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Collaboration Over Competition: Design-Build – An Old Idea for a New World

I. An Old Idea for a New World

History Behind Design-Build

In ancient Greece, the great thinkers of that age coined the term: "...arkhitekton." At its roots "arki" meant chief and "tekon" was builder. Hence "master builder" began. In the Code of Hammurabi, if a master builder built a house which failed and killed the owner, that master builder would be slain. By 1906, cooler minds prevailed as the American Institute of Architects ("AIA") recommended that a general contractor coordinate and direct all specialty contractors.

As the split between design and construction became common, legal principles evolved separating their responsibilities even further. The United States Supreme Court confirmed this in United States v. Spearin, 248 U.S. 132 (1918). In short, the *Spearin* Doctrine generally holds that an owner impliedly warrants the information, plans, and specifications it provides to the general contractor. In practical terms, the contractor is not liable to the owner for loss or damage that results solely from design. If the contractor is required to build to the plans and specifications, then it is not responsible for following them as dictated.

As the owner-bid-build model continued, a tripod of owner, architect and builder sometimes focused on their roles rather than the result. As each emphasized their traditional roles, long lead times emerged between design and construction, cost overruns as contractors sought elbow room in realizing value through change orders and contracts overreached on shifting liability.

As the housing bubble gave way to the Great Recession, public entities developed a greater market share for design and construction. Their focus emphasized

fixed costs, tight schedules and a premium on results. Design-build took hold as an alternative which focused on results, cost savings, and efficient time delivery. It is a construction delivery method that provides owners with a single point of contact. A team is assembled and works from start to finish. Key to the efficiency is a larger role of the owner in shaping the project from its outset. The owner sits at the same table with architects, builders, engineers, estimators and select specialty contractors. With early estimation, there is the development of efficiencies and more precise projection of the delivered cost. Collaboration is the key and develops a series of ideas to be explored.

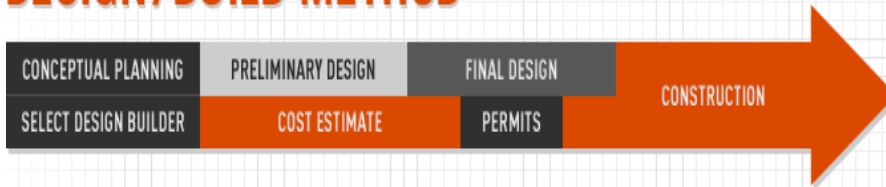
The results are significant, including streamlined schedules, phases which overlap to allow for adjustment in design, and problem solving and value engineering in real time. Team members focus on the project as a whole and support each other's progress. Three-dimension modeling is used more frequently as there is overall cost efficiency. The unique position of the owner in the vetting and selection of the design-build team is crucial as their relationships can make or break the project. Each must share risk, reward, and responsibility.

Design-build teams face greater legal liability together than the sum of their separate parts. For example, an architect is traditionally held to the reasonable and customary standard of care. In design-build, the team agreements share the risk to design, develop, and build together. This blurs the legal distinctions usually available to designers who take on more of a contractor's risk from a warranty standpoint. This, in turn, changes the insurable risk for designers.

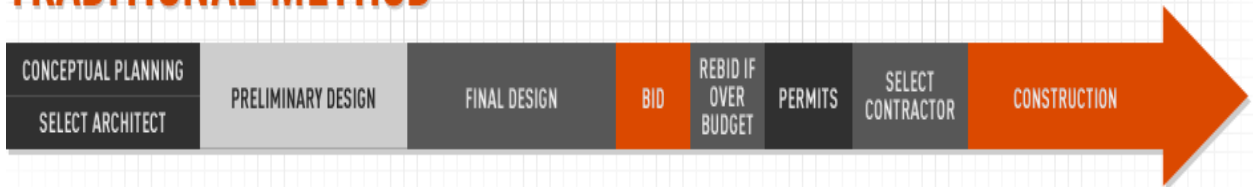
From the contractor's standpoint, as they hold so much of the control, they are able to warrant performance for a period of years. This increases value to the owner. Thus, the owner becomes the beneficiary of greater control over the project, its delivered cost, efficient scheduling, and warranted performance with the resources of a design-build team whose total responsibilities exceed their individual capabilities.

Sometimes a picture is worth a thousand words. In this instance, a chart graphically shows how the more streamlined process of design-build creates greater efficiency and efficacy in construction. By eliminating unnecessary steps, it shows how it is an improvement over the old owner-bid-build methods used for approximately the last 100 years.

DESIGN/BUILD METHOD



TRADITIONAL METHOD



The concept of the single point of contact for the owner for the project reveals how the benefit of an integrated team can create new relationships which are driven by project results.

The owner's legal relationship is with the design-builder. While it is possible that it could be a designer led team, the vast majority of the time it is the contractor. This is due to a contractor's generally accepted stronger position to obtain the insurance, bonding and other financial requirements needed for a project. Moreover, the owner provides the general design criteria and performance standards after working with the design-build team to identify and hone down the intent, scope and desired cost of the project. This is further corroborated by the input of the contractor to the designer to ensure that the project is not only buildable, but has a path to completion in the desired time frame sought by the owner.

This is the principal reason why the legal relationship between the design-build team becomes important: they are no longer separate entities with specifically defined start and stop points. Instead, the owner becomes the user and consumer of the design team's work. The designer, contractor, owner, specialty contractor and estimators have merged their efforts into one finished product. The owner, as the recipient of that product, has an expectation of its performance for its intended use. The change in the relationship has fostered a new position for all stakeholders. This, in turn, must be addressed by shared risk among its participants and insured in a way that there is a reasonable expectation of coverage for errors or omissions of contractors, designers, specialty contractors and estimators alike.

This has drawn interest in and legislation in other states. For example, in Florida, its legislature has a goal of 25% design-build projects for its Department of

Transportation. Florida Statutes, Section 337.11. Further, all state agencies are authorized to utilize design-build when it constitutes the best value in awarding contracts. Florida Statutes, Section 287.055 Its counties and municipalities are authorized to use it as well. In Texas, it has focused on design-build in transportation projects. The Texas Department of Transportation is authorized to use design-build on 3 projects annually for more than \$150 million. Texas Transportation Code, Section 223.242. Texas has moved cautiously into this area and more legislation is expected.

New Legal Environment

Like any endeavor which cuts the edge on innovation, states have shown some reluctance in accepting this delivery system. First, states are concerned about licensure for professional services as design-builders are not often licensed to provide them. Second, there is concern for anti-competitive bidding structures that run counter to public competitive bidding requirements. Third, insurance policies have reciprocal exclusions for the contractor providing design services and designers providing construction services. Fourth, conflicting municipal, state and federal laws may apply depending on the source(s) of funding for the project.

In addressing these issues, licensure can be addressed through the professional preparation, stamp, submittal and review process done through the licensed design professional(s) on the design-build team. States can address competitive bidding requirements through legislation or specific exceptions geared to savings on public projects. Insurance policies have evolved, as will be discussed below, which provides new opportunities to manage the risk. Finally, detailed review in advance by legal professionals can save the design-build team from unanticipated shortcomings to be addressed in project specific documents, procedures and if necessary requisite legal permission.

Twenty-five years ago, only 3 states allowed design-build as an acceptable project delivery method. Today, it is permitted in 43 states and the District of Columbia. Only New York, New Jersey, Pennsylvania, Alabama, North Dakota, Wisconsin and Iowa have substantive limitations where design-build can be used. 2017 State Statute Report (Design Build Institute of America, 2017).

In recent years, the developments in indemnity law have created lopsided results without relation to fault. Perhaps one of the greatest benefits of design-build is to confront the unfairness of lopsided indemnity provisions of old which no longer serve a constructive purpose on a design-build team. Like a newly written book, the reviews are mixed so far with few reported decisions; however, several important principles emerge.

The Southern District of California recently held that the *Spearin* Doctrine applies to design-build subcontractors where the subcontractor is expected to design a portion

of its work. *United States for the use and benefit of Bonita Pipeline, Inc., et al. v. Balfour Beatty Construction, LLC, et al. ("Bonita Pipeline")*, Case No. 3:16-cv-00983-H-AGS (SD Cal. 2018). The *Spearin* Doctrine generally holds that an owner (or in the *Bonita Pipeline* case, a general contractor) impliedly warrants the information, plans, and specifications it provides to the general contractor (a subcontractor in *Bonita Pipeline*). This decision is significant because it extends the *Spearin* Doctrine to design-build projects and places liability on the entity preparing the information, plans, and specifications for the project.

With respect to the written agreements required for a design-build project, there are generally two: (1) A teaming agreement; and (2) A final agreement for the design-build itself. It is crucial for all participants to be transparent about their concerns for these arrangements as the strength of the relationships will be tested during design and construction. Having to do so under the gun of a lopsided team or final agreement diminishes the chemistry of the participants, the creativity of all stakeholders and sows the seeds of discontent which may undermine the project altogether.

The team agreement sets the stage for the final agreement. Design-build team members should not expect a significant change in risk allocation, return and reward in the final agreement. Thus, clear and concise communication between team members on compensation, staffing, expectations of performance, deadlines, indemnity, insurance and participation of stakeholders needs to be clear, upfront and confirmed. Often, best practices indicate that the team agreement is made part of the final agreement.

Consider the allocation and risk of regulatory and environmental compliance with the owner. Project contracts which exclusively place responsibility for compliance on the design-builder have been strictly construed against them. For example, in *Bell/Heery, A Joint Venture v. United States*, 739 F. 3rd 1324 (Fed. Cir., 2014), the Court ruled that the addition of numerous environmental restrictions by the New Hampshire Department Environmental Sciences did not relieve the design-builder of compliance in the construction of a federal prison. Arguments regarding the disproportionate impact of the restrictions on the design-builder went unheeded as the Court focused on the language rejecting alternative legal and equitable theories on the unjust nature of imposing dramatically higher project costs on Bell/Heery. In short, say what you mean and mean what you say.

Along these lines, the Virginia Supreme Court recently evaluated the enforceability of a teaming agreement, and confirmed it is "well settled" that contractual provisions that "merely set out agreements to negotiate future subcontracts" are unenforceable. *CGI Federal, Inc. v. FCI Federal, Inc.*, 814 S.E.2d 183 (Va. 2018). There, the teaming agreement contained provisions requiring "good faith negotiations for a subcontract" in the future, and that any ultimate subcontract was "subject to final solicitation requirements" of the prime contract. These and other terms that made any subcontract contingent upon future agreements and events rendered the teaming

agreement an unenforceable "agreement to agree in the future." Following the CGI case, parties should understand that in executing teaming agreements containing this type of "agreement to negotiate in the future" language, it is likely that neither party to the agreement can be held to its commitments. If binding and enforceable obligations are intended, the parties will have to do more than use a "simple" teaming agreement.

II. New Risk and New Opportunities

With so much talent accumulated in a design team for project performance, an often overlooked feature is the insurance program and risk management. Brokers, insurers and others in the insurance industry have a broader range of experience and can add value to not only the selection of the right insurance, but the risk management tools to make it work. Central to these services is how the design-build team documents its own relationships and those with others. Contract reviews, risk prevention seminars, loss prevention and pre-claim services can make the difference in keeping a project on track and out of the courtroom. Design-build team members need brokers with experience in handling these types of projects which may be out of the realm of local retail brokers.

For large projects whose value justifies the premium, Project Specific Professional Liability insurance ("PSPL") may be a good alternative. Such coverage is written on a variety of admitted and non-admitted forms. As always, the devil is in the details; however, in general it needs to focus on designers and contractors responsible for the design-related professional services on a project. It identifies who is covered, how defense is handled and elimination of certain policy exclusions which would tend to defeat coverage such as insured vs. insured, pollution liability and other exclusions.

For smaller design-build projects that do not justify or cannot have PSPL, other alternatives like Designers and Contractors Professional Liability insurance ("DCPL") may provide project specific primary and excess coverage for construction and design services utilizing in-house or specially contracted outside services. These coverages can include broad insuring agreements, limited exclusions, credits for mediated resolution in the event of a claim, purchase of tail coverage and disciplinary proceedings assistance.

Further, care in selection of the coverage needs to take into account traditional terms of property damage and damage to your product. In situations where procured coverage did not expand traditional definitions through broad form, courts have found no coverage for defense and indemnity for design-builders. Younglove Construction, LLC v. PSD Development, LLC, 767 F.Supp.2nd 820 (N.D. Ohio, 2011).

Finally, any insurance program must take into account existing coverages, limits requirements, self-insured retention limitations and other contractual terms. The sooner the broker sees the insurance requirements and understands the design-build team and final contracts the better they can assist participants in getting the required coverage at

a competitive cost. Design-build teams also have to account for traditional coverages such as worker's compensation, comprehensive liability, auto liability and excess insurance needed.

III. Forensics: Fresh Eyes and Hands Make a Difference

A key tool for project delivery on time with performance standards met is quality control. Many forensic firms which practice in the area of litigation are uniquely suited to assist design-build teams who may be "snow blind." Often, a fresh set of eyes and hands can spot the subtle, and sometimes not so subtle but overlooked quality control issues. As it becomes more and more of an issue, especially with accelerated delivery schedules, the budgeting for and use of outside quality control review by independent, licensed and qualified firms will move from a luxury to a necessity as more exacting standards become law.

IV. Risk, Design, and Construction for Design-Build

As the efficiencies of design-build become apparent, and appreciated, the framework for addressing licensing, competitive bidding, insurance and legal issues will become more tailored to the project. Like any relatively new initiative, the systems which long held the old will eventually release to the new when the obvious is acknowledged. Design-build stakeholders, including owners, contractors, designers, specialty contractors and estimators can make the case for this unique method of delivery which will dominate the remainder of this century.

Incident to challenging times is the innovation needed to move forward. As design-build takes hold and overcomes the present objections to it, a consensus of owner, designers, builders, specialty contractors and estimators will need to reach out to all members of the insurance industry for risk management and insurance to meet these needs. The process to address these needs has only just begun with great opportunities for all stakeholders to grow in the face of challenge for the generation to come.