

**FRONT END FIRST AID:
CRITICAL CARE FOR PUBLIC WORKS
DOCUMENTS**

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INTRODUCTION:

“Front End” Template:

- ☐ Bid and contract documents (“legal stuff”)
- ☐ Does not include technical specifications
- ☐ Applies to all public works projects
- ☐ Usually in the front of the project manual

THE PROBLEM:

Many front end templates are patched together and out of date:

Old, deficient front end documents can increase risk exposure and impair contract and project administration.

COMMON FRONT END DEFECTS:

- ☐ Not up to date with law
- ☐ Patched together from outside source documents
- ☐ Internal inconsistencies
- ☐ Hard to read and use

THE PREMISE:

Some updating is better than
no updating.

HOW DO YOU EAT AN ELEPHANT?

One bite at a time.

OVERVIEW

- ❑ Ten common front end problem areas
- ❑ Ten "first aid" fixes

#1 STATUTORY COMPLIANCE: *THE PROBLEM*

- ❑ Failure to comply with applicable legal requirements
- ❑ Incorporation of inapplicable legal requirements

#1 STATUTORY COMPLIANCE: *FIRST AID*

- ☐ *Municipal Law Handbook: “The Contract Documents And Contract Provisions”* (2016 Ed., sections 7.36 – 7.75)
- ☐ Check annual legislative updates
- ☐ Cite check your front end!

#2 SUPERFLUOUS STATEMENTS OF LAW: *THE PROBLEM*

EXTENSIVE STATEMENTS OR SUMMARIES OF LAW

- ☐ Contract ≠ legal treatise
- ☐ Inaccurate statements of law
- ☐ Seldom required for legal compliance

#2 SUPERFLUOUS STATEMENTS OF LAW: *FIRST AID*

- ☐ Eliminate summaries of law or copies of statutes (except as expressly required)
- ☐ Don't define or explain "responsiveness" or "responsibility": The courts have it covered

#3 THIRD PARTY DOCUMENTS: *THE PROBLEM*

Full incorporation of informational documents
can create problems:

- ☐ Useful information is a good thing
- ☐ Making it legally binding...not so much

#3 THIRD PARTY DOCUMENTS: *FIRST AID*

- ☐ Don't fully incorporate third party informational documents
- ☐ Provide “for reference only”

#4 USE OF CALTRANS SPECIFICATIONS: *THE PROBLEM*

Caltrans “General Provisions” often conflict with municipal front end requirements:

- ❑ Cities and state agencies subject to differing laws
- ❑ Caltrans Standard Specifications often favor the contractor

#4 USE OF CALTRANS SPECIFICATIONS: *FIRST AID*

Expressly exclude Caltrans' "General Provisions" (Sections 1-9)

#5 OVERWRITTEN DEFINITIONS: *THE PROBLEM*

- ❑ Defined terms are great...
- ❑ But should not be weighted down with substantive provisions

#5 OVERWRITTEN DEFINITIONS: *FIRST AID*

“EXCUSABLE DELAY: A Delay for which Contractor may be entitled under the Contract Documents to an extension of time, but not compensation. *‘Excusable Delay’ means any delay to the path of activities that is critical to Substantial Completion of the Work within the Contract Time caused by conditions beyond the control or foreseeability, and without the fault or negligence of Contractor or its Subcontractors, such as, but not limited to: war, embargoes, fire, unavoidable casualties, unusual delays in transportation, national emergency, and stormy and inclement weather conditions that are unusual and unseasonable and in which the Work cannot continue. Without limitation to the foregoing, the financial inability of Contractor or any Subcontractor or Sub-subcontractor, shall not be deemed conditions beyond Contractor's control or foreseeability. Contractor may claim an Excusable Delay only if all Work on a critically scheduled activity is stopped for more than six (6) hours of a normal eight (8) hour work day, or if three to six hours are lost in one work day, then it may be claimed for one-half day.”* (Emphasis added.)

#6 UNLAWFUL INDEMNITY REQUIREMENTS: *THE PROBLEM*

Indemnity is “void and unenforceable”
unless it excludes the city’s:

- ☐ Sole negligence
- ☐ Active negligence
- ☐ Willful misconduct

(Civil Code Section 2782(a)-(b))

#6 UNLAWFUL INDEMNITY REQUIREMENTS: *FIRST AID*

Expressly exclude city's:

- ☐ Sole negligence
- ☐ Active negligence
- ☐ Willful misconduct

#7 ORDER OF PRECEDENCE: *THE PROBLEM*

Conflicts among the various bid and contract documents.

#7 ORDER OF PRECEDENCE: *FIRST AID*

Order of precedence recommendations:

- ☐ Addenda and Change Orders take highest priority
- ☐ Contract documents control over bid documents
- ☐ Front end controls over technical specifications
- ☐ Third party documents lowest in order

#8 INCLUDING INTERNAL PROCEDURES: *THE PROBLEM*

Front end \neq internal procedures manual

- ☐ Internal procedures become legally binding
- ☐ Liability for staff non-compliance

#8 INCLUDING INTERNAL PROCEDURES: *FIRST AID*

Eliminate all statements of internal procedures (except when required by law, e.g., claims procedures)

#9 INTERNAL CONSISTENCY: *THE PROBLEM*

Order of precedence provision will not resolve all internal inconsistencies:

- ☐ Inconsistent use of defined terms
- ☐ A “foreign” defined term may be a red flag for an unauthorized borrowed provision

#9 INTERNAL CONSISTENCY: *FIRST AID*

- ☐ Compare capitalized terms against definitions
- ☐ Check “borrowed” provisions for consistency

#10 “USER EXPERIENCE”: *THE PROBLEM*

Front end documents are used by humans:

- ❑ A poorly structured template can increase opportunities for error in completing the template
- ❑ Legalese and poor organization make it hard to understand and administer the contract

#10 “USER EXPERIENCE”: *FIRST AID*

Consider the end users with each update:

- ☐ Reduce opportunities for preparer error
- ☐ Use plain English and clear organization

CONCLUSION

An ounce of prevention is worth a pound of cure.

QUESTIONS??