



## Design-Build Teaming Agreements

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**Question:** I have been approached by a contractor and asked to team with him for a design-build project. It is a good opportunity for my firm and I want to do it, but I don't know what questions to ask or issues to consider. What do I have to know or do differently from my normal practice when I work with a contractor on a design-build team? What questions should I ask or issues should I resolve before agreeing to proceed?

**Answer:** Those are excellent questions. They are recurring more and more frequently as design-build continues to grow in popularity. Everyone knows more or less what to expect when working on a traditional project, so many issues are never raised because all parties assume that they will be resolved in the usual way. But there is not yet a "most usual way" to resolve many of the issues that uniquely arise in design-build projects.

The following is a useful outline of issues which a designer and a contractor should discuss and resolve in a "Teaming Agreement" prior to committing to any design-build project. The outline is generic, so not all of its issues will apply to all projects, and some projects may raise issues not listed in the outline, but in general I recommend that you make a copy of the outline and keep it with your standard business negotiation materials.

- 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.
- a. Informal provision of supplemental design information.
  - b. Cooperative approval of substitutions.
  - c. 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).

The structure of the team may be important, particularly it affects control of the project and the communications with the client. It may be wise to seek legal or accounting advice regarding the consequences of different types of structures. Far too often the design-build team elects to be a joint venture because this is commonly done, despite the fact that it may be the least advantageous business structure available.

The risks and rewards are the most critical business terms. There is no "right" way to allocate risks and rewards, and there is not even a single most common practice. However, under no circumstances should they be taken for granted -- always discuss explicitly the business terms and assumptions.

I recommend that you use the list of services performed differently from traditional projects as the basis for a discussion with the contractor. Already there are so many variations of design-build that you and the contractor may have very different assumption about the day-to-day details of services performed. In my opinion, the following are the major differences:

**Cooperation.** The design professional is the contractor's teammate, not the owner's representative. Within the constraint of the project's integrity, the engineer and the contractor should make every effort to ensure that the project is successful for each other.

**Efficiencies.** Since they are working as a team, the communication between the engineer and the contractor can be much more efficient than in the usual situation in which the design professional must engage in "defensive detailing" to prevent the possibility of claims. Design intent is communicated in a much less formal fashion, and the design process itself is streamlined by seeking early input from subcontractors and vendors.

**Fast-Tracking.** Design-build is ideally suited to starting construction before the final design details have been determined. Firm price and completion dates can be given to the client prior to completion of design by relying on assumptions mutually agreed by the engineer and contractor as to how the design will be completed.

Design-build works best when the engineer and contractor hope or expect to continue working together on future projects. It is easier for them to reach compromises on issues that arise in the project if there is an expectation that they will have future opportunities to work together in other projects. At a minimum, issues of exclusivity, confidentiality and future endeavors should be discussed at the outset. The dispute resolution process should be tailored to these assumptions, since it is easier to require negotiated solutions to disputes if there is an ongoing relationship.

The risk transference devices should correspond to the allocation of risks and rewards. I find the fairest philosophy to be that each party should indemnify and insure the other for claims and problems arising out of its unique areas of responsibility, and the parties should divide the responsibility for shared problems in accordance with their relative culpability. Of course, if one company participates more than its proportionate share in the project's rewards, it is logical that it should also bear a correspondingly larger share of the risks.

I would be very interested to hear from any readers of this page about any additional issues or contractual provisions in Teaming Agreements that have proved to be helpful.

## 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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