



Mitigating the Risks of Delegated Design

The use of delegated design in construction, where a project’s design professional of record (DPR) assigns responsibility for a specific part of the design to the contractor, is on the rise throughout the industry. This approach, historically limited in practice to a narrow set of specialized elements like steel stairs and fire sprinkler systems, is now being used for an ever-growing scope of specialties, from intricate excavations and sophisticated deep foundations to concrete systems, equipment, finishes, IT infrastructure, and much more.

As delegated design becomes more commonly incorporated into design and construction processes, disputes regarding responsibility and liability are also bound to increase — making it critical for all stakeholders to understand and mitigate the inherent risks.

The Pros and Pitfalls of Delegated Design

Delegated design is growing in popularity for good reason. When a portion of a project’s design is delegated to a contractor, a specialized design professional is used to design the element according to the performance criteria set forth by the DPR. This highlights the core benefit of having specialized designers handle specialized design tasks that are best suited for their expertise.

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This is particularly valuable given that in today’s world, it is neither realistic nor plausible for one architect or engineer to be an expert in every element of construction. The building industry is more complex than ever, and the rapid pace of innovation driving new construction methods and materials is only accelerating. Beyond leveraging the experience of carefully selected partners, strategically delegating design elements simultaneously enables the lead designer to concentrate on the building design and more holistically address the challenges of multi-faceted projects.

Delegated design can also offer merit from a dollars and cents perspective. If a project budget will not allow sufficient time for the DPR to do the deep research required to design a specialized element, assigning the work to the contractor can be a more efficient approach.



While delegated design can yield efficiencies, it can potentially cause design gaps and project delays at certain stages if it is not properly managed. Consider the example of a building where the design of a metal wall panel system is delegated to the contractor and the design of other cladding systems in the building is handled separately. The metal wall panel system and the additional cladding systems each meet their respective performance requirements, but it is later discovered that neither scope of work accounted for the necessary transitions between the systems, leaving the design incomplete.

This is just one specific example of design gaps that can occur. Other potential design gaps may include things like transitions between delegated steel stairs and stair landings, the relationship between the delegated steel structure design and the rest of a wall or floor assembly's components, or the interface between a delegated IT infrastructure design and a building's general electrical systems.

If gaps are identified during the design process, they can be addressed and rectified. However, depending on their nature, if they are identified during installation, they could cause unexpected delays. When these interfacing design gaps occur, work usually has to be paused while the designers address them. In addition to impacting the project's progress, these delays often result in claims and disputes.

Responsibilities & Liability: Designers vs. Contractors

All this raises the question of who is responsible when there is a delegated design dispute or claim related to issues like design gaps, compliance, or performance. The lead designer? The contractor? It depends.

As the professional tasked with design responsibility by the authorities, the DPR typically assumes all responsibility and professional liability for the project design given their role as the lead designer. This can be a gray area when it comes to delegated design. Does the contractor assume design responsibility and liability for the work it has been delegated, which is structured to meet the performance specifications documented by the DPR? Or does the risk continue to live with the DPR, who is responsible for detailing the performance criteria as well as ensuring the contractor's designs meet those requirements within the context of the larger project?

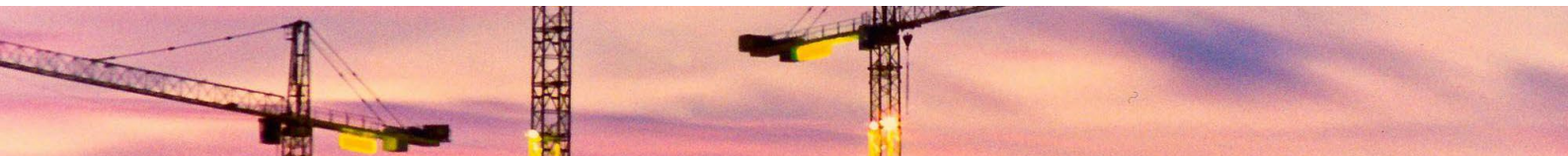
Delegated Design Case Study

As a licensed architect serving as an expert witness on disputes involving delegated design, I have seen outcomes fall both ways.

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One published case involved the appeal of Mercury Construction Corporation v. the U.S. Government in 1980. ^[1] Mercury was contracted to build two barracks in Fort McClellan, Alabama. The project included the delegated design and subsequent installation of air ducts. Mercury designed and built the ducts using fiberglass in areas above fire-resistant ceilings, but the Government contended that the ducts were required to be sheet metal in order to meet fire safety requirements.

^[1] Appeal of Mercury Constr. Corp., 80-2 B.C.A. (CCH) P14,668; 1980 ASBCA LEXIS 121, affirmed by Mercury Constr. Corp. v. United States, 230 Ct. Cl. 914, 1982 U.S. Ct. Cl. LEXIS 220 (1982)



The Government ordered Mercury to either replace the fiberglass ducts with steel or install appropriate fire safety features. The construction firm did the latter but later demanded nearly \$150,000 for the additional work, stating that the Government had approved fiberglass ducts as part of the system. The Government contended that as part of the delegated design, it did require steel ducts at these fire-rated assemblies, and thus, the approval did not alter this requirement. Though the contract language may have been complex, the judge determined that the requirement to use steel ducts in this particular scenario was indeed documented in the construction contract. As a result, the contractor was found responsible for shouldering the extra cost of the remediation work. This case and others like it represent how contractors can be held liable, even if the delegator of the work approves the design.

The Importance of Contractual Language

Agreements that clearly delineate each party's responsibilities and the standards they must meet are, without question, essential for avoiding disputes related to delegated design. As stated by the American Institute of Architects (AIA), "Delegated Design responsibilities should be expressly stated in an agreement."^[2] Their guidance continues to say:

An agreement that includes delegated design services should include (1) the contractor's overall scope of work; (2) a clear statement regarding the delegated design responsibilities, including responsibility for the adequacy of the performance criteria and the design responsibilities for each project participant; (3) how design information will be exchanged and reviewed, including if, how, and when digital models will be used and shared[;] (4) the contractor's compensation[;] and (5) requirements for professional liability insurance to be obtained by the contractor.^[3]

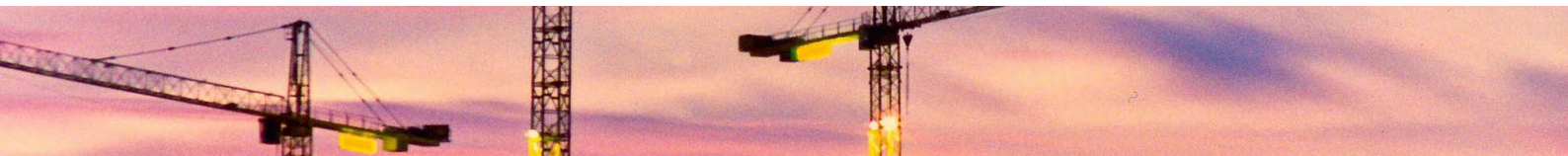
Further, AIA Document A201 – 2017, "General Conditions of the Contract for Construction," includes language in Section 3.12.10.1 that offers more specific recommendations for the delegated design portion of construction contracts. Key points include:

- "If professional design services or certifications by a design professional related to systems, materials, or equipment are specifically required of the Contractors by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy."
- "The Contractor shall be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents."
- "The Contractor shall cause such services or certifications to be provided by an appropriately licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings, and other submittals prepared by such professional."
- "The Owner and Architect shall be entitled to rely upon the adequacy and accuracy of the services, certifications, and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor the performance and design criteria that such services must satisfy."
- "The Architect will review and approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents."^[3]

In short, AIA A201 – 2017 puts the onus on designers to provide the exact specifications of the delegated design work, holds the contractor responsible for meeting those performance criteria, and puts the responsibility of reviewing and approving those designs on the lead designer.

^[2] https://dassets.aiacontracts.org/ctrzdweb02/zdpdfs/design-collaboration-paper_aia-aisc_081320.pdf

^[3] <https://learn.aiacontracts.com/articles/what-contractors-need-to-know-about-delegated-design/>



Best Practices for Risk Mitigation

As with every approach to design and construction, there are risks to using delegated design. These risks can be minimized by following leading practices derived from decades of industry experience and expertise managing design disputes.

- **Follow the AIA’s guidance to clearly define roles and responsibilities in delegated design contracts.**
Despite the AIA’s recommended contractual provisions in A201 – 2017 being widely recognized and readily available, they are often not relied on heavily enough. As a result, the lines between designers and contractors are needlessly blurred, leaving each party and the overall project susceptible to potential risks. The upfront effort to define strict contractual terms for all roles and responsibilities pays dividends for everyone.
- **Ensure the lead architect has a thorough understanding of the appropriate performance requirements for each delegated design deliverable.**
This might seem counterintuitive given that delegated design can be most valuable when the DPR does not have the in-depth knowledge to design a specialized element themselves. However, they need to have a solid enough understanding of that specialized area given their responsibility to detail the performance criteria that the delegate’s design must meet. Inadequate performance criteria jeopardize the integrity of the design and set up the project to incur extra costs and delays down the line.
- **Take a collaborative approach, when possible, to determine performance criteria.**
Building on the point above, delegates bring valuable and unique expertise to the table. Their perspective should be leveraged to help ensure the performance criteria stipulated by the lead designer include considerations and nuances that may not be on the radar of a professional who does not specialize in that area. This type of collaboration might be met with resistance in a delegated design scenario as it could create liability repercussions for the contractor. However, contractual terms can mitigate those concerns while enabling both partners to do what is best for the project, similar to how architects and delegated design professionals in the steel fabrication space openly collaborate on required specifications.
- **In addition to professional liability insurance, explore protective indemnity insurance.**
Beyond professional liability insurance that helps protect policyholders from risks related to their own errors and omissions, it is wise for designers and delegates to explore protective indemnity coverage. Protective indemnity “covers protective claims for amounts the insured is entitled to recover from downstream design professionals arising out of their failures in rendering professional services that exceed the downstream party’s own liability insurance.”^[4] This provides added protection for architects given their responsibility to review and approve a delegate’s design, as well as for gray areas where the delegated design work intersects with their scope of work.

^[4] <https://www.lexology.com/library/detail.aspx?q=b0e18cb7-9cb3-4a9a-898c-1d22fdd6ae0e>



- **Keep in mind there are some state-specific statutes that govern delegated design.** It is not common, but a handful of states have statutes outlining the use and/or parameters of delegated design in their jurisdiction. New York has the Board of Regents Rule 29.3(b). Florida has a delegation framework for engineering design. California has its own rules that pertain to delegated design, as do Missouri, Ohio, Massachusetts, and Texas.^[5] Be aware that these statutes, where applicable, must be factored into plans and contracts.

Looking ahead, all signs point to the continued growth of delegated design. Understanding the risks that accompany its benefits, and working to proactively minimize these exposures, can make all the difference between forging a productive, successful partnership between designers and delegates and potentially facing a costly and disruptive dispute.

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^[5] <https://www.agc.org/sites/default/files/pdf/Handout%20on%20Delegated%20Design.pdf>