

AGCC/LAC NEW CASES OF INTEREST

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CALIFORNIA

California Public Entities May Accept Bids that Do Not Provide Subcontractor Locations But Do Provide Their State Contractor's License Numbers

Opinion of Bill Lockyer, 03 C.D.O.S. 4756 (6/4/03)

Section 4104 of the Subletting and Subcontracting Fair Practices Act (Public Contract Code sections 4100-4114) requires that contractors bidding on public works projects provide certain information about any subcontractors who would perform more than ½ of 1% of the work, including the locations of those contractors. While bidders may provide some information after bid submission, the names and locations of subcontractors must be submitted with the bid.

This opinion concludes that a bidder violates section 4104 when it fails to provide subcontractor locations with its bid, even if the public agency could obtain that information from the Contractors State License Board using the license numbers that were included in the bid. While the bid violates that section, this does not preclude the public agency from awarding the contract to that bidder because section 4110, which specifies what public agencies may do in cases of violations, is permissive, stating that agencies "may" cancel the contract or assess a monetary penalty. This permissive language implies that agencies also may choose not to cancel the contract.

Comment: The opinion does not discuss the issue of whether a contract awarded to a bidder who violated section 4104 would be subject to an attack that it is illegal and subject to the void contract rule. The agency and awardee would have a good argument in response to such an attack that, where license numbers were

provided such that the agency could determine the listed subcontractors' locations, the violation was not material and should not void the contract.

Building Materials Are Not “Consumer Goods” Under the Song-Beverly Consumer Warranty Act (Civil Code section 1790, *et seq.*)

Atkinson v. Elk Corp., 03 C.D.O.S. 5066 (6/11/03)

The Court of Appeal affirmed the trial court's grant of nonsuit in favor of the defendant manufacturer of roof shingles but reversed the judgment due to the trial court's improper denial of plaintiff homeowner's motion to amend to add other causes of action.

In 1992, James Atkinson hired Pacific Coast Roofing to re-roof his family home. Atkinson chose roof shingles manufactured by Elk Corporation. Atkinson discovered cracks in the shingles in 1998. After Elk refused to pay for the costs of repairing or replacing the shingles, Atkinson sued it under the Song-Beverly Consumer Warranty Act (Civil Code section 1790, *et seq.*). The Act imposes certain repair and service obligations on manufacturers of consumer goods sold in the state that make express warranties concerning those goods. At the start of the trial, the trial court granted nonsuit for Elk on the ground that Atkinson was not a buyer of consumer goods under the Act; rather, Pacific was such a buyer since it was the purchaser of the shingles.

The Court of Appeal affirmed this portion of the trial court's decision, but for a different reason. While it concluded that Pacific was a retail seller under the Act, such that Atkinson was a retail buyer, it also concluded that the shingles were not “consumer goods” under the Act. The court did not find the out of state cases Elk cited persuasive, but it was persuaded by the language in the Act stating that one of the three options manufacturers subject to the Act have is to remove the consumer goods for repair. This language implies that “consumer goods” are “at least removable from their location without causing further damage.” Since building materials like roof shingles are not so easily removable, they are not “consumer goods,” and, therefore, Atkinson was not a buyer of consumer goods.

FEDERAL

The Eichleay Formula Is Not Applicable Where Performance Has Not Yet Begun but Unabsorbed Overhead May Still Be Recoverable Under a Termination for Convenience Settlement

Nicon, Inc. v. United States, COFC No. 02-5097 (6/10/03)

The Federal Circuit vacated the Court of Federal Claims decision granting summary judgment for the Government and remanded. The appeals court agreed with the COFC that Nicon could not use the Eichleay formula to recover its unabsorbed overhead because that formula is not applicable where performance never started. In this case, the Government held the contract in abeyance while a protest was pending, and, after the protest was dismissed, decided to terminate the contract for its convenience. The contracting officer rejected Nicon's claim for unabsorbed overhead, and Nicon appealed to the COFC. The COFC granted the Government summary judgment on the ground that Eichleay was not applicable where performance had not yet begun. The Circuit Court vacated that decision and instructed the court below to determine whether Nicon was entitled to recover its unabsorbed overhead damages as part of its termination settlement by some other method of allocation.