

 FARELLA BRAUN + MARTEL LLP

Managing Construction Projects in California

Wine Industry Construction

B. Scott Douglass
(415) 954-4498
sdouglass@fbm.com

big firm know how + small firm know you

Overview

- Project Delivery Systems and Pricing
- Risk Identification and Management
- Managing the Project
- Changes
- Claim Avoidance
- Statutory Remedies
- Dispute Resolution (time permitting)

FARELLA BRAUN + MARTEL LLP 2

Project Delivery Systems/Pricing Overview

- Design-Bid-Build
- Design-Build
 - Others – e.g., EPC, CMGC (at Risk), CM as Agent
- Pricing
 - Lump Sum
 - Time and Materials
 - Guaranteed Maximum Price (“GMP”)
 - Unit Pricing

FARELLA BRAUN + MARTEL LLP 3

Project Delivery Systems/Pricing

- Design-Bid-Build
 - Traditional delivery system – design specs
 - Distinguished by separating design and construction responsibilities
 - Design-bid-build projects typically progress in phases – design > bidding > construction
- Owner Benefits
 - Design Control – aesthetics, materials, equipment, finishes, etc. – e.g., tasting facility
- Owner Risks
 - Liability Gap - Implied Warranty vs. Standard of Care
 - Betterment

Project Delivery Systems/Pricing

- Design-Build
 - What is the Design-Build delivery method?
 - Design-build combines architectural/engineering services with construction responsibilities
 - The entity assuming design and construction obligations to the owner is the “design-builder”
- Owner Benefits
 - Time – fast-tracking
 - D-Ber’s implied warranty of fitness for purpose

Project Delivery Systems/Pricing

- Design-Build (Cont'd)
- Owner Risks
 - Lack of design control – e.g., barrel warehouse
 - Generally requires more owner sophistication
 - Quality of “design program” drives quality of final product – performance specs
 - Accurately capturing the essential design criteria of the project demands owner sophistication/resources
 - “Bridging” documents and scope disputes
 - Simultaneous design and construction limits owner’s capacity to influence/change design.
 - Accurate bidding requires a preliminary design sufficient to permit a cost estimate.
 - Betterment? (HVAC – FM Compliance)

Project Delivery Systems/Pricing

- Pricing
 - Lump Sum
 - Project must be delivered at a fixed price
 - Price competitively bid or negotiated prior to construction
 - Risk of cost overruns shift entirely to contractor
 - If plans and specifications are not complete
 - Excessive contingencies
 - Claims during construction

Project Delivery Systems/Pricing

- Pricing (Cont'd)
 - Time & Materials ("T&M")
 - Contractor's costs reimbursed
 - Must be identified: labor, material and equipment costs, etc.
 - Contractor also paid fixed or variable
 - Owner completely exposed for cost overruns
 - Minimize contractor's incentive to be cost conscious
 - Owner may motivate cost savings with bonus, higher fee, etc.

Project Delivery Systems/Pricing

- Pricing (Cont'd)
 - Guaranteed Maximum Price ("GMP")
 - A hybrid of lump sum and T&M
 - Parties agree upon a fixed, maximum price
 - Contractor's costs and fee paid up to maximum price
 - Owner's risk of cost overruns is limited
 - Cost savings encouraged by savings clauses

Project Delivery Systems/Pricing

- Pricing (Cont'd)
- Unit Pricing
 - Common where scope can be measured in like units
 - Miles of freeway
 - Yards of sidewalk
 - Square footage of paved parking
 - Contractor provides per-unit total cost
 - Includes direct and indirect costs
 - Equitable adjustment to scope change common

Overview

- Project Delivery Systems and Pricing
- Risk Identification and Management
- Managing the Project
- Changes
- Claim Avoidance
- Statutory Remedies
- Dispute Resolution

Risk Identification And Management Overview

- Sources of Claims
- General Risk Management Considerations
- Effective Risk Management

Risk Identification And Management

- Sources of Claims
 - Defective Design
 - Delayed Issuance of Notice to Proceed
 - Differing Site Conditions
 - Destruction or Damage to Work
 - Delay of Approvals
 - Constructive Acceleration
 - Early Completion Prevented
 - Improper Inspection
 - Labor Issues
 - Suspension of Work
 - Termination of Contract
 - Cost Escalation

Risk Identification And Management

- General Risk Management Considerations
 - Understand the risks
 - Understand who controls a given risk
 - Retain critical risks
 - Reasonably shift risks
 - Increased risk equals increased price
 - Quality in designers and contractors

Risk Identification And Management

- Effective Risk Management (Cont'd)
 - Liquidated damages for delays
 - Contractual Waivers - e.g. consequential damages
 - Contractual Liability Limitations
 - Limit type of damages - e.g., consequential
 - Limit amount of damages
 - Indemnity Provisions
 - "Type I" clauses shift risk of all liability, except the indemnitee's sole negligence or willful misconduct
 - Void and unenforceable after 1/1/13 to extent claim arises from indemnitee's active negligence
 - "Type II" clauses shift the risk of only active negligence by indemnitor

Risk Identification And Management

- Effective Risk Management (Cont'd)
 - Insurance
 - Notice and Claims Requirements
 - Method of Dispute Resolution
 - Payment claims vs. Defect Claims
 - Attys' fees
 - Litigation vs. Arbitration

Managing The Project Overview

- Project Delivery Systems and Pricing
- Risk Identification and Management
- **Managing the Project**
 - Bidding Phase
 - Construction Phase
- Changes
- Claim Avoidance
- Statutory Remedies
- Dispute Resolution

Managing The Project

- **Bidding Phase**
 - **Bidding Principles**
 - Negotiated vs. Competitively Bid Contracts
 - Negotiated Contracts
 - Parties free to choose negotiation partners
 - Exchange offers until agreement reached
 - Offers generally revocable until accepted
 - Accepted offer creates enforceable agreement (mirror image rule)
 - Competitive Bid Contracts
 - Governed by bid invitation
 - Public - strict adherence required (lowest resp. bidder)
 - Private - more leeway (promissory estoppel liability)
 - Contract not formed until winning bid is accepted

Managing The Project

- **Bidding Phase (Cont'd)**
 - **Bidding Principles**
 - Bid Bonds
 - May be required by statute or invitation to bid
 - Guarantees contractor will execute contract upon award
 - Cost differential between successful bid and next-lowest bid
 - GC's "Locking In" Subs' Bids
 - Prime contractor's dilemma – binding sub without accepting subs' bid prior to award of contract
 - Must rely on subcontractor's bid in preparing bid to owner
 - Must await award before accepting subcontractor's bid
 - Promissory Estoppel

Managing The Project

- **Construction Phase - Overview**
 - **Contract Administration**
 - General principles:
 - Read The Final Contract (RTFC)
 - Contractor Controls Means and Methods
 - Quality Work
 - On Budget
 - On Schedule
 - Record Keeping

Managing The Project

- **Construction Phase (Cont'd)**
 - **Quality Control**
 - Architect, CM (Agent) or In-House Expertise
 - Proactive Involvement and Communication
 - Weekly Owner-Contractor Meetings
 - Regular Site Visits
 - Inspections
 - Coordination before work covered (e.g., bad rebar)

Managing The Project

- **Construction Phase (Cont'd)**
 - **Cost Control**
 - Appropriate Contingency
 - New construction vs. Old/Renovation
 - Schedule of Values (cash flow issue)
 - Front-end loading?
 - Change Order pricing – limit mark-up percentages
 - Monthly Payment Applications
 - Inspections to determine percent complete
 - Fees for Construction Administration
 - Cost shifting for excessive RFI, Submittal and Pay App reviews
 - Designer/CM or Contractor
 - Spearin Doctrine in D-B-B
 - Betterment Rule in D-B-B

Managing The Project

- **Construction Phase (Cont'd)**
 - **Schedule Control** – monitoring progress
 - Baseline Schedule (CPM)
 - Rules of thumb:
 - Activity durations < 20 days
 - 10-15% of activities on CP
 - 100 activities/\$1.0 million
 - Monthly Schedule Updates
 - Time Impact Evaluations (TIEs or frag nets)
 - COs and other events causing delay
 - Recovery Schedules
 - Ordered Acceleration vs. Constructive Acceleration

Managing The Project

- **Construction Phase (Cont'd)**
 - **Record Keeping**
 - "Official" Meeting Minutes – volunteer
 - Deemed approved unless objected to within 7 days
 - Submittals/Approvals
 - Value engineering – risk of failure
 - Requests for Information
 - Turnaround time
 - Design team
 - Change Orders
 - Timely pricing and processing
 - Fixed sum or T&M with daily tickets
 - Timely responding to schedule extension requests

Managing The Project

- **Construction Phase (Cont'd)**
- **Record Keeping**
 - Payment Application
 - Conditional/Unconditional Waiver and Release Upon Progress/Final Payment (Preliminary Notices)
 - Daily Logs & Diaries
 - Photos/Video
 - Correspondence/Emails
 - Body of letter
 - Reason for letter
 - Relay circumstances
 - One topic per letter
 - Third party/two year test
 - Two years later, will a third party understand the letter?

Managing The Project

- **Construction Phase (Cont'd.)**
- Email
 - Beware! Beware! Beware! Beware!
 - Typically very informal and not carefully considered
 - Widely circulated
 - Cannot be erased permanently
 - Source of very damaging evidence
 - E-mail is so easy, people don't hesitate in relaying their thoughts – Twitter, blogs, etc.

Overview

- Project Delivery Systems and Pricing
- Risk Identification and Management
- Managing the Project
- **Changes**
- Claim Avoidance
- Statutory Remedies
- Dispute Resolution

Changes - Overview

- Sources of Changes
- Classification of Changes
- Affect on Contract

Changes

- Sources of Changes
 - Owner-initiated changes affecting
 - Design
 - Construction performance/sequence
 - Completion
 - Circumstances beyond the control of the parties
 - Unforeseeable site conditions
 - Extreme weather
 - Change in laws/code
 - Changes to material quantities
 - Value engineering
 - Commonly proposed by contractor

Changes

- Classification of Changes
 - Typically classified by
 - Source: owner or contractor initiated
 - Formality
 - Written order or directive
 - "Constructive change" arising from owner's conduct
 - C/T review and approval "extras"
 - Affected activities
 - Design: changes to plans and specifications
 - Time: modify time for completion
 - Construction: alter method, manner, or sequence
 - Risk / Responsibility changes: alter the obligations of the parties

Changes

- Classification of Changes (Cont'd)
- Typically classified by
 - Owner-directed design change
 - Contractor-proposed change
 - Constructive change
- Classifications not mutually exclusive

Changes

- Affect on the Contract
- Written Change Orders
 - Read the contract!
 - Purpose
 - Provide timely notice of changes and time/cost impacts
 - Actual knowledge without prejudice no longer adequate
 - Protect the owner against unnecessary increased costs
 - Limit contractor's ability to make unauthorized changes
 - Provide contractor with authority to vary from the contract
 - Modify contract terms

Changes

- Affect on the Contract (Cont'd)
- Written Change Orders
 - Typical procedure
 - Proposed by contractor or requested by owner
 - Negotiated with owner or owner's agent
 - Documented
 - Content
 - Description of changed work
 - Adjustment to contract price, if any
 - Adjustment to contract time, if any
 - Release/waiver of all direct and indirect costs

Changes

- Affect on the Contract (Cont'd)
- Written Change Orders
 - When contractual Change Order procedures are followed
 - The terms of the contract are formally modified
 - Disputes over change are less likely
- Unwritten Change Orders
 - The realities of the typical construction project
 - Change process is slow and delay may be disruptive
 - Informal correspondence
 - Oral directives
 - RFI responses and "clarifications"
 - Disputes much more likely
 - Requirement of written change order may be waived

Changes

- Affect on the Contract (Cont'd)
- Waiver of CO Requirement
 - Typical circumstances
 - Contractor advises owner of potential change
 - Owner approves change
 - Parties fail to document change per the contract
 - Owner refuses to pay for extra/changed work because contract requires written approval as a condition precedent for payment

Overview

- Project Delivery Systems and Pricing
- Risk Identification and Management
- Managing the Project
- Changes
- Claim Avoidance
- Statutory Remedies
- Dispute Resolution

Claim Avoidance Overview

- Anticipating Claims
- Red Flags for Potential Claims
- Types of Claims
 - Delay Claims
 - Defective Plans/Specs
- Types of Damages
- Acknowledging Valid Claims
- Contractual Mechanisms

Claim Avoidance

- **Anticipating Claims**
 - **Sources of Claims**
 - Acts of Government
 - Adverse Weather
 - Delayed Issuance of Notice to Proceed
 - Differing Site Conditions
 - Defective Plans/Specifications
 - Delay of Approvals/Decisions
 - Delayed Issuance of Change Orders
 - Delayed RFI Responses
 - Cardinal Change
 - Commercial Impracticability of Performance
 - Commercial Impracticability of Supply

Claim Avoidance

- **Anticipating Claims**
 - **Sources of Claims (Cont'd)**
 - Destruction or Damage to Work
 - Destruction or Damage to Tools, Equipment or Materials
 - Impossibility of Performance
 - Improper Inspection
 - Inadequate or Late Utilities
 - Labor Shortage
 - Lack of Access
 - Lack of Permits
 - Lack of Right-of-Way
 - Late Drawings
 - Late/Defective Material/Equipment Furnished by Others
 - Payments Delayed/Not Made

Claim Avoidance

- **Anticipating Claims**
 - **Sources of Claims (Cont'd)**
 - Material Price Escalation (e.g., steel, copper, cement, petrol-based products, gyp board, aggregates, etc.)
 - Stacking of Trades/Interference
 - Demobilize and Remobilize
 - Strikes
 - Superior Knowledge/Misrepresentation
 - Suspension of Work
 - Termination of Contract (For Cause or Convenience)
 - Constructive Acceleration
 - Agency-Mandated Changes (e.g., life and safety systems)
 - Problem in Design-Build Projects

Claim Avoidance

- **Red Flags for Potential Claims**
 - Under-funded project participants (bonding capacity?)
 - Unsophisticated project participants
 - E.g., no in-house expertise, Tribal project, etc.
 - Delayed project start
 - Lack of site activity
 - Personality conflicts
 - Project delays
 - Poor design and/or construction
 - Incomplete/delayed owner-furnished equipment
 - Significant scope changes

Claim Avoidance

- **Red Flags for Potential Claims (Cont'd)**
 - Unapproved Change Orders
 - Accusatory/confrontational attitude in correspondence or meetings
 - Increased frequency of correspondence
 - Large number of RFIs
 - Calls from subcontractors/suppliers re payment
 - Problems obtaining stop notice/lien releases
 - Inquiries from performance bond sureties
 - Problems on principal's other projects?
 - People in pin-stripe suits on site

Claim Avoidance

- **Types of Claims**
 - Delay
 - Disruption/Interference
 - Impact
 - Constructive Acceleration
 - Loss of Productivity
 - Extra Work

Claim Avoidance

- **Delay Claims – Classification:**
 - Excusable and Compensable
 - Contractor entitled to time & \$
 - Excusable and Non-compensable
 - Contractor entitled to time, but no \$
 - Relief from Owner's delay damages
 - Inexcusable
 - Contractor is entitled to neither time nor \$
 - Contractor is responsible for costs resulting from the delay and for Owner's delay damages.
 - Owner's delay damages are L/Ds or actual damages if no L/Ds clause exists.

Claim Avoidance

- **Delay Claims – Excusable and Compensable**
- Owner is responsible for delay
 - Delayed Issuance of Notice to Proceed
 - Delayed Site Access – e.g., Lack of Right-of-Way
 - Delayed Permits
 - Defective Design/Specifications
 - Delayed Reviews/Approvals/Decisions – e.g. shop drawings
 - Delayed RFI Responses
 - Improper Inspection – e.g., over inspection
 - Inadequate or Late Utilities
 - Payments Delayed/Not Made
- Owner contractually assumed risk of the event causing the delay
 - Differing Site Conditions
 - Late/Defective Material/Equipment Furnished by Others
 - Acts of Government

Claim Avoidance

- **Delay Claims – Excusable and Non-compensable Delays**
 - Unanticipated force majeure-type events, such as:
 - Labor strikes
 - Severe weather
 - Acts of God
 - Contracts usually identify such events
- Concurrent delay
 - Owner and Contractor separately responsible for delays occurring at the same time – i.e., excusable and compensable delay while inexcusable (and non-compensable) delay.
- Presents series of issues
 - Pacing delay?
- Contractor usually entitled to time extension (i.e., relief from LDs), but no \$

Claim Avoidance

- **Delay Claims – Inexcusable Delays**
 - Contractor is responsible for delay
 - Deficient Work
 - Deficient Management
 - Contractor contractually assumed risk of the event causing the delay
 - Labor/Materials Shortages
 - Subcontractor Default/Bankruptcy

Claim Avoidance

- **Defective Plans/Specs (D-B-B)**
 - Spearin Doctrine - Owner impliedly warrants that design will be sufficient for owner's purpose – warranty of accuracy and completeness.
 - Superior Knowledge Doctrine
 - Vital info missing that affects Contractor's cost to perform
 - Owner aware Contractor had no knowledge of and reason to obtain such info
 - Contract misled or did not put Contractor on notice to inquire
 - Owner aware of vital info, and failed to furnish
 - Contractor is entitled to recover extra costs if changes in design are required because warranty is breached
 - Owner's Potential Liability Gap & Betterment Rule

Claim Avoidance

- **Types of Contractor Damages**
 - Extended Field Overhead (Jobsite trailer and on-site management)
 - Extended Home Office Overhead (Eichleay Formula)
 - Indefinite suspension with no ability to mitigate
 - Price Escalation (Labor and Materials)
 - Standby Expense (Idle forces and duty to mitigate)
 - Loss of Productivity – resequence, acceleration, etc.
 - Lost Profits (Non-speculative)
 - Loss of Bonding Capacity (Non-speculative)

Claim Avoidance

- **Types of Owner Damages**
 - Liquidated damages
 - Cannot be a penalty – milestones?
 - Reasonable estimate of actual damages
 - Recoverable even if no damages actually incurred
 - Consequential Damages (Waiver Clause?)
 - Lost profit/revenues - rents, casino revenue, etc.
 - Financing costs
 - Internal staff costs
 - Actual Damages – must be foreseeable
 - Rent for alternate facility
 - Additional contract administration by A/E or CM

Claim Avoidance

- **Acknowledging Valid Claims**
 - **Evaluating Entitlement** - right to extra compensation
 - Event giving rise to valid claim (e.g., extra work, delays attributable to Owner with no concurrency, etc.)
 - Timely and adequate notice of claim (e.g., 21 days after the occurrence of the event)
 - Notice exceptions –claimant cannot count on exceptions
 - Reservation of rights/under protest (e.g., owner refuses to acknowledge entitlement) – possible waiver

Claim Avoidance

- **Acknowledging Valid Claims**
- **Evaluating Quantum** – amount of extra compensation
 - Total Cost - difference between bid estimate and total cost
 - Legally disfavored - theory of last resort
 - Difficult to prove and requires:
 - Reasonable bid estimate
 - Contractor not responsible for any costs
 - Impossible/impractical to quantify by other means
 - Modified Total Cost - similar to total cost
 - But reduce total cost by:
 - Unreasonable amount of bid estimate
 - Contractor-caused costs
 - Still must establish there is no other way to prove claim

Claim Avoidance

- **Acknowledging Valid Claims**
- **Evaluating Quantum (Cont'd.)**
 - Measured Mile – unimpacted baseline productivity rate extrapolated to impacted activity
 - Best for repetitive work (e.g., multi-story highrise, fabrication, etc.)
 - Project baseline or baseline from other project
 - Persuasive pricing method
 - Detailed Statement – contemporaneous tracking of costs
 - Ties specific events to specific impacts
 - Contemporaneous project records
 - Impacts on cost (e.g., separate cost codes in job cost reports)
 - Impacts on schedule (e.g., TIEs)
 - Easy method to prove, but difficult to capture in contemporaneous records
 - Most persuasive method

Claim Avoidance

- **Contractual Mechanisms**
 - Timely Issue COs for Valid Claims
 - Extra cost per quantum analysis
 - Time extension per schedule analysis
 - Constructive acceleration claim if no time extension
 - Team Building (e.g., Partnering)
 - IPD/Lean Construction
 - Negotiation/Mediation - preconditions to filing suit
 - Project Neutrals
 - Dispute Review Boards
 - Not necessarily binding on subs

Overview

- Project Delivery Systems and Pricing
- Risk Identification and Management
- Managing the Project
- Changes
- Claim Avoidance
- **Statutory Remedies**
- Dispute Resolution

Statutory Remedies - Overview

- Mechanic's Liens
- Stop Payment Notices
- Prompt Payment Laws

Statutory Remedies

- **Mechanic's Liens**
 - Background
 - California's mechanic's lien laws date to 1850
 - Revamped as of July 1, 2012
 - Owner the obligated to pay lesser of reasonable value of labor/materials or contract price
 - Prevents unjust enrichment
 - Supported by strong public policy considerations
 - Protections cannot be waived by contract
 - Liberally construed in favor of claimants
 - Procedures strictly enforced

Statutory Remedies

- **Mechanic's Liens (Cont'd)**

“Work of improvement’ includes, but is not limited to:

- (1) Construction, alteration, repair, demolition or removal, in whole or in part, of, or addition to, a building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or road.
- (2) Seeding, sodding, or planting of real property for landscaping purposes.
- (3) Filling, leveling, or grading of real property.”
Civil Code § 8050(a) (emphasis added).

Statutory Remedies

- **Mechanic's Liens (Cont'd)**

- Property Subject to Mechanic's Lien Claims
 - Limited to California property
 - Limited to privately held property, but can acquire leasehold interest in public property – e.g., P3s
 - Attaches to land and improvements
 - Ownership interest encumbered
 - If project Owner owns less than a fee interest, the lien attaches only against the Owner's interest

Statutory Remedies

- **Mechanic's Liens (Cont'd)**

- Substantive Criteria for Claimant
 - The project must have actually begun
 - Work must be readily observable
 - Lien attaches to “work of improvement”
 - All Mechanic's Liens relate back to when work commenced on the whole project
 - Priorities of Liens
 - Lien *relates back* to project's groundbreaking
 - Each lien claimant shares the same priority – pro rata
 - Priority over other encumbrances recorded after project's groundbreaking (lender issue?)

Statutory Remedies

- **Mechanic's Liens (Cont'd)**
 - Procedure for Enforcing a Mechanic's Lien
 - First Prerequisite: Preliminary Notice (20-day reach back)
 - Served on Owner, Prime Contractor and Lender (if any)
 - Must be served by every lien claimant, except
 - Direct or prime contractor (except when there's a Lender, and then service required on Lender)
 - An actual laborer for wages
 - Protects Owners/Lenders from surprise claimants

Statutory Remedies

- **Mechanic's Liens (Cont'd)**
 - Procedure for Enforcing a Mechanic's Lien
 - Second Prerequisite: Recording the Lien
 - Recorded in the Recorder's Office
 - Claim of lien must be timely recorded
 - Notice of Completion/Cessation recorded w/15 days
 - 60 days for GCs and 30 days for subs & suppliers
 - No Notice recorded – 90 days from "completion"

Statutory Remedies

- **Mechanic's Liens (Cont'd)**
 - Procedure for Enforcing a Mechanic's Lien
 - Third Prerequisite: Filing Lien Foreclosure Action
 - Action must be filed w/ 90 days of recording the Lien
 - Filed in Superior Court in the county where property is located
 - All "owners" of the property, and those who have a security interest in the property named as defendants
 - The mechanic's lien remedy is cumulative to all other remedies
 - Breach of contract claims
 - *Quantum meruit* claims
 - Notice of Pendency of Action (*lis pendens*) must be recorded upon filing foreclosure action

Statutory Remedies

- **Mechanic's Liens (Cont'd)**
 - Additional considerations regarding lien actions
 - Prime contractor generally obligated to remove or bond around liens
 - Owner may tender defense of liens to prime contractor
 - Owner may withhold payment from prime contractor to cover liens
 - Claimant is entitled to recover the lesser of
 - The agreed-upon price or
 - The reasonable value of the services or materials provided
 - Attorney fees ordinarily not awarded for a lien, but may recover if allowed by contract or statute (such as prompt payment statutes)

Statutory Remedies

- **Stop Payment Notices**
 - Remedy to reach unexpended construction funds in the hands of the Owner or Lender
 - A written demand to withhold the sums claimed from moneys due the Owner or prime contractor
 - Made upon the custodian of the construction funds
 - Lender
 - Owner

Statutory Remedies

- **Stop Payment Notices (Cont'd)**
 - Stop Payment Notices do not encumber the property upon which the project is located
 - Survives foreclosure of the trust deed
 - Available on public and private projects
 - Stop notice must be perfected within 90 days by filing a civil action to enforce the Stop Payment Notice
 - May be bonded or unbonded
 - Lenders only need to withhold payment when the Stop Payment Notice is bonded (125% of amount).

Statutory Remedies

- **Prompt Payment Laws**
 - Obligates Owners to pay Direct Contractors
 - Progress Payments - 30 days from receipt of properly submitted, undisputed invoices
 - Retention Payment – 45 days from "completion"
 - Owner can withhold 150% of amount disputed in "good faith"
 - Penalties
 - 2% per month
 - Attorneys' fees and costs to prevailing party

Overview

- Project Delivery Systems and Pricing
- Risk Identification and Management
- Managing the Project
- Changes
- Claim Avoidance
- Statutory Remedies
- **Dispute Resolution**

Dispute Resolution - Overview

- Negotiation
- Mediation
- Arbitration
- Litigation

Dispute Resolution

- **Negotiation**
 - Once the main method for settling disputes short of litigation/arbitration, now the exception
 - Other dispute resolution methods gaining popularity
 - Negotiations may impact further dispute resolution efforts – setting of floors and ceilings
 - Simplest and least costly method

Dispute Resolution

- **Negotiation (Cont'd)**
 - It is often available when the parties value a continuing business relationship
 - Negotiators must have sufficient authority to bind principal
 - Impracticable with difficult ratification procedures
 - Encumbered by management approval

Dispute Resolution

- **Mediation** – facilitated non-binding negotiation
 - Highly successful method for resolving disputes
 - Contractual precondition – 51%
 - Voluntary – 86%
 - Confidential
 - Maintaining a business relationship
 - More of a “when” as opposed to “if”
 - If wait too long:
 - Lose opportunity to save \$, time, resources
 - The more \$ spent, the less settleable
 - Flexible - process
 - Opportunity to present to opposing decision makers
 - Political Cover

Dispute Resolution

- **Mediation** (Cont'd)
 - Tolling Agreement (?)
 - Requires a skillful and effective mediator
 - Familiar with the construction industry
 - Creative, dedicated and persistent
 - Appropriate style for dispute/clients
 - *Facilitative*: communication and finding solutions
 - *Evaluative*: relative strengths/weaknesses of parties' cases
 - Key decision makers must participate (project people?)
 - Preparation is key
 - Prepared, willing and able to go to trial
 - Full disclosure vs. holding back
 - Mediator's Perspective – everything said/done counts
 - Settlement irrespective of facts, law, equities

Dispute Resolution

- **Arbitration** - private "binding" adjudication
 - Arbitration is a creature of contract
 - Arbitration clause may specify specific industry rules
 - Rules may be varied by agreement in the contract, or later
 - Arbitration can be compelled or waived
 - Discovery is available in arbitration
 - Arbitration awards are normally binding
 - Historically, no right to appeal, but more recent case law allows for appeal if the arbitration clause so provides
 - Court will issue judgment confirming award – difficult to oppose
 - Gained popularity with its efficiency – this is not necessarily true anymore.

Dispute Resolution

- **Litigation**
 - The default
 - Often involves
 - Delay
 - Expense
 - Least control over how dispute will be resolved
 - Offers full protection of the law
 - Appeal rights remain intact
 - The right to a jury can be helpful or harmful
 - This requires simplifying the issues
 - Heightened risk of decision on inappropriate grounds



FARELLA BRAUN + MARTEL LLP
A Different Perspective

Q & A

B. Scott Douglass
(415) 954-4498
sdouglass@fbm.com

big firm know how + small firm know you
