

A&E Briefings

Structuring risk management solutions

Design/build – taking the lead

By 2015, the design/build method of project delivery will account for half of the construction market, according to projections by the Design-Build Institute of America. This will surpass traditional design-bid-build.

Not surprising, owners appreciate the “one point of responsibility” advantage of design/build. When it comes to construction, most owners are not knowledgeable. Construction is not their business. Their business might be educating children, packing airplanes full of people or shipping boxes of goods – NOT building the schools or airports or warehouses. The last thing owners want is to get in the middle of a finger-pointing fight between the architect and the contractor about a technical matter that the owner knows nothing about.

Although the word “design” comes first, contractors typically act in the prime capacity in design/build, with designers as subcontractors. Designers argue that this arrangement makes design and quality take a back seat. That can be true. Typically, selection of the designer is more qualifications-based, whereas contractor selection is usually based on price – low bid at that.

Yet many architecture/engineering firms are unwilling to take the lead. The American

Institute of Architects estimates that less than ten percent of design/build projects are designer-led. Mark C. Friedlander, Esq. of Schiff Hardin LLP in Chicago lists some of the perceived obstacles to designer-led design/build as:

1. Lack of construction experience
2. Lack of financial/bonding capacity
3. Insurance problems
4. Construction risks
5. Licensing obstacles
6. Owner reluctance

He maintains that each of these obstacles can be overcome. “Most design professionals have

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A close-up photograph of architectural drafting tools. A blue-handled compass is positioned vertically on the left. A white ruler with black markings lies horizontally across the top. A blue ballpoint pen with a silver tip is positioned vertically on the right. The tools are resting on a white architectural blueprint with various geometric lines and shapes. In the bottom left corner, a blue plastic stencil with various shapes is partially visible.

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been taught not to assume any of the risks associated with construction and do not know how to structure their practices to take advantage of the significant opportunities and profits involved in running a construction project without undue exposure to risk," writes Friedlander. The key is to structure the design/build team appropriately, whether the design/build is one firm possessing both design and construction services in-house, a joint business venture between designer and contractor, or a designer-led team with one or more contractors in subcontractor roles. By working together in a design/build arrangement, architects/engineers and contractors can help each other minimize risks. The advantages of better communication between the design/build parties while teaming together to anticipate design and constructability problems may minimize liabilities for both designers and builders.

Learning from experience

Experience is the best teacher. Let's look at three design firms that have made the transition into designer-led design/build.

Beck Group of Dallas, Texas is an example of a large firm (575 employees) possessing both design and construction services in-house, as a result of a merger in 1999 between H.C. Beck Contractors and Urban Architecture. The companies wanted to go beyond joint ventures and offer truly integrated services. With this integration came new ways of doing business. The merged company's employees had to develop new internal mechanisms of resolving disputes among themselves, according to Betsy del Monte, AIA, LEED AP, a Principal with Beck. Says del Monte: "We found that the best training was living through an integrated project. Even those who were against the concept at the start would come from a completed integrated job saying they would

lead

not want to go back to the traditional ways.” As a single entity, Beck Group is licensed to perform both architecture and construction. Business, professional liability and project-specific insurance, as well as bonding capacity, is maintained by Beck.

OWP/P Design/Build, Inc. in Chicago is an example of a designer-led team with the contractor in a subcontractor role. President Betsy Downs, AIA, says OWP/P Design/Build has non-project-specific teaming agreements with approximately twenty pre-qualified general contractors. The choice of general contractor is made based on project type and size. Design services are subcontracted with the parent company, OWP/P Architects, Inc. A third subcontract may be executed with a mechanical/electrical/plumbing (MEP) design-builder, if the project scope requires. All parties are brought into the process early in the design phase. Each party provides appropriate insurance coverage, with OWP/P Design/Build carrying an umbrella policy to cover any gaps. Licensing is handled in a similar fashion by each party between OWP/P Architects and the general contractor. Most of the work is in the private sector, which does not require bonding. When bonding has been required, the general contractor has provided a dual obligee bond naming both the owner and OWP/P Design/Build.

You don't have to be big like Beck or OWP/P to engage in design/build – architect/engineering firms of any size can be participating in the design/build market. **Baker & Associates Architects** is an 11-person firm with headquarters in Worthington, Ohio, and two other offices in Cincinnati, Ohio, and Tampa, Florida. Prior to becoming an architect, Sam Baker, AIA, had a background in construction.

The firm also has an experienced construction manager on staff whose job it is to ensure that construction documents are contractor-friendly and constructible. Since the firm has in-house capabilities in scheduling, estimating and pricing, the construction work is contracted to subcontractors, rather than a general contractor. Baker and Associates acts as a construction manager. Liability is divided appropriately among each party. Licensing, insurance and bonding are maintained in a similar fashion to OWP/P Design/Build.

The A/E/C business is very susceptible to the current economic downturn. Design professionals and contractors are starting to scramble for work, whether residential or commercial, public or private. If owners go forward with projects in this recessionary climate, you can bet they will be looking for the maximum financial benefits they can get. In times like these, designer-led design/build can offer bottom-line business opportunities for architects and engineers.



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Results of research by the Construction Industry Institute™ show that the design/build method reduces duplicated costs between designers and builders, has significantly less design and construction cost growth, better quality performance with reduced changes and rework, and shorter overall project schedules when compared to design-bid-build. All these benefits offer a great opportunity for marketing and selling the design/build process. And because so few designers take the lead, offering designer-led design/build services to clients can differentiate an architect/engineering firm from the rest, now and in the future.

Not all design professionals are up to the challenge of leading design/build, nor do all projects lend themselves to the process. But managed well, with good, financially solid team members and the proper legal structure and business practices, architects/engineers can enjoy the rewards of controlling the design/build process.

Special thanks to Mark C. Friedlander, Esq., Co-Chair of the Construction Law Group of Schiff Hardin LLP in Chicago for his invaluable assistance in the preparation of this article.



Risk tip: are you satisfied?

This isn't what you're thinking! Otherwise this would be a risqué tip.

This is about a legal concept called accord and satisfaction. Here is a recent scenario. A condo developer in Miami entered into pre-construction contracts with a number of purchasers. The project was abandoned. The developer returned the purchasers' deposits along with a letter stating that cashing the checks would terminate the parties' rights and obligations under the contract. All the purchasers took the money back, but then sued the developer contending that there was no intent to settle an existing dispute. The purchasers lost. Why? Because they cashed the checks. (*Pamela Cristina Martinez, Maria Salvage et al. v. South Bayshore Tower, LLP, Florida Third District Court of Appeal, March 5, 2008*)

The same thing can happen to you. In response to your final invoice for \$8,000 for design services provided, a client sends a check for \$6,000. On the check, either on the memo line or on the back, you find words such as "full payment" or "in full satisfaction" or "final settlement check" or even "for services in full". Maybe the wording isn't on the check, but in a cover letter or a payment voucher. What can you do?

In the majority of states, if you do not want to accept the payment "as is" then the only thing to do is to return the check. This will preserve your rights to the balance. Merely crossing out the "full" language does not work: cashing the check means you accept the payment as final. In a minority of states, New York for example, you can cash the check as partial payment if you write the words "without prejudice" or "under protest" on the check along with your endorsement.



Another scenario: you process a lot of checks and you don't notice "paid in full" written on the memo line of one check. What happens if you cash it by mistake? You can repay the amount of the check within a certain time, usually 90 days, and then try to argue that the "paid in full" statement wasn't conspicuous enough, the check wasn't sent in good faith, the check was sent to other than a designated person, and you didn't know of an existing dispute and didn't realize that the check was tendered in full satisfaction. But usually, you're stuck.

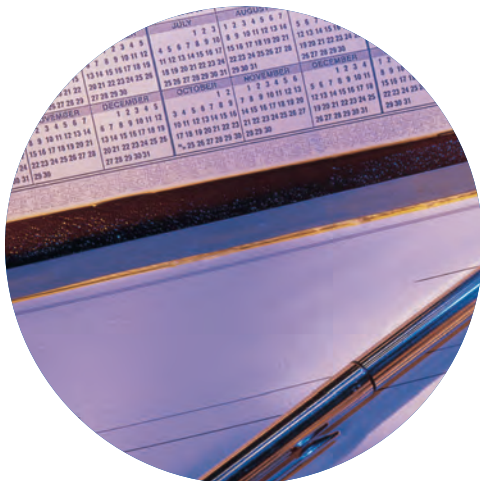
This brings up a nuance in the general rules of accord and satisfaction. There has to be an existing dispute about the amount owed – the concept of accord and satisfaction does not work with something like a car loan. For design professionals, this might play out as the client disputing the quality of your services, thereby trying to justify a backcharge reduction of your

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fees. But nuances and concepts don't get you your money. Just because you may be surprised by a reduced payment, it would be imprudent to rest your claim on the argument that there is no question as to the amount due. The fastest way to have a counter-claim against you is to sue for your money.

So why discuss accord and satisfaction now? Why does this happen? One reason you might receive a "reduced" check in the mail is because there truly is a bona-fide dispute between you and the other party. In this case, accord and satisfaction might be used like an informal dispute resolution method. A second reason may be that the other party is in financial trouble and the reduced amount is all they can afford. The current economy makes accord and satisfaction a very timely topic. Last, there are just some people out there in the world who need to "get" something out of you to feel like they have won. Perhaps some of these people are your clients.

Manage your risk: Accord and satisfaction – whether to cash a check or not – very often comes down to a business decision. You may decide to return the check and require full payment. But, if you struggle to get paid, and to get full payment, you may make the decision that, depending on the amount of money and on the character of the other party, what you get is good enough. It's just not worth the fight. Then you might make another business decision to either never work with these people again, or build a cushion into your fee to counterbalance this technique. In the end, you have to be satisfied with your financial management and the people you deal with.



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