"5 Ways to Reduce Construction Risks"

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Risk is an inherent part of public works construction projects. School districts can take 5 steps to reduce risk: (1) conduct a critical self-evaluation; (2) improve and coordinate construction and professional service contracts; (3) use bonds drafted by the school district; (4) establish a fair and expedient claims process; and (5) develop a problem solving (versus finger pointing) mind set.

1. Critical Self-Evaluation and Planning for Proper Logistical Support as an Owner.

A school district may not have any in-house construction personnel; or it may not have enough experienced in-house personnel to properly administer its construction program. Even if the school district does have personnel handling accounts receivable and payable, change order units, management units, design units, inspection units, etc., the size of the construction program will place increased burdens on them. Either way, the school district must undertake a critical self-evaluation of its internal operating staff and departments who will participate in construction-related activities.

The school district must objectively recognize its logistical needs as the owner of a construction program and then assess whether it has sufficient experienced personnel to efficiently and timely perform its obligations as an owner of a construction project. In order to fully recognize its logistical needs, the school district should hire experienced legal counsel and experienced bond program managers and/or construction managers to assist in the evaluation.

2. Improve and Coordinate Construction and Professional Service Contracts.

Many school districts hire various outside professionals in connection with a construction project or program. Most of the school district's obligations as an owner are then delegated to these professionals. However, many school districts simply accept professional service contracts (perhaps making some minor modifications) drafted by these professionals. When this happens, the school district faces much greater risk and exposure to liability, often with no or little recourse against the truly responsible party (i.e., one of its professional service vendors) when things go wrong. This happens because most of the time school districts do not conduct a thorough review of the professional service contracts, individually and collectively. Such reviews are critical to determine whether or not all of the owner responsibilities that are intended to be delegated actually get delegated. In short, if a school district simply accepts contracts from its outside professionals, it should assume that there has been no coordinated review because each contract is coming from a separate source. In such a situation, the school district is exposing itself to much greater risk than it should have to face.

With the input of experienced legal counsel and other professionals, who will not have a financial self-interest in the construction project or program, the school district should draft its own contracts (e.g., bond program manager's, architect's, construction manager's, etc.). In doing so, the school district will work from a comprehensive and coordinated set of professional service contracts.

When drafted properly, such contracts will clearly and fairly apportion responsibility and risk.

3. Use Bonds Drafted by the School District.

Far too many school districts continue to assume that they must use bonds drafted by surety companies. This is akin to asking the fox to watch the chicken coop. However, more and more school districts are discovering that surety companies will issue payment, performance and other types of construction related bonds, on forms drafted by the school district. Drafting bonds as part of a a comprehensive and coordinated set of professional service contracts will better protect the school district than will a bond drafted by the surety.

4. Establish a Fair and Expedient Claims Process.

A school district can also gain more control, and therefore minimize its risk, by developing its own claims process, rather than adopting statutory claims processes. California statutes contain a number of "claims procedures" available to school districts. Generally, those procedures are found in: (1) Government Code §§ 900 et. seq.; (2) Public Contract Code §§ 20104 through 20104.6; and (3) Public Contract Code § 10240.

Under Government Code §§ 900 et. seq., the procedure covers almost all claims with some exceptions. The claimant has one year from accrual of the cause of action to submit the claim. The claim must include certain information. However, the law only requires the claimant to "substantially comply" with the information requirements. Also, the school district has a very short time period within which to notify the claimant that the claim information is insufficient.

Under Public Contract Code §§ 20104 through 20104.6, a claimant must submit a claim in writing with documents to substantiate the claim. The claim must be filed on or before the date of final payment. This procedure is sometimes referred to as the "black hole of public works claims." The process also has required meet and confer, mediation, arbitration and litigation requirements. It takes forever to reach the end of it.

The Public Contract Code also permits school districts to opt into the arbitration process found in Public Contract Code § 10240 (which is normally only applicable to State and State Agency contracts).

While each of the foregoing statutory claims procedures has pros and cons, the biggest drawback to each is that the school district often does not know what the claim is all about, including the magnitude thereof until the construction project in question is finished or nearly finished. By that time, project participants may have moved on, memories have faded, documents have been misplaced, and the parties should be focusing on closing out the project. Also, from the contractor's perspective, the contractor has had to finance the dispute by carrying the financial costs of the disputed work. Each of the three foregoing statutory claims procedures usually ends up as a long, drawn out, hide-the-ball process filled with acrimony.

However, Government Code § 900 permits a school district to create and adopt its own claims process pursuant to the contract exception found in that statute. School districts should take

advantage of this authority. Many school districts have found that by establishing a fair and expedient claims process in their contracts, they reach the end of construction projects dispute-free. A fair and expedient claims process has at its foundation three key principles: (1) The process continually shifts the responsibility to act on the claim back and forth between the owner and the contractor based upon who is in the best position to act (e.g., produce specific information). Disputes get resolved when you get down to the specifics. Disputes get prolonged when one or both parties merely exchange generalized opinions; (2) The process requires the party advancing the claim to advance it promptly with full backup as soon as the event, circumstance or condition giving rise to the claim has ended, and also requires resolution within 90 days (in this way decisions are made while all the information is fresh and available); and (3) The process allows partial agreements to be processed as change orders so that the cash flow (the lifeblood of construction) continues and only the remaining disputed issue(s) proceed through the process. For example, if a contractor claims entitlement to a disputed extra and values it at $100,000.00 and the owner acknowledges it is a extra, but believes it is only worth $85,000.00, the process allows a "partial agreement" change order at $85,000.00 (i.e., the extent of the parties mutual agreement) and requires the contractor to immediately pursue the disputed balance (i.e., $15,000.00) in the claims process or lose it. The process has now shifted to the contractor the decision whether to pursue the additional $15,000.00 through a process that will cost him further time and money and the contractor may very well choose to forgo the $15,000.00 thereby bringing quick closure to the dispute.

5. Develop and Use a Proactive Problem Solving Approach for Construction Related Issues.

If you make a better product, more people will buy it. In the context of construction disputes, the better product is a culture developed by the owner and made mandatory for the owner's agents, employees and the other professional service vendors involved in the construction process on behalf of the owner. The culture should be "fair, firm and reasonable" and encourage "problem solving, not finger pointing." All too often, construction participants immediately start blaming someone else and finger-pointing as soon as a problem surfaces. This in turn polarizes the parties and causes them to withdraw to their respective corners. Yet, these are the very professionals whose expertise is needed to solve the problem as quickly and cost effectively as possible. Time is money. It is costly and inefficient to argue over which party or parties are legally responsible for a problem while the problem itself remains unaddressed and unresolved. Find the most cost effective way to fix it and then resolve responsibility.

Therefore, it is more prudent to require all the parties involved in the process to problem solve and resolve without anyone losing any rights and remedies. Sometimes you may have to advance disputed funds to get the problem solved under a full and complete reservation of your rights and remedies, but this will save you money in the end. Moreover, you must have an expedient claims process that allows the contractor to recoup costs if the contractor was not totally to blame. You begin to build the "better product" by coordinated and comprehensive contracts followed up with constant training of those persons operating on behalf of the school district in the construction process.