

Design-Build Coverage for General Contractors

IRMI Roundtable San Diego, CA

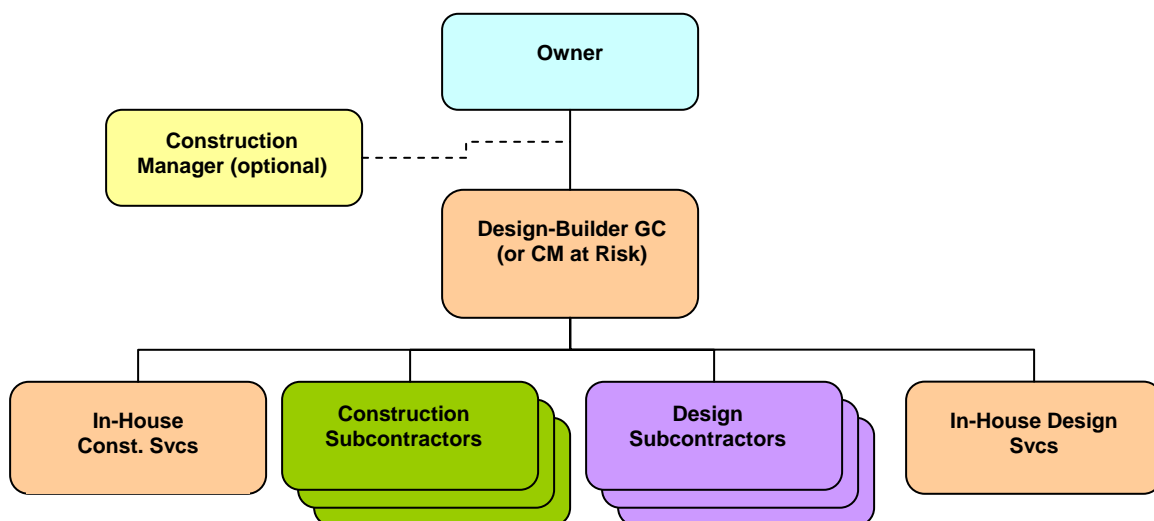
October 8-12, 2006

❖ Design-Build Overview

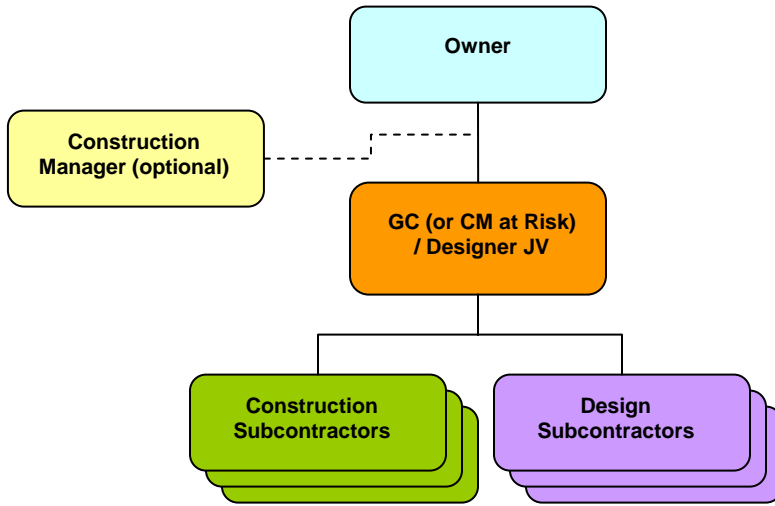
- Owner contracts with a single entity to provide both design/engineering and construction services on a project.
- A design-builder warrants both that the construction is suitable for its intended purpose and that the design is accurate.
- Depending on the contracting relationship with the owner, the design-builder may also function as an advisor and advocate for the owner as the construction manager at risk.

❖ Structure and Formation of Design Build Teams

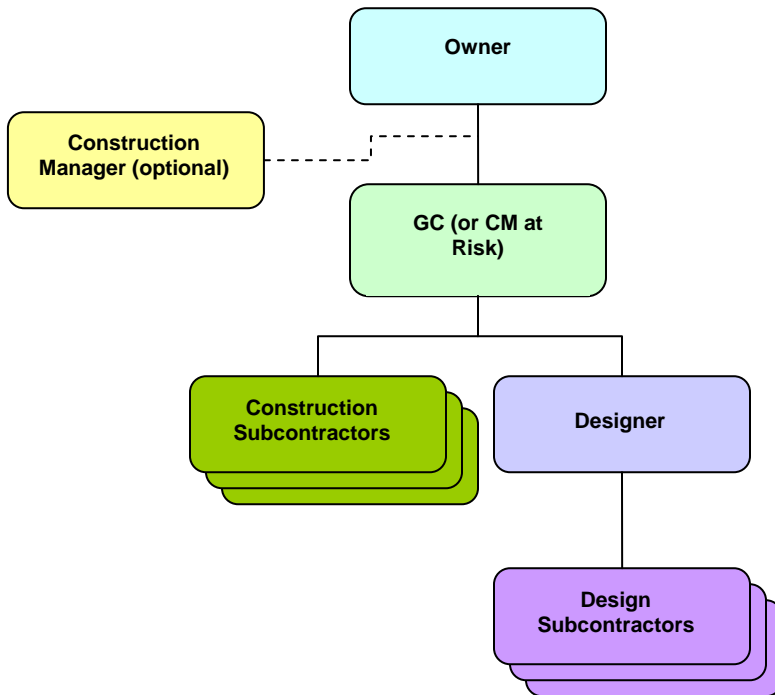
- Project team reflects the allocation of risk chosen by the owner.
- Four main forms:
 - Design-builder possesses construction and design resources in-house



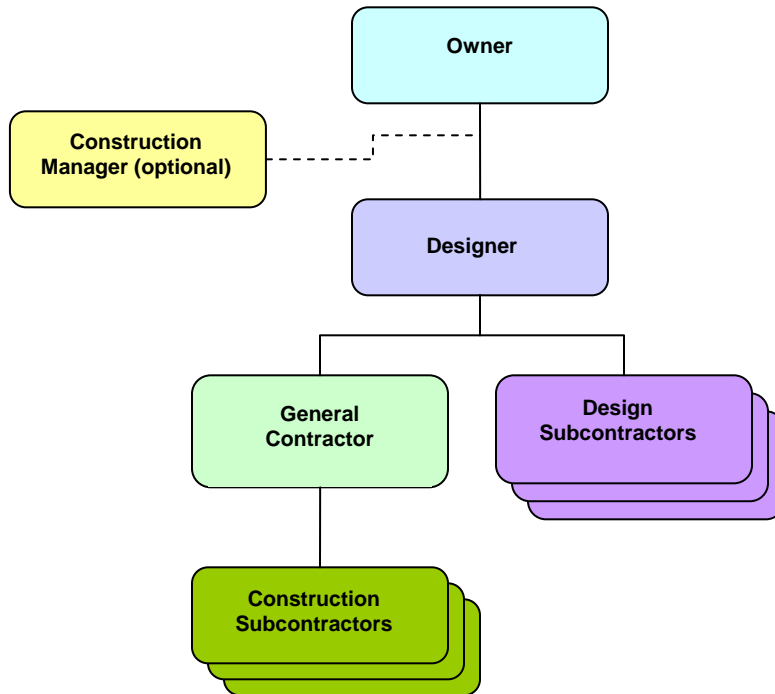
- Joint venture between designer and contractor



- Contractor-led team with designer in a subcontractor role



- Designer-led team with contractor in a subcontractor role



- A separate construction manager may be hired by the owner independent of the design-builder.

❖ **Applicable coverage**

- Commercial General Liability
- Professional Liability
- Additional Insured Status

❖ **Commercial General Liability Policy (“CGL”)**

- Provides coverage for “Bodily Injury” or “Property Damage.”
- CGL policies are occurrence-based – covered loss must occur during the policy period.
- CGL policies exclude coverage for professional liabilities.
- Defense fees are typically in addition to policy limits.
- May or may not include coverage for completed operations, i.e., for damages after the work has been turned over.
- Coverage under subcontractor policies (additional insured).

- Often required by subcontract to be named on subcontractor policies as an additional insured for liability arising out of the subcontractor's work
- If so, need to review the actual policies, not merely certificates of insurance, to verify that the coverage purchased meets the minimum contracted requirements (limits, completed operations coverage, term and termination)

❖ **Contractors Professional Liability Insurance (“PLI”)**

- Provides coverage related to “Professional Services,” broken into two distinct aspects of coverage, Part A and Part B.
- PLI policies exclude coverage for construction services.
- Claims-made policies:
 - Claim must first be made during the policy period;
 - Notice required during policy period or extended reporting period.
- Two types:
 - Issued annually to cover all of a contractor's operation:
 - Aggregate policy limits cover all projects;
 - Should be excess over project-specific PLI policies.
 - Project-specific:
 - Allows for the possibility of a tail running the length of the statute of limitations;
 - Dedicated policy limits;
 - Tailored to the risks undertaken.
- “Part A” Coverage
 - Coverage for defense and indemnity related to actual or alleged negligent acts, errors or omissions in rendering “Professional Services.”
 - “Professional Services” means the services of an architect, engineer, landscape architect, land surveyor or planner, construction manager or interior designer/space planner that the insured is legally qualified to perform;
 - No coverage for actual construction services.

- Defense fees typically erode the policy limits.
- Part “B” Coverage
 - Covers “losses” from claims arising out of the negligent acts, errors or omissions of a “Design Professional.”
 - Indemnity only – legal fees to prosecute claim against a design professional are not covered.
 - Applies to actual “losses” – judgments and settlements – not merely allegations of negligence.
 - Coverage is excess over the Design Professional’s coverage. Therefore, designer’s coverage must be exhausted before Part B coverage is implicated.
 - Note that losses covered under Part B may be, in part, the result of adjudicated/settled claims covered under Part A.
 - Contractor’s professional policy is applied as excess over the design professional’s insurance.

❖ **Key Considerations**

- “Claim” is not limited to a law suit. It encompasses any demand received by the insured.
- “Notice” of a “Claim” can include notice of the circumstances, not just a demand letter or threat of suit.