



## Designer-Led Design-Build Frequently Asked Questions

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## 1. Architect's entitlement to construction "fee"

**Q.** Why should the architect's construction company be entitled to share in the construction revenues when it delegates all of the construction risks to a general contractor?

**A.** The "fee" that the architect's construction company earns has nothing to do with the construction risks. It is more like a "finder's fee" that a general contractor may award to an agent or broker who secured it a project. By guaranteeing the price and agreeing to build a project, the architect's construction company obtains the right to award the construction contract(s), which is a valuable asset that architects ordinarily cede to the owner. Designer-led design-build is profitable for architects because the designer obtains the right to build the project, and therefore to benefit from this right, in exchange for guaranteeing the price and completion date.

## 2. Source of architect's construction "fee"

**Q.** If the architect earns a construction fee, doesn't that just add to the owner's cost of the project?

**A.** No, the fee comes from the efficiency of the designer-led design-build structure and does not simply increase the cost to the owner of the project. The savings come from several sources:

- No marketing/sales expenses for contractor
- No risk of uncompensated estimating
- Minimized contingency for pricing/estimating
- Minimized contingency due to non-adversarial administration

The marketplace has proved that contractors are able to pay a "finder's fee" in the vicinity of 5% without impact to the owner under this designer-led design-build structure.

## 3. Owner's security for the construction obligations

**Q.** Since the architect's construction company is a "paper shell," what source of financial security does the owner have if the construction company defaults on its obligations?

**A.** The general contractor is the source of the owner's financial security, even though it does not contract directly with the owner. Various types of legal documents can give

the owner direct access to the general contractor's assets, such as:

- a conditional assignment to the owner of the subcontract between the architect's construction company and the general contractor
- an agreement that the owner would be a third party beneficiary to the subcontract
- or the general contractor's performance bond naming the owner as an additional obligee.

The fallacy in current design-build practice is believing that since the general contractor is the source of financial security for the construction obligations, it must contract directly with the owner; there are numerous legal devices by which the owner can have access to the general contractor's assets or bond without a direct contract between them.

## 4. Architect's risks

**Q.** What additional risks does an architect have when practicing designer-led design-build?

**A.** There are remarkably few risks. The architect continues to bear the risk of improper design — although less risk than in traditional design-bid-build construction since the general contractor who is the 100% subcontractor is responsible for pointing out obvious design errors and omissions during the design phase and will cooperate with the architect during the construction phase to minimize the consequences of any other design problems. As for construction risks, although the architect's construction company bears liability to the owner, all of these risks — without exception — are delegated to the general contractor who must indemnify the architect from claims pertaining to these risks. The only real risk to the architect is of the general contractor's insolvency. Even the risk of construction accidents is reduced or eliminated since such claims will be insured by the general contractor rather than by the architect and its professional liability carrier.

## 5. Incentives for the general contractor

**Q.** Why would any general contractor agree to be an architect's subcontractor in this designer-led design-build arrangement and have to pay the architect a fee in exchange for being awarded the construction contract?

**A.** Because the general contractor probably would not have been awarded the project otherwise! Contractors are always trying to establish relationships with design firms who can refer projects to them. Designer-led design-build

establishes this kind of relationship formally, by contract. From the contractor's point of view, the project is a normal, negotiated deal in which it provides the typical pre-construction services during the design phase, followed by (sometimes fast-tracked) construction of the project — except that its client is the architect, not the owner. The marketplace has shown that numerous contractors, from ENR top ten in size down to single-family residential contractors, are willing and eager to pay a fee of approximately 5% to the architect in exchange for being handed the project on a silver platter, without any marketing or sales expenses and with the knowledge that it would be cooperatively administered.

## 6. Owner acceptance of designer-led design-build

**Q.** Why would any owner be interested in hiring an architect's construction company, with its 100% subcontractor, to build a project, rather than just hiring the subcontractor directly?

**A.** For most owners, the two scariest parts of a construction project are waiting to see whether the bids will come in within budget and having to hire a possibly unknown contractor whose interests may be adverse to those of the owner. Many owners would jump at the opportunity to hire the architect not only to design but to build the project. The owner usually has trust and confidence in the designer, whom he perceives as attempting to carry out his program and further his interests. By hiring the architect both to design and build the structure, the owner benefits from the architect's "single point responsibility," and avoids the distasteful problem of the architect and contractor each blaming the other for problems that may develop in the project.

## 7. Reactions of insurers

**Q.** Will professional liability insurers have any problems with designer-led design-build? Will it affect insurance coverage?

**A.** Not all insurers understand designer-led design-build, but when they do, they have no problems with coverage. The key is the establishment of the architect's construction company as a separate corporation which signs a separate construction contract. All of the professional services are performed by the design firm, and all of the general (non-professional) services are performed by the construction company. This simplifies, rather than complicates, liability insurance coverage. At least one major professional liability insurer accommodates its A/E insureds who employ this

structure of designer-led design-build by naming the A/E's construction company as an additional insured on the professional liability policy.

## 8. Personnel and expertise of architect's construction company

**Q.** What kinds of employees does the architect's construction company need to have, and what expertise must they possess?

**A.** An architect does not need any special expertise, beyond what he already possesses, to practice designer-led design-build, and its construction company needn't have any of its own employees. The construction company "borrows" employees from the design firm, who simply add a suffix to the project numbers on their timesheets to indicate that they are billing their time through the construction company. They do not need to have any specialized construction knowledge, such as labor union practices or critical path scheduling; the general contractor who is the 100% subcontractor provides that expertise.

## 9. Source of the guaranties

**Q.** How can an architect guarantee the construction price or completion date? Guaranties aren't insurable.

**A.** It is correct that the guaranties are not covered by an architect's professional liability insurance. That is why they are not made by the design firm. The architect's guaranties of price and completion date are made by its construction company. Contractors routinely give these types of guarantees. They are not insurable, but the architect's construction company delegates these risks to the general contractor who was the original source of this information via its pre-construction services.

## 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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