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Design-Assist vs. Design-Build: Capitalizing on the Efficiencies while Addressing the Risks

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DESIGN-ASSIST VS. DESIGN-BUILD: CAPITALIZING ON THE EFFICIENCIES WHILE ADDRESSING THE RISKS

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SEPTEMBER 30, 2020

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MEET THE PRESENTERS



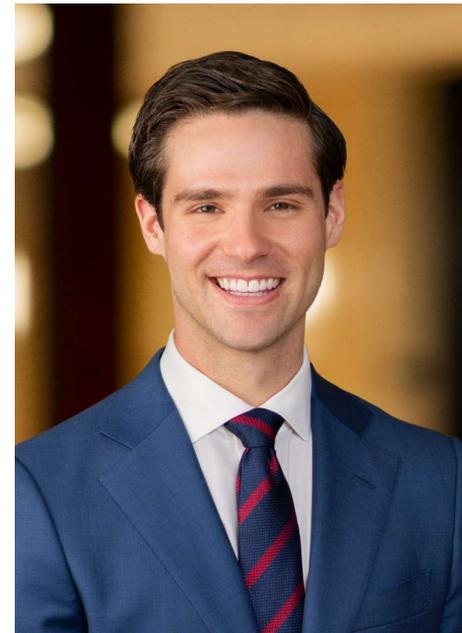
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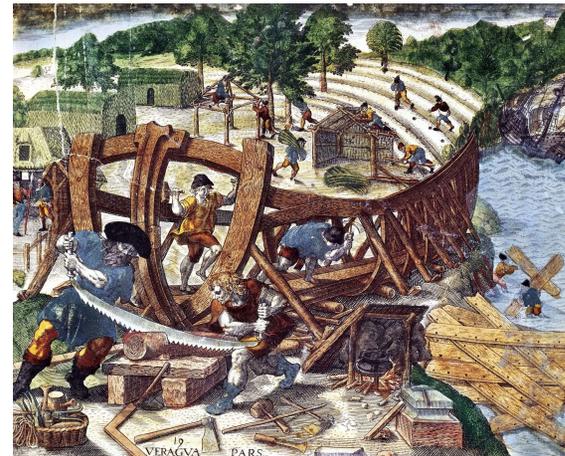
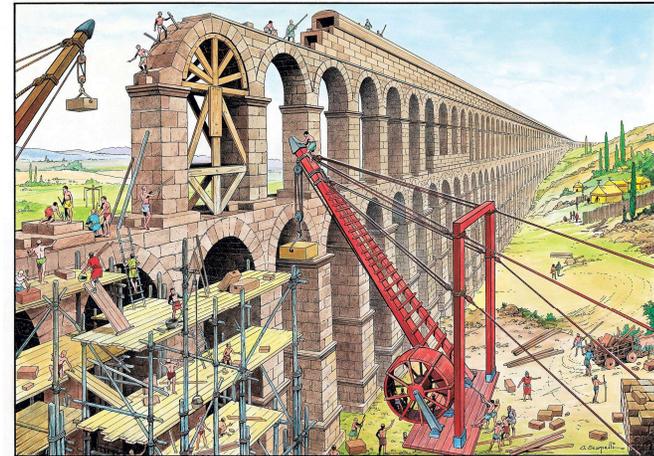
PURPOSE OF THIS PRESENTATION

- Discuss the “design-build” project delivery method
- Clarify the term “design-assist”
- Compare and contrast “design-build” and “design-assist” and discuss their relationship
- Discuss the advantages and disadvantages of each process
- Discuss how to mitigate the risks associated with both processes

What is Design-Build?

WHAT IS DESIGN-BUILD?

- Design-build is a delivery method
- It is believed to be the original delivery method for construction
- It was the primary form of construction contracting prior to the 19th century
- It is best understood contrasted with design-bid-build



DESIGN-BID-BUILD V. DESIGN-BUILD

Design-Bid-Build

The Process:

1. Owner contracts with designer
2. Designer creates design
3. Owner solicits contractors to bid on design
4. Owner contracts with winning bidder
5. Winning bidder builds the design

Design-Build

The Process:

1. Owner contracts with design-build entity
2. Entity creates design using its in-house designers or contracts itself with third-party designer
3. When design is complete, the same firm then builds the design

DESIGN-BID-BUILD V. DESIGN-BUILD

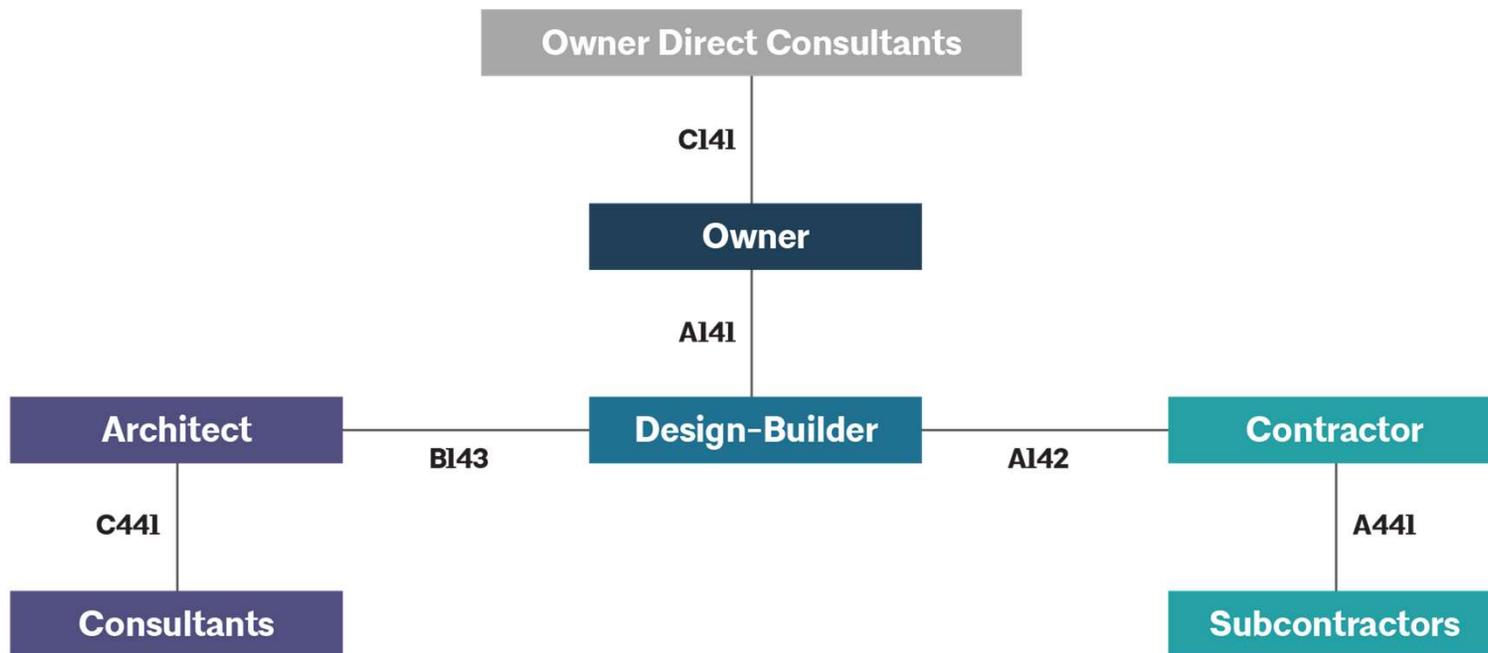
Design-Bid-Build

- Owner generally has two separate contracts
 - One with design professional
 - One with contractor
- If there is any issue involving the design or construction of the design, then the owner is stuck in the middle
- Liability is split

Design-Build

- Owner generally has one contract
 - One contract with the design-build entity
- If there is an issue involving the design or construction of the design, the owner may not be involved in the dispute
- Liability is concentrated

AIA DESIGN-BUILD DIAGRAM



THE RETURN OF DESIGN-BUILD

- As noted, design-build fell out of favor in the 19th century
- Attributable to:
 - i. The rise of architecture as a licensed profession beginning in the 1850s (founding of AIA)
 - ii. Public procurement laws requiring design-bid-build.
- However, in the 1990s, design-build began becoming favorable for its efficiencies
- Today, it is estimated that approximately one-half of all commercial construction in the US is built using design-build
- Some have estimated that in five to ten years, more than one-half of all projects in the US will be design-build

ENTITY STRUCTURE FOR DESIGN-BUILD

- A single company with in-house construction and licensed designer
- A contractor who subcontracts with a third-party licensed designer
- A joint-venture between a design firm and a contractor
 - Both entities are responsible for the liabilities of the venture
- A designer who subcontracts out the construction



Design-Build:

Advantages and Disadvantages

ADVANTAGES OF DESIGN-BUILD

Concentrated Responsibility

- *Spearin* doctrine not applicable between owner and design-builder
 - *Spearin* doctrine is the owner's implicit warranty that design specifications are reasonably free from defects and errors
 - Because a design-builder is providing the design in a design-build format, the *Spearin* doctrine does not apply from owner to contractor
- The owner generally will not bear any design responsibility
- If any lawsuits do arise relating to design and construction between owner and contractor, they should be resolved more efficiently due to the non-availability of the *Spearin* doctrine

ADVANTAGES OF DESIGN-BUILD

Ability to Fast Track Construction

- Ability to fast track construction
- In most design-bid-build projects, construction cannot begin until the design is completed or near-completed
 - Often, there is no contractor until the contractor has bid on the completed design and has been awarded the contract with the owner
 - There is a longer duration from the commencement of design to the commencement of construction
- In design-build, a contractor can begin construction without a fully completed design
 - For example, a contractor can subcontract and begin site-work before finishes are designed
 - This can shorten project duration and result in cost-savings

ADVANTAGES OF DESIGN-BUILD

Increased efficiencies resulting from construction management

- During the design process, contractor can provide designer with practical guidance regarding value engineering, constructability, scheduling, and material decisions
- Theoretically, this should result in fewer design issues, change orders, and increased costs



RISKS OF DESIGN-BUILD

- Inexperienced design-build firms
 - A project outside of their normal realm of experience
 - A project that involves a very unusual work scope
- Projects containing performance guarantees
 - If the design-build firm does not have prior experience with meeting such performance criteria, it may fail to meet it
- Compliance with state laws

COMPLIANCE WITH STATE AND LOCAL LAWS

- Throughout the United States, there is a patchwork of laws addressing the use of “design-build”
- These laws address a variety of questions, ranging from:
 - Design-build as it relates to the practice of architecture;
 - The use of design-build on public projects;
 - How contracts need to be structured
- About half of the states allow design-build practices with no-to-minimal limitations

COMPLIANCE WITH STATE AND LOCAL LAWS

- As of somewhat recently, architecture laws for number of states prohibited or did not explicitly allow design-build
- For example, in Pennsylvania:
 - The Architect Licensure Law prohibited any party from entering into a contract to provide architectural services unless that party was authorized to practice architecture
 - This prohibited design-build in some instances, even if the design-build firm intended to contract with an architect
 - This was amended in 2008 to permit design-build when the entity contracts with an architect



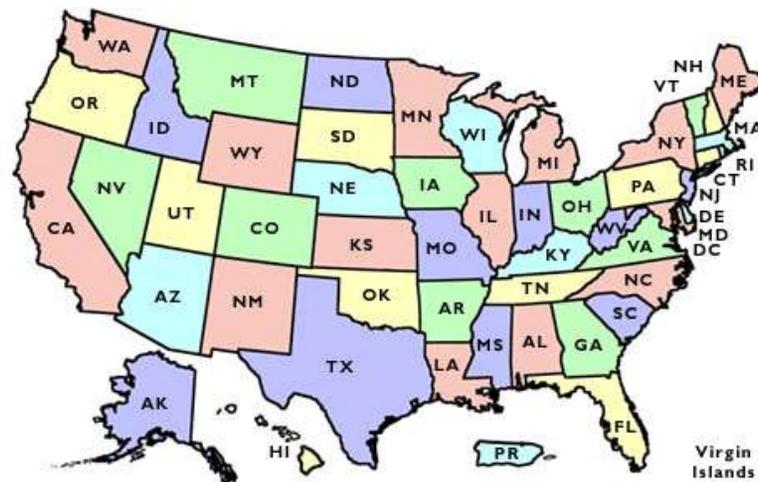
COMPLIANCE WITH STATE AND LOCAL LAWS

- Similarly, in New York:
 - Education law permits only licensed architects and engineers to render services in their respective areas
 - NY Business Law prohibits professional corporations from rendering services other than those for which they were incorporated
 - In 1988, the New York Court of Appeals permitted the practice of design build in the private sector, as long as the contracts specifically required the entity to engage a licensed design professional
 - In the New York public realm, some agencies permit design-build, other agencies do not



COMPLIANCE WITH STATE AND LOCAL LAWS

- **Takeaway:** when you are considering design-build in a particular jurisdiction, be sure to research how it treats the practice, both on a state-level and on a local-level



FORMS OF DESIGN-BUILD CONTRACTS

There are many standardized forms of design-build contracts:

- AIA141-2014, Standard Form of Agreement Between Owner and Design-Builder
- DBIA #525, Standard Form of Agreement between Owner and Design-Builder—Lump Sum
- DBIA #530, Standard Form of Agreement between Owner and Design-Build—Cost Plus Fee with an Option for a Guaranteed Maximum Price
- ConsensusDocs 410, Owner and Design Builder Agreement (Cost of Work Plus Fee with GMP)
- ConsensusDocs 415, Owner and Design Builder Agreement Lump Sum

What is Design-Assist?

WHAT IS DESIGN-ASSIST?

assist (ə- ' sist) *trans. v.* **1. to give support or aid**
<assisted at the stove>



WHAT IS DESIGN-ASSIST?

- Confusing as a term and not yet standardized
- “The scope and nature of ‘design-assist’ is often uncertain and difficult to define.”



WHAT IS DESIGN-ASSIST?

- “[o]ne of the most recent cost-saving trends in construction procurement and delivery methods.”
- “[a process] requiring significant design and engineering evaluation and input from multiple project participants throughout the project’s design preparation phase.”



DESIGN-ASSIST IS, GENERALLY

- Specialty subcontractors
- Involved during the design phase
- To provide input for the design team
- Though not necessarily with the delegation of design responsibility
- With compensation

WHAT IS DESIGN-ASSIST?

What design-assist should be:

- A clearly defined set of responsibilities for a party to perform during the design and preconstruction phase

What design-assist should not be (but occasionally is):

- An ambiguous phrase used to pass risk to parties who do not have control over such risk

ARE DESIGN-ASSIST AND DESIGN-BUILD MUTUALLY EXCLUSIVE?

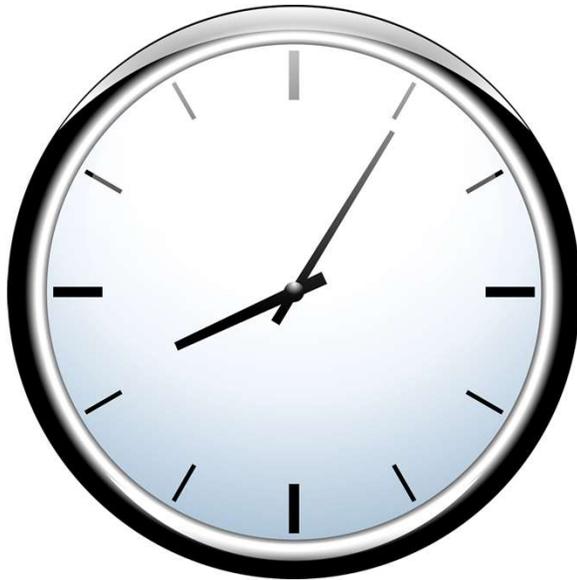
- No
- A design-build firm may engage subcontractors to provide design-assist services during the development of the design
- Design-assist services may nicely compliment a design-build project



Design-Assist:

The Theoretical Benefits

THE BENEFITS OF DESIGN-ASSIST



IN A TRADITIONAL DESIGN-BID-BUILD PROJECT

- Design team works independently to create the design prior to the involvement of the specialty subcontractors
- Once the project is bid out and construction begins, discrepancies are discovered
- Discrepancies result in RFIs, delays, change orders, additional cost
- Discrepancies make parties adversarial



THEORETICAL BENEFITS OF DESIGN-ASSIST

- The subcontractors who are actually building the components have input prior to the start of construction
- Preferences can be identified during the design process and addressed at that time, without impact to construction schedule and with minimized additional costs
- Higher quality design documents
- Better pricing accuracy
- Better coordination between the parties





Contracting and Mitigating Risks in Design-Assist

THE BIGGEST RISKS IN DESIGN-ASSIST

- Lack of uniform or standardized contract language
 - Only standard form at the moment is ConsensusDocs
- Lack of court decisions addressing issues that may arise
- Lack of treatment in statutes
- This makes it hard to predict how the law will come down when there are disputes

A CONCERNING “DESIGN-ASSIST” ISSUE

1. Subcontractor wins contract while design is still being developed
2. Subcontractor is required to provide “design-assist” services under the contract, with no written description of what that includes
3. Design for Subcontractor’s work is significantly changed without Subcontractor’s input
4. Subcontractor is not paid increased cost of work

A CONCERNING “DESIGN-ASSIST” ISSUE

**Courts have not yet addressed this situation.
However, there is framework for legal argument.**

COGHLIN ELECTRICAL CONTRACTORS, INC. V. GILBANE BUILDING COMPANY

- This case generally addresses design-assist/preconstruction services
- CM was hired by owner to build a psychiatric facility when the design was only partially completed
- The CM provided preconstruction services
- The job was fraught with design errors, omissions, and changes that severely increased costs for a sub

COGHLIN ELECTRICAL CONTRACTORS, INC. V. GILBANE BUILDING COMPANY

- The sub brought suit against the CM
- The CM brought suit against the owner
- The CM generally sought recovery against the owner based on the *Spearin* Doctrine
 - *Spearin* Doctrine: by bidding a project, the owner implicitly warrants that the design can be built

COGHLIN ELECTRICAL CONTRACTORS, INC. V. GILBANE BUILDING COMPANY

- *Spearin* Doctrine easily applies to design-bid-build
- But what happens when the contractor is involved in the design process?
- The Court said

COGHLIN ELECTRICAL CONTRACTORS, INC. V. GILBANE BUILDING COMPANY

- The owner's implied warranty regarding the design still applies
- However, the CM is held to a higher standard
- Legally, the fact finder needs to review:
 - The CM's level of participation in the design phase
 - The extent to which the contract delegates design responsibility to the CM

COGHLIN ELECTRICAL CONTRACTORS, INC. V. GILBANE BUILDING COMPANY

- Ultimately:
 - The greater the CM's design responsibility in the contract, the harder it will be to show that the owner's implied warranty applies
- Factually, this was likely very expensive to prove
- **Takeaway:** Make sure the design-assist contract is clear

MITIGATING THE RISKS OF DESIGN-ASSIST

- Clarify the scope of what services constitute “design-assist”
- Clarify who is responsible for what specific service
- Clarify who bears responsibility if there are time and cost impacts during construction
- Avoid committing to a price to perform the work before the design is substantially completed
- If you do, ensure the contract contains language that allows for cost adjustment



Examples of Design-Assist Services

WHAT ARE SOME EXAMPLES OF DESIGN-ASSIST SERVICES?

- There are very few standardized “design-assist” contracts
- ConsensusDocs 541, *Addendum to Agreements Between Owner and Construction Manager and Between Owner and Design Professional for Design-Assist Services*
- This is an addendum to contracts for both the Construction Manager (CM) and Design Professional (DP)
- The addendum can be incorporated into subcontracts
- What does ConsensusDocs 541 include?

CONSENSUSDOCS 541 ADDENDUM MAJOR POINTS

- “[T]he design process will proceed in a collaborative manner, informed by the **free-flow of accurate information concerning program, quality, cost, constructability, and schedule** from all Parties.”
- **DP retains overall responsibility for Project design**
- Addendum does not create an integrated project delivery agreement or design-build agreement
- Portions of design responsibility **can be delegated**
- Design-assist and delegated design can be used together

CONSENSUSDOCS 541 ADDENDUM MAJOR POINTS

- Subcontractors may be involved during design-assist services
- However, there is no obligation to use the same subcontractors during the construction phase
- CM's responsibilities under 541 Addendum flow down through to the Subcontractors
- All design-assist responsibilities should be set out in responsibility matrix

CONSENSUSDOCS 541 ADDENDUM MAJOR POINTS



ConsensusDocs™
BUILDING A BETTER WAY

Responsibility Matrix (Example)

RESPONSIBILITY MATRIX - DESIGN DEVELOPMENT					
D&B - Specialist Design by Sub-Contractor					
		Primary	Review	Due Date	Source
		A/E	CM		Specification
	<i>Performance specification</i>				
	<i>Design Criteria for Package</i>				
	<i>Design of interfaces related to DB component as defined by performance requirements</i>				
	<i>Produce Permit Construction Documents for inclusion in permit submission</i>				
	<i>Detailed coordinated design and permit drawings</i>				
	<i>Fully Coordinated shop drawings</i>				
	<i>Produce all installation details</i>				
	<i>Produce dimensioned and coordinated 2D drawings</i>				
	<i>Shop Drawings for Review by A/E</i>				
	<i>BIM Models where required for Review by A/E</i>				

DESIGN ASSIST SERVICES IN THE CONSENSUSDOCS 541 ADDENDUM

- Design Document Review
- Constructability Review
- Coordination Planning
- Value Engineering
- Risk Analysis

DESIGN ASSIST SERVICES IN THE CONSENSUSDOCS 541 ADDENDUM

- Cost Estimating
- Recommendations for Design-Build Items
- Code Review
- Schedule and Manpower Analysis
- Life Cycle Cost Analysis



What Design-Assist is Not: Delegated Design

THEORETICAL RESPONSIBILITY



DELEGATED DESIGN IS, GENERALLY

- When the project's design professional
- Transfers design responsibility for a specific portion of the work
- To a specialty contractor
- Usually through a general contractor or construction manager
- By way of performance criteria
- Design and construction is required to meet performance criteria
- Specialty contractor typically engages its own design professional

DELEGATED DESIGN

Design-build is an example of delegated design

COMMON ITEMS FOR DELEGATED DESIGN

- Steel connections (e.g., Section 3.1.1, Option 3 of the CoSP)
- Handrail, guardrail systems
- Steel attachments
- Sprinkler/fire suppression systems
- Curtainwalls
- Precast concrete panels
- HVAC systems
- Stair systems
- Steel joists
- Metal deck

AIA A201-2017, 3.12.10 ON DELEGATED DESIGN

- Contractor is not required to provide professional services unless they are specifically required by the CDs for certain work
- In that case, the Architect will specify performance criteria
- Contractor shall not be required to provide professional services in violation of law
- Contractor will obtain the services of a properly licensed design professional, who will sign and seal the documents

AIA A201-2017, 3.12.10 ON DELEGATED DESIGN

- The Owner and Architect are entitled to rely upon the sufficiency and completeness of those documents
 - *i.e.* the Contractor owns any errors or omissions in the delegated design
- The Contractor is not responsible for the adequacy of the performance criteria
 - *i.e.* the Owner and Architect own any errors or omission in the design concept
- The Architect's review of the documents is only for the limited purpose of checking for conformance with design concept



What Design-Assist is Not: Informal Involvement

THEORETICAL RESPONSIBILITY



INFORMAL INVOLVEMENT IS, GENERALLY

- Informal exchange of information
- From subcontractor/contractor regarding design or preconstruction services
- With no formal contract
- With no compensation
- With no expectation of reliance on the input

INFORMAL INVOLVEMENT IS, GENERALLY

- Typically happens on an ad hoc basis
- Happens with subcontractors who may be later bidding the project
- Informal involvement may increase likelihood of winning bid
- Fairly common

COMMON AREAS OF INPUT FOR INFORMAL INVOLVEMENT

- Constructability
- Manpower expectations
- Cost estimates
- Scheduling
- Value engineering
- Product selection

RISKS WITH INFORMAL INVOLVEMENT

- It can be wrongly interpreted as “design-assist” services
- Subcontractors should:
 - Caution that their input is informal and only opinion
 - Avoid wrongfully holding themselves out as design professionals
 - Make recommendations that final design decisions are left to design professional
 - Offer to provide input formally under a contract and for compensation

POTENTIAL LIABILITY EXPOSURE FOR SUBCONTRACTORS

	Design-Bid-Build	CM-At-Risk	Design Build
Delegated Design	High	High	High
Design Assist	Low	Medium	High
Informal Involvement	Low	Low	Low-to-Medium

TAKEAWAYS

- Design-build and design-assist are separate processes
- Design-build and design-assist offer similar benefits, and they can be used together complimentary to increase efficiency in the delivery of a project
- Though design-build is well understood with many contract options, design-assist is not and there are few, formalized contracts being used in the industry
- Design-build and design-assist should not be confused
- Contractors, subcontractors, and owners employing any such services should develop a clear understanding of these processes and ensure that their use is appropriate for the particular project

QUESTIONS?



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