

# Mitigating Design-Build Risks

by Joseph Nawa, Vice President, RT Specialty, LLC

Design-Build comes in several different flavors, but whether it is Contractor led, Designer led or some other combination, it creates complex exposures to loss that don't exist in Design/Bid/Build delivery methods. If you are involved in a Design-Build project it is critical that you understand your risks and manage and insure them appropriately. This article, written by Joseph Nawa of RT Specialty, LLC's National Environmental and Construction Professional Liability Practice, will help demystify the risks inherent to the Design-Build delivery method.

Construction risks are more broad and costly than ever. Knowing what they are helps prevent liability problems.

Design-build has become a growing phenomenon within the commercial building industry. According to the Design Build Industry of America (DBIA), "over half of owners have already or will use design-build in the next five years." This represents approximately 44% of the construction spending expected to take place in the nonresidential, highway/street and water/ wastewater marketplace by 2021.

As a result, contractors and construction firms are increasingly incorporating in-house design capabilities into their services and business initiatives. According to the 2019 AGC Risk study conducted by FMI, "over 43% of contractors are implementing in-house design capabilities" with 25% of the remaining respondents saying they're likely to consider those services in the future due in large part to the methodology's many advantages.

## Increased Contractor Accountability

While blurring the lines between the traditional roles of all the players, the contractor stands as the single-point-of-contact for every project detail. The success and financial rewards as well as the liability, complaints and potential litigation all fall squarely on the prime's shoulders.



For these reasons, the risks have never been broader, more intense and costlier for design build contractors. This is especially true for those builders looking to expand in-house capabilities with design services.

## Bulked Up Risk Management

Subsequently, many firms are strengthening their risk management strategies with Contractor's Professional Liability (CPrL) policies to cover the damages arising from the negligent acts, errors and omissions performed by or on behalf of any construction firm. This includes construction firms that are currently expanding their services with in-house design capabilities to better accommodate the increase in design-build opportunities.

In fact, some CPrL programs now offer first-party coverage, such as "protective" or rectification coverage (otherwise known as mitigation) to better protect against design problems and challenges. Example:

### Protective Indemnity

Protective Indemnity (first party) will protect against the damages incurred by the insured (contractor) that the insured is legally entitled to recover from design profes-

sional errors. As excess coverage, it also pays for the delta between the total damages and the damages paid by the professional liability limits available to the insured from the design professional. This is especially pertinent for contractors, who subcontract design/build activities to third-party design professionals (DP).

### **Rectification/Mitigation**

Rectification/Mitigation (first party) pays for expenses reasonably incurred during the mitigation or rectification of a negligent act, error, or omission arising from professional services (performed by or on behalf of the insured) that would otherwise lead to a professional liability claim. In addition, rectification coverage essentially replaces the DP's insurance solely with respect to the costs incurred by the named insured to remedy the design errors discovered in the course of construction and would have resulted in professional liability claims.

### **Enhanced Exposures**

During a recent analysis of RT Specialty's ECP book of business, we found that nearly 40% of the CPrL claims made throughout 2016 and 2017 consisted of design and in-house engineering errors. These findings were further supported by the AGC/FMI's 2018 risk study in which 92% of its participants admitted that design documents they received were less complete than in the past. Some of the contributing factors included more owner-driven schedules that demand quicker delivery times and an inadequate sharing of the associated design and construction risks.

In the past, such problems have led to numerous claims and settlements.

For instance, a contractor hired an engineer to develop the preliminary design of a bridge to be built over the Intracoastal Waterway. The contractor used the plan to win the design-build contract that was \$6 million less than other bids. Since the preliminary plan was under-designed, the contractor was responsible for supplying the 400,000 pounds of steel needed to complete the project. Given the design-build bid was won with a guaranteed maximum price, the contractor was obligated to finish the project with little room built in for errors or delays.

The engineer's exposure was in excess of policy limits, so the claim settled for \$1,091,000.

Another example occurred when an architect was retained by a design-builder to design loft condominiums. Built in a commercially zoned area, the sleeping spaces were constructed as live/work lofts. Once completed,

## **Important Issues to Consider**

**With design-build, everything from design and construction to the management of subcontractors and specification of materials are under the prime contractor's purview. Contractors, however, often enter design-build agreements without fully understanding the depth of their responsibilities or even properly implementing the methods needed to establish direct communications between construction and design teams. This is particularly concerning in an environment that is terribly unforgiving of the big and small errors that can result in costly delays, overrun budgets and the dire financial consequences that in extreme circumstances can actually ruin companies and businesses.**

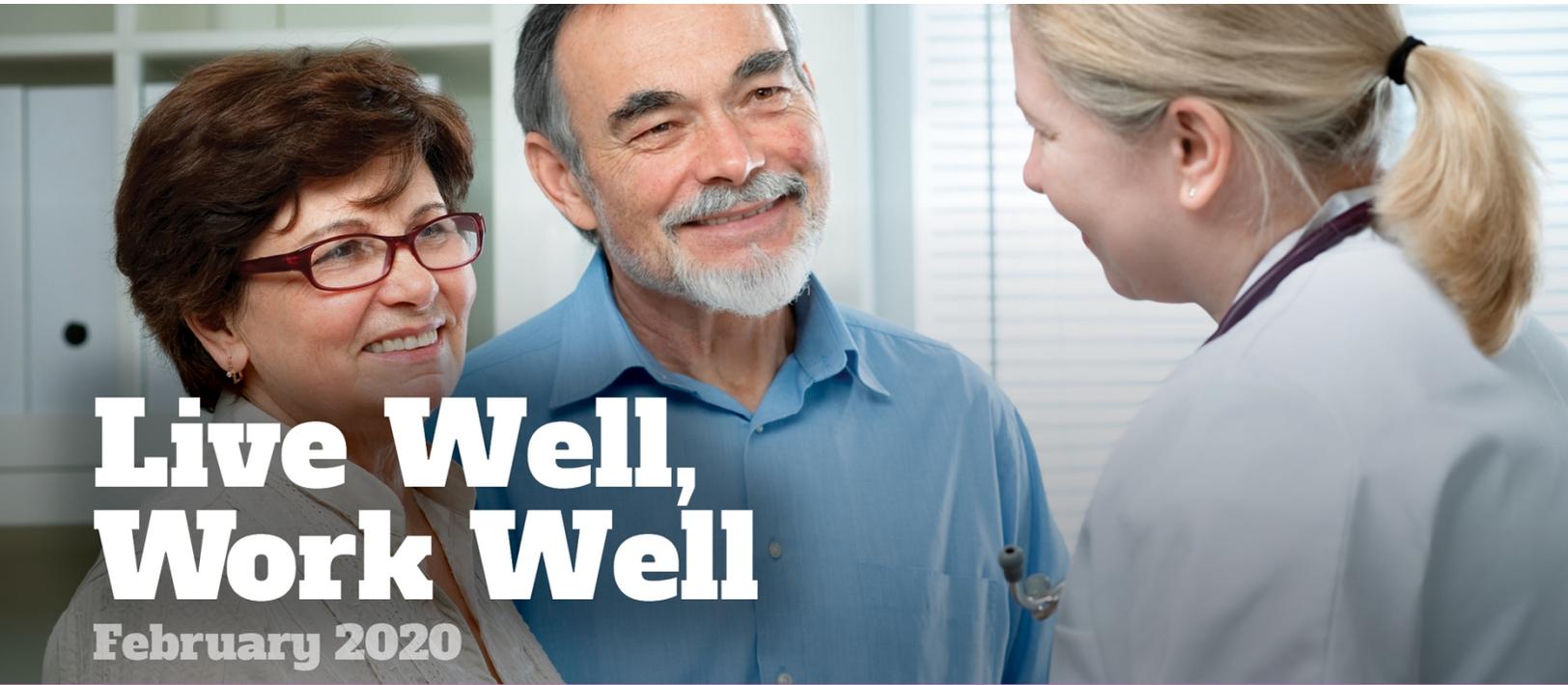
the homeowners association sued the developer due to noise complaints from all 46 unit owners.

The architect's counsel determined that a jury would have decided against their client, and the claim was settled for \$125,000.

### **Expanding CPrL coverage**

Ever-evolving to support the needs of design-build contractors, insurers have steadily expanded the coverage terms of CPrL policies by loosening protective and rectification restrictions; widening professional service definitions; and providing more consistent offerings paired with competitive pricing options. Today's market also consists of approximately 30 domestic and international carriers that regularly supply rate reductions to the firms, which demonstrates a consistent revenue increase pending the absence of adverse claims and a static palate of services. This includes project-specific coverages for smaller-sized projects (construction values less than \$100 million), stable rates for larger projects and limited faulty workmanship coverage.

In a market that's always looking for the next competitive advantage, CPrL is becoming the go-to risk management method to protect against potentially catastrophic claims that commonly result in eight-figure demands. ■



# Live Well, Work Well

## February 2020

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### It's American Heart Month: What You Need to Know About Heart Disease

Heart disease is the leading cause of death for both women and men in the United States, causing about 647,000 deaths annually, according to the Centers for Disease Control and Prevention (CDC). Heart disease is also an extremely expensive disease—costing the United States about \$207 billion annually in health care, medications and lost productivity.

#### What is heart disease?

Heart disease is a term used to refer to several different types of heart conditions. Out of all the different conditions, coronary artery disease—caused by plaque buildup in the walls of the heart's arteries—is the most common.

**According to the CDC, 1 in 4 Americans die each year from heart disease.**

#### What are the symptoms of heart disease?

The symptoms of heart disease can vary, and some people may not even know they have a heart condition until they have a heart attack. Common signs and symptoms of heart disease include shortness of breath, dizziness, chest pain, heart palpitations, weakness and fatigue.

If you experience any of these symptoms, or if they become more severe or frequent, contact your doctor.

#### Is heart disease preventable?

In many cases, heart disease can be prevented by living a healthy lifestyle and properly managing health conditions. American Heart Month, organized by the American Heart Association (AHA), is designed to raise awareness about heart disease and how people can prevent it. Here are tips that may help prevent heart disease:

- Refrain from smoking.
- Maintain a healthy weight.
- Limit your sodium intake.
- Eat a well-balanced, healthy diet.
- Exercise regularly.
- Manage your stress.
- Limit your alcohol intake.

If you are concerned about your risk of developing heart disease or would like to find out more information about the condition, visit the AHA's [website](#) and contact your primary care physician.

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# Ginger Quinoa With Green Beans

Makes: 6 servings

## Ingredients

- 1 cup quinoa
- 1 ½ cups water or broth
- 2 cups green beans
- 2 ½ Tbsp. lemon juice
- 1 Tbsp. olive oil
- 1 Tbsp. sesame oil
- 2 Tbsp. soy sauce
- ¼ tsp. ground ginger

## Preparations

- 1) Toast quinoa in a dry skillet over medium heat, stirring constantly for about 3 minutes.
- 2) Put quinoa in a medium pot and add water or broth.
- 3) Bring to a boil, then let simmer until all of the water is absorbed and quinoa is tender (10-20 minutes).
- 4) Set aside and leave uncovered to cool.
- 5) While quinoa is cooling, microwave the green beans until just tender.
- 6) Rinse in cold water to stop the cooking process.
- 7) In a large bowl, combine the quinoa, olive oil or cooking oil, sesame oil, green beans, lemon juice, soy sauce and ground ginger. Stir well.
- 8) Season with salt and pepper.
- 9) Serve at room temperature.

## Nutritional Information

(per serving)

|                |        |
|----------------|--------|
| Total calories | 239    |
| Total fat      | 9 g    |
| Protein        | 7 g    |
| Carbohydrate   | 33 g   |
| Dietary fiber  | 6 g    |
| Saturated fat  | 1 g    |
| Sodium         | 486 mg |
| Total sugars   | 2 g    |

Source: USDA

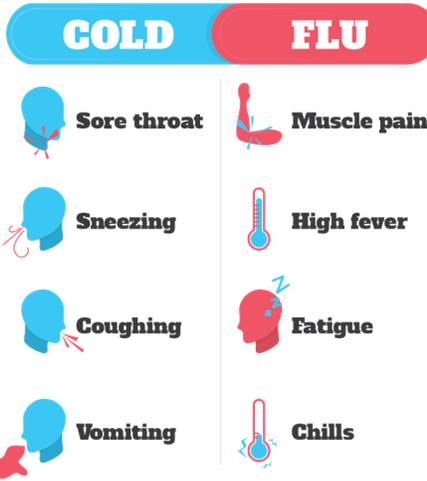
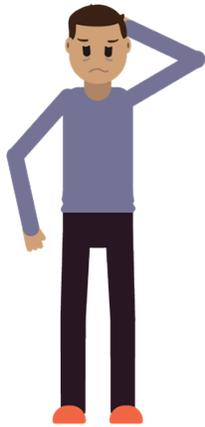
## A Cold Is Contagious for Longer Than You'd Think

The winter months are commonly associated with decreasing temperatures and increasing cases of the common cold. Typically, symptoms of the common cold come on gradually, and may start with a sore throat or irritated sinuses.

According to Healthline, when you have a cold, you're contagious approximately one to two days before symptoms start and can continue to be contagious for up to seven days after you've become sick. Unfortunately, many people can't stay home for that long to fully recover. Consider the following suggestions to help avoid becoming ill or passing on a cold:

- Wash your hands with warm water and soap often.
- Avoid touching your eyes, mouth and nose.
- Sanitize commonly touched surfaces.
- Always cough and sneeze into your elbow—not your hands—to prevent spreading germs.

## Is it a COLD or the FLU?



## Ergonomics Is the Way to a Pain-free Workday

The discomfort and pain from slouching at a desk all day is very common, with many office workers suffering pain at least once a week. Avoid unnecessary discomfort at work by focusing on your posture and making your workstation ergonomically appropriate. When applied to your workstation, these two tips will help promote good posture and correct ergonomics:

- **Chair position**—Adjust the height of your chair so that your feet rest comfortably on the floor, with your knees about level with your hips, making sure your seat is not pressing against the back of your knees.
- **Computer monitor**—Position your monitor 18 to 30 inches from your eyes. The top of your screen should be at eye level or below so you look slightly down at your work. If glare is a problem, turn off some or all overhead lights and close blinds if possible.

# Spotlight On



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*For more information, go to [www.houndsavers.org](http://www.houndsavers.org)*