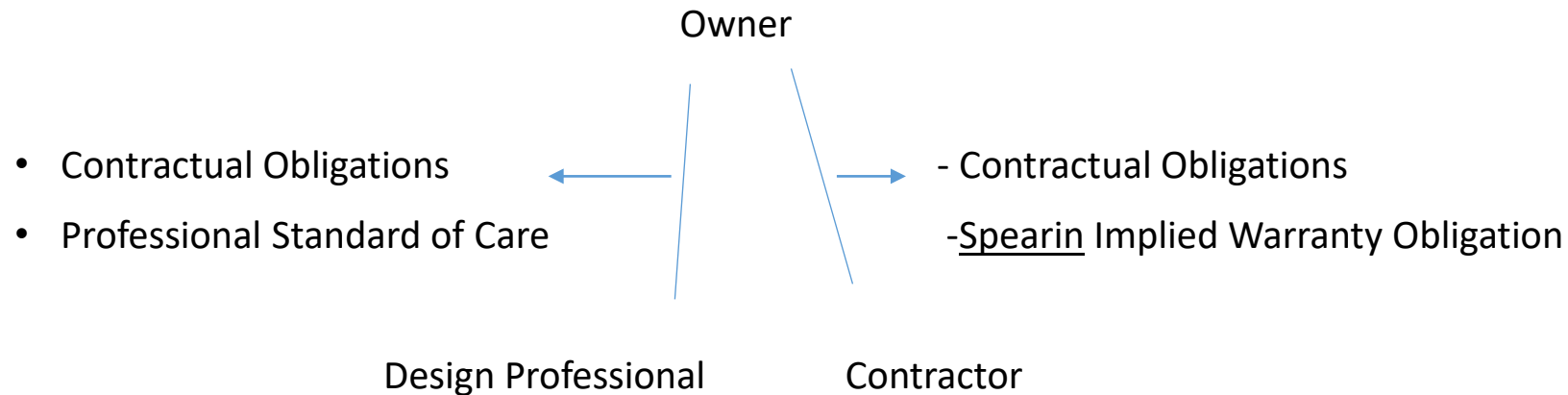


# Professional Liability Claims in Design-Build and Public-Private Partnership Projects in North America: A Different Breed

IADC – May 12, 2022

# Design-Bid-Build

- Typical Roles, Risks and Responsibilities: Final Design Adequacy and Suitability



# Design-Bid-Build

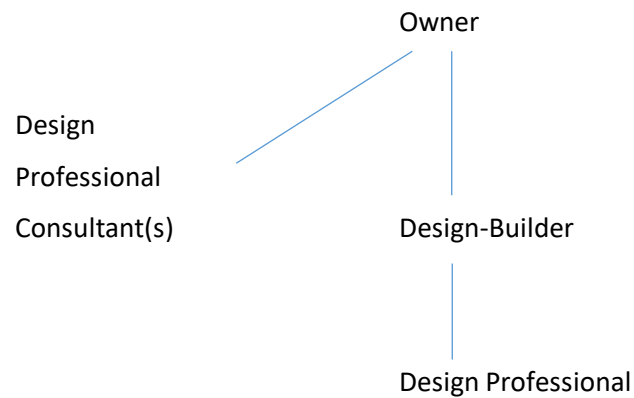
## Conventional Professional Liability Claims Asserted Against Design Professionals in Design-Bid-Build

- Roles, Risks and Responsibilities of Project Participants
- Spearin Implied Warranty Owner Obligation: Design Adequacy
- Professional Standard of Care – Definition
- Professional Standard of Care – Application
- Role of Experts
- Legal Precedent

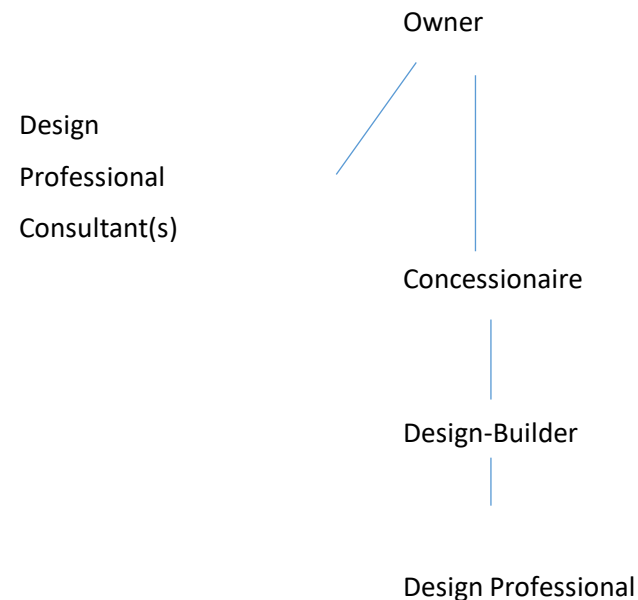
# Design-Build and Public Private Partnerships

## Typical Roles, Risks and Responsibilities: Final Design Adequacy and Suitability

### Design-Build



### Public-Private Partnership



# Design-Build and Public Private Partnerships

## Professional Liability Claims Asserted Against Design Professionals in Design-Build and Public-Private Partnership Projects

- Design-Builder, Not Owner, as Predominant Claimant
- Design Scope Distribution and Delegation: Multi-Prime
- Professional Standard of Care – Definition
- Professional Standard of Care – Application
- Contractual Terms and Flow Down/Back-to-Back
- Prime DB Contractual Impacts
  - Fixed Price: Price Certainty, Scope/Design Uncertainty:  
The Perfect Storm
  - Imbalanced Risk Allocation
- Fast Track Contract Package Sequencing
- Sparse Case Law Precedent

# Impact Claims - Burden of Proof

- The burden of proof for impacts and associated damages lies with the claimant (i.e., contractor or owner for claims against designers)
- Often the designer and its insurer are left to conduct the more robust analysis as a defense
  - Claims can include substantial delay-related damages which can make the claim disproportionate to the design contract value
  - Puts the defendant in a position with no other option than to expend the resources
- Claims against designers can be global in nature – this relates more to disruption than critical path delay (different damages)
  - “1000s of RFIs” or “extensive IFC revisions” does not automatically equate to significant damages

# Impact Claims - Causation

- Establishment of a causal link between designer actions or inactions to actual impact and damages is needed and sometime difficult to prove
- The root cause of the impact can be related to late design and/or standard of care, but also:
  - Owner interference or preferential changes
  - Contractor means and methods
  - Value engineering/optimization
  - Variations
- An actual impact should be demonstrated to recover damages

# Impact Claims – Delay/Disruption

- Designer performance and claimed impacts can fall into separate buckets of cost:
  - Designer performance against its own contract
    - LDs
    - Acceleration
    - Subcontractor premiums
    - Discrete direct costs
  - Impact of design issues/delays on overall project/construction
    - Critical path – delay related damages
- Contractors can conflate these two buckets
- Designer's defense (or its own claim/counterclaim) may require an affirmative analysis



# Impact Claims – Areas of Caution

- Contractors may set forth claims upstream to owner and downstream to designer which may include double dipping
  - Contractor may also try to claim up and then back into the downstream claim to fill in the gap of recovery
- Use of experts requires coordination
  - Delay and damages experts often rely upon Standard of Care experts
    - Important to make sure there is no scope gap in expert instructions
    - Early expert retention can be helpful in certain situations
- Expert analysis may not reflect what actually occurred
  - Selection of desired impacts versus comprehensive view of the project

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