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Whose Fault Is It Anyway? The Design Professional's Standard of Care During the Incomplete Design Phase of Design-Build Projects

Gone is the heyday of the design-bid-build project delivery model for large-scale construction projects. We are living in the golden age of design-build. The design-build model continues to enchant construction forums and real-world project teams alike, carving out its place as one of the most desirable project delivery methods.¹ A simple web search for “design-build” yields myriad websites and articles touting its array of benefits, including improved cost, schedule, and quality, as well as mitigation of risk for owners, promotion of collaboration and innovation, and overall project synergy.²

Yet, reality paints a far different picture than a perfect harmony of risk mitigation, collaboration, and innovation. In fact, as design-build delivery becomes more prevalent, its flaws become more apparent. Part of design-build's allure is its consolidation of risk such that the design-builder³ is the owner/developer's sole point of contact, both practically and contractually. No longer is the owner/developer the focal point for design-related disputes involving the design professional and the contractor. However, a repeated complaint and growing fear in design-build teams is that this shift has misallocated risk. Indeed, some believe the lack of equitable risk allocation is a threat to the construction industry itself, including the design-build segment of the industry.⁴ As design-builders feel this risk is too great to bear alone, they look to the other participants in the design-build team to share the burden when cost overruns, delays, and other issues wreak havoc on the project.⁵ This concern rings especially true in fixed-price design-build contracts, in which the design-builder is locked into its bid and cannot easily shift costs back to the owner/developer.

For the issues that trace back to the incomplete design phase⁶ of a design-build project (“IDP”), the design professional is both an obvious and convenient target for the design-builder's risk redistribution.⁷ Naturally, Design professionals in the design-build team are in the business of design.⁸ Conversely, under the typical design-build arrangement, the design-builder is responsible for preparing bids and making cost estimates.⁹ Accordingly, when a designer provides a proposal-directed, incomplete design to a design-builder, the responsibility to adequately bid and provide a fixed-price based on this design falls on the design-builder, not the design professional.¹⁰ Nonetheless, the design professional's necessarily incomplete preliminary design is the foundation for the design-builder's initial cost estimates, proposals, project budgets, and ongoing estimates of project costs.¹¹ Design issues with the incomplete preliminary design and the lack of identification of omissions or unaddressed design issues in IDPs flow downstream through the project's lifetime, proliferating and expanding into full-blown chaos: change orders, costly redesigns, and cost overruns.¹²

Consequently, when a preliminary design underestimate what is required or otherwise does not address all possible cost overruns or design changes, contractors may look to the design professionals, claiming that the preliminary design's failure to consider or warn of these contingencies constitutes a breach of the design professional's standard of care.¹³ Design professionals retort that they furnished what was asked of them: an incomplete, preliminary design which, by its very nature, does not consider all

future contingencies.¹⁴ Design professionals contend the standard of care is met even if necessary design changes create costly overruns.¹⁵ So, whose fault is it? Or, more accurately put, should the design-builder or the design professional bear the fault for the cost overruns and other undesired outcomes?

Upon initial examination, the standard of care for design professionals in IDPs is banal: professionals should use the same care that a reasonable professional would use during the pre-award design phase in similar circumstances.¹⁶ This articulation of the standard of care for design professionals is well-accepted, black letter law.¹⁷

Yet, despite the incorporation of what appears to be a trite and intuitive standard, the understanding and application of what is *reasonable* in the pre-award phase is incredibly elusive.¹⁸ This enigma stems from the lack of defined expectations for design professionals charged with creating an initial, incomplete design.¹⁹ The wide variations in the quality and quantity of the information available to the design professional in the IDPs further inhibit the creation of uniform expectations.

The lack of clarity on the standard of care for design professionals in the IDPs holds costly ramifications for design-build teams. For instance, in recent litigation between AECOM and Flatiron, Flatiron claimed that AECOM failed to meet its standard of care under their design agreement, allegedly causing \$260,000,000 in cost overruns and delays.²⁰ The original design-build contract for the entire project was valued at \$204,300,000.²¹ This dispute between AECOM and Flatiron is not unique, nor are the amounts claimed unusually large.²² When these disputes arise, the amorphous expectations and obligations of the design professional force arbitrators, litigators, and project participants to untangle webs of contractual ambiguities and multi-million-dollar liabilities.

This Article grapples with the appropriate standard of care for designs in the design-build, fixed-price context. The analysis focuses on the standard of care for design professionals who are subcontractors and not design professionals who are in a joint venture with the design-builder. Additionally, while there are additional factors in the design-build context that contribute to risk allocation, this article will focus on the doctrine and issues that directly relate to the design professional's standard of care.²³

This Article begins with the proposition that the overall cost, and cost fluctuations, of design-build projects are not dispositive as to whether the design professional met its standard of care. It then posits that the traditional common law standard of care applies to the incomplete design phases of fixed-price design-build projects. To determine the standard for these design issues, the courts must consider (a) the parties' respective knowledge, and (b) the parties' relative expectations to find the applicable standard of care for each case.²⁴

This Article will: (i) provide background on the design-build model and the general standard of care for design professionals,²⁵ (ii) describe the nature of standard of care disputes in IDPs of design-build projects and explain the need for clear guidelines on the standard of care,²⁶ (iii) provide an analytical legal framework for determining the standard of care on a case-by-case basis,²⁷ (iv) identify basic duties that are traditionally within or outside the design professional's scope of duties,²⁸ and (v) conclude with suggestions on how to manage design professional expectations and design-build team expectations to reduce the risk of future disputes and litigation.²⁹

I. Design-Build and the Present State of Jurisprudence

Understanding the application of the standard of care for the design professional's preparation of IDPs for design-build projects first requires consideration of the elements of the design-build delivery method,³⁰ the relative duties of the design-build team members during the IDP, and the established jurisprudence on the standard of care for design professionals in non-design-build projects.

A. Design-Build, IDPs, and Party Roles in Pursuit IDPs

Design-build is, or is quickly becoming, the delivery method of choice for projects in the United States and globally. According to the Design Build Institute of America ("DBIA"), design-build projects are projected to encompass 47% of construction expenditures in the United States by 2026.³¹ Design-build projects accounted for \$1.2 trillion of total combined spending from 2018 to 2022.³² In 2022, DBIA award-winning projects represented a variety of sectors, including healthcare, aviation, industrial and research facilities, commercial buildings, rehabilitation and restoration projects, education facilities, public (state and federal) projects, and utilities (including transportation and water-related) projects.³³

Notwithstanding its recent ascent in the construction industry, the design-build delivery method is nothing new. Although design-build disrupted the construction scene as a "modern" building method in the late 1980s,³⁴ the basic concept driving the design-build model is much older, harkening back to the traditional "master-builder" form of delivery used in the very first construction projects in human civilization.³⁵ The master builder, equivalent to an engineer or architect, served as the single head of construction projects, responsible for the project's design, execution, and ultimate success.³⁶ However, with the master builder's sole responsibility for the project's success also came the sole liability for its failure.³⁷ Perhaps the most severe liability imposed on master builders was under Hammurabi's Code: master builders were sentenced to death if the building's failure killed the owner.³⁸

Although design-builders are no longer subject to the death penalty for professional negligence,³⁹ the design-build method similarly utilizes a single-source system in which the design-builder is responsible, and ultimately liable, for the project's design, execution, and success.⁴⁰ This design-builder can either be an integrated entity that provides both design and construction services or a "prime contractor" entity that engages subcontractors for design or construction services.⁴¹ This Article will focus on the second model with design professionals as subcontracted consultants. This arrangement is far more typical than designer-led design-build teams⁴² (particularly on larger projects) and provides a more straightforward model for examination of designer liability in the IDP.

Design-build was revolutionary when introduced because of its stark departure from the traditional design-bid-build model that previously dominated the construction industry throughout the 20th century.⁴³ Unlike design-build projects in which one team is responsible for the construction and design of a project, in the design-bid-build model, the owner has two points of contact and two associated contracts: one for construction and one for design.⁴⁴

This two-contract approach is inherent to the structure of the design-bid-build model but has several drawbacks. The approach leaves less room for flexibility in design during the project's lifespan because the design professional must typically provide a fully developed design before a bid is awarded and construction has started.⁴⁵ Additionally, the maintenance of two separate teams during the pre-bid phase deters communication and subsequent collaboration between the contractor and designer.⁴⁶ Much of the risk involving issues arising from the execution of the design falls on the owner because the owner typically either expressly or impliedly warrants the design to the contractor in its building contract.⁴⁷ These negative aspects are associated with increased project cost and increased project duration as requiring a completed design before bidding is more costly and less efficient than starting with an incomplete, initial design.⁴⁸

Design-build has soared in popularity largely due to its ability to avoid these issues associated with design-bid-build.⁴⁹ In theory, design-build offers enables time and cost savings, innovation, and collaboration among project participants.⁵⁰ The DBIA has estimated that design-build is 102% faster than traditional design-bid-build.⁵¹ Financially, the DBIA also advocates that design-build results, on average, in 3.8% less cost growth than traditional construction methods, and that design-build projects have a

lower cost per square foot as well.⁵² Team chemistry, early builder involvement, and participation among various participants are some of the design-build features that have been credited with the method's highly praised performance.⁵³

Indeed, some of the largest, complex construction projects have placed enormous faith in the design-build model. For example, public-private partnerships ("P3") are increasingly implementing design-build delivery in the development and construction of public projects.⁵⁴ Although there is still one owner in the case of P3 design-build projects, this singular owner contracts with a single-purpose entity (sometimes called a "concessionaire" or "developer") who is responsible for the design, construction, and sometimes financing, operation, and/or maintenance, of the project or asset.⁵⁵ Despite the "concessionaire" twist, even P3 design-build projects maintain the quintessential single-source responsibility of design-build projects in that the concessionaire is responsible for both the design and construction of the project.⁵⁶ P3 projects are but one variation of the use of design-build project delivery.⁵⁷

The design-build delivery method⁵⁸ typically includes the following phases: site and team selection, project planning, design and cost estimation, construction, and completion.⁵⁹ As previously referenced, a hallmark of design-build is that in several of these phases all parties proceed on incomplete designs, each dubbed an "incomplete design phase" or "IDP."⁶⁰ Although every design-build project eventually results in a complete design, this Article will focus on designs and relationships between the design-builder and design professional in the IDP of a construction project.

Generally, at least one IDP occurs before the procurement process.⁶¹ During this "Initial Owner IDP," an owner must "complete a certain amount of preliminary engineering and project engineering in order to be able to gain environmental approvals and prepare bid documents."⁶² Although there is typically no set definition for the percentage of completion of the designs in this phase, these preliminary design efforts generally feature between 10% to 15% complete designs.⁶³ Ultimately, this very preliminary design is intended to provide sufficient information for bidders to develop an adequate bid package but avoid providing designs that are "too complete" such that they limit or restrict bidders' ability to implement innovative technical solutions and concepts.⁶⁴

Following the Initial Owner IDP and during project pursuit, the riskier and conflict-laden IDP begins, whereby the project's designer provides design services to support the design-builder's efforts to win the project.⁶⁵ Sometimes dubbed the "tender phase" or "proposal phase," this "Pursuit IDP" provides a breeding ground for potential conflicts because, typically, low pre-award budgets and lack of information force designers to make assumptions and oversimplifications, both of which are subsequently tested during design development.⁶⁶

As with the Initial Owner IDP, there is no set definition clearly delineating the expected or appropriate level of completeness for Pursuit IDP designs, but the designs are generally somewhere between 15% and 30% complete.⁶⁷ In many instances, the contract at issue will not define the required completion percentage and will simply refer to these incomplete designs as "pursuit designs," "preliminary designs," "concept packages," or some other polished term or phrase for "incomplete."⁶⁸

In the Pursuit IDP, the design professional and design-builder have two distinct jobs that influence one another. The design-builder, typically the lead member in charge of the design-build team,⁶⁹ acquires the request for proposal ("RFP") and outlines a budget to provide to the design professional to develop a preliminary design.⁷⁰ The design-builders also direct this phase and can provide input on what aspects of design and planning are necessary or unnecessary to make a bid and proposal. The design professional relies on the outlined budget, RFP, and other direction provided by the design-builder to develop a preliminary design in accordance with the guidelines contained in the RFP.⁷¹ In turn, the design-builder makes its final bid on

the project based on the design professional's design and quantity estimates included with this preliminary design, along with any predictions for future change in design and estimates.⁷²

At their core, the duties of the design professional and design-builder are at odds. Design-builders want to stay competitive by driving the project cost down as low as possible but still need the design professional to develop the design with enough “meat” that the design-builder can consider, use, or rely on the design in preparation of its cost estimate and pricing proposals.⁷³ Leading industry practitioners have characterized these design-build IDPs in less than reassuring terms, including “squishy,” “messy,” “uncertain,” and “uncomfortable.”⁷⁴ Additionally, designer professionals are often under pressure to stay within a certain Pursuit IDP budget, while being held to high enough quality, innovation, and timeliness expectations to win the project award.

If there is going to be a lawsuit on a design-build project, the central dispute will likely relate to the services provided by the design professional during the Pursuit IDP because the fixed-price will be based on the designer's work during that phase. The current litigation landscape also suggests that the allegations in the dispute will likely allege that the design professional failed to meet its standard of care in the provision of its services during this time.⁷⁵ Therefore, this Article will focus on the standard of care for design professionals for design services rendered during the Pursuit IDP of a fixed-price design-build project.

B. Established Jurisprudence for the Standard of Care of Design Professionals

Regardless of delivery method or other context, under the common law, design professionals are subject to the professional standard of care: their work should rise to the level of “ordinary and reasonable care usually exercised by one in that profession, on that same type of project, at the same time and in the same place, under similar circumstances and conditions.”⁷⁶ This professional standard of care ensures that professionals complete their work not just “reasonably well” but “in a manner consistent with members of the profession in good standing.”⁷⁷ This standard does not require perfection⁷⁸ or even satisfactory results.⁷⁹

Generally, the standard of care is owed to the party with whom the design professional has a contract and to the public at large.⁸⁰ However, at least one court has found that a design professional's duties can extend to a project design-builder or contractor hired by the project owner, even without privity of contract between the design professional and the design-builder.⁸¹ In the case of design-build, the design professional owes the standard of care to the design-builder with whom it has a design agreement.

This standard of care applies only to the work completed within the design professional's scope of services or duties.⁸² This scope can be determined by the services listed in the contract, as well as through a design professional's affirmative conduct in undertaking additional duties not listed in the contract.⁸³ In the traditional design-bid-build delivery method, design professionals are typically assigned the following two sets of duties by contract: (1) provision of design services that are functional, safe, and comply with the proposal, budget, and applicable laws, and (2) taking any steps necessary to comply with and address building permits, entitlements, private restrictions, and fiduciary duties.⁸⁴

The design professional's scope of services in the equivalent pre-bid phase of design-bid-build differs significantly from its scope of services for the pre-award design-build phase. Design professionals in the conceptual phase of a design-bid-build process are expected to provide the project owner with a prototypical design that is “developed, tested, debugged, and streamlined” to provide to the project owner.⁸⁵ As such, when courts evaluate the work of design professionals in proposal phase designs in traditional delivery models, courts are evaluating that work with the expectation that the design is complete, or at least to the level expected of similar professionals exercising reasonable care.⁸⁶

However, whether a design has been completed and tested with the reasonable care expected of similarly situated design professionals is not self-evident. Design professionals are highly trained professionals who exercise judgment and skill derived from such training, education, and experience. Thus, it is difficult for laypeople to judge whether such labor meets the professional standard of care.⁸⁷ Thus, courts typically require expert testimony to prove a breach of their standard of care, either in negligence or a standard incorporated by the design contract.⁸⁸ Generally, only when such a breach is obvious will a court not require expert testimony.⁸⁹

Courts typically require these expert witnesses be in the same field-e.g., an expert should be an architect to judge an architect's work, or a civil engineer to judge a civil engineer's work.⁹⁰ These experts do not merely testify as to whether a design professional made a mistake or not. Rather, experts testify as to whether the design professional made a reasoned decision when exercising their judgment, even if that decision resulted in error or damages.⁹¹ Typically, experts rely on their own experience and knowledge of the industry and review available documentation (such as design plans, schedules, etc.) to determine whether a design professional's work meets the standard of care. The expert does not necessarily need to agree with the decision the design professional made. Instead, the expert must determine whether the decision was within a reasonable margin of error or was one that would be made by another reasonable design professional.⁹² In the context of design-bid-build design work, these evaluations typically determine whether a reasonable design professional would have made the same design choices at the completed design stage.

Although courts permit and rely on expert testimony to determine the appropriate standard of care and whether such standard has been met, courts also recognize that the standard under which a design professional should be evaluated depends on the project details and circumstances of the alleged breach.⁹³ The design professional's judgment must be reasonable, and an erroneous decision in one circumstance may be more reasonable than the same decision made in different circumstances. Yet, courts, like juries, also lack the professional knowledge necessary to determine whether such a professional decision was unreasonable.

The court or decisionmakers' presumed lack of knowledge makes expert testimony indispensable in determining whether a standard of care has been breached. Often, it may be dispositive. For instance, in *Cranes Creek, LLC v. Neal Smith Engineering, Inc.*, the South Carolina Court of Appeals relied solely on the lack of expert testimony establishing the standard of care when upholding a summary judgment against a claim for professional negligence of a civil engineer providing site services for a residential development.⁹⁴ The court held that the plaintiff failed to prove the applicable standard of care because it provided no expert testimony establishing the standard.⁹⁵ Accordingly, the court affirmed the lower court's summary of judgment, finding there was no genuine dispute of material fact.⁹⁶

Under the traditional design-bid-build framework, *Cranes Creek, LLC* evidences that, despite years of litigation over design professionals' liability for standard of care violations stemming from complete designs, the standard of care is primarily determined by individual expert witnesses assessing each case independently. Some courts have recognized some general principles, such that the plans and designs provided by architects must be "sufficient and adequate."⁹⁷ Even then, whether the design is sufficient and adequate depends on when, where, and to whom the question is posed.

One theme, however, appears more or less constant. Basic principles of tort law dictate that the question of breach is one of fact for the jury to decide (with the help of evidence, such as expert testimony), and the question of whether a duty exists at all is one of law for the court to decide.⁹⁸ It appears that in the preliminary stages of design-bid-build, the duty is easy to determine. The designer is to complete the design to the full extent, ensure compliance with building codes, and ensure the design is functional and produces a safe structure. This predetermined standard enables a court to more easily identify the existence of a duty subject to the standard of care and enables expert witnesses to more easily determine whether such duty was met.

The questions of duty and breach are more difficult to answer in the design-build context, even with expert testimony. The design-build method complicates the makeup of the design professional's duty and what constitutes a breach because, unlike in design-bid-build, design-build necessitates incomplete designs upon which the contractor acts to complete their pre-construction duties. This both obfuscates whether the error is attributable to the design professional or design-builder and whether any omissions in a necessarily incomplete design are within the design professional's duty of care. As explained in the next section, the current jurisprudence, as amorphous as it is, inadequately addresses the standard of care for design professionals in design-build because of the fundamental differences between the design processes of the two delivery methods.

II. Defining the Present Issue

Despite the longstanding expectations in place for design professionals and the last decade's witness of design-build's increasing popularity, a striking lack of clarity and consensus plagues the industry's expectations for design professionals on design-build projects, particularly during IDPs.

Recent cases alleging similar failures on the part of design professionals during the IDPs of design-build projects ironically contain similar standard of care language. These contracts require the design professional to perform with the level of care and skill typically demonstrated by similar professionals in similar circumstances.⁹⁹ Yet, the number and similarity of these cases presents a paradox. The standard of care is breached when a design professional acts out of line with his or her peers. But if a large peer group of design professionals make the same calculated decision resulting in an alleged mistake, they cannot all be said to have breached the standard of care, because they are all acting in line with one another. So, what is the standard of care, and who sets it?

A. The Blame Game

The reality of design is that design errors or omissions are likely, even expected, especially in design-build projects.¹⁰⁰ With reliance on a roughly 30% complete design in design-build projects¹⁰¹ as opposed to the expectation of a fully complete and debugged design in design-bid-build projects,¹⁰² it should come as no surprise to design-build contractors when incomplete designs do not provide the complete picture needed for an accurate estimate. And yet, design-builders blame design professionals for the omissions. Why? Simply put, design-builders seek a “but-for” imposition of liability for their cost estimation issues, alleging that but for the design professional's errors and omissions in its preliminary design, cost overruns and costly design changes would not have occurred.

As explained previously, in a typical fixed-price design-build project, the design professionals are charged with design, and the design-builders are charged with cost estimates.¹⁰³ Often, these cost estimates rely on a less than 30% complete design during the Pursuit IDP. The design-builder depends on this incomplete design for developing its estimate that becomes the basis for its fixed-price bid to the owner.¹⁰⁴ When the preliminary design fails to capture areas for quantity growth or identify risk areas of cost overruns or design changes, the design-builder may not factor those costs into its bid and the ultimate fixed-price. Further, ambitious design-builders may underestimate areas of risk in their enthusiasm to provide the lowest bid to acquire the project. But as the project progresses after the IDP, the unidentified costs accumulate. Because the design-builder is ultimately responsible for both design and construction in the design-build model, the design-builder is left to bear the additional costs.¹⁰⁵

The issue then becomes: Who is at fault? The design-builder and design professional are left blaming each other due to unclear scopes of work and poorly divided tasks. Even with contractually specified scopes of service, it is often unclear who is obligated to do what in order to prevent these cost overruns and design changes, or at least, properly accounting for likely changes in preparing the project budget.

The division of work between the design professional and design-builder in the design-build team differs from contract to contract, but some themes are consistent. As discussed, commonly articulated duties relating to the pre-award design phase

include preliminary design and concepts to support estimating and to provide to the owner after an RFP. Additionally, narratives in technical proposals or other construction documents may be included. Such services are sometimes referred to in blanket terms like “design services” and “design development.” Certain template contracts also provide that design professionals will provide “assistance” in bidding and negotiation.¹⁰⁶ Conversely, the scope of service for design-builders in IDPs typically includes preparing and submitting bids, cost estimation, team management, supervision, and the balance of services required to satisfy the owner's RFP.¹⁰⁷

However, even when the contract clearly defines the scope of services as those above, it is difficult to see where one party's duty begins and the other ends. For instance, consider a preliminary design agreement that obligates the design professional to provide preliminary design services to assist the design-builder in calculating its bid. Beyond the provision of actual design services, the duties become less clear. As the design-builder is responsible for the final bid, then the design-builder bears the responsibility to identify risk of cost overruns and should consider that risk in calculating its bid. However, if the design professional is supposed to provide design services that “assist” the design-builder in calculating its bid, what does that assistance entail? Should the design professional identify potential areas of quantity growth? Does the design professional need to provide independent estimates to accurately warn the design-builder of cost overruns? Or, would these duties lie outside of the design professional's scope of services, as the contract only obligates the design professional to provide design services? Unfortunately, the current law provides little guidance on answering these tricky questions of duty.

B. Insufficiency of Established Jurisprudence

Common law makes clear that design professionals “owe duties to their clients and to the public to act with reasonable care, which sometimes can give rise to a tort duty independent of the contract.”¹⁰⁸ Further, “[e]ngineers owe such a duty of reasonable care to developers and contractors to whom they provide engineering services.”¹⁰⁹ As such, design professionals on design-build projects owe the same professional standard of care duties in the provision of their professional services during IDPs as are owed at all other times and on all other projects. Accordingly, design professionals providing such services during design-build IDPs must exercise the same degree of care and skill expected from similar professionals in similar circumstances.

The issue in transferring the existing design-bid-build standard of care jurisprudence to the design-build context is both the roles and the prescribed services of the design professional in the two delivery models are different, at least preliminarily. First, as discussed,¹¹⁰ the design professional provides a complete design at the outset of design-bid-build projects, contrasted with the necessarily incomplete design provided in the IDP.¹¹¹ Second, the design professional is necessarily interconnected with the design-builder in the design-build model, contrasted with the separation between the entities in design-bid-build model. This interconnection necessitates collaboration between the design-builder and design professional. These two differences fundamentally shift the focus in the court's evaluation of the standard of care in the two project models.

Compared to design-bid-build, courts must analyze the scope of the design-professional's duties at greater depth. In the design-bid-build context, courts (and expert witnesses) have clearer indicia of when an unreasonable design choice results in safety hazards, code violations, or damages. First, as design-bid-build requires a complete design before building, courts rely on a complete design to determine whether a design professional met its standard of care. The complete design enables the expert witness to address whether the design as a whole is a reasonable product. This level of completion provides a clear standard for expert witnesses to evaluate: Is it reasonable for these errors to be present in a complete design, or not? As for omissions, would a reasonable design professional consider the design “complete” without the omitted elements?

Conversely, the design-build model presents a much different framework within which expert witnesses and courts must evaluate the design professional's choices and standard of care. In the design-build context, courts must evaluate a necessarily incomplete product, which requires the design professional omit certain elements from the design. From there, the questions an expert witness must address multiply. An expert witness minimally must consider which omissions were and were not reasonable, whether the omissions were reasonable given the parameters the design professional was given by the design-builder, whether

the omissions were reasonable at the specific stage of the Pursuit IPD and for the level of completion expected (e.g., 30%), and whether and how the contractual scope of the designer's work expands or contracts specific duties of the design professional. Further, the expert witness needs to examine the possibility of auxiliary duties that come from providing an incomplete rather than complete design. Which disclaimers or warnings are necessary? Which are reasonable? Even, which are standard?

The collaboration aspect of the design-build model additionally necessitates a court to both evaluate the allocation of duties between the design-builder and design professional and determine (i) whether the design error was the proximate cause of the damages, or (ii) whether intervening actions by the design-builder impose liability on the design-builder to a greater extent than the design professional. The design professionals are charged with creating designs that follow the parameters given by the design-builder, but how much liability should be imposed when the design professional is given incomplete or unclear parameters? What if the design-builder asks that the design professional focus on producing a preliminary design quickly and cheaply? What if there are last-minute changes to the program? The collaboration required for effective design-build projects also muddles the clear lines of which party is responsible for what duties (and any mistakes from those duties) within the project.

Both of these issues are further amplified by common aspects of the design-build model. Design professionals and design-builders often enter agreements in which the scope of services the design professional is to provide is ill-defined. Take the common provision that the incomplete design be 30% complete. What is a 30% complete design? Is each element of the design to be completed 30%, or is 30% of the whole design to be completed fully? Should all building code requirements be 30% assessed, or should 30% of building code requirements be assessed? Some courts have recognized that there is a difference in standard of care for a preliminary design and final design but have not definitively determined the scope and effect of such a standard.¹¹²

Courts have struggled with determining a framework for the analysis of the standard of care and have come to differing results with little guidance on how future courts should approach these design-build cases. The following two cases describe the presently available case law and highlight the inconsistent and haphazard reasoning that courts have employed in addressing the standard of care in the IDPs of fixed-price design-build projects.

The court in *C.L. Maddox, Inc. v. Benham Group, Inc.* imposed an implied warranty on an engineer for a design-build project, despite the longstanding principle that design professionals do not warrant their designs to be perfect.¹¹³ In *Maddox*, the design-builder on a design-build project alleged breach of contract and fraudulent and negligent misrepresentation by the project's engineers, claiming over \$5 million in damages.¹¹⁴ The two entities worked on a design-build project in Illinois to remodel a coal processing system at an electric power plant. The parties orally agreed that the engineer would provide engineering for equipment layouts, sizing, and estimates so that the design-builder could prepare a "final construction cost (lump sum)" for the owner.¹¹⁵ The design-builder and engineer later formalized a subcontract after the owner awarded the design-builder the project.¹¹⁶

Over half of the design-builder's claimed damages resulted from cost overruns after the design-builder relied on the engineer's estimates in formulating its bid to the owner.¹¹⁷ The design-builder testified that it relied heavily on the engineer's estimates and that it could not have bid the project without the designer's estimates because the designer "possessed all of the design information."¹¹⁸ At trial, the design-builder showed through expert testimony that the engineer caused numerous problems on the project, including providing late drawings, providing insufficient drawings, understaffing the project, and underestimating the construction costs for the final design.¹¹⁹ The expert also opined that the engineer lacked sufficient knowledge for the type and magnitude of the project, including material handling requirements and number of drawings needed.¹²⁰

The United States Court of Appeals for the Eighth Circuit in *Maddox* agreed that the engineer was liable for the cost overruns on the project caused by estimation errors and design deficiencies.¹²¹ However, the court did not conclude that the liability was based on a breach of standard of care-rather, a breach of implied warranty.¹²² Analyzing Missouri law, the court concluded the

parties had an oral agreement separate from its written subcontract (notwithstanding a subcontract integration and superseding clause) for the engineer to provide estimates to the design-builder for use in assembling its construction costs for the owner.¹²³ Although the engineer argued that it did not warrant the accuracy of its estimates and bidding information, the court implied a warranty under Missouri law, finding that the engineer “repeatedly assured” the design-builder of its qualifications to conduct the work with the correct manpower and expertise, and the design-builder relied on these assurances.¹²⁴ Those assurances, accordingly, were warranties for which the engineer could be held liable.¹²⁵

The legal framework in this decision fails to provide a useful framework for future professional negligence cases arising from design defects during the Pursuit IDPs of a design-build project. First, the court's holding challenges the common principle that design professionals do not, and realistically cannot, warrant their designs.¹²⁶ This principle exists because a design professional cannot create a perfect design; therefore, any warranty guaranteeing a perfect design would be impossible to fulfill.¹²⁷ For this reason, claims for professional negligence against design professionals have been viewed through the standard of care lens; implying warranties wantonly into design professional's work would be untenable.¹²⁸ Second, this implied warranty is not a workable framework for future cases. In addition to the impossibility of perfection in design generally, widely implying a warranty into design work completed in the IDP would result in an intolerable level of liability for the design professional because its work is necessarily incomplete at the IDP stage.¹²⁹

The court in *Walsh/Granite JV v. HDR Engineering, Inc.* indicated that design professionals might breach their standard of care when they undertake identifying areas of potential quantity growth and fail to identify all areas of potential quantity growth.¹³⁰ Walsh/Granite JV (“W/G”) was the design-builder, and HDR Engineering, Inc. (“HDR”) was the lead engineer in a P3 bridge replacement project.¹³¹ The parties had two contracts. The pre-contract award contract (“Phase I” contract) obligated HDR to provide a project estimating spreadsheet (called “the Mother of All Spreadsheets”) that provided engineering estimates of quantities for over 500 different components to replace the 558 bridges.¹³² HDR understood W/G would use these estimates to make its fixed-price bid.¹³³ The post-award contract (“Phase II” contract) addressed engineering services project quantity growth estimates after contract award.¹³⁴ Both contracts used the normal standard of care language.¹³⁵

However, the Phase II contract had some important differences in language and provisions. The Phase II contract obligated HDR to make a matrix identifying quantity estimates of materials that had a reasonable probability of changing after preliminary designs.¹³⁶ This matrix provided estimates of likely change and estimated variances. The Phase II contract additionally created a “Design Quantity Change Fund” for \$1,000,000 to offset cost overruns arising from quantity growth in excess of the quantity growth estimates for the materials identified in the matrix.¹³⁷

The parties filed cross motions for summary judgment. HDR moved for summary judgment on a declaratory judgment that W/G was not entitled to withhold money from HDR for quantity growth damages for design elements not included in the matrix.¹³⁸ HDR argued that it could only be liable for the quantity growth for the items identified in the matrix and quantities not included in the matrix were outside their scope of duty.¹³⁹ W/G argued that the matrix did not limit HDR's liability, the standard of care governed HDR's liability for all areas of quantity growth, and W/G could withhold payments for its \$40,000,000 in damages from quantity growth areas included or not included in the matrix.¹⁴⁰

The court disagreed with both parties.¹⁴¹ The court sided with HDR that the Phase II contract defined and limited HDR's liability for the identified quantities in the matrix.¹⁴² However, the court did not agree that the Phase II contract limited HDR's liability to only the specified quantities because the contract did not have any language demonstrating that the parties wanted to limit liability for items not in the matrix.¹⁴³ The court found that HDR accordingly *could* be liable for quantity growth for materials identified in the Mother of All Spreadsheets but not the matrix.¹⁴⁴ HDR's failure to identify additional probable areas of growth

and include them in the matrix could be a breach of its standard of care.¹⁴⁵ However, the court did not provide any guidance on how to determine HDR's liability for this omission.¹⁴⁶

Neither of these cases, nor others not described herein,¹⁴⁷ are terribly helpful when it comes to defining the standard of care. As discussed, the court in *Maddox* relied on implying a warranty into the engineer's work. The widespread use of implied warranties into design professional's work in the Pursuit IDP would create an intolerable level of risk and would either dissuade all design professionals from providing design work in the Pursuit IDP or increase expenses to cover the risk. *Walsh/Granite* fails to provide any indication further than that when a design professional undertakes to predict areas of growth and allocate risk for damages from quantity growth, it may be subject to a standard of care for other areas of growth. The case does little to indicate when design professionals have a duty to identify areas of potential quantity growth or what areas are reasonable to identify.

C. The Risks from Misallocated Risk

Leaving the standard of care as a mystery that may burden design professionals with insupportable risk not only poses harm to design professionals but also to the construction industry as a community.¹⁴⁸ Misallocation or unclear allocation of risk further exacerbates these concerns and foster disputes over expectations and responsibilities, especially in design-build projects. For example, in a 2020 study conducted in Australia, risk allocation was “the most commonly nominated issue affecting the industry” and “the most commonly mentioned issue impacting satisfaction or dissatisfaction with the tender process.”¹⁴⁹ One of the specific risk issues most often mentioned was “uncapped liability,” a risk that mirrors the pressures faced by design professionals in IDPs when vague contractual scopes leave them exposed to disproportionate blame.¹⁵⁰ Similarly, contractors were poor at either understanding or managing risk, often resulting in “irrational pricing” that increased total project costs anywhere between 10 to 50%.¹⁵¹

Leaving the appropriate standard of care in the Pursuit IDP undefined only exacerbates these concerns. In an extreme scenario, if courts follow the reasoning in *Maddox* and determine that design professionals warrant their design work when they assure design-builders that they can perform competent work, design professionals would likely no longer take on design-build projects because the amount of risk would be intolerable. Further, the amount of insurance required to support that level of risk would like increase insurance costs, and thereby the cost for hiring design professionals for design-build projects.¹⁵²

Allocating risk appropriately does not only benefit design professionals; it also benefits owners. If risk is properly allocated, then the risk associated with being a design professional or a design-builder decreases. In turn, more design-build teams would be available to owners, and by the basic economics of supply and demand, the overall trend should decrease costs for owners. Further, the proper allocation of risk should result in more appropriate bids.¹⁵³ Therefore, it is imperative for the construction industry and court system to more clearly define a process for determining the duties included in the design professional's standard of care in IDPs and the level at which those duties should be performed. The risk created by this uncertainty impacts more than just design professionals and threatens the sustainability of using design-build models.

III. Finding the Standard of Care for Design Professionals in IDPs

“No man ever steps in the same river twice, for it's not the same river, and he's not the same man.”¹⁵⁴

No unified standard of care for design professionals during IDPs exists, nor can one exist. It is never the same project, and it is never the same contract. The standard is necessarily circumstantial and flexible, as are the duties that the standard encompasses. The main duties that design professionals are charged with in IDPs are set forth in the contract and typically include the pre-award designs and concepts. The mystery that remains is the level at which these services are to be performed. Traditional

standard of care jurisprudence dictates that the standard of care depends on circumstances, but *which* circumstances matter, and the manner in which the pertinent circumstances impact the level of design professional responsibility are key factors that must be identified and clarified in order to provide clarity in identifying the applicable standard of care.

This section provides two frameworks by which the standard of care can be judged. It first sets forth an analytical framework to evaluate the scope of duties owed under the standard of care by (1) examining the parties' relative knowledge and expectations, and (2) whether the alleged error constituted an omission or commission. Second, it lists some concrete factors to consider in determining the design professional's scope of duties under the standard of care appropriate for Pursuit IDPs. This section concludes by recommending that design-builder and design professionals utilize design agreements to clarify the design professional's scope of duties and define risk allocation between the design-builder and design professional, rather than relying on the ambiguous wording of a template standard of care and the interpretation of a future arbiter.

A. Analytical Framework

Although not expressly articulated, one pattern is evident in the reasoning of arbitration panels and courts that have searched for an appropriate standard of care for design professionals during Pursuit IDPs. Two factors are key to these rulings: knowledge and expectations. The effect of these factors is different depending on whether the alleged breach of the standard of care constitutes an erroneous *commission* as opposed to an erroneous *omission*.

1. Parties' Relative Knowledge and Expectations

Although common law courts have struggled with articulating an intelligible framework for analyzing the standard of care for design professionals in IDPs, the arbitration award incorporated in the record of *Parsons, Brinckerhoff Quade, & Douglas, Inc. v. Palmetto Bridge Constructors* is instructive for understanding these issues.¹⁵⁵

In *Parsons*, design-builder Palmetto Bridge Constructors hired Parsons, Brinckerhoff Quade & Douglas, Inc. as its lead design professional to assist in a bridge replacement project.¹⁵⁶ The parties had a written Memorandum of Understanding for the design professional to complete preliminary design work.¹⁵⁷ The design-builder filed a demand for arbitration to recover \$64,275,745.15 in alleged cost overruns resulting from preproposal design work errors.¹⁵⁸ Specifically, the design-builder claimed that the design professional failed to communicate uncertainty in its preliminary design, alert the design-builder to areas that had not been properly detailed, and identify areas ripe for future design changes, all in breach of its standard of care.¹⁵⁹ For these claims, the panel found for the design professional.¹⁶⁰

Although the arbitration panel did not spell out an analytical framework in their award, the facts highlighted in its findings, and later cited in its individual rulings, are revealing. In its findings, the panel highlighted the lack of collaboration in the pre-proposal phases,¹⁶¹ the design-builder's knowledge that design uncertainties existed,¹⁶² the design-builder's level of sophistication,¹⁶³ the difference in time and money spent on the preliminary design compared to the post-award design,¹⁶⁴ and the exclusion of the design professional's input on quantity and contingency estimates.¹⁶⁵ The panel then relied on these factors in articulating its rulings. The panel's findings fall into two categories instructive in determining the appropriate standard of care for design professionals: the parties' knowledge and their expectations.

The parties' relative knowledge and the available information defines and limits their respective abilities to predict risk and detect errors. The more knowledge a party has on costs, possible issues, and design, the better a party can predict risk. In considering the design-builder's level of knowledge, the panel looked at the design-builder's relative sophistication and experience¹⁶⁶ and the knowledge on the project that the design-builder did not share with the design professional.¹⁶⁷ In examining the design professional's knowledge, the panel considered what information the design professional received from the design-builder and what information was not shared with the design professional.¹⁶⁸

For instance, the panel determined the duty to warn of specific cost overruns to be outside of the design professional's standard of care partially because the design professional had significantly less information than the design-builder. Consequently, the design professional's relative lack of information limited its ability to foresee future design change and cost overrun risks, and thus limited its ability to warn the design-builder of such risks.¹⁶⁹ On the other hand, the design-builder's sophistication indicated that it was better equipped to know that the full and complete load analyses were to be completed post-award, and that the design-builder should have taken that into account.¹⁷⁰ Further, the panel highlighted that the design-builder knew of design uncertainties and was the only party that knew what estimates were being given.¹⁷¹

Conversely, the design professional had too little knowledge to be able to adequately predict risk and inform the design-builder of potential cost overruns and unexpected design changes. The design professional did not know of what estimates were being made because the design-builder withheld information on estimates and contingencies.¹⁷² Consequently, the design professional did not have the knowledge needed to predict, let alone warn, of misestimates.¹⁷³ As a result, the design-builder's relative amount of knowledge, as compared to the knowledge of the design professional, cut in favor of the design professional having met its standard of care despite cost overruns and design changes.

The second group of key facts related to the parties' reasonable expectations of what the design professional duties were to be. The panel was convinced that the design professional did not have a duty to warn the design-builder of the subject cost overruns and design changes by examining the circumstances under which design work was performed and the parties' conduct. Specifically, the circumstances indicated that the parties did not and could not have reasonably expected that the design professional had the duty to warn of specific cost overruns.¹⁷⁴

The circumstances made it unfeasible for the design professional to predict and warn of the subsequent design changes. First, the contract was for an incomplete design, not a complete design that considered all future load analyses.¹⁷⁵ The parties understood that "load testing, geotechnical investigations, scour analysis, ship impact, wind studies, aerodynamic testing, and seismic analysis and modeling" would occur post-award.¹⁷⁶ Further, the complexity of the project coupled with the limited time frame within which to complete the project rendered it unreasonable to expect the design professional to predict all future changes.¹⁷⁷ That condensed timeframe was even more apparent when comparing the resources used for the preliminary design to those used in the post award design.¹⁷⁸ Finally, the difference in cost was a key indicator of the level of completion and thoroughness, with the cost of the pre-award work being substantially less than that of the post-award work.¹⁷⁹

The parties' conduct also indicated it would be unreasonable to expect the design professional to warn of the specific future design changes and cost overruns during the IDP. Specifically, the design-builder repeatedly directed the design professional to keep design simple and keep costs low,¹⁸⁰ and the design-builder excluded the design professional from participating in estimating or providing its own estimates.¹⁸¹ This conduct indicated that the design-builder could not reasonably expect that the design professional would provide warnings of overestimates because the design professional was not included in the estimation processes.¹⁸² This lack of collaboration and involvement of the design professional in the cost estimation and bidding process cut against any reasonable expectation that the design professional would, or even could, intervene or warn of inaccuracies in cost estimates.¹⁸³ Finally, the panel recognized that some level of design changes cannot be anticipated pre-bid; therefore, it was the design-builder's duty to anticipate design changes and arrange contingencies accordingly.¹⁸⁴

In sum, the court found that the design professional had not breached its standard of care by relying upon facts indicating both the knowledge and expectations of the parties during the IDP.

This knowledge and expectations framework can also explain the court's reasoning in *Middlesex Corp. v. Fay, Spofford & Thorndike, Inc.*¹⁸⁵ In this case, Massachusetts Department of Transportation ("DOT") sent RFPs to design-build firms for the construction of the Kenneth F. Burns Memorial Bridge.¹⁸⁶ DOT provided 25% complete designs with their RFPs, which enabled bidders to bid a fixed amount both for the remaining design work necessary to complete the design and the costs of construction.¹⁸⁷ The Middlesex Corporation ("Middlesex") was one of these bidding design-build teams.¹⁸⁸ Middlesex engaged Fay, Spofford & Thorndike ("FST"), an engineering and design firm, to provide design services.¹⁸⁹

The parties executed a Teaming Agreement outlining their reciprocal obligations.¹⁹⁰ The Teaming Agreement contained a typical standard of care clause, reflecting the common law standard.¹⁹¹ The Teaming Agreement tasked Middlesex with submitting a proposal that had a "further advanced preliminary design" and "a fixed price bid."¹⁹² The contract obligated FST to provide "additional preliminary design" sufficient to enable Middlesex to make cost estimates for the project.¹⁹³ However, the Teaming Agreement did not require FST to "perform additional design beyond what was required under the RFP for a responsive proposal."¹⁹⁴ During this Pursuit IDP, several issues occurred with the bridge design and the roadway and drainage design.

The first issue concerned structural changes to the bridge design. DOT provided a conceptual bridge support system in its preliminary designs that FST determined to be inadequate.¹⁹⁵ Instead, FST opted to adopt a post-tensioning support system.¹⁹⁶ The post-tensioning system called for "drag brackets," which attached the steel arches under the bridge to the bridge deck.¹⁹⁷ The use of drag brackets would involve additional time and costs above what the conceptual design called for.¹⁹⁸ Around the time that FST was debating this design change, FST received an email from Middlesex on January 18, 2012, stating that Middlesex wanted cease pre-bid design work and finalize the design drawing for the bid package.¹⁹⁹ Conflicted, FST did not include the drag brackets in its original preliminary design, believing it could be addressed post-award.²⁰⁰ FST submitted this design to Middlesex on January 20, 2012.²⁰¹

After the FST principal-in-charge discussed the drag bracket issue with FST's sub-consultants, FST determined that the drag bracket should be included in the pre-bid package, despite Middlesex's email.²⁰² Additionally, DOT had issued an addendum to its RFP requiring significant structural re-engineering that increased the size and weight of many steel members.²⁰³ FST submitted a revised preliminary design that included both the drag brackets and addendum changes, so Middlesex could consider the increased steel costs in its cost estimate, and provided copies of the drawings and technical proposals on February 9, 2012.²⁰⁴ However, FST failed to notify Middlesex of these significant design changes, which would have been difficult for Middlesex to find from their own review of the materials.²⁰⁵ Middlesex made its bid price without being notified of the bridge changes and was awarded the bid.²⁰⁶ The addition of the drag brackets caused over \$400,000 in additional costs.²⁰⁷

However, when Middlesex sought price proposals from steel fabricators post contract award, it decided against including FST engineers with Middlesex's meetings with the fabricators.²⁰⁸ Further, Middlesex provided the January 20th drawings to the steel fabricator for its price quote, even though Middlesex was then aware of the changes to the drawings received February 9th.²⁰⁹ The steel fabricator made its price quote based on the January 20th drawings and emails describing the DOT addendum changes.²¹⁰ Middlesex nor FST provided evidence of what the steel fabricator would have quoted if it had been given the February 9th drawings.²¹¹

The second key issue concerned the roadway and drainage design. When designing the pitch and drainage, FST believed it could cut costs by redesigning the pitch and drainage of the bridge deck.²¹² The conceptual bridge design showed a crowned pitch for drainage off both sides.²¹³ The engineer redesigned the bridge for the RFP response to include a pitch on one side, causing drainage on only one side.²¹⁴ The testimony showed that FST's redesign complied with all applicable codes and was

used across the country.²¹⁵ The facts also showed that FST and Middlesex discussed this design change and that the Middlesex approved and included it into its proposal.²¹⁶ The DOT also awarded Middlesex the project with this redesign.²¹⁷ After the DOT awarded the contract, the DOT pushed back on the pitch redesign, insisting on the original crowned approach, which increased the costs to construct the bridge.²¹⁸ Middlesex opted not to seek a change order or claim for this issue from the DOT although the change increased costs.²¹⁹

Finally, FST erred in its paving design drawings by failing to account for a later DOT addendum to the RFP that increased the asphalt thickness in various locations.²²⁰ FST provided Middlesex designs that did not incorporate the changes required by the addendum.²²¹ Middlesex relied on the designs to obtain a fixed price bid from a paving subcontractor, which resulted in paying the subcontractor an additional \$126,031.²²²

Despite these issues, the project ultimately came in more than \$10 million *under* the DOT's projected cost, which included \$18 million in savings.²²³ Nonetheless, Middlesex sued FST for breaching the contractual standard of care. Middlesex claimed FST had breached its standard of care because its pre-bid preliminary design work was insufficient “to develop a fixed price bid with the same precision as a bid made on final contract drawings provided by the owner in a traditional construction project.”²²⁴ Middlesex claimed if not for FST's breach in standard of care, Middlesex would have had bid more and made more profit.²²⁵

Similar to the analytical approach of arbitration panel in *Parsons*, the court in *Middlesex* cited to the parties' respective knowledge and expectations in its reasoning. In evaluating FST's liability for cost overruns for its alleged breached standard of care, the court found FST was only required to provide the professional services necessary to complete the “additional preliminary design” required by the Teaming Agreement, and no more design than that.²²⁶ Similarly, the court did not hold FST responsible for details not addressed in the pre-bid work because the Teaming Agreement only required the engineer to complete the work necessary to present a technical proposal that was responsive to the RFP and acceptable to the DOT.²²⁷

As such, circumstances indicated Middlesex did not expect FST to make a final design, but FST also knew that Middlesex would rely on its design works for initial cost estimates.²²⁸ The expectation for the lower level of completion of the design was further supported by Middlesex's concern for cost and speed, particularly when Middlesex asked FST to cease making changes to the preliminary design so that Middlesex could focus its resources on competitive pricing during the procurement process.²²⁹

The court also noted the parties' respective knowledge on the project. Although the Teaming Agreement required FST to provide independent estimates, Middlesex did not allow FST to make its own independent quantity estimates and did not share its quantity estimates.²³⁰ Further, Middlesex decided not to include FST in its price proposals from steel fabricators and provided the earlier design that did not include the change in drag brackets.²³¹

As to the structural changes to the bridge design, the court found FST had breached its standard of care by failing to alert Middlesex to the changes but found that the breach did not cause Middlesex's damages.²³² The court held that FST had a duty to advise Middlesex of the design changes because “FST could not have anticipated that Middlesex would notice this change if it was not pointed out by FST.”²³³ However, Middlesex contributed to its own damages when it provided earlier versions of the preliminary design (without the drag brackets) to the steel fabricator.²³⁴ The steel fabricator had an inaccurate or incomplete design on which to base steel quantities because Middlesex provided the wrong plans, not because FST failed to advise Middlesex of the design changes. Because Middlesex was at fault for its own losses, FST was not liable for cost overruns.²³⁵

The court also declined to find FST breached its standard of care by “failing to know” DOT would reject the changes to the pitch design.²³⁶ First, the court noted that no expert testimony indicated that the approach was inconsistent with any building or highway codes or standards.²³⁷ Second, DOT initially must have believed it was a reasonable approach since it approved Middlesex's proposal that included it.²³⁸ Finally, and seemingly the reason with the most weight, Middlesex did not pursue a change order from DOT, and the court saw “no reason to charge FST with Middlesex'[s] strategic decision not to press this claim.”²³⁹

However, the court did find that FST breached its standard of care as it related to paving.²⁴⁰ Curiously, the court provided scant analysis of this issue. The court found FST made a mistake by failing to incorporate the changes from the DOT addendum and rejected FST's contention that the mistake was “an acceptable mistake” because the professional standard is not perfection.²⁴¹ As such, Middlesex's claim for damages for “indirect costs attributable to this direct cost increase [was] reasonable.”²⁴²

Throughout its opinion, the court highlighted the parties' expectations. The court indicated the parties both expected that the preliminary design work would evolve and change as would the estimates. The court highlighted that the Teaming Agreement stated that FST's “preliminary design work [be] sufficient to estimate costs, and if the bid is successful, there [would] be substantial design development.”²⁴³ Further, the court noted that in design-build projects generally “weights, complexities and therefore construction costs invariably increase after the contract is awarded as design development proceeds to the final approved-by-owner construction design” and noted the parties' sophistication in regards to design-build projects and working together.²⁴⁴

These three different results on the three issues fall in line with an evaluation of the parties' expectations and knowledge. For the failure to advise of the changes to the structural design, FST was the only party who knew of the design changes before Middlesex estimated its bid.²⁴⁵ Middlesex had no knowledge of the structural changes, and therefore had no knowledge of the certain risk of cost overruns in steel costs.²⁴⁶ Further, the parties agreed FST would provide designs so that Middlesex could estimate quantities for the bid.²⁴⁷ Therefore, both parties would have reasonably expected FST to notify Middlesex of design changes that would impact its quantity estimates. FST breached its standard of care in failing to notify Middlesex of the design changes because FST was the only party with knowledge of the risk of cost overruns and the parties expected that FST would provide Middlesex the information needed to make quantity estimates.

However, this analysis changes regarding actual damages. Middlesex knew of the design changes and failed to provide that information to the steel fabricator.²⁴⁸ At this point, both parties had the same level of knowledge on these designs that could increase costs.²⁴⁹ The expectation was not for FST to notify the steel fabricators of the designs; Middlesex was charged with providing quantity estimates.²⁵⁰ Not only did Middlesex ask FST not to make independent quantity estimates, but it also decided against including FST in the meetings with steel fabricators.²⁵¹ Therefore, for the actual source of damages, the knowledge and expectations weighed against Middlesex.

The parties' respective knowledge and expectations also weighed against finding FST breached its standard of care by failing to predict that DOT would ultimately reject its changes to the drainage design. FST provided a preliminary design that had no alleged defects.²⁵² FST had no knowledge that DOT would reject its design changes.²⁵³ Although FST was to make a design responsive to DOT's request, it would be unreasonable for FST to otherwise expect that DOT would reject its changes, especially because DOT had initially accepted the design changes to the pitch.²⁵⁴

An analysis of knowledge and expectations also supports the court finding that FST was liable for breaching in standard of care by failing to implement the design changes required by the DOT addendum. FST had knowledge of the addendum and the changes it required and the expertise to implement these design changes.²⁵⁵ The parties also would have expected for FST

to implement design changes, as it was charged with assisting in making a preliminary design responsive to DOT's RFP and incorporating requested changes would fall squarely within FST's primary duty. This issue, which had the least analysis, seems to be an issue most easily resolved with the knowledge and expectations analysis.

However, even in intuitively following this framework in considering the parties' knowledge and expectations, the court in *Middlesex* distinguished between claims alleging committed errors rather than omissions. The next section proposes that in addition to evaluating the parties' knowledge and expectations, whether the alleged failures are based on nonfeasance or misfeasance must be examined when evaluating compliance with the standard of care.

2. Nuanced Differences in Nonfeasance and Misfeasance

The broader principles in tort law recognize a difference in liability for claims alleging nonfeasance and misfeasance. Essentially, nonfeasance, or passive inaction causing harm, supports only a negligence finding when the law imposes an affirmative duty to act.²⁵⁶ Such a duty can be derived from special relationships.²⁵⁷ Conversely, malfeasance, or affirmative action that causes harm, requires no special relationship where the actor breaches the more general duty to act reasonably.²⁵⁸ Accordingly, the legal analysis for alleged negligence via nonfeasance differs from that for misfeasance. In a situation in which a person has acted, the focus is on the "breach" of duty, and the key question is whether such duty was breached. In a situation where the person has not acted, the key question focuses on duty and whether a relationship existed out of which an affirmative duty to act arises.

These basic principles logically extend to the standard of care for design professionals in the Pursuit IDP. Two fundamentally different questions must be examined when evaluating a claim of misfeasance as opposed to a claim of nonfeasance. Where misfeasance is alleged, the question is whether the design professional performed the required tasks with reasonable care compared to others in the same field of expertise. In contrast, when nonfeasance is alleged, the question is whether this design professional was required to do anything at all; that is, whether given the relationship between the design professional and design-builder, the design professional had a duty to act.

In sum, in disputes arising from nonfeasance, the design professional only has a duty to warn if (1) the professional has adequate knowledge of the potential risks or omissions and (2) the contractual scope includes such warnings. Conversely, in disputes arising from misfeasance, the design professional's duty to warn is more extensive, as the alleged harm would stem directly from the design professional's affirmative choices in design. Accordingly, the law's differential treatment of nonfeasance and misfeasance and their associated duties of care indicate the need for contractual clarity on when the design professional must warn the design-builder of certain risks or omissions.

B. Concrete Factors

The high-level approach presented here admittedly lacks concrete guidance on what any particular design-build team can expect to be within the design professional's scope of duties in IDPs, especially without a body of case law to provide guidance for nuanced differences and facts. The following section attempts to illuminate some concrete factors that warrant consideration in determining what is and is not within a design professional's scope of duties in IDPs.

1. Common Duties, Contractual Duties, & Affirmative Conduct

In the most basic sense, the design professional standard of care includes the duty to provide sufficient detail such that the design-builder is aware of the general or overall scopes of design involved in a certain project element. The easiest source to determine what further duties are included in a design professional's standard of care is the contract between the design-builder and design professional. First, examine the prescribed design services. This may include preliminary design services, bidding, and negotiation services, among others. Second, those services must be performed to the appropriate level of care.

The appropriate level of care can still be tied to the expectations and knowledge of the parties, which requires an assessment of the project and circumstances. Circumstances such as time can influence this level of care. For instance, whether it would be

possible (and reasonable) for a design professional to complete a load analysis in a given timeframe would influence the parties' expectations of the analyses the design professional would complete in the Pursuit IDP. Similarly, the design professional's knowledge is important to determining the appropriate level of care. If the design professional does not have all the information required to complete a task to a certain level, then that should not be within the appropriate level of care.

The contract itself can answer these questions, as well. If the contract prescribes a specific duty, both parties expect the design professional will perform that duty. If the contract further describes the purpose of the duty, the design professional knows what the design is supposed to accomplish and has reasonable guidance to achieve the task. Recall in *Middlesex*, the engineer and design-builder agreed that the engineer would assist in preparing preliminary design responsive to the DOT's RFP that would assist the design-builder in making estimates for its bid.²⁵⁹ The engineer knew that its duty to design served to enable the design-builder to make quantity estimates, so it was responsible for informing the design-builder of enacted design changes that would significantly change quantity estimates and would impact how the design-builder would bid.²⁶⁰ Thus, notifying the design-builder of those changes would fall within the engineer's duty.

Additionally, duties created from undertaking additional tasks not prescribed as duties under the contract can be analyzed in the same manner as those delineated by the contract. Knowledge and expectations apply here as well. Affirmative conduct creates the expectation that the acting design professional will complete the task and will do so in compliance with the professional standard of care. As discussed, any negligence stemming from affirmative conduct becomes a claim for misfeasance, which has a higher risk of liability.²⁶¹ Part of exercising professional judgment requires an assessment of whether the design professional is capable of performing the additional task with the same care as would a similarly situated design professional, or whether the design professional has the requisite knowledge and ability to do so.²⁶²

2. Duty to Warn and Inform of Future Changes

During the incomplete phases of design, design professionals have a duty to warn any teaming or upstream parties to the extent information *not* represented in the preliminary designs may impact the project's complexity or duration as well as a duty to timely notify such parties of any changes to complexity or duration.²⁶³ Again, the extent of such duty is determined by the respective expectations and knowledge of the parties. A design professional's duty to warn of future changes or the risk of cost overruns is circumscribed by the extent and nature of their knowledge.²⁶⁴ Similarly, a design-builder cannot expect a design professional to properly warn of future changes where the design professional has not provided the information essential to making such predictions.²⁶⁵

3. Non-Inherent Duties

Some tasks, if not written within the scope of services in the design agreement or otherwise undertaken by the design professional, appear to be easily eliminated from the design professional's standard of care. The first elimination would be an inherent obligation for the design professional to warrant its IDP design.²⁶⁶ As discussed previously, imposing a warranty on all design professionals would produce untenable results. The second area of non-inherent duties would be construction management and other tasks usually undertaken by the design-builder.²⁶⁷ Such duties would include management of the construction team and provision of cost or quantity estimates.²⁶⁸ Finally, design professionals do not have an inherent duty to manage the construction project by determining the means or methods of construction or catering designs to meet a certain build schedule.

IV. Practice Pointers: Adjust the Agreement or the Method

Given the frequency of standard of care disputes among design-build team members, the best advice is for teams to prevent these disputes at the outset by articulating expectations for parties and clarifying the roles of those involved. Additionally, teams

may consider altering the design-build method altogether to decrease the amount of uncertainty in design and price by adopting a progressive design-build model.

A. The Power of a Well-Written Design Agreement

Even though design-build teams are not guaranteed to be awarded a project during the Pursuit IDP, design professionals and design-builders should still use a written contract for these preliminary design services. The terms of those contracts should be adapted to the needs of the parties and not a copy/paste from a contract template. Specifically, the parties should frankly discuss what the design professional is expected to do during the Pursuit IDP and determine an appropriate allocation of risk at the time of contracting.

At a high level, parties should discuss and determine the purpose of the preliminary design and what tasks the design professional must complete to support that purpose. For example, the parties should define what a “30% complete” design includes and discuss what aspects will need to be accounted for in a contingency. The parties should discuss what additional expectations the parties can anticipate and what roles should be allocated to whom.

Parties should also have a frank discussion about information sharing and include agreements on the extent and granularity of such shared information in the contract terms. The design professional should inform the design-builder of the information needed to provide accurate estimates and warn of risks. In turn, the design-builder should also identify what information it is sharing with the design professional. In balancing the information that the design-builder can share and the information that the design professional will need, the parties should discuss what the design professional can be expected to do and what standard is feasible with the balance of information.

These measures alone nevertheless fail to appropriately and realistically balance risk between the parties. Even the best design professional is not a soothsayer. Design professionals should not be the sole bearers of risk for reasonable omissions or errors nor should they be required to anticipate and warn design-builders of all potential issues that could arise from an incomplete design, especially in the complex and large projects that often use the design-build delivery model.

With these considerations in mind, design-build teams should give thought to the following checklist when negotiating an appropriate design agreement during the IDP:

- **Clearly define and understand the standard of care.** Parties should define and understand whether the standard of care for the design professional is the “normal” industry standard of care or some other or heightened standard of care. In the design-build context, the incomplete nature of the design requires careful definition of what constitutes “reasonable care” at each project phase. Parties should be mindful of whether state or local jurisdictional requirements or codes impose specific standards or obligations beyond the normal industry standard of care.
- **Allocate Design Responsibilities and Risks for Each Phase.** Parties should define the design professional's role within the design-build structure and ensure the design professional's responsibilities in the defined scope of services are appropriate and achievable. Parties should discuss whether it would be useful to identify and allocate risks at each phase of the design between the design professional, contractor, and owner. If parties agree such early risk allocation is useful, they should do so.
- **Clarify expectations and risks of incomplete design.** Parties should clarify the limitations of incomplete design and identify its implications for budgeting, scheduling, and project execution. Parties may consider including limitations of liability provisions in the design agreement.
- **Establish required contingencies for cost and schedule changes.** Parties should determine how involved, if at all, the design professional will be in the calculation of contingency costs and understand the risks arising from the level of involvement.
- **Address dispute resolution process and procedure.** Parties should discuss and agree upon an appropriate process for dispute resolution in the case of potential disputes. The parties should also establish any notice and cure procedures required before commencing a formal dispute resolution process.
- **Be proactive in contract performance.** Even after contract formation, parties can avoid disputes through their respective contract performance and the administration of the project. Successful design-build requires collaboration between the parties.

As such, parties should (1) proactively flag risks that could impact construction schedules or costs, (2) conduct design milestone reviews, and (3) establish an approval process for incomplete designs.

- **Review insurance agreements to ensure that coverage matches with parties' contractual obligations.** Teams should ensure professional liability insurance is in place and sufficient to cover risks associated with design-build scenarios and incomplete designs. Parties should review policy exclusions and limitations with insurance advisors to be certain of the insurance's coverage and terms. If the agreement requires parties to engage in activities outside the scope of their insurance policy, parties either need to edit the scopes of work or consider endorsement options to fill in any gaps.
- **Consider the appropriate allocation of risk between the project owner and design-builder.** If ultimately selected after the Pursuit IDP, the design-builder may also consider protecting itself and taking care to ensure that the risk that it is taking on with the project is not too great for it to handle. This may require that the design-builder communicate with the owner regarding the risk of cost overruns and reallocating risk from the traditional design-build allocation, which places such risks almost solely in the hands of the design-builder. The owner may be the more appropriate party to take on risk and proper risk allocation may benefit all parties in the long run.

B. An Alternative Approach: Progressive Design-Build

For those willing to explore variations of the design-build delivery method, progressive design-build may be an appropriate route to avoid the issues with risk allocation in design-build. Indeed, many others have picked up on this “flavor” of design-build.²⁶⁹ Progressive design-build has several key features that ameliorate some of the concerns with risk allocation raised in this Article. First, unlike traditional design-build, a key feature of progressive design is that often the parties agree upon a 60% complete design, rather than a 30% complete design, before setting the cost of the project (often termed a “guaranteed maximum price”).²⁷⁰ Requiring a greater completion of design before setting a price for the project reduces the uncertainty and risk of cost overruns associated with a 30% complete design. Additionally, progressive design-build focuses on increasing collaboration among all parties (design professionals, owners, and design-builders), during this initial design phase.²⁷¹ Finally, PDB agreements often contain an “off-ramp” that enables owners to bid out the construction work separately if the owner and design-builder cannot agree upon a guaranteed maximum price.²⁷²

Nonetheless, progressive design-build is not a panacea. Many of the concerns with design-build extend to progressive design-build as well. Namely, although the requirement for a 60% complete design creates a longer period for pricing and allows for more certainty as to pricing than traditional design-build, the design is still, ultimately, incomplete before the guaranteed maximum price is determined. Therefore, the uncertainty remaining in the 40% of the design that is not complete still allows for concerns with the ambiguous standard of care and the potential for design errors to proliferate into costly overruns.

Further, the progressive design-build delivery method creates risk allocation issues for other parties. Although progressive design-build may increase cost reliability for owners, the delay from a longer period of design development imposes more risk on owners. If the parties cannot agree on a price once the design development is complete, the owner has sparse leverage to negotiate and no practical remedy to resolve the dispute. While the owner technically can dismiss the design-builder and find a new construction team or cancel the project altogether, this remedy is often not prudential. Between sunk costs, the price of switching teams, and the political infeasibility of canceling projects in public works, owners are left stuck with the price. Even if an owner decides to switch construction teams, some progressive design-build agreements give the design-builder firm the rights to the design, in which case the owner must rebid the whole construction project, including design.²⁷³ This reality grants design-builders formidable bargaining power in traditional progressive design-build projects. If parties want to change this dynamic, they will have to adjust the model.

In sum, progressive design-build can alleviate the issues with uncertainty, cost overruns, and potential design professional liability raised in this Article. The other practice points discussed in this section, including advice on contract drafting, contract performance, and insurance considerations, can improve the functioning of a progressive design-build model as well. As with all construction projects, the progressive design-build delivery method may be appropriate for some projects and not others.

V. Conclusion

The rise of litigation and its associated confusion in design-build projects involving claims of professional negligence or breached standards of care during IDPs illuminates the need for a defined standard of care. Unfortunately, no uniform standard of care will fit all projects—it is necessarily based on the characteristics of each project, contract, and design professional. Nonetheless, by considering the parties' knowledge and expectations, the type of “error” alleged, and basic expectations of what is and is not within the duty of the design professional, all parties can have a better framework to evaluate what is within the design professional's scope of duties under a given standard of care. The best advice this Article can give is to avoid the lack of clarity at the outset by articulating all expectations of design professionals and the design-build team in writing as a prophylactic against such contentious design professional liability litigation.

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Footnotes

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- 1 Design-build is expected to represent up to 47% of construction spending across various project types in the United States by 2026. DBIA Mid-Cycle Update Report, at 7 (Mar. 2023), https://web.archive.org/web/20230421203520_/https://dbia.org/wp-content/uploads/2023/03/DBIA-2023-Mid-Cycle-Survey-Report-FMI.pdf (hereinafter DBIA Report).
- 2 Cameron Page, *Why Design-Build Generates More Change Orders*, Clearstory (July 20, 2021), <https://www.clearstory.build/construction-blog/why-design-build-generates-more-change-orders> (noting the positive aspects of design-build include innovation and collaboration); DBIA, Design-Build Data Sourcebook 1 [hereinafter DBIA Data Sourcebook] (“Design-build saves time and money by encouraging innovation and collaboration.”); 1 Philip L. Bruner & Patrick J. O'Connor Jr., *Bruner & O'Connor on Construction Law* § 2:17 (Aug. 2023 Update) (“Design-build is seen as promoting the orderly development of standards of performance, minimizing disputes, and encouraging the use of ‘fast track’ construction practices under which separate ‘bid packages’ are awarded for sequential construction of the work.”); ACEC, Design-Build State of Practice: Recommendations for Agencies and Industry on Effective Projective Delivery, at 11–13 (Oct. 2022) (describing increased profitability, satisfaction, and business and continued team relationship benefits associated with the design build model). *But see* Park & Kwak, *Design-Bid-Build (DBB) vs. Design-Build (DB) in the U.S. public transportation projects: The choice and consequences*, 35 Int'l J. of Project Mgmt. 280, 280 (2017) (finding that the design build model does not provide significant cost advantages compared to the design-bid-build model); Chen, Jin, Xia, Wu, & Skitmore, *Time and Cost Performance of Design-Build Projects*, 142 J. Constr. Eng'g and Mgmt., no. 2, 2016, at 6 (finding that 50% of studied design build projects were over budget).
- 3 *See* Castro, *Evolving Liability for Design-Build Contracts: The Perfect Storm of Conflicting Interests*, 19 Cal. Constr. L. Rep., no. 2, 2009, at 1 (“[W]hen design-builders don ‘two hats,’ they are fully responsible for the omnibus accumulation of legal duties and obligations that are traditionally imposed on designers and builders.”); Michael C. Loulakis et al., *Liability of Design-Builders for Design, Construction and Acquisition*

Claims, Nat'l Acads. of Sci., Eng'g, & Med., at 3 (Dec. 2015) (“[In design build,] whether a problem is caused by a design defect or defective construction is immaterial—the design-builder is responsible for both.”).

4 David J. Hatem, *Recalibrating and Improving Design-Build on Public Infrastructure Projects*, Am. Bar Ass'n Forum on Constr. L., at 8 (Sept. 2022) (“The experience of the past amply demonstrates the advisability of balanced risk allocation [in design build projects]; and the promise of success in the future for the design and construction industry vitally depends on it.”); Grattan Institute, *Megabucks: Driving a Harder Bargain on Megaprojects*, at 15 (May 2021) (“Unless risk is rebalanced, industry leaders argue, the [engineering construction] sector is in jeopardy.”) (citing Australian Constructors Ass'n, *Sustaining the Infrastructure Industry: Challenges, Solutions, and Case studies*, at 4 (Sept. 2020)); Peter Ryan & Colin F. Duffield, *Contractor Performance on Mega Projects—Avoiding the Pitfalls*, at 29 (2017) (arguing that while the “continued emphasis on transferring more risks [to design-builders] may benefit the public sector,” this trend of risk allocation “does continuing damage to the construction industry as projects become larger and private sector losses become increasingly unsustainable.”); Richard Korman, *Study Finds Design-Builder Profit Shortfall on Big Infrastructure Projects*, ENR (Aug. 24, 2021), <https://www.enr.com/articles/52299-study-finds-design-builder-profit-shortfall-on-big-infrastructure-projects> (describing research revealing that design-build contractors failed to cover its costs in over 40% of studied design-build projects, and design-build contractors' profit margin fell by 77% when holding design liability in mega-projects valued \$250 million or greater; also reporting that the risk allocation in P3s have caused problems and “we have to rethink what we are doing”); see also John Sharkey AM, Phillip Greenham, Matthew Bell, Wayne Jovic, Julia Korlkova, & Did Hu, *The Health of the Australian Construction Industry*, at 6 (reporting that research revealed that risk allocation was one of two issues “most commonly mentioned as having potential to improve the industry” and “the most commonly mentioned issue impacting satisfaction or dissatisfaction with the tender process”); ACEC Risk Management Committee, *Design-Build Projects-Achieving Fair Allocation of Risk Between the Contractor and Design Professional*, at 6 (2015) (reporting that risk allocation “was the most commonly nominated issue affecting the industry” and “the most commonly mentioned issue impacting satisfaction or dissatisfaction with the tender process”).

5 See, e.g., *AECOM Technical Services, Inc. v. Flatiron | Aecom, LLC*, 2024 WL 249101 (D. Colo. 2024); *Archer Western - De Moya Joint Venture v. HDR Engineering, Inc.*, 2023 WL 3171991 (S.D. Fla. 2023), vacated in part on reconsideration, (June 9, 2023); *Pond Hollow Homeowners Ass'n v. The Ryland Group, Inc.*, 779 N.W.2d 920 (Minn. Ct. App. 2010); *Valley Paving, Inc. v. Stanley Consultants, Inc.*, 2016 WL 2615956 (Minn. Ct. App. 2016).

6 Also referred to as the preliminary design phase, conceptual design phase, tender design phase, proposal design phase, or pursuit design phase.

7 For the purposes of this Article, design professionals are qualified and licensed professionals responsible for the creation of construction, improvement, or redevelopment projects. Such professionals include architects and engineers.

8 See, e.g., Theodore Levin & Mehrdad Farivar, *Design Professional Contract Responsibilities—Pre-Design, Design, and Pre-Construction Phases*, *Design Professional's Guide to Construction Law* 57, 102–05 (Matthew J. Ninneman, Buck S. Beltzer, & Mark W. Mercante, 2021) (listing schematic design and design development as common contractual duties for architects and engineers in the design phase of a construction project).

9 See, e.g., Michael C. Loukalis & Douglas D. Gransberg, *Liability of Designers for Proposal-Related Claims in Design-Build Contracts*, *J. Leg. Aff. Dispute Resolut. Eng'g. Constr.*, Aug. 2022, at 2 (“The traditional [design build] process requires the design-builder to develop its technical and lump sum price proposals during the period between advertising the [request for proposal] and the required submission date.”); Jampole, Amoroso, Morgan, & McDonald, *Themes in design/build disputes, from a technical expert witness perspective*, 17 *Constr. L. Int'l* 35, 36 (2022) (“Pricing the differences between prototype and site adapted

elements will typically be in the domain of the contractor, since designers deal in engineering quantities associated with particular design elements, and not the cost expenditures necessary to build those elements given a set of site constraints.”).

- 10 See Loukalis & Gransberg, *Liability of Designers for Proposal-Related Claims in Design-Build Contracts*, J. Leg. Aff. Dispute Resolut. Eng'g. Constr., at 2 (2022) (describing that contractor uses the professional's preliminary design to estimate the cost of construction); Jampole, Amoroso, Morgan, & McDonald, *Themes in design/build disputes, from a technical expert witness perspective*, 17 Constr. L. Int'l 35, 36 (2022) (same).
- 11 See Jampole, Amoroso, Morgan, & McDonald, *Themes in design/build disputes, from a technical expert witness perspective*, 17 Constr. L. Int'l 35, 36 (2022) (“While ultimate responsibility for pricing lies with the contractor, the associated quantities are derived from tender designs[.]”).
- 12 See David J. Hatem, *Fixed-Price Issues Affect Engineers Too!*, ENR (Dec. 12, 2019), <https://www.enr.com/articles/48294-fixed-price-issues-affect-engineers-too>; see also Bernard Nodzon, Anna Covert, & Kevin Major, *Design Professionals and the Design-Build Project*, Design Professional's Guide to Construction Law 143, 147–48 (“When construction begins before the overall design is completed, there is less opportunity for the discovery and correction of design errors before damage results, and it may be difficult or impossible to make adjustments in constructed work to accommodate alter refinements ... In addition, it is more expensive to make design changes after completion of some phases of construction, increasing the amount of damages for which a design professional is liable if negligent design caused the problem.”); David J. Hatem, *Recalibrating and Improving Design-Build on Public Infrastructure Projects*, Am. Bar Ass'n Forum on Constr. L., at 3 (Sept. 2022) (stating that “‘cost overrun’ professional liability claims represent ... the most frequent source of professional liability claims by design-builders against consulting engineers[, and t]he source of the most severe professional liability claims by design-builders against consulting engineers”). Cf. Complaint at 1, *AECOM Tech. Servs. V. Flatiron | AECOM, LLC, No. 1:19-cv-02811-KLM, 2019 WL 13196786 (D. Colo. 2019)* (claim filed by designer against design-builder for failure to pay for costly re-designs, incurring allegedly over \$5 million in damages).
- 13 See, e.g., *Middlesex Corporation, Inc. v. Fay, Spofford & Thorndike, Inc.*, 2019 WL 3552609 (Mass. Super. Ct. 2019); *CRS Serrine, Inc. v. Dravo Corp.*, 213 Ga. App. 710, 445 S.E.2d 782 (1994); *Walsh/Granite JV v. HDR Engineering, Inc.*, 2019 WL 1382957 (W.D. Pa. 2019); see also Richard Korman, *Will Claims By Contractors on Big Design-Build Projects Ever End?*, ENR (Feb. 8, 2023), <https://www.enr.com/articles/55886-will-claims-by-contractors-on-big-design-build-projects-ever-end> (describing prevalence of suits and disputes brought by contractors against design partners in design-build projects).
- 14 See David J. Hatem, *Recalibrating and Improving Design-Build on Public Infrastructure Projects*, Am. Bar Ass'n Forum on Constr. L., at 3 (Sept. 2022).
- 15 See, e.g., *Middlesex Corp. Inc.*, 2019 WL 3552609 *11 (arguing that the failure to include requested change in preliminary design did not breach the standard of care although it caused \$126,031 in cost overruns because “the professional standard is not perfection”).
- 16 See, e.g., *Middlesex Corp. Inc.*, 2019 WL 3552609 *11 (applying the following contractual standard of care to IDP services: “The Design/Builder and Engineer agree that the applicable standard of care for the Engineer's services shall be that degree of skill and care normally exercised by practicing professional engineers performing similar services on similar projects under similar conditions.”); Answer and Counterclaim, Ex. A, at 1, *AECOM Tech. Servs. V. Flatiron | AECOM, LLC, No. 1:19-cv-02811-KLM, 2019 WL 13196786 (D. Colo. 2019)* (“The Pre-Award Services shall be consistent with all professional engineering principles generally accepted as standards of the industry in the state or province where the Project is located and shall be performed in accordance with the standard of care, skill and diligence commensurate with that provided by other design professionals at the Pre-Award services for projects of similar size, type and complexity ...”).

- 17 See [Restatement Second, Torts § 283 \(Am. L. Inst. 1965\)](#) (“Unless the actor is a child, the standard of conduct to which he must perform to avoid being negligent is that of a reasonable man under like circumstances.”).
- 18 Compare, e.g., Defendant's Brief in Opposition to Plaintiff's Amended Motion for Partial Summary Judgment, [AECOM Tech. Servs. v. Flatiron | AECOM, LLC, No. 1:19-cv-02811-KLM, 2019 WL 13196786 \(D. Colo. 2019\)](#), with Plaintiff's Reply Brief in Support of Amended Motion for Partial Summary Judgment, [AECOM Tech. Servs. v. Flatiron | AECOM, LLC, No. 1:19-cv-02811-KLM, 2019 WL 13196786 \(D. Colo. 2019\)](#).
- 19 See David J. Hatem, *Recalibrating and Improving Design-Build on Public Infrastructure Projects*, Am. Bar Ass'n Forum on Constr. L., at 4 (Sept. 2022) (stating that there are few to no industry standards guiding how to apply the standard of care in the “context of a design-builder's professional liability ‘cost overrun’ claim against a consulting engineer alleging deficiencies in merely conceptual or preliminary design prepared by the latter during the time-compressed proposal phase of a [design-build public infrastructure project]”).
- 20 The court ultimately found for AECOM, awarding \$5,000,000 for the extra work that AECOM completed on the contract. Richard Korman, *AECOM Seek \$16M From Flatiron in Denver Express Lanes Lawsuit*, ENR (Apr. 26, 2024), <https://www.enr.com/articles/58543-aecom-seeks-16m-from-flatiron-in-denver-express-lanes-lawsuit>.
- 21 *Id.*
- 22 *Id.*
- 23 Including a discussion of all sources of risk misallocation and factors affecting litigation regarding preliminary design issues would be beyond this Article's bandwidth. Nonetheless, briefly, additional factors to consider when analyzing potential liability and the division of liability between design-builders and design professionals include: the *Spearin* doctrine, the effect of the design-builder's experience and corresponding risk tolerance, and consequences of self-performance by design-builders.
- 24 *Infra*, Part IV.
- 25 *Infra*, Part I.
- 26 *Infra*, Part II.
- 27 *Infra*, Part III, section A.
- 28 *Infra*, Part III, section B.
- 29 *Infra*, Part IV.
- 30 This Article will be brief, and necessarily reductive, in its introduction of the design build delivery model and will not provide an in-depth explanation of its workings and intricacies. Luckily, a plethora of resources exist to fully describe the design-build project delivery method, its steps, and the relative downsides and positives throughout the process. For more detailed information on design-build, see generally Martin Sell, *Introduction to Design-Build*, The Architect's Guide to Design-Build Services 1, 1–14 (G. William Quatman II & Ranji Dhar, 2003); The Design-Build Deskbook (Kerry L. Kester, John R. Heisse, & James S. Schenck, IV., 4th ed. 2010).
- 31 DBIA Report at 4; Gausnell, O'Keefe & Thomas, LLC, *Fast Track Design Build: Avoid Incomplete Design*, GOTLawstl (Sept. 01, 2022), <https://gotlawstl.com/fast-track-design-build/>.
- 32 DBIA, <https://dbia.org/> (last visited June 26, 2024).

- 33 *DBIA Announces the Nation's Best Design-Build Projects*, DBIA (Aug. 11, 2022), <https://dbia.org/blog/dbia-announces-the-nations-best-design-build-projects/>.
- 34 Halsey & Quatman, *Design-Build Contracts: Revisited 25 Years Later*, 34 Constr. L. 5, 5 (2014) (citing Casey Halsey & William Quatman, *Design-Build Contracts: Valid or Invalid?*, Aug. 1989, at 1).
- 35 1 Bruner & O'Connor on Construction Law § 2:17 (Aug. 2023 Update); Kahn, *Introduction: The Changing Role of the Architect*, 23 St. Louis U. L.J. 216, 216 (1979); Friedlander, *Design/Build Solutions*, 14 J. Mgmt. Eng'g, Nov. 1998, at 3, 3; Circo, *When Specialty Designs Cause Building Disasters: Responsibility for Shared Architectural and Engineering Services*, 84 Neb. L. Rev. 162, 170 (2005).
- 36 Kahn, *Introduction: The Changing Role of the Architect*, 23 St. Louis U. L.J. 216, 216 (1979).
- 37 *Id.*
- 38 Code of Hammurabi § 229 (L. W. King Trans., 1910) (“If a builder builds a house for someone, and does not construct it properly, and the house which he built falls and kills its owner, then that builder shall be put to death.”).
- 39 Or, at least, this author could not find any current law imposing capital punishment on design-builders for negligence in the United States.
- 40 Kahn, *Introduction: The Changing Role of the Architect*, 23 St. Louis U. L.J. 216, 217 (1979).
- 41 Miller, *The Architect in the Design-Build Model: Designing and Building the Case for Strict Liability in Tort*, 33 Case W. Res. L. 116, 126 (1982).
- 42 See Bernard Nodzon, Anna Covert, & Kevin Major, *Design Professionals and the Design-Build Project*, Design Professional's Guide to Construction Law 143, 144–45, n. 6 (Matthew J. Ninneman, Buck S. Beltzer, & Mark W. Mercante, 2021) (“It should be noted that designer-led design-build teams are somewhat rare.”); Michael F. Drewry & Daniel M. Drewry, *A Comparison of Standard Forms: The Design-Builder - A/E Contract*, The Design-Build Deskbook 95, 96 (Kerry L. Kester, John R. Heisse, & James S. Schenck, IV, 4th ed. 2010) (“Often the design-build team is led by a contractor that is a traditional general contractor.”).
- 43 See Mark C. Friedlander, *Design/Build Solutions*, J. Mgmt. Eng'g, Nov. 1998, at 3, 59.
- 44 James Germano, *What is the Difference Between Design-Build and Design-Bid-Build?*, AIA Contract Documents (Mar. 11, 2022) (explaining that unlike other delivery systems, in design build “the owner decides what they want to build, ... but rather than hiring a team to create a ‘bid package,’ the owner hires a single company, known as a design-builder, to both create the architectural drawings *and* build the project.”); DBIA Data Sourcebook, at 2 (depicting the different contractual relationships for different project delivery methods).
- 45 See Ahamdifar, *Two Steps Forward, and One Step Back: How the Moving Ahead for Progress in the 21st Century Act Encourages Design-Build, But Roadblocks Remain*, Leg. & Pol'y Brief, no. 2, 2013, at 143–44 (stating that the construction phase begins when the design is “essentially complete”); Bernard Nodzon, Anna Covert, & Kevin Major, *Design Professionals and the Design-Build Project*, Design Professional's Guide to Construction Law 143, 148 (Matthew J. Ninneman, Buck S. Beltzer, & Mark W. Mercante, 2021) (stating that the design-bid-build delivery system imposes a “greater need to communicate the design with complete and detailed design documents[,]” as opposed to the design build delivery method); Alex Six & Kristen Frisa, *Design-Build vs. Design-Bid-Build: Which Is Right for Your Project?*, ProCore (June 18, 2024), <https://www.procore.com/library/design-build-vs-design-bid-build>.
- 46 See Alex Six & Kristen Frisa, *Design-Build vs. Design-Bid-Build: Which Is Right for Your Project?*, ProCore (June 18, 2024), <https://www.procore.com/library/design-build-vs-design-bid-build> (stating that the downside to separating the roles of the contractor and designer is “the lack of contractor influence

over designs”); Bernard Nodzon, Anna Covert, & Kevin Major, *Design Professionals and the Design-Build Project*, Design Professional's Guide to Construction Law 143, 148 (Matthew J. Ninneman, Buck S. Beltzer, & Mark W. Mercante, 2021) (indicating that a completed design is needed prior to construction in the design-bid-build project due to less communication between the designer and contractor).

47 This risk stems from the *Spearin* doctrine, which provides that the owner impliedly warrants the adequacy and accuracy of the provided plans and designs, relieving the contractor of liability for design issues. Accordingly, when the contractor follows these plans and designs exactly, the resulting design defects are within the liability of the owner, not the contractor. [U.S. v. Spearin](#), 54 Ct. Cl. 187, 248 U.S. 132, 136, 39 S. Ct. 59, 63 L. Ed. 166, 42 Cont. Cas. Fed. (CCH) P 77225 (1918) (“[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.”). Although *Spearin* constitutes federal case law, nearly all jurisdictions have adopted the doctrine or some derivative of it. 3 Philip L. Bruner & Patrick J. O'Connor, [Bruner & O'Connor Construction Law § 9:93 \(Aug. 2023\)](#). For more information on the *Spearin* doctrine and its application in modern project delivery methods, see Lien & Rose, *Design-Build, Performance Specifications, and Spearin: How Modern Trends in Project Delivery Have Impacted a Contractor's Defenses*, 37 Constr. L. 6 (2017).

48 See Bernard Nodzon, Anna Covert, & Kevin Major, *Design Professionals and the Design-Build Project*, Design Professional's Guide to Construction Law 143, 147 (Matthew J. Ninneman, Buck S. Beltzer, & Mark W. Mercante, 2021) (describing design-build projects as being built on a “fast-track basis[,]” in which “construction starts before the entire design is completed,” and the overlap should theoretically speed up the overall schedule).

49 See Puerto, Gransberg, & Shane, *Comparative Analysis of Owner Goals for Design/Build Projects*, J. Mgmt Eng'g, Jan. 2008, at 32, 32.

50 Cameron Page, *Why Design-Build Generates More Change Orders*, Clearstory (July 20, 2021), <https://www.clearstory.build/construction-blog/why-design-build-generates-more-change-orders> (noting the positive aspects of design-build include innovation and collaboration); DBIA, Design-Build Data Sourcebook 1 [hereinafter DBIA Data Sourcebook] (“Design-build saves time and money by encouraging innovation and collaboration.”); 1 Philip L. Bruner & Patrick J. O'Connor, [Bruner & O'Connor on Construction Law § 2:17 \(Aug. 2023 update\)](#) (“Design-build is seen as promoting the orderly development of standards of performance, minimizing disputes, and encouraging the use of ‘fast track’ construction practices under which separate ‘bid packages’ are awarded for sequential construction of the work.”).

51 DBIA Data Sourcebook, at 3.

52 *Id.* at 3–4.

53 *Id.*

54 See 1 Philip L. Bruner & Patrick J. O'Connor, [Bruner & O'Connor on Construction Law § 2:17 \(Aug. 2023 Update\)](#); Park & Kwak, *Design-Bid-Build (DBB) vs. Design-Build (DB) in the U.S. public transportation projects: The choice and consequences*, 35 Int'l J. Project Mgmt. 280, 293 (2016); see also *Public-Private Partnership (P3) Procurement: A Guide for Owners*, U.S. D.O.T., Fed. Hwy. Admin. (Mar. 2019), at 8 (discussing the use of design-bid-build or design-build models for public owners in P3s).

55 DBIA's Pub. Private Partnership Comm., *Public-Private Partnerships: A Design-Build Done Right Primer* 3 (Oct. 2016) [hereinafter P3 Primer].

56 *Id.*

57 Other variations include Progressive Design Build, Lean Design Build, and Integrated Project Delivery. See generally Miller, Korinko, & Thaxton, *Managing Design Professional Consultants: Methods, Challenges, and Potential Liabilities*, 42 Constr. Lawyer 13 (2022); *The Flexibility of Design-*

Build, DBIA, <https://web.archive.org/web/20211205015730/https://dbia.org/wp-content/uploads/2020/09/Position-Statement-Design-Build-Flexibility.pdf> (last visited June 27, 2024). For more information on the flexibility of the design-build model and ease of adaptation, *see generally* DBIA, <https://dbia.org/> (last visited Jan. 6, 2024).

58 For more description of the design-build delivery model, *see* 1 Philip L. Bruner & Patrick J. O'Connor, *Bruner & O'Connor on Construction Law* § 2:17 (Aug. 2023 Update); *Design-Build Manual*, Colo. Dept. Trans. (Sept. 2016).

59 As stated, this Article provides a simplified overview of the design-build process. There are different interpretations and definitions as to the breakdown of a design-build project's phases. Some breakdowns include the early activities such as site selection and project conception, while others suggest the process begins with team selection and project planning. *Compare, e.g.*, Bianca Holtier Coury & Kristen Frisa, *The Design-Build Method of Project Delivery Explained*, ProCore (Oct. 25, 2023), <https://www.procore.com/library/design-build-construction#3-preliminary-design-and-cost-estimation> (listing site selection and project conception as the first two phases of design-build projects), *with Everything You Need to Know About Design-Build*, Horst Constr., <https://www.horstconstruction.com/news-and-blog/design-build-construction-defined-the-team-process-examples/#:~:text=The%20design%2Dbuild%20process%20can, and%20bidding%20phases%20may%20overlap> (last visited Nov. 13, 2023) (suggesting that the process begins with team selection and planning); *What is Design-Build Construction*, ProjectSight, <https://projectsight.trimble.com/project-delivery-methods/design-build/> (last visited Nov. 13, 2023) (same).

60 *See, e.g.*, *Design Build*, FHWA, https://www.fhwa.dot.gov/ipd/alternative_project_delivery/defined/new_build_facilities/design_build.aspx (last visited Nov. 13, 2023) (noting that the project proceeds on incomplete designs).

61 There is no set, widely accepted definition describing or clearly delineating the nature and extent of design-build project IDPs, however, most design-build projects generally begin with an initial IDP as described herein. *See* Sean Dowsing, *But It's Design-Build: Analyzing and Overcoming This Conclusory Defense*, ABA (Mar. 16, 2020), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2020/spring2020/analyzing-overcoming-conclusory-defense/; Bianca Holtier Coury & Kristen Frisa, *The Design-Build Method of Project Delivery Explained* (June 11, 2024), <https://www.procore.com/library/design-build-construction#5-design-phase> (describing how design phase, in which “conceptual designs” are developed, occurs prior to the construction phase); *see also* Bernard Nodzon, Anna Covert, & Kevin Major, *Design Professionals and the Design-Build Project*, *Design Professional's Guide to Construction Law*, 143, 148 (Matthew J. Ninneman, Buck S. Beltzer, & Mark W. Mercante, 2021) (discussing how designs are often “less complete” in design-build projects compared to traditional delivery methods).

62 *Design Build*, FHWA, https://www.fhwa.dot.gov/ipd/alternative_project_delivery/defined/new_build_facilities/design_build.aspx (last visited Nov. 13, 2023).

63 *See, e.g.*, *Design Build*, FHWA.gov, https://www.fhwa.dot.gov/ipd/alternative_project_delivery/defined/new_build_facilities/design_build.aspx (last visited Nov. 13, 2023) (noting that 10 percent to 15 percent complete is typically adequate for the Initial Owner IDP in highway design-build projects). *But see* Sean Dowsing, *But It's Design-Build: Analyzing and Overcoming This Conclusory Defense*, ABA (Mar 16, 2020), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2020/spring2020/analyzing-overcoming-conclusory-defense/ (“Typically, the design is 5% to 30% complete before the owner issues the request for proposal ...”).

64 *Design Build*, FHWA.gov, https://www.fhwa.dot.gov/ipd/alternative_project_delivery/defined/new_build_facilities/design_build.aspx (last visited Nov. 13, 2023).

- 65 Ezra Jampole, Samuel Amoroso, Troy Morgan, & Brian McDonald, *Themes in design/build disputes, from a technical expert witness perspective*, Int'l Bar Assn. (Apr. 7, 2022), <https://www.ibanet.org/design-build-disputes-technical-expert-witness-perspective>.
- 66 *Id.*
- 67 Sean Dowsing, *But It's Design-Build: Analyzing and Overcoming This Conclusory Defense*, ABA: Under Constr. (March 16, 2020), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2020/spring2020/analyzing-overcoming-conclusory-defense/.
- 68 *See, e.g., ConsensusDocs 420: Standard Agreement Between Design-Builder and Design Professional*, ConsensusDocs (2022) (“Based on the Preliminary Evaluation and other relevant information, Design Professional shall prepare, for approval by Design-Builder and Owner, Schematic Design Documents consisting of drawings, outline specifications, and other conceptual documents. ...”); *see also Short Bros., PLC v. U.S.*, 65 Fed. Cl. 695, 713 (2005) (engineer referring to its initial designs as “concept designs”) (internal quotation marks omitted).
- 69 *See* Michael F. Drewry & Daniel M. Drewry, *A Comparison of Standard Forms: The Design-Builder - A/E Contract*, The Design-Build DeskBook 95, 96 (Kerry L. Kester, John R. Heisse, & James S. Schenck, IV., 4th ed. 2010); Bernard Nodzon, Anna Covert, & Kevin Major, *Design Professionals and the Design-Build Project*, Design Professional's Guide to Construction Law 143, 144–45, n.6 (Matthew J. Ninneman, Buck S. Beltzer, & Mark W. Mercante, 2021).
- 70 *See* Loulakis & Gransberg, *Liability of Designers to Contractors for Proposal-Related Claims in Design-Build Contracts*, J. Legal Affairs & Dispute Resol. Eng'g & Constr., no. 14, 2022, at 1, 2.
- 71 *See* *Design-Build Manual*, Colo. Dept. of Trans., at 67 (Sept. 2016).
- 72 *See* Michael C. Loulakis & Douglas D. Gransberg, *Liability of Designers to Contractors for Proposal-Related Claims in Design-Build Contracts*, J. Legal Affairs & Dispute Resolution Eng'g & Constr., no. 14, 2022, at 1, 2.
- 73 *See* Bernard Nodzon, Anna Covert, & Kevin Major, *Design Professionals and the Design-Build Project*, The Design Professional's Guide to Construction Law 143, 145 (Matthew J. Ninneman, Buck S. Beltzer, & Mark W. Mercante, 2021) (“Because a design-builder's interests are not identical to those of an owner, some designers report pressure, either real or imagined, to compromise their professional judgment in favor of cheaper construction.”).
- 74 Dana Kimble, Skanska Senior Director of Business Development, Troy Stahlecker, University of Washington Director Project Delivery Group, Molly Wolf, NBBJ Senior Associate, and Anthony Stewart, Skanska Vice President of Design Integration, Panel at DBIA 2022 Design-Build Conference & Expo: The “Secret Sauce”—Creating and Inspiring Design-Build Teams to Turn a Few Great Projects into the Many, at 10:00–12:00 (Nov. 01, 2022) [hereinafter “Secret Sauce”] (recording available through DBIA).
- 75 *See, e.g., Walsh/Granite JV v. HDR Engineering, Inc.*, 2019 WL 1382957 (W.D. Pa. 2019); *Metropolitan Steel Industries, Inc. v. Perini Corp.*, 6 Misc. 3d 1002(A), 800 N.Y.S.2d 350 (Sup 2004), *aff'd*, 23 A.D.3d 205, 803 N.Y.S.2d 549 (1st Dep't 2005).
- 76 J. Kent Holland, *Standard of Care for Design Professionals*, Constr. Risk 1, 2 (2011). *See, e.g., Garaman, Inc. v. Williams*, 912 P.2d 1121, 1123 (Wyo. 1996) (citing *Kemper Architects, P.C. v. McFall, Konkell & Kimball Consulting Engineers, Inc.*, 843 P.2d 1178, 1185 (Wyo. 1992)) (“[A]n engineer must exercise such care, skill, and diligence as others who are engaged in the engineering profession would ordinarily exercise under similar circumstances.”); Terence J. Scanlan, Lindsey M. Pflugrath, Troy Hatfield, & Nicole R. Sprinstroh, *The Design Professional and Tort Liability*, in Design Professional's Guide to Construction Law 171, 172 (Matthew J. Ninneman, Buck S. Beltzer, & Mark W. Mercante, 2021).

- 77 [Stan Clauson Associates, Inc. v. Coleman Brothers Const., LLC](#), 2013 COA 7, 297 P.3d 1042, 1045 (Colo. App. 2013) (quoting [Command Communications, Inc. v. Fritz Companies, Inc.](#), 36 P.3d 182, 189, 23 Int'l Trade Rep. (BNA) 2104 (Colo. App. 2001)). See [Custom Construction Solutions, LLC v. B & P Construction, Inc.](#), 684 S.W.3d 148, 166 (Mo. Ct. App. E.D. 2023), reh'g and/or transfer denied, (Jan. 2, 2024) and transfer denied, (Mar. 5, 2024) (citing [Yantzi v. Norton](#), 927 S.W.2d 427, 432 (Mo. Ct. App. W.D. 1996) (“Engineers must demonstrate they followed the standard of care applicable to all other engineers in the field.”)).
- 78 [School Bd. of Broward County v. Pierce Goodwin Alexander & Linville](#), 137 So. 3d 1059, 304 Ed. Law Rep. 1180 (Fla. 4th DCA 2014) (quoting [Bayshore Development Co. v. Bonfoey](#), 75 Fla. 455, 78 So. 507, 510 (1918)) (“Under the common law, ‘[t]he architect’s undertaking does not imply or guarantee a perfect plan.”); [Garaman, Inc. v. Williams](#), 912 P.2d 1121, 1124 (Wyo. 1996) (“[W]e do not require professionals to warrant perfect results; we only require that they exercise the appropriate degree of care.”). See Harrison Streeter, *Professional Liability of architects and Engineers* 8 (1988) (“Negligence is not defined as lack of perfection. Defects in an architect’s or engineer’s work might result from error in judgment or honest oversight and yet not constitute negligence if the requisite standard of care has been exercised.”).
- 79 See, e.g., [McKeen Homeowners Ass’n, Inc. v. Oliver](#), 586 So. 2d 679, 681 (La. Ct. App. 2d Cir. 1991) (quoting [Seiler v. Ostarly](#), 525 So. 2d 1207, 1209 (La. Ct. App. 5th Cir. 1988)); Harrison Streeter, *Professional Liability of architects and Engineers* 8 (1988) (“In the absence of special circumstances, a professional does not guarantee perfection or satisfactory results, but is only held responsible for failure to exercise reasonable care and skill[.]”).
- 80 [Pointe at Westport Harbor Homeowners’ Ass’n v. Engineers Northwest, Inc., P.S.](#), 193 Wash. App. 695, 376 P.3d 1158, 1162 (Div. 2 2016).
- 81 [Eastern Steel Constructors, Inc. v. City of Salem](#), 209 W. Va. 392, 549 S.E.2d 266, 276 (2001) (“We are not alone in concluding that a warranty of plans and specifications should extend to benefit of a contractor.”).
- 82 Terence J. Scanlan, Lindsey M. Pflugrath, Troy Hatfield, & Nicole R. Sprinstroh, *The Design Professional and Tort Liability*, in *Design Professional’s Guide to Construction Law* 171, 172–73 (Matthew J. Ninneman, Buck S. Beltzer, & Mark W. Mercante, 2021).
- 83 *Id.* at 171–72.
- 84 *Id.*
- 85 Theodore D. Levin & Mehrad Farivar, *Design Professional Contract Responsibilities—Pre-Design, Design, and Pre-Construction Phases*, *Design Professional’s Guide to Construction Law* 57, 60 (Matthew J. Ninneman, Buck S. Beltzer, & Mark W. Mercante, 2021).
- 86 See, e.g., [Martin v. Sizemore](#), 78 S.W.3d 249, 284 (Tenn. Ct. App. 2001) (finding that design product did not meet standard of care when it failed to provide for necessary safety provisions).
- 87 Farrug, *The Necessity of Expert Testimony in Establishing the Standard of Care for Design Professionals*, 38 DePaul L. Rev. 873, 880 (1989). See, e.g., [Nelson v. Commonwealth](#), 235 Va. 228, 368 S.E.2d 239, 244 (1988) (“[T]he practice of architecture is sufficiently technical to require expert testimony to establish the standard of care and any departure therefrom.”); [H. Elton Thompson & Associates, P.C. v. Williams](#), 164 Ga. App. 571, 298 S.E.2d 539, 540 (1982) (“Expert testimony is required because the court and jury are not permitted to speculate as to the standard against which to measure the acts of the professional in determining whether he exercised a reasonable degree of care.”); see also [Simon v. Drake Constr. Co.](#), 87 Ohio App. 3d 23, 621 N.E.2d 837, 839 (8th Dist. Cuyahoga County 1993) (“Expert testimony is required to establish the standard of care, unless the lack of skill or care of the professional is so apparent as to be within the comprehension of a layperson and requires only common knowledge and experience to understand it.”).

- 88 [Michael v. He Gin Lee Architect Planner, PLLC](#), 153 A.D.3d 704, 705, 61 N.Y.S.3d 236 (2d Dep't 2017) (“Where, as here, the causes of action submitted to the jury hinge on allegations of professional malpractice against an architect, it is incumbent upon the plaintiff to present expert testimony to support them”); [City of Alexandria v. Ratcliffe Const. Co., LLC](#), 95 So. 3d 1076, 1079 (La. Ct. App. 3d Cir. 2012) (quoting [Greenhouse v. C.F. Kenner Associates Ltd. Partnership](#), 723 So. 2d 1004, 1008 (La. Ct. App. 4th Cir. 1998) (internal quotations omitted) (“Unless lay persons can infer negligence by applying common sense standard, expert testimony is required to establish the applicable standard of care. Failure to submit expert testimony to prove the standard of care is a ‘fatal omission.’”); Terence J. Scanlan, Lindsey M. Pflugrath, Troy Hatfield, & Nicole R. Sprinstroh, *The Design Professional and Tort Liability*, in *Design Professional's Guide to Construction Law* 171, 173 (Matthew J. Ninneman, Buck S. Beltzer, & Mark W. Mercante, 2021) (“Generally, the plaintiff must establish the design professional's applicable standard of care through expert testimony offered by a design professional who practices within the defendant's locality and area of expertise ... However, if the issues are comprehensible to the average juror, then expert testimony may not be required to establish the standard of care required of the design professional.”).
- 89 Farrug, *The Necessity of Expert Testimony in Establishing the Standard of Care for Design Professionals*, 38 DePaul L. Rev. 873, 879 (1989).
- 90 See Terence J. Scanlan, Lindsey M. Pflugrath, Troy Hatfield, & Nicole R. Sprinstroh, *The Design Professional and Tort Liability*, in *Design Professional's Guide to Construction Law* 171, 173 (Matthew J. Ninneman, Buck S. Beltzer, & Mark W. Mercante, 2021).
- 91 Farrug, *The Necessity of Expert Testimony in Establishing the Standard of Care for Design Professionals*, 38 DePaul L. Rev. 873 (1989) (“[T]he law distinguishes between errors in professional judgment and negligence. When a plaintiff may suffer an injury due to an error in the professional's judgment, this exercise of judgment may be within an acceptable range of decisions and within the standard of care for that profession”).
- 92 See also David J. Hatem, *Recalibrating and Improving Design-Build on Public Infrastructure Projects*, Am. Bar Ass'n Forum on Constr. L., at 3 (Sept. 2022) (listing circumstances and factors relevant to determining the appropriate standard of care).
- 93 Cf., e.g., [Valley Paving, Inc. v. Stanley Consultants, Inc.](#), 2016 WL 2615956 (Minn. Ct. App. 2016).
- 94 [Cranes Creek, LLC v. Neal Smith Engineering, Inc.](#), 291 N.C. App. 532, 896 S.E.2d 273, 275 (2023).
- 95 *Id.* at 276 (“Where the common knowledge exception does not apply and the plaintiff fails to establish the professional standard of care through expert testimony, ‘summary judgment for the defendant is proper.’”) (quoting [Frankenmuth Ins. v. City of Hickory](#), 235 N.C. App. 31, 760 S.E.2d 98, 101 (2014)). See *id.* (“Thus, this Court will affirm the trial court's grant of summary judgment where the plaintiff's expert testimony ‘does not show, as is required to sustain the claim [for professional negligence], what an engineer practicing under the relevant standard of care actually does, nor any specific instances of breach of that relevant standard.’”) (quoting [Handex of Carolinas, Inc. v. County of Haywood](#), 168 N.C. App. 1, 607 S.E.2d 25, 31, (2005)). Accord, e.g., [Garaman, Inc. v. Williams](#), 912 P.2d 1121, 1124 (Wyo. 1996) (affirming summary judgment against professional negligence and breach of contract claims when the plaintiff did not present expert testimony on the standard of care, instead relying on the defendant architect's testimony); [Martinez v. Schatten](#), 2020 WL 6268169 *2 (Colo. Dist. Ct. 2020), *aff'd*, 2022 WL 769390 (Colo. App. 2022) (granting summary judgment against a professional negligence claim when the plaintiff failed to offer expert testimony on the applicable standard of care, breach, or causation); [Catholic Health Initiatives Colorado v. Earl Swensson Associates, Inc.](#), 2017 WL 10541329 *7 (Colo. Dist. Ct. 2017) (granting partial summary judgment against professional negligence and breach of contract claims when the plaintiff failed to offer expert testimony on the architect's professional standard of care).
- 96 [Cranes Creek, LLC](#), 896 S.E.2d at 277.

- 97 [Chaney Bldg. Co. v. City of Tucson](#), 148 Ariz. 571, 716 P.2d 28, 30 (1986) (en banc).
- 98 [65A C.J.S. Negligence § 921](#) (2024).
- 99 See e.g., ConsensusDocs 420 — Standard Agreement Between Design-Builder and Design Professional, ConsensusDocs, art. 2.1 (2022) (“The architectural and engineering Services shall be performed in accordance with the standard of professional skill and care required for a project of similar size, location, scope, and complexity, during the time in which the Services are provided.”).
- 100 See Zurich, Management of the design-build process in building construction 18, 19–20 (recognizing design errors and omissions as sources for potential risk, and describing potential Errors & Omissions (“E&O”) policies to manage the risk); Debra K. Rubin, Jim Parsons, & Mary B. Powers, *Fixing Construction's Fixed Price Conundrum*, ENR (Nov. 20, 2019), <https://www.enr.com/articles/48168-fixing-constructions-fixed-price-conundrum> (“Design issues often become construction risk.”).
- 101 See Sean Dowsing, *But It's Design-Build: Analyzing and Overcoming This Conclusory Defense*, ABA: Under Constr. (March 16, 2020), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2020/spring2020/analyzing-overcoming-conclusory-defense/; Debra K. Rubin, Jim Parsons, & Mary B. Powers, *Fixing Construction's Fixed Price Conundrum*, ENR (Nov. 20, 2019), <https://www.enr.com/articles/48168-fixing-constructions-fixed-price-conundrum>.
- 102 See Sean Dowsing, *But It's Design-Build: Analyzing and Overcoming This Conclusory Defense*, ABA: Under Constr. (March 16, 2020), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2020/spring2020/analyzing-overcoming-conclusory-defense/; Block, *As the Walls Came Tumbling Down: Architects' Expanded Liability Under Design-Build/Construction Contracting*, 17 J. Marshall L. Rev. 1 (1984).
- 103 Castro, *Evolving Liability for Design-Build Contracts: The Perfect Storm of Conflicting Interests*, 19 Cal. Constr. L. Rep., no. 2, 2009, at 1; Sean Dowsing, *But It's Design-Build: Analyzing and Overcoming This Conclusory Defense*, ABA: Under Constr. (March 16, 2020), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2020/spring2020/analyzing-overcoming-conclusory-defense/.
- 104 Circo, *When Specialty Designs Cause Building Disasters: Responsibility for Shared Architectural and Engineering Services*, 84 Neb. L. Rev. 162, 168 (2005) (“In the design phase, the project A/E prepares comprehensive plans and specifications sufficiently definitive to permit lump-sum price estimates”).
- 105 See Debra K. Rubin, Jim Parsons, & Mary B. Powers, *Fixing Construction's Fixed Price Conundrum*, ENR (Nov. 20, 2019), <https://www.enr.com/articles/48168-fixing-constructions-fixed-price-conundrum>.
- 106 AIA Document B143-2014, Standard Form of Agreement Between Design-Builder and Architect, AIA Contract Documents (2014); ConsensusDocs 420 — Standard Agreement Between Design-Builder and Design Professional, ConsensusDocs (2022).
- 107 Loukalis & Douglas D. Gransberg, *Liability of Designers for Proposal-Related Claims in Design-Build Contracts*, J. Leg. Aff. Dispute Resolut. Eng'g. Constr., at 2 (2022); Jampole, Amoroso, Morgan, & McDonald, *Themes in design/build disputes, from a technical expert witness perspective*, 17 Constr. L. Int'l 35, 36 (2022).
- 108 [Pointe at Westport Harbor Homeowners' Ass'n v. Engineers Northwest, Inc., P.S.](#), 193 Wash. App. 695, 376 P.3d 1158, 1162 (Div. 2 2016) (quoting [Donatelli v. D.R. Strong Consulting Engineers, Inc.](#), 179 Wash. 2d 84, 312 P.3d 620, 624 (2013)).
- 109 *Id.* at 1162.

- 110 *See infra* Part II.
- 111 Sean Dowsing, *But It's Design-Build: Analyzing and Overcoming This Conclusory Defense*, ABA: Under Constr. (March 16, 2020), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2020/spring2020/analyzing-overcoming-conclusory-defense/; Block, *As the Walls Came Tumbling Down: Architects' Expanded Liability Under Design-Build/Construction Contracting*, 17 J. Marshall L. Rev. 1 (1984).
- 112 [AECOM Technical Services, Inc. v. Flatiron | Aecom, LLC, 2024 WL 249101 \(D. Colo. 2024\)](#) (recognizing there is a difference in standard of care tailored to “preliminary design” and final design, when written into the contract).
- 113 Compare [C.L. Maddox, Inc. v. Benham Group, Inc.](#), 88 F.3d 592, 600, 44 Fed. R. Evid. Serv. 1413 (8th Cir. 1996) (imposing an implied warranty because engineer represented it was qualified and staffed to perform contracted services) with, e.g., [Kemper Architects, P.C. v. McFall, Konkel & Kimball Consulting Engineers, Inc.](#), 843 P.2d 1178, 1186 (Wyo. 1992) (quoting [City of Mounds View v. Walijarvi](#), 263 N.W.2d 420, 424 (Minn. 1978) (limiting design professional's liability to negligence because “the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals”) (internal quotation marks omitted)).
- 114 [C.L. Maddox, Inc.](#), 88 F.3d at 595.
- 115 *Id.* at 595–96.
- 116 *Id.* at 596.
- 117 *Id.* at 595–96.
- 118 *Id.* at 596.
- 119 *Id.* at 596–97.
- 120 *Id.* at 597.
- 121 *Id.* at 600.
- 122 *Id.* at 600.
- 123 *Id.* at 600.
- 124 *Id.* at 600.
- 125 *Id.* at 600.
- 126 *See, e.g.,* [C.H. Guernsey & Co. v. U.S.](#), 65 Fed. Cl. 582, 596 (2005) (quoting 6 C.J.S. *Architects* § 16) (“In the absence of an express agreement, ‘an architect, like a physician or lawyer, does not guaranty, imply, or warrant a perfect plan, or favorable or satisfactory results. It follows that an architect's work can be inaccurate or imperfect without being an actionable deviation from the standard of care.’”).
- 127 *See* Circo, [When Specialty Designs Cause Building Disasters: Responsibility for Shared Architectural and Engineering Services](#), 84 Neb. L. Rev. 162, 175 (2005).
- 128 *See Design-Build Projects—Achieving Fair Allocation of Risk between the Contractor and Design Professional*, ACEC Risk Management Committee, 1 (2015) (“No design defect can truly be ‘defect free,’ and the law does not require architects and engineers to perform to this unattainable standard.”).

- 129 *Supra* section I.A.
- 130 [Walsh/Granite JV v. HDR Engineering, Inc.](#), 2019 WL 1382957 (W.D. Pa. 2019).
- 131 *Id.* at *2.
- 132 *Id.* at *3.
- 133 *Id.*
- 134 *Id.* at *2, *5.
- 135 *Compare id.* at *2 with *id.* at *4 (“The standard of care for all professional services provided by the Architect/Engineer pursuant to this Design Agreement shall be the care and skill ordinarily exercised by members of the same profession currently practicing in the United States, on projects of similar size and complexity, in the same locality, and at the time the services are performed.”).
- 136 *Id.* at *3.
- 137 *Id.* at *4.
- 138 *Id.* at *1.
- 139 *Id.* at *1, 11.
- 140 *Id.* at *1–2, 11.
- 141 The court denied HDR's motion for summary judgment in part, granted in part, and denied W/G's cross-motion. *See id.* at *1.
- 142 *Id.* at *12–13.
- 143 *Id.* at *14.
- 144 *See id.* at *14–15.
- 145 *See id.* at *14–15.
- 146 *Id.* at *15 (simply listing whether HDR had breached its standard of care as a remaining issue of material fact).
- 147 *See, e.g., CRS Serrine, Inc. v. Dravo Corp.*, 213 Ga. App. 710, 445 S.E.2d 782 (1994).
- 148 Mibash Uddin & James G. Zack, Jr., *Public-Private Partnership Projects—What, Why, & How is Risk Allocated*, Navigant (June 2016); David J. Hatem, *Recalibrating and Improving Design-Build on Public Infrastructure Projects*, Am. Bar Ass'n Forum on Constr. L., at 8 (Sept. 2022); Grattan Institute, *Megabang for Megabucks: Driving a Harder Bargain on Megaprojects*, at 15 (May 2021); Peter Ryan & Colin F. Duffield, *Contractor Performance on Mega Projects—Avoiding the Pitfalls*, at 29 (2017).
- 149 John Sharkey AM, Phillip Greenham, Matthew Bell, Wayne Jovic, Julia Korlkova, & Did Hu, *The Health of the Australian Construction Industry*, at 6 (2020).
- 150 *Id.*
- 151 J Grattan Institute, *Megabang for Megabucks: Driving a Harder Bargain on Megaprojects*, at 15, 26 (May 2021) (transferring risk to contractors is likely to result in premiums, increasing overall costs of construction projects).

- 152 Cf. J Grattan Institute, Megabang for Megabucks: Driving a Harder Bargain on Megaprojects, at 35 (May 2021) (transferring risk to contractors is likely to result in premiums, increasing overall costs of construction projects).
- 153 Misbah Uddin & James G. Zack, Public-Private Partnership Projects—What, Why, & How Is Risk Allocated?, Navigant 14 (2016).
- 154 Quote attributed to Heraclitus, Greek philosopher in 5th Century BC.
- 155 [Parsons, Brinckerhoff, Quade & Douglas, Inc. v. Palmetto Bridge Constructors](#), 647 F. Supp. 2d 587 (D. Md. 2009) (Nos. 09CV00633, 16 110 Y 00125 05).
- 156 *Id.* at 18.
- 157 *Id.* at 18.
- 158 *Id.* at 18.
- 159 *Id.* at 35–39.
- 160 *Id.* at 89–95, 98, 125–26, 128, 135–36. The court did not impose liability for the preproposal issues but did find for the design-builder as to its backcharge claims which constituted a breach of an express warranty in the design agreement. *Id.* at 178–84.
- 161 *Id.* at 57–59.
- 162 *Id.* at 59–64.
- 163 *Id.* at 61.
- 164 *Id.* at 61.
- 165 *Id.* at 62–64.
- 166 *See id.* at 61 (relying on design-builder's experience in past projects to reason that “it is unrealistic to conclude that [the design builder] was deprived a sufficient understanding about, or lacked an appreciation of, the uncertainties of the design of the Project at the pre-proposal stage.”).
- 167 *See id.* at 58 (stating that the design-builder “did not share certain critical information with [the design professional], and overtly excluded its designer from providing input on final estimating, risk evaluation or contingency setting. Such exclusion lies at the core of this dispute.”).
- 168 *Id.* at 58.
- 169 *See id.* at 58–59.
- 170 *Id.* at 61 (“[T]he experience and sophistication of both [the design builder] and [the design professional] must be recognized. ... [I]t is unrealistic to conclude that [the design builder] was deprived a sufficient understanding about, or lacked an appreciation of, the uncertainties of the design of the Project at the pre-proposal stage.”).
- 171 *Id.* at 61–63.
- 172 *Id.* at 58, 62–63.
- 173 *See id.* at 62–63.

- 174 *See id.* at 59, 61–62.
- 175 *Id.* at 59–60.
- 176 *Id.* at 61–62.
- 177 *Id.* at 61 (“[B]ecause of the conceptual nature of the design information presented in such a limited period, and the obvious preliminary and incomplete nature of load analyses, an overarching uncertainty and one requiring appropriate design contingency was understood to exist in the pre-proposal exercise.”). *See id.* at 59 (noting the design team had approximately twelve days to provide design information for the pre-proposal design and completed bulk of their pre-proposal design work in less than three weeks).
- 178 The design professional spent 10,000 hours working in the pre-proposal phase, as compared to 300,000 hours on the post-award design. *Id.* at 61.
- 179 The design professional was paid 1 million dollars for pre-proposal work and 21 million dollars for the post-award design. *Id.* at 61.
- 180 *Id.* at 59 (“Sensitive to price issues, on separate occasions in the pre-proposal design process, [the design-builder] variously instructed [the design professional] to provide a ‘bare bones’ design and to design solely to SCDOT’s design criteria, even when it was known to [the design builder] that the criteria was insufficient ...”).
- 181 *Id.* at 62–63.
- 182 *See id.* at 62–63.
- 183 Logically, more collaboration would increase the likelihood that the design professional could bear some liability for a failure to warn of cost overruns. However, increased collaboration between the parties would have likely helped the parties to evade some of these issues. The panel highlighted the importance of collaboration in design-build success, stating:
- The design-build process is based upon the concept of designer and contractor working together as a team. Ideally, what that means during the design phase is that designer and constructor review and revise iterative design together for issues of cost and constructability. It follows, therefore, that for there to be a successful design team effort where designer and constructor are separate entities, they must act as an integrated team, regardless of the legal relationship of the combination. ... [T]here must be an environment of trust, openness and free exchange of information between the participants.
- Id.* at 57.
- 184 *Id.* at 63. However, these factors, even if they all cut in favor of the design professional, do not absolve the design professional of any duty to warn or predict future design changes. In fact, the design professional in *Parsons* did warn the design-builder of potential consequences, but as the analysis shows, it was not necessarily in the design professional’s standard of care to determine the specifics of those consequences. *See id.* at 62 (highlighting the design professional’s warnings to the design-builder regarding design uncertainties).
- 185 [Middlesex Corporation, Inc. v. Fay, Spofford & Thorndike, Inc.](#), 2019 WL 3552609 (Mass. Super. Ct. 2019).
- 186 *Id.* at *1.

187 *Id.* at *2.

188 *Id.*

189 *Id.*

190 *Id.*

191 *Id.* (“The Design/Builder and Engineer agree that the applicable standard of care for the Engineer's services shall be that degree of skill and care normally exercised by practicing professional engineers performing similar services on similar projects under similar conditions.”).

192 *Id.*

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.* at *3.

197 *Id.*

198 *Id.*

199 *Id.* at *4 (“I think the expected overrun in costs is more attributable to the number of times we have designed and redesigned elements of the structure ... Our message is we need to be done with the design now. We need to draw a line, complete the details and put the design effort on the shelf until we get the job.”).

200 *Id.* at *3.

201 *Id.*

202 *Id.* at *4.

203 *Id.* at *3.

204 *Id.* at *5.

205 *See id.* at *4–5.

206 *Id.* at *5.

207 *Id.* (“At a unit price of \$1.73 per pound this increased steel costs by \$356,708.70. The additional labor costs associated with that steel were \$62,337.89.”).

208 *Id.*

209 *Id.*

210 *Id.*

211 *Id.*

212 *Id.* at *6.

213 *Id.*

214	<i>Id.</i>
215	<i>Id.</i>
216	<i>Id.</i>
217	<i>Id.</i>
218	<i>Id.</i>
219	<i>Id.</i>
220	<i>Id.</i>
221	<i>Id.</i>
222	<i>Id.</i>
223	<i>Id.</i> at *9.
224	<i>Id.</i>
225	<i>Id.</i>
226	<i>Id.</i> at *8 (quoting the contract that stated that the engineer was “not ... required to perform additional design pursuant to this Agreement, other than such addition preliminary design, if any, as is required by the terms of the RFP for a responsive proposal”).
227	<i>Id.</i>
228	<i>Id.</i>
229	<i>Id.</i> at *4 (““We need to be done with the design now ... We will reconsider each request carefully for here on out and only ask the critical ones. I think the expected overrun in costs is more attributable to the number of times we have designed and redesigned the elements of the structure.””).
230	<i>Id.</i> at *7.
231	<i>Id.</i> at *5, 9–10.
232	<i>Id.</i> at *10.
233	<i>Id.</i> at *9.
234	<i>Id.</i>
235	<i>Id.</i>
236	<i>Id.</i> at *10.
237	<i>Id.</i>
238	<i>Id.</i>
239	<i>Id.</i>
240	<i>Id.</i> at *11.

241 *Id.*

242 *Id.*

243 *Id.* at *8.

244 *Id.* at *7.

245 *Id.* at *5.

246 *Id.*

247 *Id.* at *3.

248 *Id.* at *5.

249 *Id.*

250 *Id.* at *3.

251 *Id.* at *5, 7.

252 *Id.* at *10.

253 *Id.*

254 *Id.*

255 *Id.* at *6, *11.

256 57A Am. Jur. 2d, *Negligence by nonfeasance or misfeasance* § 14 (2024); 2A Am. Law of Torts *Conduct; acting or failing to act—Misfeasance or nonfeasance* § 9:6 (2024).

257 Ziegler, *Nonfeasance and the Duty to Assist: The American Seinfeld Syndrome*, 104 Dick. L. Rev. 525, 529 (2000); 57A Am. Jur. 2d, *Negligence by nonfeasance or misfeasance* § 14 (2024); 2A Am. Law of Torts *Conduct; acting or failing to act—Misfeasance or nonfeasance* § 9:6 (2024).

258 See Abraham & Kendrick, *There's No Such Thing as Affirmative Duty*, 104 Iowa L. Rev. 1649, 1651 (2019); 57A Am. Jur. 2d, *Negligence by nonfeasance or misfeasance* § 14 (2024).

259 Middlesex Corporation, Inc. v. Fay, Spofford & Thorndike, Inc., 35 Mass. L. Rptr. 484, 2019 WL 1411825 *2 (Mass. Super. Ct. 2019).

260 *Id.* at *9.

261 *Supra* subsection II.A.2.

262 Some additional duties, however, may not be held to the same professional standard of care. For instance, if an architect undertakes the management of a construction team and schedule, that may be outside of an architect's typical services. The standard of care for a design professional in performing non-professional services lies outside the scope of this Article, but it is important to note the limitations of the application of this proposed standard of care analysis. Although, these tasks would likely also be held to a professional standard of care. See Circo, *When Specialty Designs Cause Building Disasters*, 84 Neb. L. Rev. 162, 181 (2005).

263 See *supra* subsection II.A.1.

- 264 *See supra* subsection II.A.1.
- 265 *See supra* subsection II.A.1.
- 266 *See* ACEC Risk Management Committee, Design-Build Projects—Achieving Fair Allocation of Risk Between the Contractor and Design Professional, at 1 (2015); Kent Holland, Standard of Care for Design Professionals, *Constr. Risk* (Sep. 25, 2015), <https://www.constructionrisk.com/2015/09/standard-of-care-for-design-professionals/>.
- 267 *See* Block, *As the Walls Came Tumbling Down: Architects' Expanded Liability Under Design-Build/Construction Contracting*, 17 J. Marshall L. Rev. 1, 10 (1984).
- 268 *Id.*
- 269 Sebastian Obando, *Progressive design-build gains around the US*, Construction Dive (Nov. 8, 2023), <https://www.constructiondive.com/news/progressive-design-build-dbia-conference/699055/>; *see* Cody Thomas, *What's so Progressive about Progressive Design-Build?*, AIA Contract Documents (May 20, 2022), <https://learn.aiacontracts.com/articles/6508632-whats-so-progressive-about-progressive-design-build/> (noting progressive design-build's increase in popularity).
- 270 Alex Six & Larry Bernstein, *Progressive Design-Build: Reducing Risk with Two-Stage Procurement*, ProCore (June 11, 2024), <https://www.procore.com/library/progressive-design-build>; DBIA, *Progressive Design-Build: Design-Build Procured with a Progressive Design & Price*, at 3 (2017), <https://staging.dbia.org/wp-content/uploads/2018/05/Primer-Progressive-Design-Build.pdf>.
- 271 DBIA, *Design-Build Done Right® Design-Build Best Practices*, at 10 (2023), <https://dbianw.org/wp-content/uploads/2023/06/Design-Build-Best-Practices-Primer-2023.pdf>; Cody Thomas, *What's so Progressive about Progressive Design-Build?*, AIA Contract Documents (May 20, 2022), <https://learn.aiacontracts.com/articles/6508632-whats-so-progressive-about-progressive-design-build/>.
- 272 Alex Six & Larry Bernstein, *Progressive Design-Build: Reducing Risk with Two-Stage Procurement*, ProCore (June 11, 2024), <https://www.procore.com/library/progressive-design-build>.
- 273 Alex Six & Larry Bernstein, *Progressive Design-Build: Reducing Risk with Two-Stage Procurement*, ProCore (June 11, 2024), <https://www.procore.com/library/progressive-design-build>.

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