



Workshop O

DESIGN-BUILD: CONTRACTS AND CLAIMS

EVALUATING THE CASE LAW

Presented by

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Design-build construction continues to gain popularity. In response to the increasing demand for design-build construction, all of the major trade organizations (AGC, AIA, DBIA, EJCDC) have developed a standard design-build contract series. Each set of contracts allocates risks and responsibilities somewhat differently, based on the organization's overall goals and objectives. As some of these projects begin to see claims, trends can be seen developing in how the courts are construing various types of contract provisions. In order to effectively advise contractors on their insurance needs, agents and brokers must understand the liabilities assumed under different contracts as well as how the courts are interpreting key contractual and insurance coverage provisions. This session will get you up to speed on the growing body of case law in this expanding area.

Thursday, November 16, 9 a.m.–noon

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



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Wickwire Gavin, P.C.

Mr. Loulakis is one of the presenters for Workshop O, "Design-Build: Contracts and Claims," on Thursday. He is partner in Wickwire Gavin, P.C., a Vienna, Virginia, law firm that specializes in the representation of domestic and international clients on construction-related matters. Mr. Loulakis has an extensive and diverse background in the design-build process, having represented clients on design-build projects around the world and in the power, telecommunications, health care, public facility, and transportation sectors of the construction industry. His role on these projects ranges from advising owners about project delivery systems to contract drafting, claims administration, and dispute resolution. Mr. Loulakis also provides strategic planning advice to contractors and design professionals who are interested in participating in the design-build contracting arena. Mr. Loulakis is a national speaker on construction management and design-build and has been a frequent Construction Risk Conference speaker. In 1999, he was recipient of IRMI's Words of Wisdom award. He is the author of numerous publications on project delivery systems, including *Joint Ventures in Design-Build*, *Risk Transference in Design-Build Contracting*, and *Comparison of the New Design-Build Contract Forms*. He is also the coauthor of *Construction Management: Law & Practice* and author of a widely acclaimed interactive CD program titled "Construction Project Delivery Systems: Evaluating the Owner's Alternatives," produced and distributed by the A/E/C Training Technologies. Mr. Loulakis is a member of the Board of Directors of the Design-Build Institute of America (DBIA) and served as chairman of its Manual of Practice Committee, where he drafted the Design-Build Contracting Guide and had primary responsibility for developing DBIA's family of design-build contract documents.

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.

EVALUATING THE CASE LAW

Michael C. Loulakis
Wickwire Gavin, P.C.

I. Background

- A. Design-build liability truisms
- B. What makes design-build liability different?
- C. Where are the liability trends?
- D. Identifying the problem areas
 - 1. Unique design-build problems
 - 2. “Garden-variety” construction and design problems

II. Garden-variety construction and design problem areas affecting design-build projects

- A. Changes to the work
- B. Procedural issues
 - 1. Notice
 - 2. Lien filing requirements
- C. Differing site conditions
- D. Terminations
- E. Pass-through claims of subcontractors

III. Unique design-build problem areas

- A. Procurement process
 - 1. How far should the design be taken?
 - 2. What criteria should be used to select the design-builder?

- B. Contract Issues (will have been addressed by Ernstrom in Part 1 of presentation)
 - 1. Cost plus vs. lump sum
 - 2. Scope of work
 - 3. Performance guarantees
 - 4. Acceptance criteria
 - 5. Ownership of documents
 - 6. Limitations of liability
 - 7. Warranty
 - 8. Design liability
- C. Execution of the process
 - 1. Owner active involvement in process
 - 2. Owner’s understanding of what design-build does and doesn’t offer
 - 3. Teaming Issues
 - (1) Difference in philosophy between construction and design teams
 - (2) Agreeing to economics
 - (3) A/E’s role during bidding and construction process

IV. Major Liability Problem Areas

- A. Single point of responsibility
- B. Design liability
- C. Fair business dealings
- D. Contract formation
- E. Licensing

V. Where is Design-Build Liability Heading?

EVALUATING THE CASE LAW

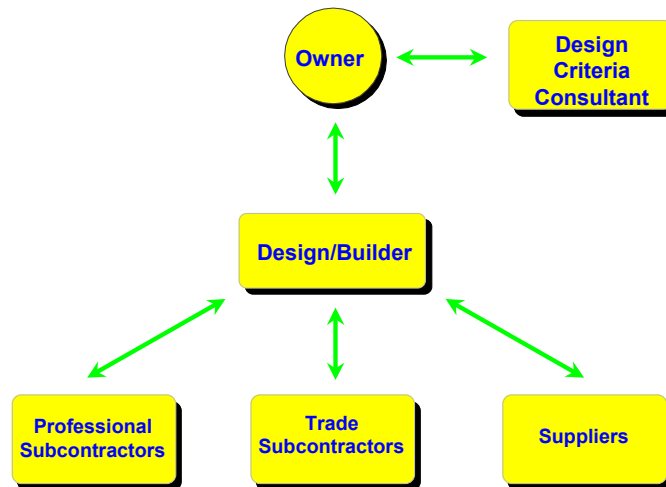
The Current State of Design-Build Liability

- Owners experiencing reduced claims
- Design-builders have significant potential (but little actual) liability
- Design professionals facing greater exposure
- Few reported cases

What Makes Design-Build Liability Different?

- Approach is structurally different from other delivery systems
- Single point of responsibility
- Performance specifications
- Role of design professional

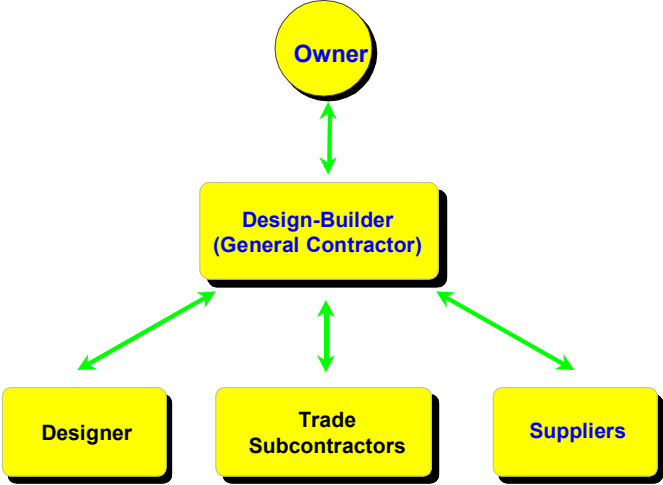
Design-Build



What Makes Design-Build Liability Different?

- Approach is structurally different from other delivery systems
- Single point of responsibility
- Performance specifications
- Role of design professional

Contractor-Led Design-Build



Does Design-Build Reduce Project Claims?

- Experience suggests that it does
- Partnering approach
 - need to act like team members
 - merger of design & construction promotes cooperation
- Qualifications-based selection becoming the norm

Identifying the Design-Build Problem Areas

- **Areas of challenge**
 - procurement
 - contracting
 - execution
- **Unique design-build issues**
 - single point of responsibility
 - design liability
- **“Garden-variety” design and construction issues**

Garden-Variety Design and Construction Issues

- **Changes to the work**
- **Procedural issues**
 - notice
 - lien filing requirements
- **Differing site conditions**
- **Terminations**
- **Pass-through claims of subcontractors**

Unique Design-Build Issues: Procurement Challenges

- Remembering “the design-build difference”
- Using consultants
- Bridging and the *Spearin* doctrine

M.A. Mortenson Co.

- Air Force medical clinic
- Design-builder relied on solicitation design documents
- Corps rejected request for equitable adjustment
- Board agreed that Corps had warranted information

Procurement Challenges (cont'd)

- **Extent of proposal deliverables**
- **Stipends**
- **Using information of unsuccessful proposers**

Procurement Challenges (cont'd)

- **Establishing qualitative selection criteria**
 - should weights be specified?
 - is low price the goal?
- **Objectively analyzing criteria**
 - past performance
 - scope of discussions
 - proposal contents

Promac, Inc. v. West

- VA medical research building
- Pricing issues
 - approved funding at \$2.6M
 - bids from \$3.1M to \$3.7M
 - low bid within 1% of final cost estimate
- IFB canceled due to “unreasonable” bid prices
- Negotiations conducted with \$2.7M target

Procurement Challenges (cont'd)

- Establishing qualitative selection criteria
 - should weights be specified?
 - is low price the goal?
- Objectively analyzing criteria
 - past performance
 - scope of discussions
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Griffy's Landscape Maintenance

- **Tree trimming and maintenance contract at Fort Campbell, KY**
- **Best value award without discussions**
- **EMF was considered, with insurance contacts for CGL submitted**
- **Information not included and Army never asked where it was**

Coffman Specialties, Inc.

- **Design-build of aircraft processing ramp**
- **Limitations in RFP**
 - 3 projects for design projects
 - 5 pages for management approach
- **CSI had lowest price, but ranked 5th out of 6 on technical merit**
- **Proposal format not per RFP**

Unique Design-Build Issues: Contracting Challenges

- **Scope of work**
- **Performance guarantees**
- **Acceptance criteria**
- **Ownership of documents**
- **Limitations of liability**
- **Warranty and design liability**

Unique Design-Build Issues: Execution Challenges

- **Owner's active involvement**
- **Owner's understanding about what process offers and does not offer**
- **Teaming issues:**
 - **design-builder's failure to recognize importance of design**
 - **economics of A/E liability**
 - **A/E's role during bidding and construction**

Unique Design-Build Problem Areas

- **Single point of responsibility**
- **Design liability**
- **Fair business dealings**
- **Ownership of documents**
- **Contract formation**
- **Licensing**

Omaha Pollution Control Corp. v. Carver-Greenfield Corp.

- **Sewage treatment plant for filtration and processing of meat packing house wastes**
- **Failure to meet performance tests**
- **\$3 million in damages**

***Rivnor Properties v.
Herbert O'Donnell, Inc.***

- Office building construction
- Design-builder subcontracts to architect
- Water leaks could not be remedied
- Design-builder liable

The design-builder “was charged with the sole responsibility for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the work under the contract, including quality control.”

CIT Group/Equipment Financing v. ACEC Maine

- Turbine at plant unable to meet performance standards
- Liquidated damages if plant failed performance test
- Clause enforced

Tips v. Hartland Developers, Inc.

- Airplane hangar in San Antonio
- Design-builder failed to meet fire code requirements for mezzanine
- Implied warranty that codes would be met?
- Court found implied warranty, but that it was inapplicable

“Contractors, not owners, are in the best position to know about and comply with relevant building codes. Furthermore, buyers are not in the business of building; they are in the business of occupying. They rely on builders to furnish structures that can be occupied.”

C.L. Maddox, Inc. v. Benham Group, Inc.

- **Electric power plant retrofit**
- **Design-builder sued A/E for bidding and engineering errors and delays**
- **Jury award of \$5 million in damages**
- **Implied warranty of design**

***Skidmore, Owings & Merrill v.
Intrawest I Limited Partnership***

- High-rise commercial facility
- GMP based on SOM design
- Owner sues over design omissions
- Jury award of \$800K upheld
- Betterment principle rejected

“Intrawest bargained for complete designs that would allow it to establish the project’s GMP. * * * SOM knew that Intrawest had a tight budget so that significant design changes after the GMP was set would threaten the project’s feasibility.”

***Combustion Engineering, Inc.
v. Miller Hydro Group***

- Hydroelectric facility
- Design-builder sues for \$8 million bonus
- Utility sues for fraud and breach of contract
- Court bars design-builder's claim for bonus fee

***Richmond Metro. Authority v.
McDevitt Street Bovis***

- Stadium project
- Problems with structural members 11 years after project completion
- Claim that design-builder committed fraud by hiding its defective work
- Statute of limitations defense upheld
- Safeguard against turning breaches of contract into fraud claims

Johnson v. Jones

- **Architect to provide design-build services**
- **Owner terminates architect**
- **New architect uses original work product**
- **Owner and follow-on architect liable for copyright infringement**

Where is Design-Build Liability Heading?

- **Owner's role with design development & review**
- **Business deal & scope of work**
- **Procurement disputes**

Where is Design-Build Liability Heading? (cont'd)

- **Disputes with subcontractors**
- **Contingent liability for performance breaches**
- **Magnitude of dollars when something goes wrong**