



Handling Contractor Claims on Public Works Projects

Wednesday, May 4, 2011 General Session; 3:00 – 4:30 p.m.

Paul W. Taylor, Hefner Stark & Marois



HANDLING CONTRACTOR CLAIMS ON PUBLIC WORKS PROJECTS

League of California Cities

City Attorneys Department

Spring, 2011

Presented by:
Paul W. Taylor
Hefner, Stark & Marois, LLP
2150 River Plaza Drive, Suite 450
Sacramento, CA 95833
(916)925-6620
ptaylor@hsmlaw.com

HANDLING CONTRACTOR CLAIMS ON PUBLIC WORKS PROJECTS

A harsh reality of public works projects is the proliferation of construction contractor claims that the public owner faces during and after the project. Many in the industry are of the opinion that the number and magnitude of construction contractor claims has increased as the economy has suffered, due to several factors. Among them, the increased number of contractors with no prior public work experience moving into the public works arena as private sector construction dries up, and the perceived need by contractors to bid public works projects at cost or less, in order to get the work, with the goal of making up the shortfall by submitting claims. Contractors have no shortage of seminars available to teach them how to make claims, no shortage of claims consultants to help them create claims, and no shortage of construction attorneys to help them prosecute their claims. On the other hand, public agencies almost without exception, are faced with dwindling resources and staff with which to deal with the aggressive claims-oriented contractors.

Despite being faced with ever-increasing numbers of construction claims and despite having to respond to the claims with limited funds and time, the public agencies are not without tools that can help the public agency mitigate the financial damages from the claims. For example, the courts have been increasingly favoring public agencies. In 2002, the California Supreme Court substantially increased the burden on contractors to recover total costs claims (Amelco Electric, below). In late 2010, the Court of Appeals upheld a public works contract clause denying payment to a contractor without a written extra work authorization (P&D, below).

With only a modest knowledge of the legal authority, a well drafted set of construction contract general conditions designed with claims protection in mind, and average knowledge and dedication on the part of the public works staff, public agencies can substantially reduce their exposure to liability for construction contractor claims on public works projects.

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

Amelco Electric was the low bidder on a multiprime construction project for the City of Thousand Oaks. During the course of construction, the City made numerous changes to the design of the project. Due to the changes, Amelco issued 221 change order requests. Amelco and the City agreed upon 32 change orders encompassing the 221 change order requests. The total change orders agreed upon increased Amelco's base contract price by almost seventeen percent.

Several months after Amelco's work was completed, Amelco requested, for the first time, an additional \$1.7 million, alleging cost overruns due to "noncaptured" costs of the change orders. Amelco's claim was rejected by the City and Amelco filed suit. In its lawsuit, Amelco claimed that the City abandoned the contract, which entitled Amelco to recover its "total cost" of construction without regard to its bid price. The jury returned a verdict in favor of Amelco which was upheld by the Court of Appeal. The California Supreme Court reversed.

In reviewing the case, the court carefully analyzed whether a public agency is liable to a contractor under an abandonment theory, when the public agency's numerous changes to the contract work make it more difficult and costly to perform the contract because of resulting delays, interference with the work of trades, and other problems. In rejecting the contractor's contention, the California Supreme Court stated that application of an abandonment theory of liability to a public agency is fundamentally inconsistent with the purpose of competitive bidding statutes. In addition, the court properly recognized several practical issues that abandonment-based total cost claims create.

First, by allowing the contractor to wait until the project is completed before giving notice of "too many changes," the public agency is precluded from making project management, budget or procedural adjustments during construction to attempt to mitigate the damages. In addition, allowing contractors to recover on the basis of "total cost" or quantum meruit, for the actual costs as opposed

to the bid price, would encourage contractors to bid unrealistically low with the hope of later prevailing on an abandonment claim based upon the numerous changes "inherent in any large public works project."

It is important to note that the court stated that it was not determining whether total cost damages are never appropriate in a breach of public contract case. In ruling against the contractor and sending the case back for a new trial, the court reiterated the four elements the contractor must prove to be able to recover on a total cost claim: (1) the impracticality of proving actual losses directly; (2) the reasonableness of the contractor's bid; (3) the contractor's actual costs; and, (4) the contractor was not responsible for the added costs. In this case, the court found that Amelco had not introduced substantial evidence to prove that Amelco was not responsible for the added costs.

Although not rejecting total cost claims outright the court has imposed upon the contractor the almost impossible burden of proving that the contractor was not responsible for any of the added costs. Just as numerous changes are "inherent in any large public works project," so are contractor mistakes and inefficiencies. To meet the fourth prong of the Amelco test, the contractor apparently must prove either that it was not responsible for any of the added costs, or it must prove how much of the added costs were the contractor's responsibility. In other words, the contractor may be required to prove its own culpability for the cost overruns as part of the attempt to obtain a total cost recovery from the public agency. Contractors may prove to be unwilling to make such an admission.

P&D Consultants, Inc. v. City of Carlsbad
(2010) 190 Cal.App.4th 1332

The parties entered into a written contract for P&D to provide civil engineering services for the redesign of the City's golf course. The contract also provided that no amendments, modifications, or waivers of contract terms would be allowed absent a written agreement by both parties. The contract also included an integration clause that stated the contract and any written amendments thereto embodied the parties' entire agreement.

The parties entered into five written amendments to the contract, each executed by P&D and the City. These five written amendments were not disputed. P&D then sought more money from the City, which the City refused to pay. P&D sued for breach of contract, breach of implied contract, quantum meruit and violation of prompt pay statutes. The City cross-claimed for deficient and incomplete work. A jury ruled in favor of P&D on P&D's claims and in favor of the City on the City's claims.

On appeal the City argued the trial court erred because P&D could not recover for extra work as a matter of law, without a written change order. The City also argued that the contract could not be orally modified or through the parties' conduct, to reach a different conclusion.

The court of appeal agreed. "Unlike private contracts, public contracts requiring written change orders cannot be modified orally or through the parties conduct." "... (T)he contract unambiguously prohibits the commencement of extra work without written authorization."

P&D argued that despite the written agreement, it was entitled to recovery based on implied contract and quantum meruit. The court of appeal summarily rejected this argument stating, "This issue is moot because P&D is not entitled to payment for any extra work without a written change order."

P&D also argued in the appeal, for the first time, that theories of equitable estoppel, waiver

and ratification give rise to the possibility of recovery from the City. The appellate court rejected these theories because they were not raised at the trial.

Although public agencies and their counsel have long argued that contractor claims based on alleged oral modifications to contracts or the conduct of the parties, are invalid, the holding in P&D now provides public agencies with appellate authority that clearly supports that position. The court also dispenses with theories of entitlement based on implied contract and quantum meruit. Arguably, theories based on equitable estoppel, waiver and ratification have not been decided and competent attorneys will draft their pleading to attempt to frame the public agencies' conduct so that one or more of these theories might be used to obtain entitlement.

Advantec Group, Inc. v. Edwin's Plumbing Co., Inc.
(2007) 153 Cal.App.4th 621

Subcontractor Edwin's worked for apartment developer Advantec. Advantec terminated Edwin's and commenced an action to recover \$168,476.00 from Edwin's. Edwin's cross-complained against Advantec, alleging among other things that Edwin's was a duly licensed contractor at all times. In response to Edwin's cross-complaint, Advantec filed a general denial, denying "all allegations" in Edwin's complaint.

At trial, Edwin's attempted to introduce evidence of its license status, by oral testimony. Advantec objected on the ground that where licensure is controverted, only a verified certificate of licensure can be used to provide evidence of licensure. (Business and Professions Code section 7031.) Edwin's requested a continuance in the jury trial to obtain a verified certificate. The trial court denied the request for continuance and issued a nonsuit as to Edwin's cross-complaint. Edwin's appealed.

Affirmed. The general denial denying all allegations of Edwin's cross-complaint "controverted" the status of Edwin's licensure and the burden of proof pursuant to Business and

Professions Code section 7031 shifted to Edwin's to provide a verified certificate of licensure.

Because Edwin's did not introduce into evidence a verified certificate of licensure, nonsuit was proper.

SELECTED CONTRACT CLAUSES FOR PUBLIC WORKS CONTRACTS

City has obtained report(s) <INSERT TITLE, DATE AND AUTHOR OF ALL REPORTS, INCLUDING SOILS REPORTS, GEOLOGIC STUDIES, ENVIRONMENTAL, ETC.>. The report(s) may contain facts that may materially effect bidders' bids.

In addition, City has constructed other public works projects throughout the City, and obtained reports and other information in the course of the design and construction of those other public works construction projects, all of which may contain facts that may materially affect bidders' bids. Bidders are strongly encouraged to inspect all of City's reports, records and documents referred to above. Said reports and documents will be made available upon written request at <INSERT LOCATION> for inspection and copying at bidders' sole cost and expense, during normal working hours.

If a pre-bid conference has been scheduled at the site of the work, all bidders, subcontractors, material suppliers and others who may be working on the work of improvement are strongly encouraged to attend this pre-bid conference. Due to the facts and circumstances of this particular project, the pre-bid conference may be the only opportunity to conduct the pre-bid investigation of the site and satisfy the pre-bid obligations set forth in these Contract Documents. If a bidder (or others) attend the entirety of a scheduled pre-bid conference and need additional time to complete their investigation of the site or other pre-bid obligations set forth in these Contract Documents, bidder must notify the City in writing, via certified or registered mail, no less than two work days after the scheduled pre-bid conference, to request additional time. The written request must include an estimate of the amount of additional time required by bidder.

City has determined that Bidders must meet the following minimum qualifications to bid the work of improvement contemplated herein:

1. Have possessed a valid, active and in good standing, State of California Department of Consumer Affairs, Contractor=s License Board <insert license type, IE., general building contractor (B) license>, for a minimum of five (5) continuous years prior to the date of bid opening.
2. Not have any pending disciplinary proceedings or investigations by the Contractor=s State License Board.
3. Have completed to the public owner=s satisfaction, no less than <insert> public works projects in the State of California, each with an original contract price of no less than \$_____, within the past five years prior to the date of bid opening.<INSERT OTHER SPECIFIC REQUIREMENTS>
4. Currently (as of the date of bid opening) or within the past five years, not have any suspensions, disbarments, or similar proceedings (including stipulated agreements), restricting, limiting or prohibiting bidder from bidding or performing other public works for any other public agency.

CONTRACTOR QUALIFICATION QUESTIONNAIRE

If requested by City, Bidder agrees to complete, sign and return this Contractor Qualification Questionnaire, including all required supporting documentation, within five (5) days of being requested by City. If Bidder fails or refuses to complete the Contractor Qualification Questionnaire, furnish all required attachments, sign the Contractor Qualification Questionnaire, or return it to the City within five (5) days of City's request, Bidder will not be considered for award of the contract, and further, Bidder agrees that the City may award the work to another Bidder or call for new bids. In such event, the Bidder shall be liable to the City for the difference between the amount of the disqualified bid and the larger amount for which the City procures the work plus all of the City's costs, damages, expenses and liabilities.

Bidder shall fully and completely answer each question set forth below. If necessary attach additional sheets. Print or type each response. If your response to any question is "no" or "none," you must state "no" or "none." "Not applicable" or other similar response, will not be accepted.

1. State the full legal name of the Bidder.
2. State the nature of the Bidder's business entity. (Sole proprietorship, joint venture, partnership, corporation, or other [describe]).
3. State the name and address of each person or other legal entity, which has a legal or equitable ownership of ten percent (10%) or more of the Bidder. For each such person or legal entity, state that person or entity's ownership interest, title and responsibilities, if any.
4. Has any person or legal entity holding a legal or equitable ownership of the Bidder, ever been accused of a civil violation of California Government Code section 12650, et seq., (False Claims Act)? If so, describe in detail all facts, circumstances and the outcome.
5. Has any person or legal entity holding a legal or equitable ownership of ten percent (10%) or more of the Bidder, ever been determined by a public agency to not be a responsible Bidder? If so, state the name, address and telephone number of the public agency, including the name of the agencies' contact person.
6. State the Bidder's contractor's license number.
7. State the date Bidder first began business.
8. State any other names that Bidder has used or done business under in the past five (5) years.
9. Describe in general, Bidder's experience.
10. Has Bidder ever failed to complete a construction contract?
11. Has Bidder's control over a work of improvement, ever been terminated?
12. For each <DESCRIBE IN DETAIL THE GENERAL NATURE OF THE WORK OF

IMPROVEMENT> that Bidder has furnished labor, services, materials or equipment in the past five years, state: the name of each project; the contract amount for each project; the name, address and telephone number of the owner and owner's representative, for each project; and a general description of the work performed by Bidder on each project.

13. For every public work of improvement upon which Bidder has furnished labor, services, materials or equipment in the past five years, whether completed or not, for which the Bidder's original contract was greater than \$<INSERT>, but not more than \$<INSERT>, state the name, address and telephone number of the owner and principal designer (architect or engineer).

14. For every lawsuit or arbitration between Bidder and the owner of any work of improvement, limited to such lawsuits or arbitrations initiated or completed within the past five (5) years, state the name and address of the tribunal, the matter number, the parties, a general description of the nature of the dispute, and the outcome, if any.

15. Has Bidder ever been charged with a felony? If so, describe in detail all facts, circumstances and the outcome, furnishing the name and address of the court in which the charge(s) were filed, including the matter name and case number.

16. Has Bidder ever been accused of a civil violation of California Government Code section 12650, et seq., (False Claims Act)? If so, describe in detail all facts, circumstances and the outcome.

17. Has Bidder ever been accused of presenting false claims to a public agency or public owner, as such claims are defined in California Government Code section 12650, et seq., or 31 United States Code section 3729, et seq.?

18. Has any public agency ever determined or ruled that Bidder is not a responsible Bidder? If so, state the name, address and telephone number of the public agency, including the name of the agencies' contact person.

19. Has any public agency ever issued a letter, ruling or determination debaring Bidder or anyone holding a legal or equitable interest in Bidder, from bidding public works? (This includes debarments that are simultaneously or subsequently suspended, revoked or withdrawn.)

20. Has Bidder ever entered into an agreement with any public agency, to not bid work for that public agency?

21. Within the past seven (7) years, has Bidder ever failed to complete a public works construction project, within the time allowed by the contract, plus written agreed upon contract time extensions? If so, state the name, address and telephone number of the owner of such public works construction project including the name of the agencies' contact person, and further, describe in detail the nature of the work of improvement.

22. Has any surety ever paid or satisfied any claim on behalf of Bidder?

23. Has any surety ever undertaken or been called upon to complete any project of Bidder?

24. For each project or work of improvement that Bidder is either (a) currently furnishing labor,

services, materials or goods, or (b) under contract to furnish labor, services, materials or goods, state: A general description of the project; the current status of the project and Bidder's work thereon; the owner's name, address and telephone number; the amount of Bidder's contract on such project.

25. State Bidder's annual gross sales for each of the last five fiscal years.

26. If requested by City (as indicated below) attach a current financial statement. As used herein, "current financial statement" means a balance sheet and profit and loss statement prepared and presented in a format that complies with Generally Accepted Accounting Principles (GAAP), covering a period of time that is no less than the most recent fiscal year for Bidder. If Bidder's most recent fiscal year ended more than six (6) months prior to the date when the Contract Documents require this Contractor Qualification Questionnaire be completed and returned to District, then "current financial statement" shall also include an interim balance sheet and profit and loss statement covering the period of time from the end of Bidder's most recent fiscal year to a period of time no greater than sixty (60) days prior to the date when the Contract Documents require this Contractor Qualification Questionnaire be completed and returned to District.

CONTRACTOR MUST FURNISH: YES [] NO [] [INSERT PRIOR TO SOLICITING BIDS]

27. The following certification must be signed by an owner, general partner, or officer of Bidder.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA, AND DO PERSONALLY CERTIFY AND ATTEST THAT: I HAVE THOROUGHLY REVIEWED THE ATTACHED CONTRACTOR QUALIFICATION QUESTIONNAIRE AND ATTACHMENTS, IF ANY, AND KNOW ITS CONTENTS, AND SAID CONTRACTOR QUALIFICATION QUESTIONNAIRE AND ATTACHMENTS, IF ANY, ARE TRUTHFUL, COMPLETE AND ACCURATE; AND City MAY RELY UPON THE CONTENTS AS BEING TRUTHFUL, COMPLETE AND ACCURATE; AND, FURTHER, THAT I AM FAMILIAR WITH CALIFORNIA PENAL CODE SECTION 72 AND CALIFORNIA GOVERNMENT CODE SECTION 12650, ET SEQ, PERTAINING TO FALSE CLAIMS, AND FURTHER KNOW AND UNDERSTAND THAT SUBMISSION OR CERTIFICATION OF A FALSE CLAIM MAY LEAD TO FINES, IMPRISONMENT AND/OR OTHER SEVERE LEGAL CONSEQUENCES.

EXECUTED ON THE DATE INDICATED BELOW, AT THE LOCATION INDICATED BELOW.

All bidders shall carefully and completely examine the site of the work contemplated, the plans and Specifications, and the proposal and Contract forms therefor, and perform all tests and inspections necessary to inform bidder of all conditions that may be encountered, the character,

quality and scope of work to be performed, and the quantities of materials to be furnished. The submission of a bid shall be conclusive evidence that the bidder has investigated and is satisfied as to the conditions to be encountered, as to the character, quality and scope of work to be performed, the quantities of materials to be furnished and as to the requirements of the proposal, plans, Specifications and the Contract.

Where the City has made investigations of site conditions, including subsurface conditions in areas where work is to be performed under the Contract, or in other areas, some of which may constitute possible local material sources, bidders and Contractor may, upon written request, inspect the records of the City as to those investigations subject to and upon the conditions hereinafter set forth. The investigations are made only for the purpose of study and design.

The records of investigations, project records, log of test borings, record of geotechnical data, investigation of subsurface conditions, cross-sections, contour maps, and any other investigations provided by City, are not a part of the Contract and are available solely for the convenience of the bidder or Contractor. It is expressly understood and agreed that the City assumes no responsibility whatsoever in respect to the sufficiency or accuracy of the above described documents or of the interpretations set forth therein or made by the City in its use thereof and there is no warranty or guaranty, either express or implied, as to the completeness or accuracy of the documents, that the conditions indicated by the documents are representative of those existing in or throughout those areas, or any part thereof, or that unlooked-for developments may not occur, or that materials other than, or in proportions different from those indicated, may not be encountered.

The availability or use of information described in this section is not to be construed in any way as a waiver of the provisions of the first paragraph in this section and a bidder or Contractor shall make their own investigation and examination to be satisfied as to conditions to be encountered in the performance of the work.

No information derived from the inspection of investigations or compilation thereof made by the City or from the Engineer, or their consultants, will in any way relieve the bidder or Contractor from any risk or from properly fulfilling the terms of the Contract.

A Claim is any request by Contractor to adjust, alter, modify, or otherwise change the Contract price or the Contract time, or both. A Claim must be stated with specificity, including identification of the event or occurrence giving rise to the Claim, the date of the event, and the asserted affect on the Contract price and the Contract time, if any. The Claim shall include adequate supporting data. Adequate supporting data for a Claim for an adjustment of the Contract time shall include scheduling data demonstrating the impact of the event on the controlling operation and completion of the Project. Adequate supporting data for a Claim for an adjustment in the Contract price shall include a detailed cost breakdown of items included within the Claim and documentation supporting each item of cost.

Contractor shall submit all Claims to the Engineer before proceeding to perform the work, or portions of the work, giving rise to such Claim. Contractor hereby expressly waives any Claims of which Contractor was aware, whether or not the exact amounts of such Claims were ascertainable, and that are not submitted to the City prior to Contractor proceeding to perform the work, or portions

of the work, giving rise to such Claims.

All Claims shall be submitted to Engineer for decision within ten (10) days after the event or occurrence giving rise to the Claim. Contractor hereby expressly waives all Claims not made within the aforesaid time limit.

Claims must be submitted to Engineer before the date of final payment. Contractor hereby expressly waives all Claims not submitted, in complete and proper form, on or before the date of final payment.

Contractor expressly waives any Claims for delay or adjustment to the Contract time if, within three (3) days of the event or occurrences giving rise to the delay, the Contractor fails to provide written notice to City. Said written notice shall include the event or occurrence giving rise to the delay, the estimated duration of the delay, and the impact of the event or occurrence upon the critical path, controlling operation and completion of the Project.

As used herein, the following terms shall have the following meanings:

"Excusable Delay" means any delay of the completion of the Project beyond the expiration of the Contract time caused by conditions beyond the control and without the fault or negligence of the Contractor such as strikes, embargoes, fire, unavoidable casualties, unusual delays in transportation, national emergency, and stormy and inclement weather conditions in which the work cannot continue. The financial inability of the Contractor or any subcontractor and default of any subcontractor, without limitation, shall not be deemed conditions beyond the Contractor's control. An Excusable Delay may entitle the Contractor to an adjustment in the Contract time.

"Compensable Delay" means any delay of the completion of the work beyond the expiration date of the Contract time caused by the gross negligence or willful acts of the City, and which delay is unreasonable under the circumstances involved, and not within the contemplation of the parties. A Compensable Delay may entitle the Contractor to an extension of the Contract time and/or Contract price. Except as provided herein, the Contractor shall have no claim for damage or compensation for any delay, interruption, hinderance, or disruption.

"Unexcusable Delay" means any delay of the completion of the Project beyond the expiration of the Contract time resulting from causes other than those listed above. An Unexcusable Delay shall not entitle the Contractor to an extension of the Contract time or an adjustment of the Contract price.

The Contractor may make a Claim for an extension of the Contract time, for an Excusable Delay or a Compensable Delay, subject to the following:

(a) If an Excusable Delay and a Compensable Delay occur concurrently, the maximum extension of the Contract time shall be the number of days from the commencement of the first delay to the cessation of the delay which ends last.

(b) If an Unexcusable Delay occurs concurrently with either an Excusable Delay or a Compensable Delay, the maximum extension of the Contract time shall be the number of days, if any, by which the Excusable Delay or the Compensable Delay exceeds the Unexcusable Delay.

(c) If an Unexcusable Delay occurs concurrently with both an Excusable Delay and a

Compensable Delay, the maximum extension in the Contract time shall be the number of days, if any, by which the number of days determined pursuant to Subparagraph (a) exceeds the number of days of the Unexcusable Delay.

(d) For a Compensable Delay, the Contractor shall only be entitled to an adjustment in the Contract price in an amount equal to the actual additional labor costs, material costs, and unavoidable equipment costs incurred by the Contractor as a result of the Compensable Delay, plus the actual additional wages or salaries and fringe benefits and payroll taxes of supervisory and administrative personnel necessary and directly employed at the Project site for the supervision of the work during the period of Compensable Delay. Except as provided herein, the Contractor shall have no claim for damage or compensation for any delay, interruption, hinderance, or disruption. There shall be no Compensable Delay unless the event or occurrence giving rise to the Compensable Delay extends the actual completion of the Project past the Contract time.

Contractor agrees that the daily Contractor Delay Damages as set forth in the Proposal Form shall be full compensation to Contractor, all subcontractors and anyone for whom they may be legally responsible, for each day of delay that may be caused by City or anyone for whom City is legally responsible, including but not limited to, extended field costs, extended home overhead costs, impact, inefficiency, unabsorbed home office overhead, underabsorbed home office overhead, hindrance, disruption or any other damage arising from delay, no matter how characterized and regardless of the cause, extent or duration of the delay. Inclusion of Contractor Delay Damages within the Proposal Form is solely for the purpose of determining the low bidder and establishing the City's maximum daily liability as a result of City delays to Contractor, if any, and City has no obligation to pay any daily Contractor Delay Damages except as provided for in these Contract Documents for Compensable Delays. In the event that City becomes liable to Contractor for compensable delays, City agrees to pay Contractor the daily Contractor Delay Damages set forth in the Proposal Form or Contractor's actual daily delay damages, whichever is less, for each day of Compensable Delay as provided for by these Contract Documents.

The Contractor and all subcontractors shall maintain records in such a manner as to provide a clear distinction between the direct costs of extra work paid and the costs of other operations.

From the above records, the Contractor shall furnish the Engineer completed daily extra work reports, either on forms furnished by the City or on computerized facsimiles of the City's forms acceptable to the Engineer, for each day's extra work to be paid for on a force account basis. The daily extra work reports shall itemize the materials used, and shall state the direct cost of labor and the charges for equipment rental, whether furnished by the Contractor, subcontractor or other forces, except for charges described in Section 9-1.03B, "Work Performed by Special Forces or Other Special Services." The daily extra work reports shall provide names or identifications and classifications of workers, the hourly rate of pay and hours worked, and also the size, type and identification number of equipment, and hours operated.

Material charges shall be substantiated by valid copies of vendor's invoices. The invoices shall be submitted with the daily extra work reports, or if not available, the invoices shall be submitted within 30 days after the date of delivery of the material or within 15 days after the acceptance of the Contract, whichever occurs first. Contractor waives payment for material charges not substantiated by valid copies of vendor's invoices submitted within the times provided.

Daily extra work reports shall be signed by the Contractor or the Contractor's authorized representative.

The Engineer will compare the Engineer's records with the completed daily extra work reports furnished by the Contractor and make any necessary adjustments. When these daily extra work reports are agreed upon and signed by both parties, the reports shall become the basis of payment for the work performed, but shall not preclude subsequent adjustment based on a later audit by the City.

The Contractor's and all subcontractor's records pertaining to the Project shall be open to inspection or audit by representatives of the City, during the life of the Contract and for a period of not less than 3 years after the date of acceptance thereof, and the Contractor and all subcontractors shall retain those records for that period. Where payment for materials or labor is based on the cost thereof to forces other than the Contractor, the Contractor shall make every reasonable effort to ensure that the cost records of those other forces will be open to inspection and audit by representatives of the City on the same terms and conditions as the cost records of the Contractor. If an audit is to be commenced more than 60 days after the acceptance date of the Contract, the Contractor will be given a reasonable notice of the time when the audit is to begin.

The Contractor and all subcontractors shall keep full and complete records of the costs and additional time incurred for any work for which a claim for additional compensation is made. The Engineer or any designated claim investigator or auditor shall have access to those records and any other records as may be required by the Engineer to determine the facts or contentions involved in the claims. Contractor agrees that failure to permit access to those records waives Contractor's claims.

The City, or its authorized representatives, shall have access, upon reasonable notice, during normal business hours, to Contractor and subcontractors' books, documents and accounting records, including but not limited to, bid worksheets, bids, subcontractor bids and proposals, estimates, cost accounting data, accounting records, payroll records, time sheets, canceled checks, profit and loss statements, balance sheets, project correspondence including but not limited to all correspondence between Contractor and its sureties and subcontractors/vendors, project files, scheduling information, and other records of the Contractor and all subcontractors directly or indirectly pertinent to the work, original as well as change and claimed extra work, to verify and evaluate the accuracy of cost and pricing data submitted with any change order, prospective or completed, or any claim for which additional compensation has been requested or claim has been tendered. Such access shall include the right to examine and audit such records, and make excerpts, transcriptions, and photocopies at City's cost.

The parties agree that in the event Contractor or any subcontractor fails to comply with this section, it would be difficult for the City to determine its actual damages; therefore, Contractor agrees to pay City, as liquidated damages, the sum of Two hundred Dollars (\$200.00), which Contractor agrees is reasonable under the circumstances, for each and every calendar day which Contractor or a subcontractor fails or refuses to provide the City, access to the materials specified in this section.

California Penal Code section 72, provides that any person who presents for payment with intent to defraud any district board or officer, any false or fraudulent claim, bill, account, voucher, or writing, is punishable by fines not exceeding ten thousand dollars (\$10,000.00) and/or imprisonment in the state prison.

Government Code sections 12650, et seq., pertains to civil penalties that may be recovered from persons (including corporations, etc.) for presenting a false claim for payment or approval, presents a false record or statement to get a false claim paid or approved, or other acts, to any officer or employee of any political subdivision of the State of California. Any person or corporation violating the provisions of Government Code sections 12650, et seq., shall be liable for three times the amount of the damages of the political subdivision, plus a civil penalty, plus costs.

All Claims by Contractor, shall include the following certification, properly completed and executed by Contractor or an officer of Contractor:

I, _____, BEING THE _____ (MUST BE AN OFFICER) OF _____ (CONTRACTOR), DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA, AND DO PERSONALLY CERTIFY AND ATTEST THAT: I HAVE THOROUGHLY REVIEWED THE ATTACHED CLAIM FOR ADDITIONAL COMPENSATION AND/OR EXTENSION OF TIME, AND KNOW ITS CONTENTS, AND SAID CLAIM IS TRUTHFUL AND ACCURATE; THAT THE AMOUNT REQUESTED ACCURATELY REFLECTS THE CONTRACT ADJUSTMENT FOR WHICH THE OWNER IS LIABLE; AND, FURTHER, THAT I AM FAMILIAR WITH CALIFORNIA PENAL CODE SECTION 72 AND CALIFORNIA GOVERNMENT CODE SECTION 12650, ET SEQ, PERTAINING TO FALSE CLAIMS, AND FURTHER KNOW AND UNDERSTAND THAT SUBMISSION OR CERTIFICATION OF A FALSE CLAIM MAY LEAD TO FINES, IMPRISONMENT AND/OR OTHER SEVERE LEGAL CONSEQUENCES.

Contractor agrees that submission of a Claim, in strict conformance with all of the requirements of this Contract, and rejection of all or part of said Claim by City, is a condition precedent to any action by Contractor against City, including but not limited to, the submission of a claim pursuant to Government Code section 900, et seq., or the filing of a lawsuit.

Any claim for overhead type expenses or costs, in addition to being certified as stated above, shall be supported by an audit report of an independent Certified Public Accountant provided by Contractor with the claim.

Contractor agrees that any costs or expenses incurred by the City in reviewing or auditing any claims that are not supported by the Contractor's cost accounting or other records, or the Contract, shall be deemed to be damages incurred by the City within the meaning of the California False Claims Act.

The parties agree that the City's exercise of its rights to order changes in the work, regardless of the extent and number of changes, or to suspend the work, is within the contemplation of the

parties and shall not be the basis for any Claim for Compensable Delay. The rights of the Contractor to adjustments of the Contract Time and the Contract Sum, based on changes ordered in the work or suspension of the work, shall be solely governed by this provision.

By resolution of the City Council, a fund has been established, money encumbered in the current budget, and assigned to the account which is the sole source of funds available for payment of the Contract Sum. Contractor understands and agrees that Contractor will be paid only from this special fund and if for any reason this fund is not sufficient to pay Contractor, Contractor will not be entitled to payment. The availability of money in this fund, and City's ability to draw from this fund, are conditions precedent to City's obligation to make payments to Contractor.

The City may request that Contractor provide City with estimated costs for proposed changes to the work. Contractor agrees to promptly provide City with detailed, itemized costs for proposed changes to the work and scheduling data demonstrating the impact, if any, of the proposed changes to the work on the Contract Time. Adjustments, if any, in the amount to be paid the Contractor by reason of any modifications of the work as set forth in a Contract Change Order, Construction Change Directive, or arising from Claims shall be determined by one or more of the following methods as elected by the District:

- A. Lump Sum Price - By an acceptable lump proposal from the Contractor. The Lump Sum Price provide by Contractor shall not include costs or expenses greater than the costs or expenses permitted for Force Account work, as set forth below.
- B. Unit Prices - By unit prices fixed by agreement between the City and the Contractor.
- C. Force Account - By ordering the Contractor to proceed with the work and to keep and present in such form as the Architect or Owner=s Representative may direct, a correct account of the cost of the change, together with all vouchers therefor. The Contractor will be paid for labor, materials, and equipment rental actually used on the Change Order work as follows:
 - (1) Labor - the Contractor will be paid the reasonable cost of labor for the workmen (including foremen when authorized by the Owner=s Representative), used in the actual and direct performance of the work. The cost of labor, whether the employer is the Contractor, subcontractor, or other forces, will be the sum of the following:
 - (1-1) Actual Wages - The actual wages paid shall include any reasonable employer payments to or on behalf of the workmen for health and welfare, pension, vacation, and similar purposes.
 - (1-2) Labor Surcharge - The labor surcharge to be added to the actual wages shall be the reasonable cost of all additional payments made to, or on behalf of the workers, other than actual wages, as required by State or Federal laws, including by way of example but not limited to, workers' compensation,

SUTA, FUTA and FICA.

(1-3) Subsistence and Travel Allowance - The actual reasonable and necessary subsistence and travel allowance paid to such workers.

- (2) Materials - The actual cost of the materials to the purchaser, whether the Contractor, a subcontractor, or other forces. If the Contractor does not furnish satisfactory evidence of the cost of such materials, it shall be deemed to be the lowest current wholesale price at which such materials are available in the quantities concerned delivered to the job site. The City reserves the right to furnish such materials as it deems advisable, and the Contractor shall have no claims for costs or profit on such City furnished materials.
- (3) Equipment - The use of equipment shall be paid for at the rates listed for such equipment in the current compilation of rental rates of the State of California, Division of Highways, applicable to the local district or competitive local rental rates of established rental agencies serving the area of the work, whichever is less. If the equipment is not shown on the above-mentioned list, Contractor shall be paid such hourly rental rates as are agreed upon by the Contractor and the Owner=s Representative prior to use of the equipment, except that in no case shall such agreed hourly rate exceed the rental rates of established distributors or equipment rental agencies serving the area, plus thirty-three and one-third percent (33-1/3%) for the cost of fuel, oil, lubrication, and field repairs and maintenance.

If the equipment is moved on to the work and used exclusively for extra work, the Contractor will be paid for the cost of transporting it to the job and returning it to its original location. The rental period shall begin when the equipment is unloaded at the site of the extra work, and shall include each day that the equipment is at the site of, and performing or utilized for, such extra work, excluding Saturdays, Sundays, and legal holidays, unless extra work is performed on such days, and shall terminate at the end of the day on which such extra work is completed or the Owner=s Representative directs the Contractor to discontinue the use of such equipment.

The rental time to be paid for equipment already on the work, or which is used for other than such extra work, shall be the actual time the equipment is in operation on the extra work, plus the time required to move the equipment to the site of the extra work and return it to its original location.

To the totals as computed above, may be added the following percentages for profit and overhead:

Labor	Fifteen Percent (15%)
Materials	Fifteen Percent (15%)
Equipment Rental	Fifteen Percent (15%)

For Change Order work performed by a subcontractor, compensation for such work shall be

based on all direct costs as listed in the subcontractor's portion of the proposal plus the above percentages. The Contractor may add ten percent (10%) to the subcontractor's proposal for overhead and profit plus actual cost of subcontractor's bond when incurred not to exceed one percent (1%) markup. Overhead and profit for all tiers of Contractor and subcontractors shall in no event exceed fifteen percent (15%) of the cost of the work. Distribution of the overhead and profit among the Contractor and the subcontractors is the responsibility of the Contractor.

The allowances for overhead and profit as enumerated in the preceding subparagraphs shall include full compensation for any and all items of overhead including but not limited to, superintendence, field overhead, home office overhead (absorbed and unabsorbed), Contractor bonds, insurance, general conditions, clean-up, safety meetings, mandated programs and processing of Claim and Change Order documents.

In no event shall the allowance for markup, overhead or profit for any changed work or claims, exceed the amount set forth above, or the amount upon which Contractor or subcontractor=s (if any) bid was based.

HANDLING CONTRACTOR CLAIMS ON PUBLIC WORKS PROJECTS

2011
League Of California Cities
City Attorneys Spring Conference
By Paul W. Taylor

What kind of construction claims
will a public works owner typically
see?

<u>CLAIM</u>	<u>DESCRIPTION</u>
1. Acts of God	(Natural Disaster)
2. Acts of Government	(Sovereign Acts)
3. Actual Acceleration	(Expedited Work.—I)
4. Adverse Weather	(Severe Conditions)
5. Bankruptcy	(Financial Failure)
6. Cardinal Change	(Major Alterations)
7. Commercial Impracticability/Perform	(Impractical Performance)
8. Commercial Impracticability/Supply	(Unavailable Material)
9. Constructive Acceleration	(Expedited Work—II)
10. Constructive Change	(Unacknowledged Modification)
11. Defective Specifications	(Unworkable Plans)
12. Delay of Approvals	(Slow Turn-around)
13. Delayed Issuance of Change Orders	(Change Delay)
14. Delayed Notice to Proceed	(Late NTP)
15. Destruction of Work	(Destroyed Work)
16. Destruction of Materials, Etc.	(Destroyed Materials)
17. Differing Site Conditions	(Unexpected Circumstances)
18. Early Completion Prevented	(Slower Finish)
19. Impossibility of Performance	(Infeasible Work)
20. Improper Inspection	(Excessive Scrutiny)

21. Inadequate Supervision	(No Oversight)
22. Inadequate Utilities	(Missing Utilities)
23. Interference	(Disruptive Actions)
24. Labor Shortage	(Unavailable Manpower)
25. Lack of Access	(Unreachable Work)
26. Lack of Information or Decision	(Awaiting Instructions)
27. Lack of Permits	(Missing Authorizations)
28. Lack of Right of Way	(Blocked Roads)
29. Late Drawings	(Drawing Delay)
30. Late, Defective Material, Etc.	(Missing Material)
31. Payments Not Made	(Funds Withheld)
32. Scheduling Difficulties	(Coordination Problems)
33. Stacking or Crowding of Trades	(Labor Congestion)
34. Strikes	(Labor Strife)
35. Subcontractor Delays	(Sub Problems)
36. Superior Knowledge, Misrepresentation	(Undisclosed Facts)
37. Supplier Delay	(Supplier Problems)
38. Suspension of Work/Delay	(Work Stoppage)
39. War and Other Hostilities	(Hostility Outbreak)
40. All Other Claims	(Generic Claims)

Most Common Claims

- CARDINAL CHANGE
- DIRECTED CHANGE
- DELAY CLAIMS

5

- Cardinal Change: A claim based on the argument that there were so many changes to the work that the original contract should be discarded and the work should be treated as a total cost claim.
- Directed Change: Where the owner directs the contractor to perform extra work.
- Delay Claims

6

CARDINAL CHANGES

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

- Application of an abandonment theory of liability to a public agency is fundamentally inconsistent with the purpose of competitive bidding statutes

Based on the decision in Amelco, is a total cost claim, or one lacking specific detail (as discussed in Amelco), a false claim?

Is a construction contractor claim for additional compensation, that is not supported by the law, a false claim?

9

Government Code Section 12651(a)(2)

‣ False claims include:

- Anyone who knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision.

10

Delay Claims

- Can there be a delay, if there is no as-planned schedule for the project?

11

- Typically, construction schedules are based on “critical path method scheduling” (CPM) for building construction projects, and “controlling operation” for engineering (Cal Trans) projects.

12

‣ **Critical Path or Controlling Operation Activity:**

- An activity, which if delayed, will delay the completion of the project.

13

- First step in analysis of delay claim is determination of the critical path or controlling operation at the time of the delay, using the as-planned schedule.
- Second step, was the critical path or controlling operation activity delayed?
- Third step, was the delay caused by an act or omission of the City?

14

Contract Provisions to Minimize Exposure from Delay Claims

- ▶ Initial schedule
- ▶ Periodic updates
- ▶ City's receipt of a periodic update in strict conformance with the requirements of the contract documents is a condition precedent to the City's obligation to pay Contractor
- ▶ No change to critical path without owner's written consent

15

- ▶ The scheduled completion date must be the same as contractual completion for the initial schedule and all subsequent updates
- ▶ Written notice of delay claims within three days of event or occurrence giving rise to the delay
- ▶ No claim for delay unless event or occurrence delays completion beyond contractual completion date
- ▶ No claim for delay unless delay is to critical path while delayed activity is on the critical path
- ▶ No pay for delay

16

Public Contract Code Section 7102

Contract provisions in construction contracts of public agencies and subcontracts thereunder which limit the contractee's liability to an extension of time for delay for which the contractee is responsible and which delay is unreasonable under the circumstances involved, and not within the contemplation of the parties, shall not be construed to preclude the recovery of damages by the contractor or subcontractor.

17

- ▶ The parties agree that the City's exercise of its rights to order changes in the work, regardless of the extent and number of changes, or to suspend the work, is within the contemplation of the parties and shall not be the basis for any Claim for Compensable Delay. The rights of the Contractor to adjustments of the Contract Time and the Contract Sum, based on changes in the work or suspension of the work, shall be solely governed by this provision.

18

Eichleay Corporation v. ASBCA

60-2 BCA ¶2,688, ASBCA No. 5183 (1960)

- The government may be liable to the contractor for unabsorbed home office overhead arising from government caused delays on a project.
- Elements:
 - First, the contractor must demonstrate that it was on "standby."
 - Second, the contractor must prove that it was unable to take on other work while on standby.

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- "Second, the contractor must prove that it was unable to take on other work while on standby."
- If the contractor was actively performing other projects while on standby, or if the contractor was actively bidding other projects while on standby, can the contractor meet the second prong of Eichleay?

20

- ▶ In light of Eichleay, how can a City limit contractor claims for extended field costs, extended home office overhead and unabsorbed/underabsorbed home office overhead?

21

- ▶ First, comprehensive requirements in the contract documents for initial and as-planned construction schedules.

22

- Second: Contractually limit the allowable markup on claims and changes to include home office overhead and extended field costs, as percentage of direct costs.

EXAMPLE:

- The allowances for overhead and profit as enumerated in the preceding subparagraphs shall include full compensation for any and all items of overhead including but not limited to, superintendence, field overhead, home office overhead (absorbed and unabsorbed), Contractor bonds, insurance, general conditions, clean-up, safety meetings, mandated programs and processing of Claim and Change Order documents.

- ▶ Third: Competitively bid contractor delay damages.

- ▶ Contractor agrees that the daily Contractor Delay Damages as set forth in the Proposal Form shall be full compensation to Contractor, all tiers of subcontractors and material suppliers and anyone for whom they may be legally responsible, for each day of delay that may be caused by City or anyone for whom City is legally responsible, including but not limited to, extended field costs, extended home overhead costs, impact, inefficiency, unabsorbed home office overhead, underabsorbed home office overhead, hindrance, disruption or any other damage arising from delay, no matter how characterized and regardless of the cause, extent or duration of the delay....

- ▶ ... Inclusion of Contractor Delay Damages within the Proposal Form is solely for the purpose of determining the low bidder and establishing the City's maximum daily liability as a result of City delays to Contractor, if any, and City has no obligation to pay any daily Contractor Delay Damages except as provided for in these Contract Documents for Compensable Delays. In the event that City becomes liable to Contractor for compensable delays, City agrees to pay Contractor the daily Contractor Delay Damages set forth in the Proposal Form or Contractor's actual daily delay damages, whichever is less, for each day of Compensable Delay as provided for by these Contract Documents.

27

- ▶ **FACT:**

- Contractors commonly disregard the claims procedures set forth in the contract documents.

28

- Submission of a Claim, in conformance with all of these requirements of this Contract, and rejection of all or part of said Claim by City, is a condition precedent to any action by Contractor against City, including but not limited to, the filing of a lawsuit or making demand for arbitration, if arbitration is expressly provided for in this Contract.

29

Abelleira v. District Court of Appeal
(1941) 17 Cal.2d 280.

- ▶ “ ... The rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.” (Page 293.)

30

‣ The best defense, is a good offense:

- False Claims Act
- Government Code section 12650, et seq.

31

Fassberg Construction Company v.
Housing Authority (2007) 152
Cal.App.4th 720

- Change order proposals are not claims, thus no false claims liability for mere submission of a false change order proposal.

32

► **One possible solution:**

- Remove all contractual obligations for contractor to submit change order proposals.
- Replace with:
- If contractor believes that any act or omission of City caused the contractor to sustain damages, contractor shall present a claim to City.

33

When do L/D's begin to accrue?

Upon completion?

What is "completion?"

Defined? Statutory?

34

Public Contract Code section 7107

- Completion means any of the following:
 - Occupation of work of improvement and cessation of labor.
 - "Acceptance" by the public agency.
 - A cessation of labor for 100 days.
 - A cessation of labor and recorded notice of completion/cessation.

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- It is agreed by the parties to this Contract that time is of the essence to the performance of this Contract by Contractor, and that in case all work called for under the Contract is not completed in all respects and requirements within the time called for in the Contract Documents, plus any agreed upon extensions of time, damage will be sustained by the City, and that it is and will be impracticable to determine the actual amount of damage by reason of such delay ...

36

The Silver Bullet

Business and Professions Code section 7031:

“ ... [N]o person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract ... ”

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- ▶ “If licensure or proper licensure is controverted, then proof of licensure pursuant to this section shall be made by production of a verified certificate of licensure from the Contractors' State License Board which establishes that the individual or entity bringing the action was duly licensed in the proper classification of contractors at all times during the performance of any act or contract covered by the action. Nothing in this subdivision shall require any person or entity controverting licensure or proper licensure to produce a verified certificate. When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure shall be on the licensee.” (Emphasis added.)

38

- ▶ Advantec Group, Inc. v. Edwin's Plumbing Co., Inc. (2007) 153 Cal.App.4th 621
- ▶ A general denial to the allegations of a complaint is sufficient to shift the burden of proof to the contractor to furnish a certificate of licensure at the trial.

- ▶ Robert D. White v. Terry E. Harper Cridlebaugh (2009) 178 Cal. App. 4th 506
- ▶ If the contractor is not properly licensed, the owner is entitled to recover all money paid to the contractor, without offset by the contractor.

Last, but not least ...

- By resolution of the City Council, a fund has been established, money encumbered in the current budget, and assigned to the account which is the sole source of funds available for payment of the Contract Sum. Contractor understands and agrees that Contractor will be paid only from this special fund and if for any reason this fund is not sufficient to pay Contractor, Contractor will not be entitled to payment. The availability of money in this fund, and City's ability to draw from this fund, are conditions precedent to City's obligation to make payments to Contractor.

41

Recap

- Construction contract is the most important single element that you have control over.
 - Comprehensive claims provisions
 - Comprehensive scheduling requirements
 - Competitively bid contractor delay damages
 - Require strict compliance with administrative remedies
 - Define "completion" or use an alternative definition for commencement of L/Ds.

42

- The False Claims Act is a tool.
Use it.
- Don't assume the contractor is properly licensed.
 - Verify
 - Verify again.