BluePrint

For Design Professionals

Design Build for Design Professionals: Practical Considerations for Contracting and Evaluating Risk

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The design-build project delivery system ("Design Build") is by now well established within the construction industry. Its popularity has been given a boost by the steady expansion of Building Information Modeling (BIM) and Integrated Project Delivery (IPD), which also require a collaborative approach between contractors and design professionals. Proponents of design-build contend this delivery method brings in projects 33.5% faster, on average, reduces costs and reduces cost growth[1]. It is undeniably an attractive method for many owners.

Fundamentally distinguishing design-build is that the design professional contracts with the contractor, rather than the owner. This contractual alignment of the parties yields a different approach, and provides new risks and challenges that may be unfamiliar to the design professional accustomed to the more traditional design-bid-build method.

Winter 2016
Volume 6/ Issue 1

Within the design-build rubric, there are different ways to structure the team, including contractor-led projects, architect–led projects and joint ventures (typically a new entity formed to serve the project only, or otherwise limited in scope and duration). Nationally, the most popular method by far is the contractor-led or "vertical structure," in which the design professional will serve as a subcontractor to

[1] See Construction Industry Institute/Penn State research for the Design Build Institute of America, December 2015.

the general contractor. Each team structure poses unique risks for the design professional. This article will focus on the vertical structure, or contractor-led model, exploring the distinctive risks with that particular model, and providing practical advice on how to minimize those risks.

Basic differences for the Design Professional

Contracting with the general contractor rather than the owner fundamentally alters the most basic project relationship both from a practical and legal standpoint. This has consequences for the design professional in terms of its loyalty, standard of care, and the architect's role from the programming or proposal phase of design to the construction phase. It may also affect how and when the architect is paid during the course of the project. This alignment will take getting used to, but most of these issues can be managed through awareness and well drafted contracts. If you're new to the game, strongly consider only partnering with an experienced design builder. We also recommend using one of the standard form construction industry contracts, such as the AIA, Consensusdocs, Design Build Institute of America (DBIA).

Getting started: The Proposal Phase, Bridging Documents and the Teaming Agreement

By definition, the design-builder is awarded the project prior to completion of a final set of plans and specifications. Accordingly, either the owner or contactor will retain a design team to create what are referred to as "bridging documents" which are used to frame the owner's project vision in sufficient form and detail to enable the contractor to prepare a reliable bid or proposal and accurately bring that vision to life. Bridging documents consist of an agreed upon number of plan sheets and specifications which provide sufficient detail so that the participants, including the contractor and owner, will have a clearer understanding of project costs, scope, schedule, materials, etc. These plans may include elevations, floor layouts, certain dimensions, among others, as decided by the participants and befitting of the project scale, in terms of number and detail, but are not intended to be construction documents.

The "design-build bridging" method is a variation of design-build in which the owner retains a designer (not affiliated with the design builder) to draft the bridging documents. Proponents of this form of design-build construction hail the method as providing superior owner control over project quality and cost, and providing for the shortening of the construction schedule. If the owner's design team has drafted the bridging documents, the general contractor will retain its own design team and use the bridging documents as a platform to create the construction documents. The owner has the option to retain the bridging-design architect to serve as its representative during construction in the capacity normally occupied by the architect during a design-bid-build project. Some states provide for this particular design build method by statute for its government owned projects.

Bridging documents created by a design professional that will not be the architect or engineer of record has its own set of challenges. Transferring or releasing electronic documents to a new design professional can implicate intellectual property issues, for example. Bridging design professionals should ensure their contracts properly allocate and limit their risk. It may be acceptable to the bridging architect to maintain liability for the originality of its design and concepts, but should disclaim liability for constructability issues, adequacy of details, project cost, and issues arising from software compatibility. There should be a clear understanding between the two participating design professionals as to what the new architect can rely on (site research, surveys, for example). Documenting this transition may be complicated by the fact that the design-builder's architect will not have a direct contract with the

bridging architect.

Whether or not bridging documents are created by the design builder's own design team, the duties and obligations of the contractor and design professional are addressed in what is called a "teaming agreement." In addition to discussing the bridging documents, the teaming agreement is used to memorialize a detailed understanding of the expectations, duties and obligations of the parties during the proposal phase.

The design-builder has a different agenda going into the project than the traditional contractor. Design is now part of their project cost, and the design-build contractor will want to contain it. So-called "defensive detailing," or the practice of adding details that are more than needed to construct the building, but are added to meet the perceived "CYA" standard of care, can be eliminated. Laboriously drafting overly detailed documents with the aim of producing a Lego-like construction experience, is replaced by a collaborative pre-construction process that incorporates input from subcontractors on details and constructability, early review of submittals and bulletin drawings.

At the proposal stage, the contractor may require an investment from the design professional in the form of fairly detailed designs in order to aid in the preparation of its bid and costs estimates. The design professional, on the other hand, unless fully compensated, is interested in providing documents with just enough detail to yield a reliable bid. The contractor and designer should agree in advance on exactly what is expected prior to award, including whether the designer will be fully or partially compensated for its efforts and a reasonable cap on any marketing hours.

Another reason this issue needs to be discussed and incorporated into the teaming agreement is to minimize exposure to claims that project losses were caused by architect negligence. If the project goes bust, the contractor may allege that it reasonably relied on the details provided by the architect, and as the project progressed, project costs escalated beyond estimates, due in part to the failure of the designer to adequately or accurately prepare the initial design. This expectation should be explicitly addressed and disclaimed in the contract documents.

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It is not uncommon for discussions around profit sharing to be raised at this juncture. Typically, design firms are not structured or capitalized to withstand a substantial share of project losses and such exposure should be avoided. However, there are risks that may be manageable, if bookended by an equitable upside should the project turn a profit. A fee reduction tied to a percentage of overall project loss (or the failure to secure the bid), along with profit sharing incentives, may be both fair to the parties and foster project success. The ratio between the architect upside and risk of loss will not be dollar for dollar. The upside should be greater for the reasons described above (business model structure and capitalization), and because the design team can only do so much in terms of controlling cost and project success. Most project risk is outside the architect's control: force majeure, owner insolvency, equipment issues, jobsite accidents, material shortages or cost increases, scheduling and coordination issues, among many others. Furthermore,

any risk to the design professional for project losses should be expressly limited to this liquidated remedy.

There are a number of form teaming agreements now available from DBIA, ConsensusDocs, and the AIA. See for example, the DBIA Standard Form of Teaming Agreement (Document 580) and A Standard Form of Agreement Between Design Consultant and Design Sub-Consultant (Document 575), and the AIA B143 -2014, Standard Form of Agreement Between Design-Builder and Architect. These and other industry form teaming agreements contain provisions dealing with preliminary design, the design-builder's proposal, and the expectations of the parties should the project be awarded.

Practice take-aways include:

- Negotiate to have the contractor pay the design professional (and its team) for as much of the preliminary design work as possible.
- Reach an understanding as to the level of detail and amount of time the design team will spend on preliminary documents.
- Consider profit and risk sharing, both as a way to balance the investment of work at the pre-award or pre-contract stage, but limit the downside if the project sustains losses. Liquidate or limit the risk to what is expressly agreed to.
- The potential for project losses should be addressed either as set forth above, or expressly waived and disclaimed.

Managing Collaboration

Facilitating the design-build process typically includes numerous pre-construction meetings with all stake-holders, and can also include a project website and the sharing of CADD drawings to create constructability drawings. The contractor in design-build values flexibility in design, and may encourage the design professional to explore alternative methods material substitutions, value engineering options to save costs and accelerate schedule, all throughout the course of construction. Communication may become less formal. Phone calls and site meetings, replace the formal RFI process. Less formality and more flexibility can be good for a project, but the design professional needs to ensure that this process is adequately managed and that there are accountability controls in place.

Practice take aways include:

- Create a list or matrix setting forth whether the designer or subcontractor (and which subcontractor) has primary or secondary responsibility for aspects including detail, constructability, and schedule.
- Identify and limit design responsibility for equipment and material selection, sequences, product substitutions that were chosen or influenced by the contractor or its subcontractors.
- Solicit from subcontractors (as experts in their field) input on material cost and availability, and input on constructability. For example, one product may be inherently more difficult to apply or install, and therefore be more susceptible to premature degradation.
- Record and circulate meeting minutes. Have all team participants sign into meetings, and commit in writing that they have participated in this process, understand the consequences of doing so, and have had a full and complete opportunity to vet the design.

The design professional should also take care that it has not taken on more liability than intended. One

issue in particular to be wary of are so-called "flow-down" provisions, which incorporate by reference the Owner/Design-Build Agreement into the teaming agreement or Design-Builder/Architect contract. What this means is that whatever the contractor has committed or promised the owner, the architect is now promising the contractor. This may work fine for subcontractors, but can have unintended consequences for the design professional. For example, the AIA A141-2014, Standard Form of Agreement Between Owner and Design-Builder contains a clause that likely creates a fiduciary relationship between the owner and design-builder:

> § A.5.6 Relationship of the Parties
>
> The Design-Builder accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to exercise the Design-Builder's skill and judgment in furthering the interests of the Owner; to furnish efficient construction administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests.

A "fiduciary" relationship, or words like "warranty" can affect the design professional's standard of care. While the design-builder may warranty both design and construction, design professionals typically provide no such warranty, and doing so is not usually covered under errors and omissions policies. The DBIA Standard Form of General Conditions Between Owner and Design Builder (Document 535) contains the following within its General Instructions section:

> Design-Builder's obligation is to deliver a design that meets prevailing industry standards. However, DBIA has provided . . . an optional provision whereby if Owner can identify specific performance standards that can be objectively measured, Design-Builder is obligated to design the project to satisfy these standards . . . The Design-Builder should recognize that this is a heightened standard of care that has insurance ramifications that should be discussed with the Design-Builders insurance advisor.

The design professional is strongly cautioned against accepting any such "heightened standard of care."

The design professional should also seek out opportunities to minimize or disclaim other risks—even risks that it might normally accept under the design-bid-build method. For example, a limitation of liability provision may be deemed an acceptable risk for the contractor because of the natural disbursement of design responsibility among the parties through the collaborative process. The design professional should also request that the contractor include a contingency budget that is tied to a specific percentage of the overall project budget specifically to cover any design errors.

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Practice take-aways include:

- Be cognizant of flow down provisions, and in particular be wary of those that might constitute warranties of design or otherwise heighten the standard of care.
- Insert language into the contract provisions that protect the designers' key employees from being hired away by the design-builder.
- Limitation of liability. Because the duty of loyalty is to the contractor, not the owner, courts may

be more likely to enforce a reasonably drafted limitation of liability provision which limits the design professional's overall risk for negligence to the fee or a small percentage of the contract price.

- Establish a contingency fund that would be depleted prior to any profit/loss allocation.

Design Phase Services

In the design-bid-build context, the designer's construction phase duties can head off claims if performed diligently, such as making regular site visits, stingily reviewing pay applications, timely responding to RFI's and meticulously recordings observations in detailed field reports. On the other hand, construction phase responsibility also opens the architect up to liability, including claims that the architect knew or should have known about construction defects or plan deviations.

Construction phase services are completely different for the design professional on a design build project. The design professional still maintains a stake in protecting the integrity of the design, however, is no longer charged with the obligation to protect the owner from the contractor cutting corners, overpricing change orders, and front loading pay applications. The role and duty of the design professional during construction should be specifically addressed including what duty, if any, is owed to the owner. The design professional should ensure that by participating in the construction phase, it is not taking on any additional responsibility for construction (as opposed to design). Specifically beware of words such as "inspecting," "managing," "overseeing" or "supervising" and eliminate them from the agreement.

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Practice take-aways include:

- Do not agree that construction phase services will include any responsibility to the contractor or owner for construction of the project in accordance with the design.
- Strike from a contract words that suggest the architect has responsibility for site safety, or otherwise has responsibility for construction, including words such as: "inspecting," "managing," "overseeing" or "supervising."

Getting Paid: Lien Rights

As a design professional hired directly by the design-builder, the design professional is now a first-tier subcontractor. This change in status affects lien rights on a project. For example, there may be additional notice requirements that must be satisfied in order to preserve and perfect your lien rights.

Typically first tier subcontractor's rights to lien the real property are limited by how much the owner owes the general contractor at the time the owner's receives notice of the lien claim. A first-tier subcontractor may also have lien rights based upon a lien on the funds that flow from the owner to general contractor to the owner. The design professional should seek guidance from their attorney as to how to attach a claim of lien on funds if payments fall behind schedule. Failure to do so at an early stage can cause the claimant to miss notice deadlines or to miss out on the opportunity to lien funds that are still being held by the owner.

Rights under a Payment Bond

On state and federal public projects, where liens are invalidated by statute, there should be a payment

bond in place that can be taken advantage of by the design professional which contracts with the general contractor. See The Miller Act, codified at 40 U.S.C. §§ 3131-3134. The Miller Act and its state equivalents are intended to provide subcontractors with a legal remedy for obtaining payment for labor and materials furnished when they are unable to file a lien due to a project's status as publically funded. Design Professionals are permitted to make a claim against a payment bond, and depending on whether they are a first- or second-tier subcontractor, certain limitations periods and notice requirements will apply. Many privately funded projects may also be secured by a payment bond, and in such cases notice and claimant requirements will be obtained within the four corners of the bond document.

All claimants against a payment bond must wait at least 90 days before commencing a civil action against Miller Act payment bond. A first-tier subcontractor generally has no special notice requirements in order to maintain an action against the Miller Act payment bond because the general contractor is assumed to have notice of the existence of its first-tier subcontractors and the amounts owed to each. However, a second-tier subcontractor must provide notice of its claim to the general contractor within 90-days of the last furnishing of professional services. Subcontractors more remote than a second-tier subcontractor are not protected under the Miller Act and, thus, cannot recover against a Miller Act bond. A civil action to enforce the claim against a Miller Act payment bond must be filed no later than one year after the last date of furnishing of professional services.

Pay if and/or when paid provisions

Many general contractors include a contract provision stating that the subcontractor will be paid if and/or when the general contractor receives payment from the owner. Some states have statutes, generally known as Prompt Payment Act, that render such provisions enforceable, or limit how long a contractor can delay payment. Prompt Payment Acts may also contain a provision that allows the design professional subcontractor to collect a higher rate of interest on payments that are not made in a timely fashion.

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