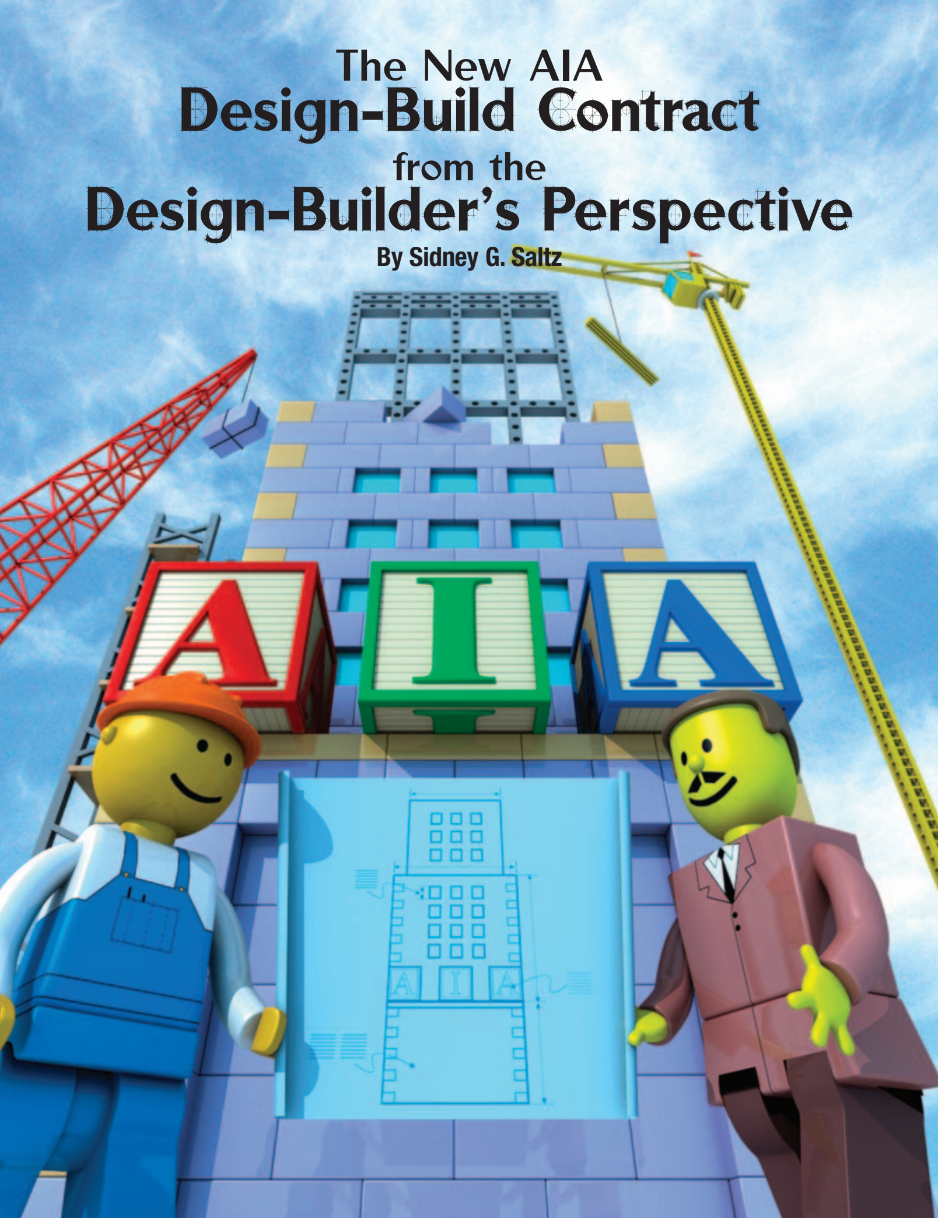
The New AIA Design-Build Contract from the Design-Builder's Perspective

By Sidney G. Saltz



In 2004, the American Institute of Architects (AIA) issued a new set of forms for use in design-build situations. The primary form in the set is AIA Document A141-2004, "Standard Form of Agreement Between Owner and Design-Builder," but there are also ancillary AIA forms and exhibits to be attached. The new AIA forms attempt to reach a balance between the interests and concerns of all parties, as did the old forms. Whether they do so or not is open to question. These forms present issues for owners, architects (either as the design-builder or a subcontractor of the design-builder), and contractors and subcontractors of a design builder. Although each role is deserving of its own analysis, this article will concentrate on the problems that the forms present for general contractors acting as the design-builders.

Design-build agreements, although becoming somewhat more common, remain the exception rather than the rule. In most situations, the owner hires an architect to develop the general concept of the project, prepare preliminary plans, and draft plans and specifications, based on which the project can be built. The plans and specifications are then put out for bid to various contractors who price the project and bid either on a firm price or on a cost-plus basis (usually with a guaranteed maximum price). After the owner selects the contractor, the architect often has responsibility to review samples and shop drawings and for supervisory functions to assure that the project is actually built in accordance with the final plans and specifications (or with change orders drafted, or at least approved, by the architect). Of course there are variations. For example, if the owner knows which general contractor it wishes to use, the owner can negotiate with that contractor to get involved early in the process and consult with the architect during the design phase. Generally, however, the architect and the general contractor act independently.

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In the design-build situation, a single entity, be it a general contractor or even an architect, determines what the owner wants and then takes full responsibility for the design and construction of the project. A single entity has the contractual relationship with the owner. If that entity is the general contractor, it will subcontract the design (unless it has an architect on its staff); if that entity is the architect, it will subcontract the construction. The owner no longer has a direct relationship with the person or entity that is not the design-builder, so a great deal of the owner's independent judgment and control is relinquished, for both the design and the cost, and the owner becomes very dependent on the trust and confidence it has in the design-builder.

There are problems for the design-builder, as well. For example, if the contractor is the design-builder and has hired the architect, the contractor cannot avoid responsibility to the owner for a problem with the design. It must seek to protect itself in its subcontract with the architect. It also may be dealing with a relatively unsophisticated owner that does not know exactly what it wants, making the design phase much more difficult.

Obviously there are advantages to each party in the use of design-build agreements or else they would not be used. For the owner, such an agreement creates a situation with one focus of responsibility, enabling the owner to avoid finger-pointing between the contractor and the designers; it creates enhanced teamwork and coordination on the project. If the owner has a good idea of what it needs, it can assign the project to the design-builder and basically go about its business while the project is built (paying the cost as it goes along, of course). As shown below, that particular benefit may, under the revised forms, be more illusory than real, because the owner is required to make numerous decisions and choices that, under the traditional arrangement, the owner may have been able to rely on its architect to make.

Another advantage for the owner is that it speeds up the process. If the design-builder knows of the owner's time constraints, it can whip the various forces into line to get the project done on time. For the design-builder, the advantage is that it has control of the entire project. It does not have to await input from other parties over which it has no control; those parties are its own subcontractors. If the contractor is the design-builder, it does not have to worry that it will not be the successful bidder to do the project, as it has already won the project. It also can select an architect it trusts to produce the design on time, on budget, and with quality.

The design-build situation reduces the potential for disputes between the architect and the contractor because the one acting as the design-builder hires the other party based on its confidence that they will have a good working relationship, and if a problem develops between them, the design-builder may be able to terminate the subcontract and hire another party. This is an advantage for both parties to the design-build agreement.

If a consultant is hired by the owner, it may negate some of the advantages to each of the parties that would result from the design-build formula, because the consultant will be another professional between the owner and the design-builder and delays may result. This arrangement, however, may conceivably be advantageous to the design-builder, because it will provide the design-builder with a party whose expertise the owner may lack, and, as shall be seen, the forms give the owner a lot of responsibility in connection with the project that the owner may not be qualified to fulfill. Of course, the agreement between the design-builder and the architect may be expected to favor the architect, because the forms were, after all, created by the AIA.

Design-Builder Agreement Structure

The AIA Standard Form (A141-2004) is relatively brief, but it is to be accompanied by Exhibit A, which is labeled "Terms and Conditions." Exhibit A

was formerly called "General Conditions." Exhibit B deals with the determination of the cost of the work, and Exhibit C deals with insurance and bonds. There is a form of agreement between the owner and a consultant (Form B142), under which the consultant advises the owner, much as an independent architect would have done. There is an agreement between the design-builder and the architect (Form B143), and there is an agreement between the design-builder and the contractor (which could conceivably be used as a subcontract form if a general contractor is the design-builder) (Form A142).

The author does not intend to present a section-by-section critique of the owner/design-builder forms as they relate to the contractor as design-builder. Such a presentation would require the reader to have the form in front of him or her and would be extremely tedious to read. Instead, this article will highlight some of the major issues for the contractor, but only the major concerns that certainly should be considered when using the forms. Here, in no particular order, are those issues.

The Owner's Rights and Responsibilities

The forms impose certain responsibilities on the owner, a major one being to provide the "Project Criteria." These are what was formerly called the "program," that is, what is to be built. In other words, the owner is to provide the design-builder with sufficient information to enable the design-builder to guide its design professionals (be they the architect, engineer, or other designer) in the preparation of the documents (called the "Instruments of Service") from which the construction is to proceed. The form begs the question of how the Project Criteria are to be developed. If the owner hires a consultant, presumably the consultant will be involved in creating the Project Criteria, and that will be useful to the design professionals. If the owner is itself a developer, it may have the expertise to provide useful information. If, however, the owner is a user—an entity intending to build a store or a factory for its own use—that may be problematic, because the owner may not be in a position to provide the design-builder with the information it requires to have the project properly designed (and built). As a result, the design-builder, or its architect, may actually have to prepare the Project Criteria for the owner's approval.

The form also provides that the "Schedule of Values" must be in a form and supported with such data

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"as the Owner may require." A Schedule of Values is a compilation of the values of the various phases of the work, so that requests for payment to the design-builder can be evaluated. How will the unsophisticated owner know what to require? It may not even know what a Schedule of Values is. Of course, its lender may have some input into this aspect of the project. The owner is to review and approve design-builder submittals; it also must approve various other documents. The owner determines the date of substantial completion (subject to dispute resolution provisions in the forms).

The forms also provide that the design-builder is not to perform construction work before the owner's review and approval of the "Design-Build Documents," which are all the documents comprising the agreement, but excluding the Instruments of Service. That requirement may not be feasible in the fast-track situation, discussed below, because all of the design-build documents may not be in place before certain work commences.

The rights granted to the owner, and the responsibilities imposed on the owner, can be very beneficial to an owner and can even move the project along efficiently if the owner is sophisticated or employs a consultant. Otherwise, the provisions can, at best, impose additional responsibilities and risks on the design-builder and, at worst, result in conflicts and disputes between the parties and delays in the completion of the project, all with additional expense imposed on both parties.

Fast Track

It is not unusual for design-build contracts to be used in a "fast-track" situation. That is one in which the need for prompt completion of the project is a paramount concern and the design and construction proceed in phases. In effect, the owner turns its piece of ground and its requirements over to the contractor with instructions to finish the project by a certain date, perhaps with the caution not to bother the owner except to request payments and to advise it when to move in (a slight exaggeration). The forms do not really contemplate fast-track construction and must be modified to accommodate that situation. Here, obviously, waiting for responses from the owner can cause undesirable delays. The design-builder, however, needs protection against the situation in which it might unintentionally deviate from unclear Project Criteria.

Liability for Design Defects

If the design-builder is a general contractor, it will, very likely, contract for the preparation of the Instruments of Service with an architect and other design professionals. Those parties may, in turn, subcontract part of the assignment to other design profession-

als (becoming, in effect, mini-design-builders). The general contractor in that situation needs some means to protect itself from liability for errors and omissions in the documents prepared by all those designers. In fact, the design-build agreement requires the design-builder to indemnify the owner against actual omissions of the design-builder, the architect, the contractors, or subcontractors, or anyone directly or indirectly employed by them, or anyone for whose acts they may be liable. This indemnification is very broad. The design-builder's errors and omissions insurance will not cover the liability relative to the errors and omissions of the design professionals with which it contracts. Only the design professional is eligible for that coverage. But, because it is the design-builder and not the design professional that has the contractual obligation to the owner, the owner is looking to the design-builder to cover the risk. How does the design-builder protect itself? The forms do not offer much help.

The design-builder, in the situation described, can protect itself by requiring that the architect, or other design professional hired directly by the design-builder, provide an indemnity covering all the work to be performed (or subcontracted by it to be performed) by that party and by requiring that the indemnity be backed by errors and omissions insurance in an amount sufficient to protect the design-builder in the event of a design defect. Similar protection should be obtained from subcontractors (such as those providing mechanical, plumbing, electrical, or fire protection work) whose in-house designers create the Instruments of Service for their work. Those designers must, under the forms, be professional designers. The amount of liability, of course, will depend on whether the waiver of consequential damages, which is a part of the form design-build agreement, remains after negotiation. It should be noted that design professionals often do not carry substantial amounts of errors and omissions insurance and are willing to increase their coverage only if the additional premium is paid by the party with which it contracts. It will generally be advisable for the design-builder to pay the extra cost, particularly if it is able to pass that cost on to the owner. That shift of cost is justifiable because the owner is the beneficiary of the additional protection.

License to Use Design Documents

The design-build agreement gives the owner a license to use the Instruments of Service for the completion of the project if the design-build agreement is terminated (provided that the designer is paid its fees). The form of agreement between the architect and the design-builder affords the design-builder the right to do so. The license is very valuable to the owner—it is a right it might not otherwise have because it is not in privity with the design professionals. The design-builder should have no objection to the application of that provision if the design-build agreement is terminated by the owner by reason of the design-builder's default. What if the agreement is terminated, not for cause but for convenience, as is provided for in the forms? The concern for the design-builder under those circumstances is to assure that it is fairly compensated for the effort expended before the termination. The problem is that the design phase of the transaction is only a part of the total deal. If the agreement is terminated for convenience, the owner will have the right to use the Instruments of Service that were prepared and charged for, but possibly without payment of substantial fee to the design-builder (and perhaps without any add-on at all), and the design-builder will have done a lot of work for little or no compensation. Accordingly, it is in the interest of the design-builder to change the form, either in the section dealing with the license or in the section permitting termination for convenience, to provide for compensation of the design-builder if a termination for convenience occurs for the effort it will have expended through the design phase.

The design-build agreement requires the design-builder to indemnify the owner against actual omissions of the design-builder, the architect, the contractors, or subcontractors, or anyone directly or indirectly employed by them, or anyone for whose acts they may be liable.

Summary

As noted above, the purpose of this article is to highlight some of the major concerns for a design-builder that is a general contractor. Lawyers representing contractors in this situation will still have to read the forms, analyze the further risks to their clients, and advise their clients on the changes to be made to afford complete protection. The point is that the forms are not a panacea for the design-builder. Nor are they a panacea for the other parties. Although design-build may provide substantial benefits to those entering into design-build agreements, it is a device that defies easy answers and easy solutions, and many agreements will have to be tweaked, or even substantially revised, so that they meet the needs of all the parties involved. ■