

California Uniform Construction Cost Accounting Commission

Minutes of Tuesday, November 17, 2015

These minutes were officially approved by the Commission at the subsequent public meeting on January 28, 2016.

1. Call to order

Chair Linda Clifford called meeting to order at 10:01 am.

Present: Linda Clifford, Will Clemens, Guiselle Carreon, Jeff Armstrong, Eddie Bernacchi, Robert Campbell, Lisa Ekers, Steven L. Hartwig, Michael R. Hester, George Hicks, and David A. McCosker

Absent: Cesar Diaz, Nathaniel Holt

Guests: Cathryn Hilliard and Shari Bacon from Construction Industry Force Account Council

Via Teleconference: David Cruce (as a member of public)

State Controller's Office: Ron Placet, Senior Staff Counsel
Anita Dagan, Manager, Local Government Policy Section (LGPS)
Jenny Jones, LGPS
Michael Gungon, LGPS

2. Introductions

The commissioners, staff, and guests all introduced themselves. Chair Clifford introduced the Agenda. Commissioner Campbell made a motion to move the "old business" item to the beginning of the Agenda in Item 3. Commissioner Bernacchi provided a 2nd and the Commission passed unanimously. Commissioner Campbell then inquired whether it would be appropriate to have closed session with staff counsel before discussion in open forum. Counsel Placet explained that closed session was reserved for litigation or potential litigation. Considering there is no litigation, Counsel Placet suggested that the commission submit questions to SCO Legal Counsel if legal guidance is required.

Chair Clifford emphasizes that the Commission has been transparent. Commissioner Campbell further explains the reason for the closed session is that he would not like to see our Counsel in a compromised situation, having to answer questions that were not previously discussed in a closed session. Counsel Placet assures Commissioner Campbell that will not happen.

3. SCO Legal Discussion on CUCCAC's Responsibilities and Authority

Counsel Placet initiated the discussion with a brief recap of when the California Uniform Construction Cost Accounting Commission (the Commission) was established and the Commission's power outlined in the California Uniform Public Construction Cost Accounting Act (the Act). Counsel listed three legal codes, in particular: Public Contract Code (PCC) 22017, 22042, and 22044.5.

PCC 22017 defines four principle duties of the Commission: (1) After due deliberation and study, recommend for adoption by the Controller, uniform construction cost accounting procedures for implementation by public agencies in the performance, or in contracting for, construction on public projects; (2) After due deliberation and study, recommend for adoption by the Controller cost accounting procedures designed especially for implementation by California cities with a population of less than 75,000; (3) Recommend for adoption by the Controller, procedures and standards for the periodic evaluation and adjustment, as necessary, of the monetary limits specified in [PCC] Section 22032; and (4) the commission shall make an annual report to the Legislature with respect to its activities and operations together with those recommendations as it deems necessary.

PCC 22042 specifies an additional responsibility given to the Commission. The commission shall review the accounting procedures where an interested party presents evidence that the work undertaken by the public agency falls within the following categories: (a) the work is to be performed by a public agency after rejection of all bids, claiming work can be done less expensively by the public agency; (b) the work exceeded force account limits; and (c) the work has been improperly classified as maintenance.

PCC 22044.5 refers to the strike provision. The Commission may only take a finding and hold a strike against the participating agency if the agency's work falls into one of the categories outlined within PCC 22042.

Counsel Placet moved to discuss Senate Bill 184 of the 2015-2016 Legislative year, specifically the codes related to CUCCAC and the CUPCCAA. Counsel stated that most of SB 84 is minor, technical changes. The only substantive change is within PCC 22042.5.

PCC 22042.5 has been added to the Public Contract Code to state "the commission shall review practices of any participating public agency where an interested party presents evidence that the public agency is not in compliance with Section 22034." This provision will become effective January 1, 2016. This provision allows the Commission to review the practices of the participating agency, as opposed to review the agency's accounting procedures pursuant to PCC 22042. Although this expands the Commission's authority, it does not grant the authority to hold a strike against the agency for violating PCC 22034.

Commissioner Bernacchi clarified that the intent was not to add into the strike provision. The commission could submit a finding to the agency without the punishment of a strike. There's no ability to strike on PCC 22034. PCC 22044.5 (strike provision) was not included in this expansion.

Commissioner Hicks mentioned that certain agencies are limited to ordinances and received complaints they didn't have lists. By adopting ordinances, this would fall under local jurisdiction.

Commissioner Bernacchi reiterated outside of accounting procedures, there is no strike. We wanted authority to make the finding, and the agency must respond to the Commission with their recommended remedy.

Commissioner Hicks asked if the notice (PCC 22034) was optional to the list or trades. The November requirement is still there which needs to be revised in a future round of changes. Commissioner Carreon responds by noting what is stated in the CUCCAC Manual. She mentioned in Section 1.04 of Chapter 1, it is outlined that you can use either/or. But the Commission will work to clear this up in the manual.

Commissioner Hicks motioned to approve the FAQ for 22034. Commissioner Hartwig seconded. Motion is passed unanimously. Commissioner Hartwig also pointed out it states here [Section 1.04 of the CUCCAC Manual] 22034 (a), when it should be 22034 (a) (1). Staff will work together with Commissioner Carreon on the manual changes.

Chair Clifford asked if anything prevents the Commission for defining qualified contractors which has been done in the manual. Our goal is to clean up the manual by January 1st. The FAQ is also planned to be published with the manual. Ideally, next meeting, the FAQs and the manual will be approved. Staff will also make sure that website address is included in CUCCAC Welcome Letter.

Counsel Placet moved to discuss the Commission's discretionary powers. PCC 22042.5 does not allow for strike. Only a violation of PCC 22042 would result in a strike. The new provision [PCC 22042.5] allows the Commission to make a finding without holding a strike against an agency.

Vice Chair Clemens expressed how helpful it is to have SCO Legal Counsel in attendance. Chair Clifford requested Counsel Placet to speak with those in the SCO-Legal Counsel office and request that one of their members attend the Commission's meetings going forward. She further stated that she wanted this request to go on record so that SCO's office understands the importance to the Commission.

Commissioner Hicks noted that it does not look good for anyone if strikes are assessed when the strikes are not supported by the PCC.

Item 11a (Ventura County) was then brought up for discussion. As the Commission began its discussion on Ventura County and pending action, Commissioner Campbell stated that Ventura County Council had the opportunity to give their opinion. CIFAC had originally stated that Ventura County reached out to Council. Ventura County Counsel had the opportunity to testify at the last CUCCAC meeting, but stayed silent. Counsel did not provide evidence at the meeting although the Public Works director of Ventura County was on the phone.

Counsel Placet recommended rescinding the original letter of “strike” against Ventura County and sending another to state that CUCCAC did not have the authority to act. The Ventura finding was for the violation of the Act and not for violation of accounting procedures.

Commissioner Bernacchi stated that, at the very least it was likely that CIFAC has a legal case against Ventura County for violating the Act. Commissioner McCosker clarified that CIFAC has always tried to work with counties in the past before coming to CUCCAC. Chair Clifford stated that Ventura stated that they had stopped before violating the accounting procedures which is not fully supported by the

letter from Ventura County since they did not include certain costs which were likely to have been incurred before the work was stopped. In addition, if CIFAC had not notified Ventura County of the possible violation, they likely would have continued and thereby surpassed the \$45,000 bid limit.

Commissioner Bernacchi stated that the road commissioner project rules makes it legal for Ventura County to surpass the \$45,000 bid limit if used properly. Chair Clifford asked what would happen if the 30% road commissioner project annual limitation amount was exceeded. Road commissioner projects allow the \$45,000 limit to be exceeded as long as the annual 30% limit is not exceeded. Chair Clifford reiterated that the Commission could legally request more information from a participating agency to make a determination whether to have a hearing for the violation which might or might not result in the Commission making a finding of a strike against Ventura.

Cathryn Hilliard of CIFAC spoke during the public comment period and stated that CIFAC disagreed with rescinding the strike against Ventura. Ventura went in with a \$160,000 budget and did not declare a road commissioner project ahead of time which, in their opinion was, already in violation of the limits. Ventura County admitted that they didn’t notice correctly. Shari Bacon of CIFAC stated the equipment and materials were still on site, but there was no one there She explained that in CIFAC’s opinion “pulling crews off the project and starting up a few weeks later does not stop the project.” CIFAC recommended sending a letter to restate Ventura had violated PCC 22042 (b) by exceeding force account limits.

Vice Chair Clemens suggested that the Commission might consider rescinding the letter based on the second contention in their letter. He then asked what the

first contention was based on. Shari Bacon answered that their letter constituted a “formal complaint.” Vice Chair Clemens asked Counsel, “What is the definition of formal complaint?” Commissioner Bernacchi asked if an oral conversation could be considered notice of a formal complaint. Counsel Placet stated that “formal complaint” is not defined, and there may not be case law on this as the context must be considered. Chair Clifford stated that in the initial letter from CIFAC it was noted that conversations were conducted at every level of City management.

Commissioner Carreon noted that school districts have adopted policies to define complaint procedures. Commissioner Hicks stated that CIFAC needs to issue a formal complaint in writing but timing needs to be understood.

Commissioner McCosker asked what will happen if the Commission voted not to rescind the strike. Counsel Placet stated that it would depend on Ventura County’s response.

Commissioner Hicks affirmed that the road commissioner project declaration is only valid if an agency notices that before beginning any work, not during the work.

At this point, Commissioner Ekers left the meeting, but as she left she expressed that she was glad that Counsel was present. She recommended that the Commission might consider rescinding the letter but still speaking with Mr. Pratt of Ventura County because of their failure to declare the road commissioner project ahead of beginning work once again.

Vice Chair Clemens also addressed the need to clarify timing issues.

Commissioner Carreon responded that the clock should start when the formal complaint is filed. Counsel Placet agreed. Counsel Placet stated that in statute, the 8 days to respond starts with the formal complaint. The question still remains – when is a formal complaint actually filed? Is it when verbal notice is given or when written notice is given?

Commissioner Hicks asked if the Commission has the authority to recognize Ventura was in violation of the road commissioner project use. Commissioner Bernacchi affirmed in order to use road commissioner project status, the agency must declare prior to start of the work.

Commissioner Hartwig asked if the materials left on site were over \$45,000. Vice Chair Clemens explained they could have moved materials to a different site or perhaps the materials are not restricted to one site. Perhaps everything was purchased in bulk and materials were on hand before sending to the site.

Commissioner Campbell stressed that the declaration of road commission is outside the Commission’s purview in terms of declaring a strike. Commissioner

Bernacchi added that due to Ventura's violation of the road commission project declaration requirement, the Commission would only look at the \$45,000 limit possible violation. Commissioner Campbell asks if the agency could start the work, stop the work, and restart the work after noticing the road commissioner project status.

Vice Chair Clemens addressed Counsel and restated his opinion that based on the second point in Ventura County Council's response letter, the Commission should consider rescinding the strike. Again, the Vice Chair asked can you use road commission after starting work? If not, can the Commission find them in violation of the \$45,000 limit?

Chair Clifford asked if the Commission could focus on defining a formal complaint. CIFAC had waited until Ventura County was actually in violation before writing a letter of formal complaint to the Commission. Commissioner Bernacchi then addressed his agreement that the Commission needs to understand the formal complaint process.

Chair Clifford recommended providing a list of questions to SCO staff to give to SCO Counsel. Commissioner Hester left the meeting. Vice Chair Clemens motioned for a vote to defer any action on Ventura County until Counsel gives more guidance after receiving the Commission's questions.

Commissioner Carreon seconded. The vote passed, with 1 opposed (Commissioner McCosker) and two abstaining (Commissioner Bernacchi, Commissioner Campbell).

Commissioner Campbell asked what might happen as a consequence of the Commission's actions and what are the Commission's options? Commissioner Campbell asked again whether it was possible for the Commission to have private, closed counsel based on attorney-client privilege. SCO Counsel deferred any response until after reviewing the Commission's questions.

Chair Clifford requested again that a SCO Legal representative to be present at the meetings and especially when a finding has been brought before the Commission. The Commission stopped for a ten minute break.

The Commission reconvened at 12:40 p.m.

Item 11b (Bid Limitations) was also moved up for discussion. Commissioner Hicks motioned to discuss the process to change bid limitations. Commissioner Bernacchi seconded. Chair Clifford opened the floor for discussion by the Commission.

Commissioner Bernacchi recalled the last changes to the bidding limitations were significant. Agencies likely thought these limits would stick for a while. Commissioner McCosker cautioned smaller contractors will have trouble if the bid limits get too high.

Chair Clifford noted the Commission is not obligated to change the limits just to review the limits every 5 years. Commissioner Bernacchi expressed the need to stick to round numbers. Commissioner Campbell inquired whether or not the review in PCC 22020 restricts the change in limits to be an increase of \$15,000. Chair Clifford replied that the limits can either decrease \$15,000 or increase \$15,000.

Chair Clifford requested to add a discussion item to the next agenda for discussion of an intermediary limit between \$45,000 and \$175,000. The Commission must review the limits every five years and can either change or not change.

Commissioner McCosker requested a revision to the motion to keep the limits the same. Commissioner Campbell seconded. The vote passed unanimously.

Commissioner Bernacchi asked what prevails in a possible dispute – statute or SCO notification with regards to when the actual increase comes into effect.

4. Approval of the Minutes

Meeting September 9, 2015 – Commissioner Campbell requested to ensure that commissioners were addressed with their full last name as “Commissioner consistently throughout the minutes. Vice Chair Clemens also requested to change “the letter of strike to Anita Dagan (SCO)” to him sending a draft FAQ on noticing road commissioner authority to SCO for comment. Commissioner McCosker motioned and Commissioner Hartwig seconded to approve the minutes of the September 9, 2015 meeting as amended. The motion passed, with 1 abstaining (Commissioner Bernacchi).

5. Commission Update (Refer to attachment Item 5)

- A. Report on new participating agencies – Chair Clifford presented an update on the participating agencies, noting 11 new agencies have opted into the CUPCCAA (Act), bringing the number of agencies participating in the Act to 926. The SCO staff confirmed all new participating agencies were sent welcome letters.
- B. Funding update – Chair Clifford reported the Commission had \$1,354.90 of unrestricted funds available for its use. Commissioner Clifford noted that SCO Counsel confirmed that travel expense claims will now be taken out of SCO’s support appropriation for Commission travel.
- C. Inquiry update – The SCO reported on all inquiries received since the last meeting. Staff will add inquiries to agenda packages moving forward.

6. Public Comment

There was no public comment.

7. Staff Comment/Requests

Anita Dagan (SCO) requests that commissioners remember to submit their agenda items ahead of time to allow staff enough time to add them to the agenda package and comply with the Bagley- Keene Open Meeting Act.

8. Reports of Officers

- A. Chair – There was no report from Chair.
- B. Vice Chair – No report from the Vice Chair.
- C. Secretary – The Secretary provided an update on various presentations for CUCCAC to schools.

9. Committee Reports

- A. Frequently Asked Questions (FAQs) – Review and Discuss

Chair Clifford request that staff correct minor spelling errors on FAQ No. 15, 16.

Vice Chair Clemens will resubmit his draft FAQ on the road commissioner to SCO Counsel.

Commissioner Carreon will work with staff on an FAQ for contractor list and trade journal options.

10. Commissioner Comments/Requests

Commissioner Carreon asks whether or not the county office has to participate when a JPA (Joint Powers Authority) is opting in. JPA does not currently have a category.

Chair Clifford states even if an agency is part of the JPA that is a party to the Act, that doesn't make them a CUCCAC member. They all are separate legal entities.

11. Old Business

- A. CIFAC's complaint against the County of Ventura's "Santa Clara Avenue Storm Drain Installation" project – Moved up to item 3.
- B. Bidding Limitation Change Process – Moved up to item 3.

12. New Business

There were no items for new business.

13. Next Meeting

The Commission tentatively scheduled the next meeting date for Thursday, January 28, 2015 from 10:00am – 2:00pm at the State Controller's Office downtown Sacramento location, pending room availability. The Commission will send SCO Legal Counsel a letter with questions on road commission

work, time frames and defining a formal complaint, and the consequences for CUCCAC not rescinding.

14. Adjournment

Meeting was adjourned at 1:36pm.

If you would like more information regarding this meeting, please contact:

State Controller's Office
Division of Accounting and Reporting
Local Government Policy Section
LocalGovPolicy@sco.ca.gov