

Approaching Design-Build Projects to Avoid (or Win) Disputes

By Stuart Eisler | Tuesday, June 20, 2023

Stakeholders engage in design-build projects believing the collaborative nature better aligns parties' interests and reduces overall risk exposure. Each of the lead parties bases this belief on different factors—the owner sees an opportunity to reduce change-order exposure and improve delivery times, the design-builder (or contractor) aims to control design volatility by ensuring project components match budgeted projections, and the designer intends to benefit by greater constructability review from the design-builder team and often additional time to detail designs. Rarely do design-build parties contemplate claims arising while initiating a project.

This being said, design-build projects carry unique, inherent risks due to the award of often fixed-price contracts utilizing incomplete, preliminary designs. As scopes creep and costs balloon, previously harmonious parties experience discord and lurking claims. While the majority of design-build projects are completed without major dispute, there are strategies available to further avoid disputes and prevail in those that are unavoidable.

PICK THE TEAM WISELY

The initial point of consideration is to actively select the team members that will lead to project success. Because parties must work closely together, it is important to select members who like working with each other. If the team does not seem like the right fit at bid, when everyone is at their most optimistic, imagine how it will feel as difficulties requiring heightened attention and decision making under stress arise. The design-build team should also include at least one lead member (the owner, design-builder or designer) with prior design-build experience to help navigate the unique environment of a design-build project.

TAKE THE TIME TO DEVELOP CLEAR CONTRACTS

It often feels as though it requires a leap of faith to commence a design-build project. The parties agree to use best efforts to achieve a successful project without necessarily holding a detailed definition of success. To mitigate the risk of the early unknown, the parties should endeavor to prepare clear, understandable contract terms. The contract should define firm expectations, including specific responsibilities and milestones beyond the rudimentary commencement, substantial completion and final completion dates.

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Where contingencies and allowances are used, these should be defined with greater particularity than in typical projects, so no disputes can later arise as to whether a certain scope falls within them. Allowances should be reconciled and contingencies incorporated to the greatest extent possible into the GMP, as this further limits the likelihood of later claims based on misunderstandings. Additionally, the timing, formatting and substantive requirements of notices, change documents, responses, claims and the like should be straightforward and workable. The parties must actually consider these provisions and not rely on default language from prior projects.

DEVELOP AND MAINTAIN ACCURATE SCHEDULES AND COST-CONTROL SYSTEMS

As the project moves forward it becomes critical to manage expectations for time and cost. The project time and cost of the work require adjustments on nearly every project, but these adjustments are particularly necessary on design-build projects as the level of detail in the plans and the work increases. The best practice to avoid disputes is to over-communicate and avoid surprises regarding time and cost adjustments. To do so, the project's schedule must remain accurate and all parties must have access to the current schedule. Going a step beyond and explaining schedule adjustments, including impacts on milestones and potential downstream impacts, provides greater clarity as to the project's status, rooting projections in reality.

Similarly, cost-control reporting should remain current and accurate as well as being shared more widely to encourage discussion and limit surprise. Significant changes should be affirmatively discussed to avoid disputes of purported excessive charges. Then, both the schedules and the cost-control systems should allow enough flexibility to include defects and anticipated disruptions as they are encountered. Consider also adding activities and cost codes to discretely track impacts of defects or disruptions to be able to discuss and/or prove claims and delays without reinventing the back-up materials.

CONFIRM THE INSURANCE PROVIDES PROPER COVERAGE

Insurance policies that may otherwise operate properly become problematic when applied to design-build projects. Pay close attention to not only the policy language but also the endorsements setting forth exclusions to coverage. Some exclusions may bar coverage for named or additional insureds on design-build projects. For example, the common exclusion on general liability policies for professional services leaves a design-builder exposed to liability for the errors of its designers. Insured versus insured exclusions may potentially limit coverage where named insureds and additional

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insureds on a design-build project face liability to each other. One must also carefully examine owner- or contractor-controlled insurance policies (OCIP or CCIP) on a project

like this for similar exclusions and coverage gaps. Finally, parties to large, complex design-build projects often procure unique or bespoke policies requiring careful analysis to ensure coverage of the types of losses that could arise.

DOCUMENT THE PROGRESS AND CHANGES OF THE PROJECT

The very nature of design-build projects mean they will evolve between bid and turnover, sometimes significantly. All participants are well advised to document both the progression of the project towards completion and changes in assumptions, scope and schedule in an organized manner. The data collected on a daily and weekly basis may turn critical at closeout of the contract and certainly if a dispute arises. Review daily reports, meeting minutes and other formal writeups, focusing on whether they provide descriptions of the conditions or issues sufficient for an outsider to understand the situation when evaluating the documents after project completion. Formal notices of dispute during the project should include more than a brief introduction to the issue and the attachment of already transmitted project records. Well-prepared documents help avoid formal litigation and serve as the foundational evidence in the rare instances when litigation is filed. Also, as noted above, the design-build participants should add distinct cost codes to track increased costs of disputed items, which may become future damages. And, fragnets and time impact analyses (TIAs) prepared during the project significantly aid in defining delay impact in a later dispute.

Design-build projects provide the potential for great rewards for their stakeholders, accomplishing the owner's goals at an improved price and quicker delivery time, while rewarding the participants with better margins on their contracts. With this reward comes distinct risk requiring thoughtful attention and management. Taking a holistic approach to recognize the distinct nature of design-build project delivery, the parties can better position themselves to avoid disputes and litigation. Adding further value to this approach, the same exercise will set one on a path towards success should a dispute or litigation become inescapable.



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