IMLA Construction Contract Drafting Initiative *Fundamentals of Design Build Contracts*

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Introduction: Design-Build Project Delivery

- Design-Build construction contract is where both the design and the construction of a project are the responsibilities of the same contractor

- Design-Build creates a single contractual relationship, one project – one contract

Introduction: Design-Build Project Delivery

- Design-Build presents alternative project delivery models for public owners and projects

- Design-Build may be appropriate, even, preferred delivery model for many project types

Design-Build: The New Normal?

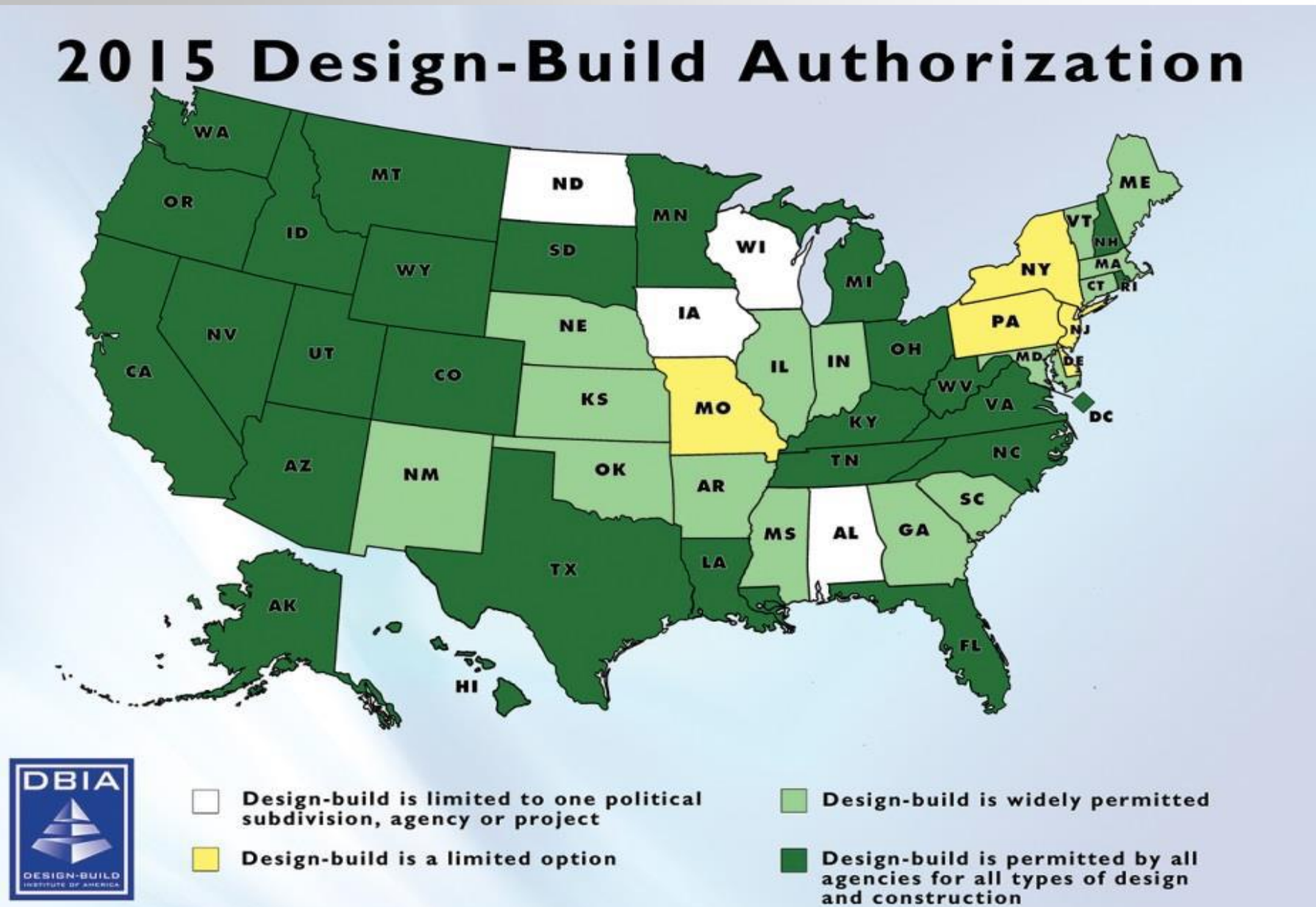
- "As owners seek more streamlined delivery of their projects, they will increasingly turn to design-build, contracting with a single entity to provide integrated design and construction services. This will encourage the traditionally factional and fractional design and construction industry to find new ways of collaborating. The shift to design build will also substantially affect issues of risk management, since so many formally competitive entities will be linked by a common contractual bond. . ."

  James P. Cramer and Scott Simpson, *The next Architect: A New Twist on the Future of Design*

Design-Build: Legal Authority

- **Statutory Authority**
  - Independent legal authority to utilize the design-build project delivery model for this type of construction, (vertical, horizontal, utility, transportation, energy)
- **Local Authority**
  - Local charters, articles of incorporation, ordinances or by-laws
  - Determine the extent of the municipal authority's legal right to utilize alternative project delivery models
  - A determination must be made of which local board or executive department has authority for procurement, vendor selection, contract
  - Appropriate local authorities appoint procurement team that will perform the procurement process
- **Sources of Authority**
  - State law, local charters, special legislation, home-rule authority
  - Special legislation to grant a limited authority

Design-Build – Legal Authority



Introduction - Design Build Project Delivery

- Design-Build should be considered for the following types of projects:
  - Projects that demand an expedited schedule and can be completed earlier
  - Projects that require minimum right of way acquisition and utility relocation
  - Projects that have a well defined scope for all parties (design & construction)
  - Projects that have room for innovation in the design and/or construction effort
  - Projects with low risk of unforeseen conditions
  - Projects with low possibility for significant change during all phases of work
  - Projects with well-defined, non-complex environmental permitting requirements

**Sources, includes information from U.S. Federal Highway Administration*

Introduction - Design Build Project Delivery

- Examples of projects that may be suitable for design-build contracting:
  - Office buildings
  - Water and sewer facilities
  - Bridges
  - Intersection improvements (with known utilities)
  - Interstate widening
  - Rural road widening
  - Fencing
  - Landscaping
  - Lighting
  - Sidewalks
  - Pedestrian walkways/overpasses
  - Signing
  - Signalization
  - Guardrail

**Sources, includes information from U.S. Federal Highway Administration*

Design-Build: Match Delivery Model & Project

- **Design-Build**
  - Buildings, fields, facilities, utility infrastructure
- **Design-Build-operate**
  - Utilities, water, wastewater, solid waste and energy, ESCOs
- **Design-Build-finance-operate**
  - Water and wastewater treatment, renewable energy, solid waste
- **Design-Build-finance-own-operate**
  - Most of the above except governmental use buildings (schools)

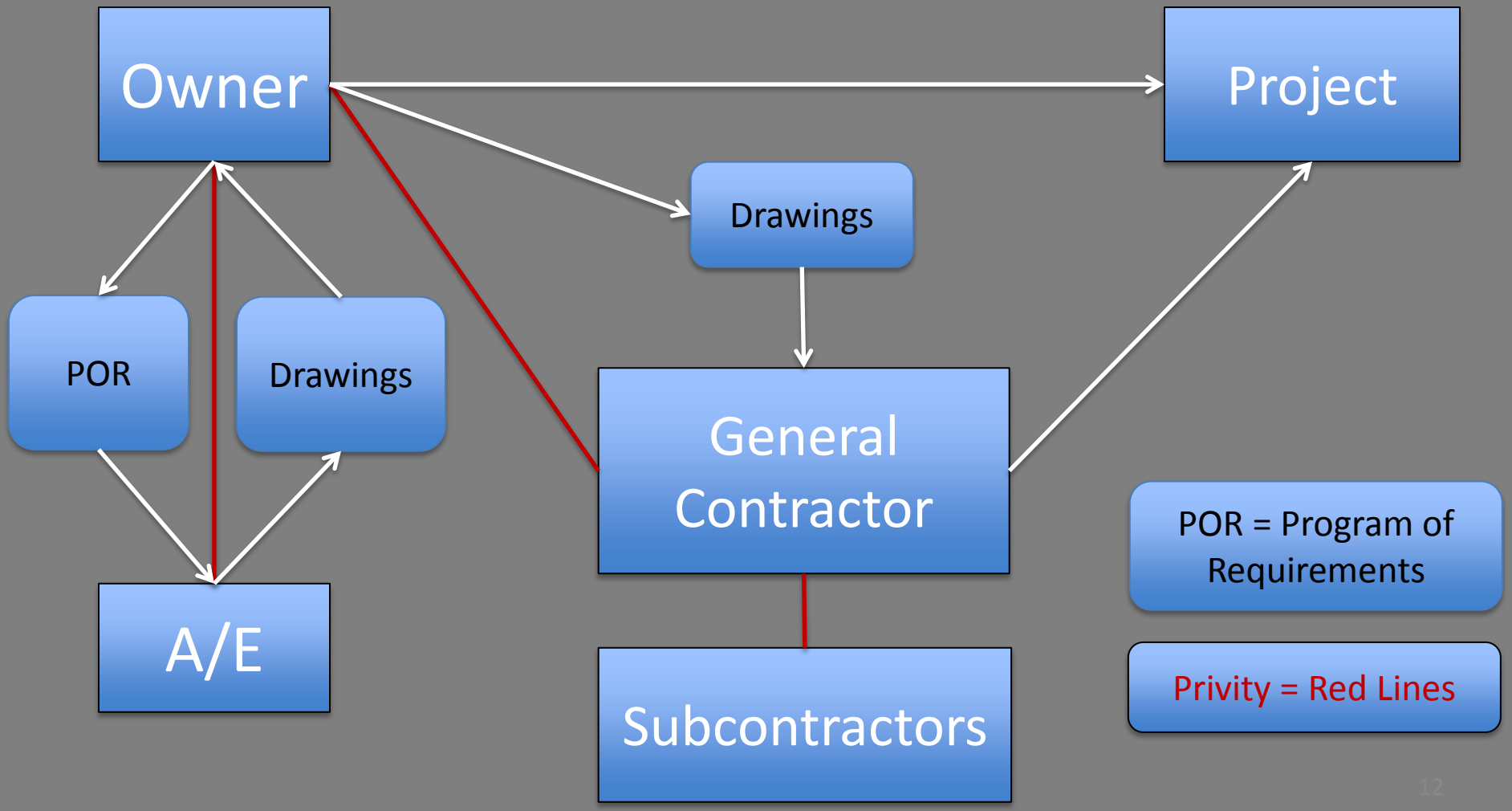
Design-Build: Project Options

- **DB** – Design Build
- **DBO** – Design Build Operate
- **DBFO** – Design Build Finance Operate
- **DBFOO** – Design Build Finance Own Operate
- **DBFOOT** – Design Build Finance Own Operate Transfer

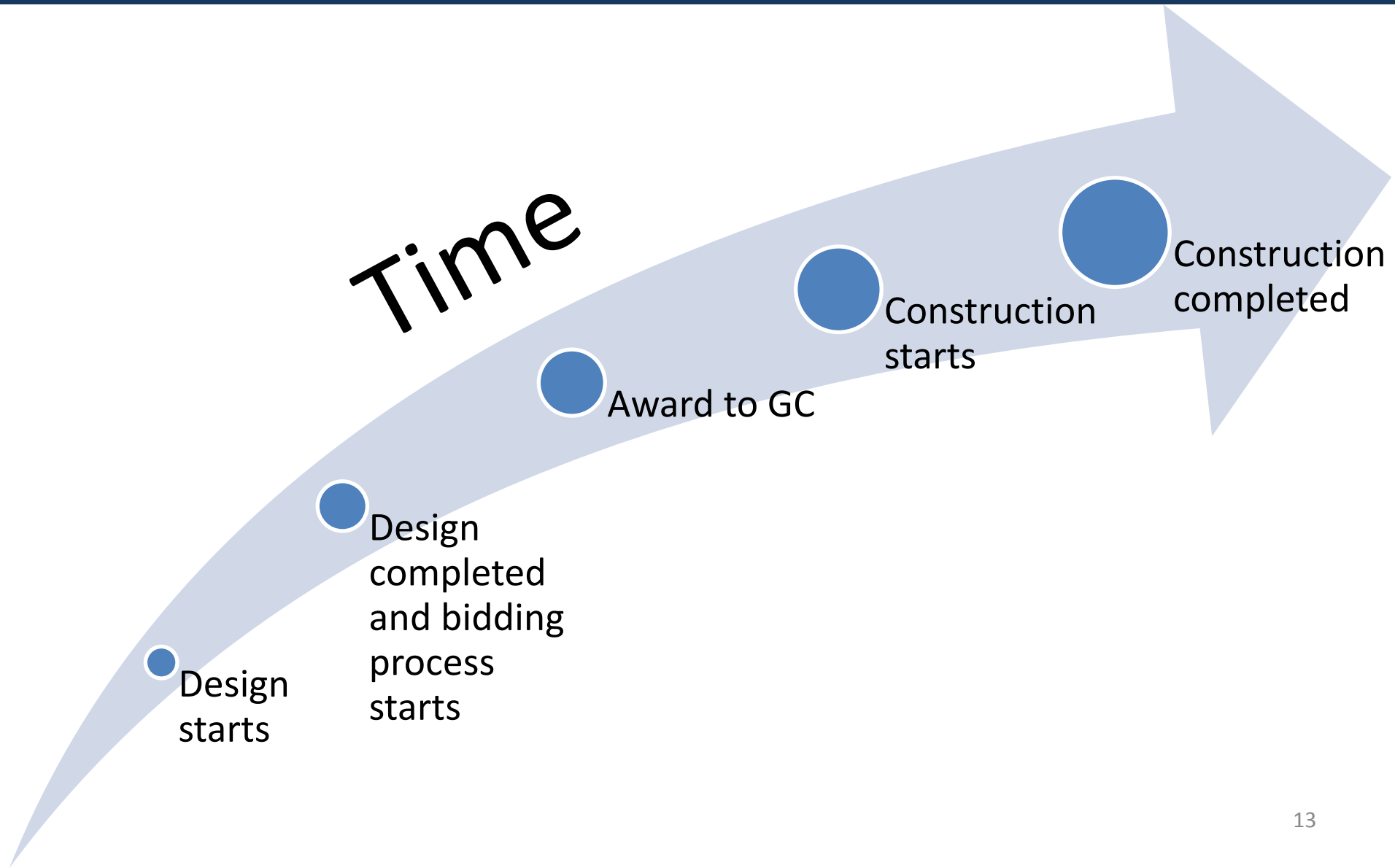
Design-Build: Project Options

- Extent of Project Delivery Model defines form and content of agreement
- DBOs have both design-build and operations phases contained in one “Service Agreement”
- DBFO – May involve public ownership
- DBFOO – Ground lease/performance of traditional Government function

Traditional Design, Bid, Build



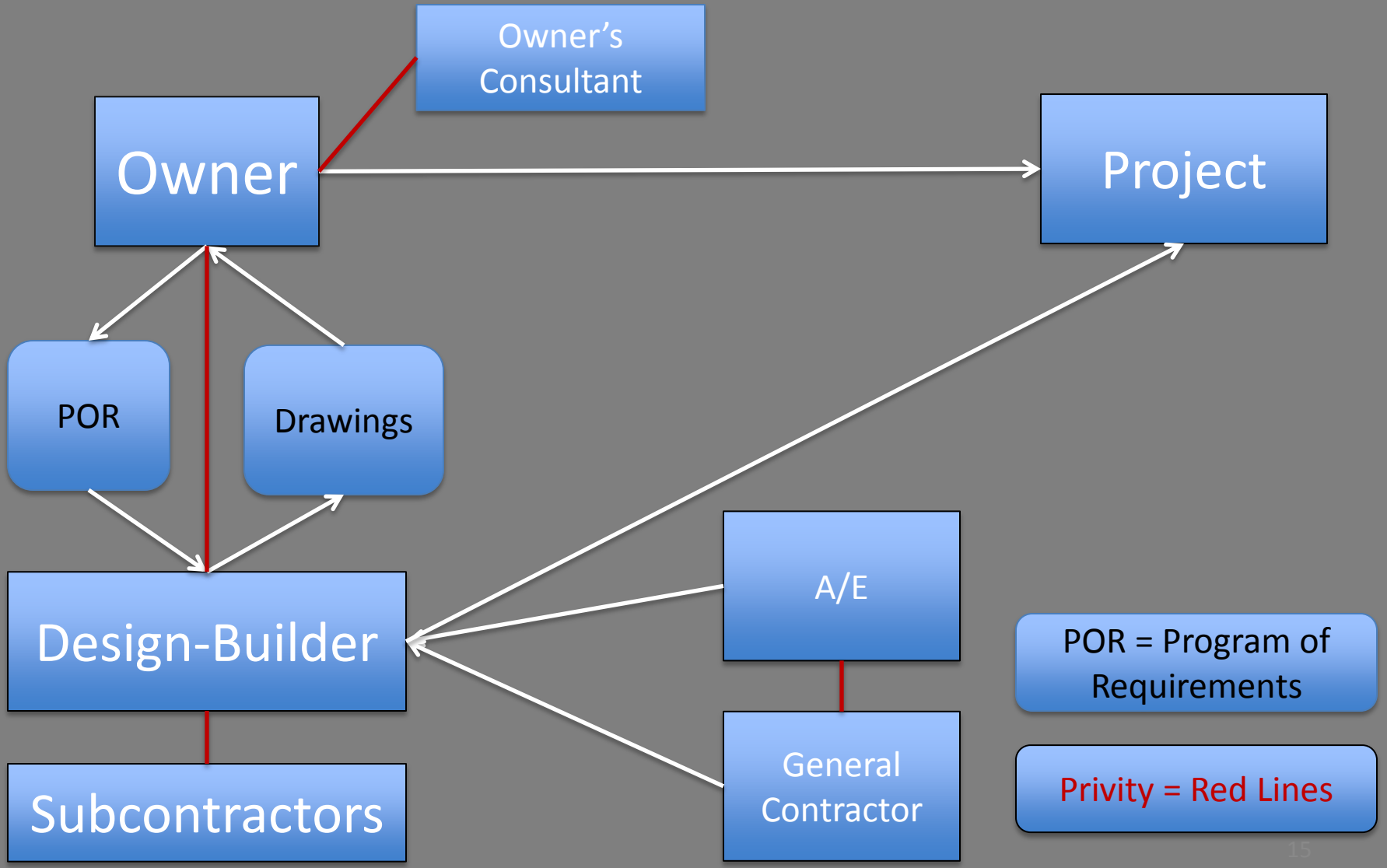
Design, Bid, Build Timeline



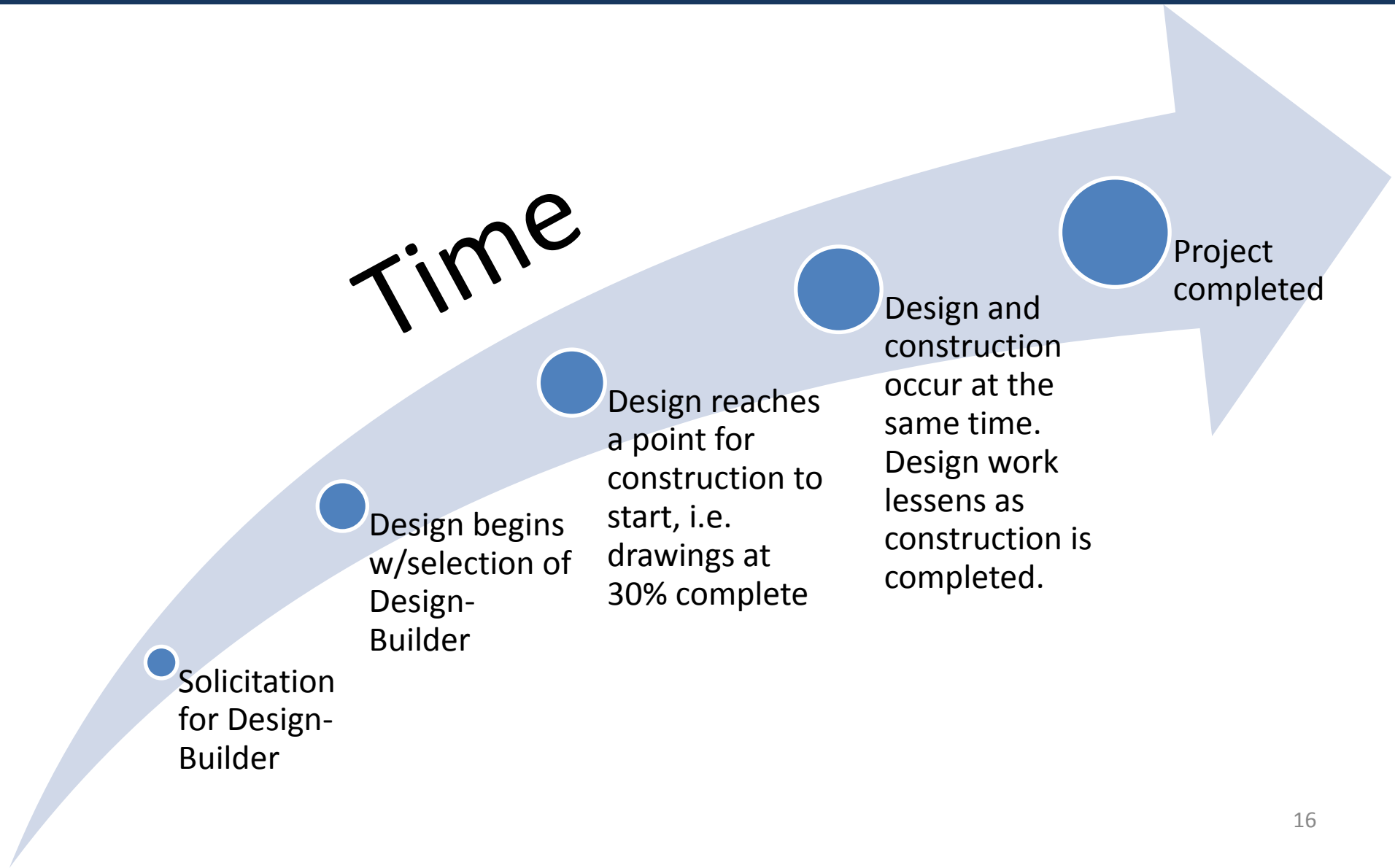
Design-Build: Design/Construction Responsibility

- Design-Build
  - Alternative project delivery method
  - Contractor responsible for design, construction means and methods, and quality
  - Owner may have design review right, but not approval
  - Owner often in better position to obtain key permits
  - Contractor responsible for construction-related permits and regulatory compliance

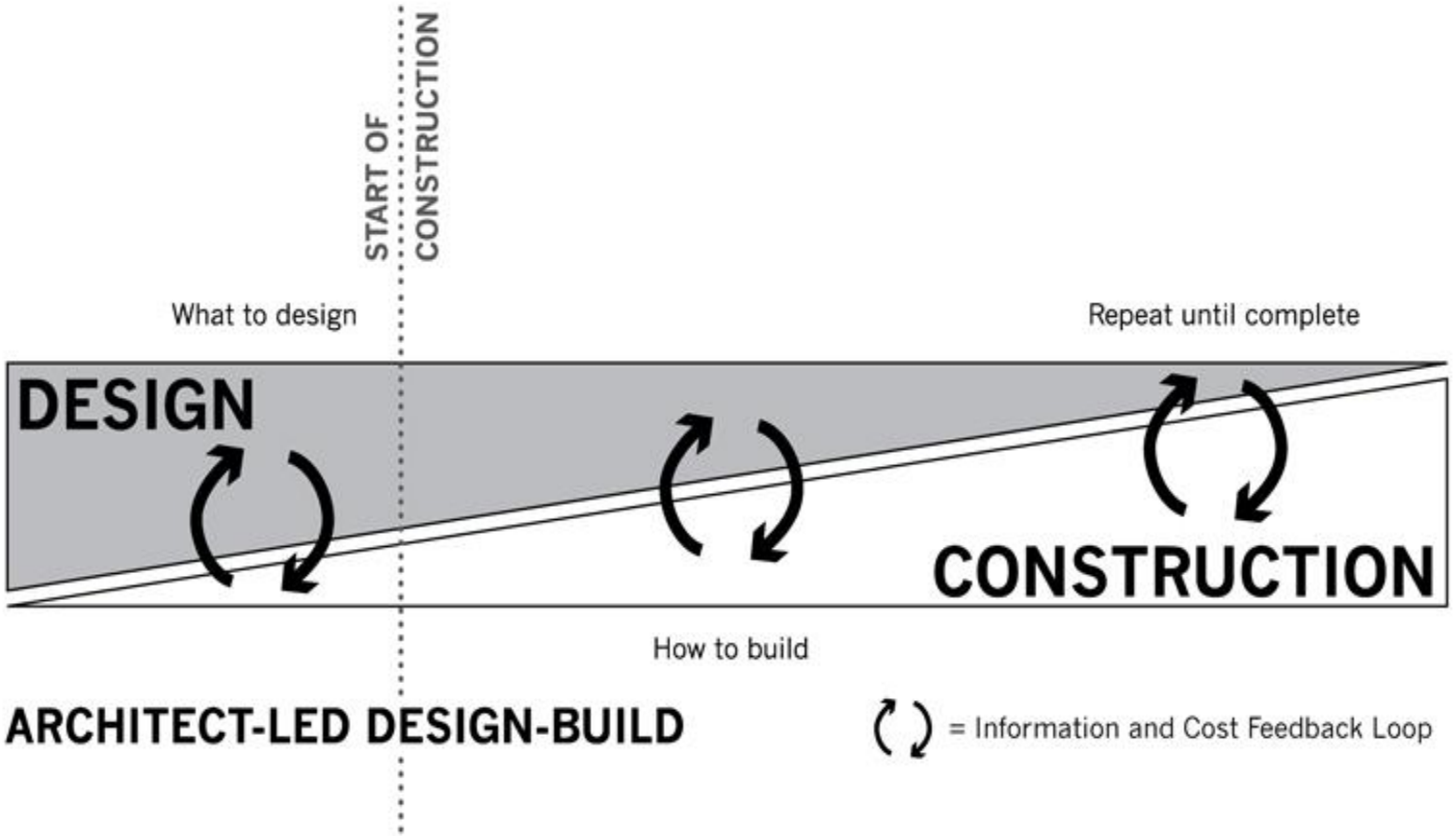
Design-Build



Design-Build Timeline



Design-Build



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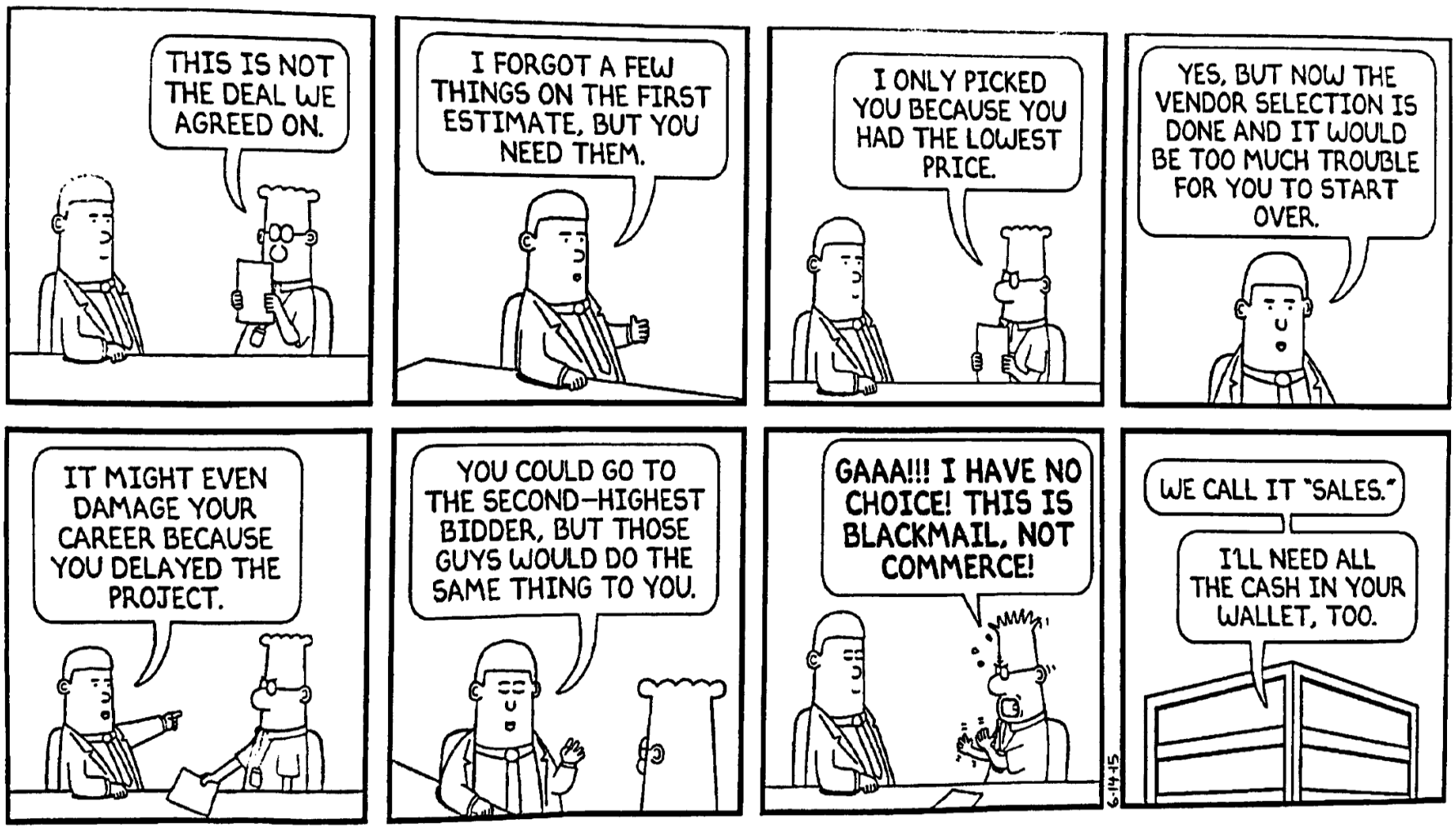
Design-Build: Fundamental Principles

- Contract goal should be to assign each risk to the party with decisional/operational responsibility for risk source
- No contract of adhesion
  - Negotiated transaction
- Complete document – body and appendices
- Invisible Teaming Agreements

Design-Build: Fundamental Differences

- Performance Based
- Single Source Guarantor
- Kiss Spearin Liability good-bye (But check your jurisdiction!)
- Qualification Based Selection

Structuring the Design-Build Solicitation and Contract



We Are In Vegas - Do You Feel Lucky!

- **Don't just rely on luck to have a successful Design-Build Construction Project**

"Luck is what happens when preparation meets opportunity."



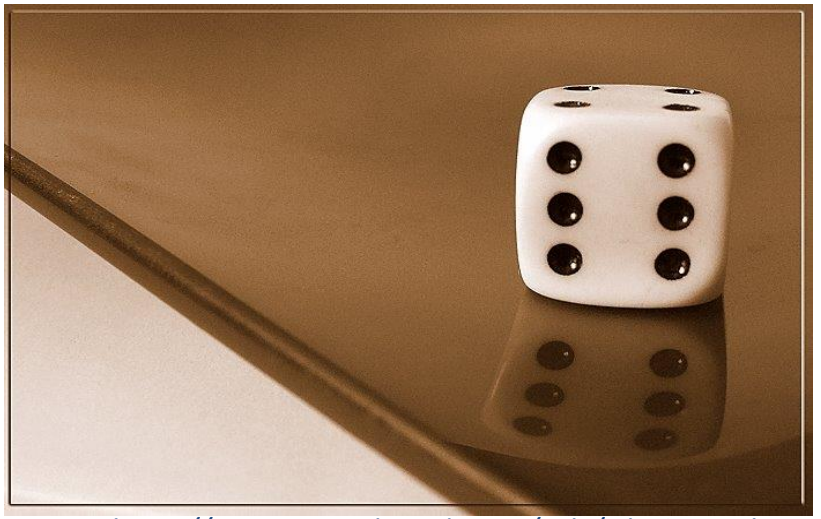
Lucius Annaeus Seneca (often known simply as Seneca) (4 BC – 65 AD). He was a Roman Stoic philosopher, statesman, dramatist, and in one work humorist, of the Silver Age of Latin literature. He was tutor and later advisor to emperor Nero. While he was later forced to commit suicide for alleged complicity in the Pisonian conspiracy to assassinate Nero, he may have been innocent. ***Apparently he was not prepared for Nero's wrath!***

Source https://en.wikipedia.org/wiki/Seneca_theYounger, *Last accessed 9/22/2015*

Don’t Leave Luck to Chance!

- **There are no “re-rolls” for Design-Build Construction Projects***
- **You get one shot at making the project a success and it starts with the solicitation and contract documents.**

***During a Craps game, if a die leaves the table a “re-roll” is called. But remember there are no “do-overs” with Design-Build Projects.**



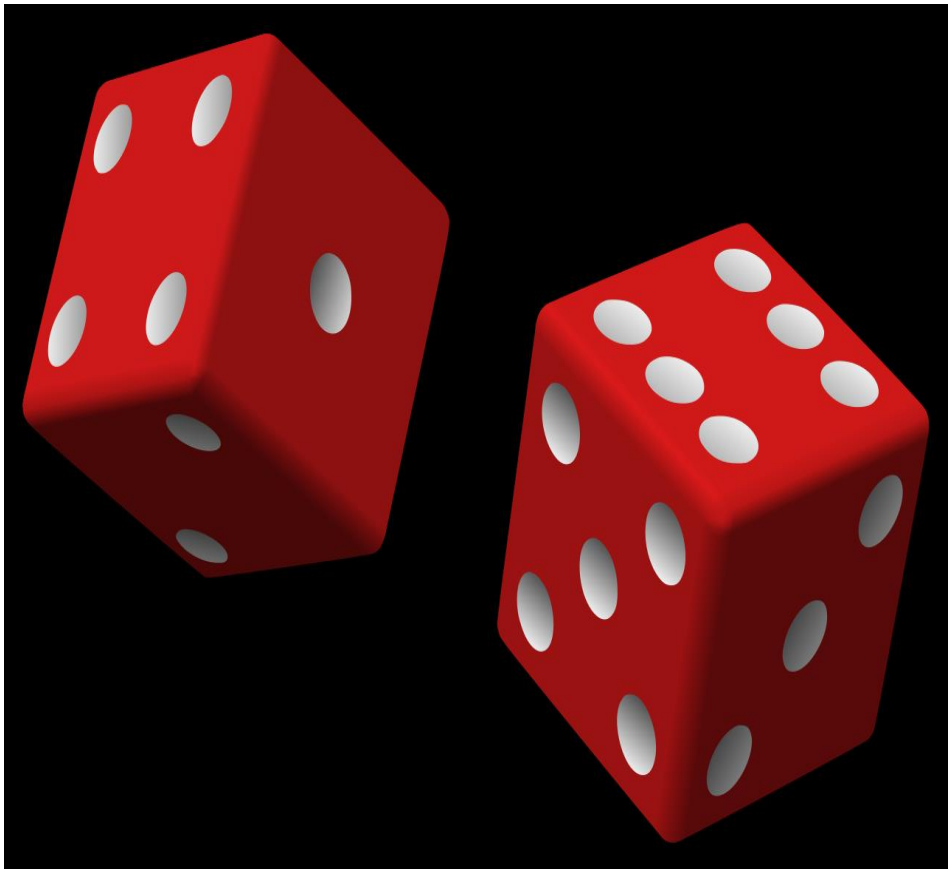
Sourcehttps://commons.wikimedia.org/wiki/File%3ALuck_with_dice.jpg: By Ana (Flickr: Luck.) [CC BY-SA 2.0 (http://creativecommons.org/licenses/by-sa/2.0)], via Wikimedia Commons Last accessed 9/22/2015

Structuring the Design-Build Solicitation and Contract

- **Determine Form of Agreement**
- **Define and Outline Contractor Tasks**
  - Design
  - Construction
  - Finance
  - Operation
  - Ownership and Conveyance

Component Areas – “The 7 P’s for Success”

- **Price**
- **Performance**
- **Protection**
- **Possession**
- **Period**
- **Project acceptance**
- **Provisions**



https://upload.wikimedia.org/wikipedia/commons/3/36/Two_red_dice_01.svg; By Stephen Silver (Open Clip Art Library) [CC0], via Wikimedia Commons, Last accessed 9/22/2015

Price

- **Lump Sum**
- **Cost-plus**
- **Guaranteed Maximum Price**
- **Unit Price**

Performance

- **DB and Operations Phase Standards**
- **Design Specifications**
- **Performance Guarantees**
- **Compliance**
  - Environmental
  - Enhanced Standards

Protection

- **Insurance**
- **Bonds**
  - Performance
  - Completion
  - Labor & Materials
- **Guarantees**
  - Parent
  - Corporate

Possession

- **Public Land Conveyance**
- **Ground Lease**
- **Private Purchase and Ownership**
- **End of Term Transfer or Buyback**
  - Fixed Price
  - Fair Market Value
  - Book Value
  - Independent 3P Valuation

Period

- **Contract Term**
  - Design-Build Period
  - Operations [Service] Period
  - Post-term Obligations
- **Renewal Periods**
  - Sole or mutual options
  - Same or renegotiated terms
- **Closeout Valuation and Life Assessment**

Project Acceptance

- Risk of acceptance on Design-Builder
- What if the project fails to meet performance standards?
- What if the project fails to meet design requirements, but still functions?
- Guaranteed scheduled acceptance date
- Delay liquidated damages

Provisions for the Contract

- **Essential Provisions**
  - Provision of Services – fully define scope
  - MBE/MWBE
  - Parent Corporation Guarantees
  - Performance/labor & Materials Bonds
  - Dispute resolution/litigation/arbitration
  - Choice of Law/jurisdiction/Service of Process
  - Construction Schedule-Liquidated damages
  - Return of Facilities
  - Sinking funds
  - Warranties/Risk Allocation

Provisions for the Contract, cont'd

- **Essential Provisions**
  - Teaming agreements
  - Owner approval of subcontractors
  - Design review and/or approval
  - Delay liquidated damages
  - Insurance
  - Owner notice for start-up/commissioning
  - CX plan

QUESTIONS

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Steven A. Torres – Bio Summary

Steven A. Torres is a Partner with Pannone Lopes Devereaux & West LLC and a member of the firm's Municipal Infrastructure Team. Attorney Torres is an experienced municipal construction and public-private partnership project advisor and legal counsel who has managed in excess of $1 billion in project value in the areas of utilities, water and wastewater, solid waste, transportation, building construction and renewable energy. Attorney Torres represents public, national and international clients in the areas of construction, technology, energy, public private partnerships, regulatory compliance, environmental permitting and litigation. Attorney Torres is Vice-President of the Design Build Institute of America Northeast Region and a member of the DBIA National Water Markets Committee. Attorney Torres chairs the International Municipal Lawyers Association's national Construction Contract Drafting Initiative to revamp design-build construction contracts for use by pubic owners.

Attorney Torres is a frequent lecturer on municipal law, alternative project delivery, project development, emerging technology, energy and the environment and has been a national and international panelist for many professional trade associations and municipal organizations. Attorney Torres is a published author in the areas of municipal law, constitutional law, energy and environmental law and international law.

Prior to joining Pannone Lopes Devereaux & West LLC, Attorney Torres served for thirteen years as a city attorney. He earned his J.D. from Suffolk University Law School, cum laude, and received his undergraduate degree in Computer Science Engineering from Daniel Webster College. He served in the U.S. Air Force from 1987-1990 as a nuclear operations officer.

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Christopher J. Petrini – Bio Summary

Chris Petrini is founding principal of Petrini & Associates, P.C., which celebrated its 10th anniversary in 2014, and is Town Counsel for the Town of Framingham, Massachusetts. Chris represents numerous cities and towns as special counsel in public construction and infrastructure disputes and litigation. Chris is a Regional Vice President of IMLA for the First Circuit and is a past President of the Massachusetts Municipal Law Association. Chris is a frequent speaker on public construction topics for IMLA and other organizations.

Chris is a graduate of Georgetown University (cum laude), and a high honors graduate of Duke University Law School. After law school, Chris served as a judicial law clerk to the Honorable Theodore McMillian of the United States Court of Appeals for the Eighth Circuit.

In his spare time, Chris is an avid mountaineer, having successfully summited several mountains over 14,000 feet in recent years.

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John P. Markovs – Bio Summary

John Markovs is the Deputy County Attorney for Montgomery County, Maryland where he is responsible for handling high profile and complex legal matters. The matters include providing legal liaison work between the County Government and State agencies, bi-County agencies, and other County departments, providing legal advice to elected and appointed officials, and representing the County before State and Federal courts and administrative agencies.

Before being promoted to Deputy County Attorney, John served as an Associate County Attorney and general counsel to Montgomery County's Department of General Services that implements the County's six-year capital improvement program with a design and construction budget exceeding 2 billion dollars.

John is admitted to the bars of Maryland, Virginia, Pennsylvania, and the District of Columbia. He is a member of several bar associations including the American Bar Association (Sections on Litigation, Construction, and Public Contract Law) and the Maryland State Bar Association (Section for Litigation and Construction Law). He served as Chair of the Maryland State Bar's Litigation Section Council (2014-2015).

John joined Office of the County Attorney after 18 years in private practice handling complex construction, commercial, and bankruptcy litigation. He is a frequent lecturer on litigation, construction and commercial law issues for clients and the business community. He is also an adjunct professor at the University of Maryland School of Law where he teaches trial advocacy.