

BUILDING BLOCKS

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

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A/E Obligations to the Project Owner in Architect/Engineer Lead Design/Build Project Delivery - What are the Professional Obligations When the A/E's Client is the Project Owner and also Engages a Contractor?

INTRODUCTION

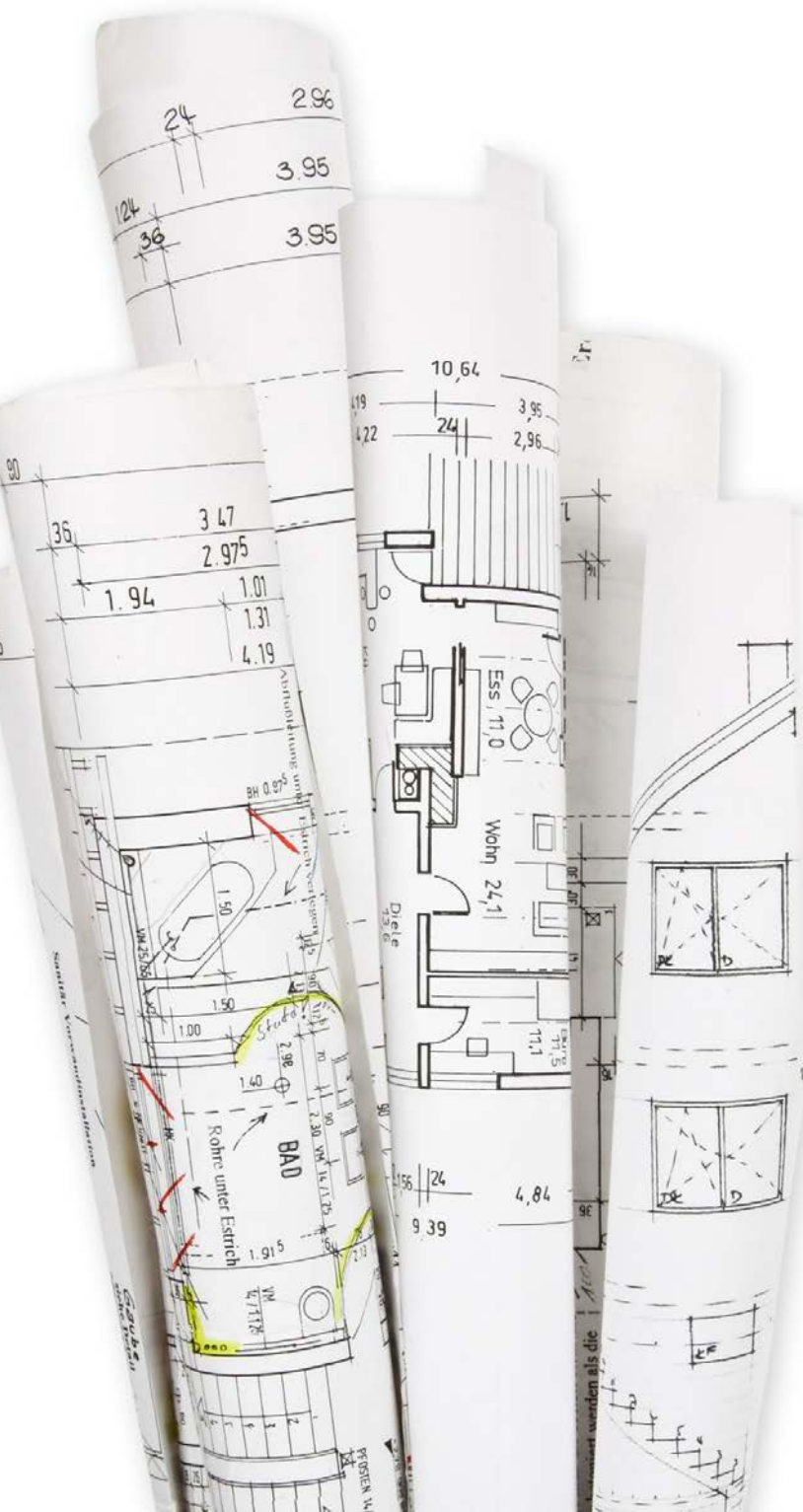
Last month's DesignPro Insurance Group's Building Blocks newsletter we discussed the following:

A/E Obligations to 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?

This month, we will discuss architect/engineer led design/build's obligations to a project owner and a contractor. As a review, the design/build project delivery method has a few variations. One variation 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

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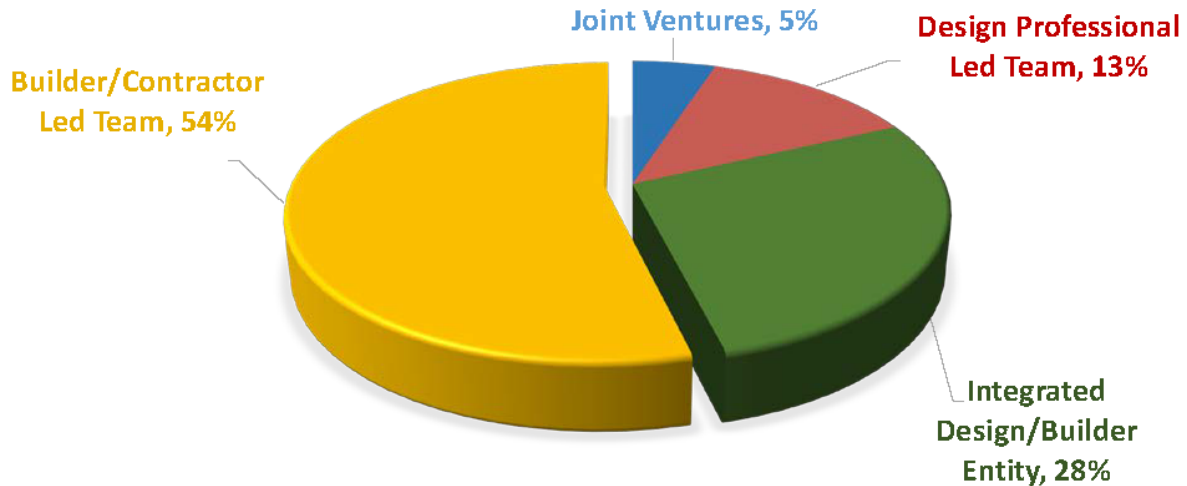
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services (a design/build integrated entity). Thirdly, the project owner may engage a design professional, who in turn engages a contractor (the focus of this article).

WHO LEADS THE DESIGN/BUILD TEAM

Source: DBIA Newsletter, Zwieg White Survey



CONTRACTUAL OBLIGATIONS

The contractual obligations to the project owner in A/E led design/build differ from the traditional design-bid-build project delivery. Not only is the A/E responsible for design, but also is responsible for construction of the project. While the A/E could utilize a standard form of agreement for the design obligations that are spelled out in professional association agreements, such as the American Institute of Architect's (AIA) Standard Form of Agreement Between Owner and Architect B101 (2017) or the Engineers Joint Contract Documents Committee's (EJCDC) Agreement Between Owner and Engineer for Professional Services E-500 (2014), those agreements fall short for the obligations related to construction.

AIA Standard Form of Agreement Between Owner and Design/Builder A141 (2014) is intended to fill this gap. The design builder may be an A/E, as stated in the AIA Contract Documents Design-Build Family's website (<https://www.aiacontracts.org/contract-doc-pages/27146-design-build-family>):

Design-build is a process in which the owner contracts directly with one entity to provide both the design and construction of the project. The design-builder may be a design-build entity, an **architect**, construction contractor, real estate developer, or any person or entity legally permitted to do business as a design-builder in the jurisdiction where the project is located. (Emphasis added.)

AIA A141, Standard Form of Agreement Between Owner and Design-Builder, Article 1.4.3 The Work states that:

The term "Work" means the **design, construction and related services** required to fulfill the Design-Builder's obligations under the Design-Build Documents, whether completed or partially completed, and include all labor, materials, equipment and services provided or to be provided by the Design-Builder. The Work may constitute the whole or part of the Project. (Emphasis added.)

While it is true that the A/E can delegate through contract terms and conditions the construction obligations to a contractor, the A/E still has the prime responsibility for the entire project to the owner. The A/E can utilize AIA Standard Form of Agreement Between Design-Builder and Contractor A142 (2014) to engage a contractor for those construction obligations.

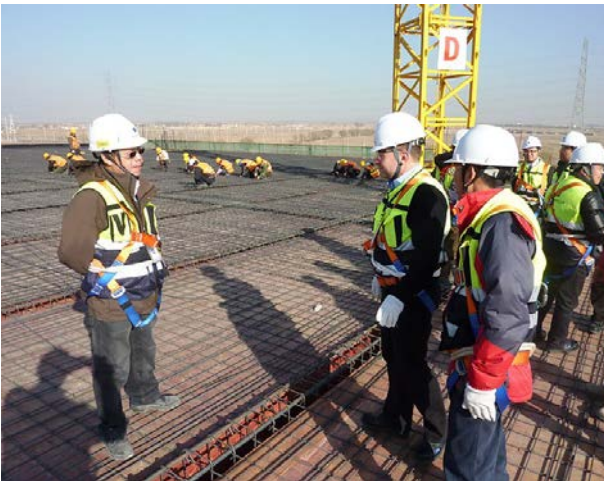
NON-CONTRACTUAL A/E OBLIGATIONS

Apart from the contractual obligations that an A/E may have when they are the lead in design/build, what ethical and professional conduct obligations may a design professional have towards both the project the owner and contractor at the same time? The A/E's ethical obligations towards the project owner in design/build are not diminished compared to the traditional design-bid-build project delivery. The question is – are the A/E's ethical obligations expanded upon as a result of engaging a contractor to build the project?

The AIA 2018 Code of Ethics and Professional Conduct Rule 3.101 states:

In performing professional services, Members **shall take into account applicable laws and regulations**. Members may rely on the advice of other qualified persons as to the intent and meaning of such regulations. (Emphasis added.)

But when an A/E is in the led in a design/build project delivery, and is primarily responsible for not only design but also construction, the A/E has to do more than “taking into account applicable laws and regulations.” The A/E has to comply with applicable laws and regulations related to construction. For example, when standing in the shoes of a contractor, the A/E is responsible for job site safety for workers in accordance with Occupational Safety and Health Administration’s (OSHA) laws and regulations.



https://commons.wikimedia.org/wiki/File:Safety_instructions_at_a_construction_site_in_China.JPG

The National Fire Protection Association (NFPA) is a United States trade association, albeit with some international members, that creates and maintains private, copyrighted standards and codes for usage and adoption by local governments. Local government regulations related to fire safety are not the responsibility of the A/E, unless the A/E is also responsible for code compliance (as opposed to the standard of “taking into account applicable laws and regulations”).

There is good authority for the position that an A/E is not normally responsible for code compliance. The Ohio Board of Professional Engineers and Surveyors Administrative Code Section 4733-35-01 Preamble of the Code of Ethics does not require code compliance, and states that:

The engineer or surveyor, who holds a certificate of registration from the Ohio state board of registration for professional engineers and surveyors, is charged with having **knowledge of the existence of the reasonable rules and regulations** hereinafter provided for his or her professional conduct as an engineer or surveyor, and also shall be deemed to be familiar with their several provisions and to understand them. (Emphasis added).

The National Council of Architectural Registration Board’s (NCARB) Rules of Conduct are recommended for Member State Boards having the authority to promulgate and enforce rules of conduct. NCARB’s Rules state that:

[i]n designing a project, an architect shall **take into account** all applicable state and municipal building laws and regulations. (Emphasis added).

Many states follow NCARB’s view. For example, the Ohio Administrative Code (OAC) 4703-3-07 (A)(2) requires that architects “take into account” all laws when performing their services. It does not require an architect to “comply with all laws.”

IN CONCLUSION

In addition to contractual and ethical obligations when in the lead on design/build, the A/E should not only have professional liability insurance for design responsibilities, but also separate general liability insurance for construction activities. This is because professional liability insurance policies exclude coverage for providing construction services. And it would be unethical for the A/E to use its authority over its contractor to designate that a project is substantially complete, in order to prematurely start the warranties and the statutes of repose.

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.

Disclaimer: *The viewpoints expressed in this article are those of the author(s) and are not necessarily approved by, reflective of or edited by other individual, group, or institution. This article is an expression by the author(s) to generate discussion and interest in this topic.*



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“Understanding Your Environmental Ethics”

AIA Ohio Valley Regional 2019
Convention
Hilton Netherland Plaza, Cincinnati, OH
September 20, 2019, 9:15 – 10:30 am



“Ethical Concerns That Your A/E Clients May Encounter”

ae ProNet Fall Conference
Chicago, IL
October 4, 2019

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FUN FACT:

SkyBridge

The longest pedestrian suspension bridge in North America recently opened in Gatlinburg, Tennessee. It is 680 feet long and is 140 feet high with a glass bottom at the highest point.

For more details and pictures of the Skybridge, visit their website at:

<https://www.gatlinburgskylift.com/skybridge>



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