Agencies cannot Make Conditional Final Offers of Just Compensation in Condemnation Actions

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In California eminent domain cases, a property or business owner is entitled to recover litigation expenses (attorneys' fees and expert costs) when the public agency's final offer of compensation is unreasonable and the property owner's final demand is reasonable. (See Code Civ. Proc., § 1250.410.) The purpose of section 1250.410 is to promote the settlement of valuation disputes in eminent domain actions and ensure full compensation to the owner in case of unnecessary litigation. But what happens when the government agency's final offer is subject to approval by the agency's governing body or a federal agency's providing project funding? Can such a contingent offer of compensation satisfy the statutory exchange requirements for purposes of assessing the agency's exposure to litigation expenses? Last week, the California Court of Appeal in *City and County of San Francisco v. PCF Acquisitionco, LLC* (May 26, 2015), confirmed that such contingent final offers do not satisfy the requirements of a statutory final offer of compensation because they do not ensure a resolution of the litigation if accepted by the property owner . Thus, contingent offers potentially expose the public agency to paying the owner's litigation expenses if the owner makes a reasonable final demand.

Background

PCF Acquisitionco involved an eminent domain action in which the city sought to acquire property for a subway station. The city's and property owner's valuation opinions ranged from $3.8 million to $10.875 million. Shortly before trial, the parties exchanged statutory offers and demands. The city's final offer of $5.5 million was made contingent on approval from the Federal Transit Administration (FTA), along with the Board of Supervisors and the Board of Directors. The property owner's final demand was for $8.6 million. No settlement was reached, and the jury determined the amount of just compensation for the property to be more than $7.3 million. The owner moved to recover its litigation expenses under Code of Civil Procedure

section 1250.410.

In assessing whether or not a public agency is liable for the owner's litigation expenses, the court analyzes the parties' statutory final offer and final demand made 20 days before trial to determine if the agency was unreasonable and the property owner was reasonable under Code of Civil Procedure section 1250.410. Although section 1250.410 does not provide guidance or define "reasonableness," the court will consider the difference between the final demand or offer and the compensation awarded, the percentage difference between the demand or offer and the award, and the good faith, care, and accuracy with which the demand or offer was calculated.

Here, the trial court denied the property owner's motion for litigation expenses, concluding that the city's offer was reasonable. The court reasoned that the city was not "unyielding" in making its offer; it considered the owner's appraisal and the risks of trial, and made an offer that exceeded its own appraisal by 60%. The court did not address whether the city's final offer of compensation was unreasonable because of its approval contingencies.

Court of Appeal
On appeal, the Court focused on whether section 1250.410 is satisfied if the agency's final offer is contingent upon the approval of its governing body or other agencies. The Court found that a contingent offer did not meet the legislative purpose of ensuring an end to the litigation, and therefore could not be considered reasonable. The Court explained that the Legislature did not intend for a property owner to "choose between entering into an uncertain and contingent bargain or risk losing any chance of recovering its litigation expenses if it proceeds to trial."

The Court relied on prior case law concluding that a public agency's final offer of compensation, subject to the right to appeal, was unreasonable as a matter of law, and concluded that the city's final conditional offer suffered from the same basic flaw because the settlement would be invalidated if the FTA, the Board of Supervisors, or the Board of Directors declined to approve the offer. The Court noted that there were no assurances that these approvals would be forthcoming, or that the offer encompassed a binding settlement. The Court concluded that the City's offer, therefore, was not an offer at all.

As a result, the Court held that the City's final offer was unreasonable for purposes of section 1250.410, and remanded the case to the trial court to determine the amount of litigation expenses to be awarded (since there was no real argument that the owner's final offer was reasonable).

Conclusion
In light of this decision, it is important for government agencies to plan ahead and ensure that all necessary approvals are made prior to making a final pre-trial settlement offer pursuant to section 1250.410; otherwise, a contingent offer may be found unreasonable. Given the short period of time between the parties' exchange of lists of expert witnesses and appraisals, and the date upon which final settlement offers are exchanged, this timing becomes increasingly difficult where federal funding is involved and FTA or FHWA approval is necessary, or where Boards or City Councils do not meet frequently.

Expert reports are typically exchanged 90 days before trial, and the statutory final offer and demand takes place 20 days before trial. Often, it takes several weeks – or even a month or more -- to schedule multiple expert depositions. Meanwhile, Board meetings may take place only once or twice a month, and items need to be placed on agenda calendars well in advance, leaving little time to complete expert discovery and

obtain board or other government approval within the 70-day window.

Indeed, the agency in *PCF Acquisitionco* argued that approval of its final offer was not "practical" due to the timing needed for approvals and open meeting requirements imposed by the city's Municipal Charter and the Board of Supervisors' rules of order. Similarly, the agency argued that it was not able to depose the owner's appraiser until three business days before the statutory deadline for exchanging settlement offers. Yet both of these explanations were rejected by the Court as a basis to extend a conditional final offer.

To avoid potential liability, agencies must plan ahead. That means putting eminent domain litigation on the agency's closed session agenda well in advance, sometimes before expert depositions have even been taken. If necessary, the Board can grant an agency staff member with a range of authority so the staff member can make a more-informed final offer after expert depositions. Similarly, agencies need to push for expedited approval of proposed settlements from the federal agencies providing oversight and funding, and ensure that these agencies understand the time constraints and potential exposure faced if a firm final offer cannot be delivered on time. The downside for failing to do so can be significant, especially as expert and attorneys' fees in eminent domain litigation continues to increase.

This is the second published Court of Appeal decision this month dealing with final offers and demands in eminent domain cases. To put everything in perspective, take a look at our recent e-alert about how the statutory exchange works with continuances and bifurcated trials.