



# DESIGN-BUILD: RIGHTS AND RESPONSIBILITY

By Nancy Fouad, Esq.

**D**esign-build (DB) is an innovative alternative project delivery method that is gaining popularity in the construction industry. Under the DB method, the owner contracts with a single entity for both design and construction. There are no separate phases for preliminary plans, working drawings, and construction. The owner is responsible for defining the project, which the DB entity uses as the basis for its bid. While the construction industry has welcomed the DB system, the rights and liabilities of the parties involved with this method is not yet completely understood. Design-build creates some uncertainties because it differs from the traditional design-bid-build (DBB) method where the owner contracts separately with the architect/engineer and the contractor. Therefore, courts are still working to understand the new risks the parties assume due to these different roles.

## SINGLE POINT OF RESPONSIBILITY

Under the DB method, design and construction are merged into a single point of responsibility, which eliminates conflicts that arise when the design and construction phases are separate. This feature also provides the owner with warranties that the project will meet certain performance requirements. Design-build cases addressing the issue of the single point of responsibility seem to suggest that courts are likely to find the design-builder liable for failing to meet the higher standard that the single point of responsibility entails.

Frequently, owners claim that the design-builder has breached his express contract duties. In *Rivnor Properties v. Herbert O'Donnell, Inc.*, the owner contracted for the design and construction of an office building. Shortly before completion of the building, the owner complained about water leaking into the building. Over a period of approximately 3 years, the design-builder attempted to remedy the leaks, but the leaks continued. The owner then filed suit against the design-builder for breach of contract and express and implied warranties. The court found the design-builder fully liable to the owner, concluding that the design-builder was charged by contract with the sole responsibility for all construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the work under the contract. Thus, his duty to the owner was to conduct periodic inspections as needed to assure all work was performed properly, resulting in a building free from defects.

## DEFENSES TO THE SINGLE POINT OF RESPONSIBILITY

At times, events beyond the reasonable control of the design-builder develop, and disputes arise as to how far the design-

builder's single point of responsibility reaches. Two types of defenses the design-builder may consider using are the impossibility of performance and owner interference defenses.

### *Impossibility of Performance.*

Design-build contracts are often based on performance specifications, and when the design-builder finds it is impossible to meet these performance specifications, disputes arise as to the extent of the design-builder's liability. One view is that once the design-builder accepts performance-based specifications, it has represented to the owner that the specifications are attainable. Courts have evaluated this matter in more detail by considering the specific contract terms agreed on by the design-builder and the relative knowledge of the owner and design-builder regarding the "impossible" specification. Courts are not hesitant in concluding that the design-builder has accepted responsibility for all damages, as well as increased costs that it may face as a consequence of impossibility.

For example, in *J.C. Penney Company v. Davis & Davis, Inc.*, the owner entered into a contract to make specified construction repairs to certain J.C. Penney buildings. The owner refused to accept the work because it did not comply with the specifications. Although the design-builder admitted that the work did not meet contract specifications, it claimed that it was impossible to meet those specifications. The court found that impossibility was not a basis to allow the design-builder to recover its additional costs from the owner for attempting to comply with the specifications. The court reasoned that, although the specifications were impossible to meet, these specifications were bargained for by the parties.

*Owner Interference/Design-Build Specifications.* Under the DB process, the design-builder develops the plans and specifications, and so the design-builder does not have the



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Questions or comments should be communicated to Nancy Fouad, Esq. at Burr & Forman, LLP in Birmingham, Alabama, [nancy.fouad@burr.com](mailto:nancy.fouad@burr.com) or call 205.458.5425. This article is intended to provide general information concerning recent developments in certain aspects of construction law. It is distributed with the understanding that it does not constitute the rendering of legal, accounting, or other professional services and should not be used as a substitute for professional service in specific situations. If legal assistance or other expert assistance is required, the services of a qualified professional should be sought. If legal advice is sought, no representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.

protection of the owner's implied warranty of specifications, as under the traditional design-bid-build method. Instead, under the DB project delivery method, the owner typically provides the design-builder with only performance specifications, rather than design specifications. As a general rule, when an owner only provides a standard to be achieved by the contractor, such as that set forth by performance specifications, the contractor warrants that the project will be suitable for the owner's stated purpose and is liable to the owner for design defects. The DB entity is then responsible for preparing the project drawings and specifications and for delivering a project which meets the owner's performance expectations. Therefore, the design-builder, rather than the owner, may be responsible for the costs of any errors in the plans and specifications it has developed.

However, it is also possible for DB contracts to contain a combination of both design and performance specifications. In these situations, the DB entity will have to carefully examine the specifications the owner has provided to determine whether the owner has implicitly warranted the suitability of particular specifications. In the case of *In re Edsall Constr. Co.*, the contractor entered into a government contract to construct two aircraft hangars, each containing two large, 21,000 pound, tilt-up canopy doors. The government's drawings depicted each of the canopy doors with three lift points and three lift cables. A note on the drawings required bidders to verify the canopy door details, including all arrangements, loads, and attachments, submit any proposed changes to the government for approval prior to bidding, and include the cost of any approved changes in the bid. The contractor reviewed the drawings during bidding and found nothing obviously wrong with the design.

Nevertheless, after the contract was awarded, the contractor discovered that three lift points were insufficient to evenly distribute the weight of the door and presented a serious safety hazard. The contractor then proposed a door using four lift points to remedy the problem. Although the design change was ultimately approved, the government denied the contractor's claim for additional costs and argued that the requirement to verify the details of the canopy door design shifted the risk of design defects to the contractor.

The court found that the written specifications for the door were performance specifications, but that the drawings incorporated significant design characteristics, in particular the design for the three lift point door. The court explained that, by using a design specifying three lift points, the government warranted that this design would safely and evenly distribute the door load. Ultimately, the court held that the contractor's bidding review of the drawings and specifications was entirely reasonable and the contractor was not obligated to inspect the government's specifications and drawings to ascertain their accuracy and ferret out hidden ambiguities and errors in the documents. Thus, the risk of design defects was not shifted to the contractor, and the contractor was entitled to recover its additional costs.

## CONCLUSION

The DB project delivery method has proven to be a successful approach for construction projects. The DB project delivery method affects some of the rights and responsibilities of the parties involved in the construction process differently than the traditional DBB method. Because courts are still uncertain as to how some of these issues should be resolved, contractors should keep these risks in mind when contracting for design-build projects. ■

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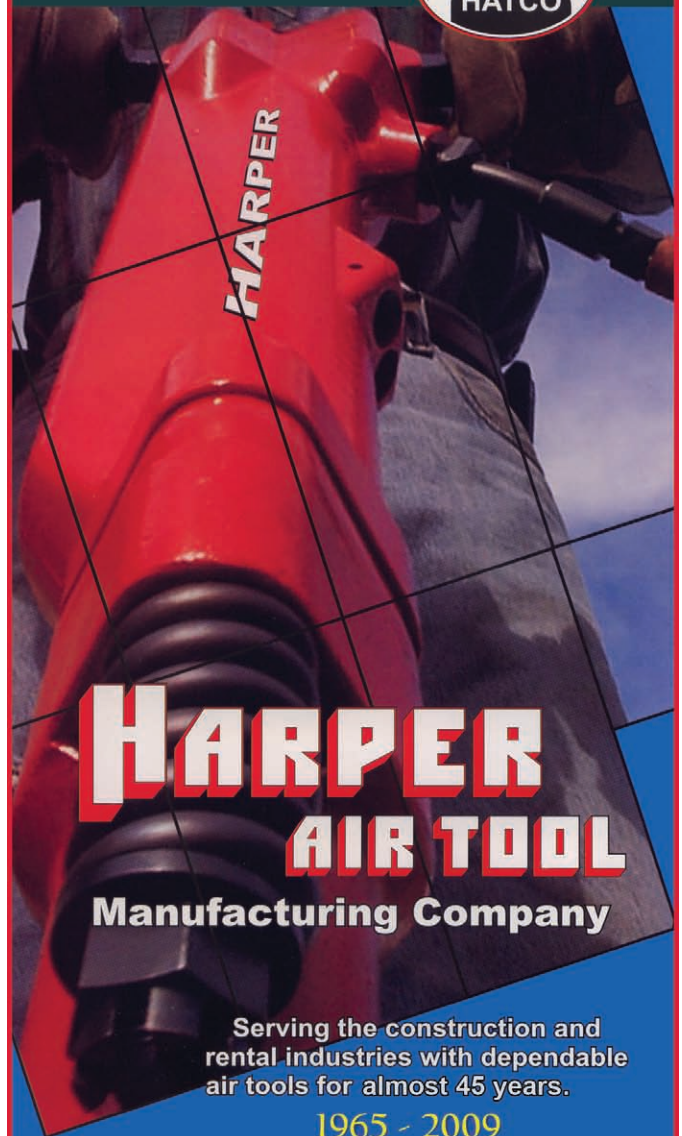
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