







	Litigation Procedures
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	Delay Analysis
	<ul style="list-style-type: none">■ Who caused the delay?<ol style="list-style-type: none">1. Contractor?2. Owner – Changes? Design errors?3. Weather?4. Acts of Public Enemy?
	


	Delay Analysis
	<ul style="list-style-type: none">■ What's the remedy for the delay?<ol style="list-style-type: none">1. Will the contractor get a time extension to perform?2. Will the contractor get overhead, etc.?3. Will the District get liquidation damages?
	


	<h2>Delay Analysis</h2>
	<ul style="list-style-type: none"> ■ Elements of Delay Analysis: The Art of Attributing Liability for Delay <ol style="list-style-type: none"> 1. Excusability 2. Criticality 3. Concurrency 3. Compensability



	<h2>Delay Analysis</h2>
	<ul style="list-style-type: none"> ■ Is the delay excusable? <ol style="list-style-type: none"> 1. Excusable delays usually defined by the contract. Examples include: <ol style="list-style-type: none"> a. Unusually severe weather b. Acts of God c. Acts of Public Enemy 2. An excusable delay may justify an extension of time for performance.



	<h2>Delay Analysis</h2>
	<ol style="list-style-type: none"> 3. Nonexcusable delays by contractor—no time or money to contractor. Examples include: <ol style="list-style-type: none"> a. Mismanagement b. Late suppliers c. Slow subcontractors 4. Nonexcusable delay by Owner: time and/or money to contractor.



	
	Delay Analysis
	<p>5. Nonexcusable delays by contractor:</p> <p>a. Liquidated damages retained by Owner</p>


	
	Delay Analysis
	<ul style="list-style-type: none"> ■ Is the delay critical? <ol style="list-style-type: none"> 1. Is the work delayed on the “critical path”? 2. Was the project not completed on time? 3. Acceleration ■ Did concurrent delays occur: i.e., are both the contractor and the owner responsible for the delay?


	
	False Claims
	<ul style="list-style-type: none"> ■ The False Claims Act – Government Code sections 12650 through 12655 ■ Imposes substantial liability for eight types of conduct: <ol style="list-style-type: none"> 1. Knowingly presenting a false claim for payment or approval to the state or any political subdivision 2. Knowingly using a false record or statement to get a false claim paid or approved by the state or any political subdivision 3. Conspiring to get a false claim paid by the state or any political subdivision


 	<h3>False Claims</h3>
	<p>4. Having possession, custody or control of public property or money to be used by the state or any political subdivision, and knowingly delivering or causing to be delivered less property than the amount for which a certificate or receipt is given</p>
	<p>5. Having authorization to make or deliver a document certifying receipt of property used or to be used by the state or any political subdivision and knowingly making or delivering a receipt that falsely represents the property used or to be used</p>



 	<h3>False Claims</h3>
	<p>6. Knowingly buying or receiving, as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property</p>
	<p>7. Knowingly making, using or causing to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state or any political subdivision</p>



 	<h3>False Claims</h3>
	<p>8. Being a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, subsequently discovering the falsity of the claim, and failing to disclose the false claim to the state or the political subdivision within a reasonable time after discovery</p>



	<h2>False Claims</h2>
	<ul style="list-style-type: none"> ■ Damages may include triple the actual amount of damages sustained by the entity, plus attorneys' fees and a fine of up to \$10,000 for each false claim. (Government Code § 12651 (a)(1)-(2).) ■ "Litigation privilege" does not apply to false claims. (Government Code § 12654(e).)


	<h2>Method of Proving Damages</h2>
	<ul style="list-style-type: none"> ■ Liquidated damages <ol style="list-style-type: none"> 1. Set by contract 2. Reasonable estimate of cost to owner of delay estimated at time of contract execution 3. To ensure reasonableness, consider all the costs owner may incur if project is late: renting alternate facilities, paying architect and inspector, etc., plus intangibles such as administrative time, loss to education, etc.


	<h2>Method of Proving Damages</h2>
	<ul style="list-style-type: none"> ■ Delay damages <ol style="list-style-type: none"> 1. Extended general conditions 2. Overhead 3. Idle equipment, labor costs 4. Lost profits


	
	<p style="text-align: center;">Method of Proving Damages</p> <ul style="list-style-type: none"> ■ Extended general conditions <ol style="list-style-type: none"> 1. Time-sensitive costs that will go up with delay 2. Personnel, equipment, services at site


	
	<p style="text-align: center;">Method of Proving Damages</p> <ul style="list-style-type: none"> ■ Overhead <ol style="list-style-type: none"> 1. <i>Eichley</i> formula 2. $(\text{Contract billings} \div \text{Total company billings for actual contract period}) \times \text{Total overhead incurred during contract period} = \text{Allocable overhead}$ 3. $(\text{Allocable overhead} \div \text{Actual days of contract performance}) = \text{Overhead allocable to contract per day}$ 4. $\text{Daily overhead} \times \text{Number of days of delay} = \text{unabsorbed overhead}$


	
	<p style="text-align: center;">Method of Proving Damages</p> <ul style="list-style-type: none"> ■ Using the schedule <ol style="list-style-type: none"> 1. Is it reliable? 2. Who prepared the schedule?


	Method of Proving Damages
	<ul style="list-style-type: none"> ■ Methods of schedule analysis <ol style="list-style-type: none"> 1. As-built schedules 2. As-planned method 3. Review out-of-sequence work and other disruptions


	Dispute Resolution Procedures
	<ul style="list-style-type: none"> ■ Methods of Dispute Resolution <ol style="list-style-type: none"> 1. Mediation 2. Non-binding arbitration 3. Binding arbitration 4. Litigation 5. Method may be determined by terms of contract and/or statute.


	Dispute Resolution Procedures
	<ul style="list-style-type: none"> ■ Public Contracts Code Section 20104, et seq.: Resolution of Construction Claims <ol style="list-style-type: none"> 1. Applies to all contractor public works claims of \$375,000 or less 2. Provides a meet-and-confer process, and non-binding mediation if claims not resolved by meet-and-confer, followed by judicial arbitration if necessary, and litigation


	
	<h2 style="text-align: center;">Dispute Resolution Procedures</h2>
	<p>■ Mediation</p> <ol style="list-style-type: none"> 1. Contract may specify mediation as a prerequisite of litigation for claims in excess of \$375,000, or parties can agree at any time to mediate even if not in contract 2. Mediation is voluntary, non-binding, and intended to provide an opportunity for the parties to evaluate each other's cases with a mediator and arrive at a mutually agreeable solution 3. The contract may provide the procedure for initiating and conducting the mediation before a mutually-acceptable mediator

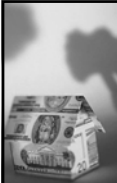
	
	<h2 style="text-align: center;">Dispute Resolution Procedures</h2>
	<ol style="list-style-type: none"> 4. Mediator should have expertise in the area of the dispute and be knowledgeable in the mediation process 5. Mediator does not have authority to impose a settlement on the parties but will attempt to assist the parties in reaching a satisfactory resolution of their dispute

	
	<h2 style="text-align: center;">Dispute Resolution Procedures</h2>
	<p>■ Non-binding Arbitration</p> <ol style="list-style-type: none"> 1. May be contractual or judicial (Public Contracts Code §§ 20104, et seq.) 2. Contract may specify applicable arbitration rules (such as American Arbitration Association rules for construction) 3. Contract may specify method of selecting an arbitrator. May be an individual or a panel 4. Arbitrator will conduct hearing, and may take testimony as well as documentary evidence 5. Arbitrator will determine an award, which either party may accept or reject 6. If a party finds award not acceptable, trial de novo in court

	<h2>Dispute Resolution Procedures</h2>
	<p>■ Binding Arbitration</p> <ol style="list-style-type: none"> 1. Similar procedure as with non-binding arbitration, except that arbitrator's award is final 2. Court overturns award on <u>very</u> limited grounds only – usually means arbitration award is the final decision

	<h2>Dispute Resolution Procedures</h2>
	<p>■ Litigation</p> <ol style="list-style-type: none"> 1. Judge or jury renders decision, can be appealed to higher courts 2. Discovery may be obtained by written interrogatories (questions), requests for production of documents or inspection of property or physical things, or by oral depositions of percipient witnesses and experts 3. Court may refer case to mediation, arbitration or other form of Alternative Dispute Resolution even if not in contract

	<h2>Dispute Resolution Procedures</h2>
	<p>■ Contractual and Government Claims Requirements for Suing Owners</p> <ol style="list-style-type: none"> 1. Submission of Claims – some contracts may provide for procedure for submission of claims to architect or engineer who may make initial decision regarding merits of claim 2. As a general rule, a claim must be timely presented to a public entity pursuant to the Tort Claim Act before the entity may be sued in court (Govt. Code, § 945.4.) 3. Claim must be presented within one year after the accrual of a cause of action, except for personal injury (six months) (Govt. Code, § 911.2.)



Dispute Resolution Procedures

■ Contractual and Government Claims Requirements for Suing Owners

4. Failure to allege compliance with Tort Claims Act may be grounds for a general demurrer to a lawsuit. (*State v. Superior Court (Bodde)* (2004) ___ Cal.4th ___, 2004 D.A.R. 6138.)