

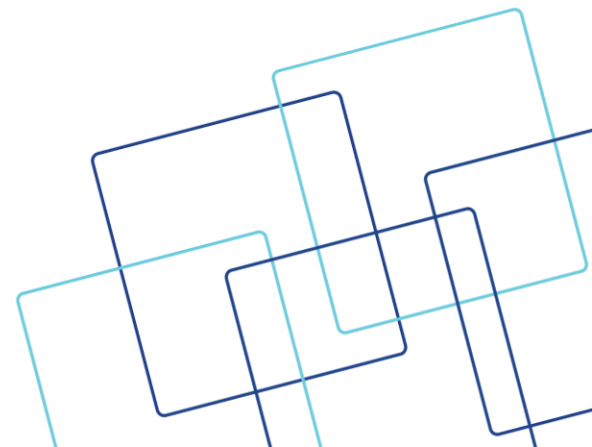


Construction Delivery Methods and Agreements

Presented by Arne B. Sandberg

SAN MATEO-FOSTER CITY SCHOOL DISTRICT

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AT LOZANO SMITH

Arne B. Sandberg is a Partner in Lozano Smith's Walnut Creek office. Mr. Sandberg represents public agencies in construction disputes and complex property cases. He has litigated on behalf of public agencies since 1993, and he has specialized in public works construction disputes and litigation since 1997. Mr. Sandberg has represented a wide variety of public works projects "from cradle to grave," with emphasis on proactive project management to minimize claims, as well as cost-effective resolution of disputes and litigation. He helps clients resolve as many disputes as possible during construction, while assisting clients in keeping the project on schedule and preparing clients for claims that may arise at the conclusion of the project. In addition to defending large claims, he has prosecuted many actions to recover damages for public agency clients based on design and construction defects, including seven-figure recoveries.



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Topics:

Construction delivery methods.

Prequalification.

Design professional agreements.

Contractor agreements.

Project labor agreements.

Design-Bid-Build, aka Competitive Bidding (Public Contract Code [“PCC”] §§20111(b) and 22032):

- Any project over \$60,000 must be competitively bid.
- If \$200,000 or less, then could use informal UPCCAA bidding.
- Some advantages: Locked into price and time; it is the standard delivery method; and limits appearance of bias or favoritism.
- Some disadvantages: No control over selection of contractor; and contractor may request more change orders.

Multiple Prime:

- Project is split into multiple contracts with trade contractors, and each one has to be competitively bid (even if under the bid threshold).
- Some advantages: Potential to start construction sooner; potential to better manage budget; eliminates general contractor's markup; and increases potential for local contractors to win a contract.
- Some disadvantages: Owner is more at risk since standing in the general contractors' shoes.

Exceptions to Competitive Bidding:

- Emergency.
- Completion of unfinished work.
- Day labor and force account.
- Sole source.
- Change orders of 10% or less.
- Public policy (*Graydon* case).
- Other statutory delivery methods.



Design-Build (Education Code [“EC”] §§17250.10 et seq.):

- Project must be over \$1 million.
- District prepares design requirements or partial design.
- Through RFP process, District selects an entity that will complete design and construct.
- Selection is based on “best value” or lowest price, and evaluation of “best value” is very flexible.
- Some advantages: District may select contractor based in part on qualifications; and unity of contract (“turnkey”).
- Some disadvantages: Price could be higher; owner may lose control over final design; skilled and trained workforce requirements apply; and no checks and balances between contractor and architect.

Lease-Leaseback (EC §§17400 et seq.):

- District leases property to contractor for \$1 per year, and contractor subleases it back to the District for price of construction.
- Two types: Lump sum price; and percentage fee.
- Contract awarded to the proposing entity with the most best value points based on price and qualifications.
- May award contract prior to DSA approval if preconstruction design services are included in contract (separate preconstruction agreement not allowed).
- Some advantages: District may select contractor based in part on qualifications; and contract could include preconstruction design services.
- Some disadvantages: Uncertainty as to terms due to 2015 *Davis* case; uncertainty as to application of validation statutes due to 2020 *Davis* case; best value selection process not as flexible as design-build; and skilled and trained workforce requirements apply.

Other Delivery Methods:



- CMAS (California Multiple Award Schedule).
- P3 (Public-Private Partnership).
- CMAR (Construction Manager At Risk).
- Energy service contracts.
- Job order contracting.

Prequalification:

- Required for projects of \$1 million or more that have received, or may receive, state funds.
- Required for all lease-leaseback projects.
- Applies to (1) all prime contractors with A and B licenses, (2) all MEP contractors, whether prime contractor or subcontractor, and (3) any other class of specialty contractor that the District may designate.
- A contractor is prequalified if its responses to questionnaire earn a minimum number of points.

Construction Contracts:

- Bidding/RFP documents and contract terms vary depending on the delivery method, but are mostly the same.
- Contracts are required even if the project is below the bidding threshold.
- Contracts must be awarded by the District's governing board.
- Change orders (different scope, adjustment to price, adjustment to time) must be approved by the District's governing board.
- If contract includes a contingency, then District staff is pre-authorized to spend those amounts on extra work performed by contractor.

Construction Professional Contracts:

- Construction professional contracts must be awarded based on a “fair, competitive selection process,” “demonstrated competence,” and “professional qualifications necessary.” (Government Code [“GC”] §§4526 and 4529.12.)
- “Construction professionals” include architectural, landscape architectural, engineering, construction management, land surveying, and environmental firms. (GC §§4525 and 4529.10.)



What is a PLA?:

- A project labor agreement (“PLA”) is a pre-hire collective bargaining agreement that establishes terms and conditions of employment for one or more projects. (PCC §2500(b)(1).)
- Governing board of a local public entity may choose by majority vote to use, enter into, or require contractors to enter into a PLA. (PCC §2501.)

PLA Requirements:

- Since 2011, a PLA must include five taxpayer protection provisions (PCC §2500(a)):
 - Prohibition of discrimination based on race, national origin, religion, sex, sexual orientation, political affiliation, or membership in a labor organization when hiring and dispatching workers.
 - Ability of all qualified contractors and subcontractors to bid for work without regard to whether they are parties to collective bargaining agreements.
 - Agreed-upon protocol for drug testing for workers.
 - Guarantees against work stoppages, strikes, lockouts, and similar disruptions of projects.
 - The agreement provides that disputes arising from the agreement shall be resolved by a neutral arbitrator.

Common Provisions in PLAs:

- No strike or lockout for any covered project.
- Expedited grievance procedures.
- Pre-job meetings to ensure appropriate labor classifications.
- Referral of workers through the union halls.
- Contractors and unions responsible for compliance, not owner.
- Identification of projects to which the PLA applies (all projects, some of them, or just one of them; or only projects over a dollar threshold).
- Identification of the work to which the PLA applies (all scopes of work, or just limited scope).
- Term of PLA (length of included projects, or certain length of time).

Claimed Advantages of a PLA:

- Reduced risk of project delay.
- Reduced risk of increased cost from worker shortage or labor dispute.
- Faster resolution of labor concerns and disputes resulting in greater stability.
- Uniformity in project rules and conditions for labor (including safety), holidays, and scheduling across all trades.
- Use of local union hall provides highly skilled and local craftpersons.
- Targeted hire program for disadvantaged community members to enter an apprenticeship.
- Summer internships by contractors for students and faculty.
- Apprentices from joint apprenticeship programs.

Claimed Disadvantages of a PLA:

- PLAs favor union contractors/workers over non-union contractors/workers.
- Reduction of the bidding pool by discouraging bids from non-union contractors.
- Increase in project costs caused by reduced competition or elimination of a contractor's ability to use its core workers.
- Benefit forfeiture for non-union employees.
- Not necessary since prevailing wages already required for public works and strikes are very rare.
- May apply to all projects.
- May apply to all scopes of labor.
- Less flexibility for owner.

Questions?





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