

**DESIGN-BUILD vs. TRADITIONAL CONSTRUCTION:  
RISK AND BENEFIT ANALYSIS**

Timothy N. Toler  
Toler & Hanrahan LLC  
Atlanta, Georgia

TABLE OF CONTENTS

- I. Contracting for Design-Build
- II. A Brief History of Design-Build
- III. Types of Delivery Methods
  - A. Design-Bid-Build
  - B. Construction Management (CM) at Risk
  - C. Multiple Prime
  - D. Design-Build
- IV. Potential Advantages and Disadvantages of Design-Build
- V. Project Conducive to Design-Build
- VI. Legal Consequences of Design-Bid-Build Delivery Method
  - A. Designer's Liability in Design-Bid-Build
  - B. Contractor's Liability in Design-Bid-Build
  - C. Owner's Liability Under Design-Bid-Build
- VII. Legal Consequences of Design-Build Delivery Method
  - A. Owner's Liability Under Design-Build
  - B. Designer's Liability Under Design-Build
- VIII. Other Contractual Considerations for the Design-Builder
  - A. Owner Cancellation of the Project
  - B. Ownership of Documents
  - C. Limitations of Liability
  - D. Statutes of Limitation and Repose
  - E. Dispute Resolution

## **I. Contracting for Design-Build**

According to the Design/Build Institute of America, more than 40% of non-residential design and construction in the U.S. is provided through the design-build process. By 2015, this number will grow to more than 50%.<sup>1</sup>

Unlike the traditional “design-bid-build” method of project delivery, “design-build” permits an owner to contract with one entity to provide both design and construction services. This can be done by an owner in several ways, including contracting with: (a) a design-build entity with both in-house design and construction capabilities; (b) a contractor-led design-builder that procures design services through a subcontract with a design firm; (c) a designer-led entity that contracts with a contractor for construction services; or (d) a joint venture between a contractor and a designer. Under any of these arrangements, the owner avoids the typical conflict as to responsibility for unanticipated problems that typically occurs between the contractor and designer on a traditional project.<sup>2</sup>

In December 2004, the American Institute of Architects (“AIA”) released new form contracts to replace 1996 versions of design-build contract forms. The new AIA A141 is between the owner and design-builder. The new AIA B142 is to be used between an owner and project criteria consultant on a design-build project. The new AIA B143 is between a design-builder and an architect and the AIA A142 is between a design-builder and a general contractor.

## **II. A Brief History of Design-Build**

When Ictinus and Callicrates built the Parthenon in Athens, they did so as *master builders* or *master masons*. They provided both the design and the build as one, seamless service. To perform one without the other was unknown.<sup>3</sup>

Around 40 B.C., Vitruvius, a Roman writer, engineer, and architect, wrote the original design handbooks, describing existing practices in the design and construction of buildings. His handbooks, which assumed that the responsibilities for what we now call design and construction were vested in a single individual, were followed for centuries.<sup>4</sup>

The first recorded instance of the intentional separation of the art of architecture from the craft of building was in Italy in the mid-fifteenth century. The work and writings of Leon Battista Alberti helped establish the art of architecture as a profession distinct from engineering and construction.<sup>5</sup>

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<sup>1</sup> See Non-residential Design and Construction in the United States, [http://www.dbia.org/fr\\_industryin.html](http://www.dbia.org/fr_industryin.html) and link to “Design-Build Market Share in the U.S.” (visited 4/1/07).

<sup>2</sup> Bruner and O’Connor, 2006 Construction Review, Construction Briefings No. 2007-1, page 30 (January 2007).

<sup>3</sup> Jeffrey L. Beard, *et al.*, Design-Build: Planning through Development § 2.1.1 (McGraw-Hill 2001).

<sup>4</sup> *Id.* at § 2.1.3.

<sup>5</sup> *Id.* at § 2.2.1.

Nevertheless, well into the nineteenth century, architects continued to retain responsibility for both design and construction, at least administratively if not always physically. In late 17<sup>th</sup> century England, Sir Christopher Wren, an architect and public servant, was charged with responsibility for the reconstruction of Saint Paul's Cathedral following the London fire of 1666. Wren designed and superintended the reconstruction of the Cathedral until its completion in 1710.<sup>6</sup>

The Industrial Revolution of the last half of the 18<sup>th</sup> century in England and throughout Europe and the United States in the 19<sup>th</sup> century, brought about the separation of design services from construction services. The reasons for this included an increased demand for design expertise and specialization in the industrial age, and the trend toward division of labor. The intellectual process of design and the physical nature of construction made for a natural segregation of the work. Also, construction was capital intensive, while design was not.<sup>7</sup>

By the middle of the 19<sup>th</sup> century there was a clear distinction between design professionals and builders. The American Institute of Architects was formed in 1857. Civil engineers formed the American Society of Civil Engineers and Architects in 1852, dropping "and Architects" from its name in 1869.<sup>8</sup>

In 1935 the separation was made absolute by passage of the Miller Act, requiring contractors on federal projects exceeding a certain amount to post performance and payment bonds. Each of the 50 states eventually enacted "Little Miller Acts." This surety requirement remains today a significant barrier to design firms offering construction services.<sup>9</sup>

All of which led to the traditional design-bid-build project delivery system which offered the owner a sequential design, bid, then build approach. As the separation and specialization of services increased, design and construction entities were sharing information only at the end of design and during the construction process. Interaction, particularly during the design phase, was extremely low.

In the 1970s and early 80s, owners brought in third parties to assist them in managing design and construction entities. These construction managers (CMs) did not hold the trade contracts nor contractually guarantee the cost or schedule to the owner. Projects were still awarded to a low bid general contractor. The CM acts as an agent of or advisor to the owner.<sup>10</sup>

But by the late 1980s, there developed the concept of the contractor being involved during the design and playing a similar role as the CM, but then contractually taking

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<sup>6</sup> *Id.* at § 2.2.2.

<sup>7</sup> *Id.* at § 2.3.

<sup>8</sup> *Id.* at § 2.4.

<sup>9</sup> *Id.* at § 2.5.

<sup>10</sup> *Id.* at § 2.6.

responsibility for the work, and guaranteeing both the cost and schedule. As these general contractors developed such capabilities, the construction manager / general contractor (CM/GC) or construction manager at risk (CM at-risk) evolved. Under this approach the construction manager could also self-perform some or all of the work in order to meet a contract guarantee. In construction management at risk, the contractor has significant input in the design process and guarantees the maximum construction price.

But the desire to establish a single point of responsibility and a faster, more seamless, delivery led many owners toward a single source design-build model. This project delivery system is characterized by a single contract between the design-build entity and the owner.

In 1993, the Design-Build Institute of America (DBIA) was formed, whose stated purpose is the promotion of design-build project delivery in the United States. In 1997, the U.S. federal government modified its Federal Acquisition Regulations to include new regulations for design-build procurement.<sup>11</sup>

### **III. Types of Delivery Methods**

#### **A. Design-Bid-Build**

In the traditional design-bid-build system of project delivery, the owner enters into two sequential contractual arrangements. The first arrangement is between the owner and the project architect or engineer, the second is between the owner and the prime contractor. This structure involves three distinct phases. In the design phase, the project A/E prepares comprehensive plans and specifications sufficiently definitive to permit lump-sum price estimates. In the bid phase, the owner submits the plans and specifications to one or more prime contractors who either submit bids as part of a competitive award process or who submit proposals to the owner for negotiation. In the third phase, the prime contractor to whom the owner has awarded the job builds the project strictly in accordance with the plans and specifications. The sequence is as follows:

Owner selects designer

Designer designs the facility

Owner then selects a constructor to build the facility

Constructor constructs the facility

Owner takes possession at substantial completion

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<sup>11</sup> *Id.* at § 2.6.

## B. Construction Management (CM) at Risk

The CM at Risk was developed to permit some overlap in the design and construction phases and to obtain significant constructability input during the design phase of a project. CM at Risk is a project delivery system where the owner contracts separately but somewhat simultaneously with a designer and a contractor. The sequence is as follows:

Owner selects a designer to design the facility.

Owner selects a contractor to perform construction management services and construction work in accordance with the plans and specifications. The CM has significant input during the design phase.

The CM generally will subcontract part or all of its construction scope to specialty contractors as soon as that specific part of the design is completed.

When the design is sufficiently complete, the CM usually guarantees the maximum price of the project and a project schedule to the owner.

The CM/GC constructs the facility.

Owner takes possession at substantial completion.

## C. Multiple Prime

Here the owner contracts separately with one or more designers and then with several constructors to deliver the project. Design may be done under one or more design contracts. Construction is performed under several coordinated but separate prime contracts with multiple constructors, usually one of each major trade. The owner assumes the duty to coordinate among the multiple prime contractors. This demands a high level of experience and significant owner staff responsibility to properly coordinate project duties and process requirements during design and construction. The sequence is as follows:

The owner selects a design entity to design the facility.

Owner selects multiple trade contractors to build the facility, either after design is complete or during design to obtain input into design.

The owner takes possession at substantial completion.

## D. Design-Build

Design-build project delivery involves a single contract for both design and construction services rather than one contract for design and another for construction. It combines

into a single role the design responsibility of the project A/E and the building function of the prime contractor.

With design-build, the total cost of the design and the construction are contained in one contract. A firm or team of architects, engineers and constructors are “at risk” for the cost, schedule, quality, and management of the project. The design-builder is both the A/E of record and the at-risk contractor. Selected specialty work, or in some cases all work, may be subcontracted to other design-build specialty companies. The steps are as follows:

The owner selects a design-build entity to design and build the facility.

The constructor portion of the entity provides constructability input to design and then constructs the facility as portions of the design become available.

The owner takes possession of the facility at substantial completion.

#### **IV. Potential Advantages and Disadvantages of Design-Build**

The *advantages* of the design-build method of delivery are often said to include:

Single point of responsibility for all aspects of the project.

Integration of design and construction responsibility.

Continuity between early design decisions and the construction process enhances constructability.

Time savings due to overlapping of design and construction phases. Materials and equipment procurement, and advance construction work, can progress before construction documents are completed.

Cost-effectiveness due to enhanced value-engineering and constructability.

Places designer and contractor on equal professional footing facilitating unified recommendations and jointly developed solutions.

Absence of claims for design errors or omissions.

Higher quality. The design-build entity has total responsibility for the finished product and cannot shift design errors or construction defects to another party.

Encourages innovation. With design-build, performance requirements are stated, and the design-builder can use different solutions to meet the owner’s ultimate project goals.

Accelerated schedule.

Risks are allocated to the party best able to manage the risk. Risks can be assigned, as appropriate, to the owner, to the design-builder, shared between the two principal parties; or mitigated by securing insurance coverage. All risks can be accounted for, discussed, and dealt with in a clear and comprehensive manner.

Conversely, the *disadvantages* of the design-build method of delivery may include:

Parties' unfamiliarity with the process.

Communicating owner's needs in design-build is different. The design-builder receives *criteria* for the design from the owner, not the design itself.

Barriers in procurement and licensing laws. Some state procurement laws still mandate the use of separate design and construction contracts.

Availability of insurance and bonding products for design-build.

**V. Projects Conducive to Design-Build**

Particularly attractive for projects that are not sensitive to aesthetic issues and in which engineering concerns dominate over architectural ones, such as industrial plants.

Project size – risk / reward value of the contract; does the project value justify the expense to prepare a design-build proposal.

Project complexity with high risk in separating design and construction responsibility (power-generating facilities, paper plants, nuclear power plants, chemical processing plants and refineries, water and waste-water treatment plants).

Where owner's requirements can be clearly stated.

Particularly attractive where owner's requirements can be defined by objective performance criteria that are readily understood by the industry.

Where owner's requirements are largely prescribed by industry or regulatory standards (civil infrastructure projects such as roads and bridges).

Where owner is a sophisticated organization experienced in design-build.

## **VI. Legal Consequences of Design-Bid-Build Delivery Method**

### **A. Designer's Liability in Design-Bid-Build**

The legal theories for designer liability arise under both contract and tort law. Traditional contract theories (breach of contract) require that the party seeking damages against the designer be a party to a contract with the designer (“privity of contract”).

But the potential risk of harm presented by design and construction activities to foreseeable persons not in contract with the designer has led to the development of tort theories of liability that do not require privity of contract.

#### **1. Design Liability Based in Contract**

##### **a. Express Contract**

A/E must meet the duties and obligations expressly set forth in its written contract with the owner. The A/E is contractually responsible to the owner for providing a design that meets the owner's requirements. The A/E will be liable to the owner for damages caused by a breach of the contract terms.

Bringing a breach of contract action against the design professional requires privity of contract.

##### **b. Implied Contract**

Courts have been reluctant to imply into a design contract a warranty that the design will be free from defects or will achieve a specific result.<sup>12</sup> The reason is that design professionals cannot guarantee results.<sup>13</sup> One court has held that a design professional “is not liable for fault in construction resulting from defects in the plans because he does not imply or guarantee a perfect plan or a satisfactory result.”<sup>14</sup>

The result may be different under a design-build contract, where courts may imply a warranty that the design-build contractor will furnish a design fit for the intended purpose.<sup>15</sup>

#### **2. Design Liability to the Owner Based in Tort**

Contract principles of liability are often less significant than tort principles in actual practice.<sup>16</sup> This is because relatively few design contracts prescribe standards of

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<sup>12</sup> Carl J. Circo, *When Specialty Designs Cause Building Disasters: Responsibility for Shared Architectural and Engineering Services*, 84 Neb. L. Rev. 162, 175 (2005).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, quoting *Surf Realty Corp. v. Standing*, 78 S.E.2d 901, 907 (Va. 1953).

<sup>15</sup> *Id.*, citing Justin Sweet, *Legal Aspects of Architecture, Engineering and the Construction Process* § 14.07 (6<sup>th</sup> ed. 2000).

<sup>16</sup> *Id.*

professional responsibility, and those that do often merely adopt a standard equivalent to the tort standard of care. For this reason, many claims brought by owners against design professionals are decided primarily under professional negligence principles under tort law rather than contract law.<sup>17</sup>

The courts will impose a duty on the design professional to conform his or her conduct to a judicially, rather than contractually, defined standard of care.<sup>18</sup> The standard is often stated in the following terms:

“[O]ne who undertakes to render professional services is under a duty to the person for whom the service is to be performed to exercise such care, skill, and diligence as men in that profession ordinarily exercise under the circumstances.”<sup>19</sup>

Stated another way, the design professional cannot render professional services in a *negligent* manner. The A/E does not warrant that the plans and specifications are error free, but does warrant that they meet industry standards (the applicable “standard of care”).

“He must possess and exercise the care of those ordinarily skilled in the business, and in the absence of a special agreement, he is not liable for fault in construction resulting from defects in the plans because he does not imply or guaranty a perfect plan or a satisfactory result.”<sup>20</sup>

It is important to note while the design professional’s duty of care owed to the owner exists independently of his or her express contractual obligations, the contract will establish the professional service, function or activity that must be exercised by the design professional with due care. Design contracts may establish many different roles for the design professional, ranging from plenary control over the project to specialized activities such as estimating costs, inspecting work in progress, and approving contractor payments. The design professional must exercise the requisite duty of care in performing each service, function or activity.<sup>21</sup>

### 3. Design Liability to Third Parties Based in Tort

Design professionals will not have contractual duties to persons who are not parties to the contract. This is the doctrine of privity of contract. But design professionals do owe a due of professional care to anyone who can be foreseeably injured as result of the designer’s negligence, regardless of privity of contract.<sup>22</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 178.

<sup>19</sup> *Minn. Forest Prods., Inc. v. Ligna Mach., Inc.*, 17 F. Supp. 2d 892, 915 (D.Minn. 1998) (quoting *City of Eveleth v. Ruble*, 225 N.W.2d 521, 524 (Minn. 1974)).

<sup>20</sup> *Surf Realty Corp. v. Standing*, 195 Va. 431, 78 S.E.2d 901 (1953).

<sup>21</sup> *Circo*, *supra* at 178.

<sup>22</sup> *See Inman v. Binghamton Housing Authority*, 143 N.E. 2d 895 (N.Y. 1957).

“Unlike contractual duties, which are imposed by agreement of the parties to a contract, a duty of due care under tort law is based primarily upon social policy . . . . While in contract law, only one to whom the contract specifies that a duty be rendered will have a cause of action for its breach, in tort law, society, not the contract, specifies to whom the duty is owed, and this has traditionally been the foreseeable plaintiff.”<sup>23</sup>

The liability of design professionals to non-contractual parties is generally limited, however, to *personal injury or property damage* arising out of the design professional’s negligence. This doctrine is called the economic loss rule. Under Georgia law, the economic loss rule bars a non-contractual party from recovering for professional negligence against a design professional if the damages caused by the negligence are purely economic.<sup>24</sup>

There is, however, one notable exception to the economic loss rule: a claim for *negligent misrepresentation*. Under Georgia law, the economic loss rule is inapplicable to claims against a design professional for negligent misrepresentation. A third party may recover even economic losses against a design professional under the theory of negligent misrepresentation “where a known third party’s reliance was the desired result of the representation.”<sup>25</sup>

The elements for negligent misrepresentation under Georgia law are: “(1) the defendant’s negligent supply of false information to foreseeable persons, known or unknown; (2) such person’s reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance.”<sup>26</sup> Under this standard, an A/E who supplies information during the course of his profession has a duty of reasonable care and competence to parties who rely upon the information in circumstances in which the maker is manifestly aware of the use to which the information is to be put and intended to be used.<sup>27</sup>

## B. Contractor’s Liability in Design-Bid-Build

### 1. Breach of Express Contract

The contractor is accountable to the owner in the performance of its work in strict accordance with the terms and provisions of its contract with the owner. Failure to

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<sup>23</sup> Circo, *supra* at 173 (quoting *Caldwell v. Bechtel, Inc.*, 631 F.2d 989, 997-98 (D.C. Cir. 1980).

<sup>24</sup> *Robert & Co. Assoc. v. Rhodes-Haverty P’ship*, 250 Ga. 680, 681, 300 S.E.2d 503 (1983); *see also Malta Constr. Co. v. Henningson, Durham & Richardson, Inc.*, 716 F.Supp. 1466, 1468 (N.D.Ga.1989).

<sup>25</sup> *Robert & Co. Assoc.*, 250 Ga. at 681, 300 S.E.2d 503; *see also Carolina Casualty Insurance Co. v. R.L. Brown & Associates, Inc.*, 2006 WL 3625891 (N.D. Ga. 2006).

<sup>26</sup> *Hardaway Co. v. Parsons, Brinckerhoff, Ouade & Douglas, Inc.*, 267 Ga. 424, 426, 479 S.E.2d 727 (1997).

<sup>27</sup> *Robert & Co. Assoc.*, 250 Ga. at 681-82.

perform in accordance with the contract gives rise to an action for breach of contract. Only parties in privity of contract with the contractor can bring an action for breach.

The contractor *does not impliedly warrant* that the A/E's design, when executed, is sufficient to meet the owner's requirements. In fact it is the owner who impliedly warrants the sufficiency of plans and specifications to the contractor under the Spearin doctrine (discussed below).

## 2. Negligent Construction

As a general rule, a breach of contract is not a proper basis for a tort claim.<sup>28</sup> But liability theories often straddle the boundary between contract and tort. Under Georgia law, the tort of negligent construction arises from a contractual relationship. In *Danjour, Inc. v. Corporate Construction, Inc.*,<sup>29</sup> the court stated:

Implied in every contract by building contractors is the obligation to perform in a fit and workmanlike manner. This contract duty is breached when the builder fails to exercise a reasonable degree of care, skill, and ability under similar conditions and like surrounding circumstances as is ordinarily employed by others in the same profession.

While courts often refer to a separate duty imposed under tort law as being "independent" from contract, the separate legal duty may be dependent on the contract in the sense that the duty that gives rise to tort liability may arise out of the contractual relationship.<sup>30</sup> The *Danjour* court upheld summary judgment for the builder where the plaintiff could not show it was in privity of contract or a third-party beneficiary of the builder's contract.

Under Georgia law, there is implied in every construction contract "the obligation to perform in a fit and workmanlike manner. This contract duty is beached 'when the builder fails to exercise a reasonable degree of care, skill, and ability under similar conditions and like surrounding circumstances as is ordinarily employed by others in the same profession.'"<sup>31</sup>

## 3. Duty of Care Owed to Third Parties

The contractor, like the design professional, owes a duty of care to those who can be foreseeably injured as a result of the contractor's negligence, regardless of privity of contract. But the economic loss rule will bar recovery on any claims *other than* claims for personal injury or property damage caused by the contractor's negligence.

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<sup>28</sup> Circo, *supra* at 177.

<sup>29</sup> 272 Ga.App. 695, 613 S.E.2d 218 (2005) (citing *Nulite Industries Co. v. Horne*, 252 Ga.App. 378, 379 (1), 556 S.E.2d 255 (2001)).

<sup>30</sup> Circo, *supra* at 177.

<sup>31</sup> *Nulite Industries Co. v. Horne*, 252 Ga.App. 378, 379, 556 S.E.2d 255 (2001) (quoting *Hall v. Harris*, 239 Ga.App. 812, 817, 521 S.E.2d 638 (1999)).

### C. Owner's Liability Under Design-Bid-Build

When the owner selects the design-bid-build method, the owner and its project A/E – not the prime contractor and its subcontractors – bear the risk of design errors and defects. This principle has developed as the Spearin doctrine, named after *United States v. Spearin*,<sup>32</sup> in which the Supreme Court held that “if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.”

This rule of law has two significant consequences:

- 1) it supports the premise that if there is a design defect which prevents the project from functioning in accordance with the owner's expectations, the contractor will not be liable; and
- 2) it enables the contractor to be paid for any changes to or defects within the design documents.

## VII. Legal Consequences of Design-Build Delivery Method

### A. Owner's Liability Under Design-Build

*In contrast to the design-bid-build method*, in a design-build project the owner *does not* assume the risks of design errors and defects because the owner does not furnish the plans and specifications. The owner may still be responsible, however, for preliminary design criteria or other design documentation or data the owner or its representatives furnish to the design-builder (under the Spearin doctrine).

### B. Design-Builder's Liability Under Design-Build

#### 1. Breach of Express Contract

Design-build projects can be structured in a variety of frameworks and on more than one tier of performance responsibility. As with design-bid-build, the scope of work and obligations undertaken by each party in a design-build relationship is determined by the contractual agreement between the parties.

Breach of express contract is the most common legal theory used by owners who have claims against design-builders. In *Koppers Company, Inc. v. Inland Steel Company*,<sup>33</sup> the owner entered into agreement with the design-builder for the design, engineering and construction of a blast furnace and a battery of sixty-nine ovens. When the project came in two years late and \$177 million over the estimated cost, the owner sued the design-builder for cost overruns and the design-builder counterclaimed for the balance of its unpaid fee. In reviewing the net jury award to the owner of \$63,902,000, the appellate

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<sup>32</sup> 248 U.S. 132 (1918).

<sup>33</sup> 498 N.E.2d 1247 (Ind. App. 3rd Dist., 1986).

court found that the agreement between the parties containing their respective rights and obligations actually consisted of four separate agreements that must be read together. The appellate court carefully reviewed and construed numerous provisions in all four agreements before affirming the award.<sup>34</sup>

The design-build contract will often have objective performance specifications with testing and guarantees built around these specifications. One example is a power-generation project where the design-builder will be responsible for achieving specific-capacity and heat-rate requirements. A “performance specification,” in contrast to a “design specification,” sets forth certain quantified, objective standards to be achieved without dictating the design. Design-build contracts often call for the imposition of *liquidated damages* in the event certain performance criteria are not met.<sup>35</sup>

## 2. Breach of Implied Warranties

As previously discussed, courts have traditionally been reluctant to imply into a design contract a warranty that the design will be free from defects or will achieve a specific result. But the melding of design and construction responsibilities into a single design-build contract may lead courts to a different conclusion. It may be that courts will imply a warranty that the design-builder will furnish a design fit for the intended purpose.

If the design-build contract requires the design professional to furnish cost estimates for the project to the owner, some courts have *implied a warranty* that the estimates will be reasonably accurate.<sup>36</sup>

Implied warranties are created by both judicial precedent and application of the Uniform Commercial Code (UCC).

Judicially imposed implied warranties typically include: the implied warranty that the work will be performed in a professional manner and the implied warranty that the work will be fit for the purpose for which it is intended.

Article 2 of the UCC is applicable to the sale of goods and establishes some commercial terms governing the rights and responsibilities of the buyer and seller of goods. Included in the scope of the UCC are warranties by the seller that its goods will be fit for the purposes intended and of merchantable quality. (Every state except Louisiana has adopted the UCC in some form).

Courts are typically reluctant to apply the UCC, and UCC warranties, to construction projects, which are typically service-intensive rather than a sale of “goods.” But

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<sup>34</sup> *Id.* at 1256.

<sup>35</sup> *See, CIT Group / Equipment Financing v. ACEC Maine*, 782 F.Supp. 159 (D. Me. 1992) (design-builder of a power facility was required to meet two sets of performance tests as a condition to acceptance.)

<sup>36</sup> *Circo, supra* at 176, citing *Kostohryz v. McGuire*, 212 N.W.2d 850 (Minn. 1973) and *Durand Assoc. v. Guardian Inv. Co.*, 186 Neb. 349, 183 N.W.2d 246 (1971).

construction projects do, at times, fall within the purview of the UCC when a balancing of the services and goods provided weighs in favor of goods. (*See, Omaha Pollution Control Corp. v. Carver Greenfield*, 413 F.Supp. 1069 (D. Neb. 1976) (court held a contract for the design and construction of a sewage treatment plant was for the sale of a product)). The more typical UCC case is *The Marley Cooling Tower Company v. Caldwell Energy & Environmental, Inc.*, 280 F.Supp.2d 651 (2003) (applying the Kentucky UCC to Marley's sale of air-cooled condensers on a power generation project).

A well-drafted design-build contract should properly disclaim any warranties that are not expressly stated in the contract. The UCC sets forth specific criteria that must be satisfied to achieve a fully enforceable disclaimer.

### 3. Liability to the Owner Based in Tort

As with the design professional in design-bid-build, the courts *will impose* a duty on the design-builder to conform his or her design activities to a judicially defined professional standard of care. The melding of design and construction roles into one entity under a design-build contract will mean that the duty of professional care will be imposed on an ever increasing array of activities and functions. As one writer has noted, “[i]njection of a professional services component to that contract appears to release a virus of negligence that infects both the construction and design components of the project.”<sup>37</sup>

Moreover, the design-builder may have increased responsibility for the design services delegated to or provided by others. A project A/E whose contract includes specialty design services furnished by consultants may, at a minimum, thereby assume a duty to the owner to use care in selecting qualified consultants, and to properly review, approve and coordinate designs by the consultants.<sup>38</sup>

### 4. Liability to Third Parties Based in Tort

The analysis for liability of the design-builder to third-parties in tort will basically track the liability of the design professional and contractor to third-parties as discussed above. But the potential for “vicarious liability” does appear to be greater in the design-build arena.

Generally, designers and contractors are not responsible for the torts committed by “independent contractors,” such as their subcontractors and consultants.<sup>39</sup> But there are two important exceptions to this general rule. The first is “where the wrongful act violates a duty imposed by an express contract upon the employer.”<sup>40</sup> The second

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<sup>37</sup> David B. Ratterman, *Duties and Liabilities of the Architect-Engineer to the Contractor and Subcontractor*, in 1 Constr. L. Handbook § 5.04 (Aspen Law & Business, 1999 ed.).

<sup>38</sup> Circo, *supra* at 184.

<sup>39</sup> See O.C.G.A. § 51-2-4; *Watkins v. First South Utility Construction, Inc.*, 2007 WL 900980 (Ga.App.).

<sup>40</sup> *Nulite Industries Co. v. Horne*, 252 Ga.App. 378, 379-80(2), 556 S.E.2d 255 (2001).

exception to the general rule is where the independent contractor is performing a non-delegable statutory or regulatory duty imposed upon the contractor.<sup>41</sup>

The courts have declared that these duties are non-delegable. In construction and design cases, the non-delegable duty analysis is often applied if the damage or injury arises out of the violation of a statute or administrative code or regulation *relating to safety*. This does not mean that the duty (i.e., the work) cannot be delegated to a subcontractor or design consultant. But it does mean that the duty is such that the person primarily responsible for performance of the duty (i.e., the design-builder at the top of the contractual pyramid) will be vicariously liable for performance by the designee, even if the designee is an independent contractor.<sup>42</sup>

### **VIII. Other Contractual Considerations for the Design-Builder**

#### **A. Owner Cancellation of the Project**

The cost associated with preparation of design-build proposals can be significant, particularly if the RFP requires substantial preliminary design work. Careful attention should be paid to the cancellation or termination provisions in design-build contracts. Does the contract provide for a termination for convenience? If so, will the design-builder be entitled to compensation for its design costs?

#### **B. Ownership of Documents**

An important consideration when drafting and reviewing the design-build contract is ownership of the design-build documents. Does the owner have the right to retain and use the design-builder's documents to complete the project if:

The design-builder is terminated for default?

The design-builder is terminated for convenience?

Can the owner use the design-build documents on subsequent projects with another design-builder?

The properly drafted contract between the owner and the design-builder should address and clarify these issues.

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<sup>41</sup> See O.C.G.A. § 51-2-5(4); *Cooper Tire & Rubber Co. v. Merritt*, 271 Ga. 16, 20, 608 S.E.2d 714 (2004).

<sup>42</sup> *Circo, supra* at 195.

### C. Limitations of Liability

Limitation of liability clauses in design-build contracts can take a number of forms:

Limit the amount of damages for which the design-builder can be liable to the owner to the contract price or a percentage thereof;

Limit the amount of damages for which the design-builder can be liable to the owner to the amount of available insurance coverage;

Exclude liability for lost profits and other consequential damages;

Establish liquidated damages as the exclusive remedy for breach of performance guarantees;

Exclude all implied warranties;

Limit liability for defective work to the cost of repair or redesign; and

Limit liability for design errors exclusively to the obligation to correct errors rather than to pay damages.

Whether a particular limitation of liability clause is enforceable in a particular state will generally involve a public policy analysis. There is every indication, however, that courts will strictly construe any such limitations contained in design-build contracts given the comprehensive nature of the services intended. A Pennsylvania Supreme Court case, cited with approval in *Koppers Company, Inc., supra*, may have captured the sentiments of many courts when it held:

“[T]he intention to diminish, curtail or deny any of the normal rights which accrue from a given relationship must be manifested with the *greatest particularity*. The writing relied upon as an expression of the intention must be construed strictly against the party seeking to invoke it.” (emphasis in original, citations omitted)<sup>43</sup>

### D. Statutes of Limitation and Repose

The A/E’s liability for design errors has historically accrued on completion of the design and issuance of construction documents. By placing these services in a single contract, it appears that the accrual date will commence on completion of the overall project.<sup>44</sup>

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<sup>43</sup> *Fogel Refrigerator Co. v. Oteri*, 391 Pa. 188, 137 A.2d 225, 230 (1958).

<sup>44</sup> See, *Kishwaukee Community Health Services Center v. Hospital Building and Equipment Company*, 638 F. Supp. 1492 (N.D. Ill. 1986) and *Welch v. Engineering, Inc.*, 202 N.J. Super. 387, 495 A.2d 160 (1985).

Georgia law establishes a six (6) year statute of limitations for actions for breach of a written contract, including breach of warranty.<sup>45</sup> A cause of action for breach of a construction contract accrues at the time the work is substantially complete.<sup>46</sup>

Georgia enforces a *statute of repose* in connection with claims for deficient performance brought against entities planning, designing, observing, supervising and performing construction work.<sup>47</sup> Actions must be brought within eight years after substantial completion of construction.

#### E. Dispute Resolution

When drafting and negotiating design-build contracts, as with design-bid-build contracts, the parties must be alert to inconsistent dispute resolution clauses contained in the various documents. In *The Hillier Group, Inc. v. Torcon, Inc.*,<sup>48</sup> the design-builder had an arbitration clause with its designer-subcontractor but no arbitration clause with the owner. When design problems arose on the project, the design-builder was forced to litigate with the owner and arbitrate the same issues with the designer-subcontractor.

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<sup>45</sup> O.C.G.A. § 9-3-24.

<sup>46</sup> *Costrini v. Hansen Architects, P.C.*, 247 Ga. App. 136, 543 S.E. 2d 760 (2000).

<sup>47</sup> O.C.G.A. § 9-3-51.

<sup>48</sup> 932 So. 2d 449 (Fla. Dist. Ct. App. 2d Dist. 2006).