Design-Build (DB) Professional Liability Risks and Risk Management

Profitable Practice For Engineers in Design-Build
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Presentation Overview

Design-Build (DB): Professional Liability Risks and Risk Management

- Background Discussion
- Path Forward
Background
Discussion

Accept
Reduce

Avoid
Transfer
Design-Build (DB): Roles and Risks for Consulting Engineers

- Owner
- Consulting Engineer
- Design-Builder
- Consulting Engineer Member
- Consulting Engineer Subconsultant
DB: Roles and Risks for Consulting Engineers

Consulting Engineer as Owner’s Consultant

Primary Risk Factors:

- Service scope
- Degree of design development furnished to Design-Builder
- Clarity and consistency as to Design-Builder’s design responsibility
- Degree of Design-Builder’s discretion and judgment in design development
- Design-Builder’s reliance rights on work product of owner’s design professional consultant / disclaimers
- Role in design submittal review process
DB: Roles and Risks for Consulting Engineers
Consulting Engineer as Owner’s Consultant

• Distinctions between risk allocation and professional responsibility for design adequacy

• Distinctions between contractual terms and practice performance realities: legal implications

DB: Roles and Risks for Consulting Engineers  
**Consulting Engineer as Member of Design-Builder**

Primary Risk Factors:

- Construction risk and responsibility
- Joint and several liability
- Cross-indemnification
- Insurance
  - Will not cover all risks
  - Gaps in coverage

Primary Risk Factors:

- Client selection
- Owner sophistication, experience and approach
- Degree of Owner-furnished design development and mandatory design criteria / standards
- Reliance rights / disclaimers
- Use of prototypical / standard design assumptions v. project-specific design
- Prime DB contract terms
- Flow-down implications
- Relational risk allocation
DB: Roles and Risks for Consulting Engineers

Consulting Engineer as Subconsultant to Design-Build

- Design development contingency
- Design development deliverables: schedule and quality control pressures and challenges
- Heightened standard of care
- Contractual risks for quantity overruns
Liquidated damages exposure

Inapplicability of betterment defense

Owner role in design submittal review process
  - Substantive comments
  - Intrusion / interference
  - Preferences / imposing judgments
  - Delays / disruption in review process

## Consulting Engineer Contractual Terms

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<tr>
<td>3. Professional Standard of Care</td>
<td>10. Consequential Damages/Limitation of Liability</td>
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<tr>
<td>5. Subsurface Conditions Risk Allocation</td>
<td>12. Fee Withholding</td>
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<td>7. Schedule</td>
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DB: Roles and Risks for Consulting Engineers
Consulting Engineer as Subconsultant to Design-Builder

Design Development Risk

Defined as the professional liability risk associated with cost or time increases (a) above “bid” or prime DB contracting price or cost terms and (b) attributable to the process of design development.
Design Development Risk

- Professional liability claims based on design development risk
  - Severity
  - Frequency

- Design development risk claims represent a major professional liability exposure for design professionals in DB
DB: Roles and Risks for Consulting Engineers

Consulting Engineer as Subconsultant to Design-Builder

The professional liability claims experience for Consulting Engineers in DB

What are the sources of professional liability claims against consulting engineers on DB projects?

- 40% based on pre-award services
- 30% based on post-award services

- Construction and design defects in completed project work
- Claims asserted prior to construction start and based on services performed prior to construction start
DB: Roles and Risks for Consulting Engineers

Consulting Engineer as Subconsultant to Design-Builder

Design Development Risk

A - B = C

A = Actual cost of design and construction

B = Design-Builder’s bid assumption based on conceptual design

C = Difference – i.e., the foundation of a professional liability claim by the Design-Builder against the Consulting Engineer
Transformed Projects

- The sequential combination of two different delivery methods for the same project-specific scope.
  
- For example, the first delivery method may be design-bid-build (or CM-At-Risk) and subsequently transform to design-build (or a public-private partnership).
  
- Transformation may be either planned or unplanned.

- Risk issues for Design Professionals
  - Design Responsibility
  - Professional Responsibility
  - Degree of Design Development
  - Prescriptive and Mandated Design
  - Interface and Coordination of Design Components
  - Third-party Reliance/Third-Party Beneficiary
Transformed Projects

What accounts for Transformed Projects?
- Owner Dissatisfaction with Original Delivery Method
- Owner Need or Desire to Compress the Design and Construction Schedule
- Budget Overruns and/or Concerns About Cost Overruns
- Owner Desire to Transfer More Risk to Design Professionals and/or Others
- Loss or Reduction in Available Public Funding
- Increased Opportunity Recognized for Private Financing

What Are Relevant Risk Factors for Design Professionals in Transformed Projects?
- Different from Risk Factors centric and specific to any singular project delivery approach
- Risk Identification and Evaluation is Essential
Transformed Projects

Design-Bid-Build (CM-At-Risk) → Design-Build (Public-Private Partnership)

Roles, Responsibilities and Risks

Design Characteristics

- Level of Development
  - Conceptual
  - 30+% 
  - “100% Complete” (for all or only a portion of the project design)

- Stamped or Sealed?
- Prescriptive
- Mandated
- Critical or Ancillary Project Component?
- Integration, Interface, Interdependency, and Coordination Considerations
- Project-Specific v. Standard, Prototypical Design/Details
Transformed Projects

Design-Bid-Build (CM-At-Risk) ➔ Design-Build (Public-Private Partnership)

Roles, Responsibilities and Risks

Contractual and Legal Issues

- Professional Responsibility
- Contractual Responsibility
- Ownership/Use Rights
- Risk Allocation*
- Permits and Approvals
- Stakeholder Requirements and Expectations
- Disclaimers, Reliance Rights
- Implied Warranty

Transformed Projects

Design-Bid-Build (CM-At-Risk) ➔ Design-Build (Public-Private Partnership)

Roles, Responsibilities and Risks

Design Professional Teams

- Same or Different
- Conflict of Interest
- Novation
- Assignments
- Third-Party Beneficiaries
- Indemnification
- Design Revision and Modification
- Submittal Review, RFIs, etc.

Owner’s Design Professional Team

Design Professional Subconsultants of Design-Builder
Transformed Projects

Design-Bid-Build (CM-At-Risk)  ➔  Design-Build (Public-Private Partnership)

Roles, Responsibilities and Risks

Professional Liability Insurance

- Practice
- Project-Specific
- Protective
Risk Management Strategies for Consulting Engineers in DB

- DB is here to stay and owner utilization will increase.
- Critical importance of Consulting Engineer risk and practice management
Risk Management Strategies for Consulting Engineers

Enabling, equipping and acculturating Consulting Engineers to successfully practice in DB

**Key initiatives:**

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<td>Scope of services and fee negotiation skills</td>
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<td>Importance of pre-award agreements with clearly defined scopes</td>
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<td>Adherence to contractual scope in <em>actual</em> service performance</td>
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<td>Timely notification and documentation regarding claims for additional compensation or time extensions</td>
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<td>Development of effective quality control procedures to address the accelerated pace and compressed cycle of design development in DB and P3s</td>
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<td>Timely addressing fee payment withholding</td>
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<td>Holding your “independent professional judgment” ground in the design submittal review process</td>
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Risk Management Strategies for Consulting Engineers

• Professional standard of care application and design development risk

• Relevance of design development contingency to professional standard of care application
“3. The contracts between the design-builder and its team members should address the unique aspects of the DB process. In furtherance of this practice, the following implementing techniques apply:

... b. The design-builder and its designer(s) should develop an understanding, at the outset of their relationship, of the key commercial aspects of their relationship, including:

... (d) the designer’s right to use project contingency for its execution-related problems, and capture these understandings in the written teaming agreement.”

*Design-Build Done Right, DBIA (2014)*
Risk Management Strategies for Consulting Engineers

• Improving upstream and lateral risk allocation in DB
  ▪ Transportation Research Board, Guidelines for Managing Geotechnical Risks in Design-Build Projects, NCHRP 24-22 (12-1-17)

• Mandated (allowance) design development contingency

• Convocation with construction community to discuss these issues
Risk Management Strategies for Consulting Engineers

• Project-specific professional liability insurance
• Dedicated coverage for specific project
• Joint and several liability mitigation
• Project owner requirements
• Consulting Engineer procurement
• Aligning project-specific professional liability insurance with contractual roles and risks of Consulting Engineers
• Relevance of CPPI and protective insurance

Questions
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