

# Best Practices for DSA Close-Outs

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## Opportunities in Contracts

**Phil Henderson**  
**Orbach, Huff & Suarez, LLP**

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## First,

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- RFQ/RFP for Your Consultants
  - The Government Code requires a “fair, competitive selection process” for “all architectural, landscape architectural, environmental, engineering, land surveying, and construction project management services.” (Gov. Code, §§ 4529.10 & 4529.12.)
  - Even when not statutorily required, we recommend using an RFQ/RFP process to procure consultants.
  - Include a form of contract when you send out the RFQ/RFP.

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## Your Current Contracts

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- ❑ All contracts should include specific language regarding closeout requirements for that party.
- ❑ Most construction contracts (General Contractor, CM/Multiple Prime, Lease-Leaseback, etc.) have included language that allows the District to withhold contract funds if the contractor does not complete “all closeout requirements” or some other more general language.
  - This language should be more specific.
- ❑ Most consultant contracts (CMs, project inspectors/IORs, special inspectors, etc.) have not included language that allows the District to withhold contract funds for a consultant’s failure to complete closeout.
  - Some general language is usually present, but this can be improved.

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## The Construction Contract

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- ❑ Most construction contracts have general language about closeout and documentation. For example:
  - “Contractor shall coordinate with Architect and Construction Manager and shall submit its verified report(s) according to the requirements of Title 24.”
  - “The Contractor shall have made all corrections to the Work that are required to remedy any defects therein, to obtain compliance with the Contract Documents or any requirements of applicable codes and ordinances, or to fulfill any of the orders or directions of District required under the Contract Documents.”
  - “Reasons to withhold payment: Failure of the Contractor to submit, on a timely basis, proper, sufficient, and acceptable verified reports.”
- ❑ Let’s do better.

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# The Construction Contract

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- ❑ Construction contracts should have more specific language regarding the documents, information, and submittals required for closeout. For example:

“Closeout Documentation shall include the following, without limitation:

- A full set of As-Built, as further defined herein
- All O&M Manuals and Information, as further defined herein
- All Warranties, as further defined herein
- Verified report(s) for all scope(s) of work (DSA-6 Verified Report, Rev 04/08, or more recent revision if available)”

“Closeout Documentation shall have a value in the Schedule of Values of not less than 5% of the total Contract Price. The value for Closeout Documentation shall be in addition to and shall not be a part of the Contract retention.”

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# The Construction Contract

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- ❑ And there should be provisions in the Contract Documents to require and enforce the Contractor’s submittal of all Closeout Documentation:

“Reasons to Withhold Payment. The District may withhold payment, in whole, or in part, to such extent as may be necessary to protect the District from loss because of, but not limited to:

...

Failure of the Contractor to submit on a timely basis and to not cause a delay in the completion or approval of the Project, all Closeout Documentation in a manner and form that is proper, sufficient, and reasonably acceptable to the District.”

- ❑ Recall that Closeout Documentation should have a value in the Schedule of Values of not less than 5% of the total Contract Price.

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# The A/E Contract

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- Your contract with your architect / engineer should require that the architect receive, coordinate and file all Closeout Documents with DSA.

“Architect shall prepare or collect, as applicable, and provide to DSA, all reports required by DSA related to the design and construction of the Project.”

“Architect shall obtain all required DSA approvals for all change orders and addenda to the contractor’s contract.”

“Architect shall prepare verified report(s) for the Project (DSA-6A/E Verified Report, Rev 04/08, or more recent revision if available)”

“Architect shall coordinate all Services required to Closeout the design and construction of the Project with the District and between consultants.”

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# The A/E Contract

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- And there should be provisions in your architect/engineer contract to require and enforce the architect’s obligations:

“District shall retain two percent (2%) of Architect’s Fee until Architect has filed all required Closeout Documents with DSA”

“District shall retain two percent (2%) of Architect’s Fee until Architect has received DSA Closeout, including DSA approval of the final As-Built set of drawings”

- We understand the concern that requiring the architect get DSA Closeout before it gets its last portion of its Fee requires the architect to wait for DSA to act.
  - We are willing to consider alternatives that accomplishes the same goal (real closeout) and does not shift the burden to District staff or increase the Board’s liability.

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## The Project Inspector Contract

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- Your contract with your project inspector (IOR) should require that the IOR provide all closeout documents, as required:

“Inspector shall provide to the District on a timely basis and to not cause a delay in DSA’s approval of the Project, all verified report(s) for all scope(s) of work (DSA-6 Verified Report, Rev 04/08, or more recent revision if available), and all other required Project documents if not already completed and provided to the District.”

“District shall retain five percent (5%) of Inspector’s Fee or Ten Thousand Dollars (\$10,000), whichever is greater, until Inspector has filed all required verified report(s) and other Project Documents.”

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## The Special Inspector Contract

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- Your contract with all your special inspectors should require that each provide all closeout documents, as required:

“Special Inspector shall provide to the District and the Project Inspector on a timely basis and to not cause a delay in DSA’s approval of the Project, all information and documentation that the Project Inspector needs to file its verified report(s) that reference or otherwise incorporate any test(s) and/or inspection(s) the Special Inspector performed.

“District shall retain five percent (5%) of Special Inspector’s Fee or Five Thousand Dollars (\$5,000), whichever is greater, until Special Inspector has provided all information and documentation that the Project Inspector needs to file its verified report(s) .”

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## The CM Contract

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- Your contract with your construction manager should require that the CM receive, coordinate and ensure all Project participants provide all Closeout Documents.

“CM shall use its best efforts and all due diligence to ensure all Project participants provide all required Closeout Documents and information on a timely basis and to not cause a delay in Project completion or DSA’s approval of the Project.”

“District shall retain five percent (2%) of CM’s Fee or Ten Thousand Dollars (\$10,000), whichever is greater, until DSA has approved the Project.”

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## Other Consultant Contracts

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- You get the idea:
  - List the documents and steps you need the consultant to provide
  - State that the consultant has to provide those documents or take those steps
  - State that you have the right to withhold funds until they provide those documents or take those steps.
    - Make the sure the amount you are holding is both significant (enough to make them perform) but not so much that it is disproportionate to the damage your are suffering (so much it makes them sue you instead of just performing).

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## All Contracts

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- ❑ Enforce your own contract and withhold the funds until you get the documents
- ❑ Consider taking it one step further:

“If the construction on a Project is otherwise complete, consultant shall provide a complete, proper, and sufficient verified report, notwithstanding any dispute between the District and Consultant. The consultant’s failure to comply with this provision shall be a material breach of this Agreement and District may recover all consequential damages resulting from that breach, in addition to any other remedies available to the District either at law or pursuant to this Agreement.”

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## All Contracts

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- ❑ Professional Liability (Errors and Omissions) Insurance
  - All consultants, including the project inspector, special inspectors, etc., should be required to carry E&O coverage.

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## Other Relevant Information

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- There is legislation that will limit a school district's retention to no more than 5%
  - In 2009 it was AB 396 and SB 802. The subject matter of these bills will come back in the next session.
  - School districts can still keep 150% of value of disputed item (Public Contract Code §7107)

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## Thank You

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