

**Collaborative Contracting:
Identifying the Right Contract
and the Right People**

Infrastructure, Construction & Procurement Group
Webinar: November 2023

CLARK WILSON

SPEAKERS:
Satinder Sidhu, Partner
Roy Nieuwenburg, K.C., Partner
Scott Lamb, Partner
Rosalie Clark, Partner

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AGENDA

PART 1 – *Traditional Project Delivery Methods:*
Satinder Sidhu

PART 2 – *Collaborative Contracting:*
Scott Lamb

PART 3 – *Integrated Project Delivery:*
Rosalie Clark

**PART 4 – *Early Stage Project Delivery Approaches and
"the right people":***
Roy Nieuwenburg, K.C.

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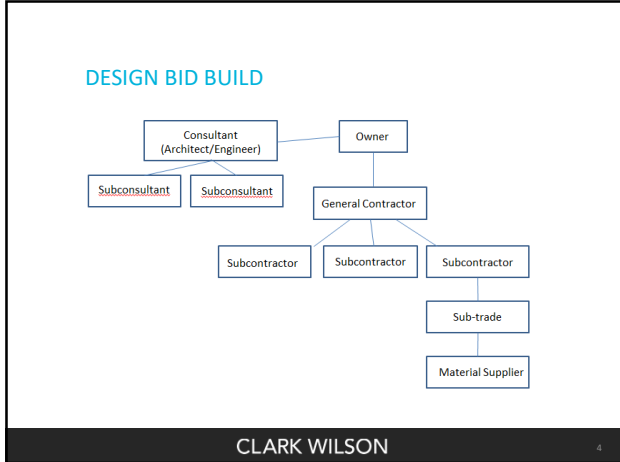
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**PART 1:
Traditional Project Delivery
Methods**

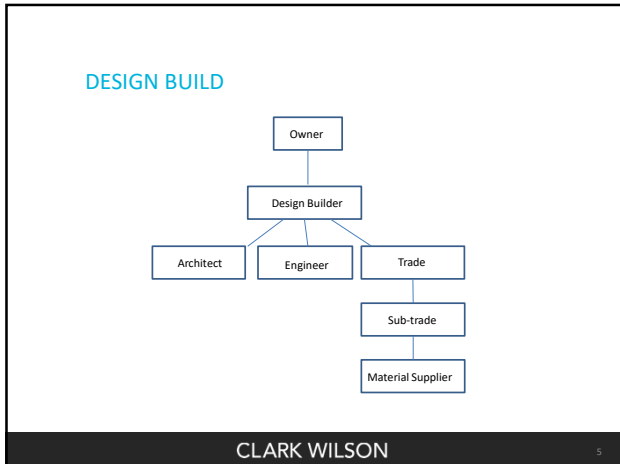
Satinder Sidhu, Partner
604 643 3119 | ssidhu@cwilson.com

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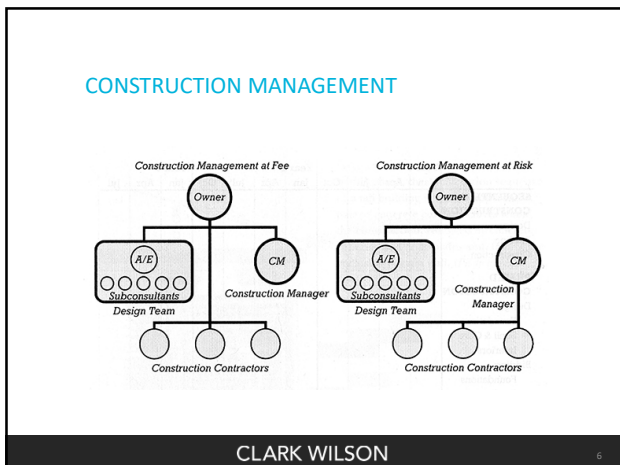
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CONTRACT FORMS

- CCDC
- CCA
- RAIC
- Engineering associations
- MMCD
- MOTI
- City and Municipal
- Bespoke contracts

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CCDC CONTRACTS

- 1) general (CCDC 2, CCDC 3, CCDC 4, and CCDC 18)
- 2) design-build (CCDC 14)
- 3) construction management (CCDC 5A, CCDC 5B and CCDC 17)
- 4) integrated project delivery (CCDC 30)

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**PART 2:
Collaborative Contracting**

Scott Lamb, Partner
604 643 3103 | slamb@cwilson.com

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What is Collaborative Contracting Generally?

- Emphasizes co-operation, transparency and shared risk and reward in construction projects.
- Shift away from traditional construction procurement and contracting models (i.e. shift away from "design-bid-build" sequential process).

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Why Collaborative Contracting

- 67% of projects 25% over budget and over schedule for completion.
- Buildings are increasingly complex to design and build – new technologies, new construction practices and increased demands for end-users of buildings (eg. new construction standards such as LEED and new environmentally friendly technologies and practices).
- Demands to accelerate design and construction – start construction projects without clear designs (eg. emergency bridge building after natural disasters and need to get to market to sell residential home projects).

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Many Types of Collaborative Contracting

1. Design Assist Construction Management

- Owner engages construction manager early in design phase to provide input on constructability, cost estimates and value engineering.
- The construction manager works collaboratively with the design team and owner to optimize the design and ensure it aligns with the budget and schedule requirements.

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Many Types of Collaborative Contracting

2. Progressive Design-Build

- Owner engages a design-builder based on qualifications.
- Design-Builder collaborates with owner's design team to develop concept, project/building requirements, design, budget and schedule.
- Often the design and construction phases overlap.

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Many Types of Collaborative Contracting

3. Integrated Project Delivery (IPD)

- Owner, design team and contractor create an integrated team early in the project concept development or design.
- Integrated team enters into a multi-party agreement to work together and share risk in the project.

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Magic in Collaborative Contracting?

- Not contractual or legal.
- Internal or external leadership to facilitate:
 - open communication
 - relationship management
 - decisive and timely decision-making
 - simplify technical information

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Two Contract Models to Review in Detail

- Construction Management with right to convert to fixed price.
 - variations of this model used for many years
 - used in various types of projects from residential, commercial and industrial infrastructure
- Integrated Project Design (IPD)
 - relatively new model, particularly in Canada
 - used mostly in public sector and industrial infrastructure projects.

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Construction Management with Right to Convert to Fixed Price

Procurement

- Selection of Construction Manager/General Contractor/Design-Builder different than design-bid-build.
- Qualifications vs. Price (RFP v. RFT)

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Construction Management with Right to Convert to Fixed Price

CCDC 5A (2010) Construction Management Contract with right to convert to CCDC 2 (2020) Stipulated Price Contract or CCDC 14 Design-Build Contract

- Use CCDC documents as they are a Canada wide standard
- Familiar to Canadian construction industry
- Easy to see and understand where shifts are made to standard terms in the supplementary conditions.

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Construction Management with Right to Convert to Fixed Price

CCDC 5A Construction Management structure for pre-construction phase

- Fixed monthly fee paid for pre-determined period or on milestones
- Construction manager works with owner, design team and consultants on
 - design
 - budget
 - schedule
- Rely on well known pre-construction activities and progression set-out in Schedule A-1 of CCDC 5A

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Construction Management with Right to Convert to Fixed Price

Construction Phase

- Continue with construction management in whole or in part (CCDC 17 Trade Contractor Stipulated Price Contracts)
- Option to convert to fixed price for CCDC 2 (2020) Stipulated Price Contract
- Transparency in subcontract/trade pricing
- Price certainty, understood design, realistic schedule
- Off-ramp of option to terminate contract and construction manager.

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Construction Management with Right to Convert to Fixed Price

Off-ramp – right to terminate

- Key difference with CCDC 5B contract which is a cost plus contract with no right to a fixed price contract and right to terminate.
- Owner's right to use all design and procurement documentation with alternative contractor or procurement process.

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Construction Management with Right to Convert to Fixed Price

CCDC 2 (2020) Stipulated Price Contract with Supplementary Conditions

- Construction Manager undertakes role as General Contractor
- Standard form alone is contractor friendly. Need to consider:
 - Builders Liens
 - Change Order/Change Directive
 - Delay Claims
 - Termination
 - Indemnities
 - Warranties
 - Deficiencies

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Construction Management with Right to Convert to Fixed Price

Reasons for Success in Contract Model

- Well-known standard form contractual terms.
- Risk is understood and reasonably allocated.
- Collaborative process is set-up early and all parties understand and agree to achievable design, budget and schedule.
- Transparency.
- Cost and schedule certainty.
- Parties are accountable.

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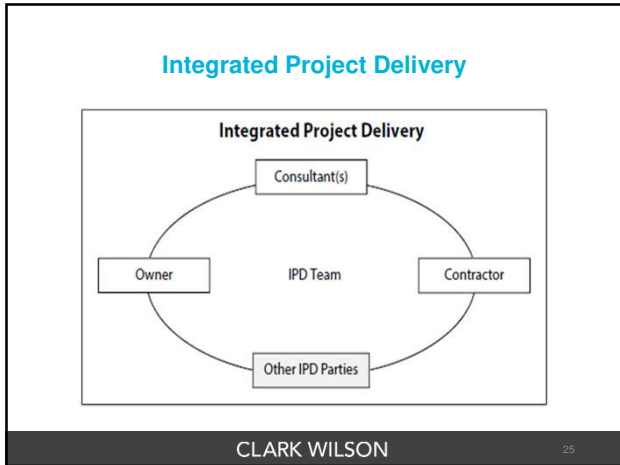
PART 3: Integrated Project Delivery

Rosalie A. Clark, Partner
604 643 3190 | rclark@cwilson.com

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Integrated Project Delivery

CCDC 30:

- Addresses issues specific to integrated project delivery (IPD) projects including scope allocation, payments, changes, conflict management, termination, insurance and contract security, and liability allocation.
- The pricing structure is cost plus with a target price.
- The profits of the design/construction team are identified and allocated to a risk pool that remains at risk subject to the achievement of mutually agreed project objectives.

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Integrated Project Delivery

Management of the Project:

- **PMT (Project Management Team):** consists of one representative appointed by each party to this *Contract* to provide management-level guidance for collaborative planning, design and construction of the *Project* to achieve the *Project Objectives*.
- **PIT (Project Implementation Team):** interdisciplinary, cross-functional teams organized by the *PMT*, and consist of appropriate representatives of the *Consultant*, *Contractor*, *Other IPD Parties*, subconsultants, and subcontractors to provide working-level guidance for the implementation of elements of the *Project*.
- **SMT (Senior Management Team):** consists of one senior executive representative appointed by each party to the *Contract*.

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Integrated Project Delivery

Key Contract Concepts:

- **Base Target Cost:** target cost of the *Design Services* and the *Work* which consists of all *Reimbursable Costs* to complete the *Project* as described in the *Base Program*, an appropriate contingency and appropriate allowances (including Risk Pool).
- **Reimbursable Costs:** stipulated in Article A-5 of the Agreement – REIMBURSABLE COSTS and include:
 - The actual costs supported by receipts, invoices or other suitable documentation that the *Design/Construction Team* incurs in performing the *Design Services* and the *Work*, and as identified in Schedule B – ALLOWED COSTS
 - Agreed on overhead.
 - All cash discounts, trade discounts, rebates and refunds, and all returns from sale of surplus of materials and equipment applicable to the *Work*.

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Integrated Project Delivery

Risk Pool

- **Risk Pool:** identifies the profit that will be shared by members of the *Design/Construction Team* and that remains at risk subject to the achievement of agreed project objectives (set out in Validation Report).
- Risk Pool may be adjusted by selection of "Added Value Incentive Items" from design / construction changes.
- The *Design/Construction Team* will get a larger payment out of the Risk Pool if the Final Target Cost is under budget.
- Errors / delays by the *Design/Construction Team* may result in effective reductions from the Risk Pool and/or additional claims by the Owner.

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Integrated Project Delivery

Validation Phase and Validation Report

- **Validation Phase:** "that phase of the *Project* commencing upon the *Effective Date* and extending through to the acceptance of the *Validation Report* by the *Owner*."
- **Validation Report:** "a written report as described in paragraphs 4.1.3 and 4.1.4 of GC 4.1 – VALIDATION PHASE."
- On acceptance of the Validation Report, the parties will proceed with the *Work*.
- Owner may terminate if does not accept the Validation Report.

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Integrated Project Delivery

Design / Procurement Phase:

- Design Services are performed using a Target Value Design.
- GC 4.2.2 The *Design Services* shall be performed using *Target Value Design*, which shall endeavour to create additional value by identifying alternative systems, means and methods to reduce capital expenditures reducing life-cycle costs, analyzing and improving work-flow, improving constructability and functionality, providing more operational flexibility, and endeavouring to reduce the actual *Reimbursable Costs* while maintaining or increasing the quality and overall function of the *Project*.

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Integrated Project Delivery

Construction Phase

- The Construction Phase is marked by the PMT issuing a Notice to Proceed.
- The Construction Phase includes (see GC 4.3):
 - Completion of Design Services;
 - Completion of procurement;
 - Performance of the Work;
 - Final testing, start-up commissioning; and
 - Delivery of all drawings, maintenance manuals, warranties, etc.

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Integrated Project Delivery

Disputes

- The approach to disputes is pretty closely matched to other CCDC contracts:
 - PMT has responsibility to manage conflicts that arise;
 - if PMT cannot resolve, dispute goes to SMT;
 - if SMT cannot resolve, Owner gives direction;
 - if parties dispute Owner direction, submitted to mediation;
 - if mediation is unsuccessful, the parties may proceed to arbitration or the courts.
- See Part 8 of the CCDC 30. Pay attention to Notice periods.

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PART 4:
*Early Stage Project Delivery Approaches
and "the right people"*

Roy Nieuwenburg, K.C., Partner
604 643 3112 | rnieuwenburg@cwilson.com

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the right people

Don Mackie: "EPCM(C) Management of Mining Projects", 2005

- "My career spans more than forty years. During that time I have been fortunate to work with the best and worst in the world of project management, sometimes within the same organization. Working in huge projects, I have experienced crisp management, while at other times I have been buried in a bureaucratic maze. Both large and small consulting organizations come to mind ..."

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the right people, continued

CHAPTER 2 - THE SCIENCE OF PROJECT MANAGEMENT
Five Basic Elements of Project Management:

- There are five basic requirements for conducting a successful project. **In order of importance**, they are as follows:
 - Choosing the right people**
 - Choosing the right people**
 - Choosing the right people**
 - Setting up the right organization
 - Using the right systems
- Only three requirements, you say? Perhaps, but the importance of selecting the right people cannot be emphasized enough. You can run a project with a poor organization and inferior systems and have reasonable success, but good organization and superb systems can never substitute for having good people in place.

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Discuss the use and concepts of:

- pre-construction services contracts,
- owner's representative agreements, and
- project management contracts,
- how they differ from (and can dovetail with) **construction management**, and **design build** (with its *owner's statement of requirements*), formats

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War Stories

Anecdote 1:

(institution) engaged a project manager, ramped up, and then went on disability. Can fully understand, but still "left in the lurch".

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War Stories – Anecdote 2

2011 THIRD QUARTER INTERIM REPORT - LETTER TO SHAREHOLDERS

[ConstructCo] had record total backlog of \$1,517.5 million as at September 30, 2011, ... [ConstructCo] announced several projects that were added to backlog in Q3, including three Alberta hospitals located in the municipalities of Medicine Hat, Lethbridge and Edson, a Vancouver office tower and the renovation and construction of Tache Hall, an art and theatre complex in Winnipeg, Manitoba. ... **All of these backlog additions are construction management assignments, which do not carry the price and schedule risk of fixed price projects.**

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War Stories – Anecdote 2, continued

Where do you think they would assign their best people?

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Horizontal lines for notes

War Stories – Anecdote 3 – Owner’s Representative Agreement

“... frequently, an owner will engage a project manager under a project management agreement. In such case, the owner still has to instruct the project manager. Who, then, would instruct the project manager? Ideally (and usually), the Owner will have internal resources (and sometimes will specifically hire an employee, for this reason, or co-opt a manager or procurement person in charge), for this purpose. If the Owner does not have such have internal resources, then ... the “owner’s representative” approach can be considered. I can see the need for an owners representative, where the owner is unsophisticated and inexperienced, and ‘just has no idea’ about construction. But this begs the question – who then would instruct the owner’s representative?”

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Horizontal lines for notes

What can you do to get “the right people”

- Importance of interviews.
• Call the references (if necessary read ‘between the lines’).
• Focus on track record, and past experience / past dealings.
• Be wary of the “bait and switch”.

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Horizontal lines for notes

What can you do to get “the right people”

- It is too late, if you have to rely on this, but even so try to include:
 - right to approve the new person (which approval shall not be unreasonably withheld or delayed)
 - if “quit”, that is one thing, but “*can’t switch if still in the organization*”
 - right to terminate / or (maybe) “right to terminate with break fee and compensate for additional costs of switching to new entity”

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What can you do to get “the right people”

- Having such provisions might serve to keep the original person in place.

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Thank you, any Questions?



Satinder Sidhu
Partner
604 643 3119
ssidhu@cwilson.com



Roy Nieuwenburg, K.C.
Partner
604 643 3112
rnieuwenburg@cwilson.com



Scott Lamb
Partner
604 643 3103
slamb@cwilson.com



Rosalie Clark
Partner
604 643 3190
rclark@cwilson.com

These materials are necessarily of a general nature and do not take into consideration any specific matter, client or fact pattern.

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Biographies



Satinder Sidhu Partner (Moderator) | 604 643 3119 | ssidhu@cwilson.com

Satinder Sidhu is a Partner and Co-Chair of the firm's Infrastructure, Construction & Procurement Practice. Satinder advises her clients on a wide range of complex construction related services including construction contracts, builders' lien claims, contractual disputes, construction delay and deficiency claims, and insurance coverage. Satinder has provided legal services on a variety of projects in B.C. and Alberta, representing owners, general contractors, design professionals, sub-contractors, material suppliers, and insurers. Satinder is strategic and pragmatic in her approach to construction contracts and claims and has recognized for her expertise in Best Lawyers in Canada.



Roy Nieuwenburg, K.C. Partner | 604 643 3112 | rnieuwenburg@cwilson.com

Roy Nieuwenburg is a Partner and Co-Chair of the firm's Infrastructure, Construction & Procurement Practice. Roy has vast experience in a broad array of complementary and overlapping commercial areas. He started out in the early 1980's principally as a banking lawyer, and then gravitated to a broad commercial practice, which includes real estate, leasing, development, construction, procurement, buying and selling, mergers, and extensive experience in software acquisitions and institutional work.

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Biographies



Scott Lamb Partner | 604 643 3103 | slamb@cwilson.com

Scott Lamb is a partner at the law firm of Clark Wilson and a senior member of Infrastructure, Procurement and Construction practice group. He is also the Co-Chair of Clark Wilson's Higher Learning practice group. Scott is called to the Bar in Ontario and British Columbia. He has practiced in the area of construction law for over 25 years acting for clients throughout the construction chain: large owners (both institutional public sector and private sector clients), general contractors, specialized contractors, suppliers, architects, engineers and consultants. Scott's practice encompasses all aspects of contract drafting and negotiations, dispute resolution and litigation. He has appeared as counsel in cases at the trial and appellate level. Scott has been repeatedly recognized by Best Lawyers in Canada for public procurement and Doyle's Guide, Leading Construction Litigation Lawyers, 2021.



Rosalie Clark Partner | 604 643 3190 | rclark@cwilson.com

Rosalie Clark is a partner at Clark Wilson and a member of the Infrastructure, Construction & Procurement team, working closely with owners, consultants, contractors and suppliers both in BC and across North America. Her services include drafting and negotiating construction contracts and documents, as well as acting for clients in construction disputes, including disputes relating to tendering and procurement, builders' liens, and delays and deficiencies. Rosalie is an active and engaged member of the community, regularly volunteering her time and expertise to industry organizations, including Women in Infrastructure, the Advocates' Society's Construction Law practice group and the Young Lawyers practice group, as well as the Canadian Bar Association's Construction Law committees.

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