

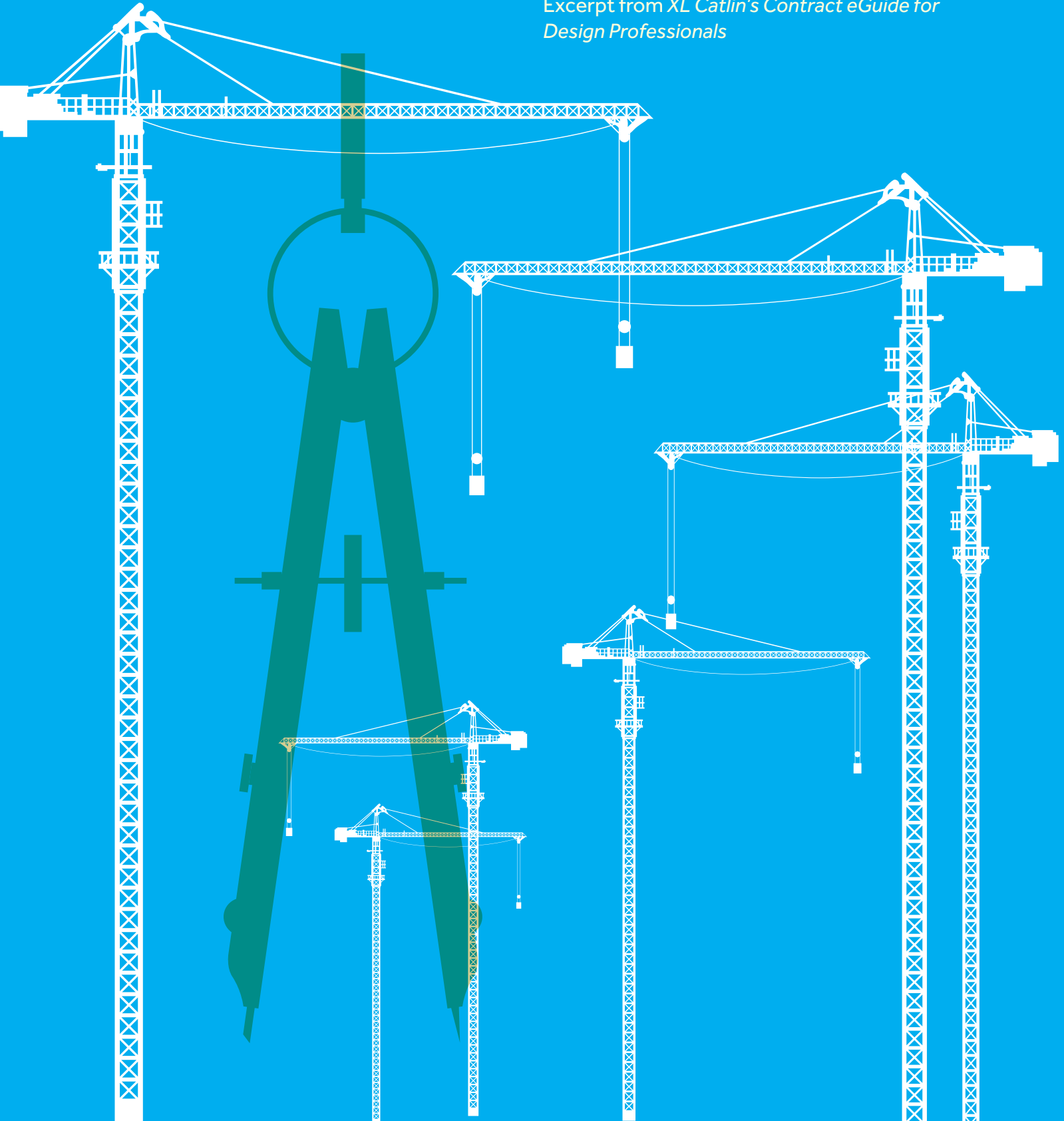
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Design-Build

*Excerpt from XL Catlin's Contract eGuide for
Design Professionals*



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Design Build

Design-build is a project delivery method that provides the owner with a single point of responsibility for completion of the project. Instead of the traditional method of design-bid-build—whereby the owner hires the designer to prepare construction documents and separately hires the general contractor to construct the project—design-build allows the owner to contract with a single entity to both design and build the project, typically for a guaranteed cost of construction.

The design-build entity responsible for the project can assume various forms. It may be a joint venture or partnership, established on a project-specific basis, between a contractor and designer. The entity may be a single company that offers full design and construction services on a regular basis. Or, as is often the case, a contractor has the lead role as the design-builder and hires the lead architect or engineer as a subconsultant. Less frequently, a design professional heads up the design-build entity and hires the contractor as a subconsultant.

Although each of these variations presents differing roles, responsibilities and liability exposures for the design professional, design-build means one thing to the owner: a sole point of accountability for the successful delivery of the project, from design through construction.

A study from the Construction Industry Institute indicates design-build is approximately 33 percent faster and 6 percent less expensive than traditional design-bid-build project delivery. Such findings are hard for owners to ignore and have set the stage for continued growth of design-build—as well as heightened expectations for speed and savings.

The Problem

Under the traditional design-bid-build project delivery method, a licensed design professional is held to a professional standard of care in the performance of services, including the preparation of drawings and specifications. Claims brought against design firms are most often based on alleged professional negligence. The general contractor, on the other hand, is usually contractually bound to construct the project on time, on budget, and in conformance with drawings and specifications. Failure to do so can result in claims against the contractor based on a variety of legal theories: breach of contract, negligence, breach of warranty and, in certain circumstances, strict liability.

The design-builder, by contrast, has full responsibility for managing, directing and coordinating both the design and the construction services. The design-builder's exposure to claims, therefore, encompasses that of the designer and the contractor combined.

Let's consider the more common design-build scenarios and the challenges presented by each.

If, as a designer, you choose to act as the lead in a design-build entity, you assume responsibility for all aspects of project delivery, including costs, construction means and methods, and jobsite safety. As such, you are accountable for the schedule, sequences and procedures, procurement of materials, and managing the subcontractors. For many design firms, this builder role is new and unfamiliar. With these added responsibilities, you also take on the insurance requirements of general contractors. You will need to determine the availability and cost of appropriate commercial general liability coverage for contractor operations. You may be required to provide surety and bonding capabilities, which can be difficult for design firms to arrange. What's more, there may not be insurance available to cover faulty workmanship (i.e., to fix construction errors and omissions) or allegations of breach of contract, such as the failure to complete the work on time. There might also be competing exclusions in your policies that create contradictions and impact coverage. For example, most general liability policies exclude design professional services, and most professional liability policies exclude construction work.

If you and a contractor jointly form a design-build entity, you may still be assuming most or all of the project risk just described. It is important to work with a general contractor who has an earnest desire to function as a partner and has the financial resources to fulfill construction-related obligations, such as funding surety bonds. It is also critical

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Under the most common design-build scenario, the owner contracts directly with the design-build contractor, and the designer works as a subconsultant. In this arrangement, your risk is similar to the risks experienced in traditional projects.[1] But there are difficulties you wouldn't face in a traditional relationship. For instance, if you contract with a general contractor or a design-build organization, your access to and communication with the owner may be limited. Therefore, you will have to rely on the design-builder to, in a complete and timely manner, interpret the owner's program requirements, explain design choices and obtain and document owner decisions. And remember, the contractor is your client. That means you may be liable directly to the contractor for your professional negligence or breach of contract—quite different than in the traditional project delivery where many (but not all) states hold contractors cannot assert economic loss claims against designers unless they have a direct contractual relationship. At the same time, you cannot completely shed your responsibility to the owner. In most jurisdictions, license laws require you to protect the interests of public health, safety and welfare.

Licensing laws are another design-build consideration. In a few states it is illegal for architects and engineers to offer contracting services without a contractor's license. Conversely, in some states it is illegal for contractors to offer design services without an architect's or engineer's license. Also, in some states, owners can seek disgorgement (return) of the design professional's fees if the architect or engineer doesn't have a contractor's license.

Rules and regulations continue to change, so stay current regarding design-build legislative actions.

The Solution

If you are considering participating in a design-build project, you need to do your homework. First, find out if design-build is legal in the state where the project is located and whether there are any licensing restrictions. Be aware that laws vary state to state as to whether design-build is permitted for public works projects. Rules and regulations continue to change, so stay current regarding design-build legislative actions. The Design-Build Institute of America (DBIA) publishes a survey of state procurement and licensing laws with regard to design-build. Finally, always check with your attorney before entering into any design-build contracts to see how any other state and local laws could impact the project.

The basics of sound loss prevention apply to design-build projects. Carefully evaluate the project budget and schedule as well as the client. Owners who use design-build but continue to operate with a design-bid-build mindset could be trouble. For example, low bid (as opposed to value-based) selection of the design and construction team can be more problematic with design-build. Find out, too, whether the client has secured adequate financing. (Contractors generally have the right to obtain detailed knowledge of project funding.) It is equally important to look at the other participants on the design-build team. How are they selected? Do they have a history of disputes and litigation? Check references and investigate their design-build project experience and financial condition.

Consider forming a separate entity to isolate your design-build risks and facilitate obtaining necessary insurance, including surety bonds. Many states permit limited-liability partnerships or limited-liability companies, organizational structures that may provide additional financial protection. Consult with your attorney and accountant on the protections, costs, advantages and disadvantages of each approach.

All members of the design-build team should carry appropriate insurance with adequate policy limits. You'll want the right to receive certificates of insurance at appropriate times throughout the project. Given the potential liability on a design-build project, it is critical there are no gaps in your coverage or the coverage of the other team members.

Even if you have professional liability design-build coverage, it will apply only to claims arising from your activities as a design professional. Therefore, appropriate comprehensive general liability insurance for both you and the general contractor is critical.

If you form a joint venture with a contractor, you may need a special coverage endorsement added to your professional liability policy. Also, because surety bonds are very difficult for most designers to obtain, the contractor's bonding capacity is important. Most bonding companies require the construction firm's principals to provide personal indemnities or guarantees against loss on the bond. Still other coverages may be necessary; so be sure to seek the help of a knowledgeable agent or broker who specializes in insuring contractors and design professionals.

Good solid contracts are especially important on design-build projects. The unique aspects of each project require you, the owner and the contractor to carefully think through and define the responsibilities and expectations of each party. The American Institute of Architects (AIA), the Engineers Joint Contract Documents Committee (EJCDC), the Design-Build Institute of America (DBIA), the International Federation of Consulting Engineers (FIDIC) and the ConsensusDocs coalition have all published "families" of standard form agreements for professionals providing design-build services. While these sets of standard documents differ in several aspects—defining the standard of care, addressing different site conditions, specifying the responsibilities of owner's consultants, establishing the beginning of design-builder involvement, describing the treatment of changes in the work, and outlining the procedures for dispute resolution and termination—they can serve as good starting points. As with all standard contract forms, however, they must be tailored by you and your attorney to fit your specific role in the project. By using a single, integrated family of documents for a project, you and the other members of the design-build team can help minimize the risk of confusion or silence on critical issues.

Responsibilities of the contracting parties will likely vary from project to project, depending on the owner's requirements and contractual terms. You should develop and draft a specific and comprehensive scope of services that carefully describes the exact roles and responsibilities of each party to the project and the allocation of risks to each party—including the owner.

Always read your contract carefully. If you are a subconsultant on a design-build project, you'll want to make certain you're not being asked to assume risks—such as for contractual obligations or warranties—inappropriate to a design professional. It's crucial you are only held to the

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prevailing standard of care and not contractually take on responsibilities not rightfully yours.

Also pay close attention to intellectual property issues. Who owns the copyrights to your designs, and what happens if there is an early termination or a sale of the project? Does the contract provide that your design is owned by the project owner and can be sold or transferred without your knowledge and consent?

In all standard owner/design-builder contracts, the design-builder is responsible for supervising the work, the means, methods, techniques, sequences and procedures of construction, and jobsite and worker safety. In your designer/contractor design-build agreements, these responsibilities should be allocated entirely to the contractor, along traditional lines.

If you are leading the design-build team or are part of a design-build entity, you need to be prepared for the likelihood you will be held responsible for jobsite and worker safety. For instance, you can be named on the contractor's comprehensive general liability policy and have the contractor contractually indemnify you from claims involving jobsite or worker safety.

You also may be responsible for complying with OSHA requirements, which is not generally an insurable exposure and may not be a risk that can be indemnified. If you have any concerns in this respect, it is best to discuss them with your insurance agent/broker and legal counsel.

Owners often choose design-build in an attempt to receive a fixed price before all of the project's risks are identified and mitigated. But design-build is not a panacea for the unknown and unforeseeable. You, the owner and the contractor must plan for changes and extra costs—they will occur.

The design-build team should include in the project budget an appropriate contingency, including a clause for the cost to correct minor design defects. Team members need to agree on how design errors and faulty workmanship will be paid for and how schedule slippage will be handled. The

owner/design-builder contract should be explicit about what conditions constitute a change and how claims for adjustments in the contract price will be treated. You will also want to provide for lender changes, acts of God, changes to codes or regulations, and subsurface or concealed conditions.

Finally, have a plan to promptly resolve disputes as they arise—and make sure this dispute resolution plan is incorporated into the contracts between and among all parties. As in all your professional service agreements, provide for mediation as the first step in reaching dispute resolution. Partnering and dispute resolution boards (DRBs) are two other claim-avoidance mechanisms to consider. The dispute resolution clauses should also address how claims by third parties will be handled.

On large or complex design-build projects, consider project-specific insurance. Although project insurance is not as widely available as it once was, you should still check with your insurance advisor to determine if it is an option. It may be possible to include the contractor's vicarious and direct exposure for professional liability under such a policy, a step that would facilitate and expedite dispute resolution among project participants.

[1] This is also true if you act as the owner consultant in an engagement called bridging. In bridging, the client retains a consultant to help develop the client's project criteria (ranging from a detailed program to schematic or design development drawings) the design-build team needs to meet. The bridging consultant remains an agent of the client throughout all phases of the project and is not part of the design-build entity. This relationship is described in AIA's C141-2014, Agreement Between Owner and Consultant.

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