

# Devil in the details: Understanding risks in design/ build project delivery methods



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Progressive design/build and design/build are both project delivery methods that integrate design and construction services within one contract. However, they differ in structure, process, and how the project moves forward. Progressive design/build raises anxiety for insurance companies, which are concerned by exposure to professional liability claims involving project-specific coverage for design/build or progressive design/build teams or joint ventures (JVs). Let's explore the similarities and differences, as well as insurance implications, of each project delivery method.

## Design/build

Design/build is the most common integrated project delivery method, where the project owner executes a single contract with one entity: the team or JV of the Prime Architect or Prime Engineer and the General Contractor (GC) or Construction Manager - At Risk (CMAR). Under the one contract, the design/build team is responsible for both the design and construction of the project. Unlike the more traditional design/bid/build project delivery method, which separates design and construction between separate contracting entities, the professional liability exposure for both design/build and progressive design/build is oftentimes much higher.

Design/build methods consolidate responsibility for numerous professional services with a single entity. These services commonly make the contracting entity liable for design errors or flaws, including vicarious liability for professional services performed by subcontractors on the project. The exposure is usually higher because the design professionals and the construction entity are on one contract. Professional liability can arise from wrong acts that have negatively impacted the project, such as project delays or increased costs due to correcting design errors and related faulty construction.

Benefits to design/build project delivery include:

- One contract:** The owner has one contract with the design/build team, not two separate contracts. With a design/build contract, the professional liability exposure for the GC or CMAR usually increases significantly, which is a concern for the progressive design/build team or JV.

- Fixed scope and price:** Typically, the project scope of work and budget are established early in the process, likely before construction begins.
- Time savings:** There will be some overlap between design and construction phases, with design plans often ready at intervals of 30%, 60% and 90% at the time of construction starting.
- Fewer changes:** Once the design and budget are finalized, changes are less frequent, and the project proceeds in a more linear fashion.

## Progressive design/build

Progressive design/build is an advanced version of the design/build project delivery method (PDM) and is sometimes compared with Fast-Track PDM, which accelerates project timelines and can save costs by overlapping certain phases of the construction process. It is based on one contract with the Prime Architect/Engineer and the GC or CMAR and typically increases the professional liability exposure for the progressive design/build team or JV. Progressive design/build focuses more on collaboration and flexibility than just design/build, especially at the beginning of a project. Progressive design/build can best be described as the design and construction phases progressing together in a step-by-step process. As with design/build, the insurance company providing contractors professional liability coverage is usually very concerned about the higher exposure for the progressive design/build team or JV, and this is typically reflected in higher premiums.

Benefits to progressive design/build project delivery include:

- Collaborative approach:** The owner, designer, and contractor work collaboratively from the project's inception, encouraging greater input and flexibility by all parties.
- More transparent pricing:** Costs are generated and calculated in a more transparent way. Often, the budget can be revised as the design expands or progresses. The owner can then have more visibility and control over costs and reduce claims against the progressive design/build team or JV for cost overruns or delays - because the owner is involved in the expansion of the budget and schedule.

3. **Phased design and construction:** The design and construction phases are more coordinated. In other words, construction may begin on certain parts of the project while design is still being finalized for other elements of the project.
4. **Flexibility for revisions:** The progressive design/build project delivery method allows the owner to change the scope, which impacts design and budget, as the project unfolds. This enables a more dynamic approach to the project. Again, this reduces the risk of claims against the progressive design/build team or JV for cost overruns or delays.
5. **Off-ramp option:** This is a huge difference between progressive design/build and design/build project delivery methods and contracts. The off-ramp is often cited as the biggest concern of insurance companies. This option allows the owner to terminate the contract early in the design/preconstruction phase of work if the project is not meeting the owner's expectations. The challenge with the off-ramp is not with the owner - it is with the insurance company. For example, if the off-ramp is invoked before the start of much construction, the insurer may now covering a 100% design exposure, which was not contemplated in underwriting the risk. Premiums for project-specific progressive design/build contractors professional liability policies therefore can be significantly higher than standard design/build.

The off-ramp provision within a progressive design/build contract allows the owner to terminate the design/build relationship at a specific milestone or phase of the project. Owners usually exercise this option after the initial design and preconstruction work. The off-ramp gives the owner flexibility and control over the project, particularly if there are concerns about the design/build team's performance, costs, or feasibility of the project. Design professionals and construction businesses, however, may still be liable for prior wrongful professional acts that occur early in the project, before the owner elects the off-ramp.

## Key Differences

1. **Process:** Design/build often is more linear in how the project progresses, with 60% to 90% design and budget completed early. Progressive design/build is more cooperative, with construction starting earlier, and it allows for ongoing changes and revisions and as field conditions require.
2. **Owner involvement:** Design/build typically has less owner interaction after initial contracting and scope of work agreements. Progressive design/build, on the other hand, typically has far more owner involvement during the design and preconstruction phases. This results in more design and cost certainty and less likelihood of an owner claim against the progressive design/build team or JV.

3. **Cost Certainty:** Design/build is typically based on guaranteed maximum price (GMP) contracts. This results in more design and cost certainty and less likelihood of an owner claim against the design/build team/JV. Progressive design/build generates initial costs and adds costs as the design progresses. Because of the owner involvement, this can help reduce the risk of an insurance claim against the progressive design/build team or JV.
4. **Flexibility:** Design/build establishes the design and construction budget earlier in the process. Progressive design/build is flexible in that it allows for design revisions and adjustments to the construction scope of work.

## Contractors professional liability exposures

Progressive design/build often creates more professional liability risks compared to traditional design/build, because of its flexibility and collaborative nature. These risks include:

- **Ongoing design:** Professional liability exposure for the progressive design/build team or JV can increase due to the ongoing changes and adjustments to the design during the project.
- **Nebulous responsibilities:** Professional liability exposure for the progressive design/build team or JV can increase due to the amount of collaboration that can sometimes blur who is responsible for what regarding the design and construction.
- **Project management:** Professional liability exposure for the progressive design/build team or JV can increase due to the transparent costs, which require careful tracking to avoid disputes. Of course, this can lead to claims if budgets or expectations are not met.
- **Risk of increased coordination:** Professional liability exposure for the progressive design/build team or JV can increase due to the overlapping phases of design and construction. This may lead to lack of, or even the miscommunication of, errors, which increases the risk of claims.

In conclusion, progressive design/build gives much greater flexibility and collaboration – oftentimes with higher professional liability risks – than common design/build. The higher risks, including the use of owner off-ramp, present distinct challenges to the progressive design/build team or JV, which must be carefully considered. For these reasons, project owners and the design/build team or JV may benefit from consulting with an agent experienced in construction risk management.

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