Paper Title: **The "New Reality" of Design Responsibility for Contractors and Subcontractors and Common Sense Recommendations**

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Session Title: The 'New Reality' of Design Responsibility

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The "New Reality" of Design Responsibility for Contractors and Subcontractors and Common Sense Recommendations

A. Introduction

The 'New Reality' of design responsibility is that contractors and subcontractors are doing more design whether overtly by express "design delegation" or even, at times, unintentionally. That is the status of the industry at present and is also the future. The purpose of this article is to identify how and why this happens and provide some "common sense" recommendations to avoid, where possible taking on design risk.

For example, new data shows that contractors are increasing in-house design capability. This data also shows the 'New Reality' that contractors are aware of this trend and are taking measures to manage this risk. This trend appears to be driven by:

- Designs are less complete
- More design-build requirements in traditional design bid build projects
- Concern the historical norm is no longer viable
- Owners expect pricing on incomplete design information
- Design coordination is lacking and needs improvement
- Constructability issues on the rise with more complicated projects
- Extensive use of BIM and VDC

The consequences of a contractor taking on design responsibility can be costly because with responsibility generally comes liability. Errors or omissions in design that impact time and cost are borne by the contractor and not recoverable from owner. Owner may have its own claims, including claims for failed performance of contractor designed components, late finish, or design defects. Latent design defects may take longer to discover and present more exposure than defects in construction, and can have a lengthy liability tail.

B. The Historical Context – Design, Bid, Build

Historically, the design-bid-build delivery system provided protection to the contactor. Under *United States v. Spearin,* 248 U.S. 132 (1918), "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications…" at 136. Of course, there have always been anomalies. *See El Paso Field Services, L.P. v. MasTec North America, Inc.*, 389 S.W.3d 802 (Tex. 2012), relying on the 1907 *Lonergan* case, "for an owner to be liable to a contractor for breach of contract based on faulty construction specifications, the contract must contain terms that could fairly imply the owner's 'guaranty of the sufficiency of the specifications…'" (*citing Lonergan v. San Antonio Loan & Trust Co.*, 101 Tex. 63, 104 S.W. 1061, at 1066 (1907)).

This historical model also has evolved to include design risks. Even in a design-bid-build project, contractors are often required to "warrant" compliance with the contract documents:

- "Contractor is required to perform work specified in the contract documents and any work "reasonably inferable from them as being necessary to produce the indicated results."
- "Contractor has reviewed all plans and drawings…and understands and agrees…that they were prepared in accordance with the designer's *best understanding* of all applicable Codes; provided, however, it is Contractor's responsibility to properly interpret and conform with all applicable Codes relating to the Work."

Preconstruction services such as constructability reviews can also involve review of an incomplete design and recommendation of alternative designs. Constructability reviews may also encompass the obligation to determine whether the project can be constructed as designed. While there may be benefits to the contractor from such reviews, such as cost savings or a reduced amount of Requests for Information ("RFI") on the project, another byproduct may be an erosion of the owner's obligation for design errors and omissions due to the contractor's initial review.

Often value engineering proposals ("VECP") carry design risk. VECPs are intended to incentivize the contractor through sharing of savings but can impose liability for the change in design. Under the ConsensusDocs, Constructor-initiated value-engineering changes may alter the Parties' respective responsibilities concerning the adequacy of the component designs and thereby shift risk for design responsibilities to Constructor.

Contractor utilization of Building Information Modeling ("BIM") as well as Virtual Design and Construction ("VDC") can presume design implication and responsibility. Contractors may be confronted during construction with inadequate design information or lack contract document coordination. Commonly, this leads to increased usage of RFI process, which itself may pose a risk of design liability, particularly if the contractor volunteers or the designer's response requests the contractor's input on a potential solution.

Even shop drawing review can constitute "delegated design in disguise." The shop drawings are the final decision on how the work proceeds and supersede the drawings. Approval of shop drawings, however, is not a defense to failure to follow the contact documents. *See, i.e.*, AIA A201, Section 3.12.

Change order work, whether agreed or implemented through change directives, presents another opportunity for the imposition of design responsibility. To protect their rights to recover for design work imposed by change directive, contractors should inform owners when they consider changed work to include design work outside the scope of the contract. Unless the contractor agrees to the

price and potential liability, notice should be provided that the design work is being performed under protest. If the contractor acts as a volunteer without documenting and providing notice of the added design obligation, responsibility for design may fall on the contractor, both in terms of the cost of the work and the potential liability for the design.

C. Design-Assist

"Design-assist" is a loosely defined term which only rarely appears in standard form contract documents. The issue is there is no bright line between design-build and design-assist. Many contractors propose design-assist, but where does collaboration stop and liability start. Contractually, there must be a clear definition of the scope of the "design-assist" work to be undertaken and the extent of liability should be expressly stated. Any professional design obligations should be clearly defined, any express warranties undertaken should be clear, and implied warranties should be disclaimed. Contractors and subcontractors should carefully consider flow-down provisions in the design-assist model, as a wholesale flow-down may not be appropriate in all circumstances.

D. Design-Build

In design-build, the protections of *Spearin* are nearly eliminated. Many performance specifications are included. Many design criteria contain wording such as "fit for use as intended, fully functional, watertight, and weather tight," which can imply even a higher and almost strict liability standard. Even without UCC type warranties, the standard of care is uncertain. Is it the standard of care for a reasonable contractor, a design-builder, or a professional design firm? Often the contract will contain representations that aggravate these ambiguities in the standard of care – "design-builder represents that it is an expert in this area."

E. Design Delegation

Design delegation is and has been a constant fact in the construction industry. Historically, design drawings provided the general intent and concept. The details of exactly how the work was to be constructed and the details were the responsibility of the contractor and its tradesmen. While the contractor typically can select and has responsibility for its "means and methods," this obligation has grown to include what may previously have been the obligation of the owner's designer.

The trend continues to be designers providing less detail and more performance specifications. This is especially true with regard to specialty work but also with primary trades such as the mechanical, electrical, and plumbing work. It is not always feasible for the owner to design every component from the ground up, and it is not uncommon for the contractor to provide design and construction of engineered systems. Design delegation also occurs with structural steel connections, foundation systems (i.e. secant piles), HVAC controls, fire

suppression, curtain walls and many other work scopes. This trend simply reflects the complexities of modern construction and places the responsibility with the people who are the most experienced with the work. This growing outsourcing of design may have some benefits to contractors by providing flexibility and potential cost savings. However, there is a price that comes with potential liability for the performance of the finished product.

Both the AIA and the ConsensusDOCS suite of documents contain language reflection design delegation and allocation responsibility.

ConsensusDOCS 200 – Agreement and General Conditions between Owner and Constructor, Section 3.15 (2017) states:

> DESIGN DELEGATION: If the Contract Documents Specify that Constructor is responsible for the design of a particular system or component to be incorporated into the Project, then the Owner shall specify all required performance and design criteria. Constructor shall not be responsible for the adequacy of such performance and design criteria. As required by the Law, Constructor shall procure design services and certifications necessary to satisfactorily complete the Work from a licensed design professional. The signature and seal of Constructor's design professional shall appear on all drawings, calculations, specifications, certifications, shop drawings, and other submittals related to the Work designed or certified by Constructor's design professional.

The AIA General Conditions – AIA A201-2017, Section 3.12.10.1 states:

> If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional.

These industry standard allocations of responsibility provide a general framework. However, the specifics for each scope of work can vary widely and each scope of work needs to be analyzed for the necessary allocation of risk.

F. The Challenge of Prescriptive v. Performance Specifications

Traditional contract documents are "prescriptive" and require strict compliance. Performance in accordance with the prescriptive specifications protects the contractor and under *Spearin,* the contractor is not responsible for the consequences of defects in the plans and specifications. With prescriptive plans and specifications, the owner warrants that they are accurate and suitable for the intended purpose. *Spearin* applies and the owner is responsible for the design.

However, even design-bid-build contract documents often contain performance specifications. Performance specifications require the end product to deliver certain productivity or meet qualitative requirements. The specification requires an objective standard to be met and the owner only provides the end result to be achieved with the design by the contractor. *Spearin* does not apply when a performance specifications place responsibility for design on the contractor.

Some contracts can present a "hybrid" of both prescriptive and performance specifications. In *AAB Joint Venture v. United States,* 75 Fed. Cl. 432 (2007), the design-build contract included technical requirements for the stone fill and density requirements using AASHTO standards. The required stone size would not allow compaction to the required density. The government argued that the AASHTO standards were performance specifications. However, the court found that the government specifications were defective because the required density could not be achieved using the required stone fill.

Regardless of the project delivery method (design-build or design-bid-build), the general trend is to evaluate each specification to evaluate design responsibility. In *Blake Construction, Co., Inc. v. United States,* 987 F.2d 743 (Fed. Cir. 1993), the court found that each specification should be reviewed on its own to determine whether it is a prescriptive or a performance specification and that contracts often have specifications that have both prescriptive and performance characteristics.

Some performance specifications, usually because an owner wants a specific type of equipment or finish, can create liability for the owner. In *Donahue Electric,* 03-1 BCA ¶ 32129, VABCA No. 6618 (2002), the owner specified a unique boiler for the design-build ambulatory care center. The boiler did not work with the also specified sterilizer equipment. The contractor was not responsible for the deficiency because the owner clearly required the specific boiler and this made the design deficiency the responsibility of the owner.

Performance specifications are intended to create a "single point" of responsibility. However, proposal/contract language can protect the contractor by limiting liability if performance specifications cannot be achieved:

- "Make good" provisions for efforts up to pre-agreed amount
- Liquidated damages tailored to specified performance or reduction in fee

- Liability limits
- Waiver of consequential damages

G. "Preliminary Drawings" and Implied Warranties

Performance specifications often come with preliminary drawings, conceptual drawings, preliminary design or design criteria. The drawings often state a percentage (i.e. 30%) of completeness of the working drawings. The information can include express disclaimers such as "must be verified," "design intent only," or the proviso to "include all costs."

In *Appeal of Lovering-Johnson, Inc.,* 05-2 BCA ¶ 33126, ASBCA No. 53902 (2005), the owner furnished "preliminary drawings" for the design-build project for military housing. The owner furnished drawings included specific sizing for piping. The piping size was insufficient. However, the board held, there was no implied warranty of the information in the preliminary drawings and the contractor was responsible to design the system to meet the performance criteria.

Another example of the balance implicit in performance specifications is *Appeal of Acquest Governmental Holdings U.S. Geological, LLC.,* 07-1 BCA ¶ 33576, CBCA 439 (2007). The contactor for a design-build lease facility that included animal holding rooms requested compensation to provide proper ventilation and heating for the holding rooms. The government supplied drawings were 30 percent complete and the government argued the performance specifications governed as the drawings only showed the "design intent" and the contractor was cautioned not to rely on the drawings. However, the board held the contract was ambiguous about the whether the design risk was transferred to the contractor.

Another similar case is *White v. Edsall Construction Co., Inc.*, 2002 WL 32619995 (C.A. Fed. No. 01-1628, Jan. 17, 2002). A design-build for a hangar included initial drawings showing hangar doors with three "pick points." However, the specified hangar doors required four "pick points." The Court of Appeals for the Federal Circuit held that the *Spearin* argument prevailed and that a general disclaimer was not sufficient and the drawing specificity and the requirement for the owner to approve all changes did not shift the design risk to the contractor.

The specificity of the contract documents determines the risk of imperfect design specifications. The more detailed the preliminary design, the more likely the implied warranty will be inferred. Disclaimers in contract documents require specificity and more than simply stating the drawings and preliminary specifications is subject to "verification."

H. Common Sense Recommendations

Project staff should be educated of the risk of assuming design responsibility unless design is expressly agreed in the contract either as part of a design-build

agreement (and when a qualified designer is part of the design-build entity or a subcontractor) or as part of the identified design delegation.

As early as the bid phase and continuing through preconstruction and prosecution of the work, project staff should identify design obligations that are expressly stated or that have the potential to be implicitly imposed on the contractor. A risk matrix or similar tracking system can include considerations identified for each project phase, such as Bid Phase (preliminary drawings by owner, performance specifications, contract clauses for compliance and coordination, etc.); Preconstruction (constructability review, subcontract terms and flow down, design-assist obligations, etc.); and Construction (construction coordination drawings, value engineering, shop drawings, RFIs, etc.). In identifying express and potential design obligations, project staff can also evaluate management and mitigation strategies to limit exposure, including utilization of contract clauses and disclaimer language.

For express responsibilities (design-assist, constructability review, shop drawings, etc.) consideration can be given to clauses placing ultimate responsibility for design on the designer and owner, such as the following:

- Contractor's recommendations, advice, or input regarding design alternatives, constructability reviews, or design modifications are subject to the review and approval of owner and designer.
- Designer shall decide all questions arising as to the interpretation of the project design, including any input or recommendations from contractor.
- Contractor's consultation with owner and the designer regarding selection of building systems, equipment or materials, or any alternative solutions offered affecting construction feasibility, schedules, cost or quality, including value engineering services, are not to be construed as assumptions of the designer's responsibility for design.

Additional disclaimers can include the following (preferably in bold font):

- **Contractor is not assuming design responsibility and design responsibility remains with the architect (engineer) of record.**
- **By making these constructability comments, Contractor is commenting only on the means and methods of implementing the design and is not assuming design responsibility or supplanting the design from the architect (engineer) of record.**
- **By submitting shop drawings and construction coordination drawings, Contractor is not assuming design responsibility and design responsibility remains with the architect (engineer) of record.**