



2020 Construction Conference
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King of the Road: The Future of Claims Arising from Design and Construction of Roadways

I. Introduction:

After the Federal Aid Highway Act of 1956 was signed into law by President Eisenhower, a series of highways were built to connect our nation. Initially borne out of concern for national defense during the Cold War, the interstate highway system became an important public improvement in each state and locality. It became the largest public works project in the history of the United States.

For cities, concern was over whether the highways would pass them by. Thus, great effort was made to route interstate highways through significant metropolitan areas. For example, Interstate 75 was originally designed to bypass Dayton, Ohio. Only the intervention of then Governor Rhodes saved the Gem City from that fate. Similar efforts were made elsewhere.

In some instances, the interstate acted as a magnet for the development of a city around it. A good example is Interstate 4 near Orlando, Florida. 21 miles of roadway completed in 1965 for a projected use of 70,000 vehicles per day now hosts over 200,000 plus the transient use of over 75 million visitors to attractions at or near Walt Disney World.

As reported in the *Wall Street Journal* on May 29, 2019, the project to rebuild is staggering. For those 21 miles near Orlando on Interstate 4, at least \$2.3 billion dollars will be spent. It will build or rebuild approximately 140 bridges in a fast growing city. To do so, designers and contractors have to coordinate with 27 utilities to relocate a plethora of underground lines, coordinate structural elements from diverse time frames and have the project rest on porous limestone prone to sink holes and not suited to deep piles. Losses during the course of construction, alone, include personal injury claims, property damage to vehicles, flood damage from retention ponds, hurricane damage and a spike in worker's compensation claims. As infrastructure renovation appears to be on everyone's agenda, how will insurance professionals from all roles and disciplines respond to these new challenges?

This panel peers into the future of the opportunities, obstacles and assessment of risk needed to ensure the successful modernization of key infrastructure required for the United States to move ahead with confidence. We examine how the construction services will likely be delivered, how risk will be evaluated and insured, what claim profiles will likely emerge and how all stakeholders can move forward.

II. Delivery Method:

The delivery method can heavily influence the risk factors for roadway construction. Historically, the split between design and construction became common in the early 20th century. As a result, 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. This focused the importance, accuracy and integrity of the design.

As cost savings and delivery times became paramount, 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. The owner, typically the public entity, sits at the same table with surveyors, 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, BIM, 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.

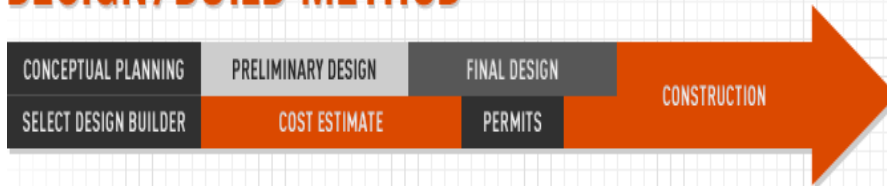
Design-build teams face greater legal liability together than the sum of their separate parts. For example, a designer is traditionally held to the reasonable and customary standard of care. In design-build, the team agreements share the risk to design, develop, and build together. This blurs the legal 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

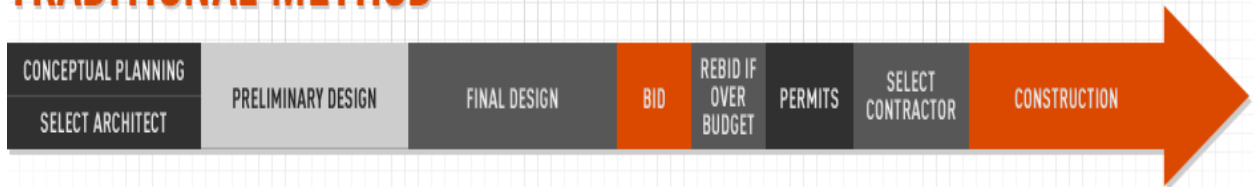
cost, efficient scheduling, and warranted performance with the resources of a design-build team whose total responsibilities exceed their individual capabilities.

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 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 has a strong interest in immunizing the state through design immunity. *Texas Department of Transportation v. Olivares* 316 S.W. 3rd 89 (2016).

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. 2018 State Statute Report (Design Build Institute of America, 2018).

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.

Thus, with design build and owner bid build projects, focus will remain on the successful interaction between designer, general and specialty contractors.

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

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.

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.

III. Scope of Risk and Severity of Claim Exposure

Roadway construction and new infrastructure projects face different consideration. First, what do you do with the old roadway? It could be buried. It could be deepened. It could be relocated. It could be completely removed and replaced. Critical to this is identification and confirmation of boundaries through an accurate and forensically reinforced survey. With drones doing the flying and greater accuracy elements available, projects should focus on ensuring that the old lines are drawn anew to avoid ownership disputes and allocation of responsibilities.

Further, a survey needs to account for all utilities, above, at grade and below ground. Quite often, there are old lines, vaults and other improvements from decades past not fully accounted for. These, alone, can not only result in delay, the whole project may need to be relocated. If not found early, this could have a catastrophic effect on the overall project and the allocation of risk through insurance. For example, the New York Court of Appeal held the City of New York partially responsible in a wrongful death action for an inadequate study. *Turturo v. City of New York* 23 N.Y. 3rd 473 (2016).

Claim exposure for new roadways, restoration of old roadways and related infrastructure is severe. Perhaps no more telling issue is the need for a hyper-accurate survey; however, integration of design components between decades old and new construction reveal different reinforcement, design, load capacity and traffic frequency. The panel will review case studies from real life cases which reveal telling issues: a blown survey can result in a complete relocation of an improvement at an astronomical cost, failure to successfully locate and address utilities can result in severing lines placing thousands without power, water or other commonly used features and failure to anticipate and address inclement weather patterns can result in severe property damage.

IV. Risk Management and Insurance

With so much talent accumulated in a 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 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. 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.

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. 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. Teams also have to account for traditional coverages such as worker’s compensation, comprehensive liability, auto liability and excess insurance needed.

V. New Role for Forensics

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 during design and construction. From peer review of design, to oversight of construction, 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.

VI. Conclusion

As a 21st century world power, the United States functions with infrastructure from the late 19th and most of the 20th centuries. Insurance professionals of all disciplines, third party administrators, in-house and outside counsel need to formulate an integrated and successful approach to new infrastructure projects which focus on roadways: past, present and future. Together, with all stakeholders at the table, successful completion of these projects at an acceptable risk will create a bright, new future.

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