

Design/Build: Will It Lead To Even More Construction Contract Litigation?

By John E. Osborn

Our law firm's practice concentrates in representing commercial and residential property owners on construction and environmental law matters. In that representation, we are frequently in the position to assist in selecting the method of project delivery: i.e. lump sum bid with an award to a general contractor, use of a construction manager, or in other cases, use of a Design/Build process.

Design/Build: Is the Future Now?

The Design/Build method of project delivery has been widely used during the past 10 years, amidst controversy over the changing role of the design professional when an architect and contractor join together as part of the same business venture. Proponents urge that Design/Build helps a project owner complete a project on time, on budget and without the construction contract claims which plague many construction and renovation projects. Others urge that as Design/Build is used more widely, disputes relating to time, budget and scope will be just as prevalent as they have been with the traditional design-bid-build process.

On September 20, 2000, at the monthly meeting of the Greater New York Construction User Council, our law firm, together with Joseph Ligamari, President, Tri-Metro Chapter, Design/Build Institute of America; Norman A. Coplan, Counsel, New York State American Institute of Architects; Frank McArdle, Managing Director, General Contractors Association of New York; James Gray, Dormitory Authority of the State of New York; Bernadette Vero, Director of Contracts, Metro North Railroad; Sam Spata, Senior Principal of HOK, P.C.; Henry L. Michel, Chairman Emeritus, Parsons Brinckerhoff, Inc.; and Thomas Coghlan, President, Design Insurance, Inc. participated in a forum to explore practical experience, successes and failures of the Design/Build process.

Because the speakers included the perspective of the contractor, design professional, insurance broker, the project owner and the construction contract claim attorney, it became clear that there are basic principles which must be followed on a construction or renovation project, no matter what type of project delivery method is used. In essence, from the perspective of the construction contract claim attorney: "What Are the Ten Most Deadly Design/Build Construction Sins and How Do You Avoid Them?"

John E. Osborn is a Partner in the New York City and Chappaqua, New York law firm of John E. Osborn P.C. which concentrates in construction contract and commercial litigation and environmental law.

The Ten Most Deadly Design/Build Construction Sins: How To Avoid Them?

On traditional and Design/Build projects, there are commonly encountered problems which lead to project delays, and cost overruns. If the commonly encountered problems can be avoided from the outset, the project can be completed on time and on budget. The following is a composite list of the Ten Most Deadly Design/Build Construction Sins which we have encountered in our practice.

Construction Sin 1: Lack of Focus Up Front

When the Design/Build method of project delivery is utilized, it is contemplated that the design professionals (the architect and the engineers) will work together with the contractor, as a team, from the inception of project development while the traditional lump sum/low bid process contemplates that the contractor enter the picture only after the bid award.

With the early contractor involvement allowed by use of the design/build process, the owner, design professionals and contractor can work together to make sure that the design is feasible for the intended purposes and that the project can be built within budgeted amounts. Clearly, with early communication among owner, design professional and contractor, there will be less unknowns, and as information is available, changes in scope of the project and type of installation being undertaken can be readily made.

Even with early involvement of the entire project team, lack of focus is the leading issue. To a degree, ready communications among owner, architect and contractor leads to informal solution of issues. Quite often the owner fails to define design criteria at an early stage because it is known that the overall design can be adjusted even during the construction phase. With a traditional design-bid-build project, the design must be fully complete prior to soliciting bids from contractors.

Favorable to the Design/Build process is: that the owner has a single point of responsibility (a design/build entity rather than a contractor and an architect); value engineering and constructability analyses can be more easily carried out at an early stage due to early contractor involvement; speed can be accomplished through use of fast tracking; there is more flexibility because design can be ironed out in the field rather than pre-bid; and measurement of the finished product is judged by performance rather than simply through an evaluation of whether the plans and specifications have been followed. Negatives of moving ahead too fast in the beginning involve risks in proceeding without a full design and inherent risks

that fast tracking is simply speeding ahead without a road map.

Construction Sin 2: Failure to Choose The Best Method of Project Delivery

Design/Build is perceived as the "new method of project delivery" and many project owners decide to use it without considering, in detail, whether it is the method best suited to the project. While an owner without inhouse design and construction capabilities may find design/build to be the most effective method, an owner with a strong inhouse staff may not wish to give up control of the project to a design/build team.

Construction Sin 3: Failure to Assemble the Right Project Team

When Design/Build is used, project owners often walk away from the process - after all, the price and scope is set. The owner does not shed responsibility simply by choosing the Design/Build method. The owner still must examine the individual members of the Design/Build team to make sure that each has the right experience and expertise. As always, the individuals design and build the project: Who are they? What do they know?

Construction Sin 4: Failure to Coordinate the Project Team

The impetus is for the owner to be less involved and pay less attention when Design/Build is used. It must be determined whether there is an overriding split among the Design/Build team members between cost and aesthetics. It is a problem that the owner does not see the traditional playing out of issues which would have been visible with traditional design-bid-build methods. It is also important to know if the Design/Build team members will be suing each other.

Construction Sin 5: Failure to Provide a Method of Changing the Scope, Price or Schedule

When delays and cost overruns occur on the construction project, the owner is still not fully protected. When a problem occurs, the Design/Build team will look critically at fallacies in the owners' original design criteria or at the accuracy of the information provided by the owner or at the owner's delay in providing information or decisions on critical issues.

Construction Sin 6: Failure to Understand (Truly Understand) Local Conditions

Unions, hours of work, and lack of availability of materials are issues which do not go away simply because Design/Build is used. The owner may expect to receive a bill when these factors are encountered.

Construction Sin 7: No Accurate Schedule or Too Elaborate a Schedule

In keeping a project on schedule, the owner must maintain hands-on involvement. In the Design/Build process, the owner tends to relinquish control; this simply does not work.

Construction Sin 8: No Periodic Meetings; Failure to Keep Minutes

Because there is not an adversarial setting between architect and contractor, job meeting minutes are often neglected. This is a big mistake. It is better to deal with small troublesome issues from day to day rather than a catastrophic situation at project's end.

Construction Sin 9: No Vision on Dispute Resolution

Setting a clear dispute resolution process prior to commencing the project, is essential. Set a practical, non binding dispute resolution process in place before beginning the engagement. It is unclear whether the perception that there will be less claims on Design/Build projects is accurate or whether those claims will simply be fought on a different battleground. As a practical matter, if members of the Design/Build team fight, the owner will be dragged into the fray.

Construction Sin 10: Failure to Recognize that Quality Still Wins the Day

With the increased emphasis on value engineering and price, inherent in the Design/Build process, quality, aesthetics and design considerations may be put to the side.

Lawsuits Against The Owner By The Design/Build Team

The Design/Build process is susceptible to lawsuits against the owner by the Design/Build team. The following are a few examples: (1) faulty or incomplete design criteria were provided by the owner to the Design/Build team; (2) the owner failed to make decisions promptly or made faulty decisions; (3) the owner failed to provide information promptly or provided faulty information; (4) the owner failed to clear or arrange access to the site; and (5) the Design/Build team encountered unanticipated conditions.

Lawsuits By One Design/Build Team Member Against Another

On the traditional construction project, there is often tension between architect and contractor. The Design/Build context does not change this. Lawsuits between Design/Build team members include the following: (1) defective design; (2) delay; (3) Coordination failures (design or construction); and (4) responsibility for extra work in instances when the owner refuses to pay.

Conclusion

Construction projects, whether carried out under a Design/Build method or traditionally, will continue to be a source of claims and disputes regardless of the method of construction project delivery selected. Avoiding costly and protracted disputes can only be achieved through good up front planning, fostering good communications among project participants, and setting a well thought out dispute resolution method before the project begins.