



Understanding and Addressing Risk in Complex Transactions

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Standardized Contract Terms

Goals of presentation:

- Identify pros and cons of public contracting process (focus on public works/construction)
- Discuss key areas of contractual risk
- Mitigate the risk through contract terms



Low Bidding

Questions for the group:

- Does provide industry utilize low bidding?
- Do your clients ever want to find ways to avoid low bidding?
- What are the drawbacks of this approach?
- What are the advantages?



The Big Picture

Contractors want to:

- Increase the overall contract cost, and
- Reach a settlement of claims

The goal of a public construction contract is to:

- Control cost overruns, and
- Level the playing field in settlement negotiations

Use your contract forms to your advantage!

- Never use AIA or other industry forms
- Never rely on Greenbook with modifications



Change Orders/Extra Work

The Contractor is not liable for:

- Extra work resulting from unforeseen conditions
- Extra costs resulting from design errors
- Owner-ordered changes to the work or design
- Unreasonable delays

PCC 7102: Contract provisions that limit the contractor's liability to an extension of time for delay shall not be construed to preclude the recovery of damages by the contractor or subcontractor.



Change Orders (Notice)

Tip 1: Review notice, request and waiver provisions.

Greg Opinski Construction, Inc. v. City of Oakdale, 199 Cal.App.4th 1107 (2011):
Contractor's failure to give notice of change order waives claim, even if the City caused the change order.

But see also *FTR International, Inc. v. Rio School District* (2015) (unpublished):

- School made it impossible to comply with notice provisions (damages weren't known at the time notice required)
- Court found notice given because contractor complained at public comment at a school board meeting.



Change Orders (Notice)

Examples:

Notice of Change. With respect to any matter that may involve or require an adjustment to the Contract Price, Contractor shall provide written notice of the underlying facts and circumstances that gave rise to the proposed change, within the following times:

- (i) If due to unknown subsurface or latent physical conditions, within three (3) days from the discovery date or prior to the alterations of the conditions, whichever is earlier.
- (ii) If due to any other matter that may involve an adjustment to the Contract Time or the Contract Price, within seven (7) days from the discovery date.

Change Order Request. [Excerpt] If any added costs or information cannot be determined at the time of the Change Order Request, Contractor shall identify the reason the costs or information cannot be determined. For any costs or information that cannot be determined at the time Contractor submits the Change Order Request, Contractor shall submit to City notice of the costs or information and all supporting documentation within three (3) days of when the costs or information become subject to determination.



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Change Orders (Mark-Ups)

- How is Extra Work compensated?
 - Unit Prices
 - Negotiation
 - Time and Materials (force account)
 - Actual Cost + Mark-Up



Change Orders (Mark-Ups)

- Tip: Set allowable costs and mark-ups by contract
 - Greenbook: “reasonable mark-up”
 - CalTrans: allows for very high mark-ups
 - Best practice: establish percentages

Example:

For Work performed by the Contractor’s forces the allowed mark-up shall not exceed fifteen (15%) percent of Labor costs, ten percent (10%) of Material costs, and ten percent (10%) of the cost of Tools and Equipment use.



Change Orders (Documenting)

- Additional costs following change order?
- Tip: use a change order form that includes language encompassing all costs, including any delay damages
- *Example:* Contractor accepts the terms and conditions stated herein as full and final settlement of any and all claims arising from this Change Order. The adjustments to the Contract Price and Contract Time in this Change Order constitute the entire compensation and/or adjustment thereto due to Contractor, including but not limited to all direct, indirect, consequential, profit, labor, equipment, tools, idle time, incidentals, and overhead (field and home office) costs, due to Contractor arising out of or related to the change in the Work covered by this Change Order.



Delay Damages

- How are delay damages calculated?
 - Actual delay costs
 - Reverse liquidated damages

PCC 7102: This section shall not be construed to void any provision in a construction contract which requires notice of delays, provides for arbitration or other procedure for settlement, or provides for liquidated damages.



Delay Damages

- Example:

Contractor will be compensated for damages incurred due to unreasonable delays for which the City is responsible. The parties agree that determining Contractor's exact delay damages is and will continue to be impracticable and extremely difficult. As such, for each calendar day in excess of the time agreed upon for completion of the work, the City shall pay to the Contractor **\$[***INSERT AMOUNT***]** per day, as reverse liquidated damages and not as a penalty or forfeiture. Such amount shall constitute the only payment allowed for any City caused delays and shall necessarily include all overhead, all profits, all administrative costs, all bond costs, all labor, materials, equipment and rental costs and any other costs, expenses and fees incurred or sustained as a result of such delays.

Question: How do you calculate Reverse LDs?



Delay Damages

- Other considerations:
 - Ensure that your contract only pays damages for **critical path delays**.
 - Meaning, delays to the ultimate completion of the project.
 - Require the contractor to regularly submit updated schedules showing completion date.
 - Force majeure delays?
 - Don't ever forget to include standard liquidated damages for contractor delays



Claims Procedures

- Governed by statute:
 - PCC 9204 – all claims. Requires mediation for unresolved disputes.
 - PCC 20104 – claims <\$375k. Requires judicial mediation
- *Statutes are not consistent but both might apply.



Claims Procedures

- Considerations for claims statute:
 - When does mediation occur?
 - Ensure that failure to give notice, request a change order, etc. constitutes a waiver.
 - Incorporate claims filing deadlines.



Additional Considerations

- Termination for convenience
- Attorney's fees provision
- Arbitration
- Performance Bond terms



Practical Considerations

- Include Public Works/Engineering staff in contract template reviews and updates
- Eliminate terms that are not used in practice
- Work with Public Works/Engineering staff to ensure that they are willing/able to implement contract terms
- Keep in mind that field staff have to work with contractors daily

