2021 Annual Conference
June 16-18, 2021
Atlanta, GA

Design-Build for the Future: How to Ensure Construction Projects are Claim Resistant

Construction disputes on design-build projects can be convoluted and complex, involving issues of coverage and determining the delineation of liability among the players. Due to the differences in project delivery methods, construction parties, their attorneys, and claims professionals should understand the nuances of how a design-built project operates and apply creative solutions to resolve disputes on design-build projects including use of technology, alternative dispute resolution processes, and careful use of experts. In addition, on a Design-Build project, there are distinct coverage issues and landmines in claims handling that practitioners should be aware of before delving in. However, with some background and change in approach to these projects, parties can enhance claim management and dispute resolution.

I. Development of Design-Build Projects

Design-Build is a project delivery system used to deliver a project in which the design and construction services are contracted by a single entity responsible for the project. Traditional construction projects are design–bid-build, whereby the owner hires the designer to prepare construction documents and separately hires a contractor to construct the project. Construction Management–At-Risk (CM-at–Risk) is another typical delivery method in which the CM can provide preconstruction service if contracted early in the project and with a commitment to deliver the project within a Guarantee Maximum Price. The owner holds two separate contracts as in the design-bid-build delivery system. However, Design-Build projects have recently seen a significant uptick in use in the United States, seeking to combine the design and construction processes, with the ultimate goal of reducing time, costs, and risks.

Design-Build Projects are here and are becoming the preferred delivery method of the future. Design-Build Projects have been increasing in use and frequency. In public works and private-public partnership projects, Design-Build is becoming the standard. Private projects are seeing an increase in design–build delivery methods as well. Quasi-Design-Build projects and hybrids are also being used. With all of these changes, a Design-Build contractor and those involved in the process must remain vigilant to understand the risks, prepare for effective claims management, and ensure that they are working to reduce risk from the outset.

Changes in the scope of work, materials or design are almost a given on any commercial construction project, regardless of the chosen delivery method. However, when a project Owner hands the project over to a Design-Build, those changes, as well as conflicts and disagreements,

should be reduced by bringing the multiple roles involved in a major project — i.e. architect, general contractor, and engineers — under one roof. Indeed, Design-Build projects allow for early collaboration, spark innovation, and can reduce the chance that expensive later clashes will surface as the project progresses. On average, design-build saves 1.9% in costs over the construction manager at risk (CMAR) method and 0.3% over design-bid-build (DBB) approach with the cost savings resulting from the overall project speed, according to DBIA. However, some Owners will still restrict the amount of project control they relinquish, even if they are enthusiastic about the potential benefits of Design-Build, and even if they hire a design-builder. Owners will sometimes issue their own set of prescriptive design requirements, performance goals or some combination of the two, leaving the Design-Builder to complete the design while simultaneously trying to stay in compliance with the Owner's requirements.

A. Key Contract Issues and the Design-Build Contractor

In a Design-Build project, the contractor essentially (or the designer if it takes lead) takes on two roles, that of both the contractor and the designer. While this may result in greater rewards, there may be greater risks involved. Some Design-Build contractors will handle all of the work in-house with their own staff of contractors and design professionals, while others will bring in consultants or joint venture partners to complete the team. These pose different approaches and lead to different challenges. In addition, if the Design-Builder is contractor-led or design-led will impact some of the potential pitfalls to keep in the forefront of risk management for these projects.

For those Design-Build teams that are more of a conglomeration, contract terms and risk exposure analysis will be of even greater importance. Designers may have additional exposure due to flow-down of improper contract terms, ambiguous or inadequate scope of services, compensation pressure, uninsurable warranties including fitness for purpose and "free from defect" language, overly broad indemnification and duty to defend obligations, fee withholding and backcharges, standard of care, and schedule-related clauses such as liquidated damages for delay, and requirements to design within budget or re-design due to value engineering or performance criteria and optimization. Preliminary design at the time of bidding is one of the critical hazards. These risks can be managed with establishing proper contingency, protecting firms with unqualified limitations of liability, and procuring the proper types and amounts of insurance. But key attention to the contract terms must be made at the outset of the project including the following that should be laid out and addressed with any Design-Build contract:

- **Scope of Work**: This provision can be as broad as covering "all necessary services and materials needed to complete the work," or it can be much more detailed. For example, the scope of work might include the Owner's project goals, permits the Design-Build contractor will secure, and things the Design-Builder will or will not do for an additional fee.

- **Timing**: Identification of the timing required for substantial completion (and definition of what constitutes substantial completion) is important to avoid issues. Including details of periodic milestones for the project to be satisfied should also be included as

well any damages for delays. Clearly stating what events (acts of God, work changes, pandemics) qualify for a time extension for the contractor is also key.

- **Indemnification**: An indemnification clause is an important protection for the Owner against claims or losses by a third party, such as an employee of the contractor who is injured on the job. But careful consideration of the terms must be made to understand the risk shifting.

- **Payment and Pricing**: Under a Design-Build contract, careful attention should be paid to addressing changes and cost over-runs in the contract, along with when and how the Owner is to make payments.

- **Insurance**: Because a Design-Builder is performing professional services in addition to construction, general liability insurance is not sufficient to cover defects resulting from design and engineering. Careful attention is therefore required for the insurance requirements for the project.

.

- **Dispute Resolution**: Like in any contract, up-front consideration to dispute resolution methods will further bolster the ability to claim-proof your project. Whether you commit to arbitration or litigation in court, some method of conflict resolution must be built into the contract in the unfortunate event the parties cannot resolve a problem that may arise.

II. Design-Build Project Pros and Cons

A. Design-Build Projects Can Be Completed More Efficiently And Quickly

Single-source responsibility. Theoretically a Design-Build project will have fewer parties to coordinate. The Owner has one point of contact when both the design and construction are under a single contract. The designer and contractor work together from the beginning as a unified team.

1. Defined Roles

The Owner is required to provide some initial information and define the criteria for the project: the program, the design requirements, schedule, budget, sustainability. The Owner can have a limited role or have more involvement.

The Design-Builder is the Owner's single point of contact for all questions regarding the facility's design and delivery. The Design-Builder can be full-service, a contractor, developer, design professional, or a joint venture. The Design-Builder is responsible for quality, budget, schedule, and performance of the completed facility.

Design professionals can perform the same type of services as deign-bid-build: programing, preliminary design, design development, construction documents, and construction administration. However, in a Design-Build context, they may not perform all of the typical services. The Design-Builder may provide some design services or on a more limited basis, but in

a Design-Build project, the design professional works from the beginning of the project and more closely with the contractors.

The Contractor is involved from the beginning of the project compared to design-bid-build when the Contractor is not involved until the design is complete. In some projects, the Contractor begins construction even during the design phase, if not immediately after. In addition, and uniquely from design-bid-build, the Contractor is involved in the design process from the beginning. The Contractor is responsible for the construction and cost.

2. Flexibility And Resiliency To Maneuver During The Course Of The Project

The Designer and Contractor work together from the beginnings as a team, providing unified project recommendations to fit the Owner's schedule and budget. Any changes are addressed by the entire team, leading to colligative problem solving and innovation, without as much blame-shifting. Instead, changes are addressed by the Design-Build team, with everyone working for one common project goal. The level of cooperation, simultaneous information-sharing enhances adjustment of the plans on an ongoing basis. This design and construction as integrated service enhances the problem-solving capabilities of the Contractor and Designer when they work together as a team, with the same goals and objectives. This teaming of professionals can significantly reduce traditional conflicts and finger pointing between designer and contractor.

In the Design-Build context, the single source of responsibility removes Owner from the middle and forces the designer and contractors to work together to mitigate risk. It is the fastest method used to deliver construction projects and can lead to a reduced delivery schedule as well as greater reliability in cost and schedule performances. Due to the single-source for both design and construction, there is a clear result in cost savings, improved risk management, increased quality, and more accurate cost estimates. This is realized through reduced administration and early knowledge of costs and seen through the time savings on the construction schedule, reduced numbers of change orders, and limited disputes.

However, on a Design-Build project, the Owner has less control over design. While initially the Owner will be heavily included with design and planning, as the project process, the Owner will be consulted on more of an as-needed basis, with the designer–builder making decisions. Some Owners are not able to resist the temptation to intervene and some do not like the less hands-on approach.

In addition, the lack of competitive pricing/bidding can dissuade some Owners from a Design-Build project. Since the Owner needs to make decisions and lock in its requirements much earlier, the overall project scope and goals require more advance planning and negotiation. Owners unfamiliar with the Design-Build process may resulting in preconceived ideas that this method eliminates change order and saves money which may or may not be the case.

Finally, while a Design-Build project can have more flexibility and resiliency, this only can happen effectively when the upfront work is done. This includes a host of risk-management tools, including good contract language and proper insurance coverage. Most general liability

policies exclude design professional services, and most professional liability policies exclude construction work.

B. Design-Related Issues for a Design-Build Project

1. Partial Design Only When Out To Bid

The Design-Builder prepares a preliminary evaluation of the Owner's criteria. Once the Owner approves the preliminary evaluation, the Design-Builder will prepare and submit a preliminary design. After the preliminary design is approved, the Design-Builder provides its proposal based on the preliminary design. Pricing estimates are established, and a final budget is provided to the Owner. In addition, the schedule is set; all expectations for the project are established. Since the Designer and Contractor are working together, there are no additional bids to be set, and the project can begin even more quickly.

2. Design-Build Contractor Can Integrate Construction Knowledge And Experience With Design

The Contractor can evaluate and provide alternates, choosing systems and methods that can enhance the project. The Design-Builder also can provide value engineering and construction ability during the course of the project. However, unfamiliarity with the process can lead to an adversarial relationship instead of a collaborative one. Experience matters. If the Contractor is the lead, and is not knowledgeable, then it will not know his limitations and may get into trouble without anticipating design conflicts among disciplines or trades.

C. Integrating the team

Some Design-Build contractors are really joint ventures that still need to integrate operations and methods. A joint venture is a collaboration between two or more parties for the purpose of carrying out the design and construction services. The joint venture may not be familiar with the roles of a design-build delivery as opposed to traditional design-bid-build delivery. Alternatively, the Owner may hire a consultant or third party to help develop the criteria documents/contract documents for the project, may be a bridging architect, or represent the Owner throughout the project.

Trade contractors and suppliers can make meaningful contributions to the design-build process by bringing their practical field experience and suggestions to the attention of the designer during the design development stage. Trade contractors help the Design-Build project delivery method by proposing best value solutions for various construction elements before the design is complete. They can help to identify and address issue of cost, procurement, and constructability.

The parties need to be integrated even though the Design-Build process has integration at its core. This integration does not necessarily happen naturally. Careful consideration must be given at the outset and in the planning stages of the project, with precision in the contracting

documents and clear communication between the Owner and the Design-Builder as well as with any third-party consultants and the trades and suppliers. Only good communication will result in a truly integrated team to deliver a successful design-build project.

III. Risk Management and Claim-Proofing for the Design-Build Project

A. Risk Management for Design-Build Projects

Conventional wisdom with Design-Build projects is that the emphasis on pre-construction collaboration between contractors, design professionals, and subcontractors generates better outcomes. While the early collaboration leads to better documentation at the outset, conflicts and misunderstandings often still arise during the project. As with design-bid-build projects, contract terms are critical for defining scope of work and otherwise mitigating risk. For instance, design professionals should not agree to contract provisions which require them to perform services in "good and workmanlike manner" which may be considered greater than the professional standard of care. Moreover, design professionals should include a provision disclaiming all express and implied warranties as bringing the design and construction aspects together can shift the perceived professional standard of care to warranty/guarantee standard. Responsibility between the parties can blur once work begins, so it is also important to clearly define contingencies (including dispute resolution), performance incentives, and insurance requirements.

Strong contract language and proper insurance can be used together to control risk exposure. For instance, limitation of liability clauses should align with available insurance proceeds. Contractors should purchase Contractors Professional Liability policy to protect themselves. This policy covers professional liability performed by or on behalf of the insured general contractor, Design-Builder, construction manager, or subcontractor which would otherwise be excluded under a typical general liability policy. Design professionals should be cognizant that their professional liability policies exclude coverage for express warranties. Lastly, the Owner should also procure a Builders Risk policy.

In theory, Design-Build provides streamlined communication and faster project delivery. While there is improved communication and collaboration between the parties, the failure to properly manage the design process will create major risk exposure for the Design-Builders.

B. Coverage-Related Concerns

The typical risks of the Design-Builder are both professional and non-professional exposures.

The non-professional risks and exposures include direct damage to property, supplies, and materials related to the project; property damage and bodily injury resulting from the contractor's operations and occurring after completion of the project; environmental exposures; and payment and performance guarantees. The design-builder is responsible for the safety of all employees and third parties on the project site. Accidents on the job site may result in workers' compensation claims and OSHA fines and penalties. Typically, a Design-Builder can secure builder's risk insurance, construction wrap-up insurance or commercial general liability

insurance, contractor's pollution liability insurance, surety bonds, automobile insurance, and workers' compensation insurance policies to address their non-professional exposures.

However, the commercial general liability (CGL) insurance policy is not adequate to cover the expanded liabilities Design-Build contractors assume. The Design-Builder's professional liability exposures are related to the professional services assumed in the design-build agreement with the Owner and then either executed in-house or subcontracted to the appropriate design professionals. Professional liability (Errors & Omissions) coverage is needed for that exposure. A professional coverage endorsement can be added to a CGL policy on an "occurrence" basis. This provides the advantage of the same high limits, with relatively low cost. However, the coverage is usually more restrictive than a stand-alone policy.

The Contractors Professional Liability (CPL) insurance policy is ideal to address contractors' liability for design errors or omissions (E & O). This coverage is written on a "claims-made" basis and insures a contractor for damages arising out of negligence of the Contractor or its architect/engineer in performing professional services under the contract. The policy includes coverage for a wide array of professional circumstances including design errors from a Contractor's:

- In-house design staff
- Design under a design-build contract
- Construction management
- Faulty workmanship of subcontractors when there is a construction management contract

C. Communication & Coordination on a Design-Build Project

Like all projects, the better the communication and coordination, the better the end result will be. The question then is: How do you accomplish that goal?

Good communication starts at the top. Use any analogy you like—quarterback, surgeon, commanding officer—all of which relate to a team. There needs to be one person in charge of the team, so the team is all working toward the same goal. The quarterback needs good field awareness, and situational awareness. Maybe the important play is not to win the game right now, but instead just to get the first down. THEN the quarterback can decide whether to go for another first down or for the touchdown. The quarterback has to tell everyone what the goal is, and then form a plan to accomplish the goal. Once the goal and the plan to achieve it has been communicated, then the quarterback needs to delegate responsibility appropriately. She shouldn't give blocking instructions to the receivers, but she should trust the receivers to run the instructed play. If the quarterback has a particularly strong player, she should listen to that player's input to help make the best decisions for the team.

Similarly, the lead party on a Design-Build project needs to closely communicate and coordinate with other key players, starting with the designers. Each member of the team can contribute talent and skills that others don't have. In the same vein, each of the key players needs to know its own limits. It is up to the Design-Build leader to coordinate all of that talent, which will ultimately benefit the project. If the Design-Build leader is a Contractor, then he likely

has a certain amount of practical design knowledge, but when design issues arise he should communicate those issues to the appropriate design professional, perhaps with his own suggestion, but then should abide by the design professional's advice. Similarly, a Designer dealing with a specialty trade contractor is well-advised to heed practical advice on the means and methods of accomplishing the designer's aesthetic or vision. Or, in the case of more fundamental design work, the foundation contractor should darn well heed the advice of the engineer to build a foundation appropriate to the project.

Design changes can impact the project schedule. Hopefully, in the coordination effort, the Design-Builder saw that delay coming, and communicated it to all concerned, especially the project Owner. In this scenario, he should also inform the team AND ask for input on where and how to address it by seeking input from his team on minimizing the impact. Like a good receiver, who knows what he can accomplish against the defense, a good designer might suggest ways to save time without compromising the project, or a good trade contractor might have a faster way to complete a task, preserving an aesthetic without compromising quality.

Technology often saves time, although everyone needs to be on the same page. For instance, plans being produced only on paper by a surveyor will create delay when the architect has to input the information into a CAD program. Or, an architect who uses online file storage so that the contractor always has the update drawings available is only effectively coordinating and communicating with the contractor IF the contractor knows to check the online file storage regularly. Online programs or methods for tracking progress or payment applications and processing can be similarly problematic if all of the parties are not aware of their usage on a project, or may suffer from incompatible platforms. Again, the key element is for all involved to be aware of these issues, and agree on how to apply them to a project.

Like any project, workmanship and workforce issues can cause problems for Design-Build projects. Again, the Design-Builder needs to be always watchful, and especially must be aware of who is in charge of construction supervision, contract administration, and/or scheduling. Once a problem is identified, good communication and coordination can minimize the impact. The Design-Builder needs to communicate to the party causing delay of the impact of his or her actions, and the consequence if the bad actions continue. While that is occurring, the Design-Builder should lean on the expertise of his team to help rectify the problem and minimize the delay.

IV. Claim Handling Issues for Design-Build Matters

A. Types of Claims on a Design-Build Project

Design build projects experience many of the same problems as design-bid-build projects. The Design-Builder needs to keep insurability of the project in mind from the beginning. Someone can slip and fall on a job site and suffer injuries. Those injuries could be minor, and be sufficiently covered by worker's compensation, or they could be life-changing for the injured worker, leading to litigation. In this latter case, the Design-Builder will be held accountable for obtaining sufficient insurance; running a safe job site; and for the propriety of the means and methods. Similarly, significant members of the team could be held responsible,

such as if an erection engineer did not properly design steel erection procedures. Fortunately, these matters are typically covered by insurance, including both CGL and PL policies.

Covid-19 has impacted many projects, either directly or indirectly. Some of the impacts include staff exposure, reduced product availability, delayed shop drawing reviews, and reduced material availability. Almost all of the impacts have caused project timeline delays, which are especially problematic if the design build contract contains a liquidated damages provision for delays. Careful contracting is necessary even in a design build project to ensure that the parties have accounted for the potential impacts of pandemics, acts of God, and the like; with the onset of Covid-19, it is even more critical to review contract terms and understand the potential risks if delays occur. Depending on the applicability of economic loss rules in the jurisdiction, these damages are less likely to be covered by CGL insurance, and may be covered by PL policies.

Design build projects can also suffer from design or construction defect claims. Where the contractor is the Design-Builder, he might rush the job and not seek or wait for responses to RFIs, thinking he knows enough to get the project done. Or he might not notice a problem on the drawings which leads to problems later. Similarly, a design professional in the role of Design-Builder may not adequately supervise the construction, although that could fall within his role. For the Design-Builder, it is more important to coordinate design and construction, because it will have singular liability to the client/Owner for both design and construction deficiencies. Whether or not the Design-Builder will have coverage depends on the jurisdiction, and the policies obtained.

Many of the previously described issues cause delay and scheduling claims. As noted, these are issues which are minimized when recognized early, and all stakeholders' are informed of these events and their respective expectations are properly managed. Regardless of an Owner's contractual right to claim damages for delays, if the Owner has been informed of delays, and the corrective action being taken, the Owner is less likely to pursue that. Additionally, if the claim is made, the Design-Builder's control over the delay, and response to it, will be analyzed as part of the claim's merits. The key is communicating the situation, and managing expectations. The more proactive the Design-Builder is, and the more it includes all responsible parties to participate in rectifying a delay, the less likely the claim will be made, and/or the claim itself will likely not be as expensive. In the event of a claim, again CGL policies are less likely to respond to this type of claim, but PL policies are more likely to provide coverage.

B. Pre-Claim Mitigation Efforts

As projects become more complicated and owner's demands continue, the frequency of claims will rise. Design-Builder insureds need to maximize their protection under their policies by reporting incidents and/or errors to the carrier sooner rather than later. Insureds can run afoul of coverage when they don't understand the importance of timely reporting. Late reporting also occurs when the insureds fail to understand the type of coverage they have available: general liability; professional liability; occurrence-based; claims-made, etc. In addition, insureds often try to "fix" any problems before reporting the matter to their carrier. It is imperative that should an insured Design-Builder be made aware of a possible error, they should report the matter immediately to their carrier.

Insureds should also avail themselves of pre-claim assistance provided by some carriers. This includes contract review and in some instances, retention of defense counsel to mitigate matters before they develop into claims.

C. Claims Handling Tips

The claims professional handling a claim arising from a Design-Build project must be vigilant from day one of the claim. They should be in contact with the principles of the insureds immediately, and select competent counsel as soon as possible.

The defense counsel selected needs to have experience in both general liability and professional liability. The defense counsel should have the dexterity to represent multiple interests, yet be firm to ensure there is no pointing of fingers. Selection of counsel who is experienced to know the pitfalls to avoid and has the strength to guide the claim and litigation forward as would benefit the insureds/clients is key. Finally, the chosen counsel should have an amiable temperament so the insureds are able to work with him/her easily.

In order to have a claim-proof Design-Build project, the parties must all intentionally work together from the outset. The power of a truly integrated team – not just the Owner and Design-Builder, but also the attorneys and insurance professionals – is undeniable. Having an understanding of the delivery method and the advantages and disadvantages of the Design-Build process will further help the parties use this highly efficient process to the benefit of the overall project, increasing the profitability and reducing risk. No construction project is claim-free but with effective planning and communication, a design-build project can be one of the most effective ways to deliver a construction project that meets the Owner's goals and reduces risk for all involved.