



HUNTORTMANN
ATTORNEYS AT LAW

THE CORNERSTONE OF CONSTRUCTION LAW™

Hunt Ortmann Palfy Nieves Darling & Mah, Inc.



Metro™

Metro Contractor Development & Bonding Program

Week One: Contract Review



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SKANSKA

DRAGADOS USA



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The Agenda

1. Competitive Bidding v. Qualifications Based
2. Bidder Prequalification
3. Bid Responsiveness v. Bidder Responsibility
4. Contract Award: What You Must Know
5. Establishing Startup Activities
6. What To Look For In Your Contract



Competitive Bidding

- ❑ Primarily used for “design-bid-build” procurement.
- ❑ The purpose is to guard against favoritism, improvidence, extravagance, fraud or corruption; to **prevent waste of public funds**; to obtain best economic result for the public. *Graydon v. Pasadena Redev. Agency* (1980) 104 Cal.App.3d 631.

Competitive Bidding

- ❑ The competitive bidding statute (more than 100 in California) generally require the contract to be awarded to **lowest responsive and responsible bidder.**
- ❑ *Pub. Cont. C.* §§ 10180 and 20672 for State Contracts; §§ 20161-20162 for City Contracts.

Competitive Bidding

□ Design Responsibility

- “The Spearin Doctrine” *United States v. Spearin*, 248 U.S. 132 (1918).
- “The owner impliedly warrants the adequacy of the plans and specifications when the project commences and any liability that arises from incomplete plans and specifications is borne by the owner.”

Competitive Bidding

- ❑ Design Responsibility
 - Design, bid, build.
 - Design-build.
 - CM at-risk.
 - Design Assist/Performance Specification

Qualifications-Based Bidding

- ❑ Used for design professional contracts.
- ❑ State and local agencies contracting with private design firms.
- ❑ Fair, competitive selection process which allows price to be considered as part of the ranking and selection process.

Bidder Prequalification

- ❑ Obtain experience and financial information from prospective bidders. *Pub. Cont. C. § 10160*
- ❑ Standardized prequalification forms and procedures to apply a **uniform system of rating bidders**. *Pub. Cont. C. § 20101*
- ❑ SBE/DBE/DVBE Participation “Goals”, “Good Faith Efforts”, and “Outreach”

Bidder Prequalification

- ❑ Public body may consider:
 - Experience and Quality
 - Past Performance
 - Insurance and Bonding
 - Capacity and Safety
 - Financial Statements
 - Local agencies: SBA contractors exempt per *Pub. Cont. C. § 20101*

Bidder Responsiveness

- ❑ The bid must be in **strict and full accordance** with the material terms of the bidding instructions. *Taylor Bus. Serv., Inc. v. San Diego Bd. Of Educ.*, 195 Cal.App.3d 1331 (1987).
- ❑ Public body may waive “minor” deviations. *Menefee v. County of Fresno*, 162 Cal.App.3d 1175 (1985).

Bidder Responsiveness

- ❑ A bid fails to comply materially with the bid package if it gives the bidder a **substantial economic advantage** or benefit **not enjoyed by other bidders** or if the bidder could have withdrawn its bid without forfeiting its bid security. *Menefee v. County of Fresno*, 162 Cal.App.3d 1175 (1985).
- ❑ Arbitrary or unwritten policies not allowed.

Bidder Responsibility

- ❑ “A bidder who has demonstrated the attribute of **trustworthiness**, as well as **quality, fitness, capacity, and experience** to satisfactorily perform the public works contract.” *West v. City of Oakland*, 30 Cal.App. 556 (1916).
- ❑ A bidder is responsible if it can perform the contract as promised.

Bidder Responsibility

- ❑ Public body may consider financial resources, surety and insurance capacity, construction experience, personnel, and disqualification from bidding other projects due to violation of law or safety ordinance.
Pub. Cont. C. § 10162.
- ❑ Cannot make an award based upon relative superiority.

Bidder Responsibility

- ❑ Before rejecting bid on non-responsibility grounds, the agency must notify the bidder of the evidence and afford it an **opportunity to demonstrate that it is qualified to perform the contract.** *City of Inglewood-Los Angeles County Civic Ctr. Auth. V. Superior Court*, 7 Cal. 3d 861 (1972).

Upon Contract Award...

- ❑ Registration with the Department of Industrial Relations is required before contract can be awarded. *Labor Code § 1725.5.*
- ❑ Contractor's license must be active **at the time of contract award.** *Business and Professions Code § 7028.15(a).*

Upon Contract Award...

- ❑ SBE/DBE/DVBE participation commitments and compliance: *Are subcontractor substitutions necessary?*
 - Subletting and Subcontracting Fair Practices Act. *Pub. Cont. C. § 4100.*
 - Request for SBE/DBE/DVBE substitution sent to Metro's Diversity and Economic Opportunity Department for approval.

Upon Contract Award...

- ❑ “Or equal” material substitution requests must be submitted **35 days** after contract award. *Pub. Cont. C. § 3400.*
 - *Contract documents may state a shorter time, even before contract award!*
- ❑ Schedule and material submittals typically due 30 days after Notice to Proceed is issued.

Upon Contract Award...

- ❑ Insurance requirements generally
 - Providing certificates/policies is a condition precedent to a Notice to Proceed being issued.
 - Forfeit bid security if not provided.
 - Certificates include policy certificate, additional insured certificate, and subcontractor insurance certificates.

Upon Contract Award...

- ❑ Insurance requirements generally
 - Coverage for two years after contract completion may be required.
- ❑ Railroad Insurance
 - **Not typically covered by a Commercial General Liability Policy.**
 - Typically is for the term of the job.
 - Typically an occurrence based policy.

Upon Contract Award...

☐ Airport Insurance

- Not typically covered by a Commercial General Liability Policy.
- Heightened level of activity in airports.
- Typically an occurrence based policy and must arise out of the ownership, maintenance, or use of the insured premises.

Upon Contract Award...

Pollution Insurance

- Not typically covered by a Commercial General Liability Policy.
- Gradual release v. Sudden/Accidental
- What substances are considered to be pollutants under the policy?

Upon Contract Award...

- ❑ Payment and Performance Bonds
 - Payment and Performance bonds are **mandatory** on public jobs in excess of \$25,000.
 - *Pub. Cont. C. §§ 10221, 10223, 10224.*

Upon Contract Award...

☐ Notice to Proceed

- Typically issued 30 days after all conditions precedent are satisfied.
- **Commences the contract time** to complete contract work.
- Payment and project schedules typically due 30 days after NTP issued.

Upon Contract Award...

☐ Notice to Proceed

- Register with small business programs compliance reporting system **14 days** after NTP issued.
- Project kick-off meeting typically occurs immediately after issuing the NTP.

Startup Activities

- ❑ Buying out suppliers – *“Buy American”*
 - Federal funds may not be obligated unless steel, iron, and manufactured products used in **FTA-funded projects** are produced in the USA, unless a waiver has been granted by the FTA or the product is subject to a general waiver. 49 *USC* 5323(j) and 49 *CFR* 661

Startup Activities

- ❑ Buying out suppliers – “*Buy American*”
 - Incorporate “*Buy American*” obligations into **subcontracts and purchase orders** AND ENFORCE THEM.

Startup Activities

- ❑ Executing Subcontracts
 - Incorporate provisions required by the prime contract with the owner.
 - Incorporate all contract documents
 - For example: insurance requirements, indemnity requirements, **change order and claims process**, “Buy American”

Startup Activities

❑ Obtaining Permits

- Must be obtained from the **agency with jurisdiction**.
- Consequences for not obtaining permits are contract default, project delays, non-compliance reports, costs to expose work for proper inspection, possible CSLB discipline, etc.

Key Contract Provisions

- Schedule and Delay
- Payment
- Differing Site Conditions
- Indemnity
- Change Order Requests and Change Orders
- COR and Claim Submission Time Limits
- Default and Termination
- Claims/Dispute Resolution



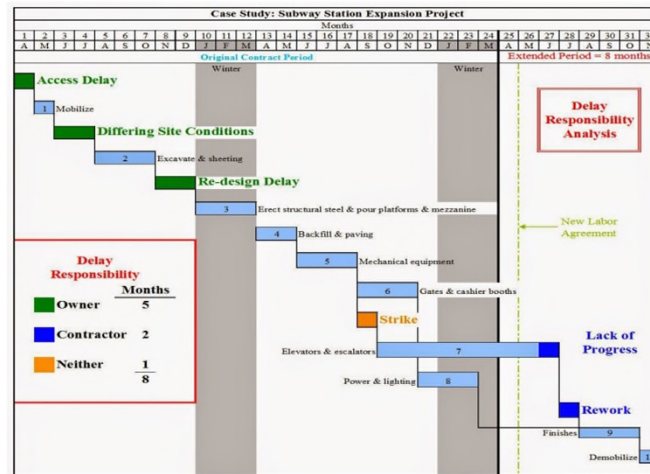
Schedule and Delay

- ❑ Complexity of schedule proportional to:
 - The complexity of the Project and
 - Mechanisms in the contract to prevent or discourage delay and impact claims
- ❑ Only critical path delay is compensable... or is it?

Schedule and Delay

❑ Critical Questions:

- What work was delayed?
- Was it on the critical path?
- Who caused the delay?



Schedule and Delay

□ Best Practices:

- Be reasonable with **baseline** schedule.
- Update project schedule at least once a month.
- Be mindful of “**look a-heads**” and revise schedule accordingly.
- Identify in the contract who owns the **float**.

Schedule and Delay

❑ Best Practices:

- Avoid surprises by using **fragnets**.
 - *The sequence of new activities that are proposed to be added to the existing schedule.*
- Consider a “shadow schedule.”

Schedule and Delay

- ❑ Contract Time Extensions
 - Significant change orders may impact the completion date.
 - Time extension can help owner avoid acceleration claim.
 - No damage for delay clauses.

Schedule and Delay

- ❑ Liquidated Damages
 - Presumed valid in California.
 - Per diem amount.
 - Usually question of comparative fault.

Schedule and Delay

- ❑ Compensable Delays
 - Increased costs caused by owner's delay (i.e., direct job costs, home office overhead, increased material costs, additional insurance or bond expenses, etc.)

Schedule and Delay

- ❑ No Damages For Delay Clauses – BEWARE
*“No claims for additional compensation or damages for delays, or productivity loss, whether caused in whole or in part by any conduct on the part of the Contractor, including conduct amounting to a breach of this agreement, or delays by other subcontractors or Owner, shall be recoverable from Contractor. The **extension of time** for completion set forth in paragraph 5.3 shall be the **sole remedy** of the Subcontractor.”*

Payment Provisions

- ❑ Conditional And Unconditional Waivers
 - The double payment problem
- ❑ Payment provisions often contain language preserving owner's rights:
 - Defective work not remedied
 - Third party claims
 - Reasonable evidence of contractor delay.

Payment Provisions

- ❑ “Pay-When-Paid” Clause
 - *Could* be unenforceable. *Capitol Steel Fabricators, Inc. v. Mega Constr. Co.* (1997) 58 CA4th 1049.
 - Unreasonable delay in payment?
- ❑ “Continue To Work” Clause
 - Common law right to stop work.
 - Waiver of right is enforceable. How far?

Prompt Payment Statutes

- ❑ Unique To Construction Industry:
 - Available on both public and private works of improvement.
 - **Separate violations** for **progress payments** and **retention**.

Prompt Payment Statutes

- ❑ Punishes Owners and Prime Contractors For Untimely Payments
 - *Public Works of Improvement:*
 - **2% per month** interest penalty against **contractor** plus **attorneys' fees** and costs (**progress and retention payments**).

Prompt Payment Statutes

- ❑ Punishes Owners and Prime Contractors For Untimely Payments
 - *Public Works of Improvement:*
 - **10% annual** interest penalty against *state agency owner* (**progress payments**).

Prompt Payment Statutes

- ❑ Punishes Owners and Prime Contractors For Untimely Payments
 - *Public Works of Improvement:*
 - **2% per month** interest penalty against *state agency/public entity* plus **attorneys' fees** and costs (**retention payment**).

Prompt Payment Statutes

- ❑ Subject to “Good Faith Dispute” Exception
 - “Good faith” dispute over amounts due.
 - Withhold 150% of disputed amount.

Differing Site Conditions

Type I

- *Actual Conditions Materially Differ From Conditions In The Contract*
- *Contractor Relied*
- *Actual Conditions Not Foreseeable and Not Reasonably Evident*

Type II

- *Actual Condition Undisclosed*
- *Actual Condition Unusual For The Area*
- *Contractor Did Not Know Of Condition and Not Reasonably Evident*

DSC Examples

Type I

- *Larger Or More Boulders Than Noted*
- *Groundwater Encountered At Shallower Depths Than Noted*

Type II

- *Fossils*
- *Hundreds Of Gallons Of Subsurface Oil At A Prison Site*
- *Buried Gas Lines*



DSC Contract Provisions

- ❑ Most contracts afford contractor some protection.
- ❑ If DSC encountered, stop work and **give notice**.
- ❑ Contracts usually contemplate some level of contractor inspection of the site.

DSC Contract Provisions

- ❑ BUT, beware of provisions that:
 - Shift responsibility/**exculpate owner**.
 - Imply excessive inspection of premises
By contractor.
- ❑ *Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility District*
- ❑ *Pub. Cont. C. § 7104*
- ❑ *Greenbook Specification Section 3-4*

Indemnity

- ❑ Two related duties:
 - *Duty to Indemnify*: Obligation to pay money on behalf of another
 - *Duty to Defend*: Obligation to pay for or assume the defense of another.
- ❑ In California, these obligations are defined by statute. *Civil Code §2772, et seq.*

Contractual Indemnity

- ❑ Type 1 Indemnity:
 - Protects the person to be indemnified (indemnatee) from liability, **regardless of its active negligence.**

Contractual Indemnity

- Type 2 Indemnity:
 - Protects the indemnitee from liability arising from the indemnitee's **passive negligence or vicarious liability**, but not from its active negligence.

Contractual Indemnity

- ❑ Limitations on contractual Indemnity.
- ❑ *Civil Code* § 2782 prohibits:
 - Indemnity agreements in construction contracts purporting to indemnify against all liability, including **liability** for the **sole negligence** or **willful misconduct** of the indemnitee.

Contractual Indemnity

- ❑ Limitations on contractual Indemnity.
- ❑ *Civil Code* § 2782 **also prohibits:**
 - Indemnity agreements with ***public agencies*** that purport to impose liability on the indemnitor for the agency's **active negligence.**

Crawford is Down...

- ❑ The Recent Evolution Of Type 1 Indemnity Obligations
 - *Crawford v. Weathershield Mfg.*, 44 Cal.4th 541(2008) and its progeny.
 - SB 474: Effective January 1, 2013.

Crawford is Down...

- ❑ Current State Of The Law:
 - No indemnity for claims arising from indemnitor's "active negligence."
 - No indemnity for claims that do not arise out of indemnitor's scope of work.

Crawford is Down...

□ BOTTOM LINE:

- Recent legislation has **gutted type 1 indemnity** agreements in most construction contracts.
- Check your contracts, particularly **subcontracts**, to ensure the indemnity section is compliant with current law.

...But Not Completely Out

- ❑ Subcontractors can still be required to provide defense, but subject to current law and contractor's written demand.
- ❑ Subcontractor elects to provide or pay for the defense
 - Defend with counsel of choice; OR
 - Pay reasonable share of defense costs within 30 days.

...But Not Completely Out

- ❑ Subcontractor's damages for failure to defend include, compensatory and consequential damages, attorney's fees, and interest.

CHANGE ORDERS

- ❑ The many sides of a change order:
 - Legal modification to the contract.
 - Created to address any issue that could result in a change to the contract.
 - Scope of work
 - Performance parameters
 - Working conditions
 - Schedule

CO PROCEDURE

- ❑ Defined by the contract.
- ❑ Typically will contain provisions regarding:
 - Timing and notice.
 - Prior approval in writing.
 - Proceeding under construction change directive.

CO PROC. COMPLIANCE

- ❑ Attention Must Be Paid To The Change Order Process:
 - Express contractual term.
 - **Potential waiver**, especially with public agencies.
- ❑ Know the procedures for pursuing a claim for a denied change order request.

CO PROC. COMPLIANCE

- ❑ Proceed under protest and/or a directed work order.
 - Document labor, materials, and equipment **daily**.
 - Use time and material tickets.
 - **Do not overstate cost/time impact** in COR or T&M tickets!
 - False Claims Act violations.

FULL AND FINAL CLAUSES

- ❑ Full and Final Clauses: Acknowledgement that all costs “*related to the Change Order*” are included within the approved Change Order.
- ❑ Omission of any cost can be costly mistake.
- ❑ Contractors can protect themselves by negotiating a reservation of rights clause.

TERMINATION PROVISIONS

- ❑ Two types:
 - For Cause (You're fired!)
 - For Convenience (Let's break up)
- ❑ Termination for cause
 - Default by one party without curing.
- ❑ Termination for convenience
 - Exactly what it says...convenience of the parties.

TERMINATION FOR CAUSE

- ❑ Notice provisions for termination for cause
 - Follow the notice provisions
 - Then follow them again
- ❑ Specify the grounds for termination
 - Be as **specific** as possible.
 - Try to avoid relying on catch-all provisions.

TERMINATION FOR CAUSE

- ❑ Specify the remedy arising from the termination.
- ❑ Watch for clause which makes an improper termination for default a termination for convenience.

TERM. FOR CONVENIENCE

- ❑ Limit compensation to the amount due on the Contract + General Contractor's cost of terminating purchase orders and material contracts.
 - Exclude profit on unperformed work.

DISPUTE RESOLUTION PROC.

- ❑ Dispute resolution occurs well before a claim is made.
- ❑ Good contract terms assist the parties to negotiate and resolve problems and move on with the project.
- ❑ But not all disputes can be resolved through informal channels.

CAUSES OF DISPUTES

- Bad plans and specifications
- Differing site conditions
- Scope of work disputes
- Project delays
- Bid mistakes
- Bad communication
- Financial troubles

AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE

- Good baseline documents
- Surveys
- Iterative drawings
- Photographs and videos
- Daily reports
- Meeting minutes

AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE

- ☐ Contract documents
 - Change orders
 - RFIs and responses

PURSUING YOUR RIGHTS IN LITIGATION

☐ Court v. Arbitration

- Arbitration with a time clock
- Cost/Benefit analysis: Arbitration is a pay to play proceeding.
- Privacy concerns
- Rights of appeal
- Strong facts but unfavorable contract terms: you may want a jury trial

PURSUING YOUR RIGHTS IN LITIGATION

- Judicial Reference – Hybrid Forum
- Mediation
 - Typically voluntary to attend
 - Negotiating a settlement, not binding

THE END.

THANK YOU FOR ATTENDING!





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