



BEST PRACTICES FOR CHANGE ORDER MANAGEMENT

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Presented by:

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Mary A. Salamone, Esq.

- Construction Law Partner with Procopio based in Orange County with 34 years of experience
- Experienced in all aspects of public and private construction projects and disputes
- Has handled multi-million dollar disputes on high profile, complex construction projects, including:
 - \$2 billion mega-development Metropolis in Los Angeles
 - \$1.8 billion Port of Long Beach Middle Harbor Redevelopment
 - Walt Disney Concert Hall in Los Angeles
 - Freight and light rail systems in California and Nevada
 - 128-mile buried petroleum pipeline
 - \$500-million stadium in Glendale, Arizona, home to the Arizona Cardinals
 - \$2 billion earthen dam in Hemet, California
 - \$2 billion Las Vegas strip casino and retail mall



Mary A. Salamone, Esq.

- Recipient of numerous awards and recognitions, including:
 - Best Lawyers in America® - 2018 - present
 - Best Lawyers in America® Lawyer of the Year, Litigation–Construction 2019/2022
 - Ranked by Chambers USA® for Construction Law for over a decade
 - “Top Lawyers,” *San Diego Magazine*, 2021
 - 2021 Woman Leader in the Law, *American Lawyer Magazine*
 - 2022 Super Lawyers® for Southern California in Construction Law
 - Martindale-Hubbell AV Preeminent® rating
 - Fellow of the Construction Lawyers Society of America
- Panel member for the American Arbitration Association for Large, Complex Construction Disputes
- Certified Arbitrator for the Office of Administrative Hearings - Public Works Contract Arbitration Program
- Member of Industry Organizations: AGC, ABC, CMAA, DBIA, and NAWIC

William A. Cook, P.E.

Partner – HKA

- **BS, Civil Engineering, Rutgers University, New Brunswick, New Jersey, 1975**
- **Registered Civil Engineer, California, No. 34497, 1982**
- **Member, National Board of Directors,
Past President - Los Angeles Chapter,
Construction Management Association of America**
- **Lifetime Member, American Society of Civil Engineers**



Performance Experience:

- Schedule
- Schedule
- Design Re
- Construct
- Value Eng
- Estimatin
- Cost Cont
- Quality As
- Project Fe
- Construct

Project & Construction Manager
Heavy Civil to Hospitals & Hotels

FIELD

Testifying Expert Witness
Schedule / delay
Quantum / damages
Standard of care

COURTROOM

tion

Webinar Agenda

- 1 Notice Requirements
- 2 Causes of Change
- 3 Authority to Issue-Duty to Proceed
- 4 Pricing Methodology
- 5 Schedule Delay and Impact
- 6 Change Order Administration
- 7 Claims and Disputes

**LET'S GET
STARTED!**

Change Orders

Barring miracles, change orders are a fact of life

- Every project is unique – never before designed or built
- Drawing is small-scale representation and cannot reflect full detail of work
- Architecture, engineering and design are not exact sciences
- Thousands of details spread over dozens of sheets – all which need to be coordinated and checked for conflicts
- Alteration of one detail may affect countless others
- Differing site conditions encountered



Change Orders

Contractor's Perspective



Change Orders

Owner's Perspective



Notice Requirements

Notice Requirements

- Contracts require Contractor to provide Owner with prompt written notice after triggering event
- Types of notice:
 - ▶ differing site conditions
 - ▶ deficiencies in plans & specs
 - ▶ changed/extra work
 - ▶ delays/schedule impact
- Rationale:
 - ▶ Owner has opportunity to investigate situation
 - ▶ Owner can consider alternative measures
 - ▶ Owner can actively participate in resolution and monitoring of work to mitigate potential costs
- Contract may also require quantification of claim and supporting documentation within a certain time period

Notice Requirements

- Read your contract! Requirement for contractor to provide Owner with prompt **written notice** after triggering event.
- Many contracts require an **initial notification followed by a submission** of schedule analysis, detailed costs and supporting documentation.
- Implement strict compliance guidelines for each project - including timing and manner of delivery.
- Types of notice
 - differing site conditions
 - errors & omissions in plans & specs
 - changed/extra work
 - schedule delays and impacts
- Beware that **failure to provide** can constitute waiver of rights.
Rationale: Owner has opportunity to investigate and actively participate in resolution and potentially mitigate damages



Notice Requirements

AIA A201-2017 General Conditions



2. take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
3. except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 In case of such termination for the Owner's convenience, the Owner shall pay the Contractor for Work

§ 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

other party. In such event, no decision by the Initial Decision Maker is required.

§ 15.1.4 Continuing Contract Performance

§ 15.1.4.1 Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

§ 15.1.4.2 The Contract Sum and Contract Time shall be adjusted in accordance with the Initial Decision Maker's decision, subject to the right of either party to proceed in accordance with this Article 15. The Architect will issue Certificates for Payment in accordance with the decision of the Initial Decision Maker.

§ 15.1.5 Claims for Additional Cost

If the Contractor wishes to make a Claim for an increase in the Contract Sum, notice as provided in Section 15.1.3 shall be given before proceeding to execute the portion of the Work that is the subject of the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

§ 15.1.6 Claims for Additional Time

§ 15.1.6.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section 15.1.3 shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

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Notice Requirements

EXHIBIT "B"

8.2 CONTRACT TIME ADJUSTMENTS

8.2.1 Extensions and Shortenings.

.1 **Extensions.** The Contract Time shall not be adjusted for Unexcused Delays and shall be subject to extension by Contract Adjustment in accordance with the provisions of this [Article VIII](#) for Excusable Delays and Compensable Delays.

.2 **Shortenings.** Contractor shall within ten (10) Days after receiving notice of Deleted Work prepare and deliver to Owner a Time Impact Analysis of the impact of the Deleted Work upon the critical path that shows

8.3 REQUESTS FOR EXTENSION

8.3.1 Submission. Contractor shall, within seven (7) Days the Discovery Date of circumstances that constituting a basis for Contract Adjustment on the grounds of Compensable Delay, submit to the Owner a complete or preliminary draft of a Change Order Request. If a preliminary draft is submitted, it shall be followed within twenty-one (21) Days after said Discovery Date with a complete Request for Extension that includes all information and data required by [Paragraph 8.3.3](#), below; provided, however, that with respect to a Compensable Delay that is continuing Delay, the portion of the Request for Extension that relates to any Delay that has not yet occurred shall, be updated no less frequently than monthly to reflect the status and effects of such continuing Delay.

to which the Contractor believes it is entitled pursuant to [Section 3.5](#) of the Construction Contract.

8.3.4 Noncompliance. Failure by Contractor to provide a timely and complete Request for Extension in accordance with this [Section 8.3](#) under circumstances where a Request for Extension is required by this [Section 8.3](#) shall constitute a waiver by Contractor of the right to a Contract Adjustment on account of such circumstances.

8.3.5 Formal Notice of Essence. Contractor recognizes and acknowledges that timely submission of a complete Request for Extension, whether or not the circumstance of the Change that is the subject of the Request for Extension may be known by, or available to, the Owner through other means or from other sources, is not a mere formality but is of crucial importance to the ability of the Owner to promptly identify, prioritize, evaluate, and mitigate the potential effects of Changes. Any forms of informal notice, whether verbal or written (including, without limitation, statements at regular job meetings or entries in monthly reports, daily logs, job meeting minutes, updated Construction Schedules, or look-ahead schedules), that do not strictly comply with the formal requirements of this [Section 8.3](#) shall therefore be deemed insufficient to satisfy the notice requirements of this [Article VIII](#).

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8.3.3 **Content.** Each Request for Extension in order to be considered complete shall include all of the following:

.1 a detailed description of the circumstances giving rise to the Delay and the reasons why Contractor believes the Delay constitutes a Compensable Delay or Excusable Delay;

.2 a Time Impact Analysis showing the impact of the Delay upon Contractor's ability to perform the Work in accordance with the requirements of the Contract Time; and

.3 if the Contractor intends to seek a Contract Adjustment the Contract Price, General Conditions Lump Sum, and General Requirements Lump Sum for Compensable Delay, a calculation of the additional compensation to which the Contractor believes it is entitled pursuant to [Section 3.5](#) of the Construction Contract.

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Notice Requirements

Peter Kiewit Sons' Co. v. Pasadena City Jr. College Dist.
59 Cal.2nd 241 (1963)

FACTS

- Contract required work to be performed within 300 days after notice of proceed, and provided for liquidated damages in the event of late completion.
- Contractor required to submit written request for time extension.
- Contractor failed to complete work on time and did not request time extension in accordance with contract.
- Contractor argued that delays were caused by owner.

Notice Requirements

Peter Kiewit Sons' Co. v. Pasadena City Jr. College Dist.
59 Cal.2nd 241 (1963)

HOLDING

- Contractor's failure to request a time extension, make a delay claim, or give required notice excused where delays caused by public owner.
- Supreme Court relied on then-existing Civil Code §1511 which excused untimely performance for owner-caused delays notwithstanding any contrary contractual provision.

Notice Requirements

Peter Kiewit Sons' Co. v. Pasadena City Jr. College Dist.
59 Cal.2nd 241 (1963)

LEGISLATIVE RESPONSE

- Legislature amended Civil Code §1511 in 1965 to permit parties to specify by contract that written notice of owner-caused delay must be given within a *reasonable* time
 - *Peter Kiewit* holding abrogated
- ➔ Prior arguments such as owner-caused delay, actual knowledge, and no prejudice to owner will most likely be rejected by court

Notice Requirements

Greg Opinski Construction Inc. v. City of Oakdale
199 Cal.App.4th 1107 (2011)

FACTS

- Contract required written change order for all modifications to price or time.
- Contractor required to submit request for time extension within 30 days of triggering event.
- No extensions of time valid unless made in accordance with contract.
- Contractor completed work late and City assessed LDs.
- Contractor argued it was excused from notice requirement because City caused delay.

Notice Requirements

Greg Opinski Construction Inc. v. City of Oakdale
199 Cal.App.4th 1107 (2011)



HOLDING

- Under Civil Code §1511, a party may require procedures to be followed when requesting extensions of time.
- Contractor's failure to give notice of delay claim in accordance with contract barred defense based on City's alleged fault.
- Court would not consider any evidence that timely performance was rendered impossible by City.
- Assessment of liquidated damages upheld.

Authority to Issue Duty to Proceed

Change Orders

In the beginning, read the Contract!

Before any extra work is performed, it is crucial to have a complete understanding of the Contract, particularly those sections defining technical scope of work and establishing timeframes and procedures for changes to the Contract.

Change Orders

Authority to Issue

- Changes initiated by Owner (RFP)
 - ▶ Request to Contractor to submit proposal for a change
- Changes requested by Contractor (COR)
 - ▶ Design directive from engineer, unforeseen condition, requirements of building inspectors, etc.



Change Orders

Authority to Issue

- Review contract to investigate who has authority to order changes in work
- A/E is frequently given authority for minor changes that do not involve extra costs
- Contractual requirement that all changes be in writing is considered valid and will be enforced by Courts to protect owners

➡ Avoid verbal directives!



Change Orders

Oral Change Orders-Public Works

P&D Consultants, Inc. v. City of Carlsbad (2010)

190 Cal.App.4th 1332

FACTS

- P&D provided civil engineering services for redesign of municipal golf course.
- Contract provided no amendments, modifications or waiver of contract terms without signed written agreement.
- City PM frequently authorized P&D to proceed with extra work before receipt of executed amendment because it took City several weeks to execute amendments.
- Parties disagreed on SOW and price for Amendment No. 5.

Change Orders

Oral Change Orders-Public Works

P&D Consultants, Inc. v. City of Carlsbad (2010)

190 Cal.App.4th 1332

FACTS (CONT'D)

- City notified P&D that Amendment No. 5 would authorize work on T&M basis for a NTE \$99,810 and verbally authorized extra work.
- P&D threatened if City did not pay for extra work beyond scope of Amendment No. 5 then P&D would discontinue work.
- City told P&D to continue work and it would “take care of it”.
- City PM told P&D a 6th amendment was prepared and “in accounting”.
- Ultimately, City refused to pay for extra work not in Amendment No. 5 and P&D sued.

Change Orders

Oral Change Orders-Public Works

P&D Consultants, Inc. v. City of Carlsbad (2010)

190 Cal.App.4th 1332

HOLDING

- Court found P&D acted at its own peril when it relied on oral authorization and prior conduct of parties in handling amendments.
- People dealing with public agencies are “presumed to know the law with respect to any agency’s authority to contract”.



Change Orders

Oral Change Orders-Public Works

G. Voskanian Const., Inc. v. Alhambra Unified School District
204 Cal.App.4th 981 (2012)

FACTS

- Voskanian was contractor on portable building relocation project which did not include fire alarm systems.
- Later the District solicited competitive bids for fire alarm scope.
- District conducted a job walk but bidders were only allowed to view 2 of 16 building interiors only from doorways.
- Fire alarm system plans given to bidders after job walk.
- Voskanian was successful bidder and awarded separate contract for fire system alarm.

Change Orders

Oral Change Orders-Public Works

G. Voskanian Const., Inc. v. Alhambra Unified School District
204 Cal.App.4th 981 (2012)

FACTS (CONT'D)

- Upon completion of work, Voskanian submitted claim (in accordance with contract procedures) for extra work on fire alarm contract for alarm devices, conduit and wiring needed for rooms not shown on plans.
- District refused to pay on basis that no modifications were approved in writing by governing board.

Change Orders

Oral Change Orders-Public Works

G. Voskanian Const., Inc. v. Alhambra Unified School District
204 Cal.App.4th 981 (2012)

HOLDING

- Court reiterated the holding of *P&D Consultants*.
- Public agency not bound to any extent by an officer's acts in excess of his/her authority.
- However, Court found exception in that Contractor was misled by incorrect plans & specs in violation of implied warranty of accuracy and allowed recovery of costs.

Change Orders

Duty to Proceed

- Contracts allow Owner to issue changes and impose on Contractor duty to proceed under protest pending later resolution of claims.
- Contractor should flow-down same requirement to subcontractors.
- Rationale:
 - ▶ Inevitability of changes
 - ▶ Protects Owner against work stoppages or delays

Change Orders

Duty to Proceed

- Failure to proceed is material breach of contract.
- Only restriction is that change must be regarded as “fairly and usually within the contemplation of the parties when the contract was entered into”. [as defined by U.S. Supreme Court in *Freund v. United States*, 260 US 60 (1922)]



Change Orders

AIA A201 General Conditions

§ 7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- .1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- .2 unit prices stated in the Contract Documents or subsequently agreed upon;
- .3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- .4 as provided in Section 7.3.6.

§ 7.3.4 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any,

§ 7.3.4 Upon receipt of a Construction Change Directive, **the Contractor shall promptly proceed with the change in the Work** involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

§ 7.3.8 Pending final determination of the total cost of a Construction Change Directive to the Owner, amounts not in dispute for such changes in the Work shall be included in Applications for Payment accompanied by a Change Order indicating the parties' agreement with part or all of such costs. For any portion of such cost that remains in dispute, the Architect will make an interim determination for purposes of monthly certification for payment for those costs. That determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a claim in accordance with Article 4.

§ 7.3.9 When the Owner and Contractor agree with the determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

§ 7.4 MINOR CHANGES IN THE WORK

§ 7.4.1 The Architect will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

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Major Sources of Changes



Change Orders

Major Sources of Changes

- Owner enhancements
- Defective plans and specifications
- Differing site conditions

Change Orders

Owner Enhancements

- Accommodate changes in Owner/Tenant need or use
- Recognition of potential improvement or problem once work in place vs. drawing review stage
- Know what you want to build beforehand and avoid “custom housing”
- Do not embark on full-scale value engineering exercise while project is underway

Change Orders

Defective Plans and Specifications

- **No implied warranty** that project can be built for contract price or within time specified
- Contractor is not required to prove fraud, negligence or any other wrongdoing by Owner
- **Boilerplate disclaimers** will not void implied warranty of accuracy
Example: Standard clause requiring contractor to inspect site, examine specs and verify accuracy
- No recovery for patent or obvious defects

Change Orders

Defective Plans and Specifications

Tell-tale signs of potential design problems:

- Submittals/Shop Drawings Revisions
- Requests for Information/Requests for Clarification
- Field Directives/Construction Change Directives
- Bulletins/Supplemental Instructions/Plan Clarifications
- Change Order Requests

Change Orders

Defective Plans and Specifications

Suggested measures:

- Select design team with specific experience
- Dedicate more resources on upfront design effort
- Use of BIM (Building Information Modeling) programs
- Peer review (A/E)
- Constructability review
 - ▶ Identifies lack of coordination between documents/disciplines
 - ▶ Perform during design development phase and before construction documents completed

Change Orders

Defective Plans and Specifications

Errors & Omissions Claims

- Professional standard of care \neq Perfection
- If changes exceed 10% of contract value, contact counsel for possible E&O claim

Change Orders

Defective Plans and Specifications

Fundamental Principle of Construction:

Spearin Doctrine

(*U.S. v. Spearin* (1918) 248 U.S. 132)

- Owner impliedly warrants that project can be constructed from the plans and specifications which are reasonably free from defect
- Applies to both public and private works of improvement

Change Orders

Differing Site Conditions

- Usually a Contractor's duty to investigate site prior to submission of bid does not require an investigation of hidden subterranean conditions.
- Unless required by statute or contract, Contractor entitled to assume that Owner adequately investigated site.
- Without DSC clause, Contractor would add a contingency amount resulting in a higher bid to account for unknown subsurface conditions.



Change Orders

Differing Site Conditions

- Type I

Contractor encounters subsurface or related physical conditions that differ materially from those indicated in the contract documents.

Examples:

- Soils not as shown in geotechnical report
- Hazardous materials
- Buried structures and/or fill (prior users)
- More rocks/boulders than shown in logs/borings



Remember: No Type I DSC in the absence of an express statement in the contract documents

Change Orders

Differing Site Conditions

- Type II

Contractor encounters unknown physical conditions of an unusual nature at the site differing materially from those ordinarily encountered and recognized as inherent in work of that character.

Examples:

- Cattle bones beneath an inlet structure
- Removal of 600-700 gallons of subsurface oil during excavation of prison site
- Concrete beams, automobile parts and railroad ties were not within ordinary definition of rubble in excavation contract
- Buried gas line, construction debris and footings

Change Orders

Differing Site Conditions – Public Contract Code § 7104

West's Ann.Cal.Pub.Con.Code § 7104

§ 7104. Contracts for digging trenches or excavations; notice on discovery of hazardous waste or other unusual conditions; investigations; change orders; effect on contract

Effective: January 1, 2007

[Currentness](#)

Any public works contract of a local public entity which involves digging trenches or other excavations that extend deeper than four feet below the surface shall contain a clause which provides the following:

(1) Material that the contractor believes may be material that is hazardous waste, as defined in [Section 25117 of the](#)

(a) That the contractor shall promptly, and before the following conditions are distributed, notify the local public entity in writing, of any:

(3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

(2) Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids.

provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties.

Change Orders

Differing Site Conditions

Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility District 149 Cal.App.4th 1384 (2007)

FACTS

- CJA was low bidder on project to install pier foundations in hillside adjacent to hydroelectric powerhouses.
- Work required boring holes into hillside for foundations.
- During bid process, owner provided information regarding borings taken adjacent to site.
- Materials stated compression tests for rocks at two of the borings were 3,600 psi and 7,300 psi.

Change Orders

Differing Site Conditions

Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility District 149 Cal.App.4th 1384 (2007)

FACTS (CONT'D)

- After CJA began work, it encountered rocks with a strength of more than 13,000 psi.
- Contract contained a general disclaimer regarding soil reports provided by Owner:

➔ *“It is sole responsibility of the Contractor to evaluate the jobsite and make his own technical assessment of subsurface conditions...The District makes no guarantee for the soil report accuracy...The District will make no additional compensation...if subsurface soil conditions are different... .”*

Change Orders

Differing Site Conditions

Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility District 149 Cal.App.4th 1384 (2007)

HOLDING

- Court found that disclaimer language in contract negated the DSC clause required by Public Contract Code §7104 since it wholly denied responsibility for subsurface conditions “indicated”.
- “Indicated” can either be a positive statement about the condition in bidding information or an inference about the condition arising from that information.

Change Orders

Weather

- Must be unusually severe for geographic region (consult National Oceanic and Atmospheric Administration)
- Force majeure event that is **non-compensable** time extension unless
 - ▶ **Owner-caused delays** pushed work into rainy season
- **Entitlement** to actual days of rain and impact days (i.e., drying out and clean-up)
- No time if not weather-sensitive work
- Weather must impact **critical path** work

Suggestion: Perform weather study and include schedule of anticipated weather days in contract

Pricing Changes

Change Orders

Pricing Changes

- Most “Changes” clauses contain administrative procedure whereby Contractor may obtain reimbursement for added costs
 - ▶ Lump Sum/Fixed Price
 - ▶ Time & Materials
 - ▶ Unit Price



Change Orders

Pricing Changes

- Agreement on entitlement and quantum:
 - ▶ Parties execute bilateral change order
- Agreement on entitlement but not quantum:
 - ▶ Owner issues unilateral change order to pay undisputed amount

Change Orders

Pricing Changes

Fixed Price Change Orders

- Contractor estimates change
- Parties negotiate
- Lump sum agreed on
- Change Order executed and work commences

Change Orders

Pricing Changes

Fixed Price Change Orders

- Credit due for changed or deleted work?
- Material quotations and equipment rental rates from vendor
- Breakdown of labor by task, hours, labor classification and hourly rate

Change Orders

Pricing Changes

Time & Material Changes (Cost Plus)

- Agree on labor and equipment rates in advance to avoid disputes
- Preferred method by Contractors: no pricing risk
- Owner should impose an NTE amount to maintain cost controls
- Pricing method when work is done under emergency circumstances, scope is not certain or parties cannot agree on lump sum

Change Orders

Pricing Changes

Time & Material Changes (Cost Plus)

- Description of change order to validate scope of work
- Laborer names, rates and classification (i.e., journeyman, apprentice, foreman, etc.)
- Detailed description of actual work performed each day by each crew and verification of hours
- Supporting documentation, including a list of materials supplied with cost of materials, vendor invoices and equipment rental or similar cost information
- Breakdown of how the final cost amount was calculated

Change Orders

Verify work on a daily basis

ABC CONSTRUCTION CORPORATION
 1234 Main Street
 Anytown, California 99999

EXTRA WORK LOG

LABOR

DATE / DJN#:	Wed. 9/29/04 #8	ID	NAME	Classification
JOB# / NAME	0426 GPD Ray Jay Electrical	A	Jones, Roy & Smith, Zack	Foreman
CONTRACT #		B	Johnson, Chris	65% Apprentice
WORK ORDER #		C	Gibbs, Keith	60% Apprentice
PREPARER:	Roy Jones	D	Gidden, Jaime	General Foreman
		E	Locher, Kevin & Turner, Darren/Salamone, Javier	Journeyman
		F	Madigan, Marcus	Material Handler

LOCATION	WORK PERFORMED	IN	OUT	ID	HRS	RATE	EXTENDED
Total 0.00						TOTAL \$	-

Original Signed _____ DATE: _____
 Authorized Owner Representative

Original Signed _____ DATE: _____
 Authorized Owner Representative

Option: Verification of Hours Only

SUBTOTAL \$	-	
TAX 8.25%	\$	-
TOTAL	\$	-

Change Orders

Pricing Changes

Unit Price Change Orders

- Objective is to **add certainty** to possible additions and/ or corrections which may be expected to occur on job
- On many public jobs such as excavation jobs, Contractors bid the majority of their scope of work in unit prices and public agency provides **estimated quantities** in Invitation to Bid

Change Orders

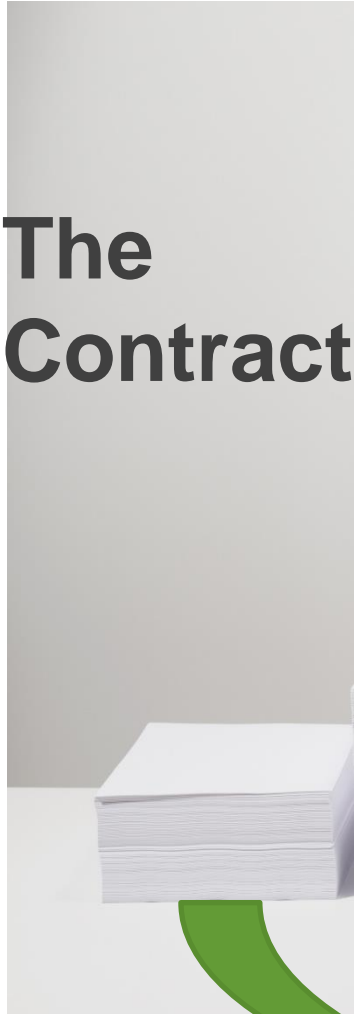
Pricing Changes

Review Contract terms for:

- Audit rights
- Escrowed bid documents
- Technical time extension requirements

Change Orders

The Contract



The Change Orders



Change Orders

Pricing Changes

Cardinal Change Doctrine

- Alteration in work so drastic that contractor required to perform duties materially different than it contracted for
 - ▶ Both quantity and magnitude of changes considered
- Frees contractor from bid and allows recovery for reasonable value of labor and materials plus markups for overhead and profit



Change Orders

Cardinal Change

Amelco Electric v. City of Thousand Oaks 27Cal.4th 228 (2002)

FACTS

- Contract awarded to Amelco with low bid of \$6,157,378.
- City changed every part of electrical work at least once.
- 240 sketches that clarified or changed electrical scope of work.
- Amelco submitted 221 change order requests.
- 32 approved change orders adding \$1,009,728 to Amelco's original contract – 17% increase.
- Amelco sued to recover actual costs less payments received (reduced claim by 5% for own inefficiencies).

Change Orders

Cardinal Change

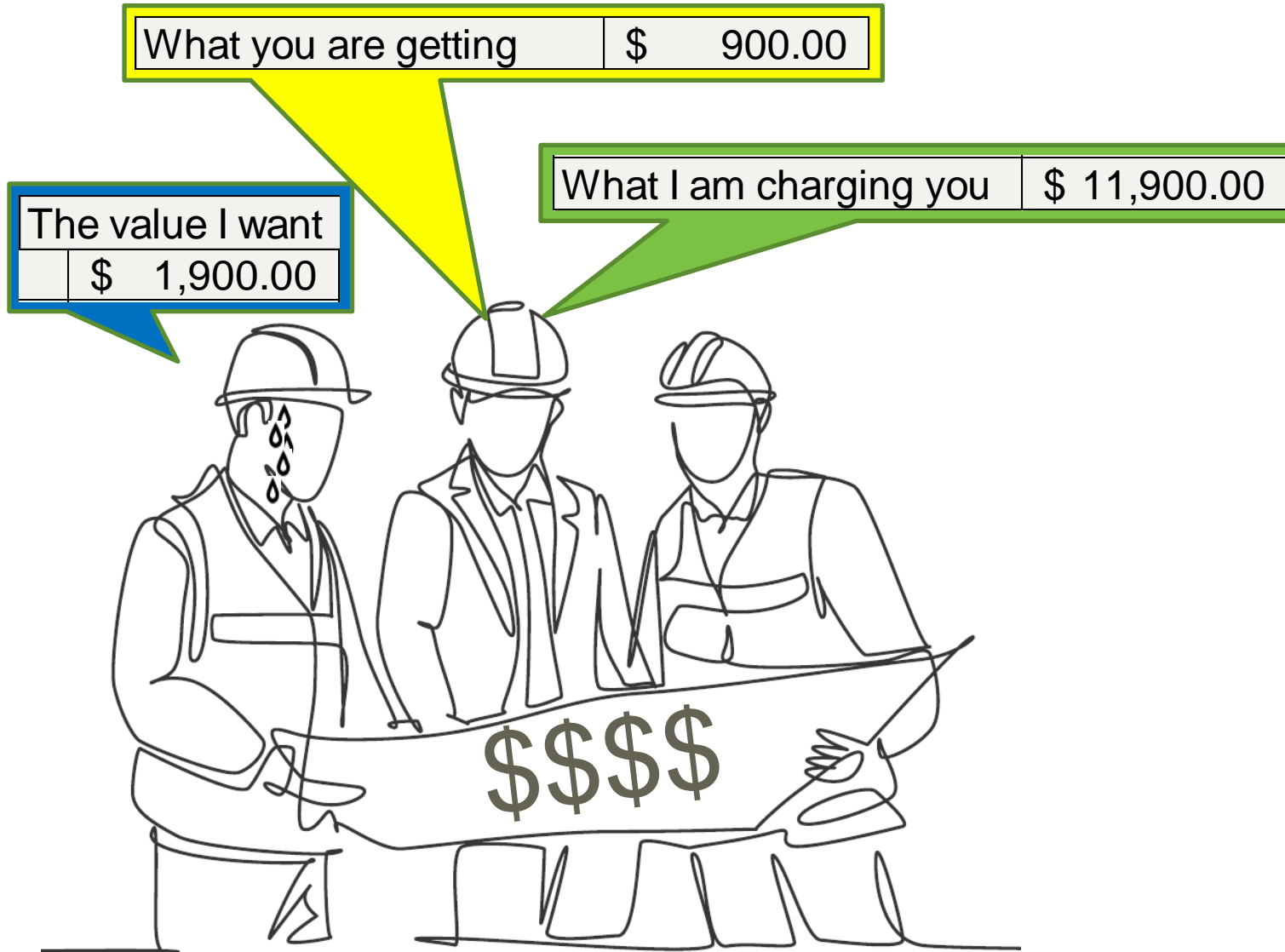
Amelco Electric v. City of Thousand Oaks 27Cal.4th 228 (2002)

HOLDING

- Court concluded that public entities may only be sued pursuant to terms of contracts entered into in accord with their municipal charters.

 Ruling does not apply to private works of improvement

False Claims Act



False Claims Act

- Article 9 of Title 2 of the California Government Code titled “False Claims Actions” (Government Code §12651 et seq.)
- Prohibits false claims for “payment or approval” that are “knowingly” submitted to State agency or local public entities
- Owner does not have to pay money to find a violation occurred
- Penalties up to \$10,000 per violation, 3x actual damages, attorney’s fees, debarment & criminal prosecution

False Claims Act

Definition of “knowingly”:

- Has actual knowledge of the information
- Acts in deliberate ignorance of the truth or falsity of the information
- Acts in reckless disregard of the truth or falsity of the information

 Proof of specific intent to defraud is not necessary!

False Claims Act

Examples of Violations

- Unbalanced bid – front end loading
- Overstated percent complete on payment application
- Cost proposals without credit for deductive work
- Time extension requests for known inexcusable delays
- Unconsented substitution of less than specified material
- Billing for work known to be within original scope of contract
- Claims for costs not incurred or work not provided

False Claims Act

Advice to Public Works Owners

- Perform a thorough investigation of the facts
- Plead allegations of a false claim with sufficient particularity, including :
 - the time, place and contents of the false representations,
 - the identity of the person making it and what he/she obtained thereby - Only allegations of the defendant's knowledge may use conclusive language
- File an action immediately upon learning of facts that would lead a reasonable person to suspect a false claim otherwise could be viewed as retaliatory

False Claims Act

Advice to Public Works Contractors

- Review the accuracy and reasonableness of all invoices, requests for payment, change order requests, and claims
- Accumulate and maintain back-up documentation
- Carefully distinguish between actual, estimated and/or contractual costs and rates in all communications with public entities
- Carefully review all subcontractor pass-through claims and require appropriate back-up documentation and sub certification of claim

Schedule Issues

Change Orders

Schedule Extension

If changes on a construction project are a certainty, then so is delay...



Scheduling

Summary of Delays

Excusable Delay



Contractor entitled to time extension but no additional compensation

Inexcusable Delay



No time extension or compensation



May be liable to Owner for liquidated damages or actual damages

Compensable Delay



Contractor entitled to time extension and additional compensation

Scheduling

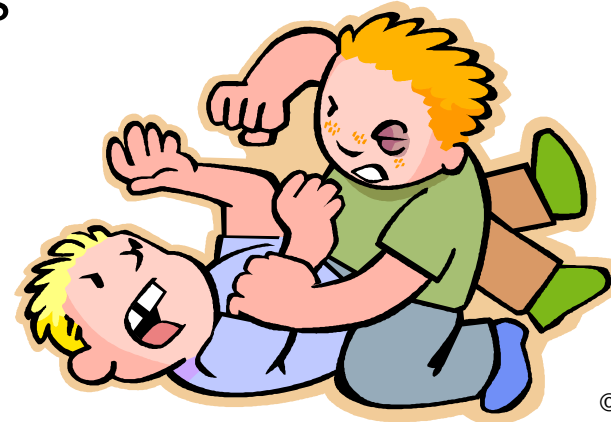
Concurrent Delay

- Two independent and overlapping delays - one caused by Owner and another caused by Contractor - both which impact the overall project completion (i.e., critical path)
 - Contractor or Owner delays may also be concurrent with a Force Majeure delay, rendering damages unrecoverable
- Owner not entitled to assess liquidated damages and Contractor not entitled to delay damages but should receive time extension to excuse delays that overlap

Scheduling

Schedule Extension

- Start with approved baseline schedule
- Only changes impacting critical path of project – controlling overall completion of project
- Monitor float consumption
 - ▶ Typically project owns float absent float sharing clause
- Enforce requirements for monthly schedule updates and delay narratives – withhold % of progress billing
- Attempt to resolve time impacts contemporaneously



Scheduling

Schedule Extension

Time Impact Analysis

- Contractor required to prepare schedule fragment depicting sequence of events to perform changed work
- Utilize schedule update in effect at time of change
 - ▶ Problem if update is mere progress payment tool
- Contractor must demonstrate *prospective* impact of changed work on forecasted critical path

Tips for Drafting a Delay Letter

- Create subject line and reference a PCO number – select a sequential number such as start with PCO-0001.
- Recipient of notice – this person is likely not on the jobsite. Review your contract.
- Provide an introduction telling them what you are going to tell them.
- Date you encountered changed conditions, etc.
- Pertinent information – pretend you have to explain this to a third party with no knowledge.
- Describe the impact in terms of time and/or cost.
- If you don't yet know impact, reserve your right to provide it at a later time.
- Refer to contract provisions that support your requested relief.
- Provide backup such as photos, daily reports, emails, RFIs, drawing references, specifications, etc.
- Notify them that you are available to meet and discuss at their convenience.
- Include after your signature who else will be getting a copy of letter and what enclosures are part of letter.

Change Order Administration

Change Orders

Administration

Change Order Drafting

- In writing and signed by parties
- Detailed scope of work to be performed
- Cross-reference all affected Contract documents
- Identify any adjustment to Contract price
- Identify any adjustment to the Contract schedule and time to complete – avoid “TBD” notation
- Review language regarding release and/or reservation of rights

Change Orders

Words of Caution

- Avoid verbal orders for extra work — typically not binding on public agencies.
- Track labor and material costs on a daily basis and have Owner or General Contractor sign to at least verify crew size, equipment and hours worked.
- Do not simply sign-off work tickets subcontractor gives you — establish authority in contract.
- Do not execute change orders with 0 days if possible schedule impact — Note “TBD.”



Change Orders

Waiver / Release Language

- Excessive changes may induce a “ripple effect” causing disruption beyond the direct effect on changed work itself so as to impact unchanged work
- Typically seen at the end of project as lost productivity or inefficiency claims from trade contractors



Change Orders

Waiver / Release Language

8. Labor, equipment and materials for revisions to the electrical plan and addition of a Heat Trace Power per (RFI-48) and (PCO 17)

ADDS	\$	2,904
TOTAL ADDS THIS CHANGE ORDER	\$	150,258
TOTAL DEDUCTS THIS CHANGE ORDER	\$	28,810
NET ADDITION THIS CHANGE ORDER	\$	121,448

The compensation (time and cost) set forth in this Change Order shall comprise the total compensation due

The compensation (time and cost) set forth in this Change Order shall compromise the total compensation due the Contractor for the work or change defined in the Change Order, **including impact on unchanged work**. By signing the 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 the interruption of schedules, extended overhead costs, delay, and all impact, ripple effect or cumulative impact on all other work under the Contract**. The signing of the Change Order Shall indicate that the Change Order constitutes full mutual accord and satisfaction for the change, and that the time and/or cost under the Change Order constitutes the total equitable adjustment owed the Contractor as a result of the change.

Change Orders

Waiver/Release Language

Reservation of Rights if No Agreement on Time

“No agreement as to impact or consequences to contract time is intended by or included in the change order. Any issue of time impact or consequences related to the work, if any, described herein is subject to negotiation, and, if resolved by the parties, will be implemented by subsequent change order.

By signing this change order, the Contractor expressly agrees that the specified compensation includes payment for all direct costs associated with the work described in the change order.”

Contract Clauses Limiting Recovery

Sample “No Damages for Delay” Clause:

Notwithstanding any other provision of this Contract, the Contractor will not be entitled to claim any Liabilities resulting from any delay or disruption (even if caused by an act, default or omission of the Owner or the Owner’s Personnel) and a claim for an extension of time will be the Contractor’s sole and exclusive remedy in respect of any delay or disruption and the Contractor will not be entitled to make any other claim.



Contract Clauses Limiting Recovery

“No Damages for Delay” Clause

- Depending on the nature of the delay and the jurisdiction where the project is located, the contractual prohibition against delay damages may well be enforceable.
- Some noted exceptions are Owner’s bad faith, fraud, gross negligence, active interference or abandonment of contract. [Abandonment can occur when parties fail to follow change order process and there are significant changes to the project drawings.]
- Prohibited in public works contracts in California.



Contract Clauses Limiting Recovery

Per Diem Clauses

- “Contractor shall be reimbursed for General Conditions and General Requirements costs at the sum of \$10,000.00 per day for such Compensable Delay that occurs over the entirety of the Contractor’s performance of the Work.”
- Sometimes these clauses are referred to as “reverse liquidated damages.”
- Review language carefully to determine if the per diem also includes all subcontractor costs.



Contract Clauses Limiting Recovery

Requirements After Claim Denial

EXHIBIT "B"

Claim shall identify the event or condition giving rise to the Claim and state its probable effect, if any, with respect to Contractor's entitlement to a Contract Adjustment.

4.2.8 Owner's Decision. A Good Faith Determination by Owner of a Claim submitted by Contractor in accordance with the provisions of this Section 4.2 shall be issued within thirty (30) Days after receipt by Owner of the completed Claim submitted and documented in accordance with the requirements of this Section 4.2. Claims for which no Good Faith Determination is issued by Owner within said time period shall be deemed denied. With respect to any Claim by Contractor for which a Good Faith Determination by Owner is timely received or that is deemed denied, if Contractor disputes such Good Faith Determination or deemed denial, then it shall personally deliver to Owner a written protest within thirty (30) Days after either: (1) the date of receipt of Owner's Good Faith Determination on the Claim; or (2) the date that the Claim is deemed denied pursuant to this Paragraph 4.2.8 if no Good Faith Determination has been issued. If Contractor fails to do so, the Good Faith Determination or deemed denial of the Claim will, without further notice, become final and binding upon Contractor.

4.2.7 Noncompliance. Strict compliance with the requirements of this Section 4.2 shall be considered a condition to Contractor's rights to assert a Claim and to initiate or seek a determination of its rights in litigation or arbitration with respect to such Claim.

4.2.8 Owner's Decision. A Good Faith Determination by Owner of a Claim submitted by Contractor in accordance with the provisions of this Section 4.2 shall be issued within thirty (30) Days after receipt by Owner of the completed Claim submitted and documented in accordance with the requirements of this Section 4.2. Claims for which no Good Faith Determination is issued by Owner within said time period shall be deemed denied. With respect to any Claim by Contractor for which a Good Faith Determination by Owner is timely received or that is deemed denied, if Contractor disputes such Good Faith Determination or deemed denial, then it shall personally deliver to Owner a written protest within thirty (30) Days after either: (1) the date of receipt of Owner's Good Faith Determination on the Claim, or (2) the date that the Claim is deemed denied pursuant to this Paragraph 4.2.8 if no Good Faith Determination has been issued. If Contractor fails to do so, the Good Faith Determination or deemed denial of the Claim will, without further notice, become final and binding upon Contractor.

4.2.9 Continuous Performance. Contractor shall maintain performance of its obligations, without interruption, suspension, or slowing, in compliance with all Good Faith Determinations made by Owner, including, without limitation, Good Faith Determinations of Claims; however, unless the Contract Documents otherwise state that a Good Faith Determination is final and binding or that Contractor waives its rights, such Good Faith Determinations

Contract Clauses Limiting Recovery

Limitation on Change Order Recovery:

“Payment on account of pending changes made by Owner shall be made **only if Contractor receives a change order from the Owner for Subcontractor's changed work**, and then, Contractor’s liability to Subcontractor shall be limited to the amount of the Owner’s change order allocable to Subcontractor's changed work. Each payment to Subcontractor on account of pending change orders shall be equal to Subcontractor's allocable share of Contractor's payment from the Owner for the pending change as determined by Contractor.”



Contract Clauses Limiting Recovery

Waiver of Consequential Damages

shall not preclude Contractor from seeking to have its rights adjudicated or arbitrated in accordance with the dispute resolution provisions of the Contract Documents.

4.3 LATENT DIFFERING SITE CONDITIONS

4.3.1 Notice to Owner. If Contractor encounters conditions it believes constitute Latent Differing Site Conditions, then Contractor shall, before such conditions are disturbed, give written notice to Owner stating, without

Except as otherwise provided in this Section 4.5, the Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to the Construction Contract. This mutual waiver includes

4.5.1 damages incurred by the Owner for rental expense, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

4.5.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for home office overhead, for impairment of bonding capacity, for losses of financing, business and reputation, and for loss of profit.

Except as otherwise provided in this Section 4.5, the Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to the Construction Contract. This mutual waiver includes

4.5.1 damages incurred by the Owner for rental expense, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

4.5.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for home office overhead, for impairment of bonding capacity, for losses of financing, business and reputation, and for loss of profit.

This waiver is applicable, without limitation, to all consequential damages due to either Party's termination in accordance with Article XIV, below. Nothing contained in this Section 4.5 shall be deemed to (a) preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents, (b) limit a Party's rights or recovery under any policy of insurance; (c) preclude a Claim by a Party if and to the extent such Party's recovery upon such Claim under a policy of insurance is unavailable due to a failure by the other Party to comply with its insurance obligations under the Contract Documents, (d) preclude a Claim by a Party arising from willful misconduct or gross negligence, or (e) preclude a Claim by Owner for up to \$500,000 of consequential damages within the scope of the waiver under this Section 4.5 and with respect to which recovery is not provided by or available from a policy of insurance.

Claims and Disputes



Claims Avoidance

Common Sense Principles

- Art of documentation
- Early identification/investigation of problems —
The “ostrich” mentality
- Rational evaluation of options
- Know strengths and weaknesses of your position
- Understand what other party is claiming — “Walk a mile in their shoes”
- Avoid bipolarization – The “us vs. them” syndrome
- Continue to follow-up

Essential Record Keeping

- Original Estimate and Bid Documents (e.g., takeoff, worksheets, management cuts)
- Daily Progress Reports
- Photographs and Videos
- Meeting Minutes
- Baseline Schedule and Monthly Updates
- Detailed Job Cost Report



➤ Remember: Written documents are given more weight by a trier of fact than a person's memory – If it wasn't written, it wasn't said!

Public Works Claims Legislation

Public Contract Code §9204

- New legislation standardizes the claims procedures for virtually all public works contracts entered into on or after January 1, 2017 with exception of projects under the jurisdiction of the following State departments:

Department of Water Resources

Department of Transportation

Department of Parks and Recreation

Department of Corrections and Rehabilitation

Military Departments

Department of General Services

High-Speed Rail Authority



Public Works Claims Legislation

Public Contract Code §9204

- New statute represents legislature's response to a perceived problem in industry whereby owners delay resolution of change order disputes effectively requiring contractors to finance the cost of extra work
- All public agencies subject to Section 9204 must include in their bid documents either text of statute or accurate summary
- Any waiver of rights granted by statute is void



Public Works Claims Legislation

Public Contract Code §9204

Three step process:

Step 1: Written Claim

- Submit a written claim to public owner by registered mail or certified mail with return receipt requested
- Claim must be supported by “reasonable documentation”
- “Claim” is defined broadly to include the following:
 - (a) a time extension, including, without limitation, for relief from damages or penalties for delay assessed by a public entity;
 - (b) payment by the public entity of money or damages arising from work done by, or on behalf of, the contractor pursuant to the contract and payment for which is not otherwise expressly provided or to which the claimant is not otherwise entitled; or
 - (c) payment of an amount that is disputed by the public entity

Public Works Claims Legislation

Public Contract Code §9204

Three step process:

Step 1: Written Claim

- Upon receipt of a claim, the public entity must conduct a “reasonable” review of the claim and provide a written statement to the contractor **within 45 days** identifying which portions of the claim are disputed and which portions are undisputed
- 45-day deadline is subject to a number of exceptions:
 - 1) Parties may extend the 45-day time period by mutual agreement
 - 2) If public entity requires the approval of its governing board and its board does not meet within the 45-day time period, the time to respond is extended until 3 days after the next regularly noticed meeting
 - 3) Public entity’s failure to respond to the contractor’s claim within the time periods specified is deemed a rejection of the claim in its entirety

Public Works Claims Legislation

Public Contract Code §9204

Three step process:

Step 2: Meet and Confer Conference

- For any remaining dispute, the contractor can demand an informal meet and confer conference which shall be held **within 30 days**.
- Within **10 business days after the meet and confer conference**, the public entity must prepare a written statement describing the portions of the claim remaining in dispute and the portions of the claim that are undisputed. If the public entity fails to do so, the claim is deemed rejected in its entirety.
- Payment on the undisputed portions of the claim must be made to the contractor **within 60 days** after the public entity issues its written statement (subjects it to prompt payment penalties of 7% per annum).

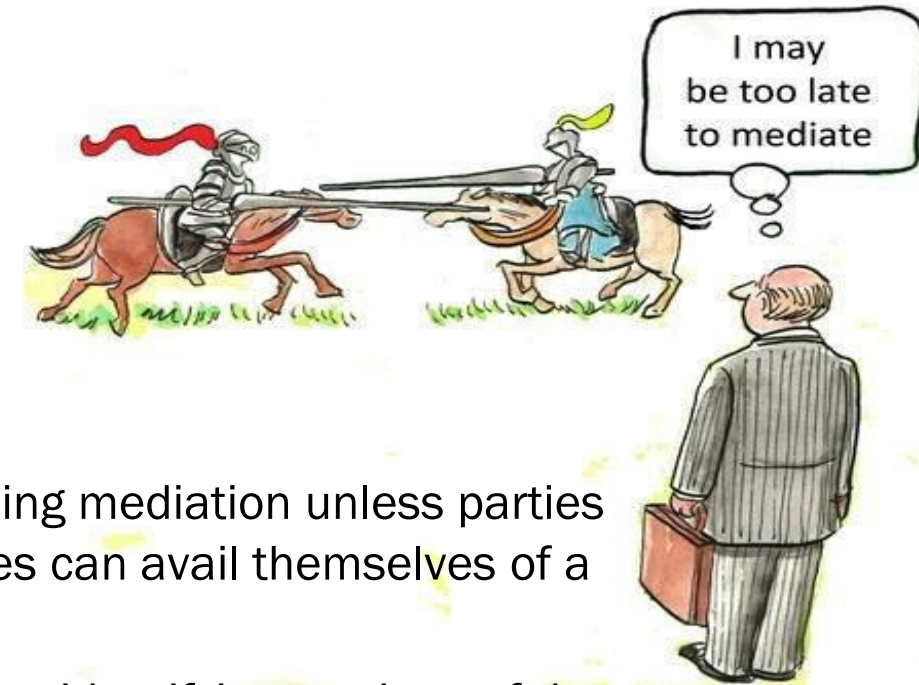
Public Works Claims Legislation

Public Contract Code §9204

Three step process:

Step 3: Non-Binding Mediation

- Any remaining claim to be submitted to non-binding mediation unless parties agree to waive in writing, in which case the parties can avail themselves of a civil action or binding arbitration, as applicable.
- **Within 10 business days** of the contractor's writing identifying portions of the claim still in dispute, public entity and contractor must mutually agree to a mediator.
- If they cannot agree, each party selects a mediator and the mediators are to select a qualified, neutral third party to serve as mediator.
- In lieu of mediation, contractor and public entity can utilize any other non-binding process including neutral evaluation or dispute review board.
- If mediation is unsuccessful, parts of claim remaining in dispute shall be subject to any applicable procedures, such as litigation or arbitration.



Dispute Resolution

- Partnering
- Negotiation
- Disputes Review Board
- Mediation
- Litigation/Arbitration

**During
Construction**

**After
Construction**

Dispute Resolution

Partnering

- Helps owner and contractor to focus on their common business objective for a successful project
- Fosters sense of teamwork and problem solving environment
- In formal setting, a partnering “character” executed, otherwise simply a matter of attitude and communication to prevent disputes
- Develop a resolution ladder, with action times

Dispute Resolution

Negotiation

- Establishing lines of communication – “bubble up” process to upper management
- Weekly, bi-weekly or at least monthly meetings should be held
- Proactive intervention
- Strive to develop a courteous, non-adversarial working relationship
- Fair and reasonable approach
- Honor the contract – know your contractual rights and obligations

Dispute Resolution

Dispute Review Board

- Typically composed of industry experts who observe construction firsthand and convene regularly
- Selection process
- Three primary benefits:
 1. Provides early attention to problems during contract performance
 2. Proves effective in resolving disputes before they grow into larger problems
 3. Cost is miniscule compared to litigation
- **Consider whether decisions are admissible** in evidence and whether condition precedent to legal action

Dispute Resolution

Mediation

- Introduces a neutral third party into the negotiations
- Neutral chosen by agreement between the parties as well as process
- Exercise of informal shuttle diplomacy
- Voluntary, but many contract now require before submitting dispute to arbitration or litigation
- Non-binding – free to walk away
- Confidential and inadmissible in evidence
- Recommend signing settlement memorandum if resolution reached

Dispute Resolution

Mediation – Fundamental Concerns

- Choosing the right time to mediate – Know enough about your case (e.g., conduct discovery)
- Selecting the right mediator – Technical expertise and a “Closer”
- Getting the right people to the table – Decisionmakers

Dispute Resolution

Arbitration/Litigation

If all else fails, some considerations...

- Contract language – Flow down provisions
- Consolidated proceeding
- Speed of process
- Expense
- Knowledge & qualifications of tribunal
- Finality – Right to appeal
- Confidentiality

Changes are a fact of life...

~~Perfect design
Perfect management
Perfect performance~~



The more effective parties are in managing change process – the more successful both parties will be at conclusion of project!

Questions & Answers



THANK YOU FOR ATTENDING

Please feel free to contact us at:

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