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MEETING OBLIGATIONS TO YOUR CLIENT AND THE PROJECT OWNER *PART 1 OF 2*

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A/E Obligations to the Project Owner in Contractor Lead Design/Build Project Delivery - What are the Professional Obligations When the A/E's Client is not the Project Owner?

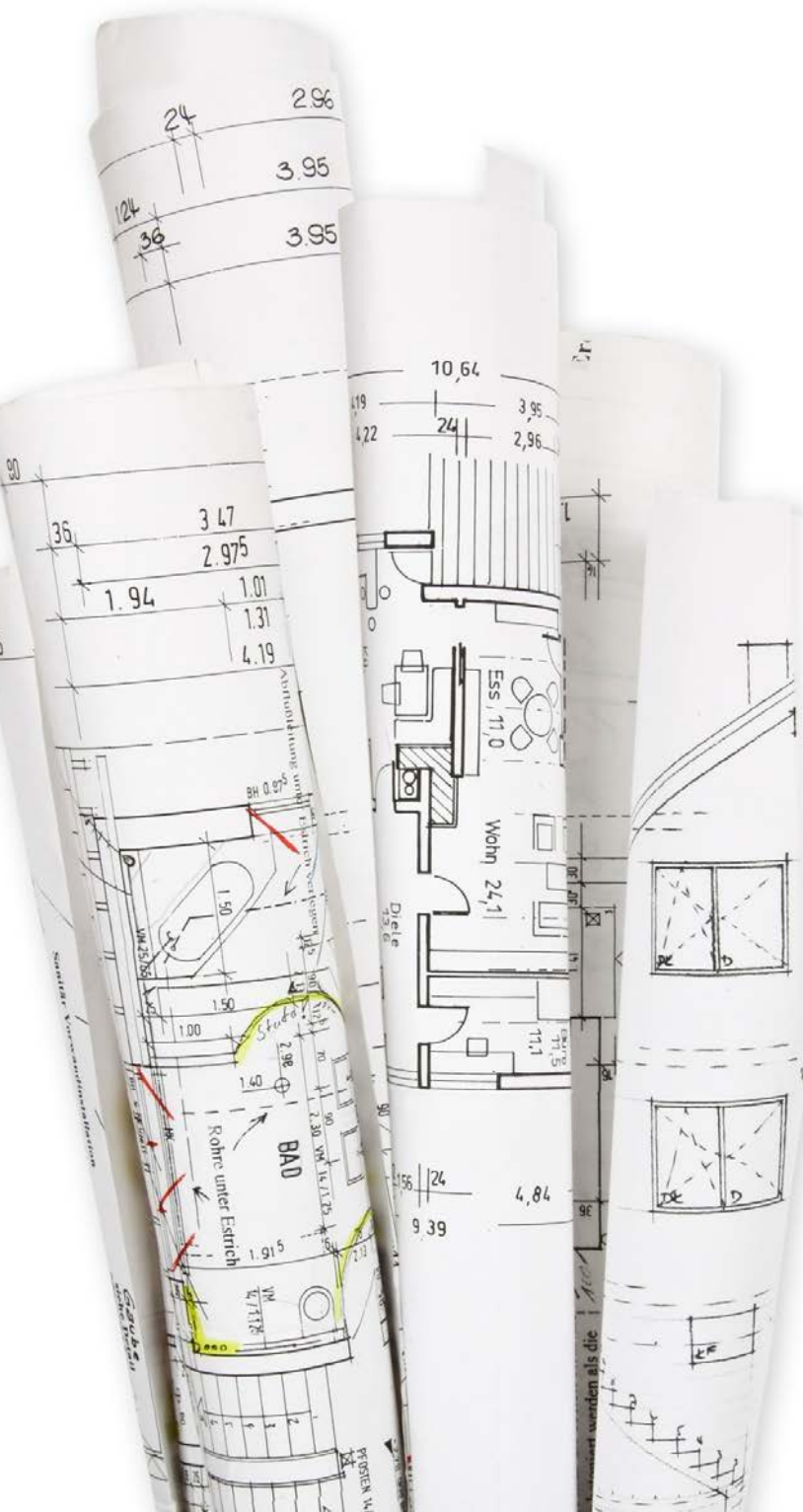
INTRODUCTION

Normally, an A/E provides their professional services to their client who at the same time is the project owner. But in a contractor lead design/build project delivery method, the A/E's client is a contractor. This article discusses whether obligations to the project owner are only based on contract, or also may include ethical and professional conduct obligations. Or, is there a difference without a distinction?

The design/build project delivery method has a few variations. One variation, the focus of this article, is where the project owner engages a contractor, who in turn engages an architect and/or engineer. Another a variation is where the project owner engages an entity that has both design and build services (a design/build

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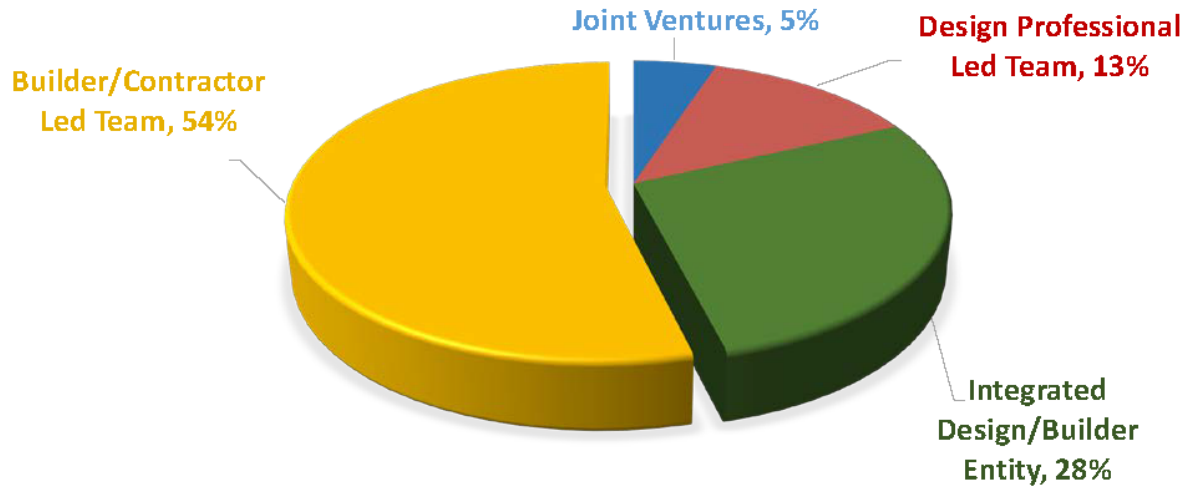
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integrated entity). Thirdly, the project owner may engage a design professional, who in turn engages a contractor.

WHO LEADS THE DESIGN/BUILD TEAM

Source: DBIA Newsletter, Zwieg White Survey



CONTRACTUAL OBLIGATIONS

Of course, design/build agreements may establish certain A/E obligations to the project owner in a contractor lead design/build project delivery method. For example, in the Design-Build Institute of America (DBIA) Standard Form Agreement between Design-Builder and Design Consultant Document # 540, a few A/E obligations are in the agreement:

Article 2: Design Consultant’s Services and Responsibilities

2.14 The Design Consultant may **communicate directly with the Owner** (with written copy to Design-Builder) **on matters of public health, safety, and welfare** when required by applicable Legal Requirements or professional codes of ethics. (Emphasis added).

2.6 Design Development Services. The Design Consultant shall **submit design submissions to the Owner**, and **perform revisions for Owner’s approval**. (Emphasis added).

Other examples are found in AIA B143 (2014) Standard Form of Agreement between Design-Builder and Architect.

2.8.7 The Architect shall provide to the Design-Builder certificates of insurance evidencing compliance with the requirement in this Section 2.8. The **certificates will show** the Design-Builder and **Owner as additional insureds** on the Commercial General Liability, Automobile, and any excess policies. (Emphasis added).

3.2.2 Project Design Presentations. Make presentations to **explain the design of the Project to the Owner**, Design-Builder, governmental authorities, or others. (Emphasis added).

Likewise, the Architect has an obligation to not disclose the Owner’s confidential information to any other person, except in prescribed limited situations under B143 10.7.

NON-CONTRACTUAL A/E OBLIGATIONS

Apart from contractual obligations that an A/E may have, what ethical and professional conduct obligations may a design professional have to a project owner?

In accordance with the Ohio Architects Board's Laws & Rules, Ohio Administrative Code 4703-3-07's Preamble, an architect is obligated to safeguard the health, safety and welfare of the public and the state of Ohio, and arguably this applies to a project owner regardless whether their client is a contractor or a project owner.

In order to safeguard the health, safety and welfare of the public and the state of Ohio, to maintain integrity and high standards of skills and practice in the profession of architecture, the following rules of professional conduct, promulgated in accordance with Chapter 4703 of the Revised Code, **shall be binding upon every person holding a certificate of qualification as a registered architect.** (Emphasis added).

The same holds true for engineers and surveyors under the Ohio Administrative Code 4733-35-01, Preamble.

In order to safeguard the life, health, property and welfare of the public and the state of Ohio, to maintain integrity and high standards of skills and practice in the professions of engineering and surveying, the following rules of professional conduct, promulgated in accordance with Chapter 4733 of the Revised Code, **shall be binding upon every person holding a certificate of registration as a professional engineer or as a professional surveyor.** (Emphasis added).

The A/E obligation to safeguard the health, safety and welfare obviously extends to the quality of the built project. One area of the construction phase of a project that differs from the traditional design-bid-build project delivery is the A/E review of submittals, such as shop drawings and samples. Construction submittals to the A/E in a contractor lead design/build delivery method typically do not contain the same level of detail in a traditional project. And that is because the contractor has discretion over the extent of the submittals, as the A/E is working for the contractor and not the project owner. As a result, the quality of a built project and A/E's obligation to safeguard the health, safety and welfare of the public could be comprised.

In a contractor lead design/build project delivery method, if the agreements between the parties (project owner, contractor and A/E) have a contractual obligation to have the design professional act as an independent interpreter of building contract documents and the judge of contract performance, the American Institute of Architects (AIA) Code of Ethics & Professional Conduct Rule 3.202's Commentary is inapplicable, as follows:

Rule 3.202 When acting by agreement of the parties as the independent interpreter of building contract documents and the judge of contract performance, Members shall render decisions impartially. *Commentary: **This rule applies when the Member, though paid by the owner and owing the owner loyalty, is nonetheless required to act with impartiality in fulfilling the architect's professional responsibilities.*** (Emphasis added).

The National Society of Professional Engineers (NSPE) Code of Ethics for Engineers, Canon iii.5.b. is also inapplicable in a contractor lead design/build project delivery, as follows:

Engineers shall not accept commissions or allowances, directly or indirectly, from contractors or other parties dealing with clients or employers of the engineer in connection with work for which the engineer is responsible. (Emphasis added).

What is clear, is that an architect engaged by a contractor (or a design/build integrated entity) should have an obligation to provide construction observation of the work. The Ohio Architects Board's Laws & Rules, Ohio Administrative Code 4703-3-12 (A)(2) states as follows:

(A) An architect may provide design services in a design-build contractual relationship provided the architect:

(1) Is an architect licensed to practice in the state of Ohio or represents an architectural firm authorized to provide architectural services in the state of Ohio, and

(2) Assures a written disclosure has been given to the client by the entity identifying the architect or architectural firm engaged by and contractually responsible to, the entity offering design-build project services, and assures **the entity agrees that the architect will have direct supervision of the architectural work and that the architect's services will not be terminated on the project, without the immediate replacement by another architect.** (Emphasis added.)

IN CONCLUSION

It is also clear is that an A/E's obligations to the project owner may be based upon contract, and also upon ethical and professional conduct in order to protect the safeguard of health, safety and welfare. And these obligations apply to their clients, regardless of whether their client is a project owner or a contractor. However, the lenses with which an A/E satisfies their obligations in a contractor lead design/build project delivery can be obscured, if they do not have an understanding of how this non-traditional method differs from design-bid-build.

About the Author

Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for the last 12 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 30 years. As a Fellow of the American Institute of Architects and a member of the AIA National Ethics Council, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.

The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

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Hilton Netherland Plaza, Cincinnati, OH
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FUN FACT:

Mount Rushmore Facts

Mount Rushmore National Memorial, is located in the Black Hills of South Dakota and depicts four Presidents: George Washington, Thomas Jefferson, Theodore Roosevelt, and Abraham Lincoln. Gutzon Borglum, a Dutch-American sculptor was selected and his son, Lincoln, finished the project after his father's death. More than 400 people helped to sculpt Mt. Rushmore where they had to climb 506 steps to the top. Clearly, safety precautions were taken as no one died in the 14 years it took to complete the project. Work began on October 4, 1927 and ended on October 31, 1941.



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