

PUBLIC CONTRACTING OVERVIEW



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For the past twenty years, Deirdre Joan Cox has practiced in the construction and public contracting field.

Ms. Cox's practice involves representing public and private owners, design professionals, and contractors in complex construction matters, including strategizing development and procurement approaches, the drafting of construction documents, advising clients during the course of construction, claims review and analysis, and claims resolution, including mediation, arbitration, and litigation. She assists property owners, communities, and projects to resolve the issues that occur at the intersections between funding, design, acquisition, and construction. She serves as construction counsel to a number of local agencies. She has extensive experience in state and federal court. Her efforts, from a project's early stages through trial and beyond, allow public agencies to deliver public projects on time and on budget.

Her experience includes multi-million dollar projects for cities, counties, and other municipalities, as well as hospitals, community college, school and special districts, and other commercial facilities in both bond funded projects, individual projects, and capital improvement programs. She has particular experience in lease revenue bond financing, Mello-Roos bonds, public private partnerships, and other financing mechanisms.

Ms. Cox has extensive experience in working with public entity clients in developing construction project manuals, i.e., "front-end" construction documents for all types of public works projects using delivery methods that involve competitive binding utilizing lowest responsible, responsible bidding and "best value" concepts for traditional hard bid / design-bid-build, design-build, construction manager at risk, and lease-leaseback delivery mechanisms.

Her work includes preparing the project documentation including drafting, negotiation, structuring of delivery and procurement approaches and risk evaluation. She also assists public entity clients in administering the bidding process and facilitating the defense and handling of bid protests, subcontractor listing, project setup, and related issues that arise during the bidding / proposal process including attending hearings and assisting in preparing findings and conclusions.

TODAY'S GOAL:

- Sensitize you to issues arising with public projects
- Emphasize importance of early legal advice on construction matters, from beginning to end
- Share best practices to avoid litigation
- Share what to expect if a matter goes to litigation

COURSE OVERVIEW

Section

Description

1. Public Contracting Overview
 - a. Importance of Strong Contract
 - b. Negotiating Professional Services Contracts
 - c. Managing Competitive Bidding Process
 - d. Claims Management and Change Order Procedures
2. Disputes, Default, and Termination
3. Best Practices to Avoid Litigation
4. Arbitration and Mediation
5. Litigation and Appeal

Generally Applicable Statutes

■ Public Contract Code

- Five parts
- Four parts apply to local agencies

■ Government Code

- Public Records Act
- Government Claims Act
- False Claims Act

■ Labor Code

- DIR Registration
- Prevailing Wages

What is a Public Work? It Depends!

■ “Public Works” Defined

- Public Contract Code: erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind
- Labor Code: more extensive: includes above, plus demolition, installation, laying of carpet, assembly and disassembly of modular office systems... paid for in whole or in part out of public funds; **includes maintenance**

Contracting Options

- Public Contract Code requires competitive bidding of public works to prevent “fraud, favoritism or collusion”
- For public agencies, that translates to the following contracting options:
 - Design-Bid-Build
 - Design-Build (for City projects over \$1M)
 - CM/GC
 - P3 (Government Code 5956)
 - CUPCCAA: \$200K Informal Bid / \$60K Force Account

Selection Methodologies

■ Low Bid

Design-Bid-Build

Owner Multiple Prime

CM Multiple Prime (CM/GC)

- Lowest responsive responsible bidder

■ Best Value Selection

Design-Build

- Owner's Bridging Documents provided to prequalified proposers. Selection based on qualifications, design, price, and safety

■ JOC (maintenance only)

- Construction cost catalog
- Tasks determined from design



Always Remember...

- **Complexity of project**
- **What's most important to you**
 - Time
 - Cost
 - Control
 - Comfort level with various project delivery methods
 - Tolerance for risk
- **External factors**
 - City Council desire for quick delivery (but at what cost?)



CUPCCAA – California Uniform Public Construction Cost Accounting Act

- Public works projects of \$60,000 or less may be performed by the employees of a public agency by force account, by negotiated contract, or by purchase order.
- Public projects between \$60,000 and \$200,000 may be let to contract by informal procedures as set forth in the Act.
- Public projects of more than \$200,000 shall, except as otherwise provided in the Act, be let to contract by formal bidding procedure.

Emergency Contracts

- **In cases of emergency, when repair or replacements are necessary:**
- **Public Agencies, by a 4/5 vote may:**
 - repair or replace a public facility
 - take any directly related and immediate action required by that emergency
 - procure the necessary equipment, services, and supplies for those purposes
- **All *without* giving notice for bids to let contracts**

“EMERGENCY” (PCC Section 1102)

- A “sudden, unexpected occurrence
- that poses a clear and imminent danger,
- requiring immediate action
- to prevent or mitigate the loss or impairment of life, health, property or essential public services.”

Importance of Strong, Internally-Consistent Contract

- Existing contract templates commonly based on existing, out-of-date forms
- Process of contract negotiating often leads to inconsistencies, ambiguities
- Seek advice from experienced construction lawyers
- Key provisions normally in “commercial terms,” references to specific exhibits

Key Contract Components

- Scope of work – what's included, what's not
- Underground Conditions and Hazardous Material
- Substitutions – timing and limitations
- Ensure provisions are internally consistent / Order of Precedence
- Payment and Performance Bonds / Insurance
- Prevailing Wages / DIR Reporting
- Schedules
- Reporting Requirements / Monitoring Project
- Change order procedures, impact of failure to comply

Key Contract Components

- Claims Procedures – PCC 9204
- Termination provisions:
for convenience / for default
- Liquidated Damages
- Dispute resolution structure, forum
- Project Completion / Timely release of retention
- Project Documentation / Audit Rights

Performance & Payment Bonds

- Payment bonds are required for projects exceeding \$25,000 (Civil Code Sections 9550, 9552).
- Performance bonds are required for County construction projects (PCC Section 20129(b)) and recommended for all construction projects.
- Payment bonds ensure subcontractors / vendors get paid
- Performance bonds are the leverage to get work completed if the contractor defaults and to get warranty work done.
- Contracting via Purchase Order does not cancel the requirement for payment and performance bonds.

Prevailing Wages

- Prevailing wages are required for all California public works projects exceeding \$1,000.
- For federally funded projects, the threshold is \$2,000.
- How to Distinguish Public Contract Code from Labor Code Requirements
 - Bidding/Contracting Mechanism: Use Public Contract Code
 - Prevailing Wages: Use Labor Code

DIR Requirements (SB 854 / SB 96)

- Duty to notify DIR within five days of awarding a contract for a public works project (Form PWC-100)
- This requirement, found in Labor Code Section 1773.3, applies to *all* public works projects.
- Owner may only accept Bids from Bidders that are currently registered and qualified to perform public work pursuant to Labor Code Section 1725.5.

Required Contract Administration and Statutory Considerations

- Progress Payments Cannot Exceed 95%
 - Public Contract Code 7201: Limits retention to 5% unless project is “substantially complex”
- Prompt Payment of Progress Payments and Retention: trap for unwary
 - 2% per month and attorney’s fees
- Liquidated Damages and Bonuses Permitted

Limiting Liability

- **Public Owners should not provide contractual limitations of liability to Contractors or Designers**
 - Contractor CGL insurance may cover consequential damages liability of contractor
 - Designer E&O insurance may cover consequential damages liability of designer
 - Limitations of liability may effectively waive insurance coverages
 - When limiting liability to Contract Price, should exclude damages covered by insurance
- **Project insurance coverages often do not protect Owner from consequential damages liability**
 - Owner should obtain consequential damage waiver from Contractor and Designers

Prohibited Contract Terms

- **No Damages for Delay**
 - Cannot contract to eliminate contractor's extended performance costs
- **No Full Indemnification**
- **Substitution of Securities**
 - Changes from statute prohibited
 - Changes void retention

Professional Service Contracts: Govt. Code Section 4526

- Qualifications-based procurement
- Select on basis of “demonstrated competence” and “necessary qualifications”
- May consider price
- “Short list” at least three
- Conduct sequential negotiation sessions

Indemnification Rules

- Public Contract Code Section 20103.6 – must disclose indemnification requirements
- Civil Code 2782.8 – Design professionals
 - Limits scope of indemnity and duty to defend
 - Limits cost to defend an upstream party to design professional's proportionate percentage of fault
 - Negligence-based damages (legal fees) likely still covered by insurance

Required Bidding Procedures and Documents

■ Subcontractor Listing Law

- Use listed subcontractors for listed work (all work in excess of ½ of 1% of contract price)
- General Contractor self performs unlisted work
- Substitutions per noticed hearing on statutory grounds, only [PCC Section 4107(a)(9) permits substitution for “non-responsibility.”]

Competitive Bidding Exemptions

- **If no statutory reference**
- **If an emergency**
- **If no competitive advantage results:**
 - Personal services: e.g. law, architecture, engineering
 - Experimental or unique products
 - Contracts with a government regulated monopoly

Bidding Procedures

- **PCC Section 6610.** Mandatory pre-bid conferences must follow advertisement by six days.
- **Written Addenda**
 - Answer Bidder Questions
 - Amend the Bid Documents
- **PCC Section 4104.5.** Three-day rule for addenda.
- **PCC 5100, et seq.** Bid relief upon hearing.

Rejecting All Bids and Rebidding

- Public entity may reject all bids and rebid
- Reserve right in bid documents
- Set realistic bid expiration dates
- Reserve right to extend bids
- May “stagger” bid effectiveness dependent upon protests

Non-Responsive Bids/ Non-Responsible Bidders

- **Defects rendering bids non-responsive**
 - time
 - price
 - quality
- **Not considering and/or rejecting the non-responsive bid**
- **Rejecting the non-responsible bidder**

PCC Section 1103

- **A responsible bidder is “ a bidder who has demonstrated the attributes of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform a public works contract.”**
- **“Trustworthiness”**
 - Honesty? Yes.
 - Labor law violations? Yes.
 - Labor – Union policy? No.
- **Debarment/Preclusion from Future Bidding**

Bid Bond

- Bid Bond: Ensures contractor proceeds
- [Performance/Payment Bonds: Ensure contractor completes project]
- If contractor awarded bid fails or refuses to sign contract or provide bonds and insurance, tender to Bid Bond
- Bid Bond Surety obligated to pay difference between apparent low bidder and next lowest bidder

Pre-Qualification Legislation

■ Procedure

- Questionnaire (Dept. of Industrial Relations)
- By project or by annual pre-qualified bid-list

■ Factors

- Completed Questionnaire
- Financial Statements

Qualification Standards

■ Legislation

- license, insurance, financial
- performance history
- legal status

■ Other Criteria Recommended

- Subcontractors
- Superintendent
- Project Manager

■ Technical Factors

Cost/Benefit Tradeoffs

- Costs / Time
- Level Playing Field
- Discourage Bad Bidders and Encourage Good Bidders
- Retain Qualified Bid Field

Bid Protest Procedures

- Legal Framework: Importance of Administrative Record
- Procedure and Exclusivity
- Briefing
- Determination
- Findings on Award

Correspondence - Practice Pointers

- **The third party/two year test** (two years from now, will a third party reading the letter understand what it is about?)
- **Subject Heading**
- **Reference Number** (where used)
- **Body of Letter**
 - relay circumstances
 - reason for letter
 - one topic only
 - reference incoming letter triggering response

Managing Performance of the Work: Stuff *Always* Happens

- Keep antennae out for the “troubled project”
- Need construction counsel to guide through the potholes
- Contract schedule: took too long
- Contract price: cost too much
- Undocumented concessions to Contractor
- Early, extra-contractual payments to Contractor – exoneration?
- Demands, notices to sureties involved: performance, payment

Claims and Change Order Procedures

- Notice of potential claim
- Documentation of claim within reasonable time
- Claim pricing rules (i.e., change order measures)
- Time impact analysis for time requests
- Exclude special, incidental and consequential damages

Claims and Change Order Procedures (AB 626 / PCC 9204)

- Effective 1/1/17, public agencies required to follow a new process for resolving contractor change orders on public works projects
- The process applies to all claims for:
 - Time Extensions
 - Payments for Additional Work, and
 - Payments of Disputed Amounts
- There is also a mechanism for subcontractors to make their claims through the contractor.

Claims and Change Order Procedures (AB 626 / PCC 9204)

- Public agencies must:
 1. Review a claim and issue a written statement within 45 days as to what portions are disputed and undisputed;
 2. Pay undisputed portions within 60 days (late payments bear interest at 7%);
 3. If requested, schedule a settlement conference to negotiate disputed portions;
 4. Issue a statement of items remaining in dispute within 10 days after the conference;

Claims and Change Order Procedures (AB 626 / PCC 9204)

- Public agencies must (con'd):
 - Pay remaining undisputed portions within 60 days, following the conference;
 - Enter non-binding mediation regarding issues that remain in dispute; and
 - State the text of AB 626 provisions, or summarize them, in project plans or specifications

The False Claims Act

- **Applies to any false claim “knowingly” presented**
- **An agent’s knowledge or acquiescence does not excuse the false claim**
- **Penalties**
 - \$10,000 per false claim
 - Treble damages for false claims actually paid
- **Common occurrences: change order and force account labor build ups and equipment charges**

The Government Claims Act

- Governments immune from liability absent statute
- Contract procedures permitted Govt. Code Sec. 930.2 *et. seq.*
- Liability of Public Entities/Employees under Govt. Code Sec. 814 *et. seq.*
- Failure to comply fatal to claims

Best Practices to Avoid Litigation

- Enter into the right agreements
- Limit your liability contractually
- Proper insurance coverage
- Be proactive: don't ignore issues
- Plan ahead; don't wait until there is a problem to hire a professional
- Read: do not rubber stamp agreements
- Write a Letter
- Don't Give Up

Best Practices to Prevail in Litigation

- Be Nice. Businesses thrive or fail based on their reputation
- Train your staff constantly and thoroughly
- Document Everything
- Gather and Retain Information – The Good, the Bad and the Ugly. Facts take time to develop

Litigation and Appeals

- Preservation of documents / litigation hold
 - Understand what information covered by hold
 - Reiterate Hold Frequently
- Take the time to understand the project from a technical side; be able to explain it to others laypersons
- Commitment of adequate personnel resources to discovery, trial prep, trial
- Importance of competent experts *who can testify and hold up under cross examination*

Informal Discovery or Investigation

- Preserve Legal Privilege
 - Conducting interviews with witnesses
 - Taking photographs (like of damaged property, accident sites, or other relevant objects or places)
- Finding out about the other side's insurance coverage.

Formal Discovery: Basics

- **Discovery enables the parties to know before the trial begins what evidence may be presented.**
- It is designed to prevent "trial by ambush," where one side doesn't learn of the other side's evidence or witnesses until the trial, when there is no time to obtain answering evidence.

Formal Discovery: Basics

- Written Discovery: Make Employees Available to Help Craft Responses
- Deposition
 - A deposition is a witness's sworn out-of-court testimony.
 - It is used to gather information as part of the litigation discovery process and, in limited circumstances, may be used at trial.
 - A written record is always created, sometimes video recorded

Depositions: Basics

- Trial Testimony, Not a Conversation or Advocacy
- Identify and Prepare Potential Deponents Early in Process
- Deponent Should Understand:
 - Theories of Liability
 - Deponent's Role in Case
 - Deponent is in Control

Arbitration and Mediation

- AAA / JAMS
- Arbitration: Importance of “Construction Arbitration Rules”
- Importance of Arbitrators with Construction Expertise
- Scope of Discovery

Mediation

- Mediation is a process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences.
- The mediator's goal is to narrow the dispute to the point where it makes sense for both sides to agree on a solution.
- If successful, both sides walk away “equally unhappy”

Mediation

- Phase 1: Opening Statements
- Phase 2: Joint Discussions
- Phase 3: Private Discussions
- Phase 4: Negotiation
- Phase 5: Settlement

Mediation: 10 Rules for Success

- Decisionmakers must participate
- Key documentation must be available
- Be right, but only to a point
- Build a deal
- Treat the other party with respect
- Be persuasive
- Focus on interests / positions
- Be a problem solver
- Work past anger
- Be patient

Mediation

- If an agreement is reached, you will be expected to keep it. If an agreement isn't reached, a hearing or trial will be set.
- Even if parties do not resolve the dispute, mediation frequently will "bring out" the real issues and enhance communications between the parties, fostering an improved working relationship.

Trial

- Trial is a structured process where the facts of a case are presented to a judge or jury, and they decide if the plaintiff has proven their case or not
- During trial, each party uses witnesses and evidence to prove their case to the jury
- Standard of proof: Preponderance of the evidence: just over 50% / more likely than not

Trial

- Judge makes decisions about the law
- Jury or Judge (if no jury) makes decisions about the facts
- Jury evaluates evidence presented to decide whether the plaintiff has met its burden of proof or the defendant has proven its affirmative defenses

Trial

- Always understand the claims
- Analyze your case
- Prepare documents and evidence
- Prepare your witnesses

Trial

- Consult with representatives
- File Complaint / Pleadings
- Discovery
- Trial
- Verdict
- Appeal

Trial

- Pre-trial Motions (in limine)
- Voir Dire
- Opening Statement
- Plaintiff's Case
- Defendant's Case
- Plaintiff's Rebuttal
- Closing Arguments
- Verdict

QUESTIONS?