

## CHAPTER 9

# DESIGN-BUILD CONTRACTING WITH THE FEDERAL GOVERNMENT

Neal J. Sweeney  
Shawn Dansky Rodda  
Antonio F. Doganiero

- [A] Requirements for a Claim Under the CDA
  - [B] The Contracting Officer's Final Decision
  - [C] Forums for Appeal and Appeal Deadlines
- § 9.06 Federal Design-Build Contract Disputes
- [A] Design/Prescriptive Specifications Control in a Design-Build Contract
  - [B] Liability for Defective Design in Design-Build
    - [1] Comparative Fault
    - [2] The Government Must Provide Accurate Information on Existing Conditions
    - [3] The Government Must Provide Accurate Preliminary Design Data
- § 9.07 Conclusion
- Appendix 9-1 Subpart 36.3 of the F.A.R.
- Appendix 9-2 GAO Regulations: 4 C.F.R. 21

- § 9.01 The Influence of the Federal Government's Approach to Design-Build
- § 9.02 Procurement Procedures for Federal Design-Build Contracts
- [A] Statutory Authorization
  - [B] The Two-Phase Design-Build Selection Procedures
  - [C] F.A.R. 15 Rewrite
  - [D] Best Value
  - [E] Tradeoff Process
  - [F] Lowest Price Technically Acceptable
  - [G] Oral Presentations
  - [H] Exchanges of Information
  - [I] Requests for Proposals
  - [J] Evaluation Factors
  - [K] Specific Agencies' Regulations
- § 9.03 Bid Protests of Federal Design-Build Contract Awards
- [A] Protests to the GAO
    - [1] Contents of a Protest to the GAO
    - [2] Time for Filing Protests in the GAO
    - [3] Impact of GAO Protests on Further Procurement Activity
    - [4] The GAO's Determination of Protests
    - [5] Decisions of the GAO and Their Relation to the Federal Courts
  - [B] Bid Protests to the Procuring Agency
  - [C] Bid Protests in Federal Court
- § 9.04 Issues Affecting Federal Design-Build Contract Awards
- [A] Past Performance Evaluations
  - [B] Prior Design Work Creating a Conflict of Interest
- § 9.05 Disputes Procedures for Federal Design-Build Contracts

## § 9.06 FEDERAL DESIGN-BUILD CONTRACT DISPUTES

The federal courts and boards of contract appeals that hear federal government contract disputes generate an extraordinary volume of reported decisions and legal precedent. These decisions provide guidance and insight on the almost infinite range of difficult issues that arise in the complex world of design and construction. Nonetheless, there are relatively few decisions which deal specifically with issues unique to design-build. This limited case law is at least in part due to the fact that historically design-build has not been the dominant project delivery system employed by the federal government, although its use continues to expand. In addition, design-build tends to substantially reduce the number and opportunities for disputes and claims with the government as compared to the traditional design-bid-build approach.

Although perhaps less frequent, there will continue to be disputes and claims on design-build contracts. The manner in which these disputes are resolved by the federal courts and boards of contract appeals is of tremendous importance for the design-build industry as a whole, and not merely for those doing business with the federal government. Reported decisions from these forums is significant to the future of design-build in federal procurement as that precedent will have a bearing on how the courts and boards evaluate future federal design-build disputes. The decisions may also affect how federal regulations are interpreted and may result in revisions to such regulations.

Decisions involving federal design-build contracts are important to the industry as a whole because of the dominating influence the federal system has on state and local public contracting, as well as private construction. The federal government is the largest consumer of construction services in the United States and probably in the world. That market influence, in and of itself, will invariably have a profound influence on the direction of the design-build industry as a whole. In addition, federal funding to state and local government for capital improvements is typically conditioned on the grant recipient accepting the federal government's procedures and approaches. Finally, federal and state courts frequently look upon the large body of case law from the courts and boards dealing with construction as persuasive and authoritative. Much of "construction law" finds its roots in this federal contract precedent.

The decisions dealing with federal design-build contract disputes make it clear that the courts and boards will not decide issues of responsibility and liability for design simply based on labeling a particular contract "design-build." The courts and boards have demonstrated an insistence on reviewing the details of the particular

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<sup>193</sup> *Cosmic Constr. Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982).  
<sup>194</sup> *Id.*

project and evaluating how specific contract clauses or provisions in the solicitation address the issue of design responsibility under those circumstances.

The decisions do not allow a design-builder free reign to do as it wishes with respect to design. Instead, the courts and boards carefully evaluate the contract documents to determine the extent of design flexibility or limitations depicted in the specifications provided to the design-builder. These decisions demonstrate that even in the context of a design-build contract, the design-builder frequently will encounter design or prescriptive specifications that do not give the design-builder any latitude and instead require strict performance according to the details set forth in the contract documents, just as the contractor in a design-bid-build context must strictly comply.

On the other extreme, the boards and courts have been unwilling to accept government arguments that the designation "design-build contract" makes the design-builder responsible for any and all design problems without regard to the specific allegations of risks in the contract or the specific circumstances of the project. Here, too, the contract clauses will be carefully evaluated to determine how the parties allocated the risk presented by a specific set of facts and circumstances. These decisions demonstrate that the government may be liable for design problems notwithstanding the "design-build" contract designation. The courts and boards have also extended the same rights and protections to the design-builder that are enjoyed by contractors performing under traditional design-bid-build contracts, provided those rights are granted under specific contract clauses and the facts support the relief.

#### [A] Design/Prescriptive Specifications Control in a Design-Build Contract

A simplistic view of design-build is that the design-builder has free reign to develop a design, as it deems appropriate, provided the government's needs are met. That may be an accurate description of some design-build contracts, but it is an inaccurate and dangerous generalization to apply to all design-build contracts. The cases discussed in this section demonstrate that the design-build designation does not give the design-builder carte blanche to do as it deems appropriate with respect to design. When dealing with the government, even a design-builder must still "turn square corners."

If contract clauses or technical specifications express the government's requirements in terms of design specifications, sometimes called prescriptive specifications, the design-builder is required to comply with the design specifications and may not alter them without the government's consensus. The results of the following cases rest on basic principles of contract interpretation—the design-builders are simply told to "Read the contract!"—these cases have nothing to do with any sovereign act or authority of the federal government. Thus, the principles expressed in these cases are equally applicable to private design-build contracts as well as public design-build contracts on every level.

*Dillingham Construction, N.A., Inc. v. United States*<sup>195</sup> involved a design-build contract for a two-story VA outpatient clinic. Because the existing facility was seismically unsafe, the VA entered into a fast-track, design-build contract that split responsibility for designing the facility between the VA and Dillingham. The dispute arose from a claim by Dillingham's electrical subcontractor, Sasco. Sasco claimed that the VA wrongfully denied its proposed use of metal clad cable (MC cable) in lieu of raceways to run conduit through the facility and of an alternative conduit fastening device. There specifications required the use of raceways and particular conduit fasteners, but Sasco insisted that this was a design-build contract and the electrical specifications were performance specifications that allowed Sasco to design the work however it wanted as long as the performance criteria were met.

The court framed the issues as hinging on the nature of the electrical specifications on which the parties based their respective position:

The sticking point in this litigation involved the degree of specificity expressed in the contract's electrical specifications. [The Government] averred that the specifications were precise and allowed no room for deviation by the contractor. Sasco countered that they were general guidelines and that the contract afforded the contractor wide latitude in interpreting them. Accordingly, the court must begin its inquiry by determining the nature of the specifications contained in the contract.<sup>196</sup>

The court then reviewed the basic differences between the two types of specifications: design and performance. The court explained:

Design specifications "describe in precise detail the materials to be employed and the manner in which the work is to be performed." They afford no discretion to the contractor, which is 'required to follow them as one would a road map.' *Performance specifications*, however, "set forth an objective or standard to be achieved, and the successful bidder is expected to exercise his ingenuity in achieving that objective or standard of performance, selecting the means and assuming a corresponding responsibility for that selection."<sup>197</sup>

Sasco insisted that the electrical specifications were merely performance standard and relied on the following language in the solicitation: "Contractor shall provide complete construction drawings and specifications for the Clinic Building, based on the preliminary drawings and *performance specifications* included with this solicitation."<sup>198</sup>

The court rejected Sasco's interpretation of this language. The court pointed out that nowhere in the contract was the contractor excused from complying with

<sup>195</sup> 33 Fed. Cl. 495 (1995), *aff'd* 91 F.3d 167 (Fed. Cir. 1996).

<sup>196</sup> *Id.* at 500.

<sup>197</sup> *Id.* at 500–01 (emphasis added) (citations omitted).

<sup>198</sup> *Id.* at 501 (emphasis in original).

the design specifications. Furthermore, the court found that Sasco was completely disregarding a section of the specification that explicitly stated that the design had to comply with the electrical specifications. That section read in part: "Contractor is to provide the complete design and is free to provide any design that meets all applicable codes the Design-Build Criteria and the Electrical Specifications."<sup>199</sup>

The court found nothing incompatible about the inclusion of performance specifications *and* design specifications in the same contract. The court concluded that it would not make sense to tell the contractor to base its design on "design specifications" because there is no further work to do on design specifications:

By their very nature design specifications are extremely precise and do not leave the contractor any leeway in exercising its judgment. Where the contract contained design specifications, there was nothing left to the contractor to formulate, and the court therefore cannot attach any significance to the solicitations failure to mention them.<sup>200</sup>

Furthermore, the court found that it was only by reading the specifications that one could determine whether specifications are design specifications or performance specifications.

[Sasco's] approach ignores that the terms "performance specification" and "design specification" are merely labels that help describe the degree of specificity contained by a contractual provision. . . . "It is the obligations imposed by the specification which determine the extent to which it is 'performance' or 'design,' not the other way around."<sup>201</sup>

Based on the determination that the specifications relating to the requirement of the raceways and specific conduit attachments were design specifications, the court applied to this design-build contract the same strict standard of performance required on any traditional construction contract:

"It is [well] settled that the Government is entitled to obtain precisely what it contracts for so long as it does not mislead the contractor." . . . "In undertaking a contract, the contractor promises to perform according to the contract specifications, and the Government has the right to insist on contract performance in compliance with them." Thus where the specifications in the contract were precise, Sasco was not permitted to deviate from them.<sup>202</sup>

The inclusion of design specifications within a contract labeled "design-build" and which leaves most of the design to the design-builder through performance specifications is not unusual. According to the Court of Federal Claims, such specifications will be interpreted and enforced in the same manner as in a traditional design-bid-build construction contract. The "design-build" moniker does not relieve

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* (quoting *Blake Constr. Co. v. United States*, 987 F.2d 743, 746 (Fed. Cir. 1993)).

<sup>202</sup> *Id.* at 502 (citations omitted).

the designer-builder of express and unambiguous contract requirements. This same approach has been embraced by the Armed Services Board of Contract Appeals.

In *FSEC, Inc.*,<sup>203</sup> the design-builder was prosecuting a claim for \$276,107 for providing what it contended were two additional exhaust fans and two additional dust collectors for a new abrasive blast and paint facility. The solicitation specifically stated the fundamental nature of the contract: "*This is a design-build project.*" Some aspects of the design have not been completed, and it will be the responsibility of the contractor to complete design details and submit the design for approval by the Government in accordance with [the specifications]."<sup>204</sup>

The contractor conceded that the original solicitation drawings included the pieces of additional equipment that were now being claimed as extras. The contractor argued, however, that the contract was a "design-build" contract and therefore it was responsible for providing and capable of changing a design that would achieve the required performance specifications. The board flatly rejected the contractor's argument and found that the contractor's interpretation of the contract was not reasonable because it ignored numerous and specific contract provisions drawings and specifications: "It focuses solely upon the words 'design-build,' thereby improperly excluding other contract provisions."<sup>205</sup>

The board pointed out that the contract documents included *both* performance and prescriptive/design specifications and also delineated which specifications were performance specifications and which specifications were prescriptive. The board found that the argument that the contract was strictly a design-build contract was also in conflict with the specification provisions, which unambiguously identified the specifications for the disputed equipment as being prescriptive in nature. Likewise, contract drawings unambiguously depicted the number of pieces of equipment the government required the contractor to provide. The court observed:

[T]he use of the words "design-build" in Amendment 0002 does not require us to conclude that appellant was responsible for preparation of the entire design as appellant contends. The prescriptive/design and performance labels alone do not create, limit or remove a contractor's obligations. Rather the obligations imposed by the specifications determined the extent to which a particular specification is either performance or prescriptive, and it is not uncommon for a contract to contain both design and performance characteristics. In this case, [the specifications] made clear that both design and performance specifications were included.<sup>206</sup>

The contractor further argued that the government's approval of other changes to design specifications was an indication of the contractor's right to design something other than presented in the specifications. The board rejected the argument that agreeing to the change of one prescriptive specifications eliminated any limitations of requirements regarding design. It explained:

<sup>203</sup> ASBCA No. 49,509, 99-2 BCA ¶ 30, 512 (1999).

<sup>204</sup> *Id.* (emphasis added).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* (emphasis added) (citations omitted).

Further, we are not persuaded that the Government's approval of the new media return system designed by appellant somehow transforms the contract into one that had no design characteristics . . . [T]he fact that the Government approved a change to one of the prescriptive specifications does not obligate it to approve any other changes and does not transform other prescriptive specifications into performance specifications.<sup>207</sup>

These cases demonstrate that the label "design-build" does not relieve the contractor from meeting the specific requirements of the specifications or give the contractor license to adjust the design as it chooses.

#### [B] Liability for Defective Design in Design-Build

Design-build contracting provides governments with a single point of responsibility for both design and construction. The general rule is that whether the problem is defective design or faulty construction, the contractor is liable. This is part of the appeal of design-build contracting for governments. Despite this general rule, a design-build contract does not guarantee the government complete immunity for liability to the design-builder for defective design.

The information the government provides to the design-builder at the outset of the design-build process may itself create liability for the government if that information is in error and the design-builder's reliance on the erroneous information results in defective design. This liability can be an extremely unpleasant and costly surprise to the government official who naively thought the design-build contractor "took care of everything."

##### [1] Comparative Fault

The protection afforded the government in a design-build approach is illustrated in *Brunson Associates, Inc.*,<sup>208</sup> which involved a design-build contract with the U. S. Army Corps of Engineers for two fabric structures to be used as training buildings. This decision also raises the argument and the prospect that, under the right circumstances, responsibility for defective design might be allocated between the government and the design-builder on a comparative fault theory.

Several months after final acceptance of the project, both structures collapsed, with both failures taking place at the same location in the structure. The government concluded that the failures were due to defective design and that the design-builder was responsible for the resulting damages.

The design-builder disputed the government's position and argued that the government should share in the liability on the theory of "comparative fault" and the matter was tried before a board of contract appeals. The design-builder alleged the shared liability arose from the government's participation in the design review and approval process, including the listing of recommended fabrics and

insisting on the use of particular cables. The design-builder also argued that any defects in the design were apparent to the government through inspections.

The board rejected the design-builder's theory that the government's review of the design was negligent. The government's personnel were not actively involved in the design efforts and had no experience with these types of structures. Moreover, the defect that the board found to be the cause of the collapse had not been a subject of any design review comments by the government nor was it discussed in the two design meetings in which the government was involved. Finally, the board relied on F.A.R. § 52.236-23, which stated that the government's review, approval, and acceptance of the contractor's design did not relieve the design-builder from liability.

This case again demonstrates the board's insistence on reviewing the specific contract terms and facts of a particular case to determine liability, rather than relying on sweeping generalization about design liability under design-build contracts. A design-build contract does not guarantee the government complete immunity from design liability. Although the burden of design responsibility and liability clearly shifts away from the government and onto the design-builder, there are circumstances in which the government maintains at least a portion of responsibility for the design and the liability for design problems.

#### [2] The Government Must Provide Accurate Information on Existing Conditions

*Pitt Des Moines, Inc.*<sup>209</sup> illustrates the manner in which the government handles information on existing conditions at the project site that can shift design liability. The case involved a design-build contract with the Navy for the retrofit of an existing facility. The contract required Pitt Des Moines (PDM) to design, fabricate, and install a large acoustical tank as well as major structural modifications to the existing building, Building 5, in which the tank was to be housed. Although it was design-build, the contract included a number of critical remedial clauses typically found in traditional construction contracts, including a changes clause, a differing site conditions clause, and a site investigation clause. The RFP included some as-built drawings of the building and offered more information at the site, but warned that the drawings "may not be accurate and shall be field-checked."

In preparing its technical proposal, PDM reviewed the RFP drawings, inspected the site, and attended a pre-proposal conference. The RFP drawings included some wall dimensions of the building, but the drawings lacked detail and their legibility was poor. PDM sought additional drawings from the government. When questioned, the government informed PDM that no other drawings were available and that the RFP drawings would have to serve as the basis for the proposal design. Inquiries were also made at the pre-proposal conference regarding potential problems relating to an adjacent building, Building 43, but the government responded that there were no such problems.

<sup>207</sup> *Id.* (emphasis added).

<sup>208</sup> *Brunson Associates, Inc.*, ASBCA No. 41201, 94-2 BCA ¶ 26,936 (1994).

<sup>209</sup> ASBCA No. 42, 838, 96-1 BCA ¶ 27,941 (1995).

Based on the information available, PDM's technical proposal made certain basic design assumptions, including the type of piling system that would be required. PDM's cost proposal was in turn based on the technical proposal.

It turned out that the RFP drawings were not accurate and were not the only drawings available. After contract award, PDM discovered additional drawings, which indicated that in many places the walls were significantly thicker than indicated on the RFP drawings. This meant that the building was substantially heavier than the contractor had calculated and the complete redesign of the pile system was required. PDM asserted a claim for differing site conditions on the basis of the actual condition of Building 5 and a separate claim for the deteriorated condition of the foundation of adjacent Building 43, which further affected work on Building 5.

The Board of Contract Appeals accepted PDM's factual allegations and agreed that the design-builder did not miscalculate or misread the RFP drawings. The government argued that even if the RFP drawings were wrong, under a "design-build" contract PDM, as a design-builder, assumed greater responsibility to obtain better drawings or to field check the RFP drawings and that the contractor acted unreasonably in failing to do so, particularly considering the disclaimer about the RFP drawings.

The Board stated the general rule for what constitutes reasonable reliance on the part of a contractor as follows:

[P]otential contractors are required to take all steps reasonably necessary to ascertain the nature and location of the work, and to satisfy themselves as to the general and local conditions affecting the work. However, [the contractor] is not required to conduct a costly or time consuming technical investigation to determine the accuracy of Government drawings.<sup>210</sup>

Although this is the well established standard applicable to firm fixed-priced construction contracts, the Board concluded that the same rule should apply to design-build contracts. In support of this conclusion, the Board noted that the policy behind the differing site condition clause applies equally to design-build contracts: to reassure bidders that they may confidently rely on information provided by the government, thereby avoiding large contingencies in bids, which would unnecessarily drive up construction costs.

The Board found that PDM met the standard and reasonably relied on the RFP drawings. Although PDM had some concerns about the legitimacy and detail of the drawings, PDM tried to get additional drawings but was rebuffed by the government. The disclaimer of the accuracy of the RFP drawings did not relieve the government of liability in light of the design-builder's reasonable efforts to investigate the site and the restricted access to Building 5. The Board noted that the government's responses to questions at the pre-proposal conference suggested nothing contrary to PDM's expectations. The Board also found that the government

<sup>210</sup> *Id.*

had an affirmative duty to turn over the information regarding foundation problems on Building 43 and breached that duty.

This case demonstrates the importance of the reliability of the information the government provides to the design-builder as part of the design criteria. Although this case involved an existing structure, its lessons can be equally applied to information the government may share or provide on an undeveloped site, such as subsurface conditions, potential hazardous waste contamination, easements, or use restrictions. If the government is aware of such circumstances that might materially affect the design-builder's work, that information should be turned over. The government cannot assume that it can completely exculpate itself from liability by insisting a design-builder automatically assume the risk of all design problems.

### [3] The Government Must Provide Accurate Preliminary Design Data

The government rarely requires a design-build contractor to start from scratch. In addition to information on existing conditions, the government frequently provides preliminary designs as part of the design criteria and for the design-builder's consideration. The government and contractor must both be mindful of the risks that the data is not accurate and make certain that the contract terms state how that risk is allocated. As design-build is such a deviation from the allocation of design risks in the traditional design-bid-build approach, special attention must be provided to the contract terms to make certain that the expectations and understanding of the parties are mutual and clearly stated.

The manner in which preliminary design information can create exposure for the government in the design-build context is demonstrated in *M.A. Mortenson Co.*,<sup>211</sup> a case involving a design-build contract for a medical clinic at an Air Force base. In this case, the RFP included a conceptual design for the project, which represented approximately 35 percent complete working drawings. The contract required Mortenson to complete the construction documents to 100 percent and construct the facility. The scope of work required that Mortenson "verify and validate the accuracy of the preliminary design information and submit complete design documents." The conceptual design included alternative structural systems that could be employed on the project.

The RFP reported that the minimum requirements of the project were stated in the project drawings and that those drawings "may be used to form the basis for the pricing proposal." The RFP further noted that the four alternative structural systems presented had been "investigated and presented as viable alternatives for pricing."

In preparing its price proposal, Mortenson used the conceptual drawings to "take-off" the quantities of structural concrete and reinforcing steel needed for the project. The contract was awarded based on that pricing approach. The final design, however, required more concrete and steel than represented in the conceptual design

<sup>211</sup> *M.A. Mortenson Co.*, ASBCA No. 39, 978, 93-3 BCA ¶ 26,189 (1993).

or Mortenson's original take-off and price proposal. Based upon this increased quantity, Mortenson presented a claim under the changes clause, which was applicable to the construction phase of the project.

The government defended the claim contending that it was not reasonable for Mortenson, as a design-builder, to rely on the information provided in the RFP in this design-build context without having a structural engineer review the adequacy of the alternate structural systems. The government further argued that, in any event, the contractor should have included a contingency in its pricing to cover increased quantities.

The Board granted Mortenson relief. The Board saw no distinction between the standards to be applied to a build-to-specifications contract as compared to a design-build contract. Instead, the Board found that the reasonableness of Mortenson's approach to the proposal had to be viewed "from the perspective of a construction contractor." Indeed, the Board disregarded the design-build element, stating: "In deciding this question, we are 'to put ourselves into the shoes' of a 'reasonable and prudent' construction contractor." It was therefore unreasonable to expect Mortenson, even as a design-builder, to undertake a pre-proposal engineering analysis of the alternative structural design. The Board noted: "The contract required . . . [the design-builder] to verify and validate the design as part of the design work, not the proposal effort." Finally, the Board pointed out the inclusion of the standard changes clause in the contract terms governing the construction phase. According to the Board, to adopt the government's view that the contractor assumed the risk of increased quantity for concrete and structural steel would ignore the changes clause and the relief it offers.

These cases demonstrate that gross generalizations and uninformed assumptions about responsibility and liability for design on a design-build project are dangerous. As with any other construction contracts, the specific contract terms and the detailed facts and circumstances must be fully evaluated before any conclusion can be reached about design liability.