



CONSTRUCTION CLAIMS

THE CLAIMS PROCESS AND PRACTICE TIPS ON
MANAGING AND RESOLVING CLAIMS.

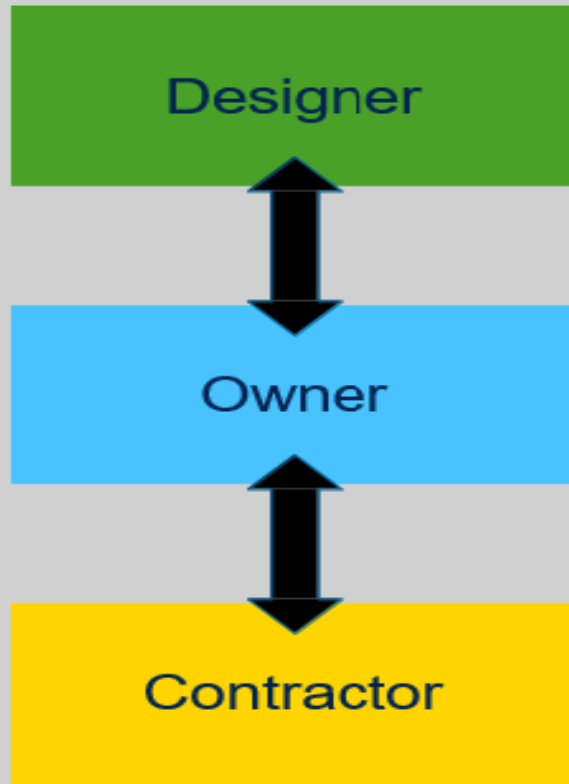
- Los Angeles County Metropolitan Transportation Authority (Metro)
 - Currently, five major rail projects under construction (Crenshaw/LAX; Regional Connector; Purple Line Extension 1, 2 & 3)
 - Upcoming Projects including Sepulveda Pass, East San Fernando Valley Project, West Santa Ana Project (may be Public/Private Partnerships – P3)
 - Exploring projects such as Congestion Pricing and Dodgers Stadium gondola system



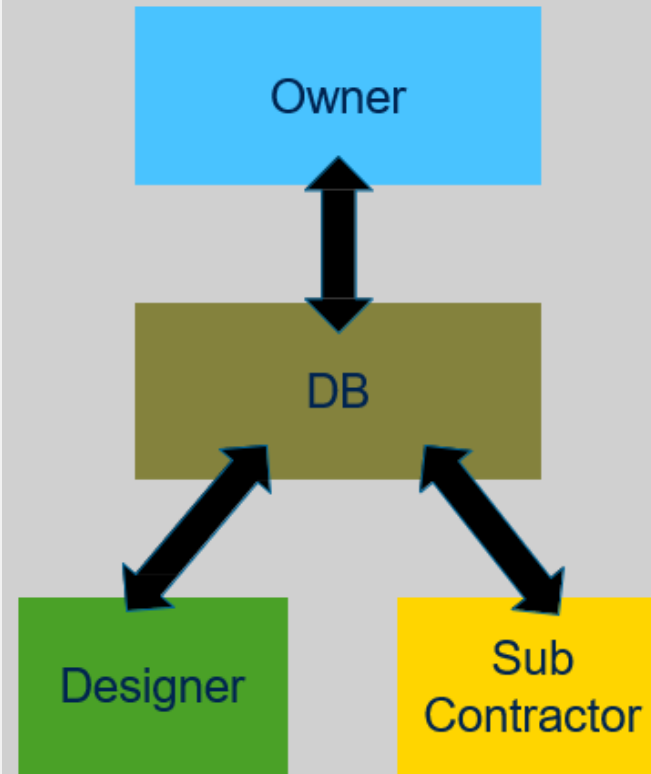
Teddy Low, Esq.
Senior Deputy County Counsel

Various Project Delivery Methods

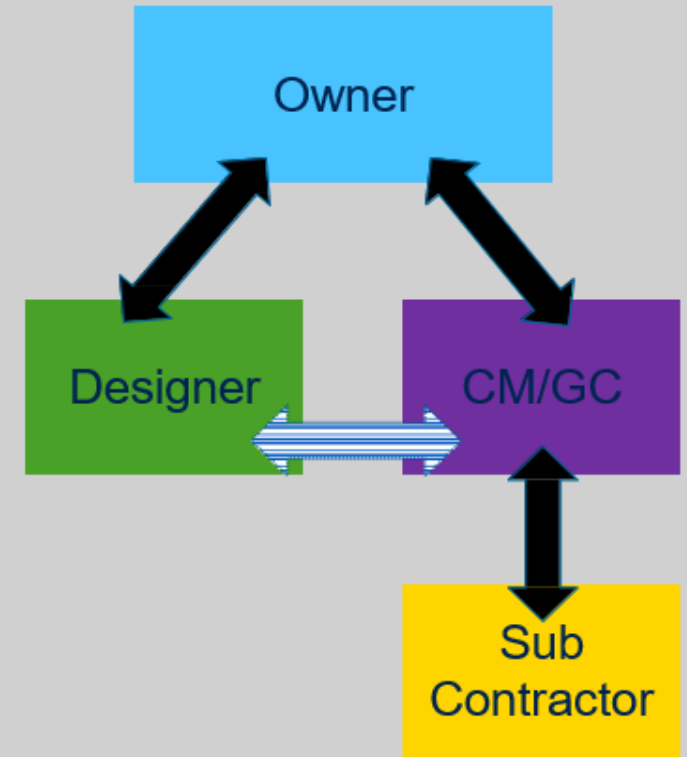
Design-Bid-Build (DBB)



Design-Build (DB)

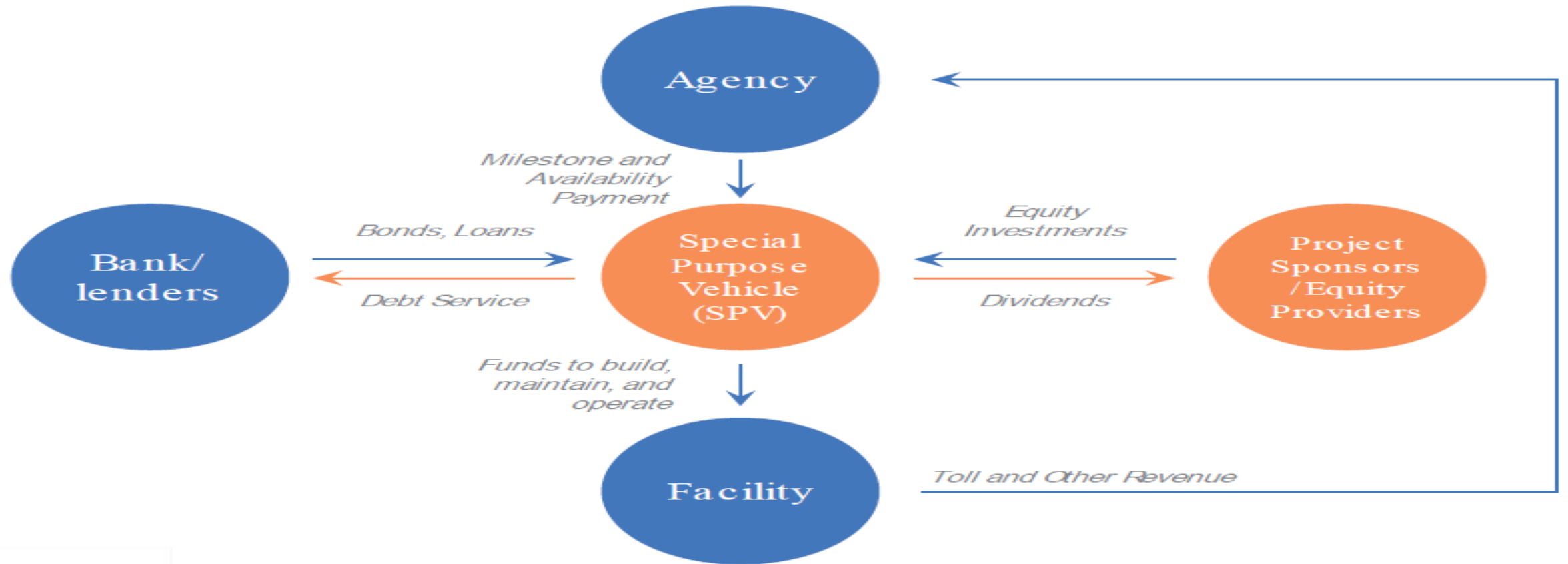


Construction Manager/General Contractor (CM/GC)



Delivery Method - Less Conventional

Public Private Partnerships (P3s)



Risk Allocation

- Design, Bid, Build
- Construction Manager/General Contractor
- Design, Build
- Design, Build, Finance
- Design, Build, Operate, and Maintain
- Design, Build, Finance, Operate, and Maintain

Public Sector

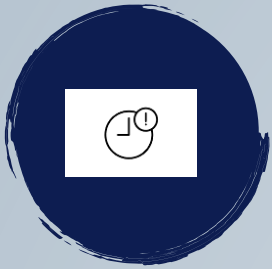


PRIVATE SECTOR

What Is a Construction Claim?

FAR 2.101 defines a claim as a “written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.”

Some Common Claims Are:



Delay

Project is taking longer than what was agreed.



Early Completion Schedules

Arise when the contractor and the client disagree about completing project on time or ahead of schedule.



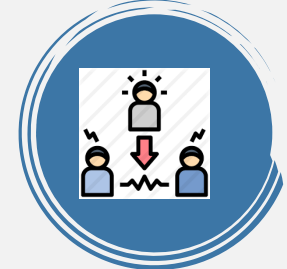
Changed Work

Dispute concerning whether a required change falls within pre-existing scope or not.



Differing Site Conditions

Claim arises out of differences between the actual site conditions and the way it was represented by owner.



Third Party Impacts

A claim where a potential third party affects the project, e.g., another governmental agency

Submission of a “Claim”

Contractual

- **Request for Change (RFC)**
- **Notice of Intent to Claim**
 - Usually a condition precedent to pursuing a claim and submitted in writing within X days after event.
 - Should set forth reasons why Contractor believes additional time and/or money is due (or other relief).
- **Filing a Claim**
 - Submit additional details and if delay is claimed, an impacted schedule analysis.
 - Request time/money (both)?



Quasi-Contractual

- **Request for Equitable Adjustment (REA)**
 - Basically, a request for an adjustment to the contract terms in order to reflect what the contractor believes the owner is liable.
 - Although the CFR recognizes REAs, often this concept is not included in contracts.
 - Contractors utilize REAs (or similar requests) in an effort to sidestep the formalities and obligations of filing a formal claim (e.g., certification of a claim, time requirements, etc.).



Statutory

- **Statutory Requirements for Submission of a Claim Greatly Differ**
 - Depending on the agency or state, the spectrum ranges from loose requirements to very prescriptive claims handling procedures which include timelines for filing and responding to claims.
 - Statutes also vary in how unresolved claims are handled: state administered appeals; mandatory arbitrations; ADR procedures; etc.



CONSTRUCTION LAW SERIES

Acret's

CALIFORNIA PUBLIC CONTRACT LAWS

2017 Edition

William D. Locher
Barbara R. Gadbois
Sara H. Kornblatt

BNI Building News

GIBBS GIDEN ATTORNEYS AT LAW
LOCHER TURNER SENET & WATTSBROOK LLP

Public Contract Code §9204

This code section became effective for all contracts executed on or after January 1, 2017.

The purpose of this section is to resolve contractor claims quicker by requiring certain public entities to analyze claims and engage in either mediation or an alternate form of dispute resolution (non-binding).

Public Contract Code §9204

PUBLIC CONTRACT CODE - PCC DIVISION 2. GENERAL PROVISIONS [1100 - 22355] *(Division 2 enacted by Stats. 1981, Ch. 306.)*

PART 1. ADMINISTRATIVE PROVISIONS [1100 - 5203] *(Heading of Part 1 added by Stats. 1982, Ch. 1120, Sec. 2.)*

CHAPTER 9. Claims and Disputes [5201 - 5204] *(Chapter 9 added by Stats. 1982, Ch. 1120, Sec. 5.)*

§204.

(a) The Legislature finds and declares that it is in the best interests of the state and its citizens to ensure that all construction business performed on a public works project in the state that is complete and not in dispute is paid in full and in a timely manner.

(b) Notwithstanding any other law, including, but not limited to, Article 7.1 (commencing with Section 10240) of Chapter 1 of Part 2, Chapter 10 (commencing with Section 19100) of Part 2, and Article 1.5 (commencing with Section 20104) of Chapter 1 of Part 3, this section shall apply to any claim by a contractor in connection with a public works project.

(c) For purposes of this section:

(1) "Claim" means a separate demand by a contractor sent by registered mail or certified mail with return receipt requested, for one or more of the following:

(A) A time extension, including, without limitation, for relief from damages or penalties for delay assessed by a public entity under a contract for a public works project.

(B) Payment by the public entity of money or damages arising from work done by, or on behalf of, the contractor pursuant to the contract for a public works project and payment for which is not otherwise expressly provided or to which the claimant is not otherwise entitled.

(C) Payment of an amount that is disputed by the public entity.

(2) "Contractor" means any type of contractor within the meaning of Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code who has entered into a direct contract with a public entity for a public works project.

(3) (A) "Public entity" means, without limitation, except as provided in subparagraph (B), a state agency, department, office, division, bureau, board, or commission, the California State University, the University of California, a city, including a charter city, county, including a charter county, city and county, including a charter city and county, district, special district, public authority, political subdivision, public corporation, or nonprofit transit corporation wholly owned by a public agency and formed to carry out the purposes of the public agency.

(B) "Public entity" shall not include the following:

(i) The Department of Water Resources as to any project under the jurisdiction of that department.

(ii) The Department of Transportation as to any project under the jurisdiction of that department.

(iii) The Department of Parks and Recreation as to any project under the jurisdiction of that department.

(iv) The Department of Corrections and Rehabilitation with respect to any project under its jurisdiction pursuant to Chapter 11 (commencing with Section 7000) of Title 7 of Part 3 of the Penal Code.

(v) The Military Department as to any project under the jurisdiction of that department.

(vi) The Department of General Services as to all other projects.

(vii) The High-Speed Rail Authority.

(4) "Public works project" means the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind.

(5) "Subcontractor" means any type of contractor within the meaning of Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code who either is in direct contract with a contractor or is a lower tier subcontractor.

(d) (1) (A) Upon receipt of a claim pursuant to this section, the public entity to which the claim applies shall conduct a reasonable review of the claim and, within a period not to exceed 45 days, shall provide the claimant a written statement identifying what portion of the claim is disputed and what portion is undisputed. Upon receipt of a claim, a public entity and a contractor may, by mutual agreement, extend the time period provided in this subdivision.

(B) The claimant shall furnish reasonable documentation to support the claim.

(C) If the public entity needs approval from its governing body to provide the claimant a written statement identifying the disputed portion and the undisputed portion of the claim, and the governing body does not meet within the 45 days or within the mutually agreed to extension of time following receipt of a claim sent by registered mail or certified mail, return receipt requested, the public entity shall have up to three days following the next duly publicly noticed meeting of the governing body after the 45-day period, or extension, expires to provide the claimant a written statement identifying the disputed portion and the undisputed portion.

(D) Any payment due on an undisputed portion of the claim shall be processed and made within 60 days after the public entity issues its written statement. If the public entity fails to issue a written statement, paragraph (3) shall apply.

(2) (A) If the claimant disputes the public entity's written response, or if the public entity fails to respond to a claim issued pursuant to this section within the time prescribed, the claimant may demand in writing an informal conference to meet and

confer for settlement of the issues in dispute. Upon receipt of a demand in writing sent by registered mail or certified mail, return receipt requested, the public entity shall schedule a meet and confer conference within 30 days for settlement of the dispute.

(B) Within 10 business days following the conclusion of the meet and confer conference, if the claim or any portion of the claim remains in dispute, the public entity shall provide the claimant a written statement identifying the portion of the claim that remains in dispute and the portion that is undisputed. Any payment due on an undisputed portion of the claim shall be processed and made within 60 days after the public entity issues its written statement. Any disputed portion of the claim, as identified by the contractor in writing, shall be submitted to nonbinding mediation, with the public entity and the claimant sharing the associated costs equally. The public entity and claimant shall mutually agree to a mediator within 10 business days after the disputed portion of the claim has been identified in writing. If the parties cannot agree upon a mediator, each party shall select a mediator and those mediators shall select a qualified neutral third party to mediate with regard to the disputed portion of the claim. Each party shall bear the fees and costs charged by its respective mediator in connection with the selection of the neutral mediator. If mediation is unsuccessful, the parts of the claim remaining in dispute shall be subject to applicable procedures outside this section.

(C) For purposes of this section, mediation includes any nonbinding process, including, but not limited to, neutral evaluation or a dispute review board, in which an independent third party or board assists the parties in dispute resolution through negotiation or by issuance of an evaluation. Any mediation utilized shall conform to the timeframes in this section.

(D) Unless otherwise agreed to by the public entity and the contractor in writing, the mediation conducted pursuant to this section shall excuse any further obligation under Section 20104.4 to mediate after litigation has been commenced.

(E) This section does not preclude a public entity from requiring arbitration of disputes under private arbitration or the Public Works Contract Arbitration Program, if mediation under this section does not resolve the parties' dispute.

(3) Failure by the public entity to respond to a claim from a contractor within the time periods described in this subdivision or to otherwise meet the time requirements of this section shall result in the claim being deemed rejected in its entirety. A claim that is denied by reason of the public entity's failure to have responded to a claim, or its failure to otherwise meet the time requirements of this section, shall not constitute an adverse finding with regard to the merits of the claim or the responsibility or qualifications of the claimant.

(4) Amounts not paid in a timely manner as required by this section shall bear interest at 7 percent per annum.

(5) If a subcontractor or a lower tier subcontractor lacks legal standing to assert a claim against a public entity because privity of contract does not exist, the contractor may present to the public entity a claim on behalf of a subcontractor or lower tier subcontractor. A subcontractor may request in writing, either on their own behalf or on behalf of a lower tier subcontractor, that the contractor present a

claim for work which was performed by the subcontractor or by a lower tier subcontractor on behalf of the subcontractor. The subcontractor requesting that the claim be presented to the public entity shall furnish reasonable documentation to support the claim. Within 45 days of receipt of this written request, the contractor shall notify the subcontractor in writing as to whether the contractor presented the claim to the public entity and, if the original contractor did not present the claim, provide the subcontractor with a statement of the reasons for not having done so.

(e) The text of this section or a summary of it shall be set forth in the plans or specifications for any public works project that may give rise to a claim under this section.

(f) A waiver of the rights granted by this section is void and contrary to public policy, provided, however, that (1) upon receipt of a claim, the parties may mutually agree to waive, in writing, mediation and proceed directly to the commencement of a civil action or binding arbitration, as applicable; and (2) a public entity may prescribe reasonable change order, claim, and dispute resolution procedures and requirements in addition to the provisions of this section, so long as the contractual provisions do not conflict with or otherwise impair the timeframes and procedures set forth in this section.

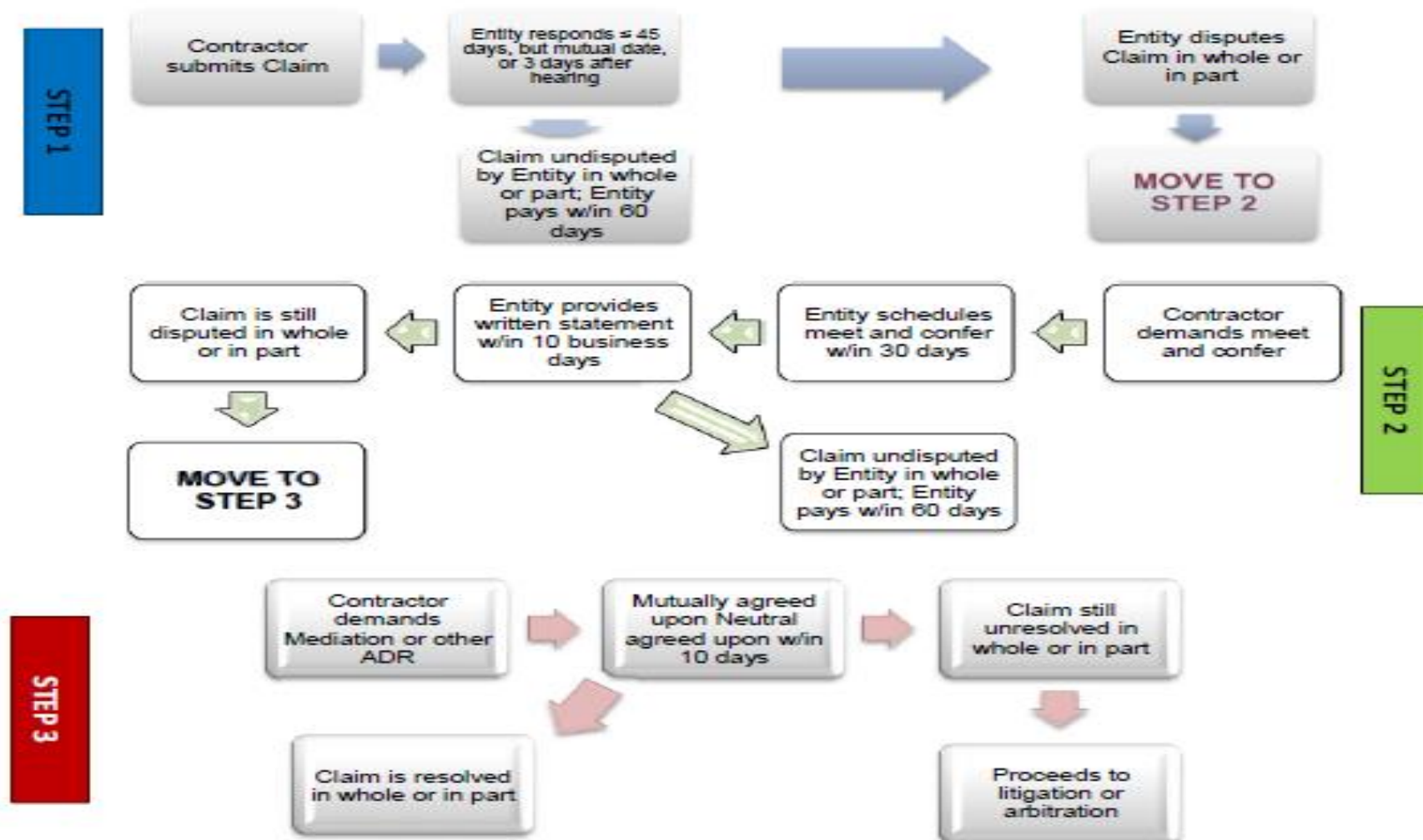
(g) This section applies to contracts entered into on or after January 1, 2017.

(h) Nothing in this section shall impose liability upon a public entity that makes loans or grants available through a competitive application process, for the failure of an awardee to meet its contractual obligations.

(i) This section shall remain in effect only until January 1, 2027, and as of that date is repealed, unless a later enacted statute that is enacted before January 1, 2027, deletes or extends that date.

(Amended by Stats. 2019, Ch. 489, Sec. 1. (AB 456) Effective January 1, 2020. Repealed as of January 1, 2027, by its own provisions.)

CALIFORNIA PUBLIC CONTRACT CODE §9204 CLAIMS RESOLUTION FLOW CHART



Public Contract Code §9204 - Highlights

Mandatory process for public works contractors to submit claims:

Three Step Process

1. Submit a Written Claim
2. Meet and Confer Conference
3. Mediation (or other ADR)

Key Take Aways

- Upon submission of claim, creates a time frame for public entity to respond.
- If any portion of the claim is undisputed, public entity must pay within 60 days of response back to contractor. Amounts not timely paid will accrue interest at 7% per annum.
- Provides a formal mechanism for subcontractors of all tiers to assert a pass-through claim through the general contractor.
- Any attempt to waive these provisions will be deemed contrary to public policy and void (minor exceptions apply).
- Statute does not apply to the following California State Departments: Water Resources, Transportation, Parks and Recreation, Corrections and Rehabilitation, Military, General Services, and High-Speed Rail Authority.

But PCC §9204 Doesn't Apply to My Agency...

There are still some important things to remember...

It is likely that the Legislature enacted a statute which directly applies to your Agency

More than one statute may apply and at times, they may conflict

When drafting your contracts, be aware of potential conflicts between your contract and the statute

Risk of Claims Can Be Created Even Before A Solicitation Is Released

PROJECT TEAM

Issue: Solicitation documents are released with a poorly defined project description, a great number of unknowns, aggressive schedule, insufficient site investigations, etc. (Poor planning, political reasons, funding considerations)

Problem Created: Savvy contractors will seek out solicitations with these flaws and aggressively price these contracts and “make up” their profits/costs with change orders/claims.

Recommendations:

1. Assist Agency in identifying these potential risks concerning problems listed above and discuss potential avenues for mitigation of these risks (e.g., retaining third party expert to review technical aspects, perform additional testing, cost realism).
2. Identify alternative delivery methods to potentially transfer to risk to contractor (e.g., Design/Build v. Design/Bid/Build).

LEGAL TEAM

Issue: Contract documents are generic and fail to take into account that not all projects are similar in scope and scale.

Problem Created: Ill-defined contracts fail to properly detail how to handle disputes which lead to more change orders and larger claims and potentially a failed or heavily litigated project.

Recommendations:

1. Often times, attorneys attempt to adopt a “Master” contract for all procurements, including construction, services, products, etc., however, a properly drafted construction contract is needed due to the previously identified issues.
2. Although a contract will cover a plethora of legal issues, often times, the largest and biggest issues center around differing site conditions, third party impacts, and handling of claims.

Post Contract Award “Claims”

PROJECT TEAM

Issues: The Agency disputes/challenges nearly every Request for Change by the Contractor or the Agency is slow in responding or fail to adequately respond to Change Orders.

Problems Created: Failure to resolve small disputes will often lead to large claims, potential cash flow problems for Contractor, and/or create a toxic relationship between Agency and Contractor.

Recommendations:

1. Provide your client with guidance on solving disputes in a timely basis. At times, a \$200K issue will balloon to \$1M+ issue due to transaction costs (e.g., expert, lawyer, ADR, increased staff time) and the next Claim will be likely more difficult to resolve.
2. Assist client in potentially identifying disputed items which have validity and resolve those issues and fight the others.

LEGAL TEAM

Issue: Contractor asserts “Claims” outside of the formal process prescribed within the terms of the Contract (e.g., Request for Equitable Adjustment, Total Cost Claim/Total Impact Claim, etc.)

Problem Created: How are these “Claims” handled? What resolution process is followed, if any?

Recommendations:

1. Force the Contractor to comply with the terms of the Contract and properly submit the “Claim” under the formal Claims procedures as this will provide contractual certain and also require the Contractor to certify the Claim.
2. If/when a resolution is reached concerning the Contractor’s Claim, attempt to globally resolve those issues and attempt to avoid “reservation of rights” or “carve outs”.

Profiting from Claims?



THANKYOU

Teddy Low 

+1 213-418-3155 

lowt@metro.net 

