Issues for Design-Build Teaming Agreements

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Structure of the Team

• Structure of the Business Relationship
  – One party prime, and the other as subcontractor
  – Joint business venture
    • Legal structure of venture: joint venture (partnership), corporation, limited liability company
    • Organization and control of the joint business venture
    • Capitalization and financial issues

• Lines of Communication
Sharing of Risks and Rewards

• Compensation
  – Amount
  – Timing of payment
  – Conditions

• Project Profits and Losses
  – Allocation of savings if project exceeds goals
  – Allocation of losses if project fails to meet goals

• Other Risks and Rewards
  – Identify and describe each
  – Allocate consequences between the parties
Design Phase Services
(that may be different from traditional projects)

• Services Provided by the Contractor
  – Costing, estimating
  – Value engineering
  – Assistance in analyzing owner-provided information
  – Constructability analysis
  – Preliminary scheduling
  – Checking design to anticipate problems
  – Acquisition of long-lead items
  – Procuring subcontractor participation and quotes
  – Negotiation with subcontractors/vendors
Design Phase Services (cont.)
(that may be different from traditional projects)

- Services provided by the A/E
  - System-by-system design, with “looping” feedback from trade contractors
  - Greater (lesser) number of alternative designs
  - Informal communications rather than “defensive detailing”
  - MEP design only schematic, completed by trade contractors
  - Acceptance of greater-than-usual price constraints
  - Out-of-sequence provision of design details
  - Heavier reliance on performance specifications
Construction Phase Services
(that may be different from traditional projects)

• By the Contractor
  – Anticipating and avoiding or minimizing the consequences of design problems
  – Fast-tracking the construction

• By the A/E
  – Informal provision of supplemental design information
  – Cooperative approval of substitutions
  – Cooperative trouble-shooting and problem-solving
Protective Business Services

• Confidentiality of Information
• Exclusive Relationships or Agreements Not to Compete
• Future Marketing/Sales Efforts
  – Responsibility of each party
  – Provisions regarding mutual commitment, exclusivity
Risk Transference

• Indemnity Provisions
  – A/E to indemnify contractor for claims arising out of breaches of A/E’s duties
  – Contractor to indemnify A/E for claims arising out of breaches of contractor’s duties
  – Provisions for cooperative defense or splitting costs of claims common to both parties
  – Provisions for indemnification by others
Risk Transference (cont.)

• Insurance Provisions
  – Coverage to be procured by each party, including limits, terms, etc.
  – Allocation of cost of insurance

• Surety Bonds
  – Description of bonds to be procured, by whom, terms, etc.
  – Provisions for allocating costs of bonds
Dispute Resolution

• Commencement of the Dispute Resolution Process
  – For claims initiated by or involving third parties, dispute process not to begin until third party aspects of claim are resolved
  – Provision tolling statute of limitations for claims involving third parties
Dispute Resolution (cont.)

• **Sequence of Dispute Resolution Actions**
  – Step negotiations between senior management
  – Non-binding mediation
  – Binding arbitration (or court litigation)
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