The Law and Business of Design-Build

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Seven Legal Issues Unique to Design-Build

1. Relationship of the parties
2. Standard of care of design work
3. Availability of performance warranties
4. Entitlement to change orders
5. Unique licensing problems
6. Unique insurance/bonding problems
7. Unique problems with competitive bidding laws
Types of Design-Build Relationships

- Integrated Company
- Contractor Prime, A/E Sub
- A/E Prime, Contractor Sub
- A/E Prime, Multiple Trade Subs
- Design-Builder Prime, A/E and Contractor each Subs
- Joint Business Venture by A/E and Contractor
Four Types of Business Ventures

- Joint Venture (partnership)
- Corporation
- Limited Liability Company (new)
- Limited Liability Partnership (new)
## Tax/Accounting and Liability Matrix for Design-Build Entities

<table>
<thead>
<tr>
<th>Type of Entity</th>
<th>Advantageous Tax/Accounting Treatment</th>
<th>Advantageous Liability Treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Joint Venture</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Corporation</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Limited Liability Company</td>
<td>✓</td>
<td>✓</td>
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</tbody>
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Issues for Design-Build Teaming Agreements

1. Structure of the Team
2. Sharing of Risks and Rewards
3. Design Phase Services *
4. Construction Phase Services *
6. Risk Transference
7. Dispute Resolution

* May be different from traditional projects
1. Structure of the Team

- Structure of the Business Relationship
  - One party prime, and the other as subcontractor
  - Joint business venture
    - Legal structure of venture: joint venture (partnership), corporation, limited liability company
    - Organization and control of the joint business venture
    - Capitalization and financial issues
  - Lines of Communication
2. Sharing of Risks and Rewards

• Compensation
  – Amount
  – Timing of payment
  – Conditions

• Project Profits and Losses
  – Allocation of savings if project exceeds goals
  – Allocation of losses if project fails to meet goals

• Other Risks and Rewards
  – Identify and describe each
  – Allocate consequences between the parties
3. Design Phase Services
(that may be different from tradition projects)

• Services Provided by the Contractor
  – Costing, estimating
  – Value engineering
  – Assistance in analyzing owner-provided information
  – Constructability analysis
  – Preliminary scheduling
  – Checking design to anticipate problems
  – Acquisition of long-lead items
  – Procuring subcontractor participation and quotes
  – Negotiation with subcontractors/vendors
3. Design Phase Services (Cont.)

(that may be different from tradition projects)

• Services provided by the A/E
  – System-by-system design, with “looping” feedback from trade contractors
  – Informal communications rather than “defensive detailing”
  – Greater (lesser) number of alternative designs
  – MEP design only schematic, completed by trade contractors
  – Acceptance of greater-than-usual price constraints
  – Out-of-sequence provision of design details
  – Heavier reliance on performance specifications
4. Construction Phase Services
(that may be different from tradition projects)

• By the Contractor
  – Anticipation and avoiding or minimizing the consequences of design problems
  – Fast-tracking the construction

• By the A/E
  – Informal provision of supplemental design information
  – Cooperative approval of substitutions
  – Cooperative trouble-shooting and problem-solving

- Confidentiality of Information
- Exclusive Relationships or Agreements Not to Compete
- Future Marketing / Sales Efforts
  - Responsibility of each party
  - Provisions regarding mutual commitment, exclusivity
6. Risk Transference

- **Insurance Provisions**
  - Coverage to be procured by each party, including limits, terms, etc.
  - Allocation of cost of insurance

- **Surety Bonds**
  - Description of bonds to be procured, by whom, terms, etc.
  - Provisions for allocating cost of bonds
6. Risk Transference (cont.)

- **Indemnity Provisions**
  - A/E to indemnify contractor for claims arising out of breaches of A/E’s duties
  - Contractor to indemnify A/E for claims arising out of breaches of contractor’s duties
  - Provisions for cooperative defense or splitting costs of claims common to both parties
  - Provisions for indemnification by others
7. Dispute Resolution

• Commencement of the Dispute Resolution Process
  – For claims initiated by or involving third parties, dispute process not to begin until third party aspects of claim are resolved
  – Provision tolling statute of limitations for claims involving third parties

• Sequence of Dispute Resolution Actions
  – Step negotiations between senior management
  – Non-binding mediation
  – Binding arbitration (or court litigation)