

# Contract Development and Negotiations

*Todd Larson, DBIA, PE, PMP Black & Veatch*

*Pat Gallagher, Esq., CDM Smith*



**DESIGN-BUILD FOR  
WATER/WASTEWATER**

Hilton Walt Disney World

Orlando, FL

March 20-22, 2013

# Learning Objectives and Major Presentation Points

- *Understand the design-build delivery structure and importance to negotiating the contract*
- *Review some of the risk allocation issues and how they relate to contract terms and conditions*
- *To get an broad appreciation for how understanding of these issues can help effectively contract and negotiate for design-build projects*



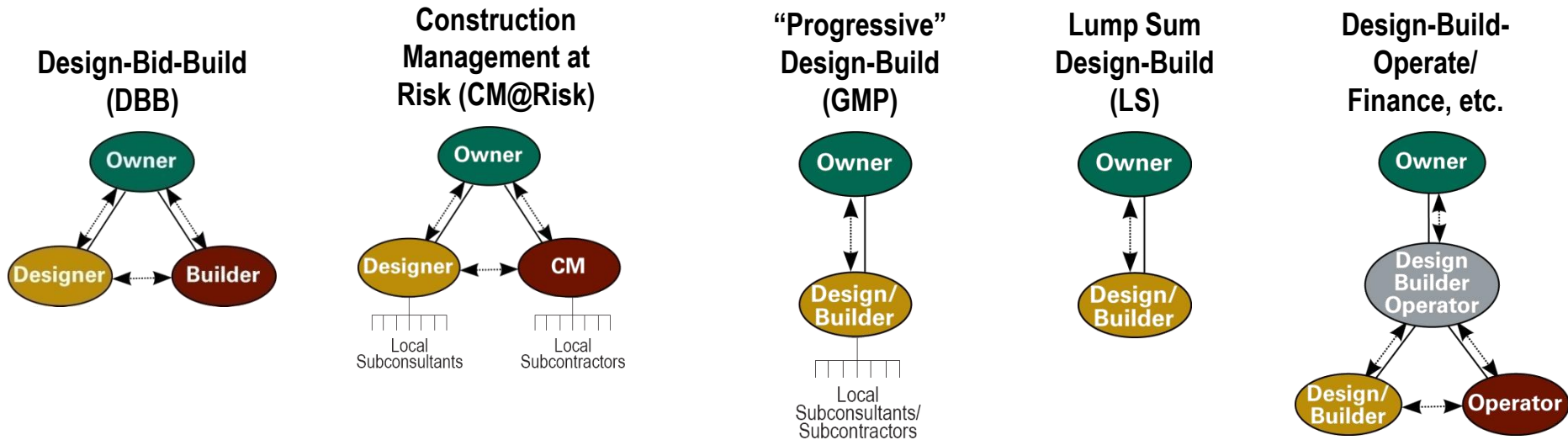
**DESIGN-BUILD FOR  
WATER/WASTEWATER**

Hilton Walt Disney World

Orlando, FL

March 20-22, 2013

# Understanding of Delivery Method is Critical to Evaluation of Contract Terms & Conditions



Alternative delivery opens different & complex contract issues

# The Design-Build Contract

- The Contract defines
  - An offer and acceptance of the offer between Parties (meeting of the minds)
  - Promise to perform
  - Valuable consideration (payment)
  - Time or event when performance must be made (meet commitments)
  - Terms and conditions for performance
  - Performance standards
- Terms and Conditions define the allocation of risks and to what extent each party has exposure liability – let's focus on this.....

**Let's Focus on  
Risk Allocation  
and Mitigation**

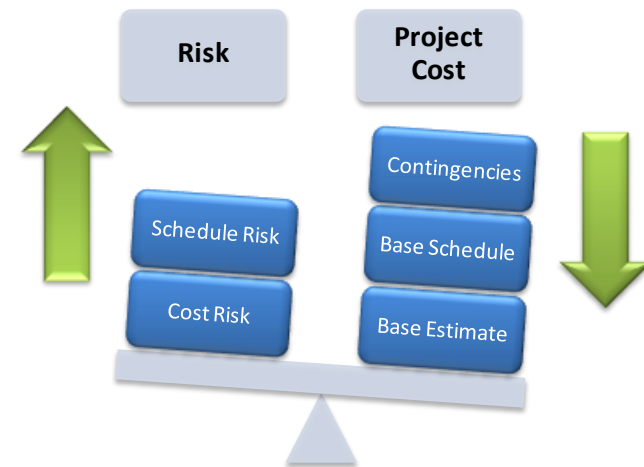
# Proper Allocation of Risk in Contract Will Result in Most Cost Effective Deal for Owner

- Owner's balancing test: Off-load ALL risk to Design-Builder
  - Now the Design-Builder is an insurer—even for unlikely risks
  - Will the Owner get “*value for money*” in this situation?
  - Owner has responsibilities for success of project
  - Risk allocation comes at a cost to Owner's budget



# Proper Allocation of Risk in Contract Will Result in Most Cost Effective Deal for Owner

- Design-Builder's balancing test: Is the risk profile generally acceptable? Can it be priced?
- If not.....,
  - Can we change this during proposal and negotiation?
  - Is project even worth investing bid & proposal funds to pursue?



# Design-Build Risks are Complex and Require Comprehensive Risk Management

<b>Change in law</b>	Resulting in significant cost to comply;
<b>Delays</b>	Owner or design-builder can cause delays, or sometimes third parties, or sometimes events outside of the control of owner or design-builder;
<b>Unknown conditions</b>	Subsurface conditions, contamination, environmental;
<b>Force majeure</b>	War, strike, riot, crime, earthquake, tsunami, fire;
<b>Regulatory approval</b>	Resulting in delay or significant cost not recognized when proposal submitted;
<b>Market conditions</b>	Inflation, escalation, commodities, competition with other projects;
<b>Errors and omissions</b>	Errors or omissions in engineering design

**Unfortunately** there are no standard contracts that deal with risks consistently – we have to craft each deal



## DESIGN-BUILD FOR WATER/WASTEWATER

Hilton Walt Disney World

Orlando, FL

March 20-22, 2013

# Risk Management Plan and Contract Negotiation Must be Coordinated

Only two conditions are clear as to who is best suited to manage risk.

	DESIGN-BUILD CONTRACT Assign to party best suited to manage	
	Owner	Design-Builder
Change in law	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Delays	<input checked="" type="checkbox"/> ?	<input checked="" type="checkbox"/>
Unknown conditions	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> ?
Force majeure	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Regulatory approval	<input checked="" type="checkbox"/> ?	<input checked="" type="checkbox"/> ?
Market conditions	<input checked="" type="checkbox"/> ?	<input checked="" type="checkbox"/> ?
Errors and omissions	<input type="checkbox"/>	<input checked="" type="checkbox"/>

Arguments can be made that each side is best suited to take these risks.



# Risk Allocation Matrix for Early Assessment

- **General review** of risk principles on Design-Build water or wastewater projects
- **Suggestions** based on experience, but not particular position of WDBC or individual members
- Matrix has **usual risks** analyzed
- **Recommended Practice:** submit draft contract to proposing companies *before* incorporating into RFP

<b>OWNER</b>	<b>DESIGN-BUILDER</b>
Limitation of Liability	Limitation of Liability
Permits – Usage, Zoning, Environmental	Permits – Building & Administrative
Permits Fines/Penalties in Operations	Permit Fines/Penalties – Construction/Site
Design on CMAR Projects	Design on Design-Build Projects
Proprietary Process/Equip – Owner Selects	Proprietary Process/Equip– Design-Builders Selects
Weather – Unusual	Weather – Normal
Materials Cost Escalation - Unusual	Materials Cost Escalation – Normal
Land Acquisition & Easements	Design-Builder Financial Capability
Project Requirements & Objectives	Schedule
Input Specifications for Raw Water or WW Influent	Cost
Site Conditions	Delay Incentives
Subsurface Conditions – Soil & Obstructions	Liability: Bodily Injury/Property Damage
Owner Changes	Damage to Facility until Handover
Payment Risk	Other Insurable Risks
Uncontrollable Circumstances	Professional Liability
Damage to Owner Property including Facility after Handover	Construction Warranty
Plant Performance - CMAR	Plant Performance – Design-Build
Uninsurable Risks: Consequential Damages	Plant Performance LDs (Design-Build)
	Coordination with Existing Facilities

**Not exhaustive....the list goes on. So let us look at a significant example**



# DESIGN-BUILD FOR WATER/WASTEWATER

Hilton Walt Disney World

Orlando, FL

March 20-22, 2013

# Proprietary Processes or Equipment

- Responsibility: Party which selects process, equipment, or supplier
- Mitigation: Performance guarantee on proprietary processes or equipment given *by supplier*
  - Flows down from Design-Builder to supplier if selected by Design-Builder
  - Flows directly from supplier to Owner if Owner specifies on project

# Plant Performance Guarantee

- Responsibility:
  - Design-Builder if DB
  - Owner if CMAR
- Allocation:
  - Design-Builder has design responsibility
  - Owner responsible for raw water/influent spec and delivering to that spec
  - Design-Builder does performance test to demonstrate compliance



**DESIGN-BUILD FOR  
WATER/WASTEWATER**

Hilton Walt Disney World

Orlando, FL

March 20-22, 2013

# Limitation of Liability

- Responsibility: Exposure between Owner and Design-Builder
- Mitigation:
  - Design-Builder's liability to Owner usually limited to a negotiated/agreed amount (% of project price)
  - Sub-limit for delay liquidated damages
  - Consequential damages typically excluded
  - Limitations apply whether in contract, tort (including negligence), strict liability, or otherwise

# Water Design Build Council Has Educational Resources to Expand Your Knowledge

- WDBC Educational Videos expand on the risk allocation matrix discussion
  - <http://www.waterdesignbuild.com/owner-resources/educational-videos/>
- Guidance documents generally consistent with these risk allocation principles
  - WDBC also has guidance RFP and Design-Build Contract forms to help Owners
  - DBIA Consensus Docs (AGC) are also available



**DESIGN-BUILD FOR  
WATER/WASTEWATER**

Hilton Walt Disney World

Orlando, FL

March 20-22, 2013