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**Sometimes the Third Time's a Charm** Using Hindsight and Perseverance to Build Into the Future  
ALFA INTERNATIONAL 2022 CONSTRUCTION LAW SEMINAR


# Government Contracting

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# Federal Design Build



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## Design-Build Generally



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## Design-Build Delivery



- Design-Builder (DB) performs both the design and construction
- Expedited process
- One point of responsibility, DB has risk of design and construction
  - Not usually a JV
    - Designer is responsible for design to DB (DBIA)

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## Design-Build v. Federal Design-Build



- **Risks are the same...**
  - Continuation of design issues- can result in additional cost/time and disputes
  - Contingency
    - How can it be used and by whom?
    - Amount to carry?
  - Need to manage design to ensure it meets requirements but does not exceed- can result in additional cost and disputes

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## Design-Build v. Federal Design-Build



- **And different...**

- Most federal design-build contracts are firm, fixed price(FFP)
  - Commercial projects- not usually the case, progressive design-build GMP approach
  - Risk associated with level of design at FFP
    - Need to provide adequate contingency and allow for time to complete design upon award

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## Design-Build v. Federal Design-Build



- **And different...**

- Requirements of the RFP are non-waivable
  - Contrary to how the commercial world works- proposal does not govern over RFP
- Government cannot take something in excess of requirements unless identified as betterment- have to watch designer and Government
- Government likely believes it has transferred all risk as a result of design-build delivery. **Spoiler alert- this is a problem!**

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## Federal Design-Build



- Selection process
  - Two phase selection
    - Quals- ensure designer and contractor are capable
      - CPARs
    - Proposed design and pricing- the level of design that is provided by Government is key
      - Usually requires a conceptual design by DB- can be costly/not fully reimbursed

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## Federal Design-Build



- **Can be a disconnect on what risk the Govt. believes is transferred v. what the DB believes it accepted**
  - *Fluor case*
    - At first blush, appears all risk is shifted, and DB cannot recover additional costs or time related to design related items
    - Not necessarily true- design criteria specified has to be correct/possible
      - DB can rely on information provided, based on contract

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## Federal Design-Build



- **Can be a disconnect on what risk the Govt. believes is transferred v. what the DB believes it accepted**
- What risk is transferred depends on the scope and the actual contract circumstances
- Remember- Design-Build delivery is a spectrum
  - Can be everything from providing a design based upon minimum technical requirements up through completing a 90% provided design

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## Federal Design-Build



- **Can be a disconnect on what risk the Govt. believes is transferred v. what the DB believes it accepted**
- Use of changes clauses as to what was assumed and reliance on information provided is still possible.
- Government can't simply shift all risk by use of buzzwords such as "this is a performance specification." Need to dig deeper to look at the actual scope, what info was provided by the Government, and what the contract states as to reliance on such information.

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## Federal Design-Build



- Mitigation of Risk related to design
  - Interplay of contingency and E&O insurance
    - Which comes first?
    - Consent to use of contingency?
    - Contractual language v. standard of care

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## Federal Design-Build



- Mitigation of Risk related to design
  - E&O
    - Practice policies or project specific with practice policies as backup?
    - Long process to get decisions/coverage- need to push
      - This is most misunderstood risk
      - Consent policies
      - Statute of limitations issues on longer project

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## Federal Design-Build



- Design-Build Mega projects
  - Own unique risks
  - Many times, two contractors joint-venture
    - Different approaches to design-build and risk
    - Culture
  - Zero factor
    - As to cost and time
    - Design issues could exceed coverage

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## Federal Design-Build



- Related Projects
  - Design-build with Government O&M contractors
    - Not the same contract, not the same protections- risk
  - State and local- moving to design-build approach following federal government
    - May not be sophisticated/have the right mindset
    - Protections that exist in federal procurement law may not apply due to state law/courts- risk

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# Problems with Design Build for Sureties



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## What is the Federal Acquisition Regulation (FARS)

- The **Federal Acquisition Regulation (FAR)** is the primary regulation for use by all executive agencies in their acquisition of supplies and services with appropriated funds.
- The FAR also contains standard solicitation provisions and contract clauses and the various agency FAR supplements.
  - [Best-Practices-Federal.pdf \(dbia.org\)](https://www.dbia.org/Best-Practices-Federal.pdf)
    - FAR (Federal Acquisition Regulation): Provides uniform procurement policies and procedures for use by all executive agencies, specifically the two-phase design build
    - It is important to note that design-build contracts integrate the primary services of the design and the construction contract, i.e., construction of a complete and usable facility with design-related services

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## Federal Acquisition Regulars System



### Title 48 - Federal Acquisition Regulars System

#### 352.236-70 Design-Build Contracts.

##### (b) Responsibility of the contractor for design.

- (1) The Contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other non-construction services furnished by the Contractor under this contract. The Contractor shall, without additional compensation, correct or revise any errors or deficiency in its designs, drawings, specifications, and other non-construction services and perform any necessary rework or modifications, including any damage to real or personal property, resulting from the design error or omission.
- (2) If the Government allows the Contractor to proceed with limited construction based on pending minor revisions to the reviewed Final Design submission, no payment will be made for any completed or in-progress construction related to the pending revisions until they are completed, resubmitted, and are satisfactory to the Government.
- (3) No payment will be made for any completed or in-progress construction until all required submittals have been made, reviewed, and are satisfactory to the Government.

[48 CFR § 352.236-70 - Design-Build Contracts.](#) | [CFR](#) | [US Law](#) | [LII / Legal Information Institute \(cornell.edu\)](#)

- As a general rule, the person who provides a design that turns out to be defective usually bears the risk of the defect in that design.

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## Problem With Design Build



- Contractors believe that the risk allocation for the design-build contract is out of whack resulting in substantial losses to the company
- Owners have been flowing down inequitable and unsustainable risk to the design build teams while reaping most of the benefits of the delivery systems

#### Contractor Market Retreats

- Multiple construction companies (SNC-Lavalin Group, Inc., Fluor Corporation, and Granite Construction Inc.) all announced large quarterly losses resulting from mega-fixed-price alternative-delivery projects and stated that the losses were forcing them to alter their business strategy.
  - SNC stopped bidding on lump sum turnkey construction projects since they believed it was the root of their performance issues
  - Granite believed that the fixed-price design-build contract delivery model and public-private partnership model resulted in an untenable imbalance in risk sharing
  - Fluor Construction believes, "[f]or lump-sum projects, the terms and conditions must have an appropriate allocation of risk between client and contractor."
- In the world of design-build contracting, equitable risk allocation frequently does not occur due to uneven bargaining power and short-sighted decisions by owners to flow down risks that arguably should not be transferred.
- While owners and their attorneys may be satisfied with the current risk allocation in their contracts, such short-term thinking has led us to the current situation where contractors are pulling back from the alternative-delivery project market.

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## Real Life Example

(Names of the Parties will not be disclosed to protect the innocent) (Taken from Dragnet)



**September 25, 2020: Surety** payment and performance bond to secure its payment and performance obligations for its Principal for a federal contract. The original bonded contract has a penal sum of \$2.2 Million dollars. The project involved the new construction of a building to house a regional agency.

Project is design-build and Principal hired a third-party architect and engineer with E&O coverage limit of \$2MM and \$4MM in the aggregate.

July 23 2021, Principal enters into several subcontracts. One of the subcontractors is responsible for supplying concrete and another subcontractor was installing the mezzanine floor.

September 10, 2021, Upon inspection Government determines that a discrepancy existed regarding specs for the mezzanine floor.

September 28, 2021, the structural engineer issues a deviation letter saying a revision to the existing flooring is possible.

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## The Tale of Woe Continues



Sometime in the Spring, 2022 Government rejects the notion that the existing floor can be repaired and orders the Principal to replace the entire mezzanine floor.

Government stops payment at about 45% of project completion. No funds released to Principal in 2022.

Principal terminates the flooring contractor and surety receives claims from 5 subcontractors totaling about \$600,000.

Principal has put A&E carrier on notice. So far, no contributions from the carrier.

So far, no performance bond claim from Government. Why would they?

Affecting Principals performance on other projects

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# Relationship Between the Surety and Principal and Principals' Indemnitors



## Bonded contractor is obligated to hold its surety harmless

### INDEMNITY

SECOND: The Contractor and Indemnitors shall exonerate, indemnify, and keep indemnified the Surety from and against any and all liability for losses and/or expenses of whatsoever kind or nature (including, but not limited to, interest, court costs and the cost of services rendered by counsel, investigators, accountants, engineers or other consultants, whether consisting of in-house personnel or third party providers) and from and against any and all such losses and/or expenses which the Surety may sustain and incur: (1) By reason of having executed or procured the execution of the Bonds, (2) By reason of the failure of the Contractor or Indemnitors to perform or comply with the covenants and conditions of this Agreement, or (3) In enforcing any of the covenants and conditions of this Agreement. The Contractor and Indemnitors shall deposit with the Surety on demand an amount of money or other collateral security acceptable to the Surety, as soon as liability exists or is asserted against the Surety, whether or not the Surety shall have made any payment therefor, equivalent to such amount that the Surety, in its sole judgment, shall deem sufficient to protect it from loss. The Surety shall have the right to use the deposit, or any portion thereof, in payment or settlement of any liability, loss, or expense for which the Contractor and Indemnitors would be obligated to indemnify the Surety under the provisions of this Agreement. If for any reason the Surety deems it necessary to demand an additional amount of collateral security to cover any possible additional liability or loss, the Contractor and Indemnitors shall deposit with the surety, immediately upon the Surety's demand, an additional amount of collateral security equal to such demand. The Surety shall have no obligation to invest or to provide a return on any such deposits.

The Surety may sell or realize upon any and all such collateral security, at public or private sale, with or without notice to the Contractor and Indemnitors, or by any other method permitted or applicable by law. In the event of any payment by the Surety the Contractor and Indemnitors further agree that in any accounting between the Surety and the Contractor, or between the Surety and the Indemnitors, or either or both of them, the Surety shall be entitled to charge for any and all disbursements made by it in good faith in and about the matters herein contemplated by this Agreement under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether or not such liability, necessity or expediency existed. The vouchers or other evidence of any such payment(s) made by the Surety shall be prima facie evidence of the fact and amount of the liability to the Surety, and of the Surety's good faith in making the payment (s). "Good Faith," as used in this paragraph and elsewhere in this Agreement, shall mean honesty in fact and the absence of wilful misfeasance or malfeasance. Neither negligence nor gross negligence shall be deemed the absence of good faith.

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- Bottom Line: Surety is taking on a risk that it doesn't usually undertake for a fraction of the premium.
- Moreover, we have the snowball rolling downhill



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# Federal Indefinite-Delivery Indefinite-Quantity (IDIQ) Contracts



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## Basic Features of IDIQ Contracts

- Federal Indefinite-Delivery Contracts – Federal Acquisition Regulations (FAR) Subpart 16.5
  1. Definite-Quantity Contract – delivery of definite quantity of supplies or services over fixed period of time to be scheduled upon order
  2. Indefinite-Quantity Contract – delivery indefinite quantity of supplies or services over fixed period of time to be scheduled upon order
  3. Requirements Contract – provides for filling all actual purchase requirements of contracting agency during specified contract period from a single contractor with deliveries scheduled upon order

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## Basic Features of IDIQ Contracts



### Features of (IDIQ) Contracts

- Govt. can obtain services to meet recurring needs where Govt. cannot determine exact quantities and required timing of service
- Allows Govt. to secure services with obligation to purchase nominal amount from contractor
- Govt. can award single contract or multiple contracts for same services
- Contractor who performs well can end up supplying all of Govt.'s needs for the specified services

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## Basic Features of IDIQ Contracts



- Single-award IDIQ contract
  - Only 1 contract awarded under solicitation
  - Could be awarded on competitive or non-competitive basis
  - Typically when only 1 contractor capable of providing services
- Multiple-award IDIQ contracts (preferred – See FAR 16.504(c))
  - Awarded to 2 or more contractors under single solicitation
  - Allows Govt. to establish a group of pre-qualified contractors
  - Contractors compete for future orders under streamlined procedure once contracting office determines specific needs

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## Basic Features of IDIQ Contracts



- Contract states minimum and maximum quantities of services to be obtained over the stated period of time
- Contract must require Govt. to order and contractor to furnish a minimum quantity of services
- Maximum quantity should not exceed amount Govt. is **fairly certain** to order
- Contract may specify maximum or minimum quantities Govt. can order under each task or delivery order
- Construction and A/E services are normally obtained under task orders

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## Basic Features of IDIQ Contracts



- Construction Services obtained through IDIQ Contracts
  - Recurring construction services - Maintenance, repair or renovation
  - Can be for a specific facility – i.e., regular maintenance and repair of military housing on a specific military installation
  - Can be for multiple locations within a geographic area
  - Contract can bundle multiple trade services – mechanical, electrical, roofing, etc., thus triggering requirement for a general contractor
  - Contract can be trade specific – thus awarded to contractor who normally performs as a subcontractor

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## Basic Features of IDIQ Contracts



- A/E Services obtained via IDIQ Contracts
  - Performance-based Statements of Work
  - Normally for minor design services to supplement/replace Govt. in-house design professionals
  - Can be awarded for multiple design disciplines under single contract
  - Can be awarded for single design discipline – i.e., Civil; Structural, Environmental, etc.

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## Small Business Considerations for IDIQ Contracts



- IDIQ construction services contracts are ideal candidates for small business set-aside contracts
- Minimum self-performance requirements
  - General Construction – at least 15% of cost of contract with own employees (not including the cost of materials)
  - Special Trade Construction – at least 25% of cost of contract with own employees (not including the cost of materials)
- Compliance monitored for base period of contract and for each task order

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## Examples of IDIQ Contract for Construction Services



- Contract to replace rotten lumber at various Govt. facilities in a large geographic area
  - 1-year base period with 2 one-year options
  - Guaranteed minimum - \$200,000
  - Maximum amount - \$1.3 million
  - Each task order had a minimum amount of \$3,000
  - Contractor required to be “ready and available to perform the work”
- Contract cancelled after 2 years
  - Govt. had only ordered services amounting to \$75k
  - Contractor submitted a claim to Govt. for \$125k, balance of minimum amount

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## *White v. Delta Const. Intern., Inc.*, 285 F.3d 1040 (Fed.Cir. 2002)



- CAFC determined the contractor not entitled to recover amount by which Govt. falls short of guaranteed minimum
- Contractor not entitled to be put in a better position by recovery than if Govt. had fully performed by ordering minimum amount
- Applied a *Termination for Convenience* analysis to unordered quantities – cost incurred on unordered quantities, including OH, plus a reasonable profit on such costs
- Govt. determined \$11,216 was fair and reasonable compensation to the contractor for a reasonable profit, incurred overhead, and all reasonable costs actually incurred based on the guaranteed minimum

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## Examples of IDIQ Contract for Construction Services



- Contract for asbestos removal and insulation installation at Naval Academy
- Various line items of work at unit prices with minimums for each line item
- Total guaranteed minimum amount - \$50k; maximum amount - \$1 million
- 1 line item – encapsulate loose asbestos dust, debris or waste with or without scaffolding: minimum quantity 37 sq. ft.; unit price = \$5/sq. ft. for price of \$185.00
- Single task order required encapsulation of 64 sq. ft. @ \$5/sq. ft.
- Govt. sought to renegotiate line item for lower unit price (\$0.11/sq. ft.)
- Negotiated modification at \$.023/sq. ft., with estimated quantity of 50,000 sq. ft. (note: not a “guaranteed minimum” quantity)

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## Examples of IDIQ Contract for Construction Services



- Negotiated modification at \$.023/sq. ft., with estimated quantity of 50,000 sq. ft. (note: not guaranteed minimum quantity)
- Govt. ultimately ordered total of 40,860 sq.ft. of encapsulation and contractor paid total of \$1,499.12 for the work
- Govt. paid a total of \$175,383.83 under the contract
- Contractor submitted a claim for \$193,800.88, arguing it should have been paid \$204,300 for the work at original \$5/sq.ft., contending repricing modification made under economic duress

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## Abatement Contracting Corp. v. U.S., 58 Fed.Cl. 594 (2003)



- Court of Federal Claims denied contractor's claim on Summary Judgment
  - Govt. had purchased the minimum agreed quantity of 37 sq. ft. of encapsulation set forth in IDIQ contract; Govt. purchased in excess of the minimum total amount of \$50,000 in services required by IDIQ contract
  - No expectation that Govt. estimates in IDIQ contracts will be accurate, as opposed to a requirements contract
  - After Govt. purchased minimum guaranteed quantity for encapsulation, Govt. did not breach contract when it renegotiated the unit price for encapsulation
  - After purchasing contract minimum, the Govt. had no further obligation to pay contractor \$5/sq.ft. for encapsulation services
  - Govt. threat to obtain encapsulation services from other contractors is not economic duress when Govt. has no further obligation to issue task orders for services after ordering contract minimum

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## Legal tips on Federal IDIQ contracts



- Without an expressly stated minimum quantity to be purchased, the IDIQ contract is void for lack of mutuality and consideration - *Maxima Corp. v. United States*, 847 F.2d 1549, 1557 (Fed.Cir.1988)
- Inaccurate Government estimates do not give rise to a Contractor breach of contract claim, regardless of the accuracy of the Govt. estimate, the contractor has no reasonable expectation of receiving any more than the contract minimum - *Travel Centre v. Barram*, 236 F.3d 1316 (Fed.Cir.2001)
- Task orders "represent the government's exercise of existing contract rights and are not separate, individual contracts. Default on a task order justifies termination of the contract as a whole - *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972 (Ct. Cl. 1965)
- Bid protests not allowed re: issuance of a task order (See FAR 16.505(a)(10)) unless:
  - Order would increase the scope, period, or maximum value of the contract
  - Order is > \$10 million for agencies other than DoD, NASA, and Coast Guard
  - Order is > \$25 million for DoD, NASA, or Coast Guard

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## DOE IDIQ ESPC Program



- 2015 - DOE issues RFP for award of up to 12 IDIQ contracts for Energy Savings Performance Contracts (ESPC) Program with total ceiling of \$55 billion
- ESPC is awarded to an energy service company (ESCO) for up to 25 years for the design, acquisition, financing, installation, testing, operation, and maintenance and repair of identified Energy Conservation Measures (ECMs) at one or more locations
- Base contract period – 5 years, with 18-month option period for issuance of task orders
- Contractor responsible for financing project and paid from costs savings
- 2017, DOE awarded firm fixed price IDIQ contracts to 21 firms, which include AECOM, Honeywell, Lockheed Martin, Siemens, Johnson Controls, and Leidos Engineering
- \$7.5 billion in ESPC contracts with investment values of:
  - 2018 - \$809 million
  - 2019 - \$818 million
  - 2020 - \$842 million

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Naval Station Guantanamo Bay IDIQ contract awarded during FY 2019  
Largest DOE ESPC Project with investment value of \$344 million

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# Questions?



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