



Contra Costa County

To: Board of Supervisors
From: David Twa, County Administrator
Date: April 14, 2015

Subject: Oppose Position on AB 1347 (Chiu) Public Contracts Claims Process

RECOMMENDATION(S):

OPPOSE AB 1347 (Chiu): Public Contracts Claims Process, a bill that establishes for state and local public contracts entered into or on or after January 1, 2016, a claim resolution process applicable to all public entity contracts, as recommended by the Public Works Director.

AUTHORIZE the County Administrator's Office to send a letter to the author communicating the "oppose" position of the Board of Supervisors on the bill.

FISCAL IMPACT:

Unknown.

BACKGROUND:

The California State Association of Counties (CSAC) is opposed to [AB 1347](#), by Assembly Member David Chiu, which would mandate a new overly-broad claims resolution process on all public contracts with unfeasible timelines, disproportionate requirements and remedies, and it is duplicative of existing processes in current public contracts. Moreover, this measure would force taxpayers to bear the costs when a contractor has failed to fully

☒ APPROVE

☐ OTHER

☒ RECOMMENDATION OF CNTY ADMINISTRATOR

☐ RECOMMENDATION OF BOARD COMMITTEE

Action of Board On: **04/14/2015** ☒ APPROVED AS RECOMMENDED ☐ OTHER

Clerks Notes:

VOTE OF SUPERVISORS

AYE: John Gioia, District I
Supervisor
Candace Andersen, District II
Supervisor
Mary N. Piepho, District III
Supervisor
Karen Mitchoff, District IV
Supervisor

ABSENT: Federal D. Glover, District V
Supervisor

I hereby certify that this is a true and correct copy of an action taken and entered on the minutes of the Board of Supervisors on the date shown.

ATTESTED: April 14, 2015

David Twa, County Administrator and Clerk of the Board of Supervisors

By: June McHuen, Deputy

Contact: L. DeLaney,
925-335-1097

cc:

vet and understand the terms of a contract with a public agency, especially including any terms related to claims resolution procedures. The County Public Works Director concurs with opposition to this bill. (See

BACKGROUND: (CONT'D)

Attachment.)

This is the CSAC housing, land use, and transportation policy area's highest-priority oppose bill right now. CSAC encourages all counties to review this measure and consider taking an oppose position as well. The bill is set for hearing before the Assembly Accountability and Administrative Review Committee on Wednesday, April 15.

Duplicative Requirements. Counties already include a clearly defined claims resolution process in public contracts. Public contracts also define how and when a public agency will respond to requests for information. In the case of road projects, many counties use the California Department of Transportation's Standard Specifications, which includes a claims resolution process that has been refined and improved over decades and used countless times. Importantly, whether it is the Caltrans process or another mechanism, a dispute resolution processes agreed to by both parties through the execution of a mutually agreed-upon contract inherently results in a process that is fair to both parties. This measure would instead skew the process in favor of contractors by adding additional burdens, paperwork, and process with no public benefit.

Overly Broad. AB 1347 would apply to a "written demand or assertion," which is defined as "a request for modification, contract amendment, or change order, seeking an adjustment or interpretation of the terms of the contract documents, payment of money, extension of time, or other relief, including a determination of disputes or matters arising out of, or related to, the contract documents or the performance of work on a public contract." This list includes a majority of the interactions between public agencies and contractors. It would not only be impossibly burdensome and unrealistic, but also costly and time consuming to have to communicate via certified mail for all of the aforementioned exchanges. Moreover, contracts should be vetted, reviewed, and fully understood by both parties prior to execution. It defeats the purpose of having a contract at all if one party can unilaterally change the content and administration of a contract after the final agreement and signatures.

One-Sided and Unfeasible Timelines. The measure would require public agencies to complete certain actions within unworkably rigid timelines without imposing similar burdens on contractors. First, an agency would have to respond to a written demand within 30 days addressing what portions of the claim are disputed or undisputed. Public contracts vary in terms of size, scope and complexity. The timeline set forth in AB 1347 does not account for differences among the variety of contracts public agencies enter into. Furthermore, counties often receive claims with very little—sometimes no— supporting data at all. At the very least, any timeline in statute should only start once the agency receives sufficient supporting data to ascertain the veracity of the claim.

Second, AB 1347 would require payment due on any undisputed portion of the claim to

be made within seven days after the public agency issues its written response to a written demand or assertion. This timeline is much shorter than current prompt payment law, which requires public agencies to make a progress payments within 30 days after receipt of an undisputed and properly submitted payment request (Government Code §20104.50). Even the largest and most sophisticated public agencies are unable to process a payment within seven days. The treasurers of smaller public agencies may only issue treasury warrants on a bi-weekly basis. Given their fiduciary duties as stewards of taxpayer money, public agencies have procedures in place to ensure that any payments are made and accounted for properly. Imposing arbitrarily-short timeframes on payments would erode well-warranted protections on the expenditure of taxpayer funds.

Usurious Interest Rate. If a public agency failed to respond to a written demand, AB 1347 would apply a 10 percent per annum. This rate is inflated above current rates than can be obtained in interest-bearing accounts, especially considering the well-warranted limitations on types of accounts in which county treasurers may deposit public funds. We further find this provision to be redundant, as public agencies define the amount of interest to be paid and how it will be calculated in existing contract specifications. These provisions are tied to the requirement of timely payments to the contractor. Indeed, in some cases counties do pay interest on late payments as outlined in the mutually agreed-upon public contract specifications.

Deemed Approved. Especially given the aforementioned concerns with the timelines proscribed in the bill, deeming a contract approved in its entirety is a significant overreach. However, even with more appropriate timelines, deeming a contract approved just because of a missed deadline, puts the public agency, at ultimately the tax payers, at financial risk.

Nonbinding Mediation. Counties appreciate efforts to find resolution of disputes outside of the court system, however, because mediation is nonbinding, one party can always object to the outcome if the proceedings go badly from their perspective. Nonbinding mediation has the potential to add additional time and cost to the public contracting process, but for intractable disputes would yield the same outcome: a final decision being made in court.

False Claims Act Exemption. AB 1347 would exempt claims made under this act from the False Claims Act (Government Code §12650). The False Claims Act is a public agency's primary tool to address fraud against government. It is nonsensical to exempt claims made to a government from one of the most important tools local governments have to protect the public's money against false claims.

Overall, CSAC is very concerned with the new claims resolution process envisioned by AB 1347 as it will only add time and squander taxpayer funding by usurping a process that works well a significant majority of the time. Under the framework envisioned by AB 1347, counties completing public works projects would be distracted from their

primary responsibility to protect the public's investment in infrastructure by ensuring that projects are built to an acceptable standard of quality and at a reasonable cost. Instead, counties would be bogged down in contract review, responding to written demands or assertions on extremely tight timelines, and fearing interest penalties. Finally, the existing claims process within public contracts works well: contractors have the obligation to substantiate their claims, while public agencies are bound to be fair and reasonable stewards of taxpayer funds. To the extent that any adjustments are needed to the existing processes, principles of subsidiarity and good sense would dictate that contractors should address the rare issue with a specific dispute resolution procedure prior to executing a binding contract with a public agency.

CONSEQUENCE OF NEGATIVE ACTION:

The Board of Supervisors would not have an adopted position on this bill from which to advocate.

ATTACHMENTS

Bill Text AB 1347

Draft Oppose Letter