ALTHOUGH THE CONCEPT OF DESIGN-BUILD HAS BEEN AROUND FOR MILLENIA, of late the entire construction industry is caught up with the idea as a way to market and deliver product. In a design-build arrangement, the contractor assumes responsibility for all professional design services, as well as the actual construction work. Even firms that initially dismissed design-build as a passing fad are now eagerly embracing the concept. However, construction and design firms who see it merely as a new selling tool, but don’t understand (or don’t care about) the differences among design-build and traditional design-bid-build, construction management, “fast track,” or other delivery systems, can end up losing money and disappointing customers.

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The Big Difference: Accountability

• It is difficult to overstate the enormous legal consequences of going the design-build route. One of the biggest adjustments that a firm starting to do design-build work has to make is fully understanding and accepting the heightened responsibility that comes with one point of accountability. The role of designer and builder historically has been adversarial—intentionally so—to provide a “check and balance” over each other for the benefit of the owner. The mere signing of a piece of paper saying that they are now on the same team will not automatically change attitudes and prejudices of all of their employees who hold very firm ideas about “corner-cutting contractors” and “nit-picking architects.”

To have a successful design-build project, the leadership of the design-build team need to anticipate the areas in which they traditionally lock horns and reach agreements on how to work together. They then need to persuade the staff members who will actually be doing the work to understand, support, and execute those agreements.

For example, suppose the design-build firm undertakes a stadium project for a firm, fixed price, and then subcontracts the structural engineering. The design-builder later realizes snow guards will be necessary to protect people on the ground from falling ice and snow from the large domed roof, a $300,000 extra. The owner refuses to pay extra, since this “essential” item should have been in the design. The design-builder must provide the snow guard system and fight it out later with its design subcontractor. Hostility between the design-builder and engineer make all further dealings very testy.

There are several key areas in which design-build work is so different from traditional contracting systems that the contract documents need to be carefully chosen to reflect the decisions that the parties intend to make. There are a number of recently developed “standard” design-build contracts that have been produced by trade associations such as the Associated General Contractors (“AGC”), the American Institute of Architects (“AIA”), the Design-Build Institute of America (“DBIA”), or the Engineers Joint Construction Document Council (“EJCDC”).

The drafters of all of these forms have de facto taken positions on potentially controversial issues, and the prudent drafter needs to be aware of what is in each one of the forms to adequately advise a client on which one is best suited to a particular project. It is entirely possible, if not likely, that the attorney will conclude that none of the forms is exactly right for his or her client’s use, and requires some modification to meet the expectations of the parties.

Defining the Scope of Work: What’s In? What’s Out?

• Contractors (particularly their field forces) are used to building what’s on the plans and specs, and not feeling bound to point out every place that it could be done faster, cheaper, or better. Designers often resist pressure to be “rushed” in review-
ing shop drawings, or to put economy ahead of perfection. Both sides historically could withdraw and blame the other if something fell through the cracks.

In design-build, the owner is led to believe that it is going to get its dream project for a budgeted price, and one of the selling points is “no surprises”—a set price, with few (if any) changes. This is hard to actually pull off in practice. In design-build, the contract for construction is being consummated much earlier in the design-development, often before the owner has its entire program fleshed out, or all the financing in place. For these reasons, the design-builder fears that it will have more problems with the scope of work. For example:

- Once the design is finalized, the owner sees that it doesn’t have as much money for construction as it originally thought, and wants to explore ways to value-engineer the cost down; or
- The owner sees that it might have the funds for some upgrades, and starts asking for prices for marble vanities, or more sound insulation, or crown molding; or
- The owner just doesn’t think the project as it is developing is meeting its investors’ expectations.

In other words, the design-builder fears that there will be more than the usual time and effort taken up with trying out new ideas after it has begun to incur general conditions. The design-builder anticipates that it will be hit with an onslaught of requests for proposals, many of which will never be acted on, but all of which affect the job. Anticipating these problems, the drafters of the currently available standard form documents try to protect the design-builder from “excessive” changes and proposals for changes. For example,

- The AIA A191 design-build contract specifically states that “[I]f the owner requests a proposal for a change in the Work from the design-builder and subsequently elects not to proceed with the change, a Change Order shall be issued to reimburse the design-builder for any costs incurred…” (emphasis added)
- The AGC and the DBIA forms (#535 and #415, respectively) require the owner to advance 50 percent of the design-builder’s estimate of the value of disputed extra work, and then fight over the other 50 percent later, to put the design-builder on an even footing with the owner.

**DAMAGE LIMITATIONS** • The “limitation of liability” clause is a stranger to most contractors. They expect to warrant that their work will meet the plans and specifications, and to have to fix it if it does not. They understand that they will be sued (or taken to arbitration) if it fails. The design community, however, has for a long time understood and attempted to deal with the enormous exposure that can come from a design that turns out to be defective. Examples include:

- A geotechnical analysis that misidentifies fill as bedrock leads to a $1 million+ retrofit foundation design;
- Insistence on use of a particular shade and composite of masonry brick that has a porous characteristic leads to freeze-thaw spalling, cost over $2.5 million to re-skin a large building; and
- Selection of a noisy roofing system for a church sanctuary, causing the building to be abandoned for services, leads to a $400,000 problem for designer.

Because the cost of repairing such design defects can be high, it is typical to see clauses in design agreements that limit the designer’s liability either to:

- A set amount of money;
- The value of the designer’s contract; or
- The limits of the designer’s insurance policy.
It is a fact of business life that insurers like to limit their liability as much as possible. There are many unique insurance issues in design-build, the most sensitive of which is professional liability insurance.

Even the last of these options can be of little use if the designer carries low limits of insurance. This issue tends to be one of the most frequently negotiated provisions in any designer-owner agreement.

Since the design-builder has agreed to take on an even bigger chunk of responsibility than the traditional designer, it should come as no surprise that groups representing design-builders in developing standard form contracts make a point of trying to minimize their exposure by limiting design liability.

- All of the standard form design-build agreements contain representations that the “work” will be in conformance with the contract documents, and free from defects in material and workmanship. AIA A191, Part II, ¶3.2.9; AGC #415, ¶3.8.1; EJCDC #1910-40, ¶6.18A; DBIA #535, ¶2.9.1.

- None of these documents include a provision that the design itself will be warranted—only the “materials and equipment” (AGC) or the “construction” (AIA, EJCDC, and DBIA). Thus, the customer is not getting any greater warranty than in traditional design-bid-build situations, unless specific performance warranties are included in the contract, which is now common in design-build water treatment, energy production or conservation, and other engineering-dominated projects.

- The AGC is the only form that explicitly, in bold print and all caps, disclaims all other warranties, to let the court know, even if the customer doesn’t understand, that no one is promising that the owner will be happy with the final product.

Again, by selecting design-build, the owner usually thinks that it is getting greater accountability. These clauses attempt to curtail such added risk. All the insurance in the world won’t protect the owner if the coverage is limited by contract.

INDEMNIFICATION AND INSURANCE
It is a fact of business life that insurers like to limit their liability as much as possible. There are many unique insurance issues in design-build, the most sensitive of which is professional liability insurance. Typically, a design professional, not the contractor, carries this malpractice or “errors and omissions” (“E&O”) insurance. There aren’t all that many carriers who write it, and they tend to be pretty particular about what they are willing to insure. When representing an owner, you should deal with this at the outset of the contract negotiations.

Does the Owner Have Recourse?
When I’m asked to review the AIA form or the EJCDC form, I give my owner clients some bad news, because both are written with the presumption that there will be no professional liability insurance at all. Since the AIA contract also omits any reference to surety bonds, the owner has to anticipate that there will be no recourse other than a breach of contract action against the assets of the design-build entity itself (which could well be a very thinly capitalized LLC), or the individual person who