



2020 Construction Conference
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**Contracting Methods and the Corresponding Risks and Rewards for the Owner,
Contractor or Design Professional**

I. Design Build

A. What is Design Build?

Design-Build is a project delivery contracting method within the construction industry. An owner enters into a contract with a Contractor or Design-Builder for the complete design and construction of a particular project. It is prudent for the design-builder to assess the responsibilities and risks they will assume under the design-build agreement and determine how best to manage those risks. A design-builder will assume certain risks, insure others, and transfer risk to design professionals and trade sub-contractors.

II. Why Do Owners Want Design Build?

Design-Build agreements are increasingly becoming a preferred delivery method within the high profile construction sector. Today, more than 40 percent of non-residential construction projects are completed under the design-build model, according to the Design-Build Institute of America (DBIA). The method is an attractive option for all parties for one driving reason: one contract. Owners, design-builders and the design professional sub-contractors have a relationship with one entity. The contract may be an industry standard agreement, such as the one sponsored by the DBIA, the American Institute of Architects (AIA), or the Consensus Documents to name the most common. One point of contact is particularly beneficial to the

owner. The Owner gives its design and requirements to one entity resulting in less direct contractual management of the project. Often, this means the project may be completed faster at a competitive overall cost. The design-builder then exerts control over both the design and the scope of the project, with selected design professionals and trade sub-contractors of their choosing.

III. When is Design Build used?

The Design-build delivery method is used for both Horizontal and Vertical construction. Design-build is desirable for horizontal construction due to the complexity, cost and duration of the project undertaking. Structural engineers opt for the design-build delivery method for public entity infrastructure projects, which have become a driving factor in the growth of the high end construction sector in recent years. Horizontal construction refers to bridge, tunnels and roadway projects, while vertical construction applies to the design of buildings. Typically, horizontal engineers are sub-contracted as the project manager to oversee the entire project; thereby the design-builder avoids dealing with architects or interacting directly with all the trade sub-contractor professionals. Vertical construction requires many trade experts and materials classes working in a congested workplace site. Owners gravitate to Design-build delivery as a way to streamline the contracting process and expedite project delivery at a competitive price.

IV. What are the Draw Backs and Risks of the Design Build Delivery?

The drawback for design-build rests with the level of risk and responsibility the contractor will assume for the project. Budget considerations are set forth in the design-build agreement at the outset of the project. In a design-build agreement, even though design responsibility is subcontracted to design professionals, the design-builder remains legally liable for those professional services. Too often, the contract does not adequately budget for unexpected contingencies leading to additional, unexpected costs incurred for rectification even before construction is underway. As an example, the design-build contractor may find themselves

responsible for the redesign and remediation of a design defect to avoid litigation or large insurance claim.

V. What are the Risks?

The typical risks surrounding a design-build project are both professional and non-professional. The non-professional risk exposures include direct damage to property, supplies and materials, as well as bodily injury resulting from the contractors' operations on the project premises that can emerge during or after completion of the project. Environmental liability exposures can be the result of accidental release or dispersal of hazardous material from the project site. The design-builder is also held accountable for the safety of all employees and third parties on the project site, which present the potential risk of workers' compensation claims and OSHA fines and penalties.

VI. What makes a successful Design Build?

Design-build delivery agreements vary from fair and equitable to onerous. The outcome of a successful design-build project squarely rests on the terms of the contract agreement that sets forth the scope of responsibility the design-build professional assumes in managing the sub-contractors and tradesmen and competitive but comprehensive project budgeting.

VII. What are the Exposures?

Contractors and design builders utilizing a project delivery method for a construction project face both professional and non-professional exposures. The design-builder must assess the responsibilities and risks it has assumed in the contract agreement and determine how best to manage those risks. With the increase in the quantity and complexity of design-build projects, it is important for design-builders and design professionals to equitably allocate risk to the party most suited to manage those risks.

A design-build agreement is a contractual relationship between an owner and design-builder, which defines the roles and responsibilities of the parties. The design-builder assumes control of the construction project and assigns project-specific specialty work to its selected design

professionals and trade subcontractors. Risk exposure for a design-builder can include damage to the property and supplies to unexpected incidents that may occur on the site during construction or for claims emerging after completion of the project. The greatest risk that demand insurance coverage result from professional liability incidents that trigger claims due to direct or contingent exposures when the design-builder contracts to provide “all design and construction services.”

VIII. How to Manage the Risks of Design Build?

The design-builder’s professional liability exposures are related to the design services outlined in the contract with the owner and then subcontracted to design professional as set forth in the agreement, which can range from very onerous to fair and equitable. Claims can arise when the design-builder unfairly allocates risk to a design professional who is ill equipped to manage that risk. For example, a design professional may not be suited to manage the risk of a specialty subcontractor who is contractually obligated to warrant and guarantee their work.

There are various tools available to assist the design-builder in mitigating risks. A design-builder with professional liability insurance coverage in the form of an annual professional liability practice policy should execute adequate mutual indemnities with its design professional sub consultants. The policy should include protective indemnity coverage, which is a type of first-party cover available in the contractor’s professional liability policy in the event that the sub consultant’s professional liability insurance is inadequate or exhausted.

When the insurance requirement of the design-builder and its design sub consultant is a project specific policy covering both entities, the “insured vs insured” exclusion precludes the design-builder from making claims against the insured design professional. Rectification coverage can provide a solution. Rectification insurance covers the costs to rectify design defects discovered during construction and when there is clear and convincing evidence that the design defect would have otherwise triggered a negligence claim.

The increasing prevalence of complex, multi-party design-build delivery projects requires thorough assessment and evaluation of the risks at the outset. The entire design-build team should be involved in seeking appropriate insurance options and solutions to protect their

respective professional liability exposures and legal obligations. Fortunately, the insurance industry has responded with customizable, sophisticated products and services to address the risk factors within this specialty sector of the construction industry today.