

Craft a Claims Process to Reduce Construction Risk

By John P. Dacey, Esq. and Gregory M. Bergman, Esq.

In the October 2005 issue of the *CASH Register*, our article “5 Ways to Reduce Construction Risks” suggested that risk is an inherent part of every public works construction program and each project. There we suggested that school districts can take 5 steps to reduce such risk: (1) by conducting a critical self-evaluation of the school district’s construction related personnel to determine if there are sufficient experienced personnel to efficiently and timely perform the school district’s obligations as an owner of a construction project; (2) by improving and coordinating construction and professional service contracts; (3) by using bonds drafted by the school district; (4) by establishing a fair and expedient claims process; and (5) by developing and constantly promoting a problem solving (versus finger pointing) mind set in these areas.

In this article we expand upon step number 4 and explain why a school district should, and how a school district can, “establish a fair and expedient claims process.”

There are a number of statutory claims procedures available to school districts. A common misconception on the part of many school districts is that these statutory claims procedures present the **only** options for claims resolution. While these statutory procedures are mentioned and touched on briefly in this article, a school district should consider establishing its own claim process that complies with

applicable law but is tailored to meet a school district’s particular needs.

Generally, the statutory claims procedures are those found in: (1) Government Code §§ 900 et. seq. (commonly referred to as the Tort Claims Act and/or a Government Code Claim); (2) Public Contract Code §§ 20104 through 20104.6 (meet and confer, mediation, arbitration, trial process (sometimes referred to as the “Black Hole of Public Works Claims”); and (3) Public Contract Code § 10240 (a state contract statute providing for arbitration, but which local public agencies, such as a school district, can opt into). It should be noted that if a school district does not, by the terms of its contract, opt

into the arbitration provisions of Public Contract Code § 10240 or does not establish its own claim process as outlined below in this article, then on claims of \$375,000.00 or less, such claims must be resolved by Public Contract Code §§ 20104 through 20104.6 (the “Black Hole of Public Works Claims”). This is not good for the contractor or the school district as it can be a long drawn out process and an expensive one too.

While each of the foregoing statutory claims procedures has pros and cons, the biggest drawback to each is that the school district often does not know what the claim is all about, including the magnitude thereof, until the construction project in question is finished or nearly finished. As such,

each of the foregoing statutory claims procedures do not reduce risk, they increase it by delaying ultimate resolution of the dispute far down the timeline continuum and away from the event, circumstance, and/or occurrence giving rise to the dispute in the first instance.

Risk is also increased under these procedures because: (1) if the contractor’s claim is ultimately proven to be meritorious, the school district will end up paying more by way of prejudgment interest and/or possibly the attorneys’ fees of the contractor (and the school district’s too) which accumulate and grow as time goes on; (2) by the time the dispute is ultimately resolved, project participants may have moved on, memories have faded, and in many instances documents have been misplaced; and, without limitation, (3) from the contractor’s (and almost always the subcontractor’s) perspective, the latter has had to finance the dispute by carrying the financial costs of the disputed work/issues thereby creating more acrimony and making the dispute harder to resolve amicably.

Conversely, if there is a process in place to understand the claim and resolve it much sooner, these additional costs and consequences are reduced and/or eliminated.

To successfully resolve a dispute, it is essential to understand what usually drives a dispute and prevents early resolution.

Disputes arise and are perpetuated by parties taking positions based upon opinions, instead of facts. By definition, an “opinion” is “a belief not based on an absolute certainty or on positive knowledge. It is what seems to be true or valid to one’s own mind.” So, what occurs, more often than not, is a decision maker for the contractor is told something by another person and/or reviews information, usually in the form of a letter-written by another, and the decision maker forms an opinion. A similar process takes place on the

To successfully resolve a dispute, it is essential to understand what usually drives a dispute and prevents early resolution.

school district's side. Before you know it each side's decision maker is well into their respective opinion (position), but farther away from the fact(s). As such they are both farther away from amicably reaching a solution. The foregoing statutory claims procedures are not adequate because they permit the opinion v. opinion dispute to perpetuate until the very end of each of the respective procedures. By then the only thing that is maximized is risk.

How then are differing parties to increase the probability of amicably resolving their disputes and spend less money in the process? You can do so by establishing an expedited claim resolution process that is geared toward uncovering specific facts. A "fact" is defined as "a thing that has actually happened, a thing that is really true, something that is beyond reasonable dispute." A process that continually forces each side down to specific facts to justify their positions is one that will force the parties to reach a resolution because when the specific facts are on the table, reasonable minds will not often disagree about what those facts actually are. It is getting there that historically is the problem.

A fair and expedient claims process therefore has at its foundation three key principles: (1) the process continually shifts the responsibility to act on the claim back and forth between the owner and the contractor based upon who is in the best position to act (e.g., produce specific information); (2) the process requires the party advancing the claim to advance it promptly with full backup as soon as the event, circumstance or occurrence giving rise to the claim has ended, and also requires resolution within 90 days (in this way decisions are made while all the information is fresh and available); and (3) the process allows partial agreements to be processed as change orders so that the cash flow (the lifeblood of construction) continues and only the

remaining disputed issue(s) proceed through the process.


Government Code §§ 930.2 and 930.4 provide a school district with the authority to establish its own claims procedures and in doing so gives a school district the opportunity to help itself resolve its disputes on an expedited and economical basis. School districts should take advantage of this authority. School districts that have done so have usually discovered that they reach the end of construction projects dispute-free.

Government Code § 930.2 is entitled "Agreement of Governing Body of Local Public Entity Establishing Claims Procedures" and states that **"The governing body of a local public entity may include in any written agreement to which the entity, its governing body, or any board or employee thereof in an official capacity is a party, provisions governing the presentation, by or on behalf of any party thereto, of any or all claims arising out of or related to the agreement and the consideration and payment of such claims."** That section also permits a school district that has adopted such a procedure to incorporate the procedure into its contract by an express reference to the procedure made in the contract.

Government Code § 930.4 states: "[a] claims procedure established by agreement made pursuant to Section ... 930.2 **exclusively governs the claims to which it relates....**" As such, the Legislature has given to school districts the discretion, and complete authority, to establish its own claims procedures to exclusively govern the presentation, consideration and payment of such claims. There is one express limitation on a school district's authority to establish its own claims procedures. As described in Government Code § 930.4, if a claim is not presented in compliance with the time deadlines established by the contract's terms and it is otherwise within one

year of the accrual of the claim, the contractor can make an application to the school board to present the claim as a late claim.

A school board should include a reference to Public Contract Code § 9201 as part of its claims process. Section 9201 provides that: "[a] public entity shall have full authority to compromise or otherwise settle any claim relating to a contract at any time."

A school board should therefore adopt a fair and expedient claims procedure tailored to its needs. The school board should set forth the claims process in its construction contract at length or by incorporating it into the construction contract by including in the contract a reference to where the procedure can be obtained. By adopting its own claim procedure which is geared to uncover specific facts, a school district will be well on the way to reducing the risks on its construction projects usually associated with the statutory procedures of Government Code §§ 900 (Tort Claims Act and/or a Government Code Claim), Public Contract Code §§ 20104 through 20104.6 ("Black Hole of Public Works Claims"), and (3) Public Contract Code § 10240 (arbitration). 

— John P. Dacey, Esq. and Gregory M. Bergman, Esq. are with C.A.S.H. member Bergman & Dacey, Inc. in Los Angeles California.