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CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DILLINGHAM-RAY WILSON, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent; CBI SERVICES, INC., Real Party in Interest and Respondent.	B192900 (Los Angeles County Super. Ct. No. BC208414) **ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING** **[NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed herein on March 18, 2010, be modified as follows:

On page 13, the third full paragraph, beginning "Because *Amelco* recognizes" is deleted and the following paragraph is inserted in its place:

> *Amelco* recognizes that a contractor can recover on a total cost or modified total cost theory. In doing so, the court cited *State of California. ex. rel. Dept. of Transportation v. Guy F. Atkinson Co.* (1986) 187 Cal.App.3d 25, 32 (*Guy F.*). The court in *Guy F.* approved an arbitrator's

use of a total cost theory of calculating damages against a public entity. *Amelco* did not decide whether a public contractor could assert a total cost or modified total cost theory. But also, *Amelco* did not disapprove of *Guy F*. Thus, the common law permits a public contractor to pursue either a total cost theory or modified total cost theory. Section 7105 does not expressly abrogate common law, and the statute and common law can be harmonized because the total cost and modified total cost theories are merely methods of proving damages. The trial court abused its discretion by not following the common law recognized in *Amelco* and by declining to decide whether DRW demonstrated a prima facie case for determining damages based on a modified total cost theory. On remand, DRW may pursue a modified total cost theory of proving damages if DRW is not required to document its actual costs. If the trial court finds a prima facie case, then DRW shall be entitled to present a modified total cost theory to the jury.

There is no change in the judgment.

Defendant and Respondent's petition for rehearing is denied.

BOREN, P. J. DOI TODD, J. ASHMANN-GERST, J.