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Project-Specific Professional Liability Insurance on Design-Build and Public-Private Partnership Projects in North America: A Path Forward

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In January 2022 Donovan Hatem LLP (“DH”) established a Task Force consisting of professional liability insurance underwriters, brokers, engineers and architects, and lawyers knowledgeable and experienced in various aspects of Project-Specific Professional Liability Insurance (“PSPL”) on Design-Build (“DB”) and Public-Private Partnership (“P3”) projects in North America. The members of the Task Force are identified on Attachment A.

Table of Contents

Task Force Mission Statement	2
Introduction	3
Task Force Principles and Disclaimers	4
Critical Issues	4
Task Force Comments on Critical Issues	6
Task Force Recommendations	30
Summary	31
Appendices	33
Appendix A: Task Force Members	33
Appendix B: Sample Proposal Phase Guidelines	35
Appendix C: Joint Code of Practice for Risk Management in Tunnel Works Approach	37

Task Force Mission Statement

The mission of the Task Force was to gather information and knowledgeable input on certain critical issues (“Critical Issues”) on DB and P3 projects in North America regarding the impact of (a) procurement and contractual practices, and (b) professional liability claims experience, upon the availability and capacity of PSPL for those project delivery approaches. Based on the discussion and evaluation of those Critical Issues, the Task Force has developed the recommendations set forth in this White Paper which are intended to address those issues, including improving procurement and contractual practices and PSPL underwriting approaches on DB and P3 projects and; thereby, enhancing the availability and capacity of PSPL on DB and P3 projects.

Introduction

The Task Force convened by Zoom conferences in 3 ninety-minute sessions on January 31, February 14 and March 21, 2022. This White Paper captures the key comments of Task Force members during (and in between) those sessions, and reports the Recommendations of the Task Force.

The diverse backgrounds, experiences, and specialized practice areas, of the Task Force members were of immense value in the generation of meaningful, realistic and balanced input. All Task Force members share significant expertise and specialization, as well as dedicated and genuine interest, in assessing the factors relevant to an objective and balanced understanding of the Critical Issues, which are attributes essential to the development of constructive and realistic recommendations to improve procurement and contractual practices on DB and P3 projects and associated PSPL underwriting, and thereby promoting the continued and increased availability and capacity of PSPL, and to do so in a sensible, pragmatic, responsible and prudent manner that serves the interests of Design Professionals, Contractors, Owners, other project participants, and professional liability insurers.

Above all, virtually all comments of Task Force members demonstrate the perceived and actual need for diligence in implementing appropriate improvements in procurement and contractual approaches in the DB/P3 contexts, which are often the root causes underlying the assertion of professional liability claims and significant losses on PSPL policies.

DH is especially grateful for the commitment, interest and input contributed by the Task Force members.

There was consensus of all Task Force members that “business as usual” is not a sustainable approach to prudently and constructively addressing the Critical Issues on a long-term basis, nor is such an approach perceived to be in the best interests of all project participants – Owners, Contractors, and Design Professionals – as well as professional liability insurers, both practice (corporate) and project-specific.

The Task Force members also shared a common view that effective and pragmatic solutions to the problems and challenges underlying these Critical Issues need to be diligently developed and implemented on a collaborative basis involving Owners, Contractors, and professional liability insurers and surety companies.

The serious concerns presented by certain DB and P3 procurement and contractual practices underlie and permeate throughout the Critical Issues. Those concerns are multi-dimensional; and based upon the discussions of the Task Force, the solutions similarly need to be multi-dimensional. To effectively address these concerns requires integrated, collaborative and contemporaneous efforts by and among all Primary Participants as well as the insurance and surety industries.

Task Force Principles and Disclaimers

The Task Force functioned within the boundaries of the following principles and disclaimers:

- Neither the opinions and recommendations included in the Task Force White Paper nor those of individual Task Force members represent the views or positions of any firm, business, organization or employer of any individual Task Force member, nor do they represent the views or positions of any organization - professional association, or industry with whom a Task Force member is or may be associated or is a member.
- The Task Force is committed to adhering strictly to the letter and spirit of antitrust law. Under no circumstances shall the Task Force activities be used or understood as a means for competitor companies to reach any understanding, express or implied, which tends to restrict competition or in any way to impair the ability of the Task Force members to exercise independent business judgement regarding matters affecting competition.

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Critical Issues

The Task Force focused its attention on 25 Critical Issues pertaining to PSPL on DB/P3 projects in North America. The list of Critical Issues was developed based upon industry research and discussions with potential Task Force members in November and December 2021. The next section of this White Paper reports the comments made by Task Force members concerning the Critical Issues. The final section of the White Paper sets forth the Recommendations of the Task Force.

The Task Force examined the following Critical Issues:

1. How do procurement and contractual practices on DB and P3 projects differ from the corresponding practices utilized on Design-Bid-Build (“DBB”) projects?
2. What is the relevance of those differences in terms of professional liability risk for Design Professionals typically insured under PSPL?
3. Are there reasons to distinguish between DB and P3 projects in responding to the preceding questions; and, if so, what are those reasons and how do they impact the PSPL underwriting and claims experiences?
4. To what degree do “megaproject” characteristics influence PSPL underwriting approaches to, and professional liability claims experiences in, DB and P3 projects?
5. What are the root causes of severity in PSPL claims experience on DB and P3 projects?
6. What are suggested modifications to procurement and contractual practices in DB and P3 projects that may improve PSPL underwriting and claims experience?

7. Are adverse/severity PSPL claim experiences in DB and P3 more acute and dominant in:
 - Public v. Private Projects
 - Certain Project Types
8. Who (e.g. Design-Builders, Owners, Concessionaires, Third-Parties) have been the dominant claimants in professional liability claims asserted against Design Professionals insured under PSPL policies on DB and P3 projects; and what are the most common claim scenarios and allegations?
9. What are the most common coverage or coverage-related issues encountered in PSPL on DB and P3 projects; and how can those issues be minimized?
10. Do claims asserted against Design Professional insureds under PSPL policies on DB and P3 projects involving design deficiencies in permanent and completed project work represent significant frequency and severity concerns?
11. What, in general, do Owners and those who represent their interests know about the reasons for significantly reduced PSPL availability and capacity on DB and P3 projects?
12. Do Owners either see the need for, or want to see, any modifications or improvements in, PSPL underwriting or coverage on DB and P3 projects?
13. What are some of the more important underwriting considerations and initiatives that may improve PSPL experience on DB and P3 Projects?
14. What information and documents should be elicited and evaluated as part of the PSPL submission and the underwriting evaluative process on DB and P3 projects?
15. From a PSPL underwriting perspective, what are the most important information and evaluations relative to the identity of project participants and proposed DB Team, including all insureds?
16. What can be done to improve post-binder PSPL project monitoring – e.g. criteria, information, reporting, periodic evaluations, timely response actions?
17. In underwriting a PSPL policy, what types of information are required of non-insureds and what is the optimum method of obtaining that information prior to binder and in obtaining updates and performing evaluations on a periodic basis?
18. Should the Design-Builder and its Design Professional subconsultants all be named as insureds under the PSPL policy; and, if so, with any modification to the insured v. insured exclusion?
19. Are CPPI and OPPI appropriate and satisfactory substitutes for reduced availability and capacity in PSPL, as evaluated from the respective interests of:
 - Owners
 - Design Professionals

- Design-Builders

20. What are some of the more important coverage modifications that may improve the PSPL experience on DB and P3 projects?
21. How will the reduced availability and capacity of PSPL on DB and P3 projects impact the practice professional liability insurance market?
22. What are the potential impacts of reliance upon CPPI and OPPI as a substitute for PSPL on the practice professional liability insurance market?
23. What are appropriate underwriting considerations and concerns in evaluating practice policy submissions for Design Professional Insureds and/or Contractors involved in DB and P3 projects that do not have PSPL?
24. What are potential practice professional liability insurance coverage concerns for Design Professional insureds involved in DB/P3 projects that do not have PSPL?
25. What are the realistic opportunities for professional liability insurers to collaborate with industry organizations and project participants to address these Critical Issues?

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Task Force Comments on Critical Issues

Critical Issue 1: How do procurement and contractual practices on Design-Build and Public Private Partnership projects differ from the corresponding practices utilized on Design-Bid-Build (“DBB”) projects?

Task Force members had several comments on this issue, ranging from subjects such as:

1. Current concerns in DB/P3 procurement and contractual practices that produce elevated levels of professional liability risk for Design Professionals involved in those projects.¹
 - 1.1 In DBB significantly more is known as to project scope and design approach and details prior to the point at which a Contractor is required to contractually commit to a fixed price and risk allocation terms.
 - 1.2 In DBB, the risk of cost and schedule impacts due to design deficiencies, inadequacies, incompleteness and unsuitability typically rests with the Owner; the Contractor has

¹ This White Paper will focus on the Critical Issues as they affect Design Professionals who serve as subconsultants to Contractor-led Design-Build. There are independent, but important and generally less elevated, professional liability concerns for Design Professionals who are under contract with the Project Owner for limited preliminary, conceptual or bridging design on DB/P3 projects. See D.J. Hatem and P. Gary, eds., Public-Private Partnerships and Design-Build: Opportunities and Risks for Consulting Engineers Ch. 12, ¶12.4.4, Washington: American Council of Engineering Companies (3d ed., 2020).

contractual and/or (Spearin) implied warranty remedies against the Owner in the event the latter risks and their impacts materialize.

- 1.3 In many public sector DBB public procurements, balanced and shared contractual risk allocation terms are mandated by statutes or regulations, such as those addressing risk allocation for subsurface conditions. Some of those statutes and regulations do not (automatically) govern in DB/P3 procurements, providing Owners with significant autonomy and discretion, and opportunities to adopt imbalanced risk allocation contractual approaches.
- 1.4 There was general consensus that current DB/P3 procurement and contractual practices place disproportionate emphasis on low/lowest price and maximum risk transfer to the private sector.
- 1.5 In DB/P3 projects, the Design-Builder typically is required to commit to a fixed price (with limited cost/time equitable adjustment opportunity) and risk allocation terms based on imprecise project scope definition; significantly limited design development; inadequate time and opportunity for investigation and study; extremely limited reliance rights regarding Owner-provided information and specialized reports and studies, and reference design – and other legal, technical and pragmatic constraints and significant uncertainties and associates risks inherent in the procurement process and schedule. In addition, competitive pressures on DB Teams are significant in the procurement process, especially influencing lower than realistic cost/quantity estimating and contingency assumptions embedded in the Design-Builder’s Pricing Proposal.
- 1.6 The more concerning DB/P3 project types are horizontal and include most public infrastructure projects (e.g. highways, transit, rail, bridges, tunnels, airports); i.e. projects with a “horizontal” profile that traverses multiple “authorities having jurisdiction” and impacting diverse political constituencies and stakeholder interests, all of whom may have review, approval or other significant rights, influences and interests in the project but no contractual obligations to the Design-Builder. Public infrastructure projects, consequently, pose significant price and risk uncertainties and often are megaprojects, further elevating the risk profile. More conventional vertical projects, especially in the private sector context, generally tend to be less concerning in terms of the Critical Issues as scope tends to be better defined and, in general, Contractors have a more confident and reliable basis upon which to estimate costs based on historic experience.
- 1.7 In some instances, Owners (and those who advise them) do not appropriately adapt procurement and contractual practices (from those conventionally utilized on DBB

projects) to align with the distinguishing characteristics and elevated risks – explicit and inherent – in DB/P3 projects for the DB Team.²

- 1.8 Many Owners (supported by their advisors) seem to “push the envelope” in terms of aggressive and imbalanced risk transfer to the DB Team, with the unrealistic expectation that the industry will be in a competitive position to price the risks, which is not what actually occurs in a low bid, predominantly price-driven procurement and selection process.
- 1.9 Many Design-Builders do not realistically price or include in their pricing adequate contingencies for scope and price evolution consequent to the natural progression of post-award or Execution Phase design development; and, following award and contractual commitment to a fixed (or guaranteed) price, the Design-Builder typically is precluded from obtaining any or an adequate equitable adjustment (from the Owner in DB, or the Concessionaire in a P3). This scenario presents a commercial pricing gap exposure, and contractual liability and non-recoverable risk and cost impact for the Design-Builder. To some degree this scenario results from market competitive pressures and other constraints imposed by the procurement process, including P3 lender alignment with the Concession Team in driving risk downstream so as to render the project “bankable”.³ This scenario is often the source and motivation for certain Design-Builder “cost overrun” claims against their Design Professional Subconsultants.
- 1.10 The recommendation was made that Owners should mandate that all Design-Builders include in their pricing proposals minimally-specified contingency amounts for particular risks, such as cost growth or evaluation due do the natural progression of design development.
- 1.11 There needs to be an effective means to allow for meaningful, constructive and collaborative dialogue among Design-Builders, Design Professionals and, especially, Owners, on these Critical Issues and related concerns.
- 1.12 DB may not be the most appropriate delivery method for all public infrastructure projects. Owners – potentially aided and benefited by input from industry outreach or similar (RFI) sessions with Design-Builders and Design Professionals – should more conscientiously evaluate the suitability of the DB approach on each project candidate

² The term “DB Team” includes the prime Design-Builder (often a joint venture or other consortium of construction contractors) and its various Design Professional subconsultants.

³ For further discussion of these risk dynamics, interdependencies and relationships, see D. Hatem & P. Gary eds., Public-Private Partnerships and Design-Build: Opportunities and Risks for Consulting Engineers, Ch. 12, §12.1, Washington: American Council of Engineering Companies (3d ed., 2020).

opportunity, especially in those circumstances in which schedule compression is not a primary consideration.⁴

- 1.13 Owner practices of requiring the DB Team to defend and indemnify the Owner for errors, omissions or other deficiencies in Owner-furnished design or Reference Indicative Design (“RID”) documents are not appropriate. The DB Team has not prepared those design documents and, as such, should not be professionally or otherwise responsible for their content. Moreover, in some instances involving Owner general disclaimers in RFP documents or highly prescriptive design requirements or details, courts and other adjudicatory bodies have ruled such practices legally ineffective to allocate some or all design responsibility to the Design-Builder.⁵
2. How are these concerns impacting the progress of successful DB/P3 utilization and implementation?
 - 2.1 The industry has already experienced significant erosion in competition due to reduction in quality and responsible Design-Builders willing to participate in DB/P3 projects due to low (or no) profit margins.⁶ The reduced competition, as a result of accelerated consolidation of Design-Builders and increasingly complex megaprojects,⁷ will exacerbate present concerns absent timely and responsive corrective actions.
 - 2.2 It is expected that a similar withdrawal trend may well be experienced in the Consulting Engineer community.
 - 2.3 Uncertainty exists as to how increased federal funding availability under the Infrastructure, Investment and Jobs Act (enacted 11-15-21) (“2021 Infrastructure Statute”) will impact Owner perceptions as to need for changes in DB/P3 procurement and contractual practices, and the timing of corrective actions in such practices. The 2021 Infrastructure Statute does and should provide the present opportunity for recalibration and improvement in procurement and contractual practices that account for the concerns underlying the Critical Issues.

⁴ See R. Drake, W. Hansmire, Getting Metro Owners the Best Value from their Major Underground Projects, 2020 Proceedings, North American Tunneling, Society of Mining, Metallurgy and Exploration, pp. 256-262.

⁵ See Liability of Design-Builders for Design, Construction, and Acquisition Claims, National Academies Press, pp. 47-56 (2015); see D. Hatem & P. Gary eds., Public-Private Partnerships and Design-Build: Opportunities and Risks for Consulting Engineers, Ch. 12, Washington: American Council of Engineering Companies (3d ed., 2020).

⁶ See Travelers Infrastructure Study, A 17-Year Deep Dive Into Heavy Civil Projects in North America (2021); and November 2019 Engineering News-Record (“ENR”) article: “Fixing Construction’s Fixed-Price Conundrum”.

⁷ An École de Technologie Supérieure (ÉTS) research, in Montreal, reviewing over 1200 mergers and acquisitions in the architecture-construction engineering firms over the period of 2005 to 2020 show a rapidly increasing consolidation process to the detriment of medium size firms.

- 2.4 There is genuine and serious doubt as to whether Owners have experienced any adverse impacts of these concerns or trends which typically manifest in claims exclusively involving the Design Builder and its Design Professionals; and, as such, whether they will see the need for change or corrective actions. That said, recent disputes (such as those on the Maryland Purple Line P3 Project) between Owners and Concessionaires on P3 megaprojects represent concerning trends.
3. What are some of the potentially responsive corrective actions?
- 3.1 There was consensus that Progressive Design-Build⁸ (“PDB”) is a positive step in providing a collaborative and transparent platform, and higher levels of design development to inform more realistic pricing and risk allocation decisions based on clearer scope definition and understandings of relevant project risk factors and final design and construction approaches. The PDB approach typically defers pricing and risk allocation commitments until at minimum a 60% level of design development (and

⁸ Progressive Design-Build generally involves a process in which contractual commitments as to fixed cost and risk allocation terms are deferred by the Owner and Design-Builder until at least approximately 60% design development has been achieved. See D. J. Hatem, “Improving Risk Allocation on Design-Build Subsurface Projects” June 2020 Tunnel Business Magazine; D.J. Hatem, Rethinking and Recalibrating Design-Build, Design and Construction Management Reporter (Donovan Hatem LLP, December 2020). PDB is gaining acceptance in certain infrastructure projects. A. Cho, Transportation World Eyes Benefits of Progressive Design-Build, Engineering News Record (4-11-22).

PDB and other related procurement and contractual approaches that defer price and other contractual commitments until design has been significantly developed have been embraced and increasingly utilized outside the U.S. These approaches are intended to address problems associated with fixed price and imbalanced risk allocation in conventional DB and DBB. See e.g., Ernst & Young Global Limited, Collaborative Contracting in North America Infrastructure (2021); V. Bortsova, Centrality of Price in New Zealand Procurement; Time for Change, Society of Construction Law New Zealand (2021); T. Richards, H. Bolland, B. Bradstreet, Buildability Risk Allocation and Mitigation, 9th Int’l Society of Construction Law Conference (October 2021); J. Forsey, M. Weatherall, J. Kehoe, Perfect Procurement, 9th Int’l Society of Construction Law Conference (October 2021).

There is growing realization by the Quebec government in Canada that RFP and calls for tenders are attracting less and less submissions on certain public infrastructure projects. A study by the construction industry showed a growing reluctance to bid for those projects: “Consultation visant à évaluer le niveau d’intérêt des entrepreneurs et des professionnels envers les marchés publics », by Raymond Chabot Grant Thornton, April 2021. It showed that 72% of contractors and 82% of professionals were staying away from public tenders. Over the last 5 years, only 13% of contractors and 19% of professionals have seen their interest grow for public market projects, while 49% of contractors and 41% of professionals kept their interest unchanged. Municipalities is where the general interest has dwindled most.

The Metrolinx and Infrastructure Ontario project sponsors for the multi-billion dollar GO Rail Expansion program (Greater Toronto and Hamilton Region), have recently executed a contract based on the PDB approach. Under that approach, the project sponsors and private sector team will collaboratively participate in a two-year collaborative process to progress design development prior to finalization of scope, risk allocation, price, and schedule for the project. See Partner Selected for GO Rail Expansion On-Corridor Works Project, April 19, 2022, <https://www.infrastructureontario.ca/Partner-Selected-RER-GO-Regional-Express-Rail-Corridor/>.

frequently even higher). PDB also provides meaningful opportunities for collaboration and discussion between the DB Team and the Owner (and its Consultants) prior to those commitments, thereby further enhancing realistic understandings as to project final design and construction approaches significantly earlier than when price and other contract terms need to be committed in conventional DB.⁹

- 3.2 There was general consensus that more prescriptive and highly-detailed design mandated by the Owner as part of the procurement and contractual process is not a positive measure given the Design-Builder's contractual obligation for risk of all design deficiencies in Owner-furnished design and RID documents. Also, this approach reduces meaningful opportunities for Design-Builder innovation and discretion in the design development and construction processes.
4. When should initiatives be advanced and corrective actions taken?
 - 4.1 There was general consensus that now is the time to address these concerns.
 - 4.2 The enactment of the 2021 Infrastructure Statute provides both an impetus and excellent present opportunity to effect improvements to address these concerns.
 - 4.3 The concern was expressed, however, that with infusion of federal funding for infrastructure projects Owners and, potentially Design-Builders and Design Professionals, will experience eventual financial benefits and may have less incentive to address these concerns on a longer term and more sustainable basis, and the opportunities for improvement will be lost; and the past and present concerns and trends will be repeated, intensified and propagated.
 - 4.4 There was general consensus that industry organizations, such as ACEC, AGC, AASHTO, ARTBA, and DBIA, should become more proactive in addressing these concerns, developing corrective actions, and engaging in constructive dialog with Owners (and their advisors).
 - 4.5 The view was expressed by some Task Force members that the insurance industry should expend more resources to gather, analyze and publish data on relevant risk and professional liability claim trends and exposures, correlations between project size and

⁹ There are other approaches to defer final price and risk allocation commitments in DB until the Design-Builder has had adequate time to evaluate relevant project factors and conditions. The Virginia DOT "scope validation" approach relating to the pricing and risk for subsurface conditions work, is noteworthy in this regard. Under that approach, the Design-Builder has a period of time following a limited notice to proceed within which to validate its pricing and risk assessments as to subsurface conditions prior to making final contractual commitments. See AASHTO Guide for Design-Build Procurement, p. 33 (2008); Guidelines for Managing Geotechnical Risks in Design-Build Projects, National Academies Press, Appendix C. p. 8 (2018); D. Hatem & P. Gary eds., Public-Private Partnerships and Design-Build: Opportunities and Risks for Consulting Engineers, Ch. 12, ¶12.2.3, p. 460, Washington: American Council of Engineering Companies (3d ed., 2020).

complexity, contractual risk allocation practices, and specific project delivery approaches (e.g., Conventional DB as compared to Progressive DB), and establish key benchmark indicators among different project characteristics to facilitate underwriter and project participant evaluation of relevant professional liability risk exposures.

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Critical Issue 2: What is the relevance of those differences in terms of professional liability risk for Design Professionals typically insured under PSPL?

The following summarizes key aspects of the Task Force discussion.

1. How do these procurement and contractual issues and concerns impact professional liability exposure for Design Professionals?
 - 1.1 There was a general consensus that a direct correlation exists among Design-Builder fixed price contracting, imbalanced risk allocation, undertakings, and Design Professional elevated professional liability risk exposure and claims, and PSPL adverse loss experiences.¹⁰
 - 1.2 The pricing gap and elevated risk exposures of the Design-Builder proximately resulting from fixed price contracting and imbalanced risk allocation – while fairly characterized as commercial or business risk of the Design-Builder (or inherent Project cost) – are being transformed into professional liability claims asserted by those Design-Builders against Design Professionals and expected to be indemnified under professional liability insurance coverage.
 - 1.3 Those professional liability claims typically are articulated as professional negligence claims against the Design Professionals.
 - 1.4 The prevalence and severity of losses due to these professional liability claims in the last 15 years proximately accounts for the significant withdrawal of PSPL availability and capacity, especially on conventional DB/P3 public infrastructure projects.
2. How does the professional standard of care (“PSOC”) apply in the context of Design-Builder professional liability claims against Design Professionals arising out of conceptual/preliminary design services performed by the Design Professional during the Proposal Phase (prepared in response to DB/P3 RFP) of a DB/P3 Project?

¹⁰ See, D.J. Hatem, Letter to the Editor, published in Eng. News-Rec. (December 16, 2019); D.J. Hatem, Rethinking and Recalibrating Design-Build, Design and Construction Management Reporter (Donovan Hatem LLP, December 2020).

- 2.1 The Task Force members acknowledged that there is significant uncertainty – based on limited published or recognized professional practice standards, technical guidelines, and legal precedent – as to the PSOC application in this specific context; and that uncertainty produces substantial professional liability risk for the Design Professionals (and their professional liability Insurers).
- 2.2 The industry would benefit from the promulgation of guidelines for recommended practices in DB procurement, especially relating to the roles, responsibilities, and risks of all project participants, including Design Professionals. These guidelines may be useful in informing PSOC evaluations.¹¹
- 2.3 The internal and external time and cost impacts of defending these claims are substantial.
- 2.4 To date, the limited adjudicated/arbitrated results in these types of claims generally tend to be significantly favorable to the Design Professionals, but at a highly significant cost and risk, and substantial impairment of professional liability coverage otherwise available for indemnity payment of proven claims.
- 2.5 In the absence of PSPL, practice (or corporate) professional liability insurance coverage maintained by Design Professionals (and/or Design-Builders) will be required, on a primary basis, to defend and indemnify these professional liability claims.¹²
- 2.6 There does not appear to be any realistic or valid reason to believe that the professional liability claims and losses – measured in terms of both severity and frequency – under professional liability **practice** insurance will be any better than that experienced under PSPL.

* * *

Critical Issue 3: Are there reasons to distinguish between DB and P3 projects in responding to the preceding questions; and, if so, what are those reasons and how do they impact the PSPL underwriting and claims experiences?

1. In general, the Task Force did not see any reason to distinguish DB and P3 projects in those respects, with certain important qualifications as set forth below. The Task Force commented that P3 procurement in the U.S. is highly dependent upon state-specific P3 enabling legislation and varying contracting practices and terms. In Canada, procurement and contracting practices

¹¹ Appendix B sets forth examples of factors that may be included in such Guidelines.

¹² Typically, PSPL is specifically procured for a particular project, and; provides primary, dedicated and guaranteed professional liability insurance coverage for claims asserted against Design Professionals on that project for a defined duration.

Practice professional liability insurance policies typically are procured and maintained as an essential component of a Design Professional’s (and/or Contractor’s or Design-Builder’s) corporate or regular insurance coverage program. Depending upon the specific policy terms, a practice policy may provide professional liability coverage excess of a PSPL policy.

and terms tend to be more uniform and standard. The vagaries in U.S. procurement and contractual practices and terms add to uncertainties and, hence, risks.

2. The constituent compositions of P3 and DB members often create “internal” conflicts and differing expectations that impact professional liability exposure of Design Professionals.
 - 2.1 To a degree recent experience suggests that dissonance, dysfunctionality and conflicting interests among constituent members of the Concessionaire and Design-Builder may incite or provide a platform for professional liability claims and, at a minimum, complicate and protract their resolution.
 - 2.2 Within a joint venture of Design-Builder participants, conflicts may arise especially if only some members of the Design-Builder are also members of the Concessionaire. Those conflicts may relate to issues that provide the actual or potential bases for professional liability claims by the Design-Builder against its Design Professional subconsultant(s). Those conflicts will exacerbate, complicate, and protract – the resolution of professional liability claims.
 - 2.3 Concessionaire expectations as to quality, sustainability, operations and maintenance costs may be more stringent and onerous than as required under the Owner Project Agreement.

* * *

Critical Issue 4: To what degree do “megaproject” characteristics influence PSPL underwriting approaches to, and professional liability claims experiences in, DB and P3 projects?

1. Traditionally, most DB/P3 infrastructure projects in the North America may fairly be characterized as “megaprojects”.
2. Megaprojects inherently, and regardless of delivery method, pose substantial risk for all project participants, including professional liability risk for Design Professionals performing in any capacity.¹³
3. As project values decrease into the \$100M or less range, the economic feasibility of PSPL becomes a serious issue. In that situation, there would be the expectation that Design Professionals will be more reliant upon practice (corporate) professional liability insurance. That will raise several issues as to adequacy of coverage limits and potential coverage gaps if a firm

¹³ For discussion of megaprojects and professional liability risk, See D. Hatem & D. Corkum eds., Megaprojects: Challenges and Recommended Practices, Chapter 18 (ACEC 2010); and D. Hatem & P. Gary eds., Public-Private Partnerships and Design-Build: Opportunities and Risks for Consulting Engineers, Ch. 12, ¶12.5 Washington: American Council of Engineering Companies (3d ed., 2020).

changes professional liability insurers during an on-going DB/P3 projects in which professional liability claim notices have been submitted to prior practice professional liability insurers.¹⁴

4. With reliance upon practice professional liability insurance as primary coverage and the absence of PSPL for smaller (and probably other) DB/P3 projects, one should expect that the prime Design Professional firms will be more active in pursuing indemnification and related claims against their subconsultants, thereby fostering tension and adversity within the Design Team and with the DB Team.
5. The reduced availability and capacity of PSPL will produce more demands upon the practice professional liability insurance market to provide higher coverage limits generally or on a project excess basis. In addition, in many instances, Design Professionals are required to provide their practice (corporate) professional liability insurance excess of PSPL primary coverage which results in additional stress on the practice professional liability market, especially if adequate PSPL limits are not available. Adverse DB claims experience may well result in reduced availability and capacity in the practice professional liability insurance market required to support the Design Professional community's involvement in Design-Build projects.
6. In addition, many DB and P3 projects – especially those of a megaproject character – have significant DBE requirements, resulting in many subconsultants on the DB Team, some of whom may well be unable to meet minimal or adequate practice insurance requirements. This situation will further elevate the risk exposure of the prime Design Professional in the absence on adequate PSPL program.
7. PSPL is the most effective risk transfer model as it allows for joint defense and indemnity of professional liability claims against the entire Design Professional Team and more efficient and cost-effective claim resolution, with reduced tension and conflict among the Team during an on-going project. The ultimate beneficiary of tension and conflict is the claimant.¹⁵
8. Smaller-scale DB/P3 projects are placing tremendous strain on the industry and forcing firms to evolve business models, and spend substantial pursuit dollars on relatively smaller projects. Also, Contractors involved in these smaller-scale projects may not have any, or any significant experience in the DB/P3 arena. The same observation may be made as to small and small-mid-sized Design Professional firms.

¹⁴ D. Hatem & P. Gary eds., Public-Private Partnerships and Design-Build: Opportunities and Risks for Consulting Engineers, Ch. 12, §12.6.2, p. 572, Washington: American Council of Engineering Companies (3d ed., 2020). Practice professional liability insurance policies typically are underwritten on a claims made and annually renewable basis.

¹⁵ D. Hatem & P. Gary eds., Public-Private Partnerships and Design-Build: Opportunities and Risks for Consulting Engineers, Ch. 12, §12.6., Washington: American Council of Engineering Companies (3d ed., 2020).

9. It is reasonable to expect that Design-Builders will even more aggressively contractually allocate design and “scope growth” risk to their trade subcontractors especially with potentially reduced available professional liability coverage.¹⁶

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Critical Issue 5: What are the root causes of severity in PSPL claims experience on DB and P3 projects?

The Task Force had several comments in response to this Critical Issue.

DB/P3 Procurement and Contractual Practices

1. There was general consensus that requiring a fixed price commitment prior to the ability of the DB Team to adequately understand and realistically assess in a time-compressed procurement period a final design and construction approach that (a) meets Project Agreement requirements, (b) relevant codes, regulations and standards, (c) prudent industry practices, and (d) the vagaries and realities of Owner processes and time for review and acceptance of Design-Builder design submittals, pose substantial pricing, time impact and other risk for the Design-Builder.¹⁷
2. The competitive and commercial realities – market pressures – in many DB/P3 procurements create pragmatic stresses on pre-qualified DB Teams to marginalize, downplay realistic pricing and risk assessments and adequate contingencies, especially relating to design development. In addition, overly-optimistic Design-Builder’s assumptions (often undisclosed during procurement) as to design and construction approaches and strategies exacerbate those concerns.
3. The adverse impacts of pricing and contingency deficiencies are further exacerbated by contractual terms imposing imbalanced risk allocation upon the Design-Builder.
4. The negative and cumulative consequences of these practices resulting from fixed price and imbalanced risk allocation have downstream adverse professional liability implications for Design Professional subconsultants of the Design-Builder, PSPL insurers, and (increasingly) practice professional liability insurers.

Design-Builder Professional Liability Claims Against Design Professional Subconsultants

¹⁶ The following is an example of risk transfer from Design-Builder to Subcontractor:

The Subcontractor acknowledges that the design submitted by the Contractor with its bid for the Project was incomplete, that the bid submitted by the Subcontractor and the Subcontract Price are based on that schematic design and that the Subcontractor has included in its Subcontract Price a provision for design development and evolution. The Subcontractor acknowledges that the Contractor has developed its bid and has entered or is entering into the Prime Contract in reliance upon the Subcontractor’s warranty and representation that the Subcontract Price includes reasonable design development and evolution relating to the Subcontract Work and that the Contractor will not incur additional cost or expenses for any such design development and evolution. Subject to Section 4 iii) above, the Contractor shall not be responsible to reimburse the Subcontractor for any additional costs, expenses or losses of any kind resulting from development and/or evolution of the bid design.

¹⁷ D.J. Hatem, Rethinking and Recalibrating Design-Build, Design and Construction Management Reporter (Donovan Hatem LLP. December 2020).

1. There is a dominant view that Design-Builders pursue professional liability claims against their Design Professional subconsultants as a strategy to recover Design-Builder pricing and contingency shortfalls.
2. PSPL becomes a de facto substitute source of funding, contingency, or subsidy for those shortfalls.
3. Design Professionals on public infrastructure projects have experienced a near-constant flow of claim notices from the Design-Builder on DB and P3 projects commencing shortly after inception of the post-award design development process.
4. Some of those notices are specific as to subject matter; others are fairly broad and encompassing in the articulation of causes and consequences. The latter category may present insurance coverage risk for Design Professionals and their practice insurers, especially in circumstances in which the Design Professional changes practice insurers.
5. Many Design-Builders have an unrealistic expectation as to the reasonable applications of the Design Professional's standard of care as to professional liability claims arising out of services performed during the Proposal Phase.
6. There is a general recognition of the need for industry guidelines as to roles, responsibilities and risks of project participants during the Proposal Phase. (see Appendix B)
7. There were some mixed opinions as to whether it is preferable to resolve Design-Builder claims on (a) an issue-by issue, real time basis or (b) a global basis. This issue has implications for deductible/self-insured retention application under professional liability insurance policies, and significant cash flow problems for Design Professionals and their subconsultants.
8. Regarding professional standard of care application, a comment was made that if virtually all larger Design Professional firms involved in DB/P3 have experienced significant professional liability claims, is that relevant in evaluating whether a firm has met customary and reasonably expected standards of performance.
9. Owner preferences, unwarranted intrusion/interference, opaque contractual interim design submittal processes and procedures, and delays in the design review process, create disputes between Owners and Design-Builders that eventually lead to consequent Design-Builder professional liability claims wrongfully aimed at Design Professionals. These types of impacts should be compensated by the Owner through contract modifications.
10. Many professional liability claims involving Proposal Phase services arise out of apparent misunderstandings as to the purpose, expectations, and scope of the Design Professional's conceptual/preliminary design deliverables and the Technical Proposal. Is the Design Professional's Proposal Phase design intended to:
Demonstrate an understanding of the Owner's technical and Project Agreement requirements ("Project Requirements")?

- (1) Demonstrate to the Owner the ability of the DB Team to produce, if awarded the DB Contract, a design capable of achieving in the final design for construction the Owner's Project Requirements?
- (2) Provide the Design-Builder with a reliable basis to realistically estimate the price of delivering a final design and construction compliant with the Owner's Project Requirements?
- (3) Produce a level of design detail suitable for final design development and to adequately inform construction methodologies?
- (4) Develop a preliminary level of design development that following award can be progressed on a "straight-line" basis to detail a final design consistent with that preliminary design?

Most of the Task Force members agree with (1) and (2), but take serious exception to (3), (4) and (5) as expressions of realistic or reasonable expectations in typical DB procurements. That said, contractual terms may be relevant in assessing those expectations. Also, while contract terms may provide part of the explanation, often actual conduct and communications of the parties during the Proposal Phase contradict contractual scope boundaries, or other limited obligations, and influence expectations and/or create ambiguities as to these points, thereby complicating dispute resolution. The parties should develop clear boundaries, parameters and basis of bid/design documents and risk matrices, all intended to mitigate these misunderstandings.

11. Professional liability claims arising out of design revisions to released-for-construction documents due to multiple, successive issuances of construction packages, i.e., fast track, have also resulted in adverse professional liability claim experiences.

* * *

Critical Issue 6: What are suggested modifications to procurement and contractual practices in DB and P3 projects that may improve PSPL underwriting and claims experience?

The Task Force comments included:

1. Need to Consider Delivery Methods Alternative to DB
 - 1.1 DB may not be the optimal delivery method for all infrastructure projects¹⁸
 - 1.2 Progressive Design-Build and CM/GC allow the opportunity for more to be known as to project design requirements, final design and construction approaches and other

¹⁸ See R. Drake, W. Hansmire, Getting Metro Owners the Best Value from their Major Underground Projects, 2020 Proceedings, North American Tunneling, Society for Mining, Metallurgy and Exploration, PP. 256-262.

aspects of the project execution prior to point of fixed price and risk allocation contractual commitments.¹⁹

2. Contractual Risk Allocation

2.1 Owners need to adopt more balanced risk allocation practices and contractual approaches. Modest progress is being made in the area of subsurface conditions risk allocation in DB/P3, in which some Owners are adopting more balanced risk sharing approaches to the allocation of those risks.²⁰

2.2 As PSPL availability and capacity continue to abate in DB and P3 infrastructure projects, expect more focus on the need for contractual liability “threshold” and limits of liability provisions. Liability “threshold” provisions preclude the ability of a Design-Builder to assert or recover on certain professional liability claims – such as those arising out of Proposal Phase services – until a certain quantified monetary threshold has been exceeded, beyond which claims may be asserted subject to adequate proof as to a contractual breach or professional standard of care departure of the Design Professional.

Limitation of liability provisions establish the maximum amount (or limit) of a Design Professional’s liability (or damages recovery) for specified contractual, professional standard of care or other related legal bases.

* * *

Critical Issue 7: Are adverse/severity PSPL claim experiences in DB and P3 more acute and dominant in:

- **Public v. Private Projects**
- **Certain Project Types**

The Task Force members had the following comments:

1. Public DB Projects Pose Elevated Professional Liability Risk

¹⁹ See D. J. Hatem, “Improving Risk Allocation on Design-Build Subsurface Projects” June 2020 Tunnel Business Magazine; and D. Hatem & P. Gary eds., Public-Private Partnerships and Design-Build: Opportunities and Risks for Consulting Engineers, Ch. 12, §12.6.2, pp. 567-572, Washington: American Council of Engineering Companies (3d ed., 2020).

²⁰ D. Hatem & P. Gary eds., Public-Private Partnerships and Design-Build: Opportunities and Risks for Consulting Engineers, Ch. 12, §12.3.2, Washington: American Council of Engineering Companies (3d ed., 2020); D.J. Hatem, Design-Build: Recalibrating Procurement and Contractual Approaches, George A. Fox Conference (May 2022).

- 1.1 There was general consensus that public DB projects pose more professional liability risk than private DB projects.
 - 1.2 There was general consensus that public infrastructure projects (i.e., highways, rail, transport, bridges, tunnels, and airports) pose higher risk for all private sector project participants, especially Contractors and their Design Professional subconsultants.
 - 1.3 These elevated risks primarily are commercial, contractual and professional liability in character.
 - 1.4 The reasons or root causes of these elevated risks include:
 - Lack of clear, or clearly understood, project scope based on Owner post-award approvals and the decisions of the Design-Builder regarding final design and construction approaches.
 - Contractual requirement for Design-Builder fixed price commitment prior to adequate project scope definition.
 - Contractual requirement for Design-Builder acceptance of aggressive and imbalanced risk allocation
 - Varied, inconsistent, and often untimely and preferential design comments and other inputs of the Owner, its consultants, or other stakeholders in the review of the DB Team design submittals.
 - 1.5 Some Task Force members reported that frequently Design-Builder professional liability claims against Design Professionals are combined with companion claims by the latter against the Design-Builder for fee payments.
 - 1.6 The combination of professional liability and fee claims often complicate the defense and resolution of these disputes.
 - 1.7 Professional Liability insurers noted that these combined claim scenarios are fairly typical and serve to elevate risk and claims expense exposure, as well as complicate and inflate settlement payments for professional liability claims.
2. Project Type as a Risk Factor
- 2.1 Integrated DB – i.e., a single firm or joint venture responsible for both design and construction tend to pose less significant professional liability risk.
 - 2.2 DB Projects in which design efficacy/adequacy is determined by whether the project meets performance or output requirements (e.g. process, power, wastewater projects that tend to be delivered by an integrated EPC Contractor) tend to result in fewer cost overrun professional liability claims and claims that tend to be more conventional in

allegation and proof; and professional standard of care application is better defined in the sense of being more established by professional standards, guidelines, practices and legal precedent.

3. Contractor Self-Performance of Design; Multi-Prime Design Professionals

- 3.1 Some Contractors view design self-performance and design distribution or delegation among multiple prime Design Professionals as ways to reduce cost. The issue for Design Professionals is interface/coordination risk and direct or indirect responsibility for adequacy of design performed by others not under their contractual control or professional supervision, or for scope gaps in the delegation or distribution of global design responsibilities.
- 3.2 Some Contractors contend that the Design Professional has a special responsibility to identify and address scope gaps or ambiguities in delegation and distribution of all design roles and responsibilities required to achieve project requirements.
- 3.3 Some Owners apparently enable the multi-prime approach through the required appointment of a “Project Engineer” or “Entrusted Engineer-In-Charge”.²¹

* * *

Critical Issue 8: Who (e.g. Design-Builders, Owners, Concessionaires, Third-Parties) have been the dominant claimants in professional liability claims asserted against Design Professionals insured under PSPL policies on DB and P3 projects; and what are the most common claim scenarios and allegations?

The Task Force had the following comments:

1. Sources of Professional Liability Claims Against Design Professionals in DB Projects

- 1.1 By far, measured in terms of frequency and severity, Design-Builder professional liability claims against Design Professionals represent the highest source of those claims.
- 1.2 Typical “cost overrun” claims by a Design-Builder against a Design Professional involve allegations that the Design Professional’s conceptual or preliminary Proposal Phase design did not meet contractual or professional standards, resulting in “cost overruns” in the cost of final design and construction approaches above the Design-Builder’s guaranteed maximum or fixed price in its contract with the Owner (or Concessionaire).
- 1.3 In contrast, the experience of Owner professional liability claims involving final design defects in completed and permanent project work has been of significantly less frequency and severity. These types of Owner professional liability claims are more conventional claims involving more established standard of care applications.

²¹See Georgia Research Project 19-09, Entrusted Engineer-In-Charge: A New Critical Position in the Design-Build Team, Georgia DOT (August 2021).

Critical Issue 9: What are the most common coverage or coverage-related issues encountered in PSPL on DB and P3 projects; and how can those issues be minimized?

The Task Force had the following comments:

1. Self-Insured Retention (“SIR”) Application

- 1.1 Number of assigned SIRs and definition of single/related claim under PSPL policies is often an area of controversy. The absence of any limit or cap of the number of potentially applicable SIRs makes funding and allocation of SIR responsibilities very challenging for Design Professionals. More clarity in policy terms would be beneficial.

2. Rectification

- 2.1 Coverage gaps created by partial indemnification (direct cost, not indirect) under Rectification Coverage is concerning; coverage for the remaining portion of the claim is uncertain. More specifically, “partial indemnification” means that some portion of a claim or costs (e.g. direct costs) may be indemnified under Rectification Coverage but other portions (e.g. consequential costs, profit loss, etc.) may not be covered.
- 2.2 Some Task Force members believe that rectification Coverage is not seen as a benefit for Design Professionals.

3. Equity Interest/Common Management Exclusion

- 3.1 How does the Exclusion apply in the context of a joint venture between a Design Builder and a Design Professional?
- 3.2 Underwriter Flexibility in eliminating or modifying scope of the exclusion?

4. Changing Practice Insurers

- 4.1 In the absence of PSPL, coverage gaps and disputes may be created by changing practice insurers on an on-going DB project in which claim notices are received over a multi-year period.

5. Extended Reporting Period Durations

- 5.1 Owner requirements for 10⁺ year extended reporting periods are unrealistic and, in many instances, unnecessary.

- 5.2 Professional liability insurers (and their reinsurers) typically do not want to guarantee PSPL for a combined policy period and extended reporting period that exceeds 10-12 years.

* * *

Critical Issue 10: Do claims asserted against Design Professional insureds under PSPL policies on DB and P3 projects involving design deficiencies in permanent and completed project work represent significant frequency and severity concerns?

The Task Force had the following comments on this Critical Issue.

1. Professional liability claims arising out of Proposal Phase Services, by far, are the more prevalent and significant sources of professional liability risk.
2. In general, professional liability claims arising out of deficiencies or inadequacies in final design are less prevalent.
3. The risk of design revisions and coordination/interface problems, and associated field re-work arising out of early works, multiple design packages and the “fast track” approach, more generally, are also sources of professional liability claims.

* * *

Critical Issue 11: What, in general, do Owners and those who represent their interests know about the reasons for significantly reduced PSPL availability and capacity on DB and P3 projects?

The Task Force had the following comments:

1. Owner Awareness of PSPL Availability/Capacity Issues.
 - 1.1 Some Task Force members stated that Owners are aware of these issues but questioned whether they perceive them as concerning.
 - 1.2 More Task Force members commented that most Owners do not know about reduced availability and capacity of PSPL coverage (which they directly or indirectly pay for) primarily due to Design-Builder claims asserted against Design Professionals, and how recovery on such claims in effect and in many instances have allowed the Design-Builder to obtain a price subsidy above and circumventing the contractual fixed price limit through a PSPL claim and ensuing payment from the Design Professional and its professional liability insurer(s). Those claims are primary reasons for the significant decrease in PSPL availability and capacity on DB/P3 public infrastructure and other projects. In addition, those claims diminish and potentially exhaust PSPL coverage

otherwise available for satisfaction of Owner claims and coverage for which the Owner has (directly or indirectly) paid premiums.

- 1.3 Alternatively, if an Owner does know that Contractors are resorting to these policies as sources of contingency funding, perhaps such an Owner considers the liquidated cost of PSPL premium to be a reasonable financial expenditure to induce and secure lower bids and further reduce its (otherwise relatively remote) cost overrun exposure to the Design-Builder.

2. Increased Owner Awareness

- 2.1 There was agreement that Owner awareness of reduced PSPL availability and capacity and related project detriments and concerns need to be elevated.
- 2.2 Owners need to understand that some Design Professionals, as well as Contractors, may refuse to submit proposals on DB projects unless/until the problems resulting in significantly reduced PSPL availability and capacity are adequately addressed and resolved.
- 2.3 Owners need to understand that reliance upon Design Professional practice professional liability insurance is not prudent, nor appropriate, given the current approach to procurement and contractual risk transference. Owners and other project participants should have the benefits of dedicated and guaranteed PSPL coverage.
- 2.4 Design Professional reliance upon practice professional liability insurance is not a sustainable approach for Design Professionals or their professional liability insurers.

3. Reliance Upon Higher Practice PLI Limits.

- 3.1 Most Task Force members agreed that Owner requirements for higher practice (corporate) professional liability limits are not a satisfactory solution for the PSPL availability and capacity problems.
- 3.2 Prime Design Professionals will require higher practice professional liability limits from their subconsultants in the absence of any or adequate PSPL, which will reduce the available pool of both prime Design Professionals and their subconsultants, particularly SBE and DBE firms that are required participants (rightfully so) by most Owners, who do not have the financial wherewithal to obtain higher professional liability insurance coverage limits.
- 3.3 There is limited capacity for such higher practice professional liability limits in the professional liability insurance market.

- 3.4 Reliance upon practice professional liability insurance will substantially increase adversity between prime and subconsultants due to lack of joint defense and the single, dedicated coverage limit under PSPL.

* * *

Critical Issues 12-25: Preface

The Task Force discussion of these Critical Issues tended to extend beyond the boundaries of the individual issues and often addressed several of those issues cumulatively. For that reason, the report of the Task Force comments of these issues has been combined and consolidated.

Critical Issue 12: Do Owners either see the need for, or want to see, any modifications or improvements in, PSPL underwriting or coverage on DB and P3 projects?

* * *

Critical Issue 13: What are some of the more important underwriting considerations and initiatives that may improve PSPL experience on DB and P3 Projects?

* * *

Critical Issue 14: What information and documents should be elicited and evaluated as part of the PSPL submission and the underwriting evaluative process on DB and P3 projects?

* * *

Critical Issue 15: From a PSPL underwriting perspective, what are the most important information and evaluations relative to the identity of project participants and proposed DB Team, including all insureds?

* * *

Critical Issue 16: What can be done to improve post-binder PSPL project monitoring – e.g. criteria, information, reporting, periodic evaluations, timely response actions?

* * *

Critical Issue 17: In underwriting a PSPL policy, what types of information are required of non-insureds and what is the optimum method of obtaining that information prior to binder and in obtaining updates and performing evaluations on a periodic basis?

* * *

Critical Issue 18. Should the Design-Builder and its Design Professional subconsultants all be named as insureds under the PSPL policy; and, if so, with any modification to the insured v. insured exclusion?

* * *

Critical Issue 19. Are CPPI and OPPI appropriate and satisfactory substitutes for reduced availability and capacity in PSPL, as evaluated from the respective interests of:

- Owners
- Design Professionals
- Design-Builders

* * *

Critical Issue 20. What are some of the more important coverage modifications that may improve the PSPL experience on DB and P3 projects?

* * *

Critical Issue 21. How will the reduced availability and capacity of PSPL on DB and P3 projects impact the practice professional liability insurance market?

* * *

Critical Issue 22. What are the potential impacts of reliance upon CPPI and OPPI as a substitute for PSPL on the practice professional liability insurance market?

* * *

Critical Issue 23. What are appropriate underwriting considerations and concerns in evaluating practice policy submissions for Design Professional Insureds and/or Contractors involved in DB and P3 projects that do not have PSPL?

* * *

Critical Issue 24. What are potential practice professional liability insurance coverage concerns for Design Professional insureds involved in DB/P3 projects that do not have PSPL?

* * *

Critical Issue 25. What are the realistic opportunities for professional liability insurers to collaborate with industry organizations and project participants to address these Critical Issues?

Task Force comments on Critical Issues 13-25 are consolidated in this section.

Underwriting Considerations

1. **Recalibrating and Aligning Underwriting of professional liability insurance to address claims experience DB Projects:**

- 1.1 **Evaluation of DB Team Members: evaluations relative to entities engaged as part of the project participants and proposed DB Team, including all insureds: Underwriting Considerations**

- Relevant Qualifications and Experience
- Relevant Experience and Qualifications of Estimators/Quantity Surveyors
- Status of Other, On-Going Projects: Potential Contemporaneous (other project) Financial and Performance Challenges and Pressures

- Relevant Claims Experience

1.2 Contractual Structure and Relationships: Underwriting Considerations

- Common interests and affiliation of multiple project participants
- Multi-prime designers: Interface and Coordination Risk
- Contractor Self-Performance of Design
- Delegation/Assignment of Design Interface, Integration, Coordination Risk Arising out of Distributed and Bifurcated Design

1.3 Pre-Binder Assessments: Underwriting Considerations

- Evaluation of Risk Register and Periodic Updates
- Assessing Design Development Contingency
- Assessment of Contractual Approaches to Risk Allocation
- Assessing Design-Technical Issues

1.4 Collateral Agreements with Non-Insureds: Underwriting Considerations

- Obtaining commitments from Design-Builder or other non-insureds to provide and update relevant project-specific information required to evaluate any developments relevant to potential professional liability exposure.

1.5 Baseline – Material Variation Approach: Underwriting Considerations

- The definition of clear and objective underwriting assumptions and expectations underlying PSPL coverage commitment should be documented in the underwriting process.
- The use of a “Material Variations Baseline Endorsement” (“MVE”) approach is one such method of documentation.²²
- On major subsurface projects, such as tunnels, the Joint Code of Practice for Tunneling Projects in the UK (“Joint Code”), jointly developed by the British Tunneling Society and the Association of British Insurers, aims to accomplish a similar objective. See Appendix C.

²² D. Hatem and D. Corkum 2010. Megaprojects: Challenges and Recommended Practices, Chapter 18, p. 599, American Council of Engineering Companies, Washington, D.C., USA: 508-538; D. Hatem & P. Gary eds., Public-Private Partnerships and Design-Build: Opportunities and Risks for Consulting Engineers, Ch. 12, §12.6.2, pp. 567-572; and footnote 389 (pp. 672-674) Washington: American Council of Engineering Companies (3d ed., 2020).

- The Joint Code approach may have application in the context of improving both procurement and contractual practices and PSPL underwriting on DB/P3 projects. More specifically, Owners, Contractors and Design Professionals may have the opportunity to align and collaborate in developing mutually acceptable processes and procedures for the definition and implementation of Progressive Design-Build requirements, especially since the latter approach has (based on limited experience to date) provided a promising avenue to address many of the problematic DB/P3 procurement and contractual practices that underlie and have generated many professional liability claims and PSPL losses.
- Professional liability underwriter members of the Task Force expressed cautious optimism about the potentially salutary effects of Progressive Design-Build in reducing risk and professional liability claims and losses. However, they also expressed the need for both (a) more clarity, understanding and uniformity in the processes and procedures to be implemented in Progressive Design-Build and (b) the opportunity to provide timely, constructive and meaningful input on that subject in a manner that would enhance PSPL underwriting and thereby potentially increase PSPL availability and capacity.
- Some members of the Task Force expressed the following concerns, reservations and suggestions about Progressive Design Build:
 - There may not be a sufficient number of Owners and DB Team members with adequate qualifications and experience in the PDB approach.
 - PDB may be selected as a delivery approach by certain Owners on a disproportionate number of megaprojects which, on their own, pose elevated risk of cost and schedule overruns; and that experience may result in negatively impacting PDB development and utilization on other more routine projects.
 - There should be guidelines developed and published for PDB implementation, subject to appropriate project-specific adaptation.
 - Qualified independent professionals should be retained by project participants to facilitate PDB implementation and, preferably, to be in a position to provide quality assurance “certifications” as to compliance with appropriate PDB guidelines (or best practices).

1.6 Contractual Reviews: Underwriting Considerations

- Professional Standard of Care: Specialized Terms
- Design Development Contingency
- Disclaimer Regarding Preliminary Design
- Consequential Damages Waiver
- Limitation of Liability
- Threshold Liability
- Integration and Survival
- Quantity Risk Disclaimer
- Design-Builder acknowledgement of preliminary nature of proposal phase design and specific need for design development contingency.

1.7 Post-Binder: Periodic/Regular Project status Evaluations and Monitoring: Underwriting Considerations

- Risk Register, Schedule and Contingency Updates
 - Post-Binder Project Monitoring and Assessments, and Meetings
2. Design-Builders need to be more transparent in sharing with their Design Professional subconsultants contingency and schedule assumptions and status/updates.
 3. Design-Builders and Design Professionals should not be all named as insureds under a single PSPL, especially one with an insured v. insured exclusion. Generally, PSPL insureds should not include Design Professionals under direct contract with the Owner.
 4. Independent of Owner professional liability insurance coverage requirements on DB and P3 projects, Design Professionals should include in their agreements with the Design Builder provisions authorizing the Design Professional to procure a PSPL (with specified limits and other particular coverage terms) and requiring that the premium cost of that policy be included in the Design Builder's Pricing Proposal to the Owner (or to the Concessionaire in a P3).
 5. Owner Protective Professional Insurance ("OPPI") policies do not provide any protection or benefit for Design Professionals and expose them to the risk of (a) subrogation claims by the OPPI insurer and/or (b) pressure to exhaust available (underlying) professional liability practice policy limits.
 6. Contractor's Protective Professional Indemnity ("CPPI") policies similarly do not provide protection or benefit for Design Professionals with respect to most of the Critical Issues.

7. A number of Task Force members emphasized the need to reduce risk associated with aggressive Design-Builder pricing, unrealistically low and inadequate (or no) design development contingency, and genuine unknown or unpredictable uncertainties as the project scope, site conditions, and the cost and time required to implement necessary final design and construction methodical approaches.
8. Increasing self-insured retention amounts significantly above several million dollars on a per-claim basis is likely not financially feasible for most Design Professionals, especially smaller to mid-sized firms.
9. The Progressive Design-Build approach appears to be an effective means of significantly reducing the risks and uncertainties associated with conventional Design-Build. Based upon comments of professional liability insurer underwriter members of the Task Force, the Progressive Design-Build approach is of keen interest as a potential path forward in improving and increasing PSPL availability and capacity.

* * * * *

Task Force Recommendations

The Critical Issues, corresponding concerns and Task Force Recommendations addressed in this White Paper should be given priority attention by all project participants and professional liability insurers.

1. **Prompt Engagement with ACEC, AGC, DBIA, AASHTO, and ARTBA in addressing Procurement and Contractual Issues and PSPL Availability/Capacity Concerns. This engagement may involve facilitated and collaborative discussions jointly with some or all of those organizations.**
2. **Develop Guidelines for DB/P3 practices, roles, responsibilities and risks during Proposal Phase of all Project Participants relating to conceptual/preliminary design issues.**
3. **Prompt Engagement with FTA, FHWA and APWA on Procurement and Contractual Issues and PSPL Availability/Capacity Concerns.**
4. **Prompt Engagement with Owners and their Advisors on Procurement and Contractual Practices and PSPL Availability/Capacity Concerns.**
5. **Evaluation of the Impact of Significant Reduction in PSPL Availability and Capacity on Practice (corporate) Professional Liability Insurance for Design Professionals, and the resultant willingness of Design Professionals to participate in DB/P3 projects.**
6. **Promote Studies to Produce Data Concerning Professional Liability Risk and Claims Experience on DB and P3 Projects.**
7. **Establish a Task Force (or other Working Group) consisting of Owners, Contractors, Design Professionals, Professional Liability Insurers and Surety companies to pursue a “Joint Code” approach to developing guidelines for Progressive Design-Build implementation that will**

enhance PSPL availability and capacity. This is one of what may be several examples of potentially constructive areas of collaboration among the various project stakeholders to address the risk, professional liability and insurability concerns raised by the Critical Issues.

* * * * *

Summary

There are multi-dimensional concerns presented by certain prevailing DB and P3 procurement and contractual practices in public infrastructure projects. At root, these concerns principally derive from mandates that fixed price be contractually committed prior to sufficient clarity and comprehension of the project scope and expectations of what is required of the DB Team in the final design and construction approaches. Those concerns are exacerbated by aggressive and imbalanced risk allocation obligations required of the Design-Builder. Further, in a highly competitive procurement environment, DB proposers often engage in aggressive pricing and do not include adequate contingencies for the unknowns in project scope and final design and construction approaches.

The cumulative effect of these concerns often produce both serious financial losses for Design-Builders and substantial professional liability claims asserted by the latter against their Design Professionals, as well as the negative financial and reputational impacts to those firms participating in DB/P3 projects. As a direct consequence, professional liability insurers, especially those underwriting PSPL have experienced significant losses, resulting in material reductions in availability and capacity in the PSPL market.

The potential solution to these concerns – as with the concerns themselves – are multi-dimensional. A collaborative, integrated and constructive approach to address these concerns should be promptly initiated among Contractors, Design Professionals, Owners, professional liability insurers and surety companies.

At root, virtually all of the concerns underlying the various Critical Issues arise out of unrealistic expectations of project participants as to the realistic and inherent project cost (“project cost”) necessary to design and construct a project that meets the Owner’s ultimate requirements. Some project participants – more than others – have the ability and opportunity to develop reasonable estimates for that project cost and to identify and assess the relevant design and construction costs.

Many of the Design-Builder “cost overrun” claims against Design Professionals in DB/P3 projects derive from failures to adequately, reasonably and realistically estimate and assess project cost and risk during the Proposal Phase. Some of those failures may be attributable to strategic and competitive factors and influences in the procurement process. However, it appears that those failures are significantly due to the inability of the majority of Design-Builder proposers to adequately define during procurement all of the relevant design and construction considerations, costs and risk inherent and necessary to assess and

price in order to achieve the Owner’s ultimate requirements. On megaprojects, the risks of unrealistic project cost and overly-optimistic risk assessment are elevated.

For the very most part, these cost overrun claims are not genuinely attributable to fault, negligence, misrepresentation or other wrongful conduct of most – and perhaps all – project participants. Rather, these claims derive and drive from the failure or inability to capture in the DB Contract a fixed price realistic basis to encompass the design and construction scope and cost, and associated risks inherent in delivering a project that meets the Owner’s ultimate requirements. Viewed in this context, the very foundation or predicate of a professional negligence claim against the Design Professional for “cost overruns” is fundamentally flawed and misdirected.

The effective analysis and balanced resolution of these concerns requires candid, and realistic discussion among all relevant stakeholders, with potentially divergent interests. There should be a common and mutual interest in seeing an industry (Owners, Contractors and Design Professionals – and insurers and surety companies) that can succeed and thrive as they all work together to deliver important public projects. The current lack of capacity and the escalating cost of the limited PSPL coverage available represents a crisis as well as an alarm that the current DB approach being employed by Owners is neither working nor in the best short or long term interests of all parties. That approach which favors Owners at the expense of other parties is neither fair, nor sustainable and is destined to negatively impact the future success and promise of the DB delivery method and the financial well-being of private sector project participants. The discussion needs to commence in earnest and progress diligently.

There are several issues to discuss and, undoubtedly, different perspectives among relevant stakeholders on those issues. The Task Force invites and welcomes that discussion and the ultimate consensus as to a path forward in the mutual and beneficial interests of all.

Appendix A: Task Force Members

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Appendix B: Sample Proposal Phase Guidelines

Factors to be considered in these Guidelines include:

- The degree of design development, detailing and prescription furnished by the Owner and included in the RFP.
- The Owner's approach to design and related (e.g. subsurface conditions) risk allocation.
- Minimized Use of Disclaimers and non-reliance provisions in the RFP as to preliminary design risk; and as to defense and indemnification obligations as to Owner-furnished reference indicated or other preliminary design defects.
- The extent and reasonableness of validation and verification (investigation, studies, etc.) expected or required of the Design-Builder and/or its Consulting Engineer during the Proposal Phase with respect to the Owner-furnished preliminary design (or related reports or information).
- The standards required of the Design-Builder in the DB Contract as to compliance with preliminary design, and the extent to which those standards are flowed-down to the Consulting Engineer, and conflict with the latter's standard of care obligation.
- The relationship and compatibility between preliminary design furnished in the procurement documents and other Owner-furnished information, investigations, etc. (e.g. subsurface); and how risk is allocated in those and other respects.
- The scope of services and professional standard of care reasonably expected of the Consulting Engineer in evaluating the preliminary design, verifying Owner-furnished information, and in preparing a proposal design; and how that standard is defined and applied relative to the cost of designing and constructing the approved final design and construction documents.
- Reasonable (or minimal) standards for design development contingency to be priced in the DB Proposal and maintained by the Design-Builder.
- The contractual (legal) significance of the Owner's acceptance of the Design-Builder's Technical Proposal; and how alternative technical concepts relate to the allocation of preliminary design risk.
- The role of professional liability insurance for the Consulting Engineer in the context of design development design risk, and best practices in specification and procurement of coverage.

- The role and relevance of terms of the Teaming (or Phase 1) Agreement in the evaluation of professional standard of care compliance as to Consulting Engineer services performed during the Proposal Phase.

Appendix C: Joint Code of Practice For Risk Management of Tunnel Works Approach

- Insurance Crisis – Tunneling Projects
- Collaborative Crisis – Constructive and Proactive Problem Solving Approach
 - Association of British Insurers
 - British Tunneling Society
- **A Commendable Model and Approach: Insurance Industry Leading, Innovating, and Distinguishing Itself, Not Retreating and Withdrawing.**

“In October 2001, the Association of British Insurers (ABI), representing insurers and re-insurers in the London-based insurance market, expressed its increasing concerns to the British Tunneling Society (BTS) about losses on tunneling projects. **The ABI advised the BTS that rather than withdraw entirely from providing insurance on tunneling projects or significantly restricting coverage scope – both of which are conventional options traditionally exercised by the insurance industry faced with similar concerns – it would work collaboratively with the tunneling industry to develop a “Joint Code of Practice” for the improved management of risk on tunneling projects.** This initiative led to the September 2003 publication of the Joint Code of Practice for Risk Management of Tunnel Works in the UK (the “Joint Code”), the purpose of which is to promote the best practices for the minimization and management of risk associated with the design and construction of tunnels. **One of the recommendations of the Joint Code is that insurance should not be considered as a contingency fund for cost overruns or substitute for adequate risk management.”**

The Joint Code provides an excellent example of a well-conceived, comprehensive and balanced attempt by the insurance industry – in collaboration with the engineering profession – to identify, manage, control and mitigate risk exposure in the specific context of tunneling and underground projects.

It should be expected that proper implementation of the *Joint Code* will establish a positive precedent in not only minimizing and managing risk but also in maximizing the availability and scope of insurance coverage...

“In reality, what is happening with the promulgation of insurance practice codes is the alignment or convergence of the emphasis on “improved contracting practices” with new insurance underwriting approaches for major subsurface projects that focus on factors and considerations significantly beyond the purely technical design and construction issues and the qualifications and experiences of the engineering and construction firms. At the center of both initiatives – improved contracting practices and new insurance underwriting approaches – is the

project owner, and specifically its planning, contracting, and management decisions and qualifications.

In many respects, this development represents an important alignment of perspectives and initiatives. **The alignment does not come without some degree of controversy and spirited debate.** To the extent that insurers are attempting to influence how project owners plan, contract for, and manage their subsurface projects, **some project owners may regard this as an unwarranted intrusion and an additional layer and burden of unnecessary oversight that will add unnecessary cost and/or time to the project and constrain their decision-making about available optional project planning, contracting, and management approaches.** Similarly, some consulting engineers and constructors may regard insurance industry involvement in the promulgation, prescription, and mandating of practice codes and requirements for subsurface projects as beyond the appropriate province or expertise of that industry.”

*Hattem, D.J. and Corkum, D. 2010. Megaprojects: Challenges and Recommended Practices, Chapter 18, p. 599, American Council of Engineering Companies, Washington, D.C., USA: 508-538; D. Hattem & P. Gary eds., Public-Private Partnerships and Design-Build: Opportunities and Risks for Consulting Engineers, Ch. 12, §12.6.2, pp. 567-572; and footnote 389 (pp. 672-674) Washington: American Council of Engineering Companies (3d ed., 2020).