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New York Slow to Embrace The 'Design-Build' System

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In the highly competitive world of construction, the difference between success and failure often depends upon efficient organization of a project. Time is money, and nowhere is that more the case than in the design and construction of a project, where each day brings increased costs for everything from project labor to project financing. Owners, contractors and design professionals in the public and private sectors alike are therefore constantly seeking ways to streamline the process and reduce the time and cost of delivering projects.

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One alternative is the design-build project delivery system, which is widely used throughout the United States, particularly on larger projects. Design-build has been calculated to reduce both costs and time to complete projects, cutting delivery speed alone by over 33 percent.[1] As a result, from 2005 to 2013 the market share for design-build in the non-residential market increased from approximately 29 percent to nearly 39 percent.[2] By dollar value, more than half of all projects over $10 million are being performed using some variant of design-build,[3] and on the West Coast, between 56 and 71 percent of construction spending in 2013 was on design-build projects.[4]

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There is no shortage of demand for design-build projects in New York. Only weeks ago, Governor Andrew Cuomo unveiled plans to renovate 31 New York City subway stations utilizing design-build contracts,[5] and approximately 22 percent of the MTA bridges and tunnels' 2015-2019 capital program will be comprised of design-build projects.[6] However, New York continues to lag behind other parts of the country in making use of design-build because of conflicting legal authority that has created an uncertain regulatory environment.

Introduction to Design-Build

For most of the past century, the primary method for delivering construction projects has been some variant of the "design-bid-build" paradigm. Under design-bid-build, the project owner contracts separately with its design team and its construction team. The project owner bears several risks under this method of project delivery. The first risk stems from what is known as the Spearin doctrine,[7] by which the owner impliedly warrants to the contractor that the drawings and specifications prepared by the design team are complete and accurate. Since the design team does not warrant its work product to the owner,[8] the owner bears the risk of cost and delay due to non-negligent errors or omissions in the design.

The second risk borne by the owner arises from the fact that the design and construction teams do not have a direct relationship with one another and, therefore, have a built-in incentive to blame one another for any errors or delays.

Design-build attempts to eliminate these two risks by the owner retaining a single entity that is responsible for providing both the design and construction of the project.[9] The owner may also separately retain a design professional to perform preliminary design services in order to furnish the functional and performance metrics that the design-build firm will have to meet, but otherwise steps out from between its construction and design teams. Since the design-build firm owes the project owner both a non-negligent design and error-free and timely construction, the design and construction teams must address internally any cost and associated delays arising from design or construction errors. By eliminating the incentive for the design and construction teams to point fingers at the other in order to increase their own fees, the design-build model seeks to bring greater efficiency to the process. A study comparing use of the two project delivery methods on public university projects concluded that delays, as measured by mean schedule growth was "significantly lower" for design-build projects than for design-bid-build projects.[10]

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The Legal Framework

Although construction is an important driver of local and national economies, construction activity also implicates public safety and health, and the law imposes various safeguards in an effort to ensure that the pursuit of profit does not place the public at risk. One of the chief means by which the law promotes the policy of protecting the public is by mandating that design services be furnished only by licensed professionals possessing sufficient knowledge, training and experience.[11] Those who are unlicensed are prohibited from performing or

aiding in the provision of design services that require a license; violation of the prohibition is a Class E felony in New York.[12] This regulatory construct, in which the design professional is nominally deputized by the state to act as a guardian of public safety, may be threatened by the design-build model, in which the design professional is, instead, aligned with the contractor in seeking to build quickly and cheaply in order to maximize profits. As we shall see, the courts, the Legislature and the New York State Education Department have taken differing approaches when confronted with this issue.

The seminal New York court decision addressing design-build is *Charlebois v. J.M. Weller Associates*. In *Charlebois*, the Court of Appeals held that a design-build contract did not involve the unauthorized practice of engineering, in violation of the Education Law, where the contract provided that all architectural and engineering services would be furnished by a specifically identified licensed engineer, pursuant to a separate contract between the contractor and the engineer, where the named professional actually performed the engineering services.[13] The critical fact, according to the Court of Appeals, was that "the engineer [who is] actually engaged to do the professional work is inescapably subject to the educational, regulatory and punishment mechanisms of the licensing entity, the State Education Department…."[14]

This key holding of *Charlebois*, that the critical factor is whether the design work was, in fact, performed by a licensed architect or engineer, has been upheld in numerous subsequent court decisions, even in cases where the contract did not specify the professional who would perform the services.[15]

Although *Charlebois* and its progeny would seem to have conclusively answered whether and under what circumstances design-build is legal in New York, the legal environment has been rendered less clear by the actions of the Legislature and the regulatory agencies. While the Legislature has not weighed in on the use of design-build generally, it has a mixed legacy, at best, in addressing its use on public projects.

In 2011, the Legislature authorized a handful of state agencies to enter into design-build contracts during a limited three-year period on projects greater than $1.2 million.[16] Even while opening the door to the limited use of design-build for certain public projects, however, the Senate version of the bill suggested that the Legislature believed design-build would otherwise constitute unlawful practice of the design professions.[17]

If the Legislature has suggested it believes that to be the case, the New York State Education Department has been far more explicit in its view that New York law prohibits design-build contracts. For example, the architectural practice guidelines issued by the Office of the Professions contains the following statement concerning permissible forms of practice: "An entity not authorized to provide architectural services, such as a general contractor, cannot subcontract with, or employ, an architect in order to provide architectural services to a third-party client, except in accordance with Regent Rules 29.3(b)(2)."[18] The cited Regent Rule allows limited design delegation, but only with respect to "components ancillary to the main components of the project."[19] Similar prohibitions are contained in the guidelines for the practice of engineering.[20]

Nearly three decades after the Court of Appeals upheld the legality of a design-build contract

which provided that the architectural or engineering services are required to be performed by a licensed architect or engineer, the legal landscape remains muddled. With the exception of public contracts led by a handful of state agencies, the three branches of government continue to take different positions concerning the legality of design-build, leaving owners, design professionals and contractors alike to decide whether to risk civil, or even criminal consequences if they enter into a design-build contract.

Where Do We Go From Here?

It is likely that the regulatory framework will continue to remain unclear with respect to design-build in New York. Even as the courts continue to uphold the legality of design-build contracts where the design services are furnished by a duly licensed professional, there is nothing to suggest that the Legislature or the Education Department will be any more swayed by the courts' view than they have been for the past 29 years. Nor, if the Legislature's actions with respect to the Infrastructure Improvement Act, which it allowed to lapse after the initial three-year period only to belatedly extend the law for another two years, does a statutory solution appear likely any time soon.

Without a clear resolution of the issue, owners, contractors and design professionals, as well as their legal counsel, will be left to weigh the authority of *Charlebois* against the risk of potential litigation and civil or criminal penalties if they enter into design-build contracts. As a result, despite the continued push for more efficient and cost-effective ways of delivering projects in New York, it is likely that the use of design-build will nevertheless continue to expand, but at rates that lag other parts of the United States.

1. http://www.dbia.org/resource-center/PublishingImages/db_dbb_cmar_comparison_large.jpg.

2. "Design-Build Project Delivery Market Share and Market Size Report, Reed Construction Data/RSMeans Consulting" (May 2014) ("RSMeans Report"), pp. 5-6. (https://www.dbia.org/resource-center/Documents/rsmeansreport2014.pdf).

3. Id., at 13.

4. Id., at 14.

5. Christian Brazil Bautista, "Cuomo Gets Government Out of Building Business at Puts Private Sector in Charge of New Subway," Real Estate Weekly Online, July 20, 2016, http://rew-online.com/2016/07/20/cuomo-gets-government-out-of-building-business-and-puts-private-sector-in-charge-of-new-subway.

6. https://www.buildingcongress.com/pdf/MTA-Bridges-and-Tunnels-2016.pdf

7. So named based upon *United States v. Spearin*, 248 U.S. 132 (1918).

8. See, *Milau Assoc. v. North Ave. Development Corp.*, 42 N.Y.23 482, 486 (1977).

9. The design-build entity can take many forms, including joint ventures, multi-party contracts or contractor- or architect/engineer-led firms, depending upon the laws of the state in which the firm or project is located. In New York, for example, a professional corporation is prohibited from performing services other than the professional services for which it is formed and a general business corporations may not furnish professional design services. See, e.g., Business Corporations Law §1506; Education Law §§7209, 7307.

10. Fernane, James David, "Comparison Of Design-Build and Design-Bid-Build Performance of Public University Projects," at 72 (2011). UNLV Theses/Dissertations/Professional Papers/Capstones. Paper 1210.

11. See, N.Y. Education Law §7200 et. seq.

12. N.Y. Education Law §6512-6516.

13. 72 N.Y.2d 587, 591 (1988).

14. Id., at 592.

15. See, *Welsh v. Perfect Renovation Corp.*, 129 A.D.3d 708 (2d Dept. 2015); *Cherokee Owners Corp. v. DNA Contracting, LLC*, 196 A.D.3d 480 (1st Dept. 2012); *McIver-Morgan Inc. v. Dal Piaz,* 188 A.D.3d 47 (1st Dept. 2013); *SKR Design Group, Inc. v. Yonehama, Inc.*, 230 A.D.2d 533, 660 N.Y.S.2d 119 (1st Dept. 1997).

16. Bill S50002-2011/A40002-2011 gave such authority only to the Department of Transportation, the Thruway Authority, the Department of Environmental Conservation, the Bridge Authority and the Office of parks, Recreation and Historic Preservation.

17. See, S500002-2011, Part F, §12 ("The submission of a proposal or responses or the execution of a design-build contract pursuant to this act shall not be construed to be a violation of section 6512 of the education law [which makes unlawful the unauthorized practice of a profession requiring a license]").

18. NY State Education Department, Office of the Professions, Architectural Practice Guidelines, Section B.1. www.op.nysed.gov/prof/arch/archguide-b1.htm.

19. Rules of the Board of Regents, §29, 3(b)(2)(i).

20. See, e.g., www.op.nysed.gov/prof/pels/pefaq.htm, Item 12: "An entity not authorized to provide professional engineering and/or land surveying services, such as a general contractor, can not subcontract with a licensed professional engineer or land surveyor in order to provide professional services to a third party client. The basis for professional regulation is that the service of the professional must be provided directly from the professional to the client without any unlicensed third party between the client and the professional. This unlicensed third party may have other interests (such as financial) that could jeopardize the level and/or quality of the professional service received by the client."