Design-Build Industry Trends, Red Flags, and How to Protect your Company from Unexpected Liability



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Garry Boehlert is a Partner in the Washington, DC Offices of the law firm Saul Ewing, LLP. Garry has represented engineering and construction firms on complex design-build projects.

He recently acted as lead counsel for the design team responsible for extension of the Dulles Silver Line Metro Project from Reston to Ashburn, VA. Garry has addressed the full gamut of geotechnical issues – tunneling, foundation/slurry wall work, subsurface profiles, differing site conditions, ground water, highway construction, bridge design/construction, and structural failures.

Prior to entering law, Garry worked on complex infrastructure projects such as the Trans-Alaska Pipeline and construction of an interstate highway, gaining hands-on construction experience.

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Historical Design-Build Projects



Filippo Brunelleschi's
Duomo of Florence

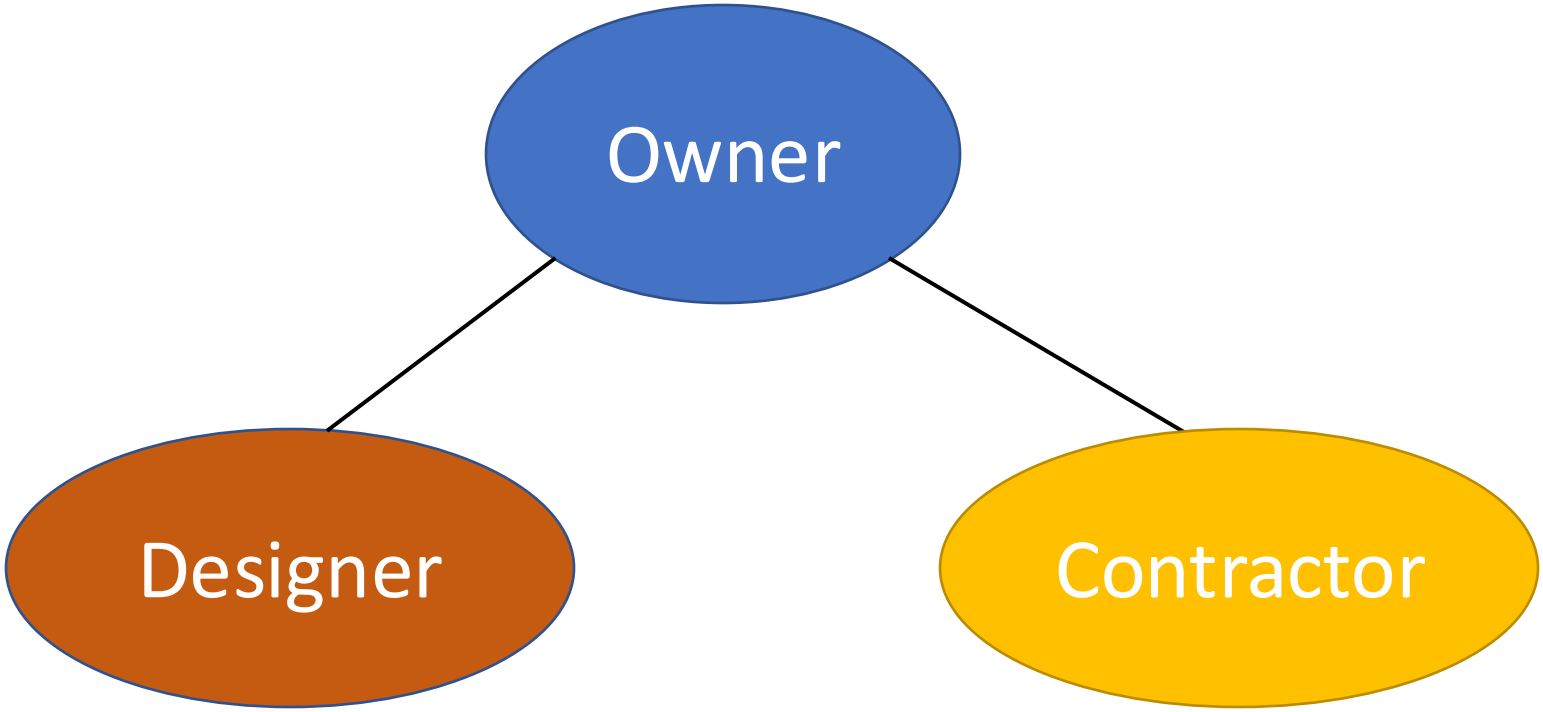


Thomas Jefferson's
Monticello

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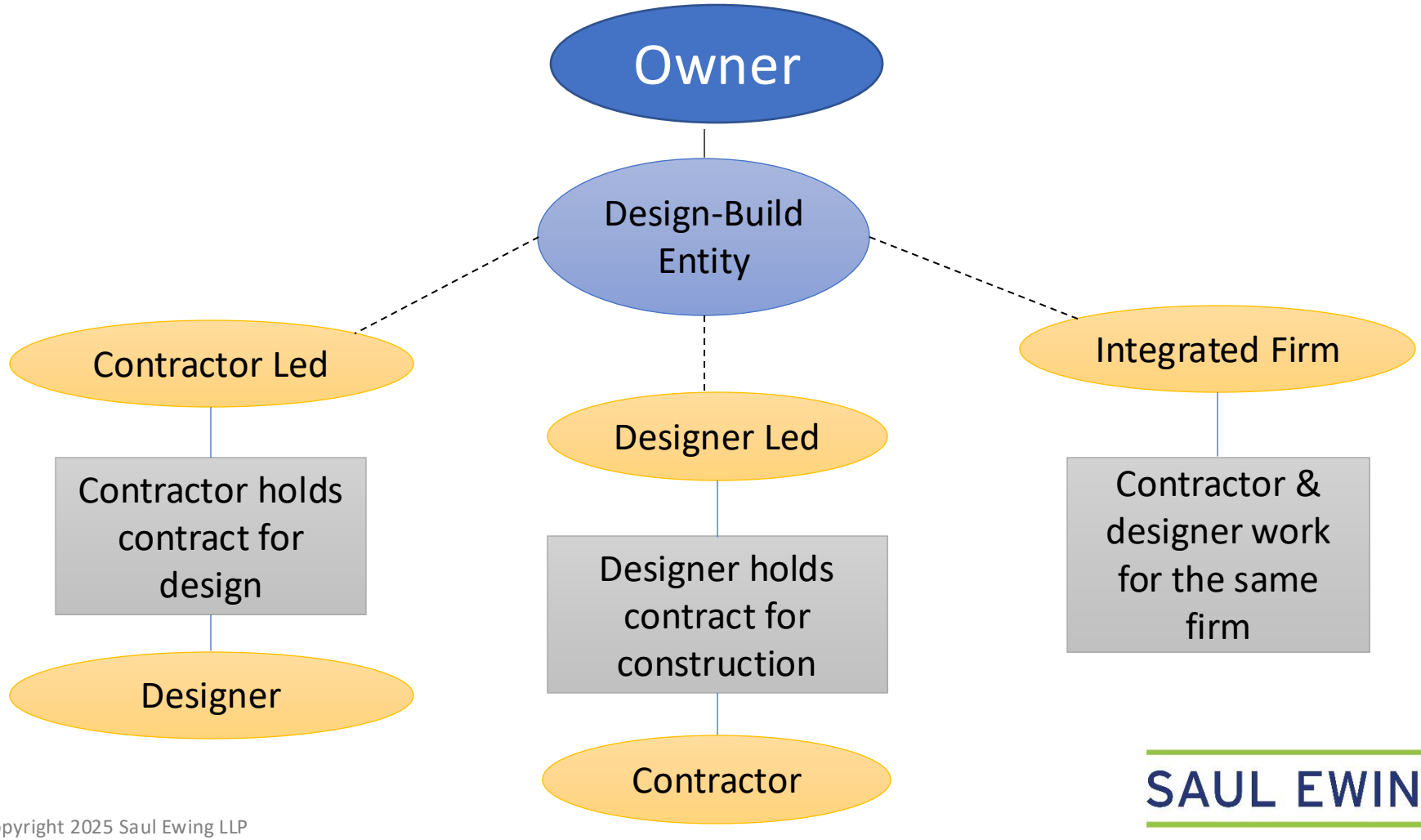
Design-Bid-Build Project Delivery



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Design-Build Project Delivery



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A Distinguishing Characteristic of Design-Build Projects

Design Evolution is to Be Expected as the Project Progresses

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Teamwork is Essential

- Design-build Projects are a team effort
- Suspicion and distrust are natural where, as in design-bid build contracting, the designer and contractor have separate contracts and conflicting agendas
- On successful design build projects, all team members need to trust one another
- In practice, however, achieving that trust is easier said than done

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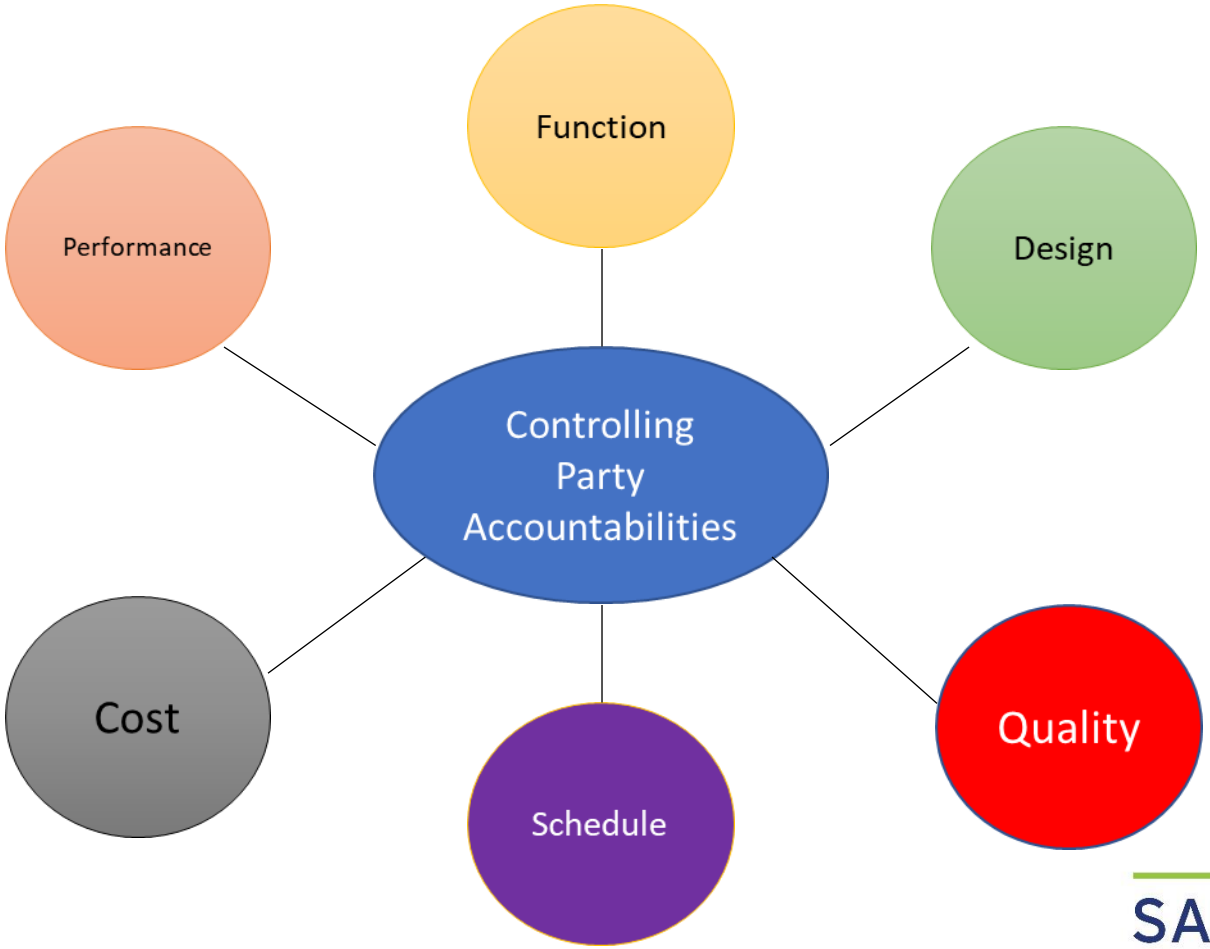
For Trust, there Needs to be an Effective Controlling Party

- When design-build teams are made up of multiple firms, one of those parties must contract directly with the owner to provide both the design and the construction
- The entity contracting with the Owner is referred to as the Controlling Party
- Most often that party is a construction contractor lacking the in-house design expertise to perform all aspects of the project

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Controlling Party Responsibilities



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Proactive Versus Reactive Response

- A healthy design-build process is focused on proactively finding solutions.
- Instead of reactively looking for someone to blame when something goes wrong, the design-build team must proactively utilize its collective experience to address problems and mitigate their impacts as soon as possible.

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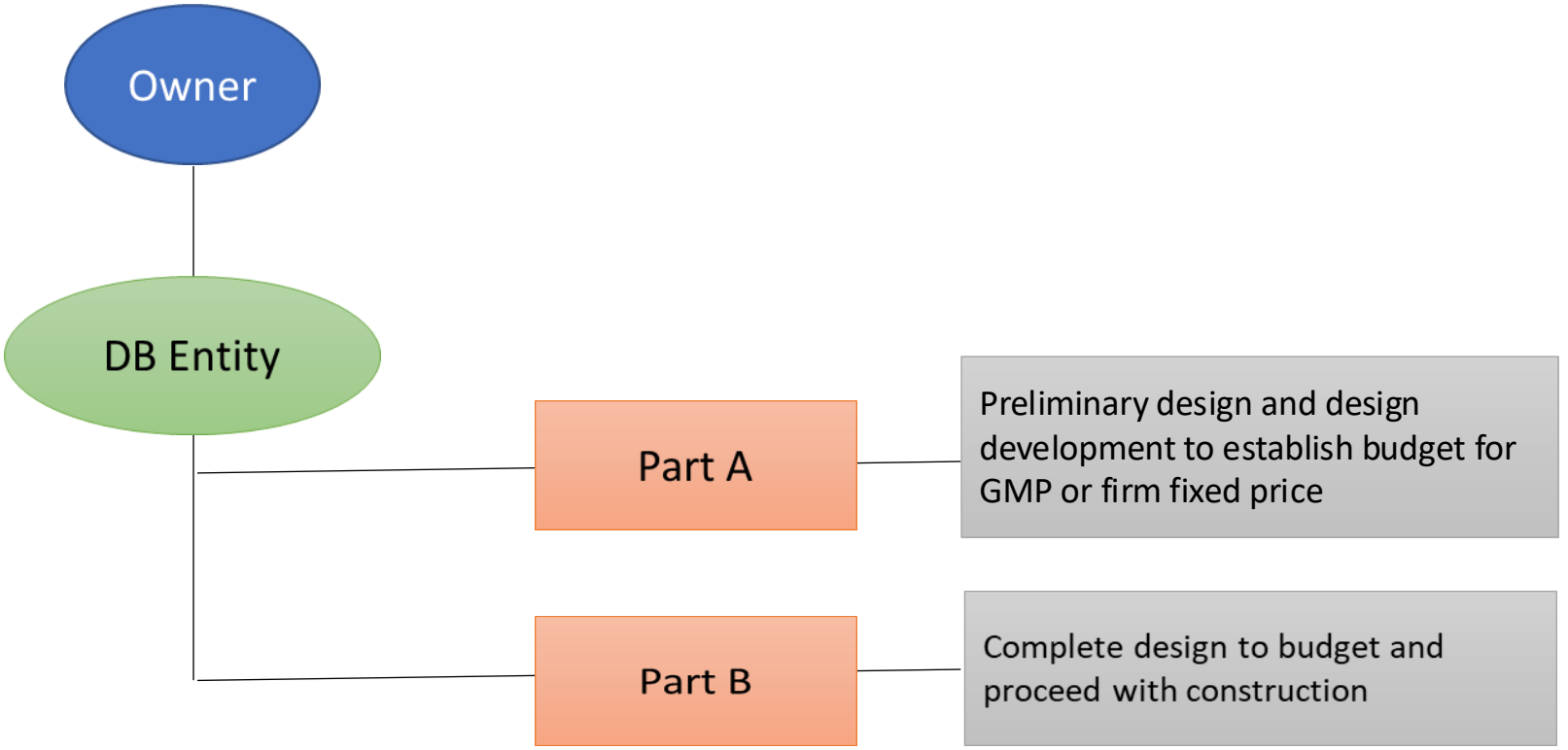
Continual Risk Management

- The Basis of Design for Design-build projects is established with less than complete design (often no more than 30% supplied by the Owner)
- After contract award, the Controlling Party must manage the design consistent with the price and schedule it contracted to deliver
- With every design iteration, the team must maintain an appropriate balance between design and budget making sure the design is feasible given the construction schedule and cost constraints

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Stages of Progressive Design-Build



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The Importance of Constructability Reviews

- The Basis of Design contained in the winning proposal establishes only the basic parameters for the design. That means that all of the details of the design still need to be worked out
- Robust Constructability Reviews need to be conducted at each stage of the design process, to evaluate the cost and construction-related challenges that will be encountered because of the way the project is being designed
- The Controlling Party needs to timely communicate the results of the constructability review to the Design Team with clear comments, explanations, and instructions
- If a design approach poses cost concerns generally there alternative ways to optimize that design for a more economical solution if the designer knows – real-time – of those cost concerns

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Continual Design-Cost Reconciliation

- As the team moves toward the final design, they must work closely together to make sure everything stays on track – performance, quality, cost, and schedule
- To do that, the Contractor's estimators and cost control personnel should work directly with the designers in order to keep the costs associated with design evolution within the project budget
- Full disclosure by the Controlling Party, along with an open book policy, fosters the type of trust that is important for successful design-build projects

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Where Design – Build Projects Start to Tip Sideways

- When best practices are not used to foster genuine teamwork and transparency, we begin to see undeserved blame asserted by the Controlling Party against the Design Team and the Design Team's subconsultants as the Contractor begins to experience quantity and cost over-runs

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Insurance Coverages Also Can Act to Undermine the Trust and Cooperation Required by Design-Build Best Practices

- Excess insurance coverage available for purchase by Construction contractors – for design team errors and omissions -- almost ensures substantial professional malpractice claims at the end of the project

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Example Insurance Provision

11.1 Designer shall exhibit $10,000,000 of Professional Liability insurance for this project. Such coverage shall (a) not exclude claims based on Designer's delay, including failure to render professional services on time or complete any project on time . . .

11.2 Contractor shall carry a $15,000,000 Contractors Protective Professional Indemnity "CPPI" policy which shall sit in excess of Designer's Professional liability insurance of $10,000,000. The CPPI Policy shall be used by Contractor for claims in excess of the Designer's Professional Liability insurance under 11.1, but only to the extent such claims are covered by such policy

11.3 Nothing contained in this Article shall be construed as a limitation of Designer’s liability for damage or injury, including death, which arises out of Designer’s obligations under this Agreement

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Triggers for CPPI Liability

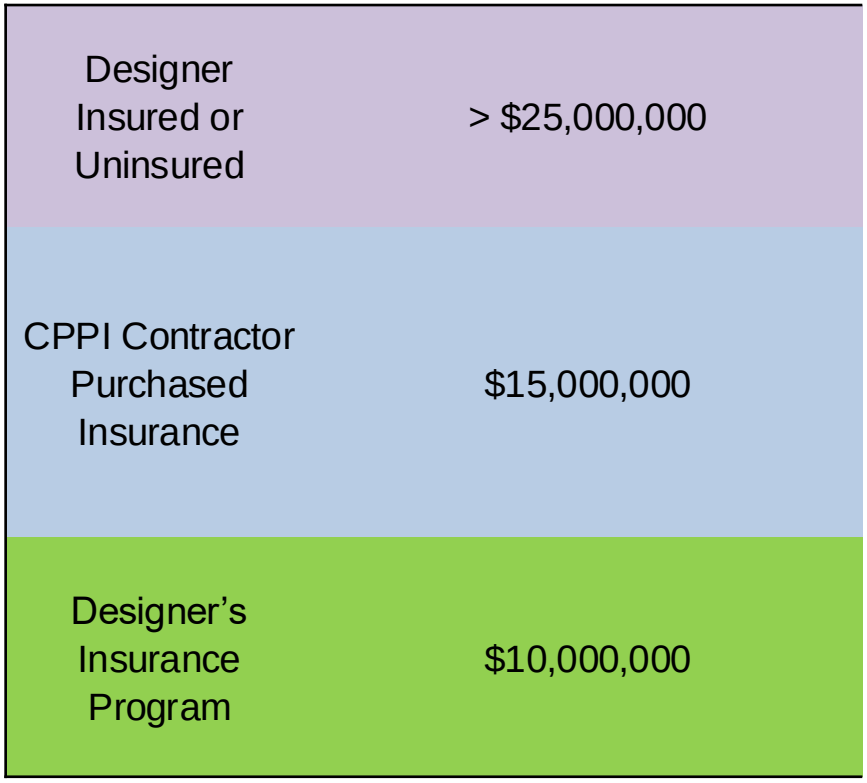
"Protective Loss," is generally defined as: . . . the amount the insured is legally entitled to recover from the Design Professional as determined by:

1. A final monetary judgment by a court of competent jurisdiction;
2. A final monetary award resulting from and arbitration or other dispute resolution proceeding in which the insured participates with our prior written consent; or
3. A settlement to which we agree in advance in writing

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CPPI Insurance Policies Can Create an Incentive for Errors and Omissions Claims Against the Design Team



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Approaches for Designers to Limit Liability

1. Know your design build partners and their history on Design Build Projects
2. Insist on Design Build Best Practices from inception to close-out
3. Document, in Writing, Contractor Approval of Design Evolution as it Occurs
4. Contractually limit liability to no more than the amount of insurance contractually required of the designer
5. Contractually Limit liability to a certain dollar amount for alleged errors and omissions

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Additional Defenses to Alleged Errors and Omissions on Design-Build Projects

1. The Controlling Party's demands mis-state the Parties' true contractual obligations
2. The Controlling Party failed (pre and post-bid) to share with the Design Team its bid costs and estimated quantities leaving only itself to blame for alleged over-runs
3. Even significant deviations from the Basis of Design are not compensable if such alleged deviations were approved by the Controlling Party during Design Development
4. The Controlling Party has failed to establish that when the Project is viewed as a whole Design Development had a significant adverse impact on quantities or cost
5. The cost of final design produced for the Project is covered by Project Contingency
6. The Controlling Party's notice of objection to Design Evolution was untimely
7. The Controlling Party's allegation of damage is not supported by a complete evaluation of the cost records (e.g., where did the Design Team save the Controlling Party quantities or cost as a result of design optimization)

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Additional Defenses to Alleged Errors and Omissions on Design-Build Projects

8. Determine whether the Controlling Party's demands against the Design Team are also alleged in requests for Equitable Adjustment asserted against the Project Owner or other Project Participants
9. The cost and quantity over-runs of which the Controlling Party complains are the result of Delegated Design and/or the Controlling Party's lack of coordination of its Subcontractors – not the fault of the Design Team (e.g. bearings which often are expressly excluded from the Design Team's scope of work)
10. The dollar amount of the claim against the Design Team in relation total construction cost for the Project may be argued to establish that the Design Team met the Industry Standard of Care – which does not require perfection

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How All this Works in the Real Word

Case Study of A Design-Build Contractor's Alleged Error or Omission by the Design Team on the Dulles Silver Line Project

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The Controlling Party's Claim Associated With Track Wall Design

- As the Phase 2 Dulles Silver Line Project Neared Completion, the Contractor asserted a more than $8,000,000 claim against the Design Team related to the Track Walls for the Project
- Specifically, the Contractor alleged that prior to bid the Design Team had provided design advice that caused the Contractor to inaccurately bid the embedment depth and to eliminate the concrete footings for certain track walls
- In its claim the Contractor sought the increased direct and indirect cost to add footings and to increase the embedment depth from 2' to 3' for many miles of track walls after MWAA and WMATA insisted the Contractor use footings and the embedment depth shown in the original bridging documents

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What Really Happened

- The Design Team's preliminary pre-bid design met MWAA's Project Technical Requirements by containing typical sections which included a footing with toe and heel for all wall sections and a minimum embedment depth of 3' to the bottom of the footing
- The Contractor responded asserting that using a footing for a standard barrier would add significant cost and asked the design team to consider the use of VDOT standard median barrier
- The Design Team advised the Contractor that it was unable to show by calculation that a VDOT barrier would meet the Project Technical Requirements, namely overturning stability criteria under highway vehicle impact load or transit surcharge loading
- The Contractor proposed other slip-formed barrier shapes to consider, however, the Design Team again responded that it could not show by calculation that the Contractor's proposed shape was able to resist vehicle impact loading

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The Contractor's Assumption of Risk

- Unconvinced that it could not persuade the Project Owner to eliminate certain footings and reduce the embedment depth to 2' or less, the Contractor chose to bid Track Walls using its own assumptions
- After award of the prime contract, MWAA and WMATA rejected the Contractor's track wall designs as inconsistent with the original proposal requirements
- Faced with the rejection, the Contractor nevertheless blamed the Design Team citing the designs the Contractor had instructed the Design Team to prepare and by arguing that a 2' embedment depth cited by the Design Team's geotechnical consultant for Frost Protection – not Overall Embedment Depth misled it during the bidding process

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The Design Team's Defenses

- Through document discovery, the Design Team Obtained the Contractor's Pre-Bid Risk Register containing a 7-figure Contingency for Track Walls – demonstrating the Contractor's assumption of risk and rebutting the assertion that it had been misled by the design team
- The Design Team also challenged the entitlement and quantum portion of the claim noting that even if the Contractor's assertion had merit, the Contractor had neglected to take into account the Design Team's design optimization reducing the thickness of the concrete track walls thereby significantly decreasing concrete and reinforcing steel quantities and cost of the track walls
- In reality by looking at the totality of circumstances the Contractor actually made money on the track walls taking into account the Design Team's optimization of design, subcontractor buy-outs, and the Contractors' self-performed work for less than its bid price for the work
- Had the Contractor utilized Design-Build Best Practices and not been aggressively reaching to access the excess CPPI insurance it had procured for alleged Design Team errors and omissions it is unlikely that this type of claim would have been asserted

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Questions ????

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