

C.A.S.H. CONFERENCE

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YOUR CONTRACTOR CAN'T PERFORM, NOW WHAT?

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Monitoring Your Construction Project

- Be familiar with the contract documents:
 - What are the obligations of the parties?
 - What are the required notice provisions?
- Review language of bonds.
- Have current list and update for contractors, sub-contractors and suppliers (phone, fax and address).

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Monitoring Your Construction Project

- Review inspector's logs and architect meeting notes:
 - Speak up if anything is incorrect.
- Verify construction is proceeding within schedule for timely completion.
- Keep Governing Board accurately advised of status of project.

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Warning Signs to be Aware of in Construction

- Are there adequate workers on site to timely complete work?
- Are required materials present?
- Are sub-contractors and suppliers being paid timely?

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Steps to Take to Avoid Termination

- Attempt to Resolve All Construction Disputes Before Default.
- Do not let problems grow.
- Work through issues as soon as they occur.
- Meetings with contractor.
- Meetings with surety.
- Recovery schedule.

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Steps to Take to Avoid Termination

- Inform Governing Board of potential default.
- Resolution of Construction Claims:
 - Public Contracts Code Section 20104:
 - Public Works claims of \$375,000 or less;
 - Meet and confer;
 - Mediation
 - Judicial arbitration.
- Any undisputed portion of a claim must be paid.

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Procedural Issues in Defaulting a Contractor

- You must follow contract language exactly.
- Material breach of contract.
- Contractor given opportunity to cure breach.
- Contractor failed to cure breach.
- Breach is not justified or excused.

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Steps to Take Prior to Termination

- What is status of work completed?
- What is status of payment to sub-contractors?
- What is status of any potential payment bond claims?
- Will sub-contractors continue to work on project?

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Steps to Take Prior to Termination

- Protection of the site:
 - Fencing;
 - Locks;
 - Security;
 - Insurance Coverage.
- Proposals by potential contractors for completion.

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Options in Terminating a Contractor

- Termination of Convenience.
- Terminating Contractor's Right to Proceed with Work.
- Take Over Agreements.
- Completion Contractor.

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Options in Terminating a Contractor

- Re-bidding required?
 - Emergency Resolutions;
 - *Marshall v. Pasadena (2004) 119 Cal. App.4th 1241.*
- Maintain detailed records.

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What to do if Your Contractor Files Bankruptcy

- Do not violate automatic stay imposed by bankruptcy filing.
- Prepare financial information:
 - Contract information;
 - Bonds;
 - Stop Notices;
 - Change Orders;
 - Payments history.

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What to do if Your Contractor Files Bankruptcy

- Determine what is goal of school district.
 - Contract performed;
 - Contract assigned/assumed;
 - Contract rejected.
- Communicate with bankruptcy trustee.
- Motion to have contract assumed/rejected.

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Recommended Actions to Minimize Risk from Defaulting Contractors

- Steps to reduce risk begins before construction starts.
- Use standardized set of construction documents:
 - Provides consistency in construction projects;
 - Provides control for school district;
 - Can be easily updated for changes in law or based on experience from prior projects.

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Recommended Actions to Minimize Risk from Defaulting Contractors

- Include in contract language:
 - Definitions of what constitutes a default;
 - Assignment of contracts if contractor is terminated;
 - Joint checks authorized;
 - Direct payment to sub-contractors;
 - Takeover agreement for sub-contractors and general contractor.

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Questions and Answers



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