



## A Blueprint For Designer-Led Design-Build

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Design-Build is by far the fastest growing method of project delivery in the country. According to statistics compiled by the Design-Build Institute of America and F.W. Dodge DATALINE2, from April, 1995 to April, 1996 the number of design-build contracts increased 103% over the previous year. Of a total \$212 billion construction market, approximately \$37.2 billion (roughly 18%) was design-build. The strongest growth was in the category defined as "industrial plants, refineries, factories and warehouses," in which the use of design-build increased more than 300% from the previous year. Its popularity is owner-driven, primarily because of shortened project delivery times and the single-point responsibility for project design and construction.

Historically, construction projects were delivered by design-build with the designer in charge. The architect or engineer had overall responsibility for the project, both the design and construction. However, as the legal climate has become more adversarial, A/E's have retreated from responsibility for construction, carving out the ever-narrowing niche that they now occupy.

More recently, architects and engineers have been somewhat hostile to design-build. They have feared that it diminishes the design professional's role and the importance of design to the project. There is some validity to these criticisms because design professionals have traditionally played a subservient role to the contractor in design-build projects. Recently, a comprehensive study by the University of Redding (England) has corroborated a commonly held opinion of design-build in this country: that it receives high marks for shortening project delivery time and providing single-point responsibility, but the quality of design suffers. The researchers suggest that designer-led design-build may be the answer.

## The Designer as Lead Design-Builder

Architects and engineers can benefit by redefining their role when they are the lead designer, particularly in design-build projects. Design professionals have traditionally been subcontractors or joint venture partners of the contractor, presumably because of the contractor's stronger financial status. But it is usually the designer who develops the initial relationship with the owner and who has the owner's trust and confidence when construction begins. It is more logical (and far more profitable), in appropriate projects, for the A/E to be the lead design-builder, subcontracting the actual construction to the contractor.

The first step is for the design professional to form a strategic alliance with a financially sound or bonded general contractor. The contractor will agree to provide extensive pre-construction services (estimating, value engineering, constructability review, etc.) in exchange for the A/E's promise to subcontract 100% of the construction work to the contractor.

The second step for most architects and engineers is to establish a sister company to be the A/E's construction division. This company enters into a Master Subcontract Agreement with the contractor which calls for the contractor to perform all of the construction for a cost (or with a guaranteed maximum price) of 95% (for example) of what the owner pays to the A/E's construction company for the construction.

The design-build agreement with the owner would then be structured differently from what is contemplated in most standard form contracts. The design professional may begin the project with a standard form contract or any other contract with which it is comfortable. If the owner elects to have the A/E guarantee the price and schedule, then all parties sign an exhibit to the design contract, filling in the blanks to establish the construction price and completion date, conditioned on the A/E constructing the project. This document may be signed at any time during the design phase, whenever the owner's program is sufficiently understood to establish the price and duration of the project. This can even occur early in the schematic phase, in which case the design professional designs to the construction price as if it were a budget.

The contractor is closely involved in establishing the construction price and developing subsequent design because it has promised to the architect or engineer that it will construct the project for 95% (for example) of the construction price quoted to the owner. Later, when the construction documents are sufficiently developed so that construction can begin, the owner signs a lump sum construction contract with the A/E's construction company which incorporates the price and schedule terms previously agreed. Then, the design professional subcontracts 100% of the construction work to the contractor pursuant to the Master Subcontract Agreement.

## Advantages When the Design Professional is Prime

Structuring a design-build project in this manner affords four significant advantages to the design professional. First, it enables the A/E to participate in construction profits which dwarf the profits from the design phase. Informal

research among design firms that take the lead in design-build projects indicate that the ratio of construction profits to design profits exceeds 4:1. There is a potential for even greater profits from construction savings when the prime construction contract is for a lump sum and the 100% subcontract is cost-plus with a guaranteed maximum price.

The second major advantage is in marketing. The architect or engineer will be able to offer owners a design-build option which the owner may elect or not at any time during the design phase. The owner does not need to commit to design-build delivery until well into the design phase. Design professionals employing this approach have found that the ability to perform both the design and construction of the project, and to guarantee the cost and schedule at an early stage, separates them from their competitors and results in many more commissions even for projects that are ultimately delivered in a more traditional manner.

The third advantage is control of design. The design professional who is prime can control the quality of design and can ensure that the construction properly implements the design.

The fourth advantage is minimized problems during the construction phase. The contractor would not be entitled to change orders for many kinds of errors or omissions in the construction documents because it participated in creating them. The designer-contractor relationship is non-adversarial, with the contractor assisting the A/E in correcting unanticipated design problems, and the A/E assisting the contractor by flexible interpretation of the design, allowance of substitutions, etc. Construction worker injury claims would no longer be defended under the A/E's professional liability policy, with its large deductibles, because the architect's or engineer's liability is as a contractor, covered under its own or the contractor's general liability policy.

## Minimal Risks and Obstacles

The major risk in designer-led design-build is liability to the owner for construction defects and related problems. But if the A/E is liable to the owner, the contractor is similarly liable to the A/E. This is the theory of general contracting. As long as the contractor is financially sound or bonded, the designer's ultimate financial risk is minimal.

It is commonly thought that design professionals' lack of financial strength prevents them from leading design-build teams. However, with the assistance of the contractor, this problem can be circumvented, giving the owner access to the contractor's financial strength. For example, the owner can be named as a third party beneficiary to the

subcontract with the contractor, and named as an additional obligee on the contractor's performance bond. Alternatively, the design professional can conditionally assign the subcontract to the owner, who would succeed to the A/E's rights against the contractor if the A/E defaults on the prime construction contract.

This design-build structure will not always be optimal or workable. It would have to be modified for public projects in many jurisdictions because of competitive bidding laws. The licensing laws in some states may create an obstacle. Also, this project delivery method is not designed for an owner whose primary objective is to obtain the lowest possible price. But this designer-led design-build structure is well suited to most private sector projects, particularly those that are driven by schedule or budget.

## About the Author

Mark C. Friedlander is a partner in the Construction Law Group at the law firm of Schiff Hardin LLP. He obtained his B.A. from the University of Michigan in 1978 and his J.D. from Harvard Law School in 1981. He is currently an adjunct professor at the University of Illinois at Chicago School of Architecture and a lecturer at Northwestern University's Engineering School, and had lectured at the Illinois Institute of Technology School of Civil Engineering from 1987-89, at the Engineering School of the University of Wisconsin in 1988 and 1990, and the Architecture School of the Georgia Institute of Technology in 1997-98. Mr. Friedlander concentrates his practice in construction law and litigation with particular emphasis on design-build methods of project delivery.

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