Alternative Project Delivery in Public Construction: Effective Contract Distinctions for DB and CMAR Projects

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Alternative Project Delivery

- Traditional Design-Bid-Build
- Design-Build
- Construction Manager at Risk (CMAR)



Alternative Project Delivery

- Sources of Procurement Authority
  - State Law
  - Home Rule Authority
  - Special Legislation



Alternative Delivery: Legal Authority

- Statutory Authority
  - Independent legal authority to utilize the design-build or CMAR 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

Traditional Design-Bid-Build vs. Design-Build and CMAR

- 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



Traditional Design-Bid-Build vs. Design-Build and CMAR

- Construction Manager at Risk
  - Progressive Design Build
  - Guaranteed Maximum Price
  - AIA A133 – 2019 Form Contract
  - EJCDC Series – Procurement and Contracting
  - DBIA – Industry Specific Series



Design-Build Project Delivery

- Both the design and the construction of a project are the responsibilities of the same contractor
- Design-Build should be considered for the following types of projects:
  - Projects with an expedited schedule
  - Projects requiring minimum right of way acquisition and utility relocation
  - Projects with a well defined scope for all parties
  - Projects with 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

CMAR Project Delivery

- Owner hires a construction manager (CM) to oversee the project from design to construction close
- Construction manager delivers project with a guaranteed maximum price provided to owner prior to the bid stage
- Benefits of CMAR
  - Streamlined communication – CM involved from the start
  - CM manages day-to-day aspects, schedule and budget
  - Job cost accuracy – higher level of cost control
  - Limited financial liability on Owner



Procurement Vehicles

- Requests for . . .
  - Expression of Interest;
  - Qualifications;
  - Proposals; and
  - Qualifications and Proposals.
- RFEI (Requests For Expression of Interest) – designed to create a list of prospective parties before seeking comprehensive bids from parties that are on the list
- RFQ (Request for Qualifications)– designed to solicit information from interested parties re. training, previous work and other evidence of their ability to complete project
- RFP (Request for Proposals) – designed to solicit bids from qualified vendors, announces and describes a project

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)

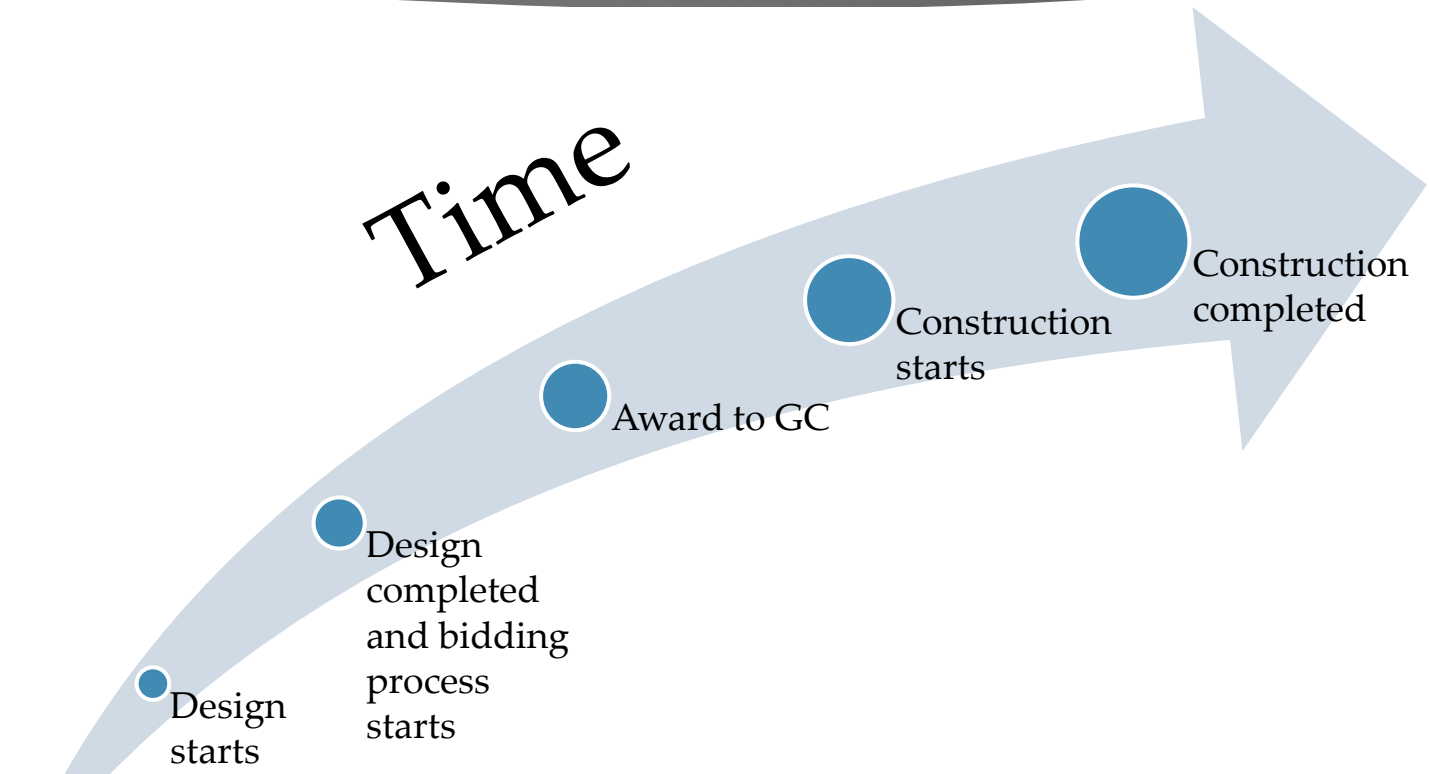
Design-Build: Project Options

- **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

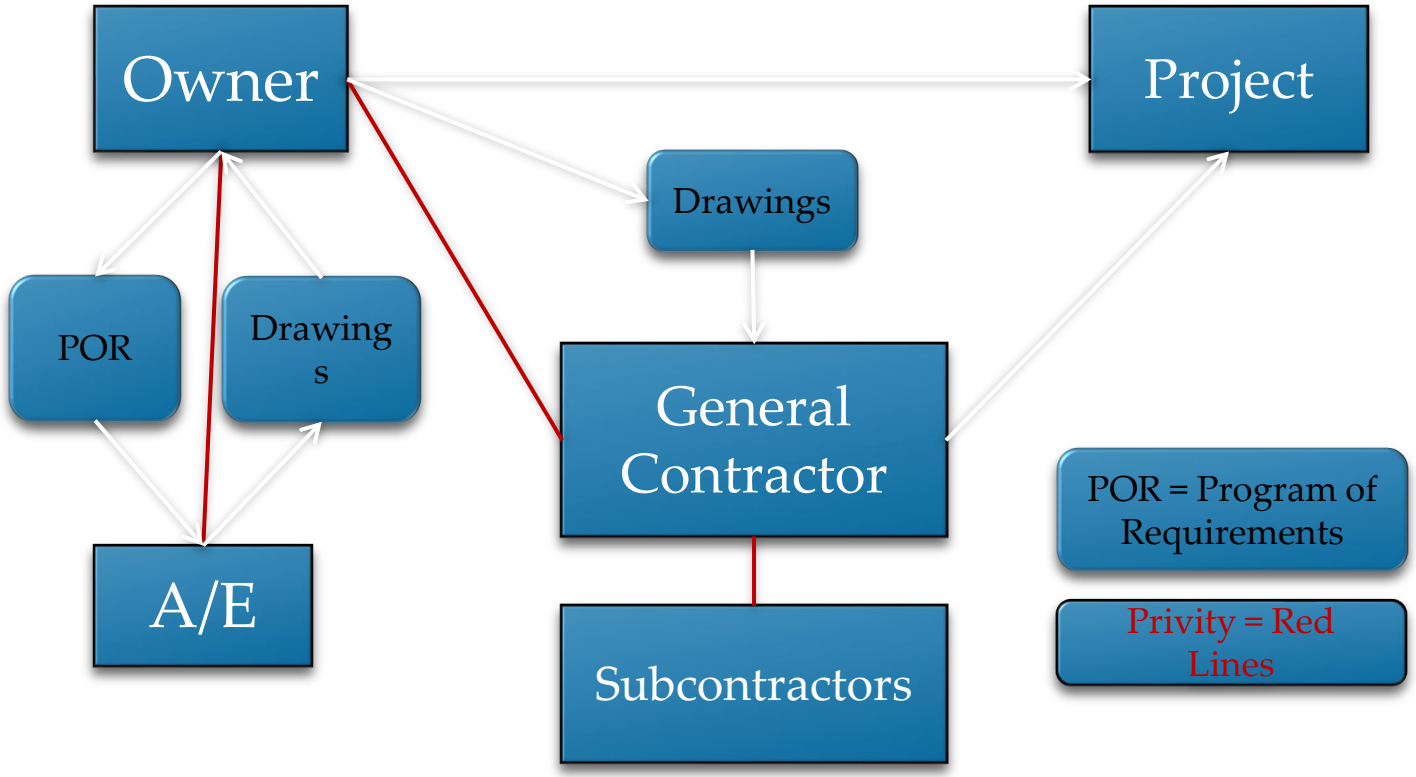
Design-Build: Project Options

- 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

Design, Bid, Build



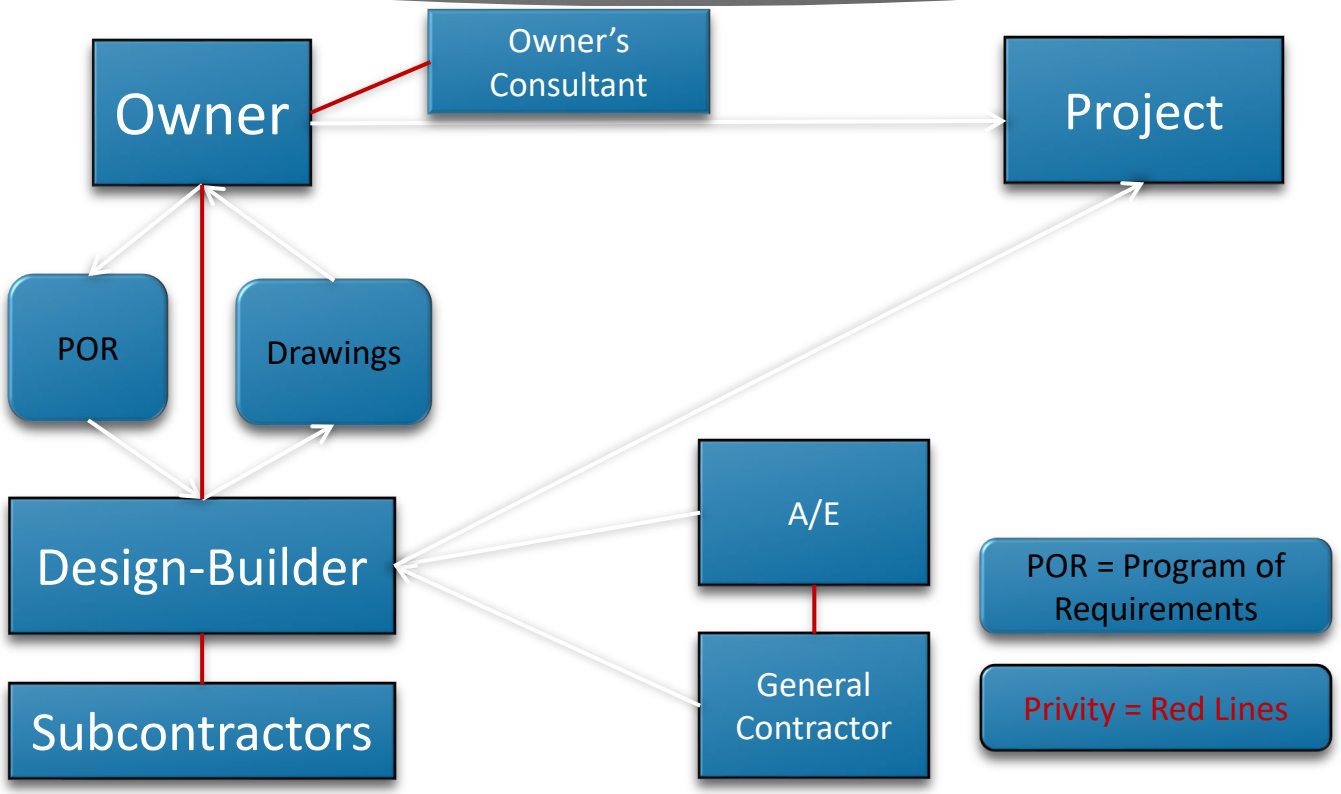
Traditional Design, Bid, Build



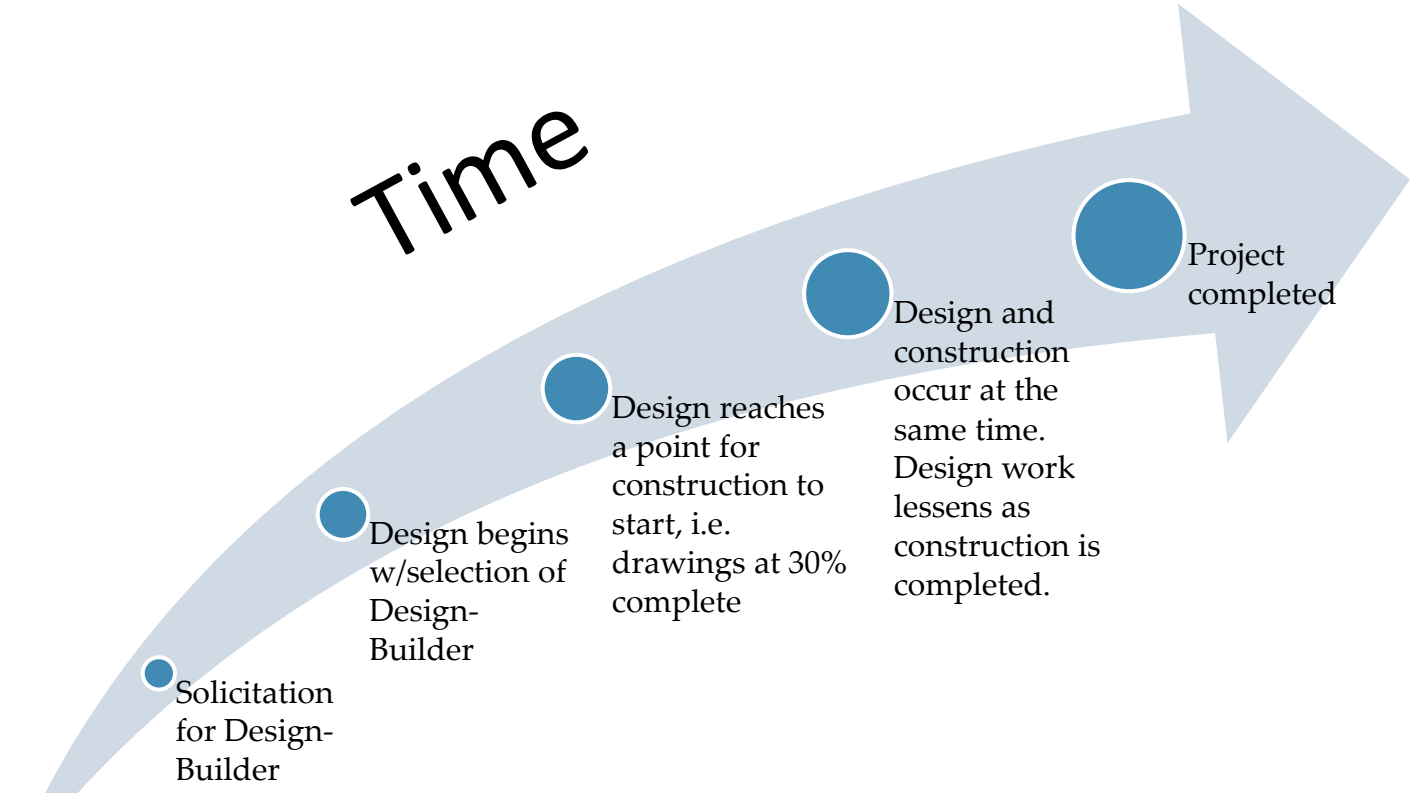
Design-Build: Design/Construction Responsibility

- 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

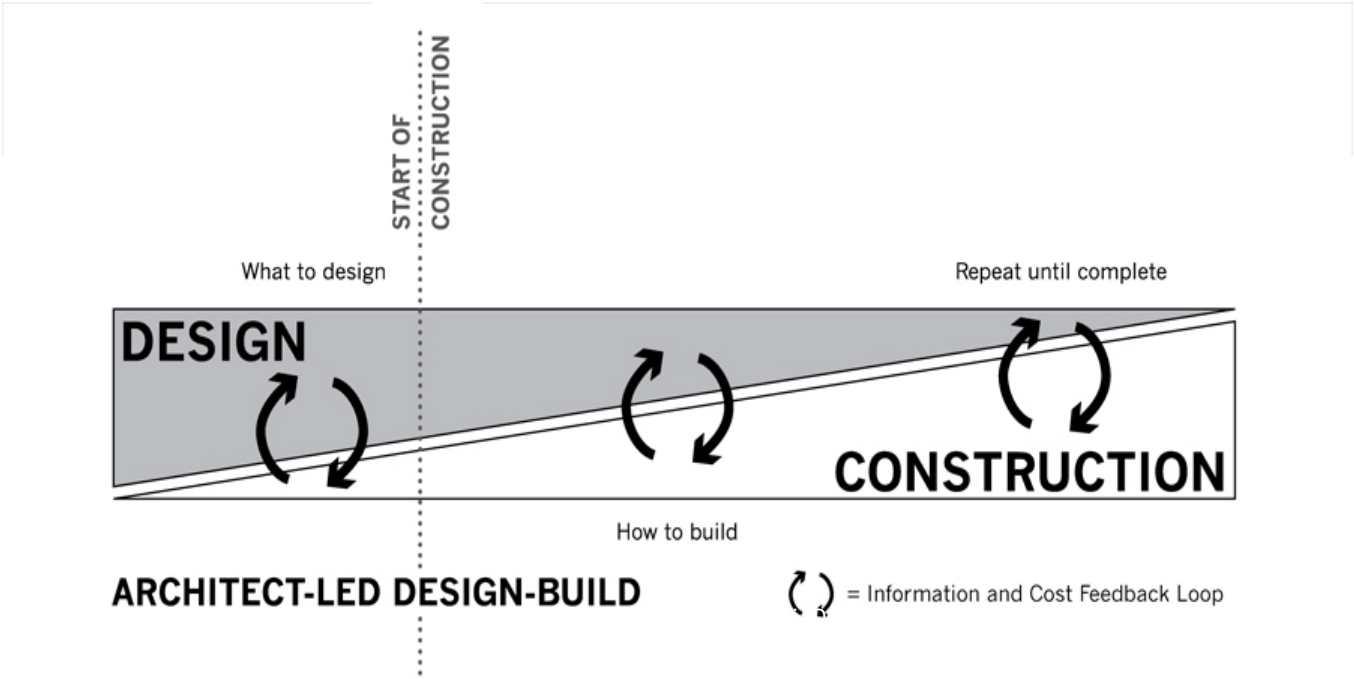
Design-Build



Design-Build Timeline



Design-Build



Design-Build: Fundamental Differences

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

KEY CMAR ADVANTAGE DISTINCTIONS

- Two contracts; design and construction
- Maintains traditional owner-designer-engineer relationship
- Contractor - consultant in design phase, at-risk general contractor in construction phase
- Contractor input during design phase (preconstruction services)
- Collaboration- distinctive feature

Structuring the Design-Build Solicitation and Contract

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

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

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

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)

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

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

Key Contract Provisions

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

Key Contract Provisions

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

Key Contract Provisions

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



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

Standard Contract Provisions

- What is an Uncontrollable Circumstances?
  - 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."

Contract Provisions: Price

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



Contract Provisions: 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

Contract Provisions: CMAR

- Construction Manager's Responsibilities
- Owner's Responsibilities
- Compensation and Payments for Preconstruction Phase Services
- Compensation for Construction Phase Services
- Cost of the Work for Construction Phase
- Discounts, Rebates and Refunds
- Payments for Construction Phase Services



Key CMAR Contract Provisions for Proposal and Contract

- - GMP & Project Cost Recap Direct Costs
- - Allowances
- - General Conditions Cost
- - Fees for CM Const. phase services, contingency, & OH&P
- - Recap of bid summary, alternates,
- - Negotiated fees

NOTE: Allowances Only for undetermined scopes of work
Should not be used just to pad contingency

Eligible Use of CM Contingency

- ✓ Re-work due to ambiguities or conflict in construction documents
- ✓ Work shown or inferred on CDs missing from bid packages
- ✓ Work not described to the extent that it is biddable
- ✓ Over-runs on allowances
- ✓ Other uses as approved by University

Ineligible Use of CM Contingency

- ✓ Additional Project management staff
- ✓ Weather protection of work or materials
- ✓ Insurance co-pay (OCIP and BRIP deductible co-pay) costs
- ✓ Overhead & Profit; or Construction Phase Services

Closeout and Final Project Accounting

- ✓ Site Management Fee and OH&P are lump sum
- ✓ Contingency is subject to audit
- ✓ Each allowance is subject to audit
- ✓ The total of all trade bids are subject to audit

Traps for the Unwary

- Missing a Qualifying Requirement
- Slipping a Filing or Submittal Date
- Using unmodified/Standard Form Contracts (AIA/EJDC)
- Permitting Binding Arbitration of Disputes
- Ineffective Forum Selection Clause or Waiver of Removal
- Warranties from Substantial Completion/Final Acceptance
- Limitation of Liability Clauses that are not on/after
- Procurement Docs not Accompanied by Final Contract

Any Questions?



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