



# COLLABORATIVE CONSTRUCTION CONTRACTS:

Opportunities and Challenges for the Energy Sector in Canada

Presented By

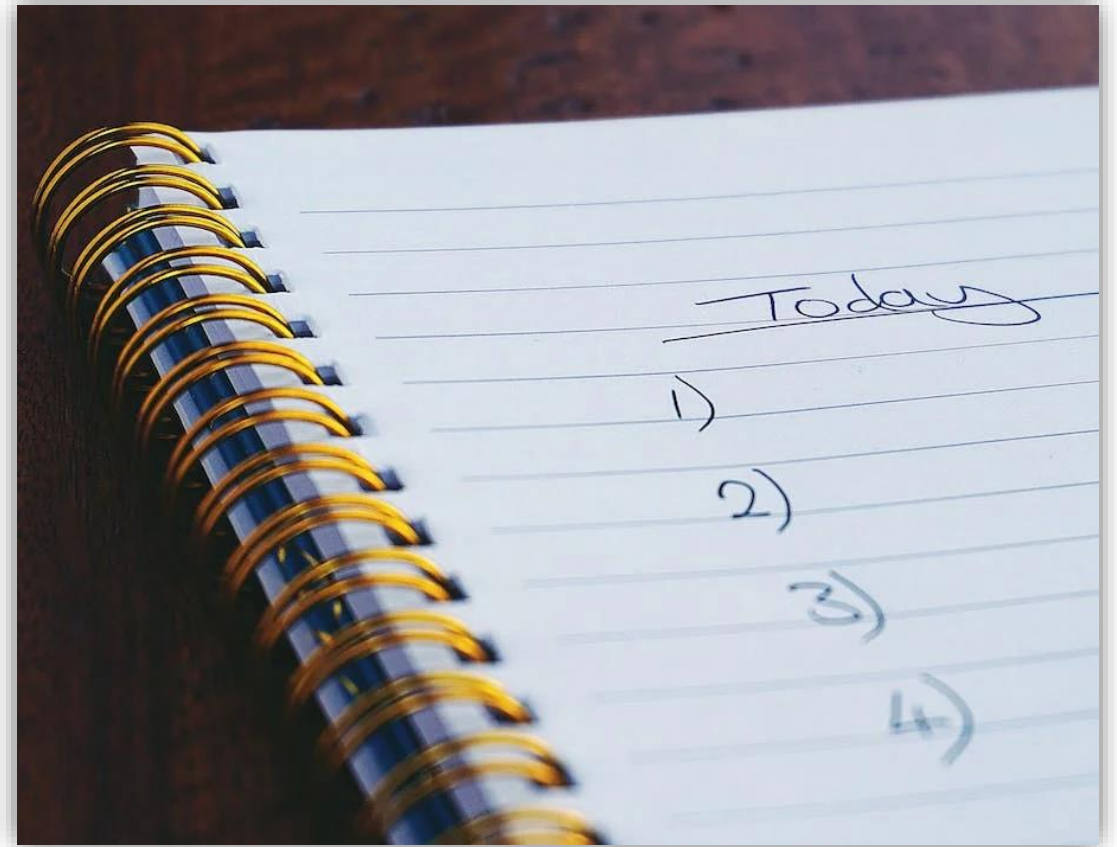
Bill Woodhead  
Theron Davis  
Robert Walker

June 16, 2023

**BLG**  
Borden Ladner Gervais

# Agenda

1. Challenges with Traditional Project Delivery Models
2. Current Market Trends
3. Collaborative Contracts
4. Conclusion and Tips for Success
5. Questions / Discussion



# 1. Challenges with Traditional Project Delivery Models

Design-Bid-Build, Design-Build, EPC, EPCM, Construction Management...

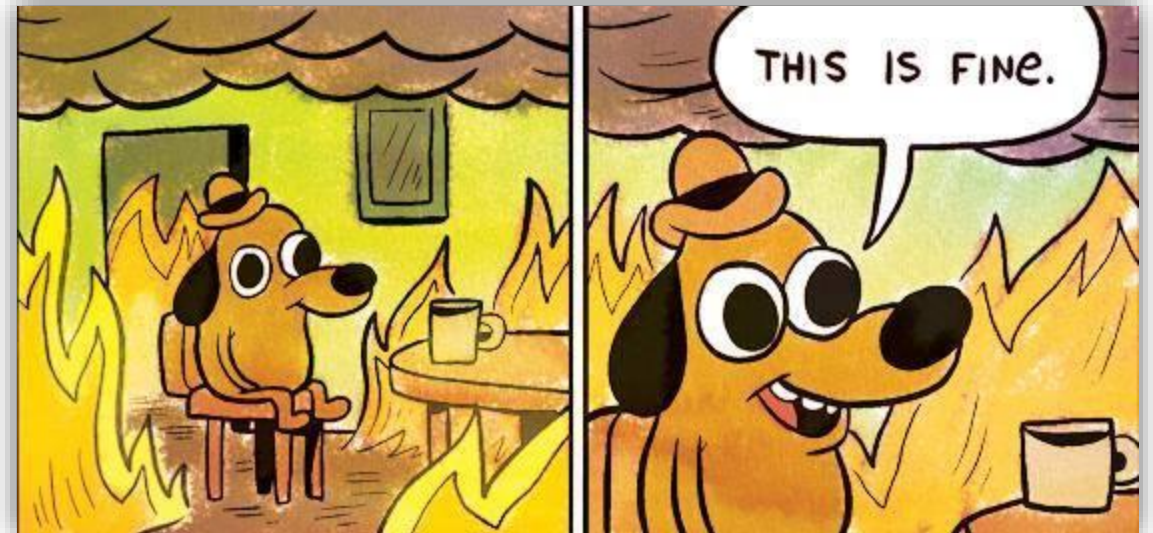


- Adversarial, Siloed
- Not Always Best Value for Money
- Subcontractor or Supplier Default, Insolvency or Abandonment
- Changes to Cost and Schedule
- Claims on Projects
- Fast-Tracking
- Conflicts of Interest

## 2. Current Trends in the Construction Industry

The construction industry is undergoing significant change due to various factors:

- Global pandemic
- Significant public and private sector demand for contractors and labour
- Increasing scale, scope and complexity of projects
- Supply chain disruption
- Cost escalation for materials, supplies and labour
- Inflation and unpredictable economic conditions
- Increased climatic events (e.g. forest fires, flooding)
- Major projects becoming significant political issues
- Increased Environment, Social and Governance





# Some Common Features of Collaborative Contracting\*

- Including all parties in the conceptualization of the project – technical and commercial planning
- Identifying, managing and mitigating project risk and uncertainties (e.g. cost and schedule challenges)
- Considering potential design and scope adjustments – constructability/cost
- Leverage expertise, skills and resource across disciplines and contracting parties
- Aiming to align commercial interests
- Pricing transparency and open-book pricing
- Early procurement of subcontractors and suppliers
- No fault and restriction on some or all disputes, subject to certain defined exceptions
- Risk sharing
- Obligation to act in good faith
- Early warning and risk management mechanisms
- Payment arrangements designed to incentivize best-for-project outcomes; pain-share gain-share
- Governance arrangements based on joint/collaborative decision-making
- Off-ramps/broad termination rights for owner and project participants



### 3. Types of Collaborative Contracts

#### Early Contractor Involvement

Owner engages contractor on consulting basis to provide constructability and procurement services during design development.

#### Progressive Design Build

Owner engages design-builder before the project requirements/specifications are finalized. During the first phase, the design-builder works with the owner to advance the design, provide cost and schedule estimates, perform procurement services and perform certain early works. The second phase initiates project execution.

#### IPD / Alliance Contracts

All major project participants (such as the owner, the contractor, the architect/engineer and certain key subcontractors/ suppliers) enter into a multi-party contract at an early stage of the project. The contract defines how collaborative decision-making and management will work.

## Early Contractor Involvement (“ECI”)



In an ECI delivery model, the owner engages a construction manager early in the design process to provide input on cost, schedule and constructability.



Often Construction Manager provides pre-construction services (similar to CM for Services) and then acts as General Contractor during construction phase (similar to DBB).



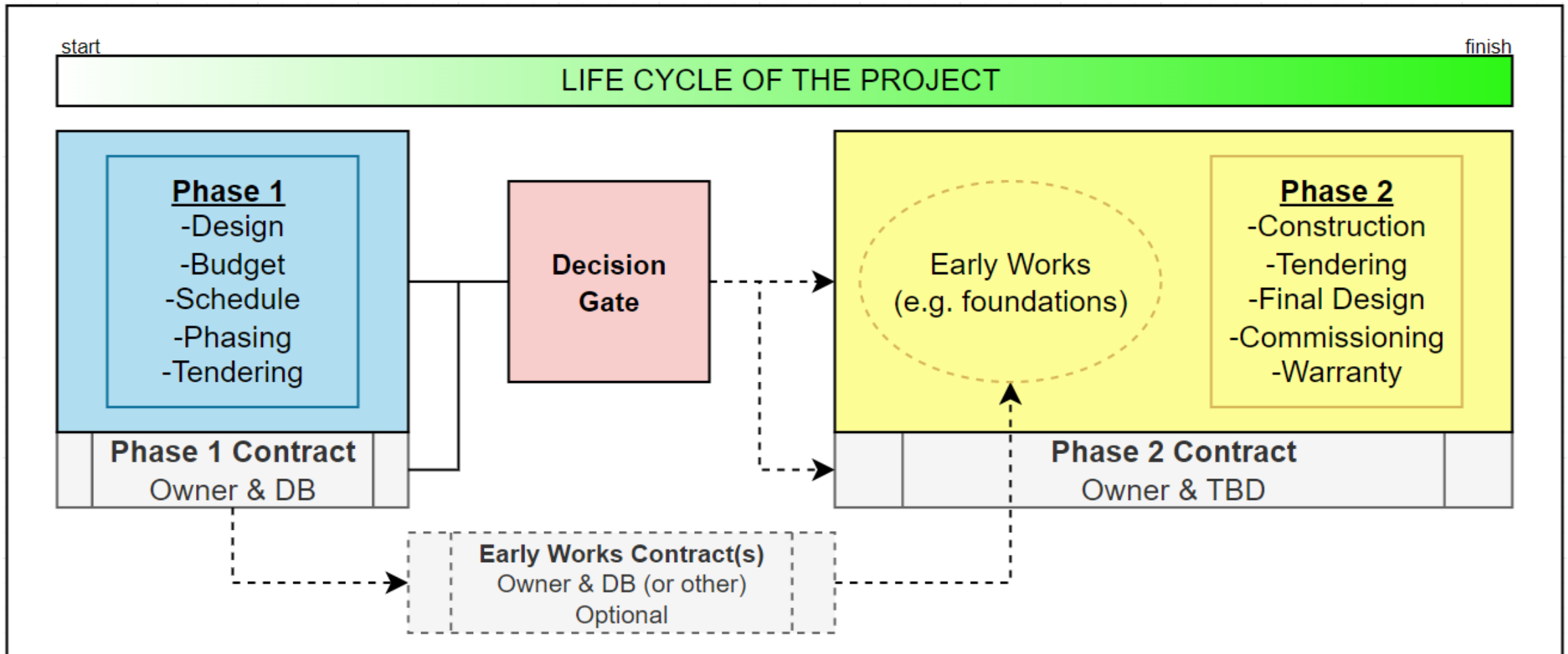
ECI delivery models have several benefits. For example: (1) pricing & schedule input; (2) value engineering; (3) open-book; (4) defer pricing and schedule commitments.

# Progressive Design Build (“PDB”)

- Owner selects a design-builder prior to finalizing functional program and budget.
- Provides opportunity for owner to have more input into the design - Owner and design-builder work together to define project requirements: design, pricing, schedule, and risk (open book & iterative).
- The designer and builder are a combined unit, facilitating cooperation across disciplines.
- Provides design-builder ability to have more information about project and risk before committing to price and schedule for final design and construction.
- The design-builder delivers the project in two “progressive” phases:
  - *Phase 1 includes the preliminary design and preconstruction services;*
  - *Phase 2 includes the final design and construction services.*
  - *Optional: Early Works may be initiated before entering into the Phase 2 Contract if necessary.*
- Can be done in one contract or in two contracts for each phase, key is to create off-ramps.
- Design-builder’s engagement in the entire process invites it to take ownership over the success of the project (e.g. getting to Phase 2 is crucial for profitability).

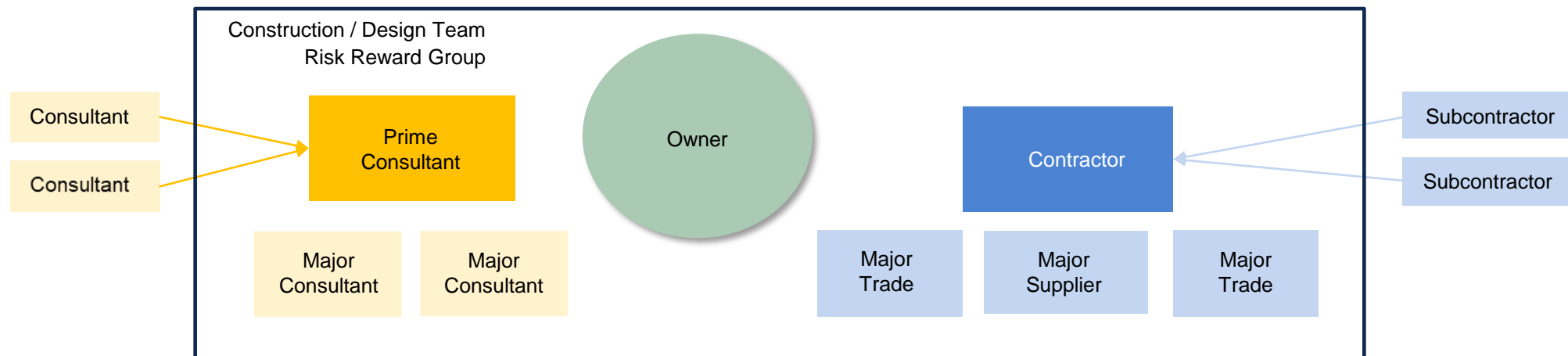


# PDB Phasing Example (Multiple Contract Model)



- A multi-stakeholder project team (Owner and “Non-Owner Participants”).
- Owner may engage multiple respondent entities to submit their qualifications for consideration.
- Alliance usually involves: (a) *Alliance Development Agreement*; and, (b) *Project Alliance Agreement*.
- Once selected, non-owner participants enter a contract with the owner to form an alliance. Non-owner participants contract with subcontractors on behalf of the alliance.
- These contracts generally include waivers of rights to sue, litigate, or arbitrate against the other party with limited exceptions - intended to prevent finger-pointing and promote collaboration.
- Common exclusions to waiver of claims: insolvency and wilful default (which might cover intentional and reckless acts or omissions; failing to pay subcontractors; express breaches like hidden pricing; etc.)
- Generally characterized by: (i) risk and opportunity sharing; (ii) commitment to “no disputes”; (iii) best for-project unanimous decision-making processes; (iv) “no fault – no blame” culture; (v) good faith; (vi) transparency expressed as open book documentation and reporting; and (vii) a joint management structure.

# Integrated Project Delivery (“IPD”)

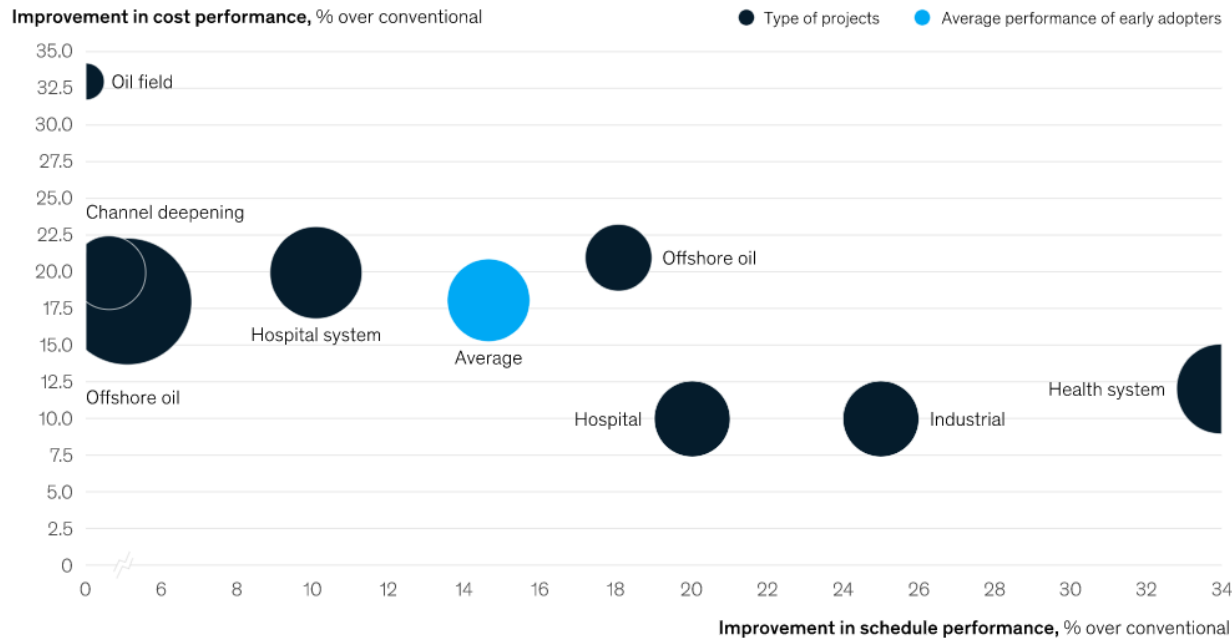


# Integrated Project Delivery (“IPD”)

- Aligns the business interests of all parties through a multi-party contractual arrangement among a minimum of the Owner, Consultant and Contractor (“all for one and one for all”)
- During the project, the IPD parties are paid their actual costs with no (or very little) profit while performing their obligations (overhead is paid).
- IPD creates a risk and reward pool that is distributed depending on pre-determined project benchmarks.
- Generally includes: (i) early involvement of key participants; (ii) shared risk and reward based on project outcome; (iii) joint project control; (iv) reduced liability exposure; and, (v) jointly developed and validated targets.
- IPD includes Five Phases
  - *(1) Solicitation; (2) Validation; (3) Design/Procurement; (4) Construction; (5) Warranty*
- Waivers of liability and financial transparency among the parties.

## Early adopters of collaborative contracts are seeing improvements in performance.

Improvements to cost and schedule performance realized in collaborative contracts



Jim Banaszak et al, “Collaborative contracting: Moving from pilot to scale-up” (January 17, 2020)

- Alliancing Association of Australasia - 2008 report shows 80% of the 30 alliance projects performed on or better than target with regard to time and cost, and only 2 projects performed worse than target in both cost and time;
- McKinsey & Company - analysis of eight collaborative contract pilots (IPD and Alliance) revealed that these agreements have resulted in a 15% to 20% improvement in cost and schedule performance compared with traditional contracts;
- Infrastructure Ontario & Infrastructure BC launching an increasing number of major projects through Alliance (and other) Models (e.g. Union Station, Cowichan District Hospital, Vernon Active Living);
- Other examples: Andrew Drilling Platform Project; New Zealand’s Northern Gateway Toll Road; Autobaan A2 Hooggelen project in the Netherlands... on or under budget.



# Challenges with Collaborative Contracts

*Every good intention comes with an unexpected consequence...*

- Agreement to Agree
- Attitude Change
- Procurement Rules Around Collaborative Contracts
- Intellectual Property Rights
- Confidentiality of Commercial Terms
- Collaboration is not Free
- Exclusionary Clauses
- Prompt Payment Legislation and Liens
- Lack of Experience
- Trade Exhaustion



## 5. Conclusion and Tips for Success

### Opportunities

- *Proactive, rather than reactive, management of projects*
- *Reduced disputes, increased engagement by project participants*
- *Provides off-ramps*
- *Attracting bidders in a contractor favourable market*
- *Realizing good value for money and avoiding paying unnecessarily for exorbitant cost contingencies*
- *Transforming “bet the company” risks into a shared burden among the parties with appropriate limits*
- *Acquisition of intellectual property, shared innovation, increased creativity to promote profit for all participants in future work*
- *Achieving on time, on budget project delivery*

### Tips for Success

- *Commit to shifting mentality, aligning goals among project participants, and continuously improving*
- *Arrange team building sessions focused on defining shared success*
- *Define, clearly understand what it looks like to abolish the blame game and how disputes will be resolved*
- *The types of models are not “watertight compartments”. Parties can combine features of collaborative contracts with primarily traditional delivery models*

# Thank You

For more information, contact:

## **Bill Woodhead**

Partner

403.232.9765

BWoodhead@blg.com

## **Theron Davis**

Senior Associate

403.232.9761

TDavis@blg.com

## **Robert Walker**

Legal Counsel, Projects & Supply Chain Management

[NTD]

robwalker@suncor.com

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this presentation. No part of this presentation may be reproduced without prior written permission of Borden Ladner Gervais LLP.

© 2023 Borden Ladner Gervais LLP. Borden Ladner Gervais is an Ontario Limited Liability Partnership.



**BLG**  
Borden Ladner Gervais