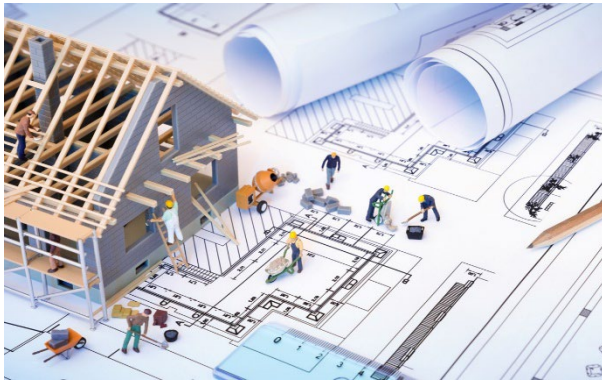




## Design-Build Poses a Greater Risk to Contractors Than Conventional Delivery

By David Pacifici | Monday, April 25, 2022



Design-build delivery carries much greater risk to a contractor than conventional project delivery methods. Chief among these risks is the potential for increased actual or final costs to a general contractor or design-build entity compared to the estimates presented in their bid. The result is that many contractors using design-build are experiencing lower profitability or even taking losses.

In addition, contractors are making claims against their prime engineering subconsultants and the mitigation coverage in their contractor's professional liability (CPrL) insurance at a much higher frequency and severity than the subconsultants and insurers had anticipated.

### CONVENTIONAL PROJECT DELIVERY AND CONSTRUCTIBLE DESIGN

In conventional project delivery, the project owner bears the risk of paying for increased costs arising from design changes and delays. This is due to the Spearin doctrine, which holds that a contractor is owed a constructible design from the owner.

All construction projects include a provision for "changes to the work," which specify that increases in the project scope, or additional scopes, are outside of the agreed price. With a conventional project, the contractor is allowed to make an additional charge for such changes, usually on a time and expense basis. These are accomplished through a change order.

To be made whole, the project owner must make a claim against the design firm (or the general contractor or construction manager) alleging the firm was negligent in providing their professional services and the firm didn't meet the standard of care in doing so and should therefore be held legally liable to indemnify the project owner for the increased costs it had to pay in the form (predominantly) of change orders.

## **DESIGN-BUILD SHIFTS DESIGN RISKS TO THE CONTRACTOR**

In design-build delivery, the project owner doesn't hire the architects or engineers but engages the contractor to design and construct the project. In most cases, the contractor will sub out the design work to an architect or engineer. Since the prime contract is between the contractor and the owner, there are key differences in the changes-to-the-work provision.

Because the project owner no longer provides the design, the owner no longer has any obligation to provide the contractor with a constructible design. The risks arising from design errors, which had previously been borne by the owner, are now borne by the contractor. The changes-to-the-work provision still exists in a design-build contract, but it's much more limited than in a conventional contract.

To address any unforeseen design errors, the contractor includes amounts in the price above what they initially estimate the project to cost. These contingencies are an inseparable part of the contract price.

Obviously, contractors try to price their estimate so they will make a profit on the job. From time to time, though, there will be surprises. In addition, competitive pressures to offer a lower price may result in a contractor not including adequate contingencies in their estimate.

"Fast-track" scheduling also contributes to uncertainty in determining the appropriate level of contingencies in a design-build contract. With fast track, contractors must provide pricing and terms based only on schematic designs, or at most 30% design documents, which have been prepared by an engineer hired by the project owner.

The owner's engineer only performs this initial design and isn't responsible for the ultimate design that the contractor uses to deliver the project. It's the contractor and its architect or engineer who develops and provides the 100% design documents.

Since the contractor is required to provide bottom-line pricing in the early stages of design, fast track poses major risks with respect to the frequency and severity of design issues.

## PROGRESSIVE DESIGN-BUILD AS AN ALTERNATIVE

The attractiveness of design-build to a certain segment of owners—with its capacity to reduce project delivery times and transfer financial risk from the owner to the contractor—is abundantly clear. It's also clear how the nature of this delivery method, combined with fast-track scheduling and mostly fixed-cost pricing, makes the predictive skills of the contractor's estimating team more important than ever.

One possible solution is the [progressive design-build delivery method](#), which can help contractors set realistic schedules and costs, and it more equitably allocates risk to all parties. It does this by creating a collaborative process, engaging the owner and members of the design-build team early on to develop the project's overall design, and clarify the programming and priorities. Once a design, schedule and costs are developed, the contractor can present the owner with a commercial proposal.

Progressive design-build leads to more certainty in pricing and timing and lowers many of the risks associated with design-build delivery. It reduces the potential for expensive cost overruns and delays, and it can result in fewer insurance claims.

### About the Author



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