions from these existing sections have been continued only in the private work part of the proposed law. See proposed Civ. Code § 7152. Those provisions should also be continued in the public work part of the proposed law.

In addition, in the private work part of the proposed law, the Commission extended the time for recordation of a notice of completion from within 10 days of completion to within 15 days of completion. The revision was made to allow an owner more time to determine whether completion had occurred. See Tentative Recommendation, p. 26. This rationale would appear equally applicable to the time for recordation of a notice of completion on a public work.

To address both issues, the staff recommends **changes to the public work section relating to recordation of a notice of completion, as follows:**

§ 42220. Notice of completion

42220. (a) A public entity may record a notice of completion on or within 15 days after completion of a public works contract.

(b) The notice shall be signed and verified by the public entity or its agent.

(c) The notice shall include all of the following information:

~~(a)~~ (1) The name and address of the public entity.

~~(b)~~ (2) A description of the site sufficient for identification, including the street address of the site, if any. If a sufficient legal description of the site is given, the effectiveness of the notice is not affected by the fact that the street address is erroneous or is omitted.

~~(c)~~ (3) The name of the direct contractor for the public works contract.

(4) The date of completion. An erroneous statement of the date of completion does not affect the effectiveness of the notice if the true date of completion is 15 days or less before the date of recordation of the notice.

(5) If the notice is based on cessation of labor, the date on or about which labor ceased.

Comment. Section 42220 combines former Civil Code Section 3093 (notice of completion) with former Civil Code Section 3092 (notice of cessation), to the extent they applied to a public works contract.



Notice Issues

The Commission has received several comments relating to the notice provisions in the public work part of the proposed law.

Many of the comments urge more consistency between the notice provisions in the private and public work parts of the proposed law. See e.g., comment of Granite Rock Company (“Graniterock”), a material supplier and contractor, CLRC Memorandum 2006-39, Exhibit p. 8; comment of Mr. Howard Brown, an attorney from Manhattan Beach, CLRC Memorandum 2006-39, Exhibit p. 30; comment of the California Department of Water Resources (“DWR”), Exhibit, pp. 2-3; comment of Gibbs, Giden, Locher & Turner LLP (“GGLT”), a law firm in Los Angeles, CLRC Memorandum 2006-39, Exhibit pp. 163-164.

Other commenters urge that notice provisions that at present appear only in the private work part of the proposed law should be added to the public work provisions. See e.g., comment of the Regents of the University of California (“UC”) (requesting that electronic notice be incorporated in the public work part of the proposed law), CLRC Memorandum 2006-39, Exhibit p. 82; comment of DWR (requesting that an identification of the work site be included in public work notices), Exhibit, p. 4.

These comments raise a more fundamental issue for the Commission — should the various notice provisions in the public work part of the proposed law be standardized, as they have been in the private work part of the proposed law?

Comparison Between Notice Provisions in Private Work and Public Work Parts of the Proposed Law

The existing mechanics lien statute contains a number of notice provisions, some applicable to a private work of improvement and some to a public work.

In the private work part of the proposed law, the Commission has standardized the notice provisions by adding an article that includes default provisions applicable to all notices (unless language specific to a notice provides otherwise). See proposed Civ. Code §§ 7100-7116.

In the public work part of the proposed law, the Commission has not taken the same approach. (This may have been a “back burner” project, to be completed when time allowed. See CLRC Memorandum 2005-43, p. 4.)

Adding standard rules for public work notices should not be difficult or controversial. It would address the comments requesting uniformity between the private and public work parts of the proposed law. It would also further the

Commission's general goal of simplifying and clarifying existing mechanics lien law without making significant substantive changes. Moreover, now that the Commission has standardized the notice provisions in the private work part of the proposed law, a failure to follow the same approach in the public work part of the proposed law could result in increased confusion and administrative burden for practitioners who work on both private and public jobs.

The staff recommends that **the notice provisions in the public work part of the proposed law be standardized as follows.**

New Standardized Notice Provisions

The staff recommends that **the following article be added to the public work part of the proposed law.** (The provisions in the article would be very similar to the notice provisions in the private work part of the proposed law).

Article 2. Notice

§ 42100. Written notice

42100. (a) Notice under this part shall be in writing. Writing includes printing and typewriting.

(b) Written notice under this part may be given by electronic communication to the extent authorized under Section 42110.

Comment. Subdivision (a) of Section 42100 generalizes various provisions of former law. See, e.g., former Civ. Code §§ 3092 (notice of cessation), 3093 (notice of completion), 3098 (preliminary notice), 3103 (stop notice).

Subdivision (b) is new.

§ 42102. Contents of notice

42102. (a) Notice under this part shall, in addition to any other information required by statute for that type of notice, include all of the following information to the extent known to the person giving the notice:

(1) The name and address of the public entity.

(2) The name and address of the direct contractor.

(3) A description of the site sufficient for identification, including the street address of the site, if any. If a sufficient legal description of the site is given, the effectiveness of the notice is not affected by the fact that the street address is erroneous or is omitted.

(4) The name, address, and relationship to the parties of the person giving the notice.

(6) If the person giving the notice is a claimant:

(i) A general statement of the labor, service, equipment or material provided or to be provided by the claimant.

(ii) The name of the person who contracted for the labor, service, equipment or material provided or to be provided.

(iii) A statement or estimate of the claimant's demand, if any, after deducting all just credits and offsets.

(b) Notice is not invalid by reason of any variance from the requirements of this section if the notice is sufficient to substantially inform the person given notice of the information required by this section and other information required in the notice.

Comment. Section 42102 is new. It generalizes and standardizes provisions found throughout former law. See, e.g., former Civ. Code §§ 3092 (notice of cessation), 3093 (notice of completion), 3098 (preliminary notice), 3103 (stop notice), 3252 (notice to principal and surety).

§ 42104. Manner of giving notice

42104. Except as otherwise provided by statute, notice under this part may be given by any of the following means:

(a) Personal delivery.

(b) Mail in the manner provided in Section 42108.

(c) Leaving the notice and mailing a copy in the manner provided in Section 415.20 of the Code of Civil Procedure for service of summons and complaint in a civil action.

Comment. Section 42104 is new. It generalizes and standardizes provisions found throughout former law. See, e.g., former Civ. Code §§ 3098 (preliminary notice), 3103 (stop notice), 3185 (notice of expiration of time to give stop notice), 3199 (notice of release of funds), 3227 (notice to principal and surety).

Under subdivision (c), when notice is given in the manner provided in Code of Civil Procedure Section 415.20 for service of summons and complaint, the notice is complete five days after mailing the notice. See Section 42112 (when notice complete). The 10 day delay provided in the Code of Civil Procedure for completion of service under that code is inapplicable.

§ 42106. Address at which notice is given

42106. Except as otherwise provided by this part, notice under this part shall be given to the person to be notified at the following addresses:

(a) If the person to be notified is the public entity, at the office of the disbursing officer of the public entity or at another address specified in the contract for service of notices, papers, and other documents.

(b) If the person to be notified is a direct contractor or a subcontractor, at the contractor's residence or place of business, or at the contractor's address shown on the building permit, on the contractor's contract, or on the records of the Contractors' State License Board.

(c) If the person to be notified is a claimant, at the claimant's residence or place of business, or at the claimant's address shown on the contract, preliminary notice, stop payment notice, or claim against a payment bond, or on the records of the Contractors' State License Board.

(d) If the person to be notified is the surety on a bond, at the surety's residence or place of business, or at the surety's address shown on the bond for service of notices, papers, and other documents, or on the records of the Department of Insurance.

Comment. Section 42106 is new. It generalizes and standardizes provisions found throughout former law.

For examples of two more particularized notice provisions, see Sections 43040 (giving preliminary notice), 44130 (giving of stop payment notice).

Subdivision (g) does not continue the unique provisions found in former Section 3227 for notice to alternate persons in the case of a personal surety or admitted surety insurer. The bond and undertaking law requires every bond to include the address at which the principal and sureties may be served with notices, papers, and other documents. Code Civ. Proc. § 995.320.

§ 42108. Mailed notice

42108. Notice given by mail under this part shall be given by registered or certified mail, Express Mail, or overnight delivery by an express service carrier.

Comment. Section 42108 is a new provision included for drafting convenience. It generalizes a number of provisions of former law, and expands the methods of giving notice to include delivery by express service carrier.

§ 42110. Notice by electronic communication

42110. (a) As used in this section, "electronic record" has the meaning provided in Civil Code Section 1633.2.

(b) A notice under this part may be given to a person in the form of an electronic record if the person has agreed to receive the notice in the form of an electronic record.

(c) If a person that has agreed to receive a notice in the form of an electronic record is a consumer within the meaning of Section 7006 of Title 15 of the United States Code, the person's agreement shall satisfy the requirements of Section 7001 of Title 15 of the United States Code relating to consumer consent to an electronic record.

Comment. Section 7110 is new. It makes the California Uniform Electronic Transactions Act (UETA) (Civil Code Sections 1633.1-1633.17) expressly applicable to notices under this part.

A consumer within the meaning of E-Sign is "an individual who obtains products or services used primarily for personal, family, or household purposes." 15 U.S.C. § 7006(1). The consumer consent

requirements of E-Sign include (i) affirmative consent, (ii) disclosure, (iii) electronic access, (iv) software and hardware upgrades. See 15 U.S.C. § 7001(c)(1).

§ 42112. When notice complete

42112. Notice under this part is complete and deemed to have been given at the following times:

(a) If given by personal delivery, when delivered.

(b) If given by mail, when deposited in the mail or with an express service carrier in the manner provided in Section 1013 of the Code of Civil Procedure.

(c) If given by leaving the notice and mailing a copy in the manner provided in Section 415.20 of the Code of Civil Procedure for service of summons in a civil action, five days after mailing.

(d) If given in the form of an electronic record, when the electronic record is transmitted.

Comment. Section 42112 is new. It generalizes and standardizes provisions found in former law.

Under subdivision (b), when notice is given in the manner provided in Code of Civil Procedure Section 1013, the notice is complete when deposited in the mail or with an express service carrier. The 10 and 20 day delays provided in the Code of Civil Procedure for completion of service under that code are inapplicable.

Under subdivision (c), when notice is given in the manner provided in Code of Civil Procedure Section 415.20 for service of summons and complaint, the notice is complete five days after mailing of the notice. The 10 day delay provided in the Code of Civil Procedure for completion of service under that code is inapplicable.

§ 42114. Proof of notice

42114. (a) Proof that notice was given to a person in the manner required by this part shall be made by a proof of notice declaration that states all of the following:

(1) The type or description of the notice given.

(2) The date, place, and manner of notice and facts showing that notice was given in the manner required by statute.

(3) The name and address of the person to which notice was given, and, if appropriate, the title or capacity in which the person was given notice.

(b) If the notice is given by mail, the declaration shall be accompanied by one of the following:

(1) A return receipt, delivery confirmation, signature confirmation, or other proof of delivery or attempted delivery provided by the United States Postal Service, or a photocopy of the record of delivery and receipt maintained by the United States Postal Service, showing the date of delivery and to whom

delivered, or in the event of nondelivery, by the returned envelope itself.

(2) A receipt for registered or certified mail issued by the United States Postal Service.

(3) A tracking record or other documentation certified by an express service carrier showing delivery or attempted delivery of the notice.

(c) If notice is given in the form of an electronic record, the declaration shall also state that the document was served electronically and that no notice of non-transmission was received.

Comment. Section 42114 is a new provision included for drafting convenience. It generalizes a number of provisions of former law, and expands the methods of proof to include a certification of the mailing by the United States Postal Service.

Notice Provisions Requiring Editing or Deletion

With the inclusion of the new article, a number of provisions in the proposed law would be unnecessary.

The staff recommends **revision of the following provisions of the proposed law, to reflect the inclusion of the new standardized notice provisions:**

§ 42060. Written notice

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

§ 42070. Notice to public entity

~~42070. Notice to a public entity shall be addressed to the public entity at the office of the disbursing officer of the public entity or at another address specified in the contract.~~

§ 42080. Mailed notice

~~42080. The following provisions apply to notice given by mail under this part:~~

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

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

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

§ 42220. Notice of completion

42220. A public entity may record a notice of completion. The notice shall include all of the following information:

~~(a) The name and address of the public entity.~~

~~(b) A description of the site sufficient for identification, including the street address of the site, if any. If a sufficient legal description of the site is given, the effectiveness of the notice is not affected by the fact that the street address is erroneous or is omitted.~~

~~(c) The name of the direct contractor for the public works contract comply with the requirements of Article 2 (commencing with Section 42100).~~

§ 43030. Requirements of preliminary notice

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

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

~~(2) The name and address of the person providing the labor, service, equipment, or material.~~

~~(3) The name of the person that contracted for the labor, service, equipment, or material.~~

~~(4) A description of the site sufficient for identification.~~

§ 43040. Giving preliminary notice

43040. (a) Preliminary notice shall be given by mail or personal delivery in compliance with the requirements of Article 2 (commencing with Section 42100).

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

~~(c) Notice to a public entity shall be addressed to the public entity as provided in Section 42070.~~

Comment. Subdivision (a) of Section 43040 restates the second and fourth sentences of former Civil Code Section 3098(a). See also Section 42080 (mailed notice).

Subdivision (b) restates the third sentence of former Civil Code Section 3098(a).

Subdivision (c) supersedes the fourth sentence of former Civil Code Section 3098(a). See Section 42070 (notice to public entity).

See also Sections 41040 ("direct contractor" defined), 41110 ("preliminary notice" defined), 41120 ("public entity" defined), 41130 ("public works contract" defined).

§ 44120. Contents of stop payment notice

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

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

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

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

~~(4) The name and address of the claimant.~~

§ 44130. Giving of stop payment notice

44130. A (a) Except as provided in subdivision (b), a stop payment notice shall comply with the requirements of Article 2 (commencing with Section 42100).

(b) A stop payment notice shall be given to the public entity by mailing or personally delivering giving the notice to the following person:

~~(a)~~ (1) In the case of a public works contract of the state, the director of the department that awarded the contract.

~~(b)~~ (2) 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 pursuant to the contract, or the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by which the contract was awarded.

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

~~Subdivision (b) restates the second unnumbered paragraph of former Civil Code Section 3103. See also Section 42080 (mailed notice).~~

A claimant wishing to receive return notice of the time within which payment of the claim stated in a stop payment notice must be enforced must pay the public entity ten dollars (\$10) at the time of giving the stop payment notice. See Section 44170.

See also Sections ~~41100 (“person” defined),~~ 41120 (“public entity” defined), 41130 (“public works contract” defined), 41150 (“stop payment notice” defined).

§ 44170. Notice to claimant of time to give stop payment notice

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

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

(e) A public entity need not give notice under this section unless the claimant has paid the public entity ten dollars (\$10) at the time of giving the stop payment notice.

§ 44230. Notice to claimant

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

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

§ 45070. Notice to principal and surety of payment bond claim

45070.

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

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

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

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

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

~~(d) Notice given by mail shall be at the address provided in the bond for service of notices, papers, and other documents comply with the requirements of Article 2 (commencing with Section 42100).~~



LABORERS COMPENSATION FUND ISSUES

J. David Sackman, an attorney with Reich, Adell, Crost & Cvitan, a law firm in Los Angeles that represents employee benefit funds (hereinafter "Laborers") contends that several sections in the public work part of the proposed law referencing "laborers compensation funds" require revision, in order to avoid a judicial finding that the sections are preempted by the federal Employment Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1001 et seq). CLRC Memorandum 2006-39, Exhibit pp. 53-80.

The concern is that, in enacting ERISA, the federal government has indicated that ERISA's provisions supersede any state law that "relates to" employee benefit funds. *Betancourt v. Storke Housing Investors*, 31 Cal. 4th 1157, 1161, 82 P.3d 286, 8 Cal. Rptr. 3d 259 (2003). Provisions in the proposed law that make particularized reference to such a fund could therefore be interpreted as improperly singling out the fund for special treatment not provided by ERISA, and could be held invalid based on a finding of federal preemption. The Laborers' proposed solution to avoid the risk of such preemption is to either merge the substance of these provisions into other related provisions that do not make particularized reference to such a fund, or to include the fund in a larger category of entities all subject to the same treatment.

The Commission has considered and generally accepted these same arguments and proposed solution with regard to provisions in the private work part of the proposed law. See First Supplement to CLRC Memorandum 2006-48, pp. 1-9; Minutes (December 2006), p. 3.

The arguments apply with the same logic to the public work provisions. It is not the Commission's intention to make changes that could expose laborer provisions to the risk of federal preemption.

The staff therefore recommends that **a new section 41075 be added to the public work part of the proposed law, and that other proposed sections be revised, consistent with the Commission's decisions relating to the corresponding private work provisions:**

§ 41075. Laborer

41075. (a) "Laborer" means a person who, acting as an employee, performs labor, or bestows skill or other necessary services, pursuant to a public works contract.

(b) "Laborer" includes a person or entity to which a portion of a laborer's compensation for a public works contract, including but not limited to employer payments described in Section 1773.1 of the Labor Code and implementing regulations, is paid by agreement with that laborer or the collective bargaining agent of that laborer.

(c) A person or entity described in subdivision (b) that has standing under applicable law to maintain a direct legal action, in their own name or as an assignee, to collect any portion of compensation owed for a laborer for work pursuant to a public works contract, shall have standing to enforce any rights or claims of the laborer under this part, to the extent of the compensation agreed to be paid to the person or entity for that work. This subdivision is intended to give effect to the long-standing public

policy of this state to protect the entire compensation of a laborer, regardless of the form in which that compensation is to be paid.

Comment. Subdivision (a) of Section 41075 continues former Civil Code Section 3089(a) without substantive change.

Subdivision (b) continues the first sentence of former Civil Code Section 3089(b) and a part of former Civil Code Section 3111, without substantive change.

Subdivision (c) continues the second and third sentences of former Civil Code Section 3089(b), and a part of former Civil Code Section 3111, without substantive change.

§ 41050. Express trust fund

~~41050. "Express trust fund" means a laborers compensation fund to which a portion of a laborer's total compensation is to be paid pursuant to an employment agreement or a collective bargaining agreement for the provision of benefits, including, but not limited to, employer payments described in Section 1773.1 of the Labor Code and implementing regulations.~~

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

§ 41080. Laborers compensation fund

~~41080. "Laborers compensation fund" means a person, including an express trust fund, to which a portion of the compensation of a laborer is paid by agreement with the laborer or the collective bargaining agent of the laborer.~~

~~**Comment.** Section 41080 continues the first sentence of former Civil Code Section 3089(b) without substantive change. See also Civ. Code § 7070 (standing to enforce laborer's rights).~~

~~See also Sections 41050 ("express trust fund" defined), 41100 ("person" defined).~~

§ 42030. Who may use remedies

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

(1) A person that provides labor, service, equipment, or material for a public works contract pursuant to an agreement with a direct contractor.

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

(3) A person described in Section 4107.7.

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

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

The reference to an “express trust fund” is replaced by a reference to a generalized category of persons or entities included within the definition of “laborer.” See Section 41075 (“laborer” defined).

See also Sections 41040 (“direct contractor” defined), 41050 (~~“express trust fund” defined~~), 41070 (“labor, service, equipment, or material” defined), 41075 (“laborer” defined), 41090 (“payment bond” defined), 41100 (“person” defined), 41120 (“public entity” defined), 41130 (“public works contract” defined), 41150 (“stop payment notice” defined).

§ 43010. Preliminary notice prerequisite to remedies

....
A laborer ~~or a laborers compensation fund~~ ... is not required to give preliminary notice.

....

Special Problem: Subcontractor Discipline

In the public work part of the proposed law, the Commission has added a new provision relating to subcontractor discipline, proposed Public Contract Code Section 43060:

§ 43060. Disciplinary action for failure to give notice

43060. A licensed subcontractor is subject to disciplinary action under the Contractors’ State License Law, Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, if all of the following conditions are satisfied:

- (a) The subcontractor does not pay all compensation due to a laborers compensation fund.
- (b) The subcontractor fails to give a required preliminary notice.
- (c) The subcontractor’s failure results in the laborers compensation fund filing a stop payment notice or asserting a claim against a payment bond.
- (d) The amount due the laborers compensation fund is not paid.

Comment. Section 43060 supersedes former Civil Code Section 3098(b); the provision relating to disciplinary action if a subcontractor fails to give preliminary notice on a work of improvement exceeding \$400, is not continued. Section 43060 is drawn from former Civil Code Section 3097(h), relating to a private work of improvement.

See also Sections 41080 (“laborers compensation fund” defined), 41090 (“payment bond” defined), 41110 (“preliminary notice” defined), 41150 (“stop payment notice” defined).

A parallel provision was included in the private work part of the proposed law, in proposed Civil Code Section 7216.

Treatment of Section 7216

In response to the tentative recommendation, Laborers asserted that both proposed Civil Code Section 7216 and proposed Public Contract Code Section 43060 raise the risk of ERISA preemption, as they each single out a laborers compensation fund for special treatment. CLRC Memorandum 2006-39, Exhibit, pp. 65, 69.

After considering Laborer’s comments relating to proposed Section 7216, the Commission deleted the section from the proposed law, and incorporated most of its provisions into another section in the private work part of the proposed law, proposed Civil Code Section 7103. See Second Supplement to CLRC Memorandum 2006-48, Exhibit pp. 1-2; Minutes (December 2006), p. 3.

Similar Treatment of Section 43060

The rationale for the deletion of proposed Civil Code Section 7216 is equally applicable to proposed Public Contract Code Section 43060. The current language in Section 43060 could expose the section to a finding of preemption, based on the special treatment of a laborers compensation fund.

The Commission should solve this problem in the same way it did in the private work provisions: delete proposed Public Contract Code Section 43060, and add a provision to the public work part of the proposed law that parallels proposed Civil Code Section 7103. In fact, the bulk of proposed Section 7103 is derived from a provision of existing law (Civil Code Section 3097(k)) that applies to public work, and should probably have been continued in the public work part of the proposed law.

This new provision would thus both promote consistency between the private and public work parts of the proposed law, and at the same time properly continue an applicable provision of existing law.

The staff recommends **adding the following new section to the public work part of the proposed law, which is nearly identical to the current version of proposed Civil Code Section 7103:**

§ 42103. Notice of overdue laborer compensation

42103. (a) A contractor or subcontractor that employs a laborer and fails to pay the full compensation due the laborer, including any employer payments described in Section 1773.1 of the Labor Code and implementing regulations, shall not later than the date the compensation became delinquent, give the laborer, the laborer's bargaining representative, if any, and the public entity, notice that includes all of the following information, in addition to the information specified in Section 43030:

(1) The name and address of the laborer, and of any person or entity described in subdivision (b) of Section 41075 to which employer payments are due.

(2) The total number of straight time and overtime hours worked by the laborer on each job.

(3) The amount then past due and owing.

(b) Failure to give the notice required by subdivision (a) constitutes grounds for disciplinary action under the Contractors' State License Law, Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

Comment. Section 42103 continues former Civil Code Section 3097(k), with the additional requirement that the information provided be given to the public entity, and include the name and address of the unpaid laborer.

Former Civil Code Section 3098(b), providing for disciplinary action if a subcontractor fails to give preliminary notice on a work of improvement exceeding \$400, is not continued.

The reference to the Registrar of Contractors in the final sentence of former Section 3097(k) is revised to refer to the Contractors' State License Law. This is a technical, nonsubstantive change.

Compliance with this section does not excuse compliance with Section 43010, if applicable.

See also Sections 41040 ("direct contractor" defined), 41075 ("laborer" defined), 41120 ("public entity" defined), 41160 ("subcontractor" defined), 42010 (application of part).

Additional Revision

The staff recommends that **the reference to "contractor or subcontractor" in the first sentence of both Sections 42103 and 7103 be revised to read "direct contractor or subcontractor."** This would appear to be a clarifying non-substantive change to existing law. In the context presented, the term "contractor" can only refer to a direct contractor.

Related Revisions Outside the Mechanics Lien law

Laborers point out two sections in the Business and Professions Code requiring similar revisions. CLRC Memorandum 2006-39, Exhibit, p. 70.

The staff recommends **the following revisions to these sections:**

Bus. & Prof. Code § 7071.5 (amended). Contractor's bond

SEC. _____. Section 7071.5 of the Business and Professions Code is amended to read:

7071.5. The contractor's bond required by this article shall be executed by an admitted surety in favor of the State of California, in a form acceptable to the registrar and filed with the registrar by the licensee or applicant. The contractor's bond shall be for the benefit of the following:

(a) Any homeowner contracting for home improvement upon the homeowner's personal family residence damaged as a result of a violation of this chapter by the licensee.

(b) Any person damaged as a result of a willful and deliberate violation of this chapter by the licensee, or by the fraud of the licensee in the execution or performance of a construction contract.

(c) Any employee of the licensee damaged by the licensee's failure to pay wages.

(d) Any person or entity, ~~including an express trust fund described in Section 7014 of the Civil Code or Section 41050 of the Public Contract Code,~~ to whom a portion of the compensation of an employee of a licensee is paid by agreement with that employee or the collective bargaining agent of that employee, damaged as the result of the licensee's failure to pay fringe benefits for its employees, including, but not limited to, employer payments described in Section 1773.1 of the Labor Code and regulations thereunder (without regard to whether the work was performed on a private or public work). Damage to an express trust fund under this subdivision is limited to actual employer payments required to be made on behalf of employees of the licensee, as part of the overall compensation of those employees, which the licensee fails to pay.

Bus. & Prof. Code § 7071.10 (amended). Qualifying individual's bond

SEC. _____. Section 7071.10 of the Business and Professions Code is amended to read:

7071.10. (a) The qualifying individual's bond required by this article shall be executed by an admitted surety insurer in favor of the State of California, in a form acceptable to the registrar and filed with the registrar by the qualifying individual. The qualifying individual's bond shall be for the benefit of the following persons:

(1) Any homeowner contracting for home improvement upon the homeowner's personal family residence damaged as a result of a violation of this chapter by the licensee.

(2) Any person damaged as a result of a willful and deliberate violation of this chapter by the licensee, or by the fraud of the licensee in the execution or performance of a construction contract.

(3) Any employee of the licensee damaged by the licensee's failure to pay wages.

(4) Any person or entity, ~~including an express trust fund described in Section 7014 of the Civil Code or Section 41050 of the Public Contract Code,~~ to whom a portion of the compensation of an employee of a licensee is paid by agreement with that employee or the collective bargaining agent of that employee, that is damaged as the result of the licensee's failure to pay fringe benefits for its employees including, but not limited to, employer payments described in Section 1773.1 of the Labor Code and regulations adopted thereunder (without regard to whether the work was performed on a public or private work). ~~Damage to an express trust fund under this paragraph~~ is limited to employer payments required to be made on behalf of employees of the licensee, as part of the overall compensation of those employees, which the licensee fails to pay.

(b) The qualifying individual's bond shall not be required in addition to the contractor's bond when the qualifying individual is himself or herself the proprietor under subdivision (a) or a general partner under subdivision (b) of Section 7068.

SUBSTANTIVE REVISIONS OF NOTICE PROVISIONS



Notice to Public Entity

With two exceptions, existing law does not specify which public employee should be served when a notice must be given to a public entity.

The proposed law generalized a special rule requiring that a preliminary notice to specified state agencies be given to the "disbursing officer" of the public entity. As a result, any notice given to any public entity could be given to the "disbursing officer." The change was premised on the theory that the disbursing officer is the person that issues payments to the direct contractor, and would therefore be the logical person to keep track of all notices that affect these payments. See CLRC Memorandum 2006-03, p. 25.

California State University ("CSU") objects to the change. CLRC Memorandum 2006-39, Exhibit p.103. CSU reports that at each of its 23 campuses, a contract administrator is responsible for managing projects on that

campus, and notices sent to a single “disbursing officer” would conflict with the manner in which CSU manages its contracts.

On the other hand, GGLT endorses the generalization. CLRC Memorandum 2006-39, p. 161. However, GGLT urges that to best implement the provision, the proposed law should require that all public works contracts include the name and address of the disbursing officer.

The staff believes CSU’s concern with the “disbursing officer” provision is a valid criticism. Notice given to the disbursing officer of a statewide entity could be problematic. In addition, the suggestion made by GGLT points out the difficulty many claimants might face in identifying the disbursing officer of a public entity.

The staff recommends that **the Commission restore existing law on the proper address for a notice to a public entity.**

If the Commission approves the standardization of the public work notice provisions discussed earlier in this memorandum, **the following additional revisions should be made:**

§ 42106. Address at which notice is given

42106. Except as otherwise provided by this part, notice under this part shall be given to the person to be notified at the following addresses:

(a) If the person to be notified is the public entity, at the office of ~~the disbursing officer~~ of the public entity, or at another address specified in the contract for service of notices, papers, and other documents.

....

§ 43040. Giving preliminary notice

43040.

If the public works contract is for work constructed by the Department of Public Works or the Department of General Services of the state, preliminary notice to the public entity shall be given to the disbursing officer of the department constructing the work.

....

Proof of Notice by Mail

Laborers suggest that proof of notice by mail should not depend on a return receipt, as delinquent contractors will often refuse to accept certified mail, or will have moved. CLRC Memorandum 2006-39, Exhibit pp. 69, 76. The group proposes that a claimant be allowed to prove delivery of mailed notice to a

contractor by proving that the notice was mailed to the current address for the contractor listed with the Contractors State License Board.

The staff notes that the proof of notice required by this section does not necessarily require a return receipt. Other alternative methods of proof of notice are also deemed acceptable (e.g., documentation showing *attempted* delivery provided by the United States Postal Service, a returned envelope in the event of non-delivery, a receipt for registered or certified mail). Proposed Pub. Cont. Code § 42114(b).

The staff does not recommend any change to the rule for proof of notice.

APPLICATION TO OTHER PUBLIC CONTRACT CODE PROVISIONS

GGLT believes it is not sufficiently clear that the proposed law does not govern other remedies provided for in other parts of the Public Contract Code. CLRC Memorandum 2006-39, Exhibit p. 160. The firm urges that a new term “claim” be added to the proposed law. The term would be defined as including only stop payment notice and payment bond claims, and could then be used throughout the proposed law.

The proposed law already uses the term “claimant” to similar effect. That term is defined as “a person that has right under this part to give a stop payment notice or assert a claim against a payment bond.” Proposed Public Contract Code Section 41020.

The staff believes the use of the term “claimant” effectively addresses GGLT’s concern.

COMMENTS ON INDIVIDUAL SECTIONS

Section 41030 (“Design Professional”)

Proposed Public Contract Code Section 41030 defines a “design professional”:

41030. “Design professional” means a person licensed as an architect pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, registered as a professional engineer pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, or licensed as a land surveyor pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code that provides architectural, engineering, or land surveying services pursuant to a public works contract.

Comment. Section 41030 is drawn from Civil Code Section 7010.

....

DWR asks whether the reference to “public works contract” in the last line of Section 41030 should instead read “professional services contract.” Exhibit, p. 2. DWR suggests that a design professional does not normally enter into a public works contract.

The meaning of DWR’s concern is somewhat unclear, and unfortunately the commenter was unavailable for clarification. Regardless of DWR’s meaning, there appears to be another problem with the definition.

Definition Inconsistent with One Provision of Existing Law

The defined term “design professional” is new. It was added to simplify the drafting of two public work sections that refer to architects, engineers, and land surveyors. No substantive change was intended.

The definition is used in only two public work sections, proposed Public Contract Code Sections 45010 (continuing existing Civil Code Section 3247) and 45090 (continuing existing Civil Code Section 3267):

Existing Civil Code Section 3247(c) refers to “providers of architectural, engineering and land surveying services pursuant to a contract with a public entity for any public work.” That reference to a contract seems to be the source of the contract language in the definition.

However, existing Civil Code Section 3267 refers only to “architects, registered engineers, and licensed land surveyors” with no mention of a contract.

If the definition of “design professional” in the proposed law includes the contract requirement, then it arguably changes the meaning of Civil Code Section 3267. That was not our intention. It would be better to do without the new definition than to inadvertently change the substance of the law.

Recommendation

There is another possible approach: delete the contract language from the definition of “design professional.”

Although the contract language is compatible with existing Civil Code Section 3247(c), it isn’t strictly necessary in that context. Section 3247(c) exempts an architect, engineer, or land surveyor from certain duties of a direct contractor. That exemption only has relevance to a design professional who is also a direct contractor (i.e., a design professional *who has a direct contract with the public entity for the public work*).

For that reason, it appears that the contract language could be deleted from the definition of “design professional” without changing the meaning of existing Civil Code Section 3247. Thus:

41030. “Design professional” means a person licensed as an architect pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, registered as a professional engineer pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, or licensed as a land surveyor pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code ~~that provides architectural, engineering, or land surveying services pursuant to a public works contract.~~

Comment. Section 41030 is ~~drawn from Civil Code Section 7010~~ is a new definition. It is included for drafting convenience. It generalizes provisions of former Civil Code Sections 3247 and 3267.

See also ~~Sections~~ Section 41100 (“person” defined), ~~41130~~ (“public works contract” defined).

The staff recommends that change. It would avoid any unintended change to the meaning of existing law. It would also avoid whatever problem the DWR comment was describing (because the comment was clearly an objection to the contract language).

Section 41060 (“Funds”)

Proposed Public Contract Code Section 41060 defines “funds”:

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

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

....

DWR suggests the Commission may want to add “electronic transfer” to the specified list in this section. Exhibit, p. 2.

Banking terminology can be complex, and the staff is reluctant to add a new term to the proposed law that does not already appear in the existing statute (as do the terms listed in Section 41060). Doing so might have unintended consequences.

The staff therefore recommends against the suggested change.

Section 41070 (“Labor, Service, Equipment, or Material”)

Section 41070 defines “labor, service, equipment, or material”:

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

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

DWR asks whether it would be appropriate to substitute a reference to “utilities” in place of a reference to “power.” Exhibit, p. 2.

The existing mechanics lien statute uses the term “power” as a basis for mechanics lien rights (existing Civ. Code § 3110); the term “utilities” is not mentioned. It is not clear what effect the proposed change in technology might have.

The staff recommends against the suggested change.



Section 42030 (Who May Use Remedies)

Proposed Section 42030 (with emphasis added) specifies who may pursue statutory remedies on a public work:

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

(1) A person that provides labor, service, equipment, or material for a public works contract *pursuant to an agreement with a direct contractor.*

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

(3) A person described in Section 4107.7.

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

Comment. Section 42030 restates former Civil Code Section 3181.

....

Requirement That Work Be Pursuant to Agreement with Direct Contractor

Graniterock has expressed concern that subdivision (a)(1) of Section 42030 will bar certain claimants from pursuing statutory remedies on a public work. CLRC Memorandum 2006-39, Exhibit pp. 4-5. Specifically, the requirement that a claimant provide work pursuant to an agreement *with a direct contractor* may exclude “lower tier” subcontractors or suppliers that provide work pursuant to an agreement with another *subcontractor*.

Both GGLT and general counsel for the Regents of the University of California (“UC”) express a similar concern about the wording of Section 42030. CLRC Memorandum 2006-39, Exhibit pp. 81, 161.

The staff agrees the language of Section 42030 may be problematic, and arguably deviates from existing law.

Existing Law

Existing law unambiguously entitles lower tier subcontractors and suppliers on a public work to stop payment notice and payment bond remedies.

Existing Civil Code Section 3226 provides that any person “described in [Civil Code] Section 3110, 3111, or 3112” may make a claim against a payment bond on either a private or a public work. (Sections 3110, 3111, and 3112 specify the persons entitled to assert a mechanics lien claim on a private work, and include lower tier subcontractors and suppliers.)

Existing Civil Code Section 3248(c) further provides that a public work payment bond shall “inure to the benefit of any of the persons named in Section 3181 so as to give a right of action to those persons or their assigns in any suit brought upon the bond.”

Existing Civil Code Section 3181, which specifies who may give a stop payment notice on a public work, similarly grants the right to give a stop payment notice to all persons that would be entitled to assert a mechanics lien claim (if the work was a private work):

3181. Except for an original contractor, any person mentioned in Section 3110, 3111, or 3112, or in Section 4107.7 of the Public Contract Code, or furnishing provisions, provender, or other supplies, may serve a stop notice upon the public entity responsible for the public work in accordance with this chapter.

Recommendation

As the right to pursue either of the two public work remedies is primarily based on the right to assert a mechanics lien claim on a private work, the staff recommends that **proposed Section 42030 be revised to incorporate language from proposed Civil Code Section 7406, which continues existing law relating to who is entitled to assert a mechanics lien claim:**

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

(1) A person that provides labor, service, equipment, or material for a public works contract ~~pursuant to an agreement with~~, if the labor, service, equipment, or material is authorized by a direct contractor, subcontractor, architect, project manager, or other person having charge of all or part of the public works contract.

....

Comment. Section 42030 restates former Civil Code Section 3181, and parts of former Sections 3110, 3111, and 3112.

....



Rights of a Material Supplier on a Public Work

Although not the subject of any comment, the staff notes that proposed Section 42030 may eliminate an existing right of a class of material suppliers to pursue public work remedies.

As indicated above, under existing law the right to give a stop payment notice or assert a payment bond claim on a public work is generally coextensive with the right to assert a mechanics lien claim on a private work. And under existing law, it is well established that a supplier *to another supplier* (as contrasted with a supplier to a *contractor*) does *not* have a right to assert a mechanics lien claim. *Theisen v. Los Angeles County*, 54 Cal. 2d 170, 352 P.2d 529, 5 Cal. Rptr. 161 (1960). Further, under existing law a “supplier to a supplier” is not permitted to give a stop payment notice, on a *private* work. Civ. Code §§ 3158, 3159.

However, on a *public* work, existing Civil Code Section 3181 (emphasis added) appears to grant *any* supplier — including a “supplier to a supplier” — a stop payment notice remedy:

3181. Except for an original contractor, *any person* mentioned in Section 3110, 3111, or 3112, or in Section 4107.7 of the Public Contract Code, *or furnishing provisions, provender, or other supplies*, may serve a stop notice upon the public entity responsible for the public work in accordance with this chapter.

(Provender is food.)

The staff solicits input from practitioners as to whether in practice this language has been interpreted to authorize a “supplier to a supplier” to give a stop payment notice on a public work.

Pending input from practitioners, the staff makes no recommendation as to whether Section 42030 should be drafted to grant stop payment notice rights to *all* suppliers on a public work. If the Commission wishes to do so, the section could be revised to add the following language:

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

....

(4) A person that furnishes provisions, material, or supplies on a public works contract.

....

Exclusion of Specifically Described Entities

The Association of California Surety Companies requests that Section 42030 be revised to provide that “persons who advance or lend funds for the payment of labor or persons who supply workers for the project and are not licensed contractors may not give a stop payment notice or assert a claim against a payment bond under this part or any other provision of this code that provides for a payment bond.” CLRC Memorandum 2006-39, Exhibit, p. 122.

The exclusions to this provision suggested by the Association do not appear in the existing mechanics lien statute. Moreover, the Association’s requested revision would impose new statutory restrictions on provisions in the Public Contract Code that are outside the mechanics lien statute, and are not a part of this study.

The staff recommends against this suggestion.



Section 42040 (Venue)

Proposed Public Contract Code Section 42040 would specify the venue for an action to enforce a public work remedy:

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

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

....

Section 42040 parallels a nearly identical venue provision in the private work part of the proposed law, proposed Civil Code Section 7052.

Commenters' Suggested Revisions of Section 42040

The Regents of the University of California ("UC") are concerned that Section 42040 would allow venue in a county in which only a small portion of a public work may have been performed. CLRC Memorandum 2006-39, Exhibit pp. 81-82. UC suggests that the section provide for venue only in the county identifies in the public works contract as the location of the work.

Laborers suggest adding language to Section 42040 to expressly allow a public work claim to be joined with a related federal claim. CLRC Memorandum 2006-39, Exhibit p. 68.

More Fundamental Problem with Venue Provision in Proposed Law

It appears that the proposed private and public work venue sections may both change existing law.

Existing law unambiguously provides that an action to enforce a *mechanics lien claim* against real property must be commenced in the county in which the real property is located. Code Civ. Proc. § 392(a). However, Section 392(a) does not appear to govern an action to enforce either a stop payment notice or a payment bond claim, which are *not* actions against real property:

392. (a) Subject to the power of the court to transfer actions and proceedings as provided in this title, the superior court in the county where the real property that is the subject of the action, or some part thereof, is situated, is the proper court for the trial of the following actions:

(1) For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of that right or interest, and for injuries to real property.

(2) For the foreclosure of all liens and mortgages on real property.

(b)

Venue for an action to enforce either a stop payment notice or a payment bond claim would appear to be governed by general venue statutes, in the Code of Civil Procedure or elsewhere. Some of these provisions may provide for

different or additional venues other than the county in which the work of improvement is located, depending on the status of the defendant.

For example, Code of Civil Procedure Section 395.5 allows an action against a corporation to be brought in the county where the corporation's principal place of business is located. Many sureties are corporations, and it is quite likely a surety's principal place of business could be in a county other than the county where work is to be performed.

Public Contract Code Section 42040 and Civil Code Section 7052, by requiring that an action to enforce *any* mechanics lien remedy may be brought *only* in the county where the work was performed, would conflict with these venue provisions.

Recommendation

Both proposed Public Contract Code Section 42040 and proposed Civil Code Section 7052 were added to the proposed law merely for drafting convenience, and are not a part of the existing mechanics lien statute.

Given that the sections appear to substantively change existing law, the staff recommends that they be deleted.

That would largely moot the commenters' suggestions regarding Section 42040, and the staff therefore recommends **no action in response to either comment.**

Section 42100 (Liability of Surety on Payment Bond)

The joint surety commenters urge deletion of subdivisions (c) and (d) of Section 42100, which describes the liability of a surety on a payment bond. CLRC Memorandum 2006-39, pp. 97, 99. Section 42100 provides:

§ 42100. Liability of surety

42100. None of the following releases a surety from liability on a bond given under this part:

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

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

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

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

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

Comment. Section 42100 restates former Civil Code Section 3225.

The commenters' request is for a change in existing law, based on an assertion that the provisions in subdivisions (c) and (d) are either illogical or unfair.

The joint surety commenters made the same contentions regarding proposed Civil Code Section 7142 (governing the liability of a surety on a private work payment bond), a nearly identical section. The Commission decided not to adopt these suggestions, as it did not want to disturb an apparent legislative balance that had been struck by competing interested parties. See CLRC Memorandum 2006-48, p. 52.

As proposed Public Contract Code Section 42100 continues the same provision of existing law as does Civil Code Section 7142, this same reasoning would apply to Public Contract Code Section 42100.

The staff therefore recommends against the suggested change.

The Association of California Surety Companies inquires whether it is the Commission's intention that Section 42100 apply to both a payment bond given under the proposed law, and to a stop payment notice release bond given under the proposed law. CLRC Memorandum 2006-39, Exhibit p. 122.

Proposed Section 42100 is drawn from existing Civil Code Section 3225, which applies to *any* bond given under any provision of the existing mechanics lien statute. Section 42100 would therefore apply to both a payment bond and a stop payment notice release bond given under the proposed law, and **no change to the section is needed.**

Respectfully submitted,

Steve Cohen
Staff Counsel

Exhibit

**COMMENTS OF JOHN CAPE, CALIFORNIA DEPARTMENT OF WATER
RESOURCES**

From: "Cape, John" <jcape@water.ca.gov>
Date: September 26, 2006
To: <bhebert@clrc.ca.gov>
Cc: "Tabor, Ward" <wtabor@water.ca.gov>
Subject: Mechanic's lien law project.

Attached are comments on the draft Stop Payment Notice provisions proposed by the CLRC for the Public Contract Code.

I have also pasted the comments in this email in case that helps with formatting problems.

If you have any question on these comments please call me at 916.653.7604.

John A. Cape

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Comments of Department of Water Resources
Office of the Chief Counsel

Draft Provisions for Stop Payment Notice
On Public Works Contract Remedies
John A. Cape, Staff Counsel
916.653.7604
jcape@water.ca.gov

The CLRC staff is to be commended for their hard work in sorting out the Civil Code Sections that commingled the Mechanic's Lien Law and the Stop Notice procedures. Those provisions had grown over the years into a confusing set of rules.

DWR supports the separation of the laws into the Civil Code provisions for Private Works and the Public Contract Code provisions for Public Works Contracts. Anyone who practices in both areas should find the separation useful since it makes clear which rules will apply to each situation.

Comments on the individual sections of the proposed Public Works Contract statute follow. (We have not provided comments on the Civil Code provisions that cover Mechanic's Liens on Private Works of Improvement.)

41030 Should "professional services" be substituted for "public works" in the last line? A design professional is not normally the person that would be entering into a public works contract. That person would usually be a licensed construction contractor.

41060 You may wish to insert "electronic transfer" after "money,"

41070 Would it be appropriate to substitute "utilities" for "power" in this section?

41090 To be consistent with section 45020 should this definition just say "A payment bond given as required by statute"?

42070 This section is not consistent with Section 44130. See comments on 44130 below.

42210 In (a) delete "of performance" Those words are redundant. The usual meaning is acceptance of the work or acceptance of the contract. "Acceptance by the public entity." is sufficient.

Cessation of labor is not an appropriate measure of completion. There are occasions where work on a public works contract may be suspended for extended periods, including for funding problems or to deal with site conditions.

Would the following be an acceptable substitute for 42210 (b)?

“(b) Notice issued by the public entity of termination of the contract for cause or convenience.”

42310 The provisions regarding release of a stop payment notice are inconsistent as further indicated below. To achieve consistency subsection (b) of 42310 should be deleted.

42320 This section should be deleted. It is not consistent with section 42340.

42340 implements the revision to CC 3262 enacted in 2005 which indicates intent by the legislature to simplify the release rules. The same rules that apply to stopping payment should be applied to amending, reducing, withdrawing or releasing a stop payment notice. See comments to Section 42330 below.

42330 Recommend that 42330 be written as follows:

“An oral or written statement purporting to amend, withdraw, waive, release, impair or otherwise affect a claim is void and unenforceable and does not create an estoppel or impairment of the claim unless one of the following conditions is satisfied:

- (1) The claimant has acknowledged receipt of payment in full for the claim.
- (2) The claimant has served documentation on the public entity that substantially conforms to the requirements of Section 44120 setting forth the conditions of any amendment, withdrawal, waiver or release of the claim.
- (3) Satisfaction of a final judgment on or entry of a dismissal with prejudice of an action by claimant on the claim.”

42340 Modify the second sentence of (a) to read as follows:

“The reduction or release shall be in writing and shall be served on the public entity in accordance with the provisions of Sections 42070 and 42080.”

42350 Should there be some cross reference to section 42340 that sets forth how an accord and satisfaction or settlement agreement would affect the withholding of funds by the public entity?

42360 – 42390 Delete all of these sections. The 2005 amendment to CC 3262 makes clear that these legalistic release forms are no longer “required” in any circumstance, so with the changes recommended above all of these sections can be deleted.

44120 Add at the end of (1): “and the location of the work” (some public entities may have several contracts at any one time with a direct contractor at different locations in the state.)

44130 Modify as shown below and delete clauses (a) and (b). Those clauses are inconsistent with Section 42070. 42070 is the appropriate directive for providing notice.

“44130. A stop payment notice shall be given to the public entity by mailing or personally delivering the notice in accordance with Section 42070. A copy of the notice shall also be served on the direct contractor.”

44160 In (b) change “court costs” to “litigation costs” to be consistent with Section 44150.

44180 In second line of (a), clause should read ... “stated in a stop payment notice”...

In last line of (a) “court costs” should be “litigation costs”.

44420 In (c) change “within the time provided” to “ within the 90 day period provided”.

45020 This section is appropriate as written. Other statutes, such as the labor code and contractor’s license laws may also require bonds.

45070 Would it simplify things if the 30 day and 90 day periods used in section 44140 were also used here?

45090 Should suppliers be included after subcontractors here and elsewhere in the code? There can be several tiers of suppliers just as there are sometimes several tiers of subcontractors.