

2022 THE CONSTRUCTION  
CONVENTION

# Who's on the Hook for Design Defects in Design-Build Projects?

It May Not Always  
Be Who You Think.

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# Learning Objectives

By the end of this session, participants will be able to:

1. Understand the differences between design and performance specifications and how they may govern design defect liability on a design-build project.
2. Determine when the **Privity** Doctrine applies to design-build contracts.
3. Identify cases where a design-builder has recovered for defect design liability against an owner, as well as examples of cases where the design-builder was unsuccessful.
4. Learn about government misunderstanding of the need to coordinate under the coordination clause of federal acquisition regulation.





# **Recent Experience Reflects Owners Seek to Control Design and Construction Without Respecting Design-Builder's Discretion**



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# Design-Build vs Design-Bid-Build

## Design-Build Contract

- Government states general criteria
- Contractor drafts the design specifications and builds according to its own design
- Government involvement in design ranges from limited to extensive
- Contractor may be liable for design defects when Government's involvement is minimal

## Design-Bid-Build Contract

- Government provides detailed specifications with design requirements
- Contractor involvement in design is very limited or non-existent
- Government is generally liable for design defects



# Owner Overreach on Recent Design-Build Projects



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# Example of Owner’s Use of Abusive Submittal Review Process to Force Design Preferences

- Over 14,000 comments by Owner (on sampling of just 2,000 of 15,568 submittals).
- “Concern” and “Preference” comments out-numbered “Non-Compliant” comments by a factor of nearly 4:1.
- Design-Builder required to address every comment to the Owner’s “satisfaction” (instead of using “**Reasonable Efforts**”), the Owner forced GC to implement a staggering increase of Owner preferences.

Owner Comment	Comment Category	% of Total	Quantity
	CN or P	70%	11,322
	Comments		
	NC Comments	31%	4,452
Comments	14,374	100%	Total Comr

Extrapolating this to the 15,568 submittals would mean that Design-Builder received 111,887 comments of which 88,390 would have been CN or P



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# Using the *Spearin* Doctrine to Push Back on Certain Types of Owner Overreach on Design-Build



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# The *Spearin* Doctrine

*U.S. v. Spearin*

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# Assessing Design-Build Risk and *Spearin*

Many owners take position that design-build eliminates the warranty, even though this is not always accurate. The following are areas where an owner might retain design responsibility:

- Accuracy of reports prepared by outside consultants
- Owner's design program
- Bridging design



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# Assessing Design-Build Risk and *Spearin*

- Generally, courts and boards of contract appeals review the details of a particular project and make a fact-specific decision on design responsibility
- Important considerations
  - The RFP and contract language
  - Interactions between contractor and owner before and during performance
- The more control/input the owner has on the design, the more likely it is that



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# Contract Specifications



# Contract Specifications

Most contracts are a combination of both design and performance specifications

- Becomes necessary to determine which specification caused the design defect
- Recovery may be denied if the particular specification at issue granted discretion to the contractor to solve the problem and the parties' acted accordingly



# Design vs. Performance Specifications



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# Recent Design-Build Case Law

- *State of Washington v. Hill*, 13 B.C.A. (CCH) ¶ 35213 (Jan. 4, 2013).
  - The government argued that because of the design-build nature of the procurement, the contractor should be liable for the hill collapse that occurred during excavation.
  - The Civilian Board of Contract Appeals (CBCA) disagreed, noting that the contractor's



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# Recent Design-Build Case Law

- *United States v. H. K. Porter & Co., Inc.*, 742 F.3d 984, 996 (Fed. Cir. 2014).
  - The government provided erroneous soils reports which caused the contractor to incur over \$4.8 million in soil excavation costs. Specifically, the government issued a revised request for proposals which provided a “soil reconnaissance report,” stating it was “for preliminary information only.”
  - The Federal Circuit held that the statement merely signaled “that the information might change,” not that the contractor would bear the risk if the “preliminary information turn[ed] out to be inaccurate.”
  - Moreover, none of the provisions requiring the contractor to check the work site as part of the design-build contract “expressly or implicitly” warned that the contractor could not rely on the government’s soil report or that the contractor bore the “risk of error” contained in the government’s soil report.





# Recent Design-Build Case Law

- *Naval Facilities Engineering Command Southwest v. Balfour Beatty Construction*, 2017 WL 2869721 (S.D. Cal. May 19, 2017).
- Naval Facilities Engineering Command Southwest awarded Balfour Beatty Construction (“BBC”) a design-build contract to design and construct a hangar replacement.
- Bonita Pipeline, Inc. (“Bonita”) was awarded a subcontract to design-build certain work. Bonita filed a lawsuit seeking compensation for alleged design errors and changes.
- The court noted that *Naval Facilities Engineering Command Southwest v. Balfour Beatty Construction* may apply to design-build projects. The court agreed with Bonita that the “critical factor” in applying *Naval Facilities Engineering Command Southwest v. Balfour Beatty Construction* is to determine whether the “specifications [are] deficient,” and that contractors can recover when plans or specifications are “incorrect.”



# ***Spearin* Application to Other Emerging Project Delivery Methods**



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# *Spearin* Application to Other Emerging Project Delivery Methods

- Public-Private Partnerships (“P3”) Projects
  - Emerging area of design risk responsibility
  - Large projects typically have unique structures
    - Can have design criteria coming from both public and private entities
    - Design-Builder may have participation in up-stream entities, creating unique considerations for design responsibility
    - “Major” subcontractors are often large general contractors
    - QA/QC inspections and Differing Site Conditions have been recent areas of litigation over design responsibility and standards

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# Questions?



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