P3s: Are Design Professionals Partners or Pawns?

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Federal, state, and local governments in the United States have discovered public-private partnerships, also known as P3s, and love them. They see them as solutions to the problem of needing critical infrastructure improvements, such as improved public roads, highways, bridges, and new and innovative water/wastewater facilities, but have no immediate way to fund such projects. P3s are also moving, albeit slowly, towards vertical projects, including higher education residential facilities, airports, courthouses, and prisons, among other municipal buildings. In theory, the system works.

Historically, a public entity desiring such improvements relied upon increases in taxes, traditional debt financing (including TIFs), or a (much less likely) budget surplus to fund the improvement. The public entity then proceeded with construction through a design-bid-build or, more recently, design-build delivery method. With a P3, the public entity partners with a private entity. The private partner (or developer) designs, builds, and finances the design and construction of the improvement with a combination of private equity and borrowed funds. In some cases, the private partner (or concessionaire) also operates, or operates and maintains, the improvement for a stipulated period of time after completion. The public entity pays the private partner back with either availability payments over a period of years and/or forgoing the collection of tolls or usage fees for a period of years following the completion of construction.[1]

Benefits abound for the public entity under a P3:

- obtains much needed financing, without burdening itself or the taxpayers with the tremendous cost of the improvement;
- receives an accelerated project delivery; and
- transfers risks typically associated with the construction (which often includes existing environmental conditions and differing site conditions, among others), financing, facility management, and lifecycle of the improvement to the private entity.

P3s, however, are fraught with traps for the unwary participant. Perhaps the most unwary of all is the design professional. On a successful project, a design professional participating in a P3 may have tremendous upside, as he or she may earn high fees and gain valuable professional exposure and recognition. However, on a "problem project," the design professional may face significant—practice threatening—risks if he or she failed to adequately evaluate, manage, and price the risks before taking the plunge into the P3.

P3 Opportunities for Design Professionals

P3s offer design professionals a variety of opportunities for participation. A design professional may serve as a consultant to the public owner or developer/concessionaire, in a like manner to an owner's consultant on a design-build project. In this capacity, the design professional's potential services range from feasibility studies and environmental assessments, to the development of criteria for the project and bridging designs, to the selection of the design-builder and its team, to reviewing and advising on the design to construction administration services.[2] Alternatively, the design professional may furnish design services to the design-builder who has contracted with the developer/concessionaire to design and construct the project. Like with a traditional design-build project, it is natural to think that the design professional works hand-in-hand with, and as a partner of, the design-builder. The design-builder needs the design professional's design in order to bid, and ultimately construct, the project. In a perfect world, the design-builder engages the design professional not merely to provide the project design, but to identify areas of concern in the proposed construction agreement and to negotiate terms that reasonably protect all parties. Typically, however, this is not how the process works.

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In order to win the project, many design-builders willingly assume significant design and construction risk and seek to flow all of that risk down to the design professional under the guise that (1) the design-builder has agreed to be bound by the terms of the design-build contract and cannot hold the design professional to a “lesser standard,” and (2) the design professional is in “complete charge” of the design. Thus, rather than becoming a collaborative partner, the design professional becomes a pawn in the design-builder’s game of risk-shifting.

In an effort to avoid this result, design professionals—together with their attorneys and insurance advisors—must take an active role in managing their risk during the contract process. They accomplish this goal by ensuring that the contract documents reflect only the risk that they are willing to assume and that they clearly define the assumptions upon which their services are based. This paper identifies the perils riddled throughout the contract documents at various stages of the design professional’s journey through a P3 project and provides design professionals with suggestions for addressing those risks.

Teaming and the Design Professional

Sometimes, a design-builder becomes aware of an attractive P3 opportunity through a developer/concessionaire’s solicitation for qualified firms (in a request for qualifications or RFQ) or proposals (in a request for proposals or RFP). In other instances, the design-builder learns of the opportunity long before its formal advertisement. In either case, the design-builder knows that it needs a strong team to win the project. That team includes a qualified design firm to furnish a design, which the design-builder will use to generate its bid. The design-builder approaches the design professional and proposes that they form a team to pursue the opportunity. The execution of an enforceable teaming agreement is critical for this purpose. It ensures the commitment of the design-builder and design professional to each other and to the opportunity and, in most cases, creates an exclusive relationship between those parties.[3]

The Teaming Agreement

Although design-builders and design professionals may enter into a teaming agreement at any time, they often do so before the private partner issues the RFQ or RFP. At this juncture of the P3, the agreement between the public entity and developer/concessionaire, the arrangements for the developer/concessionaire’s financing for the project, and/or a draft agreement for the design and construction (which would be included in the RFP) likely have not been finalized. As such, a design-builder’s obligations vis-a-vis the project are completely unknown, and this makes the teaming process that much more difficult. Teaming agreements for P3s should address a wide variety of issues, including each party’s responsibility for the effort, the compensation (if any) to the design professional for its preliminary design services, ownership of instruments of service, termination, and the resultant agreement that will govern the parties’ relationship if the design-builder wins the project.[4]

Responsibilities of the Parties

While the design-builder assumes primary responsibility for compiling and submitting the team’s proposal and communicating with the party who issued the solicitation, it typically assigns all responsibility for the proposal design to the design professional. To that end, design-builders often include language in teaming agreements that ties the design professional’s performance of pre-bid services to the standard of care, i.e., the professional skill, care, and diligence commensurate with that provided by other design professionals for projects of similar size, type, and complexity in the location of the project, at the time the project is being performed. If the design professional’s responsibilities began and ended with this statement, then he or she would be adequately protected. However, these agreements commonly go a step further and require the design professional to perform services in accordance (sometimes even in “strict and full compliance”) with the requirements of the solicitation or RFP. Thus, by agreeing—sight unseen—to comply with the RFP requirements, the design professional consents to comply with a contract (1) that includes terms that are still unknown, (2) that has standards for the services that are required to be performed, but are not yet defined, and (3) in which they will likely have little input and no influence. More significantly, RFPs often contain warranties—some of which are open and obvious, others of which are “hidden”—which heighten the standard of care and create uninsurable exposures.

Teaming agreements also delegate design-related responsibilities associated with the proposal effort to the design professional.

“Appropriate” design-related responsibilities include the preparation of the pre-bid design deliverables, preparation of a scope of design services for the project, and assisting and coordinating with the design-builder. Sometimes, however, design-builders seek to shift risks, which appropriately belong with the design-builder, onto the design professional. The most common of these risks is the risk of quantities. More and more, design-builders seek affirmation from the design professional that the design will enable the design-builder to prepare “accurate quantity and cost estimates” and submit an “accurate, low risk, high quality, responsive cost-efficient proposal” to the solicitor of the RFP. Agreeing to this responsibility, however, opens up Pandora’s box of uninsured liability for the design professional.

To manage these risks, the design professional must clearly:

1. define and refine its scope of teaming responsibilities and services so that it includes any assumptions upon which its preliminary design services are based, and
2. tie its performance exclusively to the appropriate (insurable) standard of care, while disclaiming any express or implied warranties or guarantees that may be lurking in the (yet unknown) RFP.

Compensation for Proposal Design Services

Unlike the design-builder who performs the lion’s share of its work after award of the project, a substantial portion of the design professional’s preliminary design services are performed even before the design-builder wins the project. On a P3 project, design professionals may expend tens of thousands of dollars (or more) in providing pre-bid design services, with no opportunity to recoup those monies unless the private partner awards the project to the design-builder.[5] This outlay imposes a significant financial burden upon even the larger design firms.

To manage this exposure, the design professional should negotiate compensation from the design-builder during the teaming process for these early efforts. Options for compensation include:

1. applying a stipulated multiplier to the direct labor costs (i.e., direct salary expense or direct personnel expense, or hourly billing rates) of the design professional’s employees or subconsultants performing the pre-bid services;
2. payment of certain pre-approved, direct costs incurred by the design professional; and
3. payment of third-party expenses incurred by the design professional for specialty services that are produced as final services, such as site investigations and surveying or mapping.

The design professional should also negotiate a success fee that is sufficient to fully compensate the design professional for early efforts. The design-builder would pay this success fee to the design professional only if the design-builder wins the project. Success fees may be calculated by (1) applying higher multipliers against salary or personnel expense, or full payment of standard hourly billing rates, and (2) full reimbursement for direct costs and third-party expenses, with a credit given for monies already paid by the design-builder.

Ownership of Instruments of Service

A design professional’s rights to ownership of instruments of service, including studies, surveys, models, sketches, drawings, specifications, and other similar materials, which he or she prepared or developed for a project, are protected under the United States Copyright Act.[6] Most teaming agreements, however, require the design professional to relinquish this right. They initially require the design professional to transfer all intellectual property rights in his or her instruments of service to the design-builder and, often, they require the subsequent transfer of all such interests to the developer/concessionaire. Doing so, however, not only strips the design professional of the value of his or her pre-bid design services, but also exposes the design professional to third-party liability claims that may result from the developer/concessionaire’s or design-builder’s unauthorized use of the instruments of service. But what about a design-builder who succeeds in winning a project, but then subsequently decides to terminate the design professional in accordance with the terms of the teaming agreement? This could occur as a result of a failure of the parties to agree to the remaining terms of the resultant subconsultant agreement and allows the design-builder to continue to use the design professional’s design without payment of its value.

For all of these reasons, design professionals should strongly resist provisions obligating them to turn over all intellectual property interests in their instruments of service to the design-builder; except to the extent that the RFP obligates the design-builder to convey those same rights to the developer/concessionaire. Design professionals should also ensure that the teaming agreement (and their qualifications and assumptions) includes limitations or qualifications that any use or modification of the instruments of service prepared by the design professional for this opportunity, or reuse of the instruments of service on another project, without his or her written authorization, will be at the user's sole risk and without liability to the design professional.

Finally, as to the design-builder, the design professional should negotiate:

1. an indemnification for all liabilities, losses, or damages (including attorneys' fees) that result from the design-builder's modification, use, or reuse of the instruments of service; and
2. a non-negotiable payment of the success fee sufficient to fully compensate the design professional for the full value of the preliminary design if the design-builder wins the project, unless the design-builder is compelled to terminate the design professional due to the developer/concessionaire's rejection of the design professional (if such approval is required by the RFP), or the design professional's material breach of the teaming agreement and subsequent failure to cure the breach.

One other issue of concern relative to use or ownership of instruments of service relates to the design-builder's right to continued use of the design professional's instruments of service if the design-builder and design professional part ways after the teaming agreement. In that case, the design professional should negotiate compensation for the design-builder's continued use of the instruments of service.

Termination

Teaming agreements, in general, typically provide a number of justifications for termination. Common reasons for termination include the developer/concessionaire's: cancellation of the solicitation; disqualification of either the design-builder or the designer from submitting a proposal; award of the project to another design-builder; or entry into a design-build contract with the design-builder. Design-builders also like to include provisions that allow them to terminate the agreement if the parties cannot agree upon the final terms of the design services agreement following "good faith negotiations." However, design professionals in P3s, in particular, should negotiate a reciprocal right to terminate if the parties cannot agree upon the final terms of the design services agreement following "good faith negotiations." This right protects design professionals from dangerous guarantees and warranties and disproportionate liability for damages (including liquidated damages) negotiated into the final design-build contract that would flow down to the design professional.

The Design Services Agreement

Contemporaneous with the negotiation of the teaming agreement, the design-builder and design professional must negotiate the design service agreement. This agreement will govern the relationship between the parties in the event the design-builder wins the opportunity. It may seem illogical for parties who may not even qualify to submit a bid, or will not be submitting a bid until the future, that must substantially negotiate the terms of an agreement that they may never have the opportunity to perform. However, teaming agreements, by their very nature, are agreements to work together in the future. Such agreements often lack clear evidence of the parties' intent to agree on the material terms of the contract or that the team members intend to be bound by the resultant subcontract. In consequence, courts routinely hold such agreements unenforceable.

The most well-known and frequently cited case addressing the enforceability of teaming agreements is the United States District Court for Eastern District of Virginia's decision in *Cyberlock Consulting, Inc. v. Information Experts, Inc*. In that case, the court found an unambiguous teaming agreement which

1. contained a requirement that the parties negotiate and execute a future subcontract following the award of the project;
2. conditioned the award of work to the subcontractor on the success of future negotiations;
3. conditioned the subcontract on the client's approval; and

4. suggested that the work allocation between the parties under the future subcontract could change, constituted an unenforceable agreement to agree.

Following *Cyberlock*, four key factors have emerged as necessary for an enforceable teaming agreement. Those factors are: (1) a clear and unqualified intent to subcontract; (2) agreed subcontract language, rather than future merely good faith efforts to negotiate; (3) clear scope, pricing, and payment terms; and (4) specific terms and conditions.[8] Importantly, parties do not necessarily need to agree on precise pricing (or a firm contract sum), so long as they specify a reasonably certain method for determining that sum.

While the law requires design professionals to pre-negotiate the design services agreement in order to protect its rights to perform services if the design-builder wins the project, there are significant risks in doing so. As previously indicated, virtually every agreement furnished by a design-builder to a design professional will seek to protect the design-builder from any risk associated with the design. These agreements do so through the modification of the standard of care to include warranties and guarantees, onerous indemnification provisions, disclaimer of environmental conditions, exceptions to "standard" mutual waiver of consequential damages, flow down of liquidated damages, third party beneficiary language, and the inclusion of extended warranties.

Standard of Care

Design services agreements, like teaming agreements, often give with one hand and take away with the other. On the one hand, they tie the design professional's performance to the standard of care; whereas, on the other hand, they require the design professional to perform its services in accordance with the design-build contract and all other project agreements. The problem with the latter is that these other agreements are littered with express and implied warranties and guarantees. While warranties are at the heart of, and critical to, every P3 relationship for the design-builder, they could be a death knell for the design professional. Warranties trigger the contractual exclusion under the professional liability policy and create significant coverage issues for design professionals.

Types of Warranties

Design services agreements typically contain two types of warranties: obvious warranties and "ghost warranties:"

Obvious Warranties

Obvious warranties include express and implied warranties detailed in the design services agreement itself. Sometimes found under a section heading entitled "warranties," they require the design to be "defect-free" and "fit for its intended purpose." Other times, the warranties require the design professional to perform in accordance with the "highest industry standard of care" or in a "highly professional manner" and "in compliance with all laws." Obvious warranties raise coverage issues from day one because they require performance by the design professional beyond the standard of care covered by their PLI policy.

"Ghost Warranties"

Even if the design professional manages to negotiate these warranty items out of the design services agreement, he or she must watch out for "ghost warranties." "Ghost warranties" appear throughout the design services agreement in flow down, or incorporation by reference, provisions. These provisions require the design professional to assume, on a back-to-back basis, all obligations to the design-builder that the design-builder assumes to the developer/concessionaire under the design-build contract. Since the teaming agreement and design services agreement are negotiated before the design-builder (1) wins the project and (2) negotiates the design-build contract, the nature and extent of these warranties are "invisible" at the time the parties execute the teaming agreement.

Risk Mitigation Techniques

As the single point of responsibility, the design-builder's contract provides a turn-key project, but the professional liability insurance only covers the design professional's negligent acts or omissions. This leaves a gap between what the design-builder has promised the developer/concessionaire in the design-build contract and what the design professional is (or should be) willing to provide to the design-builder in the design services agreement. Design professionals mitigate their exposure to these uninsurable warranties by (1) linking their performance of all obligations under the design services agreement exclusively to the appropriate standard of care, and (2) disclaiming any express or implied warranties or guarantees with respect to their services.

Indemnification Provisions

Other than the warranties riddled throughout the design services agreement, one of the largest areas of exposure for the design professional is the indemnification section. A design professional's indemnity obligation on a P3 project should be no different than on any other project that it performs. The design professional should only agree to indemnify and hold harmless the design-builder, and its officers and employees, from damages, losses, judgments, and expenses (including reasonable attorneys' fees and costs recoverable under the law) to the extent caused by its negligent acts or omissions in the performance of services under this agreement. Notwithstanding, indemnity obligations in design services agreements for P3s are often overbroad, overbearing, and largely uninsurable. Often, they require the design professional not only to indemnify and hold harmless, but to defend the design-builder, the developer/concessionaire, the public owner, any entity providing financing for the project, and each of their respective affiliates, subsidiaries, partners, members, sureties, subcontractors, and subconsultants from any foreseen or unforeseen claims, losses, damages, liabilities, costs, or expenses (including attorneys' fees and all costs associated with enforcing the indemnity obligation) in any way connected with the errors, acts, or omissions of, breach of contract by strict liability or failure to comply with applicable laws by the design professional or its employees or subconsultants. They further require the design professional to assume all of the indemnity obligations to the design-builder that the design-builder has assumed from the developer/concessionaire under the design-build contract, and to defend, indemnify, and hold harmless the design-builder, developer/concessionaire, and a host of other parties, from intellectual property infringements.

So, what is wrong with this provision?

The Obligation to Defend

Under virtually all professional liability policies, the design professional is not covered to defend (from day 1) any person or entity against whom a claim may be asserted in connection with its services. The PLI provides a defense *of the claim* for the design professional policyholder and, to the extent that the trier of fact finds negligence on the part of the design professional, will reimburse the design-builder (as the entity with whom the design professional has contracted) for the reasonable costs of defense. Unfortunately, this is often a significant point of conflict between the design-builder and the design professional. Design-builders often do not understand the differences between the coverage afforded by commercial general liability (CGL) policies and professional liability policies. They assume that the PLI policy, like the CGL policy, provides (or should provide) a day 1 defense to the design-builder in the event of a design-related claim. Also, design-builders frequently take the position that they hired the design professional to assume all liability with the design and they should expend no money to defend a claim that may only be tangentially related to a design issue.

The Obligation to Indemnify and Hold Harmless Persons Other than the Design-Builder

Not only is the design professional not covered to defend the design-builder, but it is not covered to indemnify or hold harmless any of the other project participants included in the indemnity given by the design-builder. Professional liability policies only cover third-party claims asserted against the party with whom the design professional contracts (i.e., the design-builder). Agreeing to indemnify and hold harmless other parties—regardless of whether or not the design-builder has agreed to defend, indemnify, or hold them harmless in the design-build contract—translates into an obligation assumed by contract and invokes the contractual exclusion in the PLI policy.

The Obligation to Indemnify and Hold Harmless for "Everything"

Professional liability policies only cover losses to the extent that they are caused by the design professional's failure to comply with the standard of care. They do not cover losses caused by other persons or liabilities assumed by contract.

Risk Management Techniques

As with any agreement, design professionals must closely examine, and narrowly tailor, any indemnification provision to:

1. eliminate the day 1 defense obligation;
2. limit the field of indemnified parties to the design professional's client (i.e., the design-builder, in this case) and its officers, directors, and employees, and not other persons or entities who may be directly or tangentially involved in the project; and

3. limit the scope of the indemnity to damages, losses, or judgments to the proportionate extent caused by the negligent acts or omissions of the design professional and/or the persons for whom it is legally liable.

Timing of Performance and Liquidated Damages

While quality of performance is critically important on a P3 project, timing of performance is equally as important. Typically, private partners desire very efficient design and construction of the improvement so that it can be put to its intended use as soon as possible and start earning the developer/concessionaire back some of its investment. For example, for a project that involves the addition of new toll lanes, the sooner the design-builder completes the construction, the faster the toll revenues will begin to roll in. To "incentivize" design-builders to complete the project in a timely manner, developers/concessionaires typically impose very strict time requirements and significant liquidated damages for failure to meet those deadlines. Often, the RFP or prime design-build contract contains tiered milestone dates with tiered liquidated damage amounts, together with an additional liquidated sum if the design-builder fails to meet the overall project substantial completion date. Design-builders seek to mitigate this risk by flowing down the time obligations and liquidated damages to the design professional. They do so by including "time of the essence" language and provisions holding the design professional liable for any delay in his or her performance. Even in this early design services agreement, design-builders expect design professionals to accept responsibility for these liquidated amounts. This expectation for the design professional to accept this potential liability comes: (1) even though the liquidated amounts may not have been determined, (2) even though the design professional will have no hand in negotiating those amounts, and (3) even though the provision fails to consider whether the design professional may be found to be at fault or whether the delay was within his or her reasonable control.

Design professionals should take several affirmative steps to mitigate these significant risks. First, design professionals should seek to remove "time is of the essence" provisions and clarify that they will not be liable for delays unless and to the extent, that (1) they caused the delay, and/or (2) the delay was within their reasonable control. Second, design professionals should seek to unconditionally eliminate any liability for liquidated damages. Albeit, if the design-builder rejects this effort, the design professional must—at a minimum—limit its responsibility for such damages to the extent caused by its negligent performance of professional services. Without such an express limitation, the design professional's coverage under its professional liability policy is jeopardized, as that policy only covers the negligent acts or omissions of the design professional and not the acts or omissions of others (such as the design-builder or the design-builder's subcontractors) involved in the project.

Waiver of Consequential Damages and Limitations of Liability

Consequential damages present another area of considerable risk for the design professional. These are damages that "[do] not directly and immediately result from a wrongful act, but instead [result] indirectly and/or after the elapse of some time."[9] Consequential damages, however, can be waived by agreement. The case of *Perini Corporation v. Greate Bay Hotel and Casino, Inc., t/a Sands Hotel and Casino, Inc.*, alerted participants in the construction industry (as a whole) to the significant risks associated with entering into an agreement without such a waiver. In that case, Perini was a construction manager for a hotel and casino renovation project. Its base fee for construction management services was $600,000. After completion of the project was delayed by approximately four months, the owner sought to recover damages from Perini for lost profits, some of which occurred after substantial completion of the project. In accordance with the contract, the parties arbitrated the dispute and the arbitrators awarded damages to the owner in the amount of $14,500,000. In seeking to overturn the award, Perini argued that the damages awarded by the arbitrators were not contemplated by the parties when they entered into the contract. The Supreme Court of New Jersey upheld the arbitrators' award.[10] For that reason, most industry organizations added mutual waivers of consequential damages to their form documents.[11]

Notwithstanding this industry trend, some design service agreements do not contain any waiver of consequential damages. Others contain a one-sided waiver, which requires only the design professional to waive its claims for consequential damages, without a corresponding obligation upon the design-builder to do so. Additionally, more and more consequential damages waiver provisions for P3s contain a litany of exceptions for damages that would normally be viewed as consequential, including liquidated damages for delay and/or contribution or indemnity for consequential losses suffered by other parties. Such waiver exceptions expose the design professional to potentially enormous liability. For example, if a design error or omission can be linked to the developer/concessionaire's future revenue stream for the project, the design professional may be liable for huge consequential damages.

Design professionals can manage their risk in this area by negotiating "standard" mutual waivers of consequential damages that cover all consequential, incidental, special, or other damages, from any theory of liability—except perhaps gross negligence or willful misconduct. They also can control their risk by negotiating a limitation of their maximum potential liability to the design-builder. Depending on the design professional's fee on the project, he or she may seek to limit liability to either the design fee, to the amount of the design professional's available professional liability insurance coverage, to the amount of professional liability required by the design service agreement, or to some other liquidated amount. Some design professionals who carry more PLI coverage than required by the design-service agreement may be willing to limit their liability to an amount greater than the insurance required by the design services agreement, but still less than their maximum coverage amount. Although not advisable, some design professionals may be willing to take some degree of uninsured risk.

Guarantee Periods and Extended Warranties

Because of the (often) extended nature of the P3 relationship, "defect liability" periods (in which the design professional agrees that his or her work will be complete and free from any and all defects, errors, and omissions in any aspect relating to the services for a certain period of time after completion of the project) and extended warranties are commonly included in P3 contract documents to ensure that the improvement "lasts" for the duration of that relationship. Using a new toll road as an example, if the public owner-concessionaire agreement allows the concessionaire to recoup its investment by collecting the toll revenues for a period of 30 years before turning the road over to the public owner, then the concessionaire wants the design-builder to guarantee the absence of defects in the design and construction for a stipulated period of time. The design-builder may agree to do so, but fully anticipates flowing down these obligations to its subconsultants and subcontractors. Assuming the design services agreement is negotiated contemporaneously with the teaming agreement before the developer/concessionaire issues the RFP, the design-builder may be unaware of the details of these warranties and guarantees when it presents the design services agreement to the design professional. As such, the specific warranties or guarantees are not specifically included in the design services agreement. Notwithstanding their absence, design services agreements will undoubtedly flow down those guarantees or warranties to the design professional through the general flow down provision or a statement that the design professional agrees to comply with all guarantee or warranty obligations in the higher tier agreements.

Like with performance guarantees during the performance of the design services agreement, "defect liability periods" following the conclusion of the project constitute obligations, beyond the standard of care, assumed by contract and are thus excluded from PLI coverage. Extended warranties requiring performance beyond the limits set forth in the applicable state's statute of limitations and/or statute of repose also constitute obligations for which the design professional would not be liable in the absence of that contract provision and are similarly excluded from coverage, as the statutes of repose in most states, and contractual claims limitations periods in industry standard form contracts,[12] cut off claims ten years after the date of the project's substantial completion. Contracts on P3 projects tend to extend that potential liability 20-30 years down the road.

Because of these concerns, design professionals should refuse to accept any performance guarantees or extended warranties contained in the design services agreement. While these obligations may be unknown at the time of negotiation, the design professional may protect himself/herself by including either a disclaimer of such obligations in the design services agreement itself or by negotiating a qualification of any such obligations that may be created by a later-issued RFP that contains them.

Third-Party Beneficiaries

Unlike traditional design-bid-build or design-build projects, where the owner is the end-user, P3s often have two ultimate users—the public entity and the concessionaire. In the event of a design or construction problem that is clearly attributable to a subconsultant or subcontractor, the public entity or concessionaire may wish to proceed directly against that subcontractor. In anticipation of this requirement, design-builders often include a third-party beneficiary provision in design services agreements. This provision requires the design professional to acknowledge the owner and concessionaire/developer as third-party beneficiaries of the design services agreement, granting them all of the same rights of the design-builder under the design services agreement. Other design-builders include this provision as a risk mitigation technique so that it does not have to be the conduit of all claims by the developer/concessionaire and/or be principally liable for any damages resulting from a breach of the design-build contract. However, risk mitigation for the design-builder translates into increased risk for the design professional.

As we have already discussed, these provisions also create peril because allowing someone other than the design-builder, with whom the design professional contracted, to enforce contractual rights against the design professional constitutes an obligation assumed by contract and may result in an uncovered loss—unless the law of the state governing the contract permits otherwise. Design professionals should seek to mitigate this risk by striking provisions allowing anyone other than the design-builder to have a direct action against them.

Ownership of Instruments of Service

Concerns relating to ownership of instruments of service in the design services agreement, and ways to mitigate those concerns, are identical to those identified in Section III.A.3. above.

Other Provisions of Concern

In addition to the provisions highlighted above, design services agreements frequently contain a number of other provisions that require modification. By way of example:

1. The design professional's assumption of all risks, costs, and expenses relating to the performance of its obligations under the design services agreement as its entire and exclusive responsibility. This provision must be narrowly tailored so that the design professional is only liable to the extent that such risks, costs, and expenses result from the design professional's negligent acts or omissions.

2. The design-builder's right to withhold or set-off payments due to the design professional under the design services agreement. This provision should be stricken in its entirety or, in the alternative, be limited exclusively to the extent of proven negligent errors or omissions caused by the design professional on the project at issue.[13]

3. The design-builder's (and higher tier parties') disclaimer of "Reference Documents" or documents furnished by the public entity, developer/concessionaire, and/or design-builder in the RFQ, RFP, or other submittal documents. Since the design professional has likely based its design and fee on assumptions made from the documents furnished by these parties, this provision should be stricken.

Assumptions and Qualifications

Assumptions and qualifications that are made a part of the teaming agreement and (preliminary) design services agreement serve as an effective way to mitigate the considerable risk associated with entering into an agreement that incorporates requirements from unknown higher-tier agreements that have not been negotiated. Before issuance of the RFP, the design professional's most important qualifications and assumptions are the disclaimer of any express or implied warranties or guarantees in connection with the performance of design services and the tying of its performance exclusively to the standard of care.

Issuance of the RFP

Once the design-builder and design professional agree upon the terms of and execute the teaming agreement, they must await and evaluate the RFP and attendant procurement documents for the opportunity. While the procurement documents often include a sample design-build contract for the project, the developer/concessionaire may revise that contract during the procurement process.[14] Design professionals must take an active part in reviewing not only all iterations of the design-build contract, but all of the other required submittal documents. This is the design professional's best chance to provide input into, and take exceptions to, the practice-jeopardizing terms in the design-build contract that will inevitably flow down to the design professional. These terms include warranties and guarantees, such as those identified earlier in this paper.

The design professional should work closely with the design-builder to prepare the proposal response. Ideally, the design professional should seek to include different standards for performance of the design (such that the design is to be performed in accordance with the standard of care, without any guarantees or warranties) and the construction of the project. Consideration should also be given to a separate (insurable) indemnity for professional design services that is limited to the design professional's negligent acts or omissions.

Additionally, the design professional should furnish the design-builder—for inclusion in the proposal—a narrative that:

1. addresses the basis for design (including, but not limited to, any assumptions made by the design professional based upon representations from the public owner and/or developer/concessionaire that the design professional relied upon);

2. clarifies that the design is a work in progress (i.e., incomplete); and

3. advises the design-builder to anticipate and account for further design development and changes to the design and account for those changes.

The reason for this is simple; frequently, when the design-builder prices (and determines quantities for) the project, the designs are only in the schematic design phase. Assuming the design-builder wins the opportunity, and the design-builder subsequently discovers during construction that its estimates were off, the design professional does not want the design-builder asserting a claim against it for the additional costs incurred. At this juncture, the design professional should also line up all (or most) of his or her subconsultants for the project. This is to ensure coverage of the full design scope, including any MBE or DBE requirements, and to ensure that the subconsultants have sufficient insurance coverage and meet any insurance requirements contained in the RFP, as well as to have them weigh in on any early qualifications and assumptions. Finally, the design professional should request his or her major subconsultants to review, and weigh in on, the design-build contract and submittal documents, as those subconsultants will similarly be bound to the flow down provisions.

Acceptance of the Design-Builder's Proposal

Assuming the developer/concessionaire accepts the design-builder's proposal, the design-builder and developer/concessionaire then proceed to negotiate the final terms of the design-build contract. Again, the design professional should seek an active role in those contract negotiations so that he or she may provide input into the final terms of the design-build contract that will inevitably flow down.

The design professional should also be sure to clearly review the terms of all higher-tier agreements, including the final P3 agreement between the public entity and the developer/concessionaire and any financing agreements entered into by the developer/concessionaire, as that agreement may also contain terms or obligations required to be flowed through the design-build contract.

Finally, the design professional should review its qualifications and assumptions from the proposal phase and "true them up" against the final design-build contract. By doing so, he or she can address any design scope or fee issues that may have fallen through the cracks.

Conclusion

On P3 projects, design-builders willingly assume significant design and construction risks and then engage in a game of risk-shifting to all downstream parties. Rather than being merely a pawn in the game, at the mercy of the design-builder, the design professional must take an active role in managing his or her risk during the entire teaming and contracting process. The design professional should rely upon his or her own resources, i.e., in-house or outside legal counsel and insurance advisors, to help ensure that the contract documents reflect only the risk that he or she is willing and able to assume and clearly define the assumptions upon which services are based.

Endnotes

[1] In the case of the latter, the tolls or fees are paid to the private partner.

[2] While this paper focuses primarily on the relationship between the design-builder and the design professional, many of the contracting concerns addressed herein will be equally as applicable to agreements between the design professional and the public owner and the design professional and the developer/concessionaire.

[3] The American Institute of Architects, in its C102-2015, *Standard Form of Agreement between Team Manager and Team Member for the Purpose of Responding to a Solicitation and Pursuing a Project*, does contemplate that the design-builder (or team manager) may have a non-exclusive relationship with the design professional (or team member). It does so to accommodate circumstances in which an owner (or the private partner, in the case of a P3) may want a particular design professional on the project regardless of who builds the project, or the design professional offers a unique set of qualifications for the opportunity.

[4] Other provisions included in teaming agreements include indemnification and waivers of consequential damages (which will be discussed in Section II.B, *infra*), insurance, dispute resolution, and non-solicitation of employees. Various industry groups offer standard form teaming agreements, including AIA Document C102-2015, *Standard Form of Agreement between Team Manager and Team Member for the Purpose of Responding to a Solicitation and Pursuing a Project*, EJCDC E580, 2017, *Teaming Agreement to Pursue Joint Business Opportunity for Design-Build Project*, and DBIA Document 580, *Standard Form of Teaming Agreement between Design-Builder & Teaming Party* (2012 Edition), which can be used for this purpose.

[5] While some owners offer stipends to the unsuccessful bidders, the amount of the stipends do not come close to compensating the team (which includes the design-builder, design professional, and potentially others) for their efforts. To the extent that an owner offers a stipend, the design professional should negotiate some percentage of the stipend to defray its costs.

[6] 17 U.S.C. § 102(a)(8). The Copyright Act defines an "architectural work" as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features." 17 U.S.C. § 101.

[7] 939 F.Supp.2d 572 (E.D.Va. 2013).

[8] *Trianco, LLC v. International Business Machines Corp.*, 271 Fed. Appx. 198, 201 (3rd Cir. 2008) (teaming agreement, which subject to future agreement as to terms, condition, and pricing, found unenforceable); *ATACS Corp. v. Trans World Communications*, 155 F.3d 659, 667-668 (3rd Cir. 1998) (teaming agreement found enforceable between a prime contractor and a subcontractor where the parties expressed an "intent to be bound" by the agreement and the agreement contained "sufficient terms for enforcement"); *Advance Telecom Process, LLC v. DS Federal, Inc.*, 119 A.3d 175 (Md. App. 2015) (court found teaming agreement under which two contractors envisioned future negotiations before executing the subcontract unenforceable); *Navar, Inc. v. Federal Business Council*, 784 S.E.2d 296, 299-300 (Va. 2016) (teaming agreement between potential subcontractors found unenforceable where the agreement failed to contain a contract sum or method for determining the sum, any requirement that the subcontractors would be actual subcontractors hired by the contractor once the prime contract was awarded, or any written documents defining an actual agreement governing the division of the work).

[9] **www.businessdictionary.com** (consequential damages).

[10] 129 N.J. 479 (1992), 610 A.2d 364 (1992).

[11] See, e.g., AIA Document B101-2017, § 8.1.3; EJCDC E500 (2014), § 6.10E.

[12] See, e.g., AIA Document A201-2017, § 15.1.2.

[13] Design professionals should never agree to a cross-default provision, which allows a design-builder to hold monies under other

agreements (often between the parties and/or their affiliates or subsidiaries) to offset sums that may be due and owing under the design services agreement or to offset sums due under the design services agreement against monies that may be due and owing to the design professional under another agreement with the design-builder or its affiliates or subsidiaries. Such provisions invoke coverage issues and a wide variety of other issues.

[14] These edits will likely result from questions or requests for clarifications of the RFP terms.