

The Law and Business of Design-Build

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Seven Legal Issues Unique to Design-Build

1. Relationship of the parties
2. Standard of care of design work
3. Availability of performance warranties
4. Entitlement to change orders
5. Unique licensing problems
6. Unique insurance/bonding problems
7. Unique problems with competitive bidding laws

Types of Design-Build Relationships

- Integrated Company
- Contractor Prime, A/E Sub
- A/E Prime, Contractor Sub
- A/E Prime, Multiple Trade Subs
- Design-Builder Prime, A/E and Contractor each Subs
- Joint Business Venture by A/E and Contractor

Four Types of Business Ventures

- Joint Venture (partnership)
- Corporation
- Limited Liability Company (new)
- Limited Liability Partnership (new)

Tax/Accounting and Liability Matrix for Design-Build Entities

Type of Entity	Advantageous Tax/Accounting Treatment	Advantageous Liability Treatment
Joint Venture	✓	
Corporation		✓
Limited Liability Company	✓	✓

Issues for Design-Build Teaming Agreements

1. Structure of the Team
2. Sharing of Risks and Rewards
3. Design Phase Services *
4. Construction Phase Services *
5. Protective Business Provisions
6. Risk Transference
7. Dispute Resolution

** May be different from traditional projects*

1. Structure of the Team

- Structure of the Business Relationship
 - One party prime, and the other as subcontractor
 - Joint business venture
 - Legal structure of venture: joint venture (partnership), corporation, limited liability company
 - Organization and control of the joint business venture
 - Capitalization and financial issues
 - Lines of Communication

2. Sharing of Risks and Rewards

- Compensation
 - Amount
 - Timing of payment
 - Conditions
- Project Profits and Losses
 - Allocation of savings if project exceeds goals
 - Allocation of losses if project fails to meet goals
- Other Risks and Rewards
 - Identify and describe each
 - Allocate consequences between the parties

3. Design Phase Services

(that may be different from tradition projects)

- Services Provided by the Contractor
 - Costing, estimating
 - Value engineering
 - Assistance in analyzing owner-provided information
 - Constructability analysis
 - Preliminary scheduling
 - Checking design to anticipate problems
 - Acquisition of long-lead items
 - Procuring subcontractor participation and quotes
 - Negotiation with subcontractors/vendors

3. Design Phase Services (Cont.)

(that may be different from tradition projects)

- Services provided by the A/E
 - System-by-system design, with “looping” feedback from trade contractors
 - Informal communications rather than “defensive detailing”
 - Greater (lesser) number of alternative designs
 - MEP design only schematic, completed by trade contractors
 - Acceptance of greater-than-usual price constraints
 - Out-of-sequence provision of design details
 - Heavier reliance on performance specifications

4. Construction Phase Services

(that may be different from tradition projects)

- By the Contractor
 - Anticipation and avoiding or minimizing the consequences of design problems
 - Fast-tracking the construction
- By the A/E
 - Informal provision of supplemental design information
 - Cooperative approval of substitutions
 - Cooperative trouble-shooting and problem-solving

5. Protective Business Provisions

- Confidentiality of Information
- Exclusive Relationships or Agreements Not to Compete
- Future Marketing / Sales Efforts
 - Responsibility of each party
 - Provisions regarding mutual commitment, exclusivity

6. Risk Transference

- Insurance Provisions
 - Coverage to be procured by each party, including limits, terms, etc.
 - Allocation of cost of insurance
- Surety Bonds
 - Description of bonds to be procured, by whom, terms, etc.
 - Provisions for allocating cost of bonds

6. Risk Transference (cont.)

- Indemnity Provisions
 - A/E to indemnify contractor for claims arising out of breaches of A/E's duties
 - Contractor to indemnify A/E for claims arising out of breaches of contractor's duties
 - Provisions for cooperative defense or splitting costs of claims common to both parties
 - Provisions for indemnification by others

7. Dispute Resolution

- Commencement of the Dispute Resolution Process
 - For claims initiated by or involving third parties, dispute process not to begin until third party aspects of claim are resolved
 - Provision tolling statute of limitations for claims involving third parties
- Sequence of Dispute Resolution Actions
 - Step negotiations between senior management
 - Non-binding mediation
 - Binding arbitration (or court litigation)

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