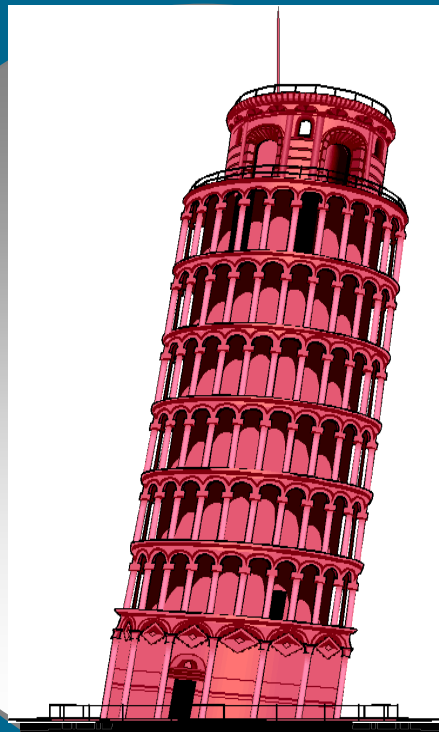




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# Who Pays for Defective Design?



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**Neal J. Sweeney** is a partner in the Construction & Infrastructure Projects Group of Kilpatrick Stockton LLP. For over twenty-five years, he has practiced exclusively in the area of construction law and public contracts, with further concentration in large public works projects. Some of his major cases involved Tren Urbano - San Juan, Puerto Rico's commuter rail system, a high-rise hospital in Los Angeles impacted by the Northridge Earthquake, one of the largest earth and rock filled dams in the United States, various projects at a Trident Nuclear Submarine base, and the Miami Performing Arts Center.

Mr. Sweeney has written extensively on construction law, Government contracts and related topics. He has edited nineteen books on construction law, including the annual *Construction Law Update* (Aspen) and regularly contributes articles to periodicals including *Development*, *Constructor*, and *ASCE Management Journal* y magazines. Mr. Sweeney is a regular lecturer on construction law for a variety of trade and bar organizations and educational institutions including ASCE, AGC, ACEC, Georgia Tech, University of Florida and Stanford University.

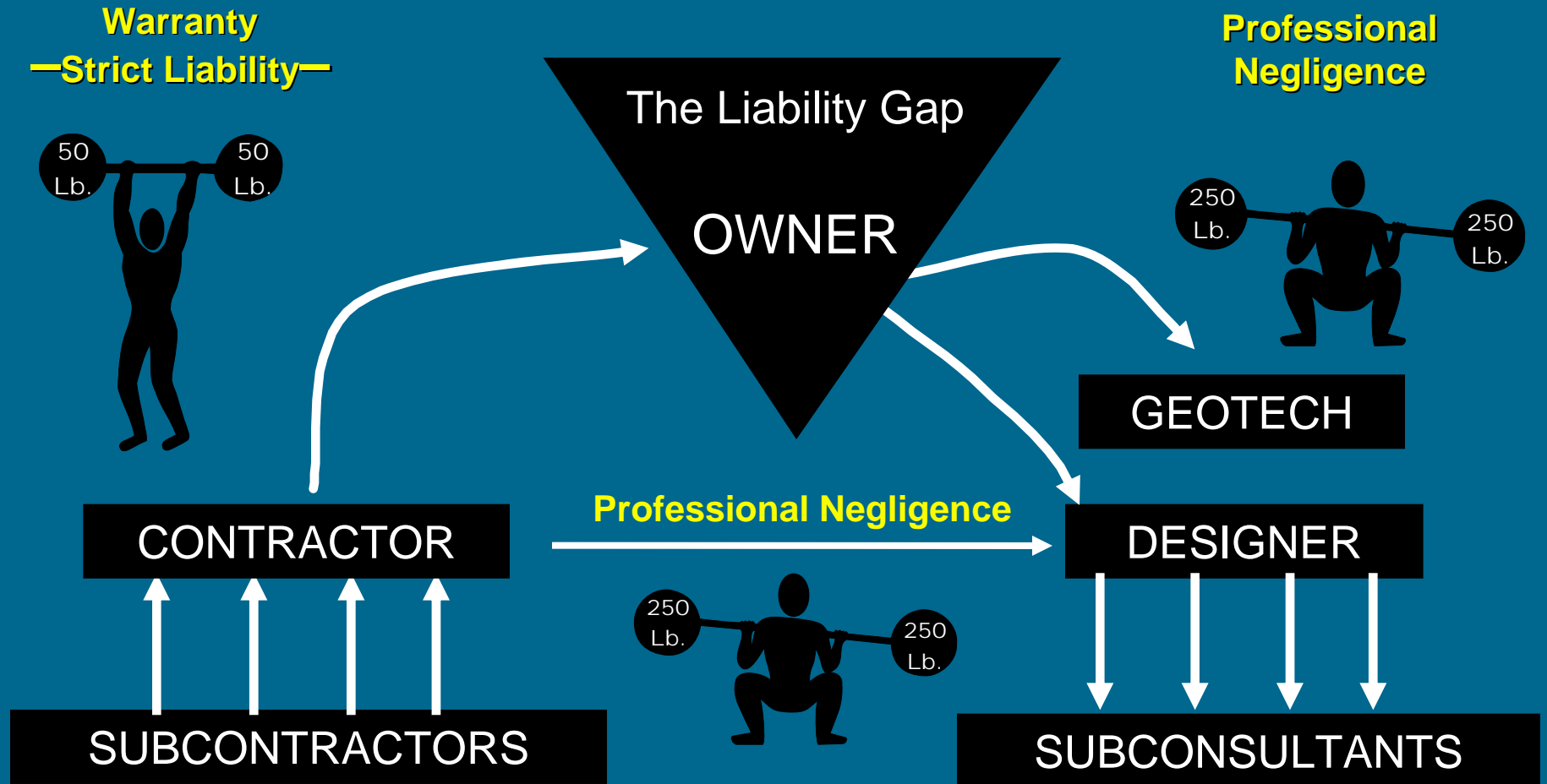
He is the immediate Past President of the Southeast Chapter of the Design-Build Institute of America and has lectured nationally for DBIA on design-build contracts and risks for over 10 years. He has been recognized for Construction Law since 2004 in *Chambers USA: America's Leading Business Lawyers*, *The Best Lawyers in America*, and *Georgia Superlawyers*.

# "Who pays for defective design?" Working in the Gray Areas



- There is a fundamental shift of liability when moving from the traditional build-to-design model to design-build.
- In theory, answering the question "Who pays for defective design?" should be easy when dealing with the opposite ends of the spectrum (build-to-design vs. design-build).
- But the real world of construction is often shades of gray, where the answer to the question "Who pays for defective design?" is not clear.
- Cases dealing with the question "Who pays for defective design?" on design-build projects illustrate how the answer may be contrary to what you expect.

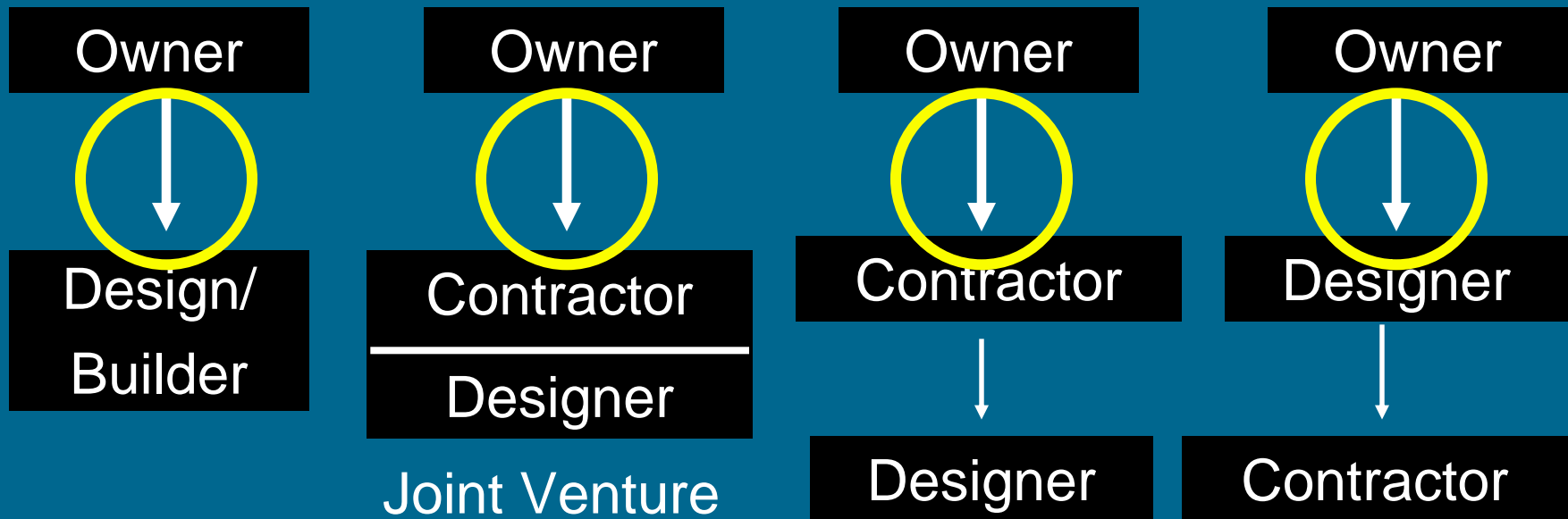
# Who Pays For Defective Design? Build To Design



# "Who pays for defective design?" Design-Build



## Design - Build



**One Stop Shopping for  
Responsibility & Liability**

## Design-Build: Shades of Gray Just the Facts . . .



- Identical Fabric Structures Failed
- Design-Builder Acknowledged Liability But Argued Comparative Fault!
- Based On Owner Design Review: Meetings & Approval

## **Design-Build: Shades of Gray Just the Facts . . .**



- **Iron Steel Fabric Structure Failed**
- **Design Responsibility**
- **Owner Reps: No Special Expertise**  
**Failure Location: Not Discussed**  
**Clause: Approval Not Acceptance**  
**Owner Not Liable!**

**But, Just Tweak The Facts . . .**

## **Design-Build: Shades of Gray Just the Facts . . .**



- Acoustical Tank & Structural Retrofit
- Poor As-Builts With Disclaimer
- Limited Site Inspection: Occupied
- Pre-Bid Inquiries & Owner Responses
- Walls Thicker: Redesign & Need to Reshore
- Owner Had Better Drawing & Was Concerned About Foundation
- Owner: Design-Build!!!



## Design-Build: Shades of Gray Just the Facts . . .



- Architectural Tantrum: Contractor Profit
- Poorly Drafted Contract
- Limited Liability

### Owner Liable!

**DSC Clause: Applies Equally to D-B**

- Waiver of Failure To Disclose Superior Knowledge

- Concerned

About For

- Owner: Design-Build!!!

## Design-Build: Shades of Gray Just the Facts . . .



- Medical Facility: RFP on 35% Drawings
- Four Alternative Structural Designs — Viable for Pricing for Proposal
- Contract: D-B Verify & Validate Final Design
- D-B Priced One of the Designs & Got Award
- Final Design Required Beefed-up Structure
- D-B Claimed Extra Steel & Concrete
- Owner: D-B Responsible for Design & Needed Structural Engineer at RFP

## Design-Build: Shades of Gray Just the Facts . . .



- Material Facility on drawings
- Four . . . liable
- for Price
- D . . .
- Final . . .
- . . .
- Owner: Design
- Needed . . . RFP

**Owner Liable!**  
**for Extra Quantities**  
**But Not Final Design**  
**Read the Contract**  
**And the RFP!!!**

## **Design-Build: Shades of Gray Just the Facts . . .**



- Design-build contract for a medical facility.
- Contractor proposed use of metal clad cable in lieu of specified raceways.
- Contractor argued that under a D-B contract and specs were only performance specs.
- Contractor argued that it could change the design as long as the performance criteria were met.



- 
- Held: Read the Specs!**  
**“Design-build” label does not trump unambiguous contract terms OR give contractor over the entire design.**  
**Owner Not Liable!**

# Who Pays for Defective Design? Summary & Conclusion



- The “Design-Build” label is not determinative of the Parties’ obligations.
- Read the contract!
- Read the specifications!
- Read the solicitation!
- Recognize that the project-specific facts and the conduct of the parties can be as important as the written terms in determining who pays for defective design.