

Emerging Legal Issues in Design-Build

*Legal Nuances and Resolution of
Disputes in Design Build*



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DESIGN-BUILD PROJECT ISSUES: MINIMIZE THE OPPORTUNITY FOR DISPUTES

1. SELECT THE RIGHT PROJECT DELIVERY METHOD
 2. DEFINE THE SCOPE APPROPRIATELY
 3. SET THE DESIGN EARLY
 4. TIE SCOPE TO BUDGET AND SCHEDULE
 5. SELECT THE RIGHT DESIGNER/BUILDER
 6. SELECT THE RIGHT OWNER'S TEAM
 7. UNDERSTAND DESIGN-BUILD PRINCIPLES
 8. DRAFT EFFECTIVE CONTRACT DOCUMENTS
 9. USE EFFECTIVE PROJECT CONTROLS
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DESIGN-BUILD DOGMA

- FASTER
- CHEAPER
- FEWER DISPUTES

1. SELECT THE RIGHT PROJECT DELIVERY METHOD

DESIGN-BUILD:

- Medium to Large Complex projects that
 1. Are time Sensitive
 2. Can benefit from innovative concepts

2. DEFINE THE SCOPE APPROPRIATELY

Balance Flexibility (“loose” Design Guidelines) with certainty of who is responsible for what

- Use performance criteria to drive creativity

3. SET THE DESIGN EARLY

...and don't tinker with it.

4. TIE SCOPE TO BUDGET AND SCHEDULE

- Expectations must be realistic
- Scope must be succinct
- Budget and schedule refinement must be shared

5. SELECT THE RIGHT DESIGNER/ BUILDER

- Qualification/Technical expertise
- Experience
- Value
 - Price
 - Features and functions
 - Life-cycle costs

6. SELECT THE RIGHT OWNER'S TEAM

Adequate staffing and oversight

- Program Architect/Engineer
- Construction Administration

7. UNDERSTAND DESIGN-BUILD PRINCIPLES

- Less Owner control
- Less Owner involvement

8. DRAFT EFFECTIVE CONTRACT DOCUMENTS

- Including Bid/Proposal Documents
- Do not necessarily rely on standard form agreements

9. USE EFFECTIVE PROJECT CONTROLS

- Schedule
- Cost
- Insurance/Bonds
- Warranties/Guaranties

RISK MANAGEMENT

New York School Construction Authority Project

- \$50 Million Project
- 12 Separate Locations
- Design Builder Joint Venture
- One Point of Responsibility?

RISK MANAGEMENT

Bonds

- Surety's Perspective
- Joint Venture/Separate Entities

Insurance

- Commercial General Liability Issues
- Professional Liability Issues
- Other Solutions

RETENTION OF CONTROL

- Acquest Gov't Holdings v. GSA (2007) - \$914,000 claim for alleged extra work associated with correction of air handling problem
- RFP was based on “preliminary design concept” for facility
- But Contract also contained specific air handling requirements
- Owner: Contractor had responsibility to make the air handlers work properly
- Contractor: We adhered to specific air handler requirements; no fault for resulting inoperability
- Court: Full hearing on merits; no summary judgment

“CONCEPT SUBMITTAL DRAWINGS”

- Appeal of M.A. Mortenson (1993) - \$187,000 claim for extra work to provide additional concrete and reinforcing steel in footings
- Contractor's bid was based on take off of steel and concrete quantities shown in foundation plan which the RFP stated “may be used” for pricing
- Actual quantities in final design were greater
- Owner: Changes Clause does not apply & Contractor should have run structural calculations at bid time to determine true quantities
- Contractor: We reasonably relied on the foundation system depicted in the “Concept Submittal Drawings”
- Court: Award in favor of Contractor

RELIANCE ON BRIDGING PLANS

- Appeal of Donohue Electric (2002)
- Boiler identified in RFP design was incompatible with sterilizer
- Owner: RFP design was for “informational purposes only” and therefore Contractor had to figure out final design, including boiler/sterilizer compatibility
- Contractor: We used the boiler you indicated in your 50% design
- Court: Award in favor of Contractor

AMBIGUOUS SPECIFICATIONS/ RULES OF INTERPRETATION

- Record Steel & Construction v. U.S. (2004) - \$188,000 claim for overexcavation of footings
- Geotech report in RFP design stated footings “should” be overexcavated
- In its bid, Contractor stated overexcavation was not necessary
- During construction, Owner insisted on overexcavation
- Owner: As a design requirement in RFP, overexcavation was not compensable as an extra cost
- Contractor: Overexcavation was merely a guideline or recommendation
- Court: Award in favor of Contractor because RFP was ambiguous – use of “should” instead of “shall”

AMBIGUOUS SPECIFICATIONS/ RULES OF INTERPRETATION

- Appeal of United Excel Corp (2003) - \$112,000 claim for costs to use stainless steel diffusers in surgical suite
- RFP stated material in operating rooms “shall be aluminum or stainless steel”
- But RFP also stated that air distribution in operating room “shall” be stainless
- Owner: Conflict between these two provisions was “patent” (or obvious) and Contractor failed to seek clarification prior to bid submission
- Contractor: Specification was only a “design parameter” and thus use of aluminum was allowed in Contractor’s discretion
- Court: Ruled in favor of Owner because Contractor failed to make inquiry

TEAMING AGREEMENTS

- C.L. Maddox v. Benham Group (1996) - \$2.7 million claim by Contractor against Engineer for faulty pre-bid information
- Prior to bid, Engineer provided preliminary design on which Contractor “relied heavily” in submitting fixed price proposal to Owner
- Pre-bid design failed to capture true scope of Owner requirements – undersizing, missing quantities, etc.
- Engineer: The pre-bid design work was conceptual only and thus contractor did not have right to rely on it
- Contractor: Engineer knew we were planning to rely on its scope in making a fixed price proposal to Owner
- Court: Award in favor of Contractor – Engineer made implied warranty to Contractor that its work was performed properly for intended purpose
- Establishment and control of contingency