



CONTRACTORS AS DESIGN-BUILDERS

Presented by

David H. Collings
Managing Director
Marsh

More contractors are getting involved in design-build projects. Even small projects are seeing a trend toward design-build as owners seek to simplify the construction process and minimize their risks on major construction projects. Contractors and their insurance agents must recognize the risks and the coverage issues associated with performing as a design-builder to avoid unexpected coverage gaps when claims arise. This session will outline the unique risks contractors face as design-builders and offer insurance guidelines and recommendations for achieving a smooth blanket of protection. Learn when contractors professional liability insurance is appropriate and when and how coverage can be arranged under more traditional insurance policies.

Wednesday, November 15, 1:30–3:00 and 3:30–5:00 p.m.

If a picture is worth a thousand words,
listen to what this one has to say.



CNA Has A Smarter Way™ of covering the risks of the construction industry. What this means for you is being able to perform your part of the big picture with confidence. CNA has been providing risk transfer and risk financing solutions to the construction community for over the past 100 years. Because we specialize in writing contractors, you can be assured of the right coverage designed specifically for your business.

Through our commitment to contractors and our partnerships with industry trade associations, we've come to a firm understanding of the exposures you face each day. This knowledge and commitment has helped us design the most flexible and comprehensive coverages available - from the core coverages every contractor needs such as Commercial Property, Commercial Liability and Workers' Compensation to coverages for unique exposures that can jeopardize your ability to continue your operation.

For more information, contact your independent CNA agent or call 1-800-CNA-6241. You can also visit our website at www.cna.com/commercial/construction and discover why **CNA Has A Smarter Way™** to help you manage construction industry risks.

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David H. Collings
Managing Director
Marsh

Mr. Collings is presenter for Workshop G, "Contractors as Design-Builders," on Wednesday. He currently oversees the following groups within Atlanta-based Marsh Industry Practices: Design Firms, Design-Build, Wrap-Ups, Surety, and Media and Entertainment. He is active in all areas of construction insurance and risk management, including wrap-ups, contractors, developers, building material suppliers, and alternative project delivery. In addition, he is the manager of the Industry Practices Knowledge Management Group, which is responsible for managing the information, public relations and technology efforts for all of the Marsh Industry Practices.

Mr. Collings has 20 years of construction insurance experience. He has produced 10 ENR Top 100 design firms and contractors and has served as client executive for a variety of design- and construction-oriented firms. Mr. Collings is a frequent speaker to the construction industry and has published many articles. His recent project experience includes designing and negotiating a Web-based project-specific professional liability program for all architects and engineers involved in a multibillion-dollar mass transit system; writing articles, publications, and a "kit" for handling design-build exposures; publishing benchmark studies on design firm professional liability insurance, project-specific professional liability insurance, and owner's protective liability insurance; developing and negotiating project insurance for privatized bridge and road toll projects; and designing and placing a project-specific professional and liquidated damages policy for a \$130 million fast-track design-build arena project.

Notes

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.

CONTRACTORS AS DESIGN-BUILDERS

*David H. Collings
Marsh*

I. Introduction

- A. Discussion of design-build trends and a review of several examples of how design-build contracts affect insurance

II. Managing Design-Build Contracts

- A. Review of contracting options available
- B. Review of key contract clauses

III. Surety Bonds

- A. Availability and cost of bonds for design-build projects
- B. Alternative bonding scenarios
- C. Building capacity for design-build bonds

IV. General and Professional Liability Insurance

- A. Scope of general liability coverage and review of professional liability exclusions
- B. Key areas to fix/amend for design-build
- C. Potential areas for coverage disputes
- D. Scope of professional liability coverage
- E. Key areas to fix/amend for design-build
- F. Use of project-specific professional in design-build

Notes

CONTRACTORS AS DESIGN-BUILDERS

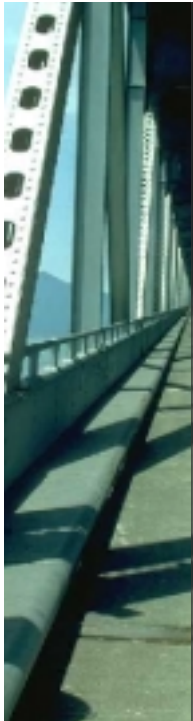


Design-Build Trends

◆ According to a 1999 Study:

- 76% of firms report that lump sum/fixed fee contracts are the most common for design-build
- Firms won 57% of their design-build proposals in 1998
- 17% of firms report their project begins without a signed contract
- 20% of projects are bonded
- Most “Design-Build” firms carry professional liability coverage

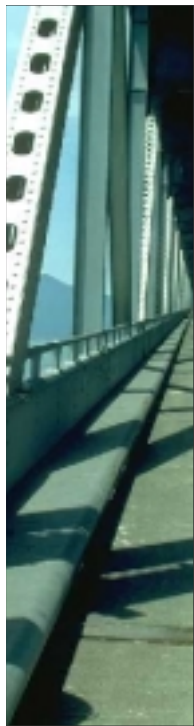
Source: 1999 Design-Build Survey, Zweig White and Associates



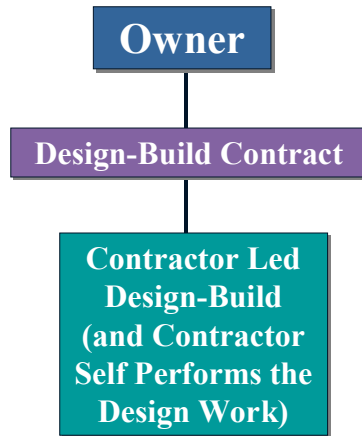
Case Study - Cost Overrun

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graph TD; Owner[Owner] --- FixedPriceContract[Fixed Price Contract]; FixedPriceContract --- ContractorLedDesignBuild[Contractor Led Design-Build]; ContractorLedDesignBuild --- SubconsultantDesignFirm[Subconsultant Design Firm];
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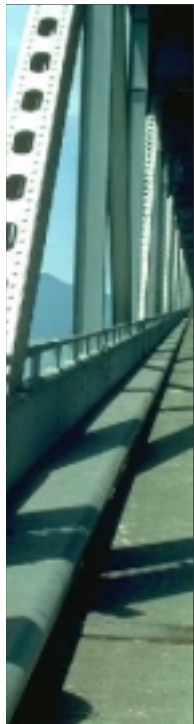
What happens when the design firm delivers drawings late and the contractor accelerates work to complete the project on time?



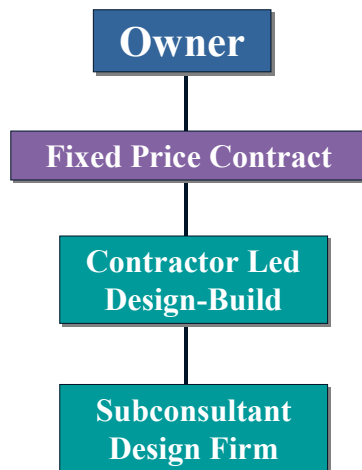
Case Study - Self Performed Design



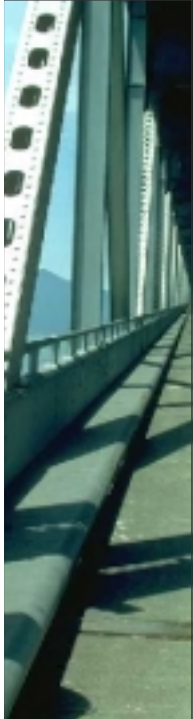
What happens when the contractor's engineer makes a mistake and there is a collapse after project completion and catastrophic loss of life and property?



Case Study - Additional Insured



What happens when the contractor wants to be named as an additional insured on the design firm professional liability insurance?



Case Study - Designer Led

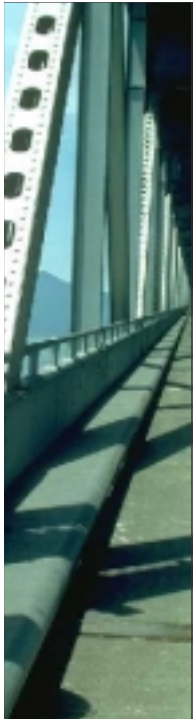
Owner

Fixed Price Contract

Design Firm Led Design-Build

Contractor

What happens when the design firm delivers drawings late and the design firm has to decide whether or not to ask the contractor to accelerate work to complete the project on time?



Case Study - Joint Ventures

Owner

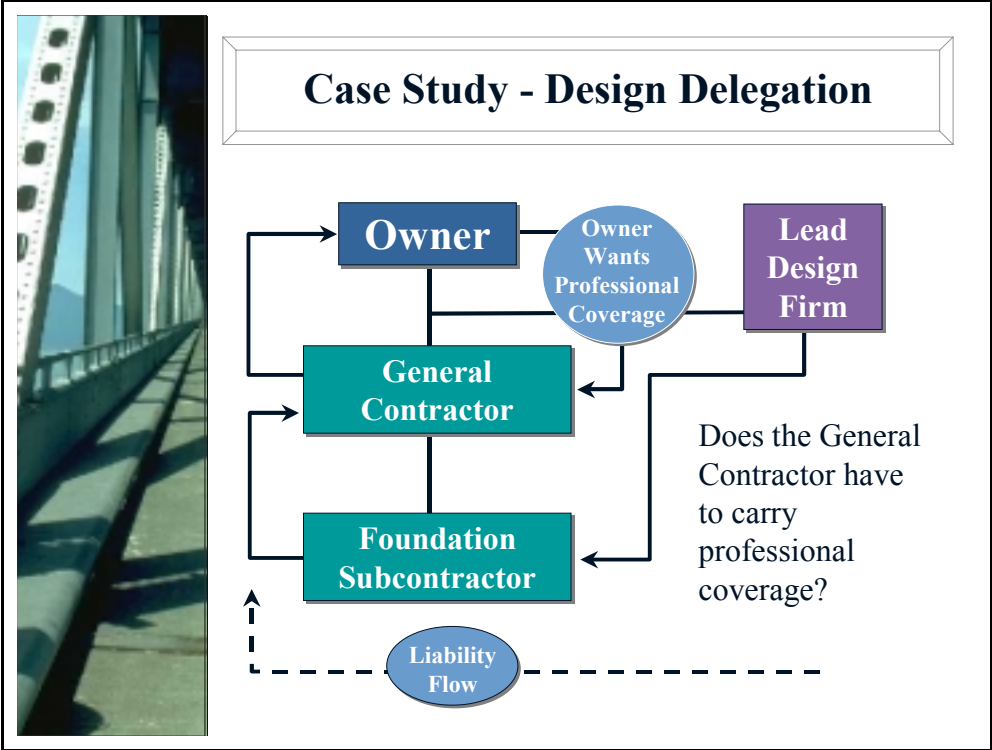
Joint Venture Entity Formed to Execute Design-Build Contract

Joint and Severally Liable

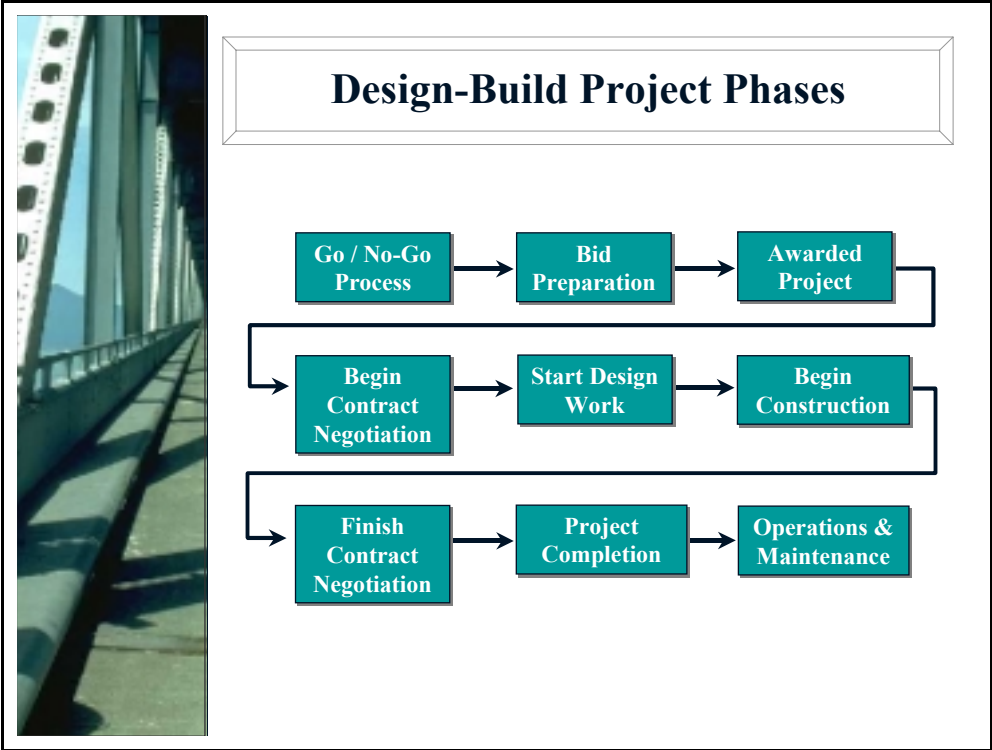
Contractor (80% Owner of JV)

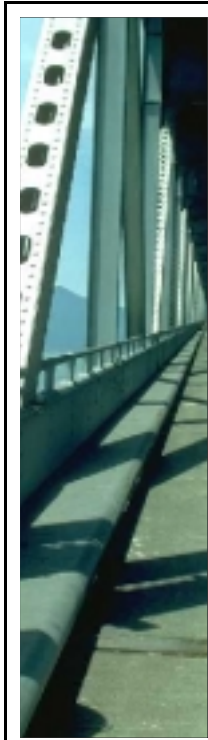
Design Firm (20% Owner of JV)

What happens when a design error leads to a loss in excess of the amount of available professional insurance?



Managing Design-Build Risk





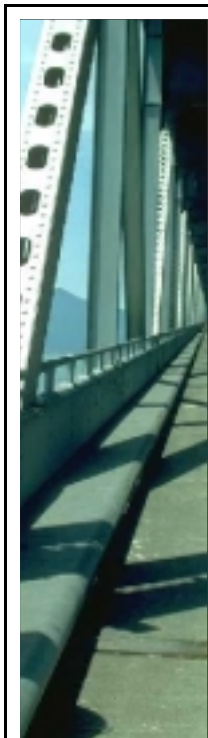
Choosing a Design Firm Partner

◆ How do you Select A Partner?

- Experience and expertise
- Claim History
- Financial Stability
- Insurance Program

◆ Forming the Team

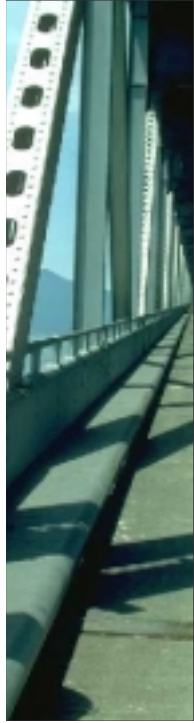
- Teaming Agreements
- Splitting Profits and Each Member Taking Responsibility for Losses it Caused



Choosing a Partner

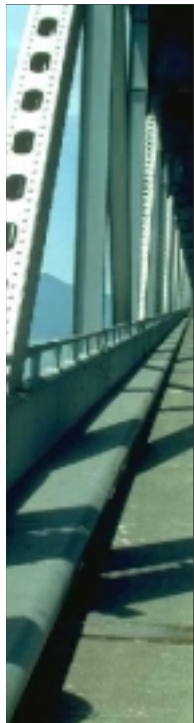
◆ Anticipate Disputes When Lead Contractor in D/B Team

- Treats design firm like just another subcontractor
- Selects a design subconsultant that has never worked on a design-build team
- Makes marketing promises that are more than it can deliver
- Takes lead in proposal without adequate input from Design Professional
- Attempts to control DP, creating professional conflicts



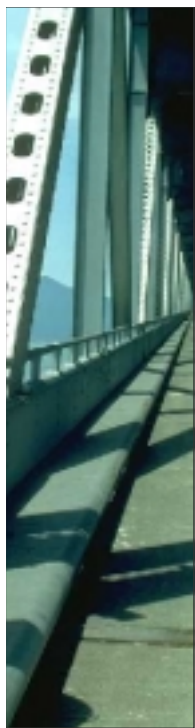
Responding to RFP's

- ◆ Responding to Design-Build RFP's Can Be Very Expensive
 - Create a Design-Build Hi Team
 - Develop an Effective Go / No-Go Process
 - Make Go / No-Go Decision Early in the Process
 - Consider Insurance to Cover Costs if Project is Abandoned



Anticipating Problems

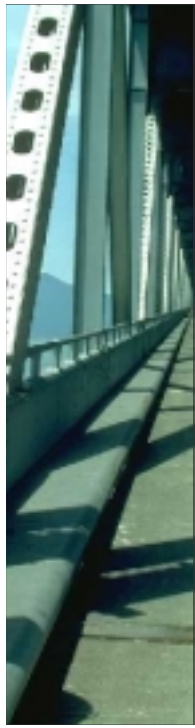
- ◆ Anticipate Disputes When Owner:
 - Is unsophisticated about the D/B process
 - Is uncertain as to why D/B is best method for the project
 - Develops incomplete or inadequate RFP
 - ◆ Watch for specifications combining design features with performance requirements
 - Has inadequate financing or budget
 - Insists of unreasonable allocation of risks
 - Requires the contractor to use a specific designer



Contract Negotiations

◆ What An Owner Will Expect of You

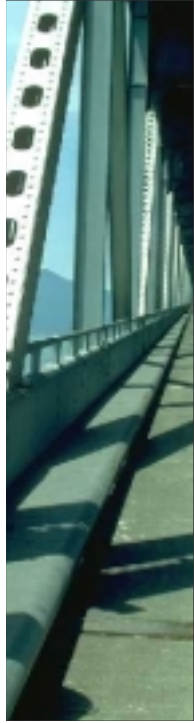
- Lump Sum / Fixed Fee
- Intermediate Indemnification (can sometimes get separate indemnification for design)
- Warrantees and Guarantees
- Liquidated Damages
- Excusable Delay (Non-Compensable)
- Responsible for Consequential Damages (but there are exceptions)
- Evidence of Professional Insurance
- Surety Bond for Entire Project



Contract Negotiations

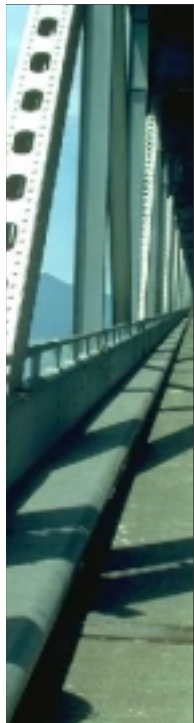
◆ What You Will Hear From a Design Firm:

- Wants to Be Held to an “Ordinary Standard of Care” (That’s all their insurance covers)
- Can’t Afford to Work Without a Limitation of Liability and/or Waiver of Consequential Damages
- Can’t Name You As Additional Insured on Their Professional Policy
- Afraid of Site Safety



Contract Negotiations

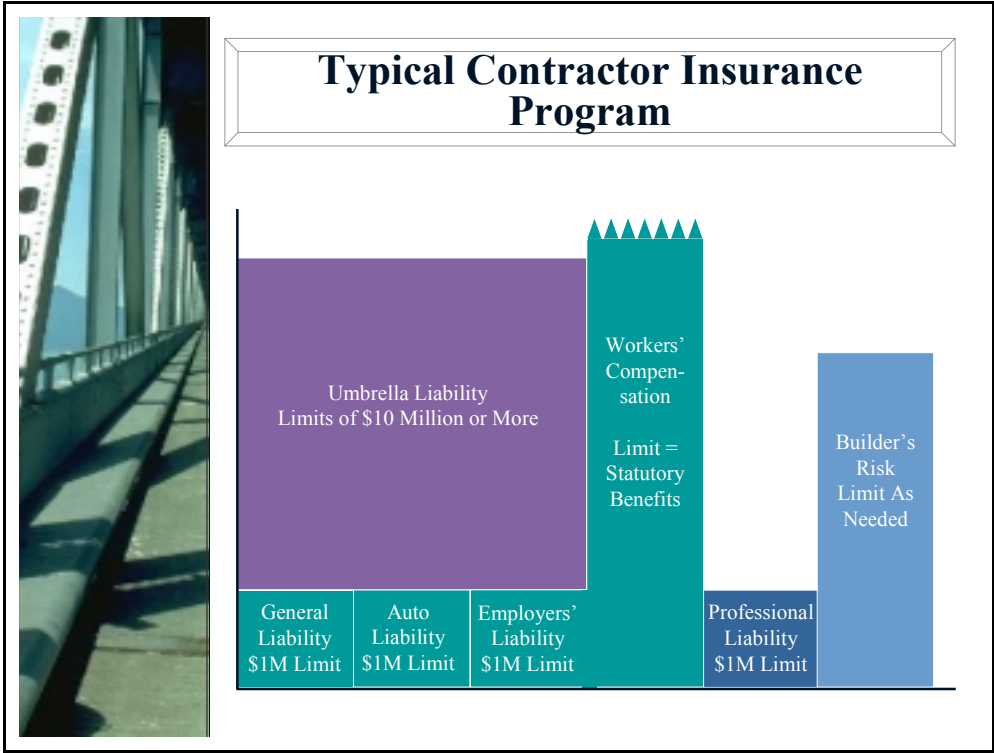
- ◆ Identifying scope of work is one of the most important issues
 - Specific and objective performance criteria developed for parts of project capable of producing objectively measured result
 - Adequately describe performance requirements of an evolving project



Contract Negotiations

- ◆ For Design-Build Contracts:
 - Contractor license required.
 - Plans generally must be sealed by licensed professionals
 - Licensed professionals must also perform various inspections of the work

Insurance—General vs. Professional Liability

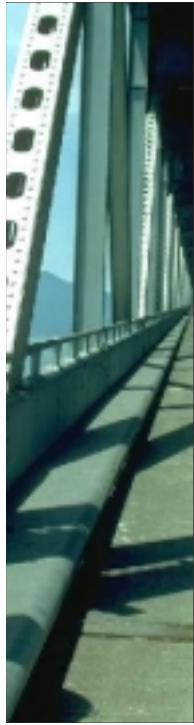


General Liability

◆ What's Covered?

- Covers "Occurrences"
- Covers "Bodily Injury/Property Damage"
- Covers Contractual Liability
- Covers Strict Liability and Negligence
- Does not cover "Pure Economic Loss"
- Professional Coverage Normally Addressed by Endorsement

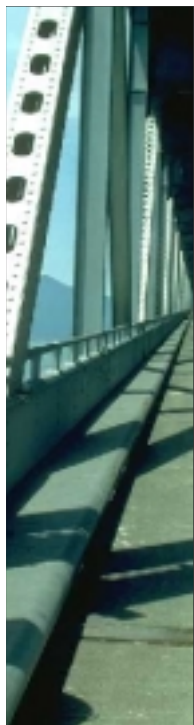
A photograph of a bridge railing is visible on the left side of this section.



General Liability

◆ What's Excluded?

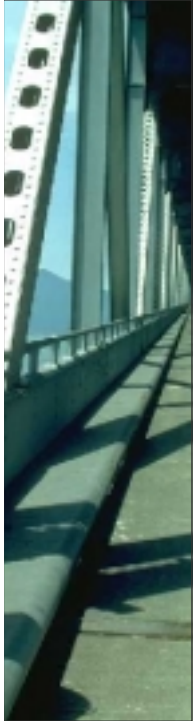
- Pollution
- Faulty Workmanship
- Damage to Self-Performed Work
- Professional Services
 - ◆ ISO 2243
 - ◆ ISO 2279
 - ◆ ISO 2280



General Liability

◆ A&E Professional Services Exclusion (ISO 2243)

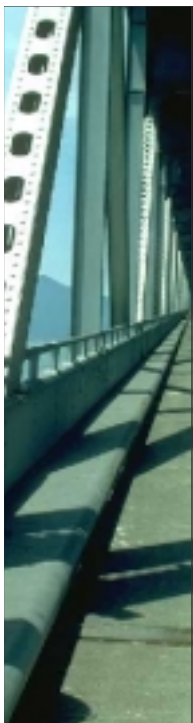
- Excludes any loss arising from:
 - ◆ The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders or drawings and specifications; and
 - ◆ Supervisory, inspection, architectural or engineering activities



General Liability

◆ The following phrase is added to the full exclusion:

- Professional services do not include services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor (ISO end't 2279).

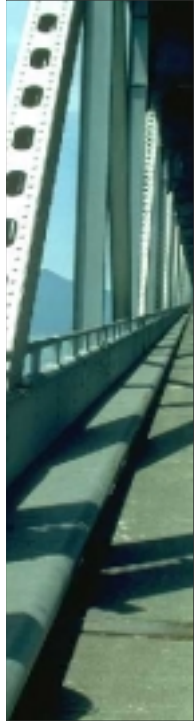


General Liability

Hidden General Liability Exclusion

◆ The Definition of Insured Contract Does Not Apply To Any Part of Any Contract Or Agreement That Indemnifies an Architect, Engineer or Surveyor for Injury or Damage Arising Out of:

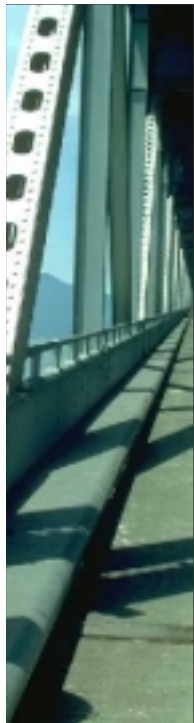
- Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, opinions, reports, surveys, field orders, change orders or drawing and specifications; or
- Giving directions or instruction, or failing to give them, if that is the primary cause of the injury or damage....



Professional Liability

◆ What's Covered?

- Covers “Any Liability”
 - ◆ Not limited to BI / PD but it does include BI / PD
- Loss must be caused by a “negligent” act error or omission
- Loss must be caused by a covered professional service
 - ◆ Architecture
 - ◆ Engineering
 - ◆ Landscape Architecture
 - ◆ Construction Management

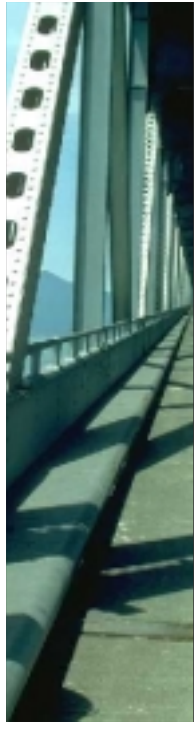


Professional Liability

◆ What's Excluded?

- Contractual Liability
- Dishonest Acts
- Fines, Penalties
- Warrantees & Guarantees
- Product Liability
- Claims Covered by Other Policies
- Faulty Workmanship

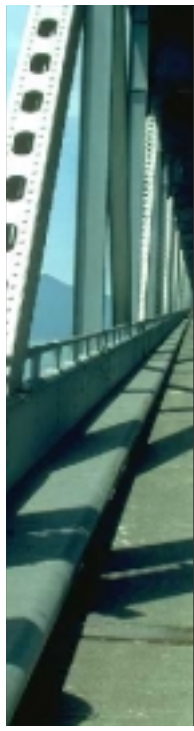
Insurance for Design-Build



Professional Liability

◆ Limitations

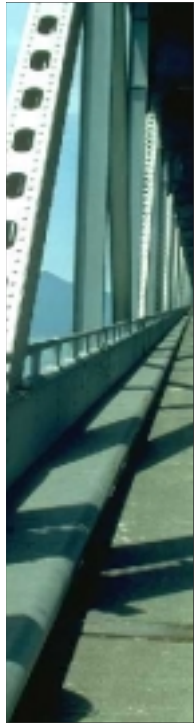
- Low Aggregate Limits
- Limits Include Defense Costs
- Covers Every Project Ever Done
- Liability Limited to Negligence Standard
- Coverage is Not Standard
- Doesn't Always Work Well in D/B Setting
- Line Between General and Professional Liability Isn't Always Clear



Professional Liability Insurance

◆ What Happens to Professional Liability on a Design-Build Project When a Design Error Results in ***Increased Cost of Construction?***

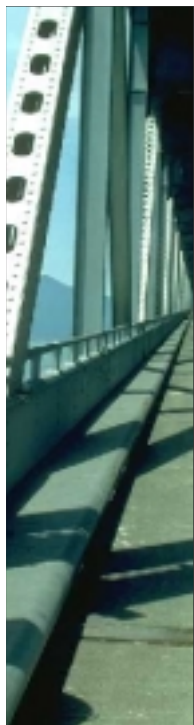
- ***Integrated Firm*** or ***Designer Led*** - There is no third party liability and therefore no protection from the lead firm's professional liability policy (Can underwriters provide first party coverage?)
- ***Contractor Led*** - Contractor will sue the design firm and the design firm's professional insurance will pay - it is not an owner issue.



Professional Liability Insurance

◆ What Happens to Professional Liability on a Design-Build Project When a Design Error Results in *Delay?*

- *Integrated Firm* or *Designer Led* - Professional liability insurance will respond. If the loss is in the form of liquidated damages, it might cause a problem, but LD's should be covered at least to the extent they match actual damages.
- *Contractor Led* - Same as above.



Professional Liability Insurance

◆ What Happens to a Lead Design-Build Contractor if the Subconsultant's Professional Insurance is Unavailable, or

◆ If the Loss Due to Design Error Exceeds the Contractual Limitations?

- Contractor Can Absorb the Loss, or
- Insure It



Professional Liability Insurance

◆ Uninsured Design Risk

- In Design-Bid-Build, it belongs to the Owner
- In Design Build, it shifts to the Lead Design Build Contractor
- How is the Uninsured Design Risk Allocated in Lump Sum Design-Build Contracts?
- Will Traditional Third Party Liability Professional Insurance Protect the Lead Contractor?

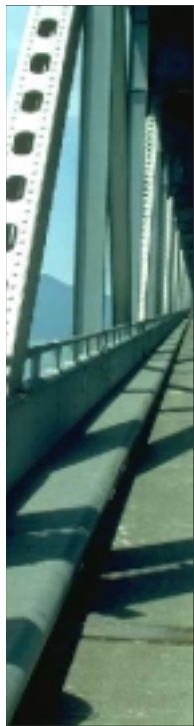


Professional Liability Insurance

◆ Contractors' Protective

- Insurance for the Design Firm's Insurance

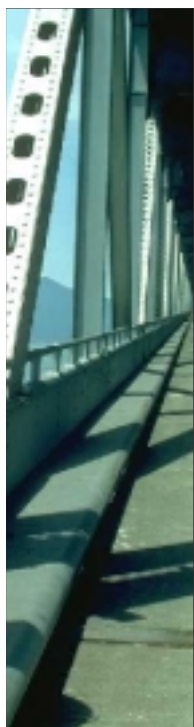




Project Specific Professional

◆ Another Solution is to Use Project Specific Professional Liability Insurance

- **Project Professional** - Covers all design firms working for the owner plus the construction manager from the beginning of design, through construction up to ten years after completion. Coverage can be amended to include the owner as an additional insured.



Project Specific Professional

Policy Limits



LIMITS - Range from 10% to 15% of hard costs

PREMIUM - Ranges from 0.10% to 0.30% of hard costs

***DEDUCTIBLE**

Coverage starts at the beginning of design*

*Amounts vary widely, but typical range is between \$50,000 and \$100,000.

For Design-Build projects, coverage should start at the beginning of bid preparation

Coverage ends 5 to 10 years after project completion



Project Specific Professional

◆ Key Issue

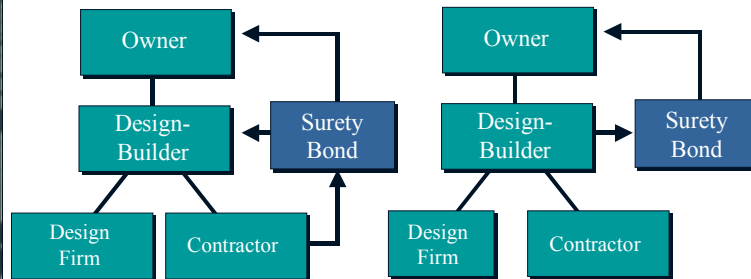
- Make sure the retroactive date goes back to the beginning of **bid preparation**. Normally, underwriters will go back to the original date of the design contract or to the beginning of design. In design-build, design errors can occur in the bid preparation phase. Covers all design firms working for the owner plus the construction manager from the beginning of design, through construction up to ten years after completion. Coverage can be amended to include the owner as an additional insured.

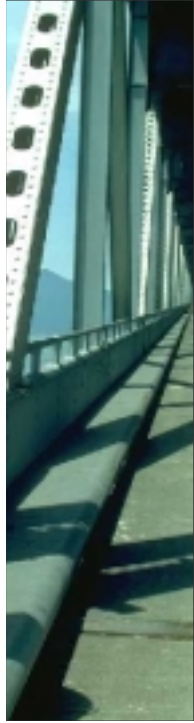


Surety Bonds

Dual Obligee Bond
(Only Construction is Bonded)

Design-Builder Issues Bond (Entire Project is Bonded)





Conclusion

- ◆ Design-Build Has Many Variations
- ◆ Professional Is One of Many Risks That Shift
- ◆ Design-Build is Hidden Within Design-Bid-Build
- ◆ Understand The Limitations of Professional Insurance
- ◆ Consider Protective Coverage
- ◆ Insurance Still Needs to Catch Up
- ◆ Consider Newer, More Creative Coverages For Larger Projects