

## USE OF BRIDGING CONSULTANTS IN DESIGN-BUILD RELATIONSHIPS

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## **I. HISTORY AND INTRODUCTION.**

### **A. WHAT IS BRIDGING?**

On most design-build projects, the architect or engineer either works in-house for the contractor, or serves in a subservient role as a subcontractor. In still other cases, the design professional leads the design-build team by holding the prime contract or acts as a joint venture partner. With any of these forms of delivery, the project owner does not have what it considers an “independent” design professional watching out for the owner’s interests. Designers and contractors complain that in a design-build competition, the cost of preparing designs sufficient to submit cost proposals often prevents otherwise qualified teams from participating. To solve both problems some owners (especially in the public sector) retain an independent design consultant to prepare a preliminary design, then prepare outline specifications, assist with the RFP and selection process, and even stay on board during the construction phase to review pay applications, inspect the work and certify the completion date. “Bridging” is the name given to this process. A graphic depiction of bridging is shown in figure A, below.

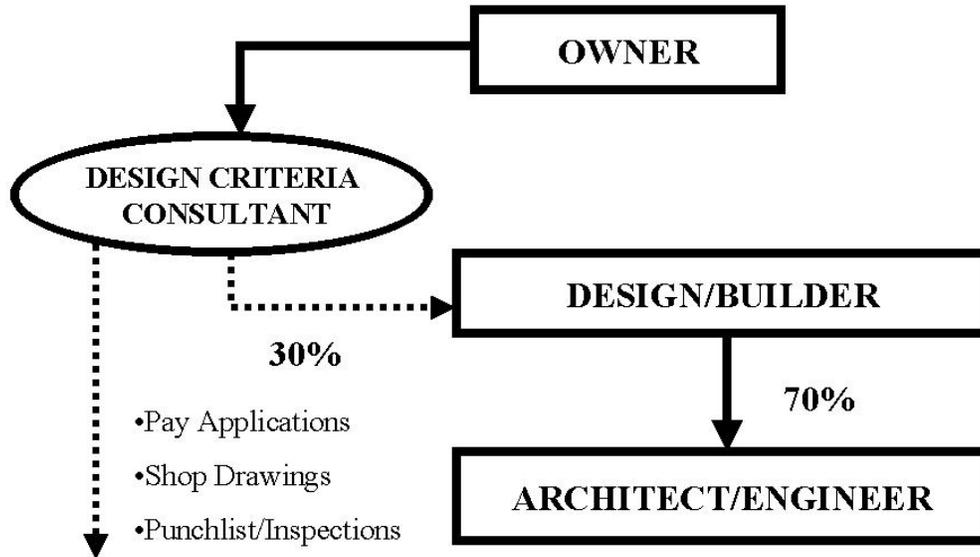
As shown below, the owner hires a design consultant (the “Design Criteria Consultant”) to prepare design documents, usually to a level of no more than 30% complete. Those schematic design documents are then used to obtain competitive proposals from design-build teams. The successful team will include architects and engineers who will complete the technical drawings with the remaining 70% of information needed for construction. Since the design is often already laid out by the owner’s consultant, some refer to the successor’s role as “Draw-Build,” in that the design is already set and all that is left for the design-build team is to “draw it.” The Design-Build Institute of America (DBIA) sometimes refers to this method of delivery as “Design/Design-Build” or two other equally awkward names “Design-Build/Bid” and “Design-Draw/Build”.<sup>1</sup> Still others call the role of the owner’s design consultant “A/E-1.”

In the most common forms of bridging, the owner’s design consultant remains as the owner’s representative to provide limited construction administration services, including final inspections and close out of the project, acting in the traditional role of the architect or engineer. The owner’s consultant may function as a neutral in resolving disputes and in passing judgment

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<sup>1</sup> DBIA’s Policy Statement Regarding Design/Design-Build, *Date Line*, DBIA Newsletter (Nov. 1999).

on the quality of work.



**Figure A. The Bridging Concept**

## **1. ORIGINS AND BRIEF HISTORY**

The term “bridging” was conceived by George Heery, FAIA, formerly of Heery International, now a principal of The Brookwood Group in Atlanta, Georgia. But the concept of one design professional completing a design started by another is not new and has ancient roots. Bridging goes back to the days of pharaohs and pyramids, when due to a shorter human life span and the decades it took to build the great Egyptian and Mayan pyramids, designs started by one person were completed by another by necessity. Centuries later, with the Gothic and Italian Renaissance cathedrals, it was expected that the original designer would not be the same one to oversee the project’s completion for the same reason. Italian Renaissance architect Leon Battista Alberti remarked in the 15<sup>th</sup> Century that, “The brevity of human life and the scale of the work ensure that scarcely any large building is ever completed by the same man as begins it.” Paying homage to the original designer’s intent, Alberti continued, “I feel that the original intentions of the author, the product of mature reflection, must be upheld.”<sup>2</sup>

A good example of this is the great red-tiled cathedral in Florence, Santa Maria del Fiore, whose original design was the combined work of architect Giovanni di Lapo Ghini and a competing master mason, Neri di Fioravanti. The two designers built huge scale models of their building designs in 1366. The Fioravanti design was chosen in 1367, with its unprecedented 143

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<sup>2</sup> Alberti, *On the Art of Building in Ten Books*, The MIT Press (1988), pp. 318-319.

foot wide dome.<sup>3</sup> His model alone was 15 feet high and 30 feet long. The great cathedral took decades to construct and each year the cathedral's architects and wardens were required to place their hands on a copy of the Bible and swear an oath that they would build the church exactly as Fioravanti's model portrayed it.<sup>4</sup> The project was later completed by yet another master-builder, Filippo Brunelleschi, whose model won the competition in 1418 to complete the cupola (or dome) and a later competition in 1436 for the lantern on top of the dome. So while many credit Brunelleschi as the "architect of record" for the Florence Cathedral, it was Fioravanti whose elaborate set of "bridging" documents – his huge model - outlined the overall design for the structure and dome, while Brunelleschi merely engineered and finished the great dome as a successor architect.

In modern-day design-build, the role of the owner's consultant is written into the laws of many states. The AIA, EJCDC and DBIA all publish form contracts to be used in hiring an owner's consultant to represent and assist the owner, including the preparation of a preliminary design.<sup>5</sup> The concept has its fans and critics, like anything else.

## **2. INDUSTRY DEFINITIONS**

The AIA and AGC defined bridging in a joint 1995 publication like this:

"Bridging is a hybrid of the traditional design-bid-build process and design-build. An owner selects an AE to develop a project design through design development (approximately 30 percent - 50 percent of the design work), and prepares scope of work documents which form the basis for competitive selection of the project delivery team. The AE specifies the project's functional and aesthetic requirements but leaves the details of construction technology up to the contractor. Construction technology is specified with performance specifications. The project delivery team then has single-point responsibility for final design and constructing the project."<sup>6</sup>

## **3. THE CANADIAN VIEW**

The concept of bridging has crept across the border into Canada. The Canadian Design-Build Institute (CDBI) defines "Bridging Consultant" in its Practice Manual as, "An individual

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<sup>3</sup> King, *Brunelleschi's Dome*, Penguin Books (2000), pp. 6-12.

<sup>4</sup> *Id.*, at p. 10.

<sup>5</sup> See, AIA's B142 Owner-Consultant Agreement (2004 ed.); DBIA's No. 501 Contract for Design-Build Consultant Services (1996 ed.); and EJCDC's Standard Form of Agreement Between Owner and Owner's Consultant for Design Professional Services on Design/Build Projects, No. D-500 (2002 ed.).

<sup>6</sup> *AIA/AGC Recommended Guidelines for Procurement of Design-Build Projects in the Public Sector*, p. 5 (January 1995).

or firm employed or engaged by an owner to develop a design to an advanced stage whereby the design-builder's role is reduced to completing the construction documents and construction (see Draw-Build)."<sup>7</sup> The CDBI Practice Manual defines "Bridging" as, "A form of design-build delivery whereby the owner enters sequentially into two separate contracts. The first contract is with a Bridging Consultant who prepares preliminary and developed designs. The second is with a draw-builder who completes (and assumes responsibility for the design prepared by the Bridging Consultant) the construction documents and builds and delivers the project."<sup>8</sup>

The CDBI plainly sees the role of the design-build contractor as merely drawing up the design prepared by the Bridging Consultant, calling this form of project delivery "Draw-Build," while assuming full liability for the design prepared by the Bridging Consultant.

#### **4. DESIGN CRITERIA CONSULTANTS**

States that have fully developed design-build statutes or regulations often write the role of the bridge firm into the law. Florida was the first to do so with its "Consultants' Competitive Negotiation Act."<sup>9</sup> Under the Florida Act, a "design criteria professional" is selected to prepare a "design criteria package" used to furnish sufficient information to permit design-build firms to prepare a bid or a response to a Request for Proposal. The design criteria package is to include:

"performance-based criteria for the public construction project, including the legal description of the site, survey information concerning the site, interior space requirements, material quality standards, schematic layouts and conceptual design criteria of the project, cost or budget estimates, design and construction schedules, site development requirements, provisions for utilities, stormwater retention and disposal, and parking requirements applicable to the project."

Under the Florida Act, the design criteria professional must be a firm that has a current certificate of registration to practice architecture or engineering. The firm is selected using a qualifications-based process similar to the procedures used to hire design professionals for state work. In determining whether a firm is qualified, the agency is to consider such factors as the ability of professional personnel; whether a firm is a certified minority business enterprise; past performance; willingness to meet time and budget requirements; location; recent, current, and projected workloads of the firms; and the volume of work previously awarded to each firm by the agency, with the object of effecting an equitable distribution of contracts among qualified firms. Some other states that have written the role of design criteria consultant into their procurement laws are Nebraska, South Dakota and West Virginia (all of which call this role "performance-criteria developer").<sup>10</sup>

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<sup>7</sup> Canadian Design-Build Institute Practice Manual, 100 Series, Section 1.2.1 (2000).

<sup>8</sup> *Id.*, at Section 1.3.

<sup>9</sup> Fla. Stat. § 287.055.

<sup>10</sup> Neb. Rev. Stat. § 79-2003; S.D. Cod. Laws § 5-18-1 (9); W.Va. Code § 5-22A-2.

## **5. MINI-BRIDGING**

A variation used by some design firms who lead design-build projects has been called “mini-bridging.” In this model, the design-builder hires trusted engineering consultants to prepare design criteria and performance specifications. Those preliminary designs are then given to trade subcontractors who act as design-build subcontractors for their respective portions of the project, e.g. mechanical, electrical or even structural components. The appeal of this model is that the design-builder can select trusted engineering consultants to prepare design criteria that will meet the project needs. This gives a comfort level when working with design-build trade subcontractors in whom the design-builder does not have complete confidence. The trade subcontractors must prepare designs that meet the specified performance criteria.

### **B. PROS AND CONS OF BRIDGING?**

**1. Con’s of Bridging.** The detractors of bridging discourages this method of procurement, stating that it eliminates many of the advantages inherent in true design-build. For example, DBIA’s primary argument against bridging is that the real advantages of design-build are lost when the design is merely handed to the team at a 30% level of completion. Among DBIA’s criticisms of bridging are:

1. That this method precludes the design-build team from any significant creativity and innovation, since basic solutions and concepts are determined before the design-build team begins.
2. Work performed in the first phase determines many of the design and functional aspects of the project for which the phase two team has to take responsibility (and liability), without any real input, leading for greater potential for disputes.
3. True design-build permits fast-track construction with the ability to procure long lead time items and begin field operations well before a project is at the 35% point of design.

When more than 30% of the design is provided in the RFP, the selection of the design-build team tends to be more price oriented since the design is already set. In those cases, there is often less emphasis on qualifications-based selection. DBIA urges selection of design-build teams based on a combination of qualifications and price, but feels that under “bridging” or “design/design-build” the selection is based solely on the basis of low price. Case studies of actual public sector projects would show otherwise, since bridging is regularly used in public procurement, yet qualifications of the design team remain a large portion of the selection criteria.

The level of design done by a bridging consultant varies. In the best uses of bridging, there is a great amount of design left up to the design-builder, who can be innovative in developing the design. When all that is left is to draw up the plans, however, the real value of design-build is lost. The level of completeness of bridging documents is an open debate and is often project-driven. One study by the New York State Department of Transportation in September 2002 reported the following ranges of designs included in procurement packages for

highway and other project types:<sup>11</sup>

|               |  |
|---------------|--|
| 5% to 15%     | Alameda Corridor Transportation Authority                      |
| 10%           | Florida DOT  |
| 10% to 20%    | Arizona DOT  |
| 10% to 40%    | Ohio DOT   |
| 15%           | Utah DOT   |
| 20%           | Atlantic City/Brigantine Connector (New Jersey DOT)            |
| 30%           | Utah Transit Authority (light rail project)                    |
| 30% to 40%    | Washington State DOT   |
| 35% initially | NAVFAC (now ranges 15% to 35% depending on project complexity) |
| 35%           | Transportation Corridor Agencies (Eastern)                     |
| 35%           | Transportation Corridor Agencies (Glenwood)                    |
| 35%           | Transportation Corridor Agencies (San Joaquin)                 |

**2. Pro's of Bridging.** On the “Pro” side, corporate owners have been downsizing in-house construction staffs and outsourcing more of those functions. With design-build, where the project’s program and design-build selection are important to success, owners need help because they have more responsibility for defining and procuring than in traditional construction where an A/E firm traditionally helps with programming and contractor selection. This presents opportunities for a new type of owner-consultant, such as program managers, and even new roles for traditional design or construction management firms.

Where modest stipends are awarded to the unsuccessful design-build teams, most would agree that the amount received does not come anywhere near covering the cost of the actual design competition. If five firms are short-listed, with only one winning the full design-build contract, the four unsuccessful teams can invest substantial sums. Only the larger firms can play that game on a regular basis and write off the uncompensated design effort. However, with bridging the teams do not have to incur a costly design fee just to compete, and can use the preliminary design prepared by the bridging firm. This entices more qualified firms, more often, to participate when there is no expensive design competition.

Owners are used to having an architect to discuss the project with, to advise them and to “keep an eye on the contractor”. Design-build without a bridge consultant requires a great deal of trust. Some owners are just not ready for that level of trust and a bridge consultant helps make the transition to design-build.

**3. Bridging As A Target Market.** Bridging is a target market for some design firms. The CEO of one large A/E firm in Virginia said in 1999 that his firm’s main focus is to be an “A/E-1”, handling conceptual design and then acting as the owner’s agent supervising the design-build team.<sup>12</sup> With firms targeting this role for their business niche, expect more

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<sup>11</sup> *Design-Build Practice Report*, prepared by Parsons Brinckerhoff Quade & Douglas, Inc. for NYSDOT (Sept. 2002), p. 18-19.

<sup>12</sup> *Design Firms See Design-Build Growing But They Remain Wary*, p. 19, *Engineering News Record*, Sept. 27, 1999.

competition. Firms will begin to compete on who is the most qualified “bridge” firm.

While fees for “bridge” architects are generally less than for traditional full-scope services, there is an attraction toward this service for at least three reasons. First, most architects will agree that the “fun” part of architecture is the design phase. Construction documents and specifications, the technical side of design, preparing “working drawings” is the less glamorous aspect. Bridge architects get to do concept designs, the way architects did in studio in college, leaving the remaining sticky, technical drawings and detailed specifications to the design-build team to develop. Second, the bridge architect retains a close relation to the owner, preserving the role of agent, advisor and trust that is enjoyed on traditional project delivery. Last, there is less risk for the bridge firm. Insurance statistics show that the majority of claims against A/E firms are for design errors or omissions. With the bridge firm doing only a 30% or so set of schematic or design development drawings, which are normally not even sealed, it is expected that the design-build team will prepare the final technical details used for construction and seal those documents. If there is a design error or omission in the drawings or specifications, liability will most likely fall on the design-build team’s architect or engineer who prepared those documents, not on the bridge firm.

### **C. INDUSTRY VIEWS ON BRIDGING**

Up until 2005, the AIA’s official Position Statement on design-build and bridging recommended that when public agencies use design-build, they should put out a detailed RFP with “project specific comprehensive scope of work documents prepared by licensed architects and other qualified professionals *who are retained for the duration of the project.*” The AIA also recommended that the design-build proposals are evaluated by a jury of qualified professionals, “including those licensed professionals who prepared the scope of work documents”. AIA recommended that the design-build entity be required to retain and use the design architect of record “throughout the duration of the project to maintain design integrity, functional and technical responsiveness, and to conduct on-site construction observation.” This is, of course, intended to make sure that the contractor does not hire an architect only to prepare construction documents, with no role during construction. The AIA’s official Board Position on alternative delivery was revised in 2005 and no longer takes a position on bridging.

## **II. LEGAL ISSUES IN BRIDGING.**

### **A. SELECTION LAWS**

In those states with laws governing the selection of a design-criteria consultant, it is stated that the selection shall be on qualifications, just like when hiring an architect or engineer. Once chosen to be the owner’s consultant, however, many states bar the owner’s consultant from serving on a design-build team for that same project due to either a conflict of interest, or an unfair advantage to a design-build team who snatches up the owner’s confidential advisor.

Several states have laws that prohibit an architect or engineer from bidding on plans they prepare.<sup>13</sup> South Carolina law bars architects and engineers who perform design services from

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<sup>13</sup> Okl. St. Title 59 § 46.27.

performing any work on the same project as a contractor, either directly or through a business in which the architect or his firm has “greater than a five percent interest”.<sup>14</sup> The intent of such laws is to prevent an unfair competitive advantage to the firm most familiar with the design. It would certainly defeat the purpose of having an “independent” architect/engineer if the bridge firm could prepare the design criteria package and then link up with one of the design-build teams competing for the project. The better approach is to bar the bridge firm from participating on any of the design-build teams.

Florida’s “Consultants’ Competitive Negotiation Act”, Fla. Stat. § 287.055, makes it clear that, “A design criteria professional who has been selected to prepare the design criteria package is not eligible to render services under a design-build contract executed pursuant to the design criteria package.” Likewise, South Dakota procurement law states that, “The performance criteria developer may not submit a proposal to enter into the design-build contract and the design-builder may not delegate or contract services under the design-build contract to the performance criteria developer.”<sup>15</sup> West Virginia says the performance criteria developer is “disqualified” from submitting a proposal and no design-builder may delegate services to the performance criteria developer.<sup>16</sup>

At least one Federal case has ruled that in this situation, the bridge firm cannot be part of a contractor’s design-build team.<sup>17</sup> The court ruled that Federal Acquisition Regulations (FAR) barred such participation and that with the bridging consultant’s participation, that team would have an unfair competitive advantage and an “organizational conflict of interest”. The case hinged, in part, on a Federal regulation, FAR part 9.505-2. That regulation stated that, “If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services -- or provides material leading directly, predictably, and without delay to such a work statement -- that contractor may not supply the system, major components of the system or the services [with certain exceptions]”.

## **B. CONFLICTS OF INTEREST**

The current AIA Code states:

“E.S. 3.2 Conflict of Interest: Members should avoid conflicts of interest in their professional practices and fully disclose all unavoidable conflicts as they arise.

Rule 3.201 A Member shall not render professional services if the Member’s professional judgment could be affected by responsibilities to another project or

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<sup>14</sup> S.Car. Code § 11-35-3245.

<sup>15</sup> S. D. Cod. Laws § 5-18-32.

<sup>16</sup> W. Va. Code § 5-22A-8 (a).

<sup>17</sup> *Matter of SSR Engineers, Inc.*, Comp. Gen. No. B-282244, 1999 U.S. Comp. Gen. Lexis 139; 99-2 Comp. Gen. Proc. Dec. P27 (June 18, 1999).

person, or by the Member's own interests, unless all those who rely on the Member's judgment consent after full disclosure."

Refer also to the NSPE *Code of Ethics for Engineers*, Rule II. 4.a (July 1996) which requires disclosure of all known or potential conflicts of interest that "could influence or appear to influence" the engineer's judgment. Conflicts of interest are the most common ethical issue in design-build, so much so that federal regulations discuss this topic. The regulations published by the Department of Transportation's Federal Highway Administration in December 2002, (67 Fed. Reg. 75902), show that significant thought was given to the issue of organizational conflicts of interest. The final rules state in 23 C.F.R. §§ 636.116 to 636.118 that policies on conflicts of interest should be stated in the RFQ or RFP, including that consultants who assist the owner in preparing the RFP will not be allowed to participate on a design-build team, unless involvement was at a "low level".

FAR 9.502 states that an "organizational conflict of interest" may result when there are factors which create "an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition."<sup>18</sup> Participating on a competing team may give that team an advantage in terms of qualifications since no other team could match the level of familiarity that the developer of the scope of work would have with the project. It would also effectively prohibit the owner from using that same design consultant for construction administration services during construction.

### **C. SPEARIN DOCTRINE AND BRIDGING**

Bridging adds a new twist to the proper role of the *Spearin*<sup>19</sup> doctrine in resolving the dispute. As the educated construction lawyer knows, the *Spearin* doctrine holds, generally, that when the owner furnishes detailed specifications to a contractor, the owner is deemed to *impliedly warrant* that those plans and specifications are accurate and suitable for their intended use. The *Spearin* case held that, "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications."<sup>20</sup> How does bridging change this doctrine? The answer depends on the level of design detail provided by the owner's consultant, and the amount of design discretion given to the design-build team.

As noted by the Veterans Administration Board of Contract Appeals in one case:

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<sup>18</sup> 48 C.F.R. § 9.502.

<sup>19</sup> *United States v. Spearin*, 248 U.S. 132 (1918).

<sup>20</sup> *Id.*, 248 U.S. at p. 136.

A properly written and administered design build contract transfers the risk of design and sufficiencies from the VA to the design builder. The owner is shielded when the design results in cost over-runs or does not work. *M.A. Mortenson*, ASBCA No. 39978, 93-3BCA, ¶ 26, 189. . . Specifications included in a design-build contract, however, to the extent that specific requirements, quantities, and sizes are set forth in the specifications, place the risk of design deficiencies on the owner.<sup>21</sup>

When the owner elects to substitute its discretion for that of the design-builder by providing detailed specifications via its bridging consultant, the owner should expect to carry the risk that comes with that substituted discretion, under traditional *Spearin* concepts. If the owner, in its effort to provide the design-builder a better idea of exactly what the owner seeks from the scope of work, provides erroneous or faulty information, the owner can be expected to bear liability under an implied warranty as with “traditional” project delivery.

#### **D. PERFORMANCE VS. PRESCRIPTIVE SPECS**

In the 2002 New York DOT study, a number of state agencies surveyed indicated their preference for performance specifications where possible on design-build projects, but almost all of the agencies relied on prescriptive specifications for significant portions of the project.<sup>22</sup> This can create a mixed bag of legal issues to sort out on public design-build projects when both types of specifications are included in the bridging documents.

*Performance Specifications* describe an end result, an objective or standard to be achieved, and leave the determination of how to reach the result to the contractor.<sup>23</sup> By contrast, *Design or Prescriptive Specifications* set forth in detail the materials to be employed and the manner in which the work is to be performed, and absent special circumstance, the contractor is required to follow them as one would a road map and without deviation.<sup>24</sup> It is not uncommon for a contract to contain both design and performance characteristics, and certainly one can find numerous government contracts exhibiting both performance and design specifications. Therefore, some forethought needs to be given into the level of detail contained in a set of bridging documents. The more detail and prescription given to the design-build team by the owner, the more likely the owner will be deemed to warrant the adequacy of its documents.

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<sup>21</sup> *Appeal of Donahue Electric, Inc.*, 2002 WL 319, 27907, (VABCA) VABCA No. 6618 (2002).

<sup>22</sup> *Design-Build Practice Report*, prepared by Parsons Brinckerhoff Quade & Douglas, Inc. for NYSDOT (Sept. 2002), p. 18-19.

<sup>23</sup> *Fruin-Colnon Corp., et al v. Niagra Frontier Transp. Auth.*, 180 A.D.2d 222 (Sup. Ct. NY 1992); *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576 (Fed. Cir. 1987).

<sup>24</sup> *Chantilly Const. Corp. v. Commonwealth of Virginia*, 369 S.E.2d 438 (Va. App. 1988); *L.L. Simmons Co. v. United States*, 412 F.2d 1360 (Ct. Cl. 1969).

#### **E. OWNERSHIP AND COPYRIGHTS**

The bridging consultant certainly is aware that another design professional will use its preliminary design to complete the project. Therefore, it is without saying that a firm serving as owner's design consultant must authorize the successful design-build team to copy and use its design. However, the bridging consultant may wish to restrict the use of the design to this one and only project, so that a successful design could be used again under control of the bridging professional.

AIA's B142, Owner-Consultant Agreement (2004 edition), says in Paragraph 3.2.1 that, "Drawings, specifications, and other documents, including those in electronic form, prepared by the Consultant and its sub-consultants are Instruments of Service for use solely with respect to the Project. The Consultant and its sub-consultants shall be deemed the authors and owners of their respective Instruments of Service and shall retain all common law, statutory and other reserved rights, including copyrights." The consultant grants the owner only a license to reproduce and use the documents in connection with the one Project, "including the Project's further development by the Owner and others retained by the Owner for such purposes, including the Design-Builder and the Design-Builder's design professionals." The license extends specifically to the design-builder and its design professionals.

#### **F. WHO IS THE A/E OF RECORD?**

It will be interesting to see how design professionals handle the credit for projects in which one firm does preliminary design and another serves as the design-build team's architect. Many of the AIA ethical complaints relate to one firm not giving proper credit to another firm when both play a role in the project. This comes up in awards competitions, in marketing brochures and in subsequent head-to-head competition and interviews. Two firms showing the same project in their qualification statement and brochures will confuse owners and hurt credibility. There is also the conflict as to who is the "architect of record" or "engineer of record" for the project. These labels, which have no legal meaning nor definition in standard contracts, often cause confusion when multiple firms are involved. Who is the true project "architect" on a project in which one firm does the bridge package and another firm does the remaining 70% or so of the design work?

The AIA's ethical Rule 4.201 requires members to "accurately state the scope and nature of their responsibilities in connection with work for which they are claiming credit." The official commentary to this Rule says that the intent is to prevent members from claiming credit for work they did not do and "denying other participants in a project their proper share of credit." Seven of the AIA's ethics decisions between 1987 and 1992 dealt with the giving or taking of credit for work. With bridging injecting two design firms into a project, we can expect more ethics complaints unless firms come up with a way to credit a competing firm with their role as either bridge architect or project architect or some other terminology.

### **III. RISK ASSESSMENT AND CONTRACTUAL SOLUTIONS FROM THE PERSPECTIVE OF THE DESIGN CONSULTANT FOR A CONSTRUCTION PROJECT USING BRIDGING-DESIGN-BUILD PROCUREMENT**

**A. INTRODUCTION AND BACKGROUND – SETTING THE STAGE**

The managing principal of one of your design professional clients just called to engage you to assist it in the negotiation and drafting of its contract for a new project. You have represented the client for many years, but you have no prior knowledge about this particular project. The client is excited because it was chosen to provide the design for this unique, world-class project.

The client informs you that it is a large “bridging-design-build project”. The Client has been selected as the prime design professional for the Owner and will be called the “Bridging Design Criteria Consultant”. The owner is a governmental entity and will use some form of bonds or certificates of participation to finance the Project.

She tells you that the firm’s scope of work for the Project is subject to clarification during the contract negotiation process but generally will consist of and include:

- Assist the Owner in the completion of its Program for the Project.
- Assist the Owner in the development of a Budget for the design and construction components of the Project.
- Assist the Owner in the development of a Preliminary Schedule for the completion of the Project through completion of construction.
- Assist the Owner in the development of the design and construction portions of the Bond Finance Program.
- Develop a set of Bridging Documents for the Owner’s use in the selection of a Design-Build Contractor, generally consisting of:
  - Schematic Design Drawing [Approximately 30% Complete]: expected to be 6-12 sheets of drawings
  - 
  - An Appropriate Project Specification, which, together with the SD Drawings, will contain the requirements for:
    - Size of the site
    - Parking
    - Related Infrastructure
    - Shape, height and general configuration of the building
    - Description of the components of the building
    - Drawings will generally reflect what the building will look like when completed.

- Assist the Owner in the development of a Request for Proposal that is to be sent out to a pre-qualified list of national and local design-builder teams asking for GMP proposals for the Project.
- Assist the Owner in the selection of the Design-Builder Team, including the negotiation of the Owner/Design-Builder-Agreement
- Serve as the Owner’s Design Consultant during the Project through final completion, including:
  - Monitor the work to be completed by the Design-Builder
  - Assist the Owner with its review of any changes to the scope of the Owner/Design-Builder Agreement.
  - Assist the Owner in conducting inspection and acceptance of the completed Project, including any reviews to determine compliance with performance or other specifications
  - Otherwise serve as the Owner’s Design Consultant during the Project

She also tells you that the Client will:

- Not serve as the “architect or engineer of record” for the Project
- Review some but not “approve” any shop drawings or submittals
- Not produce any “for construction” drawings for the Project

The Client is a large regional A/E firm, with several offices in adjacent states. You know that over the years, the client has done a number of other Projects for the Owner that used the design-bid-build procurement method. You are also aware that the client has worked on a number of contractor led design-build projects in the past. However, this will be the first time that it has served in any capacity as a consultant on a bridging-design-build project.

The client wants to meet with you right away to discuss the key issues that will need to be addressed in the contract negotiations with the Owner. She asks that you prepare a list of those key issues for your meeting with her so that the two of you can put it into a form that she can send to the Owner. She tells you that the Owner wants to schedule a meeting with its lawyer within the next week or ten days to start to work on the Owner/Bridging Consultant Agreement.<sup>25</sup> Finally, she wants to know if any special contract form will need to be used for

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<sup>25</sup> This will be the first meeting among the lawyers on the Project. You are acquainted with the lawyer for the Owner from other projects. He is an experienced attorney, with whom, you have worked in the past on design-bid-build and design-build construction projects. You have found him to be tough, but reasonable. You look forward to working with him on this Project. You do not believe that he or the Owner have done any projects in the past using the bridging/design-build method of procurement.

the firm's subconsultants on the Project.

Shortly after you complete your telephone conference with your client, she sends you the materials. In her cover email, she notes, "*we want to get our contract done quickly because we cannot be paid until the contract with the Owner is signed.*" She also commented that she hopes that "*the contract can be completed within the next month or so, and will not involve significant legal fees.*" Finally, she advises that her "*team is already working with the owner on the Program*".

**B. PREPARING FOR THE NEGOTIATION OF THE BRIDGING DESIGN CONSULTANT AGREEMENT.**

From your perspective as counsel for the Owner's Design Criteria Consultant, you believe that this will be an interesting, complex and important project. However, from your experience, you know that this type of procurement method presents a number of complex issues that will need to be anticipated, identified, discussed and addressed in the agreement between your client and the Owner.

In light of your knowledge of the bridging-design-build process, the Owner, the Owner's lawyer, your client and the construction industry, at this point, your job is to:

- Anticipate, identify and assess, as many of the actual and potential risks to your Client, as possible, that you feel will or may be associated with this particular Project
- Present ways to the Client for it to reasonably and appropriately manage, disclaim, limit, share and allocate the risk among the Parties to the Design Criteria Consultant/Owner Agreement
- Work with the Client to develop the best approach to the negotiation of the Agreement with the Owner to handle the risks. For example,
  - Should you prepare an initial draft of the Design Criteria Consultant/Owner Agreement before the first meeting?
    - If possible, the Design Criteria Consultant's lawyer wants to prepare the first draft of the document – what is the best way to get the responsibility to do so?
    - On the other hand, often governmental owner's lawyers wish to prepare the first draft and to use "the Owner's form" agreement.
    - As a rule, at some point during the drafting process, the documents will likely be sent the Client and Owner through their respective counsel.

- Should the Client meet with her counterpart at the Owner separately from the lawyers to work on business, as opposed to, legal issues in the Contract?
- Assuming that you and the Client handle the negotiations as a team, should the Client take the lead in the negotiations or should you?

## 1. INITIAL MEETING(S) WITH YOUR CLIENT.

In order to prepare for the first meeting with your Client, your first order of business is to review the materials provided to you by your client and think about the issues that you want to discuss at the meeting. It is preferred that this meeting is in-person but, if necessary, it can be by conference call. Remember this meeting can be most useful only if you have received and reviewed the materials forwarded to you by your client.

At the first meeting with your Client, you need to find out as much as you can about the Project, including, but not limited to your client's role in the Project, including the parameters, if any, for contract selection and terms that were "accepted" by your client as a part or condition of the selection process to date.

- Listen and Let the Client Describe the Project and its Role in it to you.<sup>26</sup>
  - What elements of your Client's scope, fee, duties and/or design schedule, if any, were established during the RFP/RFQ process?
    - Typically, fee, scope, schedule and subconsultants are at least discussed as a part of the selection process.
  - What disciplines will be needed by your Client as its subconsultants?
  - Did the Owner distribute or require agreement to the use of any form(s) of agreement for the Project?
  - Have any discussions about professional liability or other types of insurance been discussed?
  - Does the Owner anticipate that the design-builder will provide payment and performance bonds for the Project?
- The Schedule for the Project.

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<sup>26</sup> As experienced construction lawyers, it may sometimes be difficult to "listen with understanding" to our clients. However, it is extremely important to do so at this first meeting, so that you understand how the client "sees" or envisions the project and its role in it. This will allow you to have the best chance to achieve the Client's goals, while protecting its interests, on the Project.

- Time table for development of the agreement between the prime design professional and its client.
- Schedule for development of the Project Scope or Bridging Documents, i.e., your client's deliverables.
- Design-Builder Selection Schedule.
- Overall Project Schedule, including Construction Schedule, as Envisioned at that time.
- The identification of the Owner's other [present or future] Project Participants.
  - Soils, geotechnical or environment consultants, if any, including whether they have issued any assessments, letters or reports.
  - Insurance, financing or other consultants.
  - Civil, traffic or infrastructure consultants.
- The Owner's parameters, if any, for contract selection and terms that have already been conceptually or actually accepted by the Client as a part of the Bridging Design Criteria Consultant selection process.
- How the Client prefers to involve you in the contract negotiation and drafting process – this differs from client to client, lawyer to lawyer, and project to project.
  - Will you and the Client form a negotiating and drafting team, with your presence “at the table”; or
  - Will the Client work with the Owner or Design-Builder and use you as a consultant and scrivener?
  - Does the Client have a specific procedure that it will use or is it seeking your advice and recommendations on how to proceed?
  - Does your Client have prior experience with this procurement method or is this its first job using the Bridging-Design-Build procurement method.
- The amounts of insurance that your Client has and whether there are any issues surrounding insurance or existing claims that exists that could impact the Project.
- Ask the Client about any issues, challenges, subjects or potential events, it is most concerned about with respect to the Project?

- Have Client describe the process that will produce the Bridging Documents or Deliverables – make sure that you understand the process.

After your meeting with your Client, produce a set of confidential notes or a matrix for you and your Client to use as a checklist for discussion in the meeting with the Owner and its lawyer. Send it to your Client for the two of you to use as a check list for your meeting with the Owner and follow-up by phone or email with the Client prior to the meeting with the Owner to make sure that you and your Client are “on the same page” with respect to those negotiations. Your goal is to attend the first meeting with the Owner, with a good list of the issues that need to be addressed in the documents in order for the entire project to go smoothly.

2. **DEVELOP A “LIST” OF THE ISSUES THAT NEED TO BE DISCUSSED “IN CONCEPT”, WITH THE OWNER AT THE EARLY CONTRACT NEGOTIATION SESSIONS.**

Based upon the confidential notes or matrix that you and the Client have developed, prepare a handout for the meeting with the Owner and its counsel of the issues and subjects that you wish to discuss. In general, I recommend that this is a list of topics that are to be discussed in concept at the initial meetings among the Owner, its lawyer, and the Bridging Design Criteria Consultant and its lawyer before any definitive contract language drafted or proposed. Many of these issues can be controversial and are easier to discuss in concept before either party has gone to the trouble of drafting specific language to which it has become endeared. Following these discussions, specific language can be prepared and exchanged that considers the substance of the discussions.

The goal of the development of this list is to identify, to the maximum extent possible, the risks associated with the relationship between the Owner and Bridging Design Criteria Consultant so that once identified, they can be assumed and managed by one of the parties; shared by the parties in a documented fashion; limited in amount; insured; or formally disclaimed. Finally, the risk of the unknown or unforeseen should be addressed by the scope of services accepted by the Bridging Design Criteria Consultant; coupled with an acceptable dispute resolution process that is clear, expedient and fair.

| <u>Subject or Issue</u>  | <u>Bridging Design Criteria Consultant Recommended Practice or Proposal</u>   | <u>Comment</u>  |
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| <p><b>Form of document to used for the Owner/Bridging Design Criteria Consultant Contact</b></p> <p><b>Form Contracts vs. Custom Contracts</b></p> | <p>Ideally, as a starting point, if the Owner or Owner’s Bridging Design Criteria Consultant has a document that has been used for this type of procurement in the past, start with it. If not, select an AIA, DBIA or EJCDC design build document that is intended for use between the Owner and a Prime Design Professional. Finally, if the Owner insists upon using its own form, and the form has not been used for this type of procurement, you may do so, but recognize that this approach will probably require significant modification over the course of the process.</p> | <ol style="list-style-type: none"> <li>1. If you are very lucky, one of the lawyers may have a set of documents that have been successfully used on a bridging-design-build project in the past. If so, a complete set of documents from the same deal would be available from the same source.</li> <li>2. There is no off the shelf set of commonly used family of industry documents that are available for these deals.</li> <li>3. If you do not have a set of bridging-design-build documents from another deal to start with, I suggest using the AIA, DBIA, AGC or EJCDC “family” or “set” of documents because they will at least have a coordinated set of contracts, general conditions and related forms that will give you a certain amount of consistency and save time and money on the matters that are not controversial.</li> <li>4. As a general rule, and no matter which “form” or “family” of documents you start with, each of these deals is unique and requires that all documents be read carefully and appropriately revised and customized for each Project.</li> <li>5. The Owner/Bridging Design Criteria Consultant Agreement is sufficiently independent of the documents that will be used for the Owner/Design-Builder Agreement that it should not be the source of the first fight between the Owner and Bridging Design Criteria Consultant’s lawyers during the contract negotiations.</li> </ol> |
| <p><b>Professional Liability Insurance</b></p>   | <ol style="list-style-type: none"> <li>1. The preferred approach, if available, is a project policy, which is paid for by the Owner. It should be in sufficient amount and with a low enough per claim deductible to cover</li> </ol>   | <ol style="list-style-type: none"> <li>1. This issue needs to be discussed and resolved at a very early stage of the negotiations because it has significant implications for the other contract issues.</li> </ol>   |

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|   | <p><u>all</u> design professionals providing services on the Project.</p> <p>2. If project professional liability insurance is not feasible, you may wish to consider Owner’s Protective Professional Indemnity (“OPPI”) insurance or excess professional liability insurance for the Owner.</p> <p>3. If the Bridging Design Criteria Consultant’s practice professional liability insurance policy is to be used or relied upon in any way, it should be noted that continued coverage is not guaranteed and the limits may be exhausted by other projects.</p> | <p>2. If there is a project policy, you want to buy as much as the Owner either wants or can afford, recognizing that if there is project professional liability insurance, in the absence of a special endorsement, there may not be any coverage available under the Bridging Design Criteria Consultant’s practice professional liability insurance policy.</p> <p>3. If a project professional liability insurance policy is obtained, it will be necessary to negotiate and execute a “deductible sharing or payment agreement” to address deductible payment/sharing and project policy administration issues that affect all insureds, without regard to their contractual role in the project.</p> <p>4. If OPPI is considered, its availability and terms must be underwritten on a project by project basis.</p> |
| <p><b>Other Insurance Coverages: auto, commercial general liability, excess liability, workers’ compensation and business coverages</b></p> | <p>Typically, design professionals will offer to provide endorsements for these coverages based upon their existing coverages. If the Owner desires or requires higher limits, they need to be addressed a part of the contract negotiation process.</p>  | <p>1. The coverages are typically provided on an “occurrence basis” and present fewer long term coverages issues than professional liability insurance.</p> <p>2. When the family of insurance forms are used, e.g., AIA, DBIA, EJCDC, etc., one will typically have to add insurance coverage language because they are not adequately addressed in the form, if at all.</p>  |
| <p><b>Waiver or Limitations of Consequential Damages</b></p>  | <p>The Bridging Design Criteria Consultant will request a waiver of all consequential damages.</p>  | <p>The project impact of consequential damages typically make a waiver an essential element of the contract relationship between the Owner and Design Criteria Consultant.</p>   |
| <p><b>Limitation of Liability</b></p>   | <p>The Bridging Design Criteria Consultant will typically propose some form of maximum liability.</p>   | <p>The maximum liability of the Bridging Design Criteria Consultant should not exceed the amount of insurance coverage actually available at the time of settlement or judgment.</p>   |
| <p><b>Warranties – Express and Implied</b></p>  | <p>The Bridging Design Criteria Consultant will typically wish to confirm that it is not providing any express or implied warranties with respect to its services.</p>  | <p>1. In most, but not all jurisdictions, there are no warranties on professional design services implied at law. However, it is good practice to address the issue of implied warranties in the</p>   |

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|   |   | <p>contract.</p> <p>2. As a general rule, design professionals do not provide express warranties with respect to their services or the results. Even if they intentionally or unintentionally do so, their professional liability insurance typically does not provide coverage for warranties of any type, unless the design professional is also found to have been negligent with respect to the services at issue.</p> <p>3. The mutual expectation of the Owner and Bridging Design Criteria Consultant with respect to warranties should be discussed at the first meeting.</p> |
| <b>Indemnity and Cross Indemnity</b>        | The Bridging Design Criteria Consultant should be willing to indemnify and hold the Owner harmless for any losses or damages that the Owner incurs to a third party as a result of the Bridging Design Criteria Consultant's negligent errors, acts or omissions.   | The scope of design professionals' indemnity is almost always a subject of negotiation.   |
| <b>Copyright and Ownership of Documents</b> | Upon payment to the Bridging Design Criteria Consultant of all compensation due to it under the agreement, the ownership of the Bridging Documents prepared for the Project by the Bridging Design Criteria Consultants shall become the property of the Owner, along with all intellectual property rights, including copyright. The Bridging Design Criteria Consultant is granted a non-exclusive license to retain hard and electronic copies of the Bridging Documents, but agrees not to duplicate or reproduce the overall project design for anyone else. |   |
| <b>Dispute Resolution</b>                   | Mediation should be included without regard to the form of dispute resolution that is agreed upon.  | <p>1. Arbitration would normally be proposed by the Bridging Design Criteria Consultant with provisions for joining all necessary parties into one proceeding as necessary.</p> <p>2. Many governmental entities do not favor or may not be allowed to use arbitration.</p> <p>3. Some governmental entities have their own legally mandated dispute resolution provisions that must be followed.</p>   |

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| <p><b>Licensure and Architect or Engineer of Record</b></p>                             | <p>The Bridging Design Criteria Consultant will possess all required professional licenses and qualifications for the work that it is to perform. However, it will not be required to stamp, sign or certify any “for construction” drawings, specifications or other submissions for any building departments and will not serve as the “architect” or engineer of record for any aspect of the Project.</p>   |  |
| <p><b>Shop Drawings and Submittals; Change Orders</b></p>                               | <p>The Bridging Design Criteria Consultant, in its role as the Owner’s Bridging Design Criteria Consultant, will not review or approve construction shop drawings, submittals, samples or requests for substitution except solely as an aid the Owner in understanding the progress of the Work on the Project. No such actions shall be considered approval of the construction means, methods, sequences, techniques or construction documents for the Project.</p> |  |
| <p><b>Commissioning</b></p>   | <p>Bridging Design Criteria Consultant should recommend that the Owner provide for the “commissioning” of all of the systems for the Project as a part of the scope of services of the Design Builder.</p>  |  |
| <p><b>Estimates of Probable Construction Costs vs. Construction Cost Estimating</b></p> | <p>The Bridging Design Criteria Consultant’s will not provide for detailed construction cost estimates. A specific discussion of the Owner’s expectations for cost estimating services needs to be included in the contract discussions, along with appropriate provisions for any necessary subconsulting services.</p>  |  |
| <p><b>Field or Site Visits: “observations”/“inspections”/“reporting”</b></p>            | <p>The Parties have to discuss and agree upon the nature and scope of “construction phase” services by the Bridging Design Criteria Consultant.</p>   |  |
| <p><b>Standard of Care Scope and Limitations of Preliminary Design:</b></p>             | <p>The Bridging Design Criteria Consultant’s deliverables will meet the applicable professional standard of care for schematic design drawings and preliminary specifications to be used as “Bridging Documents”. However, the deliverables are not intended for construction and are to be used as scope documents by prospective design building who must provide significant additional information for use with them for design-build pricing purposes.</p>       | <p>The Bridging Design Criteria Consultant and Owner should discuss and understand the anticipated state of completion of the Bridging Design Criteria Consultant’s deliverables, including the limitations on their use for construction without additional work by others. The deliverables are intended to establish parameters necessary for the pricing of the design-build contract, with the understanding that the design-builder will be free to provide any design that meets the design and performance criteria set forth in the deliverables. The</p> |

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|                                  |  | requirement to meet or exceed the requirements for building codes, industry standards and/or guidelines must be set forth in the deliverables if they are to apply.  |
| <b>Economic Loss Rule Issues</b> | The agreement needs to expressly recognize that the Owner's Bridging Design Criteria Consultant will not have actual or potential liability to any construction industry participants unless it has privity of contract with such a party. | Counsel needs to be familiar with the status of the economic loss rule in the applicable jurisdiction. Without regard to the state of the law, the agreement between the Owner and Design Criteria Consultant needs to confirm the need for privity and disclaim any duties or obligations to any other parties. |

### **C. PREPARATION OF THE OWNER/DESIGN CRITERIA CONSULTANT AGREEMENT.**

The drafting and negotiation of the Owner/Bridging Design Criteria Consultant Agreement is the beginning of a long collaborative process. It must be handled by all parties and their counsel in a manner that protects and clarifies appropriate interests, without destroying or even seriously injuring the good will and positive relationships between the Owner and Bridging Design Criteria Consultant. In this respect, the lawyer for the Bridging Design Criteria Consultant must exercise professionalism, construction industry knowledge and appropriate firmness.

It is strongly recommended that as much as possible face-to-face meetings be used to discuss and address all of the concepts and issues until the contract is very close to completion. These face to face sessions allow the parties to educate each other about their expectations for the Project, develop professional and business relationships and form a foundation for understanding how to best communicate with each other in the future. Lawyers who handle both construction contract negotiations and adversarial proceedings in their practices will need to remain sensitive to the need to make a reasonable deal and maintain a spirit of reasonable compromise.

### **IV. CONCLUSION.**

As can be seen from the above, lawyers advising owners, design professionals and design-builders must be familiar with the legal and practical issues involved with the bridging method of procurement. While the method has its strong opponents, it also gives some owners comfort that they have an “independent” design professional watching out for the owner’s best interests. Standard form contracts for the Owner-Consultant relationship are “plain vanilla” and must be tailored to suit the needs of each unique project. It is the hope of these authors that this paper and presentation will open the eyes of the consulting lawyer to the many legal and ethical issues that are present when the bridging method is used.