

Risk, Claims and Why Contractors Do What They Do!

CMAA San Diego Chapter
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Our Speakers

- Ken Fredrickson, PE, CCM, DBIA
 - Director, Dialed-In Partners
- Mary Beth Coburn, PE, ESQ.
 - Partner, Best Best & Krieger LLP



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Ken Fredrickson, PE, CCM, DBIA Director, Dialed-In Partners

- A Director for Dialed-In Partners
- He has served as a senior executive and manager for national and international companies providing construction and management of infrastructure projects with a focus on alternative project delivery.
- He has worked for both public and private clients on numerous industrial, transportation, and environmental projects all over the world – half as a contractor and half providing oversight of projects and programs
- He is a Designated Design-Build Professional, a CCM, a PE and a licensed general contractor in several states.
- He is a published author in peer-reviewed journals and industry publications.

Mary Beth Coburn, PE, Partner

Best Best & Krieger LLP

- California licensed professional civil engineer with over 10 years of public works experience.
- 20+ year legal career focusing on public works and infrastructure construction law.
- Assists public agencies with the entire construction process, from contract drafting to dispute resolution.



Today's Agenda

- The Impact of Contract Language
- How Does Anything Get Done
- Approaches to Claims Resolution



SOME of the Governing Statutes, Rules and Regulations that Apply To Public Contracting

- PCC § 1100 - § 9203
- PCC § 10100 - § 19102 State Contract Act [applies to State Agencies]
- PCC § 20105 – 2164.1 [Statutes Governing Various Local Agencies] May include competitive bidding requirements and thresholds, change order limitations, bonding requirements, emergency contracting, etc.
- PCC § 22000-22355

SOME of the Governing Statutes, Rules and Regulations that Apply To Public Contracting

- Each Agency's Administrative or Purchasing Code
- Various Sections of the Government Code
- Various Sections of the Civil Code
- THE CONTRACT

Owners Should Use Contract Documents as a Shield Not a Spear



Know Your Contract Documents

Construction Template:

- Should Include Various Components and Provide an Order of the Precedence of the Component Parts:
- For example:
 1. Change Orders
 2. Addenda
 3. Special Conditions
 4. Project-Specific Technical Specifications

Know Your Contract Documents (continued)

5. Plans (Contract Drawings)
6. Contract
7. General Conditions
8. Instructions to Bidders
9. Notice Inviting Bids
10. Contractor's Bid Forms
11. Green Book (if referenced)
12. Standard Drawings
13. Reference Documents

Contract Language Sets a Tone

Do the documents establish a

- Confrontational contract resulting in a mutual attempt to take advantage of the other party.

or

- A partnership-based approach to contracting, in which both parties find it advantageous to find ways of helping each other to be more successful.

What world do you want to work in?



The Impact of Contract Language

As an Owner you want:

- to be notified in a timely manner of a problem,
- costs and other impacts collected expeditiously, and once negotiated,
- the costs of a change to be final.

So you write your contracts to cover every possible problem



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Strict Limits on Notification

- *“Contractor must notify AGENCY of any event, discovery, act, omission or uncertainty which could affect the contract schedule or the price of the contract. Such potential change must be reported in writing, within 10 days of its discovery.*
- *“The (notification) must include a reasonable estimated schedule impact, if any, and a reasonable estimated cost, if any.”*
- *“Upon discovery of differing site conditions, Contractor shall discontinue activities in the immediate vicinity, then provide immediate oral notice of the discovery of such conditions to the Resident Engineer, followed by written notice within 24 hours”*

Timely Notice is Vital!!

California is a “Strict Notice” state

In 2011, the California Court of Appeal affirmed a judgment against a contractor, reasoning that under the amended and current version of Civil Code Section 1511, parties to a construction contract may agree (as the contractor did in *Opinski*) that a contractor “intending to avoid the effect of its failure to perform by asserting that [the owner’s acts] caused the failure must be given written notice of this intention within a reasonable time.” This decision underscores the importance to contractors to read and strictly comply with the construction contract and its notice, change order and claims provisions.



Timely Notice is Vital!!

“Failure to timely report a Potential Change shall result in loss and waiver of Contractor’s right, if any, to an extension in the schedule or for additional compensation.”

“If Contractor fails to timely submit all of the requested information, it will have waived its right to a schedule adjustment or to additional compensation.”

“Contractor shall 10 days from issuance of a CN In the event that Contractor fails to give timely notice claim is waived and released.”

“Failure to submit the daily report by the close of the next working day may waive any rights to recover compensation for that day.”

“The Contractor shall not be entitled to any remedy for an asserted DSC if it does not give the AGENCY both (1) timely notice And (2) an opportunity to investigate



Is This Practical?

Many changes are not so clear-cut as to have definite start and completion dates

- Do you make a claim for changed conditions after the first hard driving pile of 500, the 10th, ????

What constitutes notice is sometimes an issue as well. Is formal written notice of a potential claim required, are site meeting minutes sufficient, is the change so obvious that notice is a given?

Which Clause Promotes a Collaborative Approach?

“The Contractor shall submit RFCs within 10 days after the occurrence ... If the Contractor delivers any RFC later than 10 days ... the Contractor shall not have, and will have deemed to have waived, any Claim to any increase in Contract Price and Time ... for the period prior to the date of delivery of the RFC.”

or

“If the Contractor fails to provide an RFC within 60 days after any occurrence of an Event, Contractor shall not have, and will have deemed waived, any claim ... unless Contractor can show ... (Client) was not materially prejudiced by lack of notice or (Client) had actual knowledge of the event”

No Good Turn Goes Unpunished

“The Contractor shall not do any extra or changed work, except upon written order from the Resident Engineer. Compensation for such extra work shall be previously agreed upon in writing between the Contractor and Resident Engineer.”

Now what happens?

1. Discovery of a potential change
2. Submit RFC within 10 days
3. AGENCY response within 15 days with a CN
4. Contractor provides a Proposal within 15 days
5. AGENCY specifies time and place for negotiations within 10 days

No Good Turn Goes Unpunished

Agreement on a lump sum amount may take up to 50 days. This is not an acceptable delay in most situations - so

“If it is determined by the AGENCY that the Contractor should proceed immediately the CM shall direct the Contractor to account for its costs (per) Section ...”

Contractor may not be able to properly assess the true impacts of a change within the time allowed (these can be substantial) - so

“Contractor shall keep record of disputed work in accordance with Section XX, “Extra Work”.”

No Good Turn Goes Unpunished

Or

*“If the Contractor and the AGENCY are unable to reach agreement on disputed work, the AGENCY may direct the Contractor to proceed with the work. The Contractor must proceed Contractor may also submit a claim **contingent upon Contractor having timely met all of the requirements for making a claim.**”*

We now entered the “Time and Material” zone



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No Good Turn Goes Unpunished

As a Contractor you must:

- make a rapid decision as to what constitutes a changed condition,
- divert limited resources to deal with a problem that you did not create,
- predict and justify all associated costs and impacts of a change,
- maintain project progress.

***Contractors have little choice but to submit
Notice of Changes quickly and often***

Agreement on Impact

“Regardless of the party responsible for the delay Contractor shall be responsible to develop and implement measures to mitigate such delays and to identify all time and cost impacts within 10 days of notice of delay.”

“Contractor further acknowledges that it has the ability to track costs which are the result of any changes made Contractor specifically waives the right to make a total cost claim, regardless of the number of changes which may occur.”

“Both the Contractor and the AGENCY agree and acknowledge that execution of change orders constitutes a mutual accord and satisfaction of work covered by a Change Order, and the Contractor specifically waives and releases any and all claims ...
“

Agreement on Impact

A series of changes may have a different cumulative impact than the sum of the individual changes

- Imagine your efficiency if you are diverted regularly to deal with a new problem
- Cumulative impacts can be unforeseeable and difficult to quantify unless the proper controls systems are in place to capture the disruption and impacts that may not be apparent on an individual basis.

Some changes result in incremental increases in the cost of the work which are difficult to isolate and quantify

- For example, a high-water table impacting the rate at which material can be excavated

Agreement on Impact

Is it fair to assume that a change has no impact on work efficiency?

“Base the proposal on the Contractor’s actual, expected construction productivity rates (and provide appropriate support for these productivity rates) ...”

“Incidental engineering costs ... shall be included in the overhead mark-up, shall include all time sent by engineers ... and all other tasks normally performed by contractors as a part of the Work ...”

Agreement on Impact

Schedule impacts go beyond the critical path schedule

“The Contractor shall submit ... with each claim for an adjustment on account of delay ... a proposed revision to the critical path schedule incorporating the effects of the delay claimed”

and most likely include impacts on resource scheduling

Lean construction scheduling techniques recognize resource scheduling as a critical planning issue

Agreement on Impact

As an Owner are you willing to consider the impact of:

- Loss of production/inefficiency
 - Crews are stopped and re-directed
 - Idle equipment
 - Stacking of Trades
 - Acceleration
- Schedule Delays and Disruptions
 - Out of Sequence Work
 - Unavailability of Materials & Equipment
 - Interference
- Dilution of supervision

What's A Contractor To Do?

Contractors can either:

- hope that the Owner will ignore the contract language, or
- refuse to agree to any settlement, operate in negative cashflow and fight it out in the end, or
- price the change high and risk a false claims action, or
- go for a total cost claim
 - Information collection has improved spectacularly in the past years where contractors are able to accurately measure productivity – the “measured mile” approach is much more credible.

What's An Owner To Do?

- Do NOT ignore the contract language
- Behave reasonably and not punitively
- Dedicate resources to fully negotiate change order
- Do NOT accept blanket reservation of rights
- Do NOT delay negotiation of time impact to end of project
- If truly unable to quantify a specific component of the change, draft express language permitting parties to revisit when exact costs are known

CONTRACT CHANGE ORDER NO. ____

Date: [INSERT]
To: [CONTRACTOR NAME]
[ADDRESS]
[ADDRESS]
Attn: [CONTRACTOR REP]
Project: [INSERT]

This Change Order covers changes to the contract as described herein. The Contractor shall construct, furnish equipment and materials, and perform all work as necessary or required to complete the Change Order items for the amount agreed upon between the Contractor and City and set forth herein.

Item No.	Description of Changes	Increase/ (Decrease) in Contract Amount	Contract Time Extension, Days
1			
2			
	Totals	\$	

CONTRACT CHANGE ORDER NO. ____

Original Contract Amount:	\$XX.00
Change by Previous Change Order(s):	\$XX.00
Contract Price Prior to this Change Order:	\$XX.00
Current Change Order Amount:	\$XX.00
Revised Contract Amount including this Change Order:	\$XX.00

The Contract Price and Contract Time shall be adjusted as set forth above. The undersigned Contractor approves the foregoing Change Order as to the changes, if any, in the contract price specified for each item including any and all supervision costs and other miscellaneous costs relating to the change in work, and as to the extension of time allowed, if any, for completion of the entire work on account of said Change Order. The Contractor agrees to furnish all labor and materials and perform all other necessary work, inclusive of the directly or indirectly related to the approved time extension, required to complete the Change order items. This document will become a supplement of the contract and all provisions will apply hereto. It is understood that the Change Order shall be effective when approved by the City.

Contractor accepts the terms and conditions stated above as full and final settlement of any and all claims arising out of or related to the subject of this Change Order and acknowledges that the compensation (time and cost) set forth herein comprises the total compensation due for the work or change defined in the Change Order, including all impact on any unchanged work. By signing this Change Order, the Contractor acknowledges and agrees that the stipulated compensation includes payment for all Work contained in the Change Order, plus all payment for any acceleration or interruption of schedules, extended overhead costs, delay, and all impact or cumulative impact on all Work under this Contract. The signing of this Change Order acknowledges full mutual accord and satisfaction for the change and that the stated time and/or cost constitute the total equitable adjustment owed the Contractor as a result of the change. The Contractor hereby releases and agrees to waive all rights, without exception or reservation of any kind whatsoever, to file any further claim or request for equitable adjustment of any type, for any reasonably foreseeable cause that shall arise out of, or as a result of, this Change Order and/or its impact on the remainder of the Work under the Contract.

How Does Anything Get Done

- Directing work on a “time and material” basis reduces schedule impact but has an associated perceived loss of cost control
- Directing work on a negotiated lump sum basis gives the illusion of cost containment but can delay critical work
 - Contractor has to account for all contingencies and unknowns as the resulting price is “full and final”
 - Contractor may be unwilling to take the “full and final” risk at a price that is acceptable
- Using existing unit prices often results in arguments of applicability

How Does Anything Get Done

Managing T&M:

- Define the scope of work narrowly
 - Be very specific as to what is considered extra work
 - It may be desirable to break a large effort into several smaller ones so that each effort is more easily tracked and the scope is limited
- Establish the schedule associated with the effort
 - Limit the number of days that the work can continue before re-authorization
- Establish a mutual understanding of the scope and cost
 - Set maximum limits on the authorization (for example - no more than \$5,000) and re-authorize as needed

How Does Anything Get Done

Issues With T&M:

- Heavy administrative burden for Owner and Contractor
- Requires additional resources to manage
- Takes project teams focus away from other work and priorities
- Cash flow stress – 90 – 120 day pay typically
- Potential to not capture 100% of all costs associated with the change, small items missed and add up over time (small tools, equipment attachments, fuel, etc.)
- Owner typically pays more in markup than fixed price change orders

How Does Anything Get Done

Managing Lump Sum:

- Determine what can be negotiated consistent with the work schedule and balance potential savings with possible delay impacts
 - Clearly define the scope and limits of the work – particularly where it impacts unchanged work or where limited T&M efforts have been authorized associated with the change
- Make use of the unilateral change order when pricing and impacts can be reasonably established

How Does Anything Get Done

Resolving changes quickly and efficiently is desirable to everyone:

- Frees up payments
- Reduces jobsite friction
- Reduces the chance of big cost or schedule surprises
- Claims rarely get smaller
- Less likely to fight for a little than a lot

Anticipate Change

Change can come from many places:

- Design changes
 - Due to regulatory changes
 - Did not work/fit as intended
 - Changed the design intent
 - Mutual agreement (VE, etc.)
- Unforeseen conditions
 - Things aren't as planned
 - Force majeure

Change Orders



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Expect the Unexpected

Each project decision has an associated risk that needs to be tracked and monitored

- Each risk should have a contingent cost and schedule impact assigned and included in the project estimate

If you made the decision as an owner not to spend money on additional geotechnical exploration – don't be shocked if there are change requests due to differing site conditions

Expect the Unexpected

Risk management is:

- A disciplined process that can help avoid negative outcomes and help recognize emerging opportunities.
- An action plan that may help to mitigate the probability of a risk happening and the consequences of when it happens.
- Improved decision making
- Better allocation of resources

PROJECT RISK REGISTER																																																										
PROJECT TITLE		Fallbrook Water Treatment Plant										PROJECT BUDGET		\$15,325,000		PROJECT DURATION		15 Months		Last Updated		10/16/10																																				
ID No.	Status	Priority	Date Identified	Project Phase	Summary Description Risk and/or Opportunity	Detailed Description of Risk Event (Specific, Measurable, Attributable, Relevant, Timebound) [SMART]	Risk Impact	Type	Cost Impact Range (B, M, \$)	Schedule Impact Range (D, W, M, Y)	Risk Distribution	Mitigation Measure	Likely Cost or Schedule Impact	Likelihood	Potential Impact	Risk Matrix	Strategy	ACTION TO BE TAKEN Response Actions including advantages and disadvantages include date	Risk Owner	Cost Contingency	Date, Status and Review Comments (Do not delete prior comments, therefore providing a history)	Expiration Event																																				
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10a)	(10b)	(11a)	(11b)	(12)	(13)	(14)	(15)	(16)	(17)	(18)	(19)	(20)	(21)																																				
0	Open	Y	8/15/09	Design	Risk Additional piling requirement	Soil conditions are inconsistent and may result in significantly more piling lengths than planned.	Cost-Schedule	Cost	8.0 11.0 20.0	10.0% 80.0% 10.0%	Best Likely Worst		11.4	80%	Moderate	<table border="1"> <tr><td>VH</td><td></td><td></td><td></td><td></td><td></td></tr> <tr><td>H</td><td></td><td></td><td></td><td></td><td></td></tr> <tr><td>M</td><td></td><td>X</td><td></td><td></td><td></td></tr> <tr><td>VL</td><td></td><td></td><td></td><td></td><td></td></tr> <tr><td>L</td><td></td><td></td><td></td><td></td><td></td></tr> <tr><td>VL</td><td>L</td><td>M</td><td>H</td><td>VH</td><td></td></tr> </table>	VH						H						M		X				VL						L						VL	L	M	H	VH		Mitigate	Additional soils testing will be performed	Mary M.	\$ 5,700	9/10/09 subcontract for additional testing was obtained	Completion of foundations etc.
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Expect the Unexpected

- **Initial Planning:** preliminary identification and assessment of project risks
- **Design Development:** collection of engineering decisions and their consequences
- **Procurement:** refine the risk management analysis
- **Contract Award:** refine the risk analysis based on negotiated positions
- **Construction:** monitor risk mitigation strategies, add new risks and retire risks as they are resolved.

***Why not identify potential issues before they occur
and develop ways to deal with these issues that best
allocates risk***



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Plan for Change

Why not work with the project delivery team to brainstorm better risk solutions and encourage more flexible planning where risks are greater:

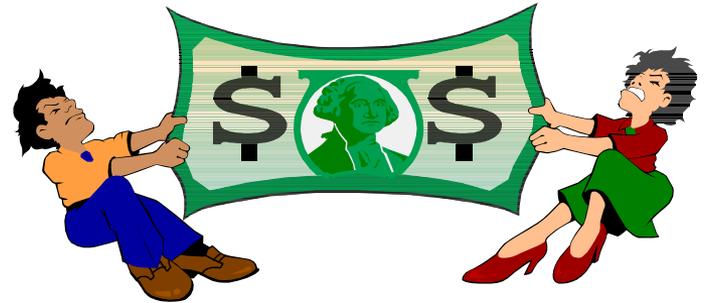
- Ask for pre-bid RFI's to expose risk identified prior to the bid
- Propose risk mitigation options for unreasonable risk transfers

Share your risk register:

- Don't want the contractor to know where you think that there may be problems
- Consider whether it is better to know and discuss in advance or discover the issue in the field

Best Practices for the Unexpected

- Consider How Changes are Administered
- Resolve as You Go
- Anticipate
- Plan
- Brainstorm the Best Solution



Claims Have to be Dealt With

Follow a Process

- Know when to escalate an issue
- Have a dispute resolution process
 - Include language in the contract appropriate to the desired approach so that the process moves forward smoothly within the relatively short window provided

Statutory Dispute Resolution Process

Effective January 1, 2017, California Public Contract Code Section 9204 was added. This new regulation establishes a claims resolution process for state and local public contracts. The intent of the regulation is to ensure that contractors are paid for undisputed claims in a timely manner and that there is a process for resolving disputed issues. Except for those entities specifically excluded, the new regulation applies to all California public entities – state agencies, local cities and counties (including charter cities and counties), districts, special districts, public authorities and others.



Dispute Resolution Statutes

- PCC § 9204 directly conflicts with existing dispute resolution language for claims under \$375,000
- PCC § 20104 et. seq. includes claim and response dates that are inconsistent with PCC § 9204
- Recommend contract language that incorporates the more stringent timeline required by the two statutes

Recommended Dispute Resolution Language

PROCEDURE FOR RESOLVING DISPUTES

Contractor shall timely comply with all notices and requests for changes to the Contract Time or Contract Price, including but not limited to all requirements of Article XX, Changes and Extra Work, as a prerequisite to filing any claim governed by this Article. The failure to timely submit a notice of delay or notice of change, or to timely request a change to the Contract Price or Contract Time, or to timely provide any other notice or request required herein shall constitute a waiver of the right to further pursue the claim under the Contract or at law.



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Recommended Dispute Resolution Language (cont'd)

Intent. Effective January 1, 1991, Section 20104 et seq., of the California Public Contract Code prescribes a process utilizing informal conferences, non-binding judicial supervised mediation, and judicial arbitration to resolve disputes on construction claims of \$375,000 or less. Effective January 1, 2017, Section 9204 of the Public Contract Code prescribes a process for negotiation and mediation to resolve disputes on construction claims. The intent of this Article is to implement Sections 20104 et seq. and Section 9204 of the California Public Contract Code. This Article shall be construed to be consistent with said statutes.

Claims. For purposes of this Article, “Claim” means a separate demand by the Contractor, after a change order duly requested in accordance with Article XX “Changes and Extra Work” has been denied by the City, for (A) a time extension, (B) payment of money or damages arising from Work done by or on behalf of the Contractor pursuant to the Contract, or (C) an amount the payment of which is disputed by the City. Claims



Recommended Dispute Resolution Language (cont'd)

governed by this Article may not be filed unless and until the Contractor completes all procedures for giving notice of delay or change and for the requesting of a time extension or change order, including but not necessarily limited to the procedures contained in Article 44, Changes and Extra Work, and Contractor's request for a change has been denied in whole or in part. Claims governed by this Article must be filed no later than the date of final payment. The claim shall be submitted in writing to the City and shall include on its first page the following in 16 point capital font: "THIS IS A CLAIM." Furthermore, the claim shall include the documents necessary to substantiate the claim. Nothing herein is intended to extend the time limit or supersede notice requirements otherwise provided by contract for the filing of claims, including all requirements pertaining to compensation or payment for extra Work, disputed Work, and/or changed conditions. Failure to follow such contractual requirements shall bar any claims or subsequent lawsuits for compensation or payment thereon.



Recommended Dispute Resolution Language (cont'd)

Supporting Documentation. The Contractor shall submit all claims in the following format:

- Summary of claim merit and price, reference Contract Document provisions pursuant to which the claim is made
- List of documents relating to claim:
 - Specifications
 - Drawings
 - Clarifications (Requests for Information)
 - Schedules
 - Other
- Chronology of events and correspondence

Recommended Dispute Resolution Language (cont'd)

- Analysis of claim merit
- Analysis of claim cost
- Time impact analysis in CPM format
- If Contractor's claim is based in whole or in part on an allegation of errors or omissions in the Drawings or Specifications for the Project, Contractor shall provide a summary of the percentage of the claim subject to design errors or omissions and shall obtain a certificate of merit in support of the claim of design errors and omissions.

Recommended Dispute Resolution Language (cont'd)

City's Response. Upon receipt of a claim pursuant to this Article, City shall conduct a reasonable review of the claim and, within a period not to exceed 45 Days, shall provide the Contractor a written statement identifying what portion of the claim is disputed and what portion is undisputed. Any payment due on an undisputed portion of the claim will be processed and made within 60 Days after the City issues its written statement.

If the City needs approval from its governing body to provide the Contractor a written statement identifying the disputed portion and the undisputed portion of the claim, and the City's governing body does not meet within the 45 Days or within the mutually agreed to extension of time following receipt of a claim sent by registered mail or certified mail, return receipt requested, the City shall have up to three Days following the next duly publicly noticed meeting of the City's governing body



Recommended Dispute Resolution Language (cont'd)

after the 45-Day period, or extension, expires to provide the Contractor a written statement identifying the disputed portion and the undisputed portion.

Within 30 Days of receipt of a claim, the City may request in writing additional documentation supporting the claim or relating to defenses or claims the City may have against the Contractor. If additional information is thereafter required, it shall be requested and provided pursuant to this subdivision, upon mutual agreement of City and the Contractor. The City's written response to the claim, as further documented, shall be submitted to the Contractor within 30 Days (if the claim is less than \$15,000, within 15 Days) after receipt of the further documentation, or within a period of time no greater than that taken by the Contractor in producing the additional information or requested documentation, whichever is greater.



Recommended Dispute Resolution Language (cont'd)

Meet and Confer. If the Contractor disputes the City's written response, or the City fails to respond within the time prescribed, the Contractor may so notify the City, in writing, either within 15 Days of receipt of the City's response or within 15 Days of the City's failure to respond within the time prescribed, respectively, and demand in writing an informal conference to meet and confer for settlement of the issues in dispute. Upon receipt of a demand, the City shall schedule a meet and confer conference within 30 Days for settlement of the dispute.

Mediation. Within 10 business Days following the conclusion of the meet and confer conference, if the claim or any portion of the claim remains in dispute, the City shall provide the Contractor a written statement identifying the portion of the claim that remains in dispute and the portion that is undisputed. Any payment due on an undisputed portion of the claim shall be processed and made within 60 Days after the City



Recommended Dispute Resolution Language (cont'd)

issues its written statement. Any disputed portion of the claim, as identified by the Contractor in writing, shall be submitted to nonbinding mediation, with the City and the Contractor sharing the associated costs equally. The City and Contractor shall mutually agree to a mediator within 10 business Days after the disputed portion of the claim has been identified in writing, unless the parties agree to select a mediator at a later time.

If the parties cannot agree upon a mediator, each party shall select a mediator and those mediators shall select a qualified neutral third party to mediate with regard to the disputed portion of the claim. Each party shall bear the fees and costs charged by its respective mediator in connection with the selection of the neutral mediator.



Recommended Dispute Resolution Language (cont'd)

For purposes of this section, mediation includes any nonbinding process, including, but not limited to, neutral evaluation or a dispute review board, in which an independent third party or board assists the parties in dispute resolution through negotiation or by issuance of an evaluation. Any mediation utilized shall conform to the timeframes in this section.

Unless otherwise agreed to by the City and the Contractor in writing, the mediation conducted pursuant to this section shall excuse any further obligation under Public Contract Code Section 20104.4 to mediate after litigation has been commenced.

The mediation shall be held no earlier than the date the Contractor completes the Work or the date that the Contractor last performs Work, whichever is earlier. All unresolved claims shall be considered jointly in a single mediation, unless a new unrelated claim arises after mediation is completed.



Recommended Dispute Resolution Language (cont'd)

Procedures After Mediation. If following the mediation, the claim or any portion remains in dispute, the Contractor must file a claim pursuant to Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.6 of Title 1 of the Government Code prior to initiating litigation. For purposes of those provisions, the running of the period of time within which a claim must be filed shall be tolled from the time the Contractor submits his or her written claim pursuant to subdivision (a) until the time the claim is denied, including any period of time utilized by the meet and confer conference.

Civil Actions. The following procedures are established for all civil actions filed to resolve claims of \$375,000 or less:



Recommended Dispute Resolution Language (cont'd)

Within 60 Days, but no earlier than 30 Days, following the filing or responsive pleadings, the court shall submit the matter to non-binding mediation unless waived by mutual stipulation of both parties or unless mediation was held prior to commencement of the action in accordance with Public Contract Code section 9204 and the terms of this Contract. The mediation process shall provide for the selection within 15 Days by both parties of a disinterested third person as mediator, shall be commenced within 30 Days of the submittal, and shall be concluded within 15 Days from the commencement of the mediation unless a time requirement is extended upon a good cause showing to the court.



Recommended Dispute Resolution Language (cont'd)

If the matter remains in dispute, the case shall be submitted to judicial arbitration pursuant to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, notwithstanding Section 1114.11 of that code. The Civil Discovery Act of 1986 (Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure) shall apply to any proceeding brought under this subdivision consistent with the rules pertaining to judicial arbitration. In addition to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, (A) arbitrators shall, when possible, be experienced in construction law, and (B) any party appealing an arbitration award who does not obtain a more favorable judgment shall, in addition to payment of costs and fees under that chapter, also pay the attorney's fees on appeal of the other party.



Recommended Dispute Resolution Language (cont'd)

Government Code Claims. In addition to any and all contract requirements pertaining to notices of and requests for compensation or payment for extra Work, disputed Work, construction claims and/or changed conditions, the Contractor must comply with the claim procedures set forth in Government Code Sections 900, et seq. prior to filing any lawsuit against the City. Such Government Code claims and any subsequent lawsuit based upon the Government Code claims shall be limited to those matters that remain unresolved after all procedures pertaining to extra Work, disputed Work, construction claims, and/or changed conditions have been followed by Contractor. If no such Government Code claim is submitted, or if the prerequisite contractual requirements are not satisfied, no action against the City may be filed. A Government Code claim must be filed no earlier than the date the Work is completed or the date the Contractor last performs Work on the Project, whichever occurs first. A Government Code claim shall be



Recommended Dispute Resolution Language (cont'd)

inclusive of all unresolved claims unless a new unrelated claim arises after the Government Code claim is submitted.

Non-Waiver. The City's failure to respond to a claim from the Contractor within the time periods described in this Article or to otherwise meet the time requirements of this Article shall result in the claim being deemed rejected in its entirety.

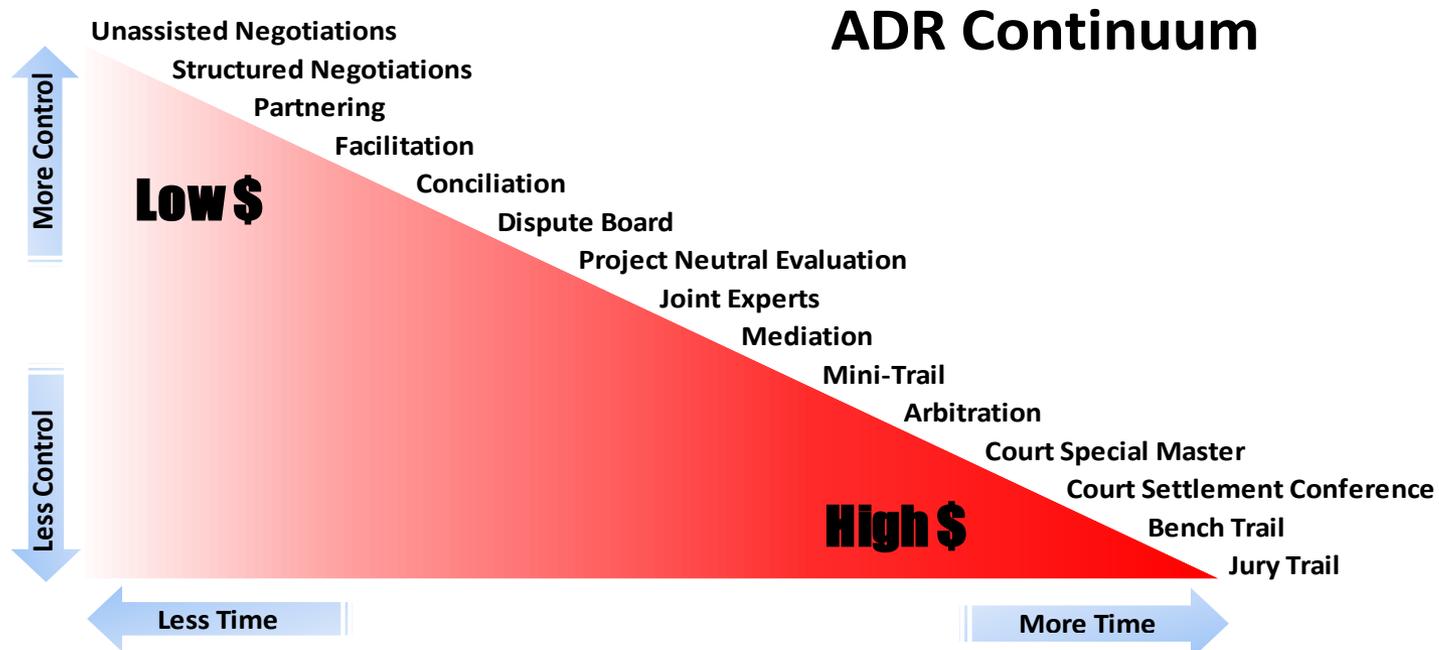


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Understand Your Options

There is a huge gap between failure to agree in the field and “going to court”



Courtesy of the Dispute Resolution Board Foundation

Make the Effort Worthwhile

ADR is most valuable when decisions have consequences:

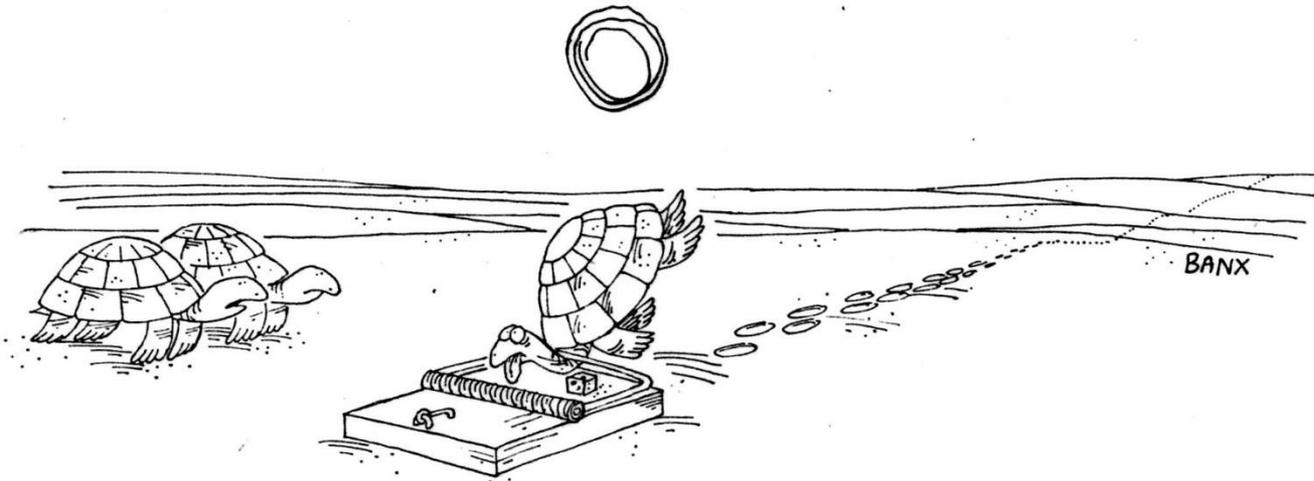
- The intention is to reach a settlement
- It is not intended to be a delay tactic
- One View Point: If findings may be used in any concurrent or subsequent claim, litigation or other action both parties take the process more seriously
- Another View Point: Admissibility in litigation drives costs of ADR up and stifles compromise and frank discussion between parties

Summary

- ✓ Contract language can have unintended consequences
- ✓ If you make the rules – don't be surprised if other people follow them
- ✓ Anticipating problems pays off
- ✓ Working together to solve problems pays dividends
- ✓ Use all of the tools in your toolbox to keep your project moving forward

Questions

Thank You!



“Poor Brendon—he never stood a chance.”



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