

## LEGAL ISSUES

- **Glenn Gould**  
*Miller Brown & Dannis*

### **Subcontractor Substitutions – Legal Issues**

- Substitution of a listed subcontractor is permitted in limited situations, including when the subcontractor refuses to sign a subcontract, is unlicensed, becomes insolvent, or fails to perform its work. (Pub. Contract Code § 4107)

## **Subcontractor Substitutions – Legal Issues**

- Hypothetical – **Subcontractor Substitution**: The contractor is a month behind and brings a subcontractor substitution request for the sheet-rock subcontractor who is refusing to perform its work because of a payment dispute and a performance dispute. Also, it appears this subcontractor never signed a contract with the contractor.
- What do you do?

## **Subcontractor Substitutions – Legal Issues**

- **District** must provide notice to the subcontractor (certified mail, RRR) of this request.
- If the subcontractor files a written objection to the substitution within 5 working days, the District must hold a hearing to determine whether the District will grant the contractor's request for substitution.
- District staff should conduct this hearing.
- District Board should approve/reject the substitution request based on the information that District staff gives to the Board and on District staff's recommendation.

## **Contractor Termination – Legal Issues/Options**

- Option No. 1: Try To Work it Out
  - Terminating will almost never speed up construction
  - Have a “get religion” discussion with the contractor
  - Post-meeting letter

## **Contractor Termination – Legal Issues/Options**

- Remove Scope
  - Short of termination, remove a portion of the contractor’s work so the contractor can get back on schedule
  - Can result in an angrier and an even less cooperative contractor
  - You may have just removed its profit
- Do I have to bid the removed scope?
  - Lawyer’s answer: maybe, maybe not

## **Contractor Termination – Legal Issues/Options**

- Get The Surety Involved Short of Termination
  - Notify surety of problems
  - State clearly that termination will be the District’s only other option
  - Some sureties are more cooperative than others
  - Suggest the surety determine if its assistance in staffing, expertise, or funding would keep the Contractor out of formal default

## **Contractor Termination – Legal Issues/Options**

- Do it: Terminate The Contractor in Writing
  - Address a “notice of termination” letter to the contractor and the surety that:
    - Terminates the contractor
    - Demands performance from the surety
  - State that District staff will go to the Board to approve the termination
    - Termination not effective until Board action

## **Contractor Termination – Legal Issues/Options**

- Do it: Terminate the Contractor in Writing (cont'd.)
  - State all pending timelines (e.g., approaching milestones, past milestones)
  - State whether the District will self-perform any work
  - Cite contract provisions on termination and failures of the contractor

## **Contractor Termination – Legal Issues/Options**

- What You Will Hear From Your Attorney:  
We Are in a Termination Situation
  - I.e., we are in a pre-litigation situation
  - Don't release any funds or sign anything without attorney review

## **Contractor Termination – Legal Issues/Options**

- Remember, the surety is not on your side of the table.
- But working with a surety will usually benefit the District. At least work more closely with the surety than you might the contractor.

## **Contractor Termination – Legal Issues/Options**

- Bankruptcy Potential
  - A defaulting contractor is often a pre-bankrupt contractor. Even so, notify the contractor (its lawyer?) of all actions being taken by District and surety.

## **Contractor Termination – Legal Issues/Options**

- Get to know your lawyer even better