



Assessing Your Exposure to Design Risks in an Evolving Marketplace

By Michael Davis

Evolving project delivery methods present new roles, opportunities and distinctive challenges for general contractors.

The construction industry has weathered a considerable amount of tumult since the Great Recession, and that turbulence has not been confined to economics. The evolution of project delivery methods (PDMs) continues to change how buildings get built and, by design—both literally and figuratively—, the roles and risks assumed by general contractors (GCs).

Design-Build, Construction Management at Risk (CMAR) and Integrated Project Delivery (IPD) (and the variations therein) have introduced new working models for the industry. General contractors are being enlisted earlier in the design phase to share their expertise and make meaningful contributions. Surveys commissioned by the Design-Build Institute of America (DBIA), for example, point to design-build accounting for 40% of nonresidential construction projects in the U.S.¹ An increasing number of public sector projects, which have historically used only the traditional design-bid-build model, are allowing alternative project delivery models. The DBIA alone reports that its members can use design-build, in some form, in all 50 states, and a majority of states permit design-build “for all agencies for all types of design and construction.”²

While bestowing more collaboration and additional opportunities to GCs, these PDMs also expose them to more design risk. While many (particularly those involved in design-build) understand this changing role, it's also true that many are taking on design risks they are not necessarily seeking out—or even know they have. This is the case not only for the new PDMs but also with design-bid-build projects. As projects become more complex, owners are looking to transfer risk, and increased collaboration is blurring the lines of who's responsible for what.

¹ “Research Finds Continued Growth of Design-Build.” Design-Build Done Right. Design-Build Institute of America. 26 June 2014.

² “State Advocacy: 2017 Design-Build State Authorization.” Design-Build Institute of America website. 2017.

“Over the last few years, a large and growing number of disputes have arisen on construction projects litigating responsibility as between the design and construction teams,” attorney Jennifer Lowndes recently wrote in an article for the American Bar Association. “Shop drawings, attempted design delegation and scope that includes installation of specialty or engineered systems are just a few ways in which contractors have seen their design-related responsibilities—and the potential for corresponding liability—expand.”³

Some of these responsibilities can indeed come as an unwelcome surprise. Take a GC who provides some pre-construction consulting services, reviews an HVAC design or makes a small change in a shop drawing. A misconception may exist that because the GC reviewed someone else’s design, it has automatically assumed responsibility for it. The GC may never have intended to assume that responsibility in its contract, but a successful claim could be made against the company.

Subsequently, as alternative building methods bring flexibility and innovation to the construction industry, GCs need to evolve with them. Here are some ways to help mitigate design risks in this increasingly complex marketplace:

- 1. Keep your contract as specific as possible.** GCs need to ensure that their long-term customer contracts clearly define the professional responsibilities and liabilities they intend to assume, while avoiding vague language that might be interpreted as shifting design responsibilities to them. Takeaways from a webinar hosted by The Associated General Contractors of America on the topic advise GCs to put the parameters of design delegation in their contracts. Delegated design, it added, can be masked as a performance specification, making it difficult for a GC to realize it has design responsibility when pricing out a project. Terms such as “means and methods design” and “shared design,” the AGC noted, “may not have the same meaning for all parties within the industry, furthering the need for clarity.”⁴
- 2. Make sure your insurance is broad enough to protect you.** GCs need insurance coverage that’s expansive enough to pick up any professional design exposures that they accept, as well as those exposures that may be imposed upon them—but not so broad as to encourage things that are appropriately addressed by other policies.

Misconceptions continue to prevail on the protection afforded by general liability (GL) insurance as it pertains to design risk for GCs. General liability coverage is designed to offer protection incurred by construction operations that result in bodily injury or property damage. It will offer little, if any, coverage against a professional design claim, and amendments to GL policies are unlikely to provide sufficient coverage for a host of reasons. General contractors also shouldn’t expect the design professional’s liability policy to extend to them; these policies typically have low limits and rarely extend coverage to an additional insured.

³ Lowndes, Jennifer. “The Contractor’s Emerging Exposure for Design Responsibility.” *Construction Litigation*. American Bar Association. aba.org. 17 May 2017.

⁴ “Takeaway Lessons from AGC Webinar on Design Delegation.” AGC of America. 21 October 2014.

Professional liability (PL) coverage for GCs has gained currency for this increased exposure, covering against damages from negligence in specialized or technical areas (i.e., professional services) that result in financial losses. Because these claims can be staggering, more GCs are obtaining this coverage. We have also seen an increase in contracts that require the GC to carry PL in addition to what the designer carries. It's vital to communicate closely with your risk manager and a knowledgeable broker to achieve the best and proper coverage.

3. **Make a case for a single carrier for multiple lines of coverage.** Consider placing GL, PL and the excess with one carrier. As important as it is to draft coverages to be broad and interlocking, recognize that a claim dispute argument will be made based on fact. If you place coverages among different carriers with a broker who does a great job of having the policies structured to work together, you still have the basic problem of a claims department saying, "We think the facts of this case are driven by what the other policy does." So you're not necessarily discussing a disagreement in coverage intent; you're arguing about a disagreement in the fact base, and this can take time to resolve.

Four Habits That Can Help Mitigate Risk

Mitigating risk is really about making thoughtful decisions as well as identifying and addressing issues early on. Here are four good habits that can help companies mitigate risk:

1. **Do your homework.** The uptick in the construction industry is a good problem to have—until it isn't. The continued lack of skilled workers in the trades and of experienced designers, combined with an abundance of projects, sets the stage for a party accepting a job that it's unprepared to handle in terms of scope or size. It can also prevent GCs from performing due diligence prior to taking on a project. One or two bad jobs can threaten even the largest of firms in terms of the costs.
2. **Establish good relationships before signing the contract.** General contractors must understand the importance of individual relationships among the principals involved in each project. The owner involvement and the owner's personality matter, and the same applies to the designer. Relationships are built with individuals, not companies. Consider the actual participants of the contractor-designer-owner team and make sure you're confident that everybody will be doing his or her job. Zurich's data indicates that at least one in four large PL claims against GCs involved work for a new customer.
3. **Borrow the best from IPD.** It gets talked about a lot, but IPD isn't actually undertaken often. Ostensibly, the goal is that the owner, contractor and designer share more of the responsibilities for the project. The best thing about IPD, from a key practice perspective, is that more attention, time and money are spent upfront working through issues. The other interesting thing we've seen in IPD is that it flies in the face of the interconnected world, where design can be done while you're sleeping on the other side of the planet. Just having the owner, contractor and designer physically located in the same place seems kind of old-fashioned, and it can't always be done; but it helps immensely in terms of driving better results.
4. **Embrace the bigger picture.** Recognize that project success depends upon things that are outside the responsibility of each party on the project and that you must separate what's important to your success versus what you're responsible for. You want a tight contract. But if you are going to focus only on delivering your contract—which in theory is all you're legally obligated to do—and the owner or designer is failing on his parts, it's unlikely that you're going to walk away successfully from that project. It's vital to recognize that there is interplay, regardless of what the contractual responsibilities or PDM may be.

4. **Don't ignore what's not your contractual responsibility.** Although GCs are very comfortable managing materials and workmanship, they may be less comfortable managing design because it hasn't historically been their responsibility. It has been the responsibility of a professional designer; and if it doesn't work, the professional either fixes it or is sued for damages for not fixing it. In today's increasingly collaborative environment, GCs must recognize that whether or not they have contractual responsibility for a design error, allegations can be made asserting construction defects or adequacy for intended use. Perhaps it was design negligence, material failure or workmanship inadequacy; often, it's a combination of those things. It can get very technical and difficult to identify what the source of the damage was, and it can take a long time to sort it out.
5. **A risk manager can help.** [In a 2016 AGC/FMI industry survey on managing and mitigating risk](#), which represents best-in-class construction firms generating \$50 billion in industry revenue each year, PDMs were on the lower half of respondents' concerns. However, it's noteworthy that "contract language/ insurance terms" was cited among their top challenges, and the study reported, "...survey participants perceive a shift in design risk and responsibilities from the architects and engineers to the contractors." Nearly 70% of those respondents had a formalized risk management department, and 67% reported having a dedicated risk manager. The study also noted that those companies with dedicated risk managers rated the effectiveness of their risk assessment process higher than those companies without one.⁵

Today's evolving marketplace can be exhilarating or intimidating, depending on how you approach this new landscape. Those GCs that embrace a changing role will differentiate themselves in a highly competitive market, but increased design responsibilities heighten risk as well as opportunity. Success will likely depend on a clear understanding of what's expected of you, in each and every project, and having a solid team to provide direction on contractual responsibilities and proper insurance coverage as you, too, evolve with your industry.

⁵ "Managing and Mitigating Risk in Today's Construction Environment: The 2016 AGC/FMI Industry Survey." https://www.fminet.com/wp-content/uploads/2017/03/ManagingandMitigatingRisk_Survey_FINAL.pdf. AGC of America and FMI. September 2016.

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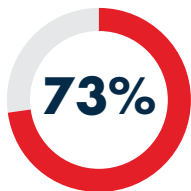
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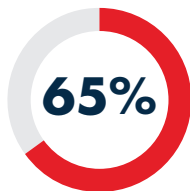
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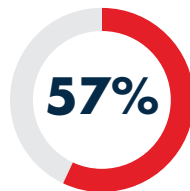
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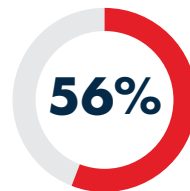
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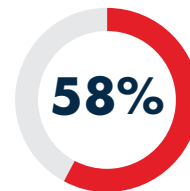
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