

Have You Ever Read Your Bid Documents?

27th Cash Annual Conference
Wednesday, February 22, 2006
10:45 am - 12:15 am

Moderator: **David Stevenson**, San Bernardino City USD

Panel: **Douglas N. Yeoman**, Parker & Covert LLP
Hugh Lee, Atkinson, Andelson, Loya, Ruud & Romo

PRE-CONSTRUCTION

PHASE

Presented by: **Hugh Lee, Attorney**
Atkinson, Andelson, Loya, Ruud & Romo

PRE-CONSTRUCTION PHASE

1. Bid Advertisements & Notice Inviting Bids
2. Handling Bid Alternates
3. Bid Security
4. Bid Protests & Language to Reduce Them

1. Bid Advertisements & Notice Inviting Bids

- # Bid Ad v. Notice Inviting Bids
- # Planning and Timelines
- # Targeting Bidders

Bid Ad v. Notice Inviting Bids

Condense Your Bid Ad & Save Money:

- # Bid opening deadline & location
- # Licensing requirements
- # Labor compliance program
- # Prevailing wage requirements
- # Mandatory Job Walks
- # Subcontractor Designation

Bid Ad v. Notice Inviting Bids

- # Bid Security
- # Payment & performance bonds
- # Alternates
- # Substitution of Securities
- # D.V.B.E
- # Request for Substitutions

#Planning & Timelines

- ▣ Publication for two consecutive weeks
- ▣ Mandatory job walks
- ▣ Prequalification of bidders
- ▣ Material changes, additions or deletions
- ▣ Board approval and re-bidding

Targeting Bidders

- ▣ Publication v. "word of mouth"
- ▣ "Newspaper of general circulation"
- ▣ Green sheets

2. Handling Bid Alternates

- ▣ Public Contract Code §20103.8
- ▣ Other Options

#Public Contract Code §20103.8

- ▣ Base bid
- ▣ Base bid + alternates specified
- ▣ Base bid + alternates in a specific order to meet funding amount
- ▣ "Blind bid" method

#Other Options

- ▣ Bidders providing various bid prices that are not alternates
- ▣ Bid "A" v. Bid "B" and using prices to negotiate future work

3. Bid Security

- #Allowable types of security
- #Bid bond surety
- #Action against bid bond and forfeiture of security

4. Bid Protests & Language to Reduce Them

#Frequent Bid Protest Issues and Scenarios

#Language and Documents to Reduce Bid Protests

#Frequent Bid Protest Issues and Scenarios

- Legal authority and discretion granted to school districts
 - bid responsiveness
 - waiving irregularities
- Designation of subcontractors for work in excess of 0.5% of the total bid
- Approved or certified subcontractors and improper substitutions
- D.V.B.E. requirements
- Licensing

QUESTIONS & ANSWERS

CONSTRUCTION

PHASE

Presented by: Douglas N. Yeoman, Attorney at Law
Parker & Covert LLP

CONSTRUCTION PHASE

1. Project Schedules
2. Handling Claims & Disputes
3. Resolution of Claims & Disputes
4. Termination for Cause and Convenience
5. Bankruptcy & Dissolution of Contractor

1. PROJECT SCHEDULES

- ⌘ Schedule of Values
- ⌘ Critical Path Progress Schedule

SCHEDULE OF VALUES

- # Schedule of Values which is prepared by Contractor following Contract award, should include:
 - Amount of overhead and profit applicable to each item of work
 - Breakdown between rough and finish work for the basic trades
 - Individual figures for large dollar equipment and materials installed or furnished on project

Schedule of Values - Cont.

- # Once approved, the schedule is used as a basis for reviewing Contractor periodic payment requests
- # Schedule should be updated from time to time as may be necessary during course of construction

CRITICAL PATH PROGRESS SCHEDULE

- # Critical Path Method (CPM), is a procedure for using network analysis to identify those tasks which are on the critical path: i.e. where any delay in the completion of these tasks will lengthen the project timescale, unless action is taken.
- # The CPM formally identifies tasks which must be completed on time for the whole project to be completed on time.

CPM - Cont.

- # The CPM identifies which tasks can be delayed for a while if resources need to be reallocated to catch up on missed tasks.
- # The CPM helps identify the **minimum length** of time needed to complete a project.
- # The CPM determines both the **early start** and the **late start date** for each activity in the schedule.

CPM- cont.

- # The CPM progress schedule, including updates, at a minimum, should include the following items of data:
 - ▣ Critical path
 - ▣ Earliest and latest dates of completion
 - ▣ Float for each activity and total project float
 - ▣ Manufacturing dates and delivery dates of critical equipment or special equipment
 - ▣ District-designated milestone activities

CPM- Cont.

- ▣ Submission dates for all submittals and shop drawings, if not provided on separate schedule of submittals
 - ▣ All underground work
- # The CPM progress schedule should be submitted following the award of the Contract, and before any payment request for mobilization; and thereafter updated at a minimum monthly.

2. HANDLING CLAIMS & DISPUTES

Sources of claims & disputes:

- Contractor claims for additional time and/or compensation
 - Extra work or changes
 - Faulty plans and specifications
 - Delay in project due to unforeseeable causes beyond the reasonable control and without the fault or negligence of Contractor

Handling Claims & Disputes - Cont.

- Subcontractor or Supplier claims for payment and/or additional compensation
 - Failure of Contractor to make timely payment
 - Extra work or changes
 - Faulty plans and specifications
 - Delay in project due to unforeseeable causes beyond the reasonable control and without the fault or negligence of subcontractor or supplier

Handling Claims & Disputes - Cont.

- District claims & disputes typically arise from:
 - Errors and/or omissions in plans and specifications by project architect
 - Failure of Contractor to timely pay subcontractors and/or suppliers
 - Failure of Contractor to prosecute work with such diligence to ensure timely completion, or complete the project within established timeline
 - Contractor making general assignment for the benefit of creditors, or if a receiver is appointed due to insolvency

Handling Claims & Disputes - Cont.

- Contractor persistently or repeatedly refuses or fails to supply enough properly skilled workers or materials to timely complete the project
- Contractor is persistently or repeatedly absent from the site
- Contractor persistently disregards laws, ordinances or instructions of the District
- Contractor or one of its subcontractors is guilty of a substantial violation of any provision of the Contract

3. RESOLUTION OF CLAIMS & DISPUTES

- # Errors and Omissions Insurance
- # Change Order
- # Stop Notice (20-Day Preliminary Notice)
- # Alternative Dispute Resolution

ERRORS AND OMISSIONS INSURANCE

- # Errors and Omissions Insurance ("E&O") is designed to cover liability related to the failure of a professional (architect, engineer or attorney) to exercise reasonable and ordinary care, and the degree of skill consistent with other professionals in their community when performing services.

E & O INSURANCE - Cont.

✦ Distinction between omissions and errors:

- ✦ **Omissions.** Seen as adding value to a project which owner would have paid for if included. Counter is that funds may not now be available, or change order cost may be higher than if originally competitively bid.
- ✦ **Errors.** Mistakes made by a designer, when corrected, do not add to the greater value of the project.

CHANGE ORDERS

✦ Primary method to document changes to the Contract amount and/or completion date

- ✦ Used by District to order changes, modifications, deletions and extra work
- ✦ Used by Contractor to claim that instructions, requests, drawings, specifications, actions, conditions, omissions, defaults, or other situations obligate District to pay additional compensation and/or to grant an extension of time for the completion of the Contract

CHANGE ORDERS - Cont.

- ✦ Contract documents should specify a period of time (e.g. 10 days) following the date in which Contractor has actual or constructive notice of the factual basis supporting the claim.
- ✦ Documents should specify that the failure of Contractor to timely submit a claim shall be deemed a waiver and relinquishment of the claim against District.

CHANGE ORDERS - Cont.

⚡ District, in its discretion, should determine the method(s) to be used to establish the value of any extra work, change, or deduction.

⚡ **Disagreement over change order.** Where Contractor disagrees with either the direction given by the architect, the amount of time to be added to the project completion date, and/or the adjustment in the Contract amount, to avoid a delay or disruption in the project, the Contract documents should include a provision similar to the following:

CHANGE ORDERS - Cont.

“In the event of a dispute between the parties as to performance of the work, the interpretation of this Contract, or payment or nonpayment for work performed or not performed, the parties shall attempt to resolve the dispute. Pending resolution of the dispute, Contractor agrees to continue the work to completion. If the dispute is not resolved, Contractor agrees it will neither rescind the Contract nor stop the progress of the work, but Contractor's sole remedy shall be to submit such controversy to determination by a court of the State of California, in _____ County, having competent jurisdiction of the dispute, after the project has been completed, and not before.”

CHANGE ORDERS - Cont.

⚡ 4 primary methods of establishing value:

- Lump sum
- Unit price
- Recognized estimating guides (e.g. R.S. Means Company, Inc.; Lee Saylor, Inc.)
- Time and material
 - Important to define terms and percentages for overhead and profit

STOP NOTICES

⚡ Permissible claimants:

- Claimant must furnish labor, services, equipment, or materials to the project; and
- Claimant typically a subcontractor or material supplier, but may include any other person performing labor on or bestowing skill or services contributing to the work.

⚡ Claimant must serve a 20-day preliminary notice to the prime contractor and District, unless the claimant has a direct contractual relationship with the prime contractor, or is performing actual labor for wages.

STOP NOTICES - Cont.

▫ Claimant should serve the preliminary notice no later than 20 days after first furnishing labor, services, equipment, or material to the job. If served later, any subsequently filed stop notice will only protect the claimant for the work performed within the 20 days immediately prior to the date in which the preliminary notice is served.

⚡ The failure to timely serve the preliminary notice, if required, results in the loss of the claimant's stop notice rights.

STOP NOTICES - Cont.

⚡ Stop notice must be filed within (a) 30 days after a notice of cessation or notice of completion is recorded, or (b) 90 days after all work on the project has either ceased or been formally accepted, where no notice of cessation or notice of completion is recorded.

⚡ District must withhold 125% of the stop notice amount, until either (a) the stop notice claimant submits a written release of the stop notice, (b) a stop notice release bond has been received, or (c) otherwise ordered by the court.

ALTERNATIVE DISPUTE RESOLUTION

- ⚡ Public works claims of \$375,000 or less which arise between a Contractor and District must **first** comply with the mediation and arbitration provisions commencing with Public Contract Code section 20104, prior to filing suit in court.
- ⚡ Claims must be filed on or before the date of final payment.

4. TERMINATION FOR CAUSE & CONVENIENCE

- ⚡ Contract documents should provide for both the ability to terminate the Contract for cause and for convenience.
- ⚡ **Termination for Cause.** The Contract is terminated for cause, i.e., upon the occurrence of certain enumerated events constituting a default.
- ⚡ Examples of bases for termination for cause:
 - Contractor refuses or fails to prosecute work or any separable part with such diligence as will ensure its completion within the time specified or any extension thereof.

Termination - Cont.

- Contractor fails to complete the work within the scheduled time.
- Contractor is adjudged bankrupt.
- Contractor makes a general assignment for the benefit of its creditors.
- A receiver is appointed on account of Contractor's insolvency.
- Contractor persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials to timely complete the project.

Termination - Cont.

- Contractor is persistently or repeatedly absent, without excuse, from the site.
- Contractor fails to make prompt payment to subcontractors or for materials or labor.
- Contractor or its subcontractors is guilty of a substantial violation of any provision of the Contract documents.
- ✦ If one or more of above bases exist, District should consider serving written notice upon the Contractor and its surety of the District's intention to terminate.

Termination - Cont.

- ✦ Notice must contain the reasons for such intention to terminate, and unless within a specified time period (e.g. 10 days) after service of the notice, the condition(s) prompting the notice have ceased or the violation(s) have ceased and arrangements satisfactory to the District for the correction have been made, the Contract, upon the expiration of the cure period, shall cease and terminate.
- ✦ Upon such termination, the Contractor is not entitled to receive any further payment until the project is finished.

Termination - Cont.

- ✦ Immediately upon the effective date of termination, District should serve written notice to the surety and Contractor, whereupon the surety is given a specified time period (as set forth in payment and performance bonds) to notify the District whether it intends to take over and perform the Contract.
- ✦ If either the surety (a) fails to timely notify the District of its intent, (b) fails to commence performance of the Contract within a designated time period from the date District serves the notice of termination on the surety, or (c) informs the District that it does intend to take over the Contract, the District may take over the work and complete the Contract at the expense of the terminated Contractor.

Termination - Cont.

Depending upon the estimated dollar amount of work required to complete the project and how critical time is for completion of the project, the District should consider the following options:

- If remaining work under \$15,000 bid limit, enter into direct contract(s) to complete work.
- If over \$15,000, competitively bid remaining work.
- If over \$15,000 and an "emergency" exists as described in Public Contract Code section 20113, upon the unanimous vote of the District Board, with approval of the county superintendent of schools, the District may enter into a direct contract.

Termination - Cont.

■ Term "emergency" is defined in Public Contract Code section 1102 as:
"a **sudden, unexpected occurrence** that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services."

■ Marshall v. Pasadena Unified School District, 119 Cal.App.4th 1241 (2004). Court found that the District's termination for convenience and subsequent adoption of an emergency resolution to enter into a direct contract to complete a modernization project, did not constitute an emergency.

Termination- Cont.

Termination for Convenience:

- Contract documents should also provide that the District may, at any time, terminate the Contract for the District's convenience and without cause.
- Upon receipt of written notice, (a) all operations cease, (b) Contractor takes necessary actions for the protection and preservation of the work, and (c) required insurance coverage continues.
- Contractor entitled to receive payment for all work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including overhead and profit for that portion of work completed, and reasonable proven damages.

5. BANKRUPTCY & DISSOLUTION OF CONTRACTOR

Steps to be taken in advance of impending bankruptcy of a Contractor:

- Verify validity of payment and performance bonds
- Notify surety in writing of any concerns regarding Contractor's solvency or performance; request a response from surety
- Calculate current amount of payment made, Contract balance remaining, and stop notices pending
- Compute percentage of completion using an independent source, not the Contractor

Bankruptcy of Contractor - Cont.

- Do **not** suspend progress payments unless surety instructs to do so, or Contractor abandons the project. Stopping payments based on hearsay about a Contractor's status may cause a breach of Contract.

Steps to be taken in the event of bankruptcy or abandonment by Contractor:

- Stop/hold all progress payments including those in processing or approved for payment, and wait for instructions from the surety.
 - If you pay a bankrupt Contractor anything without the surety's consent, you may not get credit for that payment against the Contract balance.

Bankruptcy of Contractor - Cont.

- Request surety's position on how to proceed with completion and handling of stop notice claims.
- Do **not** make any direct payments to suppliers or subcontractors without surety's consent.
 - Otherwise you may not get credit for the payments against the Contract balance.
 - Surety may have defenses to the amounts claimed or may want to negotiate for completion or discounts in exchange for its payment.

Bankruptcy of Contractor - Cont.

- Cooperate with surety's requests for documents and site inspections.
 - Surety will want to assess the status of completion and any defective work in order to estimate the completion cost.
- **Potential Completion Contractors.** Consider lining up potential completion contractors by soliciting quotes or informal bids, but do **not** enter into any completion contracts or issue purchase orders without surety's consent.

Bankruptcy of Contractor - Cont.

- Surety may not be familiar with contractors in your area, and finding contractors may expedite the process of restarting the work. On the other hand, surety has the right to select its own completion contractors if it agrees to take over and complete. Subcontractors of the original contractor are sometimes the best source of completion contractors, as they are familiar with the job, provided that their performance was not part of the problem before the bankruptcy.
- **Take Over Agreement.** If surety agrees to take over and complete the project in exchange for the contract balance, a written take over agreement will be needed. Legal counsel should be involved.

Bankruptcy of Contractor - Cont.

- **Emergency Resolution.** If surety authorizes District to hire contractors to be paid from the contract balance, consider using an emergency resolution as discussed earlier.
- **Tender Agreement.** Sometimes it may be more favorable for District to have the surety tender the full proceeds of the performance bond in exchange for a release, and allow the District to arrange its own completion (a "tender agreement").
 - This may be the case when work stops early on the project, little has been accomplished, and the full amount of the bond will be needed to complete. Again, legal counsel should be consulted.

Bankruptcy of Contractor - Cont.

- **Tender of Defense.** Promptly tender the defense of subcontractor and supplier stop notice lawsuits to the surety and ensure that they take action to protect the District's interests and prevent a default from being taken.
 - It should not be necessary, or appropriate, for the District to become involved in these lawsuits and incur defense costs, provided they are covered under the payment bond.
- **Use of Original Contractor.** Depending upon the terms of the performance bond, the District does not generally have to take back the original contractor as a completion contractor, even if this is proposed by the surety.

Bankruptcy of Contractor - Cont.

- **Extra Cost Claims.** The surety may attempt to assert extra cost claims of the original contractor to offset its completion costs. These claims should be reviewed by legal counsel.
- **Involvement in Bankruptcy Proceedings.** It is generally not necessary to become involved in the bankruptcy court matters. It is unlikely that the District will be able to recover any losses from the bankrupt contractor, since its status is usually that of an unsecured creditor, and secured creditors have priority.

Bankruptcy of Contractor - Cont.

- The bankruptcy trustee for the bankruptcy contractor has the option to "reject" the contract in bankruptcy proceedings, releasing it from the obligation to complete and also losing any rights to the remaining contract funds.
- The District may want to file a request for notices with the bankruptcy court and have your legal counsel monitor those proceedings, but not get involved in them.
- **Maintenance of Records.** District should keep careful records of all post-bankruptcy expenses on the project, especially if District is handling its own completion.

Bankruptcy of Contractor - Cont.

Any left-over contract funds will generally go to the surety, assuming it agreed to take over and complete, or agreed to have the District complete while the surety handled the payment bond claims.

No Bonds on Project. If for some reason there is no surety coverage, a far different situation occurs. The District will have to arrange its own completion, settle claims by subcontractors and suppliers, and may have to become involved in the bankruptcy proceedings to get relief from the "automatic stay", or permission from the bankruptcy court to use remaining contract funds for completion.

QUESTIONS & ANSWERS

POST -CONSTRUCTION PHASE

Presented by: **Hugh Lee, Attorney**
Atkinson, Andelson, Loya, Ruud & Romo

POST-CONSTRUCTION PHASE

Project Close-Out

#Project Close-Out

- ▣ What is substantial completion?
- ▣ The never-ending punch-list
- ▣ Completing punch-list work
 - ▣ value all remaining work & withhold (Public Contract Code §7107)
 - ▣ photo document incomplete work

#Project Close-Out - cont.

- ▣ Completing punch-list work
 - ▣ outstanding stop notices
 - ▣ other allowable withholdings (as-builts, warranties, manuals, etc.)
 - ▣ liquidated damages
- ▣ Provide an accounting of all remaining contract funds


