



Forum

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Optimizing the Use of DRBs on Construction Manager/General Contractor and Design Build Projects

By Kurt Dettman and Chris Kane

Introduction

Dispute Review Boards (DRBs) typically are used on Design Build Bid projects (DBB) to address disputes that may arise between the owner and the contractor. On DBB projects disputes often grow out of the nature of the DBB contractual relationships, where there are two separate contractual arrangements--one between the owner and the designer and another between the owner and the contractor. Most disputes brought to a DRB are directly between the owner and the contractor, and the designer often is not a direct participant in the DRB process.

The construction industry is now moving to alternative project delivery (APD) approaches including Construction Manager/

General Contractor and Design Build. These APD methods materially change the parties' contractual arrangements in a manner that results in: shifts of risk allocation; more direct involvement by the designer; and (if working correctly) greater collaboration among all the parties in project delivery. This article explores some of the implications of these different project delivery methods and the role of the DRB.

Characteristics of Construction Manager/General Contractor Project Delivery Approach

Construction Manager/General Contractor (CM/GC)¹ is a method that expands the conventional role of the contractor into acting as both construction manager

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"As the construction industry increasingly uses APD methods, DRBs need to adapt as well to this changing environment. Fundamentally, the same projects with the same engineering, cost and schedule challenges will still be built, but the contractual and management landscape will change depending on the project delivery methods used."

¹ The CM/GC delivery method is also called the Construction Manager At-Risk (CMAR) method by state law in some states.

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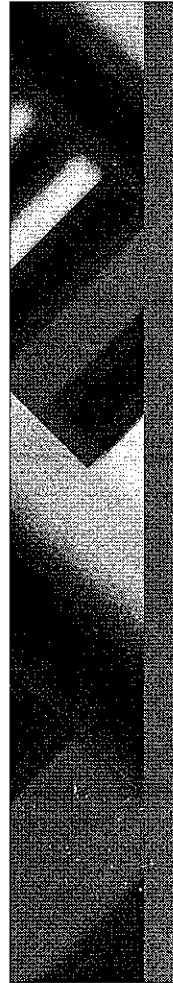
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and builder. Through a Guaranteed Maximum Price (GMP) or Lump Sum Price (LSP) approach, it creates a single source of responsibility for both construction cost and schedule risk, leading to more reliable construction pricing, more realistic schedules, and better project controls. By allowing an owner to engage a construction manager during the design process, the contractor is able to work closely with the designer and thus can provide constructability and value planning input, leading to a better defined scope and design on which the GMP or LSP is based.

The Construction Manager (CM) is generally selected on the basis of qualifications, past experience, and other “best-value” considerations, using a combination of weighting and evaluation factors. During the design phase, the CM works closely with the designer and provides input regarding design options, scheduling, pricing, means and methods, and other input that helps the designer design a more constructible and cost effective project. At approximately 60% to 90% of design completion, the owner and CM negotiate a GMP/LSP for construction and delivery of the project based on the defined design, scope and schedule. If this price is acceptable to both parties, they execute a contract for construction services, and the CM also becomes the General Contractor (GC).

Characteristics of Design Build Project Delivery Approach

Design Build (DB) is a method of project delivery in which a contract is executed with a single entity (the DB contractor) providing both design/engineering and construction delivery services for a fixed price. The DB contractor is generally selected on a best value basis (qualifications, price and other factors). The contract in this approach typically progresses through two phases, 1) completion of a higher level of design (60%+) prior to 2) fixing the price and completing construction. However, a DB contractor can also be procured initially on a competitive bid basis of LSP, where the level of design could be as little as 10% (conceptual) or as much as 30% (preliminary engineering).



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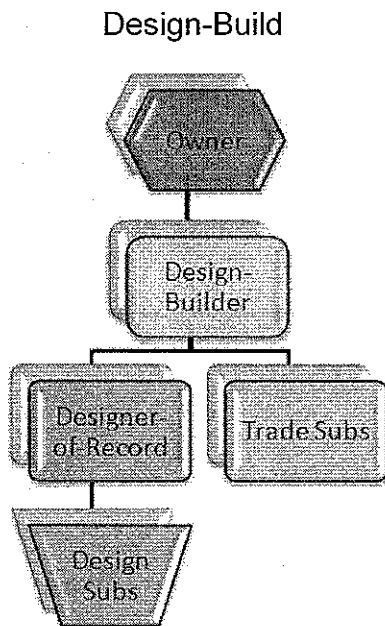
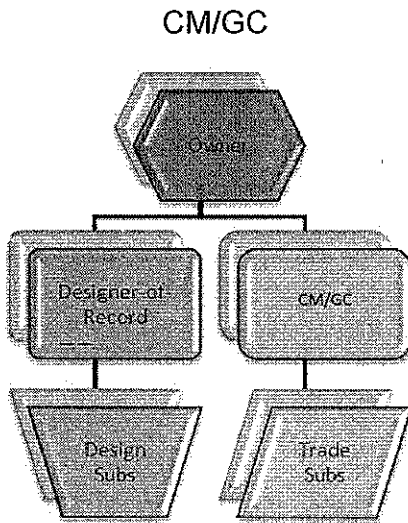
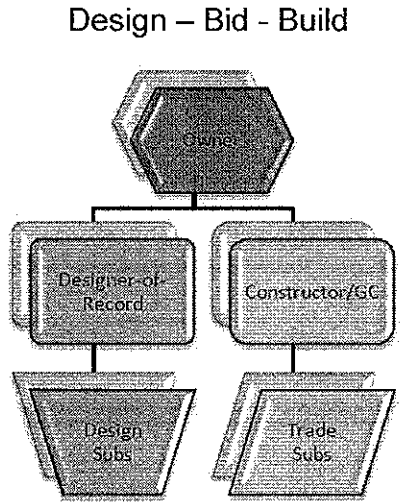
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Owners benefit in DB from reductions in the cost and time to complete projects because design and construction can be fast tracked and sequenced in parallel so that materials/equipment procurement and construction work begin sooner. The owner also benefits from reduced procurement cycles that are typically required in selecting a designer and then preparing fully designed bidding packages. Furthermore, it has been demonstrated that contractors and designers, working as an integrated team, can produce less expensive and better designed structures and facilities. This also expands opportunities to use innovative construction technology, accelerated scheduling, and improved means and methods that are incorporated into the final design. Moreover, because the DB contractor is solely responsible for the completed project, the DB contractor also is motivated to advance a quality project throughout the design and construction process.

Comparison of Contractual Structures



Is There A Different Role For The DRB On A CM/GC Project?

The short answer is no. In a CM/GC approach, the owner still has separate contracts with each of the designer and the CM/GC. The major difference, as noted above, is that the CM/GC will have had a role in providing constructibility, schedule and cost input to the designer in the final design process. In most CM/GC projects there will be extensive pre-construction services prior to finalizing the GMP/LSP, which involves the CM working closely the designer. Fundamentally, however, the owner will still maintain design responsibility under the *Spearin* Doctrine.² There are, however, some potential changes in the claim risk profile that may affect the number and types of disputes that the DRB may see. These include:

- The DRB will likely see fewer differing or changed conditions claims because the CM/GC, having been involved with the final design process, will have knowledge of (and some input into) the final design. The bottom line is that with a CM/GC approach, there are fewer “surprises” about the conditions under which the CM/GC will build the project.
- The DRB should see fewer constructibility (a/k/a design error and omissions) based claims because the CM/GC will have performed some level of constructibility reviews.
- The DRB may see claims that are cousins of DBB changed conditions claims, the “out of scope/GMP” claims. Under the typical CM/GC arrangement, the CM/GC at some point (usually close to or at final design) will give the owner a GMP that is based on many assumptions and exceptions that the CM/GC specifies as the basis of its pricing. Once construction gets under way, there may be disputes about what was inside/outside the GMP.
- Some GMPs include contingency allowances, and there are sometimes disputes over whether a particular event or circumstance (leading to delay

² Under the *Spearin* Doctrine, the owner warrants to the contractor that the design on which the bid is based is constructible if built in accordance with the plans and specifications. *United States v. Spearin*, 248 U.S. 132 (1918).

or extra cost) should be chargeable against the contingency.

- The DRB will still be expected to play its typical “dispute prevention” role since the conventional contractual silos with their attendant friction points will remain in place.

Is There A Different Role For The DRB On Design Build Project?

The short answer is a qualified yes. The fundamental difference between DBB and CM/GC on the one hand, and DB on the other, is that under a DB approach there is “single point of responsibility” for both design and construction. The following are some of the types of disputes that DRBs may see:

- There should be a virtual elimination of constructibility (design error and omission) claims since the DB contractor is responsible for both accepting any preliminary design provided by the owner and delivering a final constructible design.
- The dispute landscape may shift in focus to arenas where the owner has retained responsibility under the DB approach; these can include potential liability areas such as: right of way, environmental remediation, utilities, permits, and force majeure-type events.
- Like CM/GC, disputes may also arise on the scope of the project that the DB bought in its bid price--that is, were there assumptions and understandings that went into the pricing the scope of the project that have changed during the course of the project?
- Another type of claim that may arise, especially with owners that are on a learning curve with the DB approach, is whether the owner has delayed or changed the final design through its approval (or lack of approval) processes. A cognate type of claim may arise with construction inspection/acceptance where owners have difficulty implementing a Quality Assurance approach rather than using the traditional owner Quality Control inspection for acceptance of the DB contractor’s work.
- A final potential area of disputes is where the owner has put in prescriptive specifications that limit the DB team’s discretion, thereby potentially giving rise to a *Spearin* Doctrine-type claim that the owner ultimately dictated the final design and therefore still has responsibility if the design is not constructible or fails. Stated another way, the more discretion the DB contractor has, the more responsibility it will have; the less discretion it has, the more likely it will still have a claim against the owner if the final approved design fails.

- The DRB’s “dispute prevention” role may be more limited (in theory) since it will be focused only on the contractual friction point between the owner and the DB contractor, and not on design/construction issues as between the entities comprising the DB contractor team (designers, subcontractors and suppliers).

Commentary on the Role of the DRB on APD Projects

As the construction industry increasingly uses APD methods, DRBs need to adapt as well to this changing environment. Fundamentally, the same projects with the same engineering, cost and schedule challenges will still be built, but the contractual and management landscape will change depending on the project delivery methods used. With this in mind, the authors suggest the following for the DRB community of practice to consider:

1. DRB members need to understand the basic structuring, contractual relationships and management programs that are in place for each type of project delivery. Understanding this changed landscape of risk allocation, responsibilities, and roles is fundamental for the DRB to function effectively within the applicable project framework. Stated another way, the DRB must be attuned to and adjust its role to fit with the changed contractual and management landscape under each of the delivery methods.

2. DRB members need to apply different dispute prevention techniques that can vary depending on the project delivery method. For example, in a DBB delivery method the designer may not be “at the table” in regular project meetings because the Owner “owns” the design that has already been

“set” in 100% plans. In contrast, on a DB project the designer of record will be part of the DB contractor team and will likely be at the regular meetings where design related issues may be on the agenda (especially early in the project as construction plans and drawings are being prepared). Having the designer “at the table” may increase opportunities for the DRB to encourage the parties to resolve design issues together in the best interests of the project.

3. DRB members will need to understand the different types of claims that may arise within the changed framework of contractual and management relationships. For example, traditional claims (e.g., defective plans and specifications) under a DBB delivery model will be materially changed under a DB delivery model. The corollary to this is that DRB members may not be able to apply traditional DBB analysis and outcomes to DB based claims (e.g., non-applicability of the *Spearin* Doctrine on projects where the DB Contractor owns the design).

4. DRB members also need to recognize (and embrace) the opportunities for applying more effective dispute prevention techniques. For example, in CM/GC project delivery it is assumed that the CM/GC will assist the designer in coming up with a better engineered design and in resolving engineering challenges before construction begins, and this ethos should carry forward to building the project as well. Likewise, on DB projects the designer will be more “visible” since the early phases of the project typically will involve a rolling design process to produce “release for construction” plans and drawings. The DRB can use these changed relationships as an opportunity to encourage the parties to work together to solve engineering challenges at the lowest cost rather than positioning themselves for the more typical “it’s your problem, so fix it” approach that DRBs often see on DBB projects.

5. In addition to the dispute prevention techniques mentioned above, the DRB may also have more flexibility in proposing the use of informal advisory opinions within the context of the more collab-

orative approach to project management under CM/GC and DB project delivery approaches. For example, advisory opinions could be a good option for disputes about “what is within the CM/GC GMP or what is within the DB price”, or “what design or construction responsibilities were assumed under the CM/GC or DB contract”?

Conclusion

The fundamental role of the DRB is to prevent disputes, if possible, and help parties resolve them, if needed, at the project level. The move to APD approaches is an effort by the construction industry to try to get project participants to take a “best for project” approach to addressing challenges, avoiding disputes, and resolving claims. Greater collaboration between all the participants in the process is characteristic of APD. This is entirely consistent with the approach and philosophy of DRBs. BUT, DRBs need to reinforce these changes by understanding and embracing the new project deliver paradigms, while still maintaining the fundamental elements and integrity of the DRB process.

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