

# CALIFORNIA SURETY FEDERATION

November 30, 2009

Mr. Jose Arreiola  
City of Palo Alto  
Purchasing department  
250 Hamilton Avenue  
Palo Alto, CA 94301

***Subject: Requirement that a Surety waives its Rights Under Sections 2845 and 2849 of the California Civil Code***

Dear Mr. Arreiola:

On behalf of the California Surety Federation, representing over 30 carriers and independent agent brokers in California, the purpose of this letter is to express our concern with the City's practice of requesting sureties to waive their rights under Sections 2845 and 2849 of the California Civil Code in your performance bonds.

Specifically, the performance bond for the "Greer Park Renovation and Pump State Replacement" had such a provision. While we understand it is too late to amend the performance bond for that project, we are bringing this issue to your attention so that you may consider changes on future bonds.

Sections 2845 and 2849 are key provisions that are critical for a surety to effectively discharge its responsibilities. These two sections clearly indicate that it is the policy of the State of California that a surety is to have access to the necessary resources to complete any job of which they have bonded. It is critical to understand that the purpose of the surety bond is not "insurance" for losses, but rather to assume the contractual obligations of the contractor and ensure the completion of the project. These two sections of law provide a critical link to the resources connected with a given project so that project completion is possible.

With these two sections of law waived, a surety would not have access to project resources critical to ensuring a successful completion. For example, such a waiver could cut off access to remaining contract funds, including retentions if they are considered security by the creditor, which should rightly be applied to project costs. This could also hold true for equipment held by the creditor as security that could be used by the surety to complete the work. A final example might be if the creditor denies access to the site for a "security" reason. This could imperil the ability of the surety to conduct the work regardless of access to any financial or material resources.

In short, waiving these provisions deny a surety its fundamental right of subrogation. With the goal being the completion of the job based on the terms and the conditions of the contract, this waiver is counterproductive and not in Palo Alto's best interest. Finally, asking any company to waive state law in order to secure a contract is legally suspect and raises serious questions of enforceability in court.

Thank you for your consideration of our comment and we again urge you to remove such waivers from future bonds.

Sincerely,



Paul Gladfelty