

To Have and to Hold, in Sickness and in Health: Strategies for Managing Risk on Design/Build Teams

by Jonathan C. Shoemaker

Market research indicates that design-build project delivery is on the rise nationally.ⁱ As design-build projects become more prevalent, more and more design professionals are being approached to team with contractors for design-build projects. Some design professionals, anxious to establish themselves as the “go to” firm for design-build projects, have jumped into the deep end of design-build procurement with varying degrees of success. Other design professionals, uncertain of the risks associated with a design-build project, have passed on potentially lucrative opportunities. The design professional’s view of design-build project delivery is reflected by a recent study by McGraw Hill Construction indicating that less than one-fifth of the architects surveyed worked on design-build projects.ⁱⁱ

The purpose of this paper is to provide a framework for the “old hands” and novices alike to understand, assess, and manage the risks associated with participating on a design-build team. There are several factors that the prudent design professional ought to evaluate when preparing to participate in design-build procurement:

- **With whom** should the design professional partner on a design-build project?
- **How** should the design-build partnership be structured?
- **When** should the design professional negotiate the structure of the design-build partnership?

Generally, the most successful design-build relationships are built on past experience on traditional design-bid-build projects involving the same contractor and design professionals, where the parties collaborate in a true partnership to define and allocate risk in a fair and equitable manner before a proposal is submitted.ⁱⁱⁱ

CHOOSE THE RIGHT PARTNER FOR THE PROJECT

The first, and most significant, factor to consider when evaluating the risks on a design-build project is choosing the right partner. There are several important considerations when deciding who to partner with on a design-build project:

CHECKLIST FOR EVALUATING POTENTIAL DESIGN BUILD PARTNER

- ☐ What prior experience do you have with your potential design-build partner?
- ☐ What prior experience does your potential design-build partner have with design-build projects?
- ☐ Will you be able to effectively communicate with your design-build partner and will your design-build partner be receptive to your concerns?

As the design-build team is responsible for both design and construction of the project, prudent risk management requires design professionals to understand who their partner is, how their partner operates on a construction project, whether their partner understands the collaborative nature of a successful design-build team, and how their partner communicates.^{iv}

When choosing a design-build partner, the design professional should consider teaming with a contractor with whom it has prior positive experience. The Design Build Institute of America (“DBIA”) advises that one commonality of the worst performing design-build projects is “limited or no prior team experience” between the contractor and the design professional.^v A design professional should consider both their previous experience with the contractor as a firm and with the contractor’s employees who will be working on the design-build project. While it is important to know the contractor’s firm-wide values and practices, it is equally important to know how the contractor’s employees, whom the design professional will be dealing with on a daily basis, interact on a construction project. A design professional’s previous experience with the contractor’s “A-team” may not be reflective of how the contractor’s “B-team” assigned to the design-build project will act as a partner.

A design professional’s experience with a potential partner on traditional design-bid-build projects should inform your expectations on a design-build project. How did your potential partner handle RFIs and proposed change orders on traditional design-bid-build projects on which you worked? Were your potential partner’s RFI’s and proposed change orders reasonable? Did your potential partner review and vet subcontractor RFI’s and change orders before passing them along or simply “rubber stamp” everything? Did your potential partner interact and communicate effectively with you and with its subcontractors? The way in which your potential partner communicated with its subcontractors is how you should anticipate being treated as a part of a design-build team.

The design professional should also consider its potential design-build partner’s experience with design-build procurement when deciding whether to partner. A DBIA “best practice” for delivery of design-build projects is that “[a]ll design-build team members should be educated and

trained in the design-build process, and be knowledgeable of the differences between design-build and other delivery systems.”^{vi} For the design professional, being educated and trained in the design-build process entails understanding how to communicate effectively and collaboratively to prepare a design in accordance with the standard of care in the time-frame and within the budgetary constraints established for the project.

For the contractor with no, or limited, design-build experience, being educated and trained in the design-build process, and understanding the differences between design-build and other delivery systems, starts with a discussion regarding the standard of care for design services. Contractors are used to guaranteeing and warranting their work. Contractors, familiar with the *Spearin* doctrine,^{vii} are used to owners impliedly warranting the suitability of the design documents for the project. Contractors may be surprised that the design professional does not provide a similar warranty to the owner, but instead agrees to use professional judgment to prepare the design documents in accordance with the standard of care.

Finally, the prudent design professional recognizes that – just as on any project – excellent communication with its partner is critical to a successful design-build project. Communication begins when discussing how various risks will be allocated between and among the parties before agreeing to partner for a design-build project. If the parties fail to communicate regarding how risk will be allocated between and among the parties early on, finding the discussions uncomfortable, then it may create issues down the road when issues arise. If the design documents are not perfect, many contractors with limited design-build experience view the design professional as “just another subcontractor” and look to their design professional to pay for the entire cost of all errors or omissions, withholding payment for the costs associated with overcoming the design issue. More experienced design-build contractors recognize that there may be errors or omissions in a design, but accept that risk because the construction cost savings realized through a collaborative relationship with the design professional, over time, outweighs the risk of design-related issues.

Experienced design-build partners understand that the “[i]ndividuals not only need to be competent in their specific areas of responsibility, but they also must understand the design-build process and that success is directly depending upon the ability of the entire team to work together collaboratively.”^{viii} If the design professional chooses a design-build partner with whom it is able to effectively communicate, then this will be a good first-step in managing the risks associated with design-build project.

DETERMINE THE RIGHT CONTRACTUAL STRUCTURE FOR THE PROJECT

The second factor to consider when evaluating the risks on a design-build project is determining how to structure your involvement on the design-build project. There are countless ways in which to structure design-build teams, including through teaming agreements, joint

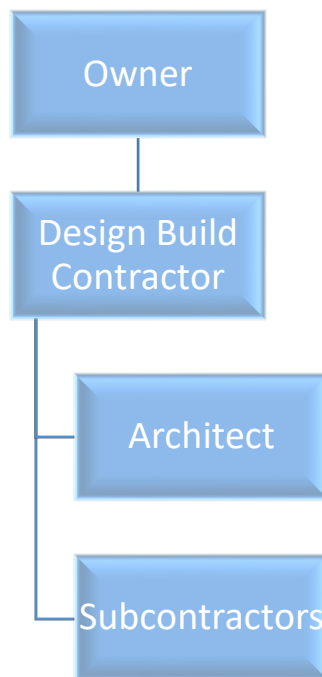
ventures, partnerships, and newly-formed companies owned by the members of the design-build team. The appropriate structure for a design-build team depends on a number of factors:

CHECKLIST OF CONSIDERATIONS FOR EVALUATING STRUCTURE OF DESIGN-BUILD TEAM

- | |
|---|
| <ul style="list-style-type: none"><input type="checkbox"/> The complexity and size of the project;<input type="checkbox"/> The jurisdiction of the project, including, but not limited to, the licensing requirements in that jurisdiction for both contractors and design professionals;<input type="checkbox"/> The insurance and bonding requirements for the project; and<input type="checkbox"/> The design-build partners' preferred allocation of risk. |
|---|

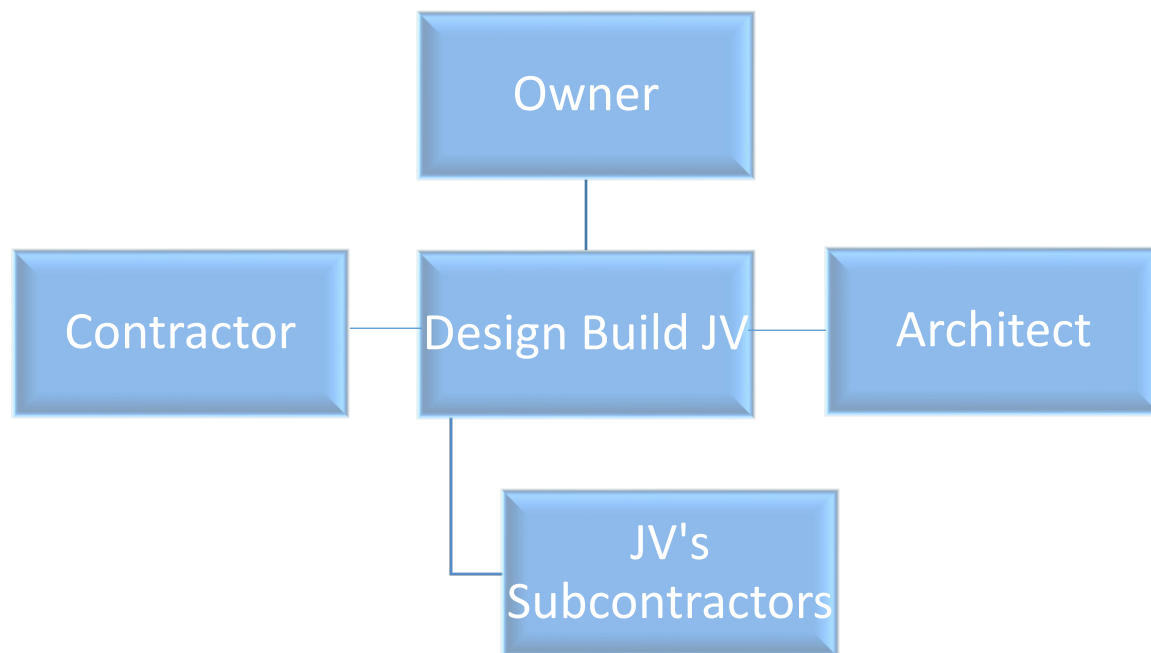
The organization of a design-build team is either a vertical relationship (e.g., a traditional prime contractor/subcontractor organization) or a horizontal relationship (e.g., a joint venture).^{ix}

A vertically structured relationship on a design-build project is governed by a teaming agreement “in which two or more independent companies join together for the specific purpose of obtaining and performing a negotiated or competitively bid contract with the intent to jointly perform the work if they are awarded the contract.”^x The following organization chart is illustrative of a typical vertically structured relationship on a design build project:



The vast majority of vertically structured design-build teams are contractor-led, with the design professional serving as a subcontractor to the contractor; however, some design-build teams are led by the design professional.

A horizontally structured relationship on a design-build project is where a contractor and a design professional come together to form a joint venture, a partnership, or a new company to provide fully integrated design-build services. The most common horizontal structure used on design-build projects, the joint venture, is “a business undertaking by two or more persons engaged in a single defined project.”^{xi} The following organization chart is illustrative of a typical horizontally structured relationship on a design-build project:



Joint venture relationships typically include joint control over the joint venture’s decisions (as opposed to the prime contractor having control), liability for the joint venture’s losses (as opposed to liability for only the design professional’s losses), and profit sharing (as opposed to only the profit earned under the design agreement).^{xii}

The risks to the design professional on a design-build project vary depending on how they structure their involvement on the project. Good practice is for “[t]he design-builder and its designer(s) [to] develop an understanding, at the outset of their relationship, of the key commercial aspects of their relationship, including: (a) the designer’s compensation, if any, during the proposal period; (b) the designer’s role in reviewing/approving the proposal; (c) the contractual liability of the designer for problems, including delays, during execution; and (d) the designer’s right to use project contingency for its execution-related problems” and to memorialize these understandings in writing, either in the form of a teaming agreement or a joint venture agreement.^{xiii} Once an

understanding of the parties' relationship is fleshed-out, a decision can be made as to how to structure the relationship.

What Are The Pros And Cons Of A Vertical Design-Build Team Structure?

Vertical Structure Considerations

Most vertically structured design-build teams begin with a teaming agreement defining the roles and responsibilities of the contractor and the design professional during the proposal phase and, if the proposal is successful, conclude with a subsequent design agreement between the contractor and the design professional.^{xiv} There are a number of risks to consider when entering into a teaming agreement on a design-build project.^{xv}

From a business perspective, one of the most significant risks to the design professional under a teaming agreement on a design-build project is the cost of preparing a proposal. While some design-build RFPs include bridging documents for the design-build team to review and develop in order to price the work to be performed, other design-build RFPs provide a basic framework for the project and require development by the design-build team. The cost and effort incurred by the design professional in developing the bridging documents (in whatever form they present themselves) will vary from project-to-project, and may depend on the amount of design development the team believes is necessary to prepare a competitive estimate for the cost of the work. Once the design professional is involved in developing the bridging documents further to assist the contractor in preparing an estimate, it is easy for the contractor to request the design professional spend a few extra hours developing a particular aspect of the design to facilitate the preparation of a more accurate estimate and it can be difficult for the design professional to say “no.”

To manage the investment made by the design professional during the proposal phase, the design professional needs to determine whether it will be compensated for its proposal phase services or whether it is providing its proposal phase services “at risk.” If the design professional is “at risk” for the cost of developing the limited design development documents, there is an inherent conflict of interest between the contractor and the design professional in terms of the amount of design development which should be completed during the proposal phase:

	Goals	Risks
Contractor's Perspective	<ul style="list-style-type: none"> Development of design documents to facilitate the preparation of <u>detailed</u> cost estimates for a successful bid 	<ul style="list-style-type: none"> Incompletely developed design documents necessitate inclusion of allowances or contingencies in the bid Incompletely developed design documents may result in changes in the design documents which result in increased construction costs
Design Professional's Perspective	<ul style="list-style-type: none"> Development of design documents to a level sufficient to allow the contractor to prepare <u>reasonable</u> estimates for a successful bid 	<ul style="list-style-type: none"> The more the design documents are developed, the greater the cost to the “at risk” design professional The contractor relies on the completeness and accuracy of the design documents developed by the design professional and does not include allowances or contingencies for further design development

By investing more time and money in developing the design during the proposal phase, the design professional advances the design and increases the likelihood of the design-build team being awarded the project and enables the contractor to develop a detailed cost estimate without having to rely extensively on contingencies. But, if the design-professional is “at risk” for its proposal costs, then the appropriate incentives may not exist for the design professional to develop the design to the level desired by the contractor.

To manage this risk, the design professional and the contractor need to determine how much design development is required for the project, to agree on the effort expected of the design professional, and to memorialize that agreement in writing. If the design professional is to provide proposal phase services on an “at risk” basis, then one way to limit this risk – and avoid being pressured to increase its “at risk” investment in the proposal phase services on the design-build project – is to include a cap on the number of hours the design professional will invest in the development of the design documents on an “at risk” basis.

The lower risk practice, of course, is to negotiate to have the contractor pay for some or all of the design professional's proposal phase services. The contractor's costs for estimating construction costs on a design-build project are not dramatically different from the contractor's costs for estimating construction costs on a design-bid-build project. By contrast, the design professional's proposal phase costs on a design-build project can be significantly greater than the proposal phase costs on a design-bid-build project. By pointing out the potential conflict of interest associated with having the design professional front the cost of its proposal phase services and the greater costs faced by the design professional in pursuing a design-build project, the contractor may recognize the value in agreeing to pay the design professional for some or all of the design professional's proposal phase services, regardless of whether the team is awarded the project.

From a liability perspective, one of the most significant risks to the design professional is a claim related to errors and omissions in the services provided by the design professional during the proposal phase. Specifically, the contractor claims that it developed its construction estimate based on a take-off performed by the contractor on the design professional's development of the requirements of the RFP to determine quantities of materials needed. When the quantity of materials increases as the design is developed, perhaps dramatically, the contractor seeks to hold the design professional responsible for increased construction costs, arguing that the design professional was negligent in its provision of proposal phase services.

This very situation played out in *C.L. Maddox, Inc. v. Benham Group*, 88 F.3d 592, 596 (8th Cir. 1996).^{xvi} The prime design-builder contracted with an engineer to conduct an "in-depth study of equipment layouts, equipment sizing and to supply necessary information and assistance for [the prime design-builder] to prepare a final construction cost (lump sum) for the project."^{xvii} The project did not go well based significantly on the engineer's proposal phase services and the prime design-builder sought to recover more than \$2.7 million from the engineer based on errors in the services provided by the engineer during its proposal phase services. The engineer argued that it did not warrant the accuracy of the information provided by the engineer as part of its proposal phase services and, therefore, could not be held liable for the claimed damages flowing from the prime design-builder's reliance on that information. The Eighth Circuit rejected the engineer's argument, holding that "when a company represents itself as being able to do work of a particular character, a warranty is implied that the work will be performed properly."^{xviii}

Since the decision in *C.L. Maddox, Inc.*, design professionals have included language in their design-build teaming agreements disclaiming the design professional's responsibility for the contractor's reliance on the design professional's proposal phase services. An example of such language follows:

The parties agree that the design professional's pre-award bid effort will be based on reasonable professional assumptions and the preliminary information as is available and known pre-bid. The design professional's assumptions and preliminary designs may be subject to revision and further development when, after the prime design-

build agreement is awarded, detailed physical investigations and designs are performed and completed. The contractor agrees that the contractor will be solely responsible for all pre-award quantity take-off based on the design professional's pre-award bid effort. The design professional disclaims any warranty or guarantee related to any estimate prepared by, or analysis of information the design professional supplies to, the contractor related to the RFP.

If the design professional has chosen the right design-build partner and is able to effectively communicate with its design-build partner regarding the reasons for including such a provision in the teaming agreement, then there should not be much push-back on including such a provision in the teaming agreement. Alternatively, if there is push-back from the design-build partner on including such a provision in the teaming agreement, then the design professional may need to reassess whether it has chosen the right design-build partner.

Another significant liability risk for the design professional on design-build projects is the unintentional guaranteeing or warranting of the design. Many of the widely-used design build contracts between the owner and design-builder require the design-builder to guarantee and warrant its "work," which is defined to include both the design and construction of the project. If this obligation is flowed-down to the design professional, it may present an uninsurable risk. One authority explains the uninsurable risk as follows:

A Design Professional has a duty to perform its professional services in a manner consistent with the standard of care that other Design Professionals would exercise on similar projects, in the same location and time, under similar circumstances. By agreeing to warrant that your professional services will produce any other result, including but not limited to an error-free design, you may be contractually liable based on breach of warranty even though you were not negligent in your performance. Professional liability insurance is intended to cover only those damages that arise out of your negligent performance. It does not cover express warranties and guarantees.^{xix}

In order to manage this uninsurable risk, the design-build partners need to understand whether the design-build partners are willing to assume the risk of guaranteeing and warranting the design and, if so, which of the design-build partners will assume that uninsured risk and how, assuming that risk may affect the price included in the design-build partners' proposal.

Does the Teaming Agreement Guarantee Your Role on the Project?

No. Simply having a teaming agreement does not guarantee the design professional's role on the project, unless there is an agreement on the terms and conditions pursuant to which the design professional will provide its services on the project if the team's proposal is accepted.^{xx} If the

design professional has chosen the right partner, this should not be a significant risk; however, this risk is readily managed by the prudent design professional.

To avoid the risk of the contractor “shopping” for a lower cost design professional after being awarded the project, the prudent design professional will insist that the parties to a teaming agreement agree on the terms and conditions for the design services on the project and append the parties’ contract for project work to the teaming agreement. Additionally, the design professional can include language in the teaming agreement providing the contractor only a limited license to use the design documents developed by the design professional during the proposal phase. If the contractor’s price is based on the design developed by the design professional, preserving ownership of the design documents developed during the proposal phase may provide the design professional leverage with the contractor in the event that the contractor reneges on its agreement to team with the design professional in preparing the proposal and the design services on the project.

By way of example, DBIA Document No. 580 – “Standard Form of Teaming Agreement Between Design-Builder and Teaming Party” (the “DBIA Teaming Agreement”) requires the contractor and the design professional specify the form of the “Subsequent Agreement” to be entered into if the design-build team is awarded the project:

If the Design-Builder is awarded the Design-Build Agreement, the Parties shall enter into a Subsequent Agreement which shall be in the one of the forms identified below and shall include a Scope of Work for the Teaming Party. If the Parties use their own form or modify the terms of any of the DBIA form agreements set forth below, the Parties shall attach the Subsequent Agreement as Exhibit A to this Teaming Agreement.

The DBIA Teaming Agreement then provides a list of DBIA form contracts which might be used as the Subsequent Agreement for the project. If the design professional signs the DBIA Teaming Agreement without identifying its scope of work and fee in the “Subsequent Agreement,” there is a risk that, if a dispute arose between the contractor and the design professional regarding the design professional’s scope of work and fee after being awarded the project, the contractor may argue that the DBIA Teaming Agreement created an unenforceable agreement to agree.

The design professional may face some resistance from the contractor to negotiating the terms of the “Subsequent Agreement,” not wanting to negotiate terms and conditions of a contract that would not come into existence if the design-build team’s proposal is not accepted. Instead, the contractor may prefer to simply attach an unmodified form contract to the teaming agreement. While this may seem reasonable, the reasonableness of the contractor’s position depends on whether the “Subsequent Agreement” includes uninsurable or extraordinary risks for the design professional.

If the owner plans on using the DBIA’s standard owner/design-builder contract, then the prime design-builder will be required to guarantee and warrant the “Work,” which includes both the design and construction of the project. While the contractor, as the prime design-builder, may be

willing to assume this risk, the design professional – who understands that its professional liability insurance does not cover guaranties or warranties of the design professional’s services – may not be willing to assume this risk.

It may be appealing to postpone negotiation of the specific terms and conditions to be included in the “Subsequent Agreement”; however, postponing negotiation of the specific terms and conditions to be included in the “Subsequent Agreement” raises a question as to whether the teaming agreement obligates the contractor to retain the design professional if awarded the design-build project and jeopardizes the design professional’s role on the design-build team. If the contractor and the design professional are unable to reach agreement on the terms and conditions of the “Subsequent Agreement” post-award, the contractor may argue that there was no agreement between the contractor and the design professional as to the material terms and conditions of the “Subsequent Agreement” and that the teaming agreement is merely an unenforceable “agreement to agree”. Where the design professional is “at risk” for its proposal phase costs, it is particularly critical to avoid any conduct which may be construed as undermining the enforceability of the Subsequent Agreement for the project itself.

In the recently issued AIA C102-2015 Document, the AIA recognizes and attempts to address the issue of negotiations over a “Subsequent Agreement” by making the follow-on agreement part of the teaming agreement. Given the costs associated with negotiating the follow-on agreement, only time will tell whether design-build contractors adopt and use the new AIA C102-2015 Document; however, it should be noted that the AIA C102-2015 Document, as drafted, does not include a “flow through” provision. As most contractors will insist on “flow through” language (regardless of the project delivery method), the prudent design professional must be vigilant to exclude (or carve out) the assumption of any guarantee or warranty obligations assumed by the design-build contractor in the prime agreement which the design-build contractor may seek to “flow through” to the design professional.

Important Vertical Design-Build Structure Provisions

The risks associated with a vertically structured design-build team will vary from project to project; however, there are several provisions which should be considered for inclusion in any design-build teaming agreement:

- An obligation to subcontract if the team is awarded the contract – as discussed above, simply signing a teaming agreement does not guarantee your role on the project if the project is awarded to the design-build team;
- Decision-making authority for the design-build team’s proposal price – the design professional needs to know how decisions regarding the design-build team’s proposal price will be made, including how decisions regarding the inclusion of contingencies (both design and construction contingencies) will be determined and quantified, as the design

professional may want to consider adjusting its fee if the design-build team's proposal price does not include an adequate design contingency;

- Scope of work to be completed in furtherance of the proposal – as every design-build project is different, the design professional needs to understand what level of design detail is anticipated by the contractor, how the contractor anticipates subcontracting the work (including any trades which will be let on a design-build basis), and how much effort is expected of the design professional during the proposal phase;
- Reliance by the contractor on the design professional's proposal phase services – recognizing that the design is not fully developed during the proposal phase, the design professional should require the contractor to assume sole responsibility for take-offs performed based on the design professional's proposal phase services^{xxi};
- Identifying how proposal costs will be borne by the parties – the design professional needs to understand whether it will be fully reimbursed for its proposal costs or whether it will provide proposal phase services on an “at risk” basis or something in between;
- Ownership of design documents developed during proposal phase – the design professional should provide the contractor a limited license to use the design documents developed by the design professional during the proposal phase;
- Waiver of liability for unsuccessful proposals – as there are a number of factors beyond the design professional's control which may result in an unsuccessful proposal, any vertically structured teaming agreement should include language waiving the design professional's liability for unsuccessful proposals;
- Limitation of obligation to guarantee or warrant design, other than agreeing that services will be provided in accordance with the standard of care – the design professional should limit, and disclaim (if possible), any obligation to guarantee or warrant its design services in both the teaming agreement and the design agreement for the project, irrespective of the obligations ultimately assumed by the contractor under the prime design-build agreement;
- Right to participate in negotiation of prime design-build agreement – the design professional should require its teammate to provide the design professional input on the terms and conditions of the prime design-build agreement (assuming it will be incorporated into the design agreement), as the contractor is likely to focus its attention – and negotiating capital – on different provisions than the design professional;
- Exclusivity provision limiting a teaming party from participating on a competing team for the project – the design professional needs to be aware of any exclusivity provisions in the teaming agreement and evaluate whether the provisions are acceptable;
- Confidentiality and non-disclosure clauses – the design professional needs to be aware of any confidentiality and non-disclosure clauses, which may impose onerous (and unrealistic) obligations on the design professional;

- Covenants not to hire the other party's employees – as working on a design-build project may provide the contractor with exposure to the design professional's talented employees, the design professional may want to request that the contractor covenant not to hire the design professional's employees; and
- Acknowledgement that the teaming agreement does not create a joint venture – as joint ventures may be created by an express or an implied agreement between the parties, the design professional should acknowledge that the teaming agreement does not create a joint venture relationship to avoid the unintentional assumption of joint and several liability and fiduciary duties (discussed in greater detail below).

While not a substitute for the advice of a lawyer on the specific teaming agreement to be negotiated, this list provides several key issues which the design professional should address with a prospective design-build partner.

What Are The Pros And Cons Of A Horizontal Design-Build Team Structure?

Horizontal Structure Considerations

A horizontal structure for a design-build team usually takes the form of a joint venture between a contractor and a design professional. Generally, joint venturers share in both the profits and losses on a project, providing a monetary incentive for collaboration between design-build partners. While the design professional shares in the profits of a successful joint venture, such a structure is not without risk. There are two significant risks faced by a design professional working on a design-build project as part of a joint venture.

First, joint venturers are typically “‘jointly and severally’ liable for any contractual breach or professional liability.”^{xxii} “Joint and several liability exists when two or more defendants are collectively and individually liable for the entire amount of a Plaintiff’s damages.”^{xxiii} If the design professional is jointly and severally liable for the joint venture’s liability, then the design professional assumes responsibility for both design errors and construction errors. CNA’s standard professional liability policy covers wrongful acts by a design professional providing services through a joint venture:

Wrongful act means an error, omission, or other act that causes liability in the performance of **professional services** for others by **you** or by any person or entity, including joint ventures, for whom **you** are liable.

The CNA professional liability policy does not provide coverage for claims brought against the joint venture related to construction errors.

In some joint venture agreements, the risk of design errors is allocated to the design professional and the risk of construction errors is allocated to the contractor. To accomplish this, the parties agree the contractor will defend and indemnify the design professional for damages caused by construction errors and the design professional will defend and indemnify the contractor for damages caused by design errors. This allocation of risk can result in “finger pointing” between the contractor and the design professional. When both joint venturers are “on the hook” for construction errors and design errors, an incentive exists for the contractor and the design professional to work collaboratively to address and resolve issues when they arise. While some design professionals may balk at participating in a design-build joint venture knowing that they may be held jointly and severally liable for construction errors, it is important to understand that this risk exists when structuring the design-build team as a joint venture.

Second, joint venturers assume fiduciary duties towards each other, a generally uninsurable risk if the design professional’s liability is not caused by its provision of professional services. The decision in *CRS Sirrione v. Dravo Corp.*, 213 Ga. App. 710 (Ga. Ct. App. 1994) illustrates the heightened risk faced by a design professional participating on a design-build project as a joint venture.

In *CRS Sirrione*, the design professional entered into a joint venture agreement with two related contractor entities for a power plant project for the United States Navy at the Norfolk Naval Shipyard in Portsmouth, Virginia. The design professional prepared the technical proposal for the project and the contractors prepared a \$100,000,000+ bid based on the design professional’s preliminary design and engineering. The contractors incurred losses on the project in excess of \$30,000,000 and filed suit against the design professional for breach of contract and breach of the fiduciary duties owed by the design professional to the contractors as a part of the joint venture seeking to recover \$12,500,000 in damages from the design professional. The trial court awarded the contractors approximately \$5,500,000 for the contractors’ breach of contract and breach of fiduciary duties claims. While it does not appear that the court distinguished between breach of contract damages and breach of fiduciary duty damages, the latter may not be covered by the design professional’s professional liability insurance policy if it does not relate to the provision of professional services or if it resulted in the design professional assuming responsibility to provide its services in accordance with a heightened standard of care. The *CRS Sirrione* case illustrates the potential risk to a design professional participating on a design-build project as a joint venture related to the fiduciary duties owed between and among joint venturers.

While some design professionals may believe that the potential reward in a design-build joint venture outweighs the risk, it is important for the design professional to understand these risks so that it may make an informed decision regarding the structure of its design-build partnering relationship.

How Does the Joint Venture Agreement Address Disputes and Pursuit of Claims?

Critical to any joint venture is an understanding between the joint venturers regarding how disputes will be resolved and claims will be pursued. Conflicts of interest may arise between joint venturers on a design-build project when deciding how to resolve claims and disputes, especially as it relates to deciding who will pay the costs associated with pursuing an Owner-related claim and how disputes between the joint venturers will be decided.

A joint venture's liabilities, including costs of pursuing an Owner-related claim, are shared by the joint venturers. This does not always mean that both joint venturers agree on the merit of a claim or on the cost-benefit analysis associated with pursuing a claim. It is important to address how decisions regarding Owner-related claims will be made in the joint venture agreement so as to avoid uncertainty, or worse, conflict between joint venturers, if an Owner-related claim arises.

DISCUSS YOUR PARTNERING RELATIONSHIP UP FRONT

Given the risks associated with design-build projects, the prudent design professional needs to make a strategic decision regarding when to negotiate and allocate risks between and amongst the design-build team. The DBIA suggests that developing an understanding of the design-build partners' relationship and key commercial aspects of their relations should occur during the proposal phase.^{xxiv} For most design professionals, however, the best time to negotiate and allocate risks between and amongst a design-build team is before the proposal phase, when the time-crunch of putting together a proposal may trump thoughtful negotiation and allocation of risk.

Key Liability Issues to Address When Bargaining Power is the Greatest

It is critical to understand what role the design professional will have in preparing and submitting a proposal on a design-build project. The prudent design professional needs to ask the following questions before signing a teaming agreement or joint venture agreement:

CHECKLIST OF CONTRACT ISSUES TO REVIEW

- ☐ Will the bid include a design contingency?
- ☐ Who will bear the costs associated with preparing the proposal?
- ☐ What input does the design professional have on the project schedule?
- ☐ Will the proposal include exceptions to the proposed prime agreement?
- ☐ How will disputes involving the design professional be resolved?
- ☐ What terms will be in the final design agreement for the project?

Each of these issues affects the risks assumed by the design professional and should be considered before proceeding with a design-build project.

The Importance of Design Contingencies

The design for a design-build project is not complete when proposals are submitted. To account for changes in scope, the unknown, and design errors and omissions, the design-build team may include contingencies in its proposal. *The Architect's Handbook of Professional Practice* recommends that the design professional consider whether the client has set aside money for contingencies and whether that sum is sufficient.^{xxv} The same is true on a design-build project.

A recent study suggests that almost all owners (97%) have contingencies on at least some portion of their project; however, the perception amongst architects (42%) and contractors (32%) is that fewer than half of the projects they work on have contingencies.^{xxvi} A contingency may be maintained by the owner or may be included in the design-team's proposal (or both).

While the amount of the contingency included on a design-build project will vary depending on the form of the prime design-build agreement (e.g., fixed fee, cost-plus with a guaranteed maximum price, etc.), a construction contingency in the "range of 5 percent to 10 percent is common, based on the level of risk, difficulty, and complexity the contractor will face" on a design-build project and a design contingency in the range of 5 percent to 10 percent is appropriate.^{xxvii} The amount of design development completed during the proposal phase can play a significant role in determining whether to include a contingency in the proposal. Design-build teams often include construction contingencies in their proposals, but rarely include design contingencies.

The prudent design professional should consider insisting on the inclusion of design contingencies in any proposal on a design-build project and defining the circumstances under which the design contingency will be used by the design-build team. Alternatively, the design professional may need to consider adjusting its fee to be included in the proposal to guard against increased construction costs associated with the development of the design that the contractor may seek to recoup from the design professional.

Cost of Proposal Preparation

While a contractor's costs in preparing a proposal on a design-build project may be slightly greater than its costs on a design-bid-build project, the design professional's costs in preparing a proposal on a design-build project are usually substantially greater than its costs on a design-bid-build project. As discussed above, the design professional needs to understand whether it will be reimbursed for its proposal phase services and, if not, the extent of the proposal phase services to be provided so that it can make an informed decision on whether to proceed with the project.

When providing proposal phase services as part of a teaming agreement, the design professional should provide the contractor a limited license for the use of its work product if forced to bear its own proposal costs. In the event that the project is awarded to the design-build team, ownership of the documents developed by the design professional as part of its "at risk" proposal phase services provides the design professional additional leverage in dealings with the contractor if the contractor fails to live up to its obligations under the teaming agreement to subcontract with the design professional for the project or if the contractor attempts to renegotiate the terms of the subcontract contemplated in the teaming agreement.

Preparing the Project Schedule

The design professional's services are part of the critical path of a design-build project schedule. One study comparing project delivery methods concluded that design-build projects are delivered 33.5% faster than design-bid-build projects and are delivered 23.5% faster than CM-at-risk projects.^{xxviii} Given the expedited schedule on design-build projects, the design professional needs to assure itself that the project schedule proposed by the design-build team provides sufficient time for the design professional to complete its services.

Taking on schedule-related obligations can create an uninsurable risk for the design professional:

A "time is of the essence" clause can impose undue risk on the Design Professional. Such a clause jeopardizes the Design Professional's duty to perform within the standard of care and may result in a liability for delay without fault...If the Design

Professional agrees to “time of the essence” clauses, it commits to something that the common law does not require. This then is an uninsurable promise or guarantee.^{xxix}

If the design professional is going to assume an uninsurable liability related the project schedule, the design professional should insist on having input in the project schedule and should disclaim any responsibility for delays caused, in whole or in part, by others. Unless the design professional is part of a design-build joint venture (and has agreed to share in the liabilities of the joint venture), the design professional should never assume responsibility for delays beyond the design professional’s control.

Input on the Prime Agreement

In its publication *Design-Build Done Right: Best Design-Build Practices*, the DBIA recognizes three “best practices” for the form of contracts on design-build projects:

1. “Contracts used on design-build projects should be fair, balanced and clear, and should promote the collaborative aspects inherent in the design-build process.”
2. “The contract between the owner and design-builder should address the unique aspects of the design-build process, including expected standards of care for design services.”
3. “The contracts between the design-builder and its team members should address the unique aspects of the design-build process.”^{xxx}

While the DBIA recognizes that the “best practice” is for the prime design-build agreement to address the expected standards of care for design services, contractors who have limited experience contracting with design professionals are often ill-equipped to negotiate with the owner on standard of care issues.

When the design professional has a “seat at the table” when it comes time to negotiate the prime design-build agreement, the design professional is able to identify and potentially modify those provisions which increase the design professional’s exposure to uninsurable claims. If the design professional is not consulted regarding the terms and conditions of the prime design-build agreement, this can create increased risk for the design professional without a corresponding increase in compensation. While providing input on the prime design-build contract does not guarantee that the design professional’s requested modifications are accepted by the owner, the design professional is afforded the opportunity to discuss risk factors with the contractor so that the design professional’s teammate understands the risks assumed in the prime design-build agreement (from the design professional’s perspective) which may, or may not, be passed through to the design professional.

Resolution of Disputes

While design professionals may be wary of the risk of claims on a design-build project, contractors find that design-build delivery reduces their risk of litigation more so than design-bid-build projects or CM-at-Risk projects.^{xxxix} If the contractor and the design professional are able to collaborate effectively, communicate, and work as a team, then the design professional may be better able to control risks on a design-build project than on a design-bid-build project, where a more adversarial dynamic can play out.

Nonetheless, it is important to recognize, and account for, the risk of the contractor serving as the initial arbiter of disputes between the design professional and the contractor's construction subcontractors. Some examples of disputes which have been reported in recent years include increased subcontractor-reliance on the design-professional's approval of submittals (as everyone is on the same team) and increased construction costs associated with discrepancies between plans and specifications.

There are two risks associated with the contractor serving as the initial arbiter of such disputes:

1. The contractor is naturally oriented towards guaranteeing and warranting its work, without consideration for standard of care issues; and
2. The contractor, more so than the owner on a design-bid-build project, may be more inclined to withhold payment from the design professional based on change orders issued to its subcontractors related to issues perceived to have been caused by the design professional.

The design professional may guard against these risks by including provisions in the design agreement (appended to the teaming agreement) that preserves the design professional's ownership of the design documents (providing the design professional leverage in the event of a dispute) and that precludes the contractor from exercising setoff rights (by withholding payment from the design professional) without the design professional's consent. While the design professional may be better positioned to resolve design-related issues on a design-build project than on a design-bid-build project, the design professional should also include contractual safeguards to limit its liability to the contractor.

Terms in the Design Agreement

When a proposal is prepared for a design-build project, the design professional's fee is based on certain assumptions by the design professional, including, but not limited to, the scope of services, the anticipated project schedule, the partners on the design-build team, and the terms of the design agreement. Just as on any project, the terms of the design agreement significantly affect

the risk assumed by the design professional on a design-build project and ought to be considered on a project-by-project basis.

There are various form agreements used by contractor's and design professionals when engaging on a design-build project together. The appropriateness of any such form agreement, however, will vary from project-to-project and depend largely on how the standard terms are modified from the "off-the-shelf" version. Whether a proposed design-build agreement is an AIA form document or DBIA form document or a custom document, some of the key terms to consider for a design-build project include (but are not limited to) the following:

- Standard of Care – as discussed above, the design professional should not assume any guaranty or warranty obligations the design-build contractor may want to "flow through" from the prime design-build agreement, but instead should insist on providing its services in accordance with the applicable standard of care;
- Limitation of Liability – the design professional should seek to limit its liability to its fee or, at the very least, to its available insurance proceeds at the time of settlement or judgment;
- Waiver of Consequential Damages – the design professional should seek a mutual waiver of consequential damages in order to avoid the risk of being held responsible for lost profit claims leveled by either the owner or the design-build contractor;
- No Damages for Delay – the design professional should seek a clause that limits the design-build contractor's ability to assert significant claims against the design professional in the event of a delay;
- Design Contingency – the design professional should seek to include a provision confirming that a contingency was included in the prime agreement for the project in recognition of additional construction costs associated with the development of the design from what is available at the time of the proposal; and
- Betterment – the design professional should seek to include a provision limiting its responsibility for costs which provide betterment, upgrade, or otherwise enhances the value of the project.

This list provides several key issues which the design professional should consider when negotiating a design agreement for a design-build project, but is not a substitute for consulting with an attorney familiar with the law of the jurisdiction in which the project is to be constructed.

CLOSING THOUGHTS BEFORE SAYING "I DO"

Prudent risk management on a design-build project for the design professional begins with choosing the right partner, selecting the right organizational structure for the teaming partnership, and incorporating appropriate language in its contract(s) for the design-build project to control the

design professional's risk. By carefully structuring its involvement on a design-build project and communicating effectively with its design-build teammates, the design professional may be able to expand its presence in the market, while avoiding common pitfalls on design-build projects.

ⁱ See, generally, "Design-Build Project Delivery Market Share and Market Size Report" dated May 2014, Reed Construction Data/RSMMeans Consulting, <http://www.dbia.org/resource-center/Documents/rsmeansreport2014.pdf>, last accessed February 5, 2016; see, also, "Research Finds Continued Growth of Design-Build" dated June 26, 2014, <http://www.designbulddoneright.com/research-finds-continued-growth-of-design-build-throughout-united-states/>, last accessed February 5, 2016.

ⁱⁱ "Project Delivery Systems: How They Impact Efficiency and Profitability in the Buildings Sector," August 2014, McGraw Hill Construction, http://www.dbia.org/resource-center/Documents/project_delivery_systems_smartreport140806.pdf, last accessed February 5, 2016.

ⁱⁱⁱ This paper focuses on issues of particular importance to the design professional associated with structuring their involvement in design-build projects. For a more comprehensive listing of issues to be considered when a design professional is considering a partnering relationship with a contractor for a design-build project, a Joint Committee of the American Institute of Architects and the Associated General Contractors of America have published an insightful "Design-Build Teaming Checklist" which identifies a number of issues that ought to be considered when partnering for a design-build project. <http://www.aia.org/aiaucmp/groups/secure/documents/pdf/aiap016384.pdf>, last accessed February 5, 2016.

^{iv} "Fundamentals of Project Delivery" dated 2011, Design Build Institute of America, http://www.dbia.org/resource-center/Documents/cii_penn_state_study.pdf, last accessed February 5, 2016 (identifying "contractor's...experience with project delivery system," "excellent team communication," and "prior experience of team as a unit" as contributing factors for success on a design-build project).

^v *Id.*

^{vi} "Design-Build Done Right: Best Design-Build Practices" dated August 19, 2013, Design Build Institute of America, p. 8, <http://www.dbia.org/resource-center/Documents/bestpractices130819.pdf>, last accessed February 5, 2016.

^{vii} "The *Spearin* doctrine's roots and name come from a 1918 United States Supreme Court decision, *United States v. Spearin*, 248 U.S. 132 (1918), which held that a contractor will not be liable to an owner for loss or damage that results solely from defects in the plan, design, or specifications provided to the contractor. Effectively, *Spearin* created a doctrine whereby the owner impliedly warrants that the plans and specifications, if followed, will result in a functioning system. *Spearin* holds that if a contractor is required to build according to plans and specifications prepared by the owner (or the owner's representative), then the contractor will not be responsible for the consequences of defects in the plan." Wally Zimolong, "The *Spearin* Doctrine as a Defense to Defective Workmanship Claims," dated April 11, 2012, <http://apps.americanbar.org/litigation/committees/construction/email/spring2012/spring2012-0402-spearin-doctrine-defense-defective-workmanship-claims.html>, last accessed February 5, 2016.

^{viii} "Design-Build Done Right: Best Design-Build Practices" dated August 19, 2013, Build Institute of America, p. 8, <http://www.dbia.org/resource-center/Documents/bestpractices130819.pdf>, last accessed February 5, 2016.

^{ix} John T. Clappison and James F. Killian, "Pre-Bid Agreements," *Specialized Agreements for the Construction Project: Forms and Substance*, p. 2 (2007).

^x *Id.* at p. 3.

^{xi} *Black's Law Dictionary*, Second Pocket Edition (2001).

^{xii} John T. Clappison and James F. Killian, "Pre-Bid Agreements," *Specialized Agreements for the Construction Project: Forms and Substance*, p. 4 (2007).

^{xiii} "Design-Build Done Right: Best Design-Build Practices" dated August 19, 2013, Design Build Institute of America, p. 7, <http://www.dbia.org/resource-center/Documents/bestpractices130819.pdf>, last accessed February 5, 2016.

^{xiv} This paper focuses on the terms and conditions to include in the teaming agreement. While some of the terms and conditions discussed in this paper should be included in the subsequent agreement, there are many important provisions to consider in the subsequent agreement – indemnity, standard of care, etc. – that are not discussed in detail in this paper.

^{xv} See, generally, "Design-Build Teaming Checklist," Joint Committee of the American Institute of Architects and the Associated General Contractors of America, <http://www.aia.org/aiaucmp/groups/secure/documents/pdf/aiap016384.pdf>, last accessed February 5, 2016.

^{xvi} See, also, Bennett D. Greenberg, "Maximizing the Benefits of Design-Build Contracting by Identifying and Managing Project Risk," *Proceedings of the 48th Annual Meeting of Invited Attorneys* (2009).

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- ^{xvii} *C.L. Maddox, Inc. v. Benham Group*, 88 F.3d 592, 596 (8th Cir. 1996).
- ^{xviii} *Id.* at 600.
- ^{xix} J. Kent Holland, Jr., *Contract Guide for Design Professionals*, p. 221 (3d ed. 2012).
- ^{xx} *Falls Garden Condo. Ass'n v. Falls Homeowners Ass'n, Inc.*, 2015 Md. LEXIS 10 (Md. January 27, 2015)(enforcing a letter of intent where there was mutual assent on all material terms to a contract); *Cyberlock Consulting, Inc. v. Info. Experts, Inc.*, 939 F. Supp. 2d 572 (E.D. Va. 2013)(a teaming agreement which did not attach as an exhibit the contract to be entered into if the team's proposal was successful was an unenforceable agreement to agree); *Celerity Q, Ltd. v. CSDC Sys.*, 2010 U.S. Dist. LEXIS 46508 (S.D. Ohio Apr. 14, 2010)(finding that the teaming agreement bound the bidder to retain subcontractor if awarded the project); *Trianco, LLC v. IBM*, 271 Fed. Appx. 198 (3d Cir. 2008)(finding a teaming agreement was an unenforceable agreement to agree, notwithstanding the defendant's agreement to award a subcontract to the plaintiff if awarded the project, because there was no agreement on terms, conditions, and pricing for the subcontract); *Atacs Corp. v. Trans World Communs.*, 155 F.3d 659 (3d Cir. 1998)(finding a teaming agreement created an enforceable contract requiring bidder to contract with subcontractor if awarded project); *W.J. Schafer Assocs. v. Cordant, Inc.*, 254 Va. 514 (1997)(a teaming agreement was an unenforceable agreement to agree because "[t]here was no mutual commitment by the parties, no obligation on the part of [one party] to sell the [product] or on the part of [the other party] to purchase them, no agreed purchase price for the product, and, indeed, no assurance that the product would be available when needed").
- ^{xxi} This risk is not addressed in the AIA C102-2015 Document. If using the AIA C102-2015 Document, it is recommended that the design professional add language limiting the design-build contractor's right to rely on proposal phase services provided by the design professional.
- ^{xxii} <http://www.theaiatrust.com/joint-ventures-anticipate-claims/>, last accessed February 5, 2016.
- ^{xxiii} Edward Ewing and Jon B. Masini, "Joint and Several Liability: A Practical Analysis of Case Law and Statutes for Defense Counsel and Insurers," *Proceedings of the 48th Annual Meeting of Invited Attorneys* (2009).
- ^{xxiv} "Design-Build Done Right: Best Design-Build Practices" dated August 19, 2013, Design Build Institute of America, p. 7, <http://www.dbia.org/resource-center/Documents/bestpractices130819.pdf>, last accessed February 5, 2016.
- ^{xxv} *The Architect's Handbook of Professional Practice*, Fourteenth Edition, p. 753-755.
- ^{xxvi} "Managing Uncertainty and Expectations in Building Design and Construction," September 2014, McGraw Hill Construction and AIA Large Firm Roundtable, <http://www.dbia.org/resource-center/Documents/mcgrawhill2014managinguncertainty.pdf>, last accessed February 5, 2016.
- ^{xxvii} "Managing the Contingency Allowance," David H. Hart, AIA, <http://www.aia.org/aiaucmp/groups/secure/documents/pdf/aiap026970.pdf>, last accessed February 5, 2016.
- ^{xxviii} "Comparison of U.S. Project Delivery Systems," Mark Konchar & Victor Sanvido, *Journal of Construction Engineering and Management*, Vol. 124, No. 6 (1998), pp. 435-444 (*cited in* "Fundamentals of Project Delivery" dated 2011, Design Build Institute of America, http://www.dbia.org/resource-center/Documents/cii_penn_state_study.pdf, last accessed February 5, 2016).
- ^{xxix} J. Kent Holland, Jr., *Contract Guide for Design Professionals*, p. 221 (3d ed. 2012).
- ^{xxx} "Design-Build Done Right: Best Design-Build Practices" dated August 19, 2013, Design Build Institute of America, p. 5-6, <http://www.dbia.org/resource-center/Documents/bestpractices130819.pdf>, last accessed February 5, 2016.
- ^{xxxi} "Project Delivery Systems: How They Impact Efficiency and Profitability in the Buildings Sector," August 2014, McGraw Hill Construction, http://www.dbia.org/resource-center/Documents/project_delivery_systems_smartreport140806.pdf, last accessed February 5, 2016.