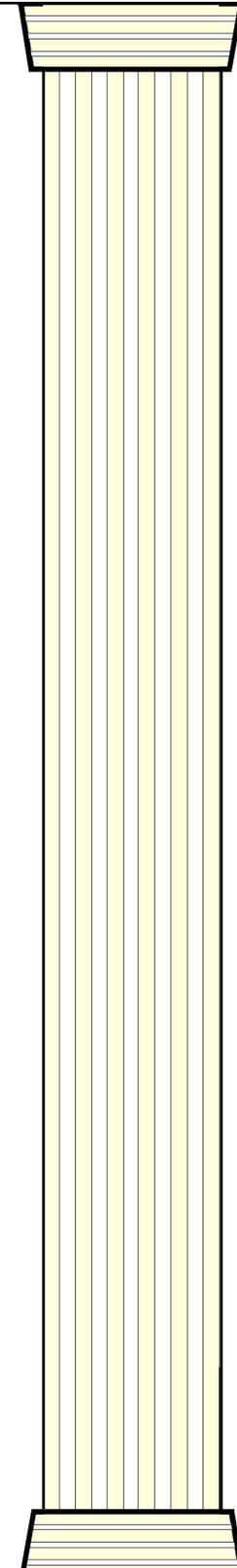

PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 03/2008: 'Design-Build Projects: Unique Risks and Rewards'

March, 2008



Design-Build Projects: Unique Risks and Rewards

Article courtesy of Professional Liability Agents Network (PLAN)



Financial Risks

Design professionals can face increased financial risks with design-build projects, and the extent and scope of these liabilities depend on the role they play in these projects. Not surprisingly, the greatest risks occur when the design firm takes the lead role of the prime design-builder.

Design-Build (continued on page 2)

Design-build is a project delivery method that provides the owner with a single point of contact for both design and construction. The concept, which dates back at least to the 'master builders' of ancient Greece, has gained great popularity in recent years as owners seek greater simplicity in directing and executing their new projects.

Architectural and engineering firms of all sizes have found themselves involved in design-build projects, occasionally serving as the design-builder, but usually acting as a subconsultant. Some of these design firms achieve great results and rewards while others are saddled with unexpected consequences. Indeed, a basic awareness of the unique financial and liability risks associated with design-build is essential to avoiding some of the unpleasant – even devastating – surprises that can await.

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contractor can contract to perform engineering services it is not licensed to carry out. In such cases, the contract can be voided, leaving the design-builder with little recourse for getting paid for services rendered and a team of irate and unpaid subconsultants and subcontractors.

Liability Risks

When acting as the prime design-builder or participating in a joint venture, design firms become responsible for all aspects of a design-build project. Essentially, your liability expands from professional liability to strict liability. This change is profound.

Under professional liability, design professionals are negligent only when it can be shown that they have breached the standard of care. That is, negligence occurs only when the design professional fails to exercise the degree of care ordinarily exercised by peers performing the same type of work and, as a consequence, someone experiences injury or damage. When strict liability applies, it is no longer necessary to show negligence. Rather, one merely has to show that a warranty or guarantee was breached, or that the 'product' involved – in this case, a structure – did not perform as it was supposed to.

Design-Build (continued from page 1)

Serving as the prime in a design-build project typically means taking on a much larger portion of the liabilities associated with the project. In fact, the design-builder may have full responsibility for managing, directing and coordinating the design and construction, including responsibility for the adequacy of the plans and for the construction means, methods, techniques, sequences and procedures, as well as for jobsite safety. Aside from retaining liability for the traditional design errors and omissions, the design professional acting as prime design-builder can now be held responsible for workplace accidents, specification errors, material failures and construction errors and delays. These liabilities can result in severe financial losses.

Other unique financial risks can occur when serving as prime on a design-build project. For instance, owners will often ask the design-builder to submit designs that are nearly half complete before committing to the project. This can lead to incurring significant expenses with limited recourse if the project is not built.

Further, with design-build projects, the full contract price is typically established at the beginning stages of the project. This presents a greater potential for unanticipated design and construction costs arising after the fixed contract price has been established. This, in turn, can lead to eroded profits or, worse, the temptation to cut corners in construction, which creates an increased chance for errors, omissions, claims and lawsuits.

Even the inexact wording of a design-build contract can pose additional financial risks. Problems inevitably arise when the lead design-builder contracts to 'perform' services for which it is not licensed. For instance, a design firm may contract to perform construction services that require special licensing, or a

Design-Build (continued on page 3)

2008 FOCUS Seminars

Cavignac & Associates' FOCUS Room
Bank of America Plaza
450 B Street, 18th Floor, San Diego, CA

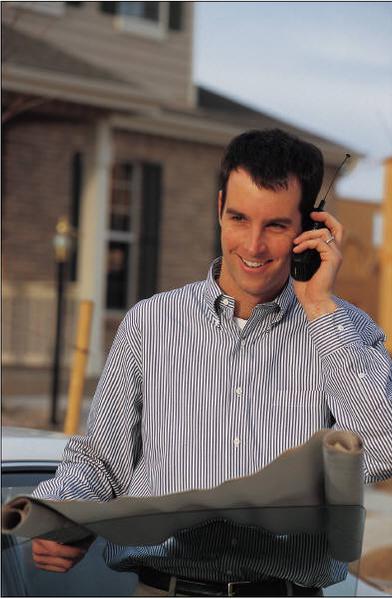
- **Office Ergonomics**
Friday, April 18, 2008 — 9:00 AM - 11:00 AM
- **Defensive Driver Training and Fleet Safety Management**
Friday, May 23, 2008 — 9:00 AM - 12:00 PM

All training sessions available to our clients
Reserve early / seating is limited! *

For more information about upcoming seminars:

- Visit our Web site at www.cavignac.com
- Contact Darcee Nichols at dnichols@cavignac.com or 619-744-0596

* NOTE: Due to the popularity of our seminars and limited space available, we regret we cannot provide refunds or credits with less than 72 hours advance notice of cancellation.



Generally, an architect or engineer serving as a subconsultant faces considerably less risk than the design-builder directly responsible to the owner. This situation can change, however, when the subconsultant manages or simply observes construction. That observation might be considered construction supervision under the design-build umbrella. In that case, the architect or engineer

could be liable for both work quality and workplace injuries.

In one court case, an architect in a design-build project was charged with liabilities for injuries to two workers. The architect had agreed to serve as construction manager on a limited basis and to develop and implement a project safety plan. For protection, the architect excluded responsibility for the means of construction or control over other parties' workers through exculpatory clauses in the design contract. The court held that the exculpatory clauses would have relieved the architect from responsibility for site safety under traditional project circumstances. However, in design-build projects, where the contract conflicts with those clauses, the more restrictive interpretation applies.

Another problem arises when the design professional reports to a contractor serving as the design-builder. Under the traditional design-bid-build method, if the construction contractor doesn't follow design specifications, the design professional reports the situation to the owner. In this design-build scenario, the construction contractor is the client and, consequently, there is no recourse to the owner to report construction problems. As a result, these problems are more likely to go uncorrected and materialize as claims years after construction is complete. And you can bet the design professional will be named as one of the parties to the claim.

Another potential liability problem is that a design firm's existing insurance may not cover the added exposures. As noted, when acting as prime contractor, the design professional assumes liabilities for construction defects and workplace safety. Professional liability insurance does not cover these exposures. The

design professional will need additional coverage, and it may be essential that multiple insurance policies dovetail with one another to avoid gaps. Likewise, the policies of other project participants must dovetail to help assure that all insurable exposures are covered.

Bonding requirements are also typically associated with design-build projects. Design firms are often surprised when surety bonds – as well as the personal indemnity or guarantee a surety bond company demands – are requirements of taking the lead on a design-build project.

Limiting Design-Build Risks

The added risks and liabilities associated with design-build projects, while daunting, are not insurmountable. By taking necessary precautions, design firms can have very successful experiences working under this project delivery method, even as the prime design-builder. Here are some issues you should address with your attorney and insurance broker before delving into the design-build field.

The Client and Project Team

Carefully evaluate the project and the client. Are the budget and schedule realistic? Is there adequate financing? What are the qualifications and design-build experience of other participants – and how were they selected? Does the client, contractor or others have a history of disputes and litigation?

Corporate Structure

Some design firms have established new corporate legal entities for each of their design-build projects. These new entities, typically set up as limited liability partnerships or companies, would then become the legally responsible parties for the projects. While this does not insulate design professionals from liability for their individual professional acts, it can protect assets used only for traditional design-bid-build projects. Consult your attorney and accountant on the protections, costs, advantages and disadvantages of this approach.

Contractual Considerations

Because of the increased potential liabilities, the design-build contracts between the design professional, owner, contractor and other parties gain extra importance. Careful attention should be paid to each party's work scope, indemnification clauses, limitation of liability provisions, construction observation requirements and dispute resolution methods.



The Design-Build Institute of America (www.dbia.org) has done substantial work in drafting appropriate design-build contract documents. The AIA, EJCDC and FIDIC have also published sets of standard form agreements for professionals providing design-build services. The AGC has established documents for its members as well. These standard documents are good starting points, but they will likely need to be tailored to fit your particular situation.

Also make sure the agreement under which you operate is legal within your state. Both the Design-Build Institute of America and the American Bar Association have published surveys of state procurement and licensing laws with regard to design-build. Also, where appropriate, include provisions that state the design-builder will ‘engage licensed professionals’ rather than ‘perform services.’

To maximize the benefits of design-build, it is essential that each party’s responsibilities and obligations be clearly defined under the contract. This not only will avoid misunderstandings as to who is responsible for what, it can also prevent duplication of effort. Likewise, a ‘teaming agreement’ is helpful to make sure that all parties to the project work together to maximize project successes and minimize potential disputes.

Also pay particular attention to opportunities to obtain indemnifications from other project participants for claims arising from their errors or negligence. Under the traditional design-bid-build system, obtaining indemnification from parties other than the client is extremely difficult because the design professional and contractors rarely have contractual relationship. However, in design-build, there is typically a contractual relationship with the contractor, subcontractors and suppliers. These relationships are

conductive to including indemnification clauses as a condition of service.

If work stops due to conflicts, it is the prime professional who suffers most. For this reason, formal methods for clarifying questions and resolving disputes become more important than ever. Rather than relying on litigation or traditional arbitration, specify use of mediation or some other dispute resolution technique.

Insurance

The insurance requirements for design-build are both complex and critical. Your coverage needs will vary depending on your specific role.

If you are the lead design-builder or are part of a design-build entity, your insurance requirements will expand to include those of a contractor. You’ll need to investigate the availability and cost of appropriate general liability coverage for contractor operations. You may also be required to provide surety bonds or rely upon the contractor’s bonding.

Also make certain that all members of the design-build team carry appropriate insurance. You may find it appropriate to be listed as an additional insured on certain policies – the contractor’s general liability policy, for example. Specialized guidance from a qualified insurance agent or broker is a must.✧

***Disclaimer:** This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.*

Did you know...?

UV rays can come from many directions. They radiate directly from the sun, but they are also reflected from the ground, water, snow, sand and other bright surfaces.

Vision Care: UV Protection

Keeping your eyes
safe from the sun

Article courtesy of the Employee Benefits Department

The sun releases its energy, called radiation, in various forms: in the sunlight we see, the heat we feel, and the invisible ultraviolet rays that cause us to sunburn. Ultraviolet (UV) rays from the sun can also damage our eyes and hurt our vision.

Dangers of UV Rays

Exposure to UV-A and UV-B rays can damage your eyes. Long-term exposure to UV rays can result in eye problems that may lead to vision loss from conditions like cataracts or macular degeneration. Other dangers include skin cancer (around the eyelids) and corneal sunburn. Long hours at the beach or skiing without proper eye protection can cause corneal sunburn, which can be very painful and may cause temporary vision loss.

Exposure Risk Factors

Everyone is at risk for eye damage from UV radiation that can lead to vision loss. The risk of sun related eye problems, however, is higher for people who:

- Spend long hours in the sun
- Have had cataract surgery or have certain retina disorders
- Are on certain medicines, such as tetracycline, sulfa drugs, birth control pills, diuretics and tranquilizers that increase the eye's sensitivity to light

Proper Eye Protection

Adequately protecting your eyes from the sun, and other elements like wind or water, is crucial to maintaining your vision and eye health.



- Use everyday eyewear that absorbs UV rays — All types of eyewear, including prescription and non-prescription glasses, contact lenses and lens implants, should absorb UV-A and UV-B rays.
For UV protection in everyday eyewear, there are several options like UV-blocking lens materials, coatings and photo chromic lenses. UV protection does not cost a lot of money and does not get in the way of seeing clearly.
- Select the right sunglasses — Sunglasses help in two important ways: they filter light, and protect your eyes from damaging UV rays.
Look for labels that clearly state they block 99% to 100% of UV-A and UV-B rays. They should also reduce glare, protect your entire eye area, be comfortable to wear and do not distort color.
Be aware that if you are at the beach or on ski slopes, you should wear sunglasses with a darker tint to block more light. Your risk of eye damage from the sun is greater because of reflection off the water and snow.
- Wear a brimmed hat or cap — A wide-brimmed hat or cap will block about half of UV rays, and also limit UV rays that hit the eyes from above or around glasses. ✂



Community Bulletin Board

'Neighbors helping neighbors in San Diego'



The 11th Annual Heroes Luncheon

Faces of the Future

'08

Commencement Ceremony

Monarch Class of 2008



Mark June 20th at 2:00 p.m. on your calendar and join us for Monarch School's 2008 Commencement ceremony. Two of our graduating students have been at Monarch for three years. Congratulations to the Monarch Class of 2008!

Volunteer Opportunities!

Monarch has a variety of volunteer opportunities for interested community supporters. If you or someone you know is interested in volunteering, please check out the current opportunities below and contact Monarch's volunteer coordinator, Kristin Shea, at (619) 685-8242, Extension 235:

- Tutors – Language arts, high-level math, elementary math
- Butterfly Enterprises Business Club – Mondays 3-5 p.m. and possibly some evenings or weekends
- Clerical Assistance – Help Development Team prepare PR packets
- Drivers/Chaperones for field trips and appointments
- After School 'Buddy' – Afternoons 3:00-5:30 p.m. to help chaperone students
- Special Events – prepare food for school parties, decorate for graduations, translate at parent meetings, holiday celebrations
- Group Dinners – Mondays or Fridays at 5:15 p.m.
- Breakfast – 7:30-8:10 a.m.

We welcome you to visit Monarch to 'meet the kids,' visit our classrooms, and tour our unique facility.

For more information, please contact Kristin Shea, Volunteer Coordinator for the Monarch School Project, at (619) 685-8242 Extension 235 or e-mail her at kshea@monarchschoools.org. You can also visit www.monarchschoools.org to learn more about our unique school. ✨



Senior Community Centers

Please join Senior Community Centers as we honor members of our community who are committed to passionately helping San Diego's

low-income seniors survive and thrive.

When

- May 9, 2008, 11:30 a.m. to 1:30 p.m.

Where

- Manchester Grand Hyatt

Hero Award Recipients:

- Qualcomm, Serving Seniors Group
- Albertsons, Store #6745 Employees
- Erica Schild, Teen-Senior Connect
- Sam Ellis, City Heights Square Resident



Tickets:

- Individual \$150
- VIP \$250
- Corporate Table \$1,500

(Corporate Table sponsorship includes 10 seats and event recognition opportunities)

For More Information about sponsorship opportunities or luncheon tickets, contact **Sheona Richardson** at 619-235-6572, Extension 305, or e-mail sheona.richardson@servingseiors.org. ✨



14th Annual Walk for Animals

When Saturday, May 3, 2008 — 7:30 a.m. to Noon

Where Crown Point Shores



Join thousands of animal lovers for fun in the sun on Saturday, May 3rd from 7:30 a.m. to noon at Crown Point Shores for the San Diego Humane Society and SPCA's 14th Annual Walk for the Animals.

The pledge walk will feature a pancake breakfast and a vendor village, complete with a number of animal-related information booths. More than 3,000 local animal lovers and their pets are expected to join together for this fun-filled, dog-themed event to help raise money for animals in need!

Register to walk or pledge your support online at www.sdhumane.org/walk. To receive a pledge form by mail or for more information, call (619) 243-3408. ✨