



## Design-Build Primer: Contractor-Led Projects Have Risks of Their Own

Design-build continues to grow as a project delivery method of choice for project owners looking for a streamlined approach to designing and building their next project. The concept is relatively simple: rather than having to deal with two primary points of contact (the contractor and the lead designer), as is typical with the traditional design-bid-build model of project delivery, the project owner chooses to have only a single point of contact. For the owner, this can greatly simplify the management of today's complex construction sites.

There are a handful of options as to who that primary point of contact, or "design-builder," will be, each of which has its own advantages and disadvantages. The obvious choices for the design-builder include:

### 1. THE LEAD DESIGNER

With the designer-led design-build method, the lead architect or engineer on the project contracts with the owner to be the design-builder and then hires the contractor, subconsultants and possibly subcontractors (if not hired by the contractor). From the lead designer's standpoint, the primary advantage of this approach is that he or she maintains direct contact with the project owner, which helps ensure that the project design meets the owner's objectives. The design-builder directs the contractor and project subs to construct the project in general conformance with plans.

The major disadvantage of this approach is that the design-builder is liable for the actions of the contractor and all subs regarding construction means and methods, and jobsite safety. This is a liability that designers typically go to great lengths to avoid. Most contracts governing the traditional design-bid-build project delivery method include specific clauses stating the designer is not liable for construction means and methods nor jobsite safety. But with designer-led design-build, because the designer has a direct contractual relationship with the contractor and oversees its activities, liability for jobsite activities is inherent.

Liabilities for construction means and methods and jobsite safety present challenging insurance requirements for design firms. A designer's typical professional liability policy does not cover these types of activities. Nor is a designer's general liability or package policy equipped to provide coverage for construction activities. Designers will need to work closely with their insurance advisors to purchase contractors general liability and professional liability, as well as other policies similar to those required of contractors, including bonds.

### 2. A THIRD ENTITY

A second approach to design-build is to have an entity other than the lead designer or contractor take on the role of design-builder. This third-entity design-builder may be a construction manager, a design firm hired solely to serve as the design-builder (but not the project lead designer), or a general contractor other than the contractor building the project.

An advantage to this third-entity approach for the lead designer is that there should be no added liability related to construction means and methods or jobsite safety. The third-party design-builder and the contractor will handle all decisions regarding construction means and methods on the jobsite. Still, the lead designer, in its contract with the design-builder, should reiterate that it is not liable for construction means and methods nor jobsite safety.

A major disadvantage of this approach is the lead designer's lack of direct interaction with the project owner. Working with a design-builder intermediary inevitably complicates communications and can lead to misunderstandings or gaps regarding client needs and design intent. You can design in accordance with the requirements specified by the design-builder, but the design-builder may not be accurately communicating the desires and expectations of the owner. And, if the owner is unhappy with the design, you can bet that any liability for negligence, errors and omissions will flow through the design-builder directly to the lead designer.

### 3. A JOINT VENTURE

In this design-build model, the lead designer and the contractor join to form a separate legal entity, often a joint venture. This new entity serves as the design-builder and primarily acts as the owner representative and conduit to the lead designer and contractor, which continue to operate as separate firms in their design and construction roles. This joint venture is often project- or client-specific.

The advantage of this structure is that the lead designer and the contractor continue to have communication with the owner through the conduit of the joint-venture design-builder. Also, the union of the designer and contractor in the design-builder role should lead to a more harmonious, less adversarial relationship than normally found between lead designer and contractor. Because they share the risks and rewards of being the design-builder, these two parties are more apt to pursue mutually beneficial solutions to any problems that arise. They might even enter into contractual agreements as to which entity (design-builder, lead designer or contractor) is responsible for which activities. They might also agree in writing to split responsibilities for liabilities along traditional lines.

For design firms, the primary disadvantage of this technique is that the joint venture they are party to will have liability for construction means and methods and jobsite safety. Even if the contractor has agreed to assume those responsibilities via a contract with the designer, that contract only applies to those parties. If the owner has a dispute regarding either design errors or faulty construction, you can bet it will take a shotgun approach and file claims against all three entities: the joint venture, the contractor and the lead designer.

Whether the newly formed joint venture entity, even with limited liability status, provides any legal protection for a design firm or its principals against a claim is questionable. Liability would depend upon the jurisdiction of any lawsuit and the specifics of the case. For instance, in some states, the designer may face joint-and-several liability, or may be placed outside the purview of any anti-indemnity statutes intended for design firms. These are areas any design firm and its attorney should thoroughly investigate before entering into a business relationship where a new entity is formed to conduct business separate from the core company.

### 4. CONTRACTOR-LED DESIGN-BUILD

We come to the fourth and most common form of design-build entity: contractor-led design-build. We have saved it for last because it's the type of design-build you're most likely to encounter (a ZweigWhite study showed that more than half of design-build projects use this approach) and it's one where there are some misconceptions as to how much added risk this project delivery method brings to the lead design firm compared to the traditional design-bid-build approach.

With contractor-led design-build, the contractor takes the role of design-builder, reporting directly to the project owner. The lead designer, in turn, reports to the contractor. Indeed, in many cases, the contractor hires the lead designer.

From the lead designer's standpoint, this arrangement has one major advantage: it has no responsibility nor liability for construction means and methods or jobsite safety. The contractor does not report to the lead designer, nor do the two parties enter into a joint venture or similar agreement where they share responsibility for design and construction.

Because of this important fact, contractor-led design-build has often been thought of as nearly equivalent to traditional design-bid-build from the lead designer's liability standpoint. Although the contractor picks up professional

liabilities because it manages the lead designer directly and any subconsultants directly or indirectly, the lead designer does not have any responsibility for the contractor or its means and methods of construction. Indeed, the contract between the lead designer and the contractor should state in writing that this is the case.

It is a fallacy though, that contractor-led design-build is, liability-wise, equivalent to traditional design-bid-build for the lead designer. Here are some important differences

- ▶ The lead designer has no contractual relationship with the project owner. This prohibits the designer from securing protective contract clauses calling for limitation of liability, mutual indemnities, mediation, waivers of subrogation, consequential damages and so forth. Chances are the contractor design-builder will not secure these protections on the lead designer's behalf. Even if the lead designer secures protective clauses in its contract with the design-builder, these clauses will not apply to the project owner.
- ▶ The lead designer rarely has direct communication with the client. The contractor will be the go-between and the designer has to rely on the contractor's communication skills to ensure the owner's needs and expectations get accurately communicated. The lead also loses the ability to play the valuable role of trusted advisor to the owner.
- ▶ The contractor is responsible for the delivery of all professional services, including designs. Therefore, the lead designer will find itself having to justify design decisions to the contractor and perhaps modifying its designs to satisfy the contractor.
- ▶ The lead designer is now liable to the contractor for negligence or breach of contract. It likely also remains liable to the project owner. Many jurisdictions do not require that a contractual relationship exist between a designer and project owner in order for the owner to be able to successfully file a claim against the designer for negligence, errors or omissions in project services.
- ▶ The contractor design-builder may not have obtained all proper licenses, permits, insurance coverages, etc., to practice as a professional in the jurisdiction where the project resides. If the contractor is found to be practicing without the necessary prerequisites, the lead designer could become embroiled in charges of misconduct and aiding and abetting an unauthorized offering of professional services.
- ▶ Because of the contractual relationship, the designer may find itself brought into any bodily injury lawsuits from the contractor's employees, raising general liability concerns.

#### TIPS FOR CONTRACTOR-LED DESIGN-BUILD

Many architects and engineers will find themselves with an opportunity to provide professional services on a contractor-led design-build project. When that occurs, work closely with your attorney and insurance agent or broker to ensure you take the necessary precautions to avoid the pitfalls you might face. Consider the following:

- ▶ Ask to see a copy of the contract between the owner and the contractor design-builder. Have your attorney and insurance advisor look for possible deal breakers (warranties, guarantees, etc.) as well as references to dispute resolution, ownership of documents, limitations of liability, and so forth. Make sure any professional liability protections garnered by the design-builder are passed through to you via your contract.
- ▶ Have your insurance broker conduct a thorough review of the adequacy of your policies, and seek certificates of insurance that demonstrate proper coverage for the design-builder.
- ▶ Look for signs of adequate funding for the project, including a contingency fund. Owners often look to design-build as a method of fixing a low project cost.
- ▶ Work with your attorney to create an equitable and detailed contract with the design-builder. The AIA, EJCDC, DBIA, FIDIC and ConsensusDocs coalition all provide good starting points for design-build contract language. Then customize that language to fit your situation. Clear and thorough scopes of services specifying the designer's and the design-builder's exact project roles and responsibilities are vital.
- ▶ Address ownership-of-document issues. If you are required to transfer ownership of your work to the design-builder or owner, set limits on what they can do with those documents. For example, limit their uses for operations and maintenance only and prohibit reuse of the design without your written consent (and adequate compensation).
- ▶ Work to add a contract clause that requires the design-builder to pay the designer for services rendered, despite any ongoing disputed services.

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