



Designer-Led Design-Build Advantages, Risks and Limitations

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This memorandum briefly summarizes the major advantages, risks and limitations of the Designer-Led Design-Build Program (the “Program”) by which the design professional (hereinafter “A/E”) offers to have its affiliated construction company guarantee the construction price and schedule during the design phase.

Advantages

1. Marketing and Sales

The A/E can distinguish itself from other design professionals who interview or submit proposals for a project by offering to guarantee the owner’s budget and completion date relatively early in the design process.

- Even if a typical design professional is willing to venture a prediction about construction cost early in or at the outset of a project, he will virtually never offer to guarantee the construction price and pay for any overage out of his own pocket.
- Even when an A/E agrees to design to a fixed limit of construction cost, he does not guarantee the cost; he merely agrees to redesign and value engineer if the bids come in too high.
- Particularly in private sector commercial or industrial construction, it is usually far more valuable to the owner to ensure that the project finishes within budget and on time than it is to take any risk to obtain the absolutely lowest price or quickest finish. Thus, the A/E’s ability to guarantee the price and schedule at an early stage is extremely attractive to owners.

2. Potential for significantly increased profit

The Program allows the A/E to take advantage of several different areas of potential profit which ordinarily are not available when the project is being constructed by a separate contractor not affiliated with the A/E.

- Most importantly, the A/E-constructor earns much of the profit that an independent construction contractor would otherwise have pocketed. Usually, the construction profit from a successful project dwarfs the architectural profit.
- The plans and specifications do not need to be completed to the same degree of detail because the A/E’s affiliated company will be responsible for the construction. There will be no adversity or hostility between the A/E and the constructor, and they will have the same interests with regard to interpreting the plans and specifications.

- The A/E will be providing few or no services during the construction phase without a corresponding reduction in the A/E’s fee.
- The construction process can often be shortened by fast-tracking. At least in theory, as soon as the design is sufficiently complete so that the initial stages of construction are known, the construction can begin. Not only does this fast-tracking permit the project to be completed sooner, which inherently saves money, but it may also position the A/E-constructor to earn bonuses for early completion.
- There is additional construction profit potential from the substitution process because the A/E will not be hostile to cheaper “equal” substitutions proposed by the constructor.
- There would likely be additional construction profit potential because of the unusually smooth administration of the project, since the A/E will refrain from taking any administrative actions that would require the constructor to spend additional money or overhead time.

3. Increased Control

As the constructor, the A/E has control of the construction phase and does not have to be concerned with a contractor modifying or eliminating important features of the design.

4. Minimized Liability

At least in some respects, the A/E has less liability under the Program than when the construction is performed by an independent contractor.

- The A/E will not have any responsibilities during the construction phase, which minimizes liability for construction accidents and injuries. To the extent that any such claim does arise out of the construction phase, it would be made against the constructor, who will be defended under its general liability policy, which does not have a deductible.
- Many claims of design defects are initiated by the contractor against the owner, who passes them through to the designer. Since the Constructor and A/E are affiliated, the constructor would refrain from making any claims regarding the design that are not in the A/E’s best interest.

Risks and Limitations

1. The risks associated with the guarantee are manageable.

Obviously, there are additional risks whenever a designer guarantees a construction cost or completion date. The risks are not unusual ones for a constructor to bear, but the Program allows the A/E-constructor to minimize these risks to a greater extent than if they were separate, unaffiliated entities.

- If the A/E-Constructor wants to “lay off” the construction risks on another entity, it can subcontract 100% of the construction work to a strategically allied general contractor and can even require a performance bond if desired. The Program recommends and provides model contracts for this approach.
- The A/E should involve its strategically allied general contractor (or trade contractors) during the design phase to do cost and schedule estimating and can sign them to fixed price or GMP contracts at a fairly early stage in the project.
- The Guarantee form allows the A/E to void the guarantees if the owner tries to insist on including “budget busting” elements in the design.
- The constructor has a far greater ability to control the price and time risks compared to an independent contractor because the A/E is affiliated with the constructor, rather than independent. Administration of the construction would be less strict than usual, and the A/E would not oppose the constructor’s cost-saving efforts through the substitution process, etc.
- The guarantee is not actually made by the A/E, it is made by its affiliated construction company, which should be a separate corporation. In the event of disastrous liability, the A/E would not bear the loss.
- The philosophy of construction contracting is that these risks are worthwhile in exchange for the potential construction profit if there is sufficient knowledge and control of what the risks will be.

2. The A/E will have to change the way it does business.

The Program requires the A/E either to have or to be able to acquire the skills of a design-builder and to recognize the parties’ different incentives.

- The A/E should develop a strategic alliance with a trusted general contractor who is either financially sound or bondable. This general contractor should be closely involved in the design phase so that it can guarantee to the A/E the same cost and completion date that the A/E is guaranteeing to the owner.
- Alternatively, the A/E must have personnel with strong estimating and construction project administration skills, preferably with experience working for contractors. These people should ideally be employees of or hired by the A/E’s construction company.
- The A/E must understand that its interests are aligned with those of the constructor much more so than those of the owner. It would no longer be the goal of the A/E, whether in design or the construction phase, to endeavor to guard the owner against problems caused by a contractor.
- The A/E would probably modify somewhat the way in which it prepares Contract Documents, particularly by relying on performance specifications to a greater degree than it does now in order to facilitate substitutions for the benefit of the constructor.

3. The Program may need to be modified for public work.

Some states and municipalities have restrictive competitive bidding laws for public construction projects. Although many states’ laws are in the process of changing to reflect the increasing popularity of design-build methods of project delivery, in some jurisdictions government officials interpret the law to prevent them from contracting for typical design-build services. One advantage of the Program is that the Price/Schedule Guarantee is an extremely flexible device which maximizes the likelihood that an A/E-led design-build project will be permissible. There is an exception to most competitive bidding statutes for professional services, such as those provided by design professionals, and many jurisdictions define construction management services as professional. Minor modifications to the Program enable the A/E to effectuate the Price/Schedule Guarantee as a construction manager, entering into multiple prime trade contracts as the owner’s agent.

About the Author

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