

# Public Construction Contracts

Planning * Procurement * Administration * Defense

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# Types of Public Construction Contracts

- Buildings
  - School
  - Municipal
  - Public Safety
- Public Works
  - Collection/Distribution/Lift
  - Treatment – drinking water & wastewater
  - Storage
- Transportation
  - Heavy & Highway
  - Bridges
  - Sidewalks
  - Parking – garages/lots

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# Planning

# Project Delivery Model Selection

- Design-Bid-Build
  - Separate Design and Construction Contracts
  - Low Bid Selection
    - Lowest Qualified and Responsive Bidder
    - Then Qualify them – don't be bashful
- Design-Build
  - Single Design and Construction Contract
    - Preliminary and Conception Design
    - Bridging Documents
    - Single point of responsibility
- Construction Manager at Risk
  - Progressive Design Build
  - Guaranteed Maximum Price
- Multiple Prime



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# Contract Vehicle Section

AIA Series

- Building (Vertical) Construction and Design Series
- Performance and Payment Bonds, Insurance and GMP Schedules

Engineers Joint Contract Documents Committee (EJCDC)

- Specifically written for Infrastructure Projects
  - Water and wastewater – collection, transmission, distribution
- Highway/Bridge

Consensus Docs

- Formed by twenty organization A/E/C
- Provides a coalition-based formation of documents
- Use is growing

Design Build Institute of America (DBIA)

- Specific to the DBIA
- Provides Best Practice and "Design Build Done Right"
- Note: all of the three major documents provided provide Model DB Agreements

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# Keys to Model Document Selection and Use

- Use Appropriate Forms and Combination of Forms for your project
- Do not leave the documents unmodified and "sign here"
- Be familiar with the combinations of forms that support specific project types:
  - e.g. AIA DB has a DB price Amendment
  - CM at Risk – additional schedules
  - e.g. BIM Exhibit
- State Models
  - Transportation – State DOT models
  - School Buildings – State Agency models
  - State Revolving Funds (SRFs)

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# Procurement

# Procurement Fundamentals

- Delivery Method Selection
  - Traditional (Low Bid) or Alternative Delivery (Qualifications Based)
- Type of Project
  - New construction,
  - Expansion, or
  - Upgrade
- Appointment of Technical Team
  - Responsible for all aspects of procurement
- Requests for …
  - Expression of Interest;
  - Qualifications;
  - Proposals; and
  - Qualifications and Proposals
- Proposal evaluations
- Contract award and contract negotiations

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# Procurement Processes: Essential Components of Procurement Documents

- Introduction
- Project Overview, Description & Objectives
- Scope of Services
- Description of Existing Facilities
- Submission Requirements, Protocol, Process and Schedule
- Pre-Submittal Meeting and Site Visit
- Clarification Requests
- Respondent Interviews
- Evaluation Criteria
- Reference Documents
- Questions
- Terms & Conditions
- Forms/Appendices

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# Alternative Project Delivery

## Sources of Procurement Authority

- State Law
- Home Rule Authority
- Special Legislation



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# Alternative Delivery: Legal Authority

- Statutory Authority – [ENABLING LEGISLATION?]
  - Independent legal authority to utilize the design-build project delivery model for this type of construction, (vertical, horizontal, utility, transportation energy)
- Local Authority- [IMPLEMENT AS ENABLED]
  - 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

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# The Contract Components: Performance

- Design Specifications
- Construction Standards
- Operations Standards
- Performance Guarantees
- Compliance
- Environmental
- Enhanced Standards

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# The Contract Components: Protection

- Insurance
- Bonds
  - Performance/Completion
  - Removal
  - Labor & Materials
- Guarantees
  - Parent
  - Corporate

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# The Contract Components: Provisions

Essential Provisions:

- Provision of Services – fully define scope
- Design review and/or approval *(Spearin)*
- Construction Schedule-Liquidated damages
- Owner approval of subcontractors
- Third-party and utility agreements
- Owner notice for start-up/commissioning
- Capital Improvements

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# The Contract Components: Provisions

Essential Provisions:

- Insurance
- Parent Corporation Guarantees
- Performance/Labor & Materials Bonds
- Warranties/Risk Allocation
- MBE/WBE
- Dispute resolution/litigation/arbitration
- Choice of Law/jurisdiction/Service of Process
- Return of Facilities
- Sinking funds

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# Administration

# Contract Administration: Key Provisions

- Standard Claims Provisions
- Uncontrollable Circumstances
- Force Majeure
- Price
- Project Acceptance



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# Standard Claims Provisions

- All claims shall be initiated by a written claim submitted to the Owner
- The Contractor and the Owner shall continue performance regardless of claims
- Price may be modified with approval if Contractor discovers previously concealed and unknown site conditions that materially vary from those typically and ordinarily encountered
- If a price change is sought, the Contractor must adhere to any change order provisions in the Contract

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# Standard Contract Provisions – "old Faithful"

## What is an Uncontrollable Circumstance?

Any act, event or condition that is beyond the reasonable control of the Party relying thereon as justification for not performing an obligation or complying with any condition required of such Party under the Contract.

## What is Force Majeure?

"Release[s] a party of liability when the parties' expectations are frustrated due to an event that is an extreme and unforeseeable occurrence, that was beyond [the party's] control and without its fault or negligence."

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# Standard Contract Provisions – "old Faithful"

## Procedure for Evoking Uncontrollable Circumstances Provisions

1) Notify the non-asserting party immediately upon first knowledge of the occurrence of the Uncontrollable Circumstance;

2) Within 3 days after notification, must provide a written description of the circumstance, the duration, and time performance will be delayed or affected; and

3) When practicable, the party shall provide a description of how much time the schedule is to be adjusted and any other impact that may have.

If the asserting party believes it is entitled to scheduled relief, it shall furnish written notice of the specific schedule relief with detail of the event giving rise to the claim.

***Nero can't fiddle: The asserting party must also take into consideration the mitigating factors to reduce the impact an Uncontrollable Circumstance may have on a project***.

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# Price

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

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# Project Acceptance

- Risk of acceptance on Contractor
- Project must meet performance/design standards
- Warranties and call back run from ***Final Acceptance*** not ***Substantial Completion***
- Guaranteed scheduled acceptance date
- Delay liquidated damages

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# Defense

# Contract Defense: Key Provisions

- Exclusive State Court Jurisdiction
- Document Precedents and Stringency
- No Damage for Delay Clause
- Severability



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# Contract Defense: Key Provisions

Exclusive State Court Jurisdiction/No Binding Arbitration

"If the dispute cannot be resolved as set forth in the Contract, the Owner and the Contractor irrevocably agree that any and all legal proceedings related to this Agreement or to the Project or to any rights or any relationship between the parties arising therefrom shall be solely and exclusively ***initiated, filed, tried and maintained*** in the State Court located in (your county). The Owner and the Contractor each ***expressly and irrevocably waives any right otherwise provided by any Applicable Law to remove the matter to any other state or federal venue***, consents to the jurisdiction of such courts in any such legal proceeding, waives any objection it may have to the laying of the jurisdiction of any such legal proceeding, and waives its right to a trial by jury."

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# Contract Defense: Key Provisions

## Document Precedence and Stringency

A Document Precedence clause identifies the order in which the various contract documents are prioritized when resolving a conflict or ambiguity within said contract documents.

In Muzak Corp. v. Hotel Taft Corp., 1 N.Y.2d 42 (1956), The Court held that where there is inconsistency between a specific provision and a general provision of a contract, the specific provision controls.

***Stringency*** – "where two or more requirements or standards apply, or a material conflict between provisions of a contract apply to a single requirement or act, the Contractor shall adhere to the more stringent of the requirements" ***i.e. Blasting.***

***ADDRESS Traditional and added rules in your language***

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# Contract Defense: Key Provisions

## No Damage for Delay Clause

"In the event of delay for any cause, the Contractor's sole remedy shall only be the extension of time granted as herein above provided, and the Contractor shall have no right to, or cause of, action for damages or additional costs resulting from any such delay."




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# Contract Defense: Key Provisions

## Key Benefits of No Damage for Delay Clause

1) Better control of schedule
2) Better control of loosely quantifiable costs and demands
3) Offset by owner's delay and liquidated damages – gives teeth to delay damage offsets
4) Applies to all types of delay claims
   - Compensable
   - Excusable
   - Concurrent

***Yours, mine and ours!***

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# Contract Defense: Key Provisions

## Severability Clause

"If any clause, provision, subsection, Section or Article of this Agreement shall be ruled invalid by any court of competent jurisdiction or other tribunal having jurisdiction, then the parties shall: (i) promptly negotiate a substitute for such clause, provision, subsection, Section or Article which shall, to the greatest extent legally permissible, effectuate the intent of the parties in the invalid clause, provision, subsection, Section or Article; (i) if necessary or desirable to accomplish item (i) above, apply to the court or other tribunal having declared such invalidity for a judicial construction of the invalidated portion of this Agreement; and (iii) negotiate such changes, in substitution for or addition to the remaining provisions of this Agreement as may be necessary in addition to and in conjunction with items (i) and (ii) above to effect the intent of the parties in the invalid provision. The invalidity of such clause, provision, subsection, Section or Article shall not affect any of the remaining provisions hereof, and this Agreement shall be construed and enforced as if such invalid portion did not exist."

***Hint: This one works a lot better than striking it and rolling the dice!***

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# Summary

- **Delivery model selection:** Chose the most effective and beneficial delivery model for your project: Don't let old paradigms get in your way
- **Angel in the details:** Draft detailed procurement documents that define not only the work but the expectations of the work, quality, standards of workmanship and costs for security, surety and performance
- **Midas Touch:** She whom has the gold makes the rules, and the owner needs to design owner protective contracts and conditions, not submit to industry standard docs [Contractor can price risk]







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# Any Questions?




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