



AIA Best Practices: Roles for the architect in design-build

Contributed by Victor

Summary

This best practice discusses the role of the architect in design build with concern to liability and risk. It examines contractual issues for the most common design-build delivery methods.

Consult your attorney

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

Architect-led design-build

The architect who assumes the prime contractual relationship with the client for a design-build project has primary responsibility for both design and construction. The architect may subcontract the “build” or construction part of the contract to a construction contractor, but much of the risk related to the project remains with the architect.

It is important for the architect to fully understand and be prepared to assume the business risks of being a design-builder. Architects are quick to recognize the relative disparity in financial remuneration—or reward—between architects and contractors on building construction projects and sometimes enter the design-build arena to reap the financial reward of being a builder. They may be less quick to recognize the added risk that accompanies the potential reward.

Most business risks are not insurable. These may include, among other things, guarantees—and the attendant penalty clauses—related to the contract sum and contract time; statutory fines and penalties; subcontractor defaults and payment problems; or liquidated damages.

Other added risks of design-build include the responsibility for compliance with consumer product, pollution, and safety laws. While insurance may be available for some of these risks, they are not covered by conventional professional liability insurance.

Contractor-led design-build

When the construction contractor has the prime contractual relationship with the client, the contractor has primary responsibility for both design and construction. The contractor may retain an architect to provide traditional design and certain construction administration-phase services.

For the architect, the relationship with the contractor in this scenario is no different than with any other client on traditional design-bid-build projects. However, both the architect and the contractor must be mindful that the contractor—not the building owner—is the architect’s client. This can be a difficult shift for both parties, particularly if they are unaccustomed to this contractual arrangement. Effective communication and a clear mutual understanding of contractual roles and responsibilities are essential.

It is important for contractors to be aware of the economic value of the architect’s services in controlling project costs, during both the design and construction phases of the project. Architects who wrongly assume that the contractor has this awareness might not capitalize on opportunities to inform and educate the contractor about the value of creative design skill in controlling costs.

Though the contractor is the architect’s client, the architect’s professional responsibility to protect the health, safety, and welfare of the public remains unchanged. Conflicts between the architect’s responsibility to satisfy code requirements and the contractor’s budget considerations are almost inevitable. The contract between the architect and the contractor should provide a mechanism for resolving such conflicts, including those that involve subcontractors. The contract should also clearly define the architect’s authority, so that the architect’s ability to perform professional duties during design and construction is not compromised.

While the professional liability of architects in contractor-led design-build is the same as with any other client, in some cases the architect may be held liable for the contractual or legal obligations of the contractor, including, among other things, the warranty, guarantee, and indemnification obligations of the builder or compliance with consumer product, pollution, and safety laws. Architects are advised to consult legal counsel about these possible risks. To the extent possible and permitted by law, the contract between the architect and the contractor should include language to indemnify and hold harmless the architect for these risks.

Architect and contractor in joint venture design-build

A joint venture design-build business arrangement exposes the architect to the same level of financial, business, and liability risk as architect-led design-build. The architect is further exposed to the additional risk of being “jointly and severally” liable with the contractor. That means both the architect and the contractor are each liable to the client for the entire obligation. If one party cannot pay, even though it may be partly or completely responsible for the loss, the other party in the joint venture must make up the full amount. In most situations where a design firm and a contractor form the prime entity, a limited liability company is established to minimize this risk.

Architect as client advocate consultant

Although a design-build contract between the design-build entity and the client (the building owner) might recognize only one consultant, the one engaged by the design-builder, this does not preclude the client from retaining a design consultant as its representative.

Typically, a client retains a design consultant to ensure that it has adequate professional advice to interact appropriately with the design-builder. The stages for which clients retain design consultants to represent their interests include, but are not necessarily limited to:

- preparation of the project parameters and a statement of requirements
- evaluation of the design-build proposals—design solution, schedule, and commercial proposal
- review of the detailed design as it progresses
- coordination of the design with the client's design requirement
- review of supporting documentation regarding certificates for payment and substantial performance

As a client advocate design consultant increases the level of involvement in a project, risk may shift from the design-build entity to the consultant. Consult your attorney and professional liability insurance underwriter to guard against inadvertently assuming such risks.

Contract considerations

Design-build service delivery may be rewarding for architects. Knowledge of and careful attention to the inherent risks may enhance the risk/reward ratio.

Whenever possible, eliminate from design-build contracts the penalty and liquidated damage clauses that impose financial or equivalent penalties for late completion or inadequate performance. As with guarantees, penalty clauses are not insurable.

Unless limited by contract, architects typically assume unlimited liability for errors in design and professional services. Whenever possible, include in design-build agreements a reasonable limitation of liability that applies to both design and construction deficiencies.

Design-build agreements should also include clauses that allow the architect to terminate services in the event of nonpayment, without being in breach of contract.

About the contributor

Portions of this Best Practice are a contribution of Victor O. Schinnerer & Company, program administrators of the AIA Commended Professional Liability Insurance Program.

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This article corresponds to:

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Chapter 09 – Design Project Delivery

Section 04 – Contractor-Led Design-Build