

# ■ Design-Build Guide

**AIA** Contract Documents

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## PURPOSE OF THIS GUIDE

This Guide is a companion to the full suite of 2024 Design-Build Documents published by AIA Contract Documents. The purpose of this Guide is to provide users of those documents with a basic understanding of the design-build project delivery method and offer some best practices for using the AIA Contract Documents' Design-Build Documents on design-build projects.

### AIA CONTRACT DOCUMENTS' DESIGN-BUILD DOCUMENTS

The 2024 Design-Build Documents are as follows:

#### **AIA Document A141®–2024, Agreement Between Owner and Design-Builder for a Traditional Design-Build Project**

A141–2024 replaces AIA Document A141–2014, Standard Form of Agreement Between Owner and Design-Builder, and consists of the Agreement, Exhibit A, Insurance and Bonds, Exhibit B, Design-Build Amendment that is executed when the Owner and Design-Builder have agreed on the Contract Sum, and Exhibit C, Sustainable Projects Exhibit (if applicable). AIA Document A141–2024 forms the nucleus of the Contract between the Owner and Design-Builder on a Traditional Design-Build project.

#### **AIA Document A141®PDB–2024, Agreement Between Owner and Design-Builder for a Progressive Design-Build Project**

AIA Document A141PDB–2024 is a modified version of A141–2024 and is for use on “Progressive design-build” projects. A141PDB–2024 consists of the Agreement, Exhibit A, Insurance and Bonds, Exhibit B, Design-Build Amendment that is executed when the Owner and Design-Builder have agreed on the Contract Sum (guaranteed maximum price), and Exhibit C, Sustainable Projects Exhibit (if applicable). AIA Document A141PDB–2024 forms the nucleus of the Contract between the Owner and Design-Builder on a Progressive Design-Build project.

#### **AIA Document A441™–2024, Agreement Between Design-Builder and Subcontractor for a Design-Build Project**

AIA Document A441–2024 establishes the contractual relationship between the design-builder and a subcontractor for either a Traditional or Progressive design-build project. AIA Document A441–2024 incorporates by reference the terms and conditions of A141–2024, or A141PDB–2024, depending on whether the project is being delivered using Traditional or Progressive design-build processes, and was written to ensure consistency with the 2024 Design-Build family of documents. Because subcontractors are often required to provide professional services on a design-build project, A441–2024 provides for that possibility.

#### **AIA Document B141™–2024, Agreement Between Design-Builder and Architect for a Traditional Design-Build Project**

AIA Document B141–2024 replaces B143–2014, Standard Form of Agreement Between Design-Builder and Architect. B141–2024 establishes the contractual arrangement between the Design-Builder and the Architect on a Traditional Design-Build project. B141–2024 does not provide a fixed scope of architect's services but instead includes an extensive menu of services from which the Design-Builder and Architect may select.

### **AIA Document B141™PDB–2024, Agreement Between Design-Builder and Architect for a Progressive Design-Build Project**

AIA Document B141PDB–2024 is a modified version of B141–2024, B141–2024, Agreement Between Design-Builder and Architect for a Traditional Design-Build Project and is for use on Progressive design-build projects. B141PDB–2024 establishes the contractual arrangement between the Design-Builder and the Architect. Unlike B141–2024, B141PDB–2024 provides a more fixed scope of the architect’s services, while also including a menu of services from which the Design-Builder and Architect may select.

### **AIA Document C141™–2024, Agreement Between Owner and Consultant for a Design-Build Project**

AIA Document C141–2024, provides a standard form for the consulting services an owner may require when utilizing the design-build delivery method. The consultant, who may or may not be an architect or other design professional, may perform a wide array of services for the owner, including programming and planning, budgeting and cost estimating, project criteria development services, development of bridging documents, and services in connection with construction of the Project. AIA Document C141–2024 consists of the Agreement and Exhibit A, Consultant’s Services. Exhibit A provides a menu of briefly described services that the parties can select and augment to suit the needs of the project. AIA Document C141–2024 is suitable for use on Traditional or Progressive Design-Build projects.

### **AIA Document C441™–2024, Agreement Between Architect and Consultant for a Design-Build Project**

AIA Document C441–2024 establishes the contractual relationship between the Architect and a consultant providing services to the architect on a design-build project. AIA Document C441–2024 is suitable for use with all types of consultants, including consulting architects, and may be used with a variety of compensation methods. C441–2024 incorporates by reference the preexisting prime agreement between the Design-Builder and Architect. C441–2024 was written to ensure consistency with AIA Document B141–2024, Standard Form of Agreement Between Design-Builder and Architect for a Traditional Design-Build Project and AIA Document B141PDB–2024, Standard Form of Agreement Between Design-Builder and Architect for a Progressive Design-Build Project, and with other documents in the 2024 Design-Build family of documents. Accordingly, C441–2024 is suitable for use on Traditional or Progressive Design-Build projects.

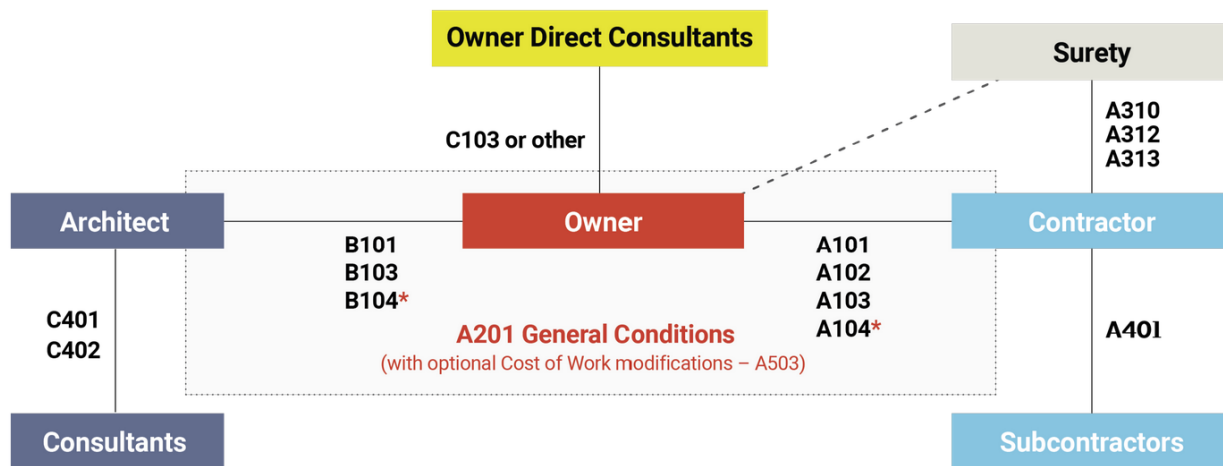
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#### **DISCLAIMER**

This Guide is meant to provide general background information on certain topics of interest to those involved with design-build projects and an explanation of, and the reasoning behind, the new 2024 Design-Build Documents. It offers general guidance and does not provide legal advice. Laws regarding the use and enforceability of the information included in this Guide may vary among jurisdictions. Users of this Guide are encouraged to familiarize themselves with the laws and regulations applicable in the jurisdiction where the Project is located and to consult an experienced attorney.

## DESIGN-BUILD DEFINED

Historically, most commercial construction projects have been delivered through some variation of a design-bid-build project delivery method. As illustrated in the graphic below, a typical design-bid-build project involves the Owner entering into one contract with an Architect to design the project and prepare Construction Documents which set out the requirements for construction. Once the design has sufficiently progressed to a point where a price for construction can be established, the Owner then enters into a separate contract with the Contractor to procure and build the project. The Architect will engage various engineers and specialty design Consultants to assist with the design and documentation for the project and the Contractor will engage various Subcontractors to build portions the project.



While there are multiple variations on the design-bid-build delivery method, the defining characteristic is the tripartite relationship between Owner, Contractor, and Architect as illustrated above. On a design-bid-build project, the “design” and “construction” teams are discrete from one another with no contractual relationship existing between them.

One of the most significant challenges for Owners on a design-bid-build project is the vicarious liability arising from negligent performance of professional services by the Architect and its Consultants. Because all design information flows through the Owner to the Contractor in a tripart contractual relationship, the Owner is primarily responsible to the Contractor for the Architect’s negligence. If the Contractor incurs additional costs, delay, and other losses as a result of the Architect’s negligence, in most circumstances the Contractor must seek recovery from the Owner. The Owner must then seek recovery indemnification from the Architect. Often, this situation is further complicated by competing allegations between the Contractor and the Architect over liability, and if separate legal proceedings are involved, the risk of inconsistent findings of liability. For some Owners, the risk of costly, multiparty or separate and independent litigation following completion of the project outweighs any benefits offered by the design-bid-build project delivery method.

In the decade following the release of the 2014 Design-Build Documents, design-build has emerged as one of the more dominant project delivery methods. While the reasons for this shift vary, one factor underlying the appeal of design-build is the single point of responsibility between the Owner, Design-Build-er, and Architect. As illustrated in the graphic below, the Owner on a design-build project enters into one contract with the Design-Builder for both design and construction of the project. In addition to engaging

various Subcontractors to construct portions of the project, the Design–Builder also engages the Architect to design the project and prepare construction documents.<sup>1</sup>



As with design-bid-build, there are multiple variations of the design-build delivery method.<sup>2</sup> However, the defining characteristic is the vertical contractual relationship between Owner and Design–Builder, and the lack of direct contractual connection between the Owner and the Project Architect as illustrated above. On a design-build project, there is no contractual separation between the “design” and “construction” teams and the Owner holds no vicarious liability for negligence of the project Architect.<sup>3</sup>

While the design-build delivery method offers significant benefits, as Owners, Architects, and Design–Builders have become more familiar with design-build, certain shortcomings have emerged. These shortcomings can have had wide-ranging legal and financial impacts for design-build project participants at all levels. That is why it is imperative that all project participants fully understand the roles and responsibilities set forth in the contract documents.<sup>4</sup>

Owners, who no longer have a contractual relationship with the Architect, may see their participation in an iterative design process significantly reduced. Whether this is a benefit, or a detriment, often depends on the project type. Owners on projects with limited design requirements and few stakeholders, such as a warehouse or storage facility, may view an iterative design process as having limited value. On the other hand, Owners on projects with significant design requirements and multiple stakeholders involved, such as an airport or a hospital, may find the lack of an iterative design process untenable. Similarly, some Archi-

<sup>1</sup> Depending on the circumstances, the Design–Builder may have in-house design and/or construction capabilities. Accordingly, the Design–Builder may need to engage an Architect and/or Contractor(s) or neither.

<sup>2</sup> In addition to the Owner/Design–Builder relationship, the Owner may also engage one or more direct consultants, including perhaps a bridging consultant. The Design–Builder may also engage designers or contractors. See FN I.

<sup>3</sup> The Owner may still have vicarious liability arising from the acts or omissions of other Owner consultants engages for the project.

<sup>4</sup> AIA Contract Documents’ 2024 Design–Build Documents help address some of these concerns.

tects find this arrangement difficult to navigate. Architects often see themselves as the Owner's advisor, particularly on project design matters, and in the Design-Build scenario, the Architect does not have that same relationship.

Design-Builders are often required to set fixed prices based on incomplete design information. When this occurs, a Design-Builder may struggle to adequately price the cost of the work and set adequate contingencies for refinement of the design after execution of the Design-Build contract. Design-Builders may also face challenges managing changes that occur during the design process because Owners may be reluctant to give up control over the design process. When cost overruns occur as a result of these challenges, Design-Builders are faced with the difficult choice of pursuing a claim against the Owner or seeking recovery from the professional liability insurance policies of Architects and their consultants.

# AIA CONTRACT DOCUMENTS APPROACH TO DESIGN-BUILD

The 2024 Design-Build Documents reflect a more nuanced and mature view of the design-build delivery process. To develop this view, multiple industry participants in the design-build industry were interviewed.<sup>5</sup> From these interviews, consensus emerged around several guiding principles for revising, updating, and drafting the 2024 Design-Build Documents.

## **1. Design-Build is Predominately Led by Construction Professionals**

The 2024 Design-Build Documents reflect a major shift in the AIA Contract Documents' philosophical approach to design-build. Prior to 2014, AIA held the view that a design professional could serve in the role of the prime contractor with the Owner and lead the design-build process as effectively as a construction professional. While no qualitative data directly refuted this view, the reality of the construction market in 2024 is that few, if any, significant designer-led vertical construction projects actually occur. The vast majority of buildings delivered using design-build involve, and have involved, contracts where the Design-Builder is a general contractor or construction manager. The 2024 Design-Build Documents are not structured in a manner that would permit the Architect or another design professional to serve as the Design-Builder and use of these documents on a designer-led design-build project is discouraged.

## **2. Design-Builder Selection Process Can Impact the Commercial Success of a Project**

Another important guiding principle arose from recognizing that the manner in which the Design-Builder is selected may impact the commercial success of a project for the Owner, Design-Builder or Architect. The Design-Builder is usually selected using either a "value-based" or a "qualification-based" selection process. The key difference between these two processes is the degree to which the Design-Builder's proposed pricing is the determinative factor in their selection. Through a value-based approach, the Design-Builder's proposed pricing for design and construction of the project is the determinative factor whereas with a qualification-based approach, the Design-Builder's qualifications are determinative. To understand how these selection processes can impact the commercial success of a design-build project, it is important to better understand their defining characteristics.

### *a. Value-Based Selection*

The value-based selection process typically begins with the Owner issuing a request for proposal (RFP) which includes the Owner's Criteria for the Project along with the Owner's budget for the Cost of the Work and a target Project Schedule. The Design-Builder, without additional input from the Owner, is required to propose a fixed price or provide a guaranteed maximum price to design and construct the project. Based on the level of detail contained in the Owner's Criteria, the Design-Builder will typically advance the design to a point at which the design requirements are sufficiently understood to allow the Design-Builder to propose a fixed price or guaranteed maximum price and schedule. The Owner may offer a stipend to cover some of the cost of the incurred by the Design-Builder in preparing its proposal. Otherwise, the Design-Builder must perform these services at their own risk. Either way, the time for responding to the RFP is limited and the economic pressure to do as little advance design as possible is extreme. This compressed timeframe may be

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<sup>5</sup> In addition to the diverse members of the documents committee, which include General Counsel for large architectural firms, owners' representatives, and architects in both large and small firms, industry liaisons including Owners, Architects, Design-Builders, and other advisors to design-build participants were also interviewed and asked to comment on document drafts.



inadequate for the Design-Builder to fully understand the Owner's Criteria, investigate site conditions, research and understand relevant codes, regulations, and standards, and progress the design to a point at which a reliable fixed or guaranteed maximum price, and schedule commitments, can be made.<sup>6</sup> As a result, Design-Builders often make fixed price and schedule offers based on a design that has been developed to some fraction of Schematic Design. Thus, the most important characteristic of a value-based selection process is the expectation that a significant portion of the overall design effort will occur *after* the Design-Builder's price and schedule commitments are fixed.

A fixed price that is based on incomplete design information is highly reliant on the Design-Builder setting appropriate contingencies. One of the most important contingencies with respect to the commercial success of the project for the Owner, Design-Builder, and Architect is the "design-refinement" contingency. This contingency covers increased construction costs that are likely to occur as design of the project is further developed and refined by the Design-Builder. Because a value-based selection process is competitive by nature, there is great commercial pressure on the Design-Builder to propose the lowest fixed or guaranteed maximum price possible. Design-Builders who are sensitive to this commercial pressure are wary of including a significant design-refinement contingency on the basis that the additional cost it adds to their fixed or guaranteed maximum price proposal will price them out of consideration for the Project. Believing they can control costs by managing the design process more carefully, some Design-Builders will opt to significantly reduce or eliminate the design-refinement contingency all together.

The decision to reduce or eliminate the design-refinement contingency is a serious commercial risk for Owners, Design-Builders and Architects. In the design-build context, the risk of additional costs resulting from design development shifts from the Owner to the Design-Builder. If the design-refinement contingency is too low or non-existent, the Design-Builder will be bound to its fixed or guaranteed maximum price and will be required to absorb costs related to design refinement if they exceed the design-refinement contingency, unless the Design-Builder can show that these costs resulted from Owner-requested changes.<sup>7</sup> At a minimum, disputes over who is responsible for additional design refinement costs create distrust and acrimony between the Owner, Design-Builder and Architect. At worse, these disputes have the potential to seriously compromise Owner's ability to achieve its program, imperil the commercial viability of both the Design-Builder and Architect, and force the Owner, Design-Builder, and Architect into costly and protracted litigation that extends long after the project is completed.

#### *b. Qualification-Based Selection*

Qualification-based selection, on the other hand, seeks to mitigate the adverse effects of competitive pricing that are inherent in value-based selection. Like value-based selection, this process begins by the Owner issuing a Request for Proposal (RFP) which includes the Owner's Criteria for the Project along with the Owner's budget for the Cost of the Work and a target Project Schedule. However, unlike the value-based selection process, the qualification-based selection process does not require the Design-Builder to offer a fixed price for construction of the project or a fixed

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<sup>6</sup> "Project-Specific Professional Liability Insurance on Design-Build and Public-Private Partnership Projects in North America," pp. 7 & 16; Donovan Hatem LLP; David J. Hatem; 2022.

<sup>7</sup> When recovery from the Owner is not possible, the Design-Builder may seek to recover these additional costs from the Architect by characterizing them as damages resulting from errors or omissions in the documents provided by the Architect to the Design-Builder for pricing, thus making the Architect's professional liability insurance the de facto design-refinement contingency. Hatem at p. 17



project schedule. Instead, the qualification-based selection process is a two-step process in which the Owner first selects the Design-Builder based primarily on its qualifications to deliver the project with a limited price proposal.<sup>8</sup> After contract award and execution, the Owner, Design-Builder, and Architect work together to advance the design to an agreed point at which the Design-Builder can offer reliable pricing and schedule commitments for construction of the project. Once the design has achieved the agreed level of development, the Design-Builder will submit a proposal for the fixed or guaranteed maximum price and schedule to complete the design and construct the project. Thus, the most important characteristic of a qualification-based selection process is the expectation that a significant portion of the design effort will occur *before* the Design-Builder's price and schedule commitments are fixed.

### **3. Design-Build Encompasses a Wide Range of Owner Involvement.**

The most significant principle guiding AIA Contract Documents' approach to design-build arose from a recognition that Owners may want a wide range of involvement in the design-build process. At one end of this range are "turnkey" design-build projects where the Owner, other than furnishing certain performance criteria the new facility must achieve, does not participate in the design process in a meaningful way. At the other end of this range is the collaborative and integrated design-build method where the Owner has substantial input in the design development process.

The 2024 Design-Build Documents recognize that vertical design-build projects require some degree of Owner involvement in the design process. Owner involvement in the design process increases the potential for Owner-directed design changes that may impact the price and schedule commitments of the Design-Builder. Owners with few internal stakeholders and less complex Owner Criteria may not need to be significantly involved in the design process. In this situation, a Design-Builder may feel more confident offering a fixed price and schedule that is based on limited design information and relies more heavily on a design-refinement contingency. Owners with numerous internal stakeholders and complex Owner Criteria may need to be actively involved in the design process. In this situation, it is in the Design-Builder's interest to engage in a robust, iterative design process with the Owner prior to offering a fixed price or schedule. In doing so, the Design-Builder's need to rely on a design-refinement contingency is reduced as Owner-directed design changes are known and considered in the Design-Builder's fixed or guaranteed maximum price proposal. Thus, the success or failure of a design-build project often hinges on the degree to which the Owner's need to be involved in the design process is understood, planned for, and managed by the Design-Builder.

To respond to the varying degree of Owner involvement possible on a design-build project, AIA Contract Documents publishes two versions of its Design-Build Documents. The **"Traditional Design-Build"** set of documents anticipate limited Owner involvement in the design process. The **"Progressive Design-Build"** documents anticipate a significant level of Owner involvement. The distinguishing characteristics of Traditional vs. Progressive Design-Build projects are identified in the chart below:

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<sup>8</sup> Owners using a qualification-based selection process may solicit limited pricing proposals as part of the RFP process. Pricing is typically limited to the costs the Design-Builder and Architect will incur during the second step of the selection process.

ISSUE	TRADITIONAL DESIGN-BUILD	PROGRESSIVE DESIGN-BUILD
Selection Process	Qualification-based, but with limited progression of design (Preliminary Design only) prior to submission of the Design-Builder's Proposal	Qualification-based, but with advanced progression of the design (through Contract Documents Phase) prior to submission of the Design-Builder's Proposal.
Owner's Criteria	The level of detail in the Owner's Criteria can vary. Successful Traditional Design-Build Projects typically start with robust Owner Criteria (bridging design documents) which are used to establish the Owner's anticipated budget for the Cost of the Work and Project schedule.	The level of detail in the Owner's Criteria can vary. Successful Progressive Design-Build projects are not necessarily dependent on robust Owner Criteria, because the Owner is involved in an iterative design development process.
Evaluation of Owner's Criteria	<p>There is limited validation of the Owner's Criteria. The Design-Builder will review the Owner's Criteria and prepare a preliminary estimate of the Cost of the Work and preliminary schedule. The Design-Builder will recommend adjustments to the Owner's Criteria to conform to applicable laws, Project Site conditions, Owner's budget for the Cost of the Work, and Owner's Project schedule.</p> <p>The Design-Builder will prepare a report which, following approval by the Owner, forms the basis for preparing a Preliminary Design.</p> <p>The Preliminary Design is provided to the Owner for its review and approval. The Design-Builder's Proposal is based on the Preliminary Design prepared by the Design-Builder.</p>	<p>Rigorous validation of the Owner's Criteria is an important feature of Progressive Design-Build. The Design-Builder reviews the Owners' Criteria and local conditions under which the Work will be performed; prepares a preliminary design; makes recommendations for fast-track scheduling and Early Release Work; prepares a preliminary estimate of the Cost of the Work and compensation for Design Services performed after the Design-Build Amendment; and prepares a Schedule for Design Services and Construction of the Work. The Design-Builder will recommend adjustments to the Owner's Criteria to conform to applicable laws, Project site conditions, Owner's budget for the Cost of the Work, and Owner's Project schedule.</p> <p>The Design-Builder will prepare a report which, following approval by the Owner, forms the basis for Schematic Design Services.</p>

ISSUE	TRADITIONAL DESIGN-BUILD	PROGRESSIVE DESIGN-BUILD
Pre-Proposal Design Services	Pre-Proposal Design Phase Services end at Preliminary Design.	<p>Schematic Design, Design Development, and Construction Documents are performed by the Design-Builder prior to preparation of a Design-Build Proposal.</p> <p>The Owner is provided interim submissions at each phase for review and approval.</p> <p>The Cost of the Work is evaluated at the conclusion of each phase of services with adjustments made as necessary through Design Development to conform to the Owner's Budget.</p> <p>The Design-Builder provides enhanced Pre-Construction Services including cost estimating, constructability reviews, early procurement of materials, and Early Release Work.</p> <p>The Design-Builder is entitled to request typical Additional Services during the performance of Design Phase Services.</p>
Design-Build Proposal/ Design-Build Amendment	<p>Design-Builder submits a proposed Contract Sum (stipulated sum, cost of the work plus a fee with or without a guaranteed maximum price) including all design fees and contingencies for increases to the Cost of the Work resulting from refinement of design. The Design-Builder's fixed price includes completion of both design and construction of the Project.</p> <p>Upon acceptance of the Design-Builder's Proposal, a Design-Build Amendment (DBA) is executed. The Design-Build Amendment establishes all costs for design and construction of the Work.</p>	<p>Design-Builder submits a preliminary estimate of the Cost of the Work plus a fee with a Guaranteed Maximum Price including all design fees and contingencies for increases to the Cost of the Work resulting from refinement of design. <b>The Design-Builder's fixed price is based on a complete or near complete set of Construction Documents.</b> The Design-Builder's Cost of the Work plus a fee with a Guaranteed Maximum Price is more aligned with the fixed price commitment of a construction manager at risk.</p> <p>Upon acceptance of the Design-Builder's Proposal, a Design-Build Amendment (DBA) is executed. The Design-Build Amendment establishes all costs for design and construction of the Work.</p>

ISSUE	TRADITIONAL DESIGN-BUILD	PROGRESSIVE DESIGN-BUILD
Owner's Responsibilities	<p>Owner provides the Owner's Criteria for the Project, including limited information regarding the project site, and if requested by the Design-Builder, the Owner will furnish a geotechnical report in accordance the Design-Builder's specifications.</p> <p>Owner is required to review a discrete set of submittals as mutually agreed to in the DBA.</p> <p>Owner reviews and approves the Design-Builder's Payment Applications.</p> <p>Other than a geotechnical engineer (if requested by the Design-Builder), the Owner does not furnish the services of any design Consultant.</p>	<p>Owner provides the Owner's Criteria for the Project, including important information about the project site including site surveys and geotechnical engineer, and civil engineering. The Owner is actively involved in the development of the Project design.</p> <p>Owner is required to render timely decisions in accordance with the Design-Builder's Schedule.</p> <p>Owner coordinates its consultants' services with those of the Architect, its consultants, and other Consultants retained by the Design-Builder.</p> <p>Owner is required to periodically update the Owner's Budget for the Cost of the Work.</p> <p>Owner is required to review a more extensive set of submittals as mutually agreed to in the DBA.</p> <p>Owner reviews and approves the Design-Builder's Payment Applications.</p>
Post-Proposal Design Services	<p>Schematic Design, Design Development, and Construction Documents are performed by the Design-Builder following execution of the DBA.</p> <p>The scope and manner of performing these services is solely within the Design-Builder's discretion. The Design-Builder has no obligation to submit to the Owner any interim design deliverable other than the complete Construction Documents. The Owner is provided Construction Documents for information only.</p> <p>The Design-Builder is not entitled to Additional Services.</p>	<p>The form agreement contemplates full performance of Design Phase Services prior to execution of the DBA. However, the Design-Builder has the flexibility to perform some or all of Construction Document Services after execution of the DBA.</p>

ISSUE	TRADITIONAL DESIGN-BUILD	PROGRESSIVE DESIGN-BUILD
Construction Work	<p>Construction of the Work generally follows the process set out in the A133 – 2017.</p> <p>Design-Builder has the flexibility to have the Architect and its consultants perform all or a portion of typical Construction Phase Services.</p> <p>Payment for Work performed after the DBA may be performed on the basis of a Stipulated Sum, Cost of the Work with a Guaranteed Maximum Price, or Cost of the Work without a Guaranteed Maximum Price.</p>	<p>Construction of the Work generally follows the process set out in the A133 – 2017.</p> <p>Design-Builder has the flexibility to have the Architect and its consultants perform all or a portion of typical Construction Phase Services.</p> <p>Payment for Work performed after the DBA is performed only on the basis of the Cost of the Work with a Guaranteed Maximum Price.</p>
Liability	<p>Liability for Design Services is subject to a professional standard of care.</p> <p>Design-Builder’s obligation to correct defective Construction Work extends for 12 months following Substantial Completion.</p> <p>Design-Builder’s indemnity obligation is bifurcated with indemnity for professional liability separate from indemnity for general and other liabilities.</p> <p>Owner and Design-Builder mutually waive consequential damages.</p>	<p>Liability for Design Services is subject to a professional standard of care.</p> <p>Design-Builder’s obligation to correct defective Construction Work extends for 12 months following Substantial Completion.</p> <p>Design-Builder’s indemnity obligation is bifurcated with indemnity for professional liability separate from indemnity for general and other liabilities.</p> <p>Owner and Design-Builder mutually waive consequential damages.</p> <p>Design-Builder and Owner may agree to limit Design-Builder’s total aggregate liability to the Owner to a stated sum, subject to certain exceptions including fraud, willful misconduct, failure to pay third parties, failure to correct work, and abandonment of the Work.</p>

# KEY TERMS AND DEFINITIONS

When evaluating a Design-Build contract, it is critical to understand how key terms are defined in the document. The Definitions section is found in Section 1.4 of both A141-2024 and A141PDB-2024,

The definition of “Work” is common to both Traditional and Progressive agreements. This definition encompasses (1) work prior to the execution of the Design-Build Amendment, (2) Design Services (those performed by the Architect and/or engineer, not including delegated design), and (3) Construction Work necessary to fulfill the Design-Builder’s obligations under the Design-Build Documents (labor, materials, equipment and other services, including Early Release Work).

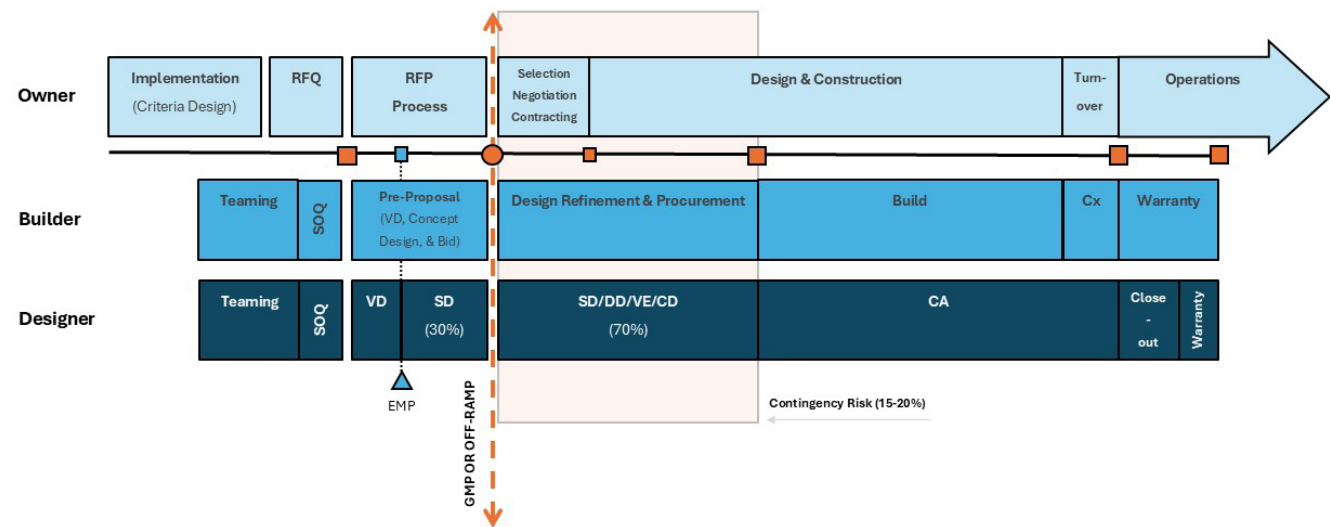
The definition of Early Release Work is also the same for both agreements. Early Release Work is a limited, predetermined portion or portions of the Design-Builder’s scope of work. This allows the Design-Builder to commence work on these discrete items prior to the execution of the Design-Build Amendment. While Early Release Work can depend on the nature of the project, demolition, site work, ordering of specialized mechanical equipment, and fabrication of structural steel are commonly performed as Early Release Work.

Other important definitions are provided below:

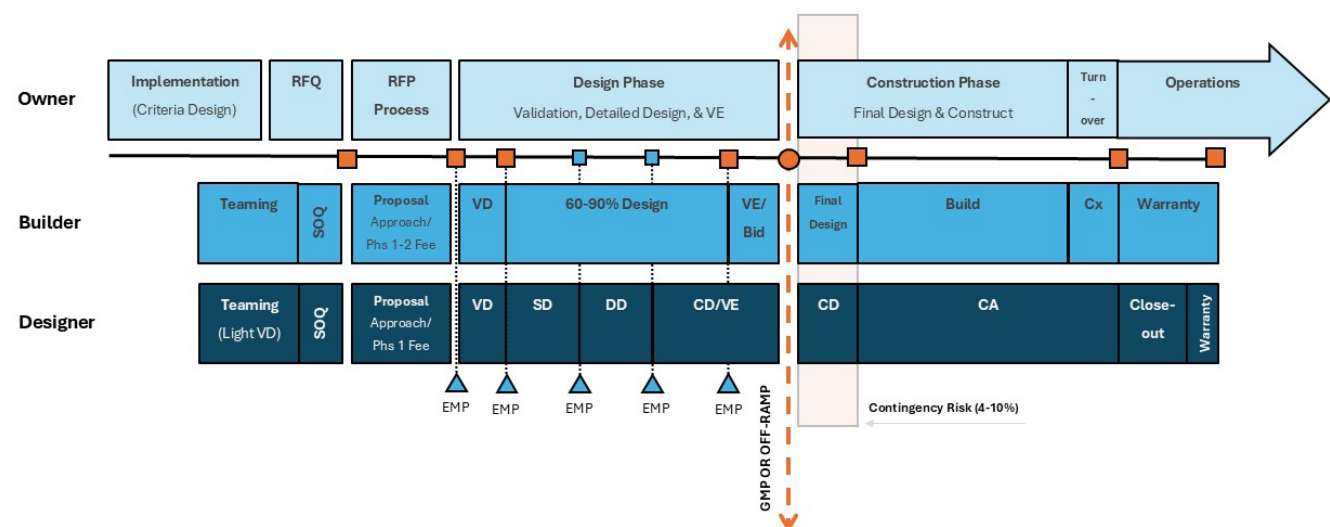
<i>Design-Build Documents:</i>	The Design-Build Documents consist of the Agreement between Owner and Design-Builder, other documents listed in the Agreement, and Modifications issued after execution of the Agreement, all of which form the Contract and are as fully a part of the Contract as if attached to the Agreement or repeated herein.
<i>Subcontractor:</i>	The Subcontractor is the person or entity identified as such in the Agreement and is referred to throughout the Subcontract Documents as if singular in number.
<i>Architect:</i>	The Architect is a person or entity providing Design Services for the Design-Builder for all or a portion of the Work and is lawfully licensed to practice architecture in the applicable jurisdiction.
<i>Work:</i>	“Work” means the (a) services required of the Design-Builder prior to the execution of the Design-Build Amendment, (b) Design Services, and (c) Construction Work.
<i>Construction Work:</i>	“Construction Work” is the construction, and services to support construction, required by the Design-Build Documents, whether completed or partially completed, and includes all other labor, materials, equipment, and services provided, or to be provided, by the Design-Builder to fulfill the Design-Builder’s obligations under the Design-Build Documents.
<i>Early Release Work:</i>	“Early Release Work” is a limited, predetermined portion of the Project or scope of the Work that the Owner authorizes the Design-Builder to commence before the parties execute the Design-Build Amendment.
<i>Design Services:</i>	“Design Services” are the professional services, including those services that are rendered by architects and engineers, which are required to fulfill the Design-Builder’s obligations under the Design-Build Documents. Design Services do not include professional or other services necessary to support Construction Work which are provided by Subcontractors engaged by the Design-Builder.
<i>Cost of the Work:</i>	The Cost of the Work includes all costs reasonably incurred by the Design-Builder in the proper performance of the Work as described in the Design-Build Amendment.
<i>Project:</i>	The Project is comprised of all design and construction, of which the Work performed under the Design-Build Documents may be the whole or a part, and may include design and construction by the Owner and by Separate Contractors.

# QUICK REFERENCE COMPARISON OF DESIGN-BUILD WORKFLOWS

## Traditional Design-Build Workflow



## Progressive Design-Build Workflow

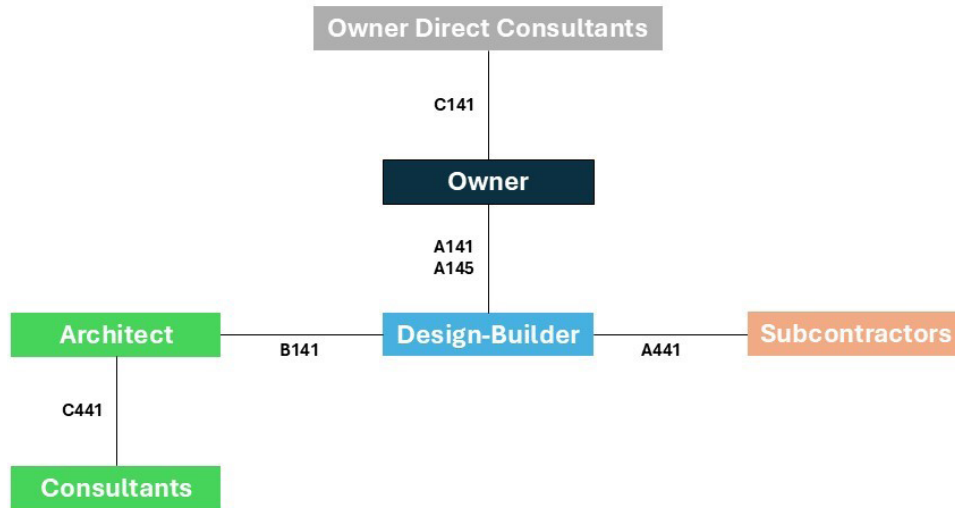




## DESIGN-BUILD FAMILY OF DOCUMENTS

Below are diagrams and explanations of the two Design-Build Families offered by AIA Contract Documents:

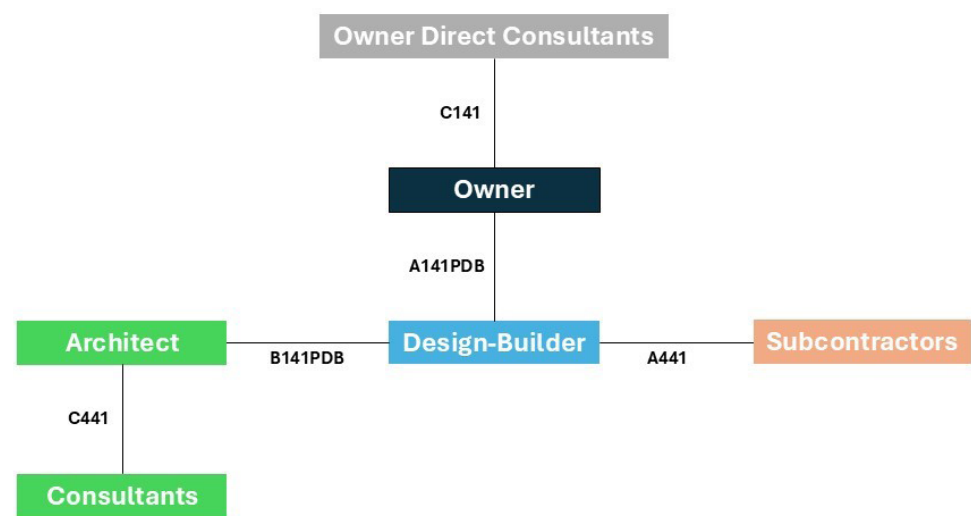
### Traditional Design-Build Family



The Owner hires the Design-Builders using form A141–2024. The Owner is also empowered to retain its own Consultants using C141–2024. These Consultants may be retained to assist with Bridging Design Services, Construction Administration Services, site assessment, Planning Services, and more. C141–2024 Exhibit A provides a list of potential Consultant services, or the parties may fill-in the relevant scope of Consultant’s services.

The Design-Builders then retains the Architect using B141–2024. The 2024 iteration of the Design-Builders/ Architect agreement is renumbered to B141 from B143 to be consistent with other Design-Build offerings. Further, under past agreements the Design-Builders hired a General Contractor using the previous A142–2014, and the General Contractor then engaged with Subcontractors. After listening to industry feedback, this process has been streamlined and the A142 eliminated. The Design-Builders can now retain any necessary Subcontractors using A441–2024. The Architect is able to retain Consultants using C441–2024, which is based on AIA Document C401™–2017, Standard Form of Agreement Between Architect and Consultant.

**Progressive Design-Build Family**



On a Progressive design-build project, the Owner hires the Design-Build using a different form than on a Traditional design-build project: the A141PDB-2024. The Design-Build then retains the Architect using B141PDB-2024. Each of these documents has been specifically tailored to meet the needs of Progressive design-build projects. The Consultant and Subcontractor forms, A441-2024, C441-2024, and C141-2024 remain the same whether on a Traditional or Progressive design-build project.

## PERFORMANCE OF THE WORK

Prior to the 2024, AIA Contract Documents required the Design-Builder to warrant that the “Work” – inclusive of all design and construction – would conform to the Design-Build Documents and be free of defects. This approach was preferred as it was found that the Owner selected the design-build delivery method because the Design-Builder was the single source of responsibility. It was not seen as equitable for the Owner to bear the risk of design and construction where the Owner was not hiring the Architect or Subcontractors. This approach was problematic in that the Design-Builder owed the Owner what was essentially a standard of perfection, while the professional liability insurance carried by the Design-Builder or its Architect, Engineers, and other design professionals only covered negligence. This meant that the Design-Builder bore the risk for any non-negligent errors committed by the Architect or its designers. In contrast, the risk of design errors is borne by the Owner under a design-bid-build delivery method. For instance, under B101®-2017, Standard Form of Agreement Between Owner and Architect, the Architect is obligated to perform its services with the same skill and care ordinarily provided by Architects performing the same services in the same or similar locality under the same or similar circumstances. However, under the Spearin doctrine, the Owner impliedly warrants the accuracy of the plans and specifications and their suitability for their intended use. *Therefore, the risks of construction following defective plans are carried by the Owner rather than the Contractor on a design-bid-build project.*

To mitigate the hazards of the Design-Builder bearing this risk, the Design-Builder’s standards and obligations relating to its performance of the work were modified in the 2024 documents. The Design-Builder must provide Design Services during both the Design and Construction Phases consistent with the degree of skill and care ordinarily provided by Design-Builders performing the same services in the same or similar locality under the same or similar circumstances. With regard to warranty, the Design-Builder now provides the same warranty as a Contractor provides on a Design-Bid-Build project, as found in AIA Document A201®-2017: the work will be of good quality and new unless the Design-Build Documents require or permit otherwise, and that the work will conform to the requirements of the Design-Build Documents and be free of defects, except for those inherent in their quality or otherwise expressly permitted by the documents.

# OWNER'S CRITERIA

Early in the Design-Build process, the Owner will prepare the Owner's Criteria. This refers to the list of specific requirements and expectations the Owner wants to set for the project. This is the opportunity for the Owner to dictate project goals, schedule requirements, the budget and scope for the work, and any aesthetic/design preferences on the project. However, the degree to which the Owner's Criteria is developed may turn on whether the project is Traditional or Progressive.

## 1. Traditional

The amount of information provided in the Owner's Criteria for a Traditional design-build project will vary depending on the type of project. However, Traditional design-build projects are generally better served by drafting a more robust set of Owner's Criteria. You may see these referred to as "bridging" documents. Bridging occurs where an Owner retains a design Consultant prior to issuing the Request for Proposal, and this Consultant prepares an initial design and budget for the project. This allows the Owner to produce usable Criteria prior to the selection of the Architect for the project. There is a balance to be struck between providing specific enough information to guide the Design-Builder's work and ensure the criteria are met, versus providing too much information. On a Traditional Design-Build project, the Parties may wish to use Exhibit A to C141-2024, agreement Between Owner and Consultant for a design-build project. While the document as a whole is perhaps more suited to Progressive design-build projects, Sections A.4 and A.5 of C141-2024 deal with bridging services and the development of the Owner's Criteria, respectively. In using this language to obtain a bridging consultant, the Owner can obtain well-developed Owner's Criteria. After selection, the Design-Builder will review the Owner's Criteria and provide a limited evaluation of its contents. The team will use this material in developing preliminary estimates for the Cost of the work as well as the Project schedule.

## 2. Progressive

In contrast to Traditional design-build, Progressive design-build is a more iterative approach that anticipates a greater level of Owner involvement. Therefore, successful Progressive design-build projects do not necessarily require robust Owner's Criteria. The Owner may use a bridging consultant or simply specify the target budget and schedule.

Rigorous evaluation of the Owner's Criteria is an important aspect of the Progressive design-build process. The Design-Builder reviews the Owner's Criteria and the local conditions under which the work will be performed. The Team then prepares a preliminary design, recommends fast-track scheduling and Early Release Work, and develops a preliminary estimate of the Cost of the Work and compensation for Design Services performed post-Design-Build Amendment. Additionally, they create a schedule for the Design Services and construction of the work. The Design-Builder will also suggest adjustments to the Owner's Criteria to align with applicable laws, project site conditions, the Owner's budget for the Cost of the Work, and the Owner's project timeline. This should culminate in the Architect's preparation of a written report evaluating the Owner's Criteria. This is an attempt to mitigate the risk inherent in overreliance on the Owner's Criteria without subsequent confirmation.

Should the Owner wish to use a bridging consultant to prepare its Criteria, Sections A.4 and A.5 of Exhibit A to C141-2024, Agreement Between Owner and Consultant for a Design-Build Project are again appropriate. This enables a third-party architect to assist with design standards and Owner's Criteria prior to the hiring of the Project Architect.

Once the Owner's Criteria has been validated, the project will progress to the well-recognized Design Phases: Schematic Design, Design Development, Construction Documents, and any Supplemental or Additional Services.

## DESIGN PHASE

The Design Phase predictably consists of Design Services, distinguishable from Construction Work and other Work Prior to the Execution of the Design-Build Amendment.

On traditional design-build projects, the Design-Builder must submit a Preliminary Design to the Owner following the Owner's Written Consent to Proceed. The Owner is then required to review the Preliminary Design. If the Preliminary Design is acceptable, the Owner will again issue a Written Consent to Proceed. Under A141-2024, this step is a prerequisite to executing the Design-Build Amendment. On a Traditional design-build project, only Preliminary Design occurs before executing the Design-Build Amendment. The remainder of the design occurs after the Design-Build Amendment is executed. The Traditional Design-Build agreement incorporates design language from AIA Contract Documents' Owner/Architect agreements. For instance, the ensuing Design Phases—Schematic Design, Design Development, and Construction Documents—are based on language found in the B-Series documents. The Owner will be required to review and approve the Design-Builder's work after each of these phases.

In contrast, the Progressive Design-Build Agreement contemplates that the Preliminary Design, Evaluation, and Full Design will occur before the Design-Build Amendment is executed. The Design-Builder's Report is due after evaluation of the Owner's Criteria. The Design-Builder is also required to review and/or investigate the on-site conditions prior to issuing its report. Another distinguishing element of the Progressive Design-Build agreement is the presence of Additional Services in the Design Phase. Again, this functions as it does in other AIA Contract Documents' Owner/Architect agreements. The Design-Builder must notify the Owner of the need for Additional Services. Upon receiving the written authorization, the Design-Builder may proceed to perform the Additional Services.

## EARLY RELEASE WORK

On both Traditional and Progressive Design-Build Projects, there may be circumstances in which the Owner wishes to authorize the Design-Builder to conduct a limited scope of “Early Release Work” prior to execution of the Design-Build Amendment. To perform Early Release Work, the Design-Builder first prepares a Proposal for the Owner’s review and acceptance for the relevant portion of work. If the Owner accepts, the Design-Builder then prepares an authorization to proceed with Early Release Work. The authorization to proceed should include terms that address the scope of work or services to be performed, schedule, compensation, retainage, insurance, bonds, and other terms applicable to the Early Release Work. To assist with this process, AIA Contract Documents offers the AIA Document G746-2024, Authorization to Proceed with Early Release Work for a Design-Build Project. The value of this Early Release Work should ultimately be included in the Contract Sum identified in the Design-Build Amendment.

## DESIGN-BUILDER’S PROPOSAL AND DESIGN-BUILD AMENDMENT

The Design-Builder’s Proposal and Design-Build Amendment are key milestones on a Design-Build Project. The Proposal is where the Design-Builder submits a list of all Drawings, Submittals, schedule, key personnel, and either the Contract Sum or Guaranteed Maximum Price. For more information on the contents of the Design-Build Amendment, please see discussion below regarding Exhibit B.

On a Traditional design-build project, the Proposal follows the Owner’s approval of the Design-Builder’s written report and Preliminary Design. The Preliminary Design will usually be designed to the same extent as the Schematic Design in the Progressive Design-Build context. On a Progressive Design-Build Project, the Design-Builder’s Proposal is prepared at a mutually agreed-upon time, though it should be no earlier than the completion of Design Development.

The Design-Build Amendment is where the Owner and Design-Builder set forth the agreed upon terms from the Proposal. The Amendment will ultimately establish the Contract Sum or Guaranteed Maximum Price, Commencement Date, Substantial Completion Date, the Design-Build Documents, and any other information upon which the price and Contract Time are based.

There are general concerns for any Design-Build Project, as well concerns attendant to the two varieties. Does the Owner have sufficient resources to ensure that the technical submittals meet the needs of the project? If so, Traditional design-build is likely appropriate. If not, Progressive design-build may be better suited to ensure greater Owner involvement. If the design is particularly important to the Owner, or the Owner wants greater access to the Architect, Progressive design-build may be more desirable. Similarly, an Owner may opt for Progressive design-build if there are multiple stakeholders interested in a project, such as a hospital or laboratory.

**Certain concerns are more relevant to Traditional design-build projects. These include:**

- Are the clarifications/qualifications, assumptions and exclusions justified/acceptable?
- Are there contingencies built into the contract price? If so, is there a sufficient design refinement contingency to budget for unexpected costs arising from the refinement of the design.
- For risks that have been identified by the Owner, have the cost and schedule risks been addressed by the Design-Builder in the Proposal?
- Assuming the Owner's Criteria was sufficient, are the stakeholders' concerns addressed?
- What level of review does the Owner want to have with regard to submittals?

In sum, the Owner assumes more responsibility to ensure that its needs are being met on a Traditional design-build project. The above considerations will assist the Owner in reaching that goal.

**Certain concerns are more relevant to Progressive design-build projects. These include:**

- Allowances and contingencies should be relatively minimal, if not eliminated entirely. Remember, the Owner should receive a more complete set of design documents prior to executing the Design-Build Amendment.
- Do the Owner, its stakeholders, the Design-Builder, and all Consultants understand what is in the documents? Are the risks understood?

Given the level of Owner involvement, the Owner should have a clear understanding of the state of the design, thus alleviating concerns that the end product may be at odds with the Owner's vision.

## **COMPENSATION**

The Design-Builder's compensation structure is segmented between compensation for work performed prior to execution of the design-build amendment and compensation for work performed following execution of the design-build amendment. There are also differences between the compensation structure for Traditional design-build and Progressive design-build.

In A141-2024, the parties are provided with a fill point for pre-Design-Build Amendment compensation which allows them to insert an amount or the basis for compensation for work performed prior to the Design-Build Amendment. On the other hand, compensation for post-Design-Build Amendment work can be a lump sum, percentage of cost of the work, or any other method of compensation agreed to by the parties.



In the A141PDB-2024, compensation for work prior to the Design-Build Amendment can be identified by the parties to be either a stipulated sum or any other method of compensation. The Design-Builder must include in its proposal its fee for preconstruction services and Design Phase services. Once the proposal is accepted, this fee is inserted into the contract between the owner and Design-Builder. Compensation for work after execution of the design-build amendment is based on the Design-Builder's fee, which can be stated as a lump sum, percentage of Cost of the Work, or other basis for determining the fee. The Design-Builder's fee is included in the guaranteed maximum price and set forth in Article 2 of the Design-Build Agreement.

## TERMINATION

The termination provisions are the same in both the Traditional and Progressive Design-Build Documents. These agreement terms can broadly be divided into pre- and post-Amendment termination powers. Prior to execution of the Design-Build Amendment, either party can terminate the agreement due to the substantial breach of the other. The Design-Builder is also empowered to terminate the agreement if the Owner fails to make a payment. Alternatively, the Design-Builder can suspend performance until such payment is made. Similarly, if there have been 90 days of cumulative suspensions on the project through no fault of the Design-Builder, it may opt to terminate the contract upon seven day's notice. In contrast, the Owner can terminate without cause at its convenience. The Owner/Design-Builder agreement now features a section under which the parties can input a termination fee and licensing fee that are triggered upon the Owner's termination of the agreement for convenience, or the Design-Builder's termination for either 90 days of cumulative suspension or the Owner's substantial failure to perform.

After the execution of the Design-Build Amendment, the Owner retains the ability to terminate the Design-Builder for convenience and without cause. The Design-Builder can terminate if, through no fault of its own, repeated suspensions or delays total more than 100% of the aggregate scheduled days to complete the project, or 120 days within a 365-day period, whichever is less. The Design-Builder can also terminate upon 60 consecutive days of stopped work, but this ability is also limited to situations where the stoppage is not the fault of the Design-Builder. Like the pre-Amendment terminations, the parties must give 7 days' notice to terminate after the execution of the Amendment.

Unique "Off-Ramps" have been built into the Progressive Design-Build Documents, that are not present in the Traditional Design-Build Documents. These allow the parties to go their separate ways on two occasions: (1) at the conclusion of the evaluation of the Owner's Criteria, and (2) following the submission of the Design-Builder's Proposal. These allow the parties to amicably separate if there are feasibility or constructability issues early in the process.

## EVIDENCE OF OWNER'S FINANCIAL INFORMATION.

The 2024 Design-Build Documents contain a mechanism by which the Design-Builder can request evidence of the Owner's financial arrangements. This enables the Design-Builder to confirm that the Owner has made sufficient financial arrangements to see the Project through. In the Owner/Design-Builder agreement, the Design-Builder has the right to demand proof of adequate financing at the inception of the project, as well as upon changes in circumstance as spelled out in the agreements. Similar terms are found in many AIA Contract Documents agreements for construction. To facilitate the request for financial information and the Owner's response, AIA Contract Documents publishes AIA Document G728™-2024, Contractor's Request for Information Relating to Owner's Financial Arrangements and G729™-2024, Owner's Response to Contractor's Request for Information Relating to Owner's Financial Arrangements.

## DISPUTE RESOLUTION

In the 2014 Design-Build Documents, any claims or disputes that arose during the project had to be submitted to an Initial Decision Maker for early resolution. The concept of the Initial Decision Maker stems from the Design-Bid-Build Documents, where the process was created to allow the project to continue while disputes were awaiting final resolution. In this context, the Architect serving as Initial Decision Maker is considered an independent third party with a duty to act impartially regarding claims by either the Owner or Contractor. However, on Design-Build projects, the Owner was designated as the Initial Decision Maker. This led to situations in which an interested party was rendering decisions.

For 2024, a new process was introduced to the Design-Build Documents that allows the parties to select either "Meet and Confer" or a "Project Neutral" for the initial resolution of claims. In the Meet and Confer approach, persons with the authority to bind each party schedule a session to meet and attempt to resolve the claim. Discussions during the Meet and Confer process are treated as settlement discussions and kept confidential. Alternatively, the Project Neutral is an individual selected by the parties that serves the same role as the Initial Decision Maker, reviewing claims and rendering an initial decision on the claims.

The selection of Meet and Confer or Project Neutral for the initial resolution of disputes involves various considerations. Meet and Confer may be more cost-effective, but it is likely that the parties may have already attempted and failed to resolve the dispute themselves. Meanwhile, a Project Neutral could be more expensive because, if they are not regularly involved in the project, they may need considerable time to review information and understand the issues in dispute. Alternatively, the Project Neutral could be compensated to remain involved throughout the project, in case a claim is asserted by either party. When selecting a Project Neutral, it's important to consider their experience in the type of project at issue as well as their background in architecture, engineering, contracting, and/or construction law.

If a resolution cannot be reached via the Meet & Confer session or Project Neutral, the Owner/Design-Builder agreement contains other avenues to obtain a negotiated resolution or eventually a binding dispute resolution. First, issues that arise on the project must be mediated as a condition precedent to filing a lawsuit or otherwise engaging in binding dispute resolution such as arbitration. This condition does not apply to claims waived elsewhere in the document, such as the waiver obtained upon the De-

sign-Builder's acceptance of the final payment. If mediation is not successful, the parties can opt to proceed to binding dispute resolution.

In Article 1, the parties should choose arbitration, litigation, or other as their method of binding dispute resolution. Litigation is the formal process of resolving disputes through the court system. Parties will be bound by relevant rules of civil procedure, rules of evidence and any local rules. The arbitration process is less formal than litigating in the courts and allows the parties and arbitrators to tailor the process to best serve the needs of stakeholders. If arbitration is selected, AIA Contract Documents default to American Arbitration Association Construction Industry Arbitration Rules. It should also be noted that the selection of the arbitrator is a key consideration. Rather than receiving a judge that is appointed to their case, the parties are empowered to help guide selection of their arbitrators. On construction cases, it is of paramount importance to select Arbitrators with subject matter experience. Generally, arbitration is viewed as a more efficient approach to achieving a binding resolution in terms of both cost and time.

## **LIMITATION OF LIABILITY**

AIA Contract Documents endeavors to balance the risk fairly on projects utilizing its forms and agreements. This philosophy is undergirded by a desire to allocate risk to the party best suited to manage that risk. This is seen in the provisions in the Owner/Design-Builder agreements that place limitations on elements of the Design-Builder's potential liability. A number of these limitations of liability concepts are common to both the Traditional and Progressive Design-Build agreements.

For example, both agreements contain a waiver of consequential damages. Consequential damages are defined to include the Owner's rental expenses, loss of use/income/profit, damage to business and reputation, and more. Conversely, the Design-Builder waives damages for lost profit and anticipated profit, principal office expenses, and damage to business and reputation. Both agreements also contain a waiver of subrogation, per the terms of which the Owner and Design-Builder agree to waive all rights against each other, as well as any Consultants, employees or Subcontractors, for any losses covered by property insurance.

Each of the Owner/Design-Builder agreements also contain provisions addressing the Owner's ability to assess liquidated damages against the Design-Builder. On Design-Build projects, Owners will assess liquidated damages against Design-Builders for failure to complete the work within the allotted Contract Time. In this way, liquidated damages function as a sort of pre-determined penalty upon breach. The 2014 Owner/Design-Builder Agreement contained a mere fill point in which the parties could enter their desired liquidated damages amount. While several of AIA Contract Documents' published guides contain language to help guide parties with this choice,<sup>9</sup> AIA-2014 did not contain any prescriptive language. During interviews, Design-Builder revealed that they are often successful in negotiating limitations on liquidated damages. Therefore, these sections of the Design-Build Agreements have been revised to prompt the parties to discuss the amount of liquidated damages, the date upon which such damages begin to accrue, and the limit, if any, on the amount that can be assessed. The parties are also prompted to insert any additional terms.

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<sup>9</sup> Owners using a qualification-based selection process may solicit limited pricing proposals as part of the RFP process. Pricing is typically limited to the costs the Design-Builder and Architect will incur during the second step of the selection process.

## LIMITATION OF LIABILITY PROVISIONS SPECIFIC TO PROGRESSIVE DESIGN-BUILD

A141PDB-2024 also includes certain provisions to better reflect the realities of Progressive design-build projects. First, there is a new provision by which the parties can agree to an aggregate limitation of liability—the maximum loss a party may incur if there is an issue on the project. This option is available only for Progressive Design-Build Projects because the delivery method is frequently used for large, complicated projects. As a result, the Progressive Design-Build agreement anticipates more sophisticated parties and greater Owner involvement. This new limitation of liability approach aims to spur more in-depth discussions about the best approach to such damages.

A141PDB-2024 also contains a new approach to additional limitations on the Design-Builder's liability. The parties are empowered to check one of two boxes in Section 16.1.8. The first box allows the parties to opt out of any additional limitation on liability. The second box denotes that the parties agree to the two ensuing paragraphs set forth below the checkboxes, each of which further limits the Design-Builder's liability. **In the event no box is checked, there is no further limitation on liability.**

The first paragraph limits the Design-Builder's liability for costs for which insurance is required. If the relevant box is checked, the Design-Builder's liability is capped at the limit of the applicable insurance policy. The second paragraph allows the parties to stipulate a total cap for other damages, expenses, and costs that are not covered by insurance required by the agreement.

There are exclusions to the limitations of the Design-Builder's liability, both for liquidated damages and under the second checkbox. These limitations do not apply to liability resulting from the Design-Builder's fraud, willful misconduct, failure to make payments related to the Work, or abandonment of the work.

## EXHIBIT A: INSURANCE EXHIBIT

The Insurance Exhibit is a document that is packaged alongside, and incorporated into, the Traditional and Progressive Owner/Design-Builder agreements. While the Owner/Design-Builder agreement itself received new insurance language, the Insurance Exhibit is the document by which the parties agree to, and memorialize, their respective insurance obligations.

As a threshold matter, the Exhibits to the Owner/Design-Builder agreements have been reordered. The Insurance and Bonds Exhibit, previously Exhibit B, is now Exhibit A to match AIA Contract Documents' conventions as found in other documents. The Insurance Exhibit has been reorganized for 2024, with the Owner's insurance obligations now preceding the Design-Builder's. As a result, A.1 addresses general terms, A.2 deals with Owner's Insurance, A.3 describes the Design-Builder's insurance and bond obligations, and A.4 contains any special terms and conditions.

The Owner's insurance obligations have been refined for 2024. While the Exhibit still requires the Owner to obtain property insurance in a builder's risk "all-risks" completed value or equivalent policy form, there are now sections where the parties can require coverage for certain causes of loss as well as other specific required coverages. Insurance for existing structures is now required where appropriate as well.

Finally, there are two new series of checkboxes for the parties to select other optional coverages common to construction projects. The first contains options for various types of extended property insurance for the project. The second is other optional insurance, which contains a new option for the Owner to obtain cyber security insurance. These are entirely optional, though the parties should discuss what types of optional insurance may be applicable. For example, cyber-crime has risen sharply between the development of the 2014 Documents and the 2024 Documents, and the parties may want to ensure the Owner is protected from its attendant risks.

The Design-Builder's insurance obligations have been altered as well. The Insurance Exhibit now explicitly obligates the Design-Builder to provide certificates of insurance to the Owner at certain times and include the Owner as an additional insured on its commercial general liability policy. The 2024 Documents maintain the Design-Builder's responsibility to purchase commercial general liability insurance, professional liability insurance, pollution insurance, and worker's compensation insurance. The commercial general liability insurance must now be written on an occurrence form. The exhibit also features a new Design-Build cyber security insurance requirement. With the increase in the frequency and sophistication of cyber-crime, this clause was added to insure against data loss, business interruption, and more. This should give the parties assurance regarding data loss, fiscal loss, and delays to the project itself. The Progressive Design-Build Insurance Exhibit is largely the same as on Traditional design-build projects, with minor revisions to match minor differences in party nomenclature and price.

## **EXHIBIT B: DESIGN-BUILD AMENDMENT**

As a result of the Exhibit reordering, the 2024 Design-Build Amendment is now Exhibit B. The Design-Build Amendment is executed after the relevant Owner/Design-Builder agreement is executed, and after a certain amount of design and preconstruction work has taken place. The Design-Build Amendment is an affirmation that the parties will proceed to advanced/final design and construction. The Design-Build Amendment is the opportunity for the parties to commit to the Contract Sum or Guaranteed Maximum Price, Contract Time, the Cost of the Work, and to memorialize any other information or relevant terms upon which the Amendment is based. The Design-Builder can also designate key project personnel, Contractors, and other project participants of note. On a Traditional design-build project, the Owner can designate any Separate Contractors it will retain. The information upon which the Amendment is based will largely consist of the documents submitted alongside the Design-Builder's Proposal: Criteria and any deviations therefrom, Specifications, Drawings, and more as set forth in the Design-Build Amendment.

Because much of this is premised on the information in the Design-Builder's proposal, there should be little opportunity for the Owner's surprise. For this reason, the Design-Builder should also prepare the Amendment, though the final document will be the result of a coordinated effort between the Owner and Design-Builder.

## **BI4I-2024, STANDARD FORM OF AGREEMENT BETWEEN DESIGN-BUILDER AND ARCHITECT**

BI4I-2024, Design-Builder/Architect Agreement has a similar structure to the prior BI43-2014. It is menu-driven, allowing the Design-Builder and Architect to select which services the Architect will provide for the project. It is possible that the Design-Builder may have designers in-house who perform some of the typical architect services. Depending on the nature of the project, it is also possible that the Design-Builder may want or need to hire separate firms for different scopes of services. For example, if the project is a hospital, they may need one Architect to design the lab spaces and another to design the rest of the facility. Although the structure of the 2014 and 2024 Documents is similar, the 2024 Documents include considerable revisions to incorporate concepts and provisions that are now standard in the industry.

The Design-Build Agreement between the Owner and the Design-Builder is not incorporated by reference into the Design-Builder/Architect Agreement, making it a stand-alone document. It is critical to note that BI4I-2024 pertains solely to Design Services rather than a combination of design and construction. Under AI4I-2024, the Design Services performed by the Design-Builder are subject to the standard of care, ensuring there is no gap in liability for the Design-Builder concerning Design Services. With the current document setup, if the Design-Builder wants to flow obligations down, they must restate those obligations in BI4I-2024, including the Owner's criteria and scope.

### **BI4IPDB-2024**

The majority of the BI4IPDB-2024 tracks the language of the Traditional BI4I-2024. However, BI4IPDB-2024 mirrors the progressive principles of AI4IPDB-2024, structuring the Design Phase services differently from BI4I-2024. In the traditional BI4I, Design Services are presented as a menu. BI4IPDB removes this menu approach and aligns the Architect's Design Services with those required of the Design-Builder in AI4I PDB. Although procurement and construction administration services generally retain the menu style, several services identified as optional in BI4I-2024 have become mandatory in BI4IPDB-2024. For example, "Evaluations of the Work Related to the Architect's Portion of the Project" is optional in BI4I-2024 but mandatory in BI4IPDB-2024.

### **Design-Assist**

The Design-Builder/Architect agreement now recognizes the significant role that design assist plays in design-build projects. While the Architect is designing the project, they need the input of the Design-Builder and the Design-Builder's trade subcontractors. These individuals provide valuable constructability reviews and critical input regarding the availability of equipment and materials. The Design-Builder does not want the Architect specifying something that is unavailable for procurement. They also provide input on the time requirements for procurement to ensure that systems, equipment, and other materials are available when needed. For example, specialized mechanical equipment may take months to procure, or structural steel may need months to fabricate, necessitating early ordering to account for long lead times.

Ultimately, the information furnished by the Design-Builder and its subcontractors is intended to aid the Architect in preparing plans and specifications for the project. The Architect maintains control over the preparation of Construction Documents and holds complete responsibility for the design. They make the

final decision on whether and to what extent to incorporate the information provided by the Design-Builder's Consultants and Subcontractors into their design and are responsible for identifying and resolving design conflicts. Despite retaining responsibility for the design, the Architect is not left vulnerable if the Design-Builder or Subcontractors provide inaccurate information. The 2024 Documents stipulate that the Architect is entitled to rely on, and is not responsible for the accuracy, completeness, or timeliness of the services or information provided by the Subcontractors, ensuring they have recourse against Design-Builder and the Subcontractors.

### **Delegated Design**

Another newer concept that has been added to B141-2024 is delegated design. The documents now acknowledge that the Architect may not be the sole designer of the project and will likely be delegating certain portions of the design to the Design-Builder or its trade subcontractors. Depending on the nature of the project, the Architect may, for example, delegate the design for mechanical systems, fire protection, truss calculations, retaining walls, or structural steel. B141-2024 and B141PDB-2024 now include a section for the Architect to identify portions of the design that are expected to be performed using delegated design services. This provision is valuable for the Design-Builder, who needs to contract the various trade subcontractors and negotiate appropriate scopes and compensation.

When portions of the design are delegated, the Architect's first and most crucial job is to establish the performance and design criteria that the delegated designer must achieve. The Design-Builder and trade subcontractor tasked with the delegated design must prepare submittals that meet the established design criteria for the Architect's review. The Architect reviews these submittals to ensure they conform with the overall design concept and coordinates the delegated design with related work. Subsequently, the Design-Builder or delegated designer signs and seals the Drawings and Specifications through a licensed design professional, if required, and the Architect signs and seals the Construction Documents.

In this scenario, there is a dynamic of two-way reliance and recourse: the Design-Builder or delegated designer is entitled to rely on the Architect's performance and design criteria, while the Architect is entitled to rely on the adequacy, accuracy, completeness, and certifications provided by the Design-Builder or delegated designer. Either party has recourse against the other should the information provided be inadequate or inaccurate.

### **Indemnification**

The 2024 Design-Build Owner/Architect Agreements now include a professional services indemnity. This provision tracks the indemnification provision in AIA Document B103™-2017, Standard Form of Agreement Between Owner and Architect for a Complex Project, requiring the Architect to indemnify and hold the Design-Builder harmless for damages, losses, and judgments (including reasonable attorneys' fees) arising from third-party claims, to the extent that they are caused by the negligent acts or omissions of the Architect or its consultants. Notably, the Architect's obligation to indemnify does not include a duty to defend because the up-front defense obligation is not covered by most professional liability insurance policies. Additionally, like in B103-2017, the Architect's obligation to indemnify is limited to the available proceeds of the insurance coverage required by the Agreement.



Also, a reciprocal indemnification obligation was added for the Design-Builder, requiring the Design-Builder to indemnify the Architect for damages, losses, and judgments (including reasonable attorneys' fees) arising from third-party claims, to the extent that they are caused by the negligent acts or omissions of the Design-Builder or its subcontractors. Similarly, the Design-Builder's obligation to indemnify does not include a duty to defend. Moreover, for both the Architect and Design-Builder, obligations were added for each to indemnify the other for infringement of a copyrighted or patented design or materials to the extent caused by that party's negligent acts or omissions. This addition recognizes the fact that most Owner-Design-Builder agreements now require such an indemnification by the Design-Builder.

### **Dispute Resolution**

BI4I-2024 and BI4IPDB-2024 also contain updated dispute resolution provisions. It is common that many claims and disputes between the Design-Build and Architect are derived from the rights and obligations or claims that the Design-Builder has under its agreement with the Owner. Accordingly, the 2024 Documents provide that claims, disputes, or other matters arising out of or related to the agreement are subject to the same dispute resolution procedures as those in the Owner/Design-Builder agreement. However, if the Architect is legally precluded from participating in those proceedings, or if the claim or dispute is unrelated to a dispute between the Owner and Design-Builder, then the parties are first obligated to mediate the dispute. In addition, the parties have the option to choose either arbitration or litigation as the method of binding dispute resolution, for claims not resolved in mediation.

### **Architect's Scope of Services**

When scoping the Architect's services, there are several considerations to keep in mind, especially when differentiating between Traditional and Progressive approaches. In a Traditional design-build delivery method, the Preliminary Design is limited, whereas in a Progressive approach, Preliminary Design does not exist as such. Instead, it involves an evaluation of the Owner's Criteria and a more thorough review of budget, schedule, and program. The primary distinction lies in the Architect's role before the Design-Build Amendment is executed. In Traditional design-build, much of the design work is completed after the Design-Build Amendment is signed. Conversely, on projects using BI4IPDB-2024, more extensive services are provided prior to the Design-Build Amendment. Additionally, the scope of services in a Progressive approach is more comprehensive compared to the Traditional approach.

### **Architect's Fee Structure**

Determining how an Architect puts together fees depends on the delivery method. Under the Traditional approach, parties need to discuss how the Architect might get paid for Preliminary Design during the request for proposal process. Often Architects should negotiate a fee for that Preliminary Design with the Design-Builder, regardless of whether the Design-Builder gets paid by the Owner and the parties figure out how to reconcile the fee if the Design-Builder is awarded the project. In a Progressive design-build project, the Architect gets paid a fee for design phases and does not finalize the fee until the final scope is known.

## **Design to Budget**

When it comes to designing to budget, the Traditional approach places much more risk on the Architect because the design is preliminary, usually in the Schematic Design or early Design Development phases. In contrast, Progressive design-build involves less risk due to more advanced design stages, typically reaching some level of completion of the Construction Documents. Cost estimating in the Traditional method is an optional service outlined in the menu of services, whereas, in Progressive design-build, the Design-Builder is responsible for performing cost estimating.

## **Coordination**

The obligation of coordination with other professionals is addressed in Section 3.1.4 of both the B141-2024 and B141PDB-2024. Basic services include coordination of the design only with the Design-Builder and the Design-Builder's Consultants and Subcontractors. The Architect has the right to rely on information furnished by the Design-Builder and its Consultants and Subcontractors. If the Architect is providing coordination of the Design-Builder's and Owner's Consultants, it falls under Supplemental Services, for which specific requirements should be outlined in detail.

## **UPDATES TO C141-2024**

AIA Document C141-2024, Owner/Consultant Agreement acts as the general conditions between the Owner and Consultant while AIA Document C141-2024, Ex. A, is a menu style of categories of services to be performed by the Consultant. Exhibit A includes a setup where each article contains basic services for various categories, and many articles also include a menu of expanded services related to the category. These services can be selected based on what is needed from the Consultant.

## **Bridging Architect Using C141-2024**

C141-2024 can be utilized to hire a bridging architect to prepare bridging documents for a design-build project. Bridging documents are used to provide design-build contractors bidding the project with the project's design and construction requirements. These documents typically contain a summary of the work, technical requirements, plans, project constraints, reference materials, and contractual requirements. From the Owner's perspective, one of the common disadvantages of design-build projects is the loss of control over the project's development. When properly prepared, bridging documents can alleviate this issue and advance the Owner's goals.

Another advantage to bridging documents is that potential Design-Builders do not have to incur costly fees associated with the typical procurement process. The potential Design-Builders are provided with the Preliminary Design from the Owner, reducing the amount of time and costs required to prepare a sufficient bid proposal. This enables firms who may otherwise be unable to cover the traditionally high costs of a preparing a proposal to meaningfully participate in the bid process. This also allows for a more realistic price proposal. Bridging documents can also reduce pre-construction costs.