

MDCSystems®
and
King & Spalding LLP
Present:

**Design-Build/Construction
Management 2003**



KING & SPALDING LLP

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Introduction and Background

Design-Build/Construction Management



Design-Build/Construction Management

- **Management is key to project success**
- **The Context of modern project management**
- **New management challenges due to**
 - **Technical complexity**
 - **Delivery cycle**
 - **Labor skills and availability**
 - **Material availability and quality**
 - **Existing conditions**

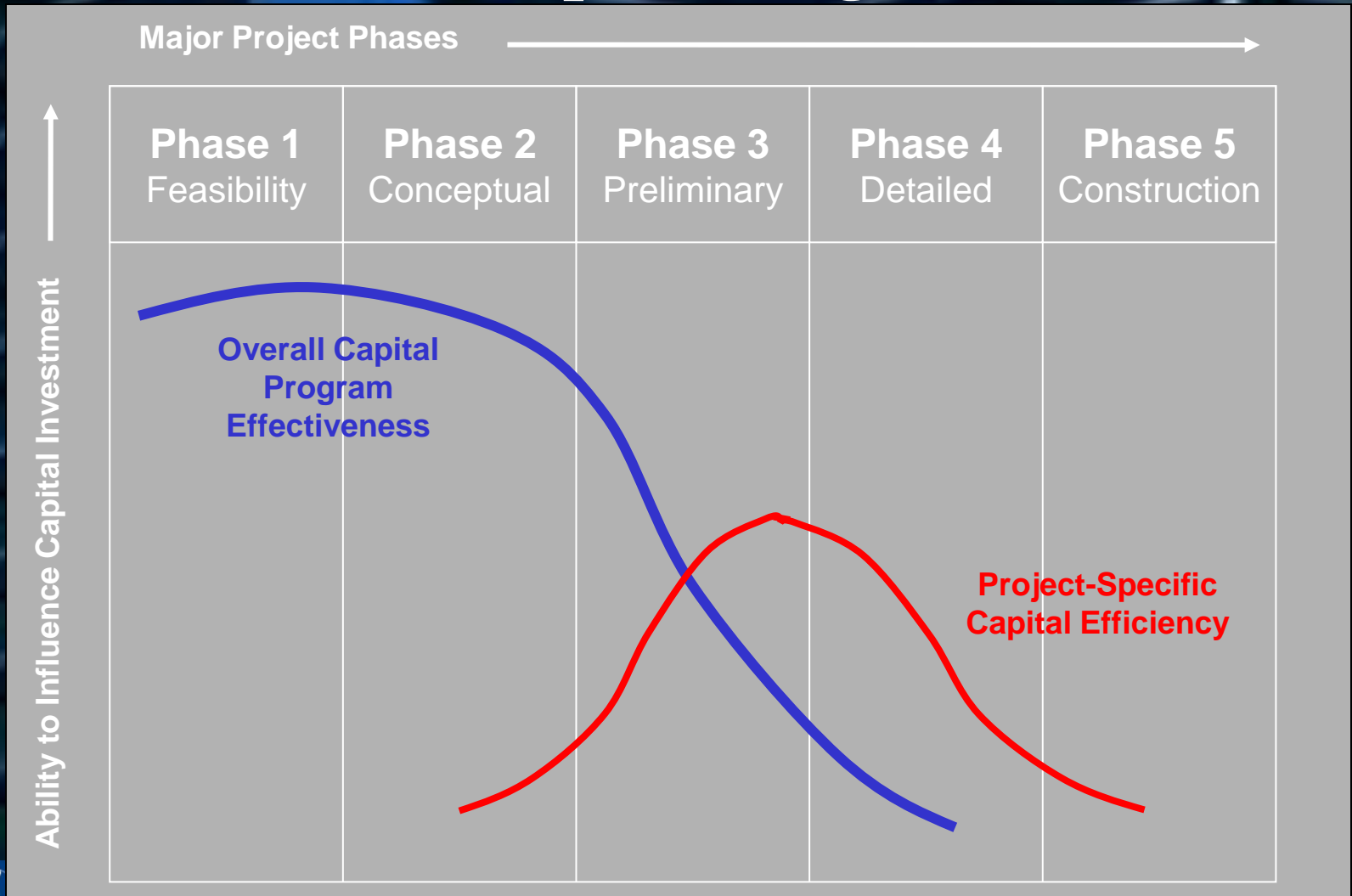
Design-Build/Construction Management

- **Contract management**
- **Scope management**
- **Schedule management**
- **Procurement management**
- **Cost management**
- **Dispute management**

Design-Build/Construction Management

- **Management tools come from contract**
 - **Monitoring/Reporting**
 - **Scheduling**
 - **Change processing**
 - **Notice requirement**
- **No data/reports – No management**
- **Bad data/reports – Bad management**

Managing Project Performance and Closeout, Scope Management

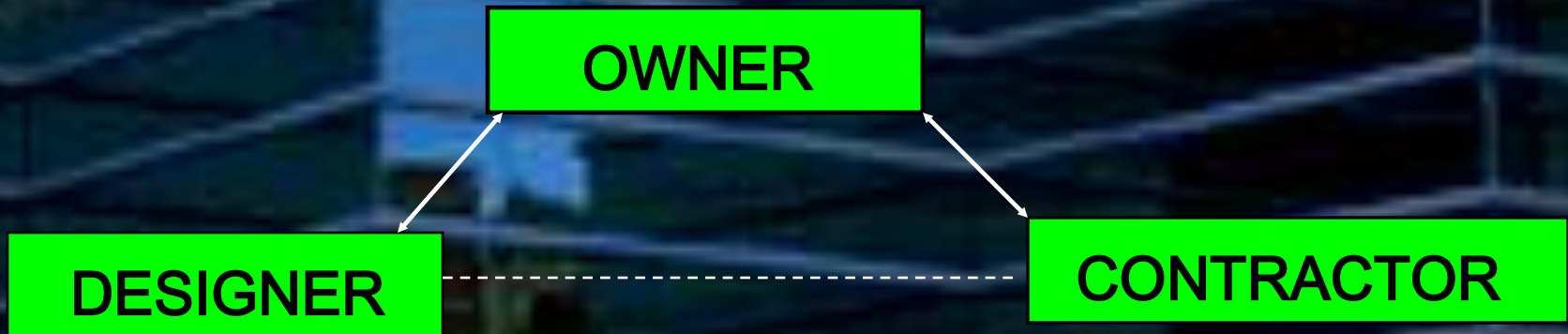


Source: Watson, Noel G., *World Energy*, Vol. 5 No. 1, 2002, pg. 153

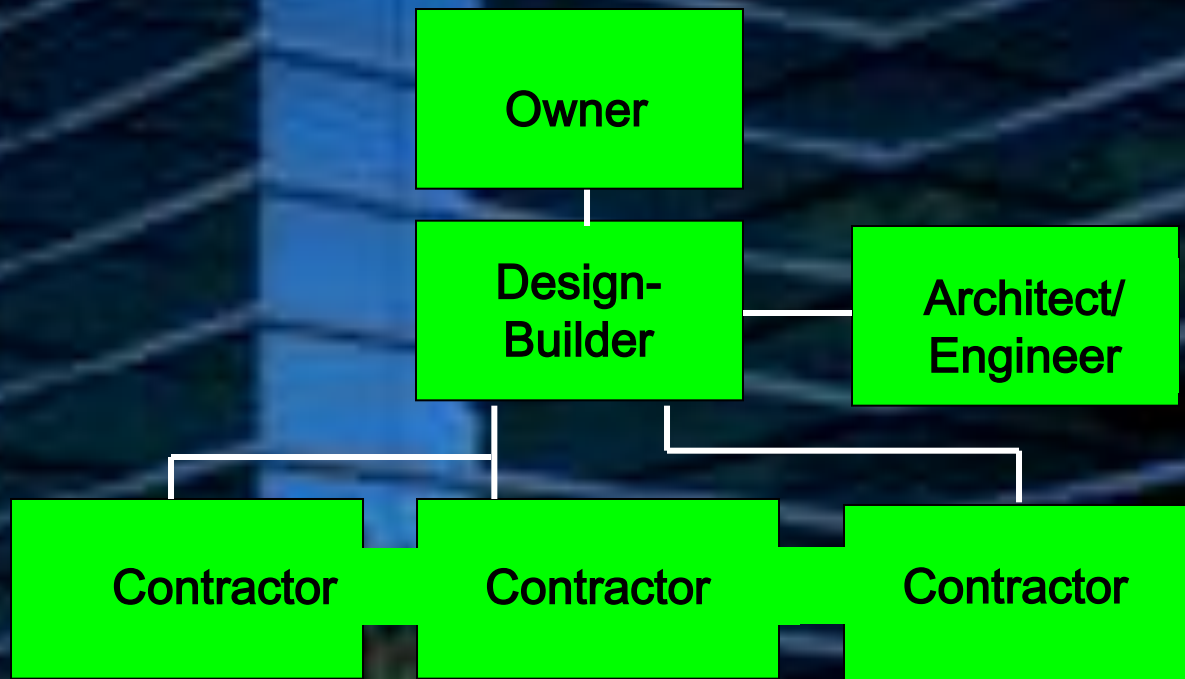
TRADITIONAL

Design/Bid/Build

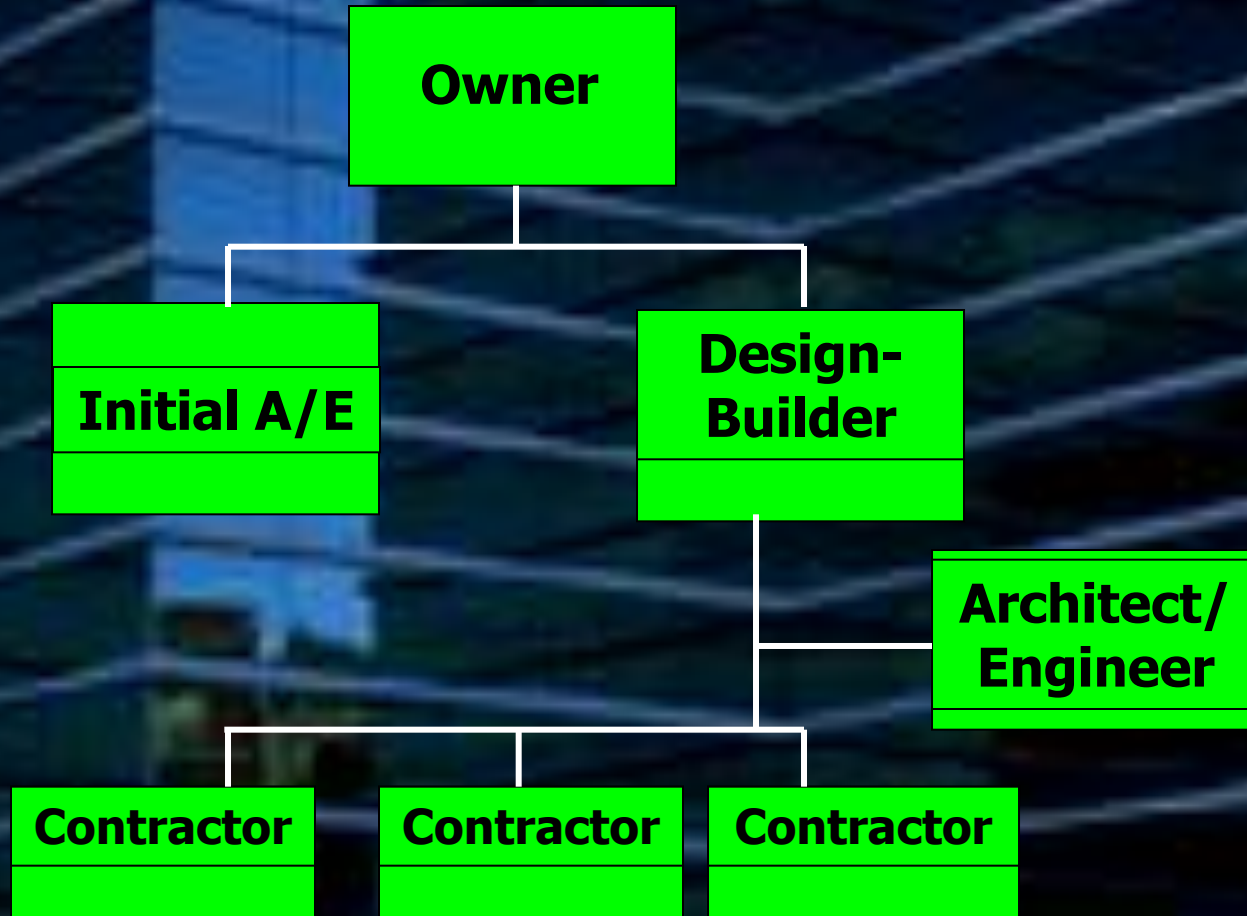
Project Triangle



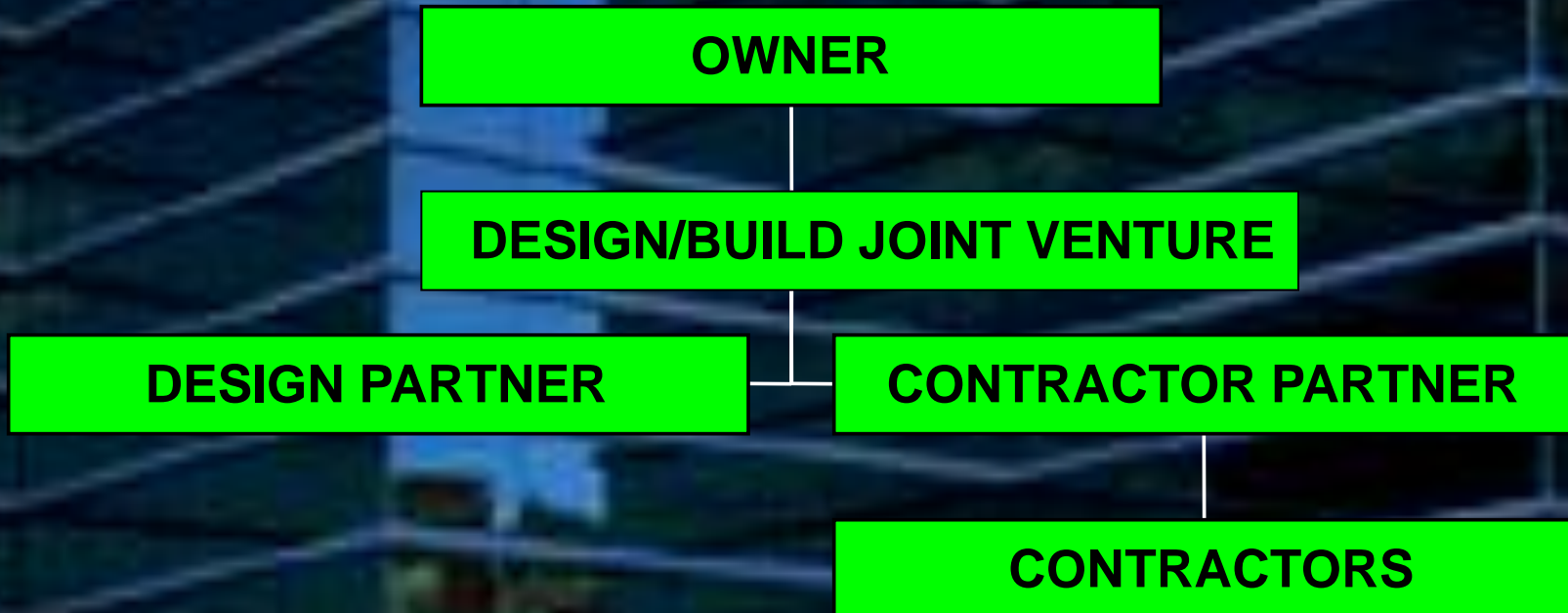
DESIGN-BUILD STRUCTURE



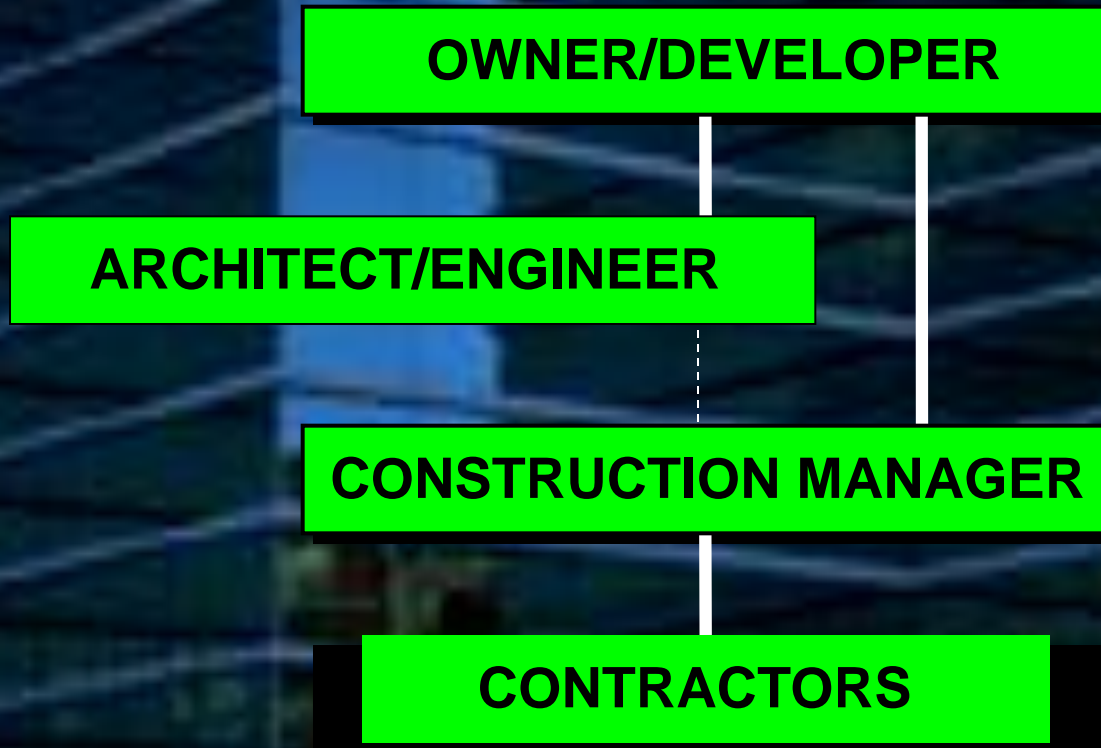
DESIGN-BUILD STRUCTURE (Bridging)



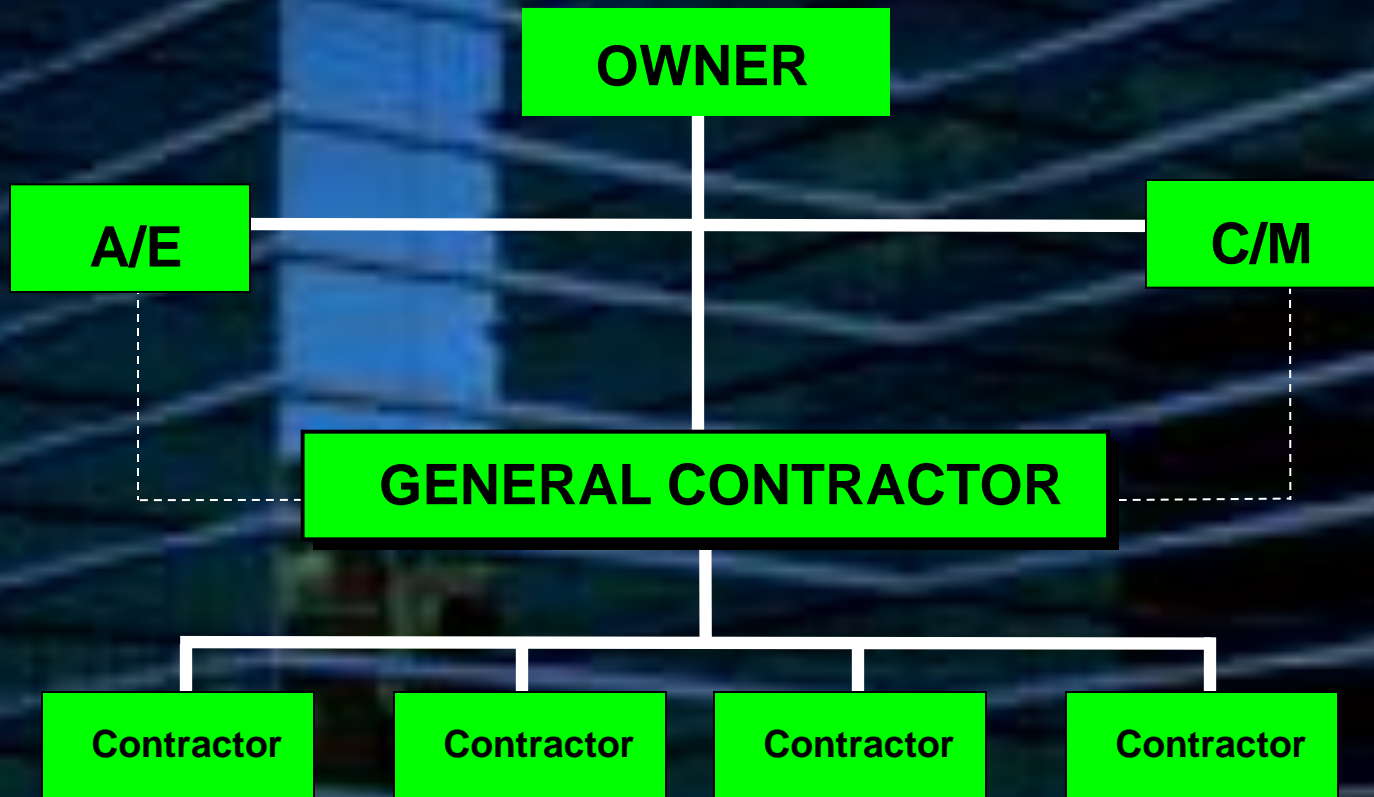
DESIGN-BUILD STRUCTURE



CONSTRUCTION MANAGEMENT (AT-RISK)



CONSTRUCTION MANAGEMENT (AGENCY)



Traditional Approach

- **Owner “Warrants” Adequacy Of Design (Spearin Doctrine)**
- **Contractor Builds What Is In the Plans & Specifications**
- **If The Result Is Not What Owner Wanted, Contractor Still Gets Paid**

Traditional Approach

- **If design is flawed or impossible, contractor gets paid for attempts to comply.**
- **Delay damages**
- **Disruption damages**

Late Design

TRADITIONAL

- Contractor gets an extension of time
- Contractor may get delay damages
- Owner, not architect, usually holds the bag

DESIGN-BUILD

- No extension of time
- Contractor can be liable for delay damages

Unclear Design

TRADITIONAL

- Contractor gets an extension of time if delayed
- Contractor may get additional money
- Architect may or may not be liable

DESIGN-BUILD

- No extension of time
- No additional money
- Design/Builder liable for added costs, delays

Design Error

TRADITIONAL

- **Owner (and architect sometimes) responsible for design**
- **Contractor gets additional money for any rework or delay**
- **Contractor gets extension of time**

DESIGN-BUILD

- **Design-Builder is responsible for design**
- **No time extension; no additional money**
- **Design-Builder can be liable for Owner's added cost, delay**

Requests For Information (RFIs)

TRADITIONAL

- If justified, Contractor gets additional time
- Contractor may get delay damages, extra costs of handling RFIs

DESIGN-BUILD

- Forget RFIs. Design is Design-Builder's problem

Utilizing Design-Build and Construction Management Effectively



Owner's Goals in Using Design-Build

- **Faster project delivery**
- **Lower cost**
- **One-stop shopping**
- **Pass on design risk**
- **Reduce/eliminate claims**

Contractor's Goals in Using Design-Build

- Better control over scope
- More flexibility in phasing, scheduling
- Better satisfy Owner's desire for quicker or cheaper job

Owner's Goals in Using a Construction Manager

- Utilize Professional Manager
- Achieve Cost Savings
- Protect Owner's Interest
- Reduce/eliminate claims

Advantages of the Construction Management Approach

- **Special expertise as needed**
- **Independent scope and constructability review**
- **Flexibility in phasing, scheduling**

Problems That May Occur in Both Design-Build and Construction Management Projects

Scope of Work
Scope of Work

Scope of Work

Scope of Work

Scope of Work

Scope of Work

Scope of Work

Scope of Work

Scope of Work

Scope of Work

Scope of Work



Common Owner Issues

- **Owner does not know what it wants — or doesn't tell Design-Builder**
- **Owner's program is unrealistic**
- **Owner keeps changing program — but doesn't know it**

Common Problems

- **The Owner's quality expectations are not met**
- **The parties attempt value engineering too late and induce design error or unwise "cheapening"**

Problems Often Occur At Boundaries Of Work Scope

- In defining boundary between Owner and Design-Builder
- In defining boundary between Design-Builder and subcontractors

Problems Often Occur At Boundaries Of Work Scope

- **Owner-supplied equipment, utilities**
- **Owner-controlled systems**
- **Dealing with acceptance testing/start up**

Execution Issues

- **Shop drawings**
- **A/E supplied details**
- **A/E field support**
- **A/E start-up support**
- **A/E problem resolution**

Owner Issues (After construction but before acceptance)

- Performance
- Quality
- Operability
- Maintainability
- Reliability

Common Project Challenges

- **Changes**
- **Engineering Deliverables**
- **Long-Lead Equipment**
- **Site Mobilization**
- **Construction Interfaces**
- **Start-up Testing/Commissioning**
- **Initial Operation & Operator Training**

Key Project Assumptions

- **Laws, Regulations, Codes & Standards**
- **Worker availability & skill levels**
- **Local materials availability & quality**
- **Existing Infrastructure**
- **Permits, Inspection Services, etc.**
- **Shipping/Freight**
- **Communications**

Common Causes of Project Failure

- **Inaccurate Project Assumptions**
- **Bad Management**
- **Technical Failures**
- **World Events**
- **Outside Influences**
- **Lack of Maintenance Planning**

Interface Problems

- **Electrical/Mechanical**
- **Controls/Electrical**
- **Electrical/Fire Safety**
- **Control/Mechanical**

Contracts Should Give Each Party A Personal Stake In Achieving Project Goals

Positive Reinforcement

- **Quality: Extended warranty periods/o&m duties to discourage “cheapening” the project**
- **Cost: Share cost savings**
- **Performance Goals: Bonuses for exceeding performance requirements (widgets per hour, cost per unit produced)**

Negative Reinforcement

- Liquidated delay damages
- Add extended o&m or warranty obligations to discourage “cheapening” the project
- Condition acceptance and final payment on passing clearly defined performance tests

Legal Perspectives of Construction Management And Design Build Contracts

**John W. Hinchey, Esquire
Peter M. Crofton, Esquire
Gregory K. Smith, Esquire**



AIA A191, “Standard Form of Agreement Between Owner and Design-Builder” (1996)

- **A two-part form**
- **Part 1: Preliminary scope definition and feasibility analysis**
- **Part 2: Completion of design and construction**

- **Design responsibility is on Design-Builder**
- **Part 1 looks like an A/E Contract, Part 2 like a Construction Contract with added design tasks**
- **No requirement for E&O insurance**

AIA B901, “Standard Form of Agreement Between Design-Builder and Architect” (1996)

- **Very basic, not detailed**
- **Puts responsibility for geotech info, etc. on Design-Builder**

- **No flow-down provisions (to pass Design-Builder's design responsibility to designer**
- **Loose time term**
- **No requirement for E&O insurance**
- **Treats the Design-Builder as if he/she were an Owner**

EJCDC Forms

- **Doc. No. 1910-49-a: “standard form of agreement between Owner and Design-Builder where basis of price is stipulated price” (1995)**
- **Doc. No. 1910-49-b: cost-plus form**
- **Both used with separate general conditions (1910-40)**

- **One-part agreement only –
No Phase 1 & 2 split**
- **More detailed than AIA forms**
- **Pre-drafted optional add-ons available for
use**
- **Doc. No. 1910-41 (1995): Sub agreement
between Design-Builder and engineer**

AGC Contract Forms

- **All designed for contractor-led Design-Build teams**
- **AGC 400: Preliminary agreement between Owner and Design-Builder**
- **Doc. No. 525 (1998): Lump sum**
- **Doc. No. 530 (1998): Cost plus fee with GMP option**
- **Doc. No. 535 (1998): General conditions**

- **AGC 410 (1999): Lump sum agreement and general conditions based on Owner's program and schematics**
- **AGC 415 (1999): Cost plus fee with GMP agreement & general conditions**
- **AGC 420 (1999): Design-Builder's agreement with Architect/Engineer**
(assumes designer is a consultant, but not a subcontractor)

Design-Build Institute

- **Doc. No. 520 (1998): Preliminary agreement**
- **Doc. No. 525 (1998): Lump sum**
- **Doc. No. 530 (1998): Cost plus fee with GMP option**
- **Doc. No. 535 (1998): General conditions**
- **NO. 540 (1999): Agreement between Design-Builder and designer**

Federal

- **Federal acquisition reform act of 1996:**
To make procurement more efficient
- **Authorizes two-phase Design-Build selection process in specified circumstances**
- **Three or more offers anticipated**
- **Design work must be done by bidders before developing price proposals and will likely be costly**

Federal

- **Project requirements can be well-defined**
- **Time constraints suggest Design-Build would be useful**
- **Potential Design-Builders are capable**
- **Project is otherwise suited to Design-Build**

Federal Model for Design-Build Procurement

- **Two-step process**
 - **Phase 1: Qualifications**
 - **Phase 2: Preparation of technical proposal & price**

- **Phase 1: To determine experience, competence, past performance, general technical approach (*no price, no detailed design*)**
- **Phase 2: Five or fewer selected contractors prepare prices & technical proposals**

- **Well-developed procedures**
- **Provision to pay some Phase 2 proposal costs of unsuccessful proposes**

Challenges of Design-Build and Construction Management



- **Crafting “teaming” agreements to establish the D/B team before the job is awarded**
- **Helping the Owner define the scope – if the Owner will let it**
- **Preventing the Owner from shifting the risk of poor definition -- if the Owner will not let the contractor help with definition**

- **Managing the designer/assuring the designer works well, meeting construction needs**
- **Balancing cost saving with adequate expenditure for design assistance**
- **Being responsible for design problems**
- **Getting insurance for design**

Value Engineering

- Performed by engineers
- Life cycle costing

More Subtle Design-Build Hybrids

- Performance specifications
- Design-Build specifications
- No specification
- Impossible specification
- Shop drawing (design) revisions

Be Realistic



- **As always, try to allocate risk to those best able to mitigate it**
- **Do not expect to shift risk without paying**

- **Design-Build projects will still not run themselves: Owner attention is still required**
- **Design-Build will not achieve faster or cheaper work if the Owner keeps making changes**

- **A poorly defined project will not do well – Design-Build or not**
- **A poorly administered project will not go faster – Design-Build or not**

- **A bad Designer is a bad Designer – Design-Build or not**
- **A bad Contractor is a bad Contractor – Design-Build or not**
- **A confused Owner is a confused Owner – Design-Build or not**

- **Good partnerships don't usually happen overnight**
- **Look for a Design-Build team that has worked together (successfully) before**

Managing Project Performance and Closeout, Schedule Management

- Why have a schedule ?
- “Games” schedulers play
- Specifying schedules
- Scheduler qualifications

Why Schedule ?

“ Except in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project...”

Blake Construction Co. vs. C.G. Cookby, Inc.

Why Schedule?

- **Formulate A Plan.**
- **Communicate The Plan.**
- **Set Goals.**
- **Measure Progress.**
- **Respond To Change.**

Who Schedules ?

- “[Construction] is the only industry where design and implementation are separated one from the other, and those engaged in design have significantly different interests and motivation than those responsible for the on-site construction.”

» The Revay Report, v10, no.2

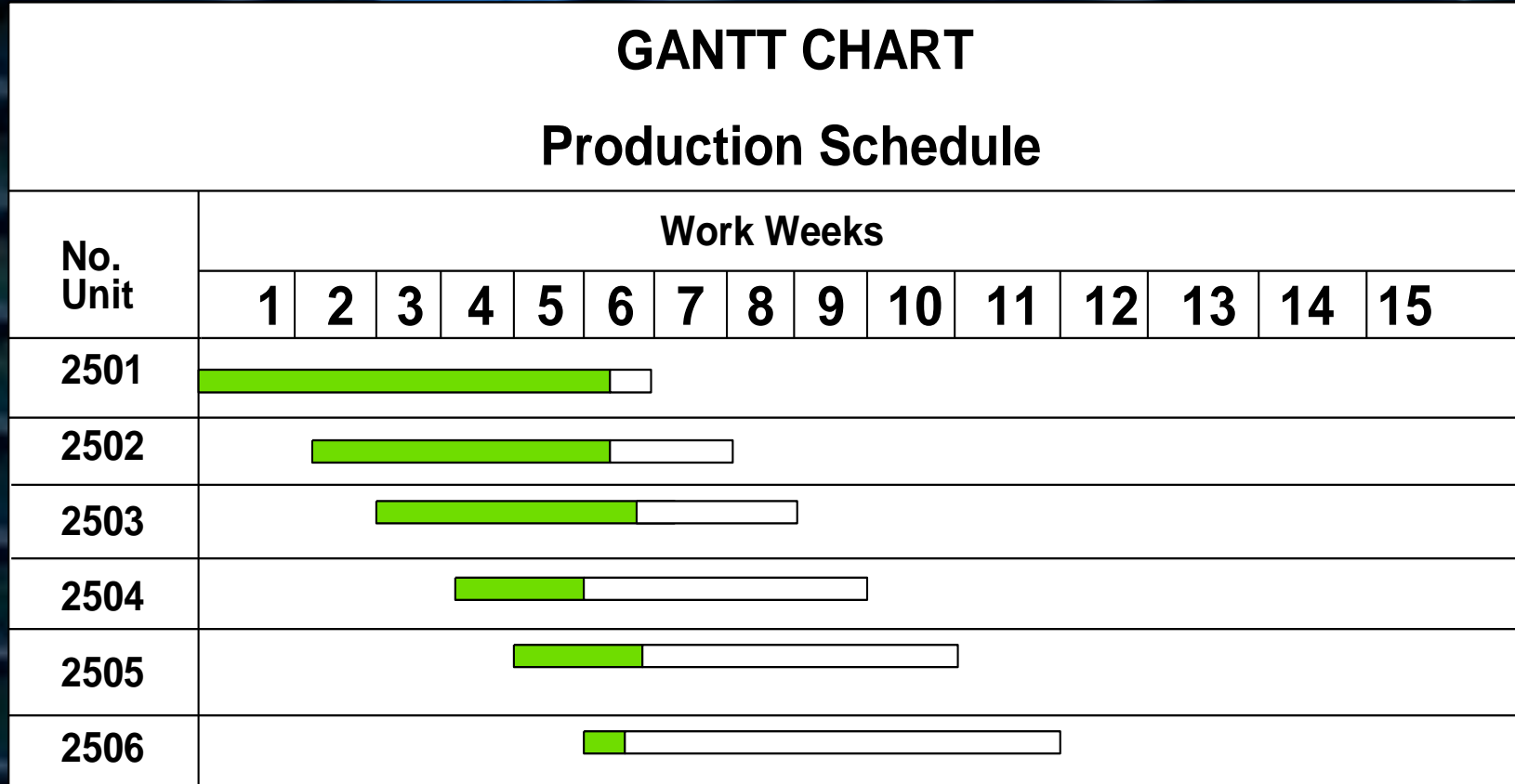
Time Impact Analysis (TIA)[®]

- **Isolates and quantifies impact of individual delay causing events**
- **Uses both as-planned and as-built schedules**
- **Identifies a day-for-day increase to project date**

Schedule Formats

- **Bar Chart Schedules (Gantt Chart)**
- **PERT Chart Schedule**
- **Network Diagram Schedule**
- **Precedence Method Schedule**
- **Critical Path Method Schedule**

Bar Chart Schedule (Gantt Chart)



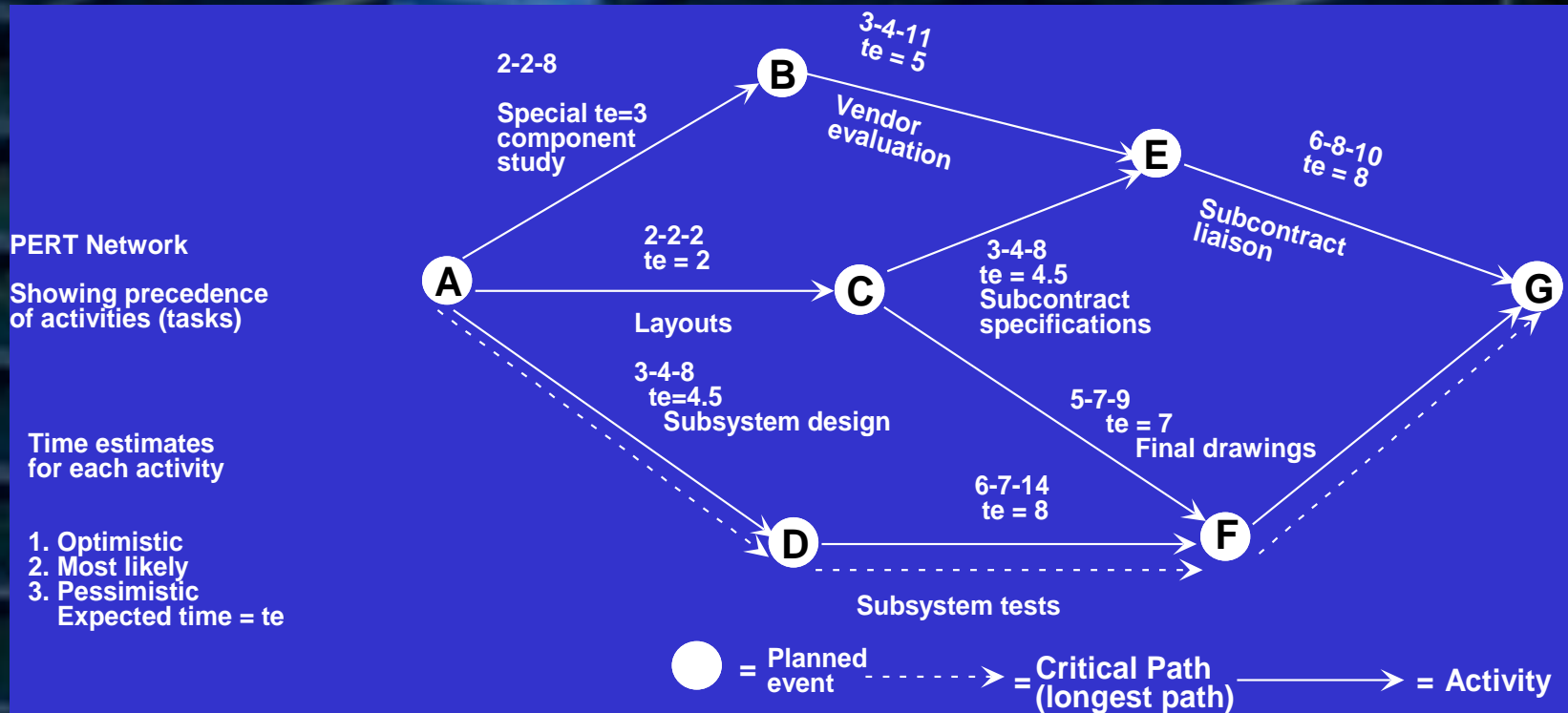
Bar Chart Schedule (Gantt Chart)

- **Strengths**
 - **Most Common Schedule**
 - **Common Sense Logic**
 - **Quick Determination of Gross Progress**
 - **Simplicity**

Bar Chart Schedule (Gantt Chart)

- **Weaknesses**
 - **Logic not Shown**
 - **No Critical Path**
 - **Difficult to Determine Overall Project Status**
 - **Does not Help Establish Relative Sensitivity**

PERT Chart Schedule



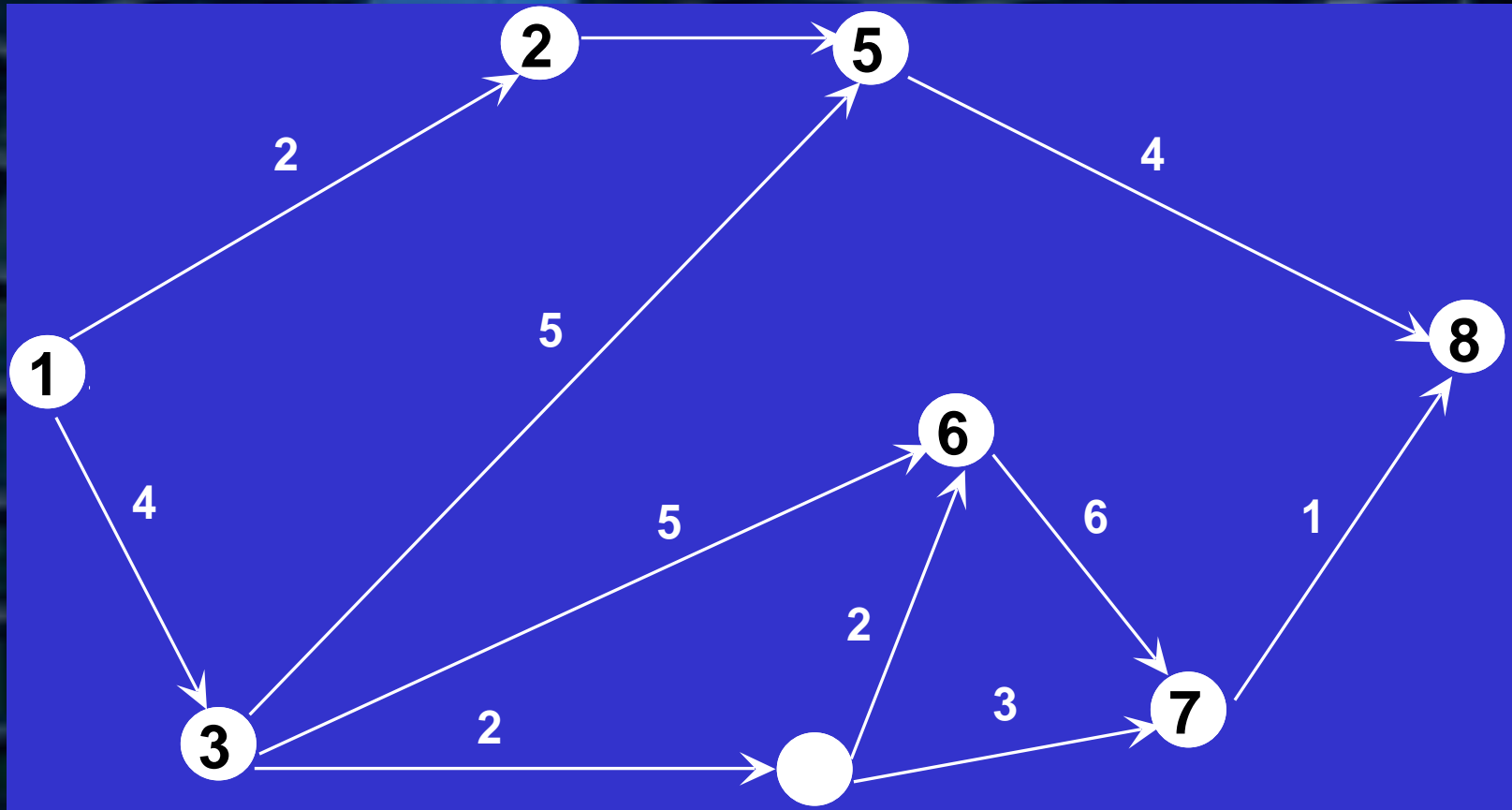
PERT Chart Schedule

- **Strengths**
 - **Responds to Interrelationships Between Activities**
 - **Produces “Best Guess” Completion Estimate**
 - **Commonly used on Projects which have no Historical Information to Base Activity Duration Estimates**

PERT Chart Schedule

- **Weaknesses**
 - **Input can be Complex and Time Consuming**
 - **Updating can be Onerous**
 - **Does not Identify the Project Critical Path**

Network Diagram Schedule



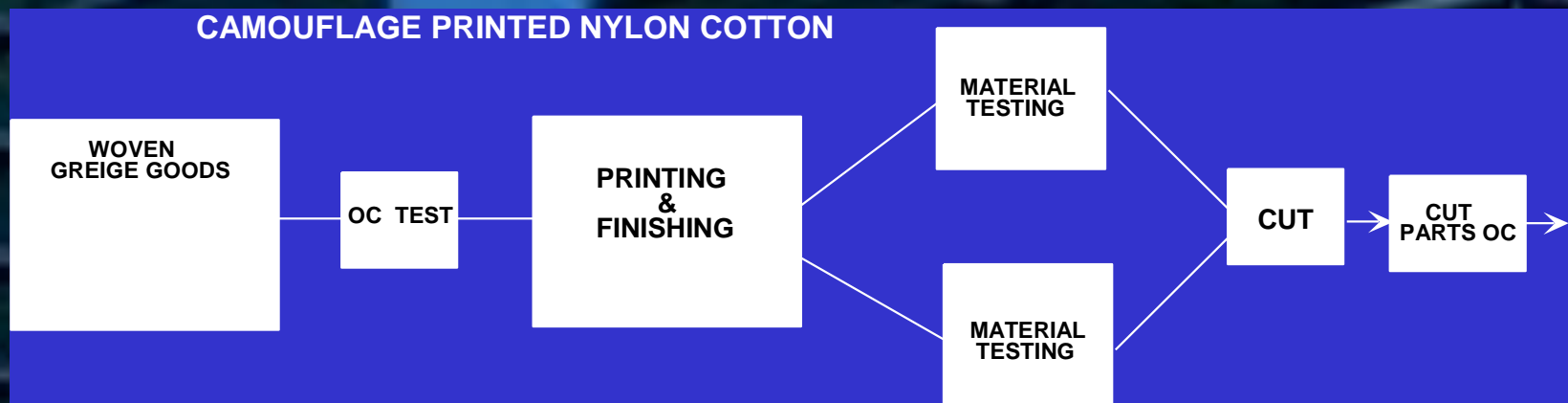
Network Diagram Schedule

- **Strengths**
 - **Automatically accounts for Uneven Activity Durations**
 - **Incorporates Resource Requirements such as Manpower, Material, Equipment, Money, etc.**
 - **Identifies which Portions of a Project have “Float” Time and are not Driving the Overall Time to Complete the Project.**

Network Diagram Schedule

- **Weaknesses**
 - **Input can be Complex and Time Consuming**
 - **Updating can be Onerous**
 - **Results are Only as Good as the Input. Logic Flaws can be Hidden and Yield Faulty Projections.**
 - **Pure Logic Diagrams can be Very Hard to Read and Understand.**

Precedence Method Schedule



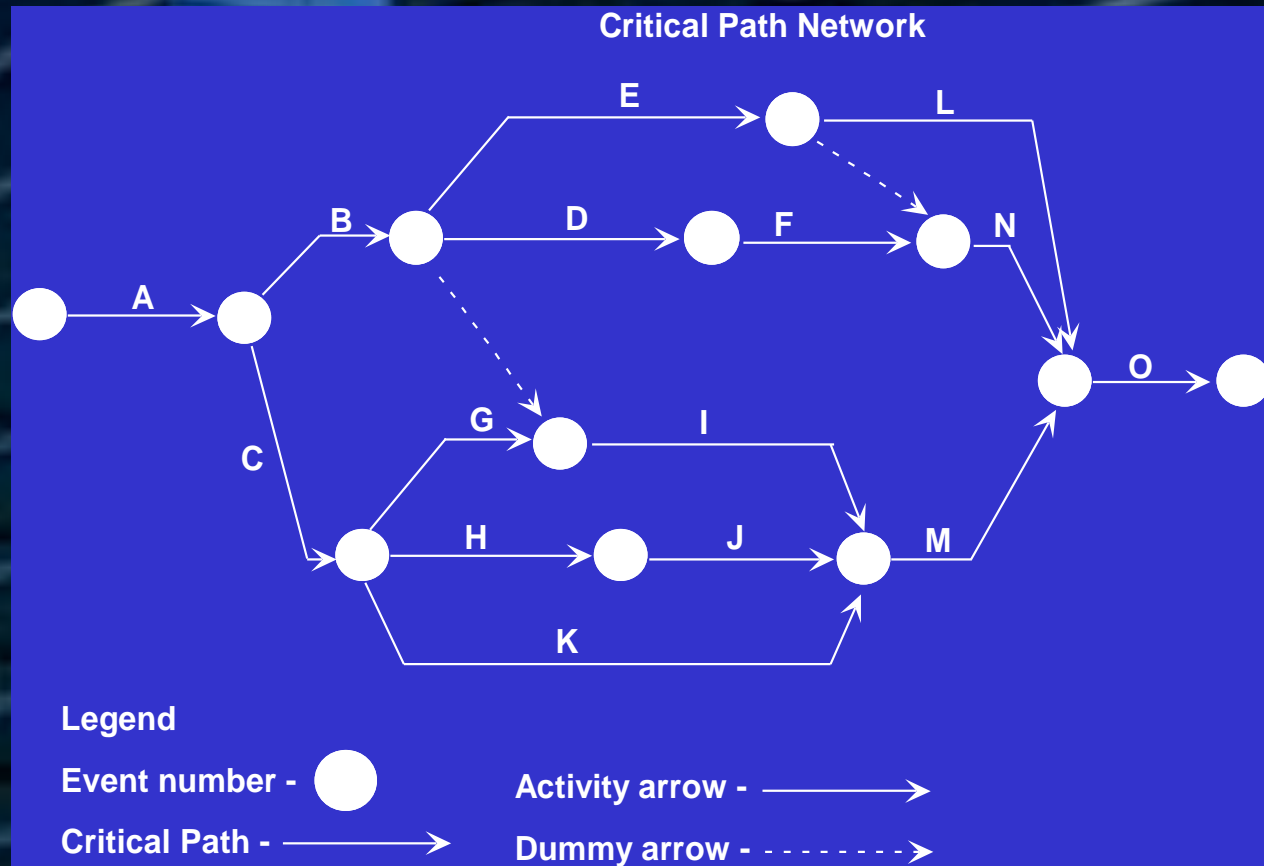
Precedence Method Schedule

- **Strengths**
 - **Does Show Inter-Activity Relationships and Constraints**
 - **Forces Consideration of Preceding / Succeeding activities.**

Precedence Method Schedule

- **Weaknesses**
 - **Input can be Complex and Time Consuming**
 - **Updating can be Onerous**
 - **Results are Only as Good as the Input. Logic Flaws can be Hidden and Yield Faulty Projections.**

Critical Path Method Schedule (CPM)



Critical Path Method Schedule (CPM)

- **Strengths**
 - **Time Scaled Logic Shown**
 - **Logical Graphic Display**
 - **Facilitates Alternative Planning**
 - **Displays Critical Path**
 - **Computer Generated Sorts of Key Data**
 - **Quick Summary and Milestone Plots**
 - **Relative Ease of Resource Loading**

Critical Path Method Schedule (CPM)

- **Weaknesses**
 - **Computer Required**
 - **Tedious Data Entry**
 - **Complex Calculations of Time Requirements**
 - **Logic Blocks to Quick Schedule Revisions**
 - **Must be Maintained**

Schedule Specifications

- **Assign responsibility for preparation.**
- **Define content.**
- **Designate software.**
- **Designate updating responsibility.**
- **Balance information needs with flexibility and complexity.**

Schedule Specifications

- **Contract Language**
 - **Responsibility for Preparation**
 - **Submission Dates**
 - **Preliminary**
 - **Final**
 - **Approval by all parties**
 - **Updates**
 - **Frequency**
 - **Content**
 - **Tables/Graphics**
 - **Changes since last Update**
 - **Electronic Media**



Schedule Specifications

- **Cost Load Schedule**
 - **Advantages**
 - **Simplifies billing**
 - **Appears to tie progress to payment**
 - **Disadvantages**
 - **Complicates data input**
 - **Payment needs often lead to manipulation**

Schedule Specifications

- **Resource Loading**
 - **Manpower (Trade)**
 - **Cost**
 - **Equipment**
- **Every additional resource adds to initial coding complexity and ongoing record keeping workload.**

Schedule Specifications

- **Linking schedule to payment**
 - A good idea?

Specific Examples of Design-Build and Construction Projects That Worked Well and Those That Did Not Work Well

Disputes and Design-Build Projects

It seemed like a good idea at
the time.

Legal Issues – Case Histories

Scope of Work

- **Wild-Fire, Inc. v. Laughlin, et al**
Ohio App. 2001
- **Laughlin & Scanlan – design-builder**
- **Wild-Fire – electrical subcontractor**
- **Original Bid – ‘stock’ plans (hotel/motel)**
- **Amended due to specific project needs and code/utility requirement**
- **One service on plans - three required for project**
- **Sub – bid includes the ‘stock’ only**
 - scope dispute
 - prescription vs. performance
- **D-B – bid includes ‘project requirements’**
- *Trial court denied the sub’s claim (breach) and rejected the claim for damages*

Good Faith and Fair Dealing

How Much is Too Much? (Scope Change)

Schweiger Construction v. GSA

- 49 Fed. Cl. 188 (Fed. Claims Ct. 2001)
- IDQ contract – value range \$175k - \$2.64M. First contract: remodeling 1600 work stations on 8 floors; compressed schedule, rigid sequencing and off-hour work
- Result - Schweiger losing lots of money!

Schweiger – looking for an ‘adjustment’.

- GSA quantity estimates inaccurate and Schweiger relied upon these estimates to bid

Schweiger sues based on...

- Change to D-B execution
- Large scale project
- Premium construction time & condensed schedule

GSA sought summary judgment due to ...

- IDQ contract prohibits such claims

The Court...

- Agreed the GSA only required to estimate the minimum, but...
- ...precluded the summary judgment against Schweiger, thus allowing the suit, although Schweiger has a ‘tremendous burden of proof.’

Result:

- Schweiger left with (largely) intact complaint and the right to ‘discovery’ to find suitable evidence to substantiate their case.

Thus...

- Public procurement based on IDQ\IDD process should aim for the final ‘scope’ to be relatively consistent. Big changes in scope of design, installation and procurement may open agency to ‘bad faith’ claims.

Legal Issues – Case Histories

Teaming Relationships

- **Henderson v. City of Crystal Lake, 743N.E. 2d 713 (Illinois 2001)**
- **Henderson & Son – builder low bid on \$13.9M project.**
- **Baxter & Woodman – supervising engineer representing the City - 50 year history of service**
- **Baxter owns 79% of B&W/Design Build – Henderson is the ‘build’ component**
 - **100% of B&W\D-B’s revenue came from ‘Henderson teamed’ projects.**
- **City concerned over ‘conflict of interest’; revoked award to Henderson on project and awarded it to next ‘responsible low bidder’.**
- **City**
 - **value of Baxter’s long term ‘knowledge’ makes replacement impractical**
 - **Concerns about ‘compromised objectivity’ of Baxter in supervising it’s business partner, Henderson.**
- **Henderson – City had no right to revoke the award based on ‘appearance of impropriety’**
- *Appellate court supported City’s decision – ‘...an exercise of City’s discretionary power in the public interest.’*
- *...not the result of ‘unfair dealing, favoritism or...arbitrary conduct’*

Legal Issues – Case Histories

Ownership of Documents

- Sokoloff v. Harriman Estates Development Corp. 96 N.Y. 2d. 409 (New York 2001)
- Harriman awarded \$65k pre-construction contract to furnish ‘architectural and site plan/landscape design; assist in obtaining a permit.’ Harriman retained an architect.
- Harriman submits a \$1.9M price to build the house as designed – higher than original estimates.
- Sokoloff rejects; demands the plans.
- Harriman refuses – ‘we build or nobody builds!’
- Sokoloff sues based on ‘specific performance’ of the pre-con services contract.
- Harriman rejects - plans not unique, thus ‘specific performance’ is not applicable.

- N.Y. Court of Appeals
- Initial – specific performance not ordered as monetary compensation can correct
 - (do over!)
- Sokoloff’s counter – design is unique and performed only by the plaintiff, thus ‘specific performance’ is valid.

On appeal the Court accepted:

- Harriman was acting as Sokoloff’s agent, thus it has a ‘fiduciary duty of loyalty’ to the Sokoloff’s;
- ...as such, Harriman must provide the owner the documents which it rightfully purchased without regard to impacts on Harriman outside of the original contract.

Key issues:

- Establish rights of ownership and transfer in multi-step processes.
- Owners have the right to expect their design-builders to look out for their best interests.

A design-builder ‘standard of care’?



Legal Issues – Case Histories

Schedule-Related Claims

- **Milford Power v. Alstom Power, 2001 Conn. Super (Connecticut 2001)**
- **Milford entered a \$230M contract with JV of Alstom and Black & Veatch to EPC a power plant. Contract allowed for price adjustments and extensions in the event of force majeure events.**
- **13 months before completion, a major site accident – 2 deaths & major damage. OSHA investigates and closes site for a period of time.**
- **1+ month later JV sends notice to Milford of ‘force majeure’ associated with events; 7 months in, JV cites ‘lack of manpower’ as force majeure event.**
- **Milford rejects force majeure ‘status’ and lack of timely notification.**
- **JV counters that notice not an issue as Milford is aware of events and is not harmed by late notice.**

The Court....

- **Rejected JV’s excuse for non-compliance; granted summary judgment**

The court cited

- **...contract terms that stated 72 hours as target maximum notice time and NEVER over 30 days.**
- **...contract contained a ‘time is of the essence’ clause**
- **Agreed that Milford was aware, but Milford was NOT aware that a force majeure claim was going to be lodged.**

Legal Issues – Case Histories

Schedule-Related Claims Redux

- Parsons Corp. v. Brooklyn Navy Yard Cogeneration Partners 2001 Cal. App. (California 2001)
 - Parsons Corp. in \$277M contract with BNYCP to deliver a 286 MW cogen plant. Contract included milestones for ‘capacity performance test’ & ‘turnover’.
 - Milestones hit late; Parsons requested time extensions due to: winter storms, fire in site adjacent building and BNYCP failure to perform ‘owner’ work. Total: \$125M.
 - BNYCP sought LDs for delay plus \$56M for poor workmanship.
 - CA Litigation – Parsons ‘writ of attachment’ against BNYCP – value: \$43M.
 - Superior allowed the writ; Appellate denied appeal.
 - ...Parsons presented credible evidence of excusable delays & fully performed its obligations.
 - ...Rejected BNYCP’s contention that the writ should be reduced due to set-offs.
 - Many owners believe ‘LD offset’ trumps ‘payments due’.
 - BNYCP used ‘offset’; Parsons used ‘writ’ counterpunch.
 - ‘Writ’ affects project financing for owner.
 - The attached \$43M not available for ongoing project costs – need for ‘other money’.
- Typical contractor ‘excuses’ for failure to notify;
- Owner not prejudiced by lack of notice.
 - Owner had actual knowledge of (source of) delays.
 - Literal enforcement would be unfair and cause substantial loss.
- Courts - if the contract requires ‘notice’ to establish a claim, then notice must be given.
- Labor force majeure claims - denied - 0

Legal Issues – Case Histories

Good Faith and Fair Dealing

- **Union Carbide v. Siemens Westinghouse, S.D. NY 2001 WL 91714 (New York 2001)**
- **UC contracted Fluor to EPC a cogen facility on a site in La. UC also contracted with Siemens Westinghouse for 2 generators. Generator contract was ‘assigned’ to Fluor. Westinghouse & Fluor entered a P.O. for the turbine gensets.**
- **Contract: commercial operation by Apr 97; reliable operation by Jan 99.**
- **Numerous problems between 97 - 99.**
- **UC sued – alleged breach of contracts, warranties and good faith & fair dealing; also professional negligence (Fluor).**
- **UC suit against Westinghouse – as 3rd party beneficiary.**

- **Fluor’s argument: claim dismissed on ‘economic loss doctrine’.**
- **UC Claims: Fluor – breach of good faith**
- **Poor workmanship - ‘willful dilatory conduct’; ‘repudiated its obligation to repair’; ‘failed to ...construct a facility with a useful life of 15 years’**

The Court decided...

- **A breach of good faith is separate from breach of contract.**
- **Such claims must be supported by specific acts showing breach was in bad faith prompted by ‘sinister motive’.**

The Court dismissed...

- **UC ‘good faith’ - same allegations used for the contract breach claim.**
- **UC Unfair Trade Practices - required more proof than simple breach - ‘immoral, unethical, unscrupulous activities’**
- **UC ‘bad faith’ – which sought consequential damages – no factual support.**

Legal Issues – Case Histories

Public Sector Procurement

- **Siemens Transport Sys. v. Metropolitan Council and Bombardier Transit Corp., 2001 Minn. App.(Minn. 2001)**
- **Council issued RFP for ‘BAFO’ submission from Bombardier, Siemens and 5 others for LRVs for LRT project. Offer to include 18 LRVs plus ‘service’; with option for 24 more LRVs at the same price.**
- **BAFO terms – highest rank = winning bid.**
- **Panel to award on “BAFO yields the highest combined score...best conforms to the overall long-term interests of the Council.”**
- **Siemens score = 83.14; Bombardier score = 82.23 but Bombardier awarded contract - considered ‘best value.’**
- **Siemens filed protested on grounds of BAFO terms and request for reconsideration.**

The Court...

- **Denied both applications.**
- **Siemens appealed – ‘arbitrary, capricious and/or unreasonable’ award.**

Appellate Court..

- **Rejected Siemens’ appeal.**

Appellate Court noted...

- **Selection not to rest ‘solely’ on the score and rank**
- **Noted language of ‘best conforms to the overall long-term interests of the Council.’**

Details...

- **Siemens best price on original 18, but the additional 24 would cost \$5.2M more than Bombardier offer.**
- **“the wording of the request was sufficient to alert ...that the evaluation panel would first look to price and quality together,...”**



Legal Issues – Case Histories

Subjective Selection – Competitive Negotiations

- **Paxson vs. United States**
 - (U.S.C. 706(2)(A) - 1988
- **D-B delivery of a SCADA system at a naval base.**
- **RFP cites factors to be used in ‘Evaluation & Award’**
- **Bid Scoring system: Max = 10,000 points**
- **Paxson = 8,690; Successful Bidder = 8,115**
- **Proposal - Technically Superior**
- **Denied the contract based on a decision by the Contracting Officer.**

- **Paxson - abuses in the application and evaluation of the selection criteria – improper award.**

Court agreed ...

- **...errors in RFP listing of criteria**

However...

- **Paxson ‘failed to establish that it was materially misled or otherwise prejudiced’ – decision not arbitrary and capricious.**

Design Build Implications

- **Without hard and fast documents to ‘bid’ to the D-B, entity has to make a judgment as to which criteria to emphasize in its proposal.**
- **Negotiated procurement for public projects introduce a stream of award disputes.**

Legal Issues – Case Histories

Dispute Process

- **Fluor Daniel v. Solutia, Inc.** 147 F. Supp. 2d. 648 (S.D. Texas 2001)
- Solutia retained Fluor for EPC services on facility in Alvin, TX. Contract contained detailed disputes clauses – required first attempt to be resolution of dispute through management hierarchy of each company.
- Failure to resolve would go to (in good faith) CPR Model Procedures for Mediation of Business Disputes. If unresolved in 30 days – each party free to go to litigation.
- Parties disagreed as to definition of ‘procedure’ for 30 day time window. Solutia – ‘procedure’ = sit down with mediator (Feb 7 – 8, 2001)
- Fluor – ‘procedure’ = selection of mediator (Nov 2, 2000). Fluor filed lawsuit on Feb. 8, 2001.

The Court...

- Citing lack of specific language in the contract deferred to CPR guide for interpretation.
- Written CPR procedure includes ‘Selecting the Mediator’ and mediation ‘proceeding’.

Court upheld Fluor’s 30 day interpretation.

Other Solutia arguments...

- Fluor’s interpretation would nullify the ability to mediate since a mediation session cannot be scheduled within 30 days of selection.
- Fluor never gave written notice of intent to withdraw nor mediator’s intent to withdraw.

Court dismissed both Solutia arguments.

- Effectively allowing filing prior to mediation.



Legal Issues – Case Histories Performance: Impossibility vs. Non-Performance

- **Impossibility of Performance vs. Nonperformance**
- **Contractor may assume risk by attempting to ‘achieve’ or via express warranty of results**
- **Owner may assume risk through contract changes or by drafting the specifications**
- **Key factors**
 - **Nature of the contract & specs**
 - **Relative knowledge of the parties**
- **Performance requirements and ‘state of the art’**
 - **Bethlehem Corp. vs. United States(1)**
 - **Colorado-Ute Electric vs. Envirotech(2)**

1 –462 F.2d 1400 (Ct. Cl. 1972) ASBCA No. 10595, 66-1 (1966)

2 – 524 F. Supp. 1152 (D. Colo. 1981)

Decisions:

- **Termination for default - Contractor assured client before award that results could be achieved.**
- **Contractor warranted ‘continuous compliance’ – ruling in favor of the Utility - Uniform Commercial Code: ‘sale of goods’ rather than service contract.**
- **Default termination converted to ‘convenience’ - agency had 18 years of experience seeking such a product to no avail – superior knowledge and expertise.**



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- The cases cited in the previous slides are from the following texts.
- Design-Build Contracting Handbook, Second Edition, Cushman and Loulakis, 2001, Aspen Law and Business, New York.
- Design-Build Lessons Learned: How 2001's Cases May Affect You, Loulakis, 2002, Wickwire Gavin, P.C., Vienna, VA.



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