

**DESIGN-BUILD
BOOM OR BUST?
Managing the Risks**

BDP BERKLEY DESIGN PROFESSIONAL UNDERWRITERS
BETTER BY DESIGN a W. R. Berkley Company

© 2015 Berkley Design Professional Underwriters | 1

**Berkley Design Professional
Underwriters**
Provider Number: 40107869

Managing Design-Build Risk
Course Number: WEB0002



Credit(s) earned on completion of this course will be reported to AIA CES for AIA members. Certificates of Completion for both AIA members and non-AIA members are available upon request.

This course is registered with AIA CES for continuing professional education. As such, it does not include content that may be deemed or construed to be an approval or endorsement by the AIA of any material of construction or any method or manner of handling, using, distributing, or dealing in any material or product.

Questions related to specific materials, methods, and services will be addressed at the conclusion of this presentation.



Legal Notice

This presentation is protected by US and International Copyright laws. Reproduction, distribution, display and use of the presentation without written permission of the speaker is prohibited.

Information provided by Berkley Design Professional Underwriters, Mark Friedlander of Schiff Hardin, LLP, and Michael B. Bomba of the AIA is for general interest and risk management purposes only and should not be construed as legal advice. As laws regarding the use and enforceability of the information contained herein will vary depending upon jurisdiction, the user of the information should consult with an attorney experienced in the laws and regulations of the appropriate jurisdiction for the full legal implications of the information. Practice management recommendations should be carefully reviewed and adapted for the particular project requirements, firm standards and protocols established by the design professional.

Today's Presenters

Andrew D. Mendelson, FAIA

- SVP – Chief Risk Management Officer at Berkley DP
- Licensed architect with 36+ years in practice
- PM, Contract Officer, CFO, Director of Practice Management
- Member of the AIA Documents Committee and Large Firm Roundtable



© 2015 Berkley Design Professional Underwriters | 5



Berkley DP's mission is to offer the right combination of products and services that help design professionals improve and protect their businesses.

- We are **PASSIONATE** about serving design firms
- We are **CONNECTED** to our brokers and insureds
- We are **COMMITTED** to surpassing expectations

Better by Design



Dedicated to the Design industry
Expert Underwriters
Real-world Risk Management Education
Expert Claims Service

© 2015 Berkley Design Professional Underwriters | 6

Today's Presenters

Mark C. Friedlander

- Partner at Schiff Hardin, LLP
- Graduate of University of Michigan and Harvard Law School
- Served as Chairman of the Professional Practice and Contracts Committee of the Design-Build Institute of America
- Adjunct professor at University of Illinois at Chicago Graduate School of Architecture 1985-2013
- Fellow of the American College of Construction Lawyers



| 7

Today's Presenters

Michael B. Bomba, Esq.

- Director and Counsel on the AIA Contract Documents team at the American Institute of Architects.
- Participated in the creation of 2014 AIA Design-Build family of documents
- Earned his J.D. from the American University Washington College of Law in 2002
- Was in private practice in Washington, DC, representing design professionals in corporate and litigation matters
- Member of the bar in both the State of Maryland and the District of Columbia



| 8

Course Description

As Design-Build increases in popularity, the more likely it is that you will become involved with this delivery method—if you're not already doing so.

Whether you're new to the process or have been working in this arena for some time, this webinar—brought to you by renowned subject matter experts in design practice, professional association contract documents, construction law, and design-build business structuring—demystifies the risks and rewards of design-build.

You'll learn about the variations in which the architect or engineer can be engaged in the process, the key differences from traditional project delivery, and how to protect yourself accordingly.

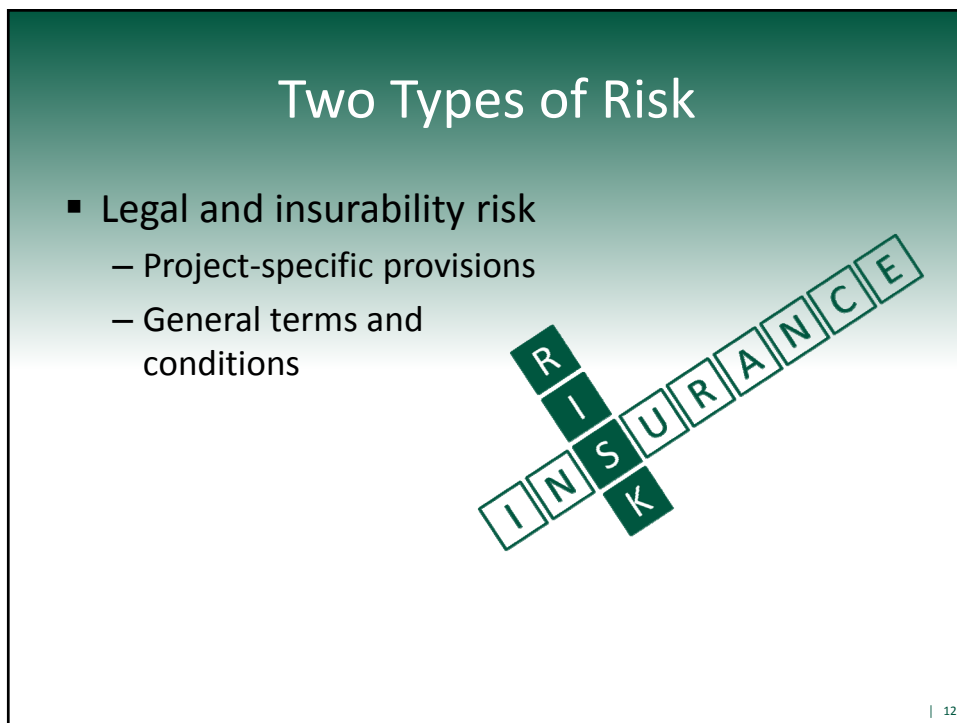
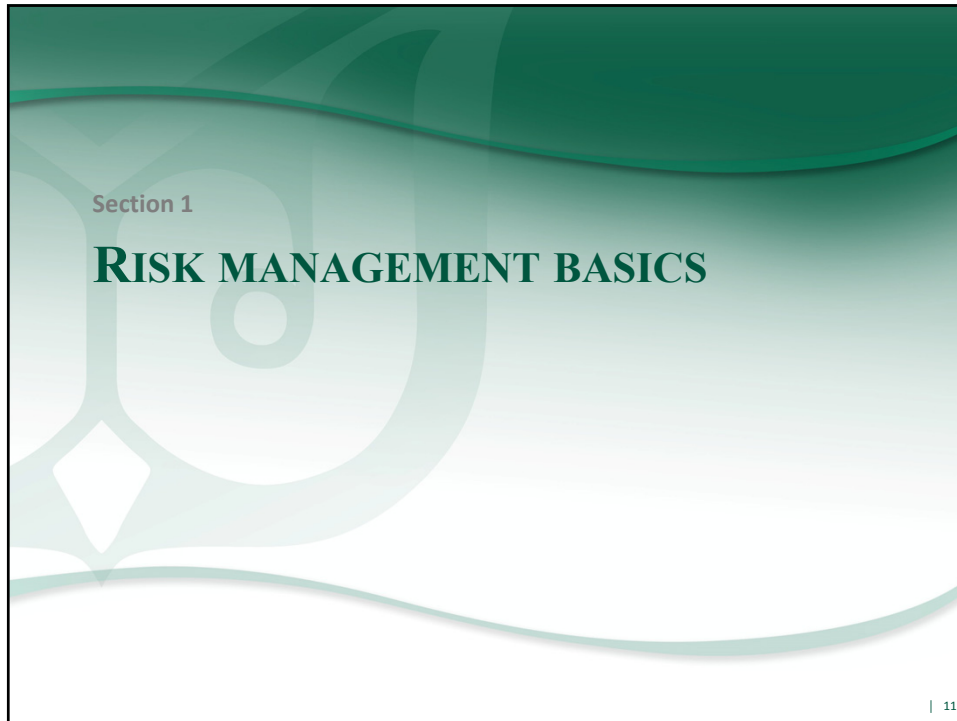
Learning Objectives

1. Gain an understanding of the various forms of the design-build team structure from the perspective of the parties: owner, design professional, contractor, joint-venture company, developer, etc.
2. Explore the benefits of using integrated agreements among the parties.
3. Learn about the fundamental differences between traditional delivery and design-build—and their impact on your business practices and professional liability exposure.
4. Review some key legal and contract issues for A/Es involved in design-build, and get advice on how to manage the related risks.



Webinar Agenda

- Risk Management basics
- Design-Build overview
- Key practice and business issues
- Contract and legal issues for A/Es
- Q&A



Two Types of Risk

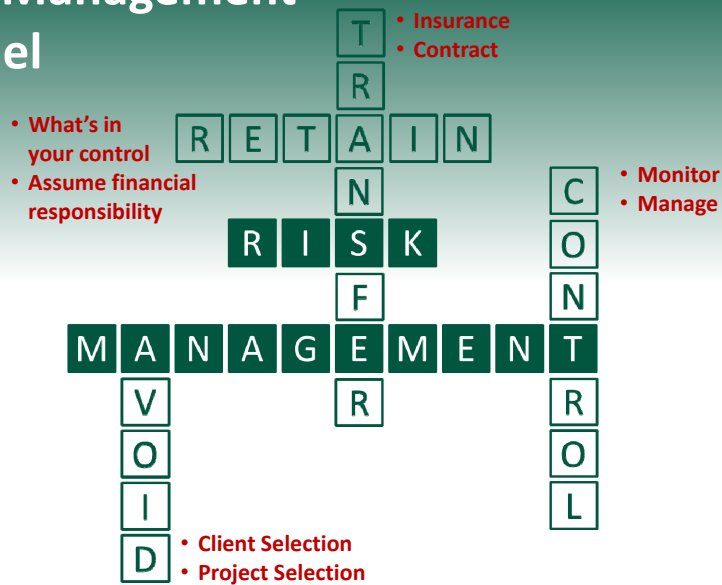
- Legal and insurability risk
 - Project-specific provisions
 - General terms and conditions

- Financial risk
 - Scope of services
 - Project and practice management



| 13

Risk Management Model



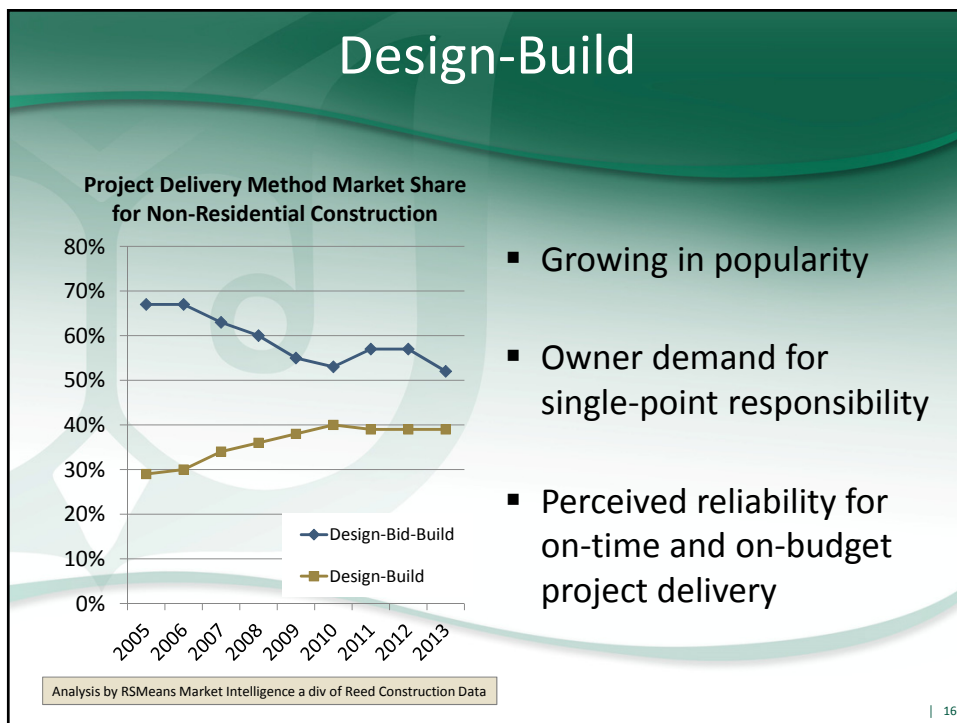
| 14

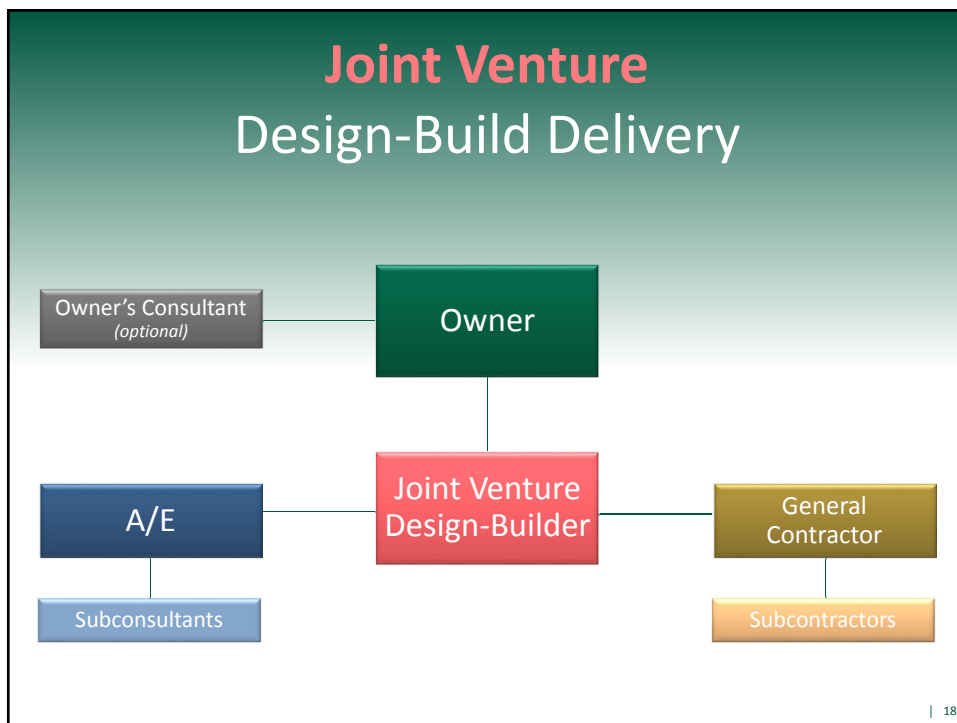
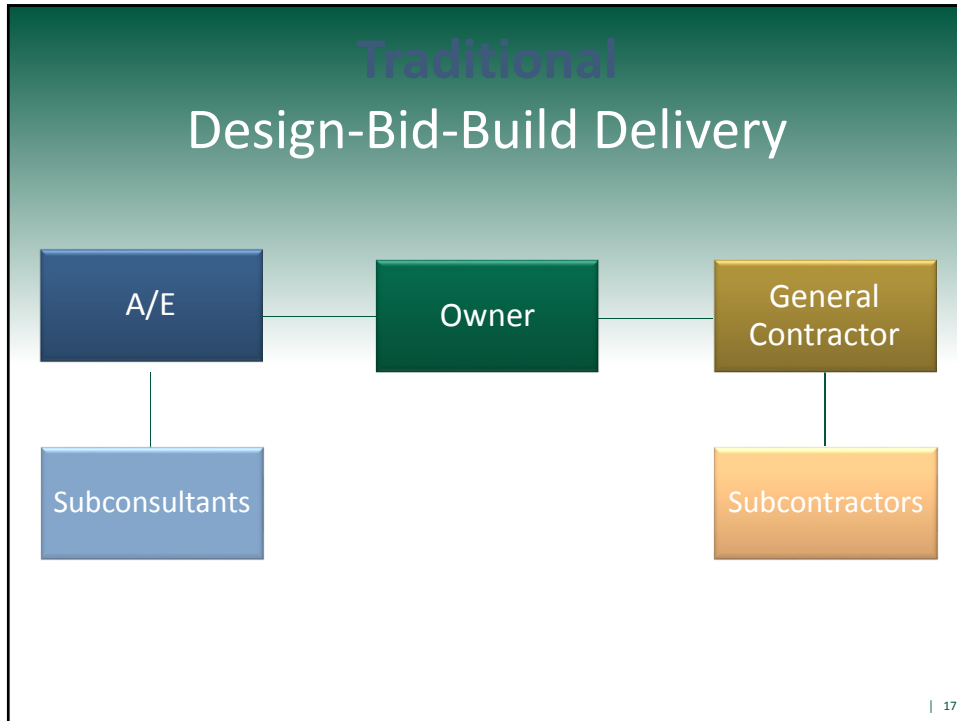
Section 2

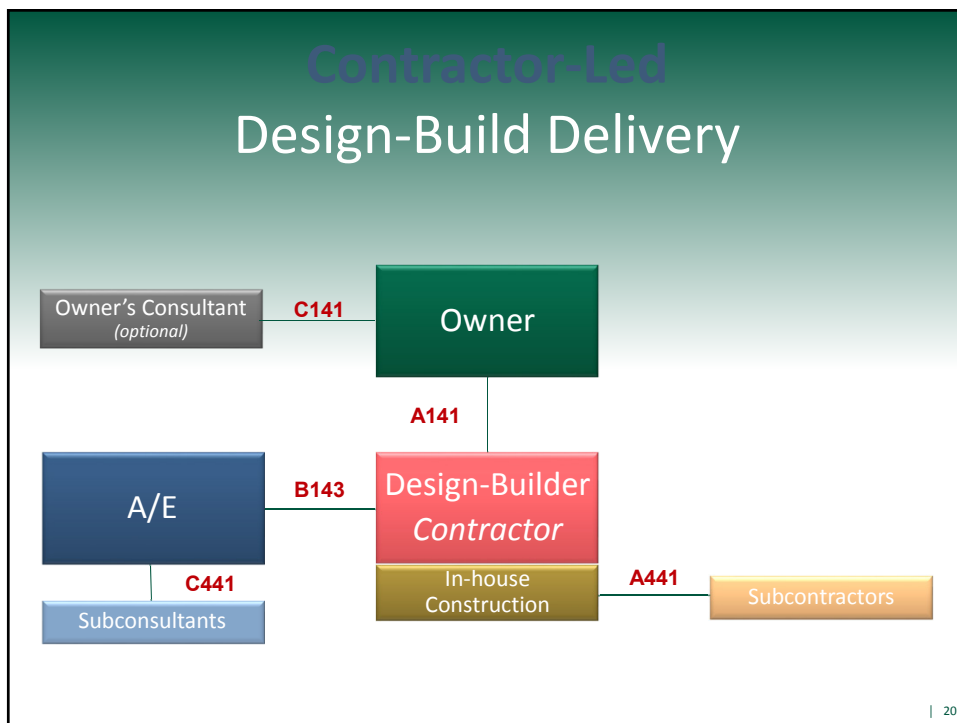
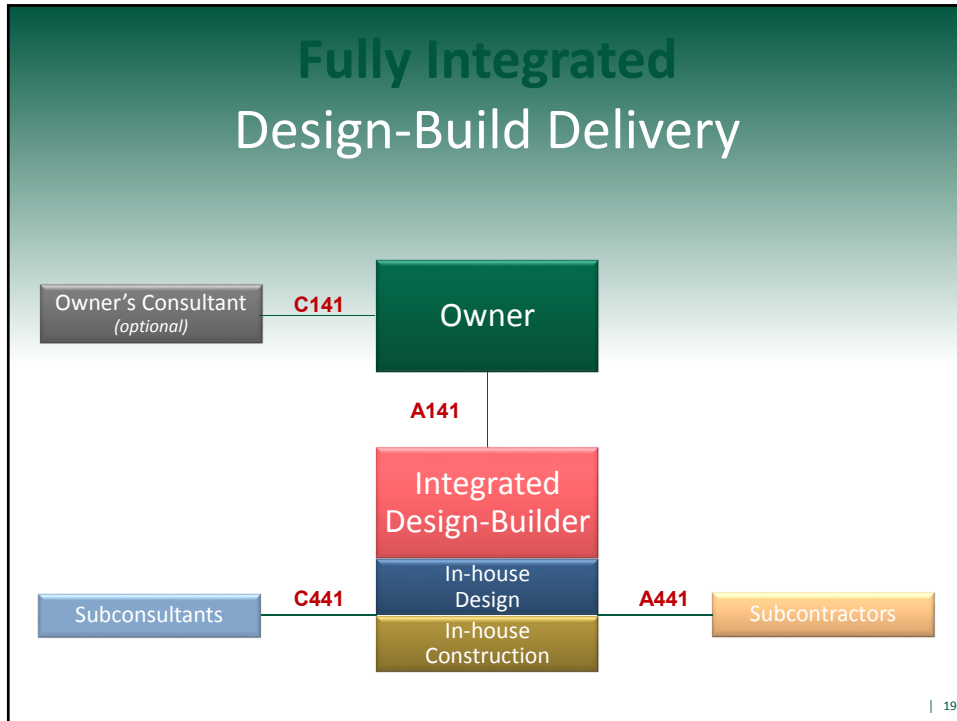
DESIGN-BUILD OVERVIEW

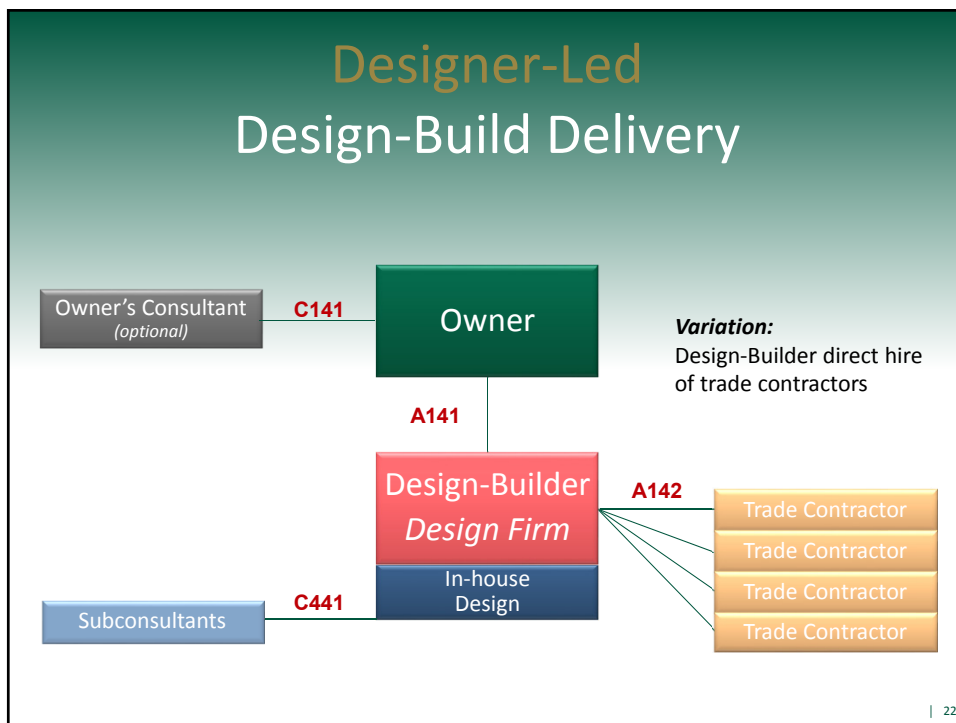
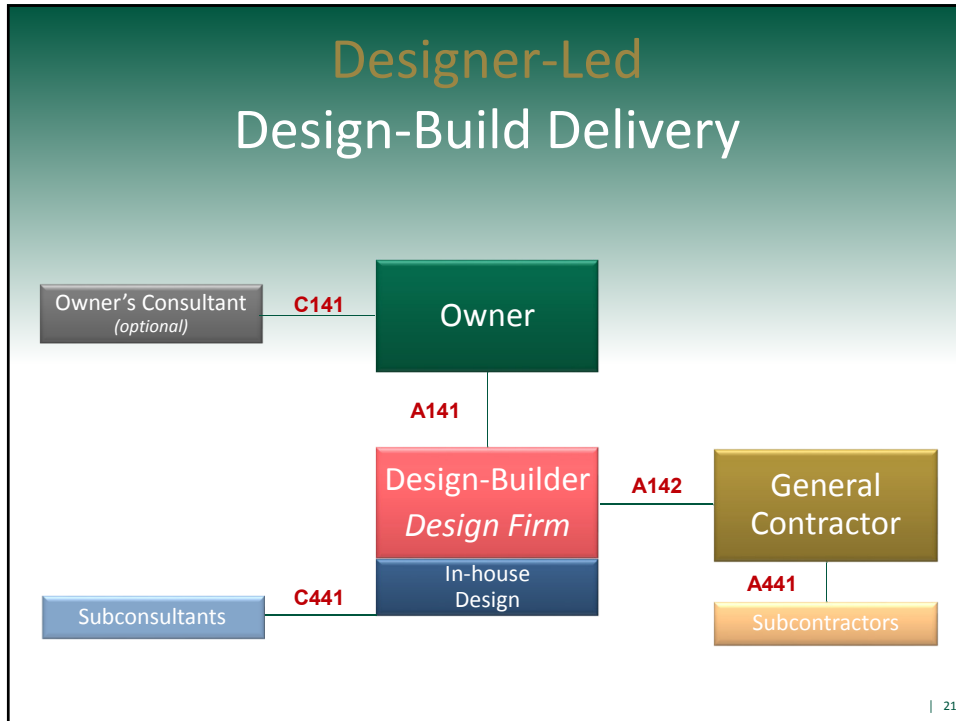


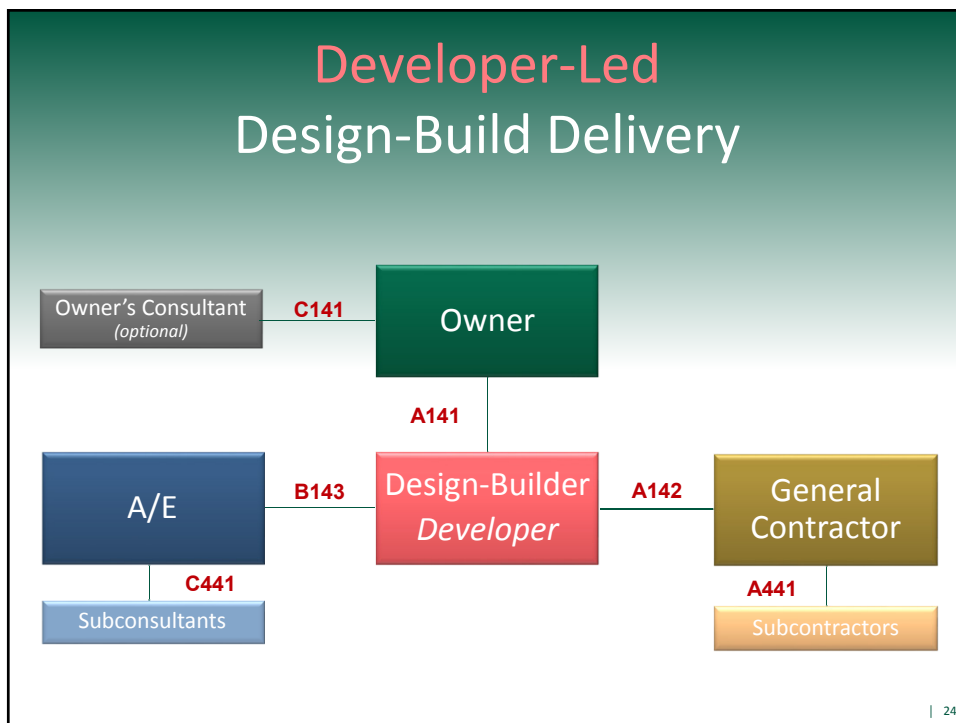
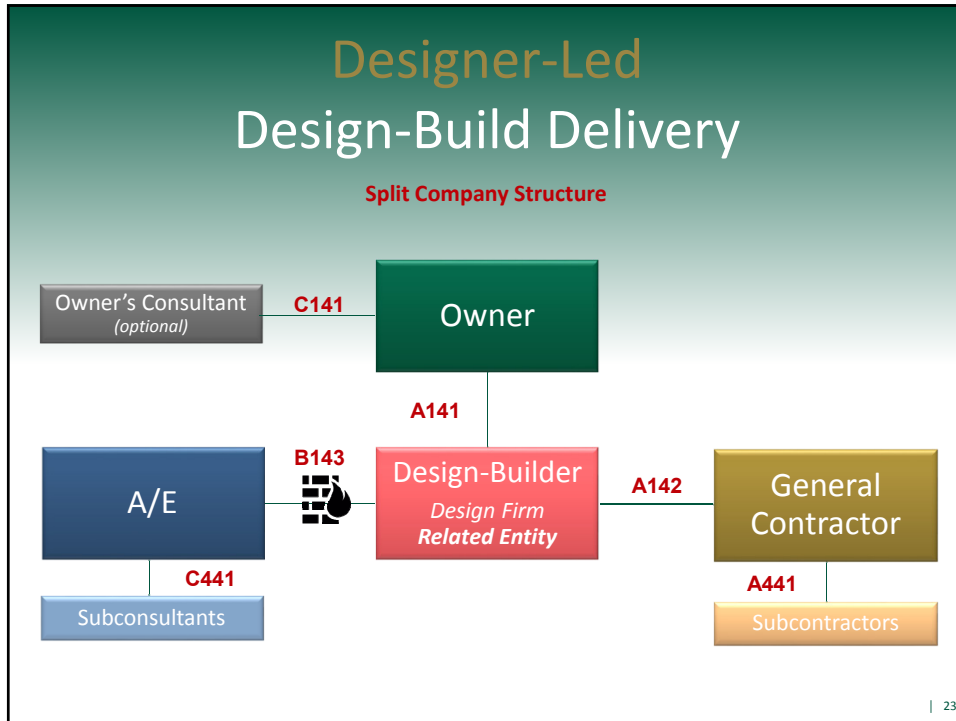
| 15











AIA 2014 Design-Build Agreements

- **A141™–2014** Agreement Between Owner and Design-Builder
 - Exhibit A – Amendment for Contract Sum
 - Exhibit B – Insurance and Bonds
 - Exhibit C – Sustainable Projects

| 25

AIA 2014 Design-Build Agreements

- **A141™–2014** Agreement Between Owner and Design-Builder
 - Exhibit A – Amendment for Contract Sum
 - Exhibit B – Insurance and Bonds
 - Exhibit C – Sustainable Projects
- **A142™–2014** Agreement Between Design-Builder and Contractor
 - Exhibit A – Terms and Conditions
 - Exhibit B – Insurance and Bonds
 - Exhibit C – Preconstruction Services
 - Exhibit D – Determination of the Cost of the Work

| 26

AIA 2014 Design-Build Agreements

- **A141™–2014** Agreement Between Owner and Design-Builder
- **A142™–2014** Agreement Between Design-Builder and Contractor
- **A441™–2014** Agreement Between Contractor and Subcontractor for a Design-Build Project
- **B143™–2014** Agreement Between Design-Builder and Architect
- **C141™–2014** Agreement Between Owner and Consultant for a Design-Build Project
- **C441™–2014** Agreement Between Architect and Consultant for a Design-Build Project
- **G742™–2015** Application and Certificate for Payment for a Design-Build Project
- **G743™–2015** Continuation Sheet for a Design-Build Project
- **G744™–2014** Certificate of Substantial Completion for a Design-Build Project

| 27

Section 3

KEY BUSINESS AND PRACTICE ISSUES

| 28

Competitive Proposals



Many Design-Build projects are awarded on a competitive basis (RFQ vs. RFP)



A/E spends proportionately more time than the contractor the design-builder on the proposal process



Stipends for unsuccessful proposals are rarely adequate



Parties should have an agreement prior to proposal development regarding reimbursement of A/E services if project not awarded

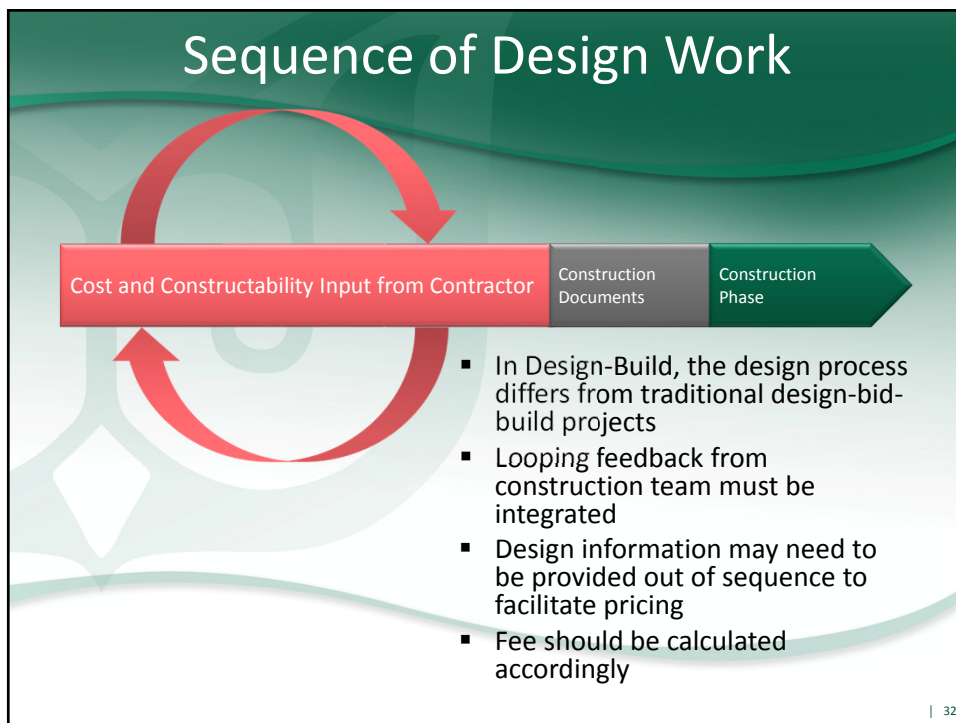
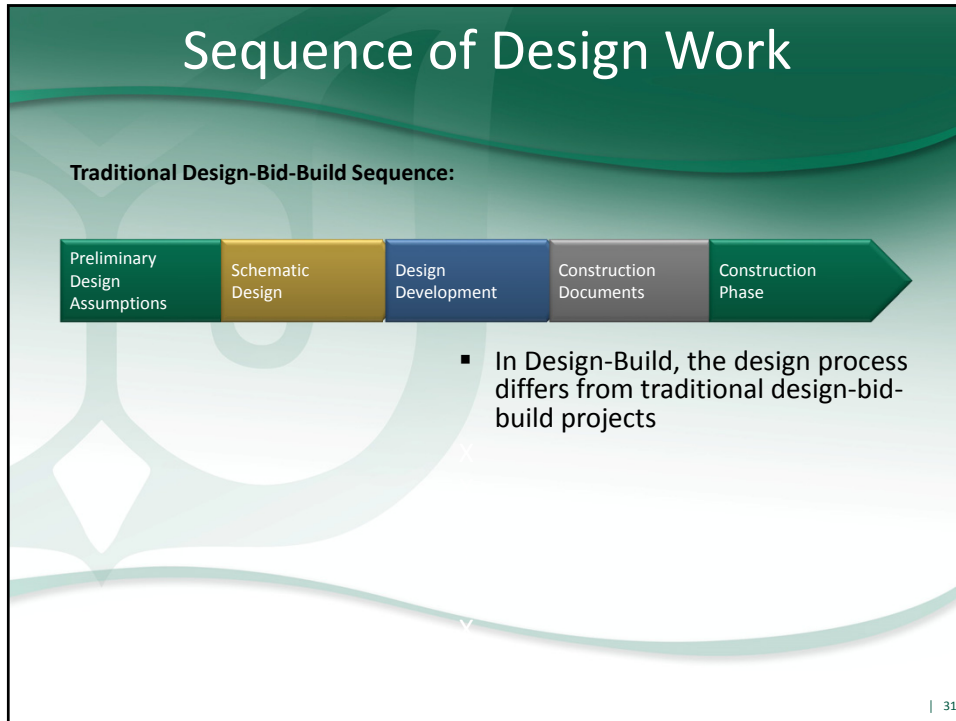
| 29

Managing Owner Expectations

- Key to managing owner expectations is a clear definition of the project intent, scope and quality
- AIA 2014 Design-Build documents
 - Owner's Criteria
 - Proposal
 - Amendment process



| 30



Participation in Savings

- Many design-build contracts are cost-plus-fee to a GMP
- Design-builder typically participates in any savings achieved
- A/E's contract should specify whether and to what extent the A/E participates
- May be advantageous for A/E to participate but must consider ethical issues



| 33


Analysis of Alternatives and Substitutions

- A/E's contract should address:
 - Extent to which it is expected to analyze design alternatives or substitutions
 - Payment for these services
- Ideally, A/E would be incentivized to participate in the analysis of alternatives and solutions by participating in savings derived from them



| 34

Entitlement to Change Orders

- In traditional Design-Bid-Build, the contractor is entitled to a change order if any of the following occurs:
 - Owner changes (e.g., scope changes)
 - Changed conditions (e.g., concealed conditions or Force Majeure events)
 -  Design problems (e.g., errors, omissions, inconsistencies, ambiguities)

Not typically a change order trigger in Design-Build

| 35

Entitlement to Change Orders

- In a Design-Build delivery:
 - A/E's contract (and the Design-Build contract) should specify on what assumptions and information the Design-Build team is entitled to rely
 - Important for contract to address changes in law or applicable requirements



| 36

Section 4

LEGAL AND CONTRACT ISSUES FOR A/ES INVOLVED IN DESIGN-BUILD

| 37

Common Issues in Design-Build

- Relationships and loyalties among the parties
- Standard of care governing design
- Indemnities
- Licensed use of drawings upon termination
- Pay-If/When-Paid clauses
- Dispute resolution



| 38

A/E's Relationships/Loyalties

Design-Bid-Build

- Usually has an agreement directly with the owner
- Represents the owner's interests
- May have an adversarial relationship with contractor

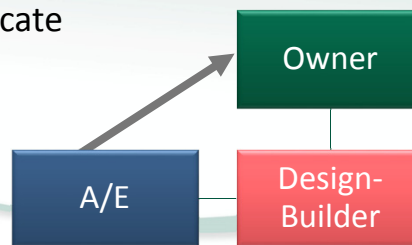
Design-Build

- Usually has an agreement with the design-builder
- May have contractual incentives to further the D/B team's goals—not the owner's
- Is teammates with the contractor

| 39

Lack of Contractual Privity

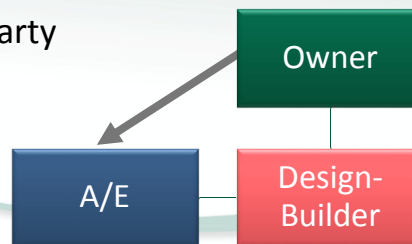
- In most D-B projects, the A/E contracts with the Design-Builder, not the owner
- Contract should specify lines of communication and overrides
- Why the design professional should be able to communicate directly to the owner:
 - Efficiency during planning and design phases
 - Problems on the project or inferior decisions



| 40

Potential Liability without Contractual Privity

- Instance where an owner wants to make a direct claim against the Design-Builder's A/E
 - In case of D-B entity's insolvency, for instance
 - New AIA docs require design professionals to sign certificate or make owner a third-party beneficiary of the A/E's subcontract



| 41

Standard of Care Governing Design

Design-Bid-Build

- Consistent with professional skill and care ordinarily provided by consultants practicing in the same or similar locality under the same or similar circumstances

Design-Build

- Design-builder may be held to the stricter warranty standards as contractors, even for the design services they provide

Such warranties are uninsurable in professional liability policies – they should not “flow down”

| 42

Indemnities

- Design-builder's indemnity to the owner is usually quite broad and should not "flow down"
- To be insurable, any indemnity in the A/Es contract with the Design-Builder should:
 - Be triggered only by professional negligence
 - Be proportionate to the extent caused by the negligent performance of services
 - Not include the word "defend"
- Consider affirmatively excluding the duty to defend

| 43

Licensed Use of Drawings

- Need to address the right to use drawings:
 - If the design-build contract is terminated
 - If the A/E terminates its subcontract to the design-builder
 - If the design-builder terminates the A/E
 - In the event of a dissolution of the design-build entity



| 44

Pay-If/When-Paid

- Common for the design professional's contract with the design-builder to include Pay-If/When-paid clause
- Some states allow, others do not
- Clause should:
 - Require the design-builder to endeavor to collect the fee from the owner
 - Include an exception when the Owner's refusal to pay is unrelated to design professional services



| 45

Dispute Resolution

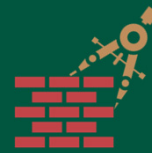
- Contracts among all design-build team members should:
 - Specify methods for dealing with third-party issues
 - Identify methods for addressing disputes within the design-build team
 - Include a provision tolling the statute of limitations
- Recommend that third-party issues be settled prior to internal disputes



| 46

Summary

- Design-Build projects can be structured in various ways – and understanding those structures can help you identify and manage your exposure
- Coordinated agreements are essential to project success
- Becoming aware of the differences between traditional delivery and design-build can shape your business practices
- Addressing key legal issues in your contracts can help you manage the related risks



| 47

QUESTIONS?

| 48

This concludes The American Institute of Architects
Continuing Education Systems Course



For AIA CES Learning Unit reporting or to obtain a
certificate of completion, please contact:

Risk-Support@BerkleyDP.com

518-407-0081



THANK YOU!

Andrew D. Mendelson, FAIA
AMendelson@BerkleyDP.com
(847) 533-1971

Mark Friedlander
MFriedlander@schiffhardin.com
(312) 258-5546

Michael B. Bomba, Esq.
MBomba@aia.org
(202) 626-7483



© 2015 Berkley Design Professional Underwriters | 50