

INNOVATIVE CONTRACTING AND RISK MANAGEMENT CLAUSES FOR SUCCESSFUL DESIGN-BUILD PROJECTS

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2017 Regional Conference
"Progressive Design Build: Improving the Process"
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- Spring Hill College (hit a priest)
- University of Tennessee
- New Orleans to Denver
- Ski, yoga, YMCA coach, hockey mom



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- Metropolitan Aqueduct Rehab in Venezuela
- Project director for \$1B (with a “B”) San Francisco Public Utilities Biosolids Digester Facilities Project
- Recently swam with pigs



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- Attempted “the wave” during jury selection
- Collegiate basketball at Northwestern
- Father of three, ruler of none
- Born in Illinois, soul belongs in Colorado



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- Senior General Counsel, State and Local Government
- Health and Wellness Coach
- Scared of heights but used to climb multi-pitch climbs
- Biggest progressive DB project negotiated is \$1B (with a “B”)
- Hit a parked cop car



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- **General Instructions – 6. Modifications**

- Effective contracting is accomplished when the parties give specific thought to their contracting goals and then tailor the contract to meet the unique needs of the project and the design-build team.
- For that reason, these Documents may require modification.
- Any modifications to these Documents should be initialed by the parties.



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- **Contingency – 7.6.2**
 - What is it?
 - Who owns it?
 - How can it be used?
 - Entitlement?



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- **Clark County \$95M wastewater**
 - “Construction Contingency” shall mean:
 - line item that is available to cover the net amount of any additional costs resulting from unforeseen conditions and events not evidenced at the time that the contract was executed, to the extent that such conditions or events do not result in or constitute a change in the work



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- **Clark County \$95M wastewater**
 - Unanticipated cost overruns on procurement or other purchased of materials or labor cost
 - expediting or acceleration costs required to meet the Schedule
 - subcontractor defaults
 - material price fluctuations
 - additional mob/de-mob
 - risks allocated to design builder







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- **General Terms 2.9.1 - Warranties**
 - Length of warranty
 - Warranty gaps
 - Flow down to subs
 - Warranty caps
 - Evergreen warranties
 - Carve outs



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- **7.4 and 7.5 - Indemnification**
 - Design-Builder's General Indemnification
 - Owner's General Indemnification
 - Rocky Mountain states
 - C.R.S. §13-21-11.5
 - Mont. Rev. Code §28-2-2111
 - Utah Code Ann. §13-8-1
 - Wyoming





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- **8.2 - Delays**
 - Compensation and time
 - Critical path and TIA
 - Long lead items
 - Labor shortages



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- **10.2 – Dispute Resolution and Avoidance**
 - Negotiate early
 - Make your provisions robust
 - 3 pages long



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- **10.5 – Consequential Damages**
 - Direct v. Consequential
 - Not “mutual” waiver
 - What about for a municipal entity?



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- **5.4 – Liquidated Damages**
 - Justification of value
 - Not a penalty
 - Link to completion point
 - Overall cap
 - Assessment v. Default



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- **6.3 – Cost of Work**

- Inclusions for water/wastewater projects
 - chemicals, power, water, startup, etc.
- Dechlorination/chlorination
 - pressure testing and hydraulic testing
- Billable/Nonbillable
 - exclusion for procurement, others not located at project



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