

# Legal Issues Related to Design-Build

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## Roadmap for Presentation

- Overview of Design-Build delivery method
- Procurement laws
- Design-Builder organizational formats
- Licensing issues
- Relationship and loyalty issues between owner and A/E
- Liability issues

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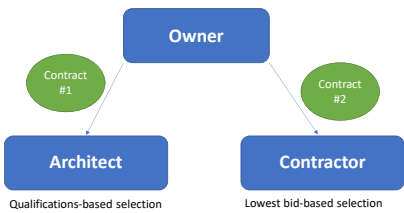
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## The Traditional Procurement Approach (Design-Bid-Build)



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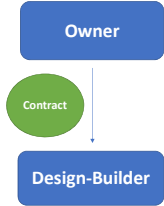
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### The Design-Build Approach



- A project delivery method under which one entity (the “design-builder”) enters into a single contract with the Owner to provide for design services and construction services.
- A single contract and point of responsibility....

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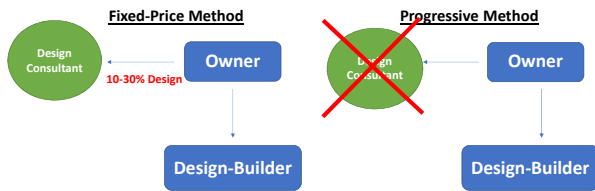
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### Fixed-Price vs. Progressive Design-Build




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### Benefits of the Design-Build Method

METRIC	DESIGN-BUILD vs. DESIGN-BID-BUILD	DESIGN-BUILD vs. CMAR
UNIT COST	6.1% lower	4.5% lower
CONSTRUCTION SPEED	12% faster	7% faster
DELIVERY SPEED	33% faster	23.5% faster
COST GROWTH	5.2% less	12.6% less
SCHEDULE GROWTH	11.4% less	2.2% less

Source: Construction Industry Institute (CII)/Penn State research comprising 351 projects ranging from 5,000 to 2.5 million square feet. The study includes varied project types and sectors. (<https://www.dbia.org/about/Pages/What-is-Design-Build.aspx>)

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### Federal Procurement Requirements

- 10 U.S.C. § 2305a (1996) - Allows fixed-price Design-Build; progressive Design-Build not allowed.
- Government must first determine that Design-Build is appropriate.
- Government must then follow a two-phase selection process:
  - **Phase 1** – Solicitation of proposals aimed at identifying not more than 5 “most highly qualified offerors” to participate in Phase 2.
  - **Phase 2** – Not more than 5 design-builders are selected to submit price proposals; winner selected based on best overall value.

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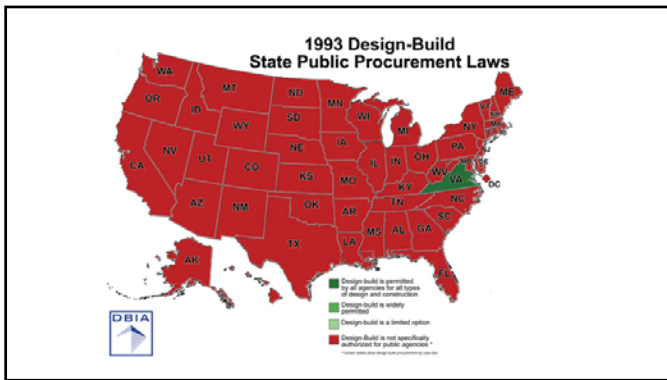
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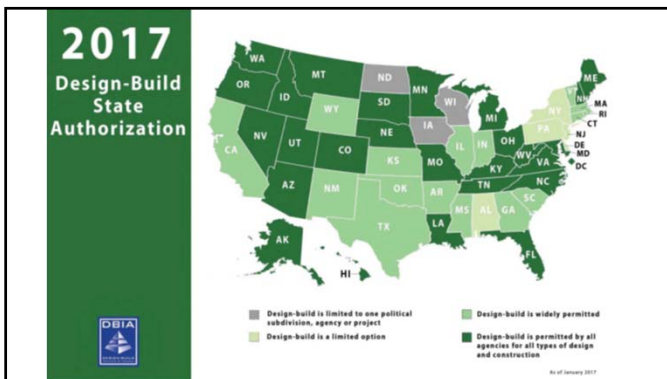
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### State Procurement Requirements

- K.S.A. 75-3739
  - State construction contracts over \$100,000 must be awarded to the lowest responsible bidder and procured via a design-bid-build delivery system.
- K.S.A. 75-37,141, *et seq.*
  - Kansas Alternative Project Delivery Building Construction Procurement Act.
  - Allows the State to elect to use "alternative project delivery" such as Design-Build and Construction Management at Risk.
  - Does not apply to road projects.
  - Only allows fixed-price Design-Build; progressive Design-Build not allowed.
  - State follows a three-phase solicitation process.

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### Kansas Municipal Procurement Requirements

- Various requirements may apply depending on type of municipal entity and project type.
- K.S.A. 13-1017 - Cities of the First Class (population 25,000+):
  - Construction contracts for public improvement projects in excess of \$2,000 must be procured via sealed bids and award made to "lowest responsible bidder."
  - Good news: Cities may "charter out" and adopt substitute local rules.
- Example - In Salina, for public improvement projects in excess of \$20,000:
 

"the city shall utilize a sealed bid process in the awarding of a contract, except as otherwise authorized by the governing body upon a finding that an alternative process is in the public interest."

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### Standard Agreement Forms for Design-Build




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### Design-Builder Organizational Forms

Design-build entities follow one of four organizational forms:

1. **Integrated Design-Build Firm** - The designer and the builder form a corporation or LLC which becomes the prime contractor.



2. **Designer Prime** - The designer is the prime contractor and the builder is a subcontractor.




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### Design-Builder Organizational Forms

3. **Contractor Prime (most common)** - The builder is the prime contractor and the designer is a subcontractor.



4. **Joint Venture/Partnership** - The designer and the builder form a joint venture or partnership or which becomes the prime contractor.




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### Licensing Issues

- K.S.A. 74-7001 makes it unlawful to practice architecture or engineering without a certificate of authorization.
- "Professional engineering" - "providing, offering to provide, or holding oneself out as able to provide professional engineering services . . ."
- Design-Build Contractors should verify and comply with all licensing requirements.
- Failure to comply may result in violations of law and/or owner's ability to terminate contract.

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### Relationship and Loyalty Issues

**Design-Bid-Build Projects-**

- Designer is the Owner's consultant:
  - Certifies quality and completeness of work before payment;
  - Reviews and approves change orders;
  - Approves contractor requested changes in materials and methods.

**Design-Build Projects-**

- Designer and Contractor are teammates

- Owner does not have all of the "checks and balances" traditionally provided by designer's separate contract.

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### Suggestions for Addressing Relationship and Loyalty Issues

**Owner**

- Recognize at the outset that Design-Build is different
- Considering hiring an independent owner's representative

**Designer**

- Recognize that, although there is a strong economic interest in the construction succeeding financially, the financial interest should not influence design-related decisions.
- Be careful with contract provisions that create conflicts of interest between the designer and the owner/contractor (e.g., duties of inspection).

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### Liability, Duties, Standard of Care

**Traditional Standard of Care for Designer-**

- Designer must exercise degree of skill and care that the average, similarly-situated designer would employ.
- Designer only liable for design; not liable for construction.
- Designer does not warrant that contractor's work will be in accordance with plans and specifications.

**Traditional Duties of Contractor-**

- Contractor must construct the project according to plans and specifications.
- Contractor does not warrant that the designer's work is free from defects.

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### Owner's Implied Warranty and Liability for Design

- Spearin Doctrine:
  - When the owner provides design documents to a contractor, it impliedly warrants that the plans and specifications are accurate and contain information sufficient for the contractor to bid and build the project.
  - 1918 Federal case involving construction of a dry dock in a naval ship yard.
  - Spearin case relied upon and adopted by most federal and state courts.
  - Requirements = reasonable reliance + prescriptive requirements in the plans and specifications.

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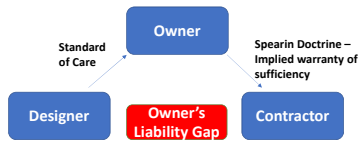
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### Owner's Implied Warranty and Liability for Design

- Spearin Risk:
  - Owner can be caught in the middle of finger pointing between designer and contractor.
  - In some cases, a liability gap between negligence and Spearin may exist.




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### Design-Build Minimizes Spearin Risk to Owner

- The whole is greater than the sum of its parts:
  - Courts view Design-Builders as more akin to a contractor than a designer.
  - Design-Builders can assume liability for both defective design and faulty construction.
  - May reduce Spearin Risk to Owner.
- But . . . traditional duties and risks can be restored by contract:
 

**2.3.1** The standard of care for all design professional services performed to execute the Work shall be the care and skill ordinarily used by members of the design profession practicing under similar conditions at the same time and locality of the Project. (See DBIA Standard Form of General Conditions).

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### Bridging Risk – Benefits of Progressive DB

- Owner makes implied warranty of sufficiency when it furnishes bridging specifications to Design-Builder.
- Fixed-Price Design Build: Owner may retain Spearin risk for errors in bridging documents that could not have reasonably been discovered by design-builder during procurement.
- Progressive Design Build: Owner can minimize or eliminate Spearin risk altogether.
  - Design-builder is paid to develop and complete confirm the basis of design and then advance that design through final contract documents.

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### DBIA Standard Language: Owner Responsibility for Inaccurate Specs: (Section 3.4)

If Owner's Project Criteria contain prescriptive/design specifications: (a) Design-Builder is entitled to reasonably rely on the accuracy of the information represented in the prescriptive/design specifications and its compatibility with other information set forth in Owner's Project Criteria, including any design or performance specifications; and (b) Design-Builder shall be entitled to an adjustment in its Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance have been adversely impacted by such inaccurate prescriptive/design specification.

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### Change Orders under Design-Build

- In traditional Design-Bid-Build, the contractor is entitled to a change order if any of the following occurs:
  1. Voluntary owner changes (scope changes)
  2. Changed conditions (concealed conditions or force majeure events)
  3. Design problems (errors, omissions, inconsistencies, ambiguities) **Not typically a change order trigger in Design-Build**
- Exception – Errors in bridging documents.
- Risk of dealing with design problems shifts to design-builder team
  - Non-integrated design-builders must agree on responsibility for change orders as between the builder and designer firms.

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### Limitation of Liability

- Commonly negotiated concepts include:
  - Waivers of consequential and indirect damages;
  - Caps on Design-Builder's total liability to owner;
  - Waivers with carve-outs (gross negligence, fraud, etc.).
- Potential liabilities substantially exceed expected profit = increased contract price.
- Availability of insurance will influence risk appetite.
- Limitations of Design-Builder's liability = Owner's increased interest in subcontract terms.

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### QUESTIONS?

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