

# CLIENT NEWS BRIEF

## “Limited Due Process” Appropriate For Subcontractor Substitution Hearings

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The California Court of Appeal recently outlined an appropriate level of due process required for a subcontractor substitution hearing. In *JMS Air Conditioning and Appliance Service, Inc. v. Santa Monica Community College District* (2018) 30 Cal.App.5th 945, the court found that the hearing process used by the Santa Monica Community College District (College) provided the “limited due process” required for a substitution hearing. The *JMS Air Conditioning* decision provides guidance for school districts, community colleges and cities as to how to conduct these hearings.

### **Subcontractor Substitution Procedure**

The Subletting and Subcontracting Fair Practices Act (Pub. Contract Code, § 4100 et seq.) (Subcontracting Act) identifies the reasons why a contractor may substitute one subcontractor for another, and prescribes the process for the substitution, including a detailed notice procedure that states if the subcontractor files written objections, the awarding authority must hold a hearing and give the subcontractor at least five days’ notice of the hearing. However, the Subcontracting Act does not provide any specific procedures or standards for conducting the hearing. *JMS Air Conditioning* focused on what was required for conducting the substitution hearing and provides useful guidance for a valid hearing.

### **Limited Due Process**

*JMS Air Conditioning* held that only “limited due process” is required for a substitution hearing. The court reasoned that, because the Subcontracting Act created only limited rights for the subcontractor, a lesser degree of due process protections are needed compared to other proceedings. The formalities of a trial are not required and the substitution hearing is “informal [in] nature, narrow [in] scope.” This can be contrasted with, for example, a public employee dismissal hearing where a higher degree of due process is required to protect the public employee’s fundamental right to employment. In this regard, the court stated that the College “is an educational institution, and the primary purpose of its governing board is thus to educate—not to referee construction disputes.”

### **The College’s Hearing Process**

The characteristics of the College’s substitution hearing included the following:

**Neutral Hearing Officer.** The hearing was conducted by the College’s facilities manager, who was “generally knowledgeable about the project.” The subcontractor argued that instead the hearing should have been conducted by the college’s governing board. The court found that the Subcontracting Act did not require the governing board to conduct the hearing itself, noting that it would be an inefficient allocation of public resources and that the governing board “does not necessarily have any background in construction.” The subcontractor had the opportunity to present its case to a neutral decision maker, which the court found to be sufficient.



Ruth E. Mendyk  
Partner  
Fresno Office  
[rmendyk@lozanosmith.com](mailto:rmendyk@lozanosmith.com)



Wesley L. Carlson  
Associate  
Fresno Office  
[wcarlson@lozanosmith.com](mailto:wcarlson@lozanosmith.com)



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Advanced Notice of Grounds for Substitution. The subcontractor received a detailed description of the reasons for the substitution request prior to the substitution hearing. Written position statements (discussed below) were also submitted before the hearing. This permitted the subcontractor to prepare and respond to the general contractor's allegations and legal arguments at the hearing.

Presenting Written Evidence and Argument. Both the general contractor and subcontractor were permitted to submit written statements detailing their positions. No page limits were set on these statements and no limits were placed on the number of exhibits or written witness statements the parties could submit. The subcontractor had an unlimited opportunity to present documents, written witness statements and argument. Witness statements were not sworn, but were accepted by the hearing officer.

Examining Witnesses. The subcontractor had the opportunity to present in-person witnesses and oral argument at the hearing. The witnesses were not examined under oath. Cross-examination of witnesses was not permitted, but the court found this did not deprive the subcontractor of due process.

Length of Hearing. The hearing officer limited the length of the hearing to two hours. The parties were advised of this in advance. The court held that "[n]othing in [the Subcontracting Act] requires a hearing of a particular length or the opportunity to cross-examine witnesses."

## **Conclusion**

The court found these characteristics of the College's hearing process satisfied the due process requirements of the Subcontracting Act. Fundamentally, due process requires affording the subcontractor an opportunity to "meaningfully defend itself." The court held that the College's hearing afforded the subcontractor that opportunity.

## **Takeaways**

The Subcontracting Act requires only "limited due process" for substitution hearings. The College's hearing in *JMS Air Conditioning* satisfied that requirement and can be used as an example for other public entity's substitution hearings. Though not an issue considered by this court, best practices generally also include presenting a hearing officer's decision to the governing board for approval of the substitution decision. This case was followed by another subcontractor substitution case that also strengthened a public entity's rights regarding substitution. ([See 2019 Client News Brief No. 25.](#))

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