Facilities Legal Updates and Implementation

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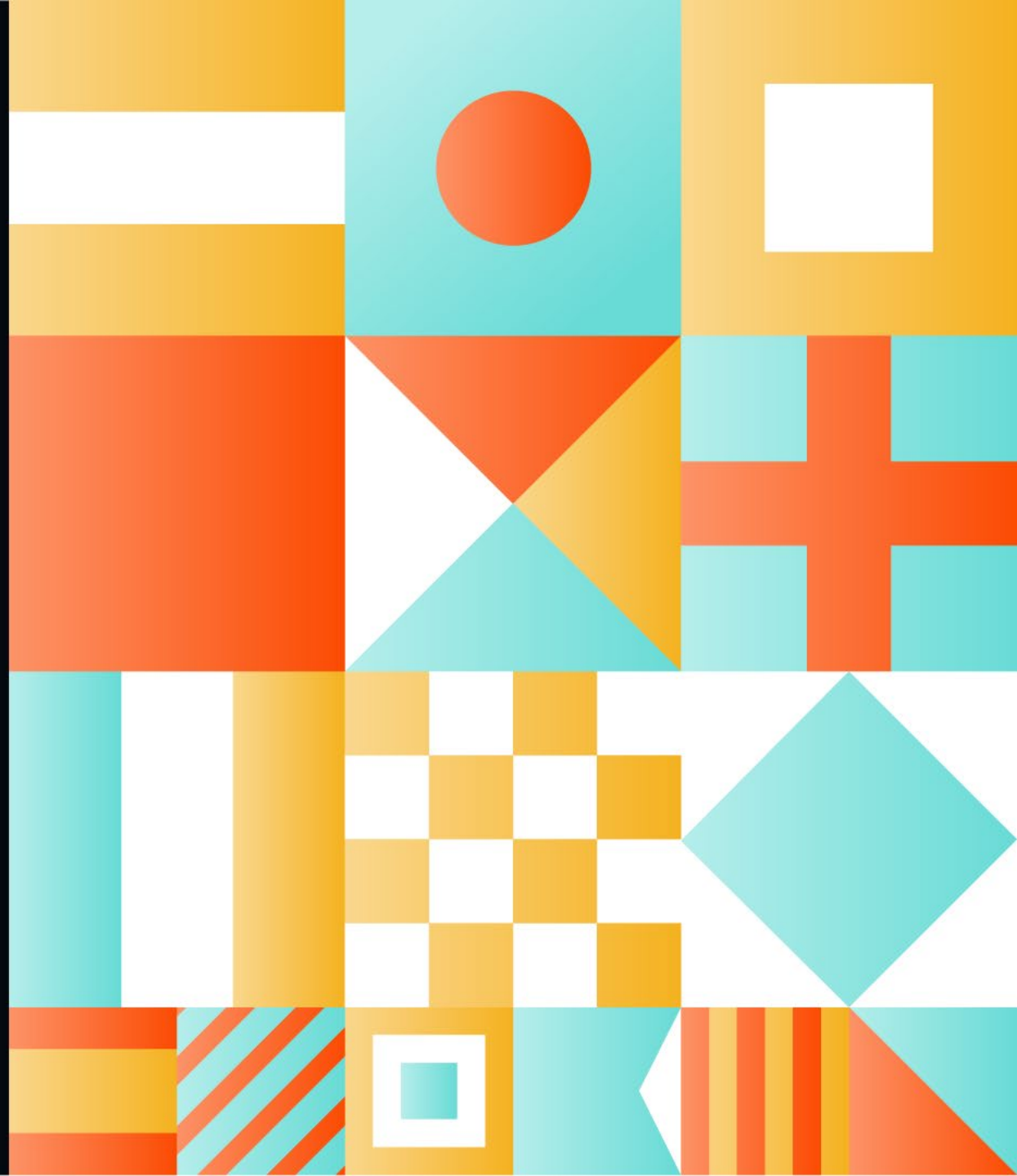

Summary/ Overview

- New Legislation:
  - AB 306: Employee Housing
  - SB 7: Jobs & Economic Improvement Through Environmental Leadership Act of 2021
  - SB 290: Density Bonus Law

- Portable Buildings: Piggyback Contracts

Summary/ Overview

- Current Issues to Consider in This Economy:
  - Bid Protests
  - Bid Mistake
  - Force Majeure
  - Long Lead Times

- Miscellaneous Topics

AB 306: Employee Housing

- Exempts certain “residential housing” from the Field Act- does not require DSA approval
- “School building” under the Field Act does not include any building used or intended to be used by a community college district as a residential building
- “Residential building” means any building used as a personal residence by a teacher or employee of a community college district
- Residents include the teacher’s or employee’s family

SB 7: Jobs & Economic Improvement Through Environmental Leadership Act of 2021

- Enacts the Jobs & Economic Improvement Through Environmental Leadership Act of 2021
- Reenacts the former leadership act of 2011 that expired (AB 900) with additional provisions
- Authorizes the Governor to certify projects that meet specified requirements- Environmental Leadership Development Projects (ELDP)

SB 7: Jobs & Economic Improvement Through Environmental Leadership Act of 2021

- Streamlines the judicial review process under CEQA
- Shortens the time for CEQA lawsuits for certain projects
- Expedited litigation procedures now applicable to certain qualifying mixed-use and residential projects
- Applicants can “opt-in” by applying to the Governor’s office for ELDP status
- Governor must certify project before a final EIR is certified

SB 7: Jobs & Economic Improvement Through Environmental Leadership Act of 2021

- Adds eligibility for infill housing development projects with investments between $15 million- $100 million (previously $100 million and above)
- Requires quantification and mitigation of impacts and that the project does not result in any net additional emission of greenhouse gases
- Must use skilled and trained workforce in addition to complying with prevailing wage requirements

SB 7: Jobs & Economic Improvement Through Environmental Leadership Act of 2021

- Projects must dedicate 15% of any housing units that are affordable to lower-income households
- Mixed-use developments (residential and nonresidential uses) must have at least two-thirds of the square footage designated for residential use
- Completion of the trial and appeal court proceedings within 270 days to the extent feasible
- Lead agency may elect to prepare the record

SB 290: Density Bonus Law

- Amends provisions of Density Bonus Law (DBL) in Government Code §65915
- Clarifies that DBL applies to both rental and for-sale housing developments
- Provides density bonuses to student housing project that provide at least 20% of units to lower-income student
- For projects with at least 20% lower-income units or 11% very low-income units and are located within ½ mile of a major transit stop, the local agency cannot impose a parking ratio that exceeds 0.5 spaces per unit

Portable Bldgs- Piggyback Contracts

- References:
  - Attorney General Opinion No. 05-405; January 24, 2006
  - Public Contract Code §20652
- OPSC email memo sent on July 7, 2021:
  - Reminded school districts about AG opinion
  - Violation may result in loss of state funding
  - Distinguished portable vs. modular buildings

Portable Bldgs- Piggyback Contracts

- AG Opinion:
  - “A school district may not, without advertising for bids, contract with another public agency to acquire factory-built modular building components for installation on a permanent foundation.”
  - Piggyback statute covers personal property, not real property
  - AG discussed modular components attached at the site and after on-site finish work is completed, results in a permanent school building
  - AG opinion did not address “portable” or “relocatable” single-classroom buildings- beyond the scope of the opinion

Portable Bldgs- Piggyback Contracts

- Use caution when using piggyback contracts for modular buildings
- Labor/ services must be incidental to lease or purchase
- Perform due diligence on underlying piggyback contract
- Don’t forget about bonds and insurance requirements

Current Issues to Consider in This Economy- Bid Protests

- Increased protests as fewer projects are available and costs increase
- Review and coordinate your bid documents to minimize protests
- Have a clear process in the documents for handling bid protests
- Allow time to evaluate bids and evaluate bid protests
- Don’t bury bid requirements in specifications or other contract documents
- Don’t include prequalification requirements in bid documents

Current Issues to Consider in This Economy- Bid Protests

- Common Situations:
  - Can irregularity be waived
  - Bid responsiveness vs. bidder responsibility
  - Allowed scope of work by a B-licensed contractor
  - Subcontractor designation issues: no subcontractor listed for certain work- work can be less than .5% of the total bid or work may be performed by second tier subcontractor

Current Issues to Consider in This Economy- Bid Protests

- When you Receive a Bid Protest:
  - Notify affected bidder and request response
  - Limit communications with bidders
  - Compile key/ relevant documents
  - Evaluate bid protest with consultants and counsel and agree on a recommendation
  - Coordinate Board meeting and award the contract

Current Issues to Consider in This Economy- Claim of Bid Mistake

- Contractors bidding on more work than they can handle
- Must meet standards in Public Contract Code §5103
- Notice within five working days of bid opening
- Must specify in detail how the mistake occurred- no general statements
- Mistake made the bid materially different
- Mistake was not due to error in judgment or carelessness in inspecting the site of the work, or in reading the plans or specifications

Current Issues to Consider in This Economy- Claim of Force Majeure

- Check to see if there is specific language in your contracts
- Outcome based on contract language and specific facts
- Contractors are not automatically entitled to invoke force majeure to excuse performance
- Must be an unforeseen event outside of the parties' reasonable control that renders performance impossible or impracticable
- Delays and additional costs are likely foreseeable today than they were in March 2020

Current Issues to Consider in This Economy- Claim of Force Majeure

- Even if a contractor can establish a case for force majeure, it must meet other contract requirements:
  - Did contractor provide timely notice
  - Did delay impact the critical path on the approved schedule
  - Did contractor mitigate its damages
  - Was delay truly unforeseeable or was it due to delays on the contractor or subcontractor not ordering materials or equipment in a timely manner

Current Issues to Consider in This Economy- Long Lead Times

- Allow more time to address ongoing supply chain issues
- Stress importance of timely submittals and approvals and enforce time requirements
- Consider owner furnished, contractor installed (OFCI) options
- Importance of enforcing requirements related to preparing and approving baseline schedules at the start of the project
- Enforce requirements for providing updated/ recovery schedules

Miscellaneous Topics

- Cooperative purchasing agreements
- HEERF funds
- ADA claims
- QUESTIONS?

Thank you

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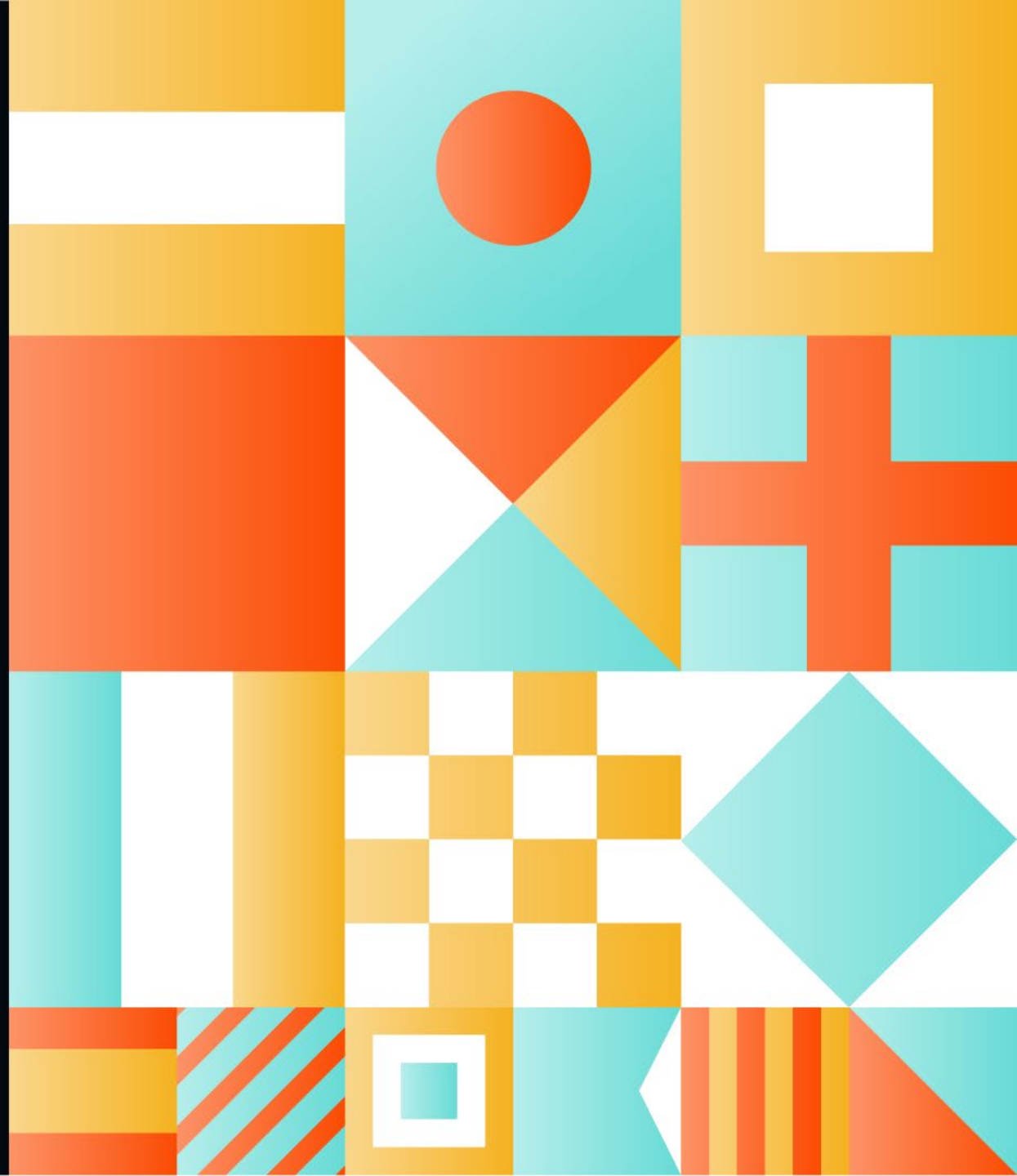
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