CHAPTER 1

Introduction

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The premise of The Design-Build Deskbook is that there is substantial demand for the design-build construction process, but that use of design-build is sometimes constrained by licensing and procurement laws that presume a division of design and construction, effectively outlawing design-build. Nevertheless, design and construction firms are actively promoting design-build project delivery, touting single-source responsibility to meet the ever-increasing demand for efficient, swift project delivery. Interest in this kind of project delivery is also growing among owners. In response to the perceived demand for design-build, in the mid-1990s most of the major construction industry organizations began to publish positions on design-build. By the time the first edition of this book was published in early 1997, the American Institute of Architects (AIA), Associated General Contractors of America (AGC), Engineers Joint Contract Documents Committee (EJCDC), and Design-Build Institute of America (DBIA) had published or were in the process of developing design-build contract forms in recognition of the increased use of and interest in design-build project delivery. Since then, the development and revision of industry contract forms and manuals of practice have proceeded unabated.

1. Some of the information in the introduction on design-build highway projects and FHWA regulations was provided by Jim Butler and Tony Lehman of Smith Currie & Hancock, Atlanta, Georgia. They have our sincere gratitude for their contribution. The first edition of The Design-Build Process was published in 1997 with an introduction by Terry Galganski and Jim Schenck, with input from the other members of the Steering Committee of Division 4 of the Forum on the Construction Industry at that time: John Heisse, Anne Gorham, David Hendrick, Jean Forneris, and Chris Whitney. The introduction to the second and third editions borrowed heavily, and gratefully, from their original work. This introduction does the same. The author has merely tried to update the introduction to reflect recent developments in the law. The author also acknowledges the editorial and research assistance of his partner, Paul Davis.
The industry response to interest in design-build is discussed at length in the second and third chapters in this edition on standard contract forms.

The first edition of this book mentioned other empirical evidence that design-build was being used more often. For example, we noted that the DBIA had been growing steadily. According to Jeffrey L. Beard, at that time Executive Director of the DBIA, membership had risen from the initial 11 members to 30 by year-end 1993, to 75 a year later, to 150 by the close of 1995, and to 230 as of August 1996. Today DBIA has 16 regional chapters and over 300 companies as members. J. Angel Martinez, AIA, speaking at the AIA 2003 National Convention, estimated that design-build project delivery had grown to encompass 40 percent of the construction market in the United States.2

The insurance companies that underwrite liability insurance for design professionals and bonds for construction companies continue to report an increase in requests for design-build insurance policies, endorsements, and bonds.3 This subject is discussed in detail in Chapter 4 of this book. Also, legal commentators increasingly are tracking case law developments related to design-build.4

Corresponding to the increasing interest in design-build has been a change in construction economics over the past quarter century. Commentators have noted a number of economic factors that seem to be driving owners to select design-build, such as:

- More complex transactions at the inception of projects, between the owner/developer, the end user, and the lender/equity financier, which create a need for definite budgets very early in the project or program;
- Instability in the financial markets, which provide increasingly greater amounts of debt financing for commercial and institutional projects, and which can have a dramatic effect on project costs if the project duration is extended;
- The increasing technological complexity and innovation in building materials components and systems, which in turn is causing product

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2. The Design-Build Dateline, the newsletter of the Design Build Institute of America, contains regular updates on legislative changes around the country relating to design-build, as well as many articles on the volume of design-build construction in place. Archive articles can be obtained by members or purchased through www.dbia.org.

3. Several insurance carriers, including CNA and Zurich, have provided insurance policies or endorsements since early 1995 to close coverage gaps in design or construction risks that firms solely performing professional services or construction work usually have.

suppliers and fabricators to take on more and more responsibility for
design and quality control;
- Because of the factors above, a desire to complete projects on a faster
track than might have been customary in the past;
- Concern about claims, disputes, and litigation, which drive up con-
struction costs and transaction costs for the project; and
- Globalization, which is introducing design-build type delivery prefer-
ences seen in other countries.

Design-build proponents believe, and insist to their customers, that design-
built fosters teamwork early in the project; helps during the early budgeting,
programming, team-building, and financing stages of the project; fits with
modern project management techniques and fast track procedures designed
to speed the process; integrates design and quality control responsibility; and
minimizes disputes, at least between the owner and the design-builder. These
virtues appear to many to neatly address all of the aforementioned economic
factors, and have prompted an increasing number of owners to experiment
with what once was an infrequently used method of project delivery. Chapter
2 contains a good discussion of the pros and cons of design-build from the
owner’s point of view.5

The bulk of this book is devoted to an analysis of the legal constraints on
the use of design-build. For example, several jurisdictions require that design
professionals, contractors, and/or their firms be licensed or registered. In
some instances, these regulations prohibit construction firms from providing
design services, or prohibit design firms from offering construction services.
It follows that the regulations inhibit design and construction firms from
pursuing or entering into design-build contracts as a sole source. These con-
straints apply to both private and most public projects. Therefore, firms that
might wish to serve as a single source of design and construction services
need to fully appreciate and understand the registration prerequisites and
prohibitions.

To understand and appreciate the constraints on design-build project
delivery, several general public policies must be understood. Underlying
the architect/engineer licensing laws are the convictions that there must be
independent professional judgment and that public safety is paramount.
A good example is found in New York. New York (as well as several other

5. For an overview of other commentary on design-build, see the Building Futures
Council Report on Design/Build as an Alternative Construction Delivery Method for Public
Owners, January 1995; the many insightful publications of the Design Build Institute of
America, headquartered in Washington, D.C.; the proceedings of the Annual Meeting of the
ABA Forum on the Construction Industry, Changing Trends in Project Delivery: The Move to
Design/Build, April 1995; and the proceedings of the Mid-Winter Meeting of the ABA Forum
on the Construction Industry, Withstanding the Tremors: The Golden Rules for a Rock-Solid
jurisdictions) prohibits ordinary business corporations from offering professional design services. This restriction is an effort to preserve and promote the independent professional judgment of design professionals. The public policy underlying the professional design corporation laws is that professionals must be able to exercise independent professional judgment, which they might be unable to do if they are beholden to shareholders, officers, or directors who are not licensed professionals and who are more interested in profits or job security than professional responsibility. When a corporation undertakes to perform both the design and the construction of a project, the concern is that the independent judgment of the individual design professionals employed by the company, and thus public safety and welfare, will be compromised. Consequently, in these jurisdictions, firms wishing to perform design services must be organized as partnerships, professional corporations, or limited liability companies owned and controlled by licensed design professionals. These laws present a substantial hurdle to any ordinary business corporations wishing to enter into design-build contracts, including construction contractors.

Another common constraint on design-build is inherent in many public bidding laws. In the past, private sector clients have been more likely than their public sector counterparts to select design-build project delivery. The disparity exists because in many jurisdictions the procurement of design and construction services on public projects must be conducted separately. Typically, the selection of a design professional must be based on qualifications. After the design is completed, construction firms are selected based on low bids—the lower, the better. Some jurisdictions actually require that the designer and contractor be separate firms, prohibiting the design professional from providing construction work. Even in jurisdictions where there is no actual prohibition on the designer submitting a bid, there is no guarantee that the designer will be the low bidder on its own design. Any statutory regime that requires that construction documents be fully prepared and that contractor selection be by low bid is, essentially by definition, antithetical to design-build. Over the last several years, however, more laws are being enacted to allow public owners to select design-build, and more public owners are favoring this method of project delivery.

The public procurement laws of most jurisdictions are rooted in laudable public policies. These laws were originally designed to ensure open competition, discourage favoritism or collusion, and engender some fiscal responsibility. The selection procedures for design professionals are generally similar to the procedures set forth under the Brooks Act. Design firms are selected for their qualifications as opposed to low price. Design professionals typically must be hired directly by the governmental agency, owe fiduciary obligations to the government agency, and are discouraged from incorporating proprietary systems or specifications into project designs. This strategy is meant to

ensure that the design professional’s total loyalty is to the owner and the public, and not to the contractors.

In selecting contractors, the prevailing wisdom under many state procurement codes has been that any selection criterion other than price is so subjective that it invites collusion and waste. The notion of the “responsible bidder” is used not to select the best contractor, but instead to weed out the obviously incompetent ones or those whose bids are not responsive. To have effective price-based bidding, there must be fairly complete drawings and specifications on which to base the bids. Consequently, the design professional must be selected and engaged before the contractor (or contractors in multiple prime jurisdictions) can be selected. Only if the design professional could thereafter obtain the contract for the construction work would true design-build be possible. As mentioned above, some jurisdictions expressly prohibit the design professional from bidding on the construction work. Furthermore, even if the design professional is allowed to bid on the construction work, the work could go to another bidder, eliminating the advantages of single-source responsibility.

As the chapters in this book show, there have been a variety of statutory initiatives to lessen the constraints on design-build. On a national level, several organizations have begun to provide model statutes, rules, and procedures for use in these jurisdictions to legislate design-build procurement. Some examples include the Building Futures Council’s Report on Design-build, January 1995,7 and the AIA/AGC Recommended Guidelines for Procurement of Design-Build Projects in the Public Sector.8 DBIA has standing committees on licensure, policy, and best practices. As discussed in Chapter 5 of this book, Congress has enacted broad design-build procurement enabling legislation applying to all federal government agencies.9

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7. The full title of this report is Report on Design/Build as an Alternative Construction Delivery Method for Public Owners, which was prepared by the Committee on Management and Contracting Alternatives, the Building Futures Council, Georgetown, Maryland. This council is an independent, nonprofit corporation composed of senior executives of organizations engaged in every aspect of the construction process, representing private and public owners, planners, engineers, architects, contractors, lawyers, financiers, accountants, insureds, investors, and academia.

8. These guidelines were published in January 1995 by the American Institute of Architects and Associated General Contractors of America, and, equally important, endorsed by the Design/Build Institute of America, the Mechanical Contractors Association of America, and the Sheet Metal & Air Conditioning Contractors National Association. For an update, see The Architect’s Guide to Design-Build Services (Randy K. Dhar & G. William Quatman eds., 2003).

9. This design-build procurement legislation is found in Division-Federal Acquisition Reform and is cited as the Federal Acquisition Reform Act of 1996. For military agencies, the legislation can be found at 10 U.S.C. § 2305(a) and for civilian agencies can be found at 41 U.S.C. § 253.
Interestingly, however, despite the impetus of trade groups and the example set by the federal government, the statutory response to design-build in most jurisdictions has been more limited than in the federal government. With respect to procurement laws, the norm has been to adopt special legislation that enables specific agencies to use design-build on a limited basis, or allows design-build on specific types of projects. Also, few jurisdictions have completely overhauled their licensing and registration regulations, opting instead to allow sole-source provision of services in specific exceptional circumstances. North Carolina, for instance, now allows construction companies to offer engineering (not architecture) services, so long as the engineering work is a necessary and integral part of the firm’s construction services.

Given the fundamental and long-standing policies underpinning the licensing and public procurement laws of most jurisdictions, one would not expect rapid changes to clear the way for design-build. Nevertheless, in the third edition of this book we noted a trend to adopt broader enabling legislation favorable to design-build. In the intervening years, that trend has continued. Much of this legislation is cloaked in “best value” procurement language. In the selection of the project and the project team, “best value” is the consideration of a wide range of factors other than, or at least in addition to, the bid price of construction. These factors include, at a minimum, the qualifications of the project team, and the projected long-term performance and cost of the project. “Best value” procurement laws remove many of the impediments to design-build.10

The trend to authorize more comprehensive use of design-build is particularly notable in highway construction. Ten years ago, the federal government gave the states some incentive to experiment with design-build in highway construction. The initial opening for design-build in highway construction came with the passage of the Transportation Equity Act for the 21st Century (TEA-21) by Congress in 1998. TEA-21 required the Federal Highway Administration (FHWA) to establish regulations for the use of design-build contracting for highway projects using federal money. The FHWA promulgated its regulations in December of 2002, providing regulations in a question-and-answer format to allow for the easy understanding and use of these regulations in formulating state policies for use of design-build.

Five years ago, some states had not adjusted their statutes to allow the use of design-build on public projects or had failed to implement a statutory or regulatory scheme for its use. Several states authorized design-build projects, but in many cases only for pilot or specific projects. A few states autho-

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rized their transportation departments to use design-build, but there was no indication that any of those states were actually using design-build. A trend was growing, however, toward full implementation of TEA-21, including the creation of state-level regulatory schemes to use design-build for highway and other transportation-related projects. Arizona, Florida, Minnesota, New York, North Carolina, Ohio, South Carolina, South Dakota, and Washington had all established websites that included guidelines under which design-build contractors could construct certain projects.

Since 2005, federal policy on highway construction has continued to evolve. Use of design-build by the states and provinces has continued to spread. According to the authors of this edition of the book, all but two of the Canadian provinces clearly allow design-build for transportation projects. The list of states that have enacted design-build delivery programs for highway construction has grown in number to 25. Thirteen more states have pilot or limited programs of some sort. Most of these states have developed comprehensive rules and procedures to follow for design-build highway projects. Details can be found in the individual state chapters.

North Carolina is a good illustration of how one state has evolved and integrated design-build into its transportation construction program. The North Carolina Department of Transportation’s (NCDOT) design-build policy and procedures took effect in January of 2000 and were revised in 2007. The information contained in this overview is drawn from the booklet Design-Build Policy & Procedures, authored by the North Carolina Department of Transportation.12

NCDOT identifies five categories of projects appropriate for design-build. These projects include emergency projects requiring expedited design and construction for the public good, projects with complex constructability issues, unusual projects that do not lend themselves to normal design-bid-build procedures, and projects for which acceleration is needed for the public good. NCDOT warns against using design-build on any project involving a railroad, as the review process for these projects may take three to four years for approval. NCDOT also retains the responsibility to prepare and obtain approval for all necessary environmental impact statements, permits, and mitigation of harm to the environment. While certain responsibilities still remain with NCDOT, utility conflicts and obtaining the right-of-way

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11. A good current discussion of nationwide design-build practices and projects can be found at this Federal Highway Administration website: http://www.fhwa.dot.gov/construction/contracts/pubs/dbpractice/a01.cfm.

are identified as issues that may require either NCDOT or the contractor to coordinate.

Design-build teams are evaluated and selected through a two-step process. This process includes short-listing that, in essence, prequalifies the design-build teams on a project-specific basis. NCDOT’s prequalification process begins with advertising a request for a Statement of Qualifications (SOQ) from all interested engineers and contractors. Once the SOQs are received, a short list of firms is selected based on qualifications.

NCDOT must address and, as appropriate, include information in their Request for Proposals (RFP) to the short-listed firms. The RFP must include: the design services required, the construction engineering requirements, the construction services required, quality assurance requirements, project access, engineering review, utilities relocation, removal of existing project features, survey requirements, formatting of final documents, and NCDOT’s responsibilities under the contract. Furthermore, the RFP is expected to state minimum staff experience requirements, geotechnical requirements, computer services, issue resolution processes, required bonding, required insurance, and public and municipal involvement in the project. The policy admonishes the department to make the design-build requirements and services clear and complete. The RFP also must include any information, data, and services that the department will furnish. This RFP is supposed to describe the project requirements completely and in a manner that is easily understood and interpreted. If there are questions concerning the RFP, NCDOT project managers are required to address all the firms in writing to issue clarifications on any questions posed. There is also a pre-proposal meeting for the short-listed firms.

The technical proposal is then evaluated based upon project design, project construction, understanding of the project, schedule, and problem resolution. The proposal must address clearly the invoicing and payment process for the entire project. The proposal must include a way to track Disadvantaged, Women, and Minority Business Enterprise (DBE/WBE/MBE) participation. The project schedule will specify the time frames for events such as design development drawing or construction document completion, submittals, project access requirements, and whether phased construction will be used.

A technical review committee (TRC) composed of at least five NCDOT employees nominated by the State Alternative Delivery Engineer reviews the proposals. The selection process is based both upon technical quality and price. The design-builders involved present their proposals to the TRC. The TRC is then required to determine if the proposal as submitted is responsive to the RFP. Each responsive technical proposal is then evaluated based upon the criteria previously provided to the design-build contractors. Each proposal is rated upon both a technical level and a financial level. The technical score is to comprise between 15 and 50 percent of the overall rating of the proposal. This percentage is multiplied by each responsive bidder’s price to provide what is called the “quality value.” The quality value is then subtracted
from the cost of the proposal to generate an adjusted price. The design-build contractor supplying the lowest adjusted price will obtain the contract.

North Carolina's process is fairly typical of the process followed by each state with an active design-build transportation program with some minor exceptions. For example, Missouri's design-build procedures allow unsuccessful bidders to receive a stipend to partially compensate them for the costs of proposal preparation as federal regulations allow. The federal regulations allowed states to craft their own policies in a manner consistent with TEA-21 without creating a strictly regimented program that must be followed. The regulations only specified the size of project for which federal monies may be obtained for a design-build project and other federal regulations concerning environmental issues that must be met.

As design-build highway construction becomes a more commonly selected method of project delivery, the approaches and procedures utilized will undoubtedly become more varied. This will require a refinement of the enabling regulations and statutes to keep pace with the innovations of the highway construction industry.

To those owners, contractors, and design professionals who wish to experiment with design-build, the licensing laws and public procurement laws can be bewildering. Within single jurisdictions, the sometimes vague definitions and jurisdictional boundaries between professions and trades complicate licensing laws. Procurement rules can vary from agency to agency, and project to project. Confusion increases when one observes that the laws vary widely from jurisdiction to jurisdiction.

The materials in this book have been assembled to provide a road map to design or construction firms wishing to pursue design-build projects in each of the 50 jurisdictions, the District of Columbia, and the provinces of Canada. The format for the chapters dealing with individual jurisdictions follows the same format used in the first three editions. To ensure some consistency and uniformity among the various design-build state surveys, we provided each author with a hypothetical client and a list of issues about licensing and procurement regulations to address from the point of view of this "client." We used the following hypothetical client, which we identify as an engineering constructor:

Client wishes to meet with its lawyer to discuss, among other things, its ability to pursue design-build projects with its existing private and public clients. Client is a corporation that has less than 50 percent of its shareholders as architects or engineers. It has been in the engineering business for many years and is willing to obtain the necessary in-house capabilities to perform construction work if its pursuit of

13. 23 C.F.R. § 636.112.
design-build projects is feasible throughout the country. As a result of its desire, what does the client need to understand before proceeding to seek and undertake these projects?

We then provided the following outline to shape each survey:

I. Private Projects
   A. What are the applicable state statutes?
      1. Architecture/Engineering license requirements:
         a. Definition of the practice of architecture or engineering
         b. Unique corporate restrictions, if any
      2. Contractor license requirements:
         a. Definition of construction
         b. Categories of construction
   B. Relevant case law
      1. Recommended course of action if:
         a. Client wishes to pursue design-build project with its own forces.
         b. Client wishes to subcontract the construction services it presently does not have the capabilities to perform.
         c. Client wishes to pursue a joint venture approach.
      2. Other issues?

II. Public Projects
   A. What are the applicable state statutes?
      3. Any actual experiences.
   B. Relevant case law
      1. Recommended course of action if:
         a. Client wishes to pursue design-build project with its own forces.
         b. Client wishes to subcontract the construction services it presently does not have the capabilities to perform.
         c. Client wishes to pursue a joint venture approach.
      2. Other issues?

For the earlier editions of the book, the Steering Committee determined that seven fundamental questions were being addressed in each survey, and that it would be beneficial if we could somehow present the answers to these questions at a glance. The Committee then presented these questions to the respective authors, with some further explanation of the intent behind them, so to elicit answers of “Yes,” “No,” or any variation to either one of these answers given the unique law in each particular jurisdiction. For the third edition, the authors were presented with the same questions, plus an additional question on highway department projects. The eight questions posed in the third edition are also posed to the authors in this fourth edition.
As with the earlier editions, the Committee’s editors have compiled the responses and summarized them on separate maps of Canada and the United States, with each map dealing with one of the fundamental questions. Each question, the additional background information that was provided to each author, and our analysis of the new results follow. Please understand that many authors had to qualify their answers to the questions, and most insisted that specific fact patterns could affect the answers. Also, even though the use of design-build has been expanding for over 15 years, there is still limited judicial guidance on the statutes and regulations discussed in this book. Consequently, we expect that some lawyers, commentators, and judges will disagree with the answers that the authors and editors have given to some of the questions. We welcome input and comments for later editions and updates. Meanwhile, the reader can find qualifications and more details in the individual chapters and in the appendices to the chapters where the answers to the following questions are answered for the particular jurisdiction.

Map 1: Professional Design Corporation Contracting for Design-Build Work with Its Own Forces

Question:
Can a professional design corporation, organized and licensed according to the relevant state laws, perform design-build work with its own forces under a direct contract with an owner?

Background Information:
The term “professional design corporation” is defined here as a special corporation, recognized by state law, which is owned and controlled predominantly by architects, engineers, or other allied licensed professionals.

This question assumes, for the sake of discussion, that the professional design corporation employs architects or engineers who are properly licensed, and satisfies the requirements for a general contractor’s license, if any. Indeed, in about half of the jurisdictions, it appears that no general contractor’s license would be required, either because such licenses are not required at all by the jurisdiction or because it is sufficient if an employee or subcontractor holds a contractor’s license.

In those jurisdictions that do require general contractor licenses, a professional design corporation could probably obtain one from the pertinent agency. In some jurisdictions, all that is required is payment of a fee. In other jurisdictions, more stringent requirements apply, but hypothetically, at least, a professional design corporation should be able to obtain references, demonstrate financial responsibility, and demonstrate competence. Nevertheless, it may be improper for a professional design corporation to provide or subcontract construction labor, materials, equipment, or related services. The problem is that some of the professional corporation acts prohibit professional corporations from engaging in businesses other than the professions they were organized to render.
Question: Can a professional design corporation, organized and licensed according to the relevant state laws, perform design-build work with its own forces under a direct contract with an owner?

Caveat: To understand the assumptions underlying this map, please see introduction, supra.
Map 1

**Question:** Can a professional design corporation, organized and licensed according to the relevant state laws, perform design-build work with its own forces under a direct contract with an owner?

Yes – See Text for Limitations and Regulatory Requirements

No – See Text for Exceptions or Exemptions

**Caveat:** To understand the assumptions underlying this map, please see introduction, *supra.*
In other words, such corporations are limited purpose corporations. Engaging in businesses or professions outside of the charter of the corporation would be professional misconduct and unlawful under the statute.

Results:
In 2003, there appeared to be 21 jurisdictions where it might be unlawful for a professional design corporation to engage in the construction business. There were also a handful of jurisdictions where public owners have been given the ability to make some exceptions. In 2009, the number of jurisdictions where it might be unlawful for a design firm to engage in the construction business had declined to 16.

Map 2: General Contractor Contracting for Design-Build Work with Its Own Forces

Question:
Can a general contractor, organized and licensed according to the relevant state laws, perform design-build work with its own forces under a direct contract with an owner?

Background Information:
This question assumes that we have a general business corporation that is a general contractor. If required by the particular jurisdiction, it has the required contractor’s license. This contractor has several employees who are licensed architects or engineers, but the company is not licensed to perform design services, and would not qualify as a professional corporation.

Results:
In 2003, restrictions applied in at least 21 jurisdictions. Basically, those jurisdictions had professional corporation laws that required that design firms be owned and controlled by licensed design professionals. If a construction company had enough licensed professionals to qualify as a professional corporation, and registered as such, it would run into the problems discussed in connection with Map 3. As of 2009, restrictions appear to apply in only 16 jurisdictions. In some of those, the restrictions limit design-build under some circumstances, but do not outlaw it outright.
**Map 2**

**Question:** Can a general contractor, organized and licensed according to the relevant state laws, perform design-build work with its own forces under a direct contract with an owner?

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**Introduction**

**Caveat:** To understand the assumptions underlying this map, please see introduction, *supra.*
A few jurisdictions have case law that interprets the professional corporation laws and describes the public policy behind the laws.14

Map 3: Engineering Constructor Performing Design-Build Work with Its Own Forces

**Question:**
Can an engineering constructor, such as the company outlined in the hypothetical, which is organized and licensed according to the relevant state laws, perform design-build work with its own forces under a direct contract with an owner?

**Caveat:** To understand the assumptions underlying this map, please see introduction, *supra*.
Background Information:
The term “engineering constructor” refers to a business entity that employs licensed architects and engineers, some of whom are shareholders or directors of the corporation. In jurisdictions requiring a certain percentage of licensed stockholders in order to perform architectural or engineering work, it is assumed that the engineering constructor satisfies such requirements.
Introduction

The differentiating factor between an engineering constructor and the general contractor in Question 2 is that the former can meet the design professional licensing requirements of many jurisdictions because its shareholder or director makeup contains sufficient numbers of licensed design professionals.

Results:
In 2003 18 jurisdictions appeared to prohibit our hypothetical engineering constructor from self-performing design-build work, mainly because an insufficient number of principals in the firm would have been licensed design professionals. Five jurisdictions appeared to restrict an engineering constructor from providing design-build project delivery regardless of ownership. As of 2009, five jurisdictions still restricted an engineering constructor such as the one in our hypothetical from providing design-build services to an owner. Fifteen more have restrictions that apply to either architecture or engineering, but not both.

Although the ownership requirements for a professional design firm may be met, some jurisdictions prohibit engineering constructors from performing design services if they also provide construction work. In Iowa, the separation of design and construction services is also supported by case law. In some jurisdictions, such as North Carolina, grandfather provisions provide that companies that were lawfully practicing architecture or engineering before laws were passed restricting such practice (1969 in North Carolina) may continue to do so.


16. In North Carolina, many companies wishing to do design-build work have tried to take advantage of the grandfather provision by buying inactive but grandfathered North Carolina corporations. This practice was so common some years ago that the North Carolina Secretary of State, in response to the growing demand, preprinted a large quantity of lists of domestic corporations that were formed prior to June 5, 1969, and sold them for a modest charge to lawyers or others who inquired about such companies. The lawyers would then hunt for inactive corporations that had words such as “architect,” “engineer,” or “contractor” in their names.
Map 4: Design Firm Contracting for Design-Build Work by Subcontracting the Construction Work

**Question:**
Is a design firm, which does not hold a contractor’s license, permitted to enter into a design-build contract with an owner and then subcontract the construction work to a general contractor?

**Background Information:**
This question focuses on whether those jurisdictions with contractor licensing statutes preclude design firms that are not licensed as contractors from providing design-build project delivery by subcontracting the construction work to a licensed contractor.

**Map 4**

**Question:** Is a design firm, which does not hold a contractor’s license, permitted to enter into a design-build contract with an owner and then subcontract the construction work to a general contractor?

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**Caveat:** To understand the assumptions underlying this map, please see introduction, supra.
**Introduction**

**Map 4**

**Question:** Is a design firm, which does not hold a contractor’s license, permitted to enter into a design-build contract with an owner and then subcontract the construction work to a general contractor?

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**Results:**
In about half of the jurisdictions, it appears that licenses are not required of corporations working as general contractors. Even in those jurisdictions that do not appear to require general contractor’s licenses, however, care should be taken by the design-builder to determine if licenses are required for pertinent specialty work, for public projects, or by the pertinent local city or county government.

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**Caveat:** To understand the assumptions underlying this map, please see introduction, supra.
In the other jurisdictions, some form of general contractor’s license will be required for the design-build project. As discussed above, in some jurisdictions a corporate design firm may be legally precluded from obtaining or using a general contractor’s license, and will have to explore the option of subcontracting the construction work to a firm that can hold such a license. In about 20 of the jurisdictions that do require general contractor’s licenses, the firm that is contractually bound to the owner must hold the license; it appears that the firm may not satisfy the license requirement by subcontracting with a firm that holds a valid license.

Map 5: General Contractor Contracting for Design-Build Work by Subcontracting the Design Work

Question:
Is a general contractor that is not licensed to practice architecture or engineering, permitted to enter into a design-build contract with an owner and then subcontract the design work to a design firm?

Background Information:
This question presents the issue raised in the New York Charlebois case. The issue arises when the firm that has a contract with the owner, and offers to provide design services, is not licensed to do so.

Results:
The responses to this question were diverse; the law is even more confused than it was at the time of the earlier editions. As of 2009, 53 jurisdictions allow such contracting with no impediments. As for the remaining jurisdictions, however, the answers vary widely. In some jurisdictions, the answer depends upon whether the design services being performed constitute architecture or engineering. In other jurisdictions, the answer varies for public and private projects. In a few jurisdictions, the authors simply had no answer.

In some jurisdictions, statutes or regulations authorize unlicensed contractors to subcontract design services. In a few jurisdictions, such as New York, where licensing laws might appear to restrict subcontracting, case law has sanctioned subcontracts. For example, Minnesota's statutory language would suggest that it would be unlawful to practice architecture or engineering services without a license since its statutes provide that it is unlawful to "solicit or to contract or furnish" such services unless so licensed (Minn. Stat. §§ 326.02(1), 326.03(1) (1994)). Its case law, however, would suggest otherwise.

17. See supra note 14.
18. For example, the Illinois Architecture Licensing Board and Department of Professional Regulation has issued regulations recognizing certain circumstances in which a person or entity, not otherwise licensed as an architect, can offer design-build services to a client. See Section 1150.85, “Acts Constituting the Practice of Architecture Pursuant to Section 5 of the [Architecture Practice] Act.”
Introduction

**Map 5**

**Question:** Is a general contractor that is not licensed to practice architecture or engineering permitted to enter into a design-build contract with an owner and then subcontract the design work to a design firm?

![Map of the United States](image)

**Caveat:** To understand the assumptions underlying this map, please see introduction, *supra.*

In some jurisdictions where delegation of design services to a subcontractor is allowed, the authority to do so is an administrative policy or regulation (e.g., North Carolina), or a judicial decision (e.g., New York), rather than a statute. Needless to say, regulations are easily overturned, and care should be taken to keep up to date in jurisdictions where the authority for subcontracting is a regulation or a judicial decision. It also bears mentioning that the Charlebois decisions in New York were very close decisions, with vigorous dissents in the appellate division and the court of appeals.
Question: Is a general contractor that is not licensed to practice architecture or engineering permitted to enter into a design-build contract with an owner and then subcontract the design work to a design firm?

Yes – See Text for Limitations and Regulatory Requirements
Limited by Discipline – See Text

Caveat: To understand the assumptions underlying this map, please see introduction, supra.

Even in those jurisdictions where the delegation of design services to a subcontractor is allowed, the identity of the designer of record and the subcontract arrangement may have to be disclosed to the owner on each project. This type of disclosure would also be a good idea in those jurisdictions where such delegation is not prohibited outright, but the authority to subcontract the design is not clear.
Map 6: Design Firms and General Contractors Forming Joint Ventures for Design-Build Work

Question: Are design firms and general contractors permitted to form joint ventures, limited liability companies, or limited partnerships to perform design-build work?

Map 6

Question: Are design firms and general contractors permitted to form joint ventures, limited liability companies, or limited partnerships to perform design-build work?

Caveat: To understand the assumptions underlying this map, please see introduction, supra.
Question: Are design firms and general contractors permitted to form joint ventures, limited liability companies, or limited partnerships to perform design-build work?

Map 6

Caveat: To understand the assumptions underlying this map, please see introduction, supra.
Background Information:
In some cases the proposed design-builder might be a joint venture consisting of partners that, collectively but not individually, have all requisite architect, engineer, and contractor licenses.

Results:
The survey results suggest that in most jurisdictions a joint venture composed of a design firm and a general contractor could offer to deliver a design-build project. In only a very few jurisdictions does it appear that legal impediments to such an approach exist. Again, the answers vary depending on whether the design services require architects or engineers, and vary between public and private projects. In ten jurisdictions, the law was unclear and the authors could not provide definite guidance.

Some subtle problems may lurk in the licensing and corporate practice laws of some jurisdictions. For example, most true joint ventures are distinct legal entities (partnerships), and as such may have to be licensed or registered separately from the individual joint venture partners. If the joint venture is organized as a formal limited liability company or limited partnership, it seems even more likely that a separate license for the new entity might be required. In most places this is a hurdle that can be cleared with proper and timely applications for the necessary licenses.

Furthermore, if the law prohibits ordinary business corporations from offering or performing design services, such that one of the joint venture partners, i.e., the general contractor partner, would be prohibited from providing design services, the joint venture entity might also be barred. Recall the public concern that decisions by design professionals not be compromised because of a shared profit motive with nonprofessionals who have ownership control of the business. In those jurisdictions where professional corporation acts are in force, it may be advisable to obtain advisory opinions from the licensing authorities before selecting the joint venture vehicle for the design-build team.
Map 7: Public Owner’s Authority to Utilize Design-Build Project Delivery on Transportation Projects

Question: Are public owners authorized to utilize the design-build method of project delivery for highway and transportation projects?

Caveat: To understand the assumptions underlying this map, please see introduction, supra.
Introduction

Map 7

Question: Are public owners authorized to use the design-build method of project delivery for highway and transportation projects?

Results:
Highway design-build was discussed at some length above in this Introduction. In the individual jurisdiction chapters, three of the authors could not give definitive answers. Only ten authors believe that design-build may not be used for transportation projects in their jurisdictions. Fifteen jurisdictions are still experimenting with pilot or limited programs. The rest of the jurisdictions allow design-build.

Caveat: To understand the assumptions underlying this map, please see introduction, supra.
Map 8: Public Owner’s Authority to Utilize Design-Build Project Delivery

**Question:**
Are public owners authorized to utilize the design-build method of project delivery for projects other than transportation projects?

**Background Information:**
This question focuses on the impediments to design-build created by conventional public procurement codes. Again, by requiring separate design and construction and cost-based bidding, many jurisdictions effectively preclude design-build.

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**Caveat:** To understand the assumptions underlying this map, please see introduction, *supra.*
Introduction

Map 8

**Question:** Are public owners authorized to use the design-build method of project delivery for projects other than transportation projects?

**Results:**
As of 2009, there are about 39 jurisdictions that allow largely unrestricted use of design-build on public projects. Fifteen jurisdictions have limited or pilot programs. In nine of those jurisdictions with limited authority, some agencies are permitted to use design-build, while others have not been authorized.

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20. For example, in North Carolina, owners can petition the State Building Commission for permission to use design-build on specific projects.
to do so. In four jurisdictions there is no clear answer. As for the remaining jurisdictions, the public procurement codes continue to be incompatible with design-build.

Design-build in the federal project arena has been significantly altered by the adoption of the Federal Acquisition Reform Act of 1996. This procurement legislation covers all government agencies, military or civilian. The federal law is discussed in detail in Chapter 5. The language of the federal act is very similar (and in some places identical) to what was proposed in the AIA/AGC Recommended Guidelines for Procurement of Design-Build Projects in the Public Sector.

Although some jurisdictions have moved to facilitate design-build, many jurisdictions continue to have rules and regulations that effectively prohibit or constrain the use of design-build. Also, there continues to be little consistency in the laws of the various jurisdictions and provinces. Regardless of the ease or difficulty of pursuing a design-build project in a particular state, these surveys provide a guide for owners, design firms, and construction firms to use to fashion effective and lawful design-build business associations and project contracts. We stated in the third edition that “it appears that design-build project delivery is here to stay.” Not only has design-build had staying power, but it continues to gain acceptance and legislative approval. Hopefully, this book will help us understand when and how we can organize a successful design-build enterprise.

22. See supra note 8.