

DESIGN/BUILD CONSTRUCTION - AN INNOVATIVE CONTRACTING APPROACH

by Bryan S. Shapiro

What do these construction projects have in common? Private homes in the posh Forest Hills suburb of Toronto; the new General Motors Place (Home of the NBA Grizzlies and NHL Canucks) in Vancouver; a municipal reservoir in Chilliwack, B.C.; and an aviation hanger in Northern Ontario? Answer - you guessed it - all four projects use a design/build method of construction.

Why the recent popularity of this contracting method? Here is an overview of the pros and cons of this innovative contracting method. First, you should realise that the design/build approach alters the traditional roles of the owner, the contractor and the outside design professional (most often an architect or consulting engineer). Second, the legal obligations of these three players also undergo a radical shift. Therefore, don't get into a design/build project unless you understand these fundamentals and have consulted legal counsel to ensure that the contractual relationships you are setting up will meet the particular needs of your project.

Role of Owner, Contractor and Design Professional under a Conventional Construction Contract: Normally, the outside independent architect or engineer prepares the plans and specifications for the owner prior to tendering. This means that the architect or engineer is legally responsible to the owner for design defects according to his professional services contract. Generally, the design professional has no liability for defective construction, other than for defects that should have been reasonably observed from field services & inspections which he has carried out. Most important of all, the independent architect or engineer has contractual obligations to protect the owner. One result, is that the architect or engineer frequently acts as agent for the owner during the construction phase.

Under a conventional construction contract, the owner employs plans and specifications by way of a competitive bidding format to obtain tender bids and to select the successful contractor. This means that the owner warrants the sufficiency of the plans (full disclosure of information), and assumes any liability for defects in the plans or specifications that he provides to the contractor. Conversely, the contractor is responsible for defective construction and workmanship, but has no liability for design defects.

The typical construction contract approach leaves a big hole between the design professional and the contractor. These two parties are not linked by contract: they do not owe any contractual duties to each other, although recent jurisprudence suggests that in certain circumstances, the design professional may indeed owe a legal duty in tort to a bidding contractor. Also, their bonding and insurance requirements are arranged independently. Legally, in this typical construction approach, the design professional and the contractor occupy positions that are on the "opposite side of the table."

Role of the Parties Under a Design/Build Contract: The first major change that one observes in a design/build contractual arrangement is that the owner signs a single agreement with the

contractor. Under this agreement, the contractor agrees to provide both design and construction work, usually for a lump sum fee. This means that the design professional is either employed by the contractor, or is working with the contractor in a joint venture style of arrangement.

Second, the owner initiates the design/build process by laying out its own functional or performance requirements. The owner's requirements are usually sent to contractors by way of a Request for Proposals (RFP), and the responses are then evaluated to select the successful contractor, based upon various criteria, including but not restricted to price and design innovation. Under a design/build contract, the contractor's primary legal obligation is to satisfy the owner's broad performance specifications. The contractor is NOT building the facility or project to rigid specifications or to plans prepared by a design professional. This approach means that the contractor is responsible for both faulty workmanship in construction and for defects or deficiencies in design;

With a design/build approach, the outside independent architect or engineer no longer is employed by the owner. Therefore, owners that don't have the internal expertise relative to their project's design and construction may have to engage an additional independent advisor. The advisor's role would be to offer advice to the owner on design adequacy, to inspect critical parts of construction, to ascertain that construction generally complies with the project design and to prepare evaluations used for interim payment purposes.

Why are Design/Build Contracts Becoming so Popular?

Listed below are the major tradeoffs one should consider in employing the design/build approach.

(SEE NEXT PAGE FOR A COLUMN COMPARISON OF PROs and CONs)

ADVANTAGES OF DESIGN/BUILD

ONE party does both design and construction. Can obtain full benefits of shared approach re access, methods and schedule. Should offer savings in both cost and speedier construction.

CAN yield savings on design fees. Also attractive to owners without manpower or adequate technical resources;

CAN yield greater certainty as to final cost of project. Tend to be lump sum contracts since owner lacks internal estimates/quantities expertise;

CAN be payment by fixed instalments at certain stages. (% of lump sum). Payment by evaluation is unlikely, unless independent advisor is engaged.

IF DISASTER STRIKES (project failure) the owner is NOT caught between design professional (defects in design) and contractor (defects in workmanship);

IF DISASTER STRIKES (project failure) the \$ resources of design/build contractor are likely greater than individual professionals or firms;

DISADVANTAGES OF DESIGN/BUILD:

NO CHECK on the reasonableness of the price; IF DETAILED CHECK on price is attempted, it will wipe out the attempted savings on design fees;

WHERE comparisons have been made between prices for design build v. traditional contracts - little evidence of savings in \$ to owner. Lots of evidence of speedier construction;

CONTRACTS for design/build have to be carefully drafted if certainty of lump sum price is to be achieved; DESIGN/BUILD is incompatible with COMPETITIVE TENDERING. Cost of tendering greatly increased since all bidders have to carry out independent design work;

STANDARD FORM contracts for design build projects are not readily available;

SUBSTANTIAL LOSS of control by owner during construction phase. Even if independent consultant hired to supervise, difficult to judge delays, deficiencies, requests for payment design inadequacies, or extensions of time;

VERY DIFFICULT to obtain long-term contract protection for design, suitability and performance of work;

SATISFACTORY BONDING/INSURANCE for design/build is either commercially unavailable, or prohibitively expensive.

BY-LINE/AUTHOR CREDIT AT END OF ARTICLE;

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If you would like a copy of a more detailed article entitled "Design/Build Construction: Legal and Practical Issues" written by Bryan Shapiro, please contact his law firm at fax number 1-604-684-7094.

WHAT TYPE OF PROJECT IS MOST APPROPRIATE FOR THE DESIGN/BUILD APPROACH?

(Provided space is available, The Legal Edge will provide brief illustrations in the side bar columns re ...recent projects.)

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