

**DESIGN-BUILD SEMINAR*****IDENTIFYING DESIGN-BUILD RISKS***

Presented by

**J. William Ernstrom  
Partner  
Ernstrom & Dreste LLP**

***Monday, October 29, 9:00 a.m.-5:00 p.m.***

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**J. William Ernstrom**  
**Partner**  
**Ernstrom & Drete LLP**

Mr. Ernstrom's duties as a speaker include two IRMI Construction Risk Conference sessions: He will be a presenter for "Design-Build," one of Monday's all-day seminars, and Workshop L, "Making the Bond Pay," on Wednesday.

Mr. Ernstrom, Partner, Ernstrom & Drete, LLP, Rochester, NY, is General Counsel of Alberici Corporation, the Counsel to the Contract Documents Program of the American Associated General Contractors, and project counsel for the Dallas Fort Worth International Airport \$3,000,000,000 expansion program. He is the only attorney ever selected to be a member of the Consulting Constructors' Council of America. He is a member of the National Construction Dispute Resolution Council for the American Arbitration Association.

Mr. Ernstrom is a construction and surety attorney with over 25 years of experience. His practice is extensive in all phases of law representing contractors, private and municipal owners, and sureties. Mr. Ernstrom has authored numerous articles on surety and construction law topics, and has spoken at the Fidelity & Surety Law Committee Mid-Winter Meeting (1995), the ABA's Forum on the Construction Industry (1997), and the National Bond Claim Association. Mr. Ernstrom has given national seminars for the National Association of Surety Bond Producers on "The General Conditions of the Contract for Construction: A201, 1997 ed.—It Isn't What It Used To Be." He also frequently lectures throughout the country for the Associated General Contractors and the Construction Financial Management Association. Mr. Ernstrom has written about construction management for the *Wiley Construction Law Update* publications. He has authored and presented for the 1997 annual meeting of the Design Build Institute of America on "Surety Bonding for Design Build." Mr. Ernstrom is coauthor of "AGC Revises Design-Build Contracts," for the 2000 Supplement to *Construction Risk Management*, International Risk Management Institute, Inc.; "Managing and Litigating the Complex Surety Case: Proving and Defending Quality of Work Issues," American Bar Association, Tort and Insurance Practice Section. Mr. Ernstrom has also spoken by invitation on construction claim issues to the Court of Claims of the State of New York and the New York State Association of County Attorneys.

Mr. Ernstrom is a member of the ABA Fidelity & Surety Committee, the Surety Claims Institute, and the National Bond Claims Association. For 4 years, he represented the AGC in its negotiations with the AIA concerning the A201 family of documents. He was also the principal author of the new AGC Document 200, the first national standard form lump sum contract agreement with related general conditions created jointly by owners and contractors. Mr. Ernstrom was also a member of the AGC Task Forces that recently revised the AGC Standard Design-Build set of documents, the AGC's Construction Management Agency contract documents, and prepared AGC's new Program Management Contract. Mr. Ernstrom is a member of the Surety Bonding Committee, Project Delivery Systems Committee, and Subcontractor Relations Committee of the AGC of America.

Mr. Ernstrom is the Region II Vice-Chairman for New York of the Public Contract Section of the American Bar Association. For 10 years, he was the Chairman of the New York State Construction Dispute Resolution Council. He is also a mediator and a national arbitrator for the American Arbitration Association. Currently, Mr. Ernstrom is the Chairman of the first Dispute Review Board ever to be used by the New York State Office of General Services.

Mr. Ernstrom graduated with honors from Hamilton College and received his Juris Doctor, with honors, from Cornell Law School.

## ***Notes***

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# IDENTIFYING DESIGN-BUILD RISKS

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*J. William Ernstrom  
Ernstrom & Drete, LLP*

## THE RULES HAVE CHANGED

**It's important to understand the risks!**

### **It will Work for any Project**

- Design-Builder only establishes roles/relationships
- Each project has unique success drivers
- Personality and management style of Owner
  - Owner's leap of faith or need for control over the design?
  - Does Owner trust its service providers?
  - Owner's decision making: keep pace w/ tight schedule?
  - Does Owner micro-manage by committee?

## **The Risk Factors of Design-Build**

- Pre-Contractual
  - Licensure issues
  - Teaming Issues
- Contractual Issues
  - The key risk issues

## **REMEMBER . . .**

We are in the construction business!

## **Pre-Contractual**

Licensure Issues

LICENSURE  
Is it legal?

**Pre-Contractual**

Teaming Issues

**Why a Teaming Agreement**

Clear communication pathways

**Pre-Teaming Issues  
Selection of Team Members**

- Have you done a careful analysis of potential team members?
  - Compatibility
  - Proven knowledge in product type
  - Experienced in design-build arena
  - Necessary financial capacity to carry their share
  - QBS process - not lump sum proposal
- Have you used the AGC Teaming Checklist?

### **Why a Teaming Agreement?**

- Proposal preparation:
  - Failure to agree on roles and duties
  - Failure to agree on sharing of costs & honorarium
  - Failure to agree on how to handle disclosure and ownership of proprietary information
  - Failure to get confidentiality agreement
  - Failure to get non-compete.

### **Teaming Agreement Proposal Phase**

- Costs of materials and preparation and how allocated if loss
  - design work
  - estimating
  - scheduling
  - market analysis
  - specialized presentation materials
- Defines what happens if successful
  - job cost?
  - Born by parties?

### **Teaming Agreement Proposal Phase**

- Exclusivity
- Team leader
- Proposal preparation issues & costs
- Bonding requirements at submission
- Roles & responsibilities of team members during proposal & presentation
- When can members withdraw
- Who makes final call on disagreement in proposal & presentation.

**Post Award Considerations**

- Preparation of matrix of responsibilities
- Flow down of prime contract terms
- Establish process for coordinating design with construction
- Establish contingency
- Limitation of liability.

**Teaming Risks**

- Termination/Withdrawal of one team member
  - Portion of proposal unacceptable
  - Loss of licensure
  - What happens when a team member defaults?
  - Remaining team members should consider imposing a penalty for withdrawal.

**Contractual Risk Issues**

**Contractual Risk Issues**

NOT!

### **Project Risk Issues**

- Contingencies
- Savings sharing
- Cost overruns
  - Design delays
  - Schedule delays
  - Budget overruns
  - Rework
  - Errors & omissions
  - Financial failure of team member.

### **D/B Contractual Terms to Trap the Unwary Design-Builder**

- Order of precedence - the Design-Builder's Proposal
- Permits - who is responsible for obtaining & purchasing them?
- Changes in the law - who's responsible?
- Delay - force majeure - who bears risk?
- Indemnification-now covers design-does it change the standard of care?
- Limitations of Liability - are there any?

## DESIGN/CONSTRUCTION LIABILITY

### Single Point of Responsibility

- Who is creating the design?
- Implied warranty of performance
- Design liability pass through
- What is the standard of care for design?
  - Is there a change from negligence to strict liability by virtue of warranty provisions?
  - Is there a difference between prime contract and sub-consultant's?
  - Non insurable.

### Other Design Issues

- What is the Design-Builder buying?
  - Bridging
  - Surety as Completion Contractor
  - Owner or Third Parties
- Delay by A/E in furnishing documents
  - Provide incentive-cut in on savings clause
  - Share in LDs-set ceiling & floor.

### **Other Design Issues**

- Ownership of Documents
  - What happens if A/E decides to walk?
    - Who owns the documents?
  - What happens when Owner terminates?
    - Who owns the documents?
- Design Development - written sign off.

### **Other Design Issues**

- Handling subcontracted design
  - Require licensed design professional
  - Require A/E to coordinate other subcontractor design
  - Manage to budget and schedule
- S/L & S/R
  - Varies state to state
  - Owner
  - Third parties.

### **Other Design Issues: Performance Guarantees & Warranties**

- Failure to provide design capable of achieving performance criteria constitutes material breach
- Implied covenant to comply with codes
- Design-Builder guarantees design when design sub-consultant has not
- Insurability?

**THE OWNER**

**Does the Owner Understand  
What It Is Asking?**

**Does the Owner Know  
What it Wants?**

- The Owner's Program
  - Does Owner have a program?
  - Clear, complete & well defined
- Material Changes and Deviations
- Progressive Sign-Off
- Use of standard specifications.

**Owner Responsibilities**

- Funding & Payment
- Timely reviews and Approvals
- Surveys, Geotech Reports, Easements, Environmental Studies
- Hazardous Conditions
- Third-Party Agreements
- Permits.

## **Compensation**

- Lump Sum vs. Guaranteed Maximum Price
- GMP
  - When is GMP delivered?
  - Adjust after most trades purchased
    - $GMP = \text{sub prices} + \text{prices to be bought} + \text{contingency}$
- Bonus Payments?
- LDs?

## **AMENDING AND SUPPLEMENTING THE DOCUMENTS**

## **CHANGES**

## **AMENDING AND SUPPLEMENTING THE DOCUMENTS**

- Change Orders - Limitations on fees
- Work Change Directives
  - If Owner and the Design-Builder disagree as to whether work is within the scope of the Work, Design-Builder furnishes estimate of costs.
  - If Owner issues a written order to proceed, Design-Builder performs disputed work and Owner pays Design-Builder fifty percent (50%) of its estimated cost to perform the work.
  - Both parties reserve their rights as to whether the work was within the scope of the Work.
- Minor Work.

**INSURANCE AND BONDING**

**TERMINATION &  
SUSPENSION**

**Disputes**

Don't get caught in the middle!

**QUESTIONS ?**