

DATE ISSUED: August 14, 2000

REPORT NO. 00-168

ATTENTION: Honorable Mayor and City Council

SUBJECT: CONSTRUCTION MANAGEMENT/CLAIMS
AVOIDANCE

SUMMARY

THIS IS AN INFORMATION ITEM ONLY. NO ACTION IS REQUIRED ON THE PART OF THE CITY COUNCIL

BACKGROUND

In the last three years, the City's Capital Improvement Program (CIP) has experienced a marked decrease of both contractor initiated change orders (less than half the regional average) and construction claims against the City resulting in litigation. Only a few years ago, a significant percentage of the City's CIP construction projects resulted in disputes with contractors which involved costly litigation. Several factors contributed to this situation:

- a) There was poor communication and mistrust between the City's inspectors and contractors;
- b) Technological advances in construction material, equipment and services raised the bar for inspection knowledge;
- c) Environmental considerations and expectations heightened; and
- d) An increase in the consideration of the accumulative effects that noise, dust, lights, traffic impacts, etc. have on neighborhoods and business during construction.

The Engineering and Capital Projects Department realized that focusing attention on inspecting only the "engineering" aspects of a project would no longer meet the needs of this changing environment. A comprehensive effort was initiated to transition from "inspecting" to "construction managing." Through in-house research as well as partnering efforts with the construction industry, new tools were developed to reduce the problematic trend of litigation. The City's research and partnering revealed needs that began the evolution of three new programs:

- 1) Development of the Construction Management Academy;
- 2) Inclusion of mandatory mediation for dispute resolution in all City Contracts; and
- 3) Creating a Public Works Legal Litigation Team that works closely with staff on all CIP related matters.

DISCUSSION

These three programs form the foundation of the City's dispute resolution effort on CIP projects. Each individually addresses an area that had been a concern of the Department's management.

Construction Management Academy (CMA)

The CMA provides comprehensive training in all aspects of construction management and is administered by Engineering & Capital Projects, Field Engineering Division. The curriculum is comprehensive and focuses on ensuring that the City's construction managers have the knowledge and resources necessary to effectively coordinate the myriad of tasks and details required to bring complex construction projects to a successful completion.

CMA is facilitated by personnel from the City and the Construction Industry. To date, more than 350 students have graduated from the 15 Construction Management Academies, which have been held since the first class in May of 1996. The subject matter discussed and taught over the five day course includes:

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| Survey Services | Materials and Testing | Landscaping |
| Preconstruction Meetings | Invoices and Payments | Daily Reports |
| Submittals/Request for Information | Final Inspection, NOC | Construction Recycling |
| Defaults and Debarment | Civil Liability Avoidance | Mediation |
| Partnering | Project Development | Advertising and Award |
| Equal Opportunity Contracting | Scheduling | Change Orders |
| Violations and Stop Notices | Safety and Risk Mgmt. | Traffic Control |
| Environmental Regulations | CEQA | Underground Storage Tanks |
| NPDES/Stormwater Program | Asbestos/Lead Abatement | Hazardous Materials Mgmt |

Upon graduating from the academy, construction managers have the tools and concepts necessary to manage the City's projects. When confronted with complex issues, they have benefitted from the many problem solving workshops provided in the class. In addition, the construction managers have developed relationships with the trainers and instructors that are available resources to assist them at any time.

Representatives from several local agencies and private consultants have also attended the CMA, earning it a reputation as a leader in public works construction management training. The American Public Works Association (APWA) has also recognized that this highly successful training program is the first of its kind in the nation. At the request of APWA, City staff provided guidance and insight to this national organization to assist them in their effort to develop a nationwide training program modeled after the City's program.

Mandatory Mediation in all City Contracts

Mediation was a trend that began in the construction industry on private projects in the 1980s and 1990s in an effort to avoid costly litigation. The City evaluated this approach and realized the merit to the program. The Association of General Contractors (AGC) also endorsed its use.

Therefore, in the early 1990s, all City contracts mandated the use of dispute resolution through mediation.

Mediation is the process where a neutral third party meets with all parties involved in the dispute and attempt to settle the dispute through negotiations. The parties agree that before they resort to litigation, they will mediate disputed matters. This type of mediation is non-binding because any party may take a disputed matter to court after mediation. This is an important point in that if the City does not feel its interests are satisfied by mediation, the option to litigate is available.

Mediation and CMA work hand-in-hand. In order to mediate successfully, construction managers must document all aspects of the project fairly and accurately. Negotiations typically revolve around scheduling, unforeseen conditions/impacts, and estimates for work/lost time. The skills learned in CMA accompanied by the City's skilled legal counsel are key in being successful.

Ninety percent (90%) of all construction claims were handled by staff and the City Attorney's Office by means of dispute resolution and mediation. Average settlement amounts were 23% of the claim amount petitioned for.

Legal Litigation Team

Disputes in a construction environment occur routinely. In the past, the E&CP Department was provided legal counsel by one attorney during the design and construction of all CIP projects. As the problems moved to "after construction lawsuits", the attorney that provided the day-to-day counsel would refer the case to another attorney who specialized in litigation. However, the later attorney did not have the history of the project or the dispute. This often resulted in a disconnect with the attorney providing advice during the project and that of the litigating attorney.

In 1997, a change in philosophy was undertaken by the City Attorney's Office working with the E&CP Department. This new philosophy provided that the same team in the City Attorney's Office, the Construction Litigation Unit, would provide both day-to-day legal advice as well as take the lead on any lawsuits that did materialize. This early involvement by legal counsel when disagreements occur can in many cases help avoid an escalation of the dispute. If the dispute did evolve into a larger problem or claim, knowledgeable legal counsel can advise staff throughout the project. The City's legal counsel and construction managers work as a team to solve problems or document claims to achieve the City's best interest in resolving these claims at the least cost.

CONCLUSION

These three programs have been the backbone to the City's success in handling construction claims. The number of claims and their overall value have been reduced significantly. The Field Engineering Division began documenting the results of these three programs in July of 1997. Through October 1999, construction was completed on two hundred and fifteen CIP projects. Contractor-initiated change orders have been limited to approximately 2.4%. This compares

very favorably to the regional average for contractor-initiated change orders which is approximately 5.2%.

Since the commencement of these programs, thirteen (13) projects resulted in claims that were not resolved at the staff level. Of the thirteen (13) project claims filed, nine were successfully settled without litigation; one was settled prior to the trial date; two are still in mediation; and one is scheduled for trial. The average settlement amounts were 23% of the claim. This data shows that problems are being resolved earlier in the contract, with fewer costly delays, resulting in reduced impacts to project budgets and the community.

Respectfully Submitted,

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