

# Quarterly Review

## Proposed Legislation Permits the Limited Use of the Design-Build Method on Public Projects

By Jenifer Minsky, Esq.

THE NEW YORK STATE DEPARTMENT OF TRANSPORTATION spends millions of dollars each year to maintain and improve transportation within the state, thereby creating numerous opportunities for design and construction professionals. These opportunities are even greater now due to the Lower Manhattan redevelopment, the development of the West Side stadium, the 2012 Olympics bid and reconstruction of the New York State Thruway in the Albany corridor. Unfortunately for those professionals practicing the design-build method of construction, as opposed to the traditional design-bid-build method, the laws of the State of New York make it difficult, if not impossible, for design-build entities to take advantage of many of these opportunities.

### DESIGN-BUILD LAW APPLICABLE TO PUBLIC PROJECTS

In 1988, the New York State Court of Appeals paved the way for the use of the design-build method on construction projects in New York. The case of *Charlebois et al. v. J.M. Weller Associates, Inc.*<sup>1</sup>, held that, assuming certain criteria were met, the design-build method did not violate New York's education laws, which generally provide that only those people licensed as architects or engineers may practice those disciplines. This case is equally applicable to the private and public sectors and, accordingly, the education laws are not usually a barrier to the use of the design-build method on public construction projects.

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## Interview with Buildings Commissioner Patricia J. Lancaster, Part II

With Raymond T. Mellon, Esq.

The following article is the second half of partner Raymond T. Mellon's interview with Patricia J. Lancaster, AIA, the Commissioner of the Department of Buildings of the City of New York. The first half appeared in the Fall 2004 edition of our newsletter.

RTM: Since we have already discussed the NYC Building Code, can you address the International Building Code (IBC)?

CL: The existing code of the City of New York is byzantine and not well organized. AIA, BOMA, the Architects Council and the Society of Architects lobbied hard after 9-11 to reorganize the code using the framework of the IBC. Actually, I remember this watershed meeting when we had 50 people down in our third floor conference room. Personally, I had my hands full with the re-engineering of the DOB, but it seemed that waiting for two years for us to finish Mica (now called Operation Redesign) was not the best plan. I called for a vote and asked whether we should do this now or wait, and it was unanimous to go ahead. I told them that I would need their help and they have been incredible. I have 400 people from the private sector

spending hours and hours on the 13 technical committees.

RTM: How do the City Code and the IBC fit together?

CL: It is important to realize that the International Building

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### Spring 2005 Legal Updates

1. The cost of correcting defective work without damage to property other than the completed work itself is not covered by liability insurance as it is not deemed an "occurrence." *Tratoros Construction Inc. v. AUI Insurance Co., et al.*, No. 33226/01, N.Y. Sup., Kings Co., March 3, 2005.
2. N.J. Supreme Court rules municipal construction official has the authority under the UCC to cite a developer for a construction code violation, such as improperly installing stucco resulting in mold damage, with respect to property for which a certificate of occupancy has already been issued. *DKM Residential Properties Corp. v. The Township of Montgomery, et al.*, 182 N.J. 296, 865 A.2d 649 (2005).
3. New York 1st Dept. Supreme Court Appellate Division denies summary judgment stating that questions exist regarding whether the shifting of earth, due to excavation activities at an adjacent construction site, falls within an "earth movement exclusion" to deny coverage for the resulting collapse. *Burack v. Tower Insurance Company of New York*, 2004 N.Y. Slip. Op. 07931 (App. Div. 1st Dept.).

# Insuring a Design-Build Project

By Bill P. Chimos, Esq.

The continued growth in design-build's popularity has made it necessary for design professionals to seek ways to limit their risk. In 1987, less than 3 percent of all non-residential construction in the United States consisted of design-build projects<sup>1</sup>. However, in 2005, design-build will account for more than forty percent of all non-residential construction projects in the United States<sup>2</sup>. The design-build process prescribes one party as being responsible for both the design and the implementation of the design for a project. The design-build process increases the risks typically associated with a traditional design-bid-build project. However, these risks can be limited through the procurement of appropriate insurance by the design firm.

In traditional projects, design professionals are liable for errors and/or omissions under a negligence theory. It is well settled that in order to sustain a negligence cause of action, the plaintiff must show (a) that the design professional owed plaintiff a duty of care; (b) that said duty was breached; and (c) that the breach of this duty proximately caused plaintiff's damages<sup>3</sup>. While an action for negligence does not arise pursuant to a contract, actions for breach of warranty do arise under a contract. Over time, standard AIA Contract Documents have significantly reduced a design professional's responsibility for performance on a job site. While once supervisory on the job site, the design professional's responsibility has evolved into assessing whether the work generally conforms to the contract requirements and advising the owner on whether to pay for the work<sup>4</sup>.

Generally, a design professional has no responsibility for site safety or for the contractor's failure to perform its services in accordance with the contract documents. In a design-build project, design professionals remain liable for their own negligence, but they may also be responsible for the accuracy and completeness of project plans, specifications and cost estimates<sup>5</sup>. The design professional is responsible for workmanlike performance as well as the feasibility of the

project design. "The design-builder is liable for defective project-related conditions irrespective of whether the project was designed in accordance with industry standards or whether the work was performed in accordance with the plans and specifications. Liability is imposed by extending theories of express warranty as measured by the design-builder's contractual undertaking."<sup>6</sup> Thus, this increase in responsibility differs significantly from the traditional design-bid-build process.

In addition to the increase in responsibilities for the design-builder, the design-builder also incurs increased costs prior to the award of the contract. In order to bid a project, a design-builder must complete most of the preliminary design and certain aspects of the final design of the project without any commitment of compensation from the owner. This is clearly different from the traditional design-bid-build process where the architect is retained by the owner and paid to prepare the drawings and specifications that will be bid out to multiple contractors to construct the project. Additionally, the design-builder as contractor faces increased exposure for property damage from the increased performance obligation and may be responsible for the consequential losses resulting from defects in the performance of the work on the project. Thus, claims against a design professional are "no longer limited to defects in workmanship or deviation from acceptable standards of performance,"<sup>7</sup> but may include damage to property and economic loss claims.

*"In a design-build project, design professionals remain liable for their own negligence..."*

Risks can be limited through the design firm's procurement of appropriate insurance. Depending on the contractual requirements, a design-build entity may

be required to carry insurance policies for general business liability, professional liability, construction liability, workers' compensation, builder's risk, automobile, inland marine, bonds, directors' and officers' coverage, employment practices liability and employee benefits liability<sup>8</sup>. Commercial general liability (CGL) policies specifically exclude coverage for claims resulting from professional services such as engineering, architecture and surveying. Due to this exclusion, design-builders must rely on errors and omissions policies which are specifically tailored to protect an entity from any liability resulting from a design professional's negligence.

*"Liability is imposed by extending theories of express warranty as measured by the design-builder's contractual undertaking."*

While a CGL policy is written on an "occurrence-form" basis, most professional liability policies are written on a "claims-made" basis. One concern with professional liability policies in the design-build scenario is whether coverage will be available if a claim is made after the policy period in which the project occurred. Other concerns include the difficulty of securing professional liability protection for the design-build team unless the architect is the prime design-builder, the potential for uninsured contingent professional liability exposure, and allocation of liability issues within joint venture agreements.<sup>9</sup> Project-specific professional liability insurance for design-build projects has increased in popularity as a response to some of these issues. "The named insured on a project-specific professional liability policy can be the prime design-builder (architect, general contractor, or joint venture) or the architect in a role as subcontractor to a general contractor."<sup>10</sup>

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# Proposed Legislation Permits the Limited Use of the Design-Build Method on Public Projects... Continued from front page

Despite the existence of *Charlebois*, however, there are a number of state laws that effectively preclude the use of design-build on public projects. Contractors and design professionals must be familiar with these laws as a contract in violation of these laws is void and unenforceable. A violation will likely result in a contractor or design professional being denied recovery even if it performed work from which the state benefited.

For instance, New York's "Wick's Laws," including Section 101 of the General Municipal Law<sup>2</sup> and Section 135 of the State Finance Law<sup>3</sup>, require the preparation of separate specifications and the bidding of separate contracts for plumbing, HVAC (heating, ventilation and air conditioning) and electrical work on public projects over a threshold amount. While the purpose of the Wick's Laws is to ensure expertise in these areas, the practical result is that the award of a single contract to one contractor, as is done in a design-build contract, is essentially prohibited.

In addition, certain New York laws, including Section 103 of the General Municipal Law<sup>4</sup>, Section 6218 of the Education Law<sup>5</sup>, Section 8 of the Public Buildings Law<sup>6</sup>, Section 28 of the Highway Law<sup>7</sup> and Section 359 of the Public Authorities Law<sup>8</sup>, require that construction contracts on public projects be awarded to the lowest bidder, based upon open competitive bidding. As a practical matter, these statutes make it difficult for a state agency to utilize the design-build method because they require that the designer be retained prior to the contractor and that the design be completed prior to awarding the construction contract.

The above laws do not apply to every public entity or project within New York State. Accordingly, there may be limited opportunity for design-build on certain public projects. However, the New York State Department of Transportation is bound by these laws. As a result, Department of Transportation contracts are inaccessible to

design-build purveyors unless and until the laws are changed.

## LEGISLATIVE EFFORTS

While the Department of Transportation has indicated a preference for utilizing the design-build method, at least on a limited basis, past legislative efforts to change the existing construction procurement laws have met with little success. As far back as 1992, legislators were unsuccessful in securing proposed pilot design-build programs for public projects. For instance, legislation was introduced, at the behest of the Department of Transportation, allowing the design-build method to be utilized in connection with the reconstruction of Route 9A in Lower Manhattan as part of the World Trade Center restoration and for improvements related to the proposed 2012 Olympics, along with various other transportation projects within New York State.

*"...certain NY laws...require that construction contracts on public projects be awarded to the lowest bidder, based upon open competitive bidding."*

While the above legislation seems to have lost momentum, there may be new hope for design-build purveyors in New York. Governor Pataki recently introduced his proposed budget for 2005-2006, which included legislation affecting the use of design-build on public projects. This legislation expressly permits the limited use of design-build on public projects<sup>9</sup>. Specifically, the proposed legislation temporarily amends the Highway Law and Public Authorities Law in order to allow the Department of Transportation and the Thruway Authority to establish pilot design-build programs.

Pursuant to Governor Pataki's proposed legislation, within the next five years, the Department of Transportation will be permitted to enter into design-build contracts for the design and construction of highways, structures, or appurtenant facilities for twelve design-build projects, while the Thruway Authority will be allowed to undertake five such contracts. The particular projects are to be chosen by the respective departments rather than being predetermined in the legislation.

The Governor's proposed legislation addresses the obstacles to the design-build method discussed above. For instance, the Department of Transportation will be permitted to contract with a single entity or a team comprised of various entities, as opposed to bidding and awarding separate contracts with specific trades. In addition, the Department of Transportation will be allowed to choose the proposal that it perceives to be the best value to New York based upon a number of factors, as opposed to choosing a contractor based solely upon the price of the bids.

If such legislation passes, New York will not be the first state to change its procurement laws to allow for its Department of Transportation to utilize the design-build method, at least on a limited basis. Utah's statutes, like those in New York, while not expressly prohibiting design-build, had erected barriers to its use. In order to repair one of its interstate highways in time for the 2002 Salt Lake City Olympics, Utah modified its laws to permit the contract to be awarded to a firm that provided the best value to the state, even if another firm provided a lower bid. Utilizing design-build, Utah completed one of the largest design-build projects ever achieved and the first design-build interstate highway project. Furthermore, the Departments of Transportation in Arizona, North Carolina and Minnesota, all passed legislation permitting the design-build method to be utilized on a specific number or percentage of projects

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## Interview with Buildings Commissioner Lancaster... Continued from front page

Code is a base framework, like a skeleton. The IBC is in use in 48 states now and each jurisdiction formulates revisions to the base structure that are applicable to its own jurisdiction. New York City's revisions will be suitable for its denser urban environment. It will be particular to New York City.

The International Building Code is organized by subject matter and we have representatives on our committees in each area. Here again, we are building consensus up front. We want all the issues on the table, and if, for example, the technical committee can't come to an agreement on what they want to recommend, it goes to adjudication by code program unit, and if they can't agree, it will then go to adjudication by the managing committee.

We had one Council hearing last year. There is a competing bill out there that would impose the National Fire Protection Association (NFPA) code on New York City, but that code simply does not have the credibility of the IBC. The NFPA code is based on the standards used to construct Disneyworld's Epcot Center, and it is only used by two small municipalities in this country. Significantly, the support structure and resources for training simply aren't there, something that we learned when we adopted the National Electrical Code (NEC), which is also an NFPA Code. While this process has not gone as smoothly as originally envisioned, we remain strongly committed to giving New York City a better building code, which this Administration believes should be based on the IBC. We are in the process of working with the Council to satisfy its concerns and we expect to move this along later this year.

**RTM:** How will the format ultimately be decided?

**CL:** Ideally, what we will have, and what they have done in other jurisdictions, are margin notes that say "NYC" so that you know what the New York City revision is. For instance, you might compare the base IBC to the New York City IBC to see what

changed and why. The other issue worth mentioning is the immense technical resources behind the IBC. They have training classes, they offer certification and plan exam consultations, and they have technical committees set up all over the country to revise each section on a three-year cycle so that every three years, the entire country mobilizes around the latest technology.

*"I go out to the sites pretty regularly before a hurricane, for instance, or when we are investigating alcohol or drug usage, just to have a presence."*

With the Electrical Code, which has been out a little longer, revisions are becoming fewer because researched and tested ideas are presented to the NFPA first and then they become incorporated into the base code. As a result, there were 40 fewer revisions to the NEC in the 2003 cycle than there were in the year 2000 cycle. There are about 300 revisions in total.

**RTM:** I take it you are anticipating that once the Code is implemented, the ongoing cycle will be less intense and the Code itself will be better organized and far less byzantine.

**CL:** Correct. Again, it is important to highlight the base framework structure. Occupancy groups are in the same place all over the country now and what has happened with our Code will probably continue to happen to a certain extent because we are New York City and we are just going to do that. But the Code, the reference standards, and the technical policy and procedure notices that come out together and constitute the Code, should become more cohesive, coherent and comprehensive.



**RTM:** You are confident that ultimately it will be the governing Code for New York City in a modified form?

**CL:** Absolutely. We have tremendous industry support and momentum. This is what is best for New York City and I'm confident that we will prevail in the Council.

**RTM:** Commissioner, are there particular buildings that you are fond of?

**CL:** As Commissioner I treat all buildings the same. But, there is a special thrill in the high-rise buildings that are in the site safety program, since I do feel strongly about safety. I go out to the sites pretty regularly before a hurricane, for instance, or when we are investigating alcohol or drug usage, just to have a presence.

**RTM:** Well, let's talk more about safety now.

**CL:** In October of last year, we put into effect a new form that asks for different categories of information so that we can do a better job of diagnosing why construction accidents happen. Injuries to passersby related to construction sites are included in the statistics as well. It's still hard to gauge the level of accidents. Our statistics rose in the past year, but that was after we implemented the new form and made a real push to make sure that accidents were reported. We think that site safety training is important as well as our own supervision. High-rises

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are required to do a safety meeting once a month. We intend to make a better diagnosis going forward. Meanwhile, we are stepping up our scrutiny of high-rise construction.

**RTM:** What other safety initiatives have you implemented?

**CL:** We drafted a bill for scaffolding safety. I don't know whether or not it will be passed, so it is sometimes frustrating. We joined forces with the Building Trade Employers Association and OSHA on this just to get everyone thinking about safety.

**RTM:** Consensus building again.

**CL:** Absolutely, and also focusing. Let's focus so that we do not have people killed in construction accidents.

**RTM:** Tell us more about the proposed scaffolding law.

**CL:** This bill would require the licensing of businesses that use scaffolds over 40 feet in height. Licensed businesses will be required to obtain a permit for any scaffold over 40 feet and employ a certificate holder to supervise work on scaffolds above that height. The City's Law Department has approved the current version of the bill and we hope to introduce it to the City Council in the near future.

There are other safety measures under consideration.

Right now, our site safety regulations apply only to large-scale construction projects, mainly buildings that are 15 stories or greater. In the International Building Code proposal that we discussed earlier, there will be a provision to expand the current site safety model to include buildings over seven stories or 100 feet in height. For buildings between seven and 14 stories, the new model would require a site safety coordinator on site, with somewhat less stringent requirements. The requirements for a site safety manager would remain for the larger sites.

Also, the Department is supporting legislation that would require any individual or business applying for a construction permit on a one-, two- or three-family dwelling to have a "residential contractor" license. The residential contractor must be, or directly employ, an individual who is a certificate holder. That person will have the responsibility for construction safety, on-site code compliance, and compliance with plans concerning all construction. Certificate holders would be subject to background checks and would be required to pass an exam. This bill (Intro 513) was introduced to the City Council in January and is currently awaiting a public hearing.

Another area that we've been concerned about is excavations. It seems like there have been more accidents involving trenches and excavations. The Department designed excavation and trench guidelines with descriptions and diagrams of the steps necessary to safely provide sheeting, shoring and bracing. The guidelines are now handed out with all permits and can be downloaded from our website. In addition, the Department is working with the structural engineers of New York and OSHA to offer seminars in safe construction practices, which we expect to offer as part of a safety week in the first week of May.

I'm also committed to improving training for the staff, for two very important reasons. This will make them more professional and help us better protect public safety. All 120 of our Construction Inspectors are enrolled in courses to be conducted by the Mechanics Institute in May. The courses will cover specific sections of the Building Code, including Fire Protection Construction Requirements and Means of Egress. Also, future classes on structural work,

occupancy and construction classification will be planned. If the classes prove successful and worthwhile, we will reach out to the industry and encourage others to attend.

*"If the public has the information, my staff and industry members are made more accountable."*

**RTM:** As a final subject, it appears that the education you provide to the general public is enormous. Tell me about that and why you do it.

**CL:** Educating the public is a matter of multi-level transparency because it allows us to communicate to all parties involved. If the public has the information, my staff and industry members are made more accountable. We did a series of brochures last year called Building Knowledge, which is more for the public than the trades, really, and they are on the web. One topic addresses what it takes to get a permit. If we educate the public, it makes the process transparent and consistent on the parts of the trades and my staff at the same time. It applies in all of the boroughs, which addresses a complaint. In addition, the Office of Technical Affairs now holds weekly seminars for technical professionals and anyone can attend. The industry loves them. The Office of Technical Affairs originally had five people, and now there are 50 on staff.

**RTM:** You have covered a lot of ground in our discussion. Thank you, Commissioner, for all of the information you have shared with our readers.

*"I'm also committed to improving training for the staff, for two very important reasons. This will make them more professional and help us better protect public safety."*

# Licensing Requirements for Design-Build Projects

By Jenifer Minsky, Esq.

Both design and construction professionals entering into a design-build arrangement must be aware of the licensing requirements in the state in which a particular project is located. While a specific “design-build” license is not offered in any state, every state requires that engineers and architects be licensed. Furthermore, a number of states and municipalities license contractors. Licensing requirements can be problematic in a design-build scenario, because one party contracts to perform both the design and the construction services. The design-builder must be careful that it does not actually perform any services for which it is not licensed and that its contract does not call for it to perform such services. In addition to the criminal penalties which may be imposed for practicing a particular profession without a license, such a violation may render the design-build contract void and unenforceable.

## *The Effect of Licensing Requirements on Design-Build in New York*

New York’s Education Law contains a comprehensive set of regulations for the licensing of architects and engineers. Sections 7202 and 7302 of the Education Law provide that only a licensed individual may practice architecture or engineering or use the title “architect” or “engineer.” Furthermore, under Sections 7209 and 7307(2), only architects, landscape architects, engineers and/or land surveyors may join in the formation of a joint enterprise, partnership or professional service corporation or any combination of these entities to provide architectural or engineering services. Therefore, other types of licensed or unlicensed professionals cannot join in such an enterprise. In addition, individual municipalities may have their own licensing requirements for entities conducting business within their confines.

For instance, Nassau County requires home-improvement contractors to be licensed. Accordingly, all parties to a design-build contract must check jurisdictional requirements and ensure that the contract does not require the practice of any profession for which an appropriate license has not been obtained.

*“Licensing requirements can be problematic in a design-build scenario, because one party contracts to perform both the design and the construction services.”*

*Charlebois v. J.M. Weller Associates*, 535 N.Y.S.2d 356 (1988), is the seminal case in New York addressing the enforceability of a design-build contract. The contract at issue in *Charlebois* was between an owner and an unlicensed contractor operating as a business corporation. The contract specifically provided that the services of an architect/engineer would be furnished by the contractor pursuant to an agreement between the contractor and the architect/engineer. The owner attempted to avoid payment under the contract by arguing that the contract was invalid as violative of Education Law Sections 7202 and 7209. Had the owner prevailed in its argument, the design-build method would, for all practical purposes, be impossible to utilize in New York. Fortunately for practitioners of the design-build method, the *Charlebois* Court, in a close decision, found that the builder was not engaging in the unauthorized practice of engineering. In making its decision, the Court noted that an engineer, who was subject to the educational, regulatory and punishment mechanisms of the licensing entity, the State Education Department, was engaged to provide the professional services,

even though he was not a signatory to the contract. In *SKR Design Group, Inc. v. Yonehama, Inc.*, 660 N.Y. S.2d 119 (1<sup>st</sup> Dep’t 1997), the owner argued that its contract with a business corporation, as opposed to a professional corporation, for the design and construction of a restaurant was void as against public policy under the Education Law. The design-builder argued that the contract, which provided for design services to be performed by qualified architects, engineers, and other professionals selected and paid by the design-builder, was proper because it did not require the builder to perform the design services itself. Furthermore, the evidence indicated that the design-builder actually retained a licensed individual to perform the professional services.

*“Individual municipalities may have their own licensing requirements for entities conducting business within their confines.”*

The defendant in *SKR* attempted to distinguish its case from *Charlebois* because the design professional in *Charlebois* was actually named in the design-build contract. The Court in *SKR* found that it is “a specific license, not a specific name, which the law requires.” In other words, the important fact is that a licensed individual, who is subject to the requirements and penalties of the Education Department, performs all of the design services, regardless of whether he is actually named in the design-build contract. However, this issue has not been addressed by the highest court of the State. Accordingly, while there is sound precedent that the design professional need not be named in the contract, doing so is the more cautious approach.

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### *The Effect of Licensing Requirements on the Unlicensed Professional in New York*

The *Charlebois* Court recognized a number of earlier decisions holding that the absence of an appropriate license bars recovery under a contract where, as here, the purpose of the licensing scheme is to protect the public's health and safety. However, the Court also noted that it would be unfair to allow the owner to use the builder's lack of a license as a sword rather than a shield since the contract specifically stated that the builder would retain a design professional and the services were actually performed by a licensed professional. Had these two factors not been present in *Charlebois* the result very well may have been different.

*"The Court also noted that it would be unfair to allow the owner to use the builder's lack of a license as a sword rather than a shield..."*

In fact, a number of New York courts have relied upon *Charlebois* in holding that a person who engaged in the unlicensed practice of architecture or engineering is precluded from recovering payment for the services performed. Unlicensed individuals have also been precluded from recovering for any services performed under the contract, including those for which no license was required. However, New York courts appear reluctant to allow an owner to recoup money already paid to an unlicensed professional for services performed. As with many legal issues, one cannot predict with complete certainty how a court will rule with regard to the validity of a contract which is performed in violation of the licensing laws. However, courts generally

weigh the inequity of an owner who attempts to use the licensing laws to avoid paying for services rendered against the goal of punishing the unlicensed practice of a professional by refusing recovery.

*"A court in Connecticut held that an unlicensed plaintiff could not recover for...services he performed."*

Apart from whether a particular contract is unenforceable, a person participating in the unauthorized practice of architecture or engineering is still subject to sanctions. Specifically, Section 6512 of the Education Law provides that the unauthorized practice of any of the licensed professions is a felony. In addition, violation of the Nassau County Code, which requires contractors to be licensed, is a misdemeanor. Other municipalities may have their own licensing statutes with attendant consequences. Accordingly, criminal penalties, such as fines or incarceration, may be imposed upon an individual who participates in the unauthorized practice of a licensed profession. Furthermore, even if the contract is not completely void, a party may be subject to suit under a number of theories including breach of contract, negligence, fraud or negligent misrepresentation.

### *The Effect of Licensing Requirements on the Unlicensed Professional in Other States*

Each state has its own licensing statutes and the factors in each case vary. Therefore, it is impossible to determine with certainty how a particular court will rule if an individual is found to be practicing a profession without a license. Furthermore, many states have not addressed these issues in their highest court, leaving interpretation of a particular state's licensing laws to its lower courts.

Courts have responded differently when the licensing statute in that jurisdiction does not specifically require the invalidation of a contract entered into in contravention of the statute. For instance, in *Design Development v. Brignole*, 20 Conn. App. 685 (1990), an Appellate Court in Connecticut held that an unlicensed plaintiff could not recover for architectural and engineering services he performed. The Court found that the Connecticut statute imposed criminal sanctions upon a person in violation, rendering the contract illegal and therefore, void and unenforceable. An Appellate Court in Illinois, in *Kaplan v. Tabb Associates, Inc.*, 327 Ill. App. 3d 320 (1995), also refused to allow recovery by an unlicensed professional based upon the Illinois statute which imposed criminal penalties for a violation. Conversely, the Vermont Supreme Court, in *Howard v. Usiak*, 775 A.2d 909 (2001) and *Gallagher v. Leary*, 164 Vt. 633 (1996), held that a violation of the state's licensing statute does not compel the return of fees paid for services rendered because the statute did not require such a penalty, despite the fact that its statute, like those in Connecticut and Illinois, imposed a criminal sanction upon violators.

A full discussion of each state's laws would be well beyond the breadth of this article. Accordingly, it is important that an architect, engineer or contractor who wishes to perform services in another state, whether under a design-build contract or the more traditional design-bid-build contract, review and comply with the licensing requirements in that particular state. Furthermore, it is prudent to outline each party's responsibilities in the contract and to name each of the entities performing work, if they are known, at the time the contract is entered into. Of course, the parties must ensure that the services are actually performed by properly licensed individuals or entities. Finally, the parties to such a contract must be familiar with the laws regarding design-build in the particular jurisdiction in which the project is located.

## Proposed Legislation Permits Design-Build...

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each year. These are merely examples of a few states that have changed their laws to allow the use of design-build on public projects. It is far from an exhaustive list.

While Governor Pataki's proposed legislation specifically states that the use of design-build could result in faster and less costly construction projects, it also states that the design-bid-build method will remain the most appropriate method for transportation projects. Accordingly, it seems unlikely that this legislation is the precursor to the adoption of the design-build method on a wholesale basis.

However, the legislation does provide for the submission of a report by the Department of Transportation and the Thruway Authority, in conjunction with representatives of the construction and design industries, to the Governor and the legislature's transportation committees, evaluating the success or failure of design-build for highway projects. This indicates a potential willingness to extend the use of design-build, at least on a limited basis, if the pilot project is successful.

Zetlin & De Chiara LLP is pleased to announce that it will chair the 2005 Associated Owners and Developers Conferences.

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1. 535 N.Y.S.2d 356 (1988).
2. N.Y. General Municipal Law § 101 (McKinney 2003).
3. N.Y. State Finance Law § 135 (McKinney 2003).
4. N.Y. General Municipal Law § 103 (McKinney 2003).
5. N.Y. Education Law § 6218 (McKinney 2003).
6. N.Y. Public Building Law § 8 (McKinney 2003).
7. N.Y. Highway Law § 28 (McKinney 2003).
8. N.Y. Public Authorities Law § 359 (McKinney 2003).
9. S. 994 and A. 1924.

## Insuring a Design-Build Project

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The project-specific approach offers several advantages. It assures that all of the project participants will have professional insurance in place in conjunction with that project even after the project is completed. It allows prime design-build entities that do not maintain professional liability insurance to present a certificate of coverage to the owner. It should also simplify allocation of professional liability for the project and will benefit the parties during the resolution of project disputes<sup>11</sup>. It should be noted, however, that project-specific policies are more expensive than the professional liability policies generally maintained by design firms and/or contractor/design-builders<sup>12</sup>.

Currently, the design-build delivery system seems to be the preferred method for owners and/or developers, although certain states may limit the use of this process<sup>13</sup>. The projects best suited for design-build are ones that are time- and price-sensitive, with a clear scope and requirements, and where coordination, cooperation and expertise of a constructor are essential. Government buildings, bridges, process plants, highway tunnels and high rises have all been constructed using the design-build method.

While there may be financial gains and increases in responsibility and control which inure to design professionals when performing services on a design-build project, these professionals must be aware of the additional risks which may ensue pursuant to the contract documents or may arise as a result of limited insurance coverage.

Thus, it is imperative that the design professional properly evaluate its risks at the onset of the project and choose the appropriate insurance coverage based on the project's requirements.

1. Terry R. Tennant, Advanced Project Delivery Systems: Design-Build and Design Delegation Insurance Issues, American Bar Association Forum on the Construction Industry and Section of Public Contract Law (1998).
2. Design-Build Institute of America, Market Penetration of Major Project Delivery Systems, at [http://www.dbia.org/ind\\_info/mkt-chrt.html](http://www.dbia.org/ind_info/mkt-chrt.html).
3. See *Havas v. Victor Paper Stock Co.*, 49 N.Y.2d 381 (1980).
4. John Agoitini, Legal Aspects and Risk Management of Design/Build Contracts, at <http://www.aepronet.org/pn/vol9-no.1.html>.
5. Mark V. Niemeyer, Managing Risks on Design-Build Projects the Surety's Perspective (1998), at [www.roughnotes.com/rnmag/march98/03p.56.html](http://www.roughnotes.com/rnmag/march98/03p.56.html).
6. *Id.*
7. *Id.*
8. Design-Build Insurance (2003), at [www.aiacolorado.org/chapters/Denver/designbuild/db-insurance.html](http://www.aiacolorado.org/chapters/Denver/designbuild/db-insurance.html).
9. Grover Simpson, "Insurance and Bonding for Design-Build" The Architect's Guide to Design-Build Services. Ed. G. William Quatman II, FAIA, Esq. and Ranjit Dhar, FRAIC, Hoboken, NJ, John Wiley and Sons Inc. (2003), pp. 143-160.
10. *Id.*
11. *Id.*
12. Advanced Project Delivery Systems, supra note 1, at p. 15.
13. Legal Aspects and Risk Management of Design/Build Contracts, supra.

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