

1-1964

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Recommended Citation

John E. Wahl, *Should the Chartered City's Contractor Be Exempt from California's Public Works Act*, 16 HASTINGS L.J. 265 (1964).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol16/iss2/11

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SHOULD THE CHARTERED CITY'S CONTRACTOR BE EXEMPT FROM CALIFORNIA'S PUBLIC WORKS ACT?

Since there can be no mechanics' liens against public property,¹ mechanics and materialmen have the substitute protection in California of the Public Works Act.² This statute requires a bond for the protection of mechanics and materialmen on public works projects, but it has twice been held that chartered cities and their contractors do not have to obtain these bonds.³ Although the statute under consideration in these decisions was a predecessor of the present statute, the decisions apparently set an outer limit for the scope of the present statute, because the old statute expressly extended its protection to contracts of "any city and county, city, town or district therein . . ."⁴ The present statute does not expressly mention cities or municipalities.

These cases are fairly old.⁵ Because, as will be seen, the concept on which they are based is subject to change as conditions change,⁶ it is the purpose of this note to consider the present desirability of exempting chartered cities from the application of the Public Works Act.

Background: The "Municipal Affairs" Concept in California

More than seventy percent of Californians live in cities, and most of these Californians live in cities operating under local charters.⁷ Therefore, the importance of the activities of chartered cities is not negligible.

This State has broad constitutional "municipal home rule" provisions.⁸ The key

¹ There can be no lien for labor or supplies on property belonging to the public and used for public purposes. *Mayrhofer v. Board of Educ.*, 89 Cal. 110, 26 Pac. 646 (1891); *Sunlight Elec. Supply Co. v. McKee*, 226 A.C.A. 75, 78, 37 Cal. Rptr. 782, 784 (1964) (dictum).

² This is the name by which the present CAL. GOV'T CODE §§ 4200-10 (Chapter 3 "Contractor's Bond" of Division 5 "Public Works and Public Purchases" of Title 1 of the CAL. GOV'T CODE) are known. *California Elec. Supply Co. v. United Pac. Life Ins. Co.*, 227 A.C.A. 148, 154, 38 Cal. Rptr. 479, 482 (1964).

³ *Loop Lumber Co. v. Van Loben Sels*, 173 Cal. 228, 159 Pac. 600 (1916); *Williams v. City of Vallejo*, 36 Cal. App. 133, 171 Pac. 834 (1918).

⁴ Cal. Stat. 1911, ch. 734.

⁵ Or at least middle aged: forty-six and forty-four years old.

⁶ The municipal affairs concept, which is the basis for these decisions, fluctuates with changes in the conditions of life. See note 13 *infra* for the cases establishing this rule.

⁷ Although only seventy cities, about one-fifth the total number of cities (383), operate under local charters, these seventy include most of the city population of the State. CROUCH, MCHENRY, BOLLENS & SCOTT, CALIFORNIA GOVERNMENT AND POLITICS 242, 244 (3d ed. 1964).

⁸ California was the second state to adopt "municipal home rule." Crouch, *The California Way*, 51 NAT'L CIVIC REV. 139 (1962). This is presumably based on CAL. CONST. art. XI, § 11 adopted in the Constitution of 1879. This section applies to all cities as well as counties, towns, and townships, but merely gives such public bodies power to make and enforce, within their own limits, "local, police, sanitary and other regulations as are not in conflict with general laws." The broader power given to chartered cities in the field of "municipal affairs" did not find its way into CAL. CONST. art.

provision for our purposes is this: Cities may prepare and adopt charters which allow them "to make and enforce all laws and regulations *in respect to municipal affairs*, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."⁹ What is meant by "municipal affairs" in the exercise of home rule has not been settled, in that there is no final description in terms of the various activities of municipalities. For reasons which will be presented, there can never be such a final description.

It is well established that "municipal affairs" means the internal business affairs of the municipality,¹⁰ but this definition only seems to beg the question. What is or is not an internal business affair of a municipality? The court says that it must "decide, under the facts of each case, whether the subject matter under discussion is of municipal or statewide concern."¹¹ If the subject matter under discussion is of general statewide concern, the subject is not a municipal affair, and the general State laws will prevail.¹²

But something which at one time may be only an internal business affair of a municipality may later become a matter of statewide concern, and our courts have recognized this in applying the "municipal affairs" concept. The often quoted statement recognizing the necessity for change in classification as the times change is this: "[T]he term 'municipal affairs' is not a fixed quantity, but fluctuates with every change in the conditions upon which it is to operate."¹³ The telephone company cases¹⁴ are a good illustration of this rule in operation. In 1911 the court

XI, §§ 6, 8 until 1914, although the 1896 amendment to § 6 exempted charter provisions pertaining to municipal affairs from the control of State laws. Missouri, which adopted municipal home rule in 1875, was the first state to do so. Bromage, *The Home Rule Puzzle*, 46 NAT'L MUNIC. REV. 118, 121-22 (1957).

⁹ CAL. CONST. art. XI, § 6. (Emphasis added.) CAL. CONST. art. XI, § 8(j) contains almost identical language. Senate Constitutional Amendment No. 25, 1963, ratified in the November 1964 general election, which amends CAL. CONST. art. XI, § 6, does not change the language quoted from the section previously in effect. See also CAL. CONST. art. XI, § 11.

It should be noted that although the legislature must approve the charter, it must approve or reject in toto. The legislature cannot amend the charter. CAL. CONST. art. XI, § 8(g).

¹⁰ *City of Walnut Creek v. Silveira*, 47 Cal. 2d 804, 306 P.2d 453 (1957); *Fragley v. Phelan*, 126 Cal. 383, 58 Pac. 923 (1899).

¹¹ *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 294, 384 P.2d 158, 169, 32 Cal. Rptr. 830, 841 (1963).

¹² *Professional Fire Fighters, Inc. v. City of Los Angeles*, *supra* note 11; *Eastlick v. City of Los Angeles*, 29 Cal. 2d 661, 177 P.2d 558 (1947); *City of Pasadena v. Charleville*, 215 Cal. 384, 10 P.2d 745 (1932); *Horwith v. City of Fresno*, 74 Cal. App. 2d 443, 168 P.2d 767 (1946).

¹³ *Helmer v. Superior Court*, 48 Cal. App. 140, 141-42, 191 Pac. 1001 (1920), *petition for supreme court hearing denied*, 48 Cal. App. 147 (1920). *Helmer* is cited as authority for the quoted rule at 105 A.L.R. 259, which is in turn cited for the same reason in 37 AM. JUR. *Municipal Corporations* § 106 (1941). Restated in *Butterworth v. Boyd*, 12 Cal. 2d 140, 82 P.2d 434, 126 A.L.R. 838 (1938). See also 31 OFS. CAL. ATT'Y GEN. 259 (1958).

¹⁴ *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal. 2d 766, 336 P.2d 514 (1959), *proceedings after remittitur*, 197 Cal. App. 2d 133, 17 Cal. Rptr. 687

decided that the maintenance of telephone poles and wires on city streets was a municipal affair.¹⁵ This decision was followed as late as 1949,¹⁶ but in 1959 the supreme court found that telephone service had become a matter of such general, statewide concern that the construction and maintenance of telephone lines in the streets and in other public places must also be a matter of general, statewide concern.¹⁷

How do you determine whether something is of general, statewide concern? It has been said that the test of whether a matter is or is not of statewide concern is the legislative purpose in each individual instance.¹⁸ It has also been said that when there is any doubt as to whether a subject is truly a "municipal affair" the doubt must be resolved in favor of State regulatory power.¹⁹

There seem, then, to be six general rules for determining the applicability and effect of the constitutional "municipal affairs" provisions. (1) Only internal business affairs of the municipality qualify as municipal affairs. (2) When the subject matter is of general, statewide concern it is not a municipal affair. (3) When the subject matter is found to be a municipal affair, and the municipality operates under a charter which grants it legislative power over municipal affairs, then the municipality is exempt from the operation of the general State laws in respect to that subject matter.²⁰ (4) The purpose of the State legislature in enacting a particular statute determines whether the subject matter of the statute is of general, statewide concern in any given situation. (5) Nothing is forever fixed as being in or out of the municipal affairs category, since the municipal affairs concept fluctuates with changes in the conditions of life. (6) If the classification is doubtful, the doubt must be resolved against the subject being a municipal affair.²¹

(1961); *Sunset Tel. & Tel. Co. v. City of Pasadena*, 161 Cal. 265, 118 Pac. 796 (1911); *City of San Diego v. Southern Cal. Tel. Co.*, 92 Cal. App. 2d 793, 208 P.2d 27 (1949).

¹⁵ *Sunset Tel. & Tel. Co. v. City of Pasadena*, 161 Cal. 265, 118 Pac. 796 (1911).

¹⁶ *City of San Diego v. Southern Cal. Tel. Co.*, 92 Cal. App. 2d 793, 208 P.2d 27 (1949).

¹⁷ *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal. 2d 766, 336 P.2d 514 (1959), *proceedings after remittitur*, 197 Cal. App. 2d 133, 17 Cal. Rptr. 687 (1961).

¹⁸ *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 294, 384 P.2d 158, 169, 32 Cal. Rptr. 830, 841 (1963).

¹⁹ *TWA v. City & County of San Francisco*, 228 F.2d 473 (9th Cir.), *cert. denied*, 351 U.S. 919 (1956).

²⁰ The charter adopted under the constitutional home rule provisions actually operates not as a grant of powers, but as a limitation and restriction on the exercise of power over all municipal affairs, but an enumeration of specific powers does not constitute an exclusion or limitation to those powers enumerated. *City of Glendale v. Trondsen*, 48 Cal. 2d 93, 308 P.2d 1 (1957) holding a garbage collection fee valid as a tax as well as a police measure even though there was no express authority for such a tax in the charter, since such a taxing power is a municipal affair. See also 29 OPS. CAL. ATT'Y GEN. 184 (1957).

²¹ *Quaere*: Might this be extended to mean that there is a rebuttable presumption that any given subject is a matter of general, statewide concern, and the burden of proof is on the party claiming that the subject is a municipal affair? The writer has found no cases directly answering this question; *cf.* *Pacific Tel. & Tel. Co. v. City of Los Angeles*, 44 Cal. 2d 272, 280, 282 P.2d 36, 41 (1955) and *Oro Elec. Corp. v. Railroad Comm'n*, 169 Cal. 466, 477, 147 Pac. 118, 121-22 (1915) hinting at an affirmative answer.

The Problem: Municipal Affairs and the Public Works Act

In *Loop Lumber Co. v. Van Loben Sels*²² a unanimous court held that the Public Works Act did not apply to a contract to do sewer work for a city. The result was that a materialman was not paid by the surety when the contractor defaulted, even though the surety had furnished a bond for the benefit of laborers and materialmen in accordance with the statute. The surety successfully defended on grounds the statute did not apply to the sewer contract because the city charter fully occupied the field of the letting of public contracts and required no bond. Therefore the bond was void for lack of consideration. There was no consideration because the "bond was given solely to secure the right on the part of the contractor to proceed with the performance of his contract with the city."²³ Since the statute did not apply, the right to proceed existed without the bond, and the bond was secured by the contractor for no consideration. Does not this result seem unjust?

In *Williams v. City of Vallejo*²⁴ the district court of appeal followed *Van Loben Sels* in an action against the city of Vallejo and individual members of the city's board of public works to recover for work and material furnished to a contractor on a municipal reservoir project. The plaintiff's theory was that the defendants were liable for his loss because they had not required the contractor to furnish the bond required by the State statute. The court said the project was a municipal affair. Therefore the statute was held inapplicable.

Aside from *Van Loben Sels* and *Williams* the question of the applicability of the State labor and material bond law to chartered cities has not been litigated,²⁵ but those cases are not forgotten. In 1957 the supreme court cited *Van Loben Sels* as authority for the proposition that "collection, treatment, and the disposal of city sewage and the making of contracts therefor are . . . municipal affairs."²⁶ But in view of rule number two outlined above (*i.e.*, what is or is not a municipal affair changes as conditions change) the question of the applicability of the State labor and material bond law to chartered cities is subject to being reopened.

The present question is whether, under current conditions, it was the legislative intent that requiring labor and material bonds on all public contract projects be a matter of general, statewide concern. If the answer is yes this *aspect* of public works contracts, which might in all other respects be solely municipal affairs, is not a municipal affair.

Solving the Problem: Municipal or Statewide Concern?

The purpose of the Public Works Act has been explored by the courts.²⁷ The statute exists to create a fund to satisfy the claims of laborers and materialmen on

²² 173 Cal. 228, 159 Pac. 600 (1916).

²³ *Id.* at 231, 159 Pac. at 601.

²⁴ 36 Cal. App. 133, 171 Pac. 834 (1918).

²⁵ *Nelson v. Trounce*, 184 Cal. 732, 195 Pac. 393 (1921) held this kind of law applicable to a school district contract executed by the board of education of a chartered city, but the city charter which was involved in that case specifically made powers and duties of the board of education subject to State law.

²⁶ *City of Glendale v. Trondsen*, 48 Cal. 2d 93, 99, 308 P.2d 1, 4 (1957) (unanimous court).

²⁷ *Globe Indem. Co. v. Hanify*, 217 Cal. 721, 20 P.2d 689 (1933); *Pneucrete Corp. v. United States Fid. & Guar. Co.*, 7 Cal. App. 2d 733, 46 P.2d 1000 (1935); see also 33 OPS. CAL. ATT'Y GEN. 129 (1959).

projects on public property, since these laborers and materialmen cannot obtain mechanics' liens.²⁸ The statute is expressive of a broad public policy for the protection of laborers and materialmen.²⁹ It has also been said, in determining the intended scope of the law, that the statute was intended to apply to all governmental agencies whose buildings or structures are not subject to the liens of mechanics or materialmen.³⁰

The present statute does not specifically mention cities, towns or municipal corporations. The section requiring the bond speaks only of contracts "for the State, or for any political subdivision or agency of the State. . . ."³¹ Since the statute which the court considered in 1916 in *Van Loben Sels* specifically included every "city and county, city, town or district therein," it would seem a fortiori that the present statute would be inapplicable.³² But on closer inspection the omission of specific mention of cities in the later statute seems merely to be bad drafting.³³ The section which prescribes the beneficiaries of the labor and material bond³⁴ designates them as being those persons described in a section of the Code of Civil Procedure³⁵ who are entitled to file claims, when they have not been paid by the contractor, on public works contracts. Thus the whole labor and material bond law is related to that section of the Code of Civil Procedure, and *that* section, in talking about officers and public bodies by whom a public contract may have been awarded, uses this language: "the commissioner, managers, trustees, officers, board

²⁸ See note 1 *supra*.

²⁹ *Globe Indem. Co. v. Hanify*, 217 Cal. 721, 20 P.2d 689 (1933); *A. L. Young Mach. Co. v. Cupps*, 213 Cal. 210, 2 P.2d 321 (1931); see also 33 OPS. CAL. ATT'Y GEN. 129 (1959).

³⁰ *Sunset Lumber Co. v. Smith*, 95 Cal. App. 307, 272 Pac. 1068 (1928).

³¹ CAL. GOV'T CODE § 4200. Equivalent language is used in § 4208, which conditions the contractor's payment on the filing of a bond. Section 4210, which covers the procedure for compliance with the stop notice requirement, uses "public agencies."

It is true that there are decisions determining cities, for certain purposes, not to be political subdivisions of the State. Letter from Mr. Jack D. Wickware, Assistant Legal Counsel, League of California Cities, to the author, August 28, 1964, citing *Abbott v. City of Los Angeles*, 50 Cal. 2d 438, 467, 326 P.2d 484, 501 (1958); *Blum v. City & County of San Francisco*, 200 Cal. App. 2d 639, 643, 19 Cal. Rptr. 574, 576 (1962); *Otis v. City of Los Angeles*, 52 Cal. App. 2d 605, 611-12, 126 P.2d 954, 958 (1942). But, for other purposes, there is authority to the contrary: "[A] municipal corporation is but a branch of the state government and is established for the purpose of aiding the legislature in making provisions for the wants and welfare of the public within the territory for which it is organized. . . ." These words appeared in 1893 in *In re Wetmore*, 99 Cal. 146, 150, 33 Pac. 769, 770, but the district court of appeal quoted the language in 1918, four years after the present "municipal affairs" provisions became part of the California constitution, in *Akerman v. Moody*, 38 Cal. App. 461, 464, 176 Pac. 696, 698.

³² CAL. GOV'T CODE § 4200. (Emphasis added.)

³³ All other chapters of the Public Works and Public Purchases Division of the CAL. GOV'T CODE specifically mention cities or municipal corporations. Chapters 1, 2, 4, and 5, Division 5, Title 1, CAL. GOV'T CODE. See §§ 4001 ("city"), 4103 ("city"), 4303 ("municipal corporation"), 4331 ("city"), 4332 ("city officers"), 4380 ("municipal corporation"), 4401 (defining "public agency," for the purposes of Chapter 5, as including "any . . . city").

³⁴ CAL. GOV'T CODE § 4205.

³⁵ CAL. CODE CIV. PROC. § 1192.1.