



**CAPITAL PROJECT  
STRATEGIES**

# **Design-Build Legal Issues**

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# DBIA's Contracts: Historical Perspective

- Contracting Guide
- Decision to be independent of other associations
- Drafting philosophy
  - Modern risk allocation approach
  - Process-oriented approach
  - Easy to use
  - Addressing unique design-build issues
  - “Tweaking” garden variety issues

# DBIA's Contracts: The Key Issues from 1998

- Ownership of Documents
- Managing the nuances of the design development process
- Clarifying the contractual scope of work
- Outlining the development of a GMP
- Creating a balanced commercial relationship

# DBIA's 2010 Revisions: What is New?

- Refining some of the unique design-build issues
  - Document ownership
  - Scope of work development
- Liability for owner's defective specifications
- Menu approach for major commercial issues
- Addressing advances in the industry
  - Sustainable design
  - BIM
  - Electronic data

# Scope of Work

- Factor most critical to success of project
- Owner's and design-builder's expectations have to align
- New language ensures framework for scope agreement
  - Basis of Design Documents
  - Resolution of conflicts

# Scope of Work: Basis of Design Documents

- Newly defined term
- Lump Sum Agreement (525)
  - Owner's Project Criteria
  - Design-Builder's Proposal
  - Deviation List
- Cost Plus GMP (530)
  - Specifically identified in the GMP Proposal
  - Includes Owner's Project Criteria
- Basis for determining what the price is based upon

# Scope of Work:

## Process for Resolving Conflicts

- Before execution of agreement or acceptance of GMP :
  - Design-Builder and Owner will “carefully review all the Contract Documents” for conflicts or ambiguities
  - Discuss and resolve those identified
- After execution of agreement or acceptance:
  - Informally attempt to resolve
  - Reference to order of precedence

# Key Challenge: Who Has Responsibility for Errors in Bridging Documents?

- What have we learned over past 10 years?
  - Bridging is widely used
  - Owners have tried to distance themselves from liability for documents they create
  - Caselaw has not upheld Owners' views
    - *Spearin* doctrine
    - *Mortenson* doctrine
- New clause addresses issue head-on

# Owner Responsibility for Inaccurate Specs: (Section 3.4)

If Owner's Project Criteria contain prescriptive/design specifications: (a) Design-Builder is entitled to reasonably rely on the accuracy of the information represented in the prescriptive/design specifications and its compatibility with other information set forth in Owner's Project Criteria, including any design or 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/design specification.

# Ownership of Documents: Historical

- Need to balance the interests of all parties
- Design-Builder owned the Work Product
- If Design-Builder relationship ended before work completed:
  - Owner given limited license to use the Work Product
  - Indemnification of Design-Builder and its team
  - Payment for right to use the Work Product

# Ownership of Documents: Project Completion and Payment in Full

- Base contract language
  - Design-Builder retains ownership of Work Product
  - Owner has limited license to use for occupancy
  - Alteration of Work Product without Design-Builder's involvement is without risk to Design-Builder
- Options:
  - Ownership transfer of Work Product for “architectural and other design elements and specifications that are unique to the Project”
  - Ownership transfer of all Work Product

# Ownership of Documents: Owner's Termination for Convenience

- Owner given limited license to use Work Product to complete project
- Owner's occupancy rights same as above
- Owner provides indemnity and payment of stipulated amount for right to use Work Product
- Same remedy applies if Design-Builder terminates because of Owner's default

# Ownership of Documents: Design-Builder's Termination for Cause

- Limited license to use Work Product
- Does not require “payment in full”
- Does not provide for indemnification
- If Design-Builder is not in default, then treated as a termination for convenience
- Language a bit cleaner than 1998 Edition
  - Clause triggered “if it is determined that Design-Builder was in default ...”
  - Unclear as to whether it required adjudication

# Key Commercial Issues

- Contract Price
  - Cost of the Work
  - Establishing the GMP
  - Allowances
- Schedule and Liquidated Damages
- Confidentiality
- Insurance
- Dispute Resolution

# Definition of Contract Price (Section 6.1)

- Owner to pay Design-Builder the Contract Price, defined as:
  - Fee
  - Costs of the Work
  - Subject to GMP
- Optional section for limited work

# Design-Builder's Fee (Section 6.2)

- Fee is either fixed amount or percentage of Cost of the Work
- Adjustment in fee has been changed:
  - For additive change orders, Fee is identified as percentage of additional Costs of Work
  - For deductive changes, option created:
    - No additional reduction for Fee or markup
    - A reduction for Fee applied to direct cost of the net reduction

# 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 6.3.24 to address the payment of warranty work:]*

- .24 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.

# Allowance Items and Allowance Values (Section 6.4)

- Itemization for each is contained in GMP Exhibit or GMP Amendment
- Considered part of GMP
- Affirmations that:
  - Design-Builder & Owner have worked together to review items/values
  - Reasonable estimates for item
  - Owner to provide written notice to proceed on item per dates in Project schedule (potential adjustment if fail to)

# Allowance Items and Allowance Values (Section 6.4) (cont'd)

- Change Order to reflect difference between actual cost of Allowance Item & Allowance Value
- Allowance Value only includes direct costs of Allowance Item
  - Design fees, PM, general conditions, overhead, and profit not included in Allowance Value
  - Optional language that does allow adjustment in Fee and markup if actual direct costs are higher or lower than a specified percentage

# GMP (Section 6.6)

- GMP established upon execution of Agreement
  - GMP value included directly in contract
  - Documents used as basis for GMP included in 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 Fund

- Designated dollar value
  - Exclusive use of the Design-Builder
  - Unanticipated costs that are not a basis for Change Order
- Examples:
  - Trade buy-out differentials
  - Overtime and escalation
  - Correction of defective work (however caused)
- Owner receives notice of all anticipated charges
  - Monthly status report
  - Three month forecast
  - Reasonable steps to obtain recovery from Subcontractors in event of a default

# Performance Incentives (Section 6.8)

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

# Retainage (Article 7)

- 1998 Edition called for release at 50% of the Work being completed
- New contracts:
  - Satisfactory completion of the work
  - Design-Builder is otherwise in compliance with contract
- Optional language:
  - General conditions carved out from retainage
  - Owner will “reasonably consider reducing retainage for Subcontractors completing their work early”
- Warranty Reserve

# Commercial Issues: Time-Related Clauses

- Definitions
- Delay damages to Owner
- Delay Damages to Design-Builder

# Time-Related Clauses: Definitions

- “Final Completion” added
- “Substantial Completion” supplemented and alternate version provided
  - Use for intended purpose
  - Temporary Certificate of Occupancy date
- “Force Majeure Events”
  - Beyond control of both parties
  - Includes weather conditions not reasonably anticipatable
  - No mention of foreseeability or impossibility

# Time-Related Clauses:

## Liquidated Damages (Section 5.4)

- Philosophy of “deadband” around Scheduled Substantial Completion Date (SSCD)
- Menu of options for delay damages:
  - Late Final Completion
  - Actual damages in lieu of liquidated damages
    - Costs directly related and caused by Design-Builder’s late completion
    - Consequential damages waiver remains intact
  - Maximum aggregate liability for liquidated damages

# Time-Related Clauses: Monies to Design-Builder (Section 5.6)

- Early Completion Bonus
  - Consistent with previous editions of DBIA contracts
  - Deadband around SSCD
  - Maximum aggregate bonus is an option
- Time extension rights
  - Base contract does not give Design-Builder delay damages for Force Majeure Events
  - Option to change this:
    - Force Majeure Events must exceed an agreed-upon number of cumulative days
    - Design-Builder paid either an agreed daily value or the direct costs and expenses it has reasonably incurred

# Confidentiality

- Application
  - Information that is determined by the transmitting party to be confidential or proprietary and:
    - The transmitting party identifies it as confidential
    - The transmitting party takes steps to maintain confidentiality
    - Document not in public domain
  - Receiving party agrees to:
    - Maintain confidentiality
    - Use the information only on the project

# Bonds and Insurance

- Options for:
  - Performance and Payment Bonds
  - Other performance security
- Insurance clauses had a major rewrite
  - Article 5 of Document 535
  - New Exhibit to Agreement
    - Types of insurance
    - Limits of insurance
    - Endorsements

# Dispute Resolution

- Field Level
  - Representatives of the parties meet first
  - This step is to conclude within 14 days of written notice of claim unless otherwise agreed
- Meeting of Senior Representatives within 30 days after the request by either party
- Mediation within 30 days of conclusion of meeting of Senior Representatives
  - Commenced within 90 days of submission
  - AAA rules
- Arbitration per AAA Rules
- Check-box option for litigation

# Conforming the DBIA Documents to Latest Industry Trends

- Electronic Data
- BIM
- Sustainability



# Electronic Data

- Purpose:
  - Recognize that material is sent electronically
  - Disclaim any warranty on software
  - Does not cover BIM – only addresses use of electronic data
    - Email
    - File sharing
    - CAD drawings
- Owner and Design-Builder to agree upon software and format for transmission
  - Each party to secure legal rights for accessing the format
  - No transfer of rights to Work Product

# Electronic Data (cont'd)

- Acknowledgment of risks of corruption of data
  - Agreement to be reached on protocol for notification of changes made to the Electronic Data
  - Transmission of Electronic Data is not intended to invalidate the standard of care relative to the creation of the data, unless such data is:
    - Materially changed by the receiving party
    - The transmitting party did not participate in the alteration

# BIM Exhibit

- Purpose – establish procedures for use of BIM on a project
- Initial conference : parties are to meet and confer about:
  - Use
  - Outcomes
  - Information and deliverable to be submitted
  - Format
  - Roles of the Participants
  - Submission schedules

# BIM Exhibit (cont'd)

- Information Management
  - Design-Builder to identify software that the Participants will use
  - Check boxes for how software is to be paid
  - Design-Builder to identify Information Manager
- Role of Information Manager
  - Establish submission standards
  - Control access to BIM (controls and passwords)
  - Receipt and organization of information submitted
  - Central communications point

# BIM Exhibit (cont'd)

- Responsibility for Information and Deliverables (“I&D”)
  - Each Participant responsible for complying with their Contracts regarding I&D
  - Responsible for Subcontractors and Subconsultants
  - Preservation of standard of care and intellectual property
  - I&D are only suitable for this project
  - Participants not responsible for errors in their I&D if caused by software/hardware compatibility
- Participant Responsibilities
  - Must review I&D submitted to and developed by it to determine if:
    - I&D is adequately and accurately reflected
    - I&D is consistent with the Project and the Basis of Design Documents
  - If problems are discovered, immediate notification to Design-Builder and Information Manager

# Sustainable Project Goals Exhibit

- Check-box approach with a number of key issues to be addressed
- Project Goals
  - Discussion about the extent to which:
    - Sustainable design elements to be used
    - LEED Certification will be required and what level
  - Requisite credits to achieve LEED certification
    - Included in the Basis of Design Documents if feasible
    - If not feasible, work together as part of design development process, with change order as appropriate

# Sustainable Project Goals Exhibit (cont'd)

- Use of Independent Commissioning Authority (CxA) if LEED certification required
  - Lead and oversee completion of all commissioning processes
  - LEED Accredited Professional
  - Check-box for:
    - Who retains and pays for the CxA
    - Whether the level of service is for Fundamental Building Services Commissioning or Enhanced Commissioning

# Sustainable Project Goals Exhibit (cont'd)

- Legal Requirements
  - Owner to determine what sustainable standards are required by law
  - Identified in the exhibit
  - Changes of law not the risk of Design-Builder
  - Owner acknowledgment that satisfaction of standards is dependent on subjective determination of USGBC and other agencies/entities
  - Pledge of parties to use best efforts to satisfy the standards

# Sustainable Project Goals Exhibit (cont'd)

- Remedies if failure to obtain level of LEED certification or identified sustainability standards:
  - Waiver of damages
  - Liquidated Damages
  - Limited obligation to cure
    - Remaining contingency
    - Design-Builder's share of savings
    - Designated amount
    - Waiver of consequential damages
- Experimental Products, Designs and Systems
  - Set forth in exhibit
  - Owner alerted to the lack of experience and assumes the risk after discussion with Design-Builder
  - Owner will look only to manufacturer and waives claims

# Contract Clauses that Create Trouble

- Responsibility for errors in the RFP Documents
- Standard of care/fitness for purpose
- Limitations of liability
- Treatment of performance guarantees
- Defining excusable delays and compensation events
- Dispute resolution processes
- Change order processes

# *Encon Utah, LLC v. Fluor Ames Kraemer*

## (2009)

- Partial termination for convenience of UDOT contract on Legacy Parkway
- FAK appeals \$1.7M jury verdict to girder sub on basis that prime's termination provision should have been used
- Clauses:
  - DB contract: recovery of out of pocket costs for work performed and fair and reasonable profit
  - Subcontract : actual costs of work performed plus reasonable OH & profit
  - DB contract limits compensation to “value of work performed”
  - Incorporation by reference of all clauses except those specifically excluded
- Court relies on other provisions to find for subcontractor
  - Encon would comply with prime as applicable to subcontractor's scope of work
  - Subcontract clause would be meaningless under FAK's interpretation



# ***Veolia Water North America v. City of Atlanta (2008/2009)***

- Design-build-operate of water reclamation centers and biosolids management
  - Disposal of biosolids through indirect thermal drying and fertilizer pellets
  - \$54 million capital improvement plan over 4 years
- Rescoping of contract
  - City didn't have the money for capital improvements
  - US Filter discovered operational parameters had changed
  - Elimination of thermal drying and pellets and making selected improvements
  - Significant impact on US Filter's work and costs that impacted long-term plan
  - Consensus that needed amendment to agreement
- Submission of \$30 million claim results in default termination
- Notice provisions upheld

# ***S&B/Bibb v. Progress Energy (2010)***

- Power plants in Polk County, Florida
  - 4 hurricanes hit project and Gulf
  - \$40 million claim for increased labor and material costs
- Court rejected claim:
  - Firm fixed price contract
  - Force majeure clause limited relief to time extensions
  - Fact that contractor mitigated the delay and finished project on time irrelevant

# *Matter of McCarthy/Hunt, JV* (February 10, 2010)

- Martin Army Community Hospital at Fort Benning
  - AECOM was design criteria consultant
  - Turner awarded \$333 million design-build contract in September, 2009
  - Ellerbe Becket was Turner's lead designer
  - AECOM acquired EB in October, 2009
- Protest based on organizational conflict of interest

# *Matter of McCarthy/Hunt, JV* (February 10, 2010)

- Types of organizational conflicts:
  - Unequal access to information
  - Biased ground rules
  - Impaired objectivity
- Failure by AECOM to “wall off” team from EB
  - Didn’t matter that merger was on and off
  - No plan to ensure that EB did not get access to information
  - Nothing disclosed to Corps along the way
  - AECOM could have skewed the “rules”
- Turner terminated for convenience on March 23, 2010



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