

Design-Build Joint Venture Agreements

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February 1997

The author gratefully acknowledges the assistance of Galvin Kennedy, an associate with the firm of Greenberg, Peden, Siegmyer & Oshman, P. C.

I. Common Allocation of Responsibilities of the Design/Builder in Design/Build Agreement to Various Team Members

The printed form Design/Build Agreement shifts some risks and responsibilities, but still is an incomplete document. For example, the AIA's A-491, although created as the agreement between the Design/Builder and the Contractor, blurs many of the traditional rights and obligations of the parties, and fails to address others.⁽¹⁾ It is meant to be used in conjunction with other AIA documents in the same family, but even if all are employed, supplementation is necessary. The same is true of the AGC family of design build contracts.⁽²⁾ This paper will address some of these issues.

A. Design Responsibilities

One of the most significant problems with determining the rights and responsibilities between the Design/Builder and the Contractor is that such an agreement combines some of the parties' traditionally separate responsibilities, but does not refer to others. It is important to compare and contrast the changes in Design Professional and Contractor requirements under the B-141 and A-101/201 systems with the A-491.⁽³⁾

Because the use of a design-build program unifies a team of players to produce an end product, instead of the use of a more traditional Owner-Architect-Contractor triangle, with its accompanying checks and balances, the design responsibilities and obligations, traditionally divided and assigned to specific entities, may be allocated without specificity to the unified team.⁽⁴⁾ The first and most obvious difference is that in the traditional context, the Architect is the Owner's representative in dealing with the Contractor. In the Design/Build format, the Architect's role changes and becomes more aligned with the Contractor. The allocation of responsibility generally to a Design/Build team can change or limit the finger-pointing in times of error, but the break with traditional roles may lead to a change of allegiances between the parties.

1. Who is responsible for programming?

"Programming" is the determination of the Owner's needs and requirements for a project. Traditionally, the Architect is responsible for the initial consultation with the Owner in which the Owner relates the nature of the end-product desired. Obtaining this information is part of an Architect's basic services in a B-141 contract.⁽⁵⁾ But detailed programming is one of the "additional services" identified in the B-141 standard AIA contract. In design-build situations, it is both possible and optimal to have the Architect and the Builder participate in the programming discussions.⁽⁶⁾ Unlike the AIA form, the AGC contract clearly contemplates that the Contractor will be the dominant team member. The AIA A-491 contract does not allocate the programming responsibilities to either the Contractor or the Architect. It is the Design/Builder who determines the Owner's program.⁽⁷⁾

Where the Design/Builder is a joint venture or other form of team between the Contractor and Designer, a separate joint venture agreement would be needed between the team members to allocate this responsibility. Are all members of the design-build team responsible for acquiring information about and complying with the Owner's program? Who bears liability for the failure to comply? If the Design/Builder is responsible for providing the Contractor with the Owner's design objectives and budget, but fails to do so, and his failure results in the Contractor's inability to accurately evaluate and comply with the Owner's program, is the Design/Builder shielded from responsibility because the Contractor is performing as an independent Contractor? Or is the Contractor responsible for all changes in the project scope or program? The teaming agreement should address and resolve these issues.

2. Obligation of Architect to design to budget?

It has been the traditional role of the Design Professional to undertake an Owner's initial cost estimate on a particular project.⁽⁸⁾ A liability sometimes associated with this service is that the Designer's estimate may create a cost condition, and the Designer may be responsible for cost overruns⁽⁹⁾ which exceed the cost condition.⁽¹⁰⁾ If these initial cost estimates are merely calculated guesses, and not cost conditions, no liability arises.⁽¹¹⁾ The Owner bears the burden of establishing the existence of a cost condition.⁽¹²⁾ The Design Professional frequently argues against accepting liability for a cost condition by explaining that he has neither the luxury of controlling the many factors that influence the cost of a construction project nor can he estimate with certainty the cost of labor, time, equipment, or materials involved in a project.⁽¹³⁾ This lack of control of the costs by the Architect is an argument which is now incorporated in the B-141 document itself.

Some courts have declined to accept such defensive arguments, assuming that (a) even a written agreement does not embody the entire agreement of the parties,⁽¹⁴⁾ (b) costs are discussed by parties,⁽¹⁵⁾ and (c) cost is an essential element of the contract and may be explained by parol evidence.⁽¹⁶⁾ Courts have developed two general rules for when the actual or probable cost of a project exceeds the agreed cost condition. Essentially, the penalty for the Design Professional's creation of a cost condition and his failure to meet the condition is taken out of the Design Professional's fee. The majority rule holds that the Designer cannot recover his fee if the actual cost substantially exceeds the estimated cost; the minority rule holds that the Designer cannot recover his fee if the actual costs exceeds the estimated cost in any way.⁽¹⁷⁾ In the role as Design/Builder with a lump sum or cost capped project, the team has its fee (and maybe more) at risk in such circumstances. Consideration should be given to how the team members should apportion this risk between themselves.

The A-491 design-build contract does not clearly discuss which team members shoulder the risk of cost overruns, but assumes it will be the Contractor in Part 2 by requiring a fixed price commitment at that stage. In Part 2 of the A491, the Contractor performs no less than five budgeting exercises, and participates in value engineering. It would appear therefore, that the Contractor, not the Design/Builder, is responsible under a Design/Build arrangement for the preliminary evaluations of the budget.⁽¹⁸⁾ It is important to note that these estimates are to include and detail the Contractor's assumptions as to labor, materials and equipment.

In *CRS Serrine vs Dravo Corporation*, a Georgia Court, however, found that an Architect/Engineer ("A/E") was partially liable to the Contractor in a design-build agreement for failing to provide accurate data upon which the joint venture based its bid.⁽¹⁹⁾ This case involved a design-build fast track⁽²⁰⁾ project for the construction of a power plant in which fixed-price competitive bids were submitted on the basis of preliminary design and engineering done by the bidders for the Navy. The power plant ended up

costing substantially **(\$30,000,000!)** more to construct than the bid. The Contractor sued the A/E for breach of contractual and fiduciary duties imposed upon it under the joint venture agreement to (1) provide sufficient, accurate information to the Contractor upon which to base the bid, (2) to make reasonable efforts to design the project within budgeted quantities, and (3) to track quantities in its design and promptly notify the Contractor that budgeted quantities would be exceeded.⁽²¹⁾ The Court found the A/E at least partially liable for each of these theories of damages.

The Georgia Court also found that the joint venture agreement contained ambiguous language regarding the allocation of risk for increases in construction costs.⁽²²⁾ The Court considered extrinsic evidence and other sections of the joint venture agreement to conclude that the section allocating risk cannot be interpreted as shielding the A/E from all responsibility for increase in construction material quantities, even if such increases were caused by errors or omissions in the A/E's pre-bid or post-bid design and engineering work. In reaching this decision, the Court was also influenced by another section of the joint venture agreement that in effect provided for a \$750,000 deductible on damage claims against the A/E for errors in its design and engineering work.⁽²³⁾ If there was a deductible on damage claims against the A/E, the Court reasoned, then clearly the parties could not have intended to absolutely bar claims against the A/E for its mistakes.

The Court found that the A/E caused the Contractor about \$8,000,000 of the \$30,000,000 loss, but further reduced the award to the Contractor to less than \$6,000,000 on apportionment of fault. On the second appeal of the same case, the actions of the trial court were affirmed.⁽²⁴⁾

3. Redesign if over Budget; Liability to the Owner

In the 1996 A491, although the Contractor may provide value engineering services, the Contractor still appears to be liable for cost overruns.⁽²⁵⁾ All of these forms require the Contractor's compliance with changes made by the Design/Builder. And although they do not provide for the Contractor to redesign the project, they allow the Contractor to be penalized if and when the Design/Builder believes the Contractor's work will run over budget. So it is critical for each and every member to do their homework and agree on both the design and the budget, before entering into the construction portion of the design-build contract.

4. Control of the Design by Contractor or Architect; Liability to a Third Party

Design Professionals historically have avoided liability for damages caused by the Contractor's specific construction methods or techniques. The courts generally held that these were the responsibility of the Contractor.⁽²⁶⁾ However, as liability for problems on projects expanded (i.e., the search for deep pockets expanded), the Designers were drawn in to the fray. In 1958 a California court found that Design Professionals who were not directly controlling the Contractor could be nevertheless be liable because of their supervisory control of a project. The court found that because the Design Professionals had the ability to stop the work when the work did not comply with the contract documents, they also *had a duty to exercise that right* if the Contractor's progress did not adhere to the plans and specifications.⁽²⁷⁾ In 1967, the Illinois Supreme Court assessed liability against an Architect for its failure to stop work when the Architect, in its supervisory capacity, failed to stop work which created hazardous conditions.⁽²⁸⁾ Shortly thereafter, the AIA removed the Architect's "right to stop work" language in the Owner-Architect agreement, and gave it to the Owner to reduce the risk of liability for the Designer.⁽²⁹⁾

Today, the Owner-Architect Agreement has further attempted to reduce liability by allowing the Design Professional only to observe the work. The AIA B-141 document attempts to eliminate the Design

Professional's supervisory functions and liability by replacing the terms "supervise" and "inspect" to "familiarization" and "observe."⁽³⁰⁾ The Owner-Architect Agreement also attempts to reduce liability by specifically disclaiming control over the construction methods, means and techniques⁽³¹⁾ used in the project.

However, these word changes are not always sufficient to reduce liability. In a significant case in Texas, an action was brought by an Owner against an Architect for deficiencies in the Contractor's work. The appellate court held that a contractual provision in which the Architect was not responsible for the Contractor's failure to carry out work in accordance with the contractual documents did not exculpate the Architect from liability for the General Contractor's failure to carry out work in accordance with the contractual documents. The court's holding was in light of the Architect's contractual responsibility to keep the Owner informed of the progress of work and to guard the Owner against defects and deficiencies in the work of Contractor. *Hunt v. Ellisor & Tanner, Inc.*⁽³²⁾

However, in *Romero v. Parkhill, Smith & Cooper, Inc.*,⁽³³⁾ a later action brought by a third party (Subcontractor's employee) against an engineering firm for Engineer's firm's failure to supervise, control and inspect the construction site (that such negligence was the proximate cause of the injuries sustained by the employee), the court distinguished *Hunt*, because it dealt only with the contractual relationship between the Owner and the Architect, while the *Romero* case involved a suit by a third person for injuries resulting from the Architect's alleged breach of the contract.

The *Romero* court also considered the employee's argument that the Engineer, the Subcontractor, and the Owner were all engaged in a joint enterprise, and thus were jointly liable. The court declined to accept the joint enterprise arguments and found that, because the engineering firm retained less control over the work on the project (i.e. the Engineer was to "observe the progress of the executed work and to determine in general if such work meets the essential performance and designated features and the technical and functional requirements of the contractual documents"), the Engineer would not be liable. Therefore, the contractual inequality of control by the Engineer, compared to the control exercised by the Contractor, negates the essential control element of a joint enterprise.

The Economic Loss Rule is still alive and well in Texas, and will bar economic damage claims asserted against the Design Professional in the absence of privity.⁽³⁴⁾ But remember that the Economic Loss Rule does not impose a privity requirement if damages are not economic, i.e., if the damages consist of personal injury or property damage. Consideration of these cases leads to the conclusion that the degree of control will be an important issue in determining liability of the team members to a third party. While a joint venture agreement may assign liability internally for the risk of dealing with a third party, each team member may have still joint and several or comparative liability to the injured third party. The mere existence of a joint venture agreement will imply joint control of the project, and therefore, joint liability. Care should be exercised in assigning control in the teaming agreement, because the drafter will also be assigning liability at the same time. While allocation of control of the joint venture project to the Contractor exclusively during the construction phase will give the Designer a good argument to avoid liability to a third party, there is little comfort that can be assured these days.

The 1985 version of the A-491, Part 2, Paragraph 9.3 provided that "[i]f the Contractor fails to correct defective Work as required or persistently fails to carry out Work in accordance with the Contract Documents, the Design/Builder may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the Design/Builder's right to stop the Work shall not give rise to a duty on the part of the Design/Builder to exercise the right for benefit of the Contractor or other persons or entities." The 1996 version has dropped this language from Part 2 but retains the same intent by incorporating the A201, at least for now. When the 1997 version of

the A201 is released, this should be checked again.

The Design/Build contract scheme seeks to avoid the troubled waters of *Rodgers*⁽³⁵⁾ and *Miller*⁽³⁶⁾ by adding a disclaimer of liability to persons and entities other than itself.⁽³⁷⁾ In 1993, the Illinois Court of Appeals found that a Design Builder was liable for personal injuries sustained by the employee of a Subcontractor, even though the Subcontractor's work had been *unknown to* and *unapproved by* the Design Builder, where the Design Builder had the obligation to provide for safety compliance at the site and had the right to *stop the work if it is being done in a dangerous manner*. The court cited *Miller* and held that a defendant which retained a right to stop work could be liable under the Illinois Structural Work Act (Ill. Rev. Stat. 1987, ch. 48, paragraph 60 *et seq.*) because it retained control over the painting task.⁽³⁸⁾ Although the case did not refer to the right to stop the Contractor's work, the Court found that its right to stop the SubContractor's work created liability.⁽³⁹⁾

The extent of the Contractor's liability to third party employees, however, may be limited by the state workers' compensation laws, even if only one of the team members directly employs the injured employee.⁽⁴⁰⁾ In 1994, the Illinois Court of Appeals held that the same principles that apply to a partnership apply to a joint venture, and because a partner is an agent of the partnership for the purpose of its business, the members of a joint venture are agents of the joint venture and their duties and liabilities are the same as that of the principal, the joint venture.⁽⁴¹⁾ The appellate court held that an employee of the joint venture was barred from suing the joint venture or either of the joint venturers under any claim except for workers compensation claims.⁽⁴²⁾ The employee also argued that he was employed by only one of the joint venturers and thus was not barred from suing the joint venture itself or the other joint venturer. The court rejected this argument, holding instead that the liabilities of the members of the joint venture and the joint venture itself are coextensive.⁽⁴³⁾

5. Licensing Requirements.

Does the joint venture have to be licensed to practice architecture or to perform construction, or both? This will be governed by the law of the state where the project is located, and will vary from state to state. In a New York case, *Charlebois v. J.M. Weller Assoc., Inc.*,⁽⁴⁴⁾ the court considered the issue of whether the enforcement of the licensing statutes demands that design-build arrangements combining the services of Design Professional and Contractor be declared void in the absence of specific legislative sanctioning for the creation of such commercial relationships. In the case, a contract was entered into between Charlebois and Weller Associates, an unlicensed business corporation, which was not a professional corporation and was not qualified to practice engineering. The question presented was whether that design/build contract should be declared invalid as against public policy. The New York Court of Appeals ruled that the state education and licensing statutes and public policy were not violated because of the contract's express requirement that the Contractor engage a specified licensed person or professional corporation to perform the tasks for which the law specifically requires a license.⁽⁴⁵⁾ The court held that "it cannot be *** that an entire contract comprehending many services to be performed, including those calling for the services of licensed professionals, can be stricken because the party furnishing the services is not itself a licensed professional."⁽⁴⁶⁾ The contract indisputably required the engineering services of James M. Weller, P.E. and the policy sought to be protected by the education laws was adequately addressed by Contractor Weller Associates' engaging a properly licensed person.

Compare the harshness sometimes found in other state's licensing laws, and the penalties imposed on the party who is not licensed in the new role undertaken in the design-build scheme. For example, Alabama has a very provincial law that strips a design-builder of virtually all rights who is not licensed in

Alabama as a contractor, but who nevertheless contracts for 100% of the construction to a licensed contractor. The law allows the owner to sue the design-builder, but does not allow the design-builder to counter claim against the owner for unpaid money, or to cross claim and sue the licensed contractor who failed to perform the construction contract.⁽⁴⁷⁾

6. Is the Contractor liable for Design Errors?

In the joint venture, design/build arena, the Contractor does not escape liability for errors in design. The case law is clear that the design/build Contractor will be held responsible for design errors.⁽⁴⁸⁾ Indeed, some commentators on design/build contracts believe that when design/build services are offered, the Contractor should expect to be the single source of responsibility for all building failures.⁽⁴⁹⁾

7. Value Engineering/Cost of Redesign/Allocation of Savings

Value engineering has long been the province of the Contractor, who usually knows best the costs and capacities of his building materials. In the AIA B-141 agreement, the Design Professional is given the responsibility for "evaluating substitutions proposed by the Contractor and making subsequent revisions to Drawings, Specifications and other documentation resulting therefrom."⁽⁵⁰⁾ The Design Professional's selection of replacement or substitute materials subjects him to liability if the materials are found unsuitable for their intended use.⁽⁵¹⁾ The standard of care demands that before using new or untested materials or equipment, the Architect must determine whether this material or equipment has been successful, and if necessary, have tests made to ascertain that the products, materials, or equipment are suitable for the intended use.⁽⁵²⁾

In Design/Build contracts, this responsibility falls squarely, expressly, and some would argue appropriately, on the Contractor's shoulders as part of his Basic Services.⁽⁵³⁾ As the Design Professionals argued in *United States v. Rodgers & Rodgers Constr. Co.*, they do not possess firsthand knowledge of labor, materials, equipment and supply costs. Contractors are better able to determine these costs and calculate the costs and availability of adequate redesigns and shortcuts. But in a custom drafted, shared responsibility teaming agreement, the Design Professional will not be able to lay the liability entirely on the Contractor.

8. Compensation

In the teaming contract, the Design Professional and the Contractor must decide how to distribute payment from the Owner. Does the Designer take all of the front end money? Does the Contractor receive some of the money budgeted for design, for providing the value engineering? Is the Owner asked to make separate allocations to each venturer? Can a Contractor who does not have an architectural license split architectural fees with the licensed Designer who is his joint venture partner? Does the Architect share in the Contractor's fee for construction? How do they share profit and losses? Who controls the money? How is overhead allocated? Who bears the financial risk of a warranty expense? What if it is a mixed design and construction problem?

In a traditional situation the Design Professional is the progress checker between the Owner and the Contractor. Paragraph 2.6.10 of B-141 provides that the Architect's certification for payment constitutes his representation to the Owner that the work has progressed to the point indicated and that the quality of the work is in accordance with the contract documents. Each certificate of payment issued by the Architect is a representation that the Contractor is entitled to payment in the amount certified. Final payment to the Contractor is made after the Contractor has assembled all required documents and after

the Architect has reviewed the documents, the site, and has forwarded written warranties to the Owner.
(54)

In contrast, the AIA A-491 Design/Build contract provides that the Design/Builder shall make progress payments to the Contractor, from which payments the Contractor shall pay the Subcontractors. Each progress payment is based on the percentage of project completion, retainage, and materials costs.⁽⁵⁵⁾ Notably, the Contractor's application for each progress payment is not merely a request for payment for services rendered but is also a warranty to the Design/Builder (and Owner) that the work is of the quality required by the contract documents, that the materials provided are free and clear of liens, and that the Contractor is entitled to payment in the amount requested.⁽⁵⁶⁾

9. Traditional Professional Obligations vs. Obligations as a Team Member

In traditional construction contracts, because of the limited role of the Architect, he will be held to a different set of liabilities than Contractors. Over recent years, the liability of an Architect has been expanded to include liability to third parties for personal injury, property damage, negligence and intentional torts.⁽⁵⁷⁾

The traditional allegiance of the Designer to the Owner is substantially eroded in the design/build situation. The savvy Owner will no longer consider the Designer to be the Owner's representative for deciding disputes with the Contractor, approving pay applications, determining substantial completion.⁽⁵⁸⁾ Now the Architect may be perceived by the Owner as being in bed with the Contractor, a potentially evil alliance from the Owner's point of view. Who will provide the check and balance previously provided by both the Contractor and the Architect in their separate roles when they contract separately with the Owner? For example, now a decision being made by the Architect whether to accept a substitution from the Contractor may be influenced by the Architect's sharing in the savings to be earned by the Contractor as a joint venturer. Before, the Architect was looking out for the Owner's best interests, and perhaps has a disincentive to approve a substitution. This change in loyalty creates a host of ethical and moral questions for the Designer. Does it matter whether the Owner is sophisticated or not? Does the Owner need all of the protection traditionally afforded by the Architect?

The questions above are intended to raise the consciousness of the reader to the changing loyalties of the parties. But will the design/build joint venture always suffer from reduced quality because of the loss of the check and balance, by the teaming of the Contractor and the Designer? Perhaps sometimes, but certainly not always. The project quality may be enhanced by the early involvement of the Contractor. Cost and buildability factors may be evaluated much earlier in the project, which should have a positive influence on the design process. The Contractor will know the design better than in a pure bid/construct situation. The Architect will usually be more involved in the day to day administration of the construction phase of the project. Communication between the Contractor and the Architect will often be more frequent, which is good for all. The Architect will likely be more willing to spend the time necessary for resolving the Contractor's questions where the Architect has a financial stake in the Contractor's profit.

B. Construction Responsibilities

1. Purchasing

The purchasing of materials for a project is a responsibility generally of the Contractor, along with the purchase of all labor, equipment, tools, and other facilities and services necessary for the execution and

completion of the work.⁽⁵⁹⁾ Will the Designer get involved in this process in a design/build situation? Who will control cost and quality, choice of vendors, etc.? What if a particular SubContractor is acceptable to the Contractor, but not to the Designer? If savings are achieved, who should share in them and in what proportions? Care should be exercised in drafting the joint venture or teaming agreement to deal with these issues, and to determine who has control, and who should pay the cost.

2. Project Management

Management of the project should be carefully and clearly stated in the teaming agreement. Will the Designer have sole control of the design effort, or not? Will the control change after the preliminary phases, or will it stay the same throughout the project? When, if ever, will control shift to the Contractor? How will it shift? Will there be a transition? Will there be two separate managers, each responsible for his portion of the overall project? How would such an arrangement be coordinated? Will there be a tie breaker? Who will be responsible for Subcontractor design (shop drawings) review and coordination? Can the Contractor fire an ineffective employee of the design firm, and vice versa? Can the Architect cause a marginal Subcontractor to be replaced by a more expensive one? Would he choose to do so as readily, if that extra cost would be shared by the Architect? The Design-Builder is given control over selection of the Subcontractors in 9.1, Part 2 of the 1996 A491. Is this desirable?

C. Surety Bonds

Generally, payment and performance surety bonds are specialized contracts containing a promise by the Surety to pay certain claims against a project if not first paid by the party furnishing the bond, and promising to complete the bonded project if that party does not perform his contract.⁽⁶⁰⁾ Traditionally, the prime Contractor furnishes such bonds to the Owner. The Designer rarely furnishes such bonds. Who will provide the bonds in a joint venture?

1. General Indemnity Agreement

Surety bonds, issued by compensated sureties, are meant to function as credit accommodations to the Owner. But these are credit transactions in which the Surety anticipates no loss. Before issuing its bonds, the Surety will have conducted an underwriting analysis to satisfy itself as to both the Principal's capacity to perform the bonded obligations and its financial ability to fulfill its contractual and common law duties to indemnify and exonerate the Surety against any loss sustained or threatened as a result of the issuance of the bonds. The compensated Surety will not rely solely upon its common law rights of indemnity and exonerations, however. A condition uniformly imposed by the Surety is that its Principal and the individuals who control it execute an agreement of indemnity to augment the Surety's common law rights.⁽⁶¹⁾

The specific terms of the General Indemnity Agreement (GIA) will vary, but the common objective is to provide the Surety with a contractual right of recovery against the Principal and other named indemnitors, to facilitate the handling of bond claims, to require the disposition of collateral to secure the Surety against losses once claims against the bond are asserted, to ease burdens of proof in actions to recover losses and expenses, and to provide a security interest in the Principal's equipment, machinery, and receivables.⁽⁶²⁾ The GIA also establishes the Surety's right to pay or otherwise settle its bond obligations, thereby enabling it to avoid unnecessary and costly litigation while protecting its rights of indemnity against the Principal and the named indemnitors.⁽⁶³⁾

Most GIA's function to contractually extend the Principal's indemnification obligation beyond those

obligations to third parties for which the Principal is found to be liable by requiring indemnification for all losses sustained by the Surety in good faith as a result of its issuance of its bond on behalf of the Principal, whether or not the Principal is ultimately found liable to the bond claimant.⁽⁶⁴⁾

In the joint venture or teaming arrangement, will the Designer also be asked to indemnify the Surety? Whatever entity is issuing the bonds will have to indemnify the surety. Traditionally, this is only done by the Contractor. Remember, this is usually coupled with personal guarantees by the individuals who own the entity furnishing the bond. Should extra compensation be paid to the team member who signs the GIA, as compared to those who don't? If so, how much is fair to compensate for this risk? Will liabilities be split along the same lines that profits are being split?

Usually all who sign the GIA are jointly and severally liable to the Surety. Even a member of the joint venture who does not sign the GIA may still have some liability to the Surety. This is so because the Surety has equitable subrogation rights from the member who did sign the GIA. Thus, the Surety has the right to step into the shoes of the signing team member and sue any party, including the co-members, whom the principal on the bond could have sued. A New York Appellate Court addressed this issue under unusual facts.⁽⁶⁵⁾ Two Contractors had successfully bid on different parts of a public project. Only one of the Contractors signed a performance bond with a Surety. After execution of the Surety contract, the two Contractors formed a joint venture with the intention of performing both contracts together. Each Contractor then subcontracted their respective services under the two contracts to the joint venture. One of the Contractors, the one who signed the GIA, then breached its contract and the County sued that Contractor. The Surety, who was obligated to pay the County for all claims against this Contractor, then sought indemnification from the joint venture and the other Contractor.

Under the general rule, a General Contractor is able to shift the legal responsibility for defective work to the subcontractor who actually agreed to do the work through a right of recovery against the subcontractor. This situation was present in *Monroe* except for the fact that the subcontractor was a joint venture consisting of the general Contractor and yet another Contractor. The solvent member of the joint venture argued that the insolvent member cannot sue itself in indemnity since it, as a coventurer, is responsible to some degree for the wrongdoing, if any, and that is exactly what is being done when the Surety, standing in the shoes of the insolvent Contractor, sues a joint venture comprised of the two Contractors.⁽⁶⁶⁾

The Court rejected this argument on two grounds. First, the Court reasoned that because indemnity here is based on an implied right based on contract, the fact that the insolvent Contractor is a partner in the third-party defendant joint venture and probably in that sense partly responsible for any liabilities does not bar recovery in indemnity. Second, the Court found that as a matter of common sense, if the insolvent Contractor can contract with itself by contracting with a joint venture in which it is a coventurer, as it has done, it must also be able to sue itself by suing the same joint venture. Although *Monroe* involved a joint venture between two Contractors, these same principles should apply to a joint venture between a Contractor and an Architect or Engineer.

2. Bond Premium Cost

Bonding of the construction is frequently required by law or by contract. Typically, the Contractor provides the bonds for his work. The cost of bond premiums is a very real concern to Contractor.

Another issue that should be clearly resolved between the joint venturers is the right to receive payment and performance bond dividends and refunds. Because the amount of the bond premium for construction jobs is set by law, some bonding companies compete by returning to their insured a percentage of the

bond premium at the conclusion of a job. This may be important where you have a joint venture between Contractors, one furnishing the bonds, the other performing the contract. A recent Texas case illustrates the point.⁽⁶⁷⁾ The Contractor doing the work brought an action for conversion against the company furnishing the bonds from the Surety, when the latter company collected bond dividends (partial premium refund checks) from the Surety. The Design/Builder and Contractor should clearly set out in their underlying joint venture agreement who is entitled to such reimbursements.

3. Bonding of Design vs. Construction

Does the Contractor really want to indemnify the Surety against loss from defective design? Does the A/E want to indemnify the Surety from loss for defective construction? These are new risks for these players, and a feeling of comfort rarely accompanies new risks that are in the hands of others.

The laws of suretyship and guaranty will vary between each state, and will differ in varying degrees from such federal laws as the Miller Act. In Texas, for example, the liability of a Surety on its bond is determined by the language and terms of the bond,⁽⁶⁸⁾ and the Surety may stand on the letter of the contract.⁽⁶⁹⁾ Further, the Surety is not liable for the default of its Principal to perform any duty or obligation not fairly within the undertaking.⁽⁷⁰⁾ A Design/Build agreement may obligate the Surety to bond the design as well as the construction. The Surety should be put on specific notice as to the existence of the Design/Build agreement, if the design function and product are to be bonded along with the Contractor's performance. Does such a circumstance obligate the Surety to impliedly warrant habitability, fitness for purpose, and other implied warranties?

In 1992, a Louisiana Surety contracted with a Contractor to supply a Surety bond guaranteeing the performance of the contract in favor of the Owner. After construction was completed, the building developed cracks and serious foundation problems; the errors were determined to be of design, not construction. Nevertheless, on a theory of strict construction in favor of the obligee, a Louisiana Court of Appeals held that the Surety's agreement for the construction bond referenced specifically the Contractor's Design/Build agreement, and therefore applied the Surety agreement to the entire Design/Build contract and to the design failures of the project.⁽⁷¹⁾ The court found that "[s]ince the contract covered by the accessory promise placed both **design** and **build** responsibilities on the Principal, the **Surety** contract, when interpreted strictly, must be construed to cover both aspects of the project."⁽⁷²⁾

Citing the Louisiana court's decision, a Connecticut Superior Court, in *Newman v. CFC Construction, L.P.*⁽⁷³⁾ held a Surety company liable for the failures of an Architect when the Owner-Contractor Agreement specifically required the services of an Architect. This court held that (1) there was no question the Surety, by executing the bond, acquired obligations which were coextensive with that of the Principal,⁽⁷⁴⁾ (2) the express terms of the bond referenced entities and services other than the Contractor,⁽⁷⁵⁾ (3) the additional references in the bond, examined in context of the Owner-Contractor Agreement which required the services of the Architect in issue, compelled the conclusion that all work done by the Architect was intended to be covered by the bond, and (4) that state's statutes required a liberal reading of the bond.⁽⁷⁶⁾

The net effect of this is that the Contractor's Principal, who personally indemnifies the Surety by signing the GIA in a design/build situation, is likely making himself personally liable to the Surety for any loss incurred by the Surety for the failure of the Designer to properly design the project. This is decidedly not a traditional risk for an owner of a Contractor to be undertaking. And it is to be remembered that the

Contractor itself will also be an indemnitor to the Surety. The Contractor and its indemnitors should explore being named as additional insureds on the Designer's professional liability policy, or arranging such insurance for themselves.

II. Contract Administration Issues among Team Members

A. Insurance

1. General and Professional Liability

The addition of new responsibilities for the Contractor and Design/Builder heralds additional liability. The addition of liability brings the need for additional insurance of these risks. If the project is design/build, both the Architect and the Contractor will want liability coverage for the design portion of the project. Typically, the Contractor would not be able to get that insurance without teaming with the Designer. Even then it can be difficult to obtain. Watch for high deductibles and low limits. However, many insurers and sureties refuse to issue insurance or bonds for responsibilities beyond the ordinary scope of the Design Professional or Contractor. Many of the services for which Design/Builders and Contractors find themselves liable under A-491 are simply not covered by their insurers and sureties. Projects which are designed under a design/build paradigm create special circumstances regarding the insurance coverage. Most Contractors and Design Professionals are not Design Builders. They are one or the other, and are insured as one or the other, but not both.

For a Contractor, the general liability coverage protects the insured from claims for personal injury and property damage suffered by third parties resulting from certain perils and occurrences.⁽⁷⁷⁾ The problem, however, is that these traditional areas of Contractor coverage do not include coverage for design errors since design responsibility is not typically within the province of the Contractor. In fact, the typical general liability policy specifically excludes design liability from coverage.

The Architect's policy typically provides coverage only for professional liability and does not carry general liability coverage applicable to construction activities. Moreover, that Architect's insurance is predicated on the issue of professional negligence, rather than on the types of occurrences which trigger coverage under a Contractor's general liability policy. Consequently, the design/build situation often presents a case of incomplete coverage.⁽⁷⁸⁾ Many Architect/Engineer errors and omissions policies exclude any coverage on projects where the Architect/Engineer is performing any construction services. Only those firms which directly perform both functions and do a significant volume of Design/Build projects can be expected to maintain both types of coverage.⁽⁷⁹⁾

In practice it is unusual for insurance issues to dictate the relationships between the parties. The parties often view insurance as less important than the contract price, time for performance, and other legal, contractual and business issues. The insurance is usually procured just before project start, not at contract formation. Second, insurance is usually not addressed in any detail until the other aspects of the relationship and agreement are in place, and while it is not too late at such a point to focus on the insurance issues, the parties generally lack the inclination to reconsider the entire process and therefore choose to work around the problem or ignore it.⁽⁸⁰⁾

The 1996 A-491 Part 1 does not require the Contractor and the Design/Builder to acquire and retain individual insurance policies. Part 2 addresses insurance by incorporation of the A201. But this form addresses insurance to be provided by the Contractor without any mention of the design risk, and is completely inadequate in this regard. Hopefully, the 1997 A201 will do better when it is issued, but these new provisions must be checked by the practitioner. Much thought needs to be given to these risks,

the shifting of these risks by the indemnity clauses, and what insurance products (at what cost) should be employed to deal with our litigious society.

2. Wrap up Programs/Project Insurance

Wrap up programs are a type of global insurance policy usually seen in the larger construction projects. A wrap up program can be taken out by an Owner to provide broad coverage for items such as worker's compensation for everyone on the project.⁽⁸¹⁾ In a Design/Build situation, the Design/Build joint venture may take out such a global policy. Because an insurance policy's coverage will only apply to those beneficiaries named in the policy, it is important to identify the beneficiaries covered by the global policy. This may be a difficult task.

III. Post Construction Issues

A. Warranty Liability: Expense and Control

Even if the parties manage to complete the Project on time, in budget, and without litigation (yet), liability follows the parties around for years after the last worker left the site. Personal injury, maintenance and warranty problems crop up. Who was at fault? Who is contractually committed to fix it? For how long? Is it a design problem, a construction problem, a maintenance problem, and act of God, or some combination of all?

Generally, the Uniform Commercial Code ("UCC"), adopted in some form by most states, does not apply to typical construction contracts between owners and general Contractors because Article 2 of the UCC is restricted to transactions involving a sale of goods, not a sale of services. Nevertheless, transactions in connection with a large construction project often involve the sale of goods within the meaning of the UCC. Manufacturers and distributors of construction materials and equipment are sellers of goods and subject to the warranty provisions, express and implied, of the UCC.⁽⁸²⁾

The Contractor who uses the AIA A201 family of construction documents will find the contractual warranty provisions in Paragraph 3.5.1 and correction of Work obligations set forth in Article 12.⁽⁸³⁾ Typically, the Contractor will budget some warranty expense money when bidding or negotiating the project. A whole new set of warranty risks arise in the design build situation. Now defects in design, traditionally a shield employed by the Contractor when declining to honor a warranty claim, will no longer be available. How shall this extra risk be budgeted? How shall the cost be apportioned between the venturers? Should a specific portion of the profits be escrowed until the expiration of the warranty period? Insurance to cover warranty claims is generally not available, so this is a real risk to be dealt with in the teaming agreement.

B. Post Construction Liability Tail

Gaps in coverage for liability are to be avoided. Claims made and occurrence liability policies are each designed to cover only certain periods of time. Liability tails can be purchased to extend the coverage period. Have your client consult their insurance professional or risk manager.

C. Statutes of Limitations and Repose

Statutes of limitation vary from state to state. With a number of states applying the discovery rule for commencement of the statutes of limitations, the time limit for a professional's liability, and the

subsequent need for professional malpractice insurance, can be indefinite.⁽⁸⁴⁾ To limit this exposure, some states have now passed statutes of repose, which cut off the otherwise unlimited discovery period.⁽⁸⁵⁾ By way of example, we will look at Texas, New York and California.

1. Texas

The State of Texas has ten year statutes of repose governing the liability of Architects, Engineers, and Contractors.⁽⁸⁶⁾ The ten year period begins with substantial completion. The Dallas Court of Appeals discussed the interaction of the Texas statutes of limitations and repose in *Dallas Market Center Developing Co. v. Beron & Shelmire* with regard to contract claims.⁽⁸⁷⁾ The Dallas Market Center (DMC) brought an action for defective masonry work on the Anatole Atria more than ten years after construction was complete. The Dallas appellate court upheld the trial court's granting of summary judgment for the defendants and held that the statute of repose could cut off the right to sue for defective work even before the defect could have been discovered, and notwithstanding claims of fraudulent concealment.⁽⁸⁸⁾ Moreover, in 1994, the Texas Supreme Court held that Texas' statute of repose passes constitutional muster.⁽⁸⁹⁾

Compare *El Paso Associates, Ltd. v. J.R. Thurman & Co.*,⁽⁹⁰⁾ where the court of appeals ruled that although the purchase of certain real property occurred on July 20, 1981, there was some evidence indicating the discovery of the defect (structural problems) in December of 1981. There also were inspection reports in 1984 and 1985. The claimant had brought the lawsuit some years later and the trial court granted defendant's summary judgment based on its defense of limitations.⁽⁹¹⁾ The Court of Appeals reversed and remanded the case back to the trial court. Among the various causes of action was Texas' very expansive consumer protection law: the Deceptive Trade Practices Act ("DTPA").⁽⁹²⁾ The DTPA has a two-year statute of limitations, but is subject to the discovery rule. The statute does not begin to run until the date the consumer discovered, or should have discovered in the exercise of reasonable diligence, the deceptive act or practice (defective work). This statute is a real headache for Texas Contractors, because plaintiffs use it to get around contractually limited warranty periods. Moreover, the DTPA is not just a problem for Contractors. It has been applied successfully against Architects for breach of the implied warranty of good and workmanlike performance, as established in *Melody Home Manf'g Co. v. Barnes*.⁽⁹³⁾ The application of the DTPA to Contractors and to Architects in Texas increases the threat of consumer protection claims asserted against teamed construction efforts, such as Design/Build contracts.

2. New York

In New York, a cause of action against a Contractor for defects in construction generally accrues upon completion of the actual physical work. Unlike Texas, assertions of fraud and negligence do not serve to extend the life of the plaintiff's claim, which is governed by the six-year statute of limitation applicable to contract claims.⁽⁹⁴⁾ New York's consumer protection statute, N.Y. C.L.S. Gen. Bus. § 349 (1994), has been applied to construction scenarios with limited success. In one situation, a homeowner's complaint against a home Builder was dismissed insofar as they alleged deceptive business practices under CLS Gen. Bus § 349 and 350-d. The case turned on whether the homeowners failed to state facts showing that they relied to their detriment on deceptive practices occurring after effective date of statutory provisions creating a private cause of action.⁽⁹⁵⁾ The court held that the plaintiffs' causes of action for breach of the implied warranties of workmanlike construction and habitability were properly dismissed as to those plaintiffs who lacked privity with defendants.⁽⁹⁶⁾ Logically, the union of the Design Professional and the Contractor in Design/Build situations may establish privity for purposes of the New

York consumer protection laws, where privity has previously been a good defense.

3. California

The state of California provides a ten year statute of limitations on actions based on latent defects or deficiencies in development of real property, including actions against construction sureties or actions for indemnity.⁽⁹⁷⁾ This statute imposes an absolute requirement that a suit arising out of a latent defect in real property be brought against the developer, or other persons named in the statute, within ten years of the date of the substantial completion of such development or improvement. Code Civ. Proc., § 338, subd. (2), limits the bringing of such an action to three years after discovery of the defect. The statutes, read together, limit the total time available for bringing such an action to ten years. The statutes are mutually exclusive and the action must be filed within the shorter of the two periods.⁽⁹⁸⁾ An action for damages for patent deficiencies (such as are apparent by reasonable inspection) in design, supervision, survey, or construction of improvement to real property, or injury to person or property resulting therefrom, are to be brought within four years after substantial completion of improvement, except that if injury to person or property occurs during fourth year, action may be commenced within one year after date of injury but not more than five years after substantial completion of improvement.⁽⁹⁹⁾ Therefore, actions for a latent defect must be filed within three (latent defect) or four (written obligation) of discovery, but in any event within ten years of substantial completion.⁽¹⁰⁰⁾ California has imposed a three year statute of limitations on liability created by statute, including consumer protection statutes.

4. The Teaming Agreement

The design/build joint venturers must determine the applicable law affecting their post-construction exposure, and deal with this risk in the teaming agreement. Insurance coverage and risk allocation are critical. Will there be some form of indemnification between the team members? Who will have the right of control on settlement or litigation of such a claim? Will each party have its own counsel, or share one? Consider the potential for conflicts. How will the cost of litigation and any deductibles be funded?

IV. National Form Contracts are just a Beginning.

The responsible practitioner will view printed form agreements issued by national organizations such as the AIA and the AGC as being biased toward their respective constituencies, and too broad to deal with all of the requirements of a particular transaction without substantial modification. They contain some really one-sided clauses.⁽¹⁰¹⁾ It is hoped that this paper has raised the consciousness of the reader, so that the many problems facing the design-build joint venturer will be discussed and addressed.

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1. See AIA A491, 1996 Ed.
 2. See AGC Document 420 (1993) and related forms.
 3. See AIA A101 and A201 1987 Ed. The AIA is updating these forms, and new versions are expected to be published later in 1997. New for 1996 is the incorporation of the A201 into the A491 Part 2 by reference. The incorporation clause refers to the then current A201, so be careful. Just by dating your A491 document, you will be deciding whether to incorporate the 1987 or the 1997 version of the A201.
 4. 23 Construction Contracts 57 (Practicing Law Institute 1981).
 5. See AIA B141 (1987).

6. See AIA A491 (1996) ¶3.1.2.
7. See ¶3.1.2 of the A491 (1996).
8. AIA Doc. B-141, Owner-Architect Agreement, 14th Ed., 1987, ¶ 2.2.2, (which provides in part that "[t]he Architect shall provide a preliminary evaluation of the Owner's program, schedule and construction budget requirements....").
9. Compare ¶ 5.2 of the B-141, which provides that the architect is not responsible for cost overruns other than the architect's cost in redesigning the project to meet the budget. Despite this contractual language, litigation often arises when costs overrun.
10. *White v. Kanrich*, 201 Cal. App. 2d 356, 20 Cal. Rptr. 37 (4th Dist. 1962).
11. *Jay Dee Shoes, Inc. v. Ostroff*, 191 Md. 87, 59 A. 2d 738 (1948); see also *Griswold & Rauma Architects, Inc. v. Aesculapius Corp.*, 301 Minn. 121, 221 N.W. 2d 556 (1974).
12. *Orput-Orput & Assoc. v. McCarthy*, 12 Ill. App. 3d 88, 298 N.E. 2d 225 (1973); *Town Planning & Eng'g Assoc. v. Amesbury Specialty Co.*, 369 Mass. 737, 342 N.E. 2d 706 (1976).
13. Foster, C. Allen and James S. Schneck, IV, "Construction and Design Law," § 4.6b.1 (1991) p. 71; see also J. Sweet, "Legal Aspects of Architecture, Engineering and the Construction Process," § 15.03(c) (3d Ed. 1985).
14. J. Sweet, *infra* FN 13, § 15.03(c).
15. *Williams & Assoc., Architects & Engineers v. Ramsey Products, Corp.*, 19 N.C.App. 1, 198 S.E.2d 67, 69 A.L.R. 3d 1348 (1973), *cert. den'd*, *Williams & Assoc. v. Ramsey Products Corp.*, 284 N.C. 125, 199 S.E. 2d 664 (1973).
16. *Reynolds. v. Long*, 115 Ga. App. 182, 154 S.E. 2d 299 (1967).
17. Foster & Schneck, *supra*, at 74 *citing* Annot., 20 A.L.R. 3d 778 (1968). See also *Griswold & Rauma, Architects, Inc. v. Aesculapius Corp.*, *supra*, at FN 11.
18. AIA Doc. A-491, Part 1, Design/Builder-Contractor Agreement (1996).
19. *CRS Surrine, Inc. v. Dravo Corp.*, 445 S.E.2d 782 (Ga.App. 1994), affirmed on second appeal, 464 S.E.2d 897 (1995).
20. If you look up "fast track construction" in a legal dictionary, you will find it listed under "litigation."
21. *Id.* at 784.
22. One section of this joint venture agreement provided, "Notwithstanding any of the forgoing, [A/E] shall have no risk, liability, or accumulation will occur or error and omission charges for construction material quantity variations if the actual quantities are different from those in the bid to the Navy." *Surrine*, 445 S.E.2d at 788. Apparently, some language was dropped. This typo complicated this \$30,000,000 lawsuit. The opinion does not mention who created this additional headache for the parties.
23. Section 9.2 of the joint venture agreement provided, "Notwithstanding Article 8.2, [A/E] shall not be liable to [Contractor] for any increase in the direct cost to [Contractor] to perform its scope of work resulting from [A/E's] engineering errors and omissions detected by [A/E] and noticed to [Contractor] subsequently to [Contractor's] expenditure of any costs in the performance of its work in reliance thereon up to a cumulative maximum cost to [Contractor] of . . . \$750,000; over and above which [A/E] shall be liable to [Contractor] for any such increases . . ." *Moran*, 445 S.E.2d at 787.
24. *Surrine*, 464 S.E.2d 897 (Ct. App. Ga. 1995).
25. See A491 ¶ 2.1.1-.12 (1996).
26. *Moundview Indep. Sch. Dist. Co. 621 v. Buetow & Assoc.*, 253 N.W. 2d 836 (Minn. 1977).
27. *United States v. Rodgers & Rodgers*, 161 F. Supp. 132 (S.D.Cal. 1958).
28. *Miller v. De Witt*, 37 Ill.2d 273, 266 N.E.2d 630 (1967).
29. *McGovern v. Standish*, 65 Ill.2d 54, 357 N.E.2d 1134 (1976), *overmarked in part by Emberton v. State Farm Mut. Auto Ins. Co.*, 71 Ill. 2d 111, 15 Ill. Dec.664, 373 N.E. 2d 1348 (1978). See generally, AIA A201 (1987).
30. AIA Doc. B-141, Owner-Architect Agreement, 14th Ed., 1987, ¶ 2.6.5.

31. AIA Doc. B-141, Owner-Architect Agreement, 14th Ed., 1987, ¶ 2.6.6.
32. *Hunt v. Ellisor & Tanner, Inc.*, 739 S.W. 2d 933, 937 (Tex. Civ. App.--Dallas 1987, writ den.) (holding that the first three sentences of paragraph 2.2.4 of the general conditions [of the Owner-Architect agreement] impose a non-construction responsibility upon the architect, for which responsibility the architect could be found liable.)
33. *Romero v. Parkhill, Smith & Cooper, Inc.*, 881 S.W. 2d 522, 528 (Tex. App.--El Paso 1994, writ den.).
34. *Southwestern Bell v. Delanney*, 809 S.W.2d 493 (Tex. 1991); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 717 (Tex. 1986); and *Thompson v. Espey Huston & Assoc.*, 899 S.W.2d 415 Tex. App.--Austin, 1995, no writ).
35. *United States v. Rodgers & Rodgers*, 161 F. Supp. 132 (S.D.Cal. 1958).
36. *Miller v. De Witt*, 37 Ill.2d 273, 266 N.E.2d 630 (1967).
37. A491 Part 1, ¶ 1.3 (1996). The issue is the exercise of control, contractual, or real.
38. *Cockrum v. Kajima Internat'l, Inc.*, 243 Ill. App. 3d 402; 610 N.E. 2d 1373; 1993 Ill. App. LEXIS 438; 183 Ill. Dec. 129 (4th Dist. 1993) appeal granted 152 Ill. 2d 556, 190 Ill. Dec. 885, 622 N.E. 2d 1202 (1993); see also *White Budd Van Ness v. Major-Gladys Drive*, 798 S.W. 2d 805 (Tex. App.--Beaumont 1990) writ *dism'd per curiam*, *White Budd Van Ness v. Major-Gladys Drive*, 811 S.W. 2d 541 (Tex. 1991).
39. It is further notable that the A201, by incorporation into the A491, specifically seeks to shift liability for personal and property injuries from the Design Professional to the Contractor.
40. *Moran v. Gust K. Newberger/Dugan & Meyers*, 268 Ill. App. 3d 999, 645 N.E. 489, 493, 206 Ill. Dec. 484 (1st Dist. 1994).
41. *Id.* at 493.
42. *Id.* citing *Smith v Metropolitan Sanitary District*, 77 Ill.2d 313, 396 N.E.2d 524, 33 Ill. Dec. 135 (Ill. 1979). In Texas, the current statutory definition of partnership recognizes that an association of two or more persons to carry on a business for profit will create a partnership, regardless of whether the association is called a partnership, a joint venture, or some other name. Tex. Civ. Stat. Ann. art. 6132b--2.02(a) (Vernon Supp. 1997).
43. *Moran*, 645 N.E.2d at 494.
44. 72 N.Y. 2d 587; 531 N.E. 2d 1288; 1988 N.Y. LEXIS 3361; 535 N.Y.S. 2d 356 (1988).
45. *Id.* at 1290, citing *Vereinigte Osterreichische Eisen und Stahlwerke v. Modular Bldg. & Dev. Corp.*, 64 Misc. 2d 1050, 316 N.Y.S. 2d 812 (1970) *mod. on other ground*, 37 A.D. 2d 525 (1971).
46. *Id.* at 1291.
47. *Failure of Building and Construction Artisan or Contractor to Procure Business or Occupational License as affecting Enforceability of Contract or Right of Recovery for Work Done--Modern Cases*, 44 ALR 4th 271.
48. *Dobler v. Malloy*, 214 N.W. 2d 510 (N.D.1973); *Co-Operative Cold Storage Builder, Inc. v. Arcadia Foods, Inc.*, 291 So. 2d 403 (La. Ct. App. 1974).
49. Avery, Richard, "Contractor Design Responsibility," Texas Bar Assoc., 7th Ann. Construction Law Conf. 1994, p. 9.
50. AIA Doc. B-141, Owner-Architect Agreement, 14th Ed., 1987, ¶ 3.3.4.
51. *St. Joseph Hosp. v. Corbetta Constr. Co.*, 21 Ill. App. 3d 925, 316 N.E. 2d 51 (1st Dist. 1974) Criticized by *Haas v. Cravatta*, 71 Ill. App. 3d 325, 27 Ill. Dec. 141, 389 N.E. 2d 226 (2d Dist. 1979).; see also *Greenberg v. City of Yonkers*, 45 A.D. 2d 314, 358 N.Y.S. 2d 453 (2d Dist. 1974), *aff'd Greenberg v. City of Yonkers*, 37 N.Y. 2d 907, 378 N.Y. S. 2d 382, 340 N.E. 2d 744 (1975). Accord, *White Budd Van Ness v. Major-Gladys Drive*, 811 S.W. 2d 541 (Tex. 1991).
52. Goodin, "Architectural Malpractice Litigation," 19 Am. Jur. *Trials* 231, 269 (1972).
53. AIA Doc. A-491, 1996, Part 1, ¶ 2.1.3-.11.
54. AIA Doc. B-141, Owner-Architect Agreement, 14th Ed. 1987, ¶ 2.6.14. Be aware that the doctrine of substantial compliance may apply even though the contract expressly states that final

payment should be contingent on full completion and the issuance of the architect's certificate.

Uhlir v. Golden Triangle Development Corp., 763 S.W.2d 512, 515 (Tex. App.--Ft. Worth 1989, writ ref'd n.r.e.)

55. As discussed *infra*, the Design/Builder's control of the Contractor's progression payments extends to the Design/Builder a mechanism of control over the entirety of the project.
56. AIA Doc. A201, incorporated by reference into the 1996 A491.
57. See Hatem, "*Liability of Design Professionals to Nonclients: Development & Theories*," Construction L. Adviser (Callaghan & Co. March 1984).
58. See AIA A201 1987 General Conditions.
59. AIA Doc. A201, General Conditions of the Contract for Construction, 1987, ¶ 3.2.
60. Schubert, Lynn, "Modern Contract Bonds- An Overview", The Law of Suretyship, American Bar Association, 1993, p. 3-1.
61. Shahinian, Armen, "The General Agreement of Indemnity," The Law of Suretyship, American Bar Association, 1993, p. 27-1.
62. *Id.*
63. *Id.*
64. ***Commercial Ins. Co. of Newark, N.J. v. Pacific-Peru Constr. Corp.***, 558 F.2d 948, 953, (9th Cir. 1977).
65. ***County of Monroe v. Raytheon Co.***, 602 N.Y.S.2d 743 (Sup. 1991).
66. ***Monroe***, 602 N.Y.S.2d at 749.
67. ***Cecil Pond Constr. Co. v. Ed Bell Investments, Inc.***, 864 S.W.2d 211, 213 (Tex. App.--Tyler, 1993, no writ).
68. ***Howze v. Surety Corp. of America***, 584 S.W. 2d 263 (Tex. 1979).
69. ***New Amsterdam Cas. Co. v. Bettes***, 407 S.W. 2d 307 (Civ. Ct. App.--Dallas 1966, writ ref'd n.r.e.)
70. ***New Amsterdam Bond Co. v. Bettes***, 407 S.W. 2d 307 (Civ. Ct. App.--Dallas writ ref'd n.r.e.).
71. ***Nicholson & Loup, Inc. v. Carl E. Woodward, Inc.***, 596 So. 2d 374, 389, reh'g denied (La. App. 4th Cir. 1992).
72. *Id.*
73. This case is unreported at No. CV-91-0318137-S, 1994 Conn. Super. LEXIS 3002 (Nov.28, 1994). Counsel is cautioned to make an independent determination of the status of this case.
74. *Id.*, citing ***Star Contracting Corp. v. Manway Construction Co.***, 32 Conn. Sup. 64, 66-67. 337 A.2d 669 (1973).
75. *Id.*, at p. 3.
76. *Id.* at p. 7.
77. Meyers, Robert, "Design Build Project Delivery," 1991, p. 125.
78. *Id.* at 126.
79. *Id.*
80. *Id.* at 127.
81. In Texas, this sort of broad coverage is governed by statute: "A subcontractor and prime contractor may make a written contract whereby the prime contractor will provide the workers' compensation benefits to... employees of the sub-contractor. [T]he contract may provide that the actual premiums (based on payroll) paid or incurred by the prime contractor for workers' compensation insurance coverage for ... employees of the sub-contractor my be deducted from the contract price or any other monies owed to the sub-contractor by the prime contractor. In any such contract, the sub-contractor and his employees shall be considered employees of the prime contractor only for purposes of the workers' compensation laws of this state ... and for no other purpose." Tex.Rev.Civ.Stat.Ann. art. 8307, Sec 6(a).
82. Henderson, John R., "Warranties and Latent Defects," Texas Bar Assoc., 3rd Ann. Construction Law Conf., 1990, p. 2.
83. See AIA A201 General Conditions 1987 Ed.

84. Foster & Schneck, *supra*, at § 30.17.
85. See generally Winters, "Statutes of Repose for Design Professional: A Survey," Construction L. Adviser (Callaghan & Co., May 1985).
86. Tex. Civ. Prac. & Rem. Code § 16.008 and 16.009 (Vernon 1986).
87. 824 S.W. 2d 218, 220 (Tex. App.--Dallas 1991, writ denied).
88. The constitutionality of statutes of repose have been challenged in many states. Check the law of the state of concern to the reader on this issue. The holdings around the country are not uniform.
89. **Trinity River Auth. URS Consultants**, 889 S.W.2d 259, 263 (Tex. 1994).
90. 786 S.W.2d 17 (Tex. App.--El Paso 1990, writ dism'd by agr.)
91. *Id.*, at 18.
92. Tex. Bus. & Com. Code § 17.46 *et seq.*
93. See also **White Budd Van Ness v. Major-Gladys Drive**, 798 S.W.2d 805 (Tex. App.--Beaumont 1990) *writ dism'd per curiam*, 811 S.W.2d 541 (Tex. 1991), *citing Melody Homes Manf'g Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987).
94. **Calamel v. Ridge View Realty Corp.**, 115 A.D. 2d 279; 496 N.Y.S. 2d 154 (4th Dep't. 1985); *citing Cabrini Med. Center v. Desina*, 64 N.Y. 2d 1059, 1061, 489 N.Y.S. 2d 872, 479 N.E. 2d 217 (1985); see also **State of New or v. Lundin**, 60 N.Y. 2d 987, 471 N.Y.S. 2d 261, 459 N.E. 2d 486 (1983).
95. **Butler v. Caldwell & Cook, Inc.**, 122 App. Div. 2d 559, 505 N.Y.S. 2d 397 (4th Dep't 1986).
96. **Butler v. Caldwell & Cook, Inc.**, 122 A.D. 2d 559, 505 N.Y.S. 2d 397 (4th Dep't 1986); *citing Miller v. General Motors Corp.*, 99 A.D. 2d 454, 89 N.Y.S. 2d 785, *aff'd*. 58 N.Y. 2d 993) (holding that "a plaintiff who is not in privity with the seller of the product which is alleged to have caused his injury possesses a cause of action in negligence or strict products liability as opposed to what has often been incorrectly labeled breach of warranty.")
97. Cal.Code.Civ.Proc. § 337.15 (1995).
98. **Liptak v. Dian Apartments, Inc.**, 109 CA. 3d 762, 167 Cal. Rptr. 440 (2d Dist. 1980).
99. Cal. Code. Civ. Proc. § 337.1 (1995).
100. **North Coast Business Park v. Neilsen Constr. Co.**, (1993, 4th Dist.) 17 CA. 4th 22, 21 Cal. Rptr. 2d 104, 1993 Cal. App. LEXIS 724, 93 C.D.O.S. 5326, 93 Daily Journal D.A.R. 8923 (4th Dist. 1993).
101. For example, ¶ 12.4 of the A491 (1996) requires the Contractor who does not receive full and final payment to formally demand arbitration within 30 days of receiving the Architect's final Certificate of Payment, or lose the claim by the Owner's accountant's report becoming final and binding on the Contractor! 30 days is too short a window for a forfeiture to occur. Whether that will be enforceable in light of statutes such as Texas' Sec. 16.070 of the Tex. Civ. Prac. and Rem. Code, which voids contractual limitations periods shorter than 2 years, remains to be seen.