MINUTES

MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON LOCAL GOVERNMENT

Call to Order: By Senator Kennedy, on March 23, 1993, at 3:00 p.m.

ROLL CALL

Members Present:
Sen. Ed Kennedy, Chair (D)
Sen. Sue Bartlett, Vice Chair (D)
Sen. Dorothy Eck (D)
Sen. Delwyn Gage (R)
Sen. Ethel Harding (R)
Sen. John Hertel (R)
Sen. David Rye (R)
Sen. Bernie Swift (R)
Sen. Eleanor Vaughn (D)
Sen. Mignon Waterman (D)
Sen. Jeff Weldon (D)

Members Excused: None.

Members Absent: None.

Staff Present: Connie Erickson, Legislative Council
Rosalyn Cooperman, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing: HB 128, HB 342, HB 344, HB 421, HB 644
Executive Action: HB 342, HB 344, HB 421

HEARING ON HB 421

Opening Statement by Sponsor:

Representative Bill Strizich, House District 41, stated HB 421 would authorize the establishment of a property tax levy for public safety purposes. He said this tax would be used to support funding for all services currently provided by the county sheriff's department and funded by the county general fund. Representative Strizich stated HB 421 would create a "stand-alone public safety levy" that would no longer have to compete with other programs for scarce dollars. According to Representative

Strizich, statewide county general fund budgets are $105 million, 37 percent of which is spent on public safety programs. He said the establishment of a separate levy would allow voters to determine whether the county is spending too much or too little for public safety in comparison to other programs. Representative Strizich added that the public safety levy would be required to fall within the I-105 limit and would not constitute a property tax increase.

Proponents' Testimony:

Mr. Gordon Morris, Montana Association of Counties, stated his support for HB 421. He said funding for public safety should be equal in status with all other specialized funds.

Opponents' Testimony:

None.

Informational Testimony:

None.

Questions From Committee Members and Responses:

Senator Gage asked Mr. Morris how many special levies had been separated from the county general fund. Mr. Morris replied there were none comparable to the public safety levy. He added that HB 421 would not create any new taxing authority.

Senator Vaughn asked Mr. Morris if the levy for the county general fund would still be required to remain within the I-105 limit if a special levy for public safety was established. Mr. Morris replied yes and added that by establishing a special levy for public safety, the sheriff's office would not have to compete with other departments for scarce funds.

Closing by Sponsor:

Representative Strizich stated he appreciated the good hearing on HB 421. He said Senator Doherty would carry HB 421 on the Senate floor in the event it received a Do Pass.

HEARING ON HB 342

Opening Statement by Sponsor:

Representative Bill Strizich, House District 41, stated HB 342 would give airport managements more flexibility in negotiating leases on airport property. He said Section 1 of HB 342 would double the time period for leases, contracts and other arrangements from twenty to forty years. Representative Strizich noted this longer time period would be consistent with state laws and financial requirements. He said current law requires airport authorities to charge for the use of property based on the individual tenants' wear and tear on the facility, which is nearly impossible to determine. HB 342 would change this law to require that the charges be reasonable.

Proponents' Testimony:

Mr. Ted Mathis, Gallatin Airport Authority Manager, stated his support for the lengthening of airport lease agreements. He said that because companies have a sizable investment in airport hangars, airport managements should have the authority to enter into long term stable agreements with interested parties. Mr. Mathis stated it is virtually impossible to determine individual tenants' wear and tear on airport property. He said HB 421 would also exempt airport authorities from taxation to the same extent that other public facilities are currently exempted.

Mr. Tim Phillips, Missoula International Airport Director, stated his support for HB 342. He said he was also testifying in support of HB 342 on behalf of the airport managers from Kalispell and Great Falls airports.

Mr. Rick Griffith, Butte Airport Manager, stated his support for HB 342.

Opponents' Testimony:

None.

Informational Testimony:

None.

Questions From Committee Members and Responses:

Senator Gage asked Mr. Mathis if an airport authority was similar in function to a port authority, to which Mr. Mathis replied it was.

Closing by Sponsor:

Representative Strizich concluded HB 342 was straightforward in its intent.

HEARING ON HB 344

Opening Statement by Sponsor:

Representative Dave Brown, House District 72, stated HB 344 would provide some technical revisions to the law in order to meet current Federal Aviation Administration (FAA) regulations. He said the first eight pages to HB 344 would change existing language to make definitions gender neutral in accordance with FAA law. Representative Brown stated the substantive changes made by HB 344 would do the following: provide more stability for airport bonding requirements; authorize airports to enforce provisions within their boundaries; permit airports to establish a reserve fund for repairs, maintenance and capital outlays; and, allow airports to adopt rules of authority which must be approved by the local governing body.

Proponents' Testimony:

Mr. Tim Phillips, Missoula International Airport Director, stated his support for HB 344. He said HB 344 would define an airport authority as part of a municipality and would authorize the authority to administer its own finances. Mr. Phillips said HB 344 would also allow airports to enforce regulations within their influence zones.

Mr. Ted Mathis, Gallatin County Airport Manager, stated his support for HB 344.

Mr. Rick Griffith, Butte Airport Manager, stated his support for HB 344.

Opponents' Testimony:

None.

Informational Testimony:

None.

Questions From Committee Members and Responses:

Senator Waterman asked Connie Erickson to define "governing body" as stated in HB 344. Ms. Erickson replied governing body as defined in HB 344 would apply to all of Title 67 which pertains to aeronautics.

Senator Kennedy asked how a reserve fund would differ from a debt service fund. Mr. Griffith replied a debt service reserve fund is a set aside fund inside of a bond agreement that requires another entity to establish a very specific reserve fund to pay bondholders in the event that funds are not available. He said HB 344 would authorize an airport authority to set up a number of reserve funds to pay for repairs and capital outlays.

Senator Gage asked Representative Brown if an airport authority was allowed to levy mills. Representative Brown replied the authority may levy up to two mills.

Closing by Sponsor:

Representative Brown stated he closed his remarks on HB 344. He said Senator Kennedy would carry HB 344 on the Senate floor.

HEARING ON HB 128

Opening Statement by Sponsor:

Representative Dave Brown, House District 72, stated HB 128 would require DUI task force meetings to be open to the public with public notification seven days prior to the meeting. He said the task force usually met to discuss money matters and added this process should be open to public scrutiny. Representative Brown stated the task force could run a series of Public Service Announcements (PSAs), free of charge, to alert citizens of upcoming meetings.

Proponents' Testimony:

None.

Opponents' Testimony:

None.

Informational Testimony:

None.

Questions From Committee Members and Responses:

Senator Waterman asked Representative Brown why the language at the top of page 4 had been changed to allow the reinstatement fee to fund programs relating to "substance abuse, minors' problems and law enforcement training and equipment". Representative Brown replied the change was made by Legislative Council to reflect changes made in the law last session.

Senator Eck asked Representative Brown if funding for the task force came from the distribution of money from the alcohol tax. Representative Brown stated the task force receives funds from the driver's license reinstatement fee. He said half of the money funds county task forces while the other half funds county youth drug and alcohol education programs.

Senator Kennedy asked Representative Brown if the new language on page 4, which expands the purposes for which license reinstatement fees may be used, would constitute an increase in funding. Representative Brown replied the expansion of purposes for which license reinstatement fees may be used was passed during the last legislative session.

Senator Eck stated the county should have a process of announcing meetings whenever decisions regarding discretionary spending are to be made. She asked if the passage of HB 128 would trigger an influx of similar bills in future sessions to require the same thing of other task forces. Representative Brown replied he did not believe there were any other task forces in existence which received state revenue.

Closing by Sponsor:

Representative Brown stated Senator Lynch would carry HB 128 on the Senate floor.

HEARING ON HB 644

Opening Statement by Sponsor:

Representative Dave Brown, House District 72, spoke from prepared testimony in support of HB 644 (Exhibit #1). Representative Brown also distributed copies of two sets of amendments plus a gray bill to HB 644 (Exhibits #2-#4).

Proponents' Testimony:

Representative Russell Fagg, House District 89, stated his support for HB 644. He said the House recently voted not to construct any state buildings over the biennium. He added that

HB 644 would help address the consequences of this decision by allowing private individuals to construct these buildings and lease them back to the state. Representative Fagg added that this construction by private individuals could only be done if the total cost incurred was less than what it would have cost for a local government to build the facility. He concluded this option was not mandatory for local governments.

Ms. Jackie Martelli, Butte Local Development Corporation, spoke from prepared testimony in support of HB 644 on behalf of Mr. Evan Barrett (Exhibit #5).

Mr. Gordon Morris, Montana Association of Counties, stated his support for HB 644. He added he was also speaking in support of HB 644 on behalf of Mr. Alec Hansen from the Montana League of Cities and Towns.

Mr. Dave Ashley, Department of Administration, stated his support for HB 644 with the amendments offered by the Department (Exhibit #2). He said the Department did not object, in concept, to the ideas expressed in HB 644 but added the Department had some concerns about the bill in its current form. Mr. Ashley said the state has a lease/purchase statute already in existence and added that passage of HB 644 would create a similar agreement. He noted the options outlined in HB 644 represent a radical departure from the typical method of construction of state buildings. Mr. Ashley concluded the Department of Administration requests it be amended out of HB 644 so that the Department may come back to the Legislature in two years with a more permanent solution.

Mr. Tom McNab, Montana Technical Council, spoke from prepared testimony in support of HB 644 (Exhibit #6).

Mr. Carl Schweitzer, Montana Contractors Association, stated HB 644 would be a good mechanism for financing public buildings.

Mr. Elmer Johnson, Bruce Andersen Company, stated his company has completed sixteen design/build projects in other states within the past three years. He said HB 644 would provide another option for the construction of state buildings.

Mr. Alec Hansen, Montana League of Cities and Towns, stated design/build agreements are common in other states. He said Montana's cities can handle the responsibilities accompanying the oversight of design/build agreements.

Mr. Bill Egan, Montana Conference of Electrical Workers, stated his support for HB 644. He said, however, he had some serious concerns regarding the bid process. Mr. Egan stated there would need to be a knowledgeable third party advocate involved to ensure the standards of the design/build process were strictly adhered to. He submitted a copy of a magazine article outlining the design/build process (Exhibit #7).

Mr. Harrison Fagg, former state representative from Billings, stated his support for HB 644. He said as an architect, he is concerned with the state's ability to continue construction of facilities at an affordable rate. Mr. Fagg said HB 644 would provide an incentive for private contractors to build a sturdy facility because they will have to lease the facility for twenty years. He concluded HB 644 would not allow contractors to circumvent any of the U.S. uniform building codes and would ensure a well built facility.

Opponents' Testimony:

None.

Informational Testimony:

None.

Questions From Committee Members and Responses:

Senator Gage asked Mr. McNab if local governments were required to accept the building upon completion of the twenty year lease. Mr. McNab replied the local government would not be required to accept the building upon completion of the lease.

Senator Gage asked Representative Brown why page 3 of the gray bill states "the government unit shall acquire ownership of the facility and facility site without cost". Representative Brown replied a local government would be required to accept the building upon completion of the lease if the building was located on government property.

Senator Eck asked Representative Brown if any private contractors were making plans to use this option to construct state buildings. Representative Brown replied he was not aware of any pending construction projects using this method. Mr. Morris replied it would be conceivable that this process could be used in the future for the construction of juvenile detention centers.

Senator Eck asked Mr. Morris which counties might be interested in using this option. Mr. Morris replied he was unsure, but stated Cascade County may have an interest in using this option for future construction projects.

Senator Vaughn asked Representative Brown if the landlord would be responsible for the upkeep of the building during the lease period, to which he replied yes.

Senator Weldon asked Representative Brown to define the "retroactive applicability clause" as stated in the amendments to HB 644. Representative Brown replied he could not answer Senator

Weldon's question. Senator Bartlett replied the clause might reference bonding limits.

Senator Bartlett asked Representative Brown why HB 644 was limited to new construction. Mr. Egan replied doing so would provide greater control over the process.

Senator Rye asked Representative Brown to address the concerns stated by organized labor. Representative Brown replied he was surprised by organized labor's guarded support of HB 644. He said organized labor representatives who had concerns about HB 644 were not giving local governments enough credit.

Senator Rye asked Representative Brown if HB 644 mandated privatization. Representative Brown replied HB 644 would not mandate privatization but would instead offer local governments another option for the construction of buildings.

Senator Eck asked Mr. Ashley to explain the differences between the mechanism in HB 644 and current statute. Mr. Ashley replied existing statute allows for a lease/purchase option while HB 644 would allow for a design/build option in addition to the lease/purchase one.

Senator Eck asked Mr. Ashley if the state had entered into any lease/purchase agreements with private entities. Mr. Ashley replied the lease/purchase statute was specifically passed to allow for financing of the construction of the Department of Social and Rehabilitational Services building.

Closing by Sponsor:

Representative Brown stated HB 644 was not a panacea for the state but added it would offer a cheaper way for local governments to finance construction of facilities. He said it would be possible to convene a conference committee if the Committee found any serious flaws in the bill.

EXECUTIVE ACTION ON HB 128

Motion:

Senator Eck moved HB 128 BE CONCURRED IN.

Discussion:

Senator Weldon asked if HB 128 had any proponents or opponents, to which Senator Waterman replied HB 128 had neither proponents nor opponents.
Senator Eck stated she had some questions about the bill, but

stated she believed giving proper notice of meetings was important.

Senator Waterman stated she was concerned the Committee would be micromanaging the affairs of local governments if it required special notification for task force meetings. She said the bill received no proponents and no opponents and was drafted because Representative Brown was upset that he missed a couple of task force meetings. Connie Erickson replied task force meetings were open to the public, however, she stated there would be a problem if the task force was not meeting in public.

Senator Eck asked Mr. Morris if task forces which distribute money hold open meetings to gain public input on the distribution of funds. Mr. Morris replied any county allocation of money must go through the appropriation process which is open to the public. Connie Erickson said statute requires that "unless otherwise specifically provided, a local government unit other than a municipality is required to give notification of meetings."

Motion:

Senator Eck withdrew her motion and moved HB 128 BE TABLED.

Discussion:

Senator Gage stated he opposed Senator Eck's motion because the task force has the authority to distribute money for county programming. He said residents should have the opportunity to participate in the decision making process through open meetings.

Senator Kennedy requested Senator Eck withdraw her motion to TABLE HB 644 so that the Committee may discuss the bill in more detail at the next meeting.

Senator Eck withdrew her motion.

EXECUTIVE ACTION ON HB 342

Motion/Vote:

Senator Eck moved HB 342 BE CONCURRED IN. MOTION CARRIED UNANIMOUSLY. Senator Gage will carry HB 342 on the Senate floor.

EXECUTIVE ACTION ON HB 344

Motion/Vote:

Senator Eck moved HB 344 BE CONCURRED IN. MOTION CARRIED UNANIMOUSLY. Senator Kennedy will carry HB 344 on the Senate floor.

EXECUTIVE ACTION ON HB 421

Motion:

Senator Vaughn moved HB 421 BE CONCURRED IN.

Discussion:

Senator Eck asked for an explanation of HB 421 as she was not present during its hearing. Senator Rye replied HB 421 would give local governments more flexibility in distributing revenue.

Senator Hertel asked if the creation of a specific levy for public safety would create additional competition between county agencies for the remaining revenue.

Senator Eck asked Mr. Morris if any counties still used an all-purpose levy to fund county programs. Mr. Morris replied that Powder River County is the only county which still uses an all-purpose levy. He noted HB 421 would establish the same levy authority for public safety purposes as has been given to other areas including county fairs, museums, district courts and roads. Mr. Morris stated that in creating a specific levy for public safety programs, county offices would not be competing unfairly for those funds.

Senator Hertel asked Mr. Morris if other programs would receive less funding if the public safety levy was separated from the general county fund. Mr. Morris replied that, under I-105, it would be possible that some county programs could receive less funding. Mr. Morris stated that, until a few years ago, district courts were funded wholly from the county general fund. He said counties were given specific district court levy authority as is now being requested for public safety programs. Mr. Morris noted this authority would be discretionary.

Senator Bartlett asked Mr. Morris if the public safety levy would have a limit in the event I-105 was discontinued. Mr. Morris replied HB 421 is requesting permissive levy authority as opposed to creating a levy with a statutory maximum. He said this authority currently exists for a number of county programs.

Vote:

MOTION CARRIED with Senators Gage, Hertel and Swift voting NO.

ADJOURNMENT

Adjournment: 5:20 p.m.

SENATOR JOHN "ED" KENNEDY, Jr., Chair

ROSALYN COOPERMAN, Secretary

JEK/rlc

ROLL CALL

SENATE COMMITTEE Local Government DATE 3-23-93

NAME	PRESENT	ABSENT	EXCUSED
Senator John "Ed" Kennedy	✓		
Senator Sue Bartlett	✓		
Senator Dorothy Eck	✓		
Senator Delwyn Gage	✓		
Senator Ethel Harding	✓		
Senator John Hertel	✓		
Senator David Rye	✓		
Senator Bernie Swift	✓		
Senator Mignon Waterman	✓		
Senator Jeff Weldon	✓		
Senator Eleanor Vaughn	✓		

FC8

Attach to each day's minutes

SENATE STANDING COMMITTEE REPORT

March 24, 1993

MR. PRESIDENT:

We, your committee on Local Government having had under consideration House Bill No. 342 (first reading copy -- blue), respectfully report that House Bill No. 342 be concurred in.

Signed: John Ed Kennedy Jr.
Senator John "Ed" Kennedy, Jr., Chair

Amd. Coord.
Sec. of Senate

Senator Carrying Bill

661220SC.San

SENATE STANDING COMMITTEE REPORT

March 24, 1993

MR. PRESIDENT:

We, your committee on Local Government having had under consideration House Bill No. 344 (first reading copy -- blue), respectfully report that House Bill No. 344 be concurred in.

Signed: John Ed Kennedy Jr.
Senator John "Ed" Kennedy, Jr., Chair

HL Amd. Coord.
___ Sec. of Senate

Senator Kennedy
Senator Carrying Bill

661221SC.San

SENATE STANDING COMMITTEE REPORT

March 24, 1993

MR. PRESIDENT:

We, your committee on Local Government having had under consideration House Bill No. 421 (first reading copy -- blue), respectfully report that House Bill No. 421 be concurred in.

Signed: John Ed Kennedy Jr.
Senator John "Ed" Kennedy, Jr., Chair

Amd. Coord.
Sec. of Senate

Senator Doherty
Senator Carrying Bill

661222SC.San

HB 644
The Lease-Purchase Method for Local Government Construction

Although this bill has seen many amendments, it is really a simple bill. HB 644 simply provides an additional mechanism by which local governments can construct public facilities.

HB 644 would allow the construction of public facilities using the lease-purchase method of design, financing and construction. The method has been in use in a number of states quite successfully over the years. (This language is modeled after the State of Kentucky) The key element of the bill allows local governments to enter into 20 year lease-purchase arrangements on such facilities. That statutory change makes the financing through this method possible. At the end of a 20 year lease, the facility would convert to public ownership at no further cost to the local government.

The bill establishes the elements that must be included in a lease-purchase contract; provides that the principal amount of the lease-purchase contract is considered as debt and must be treated as so by the local government, including the requirement that there be a vote of the people if the debt would exceed $500,000; provides the methodology for such an election; provides that interest from investment in the finances of such facilities would be tax exempt at the state level, as it is on the federal level; provides that the facilities would be exempt from property taxes as long as they were occupied or utilized by a public entity; establishes a process for securing and evaluating bids, including the general criteria to be used; allows contractors, architects engineers, etc. to contract together to bid the projects; requires the statutes on standard prevailing wage rates and construction codes to be adhered to; provides a bidding preference for Montana firms bidding the projects; and applies the process to new facilities only, with the exception of historical buildings.

We have worked with the League of Cities an Towns, MACO, Labor, Architects, the Montana Technical Council, the Montana Contractors Association, individual contractors, state bond counsel, economic development people and the State Department of Administration to make this a bill acceptable to all. (The state is not part of the bill now, but will spend the next two years between sessions evaluating the bill and the local efforts under the bill to determine how it can be best implemented by the state.)

I have a number of amendments which I ask the committee to insert prior to debating the bill. The bill got a late start out of the Legislative Council and, frankly, was not a complete bill when heard by the House Committee. Amendments to the bill were drafted by state bond council and the legislative council and placed on the bill in floor debate on the house side. Those amendments, because of the lack of time, created many inconsistencies in the terminologies within and structure of the bill. Corrections to those non-substantive issues make up the bulk of these amendments. In addition, round table

Exhibit 21
3-23-93
HB-644

discussions with all interested in the bill resolved some questions about the bill and have resulted in some of these amendments, for example, having the process apply to existing historical buildings which can be renovated and preserved as apart of the lease-purchase method.

With these Amendments on the bill, and a consensus of all interested parties accomplished, I urge your support of this bill which will help provide local government with a tool they need and can use.

DEPARTMENT OF ADMINISTRATION
DIRECTOR'S OFFICE

MARC RACICOT, GOVERNOR

MITCHELL BUILDING

STATE OF MONTANA

(406) 444-2032
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PO BOX 200101
HELENA, MONTANA 59620-0101

SENATE LOCAL GOVERNMENT
EXHIBIT NO. 2
DATE 3-23-93
BILL NO. HB 644

March 15, 1993

Representative Dave Brown
Montana House of Representatives
State Capitol
Helena, MT 59601

Dear Representative Brown:

The purpose of this letter is to ask you to consider removing state government from the provisions of HB 644 ("An Act Authorizing the State, Cities, And Towns to Construct Public Works by the Lease-Purchase Method of Finance"). Attached are amendments that remove the state from the bill. The reasons for my request are as follows:

1) This bill represents a significant philosophical change in the way that the state could procure facilities. As I mentioned before, the Department is not opposed to having this option available. However, this procedure deserves additional review and input from all parties to make sure it is done correctly.

2) Use of this procedure will require coordination with affected agencies' operating budgets and the Long Range Building appropriations bill. For example, we would need authority in the appropriations bill to proceed in a conventional manner, or, if determined to be in the state's best interest, to "design-build-lease-purchase" a project. We would want to select those projects, in advance, that lend themselves to this design-build procedure and assure that the agency's operating budget reflects the necessary lease payments.

Because currently authorized projects are far enough along in the process, it would be unlikely that we would use the design-build option during the upcoming biennium. Therefore, removing the state from the bill would not affect the actual timetable in which we would use this procedure for acquiring buildings.

3-23-93
HB-644

Introduction of this bill has generated much discussion among my staff. Be assured that we will work during the interim to bring a workable and useful bill for state construction to the 1995 Legislature.

Please call me if you have questions.

Sincerely,

Lois Menzies

Lois Menzies
Director

Attachments

cc: Evan Barrett

3-23-93
HB-644

AMEND HB 644, AS FOLLOWS:

1. Title, line 4.
   Following: "THE"
   Strike: "STATE,"

2. Page 1, line 24.
   Following: "MEANS"
   Strike: "THE STATE OR"

3. Page 12, line 16.
   Strike: "the state, as authorized by the legislature, or"
   Line 23.
   Following: "the"
   Strike "state"
   Line 25.
   Strike: "state,"

4. Page 13, line 5.
   Following: "the"
   Strike: "state,"

5. Page 17, line 19.
   Strike: Section 13

Amendments to House Bill No. 644
Third Reading Copy (BLUE)

Requested by Representative Dave Brown
For the Committee on Local Government

Prepared by Valencia Lane
March 23, 1993

SENATE LOCAL GOVERNMENT
EXHIBIT NO. 3
DATE 3-23-93
BILL NO. HB 644

1. Title, line 4.
Strike: "STATE,"

2. Title, line 5.
Following: "CITIES,"
Insert: "UNIFIED LOCAL GOVERNMENTS,"

3. Title, line 7.
Following: "CONTRACTS;"
Insert: "PROVIDING CERTAIN TAX EXEMPTIONS;"

4. Title, line 9.
Strike: "AN"
Insert: "A RETROACTIVE"

5. Page 1, line 18.
Following: "(1)"
Strike: ""BUILDING""
Insert: ""Facility""
Following: "ANY"
Insert: "building,"
Following: "STRUCTURE"
Insert: ","

6. Page 1, line 21.
Following: "A"
Insert: "building,"
Following: "STRUCTURE"
Insert: ","

7. Page 1, line 23.
Following: "CONTRACT"
Insert: "under [sections 1 through 6 and 10 through 12] unless the building, structure, or improvement is a recognized historic structure in need of preservation"

8. Page 1, line 24.
Following: "MEANS"
Strike: "THE STATE OR"

9. Page 1, line 25.
Following: "CITY,"
Insert: "unified local government,"

10. Page 2, line 5.
Following: "CITY,"

Insert: "unified local government,"

11. Page 2, line 7.
Following: "CONTRACTS."
Strike: "ANY"
Insert: "In addition to currently authorized methods of contracting public works, any"
Following: "UNIT"
Insert: ", as authorized by its governing body,"

12. Page 2, line 3.
Page 2, line 8.
Page 2, line 13.
Page 2, line 17, in two places.
Page 2, line 21, in two places.
Page 3, line 23.
Page 3, line 25.
Page 4, line 16.
Page 4, line 17.
Page 5, line 8.
Strike: "BUILDING"
Insert: "facility"

13. Page 2, line 21.
Following: "SITE"
Insert: "without cost"

14. Page 2, line 22.
Following: line 21
Insert: "(4) In conjunction with the lease-purchase contract, the governmental unit may grant leases, easements, or licenses for lands under the control of the governmental unit for a period not to exceed 20 years."

15. Page 3, line 11.
Following: "CONTRACT"
Insert: "in which the principal amount exceeds $500,000"

16. Page 5, line 1.
Following: "4]"
Insert: "or is exempt from an election because the principal value of the lease-purchase contract is less than $500,000"

17. Page 5, line 17.
Following: line 16
Insert: "NEW SECTION. **Section 8. Lease-purchase facility exemption.** A facility, as defined in [section 2], is exempt from taxation."

18. Page 12, line 13 through page 13, line 6.
Strike: section 9 in its entirety
Renumber: subsequent sections

19. Page 13, line 9.
Page 13, line 13.

Page 13, line 22.
Page 14, line 14.
Page 14, line 17.
Page 15, line 2.
Page 15, line 5.
Page 15, line 7.
Page 15, line 13.
Page 15, line 17.
Page 15, line 19.
Page 15, line 21.
Page 16, line 12.
Page 16, line 23.
Page 17, line 8.
Strike: "public agency"
Insert: "governmental unit"

20. Page 13, line 10.
Strike: "building, structure, or other improvement
Insert: "facility"

21. Page 14, lines 11 and 12.
Following: "by the" on line 11
Strike: remainder of line 11 through "agency" on line 12
Insert: "governmental unit"

22. Page 14, line 23.
Strike: "agency"
Insert: "governmental unit"

23. Page 15, line 8.
Following: "lowest"
Insert: "responsible"

24. Page 15, line 9.
Following: "cost"
Insert: "that yields the most beneficial"

25. Page 15, line 9.
Strike: "agency"
Insert: "governmental unit"

26. Page 15, lines 23 and 24.
Following: "and" on line 23
Strike: remainder of line 23 through "(i)" on line 24

27. Page 15, lines 24 and 25.
Following: "finalist" on line 24
Strike: remainder of line 24 through "offers" on line 25

28. Page 16, lines 1 through 7.
Strike: subsection (k) in its entirety
Insert: "(2) In evaluating proposals as required in subsection (1), the governmental unit shall use the following criteria:
(a) experience, including the number and type of similar projects completed by the development team and the

number of years the development team or its members have been in business;

(b) a technical approach that includes a demonstration within the proposal that the technical aspects of the project can be met, an architectural and engineering presentation showing the floor plans, sections, elevations, designs, and other technical aspects that demonstrate compliance with the project, and the selection and longevity of materials and equipment;

(c) project management, including an analysis of the developing team's approach to the proposed project description as presented by the governmental unit, the proposed project schedule of construction, and the maintenance program;

(d) the proposed cost, including construction costs and operating costs, an evaluation showing a comparison to a similar facility operated by the governmental unit or a comparable governmental entity, the lowest cost offered the governmental unit, and evidence that the proposed facility provides savings over traditional construction and financing methods; and

(e) if applicable, the appropriateness of the site or location.

(3) The criteria in subsection (2) must be given an appropriate relative value by the governmental unit for scoring purposes."

Renumber: subsequent subsections

29. Page 16, line 16.
Following: "the"
Strike: remainder of line 16 through "improvements"
Insert: "facility"

30. Page 16, line 20.
Following: line 19
Insert: "(6) In evaluating the cost portion of the proposal, the governmental unit shall apply the preferences provided for in 18-1-102."

31. Page 16, lines 21 and 22.
Following: "A" on line 21
Strike: remainder of line 21 through "improvement" on line 22
Insert: "facility"

32. Page 17, line 7.
Following: "the"
Strike: "building, structure, or improvement"
Insert: "facility"

33. Page 17, lines 9 and 10.
Following: "leased" on line 9
Strike: remainder of line 9 through "facilities" on line 10
Insert: "facility"

34. Page 17, line 17.

Strike: "building"
Insert: "facility"

35. Page 17, lines 19 through 23.
Strike: section 13 in its entirety
Insert: "NEW SECTION. **Section 13. Sublease to public entity.** A governmental unit may enter into a lease-purchase contract for a facility and concurrently or subsequently sublease that facility to another public entity as long as the sublease term does not exceed 20 years or the time remaining on the lease-purchase contract, whichever is less.

NEW SECTION. **Section 14. {standard} Codification instruction.** (1) [Sections 1 through 6 and 10 through 12] are intended to be codified as an integral part of Title 18, chapter 2, and the provisions of Title 18, chapter 2, apply to [sections 1 through 6 and 10 through 12].

(2) [Section 7] is intended to be codified as an integral part of Title 15, chapter 30, and the provisions of Title 15, chapter 30, apply to [section 7].

(3) [Section 8] is intended to be codified as an integral part of Title 15, chapter 6, part 2, and the provisions of Title 15, chapter 6, part 2, apply to [section 8].

NEW SECTION. **Section 15. {standard} Retroactive applicability.** [Sections 7 and 8] apply retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1992."
Renumber: subsequent section

36. Page 1, lines 13 and 16.
Page 2, line 2.
Strike: "7 AND 9"
Insert: "6 and 10"

37. Page 13, line 9.
Strike: "9"
Insert: "3"

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SPECIFIED PRICES, TERMS, AND CONDITIONS. AT THE EXPIRATION OF A LEASE-PURCHASE CONTRACT, THE GOVERNMENTAL UNIT SHALL ACQUIRE OWNERSHIP OF THE ~~BUILDING~~ FACILITY AND ~~BUILDING~~ FACILITY SITE WITHOUT COST.

(4) IN CONJUNCTION WITH THE LEASE-PURCHASE CONTRACT, THE GOVERNMENTAL UNIT MAY GRANT LEASES, EASEMENTS, OR LICENSES FOR LANDS UNDER THE CONTROL OF THE GOVERNMENTAL UNIT FOR A PERIOD NOT TO EXCEED 20 YEARS.

NEW SECTION. **SECTION 4. INDEBTEDNESS -- PROCEDURE -- ELECTION.** (1) A LEASE-PURCHASE CONTRACT MUST INCLUDE A PROVISION FOR ALLOCATION OF EACH RENT PAYMENT TO PRINCIPAL AND INTEREST, AND THE AGGREGATE AMOUNT PAYABLE BY THE GOVERNMENTAL UNIT CONSTITUTES AN INDEBTEDNESS OF THE GOVERNMENTAL UNIT. A LOCAL GOVERNMENT MAY NOT ENTER INTO A LEASE-PURCHASE CONTRACT IF THE INDEBTEDNESS EVIDENCED THEREBY WOULD CAUSE THE LOCAL GOVERNMENT TO EXCEED ANY APPLICABLE LIMITATION ON THE LOCAL GOVERNMENT PERTAINING TO INCURRING INDEBTEDNESS. THE AMOUNT OF INDEBTEDNESS EVIDENCED BY A LEASE-PURCHASE CONTRACT MUST BE CONSIDERED TAKEN INTO ACCOUNT IN DETERMINING THE TOTAL AMOUNT OF INDEBTEDNESS THAT A LOCAL GOVERNMENT MAY INCUR.

(2) A LOCAL GOVERNMENT MAY NOT ENTER INTO A LEASE-PURCHASE CONTRACT IN WHICH THE PRINCIPAL AMOUNT EXCEEDS $500,000 WITHOUT SUBMITTING THE QUESTION OF ENTERING INTO THE LEASE-PURCHASE CONTRACT TO THE REGISTERED ELECTORS OF THE LOCAL GOVERNMENT IN A GENERAL OR SPECIAL ELECTION. THE NOTICE OF THE ELECTION MUST STATE

THE DATE OF THE ELECTION, THE HOURS THE POLLS WILL BE OPEN, THE QUESTION TO BE SUBMITTED TO THE ELECTORS, THE TERM PERIOD OF THE LEASE-PURCHASE CONTRACT, THE PRINCIPAL AMOUNT OF INDEBTEDNESS, AND ANY OTHER INFORMATION THAT THE GOVERNING BODY MAY CONSIDER PROPER. THE QUESTION SUBMITTED TO THE ELECTORS MUST BE IN SUBSTANTIALLY THE FOLLOWING FORM:

SHALL THE GOVERNING BODY OF THE _____ (NAME OF THE LOCAL GOVERNMENT) BE AUTHORIZED TO ENTER INTO A LEASE-PURCHASE CONTRACT FOR THE ACQUISITION OF A ~~BUILDING~~ FACILITY TO BE USED _____ (STATE THE GENERAL OR PRIMARY USE FOR THE ~~BUILDING~~ FACILITY), FOR A TERM NOT TO EXCEED _____ YEARS, EVIDENCING INDEBTEDNESS TO THE _____ (NAME OF THE LOCAL GOVERNMENT) IN A PRINCIPAL AMOUNT UP TO _____?

YES [ ]

NO [ ]

(3) IN LIEU OF SUBMITTING ONLY THE QUESTION OF ENTERING INTO A LEASE-PURCHASE CONTRACT TO THE REGISTERED ELECTORS, THE GOVERNING BODY MAY SUBMIT TO THE REGISTERED ELECTORS THE QUESTION OF ISSUING GENERAL OBLIGATION BONDS OR OF ENTERING INTO A LEASE-PURCHASE CONTRACT, IN WHICH CASE THE QUESTION TO BE SUBMITTED TO THE REGISTERED ELECTORS MUST BE IN SUBSTANTIALLY THE FOLLOWING FORM:

SHALL THE GOVERNING BODY OF THE _____ (NAME OF THE LOCAL GOVERNMENT) BE AUTHORIZED TO INCUR DEBT IN A PRINCIPAL AMOUNT UP TO _____ TO FINANCE THE ACQUISITION OF A ~~BUILDING~~ FACILITY TO BE USED FOR _____ (STATE THE GENERAL OR PRIMARY

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USE FOR THE ~~BUILDING~~ FACILITY), WITH THE DEBT TO BE EVIDENCED EITHER BY GENERAL OBLIGATION BONDS OR BY A LEASE-PURCHASE CONTRACT, PAYABLE OVER A TERM NOT TO EXCEED _____ YEARS?

YES []

NO []

NEW SECTION. **SECTION 5. TAX LEVIES FOR PAYMENT OF RENT UNDER LEASE-PURCHASE CONTRACT.** IF A LEASE-PURCHASE CONTRACT IS APPROVED BY THE REGISTERED ELECTORS IN ACCORDANCE WITH [SECTION 4] OR IS EXEMPT FROM AN ELECTION BECAUSE THE PRINCIPAL VALUE OF THE LEASE-PURCHASE CONTRACT IS LESS THAN $500,000, THE AMOUNT OF TAXES REQUIRED TO MAKE RENTAL PAYMENT UNDER THE LEASE-PURCHASE CONTRACT IS NOT SUBJECT TO THE LIMITATIONS OF 15-10-412.

NEW SECTION. **SECTION 6. PAYMENT OF OPERATING EXPENSES.** A LEASE-PURCHASE CONTRACT MAY CONTAIN PROVISIONS REQUIRING THE GOVERNMENTAL UNIT OR THE LESSOR TO PAY PART OR ALL OF THE COSTS OF INSURING, MAINTAINING, AND REPAIRING THE ~~BUILDING~~ FACILITY THROUGHOUT THE TERM OF THE LEASE-PURCHASE CONTRACT. THESE OBLIGATIONS, IF ASSUMED BY THE GOVERNMENTAL UNIT, DO NOT CONSTITUTE INDEBTEDNESS ON THE PART OF THE GOVERNMENTAL UNIT.

NEW SECTION. **SECTION 7. TAX-EXEMPT INTEREST.** THE INTEREST PAYABLE ON ANY LEASE-PURCHASE CONTRACT, WHEN SEPARATELY IDENTIFIED AS INTEREST IN THE LEASE-PURCHASE CONTRACT, MAY NOT BE INCLUDED IN GROSS INCOME FOR PURPOSES OF THE MONTANA INDIVIDUAL INCOME TAX.

NEW SECTION. **SECTION 8. LEASE-PURCHASE FACILITY EXEMPTION.** A FACILITY, AS DEFINED IN [SECTION 2], IS EXEMPT FROM TAXATION.

SECTION 9. SECTION 15-10-412, MCA, IS AMENDED TO READ:

"15-10-412. Property tax limited to 1986 levels -- clarification -- extension to all property classes. Section 15-10-402 is interpreted and clarified as follows:

(1) The limitation to 1986 levels is extended to apply to all classes of property described in Title 15, chapter 6, part 1.

(2) The limitation on the amount of taxes levied is interpreted to mean that, except as otherwise provided in this section, the actual tax liability for an individual property is capped at the dollar amount due in each taxing unit for the 1986 tax year. In tax years thereafter, the property must be taxed in each taxing unit at the 1986 cap or the product of the taxable value and mills levied, whichever is less for each taxing unit, except in a taxing unit that levied a tax in tax years 1983 through 1985 but did not levy a tax in 1986, in which case the actual tax liability for an individual property is capped at the dollar amount due in that taxing unit for the 1985 tax year.

(3) The limitation on the amount of taxes levied does not mean that no further increase may be made in the total taxable valuation of a taxing unit as a result of:

(a) annexation of real property and improvements into a taxing unit;

(b) construction, expansion, or remodeling of improvements;

(c) transfer of property into a taxing unit;

(d) subdivision of real property;

(e) reclassification of property;

(f) increases in the amount of production or the value of production for property described in 15-6-131 or 15-6-132;

(g) transfer of property from tax-exempt to taxable status; or

(h) revaluations caused by:

(i) cyclical reappraisal; or

(ii) expansion, addition, replacement, or remodeling of improvements.

(4) The limitation on the amount of taxes levied does not mean that no further increase may be made in the taxable valuation or in the actual tax liability on individual property in each class as a result of:

(a) a revaluation caused by:

(i) construction, expansion, replacement, or remodeling of improvements that adds value to the property; or

(ii) cyclical reappraisal;

(b) transfer of property into a taxing unit;

(c) reclassification of property;

(d) increases in the amount of production or the value of production for property described in 15-6-131 or 15-6-132;

(e) annexation of the individual property into a new taxing unit; or

(f) conversion of the individual property from tax-exempt to taxable status.

(5) Property in classes four and eleven is valued according to the procedures used in 1986, including the designation of 1982 as the base year, until the reappraisal cycle beginning January 1, 1986, is completed and new valuations are placed on the tax rolls and a new base year designated, if the property is:

(a) new construction;

(b) expanded, deleted, replaced, or remodeled improvements;

(c) annexed property; or

(d) property converted from tax-exempt to taxable status.

(6) Property described in subsections (5)(a) through (5)(d) that is not class four or class eleven property is valued according to the procedures used in 1986 but is also subject to the dollar cap in each taxing unit based on 1986 mills levied.

(7) The limitation on the amount of taxes, as clarified in this section, is intended to leave the property appraisal and valuation methodology of the department of revenue intact. Determinations of county classifications, salaries of local government officers, and all other matters in which total taxable valuation is an integral component are not affected by 15-10-401 and 15-10-402 except for the use of taxable valuation in fixing tax levies. In fixing tax levies, the taxing units of local government may anticipate the deficiency in revenues resulting from the tax limitations in 15-10-401 and 15-10-402, while understanding that regardless of the amount of mills levied, a taxpayer's liability may not exceed the dollar amount due in each taxing unit for the

1986 tax year unless:

(a) the taxing unit's taxable valuation decreases by 5% or more from the 1986 tax year. If a taxing unit's taxable valuation decreases by 5% or more from the 1986 tax year, it may levy additional mills to compensate for the decreased taxable valuation, but in no case may the mills levied exceed a number calculated to equal the revenue from property taxes for the 1986 tax year in that taxing unit.

(b) a levy authorized under Title 20 raised less revenue in 1986 than was raised in either 1984 or 1985, in which case the taxing unit may, after approval by the voters in the taxing unit, raise each year thereafter an additional number of mills but may not levy more revenue than the 3-year average of revenue raised for that purpose during 1984, 1985, and 1986;

(c) a levy authorized in 50-2-111 that was made in 1986 was for less than the number of mills levied in either 1984 or 1985, in which case the taxing unit may, after approval by the voters in the taxing unit, levy each year thereafter an additional number of mills but may not levy more than the 3-year average number of mills levied for that purpose during 1984, 1985, and 1986.

(8) The limitation on the amount of taxes levied does not apply to the following levy or special assessment categories, whether or not they are based on commitments made before or after approval of 15-10-401 and 15-10-402:

(a) rural improvement districts;

(b) special improvement districts;

(c) levies pledged for the repayment of bonded indebtedness, including tax increment bonds;

(d) city street maintenance districts;

(e) tax increment financing districts;

(f) satisfaction of judgments against a taxing unit;

(g) street lighting assessments;

(h) revolving funds to support any categories specified in this subsection (8);

(i) levies for economic development authorized pursuant to 90-5-112(4);

(j) levies authorized under 7-6-502 for juvenile detention programs; ~~and~~

(k) elementary and high school districts~~.~~; and

(l) levies required to make rental payments under a lease-purchase contract approved under the provisions of [section 4].

(9) The limitation on the amount of taxes levied does not apply in a taxing unit if the voters in the taxing unit approve an increase in tax liability following a resolution of the governing body of the taxing unit containing:

(a) a finding that there are insufficient funds to adequately operate the taxing unit as a result of 15-10-401 and 15-10-402;

(b) an explanation of the nature of the financial emergency;

(c) an estimate of the amount of funding shortfall expected by the taxing unit;

(d) a statement that applicable fund balances are or by the end of the fiscal year will be depleted;

(e) a finding that there are no alternative sources of revenue;

(f) a summary of the alternatives that the governing body of the taxing unit has considered; and

(g) a statement of the need for the increased revenue and how it will be used.

(10) (a) The limitation on the amount of taxes levied does not apply to levies required to address the funding of relief of suffering of inhabitants caused by famine, conflagration, or other public calamity.

(b) The limitation set forth in this chapter on the amount of taxes levied does not apply to levies to support:

(i) a city-county board of health as provided in Title 50, chapter 2, if the governing bodies of the taxing units served by the board of health determine, after a public hearing, that public health programs require funds to ensure the public health. A levy for the support of a local board of health may not exceed the 5-mill limit established in 50-2-111.

(ii) county, city, or town ambulance services authorized by a vote of the electorate under 7-34-102(2).

(11) The limitation on the amount of taxes levied by a taxing jurisdiction subject to a statutory maximum mill levy does not prevent a taxing jurisdiction from increasing its number of mills

beyond the statutory maximum mill levy to produce revenue equal to its 1986 revenue.

(12) The limitation on the amount of taxes levied does not apply to a levy increase to repay taxes paid under protest in accordance with 15-1-402."

~~NEW SECTION. Section 9. Lease-purchase financing of public construction projects -- authority. In addition to currently authorized methods of contracting public works, the state, as authorized by the legislature, or a county, city, or town, as authorized by its governing body, may, for a period not to exceed 20 years, lease a building, structure, or other improvement for any authorized public purpose pursuant to a contract that provides for the construction of the building, structure, or other improvement under a lease-purchase plan. In conjunction with the plan, the state, county, city, or town may grant leases, easements, or licenses for lands under the control of the state, county, city, or town for a period not to exceed 20 years. A lease must comply with the provisions of [sections 2 10 through 4 12] and must provide that at the end of the lease period, the building, structure, and related improvements, together with the land on which they are situated, become the property of the state, county, city, or town without cost.~~

NEW SECTION. **Section 10. Lease-purchase financing of public construction projects -- procedures for awarding leases.** (1) A ~~public agency~~ GOVERNMENTAL UNIT authorized under [section ~~1~~ 9 3] to

acquire a ~~building, structure, or other improvement~~ FACILITY by a lease-purchase contract shall comply with the following requirements:

(a) The ~~public agency~~ GOVERNMENTAL UNIT shall develop a request for proposals that clearly defines the project program, functional requirements, quality considerations, time requirements for submission of proposals, construction time requirements, financial requirements for bidders, project budget, and proposal evaluation scoring methods, including the relative importance of evaluation factors. A request for proposals may be amended at any time prior to the deadline for the submission for proposals.

(b) The ~~public agency~~ GOVERNMENTAL UNIT shall advertise in at least one issue each week for 3 consecutive weeks in two newspapers published in the state, one of which must be published at the seat of government and the other in the county where the work is to be performed, if different. The advertisement must call for the submission of letters of interest and eventual submission of proposals and must state the time and place for reply.

(c) To respond to the newspaper advertisement, a firm shall respond on or before the time and date designated in the advertisement. The response must take the form of a one-page letter of interest that must provide the firm's name and address.

(d) All timely letters of interest must be opened at the same time, publicly read, and kept on file by the ~~public agency~~ GOVERNMENTAL UNIT. A firm that fails to meet the deadline is barred

from the procurement process.

(e) The ~~public agency~~ GOVERNMENTAL UNIT shall send a letter to each of the firms that submitted a letter of interest under subsection (1)(c), inviting each firm to submit a written proposal, on a form created by the ~~public agency~~ GOVERNMENTAL UNIT, on or before a specified time and date. Proposals must respond to all of the criteria set forth in the request for proposal. Each proposal must show a savings by use of the lease-purchase plan over conventional contracting and financing methods. A firm that fails to submit a written proposal, on the form supplied by the ~~agency~~ GOVERNMENTAL UNIT, on or before the deadline is barred from further involvement in the procurement process.

(f) After the request for proposals has been mailed and before written proposals are submitted, the ~~public agency~~ GOVERNMENTAL UNIT may contact the firms and may hold any meetings, discussions, or negotiations considered appropriate.

(g) The ~~public agency~~ GOVERNMENTAL UNIT shall keep the written proposals confidential until the contract is awarded.

(h) The ~~public agency~~ GOVERNMENTAL UNIT shall evaluate the written proposals and score them numerically to determine the lowest RESPONSIBLE cost THAT YIELDS THE MOST BENEFICIAL proposal based on total scores. The ~~agency~~ GOVERNMENTAL UNIT shall then select, but not rank, the three most qualified firms based upon the evaluation factors set forth in the request for proposals.

(i) The ~~public agency~~ GOVERNMENTAL UNIT shall send a letter

to each firm that responded to the request for proposals, informing the firm of the three finalists and the procedure that will be followed in the awarding of the contract.

(j) The ~~public agency~~ GOVERNMENTAL UNIT shall separately interview the three finalists. Each interview may be attended only by representatives of the finalists and by ~~public agency~~ GOVERNMENTAL UNIT personnel. The interviews are confidential. Following the interviews, the ~~public agency~~ GOVERNMENTAL UNIT shall rank the finalists based on the weighted evaluation factors in the request for proposals and~~:~~

~~(i)~~ award the contract to the top-ranked finalist~~; or~~

~~(ii) request best-and-final offers~~.

~~(k) The written request for best-and-final offers must state a time and date by which all best-and-final offers must be received. A firm that fails to submit a best-and-final offer may not be awarded the contract. The public agency shall rank the best-and-final offers based on weighted evaluation factors in the request for proposals and award the contract to the top-ranked firm.~~

(2) IN EVALUATING PROPOSALS AS REQUIRED IN SUBSECTION (1), THE GOVERNMENTAL UNIT SHALL USE THE FOLLOWING CRITERIA:

(A) EXPERIENCE, INCLUDING THE NUMBER AND TYPE OF SIMILAR PROJECTS COMPLETED BY THE DEVELOPMENT TEAM AND THE NUMBER OF YEARS THE DEVELOPMENT TEAM OR ITS MEMBERS HAVE BEEN IN BUSINESS;

(B) A TECHNICAL APPROACH THAT INCLUDES A DEMONSTRATION WITHIN

THE PROPOSAL THAT THE TECHNICAL ASPECTS OF THE PROJECT CAN BE MET, AN ARCHITECTURAL AND ENGINEERING PRESENTATION SHOWING THE FLOOR PLANS, SECTIONS, ELEVATIONS, DESIGNS, AND OTHER TECHNICAL ASPECTS THAT DEMONSTRATE COMPLIANCE WITH THE PROJECT, AND THE SELECTION AND LONGEVITY OF MATERIALS AND EQUIPMENT;

(C) PROJECT MANAGEMENT, INCLUDING AN ANALYSIS OF THE DEVELOPING TEAM'S APPROACH TO THE PROPOSED PROJECT DESCRIPTION AS PRESENTED BY THE GOVERNMENTAL UNIT, THE PROPOSED PROJECT SCHEDULE OF CONSTRUCTION, AND THE MAINTENANCE PROGRAM;

(D) THE PROPOSED COST, INCLUDING CONSTRUCTION COSTS AND OPERATING COSTS, AN EVALUATION SHOWING A COMPARISON TO A SIMILAR FACILITY OPERATED BY THE GOVERNMENTAL UNIT OR A COMPARABLE GOVERNMENTAL ENTITY, THE LOWEST COST OFFERED THE GOVERNMENTAL UNIT, AND EVIDENCE THAT THE PROPOSED FACILITY PROVIDES SAVINGS OVER TRADITIONAL CONSTRUCTION AND FINANCING METHODS; AND

(E) IF APPLICABLE, THE APPROPRIATENESS OF THE SITE OR LOCATION.

(3) THE CRITERIA IN SUBSECTION (2) MUST BE GIVEN AN APPROPRIATE RELATIVE VALUE BY THE GOVERNMENTAL UNIT FOR SCORING PURPOSES.

~~(2)~~(4) Contractors, architects, engineers, and other parties considered necessary to complete the project may contract together, as provided by law, to pursue the project.

~~(3)~~(5) The ~~public agency~~ GOVERNMENTAL UNIT shall enter into a lease-purchase contract with the firm awarded the contract under

THE PROPOSAL THAT THE TECHNICAL ASPECTS OF THE PROJECT CAN BE MET, AN ARCHITECTURAL AND ENGINEERING PRESENTATION SHOWING THE FLOOR PLANS, SECTIONS, ELEVATIONS, DESIGNS, AND OTHER TECHNICAL ASPECTS THAT DEMONSTRATE COMPLIANCE WITH THE PROJECT, AND THE SELECTION AND LONGEVITY OF MATERIALS AND EQUIPMENT;

(C) PROJECT MANAGEMENT, INCLUDING AN ANALYSIS OF THE DEVELOPING TEAM'S APPROACH TO THE PROPOSED PROJECT DESCRIPTION AS PRESENTED BY THE GOVERNMENTAL UNIT, THE PROPOSED PROJECT SCHEDULE OF CONSTRUCTION, AND THE MAINTENANCE PROGRAM;

(D) THE PROPOSED COST, INCLUDING CONSTRUCTION COSTS AND OPERATING COSTS, AN EVALUATION SHOWING A COMPARISON TO A SIMILAR FACILITY OPERATED BY THE GOVERNMENTAL UNIT OR A COMPARABLE GOVERNMENTAL ENTITY, THE LOWEST COST OFFERED THE GOVERNMENTAL UNIT, AND EVIDENCE THAT THE PROPOSED FACILITY PROVIDES SAVINGS OVER TRADITIONAL CONSTRUCTION AND FINANCING METHODS; AND

(E) IF APPLICABLE, THE APPROPRIATENESS OF THE SITE OR LOCATION.

(3) THE CRITERIA IN SUBSECTION (2) MUST BE GIVEN AN APPROPRIATE RELATIVE VALUE BY THE GOVERNMENTAL UNIT FOR SCORING PURPOSES.

~~(2)~~(4) Contractors, architects, engineers, and other parties considered necessary to complete the project may contract together, as provided by law, to pursue the project.

~~(3)~~(5) The ~~public agency~~ GOVERNMENTAL UNIT shall enter into a lease-purchase contract with the firm awarded the contract under

subsection (1). The contract must require the lessor to comply with all applicable state, federal, and local laws in the construction of the ~~building, structure, or improvements~~ FACILITY, including the bonding provisions in Title 18, chapter 2, part 2, and the requirements for the standard prevailing rate of wages in Title 18, chapter 2, part 4.

(6) IN EVALUATING THE COST PORTION OF THE PROPOSAL, THE GOVERNMENTAL UNIT SHALL APPLY THE PREFERENCES PROVIDED FOR IN 18-1-102.

NEW SECTION. **Section 11. Lease-purchase contracts -- building and construction code requirements.** A ~~building, structure, or improvement~~ FACILITY constructed and leased to the ~~public agency~~ GOVERNMENTAL UNIT under a lease-purchase contract pursuant to [section ~~2~~ 10] must be constructed:

(1) in accordance with all applicable state and national safety, building, and construction code requirements; and

(2) to last, at a minimum, for a period of 30 years.

NEW SECTION. **Section 12. Lease-purchase contracts involving private land.** When a lease-purchase contract is awarded under [section ~~2~~ 10] to a firm that owns the land upon which the ~~building, structure, or improvement~~ FACILITY is to be built, the ~~public agency~~ GOVERNMENTAL UNIT must be granted an option to purchase the leased ~~buildings, land, and any appurtenant facilities~~ FACILITY. The option price to be paid may not exceed fair market value as of the time the option is exercised, as determined by a

competent and qualified real estate appraiser selected by mutual agreement of the parties. However, the option price may not be less than a sum equal to the remaining balance of any mortgage lien encumbering the property and securing the repayment of money advanced to the owner for the original construction of the ~~building~~ FACILITY, plus an amount not to exceed 10% of the mortgage balance.

~~NEW SECTION. Section 13. **Applicability.** With respect to state construction, [this act] applies to all buildings, structures, and improvements that may be authorized by the legislature during the 53rd legislative session and that may be authorized in future sessions.~~

NEW SECTION. **SECTION 13. SUBLEASE TO PUBLIC ENTITY.** A GOVERNMENTAL UNIT MAY ENTER INTO A LEASE-PURCHASE CONTRACT FOR A FACILITY AND CONCURRENTLY OR SUBSEQUENTLY SUBLEASE THAT FACILITY TO ANOTHER PUBLIC ENTITY AS LONG AS THE SUBLEASE TERM DOES NOT EXCEED 20 YEARS OR THE TIME REMAINING ON THE LEASE-PURCHASE CONTRACT, WHICHEVER IS LESS.

NEW SECTION. **SECTION 14.** CODIFICATION INSTRUCTION. (1) [SECTIONS 1 THROUGH 6 AND 10 THROUGH 12] ARE INTENDED TO BE CODIFIED AS AN INTEGRAL PART OF TITLE 18, CHAPTER 2, AND THE PROVISIONS OF TITLE 18, CHAPTER 2, APPLY TO [SECTIONS 1 THROUGH 6 AND 10 THROUGH 12].

(2) [SECTION 7] IS INTENDED TO BE CODIFIED AS AN INTEGRAL PART OF TITLE 15, CHAPTER 30, AND THE PROVISIONS OF TITLE 15, CHAPTER 30, APPLY TO [SECTION 7].

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(3) [SECTION 8] IS INTENDED TO BE CODIFIED AS AN INTEGRAL PART OF TITLE 15, CHAPTER 6, PART 2, AND THE PROVISIONS OF TITLE 15, CHAPTER 6, PART 2, APPLY TO [SECTION 8].

NEW SECTION. **SECTION 15. RETROACTIVE APPLICABILITY.** [SECTIONS 7 AND 8] APPLY RETROACTIVELY, WITHIN THE MEANING OF 1-2-109, TO TAX YEARS BEGINNING AFTER DECEMBER 31, 1992.

NEW SECTION. **Section 16. Effective date.** [This act] is effective on passage and approval.

-End-

SENATE LOCAL GOVERNMENT
EXHIBIT NO. 4
DATE 3-23-93
BILL NO. HB 644

HOUSE BILL NO. 644

INTRODUCED BY D. BROWN, FAGG

A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING THE ~~STATE,~~ COUNTIES, CITIES, UNIFIED LOCAL GOVERNMENTS, AND TOWNS TO CONSTRUCT PUBLIC WORKS BY THE LEASE-PURCHASE METHOD OF FINANCING; ESTABLISHING PROCEDURES FOR AWARDING THE LEASE-PURCHASE CONTRACTS; PROVIDING CERTAIN TAX EXEMPTIONS; AMENDING SECTION 15-10-412, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND ~~AN~~ A RETROACTIVE APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **SECTION 1. SHORT TITLE.** [SECTIONS 1 THROUGH ~~7 AND 9~~ 6 AND 10 THROUGH 12] MAY BE CITED AS THE "LEASE-PURCHASE CONTRACT ACT".

NEW SECTION. **SECTION 2. DEFINITIONS.** AS USED IN [SECTIONS 1 THROUGH ~~7 AND 9~~ 6 AND 10 THROUGH 12], THE FOLLOWING DEFINITIONS APPLY:

(1) ~~"BUILDING"~~ "FACILITY" MEANS ANY BUILDING, STRUCTURE, OR OTHER IMPROVEMENT TO REAL ESTATE THAT IS TO BE CONSTRUCTED, LEASED, AND SOLD TO A GOVERNMENTAL UNIT PURSUANT TO A LEASE-PURCHASE CONTRACT. A BUILDING, STRUCTURE, OR OTHER IMPROVEMENT TO REAL ESTATE IN EXISTENCE AT THE TIME A LEASE-PURCHASE CONTRACT IS ENTERED INTO MAY NOT BE THE SUBJECT OF THE LEASE-PURCHASE CONTRACT UNDER [SECTIONS 1 THROUGH 6 AND 10 THROUGH 12] UNLESS THE BUILDING,

STRUCTURE, OR IMPROVEMENT IS A RECOGNIZED HISTORIC STRUCTURE IN NEED OF PRESERVATION.

(2) "GOVERNMENTAL UNIT" MEANS ~~THE STATE OR~~ ANY COUNTY, CITY, UNIFIED LOCAL GOVERNMENT, OR TOWN.

(3) "LEASE-PURCHASE CONTRACT" MEANS A CONTRACT ENTERED INTO PURSUANT TO [SECTIONS 1 THROUGH ~~7 AND 9~~ 6 AND 10 THROUGH 12], WHEREBY THE LESSOR LEASES AND SELLS A ~~BUILDING~~ FACILITY TO A GOVERNMENTAL UNIT.

(4) "LOCAL GOVERNMENT" MEANS ANY COUNTY, CITY, UNIFIED LOCAL GOVERNMENT, OR TOWN.

NEW SECTION. **SECTION 3. AUTHORITY TO ENTER INTO LEASE-PURCHASE CONTRACTS.** ~~ANY~~ IN ADDITION TO CURRENTLY AUTHORIZED METHODS OF CONTRACTING PUBLIC WORKS, ANY GOVERNMENTAL UNIT, AS AUTHORIZED BY ITS GOVERNING BODY, MAY ACQUIRE BY LEASE-PURCHASE CONTRACT ANY ~~BUILDING~~ FACILITY AND THE SITE ON WHICH IT IS LOCATED THAT IT IS OTHERWISE AUTHORIZED TO ACQUIRE. A LEASE-PURCHASE CONTRACT MUST INCLUDE:

(1) THE TERM OF THE LEASE-PURCHASE CONTRACT, WHICH MAY NOT EXCEED THE SHORTER OF THE ESTIMATED USEFUL LIFE OF THE ~~BUILDING~~ FACILITY OR 20 YEARS;

(2) THE AMOUNT OF RENT AND THE DATES WHEN THE RENT IS DUE; AND

(3) AN OPTION FOR THE GOVERNMENTAL UNIT TO PURCHASE THE ~~BUILDING~~ FACILITY AND ~~BUILDING~~ FACILITY SITE ON ONE OR MORE DATES BEFORE THE EXPIRATION OF THE LEASE-PURCHASE CONTRACT, WITH

BUTTE LOCAL DEVELOPMENT CORPORATION

SENATE LOCAL GOVERNMENT
EXHIBIT NO. 5
DATE 3-23-93
BILL NO. HB 644

DATE: March 23, 1993

TO: Members of the Senate Local Government Committee

FROM: Evan Barrett, Executive Director

SUBJ: Support for HB 644

I am sorry that a business commitment in Washington DC precludes me from appearing to testify in favor of House Bill 644. I hope that this written testimony will adequately express the desire of the Board of Directors of Butte Local Development Corporation to see passage of this bill.

HB 644 provides needed flexibility to local government in the construction of buildings and other facilities. As an economic development organization, we work closely with local government in accomplishing community and economic development. Any new tool provided to local government which allows them to design, construct, and finance facilities at less cost to tax payers is needed in the current economic climate for local government.

Additionally, construction is a basic sector job producer. It is recognized as such by all economists. Job creation is the most important challenge facing our state and the kind of jobs that can be created from public works construction are among the better jobs available. They also generate secondary and spin-off jobs. Because of our commitment to economic growth and jobs, the Butte Local Development Corporation Board of Directors recommends that the bill be passed with the amendments being suggested by Representative Brown. Those amendments represent the consensus among virtually all parties interested in this legislation which is innovative for Montana, but has been highly successful in other states for many years.

Thank you.

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! montana technical council

P.O. Box 20996, 1629 Ave. D, Billings, MT 59104, Phone 406/259-7300
Fax: 259-4211

MONTANA CHAPTER AIA	AIA
AMERICAN SOCIETY OF CIVIL ENGINEERS	ASCE
BILLINGS ARCHITECTURAL ASSOCIATION	BAA
CONSULTING ENGINEERS COUNCIL OF MONTANA	CECM
GREAT FALLS SOCIETY OF ARCHITECTS	GFSA
AMERICAN SOCIETY OF LANDSCAPE ARCHITECTS	ASLA
ARCHITECTURAL SOCIETY OF HELENA	ASH
MONTANA ASSOCIATION OF REGISTERED LAND SURVEYORS	MARLS
MONTANA SOCIETY OF ENGINEERS	MSE
INSTITUTE OF ELECTRICAL AND ELECTRONIC ENGINEERS	IEEE

Testimony for House Bill 644, March 23, 1993.

For the record, my name is Tom McNab. I represent the Montana Technical Council. The council is made up of 11 professional design societies.

Our members provide design and project management services on buildings, utilities, and other site improvements related to public works projects.

We have had a spirited discussion about HB644 based on the two basic portions of the bill.

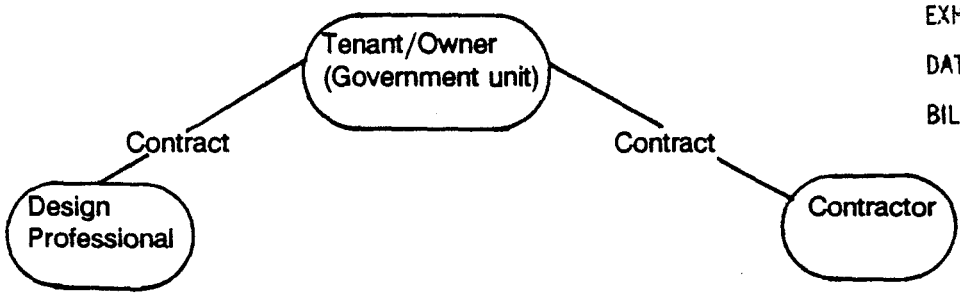
> The first part of the bill concerns lease purchase financing method. MTC supports the use of lease purchase financing because it provides a method of financing needed public works projects when traditional funding methods are not available, and allows local government units to use an alternate funding method that the state currently can use under MCA 18-3 part I.
>
> The second part of the bill is the procedure for awarding the lease purchase contract. This part of the bill should be re-labeled Procedure for Awarding a Design Build Lease Purchase contract. Design Build is a considerably more complicated process for delivering a public works project than the current process in place in the state.

As a result MTC is divided on supporting this portion of the bill. For the committee's information, we provide the following brief comparison of the two delivery processes.

The following diagram shows the fundamental difference in the two delivery methods.

SENATE LOCAL GOVERNMENT
EXHIBIT NO. 6
DATE 3-23-93
BILL NO. HB 644

Traditional method:

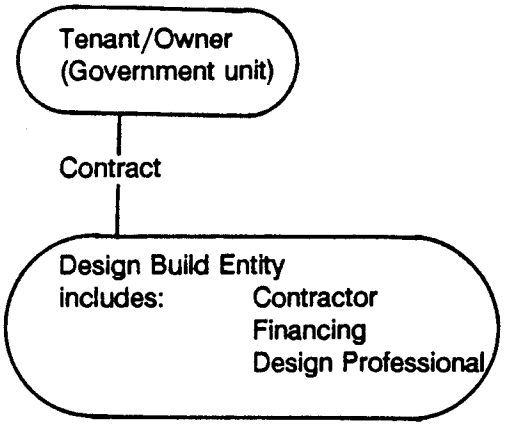


Design bid construct:

- Owner selects design professional based on qualifications, then negotiates fee.
- Owner works with the Design Professional to develop the design, having input throughout the decision making process.
- Owner contracts for construction based on bids received from contractors who have bid on a complete design that defines the quality, scope, and function required by the owner.
- Design professional represents owner's interest (advocates for the owner) through the entire process.

Exhibit #6
3-23-93
HB-644

Design build:



Changes roles and responsibilities of parties involved:

- Process requires that the government unit have the inhouse or contracted capability to make program, functional, quality decisions up front to prepare the request for proposal.
- Allows little input in the design process after the program is developed.
- Requires tenant/owner to evaluate a number of technical proposals involving construction techniques, building code issues, construction costs, energy costs, financial evaluation, functional, and aesthetic issues, to name a few.
- Provides no representation of the "tenant/owner" in the process.
- The design professional is contracted to the design build entity; not the tenant/owner and is responsible to the design build entity.

The Montana Tech Council is concerned with the question 'who advocates for the tenant/owner' and how are their interests protected during a complicated review process?

The current law allowing lease purchase of state projects uses the traditional method of design bid construct to deliver the project, but adds a bidding requirement for lease purchase.

This committee must decide if design build is appropriate for local government units to use as a public works delivery process.

Thank you for your attention.

Tom McNab

Thomas E. McNab

GOVERNMENT WORK

IRS design-build job taxes teams' good will

Another federal design-build competition has left a host of angry bidders feeling exhausted, exploited and financially drained. Aside from losing, they are upset that the General Services Administration allowed 11 bid teams to spend 18 months vying for a $100-million contract to develop and build a new Internal Revenue Service computer center in downtown Detroit.

GSA awarded the job late last month to a Chicago-based project team led by developer Walsh Higgins & Co. The firm will own and maintain the 900,000-sq-ft, three-building complex under a 20-year lease agreement with GSA. The federal government will pay the firm an annual rent of $14.9 million. A sister company, Walsh Construction Co. of Illinois, will be the general contractor on the two-year, build-to-suit project. Lohan Associates is the architect. Work is expected to break ground this spring and create more than 1,200 jobs.

Most bids estimated the cost of the project at about $85 million and called for an annual rent closer to $17 million. But Walsh won because GSA chose "the offer that represents the best value to the government, not necessarily the lowest price," notes Nanette L. Myers, GSA's contracting officer. She claims this approach allowed GSA to make trade-offs between price and five other factors—quality, experience, energy conservation, occupancy schedule and an operation and maintenance plan.

Several unsuccessful bidders say they are frustrated because they still do not know how GSA weighted each factor or what criterion was decisive. They also note that GSA amended its proposal six times, requiring multiple submissions that pushed the cost of each bid up to an estimated $500,000 or more.

"Many of us feel very badly about the whole process," says Arnold Mikon, president and chief executive officer of architect-engineer Smith Hinchman & Grylls Associates Inc., Detroit. "We spent over $300,000 ourselves for a fee that probably would have been about $4 million. So our risk-to-reward ratio here was really a zero-sum game."

SH&G's bid team included Detroit contractor Walbridge Aldinger and Houston developer Gerald Hines. Others dissatisfied include The Turner Corp., New York City, U.S. Equities Realty Inc., Chicago, and Hellmuth Obata & Kassabaum Inc., St. Louis. ■

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INTERIOR CONSULTANTS

February 18, 1993

Chester A. Widom, FAIA
Vice President
The American Institute of Architects
2020 Santa Monica Boulevard Suite 400
Santa Monica, CA 90404-2063

Dear Chet:

Thank you for this request and opportunity to discuss with you issues of importance to the Interiors Committee. We commend the Board for their new found commitment to the committees and broader view of the Institute and profession.

Fortunately (in consideration of your request for brevity), I did not receive your letter until day before yesterday and should have no problem being brief. I solicited responses from the other members of our steering group which I have enclosed in their entirety.

I would like to suggest some background reading if you have not already had the opportunity. "Interior Perspectives: The Challenge to Excellence in Interior Design," an Interiors Committee program from last year, and "Current Practices in the Architecture of Interiors" are both AIA publications and will provide insight into some of the following issues.

As you will see in reading the individual responses herein, our committee is not unlike the profession as a whole in our diversity. The size of firm, size of projects, types of projects, geographic location, and methodologies of practice all vary. One commonality we do share is that the practice of interior design is different from the practice of architecture.

In Rob Steinmetz's letter, he illustrates the point that Interiors, as a practice type, has been largely ignored by the Institute. If not ignored, misunderstood. This is confirmed by an informal survey of our members regarding use of AIA documents. The majority of committee members do not use AIA contracts, specs, or other AIA documents because they just don't apply to our needs.

I believe the reason these documents don't fit the need is that they are created by people who do not understand interiors practice. Not that they aren't good documents in and of themselves, the problem is that they strive to fit into a mold that is just not right. That mold is the AIA mold. A mold that doesn't accept diversity.

The vast majority of projects that we become involved in are very short lived in comparison to architecture. In retail design, the average life span of an installation is five years. Offices and health care may be five to ten years. The priorities for interior projects and project delivery are radically different from that of common architectural projects. The emphasis of the last few years has been to keep it as cheap as possible, including the fees. Please read the attached editorial from June 1992 *Interiors* magazine.

Kirk Millican points out in his letter the obsession for project management within his firm, which is also prevalent within the profession. In discussions with Rob and Kirk, the concept of the AIA as a framework for methodologies for a variety of practice types and project types was discussed as one approach that could be considered.

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NEW RULE TO CLARIFY "DESIGN/BUILD" PROJECT DELIVERY PROCESS

Exhibit # 6
3-23-93
HB-644

—by Professor Walt Lewis, FAIA

The selection, by both private and public owners, of the "design/build" project delivery process has been increasing. There are numerous versions and approaches to the design/build process, some of which are illegal under the current provisions of the **Illinois Architecture Act.** This has prompted the Illinois Architecture Licensing Board (Board) to make recommendations to the Department of Professional Regulation to enact a new rule to clarify how the design/build project delivery process can be executed legally in Illinois.

For the purposes of rulemaking, the design/build project delivery process is defined as a method in which one entity signs a single contract accepting full responsibility for both the design services and the construction execution for a building facility. This is in contrast to the "traditional" project delivery process in which multiple contracts are awarded separately to an architect for the design services and to a contractor for the construction execution *(See Figure 1. - Project Delivery Processes).*

The declaration of public policy in the Illinois Architecture Act asserts that the practice of architecture is subject to regulation and control to protect the public health, safety, and welfare and that only qualified persons are licensed as architects to practice architecture in the State of Illinois. The Act further requires that all buildings within the State that are intended for use by the general public must be designed by an architect licensed by the State. The practice of architecture is defined to include the ***offering to furnish*** professional services as well as ***actually furnishing*** the professional services.

When an owner contracts with a design/build entity to "design" and "build" a project to be used by the general public there can be no question that their agreement contemplates the "practice of architecture."

Conversely, when the design/build entity is in the process of soliciting or marketing their "design" and "build" capabilities to an owner whose facilities will be used by the general public, the entity is clearly "offering to furnish" and "intends to furnish" architectural services, that is, "practice architecture." If the design/build entity is a firm engaged in the practice of architecture, in Illinois, it must do so, according to the Illinois Architecture Act, in one of the following forms:

- sole proprietorship;
- partnership;
- professional corporation;
- limited liability corporation; or,
- general business corporation.

A partnership or corporation which includes within its stated purposes, practices, or holds itself out as available to practice architecture, must obtain a license from the Department of Professional Regulation to do so. Such an entity seeking to be licensed is required to meet the following criteria:

1. two-thirds of the Board of Directors, in the case of a corporation, or two-thirds of the general partners, in the case of a partnership, are licensed under the laws of any State to practice architecture, professional engineering, or structural engineering; and,

2. the person having the architectural practice in this State in his charge is:

a) a director, in the case of a corporation, or a general partner, in the case of a partnership, and

b) holds a license under this Act.

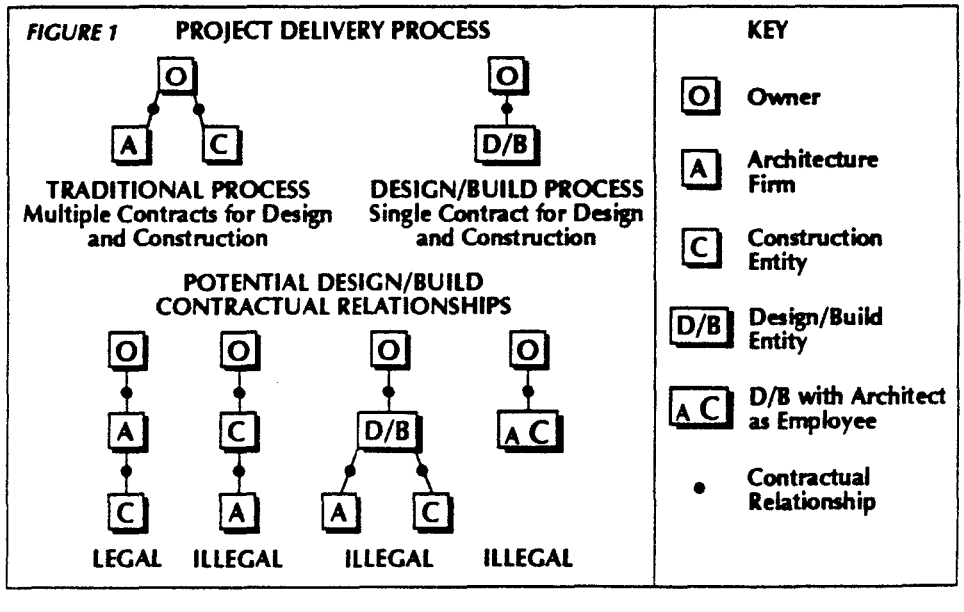
The Board is considering rules that would require that an entity which is a partnership or corporation offering a combination of architectural services together with construction services may offer to provide architectural services only if:

A. an architect licensed in Illinois participates substantially in all material aspects of the offering;

B. there is written disclosure at the time of the offering, that such architect is engaged by and contractually responsible to such partnership or corporation;

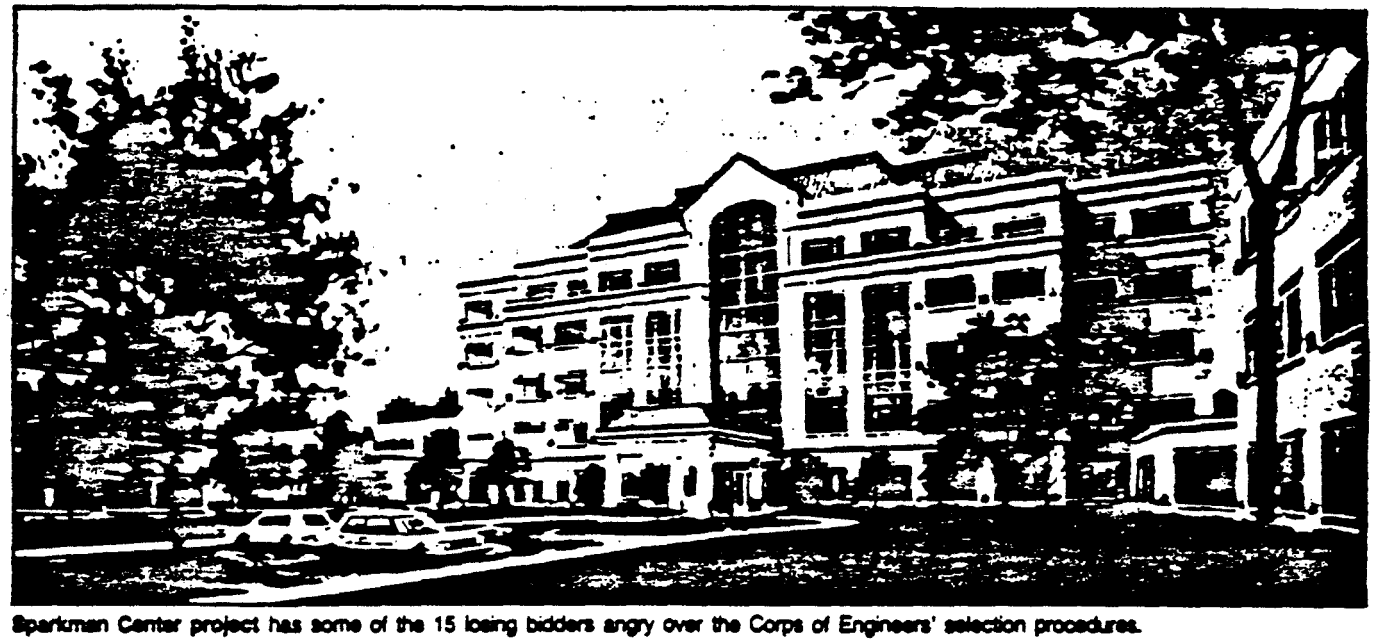
C. such partnership or corporation agrees that such architect will have direct supervision of the design and that such architects services will not be terminated without the consent of the person engaging the partnership or corporation; and,

D. the providing of architectural services by such architect will conform to the provisions of the Illinois Architecture Practice Act of 1989 and the rules adopted thereunder, which includes (1.) and (2.) above.



CONTRACTING

Design-build job stokes tempers



Sparkman Center project has some of the 15 losing bidders angry over the Corps of Engineers' selection procedures.

Design-build construction is growing in popularity among federal agencies, but some of the 15 losing bidders on one Corps of Engineers's contract awarded earlier this month are pretty sour on the prospect. They claim that the selection process is too confusing and expensive. Corps officials say they hope to smooth out ad hoc local rules with national guidelines soon.

The $58.4-million, 600,000-sq-ft Sparkman Center for Missile Excellence in Huntsville, Ala., is one of the largest design-build projects the Corps has undertaken, say Corps officials. It was bid in August by the Corps's district office in Mobile and the winner was a joint venture of Centex Rooney Construction Co. Inc., Fort Lauderdale, and Atlanta architect Smallwood Reynolds Stewart Stewart & Associates Inc. Construction starts in early 1993.

Evolving rules. The Corps's selection process for design-build projects still is evolving. "Basically we haven't done many, but there's going to be more of it," says a source at the Corps's Construction Policy Group in Washington, D.C. He says a study group has been formed to develop an overall policy, but "it's still in the infancy stage." Meanwhile, individual districts work on their own.

Many of the 15 losing bidders on the Sparkman project are bitter about the experience—one that some firms say they cannot afford to repeat. According to several bid teams, the main problems were uncompensated costs, subjectivity in selection and a lack of explanation at the end as to why their firms did not win.

Overall, the teams spent an estimat-

How the bidders stacked up

Centex-Rooney Construction Co. Inc., Ft. Lauderdale, $58,839,900; Manhatten Constructon Co., Dallas, $57,999,000; Blount Inc., Montgomery, Ala. $58,710,917; J.W. Bateson Co., Dallas, $58,547,000; Hensel Phelps Construction Co., Little Rock, Ark. $58,725,000; Caddell Construction Co., Montgomery, Ala., $58,800,000; Opus Corp. & Opus Construction, Minneapolis, $58,785,000; Hyman-Stubbins Inc., Boston, $59,992,000; Herbert/PCL/Joint Venture, Birmingham, Ala., $58,962,608; Turner Construction Co. DBA Universal Construction Co. Inc., Huntsville, Ala., $59,068,500; Metric Constructors, Marietta, Ga., $58,100,000; McDevitt, Street, Bovis, Akamoor Springs, Fla., $59,199,000; Benton Cook of Atlanta Inc., Atlanta, $59,195,000; Brasfield & Gorrie General Contractors Inc., Birmingham, Ala., $59,524,250; AMCA International Construction Corp., Jones Div., Montgomery, Ala., $58,965,000; The Austin Co., Atlanta, $64,894,800;

ed $4 million or more pursuing the project. All 16 bidders developed their design to 20% to 30% completion and several bidders estimate that each spent at least $250,000 and as high as $500,000. No compensation will be paid to the losing firms. "We're big boys. We knew there was no guarantee, but this is a waste of resources," says Ennis Parker, president of the A-E division of Rosser Fabrap Inc., Atlanta. It teamed with Brasfield & Gorie Inc. Montgomery, Ala. "In a sense it's exploitive," he claims.

Others agree. "I think it's lousy," says W. Easley Hamner, a principal with the Stubbins Associates, Cambridge Mass., which teamed with George Hyman Construction Co., Bethesda, Md. By not limiting the competition, "15 teams were burned, and they're going to be reluctant to bid again," he says.

The Corps considered short-listing firms, but decided that such a move could lead to a protest because the teams were equally qualified, says Ed Crabtree, chief of construction contract administration for the Corps's Mobile District. "In fairness to all the bidders, we thought it was in their best interest [for us] to review all the proposals," he says. Nevertheless, Crabtree says he was "flabbergasted" by the large number of proposals.

Too much work. Crabtree claims that the selection criteria did not require firms to develop the design as far as they did. "It was kind of up to the individual proposers," he explains. "A lot of them carried the design farther than we intended." He says the project was funded by a special congressional appropriation of $67.6 million, of which $58.4 million was for new construction. Firms were asked to design the most space into the office building for the price, he says.

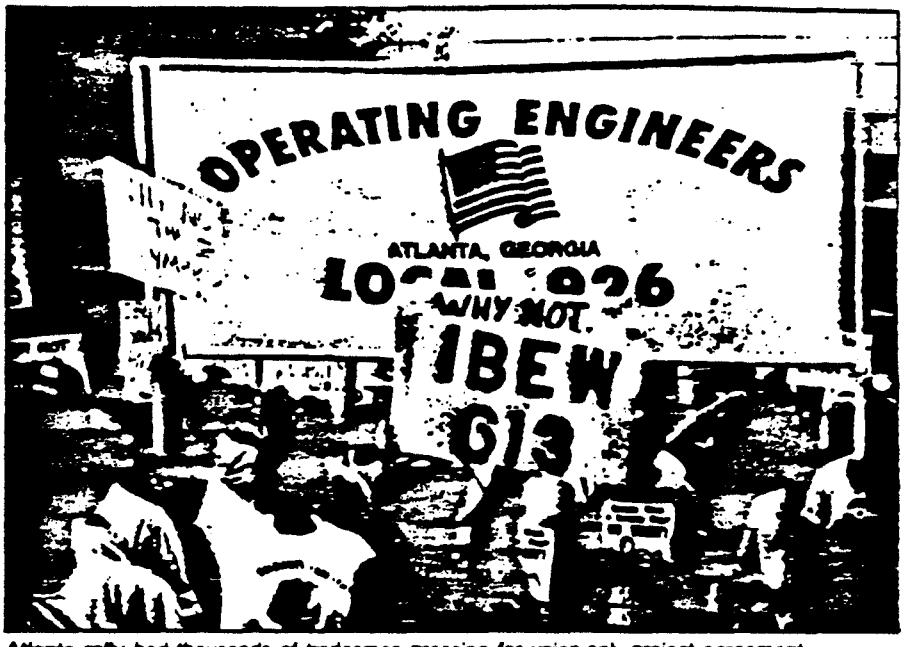
Firms bidding the Sparkman project also criticize the post-selection follow-up, saying they received little meaningful feedback. Firms requesting a debriefing received a four-page synopsis of their proposal's shortcomings, but no comparison with the winner, says John Knuttson, senior project manager for Harbert Construction Co., Birmingham Ala. "Nobody knows what made the winning proposal win," he says. "For all the money we spent, we could at least get that."

"It's just too costly," concludes Parker. "We've bid two General Services Administration projects and this one and they all have been unsatisfactory experiences. We 'never say never,' but we're certainly soured on the process." ■

By Steven W. Setzer

LABOR

Unions want winner's circle on Olympics work



Atlanta rally had thousands of tradesmen pressing for union-only project agreement.

Union workers rallied in downtown Atlanta Sept. 18 to make their case for a union-only employment policy for construction relating to the 1996 Summer Olympic Games, setting the stage for a protracted wrangle with local Olympics officials.

About 5,000 unionists from various industries showed up, including a substantial contingent of union construction workers. They exhorted Atlanta Olympics chief Billy Payne to "treat workers right," by requiring livable wages, health care and benefits on Olympics construction and operating contracts.

Jesse Jackson led the march and the rally was peaceful. It marked the most overt move by unions in an 18-month series of negotiations with Olympics managers. At issue is $500 million worth of construction contracts and more than $1 billion in other revenues that the games will generate during the two-week event in August 1996.

The march was organized by the multi-industry Atlanta Labor Council and it drew workers from 20 states and representatives from 37 state and national AFL-CIO affiliates. Charlie Keys, business manager of the North Georgia Building and Construction Trades Council, acknowledges the slim chances for a union-only project agreement for the construction work. But he says the unions will still hound Olympics officials. "We've tried to make it plain that we're not against the Olympics, but they can't hide behind the Olympics mystique to mistreat workers," says Keys.

A private entity called the Atlanta Committee for the Olympic Games has been established to manage the games. Officials say contracts will be awarded on a "merit" basis, but they have not formally adopted a policy. A decision likely will be made at ACOG's board meeting on Oct. 20, says a spokesman.

The general position of ACOG is that both union and nonunion firms will compete on equal footing. A similar policy was adopted for the now-completed Georgia Dome and union firms won about 30% of the $207-million project.

Local construction associations are opposed to any type of union-exclusive agreement. "We are very much opposed to a project agreement or union-only policy," says John Chambless, executive director of the Georgia chapter of the Associated General Contractors. "The low bidder should get the work." ■

Exhibit #4
3-23-93
HB-644

RTKL

RTKL Associates Inc.
400 East Pratt Street
Baltimore, Maryland 21202
(410) 528-8600/Telex 87916 RTKL BAL

Project
Project No.
Date October 14, 1992

Memorandum

To: James P. Cramer

From: Harold L. Adams

Re: Resolution Regarding Competitive Design/Build Proposals for Federal Projects

The Large Firm Roundtable supports the federal government's efforts to achieve high quality and cost-effective design. However, the competitive design/build approach is unlikely to achieve that goal because:

- The cost to participate is very high.
- There is inadequate compensation for the design professionals and contractors.
- The Functional and Space Programs frequently are inadequately prepared.
- There is no pre-qualification process, so many firms who are unqualified waste time and effort.
- Selection criteria is not published.
- There is no opportunity for interaction between user and designer.
- Profits are achieved at the expense of quality.
- The building agency unfairly is transferring risk and cost to the design and construction industries.

The Roundtable recommends that the AIA neutral policy be changed to one of opposition; and that meetings with allied design professionals and the AGC be convened to develop support for selection based on qualifications.

It is further recommended that the AIA take the initiative to forge a common position with allied professionals to educate the Congress and provide the federal government with a detailed process which will achieve the government's goal of architecture with value for money.

HLA:jp

RECOMMENDATIONS OF THE LARGE FIRM ROUNDTABLE OF THE AMERICAN INSTITUTE OF ARCHITECTS ON IMPROVING SELECTION PROCEDURES FOR DESIGN-BUILD PROJECTS

June 19, 1992

Background

Members of the Large Firm Roundtable of the AIA, meeting on May 1, 1992, in Minneapolis, Minnesota, asked the AIA to convene an ad hoc focus group to discuss design-build selection procedures in use in government procurements and, if possible, to make recommendations for improving the procedures.

On June 19, 1992, the focus group convened in Boston, Massachusetts. Attending were representatives of the following firms, all with experience in design-build projects:

Ellerbe Becket, Inc., Minneapolis, Minnesota;
Flad & Associates, Madison, Wisconsin;
Gruzen Samton Steinglass, New York, New York;
Hellmuth, Obata & Kassabaum, Inc., St. Louis, Missouri;
NBBJ, Seattle, Washington;
RTKL Associates, Inc., Baltimore, Maryland;
The Stubbins Associates, Cambridge, Massachusetts.

Joining them were the chairman of the AIA's Federal Agency Liaison Consulting Group and the AIA First Vice President/President-Elect.

Focus group members discussed the fact that federal and state agency officials have resorted to so-called "nontraditional" project delivery methods, such as design-build, in an effort to avoid cost overruns encountered during construction projects. The use of nontraditional methods seems to arise from officials' frustration with the complexities and inefficiencies of their own "traditional" procurement methods, which are enshrined in complicated procurement regulations. Unfortunately, "traditional" procurement methods usually do not use (or seem to be precluded from using) standard cost control procedures used in private industry such as preselected bidders, construction phase contingencies and "partnering."

Some focus group members reported having been told by government officials that design-build procurements had been successful in controlling costs; other focus group members reported conversations in which officials said they were not sure whether design-build had been effective or not. But focus group members agreed that design-build projects have become common and are likely to remain so.

Focus group members then discussed various design-build projects with which they had been involved, either as the design members of teams competing for the design-build project or as members of design-build selection juries. The projects discussed included both state and federal design-build selections.

Improvements in the Design-Build Selection Process

There emerged a consensus that the procedures and practices listed below seem to characterize successful design-build selections. By "successful design-build selections," the focus group members mean a process that: (1) treats fairly the design-build teams competing for selection in terms of their time, money and effort; (2) gives the government a design-build team, project plans and a budget it can count on, (3) assures the government of good value and a facility suitable for the purpose intended, and (4) fosters even in losing competitors a sense that they have been dealt with fairly (and thereby minimizes the possibility of award protests).

Limited Prequalification. Design-build selections are typically run in two phases. In the first phase, teams submit statements of their qualifications. Those firms chosen to proceed to the second phase prepare relatively detailed designs and cost estimates. In successful selections, only three to five firms are chosen to proceed to the second phase. Allowing more competitors than this severely complicates the selection panel's job and it makes it extremely unlikely that the agency commissioning the project will be able to pay compensation to the second phase competitors. With many more firms competing in the second phase, it is more difficult to have meaningful communications with them about details of the project program and there are only that many more disappointed competitors in the end who have invested considerable time and money to no avail, and who may have a possible interest in protesting the award.

Selecting a few firms for the second phase should be done according to criteria spelled out from the start. Prequalification is typically accomplished through relatively simple written submissions and interviews. Criteria often include requirements that teams have experience on similar types of building projects, but the criteria should not be so stringent that newly formed teams and innovative concepts are precluded.

There is nothing novel about prequalifying only a small number of teams; the "traditional" architect-engineer selection process typically involves prequalifying three to five firms prior even to interviews.

Compensation and Limits on Presentation Materials. A stipend should be paid to each of the teams selected for the second phase. If limits are imposed on the time devoted to the second phase and to the materials and documents that the competitors are required to produce, it is possible to limit the amount of fair compensation.

In design-build selections, competing teams are usually required to produce a design with a detailed (and sometimes guaranteed) price proposal. To produce the price proposal the contractor or developer member of a team often has to do no more than it would under the traditional project delivery system: namely, take a set of design documents and estimate the cost of construction. Under some design-build selections, however, the team is also required to provide private market financing for the project as well as to provide a site. In those cases, the contractor-developer must expend much more effort than under the traditional system. But the design team member must always do considerably more work than under the traditional selection system.

Under the traditional system, the architect-engineer designer does not produce any of his design product in competing for the project. The effort, rather, is put into analyzing the approach required by the project. In a design-build competition with a required price guarantee, the designer is likely to be required to proceed through schematics and design development (at least 35% of total design services) in order to permit the team to establish its price for the project. In some cases, the designer may have to proceed through construction documents (at least 75% of total design services). Not only is this an unreasonable burden on the competitors, but it means that all of this work is done without benefit of detailed owner or user input. It is therefore likely that much of the work will need redoing later.

Many design-build selections require the design-build team alone to bear the costs of producing the detailed designs and cost estimates. The winning team may be compensated for this work. The unsuccessful competitors are often not compensated, and this often leads to resentment at best and litigation at worst.

Reasonable compensation should be paid to the phase two competitors. The amount of detail in designs and cost estimates has been curtailed in successful design-build selections. Experience shows that at least minor changes must usually be made in designs and cost estimates once the design-build team is "on board." Curtailing the detail required in phase two submissions (by limiting the number of drawings required, not permitting models, etc.) reduces the time and expense for everyone, including the government agency, involved in the selection. But the detail required in submissions can only be curtailed if the requirement for a guaranteed price is also eliminated: as long as a price guarantee is required, competing teams are forced to go through extensive design development, regardless of how simple a design submittal is officially called for.

Jury or Selection Panel. A competent jury is crucial. Members should include design and construction experts from outside the government agency to take advantage of fresh perspectives and to insulate the process from giving the appearance of political or insider selections. Of course, the jury should also include representatives of the government agency that will use the facility.

The jury should be selected early enough to review and comment on the program and to make the prequalification selections. This provides continuity and consistency in the judging process. It is essential that the jury be knowledgeable about and in accord with the program requirements.

The names of jury members should be made public. Potential competitors will know what design and other predilections the jury members have, and they ought to know. That way, they can make an informed decision about whether to go into the selection process or not.

Although government regulations may require final selections to be made by a government official, state and federal regulations usually permit outside advisory panels to be constituted, so long as conflict of interest rules are followed.

Program and Criteria for Evaluation. In order for competing teams to have a clear understanding of the project and, commensurately, for the government agency to get proposals responding to its requirements, the project must be clearly delineated in the program documents. Expectations for the facility' performance and quality must be clearly stipulated.

Criteria for prequalifying and for final selection must be clearly stated in writing to avoid misunderstanding and legal challenges. For the final selection, it is important to describe what weight will be given to various criteria, such as design quality, cost, etc. And, as noted above, the jury should be consulted in devising the program and selection criteria.

Feedback. There is a widespread misconception that "blind" competitions are fair. Competing teams are often forbidden to have private conferences with the project's managers until the competition is over. In order to answer the inevitable questions about the program, agencies often arrange public question-and-answer sessions at which all teams are present, or else written questions and agency answers are circulated to all teams. The problem with this is that, under either format, teams are reluctant to ask important questions that would divulge their design or financing intentions to other competitors.

A better solution has been used in some state design-build projects. Each team is given an equal opportunity for direct and private communication with the project managers. Basic elements of fairness are retained and each team gets to ask the important and possibly tell-tale questions it has. The result is proposals that respond more directly to the agency's intentions. A side benefit is that the agency managers have an opportunity to evaluate how each team approaches the project and how it interacts in a private working session.

It is also important to provide candid feedback to unsuccessful teams after the prequalifications are made and again upon final selection. Written jury reports should be provided after each phase describing why the successful competitors were selected. Waiting until a contract is signed, as is often the practice, leads to a growing sense of frustration and perceptions that the process may not have been fair. Teams want and need to know how they fell short. The agency needs teams to feel that they have a reasonable chance if they submit for the next project.

Qualifications-Based Selection. The above comments focus on a design-build process based on competing design and price proposals. The government's needs may be better met through a design-build selection based on teams' relative qualifications. Such a procedure would still select a single entity responsible for integrating design and construction; a guaranteed price could be set at the appropriate point in the subsequent design phase. This selection method would have the added benefits of allowing detailed user/owner input in the earliest stage of the design process and would also reduce the time and cost of the selection process. Fair pricing could be assured by open-book costing and existing government auditing procedures.

December 30, 1992

Mr. James B. Stewart, Director
Office of Design and Construction
Public Buildings Service
General Services Administration
18th and F Streets, N.W.
Washington, DC 20405

Dear Mr. Stewart:

The Request for Proposal (RFP) for a design/build procurement for a new federal courthouse in Minneapolis, Minnesota contains the seeds of a disaster for the government and design and construction firms. The American Institute of Architects urges GSA to revise the RFP and re-think this procurement. We urgently request the opportunity to meet with the appropriate GSA officials.

AIA urges use of the traditional design/bid/build process which utilizes the well-understood and qualifications-based selection procedures of the Brooks Act. The traditional process, with a few adjustments, may well be the best method through which this project can be delivered.

But if GSA finds that design/build is a better method for this project, then AIA requests that the following recommendations be adopted. We believe our recommendations will enhance the quality of competition, ensure equitable treatment to firms submitting their qualifications for this project, and restore the construction industry's confidence in GSA's ability to administer a successful design/build project.

In addition to these specific recommendations, we are enclosing a copy of our general recommendations on design/build procedures which we previously discussed with you.

Minimum Requirements for a Firm Need to be Strengthened

Design/build often imposes inordinate and unwarranted costs on A/E and

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construction firms. A chief contributor to those costs is that too many firms are allowed to compete for the contract following the minimum requirements review, even though most of these firms do not have a realistic chance of succeeding. All these firms continue expending huge sums to develop negotiating positions and to generate submittals. GSA should slate 3 to 5 firms only to prepare submissions. Short lists of that size are routinely prequalified under traditional design/bid/build procedures.

The unfairness of keeping too many firms in the running for a project was documented in the enclosed article in the September 28 edition of ENR Magazine. This article explained the frustrations of 15 unsuccessful offerors participating in a design/build RFP issued by the U.S. Army Corps of Engineers.

AIA encourages GSA to amend its RFP to place additional obligations on prospective offerors to demonstrate their abilities to perform on this project. GSA must reduce the field of competition at some point in the selection process, and AIA believes that the reduction must come at this point. Minimum requirements could include, for example, that:

- each of the offeror's required team members must have successfully provided delivery services in their proposed capacities for at least three of the space types listed in subparagraph 2.1.1.3;

- high-rise experience be defined as experience on a building not less than 12 stories in height above grade;

- offerors be able to submit examples of two previous design/build projects pursuant to subparagraph 2.1.1.8;

- offerors must provide examples of how they have fulfilled the RFP's two-fold design requirements of 1) providing efficient and economical facilities for the use of the courts, court-related functions and other government agencies, and 2) providing visual testimony to the role and responsibility of the U.S. courts in assuring justice and equality before the law. The new courthouse, according to the RFP, is to be a building dedicated to the law and the attainment of justice, and the design of the courthouse should reflect the nobility of these aspirations and their timeless quality. The examples should accurately reflect these requirements.

A Firm's Qualifications

AIA recommends that GSA reduce the number of submittals required in the Phase 2 evaluation. AIA understands from its members that the cost for a firm to submit

the information that is required in Phase 2 is estimated to be $300,000 to $400,000.

Payment of Stipend

AIA requests that GSA offer to the 3 or 5 final proposers a stipend commensurate with the amount of work that they will be required to perform.

Selection Panel Members' Identity

GSA needs to identify immediately the members of its selection panel. This information, if provided at the beginning of the process, could reduce the number of competing firms, since some design/build teams could voluntarily remove themselves from the process if they believe that they may not be viewed favorably by the selection panel. Proposers are placing a large sum of money at risk to compete in the design/build RFP. It is only fair to provide this information to the proposers in order to let them properly assess whether or not they want to accept the risk of competing.

These amendments will improve the process by which GSA is seeking proposers for its design/build RFP. We heartily encourage you to make these amendments so that the design and construction industry will not meet with the unneeded expense and so that GSA will not meet with the contention and protest that have characterized some past GSA and Corps of Engineers projects.

We look forward to working with you to secure changes in this design/build RFP and in the GSA design/build program overall. We request a meeting with you and the project managers at the earliest opportunity to discuss these recommendations.

Sincerely,

Bob Peck

Robert A. Peck
Group Vice President
External Affairs

RAP:dej

E. G. SPURLING, JR. FAIA
6312 Marjory Lane
Bethesda, MD 20817-5804

THE NORTH CAROLINA BOARD OF ARCHITECTURE
501 N. BLOUNT ST. RALEIGH, N. C. 27604 919/733-9544

August 24, 1992

Exhibit #6
3-23-93
HB-644

RE: DESIGN/BUILD OPINION BY THE NC BOARD OF ARCHITECTURE

Ladies and Gentlemen:

The North Carolina Board of Architecture has received a number of requests to evaluate the status of various "design/build" arrangements. These have varied dramatically in the source of the requests, the variety of relationships proposed, the proposed project responsibility, the contractural arrangements, the representation of the arrangement to the public, etc.

In public meeting of May 13, 1992, the Board adopted the enclosed "Interpretive Statement on Design/ Build Undertakings in North Carolina". It is being sent to you as a registered design professional, code official, or other involved participant in the design and construction process. We hope that your reading of this will increase your awareness of the position the Board has taken concerning this matter, and will allow you to help us to control the unauthorized practice of architecture through non-conforming "design/ build" practicioners in this state.

The statement is the result of an extensive effort to clarify a controversial subject of regulation. We welcome your suggestions on ways to make the Board's position clearer. To summarize a few of the points that may be of interest as practical matters:

1. It is considered inappropriate for contractors to offer design/build services without the identification of those who would be the licensed entities providing the design aspects of the services; not to do so would amount to the offering of the unlicensed practice of architecture or engineering. Therefore, the offering of the design/build service by an unlicensed entity is illegal.

2. An architect cannot participate in the design/build process as an employee of a company that does not hold a license to practice architecture from this Board. Any provision of such service should be by independent contractural arrangement.

3. Requirements for disclosure of the duties and responsibilities of the participating parties suggest that all project documents, title blocks, etc., at the very least disclose the identity of the design professional responsible. Contractor's title blocks are not sufficient.

We invite you to bring any questions you may have regarding the above and the enclosure to the Board. Should you observe that there are those practicing outside these guidelines, we would appreciate your bringing those instances to the attention of the Board and its Attorney.

Sincerely,

Michael R. Tye

Michael R. Tye, A.I.A.
President
Encl.

NORTH CAROLINA BOARD OF ARCHITECTURE

INTERPRETIVE STATEMENT ON THE DESIGN/BUILD UNDERTAKINGS IN NORTH CAROLINA

[Adopted May 13, 1992, pursuant to N.C.G.S. 150-2(8a)(c) and N.C.G.S. 83A-13(b)]

North Carolina architecture law generally prohibits the practice of architecture by any person or entity not licensed as an architect in North Carolina. The definition of "the practice of architecture" in North Carolina is broad. It includes not only *doing* the things that architects do, but *offering* to do those things, or *using the title* "architect." However, the North Carolina architecture law exempts "design/build undertakings" under particular circumstances, so long as an unlicensed person or entity does not end up "practicing architecture." North Carolina General Statute 83A-13(b) states that nothing in the architecture law:

> Shall be construed to prevent a duly licensed general contractor, professional engineer or architect, acting individually and in combination thereof, from participating in a "design/build" undertaking including the preparation of plans and/or specifications and entering individual or collective agreements with the owner in order to meet the owner's requirements for predetermined costs and unified control in the design and construction of a project, and for the method of compensation for the design and construction services rendered; *provided*, however, that nothing herein shall be construed so as to allow the performance of any services or any division thereof by one who is not duly licensed to perform such service or services in accordance with applicable licensure provisions of the general statutes; *provided further*, that full disclosure is made in writing to the owner as to the duties and responsibilities of each of the participating parties in such agreements; and *provided further*, nothing in this chapter shall prevent the administration by any of the said licensees of construction contracts and related services or combination of services in connection with the construction of buildings. (North Carolina General Statute 83A-13(b).

I. Statutory Provisions:

For proper analysis its helps to break down into separate parts the above-quoted law.

A. **"Duly Licensed General Contractor":** This refers to only those who are licensed as "general contractor" pursuant to North Carolina General Statute Chapter 87. A general contractor is:

> any person or firm or corporation who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage on his own behalf or for any person, firm or corporation that is not licensed as a general contractor pursuant to this article, the construction of any building, highway, public utilities, grading or any improvement or structure or the cost of the undertaking is forty-five thousand dollars or more or undertakes to erect a North Carolina labeled manufactured modular building meeting the North Carolina State Building Code (North Carolina General Statute 87-1). All general contractors in this state must be licensed by the State Licensing Board for General Contractors [North Carolina General Statute 87-10, 87-13].

B. **"Professional Engineer":** These are regulated by the North Carolina State Board of Registration for Professional Engineers and Land Surveyors. A "Professional Engineer" must be licensed by the Board (North Carolina General Statute 89C-3, 89C-13).

C. **"Architect":** An "Architect" is a person duly licensed to practice architecture by the North Carolina Board of Architecture, subject to the provisions of Chapter 83A of the North Carolina General Statutes. The "practice of architecture" is defined as:

> Performing or offering to perform or holding oneself out as legally qualified to perform professional services in connection with the design, construction, enlargement or alteration of buildings, including consultations, investigations, evaluations, preliminary studies, the preparation of plans, specifications and contract documents, administration of construction contracts and related services or combination of services in connection with the design and construction of buildings, regardless of whether these services are performed in person or as the directing head of an office or organization [North Carolina General Statute 83A-1(7)].

D. **"Acting Individually and in combination thereof":** For as far back as records can be found regarding the design/build exemption these words have been construed to *not* include an employer/employee relationship. Although a licensed general contractor, a professional engineer or architect, while maintaining independence, can participate in a "design/build" undertaking, the architect cannot participate as an *employee* of a person or entity that is not licensed by the Board of Architecture.

For instance, on September 11, 1979, the Board issued an opinion letter regarding a duly licensed architect who was offered a position as vice-president of design and marketing with a contracting firm. The architect's duties would include "the design of buildings pursuant to the design-build concept." The Board warned the architect that he could "not render architectural services in the name of the corporation unless it is for the design of a building for the corporation's own use. . . by the fact that the licensed architect is an employee of a corporation, which is not a professional corporation, the provisions of the architecture law would be violated."

Later, in an opinion letter dated December 9, 1987, the Board informed the attorneys for the North Carolina Chapter of the American Institute of Architects that:

> in G.S. 83A-13(b), relating to design/build services, the architectural services are rendered to owners. G.S. 83A-12 prohibits the practice of architecture to those entities which are not licensed which prohibition speaks in terms of prohibiting an indication or willingness to practice for others. The ability of a corporation to practice architecture through those licensed employees must be limited to the rendition of services for itself. However, it is certainly prohibited by G.S. 83A-12 for such an unlicensed corporation to hold itself out as rendering services for others. Any attempt by a corporation to render services for others by asserting that it was practicing for itself when in reality it was practicing for others, would be stringently and strictly construed against this type of activity.

More recently, the Board issued a Declaratory Ruling on point:

> G.S. 83A-12, however, prohibits the practice of architecture by unlicensed corporations. In the case at hand, the employer is also providing architectural services to outside clients through the staff architect. This situation could present the architect with conflicting duties owed to the employer and the fiduciary duty owed to the client and is therefore prohibited. The design/build exemption set out in G.S. 83A-13 would not apply to this situation as described. While an architect may enter into such a project, the statute does not permit the employment of an architect by a contractor,

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through which the architect then provides design services to the client. Rather, this statute addresses the individual licensed architect or architectural firm which enters into an individual or collective agreement with the owner to provide the necessary architectural services for the project." (Declaratory Ruling to David Ward Jones, November 28, 1990).

E. **"Entering individual or collective agreements with the owner in order to meet the owner's requirements for predetermined costs and unified control etc":** This phrase generally permits the licensed general contractor, professional engineer or architect to offer services at a price encompassing the architects' services as well as services of other professionals in order to accommodate an owner's requirements for predetermined costs and unified control. Of course, this means that if the arrangement is not primarily made to meet the owner's requirements, but is rather a *marketing ploy enabling a general contractor to trade upon the architectural title of a licensee*, the exemption would not apply. For example, the state of Tennessee recently pronounced that "offering through sign, brochure, business card, yellow pages or other advertising, to provide design/build services, is offering to provide architectural, engineering, or landscape architectural services to the public. The Tennessee Board pointed out that "design/build is a legitimate professional activity which is being abused across the state by unlicensed drafting."

F. **"Provided, however, that nothing herein shall be construed so as to allow the performance of any such services or any division thereof by one who is not duly licensed to perform such service or services in accordance with applicable licensure provisions":** This language relates back to the discussion on architects as employees of design/build firms. It also relates to G.S. 83A-12 which prohibits "any individual, firm or corporation to practice or offer to practice architecture in this state as defined in this chapter [N.C.G.S. 83A-1(7)], or to use the title "architect" or in any form thereof, ...unless such a person holds a current individual or corporate certificate of admission to practice architecture [in North Carolina]." The law plainly precludes any person or general business corporation not licensed under the architecture statute from using an employee to provide architectural services to others.
Violation subjects the architect to disciplinary action pursuant to North Carolina General Statute 83A-14 and 83A-15. The unlicensed person or entity can be enjoined or prosecuted for unauthorized practice pursuant to North Carolina General Statute 83A-16 and 83A-17. Architects may not be employed by building contractors, but may enter individual independent contracts or collective agreements with them to the extent permitted under General Statute 83A-13. The Board has historically permitted architects to be employees of the government, construction firms and utilities only to the extent these employees are in effect the architect's clients. In these instances the rules of ethics still apply to architects.

G. **"Provided further, that full disclosure is made in writing *to the owner* as to the duties and responsibilities of each of the participating parties in such agreements":** This language places upon the architect party to a design/build undertaking the affirmative obligation to provide, in writing, to the owner a description of the architect's duties and responsibilities.

H. **"Provided further, nothing in this chapter shall prevent the administration by any of the said licensees of construction contracts and related services or combination of services in connection with the construction of buildings":** This provision permits *licensed* general contractors, *professional engineers*, and *licensed* architects to provide contract administration services in conjunction with the construction of buildings. In the light of the definitions of each of these three professions, only these licensees can administer contracts for non-exempt projects.

II. Conclusions and Examples:

North Carolina General Statute 83A-12 sets out the purpose of the architecture law: "To safeguard life, health and property." Exemptions to laws of general application, pursuant to ordinary statutory construction, are to be read precisely and narrowly. The close inspection of the exemption for design/build undertakings helps answer a number of question often raised by architects and contractors. For example, a contractor who is not a registered architect cannot hire as an employee a registered architect who will be responsible for providing design services, including the sealing of documents, required in order for the contractor to operate as a "design/build contractor." Similarly, a registered architect cannot perform design services, including the sealing of documents, under the supervision of a nonprofessional. Aside from the restrictions on design/build arrangements, such a practice would be a direct violation of North Carolina General Statute 83A-15(a)(3)(c) which prohibits "knowingly undertaking any activity... or accepting any compensation or reward except from registrant's clients, any of which would reasonably appear to compromise registrant's professional judgment in serving the best interest of clients or public."

An architect may participate in a design/build project in these ways by:

(1) Entering into an individual agreement with the owner to provide architectural services to be constructed by a contractor selected by the owner under separate contract where the architect is responsible for establishing the design and quality of materials and systems to be incorporated in the project in conjunction with the owner, and the contractor is responsible for estimating alternatives proposed to and for consideration of the owner in terms of design and material selection and ultimate construction of the project for a lump sum amount or, in some instances, on a cost basis. Such projects are typically "fast-tracked," meaning construction was begun before the total completion of all construction documents in order to minimize the total design and construction time for the owner.

(2) The architect may participate in a design/build undertaking whereby the architect contracts with the licensed general contractor to provide architectural services, and the licensed general contractor is under agreement with the owner to provide design and construction services and is responsible to the owner for both services. Such an architect must provide services in keeping with the statutory obligation to safeguard life, health and property and, of course, must disclose in writing to the owner the architect's duties and responsibilities in the arrangement.

(3) An architect can participate in a design/build project when one architect prepares conceptual drawings and defines scope, materials and systems to be incorporated in the building, which plans are then submitted for pricing by a contractor for design and construction following the arrangements described in the second alternative above.

(4) It is possible for an architect to enter into a design/build contract with an owner and subcontract the estimating and construction aspects of the project to a contractor, in which case the architect has contractual responsibility for both elements to the owner.

Design/Build Ventures

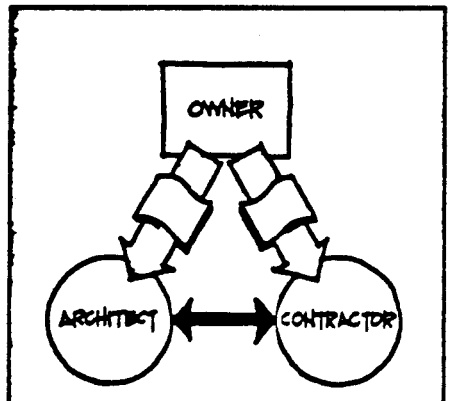
Architects join contractors to explore new forms of practice.

MENTION THE TERM "DESIGN/BUILD," AND architects immediately take opposite sides as to the merits of this project delivery system. Some are leery of any linkage between architectural and construction services. Others happily practice according to one type of design/build arrangement but look askance at alternatives. And a few are experimenting with modifications of the classic definition of design/build to avoid problems they feel are inherent to other methods of project delivery (see diagrams, right).

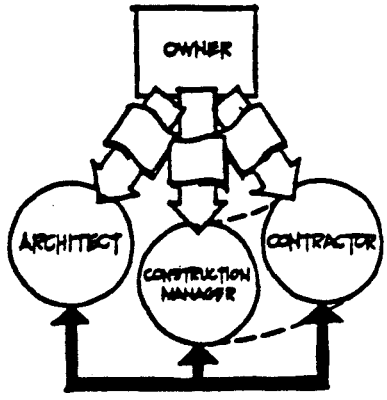
Alerted to the increasing number of design/build projects in the public sector, the AIA appointed a task force in 1989 to review its existing policy on the subject. The group's resulting policy statement, issued in June, defines design/build as "a method of project delivery in which one entity signs a single contract accepting full responsibility for both design and construction services of the building facility." This seemingly simple description, however, belies the complexities of design/build. The reasons architects engage in this method, the means by which design/build jobs are awarded, and the organization of design/build teams are as varied as the projects that result from such undertakings.

A design/build entity may consist of an architect who has acquired a general contractor's license to build his or her own designs. It may be a general contractor who subcontracts design services to a registered architect so that the builder can offer better designs to an owner who would otherwise not commission an architect directly. Some design/build entities are project-specific joint ventures between an architecture firm and a construction company. Others are established as permanent corporations with in-house architectural and construction expertise. Although the permutations of design/build seem endless, the makeup of a design/build entity within a specific state is contingent on that state's statutes governing licensed occupations. Some forms of design/build are illegal in certain jurisdictions.

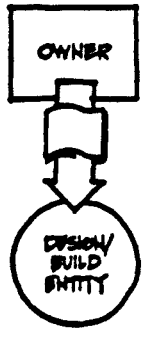
By organizing a project around a single contract, and therefore a single point of



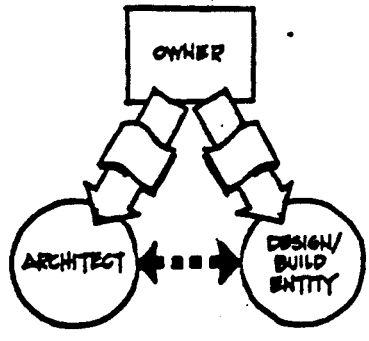
Traditional Delivery Method
Owner commissions architect to produce schematic design, design development, and construction documents. General contractor is hired only after architect completes all such documents.



Construction Management
Owner hires architect and construction manager. Architect, in consultation with manager, completes documents. Owner then hires general contractor; construction manager may also assume this role.



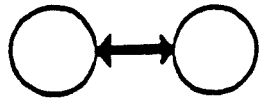
Design/Build Classic Model
Owner contracts with one design/build entity, which provides design and construction services. This entity can be organized in many ways, depending on state laws governing such arrangements.



Design/Build Alternate Model
Owner commissions architect to develop preliminary design, then contracts design/build entity for construction documents and services. Interaction between architect and design/build entity varies.

DWIGHT MICHELL ILLUSTRATIONS

Contract between owner and service provider



Communication, but not contract, between service providers

ously. This exclusivity yields another benefit. If the lowest aggregate bid is still too high for the budget, the construction chief goes to the three bidders (assuming the three bids were reasonably close together, as they usually are) and requests free value engineering from each.

"How would you take a half million out of the job?" he asks them, and it is typical for all three to respond. The architect and the owner process the suggestions and rebid the project with the value engineering they are willing to accept built into their revised construction documents.

This value-engineering advice comes from contractors who have just completed a close examination of the project. They are willing to give the advice freely because they know that rebidding will be confined to those in the first bidding and because they want to stay on the client's favored list.

I have observed this highly developed version of the classical project delivery system, and it works. Why then has this university decided to abandon the classical project-delivery system in favor of construction management as it launches a major construction program?

Neil Sheehan observed in his book on Vietnam, *A Bright Shining Lie*, that we were, in large part, propelled into the Vietnam catastrophe by misunderstanding an earlier limited success in the Philippines. Something similar is at work here: Someone had one success in construction management and is an uncritical champion of the process ever after.

How construction management began

Construction management was born in the 1960s out of some quite specific exigencies. Inflation was increasing construction costs at a rate of 1 1/2 percent per month. But, if an owner could start procurement one-third of the way through a design process anticipated to take 18 months, he might save 18 percent on heavy-cost items such as steel.

It was feasible for the architect to package construction documents for segments of the project. Foundation and structural steel, for example, might compose a first-bid package when design-development documents were still in preparation for the balance of the project.

But who would coordinate a project being bid in segments? If the owner was a public agency, it was probably not capable of doing so and, in most states, barred by law from negotiating this role with the general contractor.

Thus was born the professional construction manager [who often, in latter years, might indeed be an architect] and who would coordinate on the owner's behalf the multiple-segment process. The professional CM was subject to the same laws as an architect or engineer and could be retained by negotiation, rather than by bidding.

General contractors seize the day

The private sector was similarly affected by inflation in construction in the 1960s, but was free of laws inhibiting negotiated contracts with contractors. General contractors saw the opportunity in the private sector to take on the coordination role themselves. There was a new fee to be earned in the process and, if the owner could be persuaded to make direct contracts with the subs in each segment of bidding, the GC/CM would have no financial responsibility for failures of the segment contracts.

These contractors could do even better if the private owner accepted that the cost of purchasing in segments to defeat inflation was not to know the final price until the bids came in on the last segment. This meant in essence that the GC/CM never gave a price commitment.

> "We were propelled into Vietnam, in part, by misunderstanding an earlier limited success in the Philippines."

As the parties to the process became more experienced, however, the owners began to deny GC/CM's that advantage. After all, these new GC/CMs were only lately transformed from conventional general contractors with the experience and knowledge that enabled them to estimate costs. Owners expected a Gross Maximum Price at the time the first segment went out for bid—not when the last segment bids were received. This was not an unreasonable demand by owners who, of course, wanted their costs capped early. But, in practice, this aspect of the GC/CM's role has caused great mischief.

The basic conflict of interest

I have observed architects taking positions on behalf of their client-owners or even on behalf of the building itself (when their client-owners were willing to have it cheapened) which were often contrary to the financial interest of the architect himself. These include comprehensive redesign, extended negotiations, or—when circumstances warranted—just saying no. That possibility is inherent in the fiduciary responsibility that the architect customarily undertakes. The general contractor, however, is historically a vendor who has no performance obligation beyond his contract obligations.

With these thoughts in mind, examine what happens when the GC/CM is asked for a GMP at the beginning of design development. He wants, of course, ultimately to build the project and knows that a GMP beyond the owner's pocketbook may terminate the project altogether or, at least, cause the owner to engage a new CM. But he has an out. He can claim that the final documents materially embellished the GMP documents; in short, the profligate architect was at fault. This conflict frequently arises and makes many architects unhappy with the GC/CM process.

When a project is bid in phases, there are other risks including possible dispute when the responsibility for work falls between bids in two phases. In the conventional system, there is a general contractor who must perform the work no matter the disputes of subs. But when there is, in effect, no general contractor (because he is now the CM), that responsibility goes up to the owner or the architect for failing to bundle the work with the appropriate subcontractor's responsibilities.

When inflation is at less than 1/2 percent per month, bidding in phases makes very little sense. Yet there are GC/CMs who will still recommend it.

A GC/CM's fee may be no more than an owner might pay a conventional contractor. But it is often a great deal more. One leading GC/CM demands 20 percent of all value-engineering savings it produces and 40 percent of the owner's contingency fund not spent. Frequently, there is no maximum on the amounts which a GC/CM charges for time and materials.

A clear listing of the construction administration duties of a CM differentiated from an architect's has yet to be written. When two independent parties are assigned the same job, it has been my experience that the job doesn't get done—each party blaming the other.

The rush to new ways of doing things is a weakness in us all. As architects advise their clients on whether or not to abandon the classical project-delivery system, they should at least have in mind its virtues and some of the perils of the construction-management system when it is not carried out by persons with impartial interests.

Perhaps the last word on all of this is that an honorable owner, a devoted and skilled architect, and a contractor of integrity and capacity will build successfully no matter what system is used.

Mr. Sapers is a partner in the Boston law firm of Hill & Barlow. His clients include architects around the world. He is adjunct professor at the Harvard Graduate School of Design, where he teaches legal problems in design. In 1975, he received the AIA Allied Professions Medal and, in 1988, was elected Honorary AIA. □

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Design/Build Methods Mature

Release of new AIA documents reflects steady rise in the use of this delivery process
By Christopher Wist

Despite its increasing acceptance in recent years, design/build still sparks heated debate among architects. Advocates claim that it helps control costs, increases efficiency, and promotes accountability within the construction industry. Detractors maintain that it raises serious and as yet unresolved legal and ethical problems. Both sides agree, however, that design/build as a project delivery method represents a significant departure from the way in which American architects, owners, and contractors have structured their legal relationships for most of this century.

In the conventional project delivery method, an owner enters into two separate contracts: a design contract with the architect and a construction contract with the contractor. For owners, the alternative concept of "single-point responsibility"—hiring one entity to be responsible for both design and construction—holds great appeal in terms of perceived economies, speed, and flexibility.

From the architect's standpoint, the design/build debate revolves around the question of whether anyone with a financial stake in the construction of a project can serve the interest of the owner above his or her own. The roots of this discussion predate the founding of AIA when, in the early 19th century, architects were engaged in fierce competition for clients with design/builders who called themselves "package dealers." Like their modern-day counterparts, package dealers provided both design and construction services to owners.

To create a legitimate distinction between themselves and package dealers, architects adopted a system of professional ethical principles that, among other things, placed the client's interests above those of the architect. Not surprisingly, the standards also prohibited architects from acting or holding themselves out as design/builders. This prohibition was carried over into AIA's mandatory code of ethics and was not seriously questioned for more than a century thereafter.

By the 1970s, however, dissenting voices from both inside and outside the profession began to argue that the ethical prohibition against design/build was an anachronism. AIA in 1978 authorized a three-year trial period during which members would be permitted to engage in design/build work. Before the experiment was completed, however, antitrust questions encouraged AIA to drop its mandatory code of ethics (including its prohibition of design/build) in favor of a purely voluntary statement of ethical principles. In 1986, the AIA again adopted a mandatory code of ethics. The new code does not prohibit design/build, but nonetheless targets it as a *potential* conflict of interest. Many insist design/build violates professional ethics.

"We think that [design/build] is bad for [AIA] and for the public," says Barbara Rodriguez, executive director for the New York State Association of Architects. "I just read an editorial in the New York *Times* expressing concern over the fact that so many physicians in America are now employees of health-care organizations rather than independent professionals. The author was worried that these doctors might put their employers' interests above those of their patients. Substitute the word 'architect' for 'doctor' and 'client' for 'patient,' and you have the principal argument against design/build in a nutshell."

Norman Coplan, legal counsel to the New York State Association of Architects, agrees. "Design/build is conducive to a diminution of the architect's obligation to the public," he says. "Architects can no longer exercise their unfettered judgment to promote the public's safety, but must keep within the economic confines imposed by their employers."

Design/build's proponents, on the other hand, deny this charge. "The quality of materials specified depends on whether or not it's a 'high-image' building," says Thomas W. McInerney, chief of architectural productions for the Mt. Pleasant, Ill., office of the Opus Corporation, an 800-person design/build firm headquartered in Minneapolis with $200,000,000 worth of construction to its credit in 1985. "The owner is given a range of choices that fit within his budget, and he will often make the final decision." McInerney adds, "Design/build has opened up new opportunities for architects [and] added a different dimension to my career growth. I've really been enjoying myself."

Perhaps the most attractive (and most controversial) claim made about design/build is that it is a less expensive process than the conventional project delivery method. According to Richard Wilberg, marketing director for Opus, a given project can almost always be built at a lower cost using design/build.

Even some of design/build's detractors, such as Rodriguez, concede that design/build "may possibly" offer some savings in cost. Other critics, however, are not as charitable. In testimony before an Indiana state construction committee, Jesse Jones, president of Glenroy Construction, a 400-person company based in Indianapolis, stated that design/build is not less expensive than the conventional approach to construction. According to Jones, "There's no free lunch, and if you've got five [architects] out there doing designs, sooner or later, they're going to get paid for it, or they're not going to participate."

As to the question of time savings, however, few will deny that the streamlined, single-point-of-responsibility organizational structure of design/build gives the design/builder far greater control over the entire design and construction process, therefore increasing the potential for completing the project in less time than the conventional approach.

Christopher Wist is director of legal research for AIA's documents program.

No strangers to controversy, two respected architects, formerly competitors, team up to champion a project-delivery system that will seem revolutionary to many U.S. practitioners.

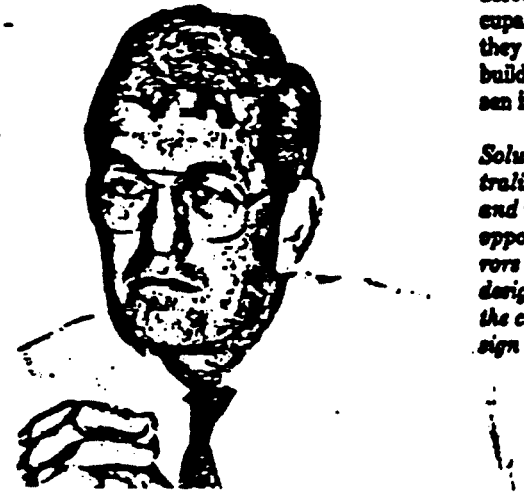
length. Contractors and manufacturers keep detailed cost information confidential and may even understate costs for competitive advantage. And architects must omit manufacturers' proprietary technology from their designs to sustain competition in bidding.

In the U.S., building contractors have little say about what they build. Since technology is set by plans and specs, contractors are rarely able to win bids or improve profits with better ideas. Good contractors are frustrated. The process encourages them to find the cheapest subs, bid low, and improve profits with change orders.

If U.S. building contractors could win jobs and improve profits by using better technology, they would invest in R&D.

Solution: In bridging, as in the traditional design process, architects and engineers, consulting with clients, produce the right design for the clients and, as in design-build, other architects and engineers consulting with contractors and manufacturers develop the best technology.

In Japan and parts of Europe, processes like *Bridging* are common and contractors invest in R&D to get jobs. ***If U.S. building contractors could win jobs and improve profits with better technology, they would invest in R&D and gain international-market share for themselves, architects, engineers, and manufacturers alike.***



3. Centralizes responsibility and reduces legal costs

Problem: Everyone is exposed to more claims than necessary due to divided responsibilities. Legal costs add to budget overruns for clients and destroy profits for architects, engineers, and contractors. The traditional process is based on the flawed assumption that architects and engineers can prepare perfect plans and specifications. Clients talk more and more of holding architects liable for mistakes. Errors-and-omissions insurance is now often half of an architect's typical profit—a significant cost to pass back to clients as overhead. And errors-and-omissions insurance doesn't completely protect clients. American courts hold architects and engineers only to a standard of skill, knowledge, and judgement equivalent to that generally exhibited by members of other professions. Flawed design costs clients *and* architects money.

Much of architects' and engineers' liability comes from contractors making claims of negligence or improper acts—decisions by architects and engineers during construction, mix-ups in shop drawings and product-submittal approvals, and delays in approvals or decisions by architects and engineers during construction. Other claims against architects and engineers come from latent defects in the building that show up after occupancy. While contractors may be at fault, they are frustrated because they must often build systems that they would not have chosen in the first place.

Solution: Bridging, as in design-build, centralizes responsibility for construction and its correction, and minimizes the opportunity for contractor claims of errors and omissions. As in the traditional design process, a professional represents the client's interest during and after design and construction.

What You Need to Know

Q. Can the contractor raise building costs while producing construction documents?
A. Not without an approved change order.

Q. Are there incentives for the contractor to save money?
A. The contractor keeps 100 percent of savings, if they stem from cost-effective technology that meets the requirements of the contract, and shares savings for suggestions that, while not meeting the requirements, are approved by the owner and the owner's consultant.

Q. Who guides the project through government and community approvals?
A. The client's architect goes before such organizations as zoning, community, and landmark boards. The builder's architect files plans and is the architect of record.

Q. How do clients' consultants assure that design and construction are carried out according to their preliminary designs and specifications?
A. By controlling the client's payments to the contractor.

Q. Will the client wind up talking to the contractor's architect, undermining the original consultant's role?
A. Not any more than to any other sub, says Heery.

Q. Who owns the construction documents after the client has paid for them?
A. The client.

Q. Will *bridging* mean asking an unlicensed entity to perform professional design services during design development?
A. Not so long as the architect of record makes sure that such design is performed by licensed individuals. (A special caution is raised by state licensing boards, such as New York's, which have recently cracked down on such borderline cases as steel connections designed on shop drawings.)

Q. Is *bridging* ethical?
A. "As long as there's full disclosure to the client," says the AIA's James Franklin.

Charles K. Hoyt

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Contracts define the architect's role

As far as owners are concerned, ultimate responsibility for *all* aspects of a design/build project rest with only *one* entity. However, within the design/build team, players may divide responsibility in a number of ways. Different contract agreements define the role that architects play in the process. Many variations within the basic framework are possible, for example:

- The design/builder may be an individual or corporation that obtains design and construction services from architects and contractors who are in its direct employ;
- Design/build arrangements may take the form of partnerships or joint ventures, such as between an architect and a builder;
- The design/builder may be an autonomous entity that parcels out the tasks of design and construction to independent architects and contractors, much as an owner does under the traditional project delivery method;
- Architects or contractors may act as the design/builders, and obtain from other sources those services they cannot personally provide.

A variation on the basic design/build process is called design/build/bid. Design/build/bid involves several design/builders competing for the contract to build a single project. Competitors typically prepare proposals based on a set of preliminary criteria prepared by the owner, who normally employs a separate architect to develop scope drawings and outline specifications. Insofar as several design/builders are in direct bid competition, design/build/bid closely resembles the conventional method of project delivery.

To help architects structure these various agreements, regardless of the form, AIA in 1978 initiated an intensive effort to develop standard contract forms for design/build. This effort culminated in the publication of AIA's family of design/build documents (AIA documents A191, A491, and B901) in 1985.

The basic AIA design/build document, A191, is intended for use between the owner and the design/builder. The other two documents are intended for use by the design/builder and third parties: A491 is for construction services, and B901 is for architectural services.

Robert Paul Dean, AIA, a member of the Institute's documents committee who helped write the trio of documents, explains: "Each of the three design/build documents comprises two agreements, intended for sequential execution. The part one agreement in each case roughly encompasses the traditional phases of programming, schematic design, and design development. The part two agreement generally parallels the traditional phases of construction document preparation and actual construction. The two agreements acknowledge that preliminary services might result in a decision not to proceed. In that event, the parties might conclude their contractual relationship without executing Part Two. In other circumstances, the parties might use Part Two without ever having entered into Part One."

A key feature of AIA's design/build documents is that they do *not* create any professional relationship between the owner and architect, unless the architect is a principal of the design/build organization. Both documents A191 and B901 provide that: "Nothing contained in the design/build contract documents shall create a professional obligation or contractual relationship between the owner and any third party."

This feature represents a dramatic departure from the architect's fiduciary duties of loyalty, trust, and openness inherent in the conventional project delivery method, through which the architect constantly advises the owner concerning the project. In purely legal terms, the owner-architect relationship in design/build can best be characterized as an "arm's-length business relationship," similar to that existing between a merchant and his or her customer. Architects involved in design/build, however, flatly deny that their relationship with owners is more distant. Stephan Bricker, AIA, vice president of the design/build firm Arbor Health Care Inc., states that "the relationship between architect and client is, if anything, closer in design/build than in a traditional practice. You're more involved with the client in all aspects of the project, from site preparation to providing furnishings."

Others believe that owners involved in design/build projects are less interested in specifics than those working with conventional project delivery methods. According to Richard Wilberg, owners in simpler design/build projects often play a minimal role in the process, at least after the construction has begun in earnest. Norman Coplan speculates that this may be because the design/build owner is primarily interested in purchasing a usable "finished product" and is not particularly concerned with the interim steps needed to create it.

Will design/build work for you?

In the final analysis, the question of whether design/build is the right approach for a given firm or project depends upon a multiplicity of factors. In addition to choosing among the various contractual agreements that a design/build project may take, individual architects and firms should consider the following:

- *Insurance:* Ten years ago there was a serious question about whether the insurance industry would be able to underwrite policies for architects practicing design/build. In part, these fears have proved to be unfounded. Professional liability coverage is generally available for architects who work on design/build projects. This insurance, however, is typically limited by exclusionary language stating that coverage does not extend to an "equity interest" that the architect may have in the design/build entity. Thus, all things being equal, an independent architect who is hired by a design/builder as a consultant (but not as an employee) should have no more trouble obtaining insurance than an architect practicing in the traditional manner. An architect who enters into a design/build contract in a role other than consultant, however, faces the potential loss of any investment made in the design/build entity, even though he or she will still be insured for professional liability. Architects contemplating entry into the design/build field should first consult with a reputable insurance counselor.
- *Internal Practice Management:* Some architects involved in design/build have noted that a "natural division" exists between the design and construction departments of their firms. Often, such departments will keep their own separate books and records. In some cases, it has even been found desirable to maintain separate payrolls within the same firm. Some architects in design/build firms have experienced difficulty in working with a partner who is not a design professional and who does not fully appreciate the intricacies and demands of the design function.

In any case, check state laws—some states forbid design/

builders from using certain business arrangements, although the prohibition is not usually phrased in explicit terms. For example, certain states bar some forms of corporations from practicing architecture. In those states, a design/build corporation must hire an independent architect-consultant to provide design services, even if it has several registered architects on its payroll. Other considerations, such as partnership liability, may also influence the choice of business format.

• *Licensing:* Design services under a design/build contract should be provided by a registered design professional licensed in the state of the project. Moreover, some states, including New York, prohibit architects from rendering services to an owner through an intermediary. (Of course, when the architect is a principal of the design/build entity, there is no intermediary between the architect and the owner.) On the other hand, because of business and insurance reasons, architects may want to shield their practice by creating a separate design/build organization.

• *Warranties:* The design/builder usually makes warranty-like representations concerning the overall quality of the completed building. Generally, such warranties are not made by architects or contractors in the traditional project delivery method; the *owner* is responsible for the sufficiency of the drawings and design to suit his or her particular purposes. In design/build, however, the owner will often provide the design/builder with little more than a basic program, and then will rely upon the design/build firm to come up with a project that meets it. In effect, as a design/builder an architect sells a "finished product"—and a promise that the product will meet the owner's stated purposes.

In the end, design/build, responsibly performed, offers three major benefits to architects: greater control of the execution of the design; fewer cash flow fluctuation problems; and, according to Bricker, a greater incidence of repeat customers. Two major disadvantages are greater liability as the result of greater control and a greater amount of up-front capital needed to acquire heavy construction equipment and to sustain a work force, unless a design/build firm is formed by an architecture firm and a contractor joining forces.

Only time will tell if design/build is just a passing phenomenon or a permanent addition to the American construction industry scene. What is certain, however, is that design/build is finally attracting the interest that its proponents have long argued it deserves. Its future development merits the continued attention of individuals with a serious interest in the evolution of architectural practice. □

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HB 644

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Issues in Architecture

Design/Build: Substituting New Problems for Old Ones

If one were to believe the considerable press being given to the promotion of the design/build concept of project delivery, you would think that we have discovered a unique process that, when implemented, will solve our industry's common problems. The advantages of design/build most frequently cited by proponents include establishing a single point of project responsibility, project cost savings, early project delivery and a guaranteed price. In some cases agencies also have used this process to get around traditional capital funding procedures and regulations.

James R. McGranahan, FAIA, is president and chief executive officer of MMA Architecture and is a national director of the AIA, representing the Northwest and Pacific Regions.

Our experience in managing four major design/build projects with three different agencies has provided us with a unique opportunity to evaluate these claims. Our conclusion: design/build is, at best, a complex alternative project delivery system that modifies the traditional roles and responsibilities of the owner, contractor and the design team and substitutes new problems for old ones. It is not a panacea for anything and it should be used only with extreme care and understanding of the roles and responsibilities of all participants.

For example, under design/build, a single point of responsibility for design and construction can be effected by having the contractor (or, less frequently, the Architect) assume this responsibility including the liability that comes with it. Under this structure, however, the design team is contractually responsible not to owner, but to the contractor, and must often develop solutions that meet the program requirements at the lowest level; that is, solutions which are the most cost effective rather than those that may be in the best interest of the owner in terms of life cycle costs, improved utilization or enhanced aesthetics. Also, since the design team does not contractually represent the owner, the owner generally must retain a whole new consulting team to "oversee" the process thus setting the stage for potential conflict in the resolution of disputes.

Owners must recognize that the shifting of "design" and "build" responsibilities to a single entity does not relieve them of their responsibilities to provide competent direction and management to control of the process. They should never abdicate their role as the client nor pass the buck on decision making to the design/build team.

While the ability to lock-in project cost with a guaranteed price is a viable goal, the owner must recognize that holding the line on the budget is primarily a function of how well the program and performance specifications have been documented. While the design/build team can be held accountable to absorb cost overruns for work identified and included in the contract documents, it has no responsibility to design, secure and/or install any items not so identified. The design/build process does not alter this reality.

Early project delivery is touted as another advantage of the design/build delivery process. Our experience in each of the four projects does not support this premise. While in some instances you can gain agency approval to start construction prior to the completion of all the design documents, this advantage is generally offset by the time expended in the management of the competition phase.

While some agencies may capitalize on design/build as a process to overcome existing funding procedures and regulations, most agencies like the design competition process because it provides them with an opportunity to "see" and critique several designs and

(continued)

select one they like best. Most design/build competitions do not compensate the competitors for this phase, making it even more attractive to the agencies. Even when they do provide a stipend, it often will not even cover reproduction costs of the presentation materials used in the competition.

Design/build as a viable alternative to the traditional delivery systems has met with mixed reviews in our industry. Both AIA and AGC have softened their original position against the process. AIA's current position is that "when a public agency employs the design/build method, selection of the design/build entity should be based on the Brooks Act qualifications based selection procedures which require competence, capability and a negotiated price that is fair and reasonable to the public." AGC policy "does not recommend the use of design/build procedures when public funds are expended." However, both organizations acknowledge that should specific project requirements dictate the use of design/build, certain prescribed procedures should be followed.

There is definitely a trend in the use of design/build in the public sector. Cities and other municipalities, universities, the Corps of Engineers, General Services Administration and the U.S. Postal Service are all experimenting with this process. There are those who feel that it is the wave of the 90's and firms who choose not to get on-board will miss a marketing opportunity.

Perhaps so, but if you choose to compete in this market, you must understand the rules of the game. Rule One: Winning is the only thing! Rule Two: Winning is the only thing! Rule Three: Winning is the only thing! Losing can be hazardous to your very existence. Losing can easily cost your firm hundreds of thousands of dollars to say nothing of the lost opportunities and profits foregone. If gambling isn't in your blood, don't play.

Why then, do firms choose to compete in design/build competitions? Some say for the excitement, the challenge, the competition, the ego, and the gamble. It does provide an opportunity for firms to complete for a project type and scale for which, under the traditional process, they may not be able to compete. Some do it because they are not busy and have excess capacity. Some even see it as an opportunity to make money.

Our reasons to compete in design/build include, perhaps, the full range of reasons noted above. We have won 4 of 6 public design/build competitions we have entered in the past few years. We understand Rule One, Rule Two and Rule Three and commit the necessary resources to make it happen. Would we prefer to do our work under the traditional process? You bet we would! But, if design/build is where it's at in the 90's, we'll be there.

James R. McGranahan FAIA, is president and CEO of MMA Architecture. His firm has competed successfully in design/build competitions including the $32 million Tacoma Dome, the $5.2 million Everett Community College Library and Student Center, the $9 million Elementary Education Center at Fort Lewis and, just breaking ground, the $42 million Department of Ecology Headquarters Building on the St. Martin's campus in Lacey. He is a national director of the AIA representing the Northwest and Pacific Region and Chairman of the AIA Federal Agency Liaison Consulting Group.

James R. McGranahan writes regularly for the Daily Journal of Commerce, authoring the monthly column, "Issues in Architecture."

DATE 23 March 1993

SENATE COMMITTEE ON Local Government

BILLS BEING HEARD TODAY: HB 128 - Brown; HB 342 - Strizich
HB 344 - Brown; HB 421 - Strizich; HB 644 - Brown

Name	Representing	Bill No.	Check One: Support	Oppose
Jackie Martelli	Butte Local Development Corp.	644	X	
Tim Phillips	Mont. Airport Mngt Assn	342 344	✓	
TED MATHIS	GALLATIN AIRPORT AUTHORITY	342 344	✓	
Elmer Johnson	Bruce-Anderson Co.	644	+	
Tom Worrell	A&E Division	644		
Debra Fulton	Dept of Adm	644		
Dave Brown	Sponsor - HB #72	128 644 344 342	X	
Harrison Fagg	Self.	644	X	
Rick Griffith	Butte Airport	342 344		
Gordon Morris	MACI	HB 421 HB 644	✓	
Carl Schweitzer	Montana Chamber	HB 644	✓	
Tom Ebzery	Atty rep Mont Airport Mgt Assn	HB 342 HB 344	✓	

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