

California Special District

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Annual conference preview

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The construction connection

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Every time a construction project comes along, a special district has a unique opportunity to strengthen ties to the community. Whether constructing a new facility, renovating and modernizing an old one, or replacing some infrastructure, reach out and make the constituents part of the process. While this involves some pre-planning and a modicum of expense, it will reap major rewards for your district long term.

Every construction project poses risks for the public entity owner. These risks are: political; pragmatic and financial. For instance, political risk may come from the community at large (an unpopular project the community does not want), special interest groups (wanting to control a project), or even from within the public entity itself (a faction within vying for institutional power or influence). Each of these can jeopardize a project's success and give the public entity a proverbial black eye. Lose confidence with the electorate and you are in for tough times. There is a better way.

To manage those risks, employ the "RISC Methodology".

RISC blends pragmatic problem solving with applicable legal principles to achieve fair, firm and reasonable results to ensure your construction project's success. Successful projects having community input equate to immeasurable goodwill with the community.

RISC is an acronym for "Research; Initiative; Selection and Contracts."

Research: How does the project fit into the current long term facilities master plan? Is the long term facilities master plan tied tightly into the district's long term service plan? Have all available funding lines been identified? Do any of the funding lines have sunset dates after which the money is lost? What construction delivery methods are available to the district? Which delivery method is best for this particular project? Are there timing concerns that impact the project?

Initiative: Brainstorm all available options on how to get the project built. Envision all that may occur and plan for the contingencies. Share your "plan" with the community through an outreach program. Invite community comment and responses. Publish them. Make ownership meaningful –take charge and "own it" – do not just farm out the responsibility or ownership of the project and wait till it finishes. Which employee has charge of the project?

Selection: Choosing the right project participants is critical to success. Given that there are multiple participants who will have a contract with the district for the project, make sure you have a thorough selection process developed. Do any professional service providers reside or employ qualified people within your district? Can they become involved? The selection process should be designed to find service providers with solid experience, but who will bring that experience to the project in the way the owner wants it, not the way the service provider wants it. This is achieved through requiring all service providers to use your coordinated set of construction related contracts.

Contracts: Most public entities may have a construction contract that they use for a project, but then accept professional service contracts from a variety of other project participants such as an architect, engineer, inspector, construction manager, testing and inspection company, etc., etc. This is a recipe for disaster. If the professional service vendor or its lawyer is drafting the contract, who do you think the contract will better protect – the district or the professional service vendor? A coordinated set of construction related contracts is critical to a

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successful project. There are certain secrets to a good contract: it must set specific standards of performance for all the professionals involved (no more of this “standard in the industry” fodder which is the service providers way of avoiding specific performance standards); consequences for failing to perform to the specific standards must also be expressly identified in the contract; payment provisions must have back charge and use of third party performance options; defense and indemnity provisions must be meaningful and include defense and indemnity for breach of contract damages, not just for personal injury or property damage claims; specific timeframes and deadlines must be clearly called out with clearly stated consequences; bond forms drafted by the district must be used to provide meaningful protection; and there are other provisions as well.

To successfully implement the RISC Methodology, understand that there are four main reasons why construction projects fail. Rather than walking through the community with that “black eye” because a project is troubled or has failed, get ahead of the process.

Construction projects fail and lead to poor community relations because of: (1) Poor Drawings; (2) Poor Contracts; (3) Poor Execution; and/or (4) Poor Cash flow.

Poor Drawings and Poor Contracts:

These are issues that can be dealt with and resolved pre-bid. While they require some up front planning and expense, the rewards reaped in dollars saved is often substantial. Solving a potential construction conflict or

problem before the bid even goes out is a lot less costly than trying to solve it in the field after construction has begun and the contractor and subcontractor cash clock is ticking. The more complicated the project, the greater the need to vet and check the drawings carefully for conflicts. The design professional’s contract must specifically set a standard to be met and stated consequences if the design professional’s work product falls short of the standard. Likewise, all construction related contracts must be coordinated so that: there are clear lines of responsibility for all aspects of the project; all of the district’s obligations to be delegated are specifically delegated; the district’s rights and remedies are used when required; and so that the district does not pay two or more professional service providers to perform the same task(s).

Poor Execution: Construction is not a science and people are human. Unforeseen conditions will arise. People’s personalities also can have a huge impact on a project. Therefore, as the owner, the district has the obligation and

opportunity to set the tone and standard for how the project will be built. A district employee must “own” the project (e.g., treat it as if the employee’s own money was on the line). The coordinated contracts must be followed and enforced. When the contractor starts building, stay out of its way. The District should not be changing its mind and constantly adding to a project during construction, if the owner constantly adds to the work, this is a guarantee that the project will take more time and go over budget. Have a firm, fair and reasonable mindset. Pay promptly and fairly on all properly submitted payment applications – it’s the law! Ensure that all contractor questions are promptly responded to by ensuring your design professional is specifically required to do so. Also, do not be afraid to use the “Big Stick” (e.g., money and specific remedial clauses that should be in every public works construction contract (like “back charges”

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Conference highlight



WEDNESDAY BREAKOUT SESSION

Public Works Projects: Minimizing Risks and Reducing Costs – Proven Methodologies



Breakout Session

A
DISTRICTS **WORK** TOGETHER.
of art.

In Brief

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Open Space District Launches Geocache Challenge

Recognizing the current generations' interest in high-tech devices and the importance of getting out and appreciating the natural resources around us, Midpeninsula Regional Open Space District (MROSD) has launched a new Preserve Circuit Geo-Challenge. Through the program, MROSD releases a list of coordinates for 22 caches in its preserve circuit. Geo-Challenge participants download map coordinates from geocaching.com onto a GPS unit and head out to find caches hidden along the trails. A cache often will contain a logbook and objects for trade that appeal to young participants. If a participant takes an object from the cache, they must replace it with an item of equal or greater value. The program is intended to mix a game with technology and hiking and the outdoors. "Geocaching is an activity that is reintroducing families and their kids to our natural spaces. It's doing it in a way that is engaging all generations of the family so that everyone gets to go out and participate and learn what being in the outdoors is all about," according to Steve Wood with Recreational Equipment, Inc (REI). Wood and REI worked closely with MROSD to launch the program. The goal for the program, according to the district, is to get kids out from behind their TV and computer screens and out interacting with nature.

Recognitions

Tulare Local Hospital District received the 2011 President's Club Award from the Association of California Healthcare Districts. The award is given each year to a healthcare district or hospital that has improved the delivery of health care services to its community and bettered its financial position through strong and creative leadership.

Both **Rancho California Water District** and **Menlo Park Fire Protection District** received the Certificate of Achievement for Excellence in Financial Reporting Award for their comprehensive annual financial reports. The award is presented by the Government Finance Officers Association of the United States and Canada.

For the seventh consecutive year, the **Camarillo Health Care District** received the 2011 Ventura County Family-Friendly Employer honor by the Business Work-Life Alliance of Ventura County. The award recognizes employers for establishing and maintaining workplace practices that support work-life balance. ■

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and "use of third party contractors"), but which all too often are not there). Finally, if a person's personality is a detriment to the project, warn them and then remove them if necessary.

Poor Cash Flow: The contracts involved in a construction project are like arteries in our body. Cash is the lifeblood of construction. Cash either flows smoothly and constantly through these contracts or it does not. If it does not, you will not have a successful project. The district can keep cash flowing by: (1) having a good coordinated set of construction related contracts; (2) instead of rejecting an entire payment application that does not have 100% support, promptly pay all supported portions and reject only the unsupported portion(s) stating why you are doing so; (3) early retention release provisions for up front trades should be utilized; (4) require stop notice release bonds as

a contract requirement; (5) use back charge provisions so contractor and professional service providers do not "get ahead of you" cash wise; (6) use an effective escrow retention agreement, the statutorily suggested one benefits contractors not the owner; (7) have a specific substantial completion punch list and estimate of cost obligation built into the bid documents and enforce it to achieve effective project closeout and proper release of undisputed retention; and (8) use the "partial agreement change order and expedited claims process" that more and more public entities are now using and finding that their projects finish claim free. ■

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