



Checklist For Design-Build Teams

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I may be blackballed from the legal profession for revealing this, but contractors and design professionals rely too heavily on lawyers to negotiate their contracts. The best way for two knowledgeable parties to negotiate a contract is to list, discuss and resolve all of the business issues with each other, and then to turn those conclusions over to a lawyer to draft the agreement and spot potential additional issues.

This is especially true when a contractor and an A/E are teaming up to market for or to perform a design-build project. In design-build, there is no one "standard" way for the design-build team to function, and even the manner in which services are provided differs from traditional construction projects. It is important to consider all of these issues and to discuss them thoroughly.

I have developed an outline of issues that I recommend be considered and discussed by both members of the design-build team. Many clients have told me that it is a useful checklist for negotiating and agreeing on the terms that will govern the design-build team. After discussing and reaching agreement on these issues, it is relatively trivial to draft the contract.

The issues listed below are those which must be discussed and resolved. Except for a couple issues which are highly legal in nature (indemnification and dispute resolution), I do not recommend any one particular resolution of the issue over any other. There is no right or wrong resolution of most of these issues, but discussing and agreeing on them in advance will minimize unpleasant surprises and disappointed expectations as well as any animosity or claims resulting from the project.

I. Structure of the Team.

A. Structure of the Business Relationship.

1. One party prime, and the other as subcontractor.
2. Joint business venture.
 - a. Legal structure of venture: joint venture (partnership), corporation, limited liability company.
 - b. Organization and control of the joint business venture.
 - c. Capitalization and financial issues.

B. Lines of Communication.

II. Sharing of Risks and Rewards.

A. Compensation.

1. Amount.
2. Timing of payment.
3. Conditions.

B. Project Profits and Losses.

1. Allocation of savings if project exceeds goals.
2. Allocation of losses if project fails to meet goals.

C. Other Risks and Rewards.

1. Identify and describe each.
2. Allocate consequences between the parties.

III. Design Phase Services (that may be different from traditional projects).

A. Services Provided by the Contractor.

1. Costing, estimating.
2. Value engineering.

3. Assistance in analyzing owner-provided information.
4. Constructability analysis.
5. Preliminary scheduling.
6. Checking design to anticipate problems.
7. Acquisition of long-lead items.
8. Procuring subcontractor participation and quotes.
9. Negotiation with subcontractors/vendors.

B. Services provided by the A/E.

1. System-by-system design, with “looping” feedback from trade contractors.
2. Informal communications rather than “defensive detailing”.
3. Greater (lesser) number of alternative designs.
4. MEP design only schematic, completed by trade contractors.
5. Acceptance of greater-than-usual price constraints.
6. Out-of-sequence provision of design details.
7. Heavier reliance on performance specifications.

IV. Construction Phase Services (that may be different from traditional projects).

A. By the Contractor.

1. Anticipation and avoiding or minimizing the consequences of design problems.
2. Fast-tracking the construction.

B. By the A/E.

1. Informal provision of supplemental design information.
2. Cooperative approval of substitutions.
3. Cooperative trouble-shooting and problem-solving.

V. Protective Business Provisions.

A. Confidentiality of Information.

B. Exclusive Relationships or Agreements Not To Compete.

C. Future Marketing / Sales Efforts.

1. Responsibility of each party.
2. Provisions regarding mutual commitment, exclusivity.

VI. Risk Transference.

A. Insurance Provisions.

1. Coverage to be procured by each party, including limits, terms, etc.
2. Allocation of cost of insurance.

B. Surety Bonds.

1. Description of bonds to be procured, by whom, terms, etc.
 2. Provisions for allocating cost of bonds.
- C. Indemnity Provisions.
1. A/E to indemnify contractor for claims arising out of breaches of A/E's duties.
 2. Contractor to indemnify A/E for claims arising out of breaches of contractor's duties.
 3. Provisions for cooperative defense or splitting costs of claims common to both parties.
 4. Provisions for indemnification by others.

VII. Dispute Resolution.

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

As most design-build practitioners agree, design-build teams work best when the contractor and the design professional actively cooperate and attempt to further each other's best interests. A design-build project is successful when both teammates are pleased with the result. That success is much easier to achieve if the issues outlined above are discussed thoroughly in advance so that each member understands the other's expectations as well as its own.

About the Author

Mark C. Friedlander is a partner in the Construction Law Group at the law firm of Schiff Hardin LLP. He obtained his B.A. from the University of Michigan in 1978 and his J.D. from Harvard Law School in 1981. He is currently an adjunct professor at the University of Illinois at Chicago School of Architecture and a lecturer at Northwestern University's Engineering School, and had lectured at the Illinois Institute of Technology School of Civil Engineering from 1987-89, at the Engineering School of the University of Wisconsin in 1988 and 1990, and the Architecture School of the Georgia Institute of Technology in 1997-98. Mr. Friedlander concentrates his practice in construction law and litigation with particular emphasis on design-build methods of project delivery.

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