



**CAPITAL PROJECT  
STRATEGIES**

# **Recent Developments in Design-Build Contracts and Caselaw**

**DBIA Mid-Atlantic Chapter and ACEC/MW  
February 24, 2009**

**Michael C. Loulakis, Esq., DBIA  
President/CEO  
Capital Project Strategies, LLC**

# Release and Review of New DBIA Contract Documents

- The evolution of DBIA's contract documents
- Drafting philosophy
  - Modern risk allocation approach
  - Process-oriented
  - Easy to use
- Raising the contract bar

# Taking It To The Next Level

- One size does not fit all
  - Menu approach
  - Encouraging the parties to discuss hard issues
- Addressing advances in the industry (sustainable design, BIM, electronic data)
- Roll-Out Process
  - Preparation of drafts
  - Solicit member input
  - Release in the Spring 2009
- What follows is a work in progress

# Scope of Work

- Critical success factor
- Modifications to Contract Document definition (minor changes)
- Basis of Design Documents as new defined term
  - Owner's Project Criteria
  - Design-Builder's Proposal
  - Deviation List

# Dealing with the Realities of Bridging

**3.4 (New)** Owner is cautioned that in the event Owner's Project Criteria contain prescriptive specifications: (a) Design-Builder is entitled to reasonably rely on the accuracy of the information represented in the prescriptive specifications and its compatibility with other information set forth in Owner's Project Criteria, including any performance specifications; and (b) Design-Builder shall be entitled to an adjustment in its Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance have been adversely impacted by such inaccurate prescriptive specification.

# Cost of the Work

## (Section 6.3)

- Premise: “Costs reasonably incurred in the proper performance of the Work”
- Categories that have been changed:
  - Personnel stationed at home/branch offices that have been identified in exhibit
  - Option for a multiplier to cover employee benefits (not auditable)
  - Costs to correct defective work (including warranty work after Substantial Completion)
  - Option for warranty work – escrow account

# Warranty Escrow

*[Design-Builder and Owner may want to consider adding the following Section 6.3.22 to address the payment of warranty work:]*

.22 Owner and Design-Builder agree that an escrow account in the amount of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) shall be established prior to Final Completion, which escrow shall be used to reimburse Design-Builder for the Costs of the Works incurred after Final Completion to perform warranty Work. The escrow agreement will provide that any sums not used at the expiration of the warranty period shall be returned to Owner, subject to any savings Design-Builder may be entitled to under this Agreement. In the event the warranty escrow account is exhausted, but funds remain under the GMP, Owner shall be obligated to pay Design-Builder the Costs of the Works incurred after Final Completion to perform warranty Work up to the GMP.

# GMP

## (Section 6.6)

- GMP established upon execution of the Agreement
  - GMP value included directly in contract
  - Documents used as basis for GMP included in the GMP Exhibit
  - Recommendation on types of documents to include
- No guarantee of line items
  - Design-builder has sole discretion to apply overruns from one line item to another
  - Optional language to have a cap on General Conditions

# GMP Contingency

The GMP includes a Contingency in the amount of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) which is available for Design-Builder's exclusive use for unanticipated costs it has incurred that are not the basis for a Change Order under the Contract Documents. By way of example, and not as a limitation, such costs may include: (a) trade buy-out differentials; (b) overtime or acceleration; (c) escalation of materials; (d) correction of defective, damaged or nonconforming Work, design errors or omissions, however caused; (e) Subcontractor defaults; or (f) those events under Section 8.2.2 of the General Conditions of Contract that result in an extension of the Contract Time but do not result in an increase in the Contract Price. The Contingency is not available to Owner for any reason, including changes in scope or any other item which would enable Design-Builder to increase the GMP under the Contract Documents.

# GMP Contingency (cont'd)

Design-Builder shall provide Owner with advance written notice of all anticipated charges against the Contingency, and shall provide Owner as part of the monthly status report required by Section 2.1.2 of the General Conditions of Contract an accounting of the Contingency, including all reasonably foreseen uses or potential uses of the Contingency in the upcoming three (3) months. Design-Builder agrees that with respect to any expenditure from the Contingency relating to a Subcontractor default or an event for which insurance may provide reimbursement, Design-Builder will in good faith exercise reasonable steps to obtain performance from the Subcontractor and/or recovery from any surety or insurance company. Design-Builder agrees that if Design-Builder is subsequently reimbursed for said costs by a Subcontractor or through insurance, then said recovery will be credited back to the Contingency.

# Contingency Release

*[Owner and Design-Builder may want to include the following supplemental paragraph to Section 6.7.1.2]*

Owner and Design-Builder agree that \_\_\_ percent (\_\_\_%) of the Contingency will be released to Owner after Design-Builder has bought out \_\_\_ percent (\_\_\_%) of the value of all Subcontracts, provided, however, that at such time, Design-Builder shall not be required to release an amount greater than the amounts Design-Builder has identified for reasonably foreseen uses or potential uses of the Contingency.

# Performance Incentives (Section 6.8)

- Fill-in-the-blank provision through Exhibit
  - Schedule incentives already covered
  - Award fees
  - Safety incentives
  - Personnel retention

# Substantial Completion and Damages/Bonuses

- Optional language that ties Substantial Completion to TCO
- Liquidated damages cap
- Actual damages with a cap (consequential damages are waived)
- Bonus with a maximum aggregate cap
- Delay damages that have specified values for design-builder recovery

# Work Product Ownership

- Historical viewpoint
- Definition broadened to include Electronic Data
- Limited license transferred at project completion and payment in full
- Options
  - Owner owns elements of the design unique to the project and limited license for non-unique items
  - Owner owns everything
- Termination for cause gives owner full rights

# Electronic Data

- Recognition that material is now regularly sent electronically
- Disclaimer of software warranty
- Protection of intellectual property
- No warranty in media of transmission
  - Standard of care in underlying data
  - Cannot be altered without participation of the design-builder

# Confidential Information

- Needs to be identified as confidential
- Party claiming must maintain it confidential
- Confidential document cannot otherwise be available

# BIM Addendum

- Simplicity was key
- New terms
  - Deliverable: information required to be submitted or produced through BIM process
  - Information Manager: person responsible for managing BIM process and system
  - Participant: anyone submitting information through BIM process
- Meet and confer on use, outcomes, format
- Standard of care and intellectual property
- Participants must review information and identify problems

# Sustainable Project Goals Exhibit

- Parties to agree on whether LEED Certification will be required
  - Check the box on LEED goal level
  - Credits to achieve level shall be set forth in the Basis of Design documents
- Optional clauses
  - Waiver of damages if best efforts used
  - Liquidated damages
  - Obligation to cure with cap on dollars
  - Waiver of consequential damages

# ***Ball v. Versar (2006)***

- Remediation of a Superfund site at Enviro-Chem's solvent processing facility in Indiana
  - Record of Decision called for use of a soil vapor extraction system (SVE)
  - Fixed price DBOM contract, with two year requirement to achieve compliance with cleanup standards from startup of SVE system
  - SVE system failed to achieve cleanup standards in the Consent Decree
- Primary dispute was whether contract covered groundwater remediation
  - Additional work
  - Contract unenforceable because of mutual mistake/unilateral mistake
  - No amount of augmentation of the SVE system would enable system to work under existing site conditions
- Court rejected Versar's defenses and found breach of contract

## ***Ball v. Versar*** (cont'd)

- DBOM Contract explicitly incorporated:
  - Consent Decree and all tables
  - Chemical limits for groundwater contaminant concentrations
  - Versar was obligated to deal with all water that the SVE collected without any increase in the Contract Price or Contract Time
- Versar assumed the risk of unknown conditions at the site, with no adjustment in contract price
- Mutual mistake argument rejected
  - Court rejected notion that earlier design of SVE shifted risk to Owner
  - “Certainly there might be an issue if *no* SVE system was capable of remediating the contamination ... but Versar has not argued for avoidance of the contract on the grounds of impossibility.”

# ***Old Dominion Electric Cooperative v. Ragnar Benson (2006)***

- \$47 million EPC contract for power generation facility in Virginia
  - Project finished months behind schedule and EPC contractor default terminated
  - Issue over whether non-rippable rock was a differing site condition
- Potentially conflicting contract language:
  - EPC contract clearly shifted all risk of site conditions to contractor
  - Technical specification required contractor to track quantities of non-rippable rock and report to Owner
- Court used the order of precedence clause to find against contractor

## ***Old Dominion Electric*** (cont'd)

“[The Contract] suggests that RBI undertook a turnkey project with performance-based specifications. \*\*\* As the Court sees it, for RBI to have any reasonable standing to argue that ODEC breached the Contract ... for the removal of the non-rippable rock, RBI would have needed to notify ODEC, prior to being awarded the Contract, or any subsurface conditions differing from those identified in the [RFP].”

# *Appeal of Strand Hunt Construction (2008)*

- Design-build of Joint Security Forces Complex in Alaska
  - Performance specification for a window that could meet arctic and blast mitigation conditions
  - Design-builder claimed that specification was defective, as there were no “ready made” windows meeting the spec
- Claim rejected:
  - Proposal and interim design submissions confirmed that it would meet the specification
  - RFP did not promise the availability of “ready made” windows
  - There was adequate time to get it manufactured
  - Design-builder and its architect delayed in investigating this

## ***Strand Hunt Construction*** (cont'd)

“SHC argues that it had no choice but to make sure its proposal and design specifications mirrored the RFP requirements. However, if SHC [did so], it did so at its own risk. SHC was obligated to not just say that it would meet requirements, but also to be sure it could actually do so.”

# *Shaw Constructors v. ICF Kaiser (2008)*

- Design-build of nitric acid facility at nitrogen plant for PCS Nitrogen Fertilizer
  - Kaiser was EPC contractor and Shaw was primary subcontractor
  - Subcontract started off lump sum and converted to cost plus
- Project substantially late due to design problems and delays by Kaiser
  - Kaiser eventually went bankrupt and Shaw sued PCS under lien law
  - PCS claimed that Shaw's costs were inflated and improper
- Court concluded that Shaw should prevail:
  - Inefficiencies in Shaw's work caused by Kaiser
  - Kaiser agreed with the costs
  - Lien waivers were ineffective defenses
  - Kaiser seemingly, during performance, signed off on everything

# *Casey Industrial v. Seaboard Surety (2006)*

- Casey was subcontractor to Ragnar Benson for concrete and underground electrical work
  - RBI was defaulted, and Seaboard took over
  - Seaboard argued that Casey was late and owed \$15,000/ day in liquidated damages
- Subcontract deleted a standard provision that flowed down all rights and responsibilities from the EPC contract
- Court concluded that this prevented liquidated damages from flowing to Casey
- Court concluded that this did not mean Casey had no responsibility for delays
  - Other provisions gave RBI rights if Casey was late (e.g., termination)
  - Gave right to Seaboard to seek actual damages

# *Tennessee Gas Pipeline v. Technip USA (2008)*

- \$87 million EPC contract for improvements on a gas pipeline
  - Delays of between 6 to 20 months, attributed to shortages of skilled labor, new technology and change orders
  - Jury found Technip breached contract and awarded \$18.5 million
- Technip's appeal focused on consequential damages waivers and failure to comply with warranty provision
- Court agreed that warranty clause not followed and reversed that portion of verdict
  - Failure by Owner to give written notice under clause
  - Disagreed with Owner that contract did not require any notice
  - Warranty clause as exclusive remedy

# *Tennessee Gas Pipeline v. Technip USA*

*(cont'd)*

- Court evaluated what constituted consequential damages
  - Parties released each other from any “indirect, special, incidental or consequential loss or damages”
  - Identified “loss of profits or revenue, loss of opportunity or use,” and “like items of loss or damage”
- Court rejected Technip’s argument that removal of liquidated damages provision eliminated owner’s ability to recover any delay damages
- Project delay costs incurred by owner (oversight and inspectors) of \$4-5 million were deemed direct damages
- Court found the following as consequential damages and non-recoverable:
  - Loss of efficiency for excess lube oil and gas use on old equipment
  - Interest on funds used for construction

# *Riley Construction Company v. United States* (2005)

- Design-build contract with Navy
  - 49,000 sq. ft. building vs. 56,000 sq. ft. building
  - Riley submitted a claim for almost \$1 million, including \$73,000 for additional design fees
- Designer had a fixed price contract
  - Not billed Riley for additional fees
  - Only spent 26 hours more than budgeted
- Government filed claim for violation of False Claims Act
- Court rejected summary judgment motions:
  - Riley did not intend to deceive, but may have acted with deliberate ignorance or reckless disregard
  - Riley did not make a limited inquiry into adequacy of additional fees
  - Question as to whether design agreement would allow designer to get an equitable adjustment



**CAPITAL PROJECT  
STRATEGIES**

# **Recent Developments in Design-Build Contracts and Caselaw**

**DBIA Mid-Atlantic Chapter and ACEC/MW  
February 24, 2009**

**Michael C. Loulakis, Esq., DBIA  
President/CEO  
Capital Project Strategies, LLC**