

Risk Allocation and Claims Resolution

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Presented By:
Mary Beth Coburn, P.E. Esq.

Purpose and Learning Objectives

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- Provide A Basic Overview Of The Application To CA Public Works For:
 - Insurance
 - Bonds
 - Indemnity
 - Dispute Resolution



Comprehensive General Liability and Builder's All Risk

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- BROADLY (In The Context Public Works):
- **Comprehensive General Liability** (“CGL” or “GL”) Covers Damage To Third Parties (Injuries, Property, etc.)
- **Builder's All Risk** (“All Risk”) Covers Damage To The Project Due To “External Circumstances”



Comprehensive General Liability and Builder's All Risk

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- CGL:
- Accidents On The Project
 - (Example: Contractor Leaves Trench Uncovered, Someone Trips...)
- Defends Against Lawsuits
 - (Example: Contractor Gets Sued By Adjacent Property Owner Claiming Project Damaged Property)



Comprehensive General Liability and Builder's All Risk

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- All Risk Examples:
 - Weather
 - Fire
 - Explosion
 - Vandalism
- In CA, PCC 7105 Requires Agencies To Separately Pay Insurance Premium For Damage Caused By Earthquakes > 3.5 Magnitude and Tidal Waves



Comprehensive General Liability and Builder's All Risk

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- In Insurance Terms, All Risk Policies Cover Whatever Isn't Excluded From the Policy
- Practically, On Construction Projects, They Generally Cover Damage To The Project



Comprehensive General Liability and Builder's All Risk

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CGL Covers (Generally)

- Third Party Damage
- Damage To Owner's Property That Is Not Part Of The Project
- Injuries To Third Parties
- Typically includes Negligence Of Insured

All Risk Covers (Generally)

- Damage To The Four Corners Of The Project
- May Include Project Equipment/Material In Transit

Project Bonds

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- Bid Bonds
 - Guarantee That The Contractor Will Execute The Contract
- Payment Bonds
 - Protects Subcontractors, Material Suppliers and Laborers
- Performance Bonds
 - Guarantee Performance Of The Contract



Performance Bonds vs. Insurance

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- Insurance Protects The Owner From Damage From Some Event Or Accident
- Performance Bonds Protect The Owner From Contractor Default/Breach of Contract



Latent Defect Liability

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Code of Civil Procedure 337.1 – Patent Defects

- Four Years After Substantial Completion
- Patent = Apparent By Reasonable Inspection

Code of Civil Procedure 337.15 – Latent Defects

- Ten Years After Substantial Completion
- Latent = Not Apparent By Reasonable Inspection



Indemnity

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- Indemnitor = Party Providing Indemnity to Another Party
- Indemnatee = Party receiving indemnification
- Generally Covers Claims Made Against the Indemnatee by Third Parties



Indemnity

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- In the Public Works
Arena Statutory
Indemnity Obligations
Include:
 - Civil Code 2782 Covers
Contractor's
Indemnification of Owners
 - Civil Code 2782.8 Covers
Designer's Indemnification
of Owners



Indemnity

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- Unless Limited By The Terms Of The Contract, Indemnity Applies Regardless of Insurance
- Single Biggest Point of Contention Between Owners/Designers/Contractors



Dispute Resolution

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- Start with the Contract:
 - Early Notice Provisions
 - Opinski Construction vs. City of Oakdale
 - CORs/PCOs
 - Change Orders
 - Bilateral
 - Unilateral



Dispute Resolution

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- Don't Kick the Can
- Fully Resolve Change Orders as Soon as Possible

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.



Dispute Resolution

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- Two Statutes Govern Dispute Resolution on Public Works Construction Contracts:
 - Public Contract Code 9204
 - Public Contract Code 20104 et. seq.



Dispute Resolution

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- PCC 9204 – Effective 1/1/17
- Applies to all Local Agencies
- Does Not Apply to Some State Agencies (CalTrans, DGS, etc.)
- Applies to All Claims for Time and/or Money



Dispute Resolution

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- PCC 20104 – Effective 1/1/91
- Applies To All Local Agencies
- Applies To All Claims For Additional Compensation Under \$375,000
- Includes Separate Claims Requirements For Claims Under \$50,000
- Unresolved Claims Are Subject to Judicial Arbitration



Dispute Resolution

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- Some Conflicts in Timing and Claim Process Between 9204 and 20104
- Only An Issue When Claims are Under \$375,000

Claims Under \$375,000:

- Follow The More Stringent Requirement Between 9204 and 20104
- Follow The Contract Requirements

Claims For Time Extensions Or Compensation Over \$375,000:

- Follow 9204
- Follow The Contract Requirements

Best Practices:

- Resolve Claims As They Arise
- Memorialize Resolution
- No Handshake Deals
- If Impossible To Resolve Immediately, Expressly State What Remains Unresolved
- Claims Avoidance? = Be Fair



Questions?

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Contact

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Mary Beth Coburn, P.E. Esq.
marybeth.coburn@bbklaw.com
655 West Broadway, 15th Floor
San Diego, California 92101
(619) 525-1369
www.bbklaw.com

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