

Progressive Design-Build Agreement for Water and Wastewater Projects

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Progressive Design-Build

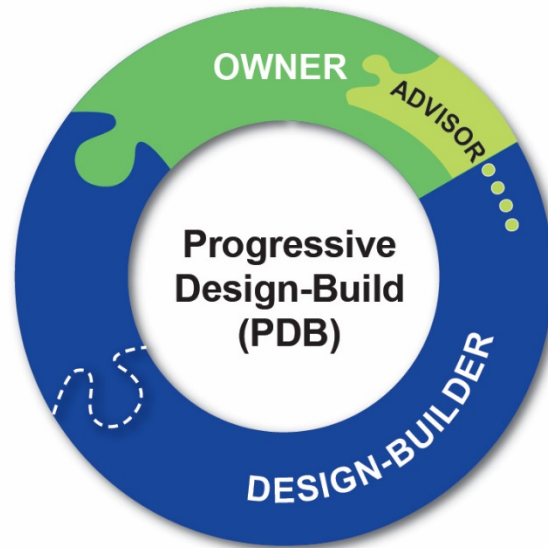
- Key Elements to be summarized
- WDBC Documents – Model Procurement Guide
- DBIA PDB Primer



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Progressive Design-Build



Origin of Effort

- DBIA / WDBC Strategic Alliance
- DBIA Standard Form of Agreement Between Owner and Design-Builder – Lump Sum **525** and DBIA Standard Form of Agreement Between Owner and Design-Builder – Cost Plus Fee With an Option For a Guaranteed Maximum Price **530**



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Use of the Agreement

- Public and Private Entities
- Template only with many choices
- Applicability to other Sectors



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General and Specific Instructions

- Modifications to instructions to account for phased services
- GMP added

Instruction

DBIA Document No. 545 (“Agreement”) should be used for progressive design-build water and wastewater projects. Progressive Design Build allows an Owner to complete a Design Build project in two phases. In Phase 1, the Owner completes preliminary design, sets the construction plan, and establishes the Phase 2 costs to complete final design and the planned construction. This Agreement allows for the Owner to pay the Design-Builder for design services and construction work in Phase 2 using Cost of the Work plus a Fee, with or without a Guaranteed Maximum Price (“GMP”), or Lump Sum.



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Specific Instructions

If there is uncertainty about Owner's final design Project Criteria after Phase 1, or the final design Project Criteria remain to be developed by Owner and Design-Builder together during Phase 2, a cost-plus/GMP contracting approach is desirable.

If there is certainty as to Owner's Project Criteria and project design after Phase 1, a lump sum fixed price for the completion of all design and construction services in Phase 2 may be suitable, especially when the Owner procures Design-Builder's services by competitive means.

When a GMP or Lump Sum is established after execution of this Agreement for Phase 2 work, the Proposal must be attached to the Contract Price Amendment pursuant to Section 2.3.2.3. Both the Contract Price Amendment and Proposal will include those Basis of Design Documents Design-Builder uses as the basis for its Contract Price.



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Specific Instructions

This Agreement provides the parties flexibility in establishing the Phase 2 Contract Price. Parties can establish a GMP or Lump Sum for Phase 2 after entering into this Agreement, or elect to proceed on the basis of costs plus a fee, without a GMP or Lump Sum.

If a GMP or Lump Sum method is elected, the GMP or Lump Sum should not be established until the Basis of Design Documents are sufficiently defined during Phase 1 to make the GMP or Lump Sum realistic and meaningful. Setting it too early does not permit reasonable opportunity for scope definition and evaluation of Project risk. On the other hand, setting it too late may not achieve Owner's objective of having an early price guarantee to enable it to make decisions relative to the Project



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Key Terms – Phase 1

- Phase 1 Services

2.2 Phased Services.

2.2.1 Phase 1 Services. Design-Builder shall perform the services of design, pricing, and other services for the Project based on Owner's Project Criteria, as may be revised in accordance with Section 2.1 hereof, as set forth in Exhibit B, Scope of Services. Design-Builder shall perform such services to the level of completion required for Design-Builder and Owner to establish the Contract Price for Phase 2, as set forth in Section 2.3 below. The Contract Price for Phase 2 shall be developed during Phase 1 on an "open-book" basis. Design-Builder's Compensation for Phase 1 Services is set forth in Section 7.0 herein. The level of completion required for Phase 1 Services is defined in Exhibit B, Scope of Services (either as a percentage of design completion or by defined deliverables).



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Key Terms – Phase 2

- Phase 2 Services

2.2.2 Phase 2 Services. Design-Builder's Phase 2 services shall consist of the completion of design services for the Project, the procurement of all materials and equipment for the Project, the performance of construction services for the Project, the start-up, testing, and commissioning of the Project, and the provision of warranty services, all as further described in the Contract Price Amendment. Upon receipt of Design-Builder's proposed Contract Price for Phase 2, Owner may proceed as set forth in Article 2.3.



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Key Terms – Proposal Acceptance

- If accepted, parties execute Contract Price Amendment
- Failure to accept Proposal:
 - Modify proposal
 - Owner authorizes DB to proceed on a reimbursable basis
 - Terminate for convenience



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Key Terms – No Option Exercised

If Owner fails to exercise any of the above options, Design-Builder shall have the right to (a) continue with the Work as if Owner had elected to proceed in accordance with Item 2.3.2.4 ii. above, and be paid by Owner accordingly, unless and until Owner notifies it in writing to stop the Work, (b) suspend performance of Work in accordance with Section 11.3.1 of the General Conditions of Contract, provided, however, that in such event Design-Builder shall not be entitled to the payment provided for in Section 9.2 hereof, or (c) may give written notice to Owner that it considers this Agreement completed. If Owner fails to exercise any of the options under Section 2.3.2.4 within ten (10) days of receipt of Design-Builder's notice, then this Agreement shall be deemed completed. If Owner terminates the relationship with Design-Builder under Section 2.3.2.4(iii), or if this Agreement is deemed completed under this paragraph, then Design-Builder shall have no further liability or obligations to Owner under this Agreement.



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Key Terms – Phase 1 Compensation

- Lump sum payment

Contract Price

.1 Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract the sum of _____ Dollars (\$ _____) for the Phase 1 Services, subject to adjustments made in accordance with the General Conditions of Contract. Unless otherwise provided in the Contract Documents, the Phase 1 Services compensation is deemed to include all sales, use, consumer and other taxes mandated by applicable Legal Requirements.



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Key Terms – Phase 2

Compensation

- Completion of Phase 1 Services = proposal submitted for cost of Phase 2
- Compensation for Phase 2
 - Lump Sum
 - GMP or Fee plus Cost of the Work



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Contingency Instructions

Enter the amount of Design-Builder's Contingency if using a GMP. The Contingency is for the exclusive use of the Design-Builder and covers all unanticipated costs incurred that are not the basis of a Change Order. This section sets forth by way of example only the type of costs that would be funded out of the Contingency. Other costs such as but not limited to any deductibles the Design-Builder is obligated to pay would be subject to reimbursement. The Design-Builder is also required to provide the Owner with a monthly status report accounting for the Contingency, including all reasonably foreseen uses and potential uses, of the Contingency for the upcoming three months.

While not provided for in the Contingency provision, DBIA recognizes that there may be situations where the Owner will want to recapture the Contingency prior to Final Completion. For example, the Owner may want to use amounts in the Contingency to fund changes to the Project. The Owner's desire has to be balanced against the Design-Builder's need to use the Contingency to fund unanticipated costs for which it is liable. An option to consider to accommodate both interests is to establish an "Owner's Contingency" and a "Design-Builder's Contingency" in the GMP. If this option is used, any savings clause in the agreement should be drafted appropriately to address these pools of funds.



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Contingency

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- While not provided for in the Contingency provision, DBIA recognizes that there may be situations where the Owner will want to recapture the Contingency prior to Final Completion. For example, the Owner may want to use amounts in the Contingency to fund changes to the Project. The Owner's desire has to be balanced against the Design-Builder's need to use the Contingency to fund unanticipated costs for which it is liable. An option to consider to accommodate both interests is to establish an "Owner's Contingency" and a "Design-Builder's Contingency" in the GMP. If this option is used, any savings clause in the agreement should be drafted appropriately to address these pools of funds.



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Key Terms – Savings and Costs for Defective Work

- Savings
- Costs for Defective /Non-conforming work



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Key Terms – Termination for Convenience

- By Owner
- By Design-Builder



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Key Terms – Liquidated Damages

- LDs for substantial and final completion
- Cap on LDs
- Early Completion Bonus



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Key Terms – Limitation of Liability

- Article 13 added:

Limitation of Liability

13.1 Limitation. To the fullest extent permitted by law, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of Design-Builder, its Design Consultants, and Subcontractors, surety (if any) and their respective officers, directors, employees, and agents, and any of them, to Owner and anyone claiming by, through or under Owner, for any and all claims, losses, liabilities, costs, or damages whatsoever arising out of, resulting from or in any way related to the Project or this Agreement from any cause, including but not limited to the negligence, indemnity, professional errors or omissions, strict liability, breach of contract, or warranty (express or implied) shall not exceed _____percent (___%) of the Contract Price. The parties agree that specific consideration has been given by the Design-Builder for this limitation and that it is deemed adequate.



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