

THE LIFE OF A
CONSTRUCTION DEFECT CLAIM

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Real Life Examples



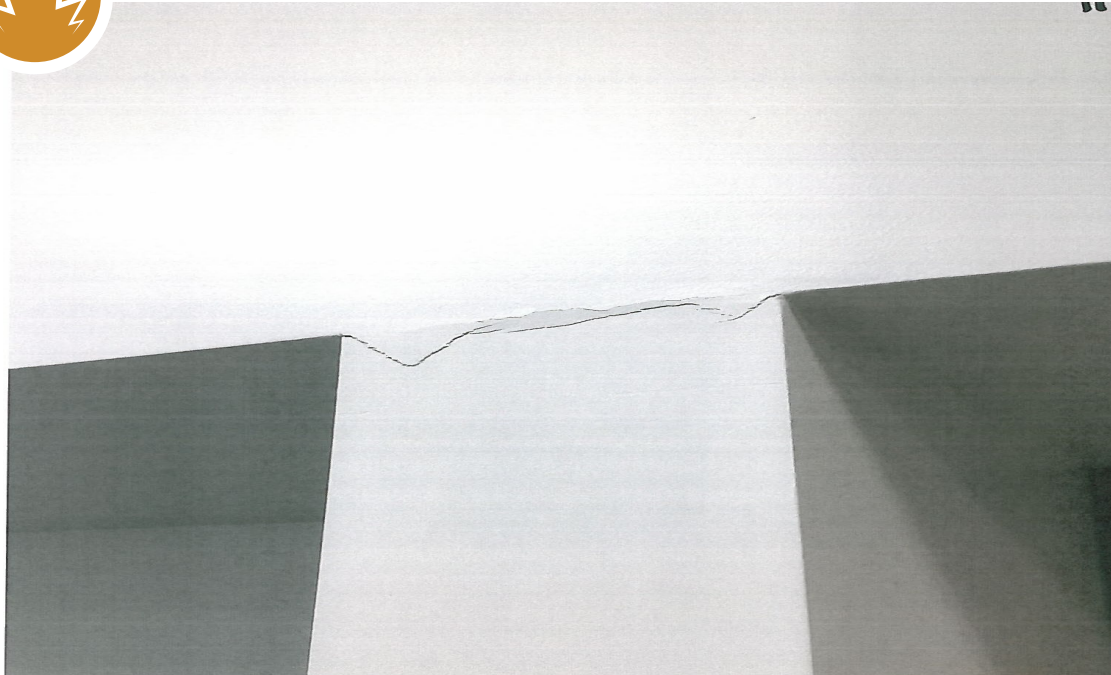
New Science Lab

Excessive Moisture Through Slab Causing Finish to Delaminate



New Library and Admin Building

Soils Subsidence Causing Settlement Cracks to Walls



New Library and Admin Building

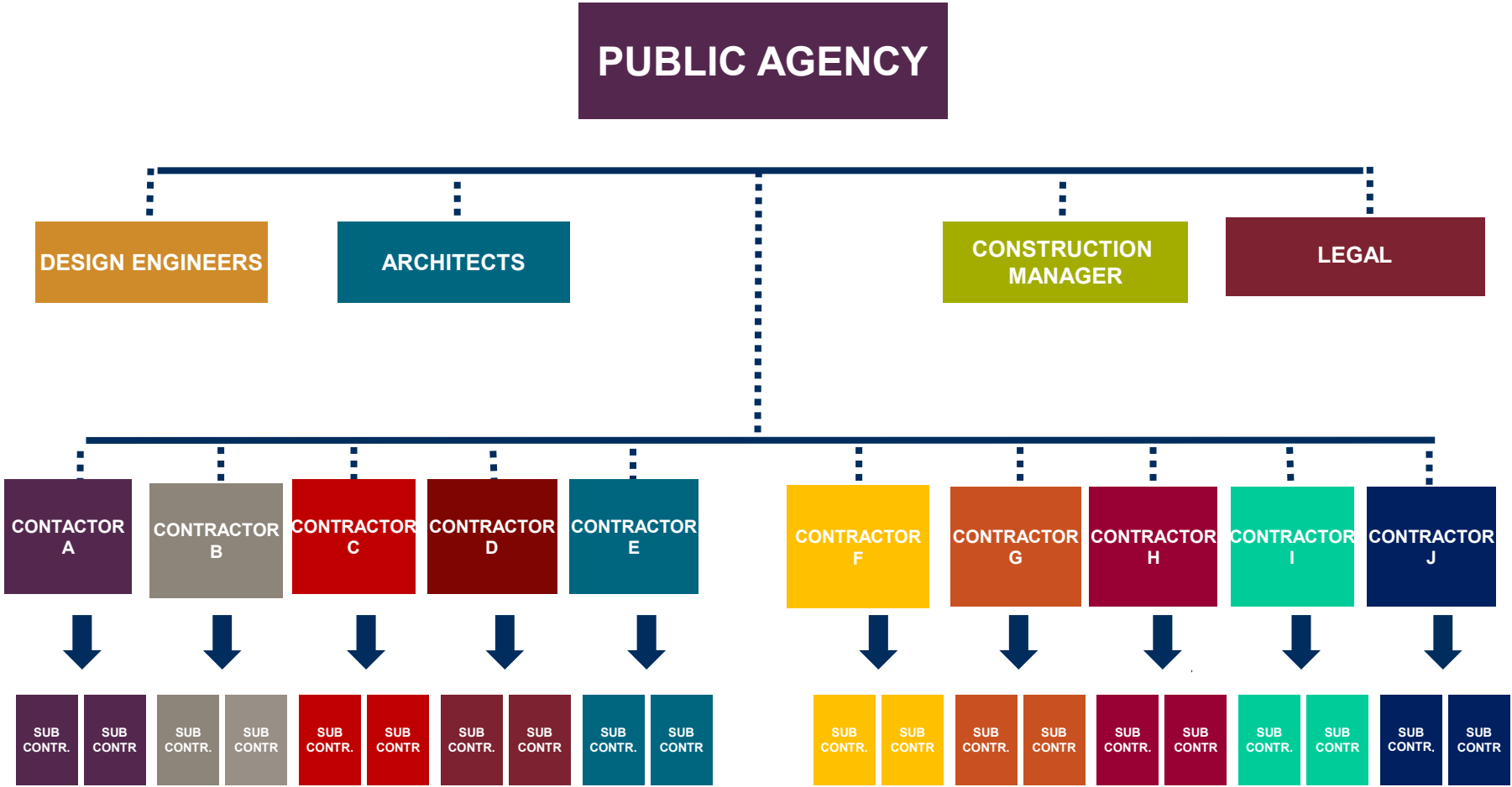
Doors out of Square



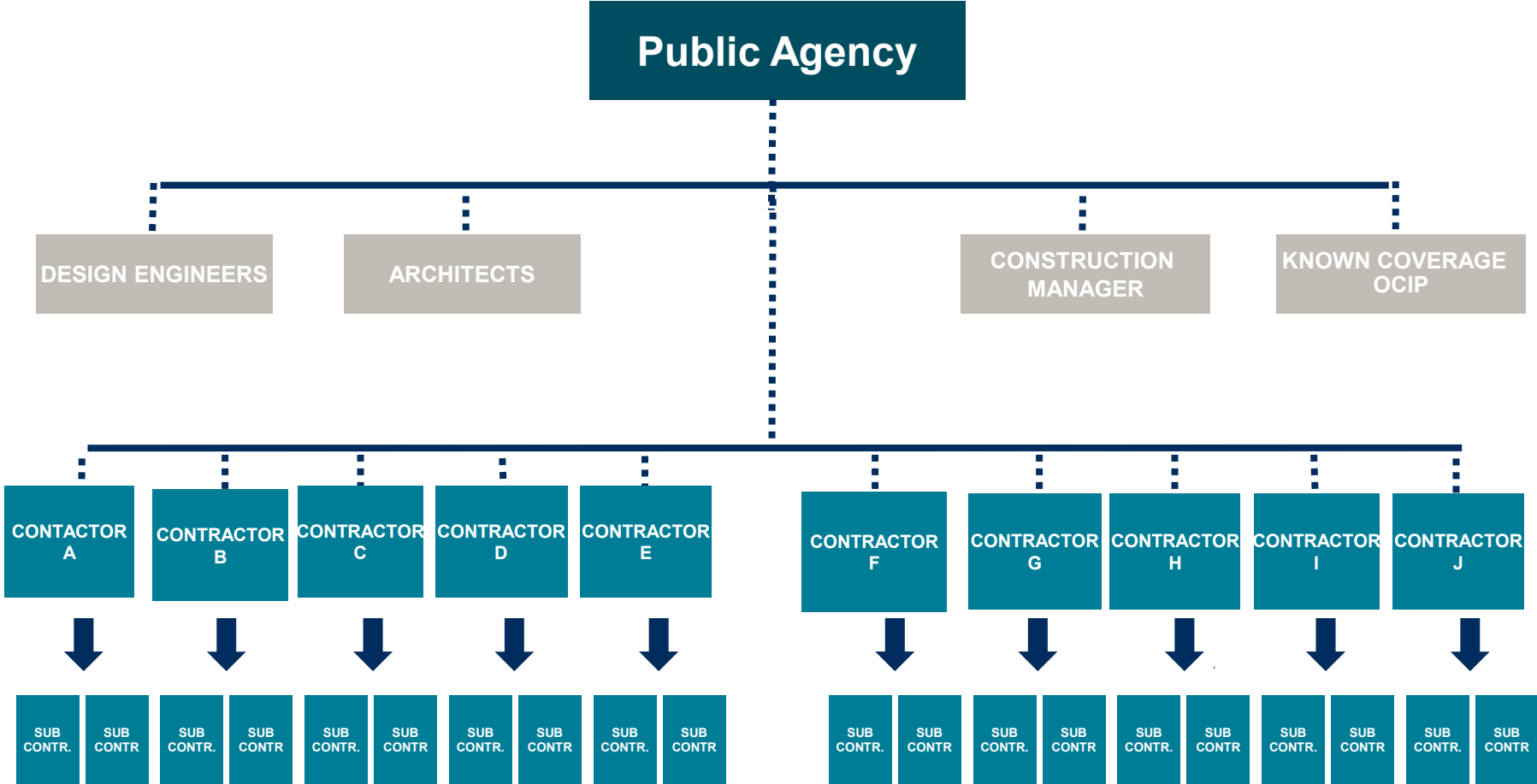
Risk Transfer Options

- Contract provisions will typically transfer the Public Agency's Risk of Loss to the General Contractor under the Contractual Indemnity Provision.
 - **Traditional Insurance Program:** Straight passthrough of liability from Public Agency to General Contractor to Subcontractors via Indemnity and Hold Harmless Agreement. Liability is fault based causing implicated subcontractor (s) to apportion blame to another trade to avoid liability creating an adversarial relationship. Public Agency has limited control.
 - **Owner Controlled Insurance Program (OCIP):** “Wrap coverage”- Entire project and all enrolled contractors are NAMED or Additional Named Insureds in a series of policies that make up the program. OCIP may include Cross Suits and Joint Defense Endorsements thwarting the need to apportion fault. Focus is not on who is to blame, but on how do we fix. Public Agency enjoys more control over Risk Transfer and processes.

Traditional Insurance Model

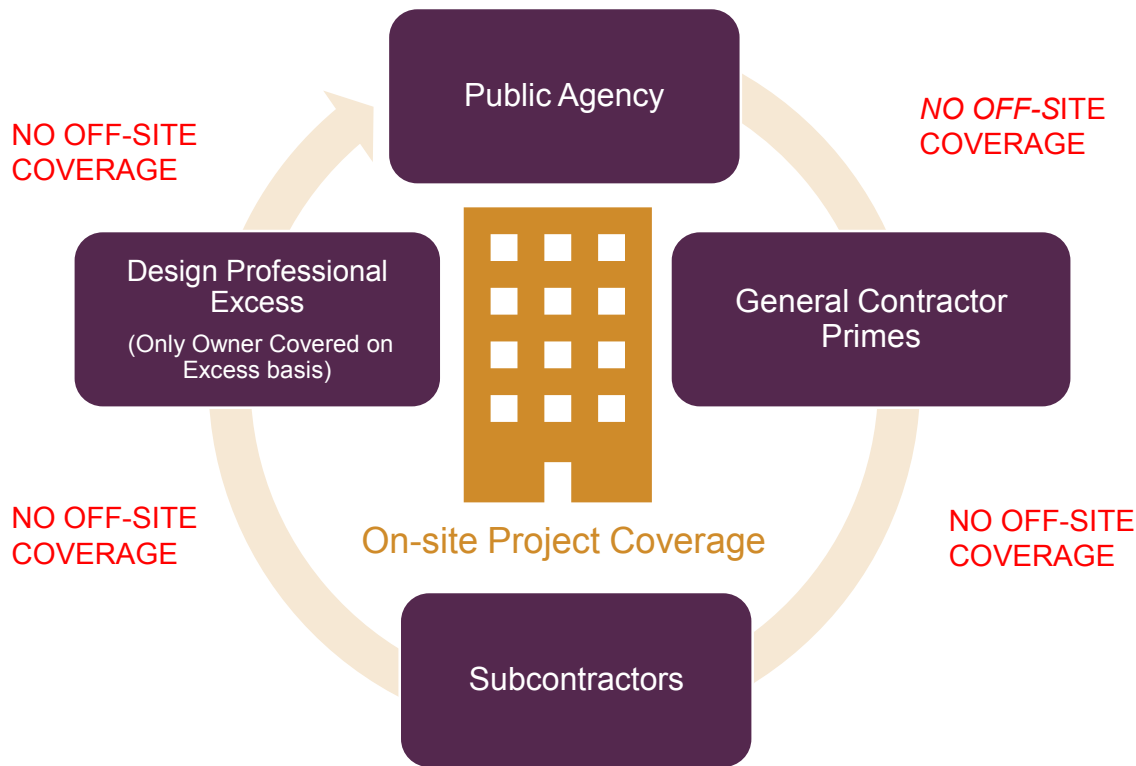


OCIP Insurance Model



OCIP "WRAP" COVERAGE

Property in temporary off-site storage/staging or in transit covered



Policies That Make Up the Program

- Coverage generally includes
 - Worker's Compensation
 - Commercial General Liability.
- Can also include but not limited to
 - Builders Risk
 - Contractors Pollution Liability
 - Owners Protective Professional Indemnity liability
- Project Specific or "Rolling Wrap"
- Contractors must be enrolled to be covered
- Covers Bodily Injury /Property Damage Claims that occur on the project
- Construction Defect claims of Public Agency

Construction Defect Life Cycle



Manifestation of a Defect

- Three years after substantial completion water stains are noticed on decorative ceiling tiles.
- Director of Facilities investigates to determine if maintenance issue exists related to water intrusion via windows, roofs or penetrations in elevation.
- Maintenance issue is eliminated and Construction Defect is suspected. Director notifies Insurance broker or carrier at 1-800 number of a possible water intrusion issue with damage being caused to carpet, ceiling tiles, baseboard, fixtures, etc.

New Administration Building

Water Intrusion Causing Building Damage



Wet Carpet Observed After Rainfall



Investigation



Investigation

- 24 to 48 hours after being reported a claim is opened, an adjuster is assigned and the investigation begins.
- The adjuster will contact both the Agency official and the General Contractor to obtain information on the status of the project, request copies of contracts and any other pertinent information related to the scope of work for the implicated contractor (s).

Investigation

- The **adjuster will** then, after **review** of all of the **requested documents**, consider appointing an independent expert who will conduct a visual inspection photographing the conditions if necessary and will make recommendations to the carrier for further inspections or testing, including Destructive Testing, if required.
- The **expert will** also **recommend a testing protocol**, including the location and scope of testing in order to identify the source of the damage.
- The **Agency may elect to retain an expert** of their own (at their own expense) to either conduct their own investigation or to oversee the carrier's expert and advise the district on the appropriateness of the Scope of Testing and the recommended Scope of Repair.

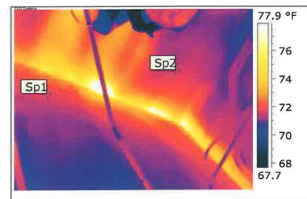
Water Testing



Infrared Imaging During Testing

Customer LBCC Building "T"- Section B North

Location	Inspector	Date	Picture
North East Corner	Terry Chavez	5/19/2012	3



Area
Wall Profile with Fire Caulking after 30 Minute Water Test

Temp. 1	Temp. 2	Delta T
71.7 °F	71.5 °F	0.2

IR Report Summary

The results from the water test are as follow:

- Only the South East walkway expansion joint between Building A and Building B showed temperature changes within the walls during the water test. After 10 minutes into the water test, the water was seen pouring down the wall and splashing the handicap door button.
- For all the other sides there were no visible temperature changes within the walls. Several pages are included showing wall profiles during test.

Destructive Testing of Suspect Area



Destructive Testing Begins



Leak Location Found



Repair Plan

- Experts recommend repair protocols and scope of repair.
- The Public Agency has control in accepting the recommended protocol and scope of repair.
- If all parties are unable to reach an agreement then an independent mediator can be assigned to resolve the dispute and establish an acceptable Repair Protocol and Scope of Repair.

Resolution

- **Only after** the source of the damage has been confirmed and estimates for repairs obtained will an offer to settle the claim be made by the carrier. If the Public Agency agrees, then the carrier will submit a Settlement Agreement and Release of all claims for review and signature.
- Once completed, funding will be made.
- If no agreement can be reached, then litigation will typically follow

Factors that can Affect Settlement

- **Design issues-** Often times issues related to design are discovered. The Commercial General Liability policy excludes damages caused by design requiring a tender of claim to the design/engineering professionals.
- **Tolling Agreements-** Allows for additional time if SOL will force litigation. All parties must agree in writing.
- **Litigation required-** If Tolling Agreement cannot be entered into.
- **Recovery of Expert Fees and Costs-** *Stearman v Centex Homes (2000) 78 Cal App 4th 613*
- **California Civil Code of Procedure 583.310 – 583.360** provides that an action shall be brought to trial **within five years** after the action is commenced against the defendant. If not, the case is Dismissed With Prejudice.

Factors that can Affect Settlement

Contract Provisions

- Indemnity and Hold Harmless Agreement
- Prevailing Party Language
- Surety Bonds
 - **Bid Bond/Bid Security:** Assures the District that the bidder will enter into the contract and has the financial means to accept the job for the price quoted in the bid
 - **Performance Bond:** Guarantees completion of the project and protects the District from a contractor's default or termination
 - **Payment Bond:** Guarantees that subcontractors, material suppliers or laborers that provide work or materials for the project will be paid

Factors that can Affect Settlement

- The Traditional Insurance Program is adversarial in nature forcing each implicated party to seek apportionment of fault to another implicated trade resulting in protracted litigation, increased fees and costs and erosion of available limits.
- The average CD claim in a Traditional Insurance format lasts two to three years, can go to five years before settlement is achieved.
- **The average OCIP claim lasts 10 months.**

But Wait, not so Fast!

- **California Civil Code § 2782.05:** contracts and amendments entered into on or after January 1, 2013, section 2782.05(e) governs the allocation and performance of defense obligations by and among subcontractors on non-residential projects, **both public and private**. No defense or indemnity owed by the Indemnitor to the Indemnitee for the Indemnitee's own "Active Negligence."
- **California Civil Code §2782.8:** shall apply to **all** contracts entered into on or after January 1, 2018, for design professional services, wherein any contract that purports to indemnify the indemnitee is unenforceable, **except to the extent that the claims arise out of the "negligence, recklessness, or willful misconduct of the design professional."**