

Introduction to Public Contracting Procurement and Public Works

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County Counselors' Association
of California

March 17, 2016

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Introduction and Overview



Public Works Services Real Property Personal Property

Types of Contracts

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Authority to Contract



General Law Counties

- Government Code
- Public Contract Code



Charter Counties

- Charter
- Ordinances

Key Contract Terms

Parties

- Name
- Form of Entity
- License No.
- Ins. Certificate

Scope of Work/Services

- Prescriptive Requirements
- Performance Requirements

Compensation

- Stipulated Sum
- Cost Plus a Fee with a GMP
- Unit Price

Time for Performance

- Commencement
- Completion
- Extensions

Design Professionals

- Qualifications-based selection – then negotiate reasonable price
 - Gov't Code §§ 4525–4529.5
- VS.
- Best-Value Competitive Selection – price is considered with other factors
 - Gov't Code §§ 4529.10–4529.20

Procurement Practice Tips

- Include contract form in RFP/Bid Invitation
- In RFP for consultant services consider
 - Proposer must agree to sign contract as-is; or
 - Proposer may suggest limited revisions
 - Nature and extent of revisions
 - May render proposal non-responsive or
 - Will result in deduction of points from score

Design Professionals Contracts

- Indemnity for negligence, recklessness or willful misconduct
 - Civil Code §2782.8
- Insurance
 - Claims made policy; maintain after completion
- Limitation of Liability
 - *Markborough California, Inc. v. Superior Court* (1991) 227 Cal. App. 3d 705

Sample Limitation of Liability Provision

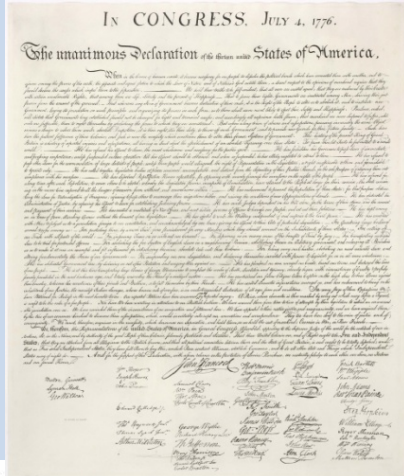
The image shows a sample AIA Document B101-2007, titled "Standard Form of Agreement Between Owner and Architect". A yellow box highlights a specific provision that reads: "The total liability of Architect to County for any and all Notwithstanding the foregoing, if Architect fails to maintain the professional liability coverage required by this Agreement, there shall be no limitation of liability of Architect. when Architect is required to maintain professional liability insurance for this Project." The document is partially obscured by other pages, and the highlighted text is framed by a red border.

Competitive Selection for Service Contracts

RFQ:	• Qualifications
RFP:	• Proposals/Bids
Sole Source:	• Negotiations
Transparency	• New SB 331 "CRONEY"



Constitutional Issues: Local Preference



- Commerce Clause
- Privileges and Immunities
- Equal Protection

Local Preference Implementation



- Rationale
- Exception to Award to Low Bid
- Implementation

What are the Differences Between Local Preference and Local Hire Programs?



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Bidding Procedures



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Evaluation of Bids

- To maintain fairness during the evaluation process, bids must be rejected if they are:
 - Not responsive to the invitation and instructions to bidders; or
 - If a bidder is not responsible to perform the work

Rejection of Bids

- Awarding agency generally has the discretion to:
 - Reject all bids and re-advertise
 - Abandon the project



Responsive Bids

- Bid must conform to material terms of the bidding documents
- Determined from the face of the bid, without investigation
- Case-by-case determination
- Cannot be rejected based on unwritten rules



Responsible Bidder

- “Responsible Bidder” = trustworthiness, quality, fitness, capacity and experience of the bidder to satisfactorily perform the particular requirements of the proposed work
 - Public Contract Code §1103



Responsible Bidder

- Before rejecting a low bidder on grounds of non-responsibility, public entity must:
 - Notify the bidder of the evidence supporting that finding; and
 - Afford bidder opportunity to demonstrate it is qualified to perform the contract
 - Practice Tip: Public hearing of grounds for non-responsibility may dissuade bidder from protesting



Project Administration

Change Orders — Practical Tips

- Resolve claims are earliest opportunity
 - Include description of the change
 - Include adjustment to the contract price
 - Include adjustment to the schedule
 - Include release/waiver language
- If contractor rejects proposed change order, follow contract procedures – construction directive, claims procedures, etc.

Change Order Form

Change Order Form

Project (Name and address):	Change Order No.:
Contractor (Name and address):	Change Order Date: Contract Date:

The following change is hereby made a part of the Contract Documents enumerated in the Short Form Contract as

This Change Order is in full compromise and settlement of all adjustments to Contract Time and Contract Price, and compensation for any and all delay, extended or additional field and home office overhead, disruption, acceleration, inefficiencies, lost labor or equipment productivity, differing site conditions, construction interferences and other extraordinary or consequential damages (hereinafter called "Impacts"), including any ripple or cumulative effect of said Impacts on the overall Work under the Contract arising directly or indirectly from the performance of Work described in this Change Order. By execution of this Change Order, Contractor agrees that this Change Order constitutes a complete accord and satisfaction with respect to all claims for schedule extension, Impacts, or any costs of whatsoever nature, character or kind arising out of or incidental to this Change Order and Contractor represents that each Subcontractor performing the change described above has executed a change order that contains substantially the same accord and satisfaction provisions as are set forth above in this Change Order.

Public Works Claims

- Require compliance with claims procedures in contract
- Monitor compliance and provide notice on non-compliance
- Do not waive notice or compliance with claims procedures
- Attempt to liquidate claims through the change order process

Liquidated Damages on Public Projects

- Local agency contracts may contain a liquidated damages provision
(Government Code §53069.85)
- Liquidated damages to be assessed must not be “manifestly unreasonable”
- Practical tip: may be a sword or a shield!

Public Contract Requirements

Contractor Liability for Delay Damages Limited to Liquidated Damages (Public PCC §7203)

- A requirement that a Contractor be responsible for delay damages is not enforceable unless liquidated to an identified amount
- Delay Damages Exclude Damages after notice of Completion or Acceptance by Public Agency
- May Include Multiple Liquidated Damages

“No Damages for Delay” – PCC §7102

- Not enforceable on public works projects, **unless**:
 - County is not responsible for the delay
 - Delay is not unreasonable
 - Delay was contemplated by the parties
- Strictly construed by most courts because of harshness
- Damages for acceleration and disruption may not be not barred





Insurance and Risk Management

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You Pay for Insurance in Almost Everything You Buy



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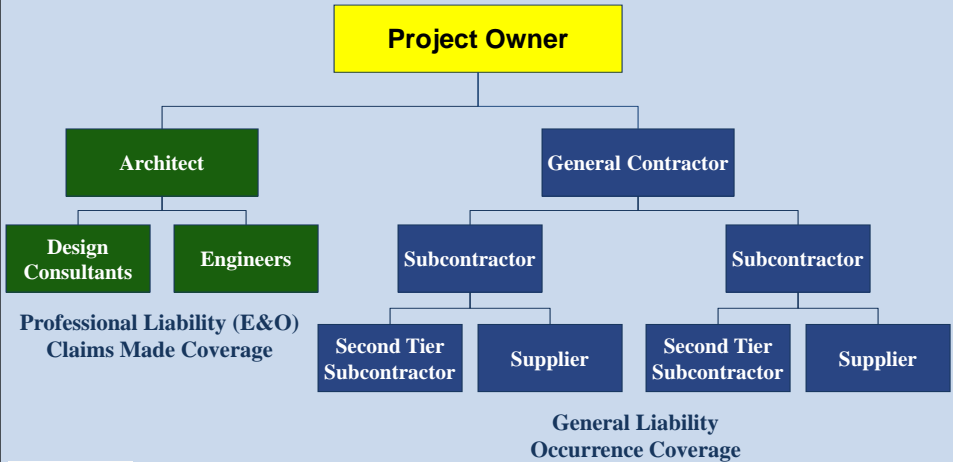
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Recognizing Coverage – Typical Types of Insurance

- Commercial General Liability (“CGL”)
- Workers Compensation
- Automobile Liability
- Professional Liability
- Pollution
- Employment Practices Liability (“EPL”)
- Property Insurance / Builders Risk
- Business Interruption / Delay in Completion
- Fidelity / Crime / Cyber Insurance

Traditional Liability Insurance Public Works Construction Project



Professional Liability Insurance

- Broad coverage, including economic loss
- Claims made (and reported) policy form
- Defense costs within limits
- Consent clauses
- Limitations on additional insured coverage

Additional Insured Status

- Can cover defense costs as well as payment of a judgment or settlement
- Additional Insured status is usually obtained by an “endorsement” to another party’s insurance policy
- Specify the precise endorsement
- Do not rely on certificates!

Certificate of Liability Insurance

ACORD. CERTIFICATE OF LIABILITY INSURANCE

INSURER: _____

INSURED: _____

INSURANCE INFORMATION:

INSURANCE A: _____

INSURANCE B: _____

INSURANCE C: _____

INSURANCE D: _____

INSURANCE E: _____

INSURANCE F: _____

INSURANCE G: _____

INSURANCE H: _____

INSURANCE I: _____

INSURANCE J: _____

INSURANCE K: _____

INSURANCE L: _____

INSURANCE M: _____

INSURANCE N: _____

INSURANCE O: _____

INSURANCE P: _____

INSURANCE Q: _____

INSURANCE R: _____

INSURANCE S: _____

INSURANCE T: _____

INSURANCE U: _____

INSURANCE V: _____

INSURANCE W: _____

INSURANCE X: _____

INSURANCE Y: _____

INSURANCE Z: _____

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THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE BY THE POLICIES BELOW.

Certificate of Liability Insurance

IMPORTANT

If the certificate holder is an ADDITIONAL INSURED, the certificate must be endorsed. Endorsement to the certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

If SUBROGATION IS WAIVED, the terms and conditions of the policy, certain policies may require an endorsement. This certificate does not confer rights to the certificate holder.

DISCLAIMER

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If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

Additional Insured—Owners, Lessees or Contractors (Form B)

POLICY NUMBER: _____ COMMERCIAL GENERAL LIABILITY
THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
ADDITIONAL INSURED—OWNERS, LESSEES OR CONTRACTORS (FORM B)

This endorsement modifies insurance provided under the following:
 COMMERCIAL GENERAL LIABILITY COVERAGE PART
 SCHEDULE

Name of Person or Organization:

If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.
 (WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you.)

CG 20 10 11 85

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WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you.

Additional Insured—Owners, Lessees or Contractors—Scheduled Person or Organization

CGI, Additional Insured Endorsement 313

POLICY NUMBER: _____ COMMERCIAL GENERAL LIABILITY
THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
ADDITIONAL INSURED—OWNERS, LESSEES OR CONTRACTORS—SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:
 COMMERCIAL GENERAL LIABILITY COVERAGE PART
 SCHEDULE

Name of Person or Organization:

If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.
 (WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.)

... but only with respect to liability arising out of your ongoing operations ...

Post-1985 Form 2010 Endorsement—Limits coverage to on-going operations

Builders Risk



Builders Risk Insurance

- Protects against damage to the construction project and delay to completion

Practical tips:

- Owner should be the first named insured to control the adjustment of the loss
- Should require the insurer to waive subrogation against project participants



Cates Construction v Talbot Partners
(1999) 21 Cal.4th 28

CA Supreme Court upheld an award of damages against surety for delays caused by the contractor based upon:

- The language of the bond stated that the terms of the construction contract were incorporated by reference; and
- The language contained in the construction contract made timely completion of the project a material term

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Recommendations for Owners

- Performance Bond
 - Require contractors to use proper bond forms
 - Investigate and qualify surety
 - Notify surety of all contractor defaults and delays and stop notice claims
 - Secure surety consent to settlements, release of retention and final payment

Practical tip: Do not “release” the bond unless contractually required to do so.

Prevailing Wages

SB 854 - As of January 1, 2016:

- Awarding bodies must register **ALL** public works projects with the DIR.
- Contractors and Subcontractors must submit certified payroll records to the Labor Commissioner using DIR’s electronic system.

The Stop Payment Notice Right

STOP PAYMENT NOTICE
LEGAL NOTICE TO WITHHOLD CONSTRUCTION FUNDS
PRIVATE AND PUBLIC WORKS
(California Civil Code §§ 8800 et seq., 9399 et seq.)
 Bonded Stop Payment Notice – Bond Attached

To: _____
(Name and Address of Construction Lender or Owner/Required Owner or Public Entity)

Description of Project Site – Sufficient for identification, including Street Address, if any – § 8102(a)(6) _____
(Name and Address of Owner)

Name and Address of Direct Contractor _____
(Contractor's Name, Address and Relationship to the Parties – § 8102(a)(5))

Name of the Person to or for Whom the Work is Provided – § 8102(a)(5)(b) _____
(General Description of Work Provided and to be Provided – § 8102(a)(5)(a), 8902(b), 8902(c))

• Estimate of total amount in value of the work to be provided: \$ _____
 • Total amount due claimant for work provided through the date of this Stop Payment Notice, after deducting all just credits and offsets: \$ _____

VERIFICATION
 I, the undersigned, say: I am the _____
(President Of, Manager Of, A Partner Of, Owner Of, Agent Of, Etc.)
 the claimant named in the foregoing Stop Payment Notice. I have read said Stop Payment Notice and know the contents thereof, and to the best of my own knowledge, I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on _____ at _____ City and State (Where Document Signed) _____
(Signature of the Individual who is Verifying True the Contents Of Stop Payment Notice on This)

REQUEST FOR NOTICE OF ELECTION
(Private Works Only, California Civil Code §§ 8922, 8900, et seq.)
 If an election is made and to withhold funds pursuant to this stop payment notice by reason of a payment bond having been recorded in accordance with §§ 8922, 8900, et seq., please send notice of such election and a copy of the bond within 30 days of such election in the enclosed pre-addressed stamped envelope. (CLAIMANT MUST ENCLOSE SELF-ADDRESSED STAMPED ENVELOPE.) This information must be provided by you under California Civil Code §§ 8922, 8900, et seq.

Signed: _____
(PRINT NAME)

Note: Claimant must serve this Stop Payment Notice in accordance with the provisions of Civil Code § 8106 and should complete and maintain a Proof of Notice Declaration in accordance with Civil Code § 8115.

Reduction or Release of Stop Payment Notice

REDUCTION OR RELEASE OF STOP PAYMENT NOTICE
 REDUCTION (PARTIAL RELEASE) FULL RELEASE
(Cal. Civil Code § 8128)

TO: _____
(Name and Address of Construction Lender/Owner/Required Owner or Public Entity)

(Name and Address of Owner/Required Owner)

(Name and Address of Direct Contractor)

(Description of Project Site – Sufficient for identification, including Street Address)

You are hereby notified that the undersigned claimant ("Claimant"), hereby releases, to the extent set forth herein, the Stop Payment Notice which was served in connection with the above-described work of improvement. Said Stop Payment Notice, dated _____ and was for the _____ and was for the _____ provided to: _____
(General Description of the Work)
(Party that Requested the Work)

Claimant's Stop Payment Notice is released as follows:

Reduction (Partial Release). By this Reduction of Stop Payment Notice, Claimant reduces and certifiably releases the claim stated in the above-described Stop Payment Notice by the sum of \$ _____ only, and also releases the construction lender/owner/public entity (Amount to be Released) _____ from any duty or obligation to withhold said sum in response to said Stop Payment Notice. Claimant expressly reserves any and all rights which Claimant has or may have with respect to the unreleased portion of its Stop Payment Notice, to wit, a claim in the amount of \$ _____ (Amount of Remaining Claim).

Full Release. By this Release of Stop Payment Notice, Claimant releases the above-described Stop Payment Notice in its entirety, and also releases the construction lender/owner/public entity from any duty or obligation to withhold any amount in response to Claimant's Stop Payment Notice and retains any right of action with respect thereto.

Claimant reserves any and all contractual and/or other statutory rights that claimant has or may have with respect to the above described Work of Improvement.

Revisions to Statutory Releases

- Mandatory releases h
- Conditional
- Unconditior
- Conditional
- Unconditior

**UNCONDITIONAL WAIVER AND RELEASE
ON FINAL PAYMENT
(California Civil Code § 8138)**

NOTICE TO CLAIMANT: THIS DOCUMENT WAIVES AND RELEASES LIEN, STOP PAYMENT NOTICE, AND PAYMENT BOND RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL WAIVER AND RELEASE FORM.

Identifying Information
 Name of Claimant: _____
 Name of Customer: _____
 Job Location: _____
 Owner: _____

Unconditional Waiver and Release
 This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for all labor and service provided, and equipment and material delivered, to the customer on this job. Rights based upon labor or service provided, or equipment or material delivered, pursuant to a written change order that has been fully executed by the parties prior to the date that this document is signed by the claimant, are waived and released by this document, unless listed as an Exception below. The claimant has been paid in full.

Exceptions
 This document does not affect any of the following:
 Disputed claims for extras in the amount of: \$ _____

Signature
 Claimant's Signature: _____
 Claimant's Title: _____
 Date of Signature: _____

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- Property lien
- Payment
- Payment
- Payment
- Payment

Definition of a False Claim

For purposes of the False Claims Act, a “claim” includes any request or demand for money, property or services made to any employee, officer, or agent of the state or of any political subdivision, or to any contractor, grantee, or other recipient

Gov’t Code §12650(b)(1) and (3)

FCA Damages and Penalties

A person who commits any of the prohibited acts will be liable to the state or to the political subdivision for three (3) times the amount of actual damages, for the costs of a civil action brought to recover any of those penalties or damages, including attorneys' fees, and may be liable for a civil penalty of up to \$10,000 for each false claim

Cal. Gov't Code §12651(a)

Real Property Disposition and Acquisition

CEQA

Condemnation

California Environmental Quality Act (CEQA)

- Under CEQA, a public agency must prepare an environmental impact report (EIR) on any project the agency proposes if that project may have a significant environmental impact.
- A city's conditional agreement to sell land for private development, coupled with financial support, was an approval of the project that required an EIR.

Save Tara v. City of West Hollywood, (2008) 45 Cal.4th 116



Final Comments