

Design-Build Insurance Considerations

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CONSULT YOUR ATTORNEY

The information herein should not be regarded as a substitute for legal advice. Readers are strongly advised to consult an attorney for advice regarding any matter related to design-build service delivery.

SUMMARY

The design-build delivery method may require an increase in liability insurance from the design-bid-build method. It is important that your insurance coverage adequately covers all risks undertaken. Key elements of liability coverage may include: implied warranties, exposure to risk, and express guarantees and warranties.

EVALUATE YOUR INSURANCE COVERAGE

Many professional liability insurance policies issued to architects contain a provision that covers claims arising from design-build projects when the architect retains an unrelated contractor. Some policies can be modified to cover design-build contracts in which both design and construction is performed either directly or through a related company.

Coverage is generally not extended, however, for claims arising out of faulty construction materials or workmanship unless such defects are due to an error in the field services or inspections of the architect. Professional liability policies also typically stipulate that coverage is excluded for claims arising out of deficiencies in materials, equipment, or products supplied or manufactured by or on behalf of the architect, unless the procurement is performed by the architect as an agent of the client.

Architects contemplating a design-build contract should consult their insurance brokers to determine if their coverage is appropriate for design-build.

POTENTIAL ADDITIONAL LIABILITY

Design-build contracts have the potential to increase an architect's liability. It is important to note whether the contract states the architect is liable for both construction and design deficiencies. Other members of the design-build team may also be exposed to liability.

Another point of potential increase in liability for the architect is in the contractor's preparation of a design-build bid. Because the bid is based on information supplied by the architect the contractor relies on the architect's preliminary drawings to determine a guaranteed maximum price.

EXPOSURE TO ENVIRONMENTAL RISKS

Any design-build agreement should address the liability related to the presence of pollutants on the project site, whether they are known in advance or are unforeseeable. Under current law, any contractor, including any design-builder, assumes a significant risk of liability for environmental pollutants by virtue of the design-builder's control over the site for a specified period of time. Whenever possible, the design-build agreement should include language to transfer this risk back to the property owner.

Contractor's pollution liability coverage is essential for any design-build entity, and this coverage often is available to architects.

IMPLIED WARRANTIES OF FITNESS

The design-build contract should separate responsibility for design from responsibility for construction workmanship and materials. Otherwise, architects may be deemed to have provided an implied warranty of fitness for the entire project, including the design. The "standard of care defense" might not be available in this situation, nor would the added liability of the implied warranty be insurable under the professional liability insurance policy.

EXPRESS GUARANTEES AND WARRANTIES

A design-build contract may create an implied warranty by the architect. Clients may seek additional assurance and demand that an express performance guarantee be included in the agreement.

Express warranties pertaining to workmanship and materials are customary in the construction industry and probably cannot be avoided. Such warranties should not, however, be extended to apply to

professional services. Architects should bear in mind that any claim arising out of an express warranty or guarantee pertaining to their design services would be excluded under the terms of a typical professional liability insurance policy.

Architects may warrant that they are qualified to carry out the work or that the design will meet a performance target. But they should exercise care not to guarantee that a project will produce a certain output or generate a specified income as they do not control the manner in which the project is constructed or operated and cannot be responsible for performance deficiencies that may be due to the acts of others.

RESOURCES

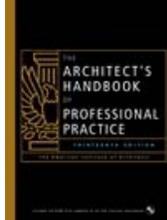
More Best Practices

The following AIA Best Practices provide additional information related to this topic

- 07.01.02 Marketing Design-Build Services
- 18.10.02 How Roles Change in Design-Build
- 18.10.04 Considerations for Undertaking Residential Design-Build

For More Information on This Topic

See also “Design-Build” by Ron Gupta, AIA, et al, *The Architect’s Handbook of Professional Practice*, 13th edition, Chapter 18, page 612.



See also the 14th edition of the *Handbook*, which can be ordered from the AIA Bookstore by calling 800-242-3837 (option 4) or by email at bookstore@aia.org.



See *The Architect’s Guide to Design-Build Services*, G. William Quatman II, FAIA, Esq., and Ranjit Dhar, FRAIC, editors. Developed by the AIA Design-Build PIA, the *Guide* offers the real-world expertise of 30 industry leaders from the United States, Canada, and Mexico.



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Key Terms

- Practice
- Insurance management
- Liability insurance
- Professional liability insurance



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