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## Design-Build Contracts in Virginia

Kevin B. Lynch  
*University of Richmond*

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## DESIGN-BUILD CONTRACTS IN VIRGINIA

Construction law is a varied and intricate outgrowth of the innumerable complex relationships inherent in any building project. The role of the architect,<sup>1</sup> once the master builder, has undergone and continues to undergo a redefinition. Due to recent changes in the construction industry, especially the development of construction management and design-

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1. While philosophical distinctions may be drawn between the meaning of the terms "architect" and "engineer" there is little practical significance to such distinctions. It is generally agreed that though architects are generally employed in residential or commercial construction, whereas engineers are generally employed on industrial or public utility projects, both may perform design and supervision functions, and where one entity performs both functions the label "architect" or "engineer" is irrelevant to the outcome of the case. C. DUNHAM & R. YOUNG, *CONTRACTS, SPECIFICATIONS, AND LAW FOR ENGINEERS* 111, 384 (2d ed. 1971).

Concurring, another commentator noted that while the majority of tort liability cases involve architects "in practically all situations, the word engineer could be substituted for architect when an engineer is furnishing similar service." Bell, *Professional Negligence of Architects and Engineers*, 12 VAND. L. REV. 711, 712 (1959).

Thus the impact of design-build concepts is of equal relevance to engineers in Virginia where the statutes fail to make any substantial distinction between "architects" and "engineers."

**§ 54-17.1. Definitions.** — The following terms, as used in this chapter, shall have the meaning given in this section:

(1)(a) "*Architect*" means a person who, by reason of his knowledge of the mathematical and physical sciences, and the principles of architecture and architectural design, acquired by professional education, practical experience, or both, is qualified to engage in the practice of architecture as attested by his licensing as an architect.

(b) "*Practice of architecture*" shall mean any service wherein the principles and methods of architecture are applied, such as consultation, investigation, evaluation, planning, design, including responsible administration of construction contracts, in connection with any private or public buildings, structures or projects, or the equipment thereof, or the accessories thereto.

(2)(a) "*Professional engineer*" shall be deemed to mean a person who is qualified to practice engineering by reason of his special knowledge and use of mathematical, physical and engineering sciences and the principles and methods of engineering analysis and design acquired by engineering education and experience; and who has complied with the requirements for licensing as set forth in § 54-27.

(b) The "*practice of engineering*" shall mean any service wherein the principles and methods of engineering are applied to, but are not necessarily limited to, the following areas: consultation, investigation, evaluation, planning and design of public or private utilities, structures, machines, equipment, processes, transportation systems and work systems, including responsible administration of construction contracts.

VA. CODE ANN. § 54-17.1 (Repl. Vol. 1978).

build concepts, the regulatory framework within which the building project operates is, in many states, in need of reform. The purpose of this comment will be to examine the impact of the development of design-build concepts on the traditional model of owner, architect, and contractor relationships and to discern the feasibility of the design-build concept under existing Virginia law.

## I. THE TRADITIONAL MODEL AND RECENT DEVELOPMENTS

No one model can satisfactorily describe the interaction between owner, architect and contractor. The responsibilities of each party are set out in contract agreements which may vary depending upon the parties involved and/or the character of the building project.<sup>2</sup> Under the traditional model a triangular relationship existed by virtue of the owner's separate contracts with the contractor and the architect and by assigning in both contracts supervisory responsibility to the architect.<sup>3</sup> The architect interpreted contract documents, certified the sufficiency of the contractor's performance, served as the channel of communication between the owner and the contractor, and arbitrated any disputes which may have arisen.<sup>4</sup> In addition, the architect owed a fiduciary duty to his client, who relied upon the architect's professional skill to represent his best interest and insure the quality of the work done by the contractor.<sup>5</sup>

The traditional model is no longer universally appropriate. "In comparatively recent times this concept has been fragmented. No one person is now in charge of the project from conception to completion . . . and the architect is primarily retained to provide the design for a proposed project and to lend his assistance in its implementation."<sup>6</sup>

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2. Traditionally the architect was the master builder. Michaelangelo and Leonardo da Vinci are the prototypes of the omniscient master builder who was charged with responsibility for the total success of a construction project. In this role the architect not only graphically portrayed the basic concept of the aesthetic and structural components of an edifice, he also took charge of its implementation, and was liable for its failure.

Kahn, *Introduction: The Changing Role of the Architect*, 23 ST. LOUIS U.L.J. 216 (1979).

3. Sweet, *Owner-Architect-Contractor: Another Eternal Triangle*, 47 CALIF. L. REV. 645 (1959). "The AIA General Conditions, past and present, has expressly provided that nothing in the contract documents creates a contractual relationship between the architect and contractors. The courts have agreed with this interpretation." Davidson, *The Liability of Architects*, 13 TRIAL 20, 22 (June 1977).

4. See, e.g., AMERICAN INSTITUTE OF ARCHITECTS, DOCUMENT A201, THE GENERAL CONDITIONS OF THE CONTRACT FOR THE CONSTRUCTION OF BUILDINGS, art. 38 (9th ed. 1963) [hereinafter cited as AIA, GENERAL CONDITIONS].

5. C. DUNHAM & R. YOUNG, *supra* note 1, at 4.

6. Kahn, *supra* note 2, at 216.

The reduced role of the architect is attributable to many factors — legal, economic and technological. Several legal factors have combined to increase the architect's susceptibility to third party suits.<sup>7</sup> One such factor was the removal of privity as a requirement to sue the architect.<sup>8</sup> When the doctrine of privity was rejected, the architect was no longer insulated from third party liability for negligent performance of his contractual duties.<sup>9</sup> The courts began to reinterpret the scope of the architect's duty under the owner-architect agreement, especially with regard to the architect's duty to supervise the construction of the building project.<sup>10</sup> The architect became increasingly susceptible to liability not only to the owner, but also to third parties injured at the work site,<sup>11</sup> sureties<sup>12</sup>

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7. It has been estimated that architectural malpractice suits have been increasing at the rate of 20% each year and that 29.6% of insured architects or engineering firms were sued in 1976. N.Y. Times, Feb. 12, 1978, § 1, at 1, col. 1.

8. "The earlier decisions . . . freed the architect of responsibility once the structure had been completed and turned over to the owner. This was accomplished by applying the privity of contract doctrine to bar suits by an injured third party against the architect. . . ." Crisham, *Liability of Architects and Engineers to Third Parties*, 26 FED'N INS. COUNSEL Q. 177, 179 (1976).

The doctrine of privity had its origin in the English common law in *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842) where the driver of coach which lost a wheel and overturned could not sue defendant since defendant's contract to maintain the coach in proper repair was with one other than the plaintiff, hence there was no privity. As a result, the court required the plaintiff to prove not only the elements of negligence but also the "existence of a legally recognized relationship, or privity, with the defendant." See Note, *Liability of Design Professionals - The Necessity of Fault*, 58 IOWA L. REV. 1221, 1222 (1973).

The doctrine endured in construction law long after it ceased to have any vitality in other legal contexts. This is evidenced by its use in relation to architects and engineers in cases as late as 1965. *E.g.*, *Peyronnin Constr. Co. v. Weiss*, 137 Ind. App. 417, 427-29, 208 N.E.2d 489, 494-95 (1965). See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 18.5 (1956).

9. *Inman v. Binghampton Hous. Auth.*, 3 N.Y.2d 137, 164 N.Y.S.2d 699, 143 N.E.2d 895 (1957) is generally recognized as the leading case in the assault on the doctrine of privity with respect to architects.

10. "The greatest growth of claims by third parties against architects seems to be arising out of contracts or agreements between the architect and the owner to provide supervision or general administration of the structure or project which the architect designed and planned." Crisham, *supra* note 8, at 184.

11. In the early 1900's, courts had consistently held that a supervising architect was only responsible for the results of a project and that there was no duty to supervise the methods or manner of construction to inspect for safety. *E.g.*, *Clinton v. Boehm*, 139 A.D. 73, 124 N.Y.S. 789, 791 (1910) (where, according to the owner-architect contract, the architects were to "superintend the construction and erection" of the building). This, however, is no longer the case as courts have imposed varying degrees of supervisory responsibility upon architects. In recent years some courts have gone so far as to impose liability for third party injury at the construction site based upon a provision in the architect-owner agreement giving the architect the right to halt construction. See *Miller v. Dewitt*, 59 Ill. App 2d 38, —

and contractors<sup>13</sup> via the court's interpretation of the architect's super-

226 N.E.2d 630, 638 (1967), *rev'g*, 37 Ill. 2d 273, 208 N.E.2d 249 (1965), where the court stated:

[U]nder the terms of the contracts the architects had the right to interfere and even stop the work if the contractor began to [perform] in an unsafe and hazardous manner in violation of its contract with the owner. . . . We agree with the architects that they had no duty to specify the method the contractor would use . . . , but . . . the architects had the right to insist upon a safe and adequate use of that method.

. . . .  
 . . . [W]e conclude that if the architects knew or in the exercise of reasonable care should have known that the [manner of construction] was inadequate and unsafe, they had the right and corresponding duty to stop the work until the unsafe condition had been remedied. If the architects breached such a duty they would be liable. . . .

(Citation omitted). *Contra*, *Reber v. Chandler High School Dist. No. 202*, 13 Ariz. App. 133, 474 P.2d 852 (1970) (expressly rejecting the *Miller* rationale). It should be noted that the *Miller* decision could just as well have been based upon the Illinois Structural Work Act, ILL. REV. STAT. ch. 48 §§ 60-69 (1973). *Miller*, 59 Ill. App. 2d at 125, 226 N.E.2d at 639. Referred to as the "Scaffold Act," it is "similar in content if not [in] name to statutes found in other states . . . [and] places a non-delegable duty upon . . . [those] 'having charge of' construction work to see that ladders, scaffolds, cranes, hoists, stays, supports and other mechanical contrivances are safely and properly placed, set, erected and operated." *Crisham*, *supra* note 8, at 190-91. Here again, the court used the contract provision for general construction supervision to hold the architect as one "having charge of" construction and therefore liable. *See generally* *Annot.*, 59 A.L.R.3d 869 (1974 and Supp.).

12. Most of the cases holding an architect liable to an insurance company have done so on the basis of the architect's incorrect certification of payments to the contractor, followed by the contractor's default. . . .

. . . Such a default places the burden on the seller of the contractor's performance bond to complete the project and absorb whatever loss was incurred by the owners' overpayment. The insurance company may then try to recover its losses from the architect on a theory of negligent certification of partial payments.

*Merritt, Up Against the Wall, Master Builder: The Architect's Legal Status*, 23 ST. LOUIS U.L.J. 384, 411-12 (1979) (citations omitted).

In line with these cases are decisions in which the architect is held liable to the surety company based upon his negligent supervision of the contractor's negligent construction. The architect has been held liable in certain cases despite his expression of disapproval prior to the negligent construction.

In *Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum Inc.*, 392 F.2d 472 (8th Cir. 1968) the architect was held liable for losses incurred by the surety company in rebuilding a retaining wall which had been improperly constructed despite evidence that the architect had informed the contractor of misaligned forms and told him that the work would be rejected. "The case is disconcerting because no court would have held the architect liable to the contractor in such a situation." *Merritt, supra*, at 413.

13. Interpretation of the architect's duty to supervise construction has been carried to its extreme in allowing the contractor to recover. In *United States v. Rogers & Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958) the contractor had failed to use concrete of the specified quality, after which the architect had authorized the incorporation of bents (pre-formed structures which are hoisted into place to form the skeleton of the building). The architect was held

visory function under the architect-owner agreement.

A direct result of this liability has been "regular modification and re-drafting of the standard form owner-architect agreements . . . as an attempt on the part of the architect to insulate himself from responsibility" for construction means, methods, techniques or safety precautions used by contractors.<sup>14</sup> "Too few lawsuits arising under the twelfth (1970) and thirteenth (1976) editions of *AIA General Condition*<sup>15</sup> have reached appellate courts to elucidate whether the pattern of liability for 'construction administration' is changing."<sup>16</sup> Commentators, however, have strongly suggested that this pattern of liability is not changing and, furthermore, should not change.<sup>17</sup> It must be emphasized that while courts have often declined to impose such liability upon the architect, the increase in the scope of potential liability is a factor which has contributed significantly to the general trend in which the architect has surrendered much of his former authority regarding construction administration and supervision to the owner.

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liable for losses incurred by the contractor in removing and repouring the concrete. Merritt, *supra* note 12, at 410.

14. Crisham, *supra* note 8, at 185. The term "general supervision and the direction of the work" was deleted from the standard form owner-architect agreement after the seventh (1958) edition of the American Institute of Architects, Document A201, The General Conditions of the Contract for Construction of Buildings. Davidson, *supra* note 3, at 23.

Consequently, the *AIA, General Conditions*, from the ninth (1963) edition onward, has provided simply that the architect 'will make periodic visits to the site to familiarize himself generally with the progress and quality of the work and to determine in general if this work is proceeding in accordance with the contract documents' and that 'he will not be required to make exhaustive or continuous onsite inspections to check the quality or quantity of the work and he will not be responsible for the contractor's failure to carry out the construction work in accordance with the contract documents.' The eleventh (1967) edition added the language that the architect 'will not have control or charge of construction means, methods, techniques, sequences of procedure, or for safety precautions and programs in connection with the work. But not until the twelfth (1970) edition did the architect abandon the right to stop the work.

*Id.* at 24.

15. *AIA, GENERAL CONDITIONS supra* note 14.

16. Davidson, *supra* note 3, at 24.

17. "However, further examination of the current thirteenth (1976) edition of *AIA, General Conditions* would suggest that [the pattern of liability] should not be, and, is not changing." *Id.*; "In spite of the lengthening of the clause and the shortening of the duties and whether it is called 'supervision,' 'inspection,' 'administration,' 'casual observation' or even 'a glance,' the architect does owe some duty . . ." which is not relieved by attempted disclaimers. Goodin, *Architects and Malpractice*, 34 *Ins. Counsel J.* 290, 292 (1967); Kornblut, *Document A201 Strives to Clarify - Not Change - The Roles of Architect, Contractor and Owner*, 161 *ARCHITECTURAL RECORD* 67 (April 1977).

Economic and technological factors have also served to reduce the vitality of the traditional model. Under the traditional model, the owner first hires an architect to develop a schematic design of the building project, reduce that design to a set of detailed drawings and produce a set of construction documents from which the building will be constructed.<sup>18</sup> The owner then selects a contractor, the selection process being conducted in any number of ways.<sup>19</sup> After the owner has selected a contractor, the actual erection of the building may begin.

As numerous commentators have noted, this process is time consuming and inadequate to meet the needs of the modern institutional client.<sup>20</sup> Construction cannot begin until after all the plans and specifications have been finished.<sup>21</sup> This delay renders the owner vulnerable to a wide range

18. Schematic design . . . consists of studying the project requirements and establishing basic design concepts. . . .

. . . .

When the schematic design is resolved and agreed to by the owner . . . the designer begins to reduce the schematic design to detailed drawings. . . .

. . . .

The final design stage consists of the production of construction documents from which the building will be built. . . .

. . . .

When the architect has completed the construction document stage he will have generated a complete set of drawings ['plans'] and specifications ['specs']. The drawings are highly stylized graphic representations which describe what the parts of the building look like, what their dimensions are, and how they are to fit together. . . . A set of 'specs' is ordinarily bound in book form and may be several hundred pages in length.

Note, *Preface to Traditional Relationships on the Building Project*, 23 St. Louis L.J. 205, 208-13 (1979).

19. A contractor may be selected either by competitive bidding or through private negotiation except on public projects in which case the contractor is always chosen on the basis of the competitive bidding procedures provided under appropriate state or federal statutes or regulations. Carey, *Assessing Liability of Architects and Engineers for Construction Supervision*, Ins. L.J., March 1979, at 147.

To bid the job, the contractor obtains a set of plans and specs . . . He then calculates the quantities [and cost] of different materials required and the estimated labor to install them. . . . Finally, the contractor will add in overhead, local, state and federal taxes, multiply by a safety factor and profit margin and derive a price at which he is willing to bid the job.

Note, *supra* note 18, at 212-13.

20. See J. SWEET, *LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS* 245 (2d ed. 1977); AMERICAN INSTITUTE OF ARCHITECTS, *DESIGN-BUILD-BID: AN OWNER'S GUIDE* (n.d.).

21. Construction cannot begin until there is a contractor. A contractor is selected on the basis of his bid, which he can determine only from the final drawings (plans and specs), Note, *supra* notes 18-19.

of unforeseen events which may, individually or collectively, prove disastrous to the building project. There may be delays between the completion of design and the start of construction.<sup>22</sup> The owner is then increasingly likely to incur cost overruns due to the escalating cost of materials and labor, the reduced availability of materials and possibly unforeseen weather delays.<sup>23</sup>

With the changing character of the owner has come a change in the nature of his needs. The traditional model envisions the owner as a single person and the building project as a single building.<sup>24</sup> Today, however, the owner is likely to be a corporate body and the building project a group of buildings.<sup>25</sup> The needs of the modern institutional client have increased the size and the complexity of both the design and construction phases of the building project<sup>26</sup> while combining with other factors to place a heightened emphasis on cost control and fast construction in today's construction industry.<sup>27</sup> With the growth of project types and their complexity has come the concomitant need for new technology and specialized skills which the architect is not always qualified to provide.<sup>28</sup> As architectural education has lagged behind the changes in the construction

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22. [S]everal months may elapse between the completion of final design and the start of construction.

. . . .

. . . [A]s more sophisticated factory-fabricated building products enter the market, the lead time for advance production scheduling and preliminary architectural planning expands tremendously. . . . [For example] factory-fabricated demountable steel office partitions, designed to fit a modular floor plan, may require several months' notice to fit into a manufacturer's production schedule.

C. GRIFFIN, *DEVELOPMENT BUILDING: THE TEAM APPROACH* 14 (1972).

23. Kahn, *supra* note 2.

24. W. CAUDILL, *ARCHITECTURE BY TEAM* 87 (1971).

25. *Id.* at 88.

26. Comment, *The Roles of Architect and Contractor in Construction Management*, 6 U. MICH. J.L. REF. 447, 453 (1973).

27. Inflation in construction and financing costs has placed a premium on speed in the development process. Once the developer [owner] has decided to build, each month's delay is a month's lost rent. But, . . . the financial penalties for delay are much greater than mere loss of income. . . . By cutting design-construction time from 24 to 18 months, and thereby generating early cash-flow receipts from a building, a developer may cut his equity cash participation by as much as 30 percent. This cash-investment reduction increases financial leverage, or profit-equity ratio, and leverage is the key to financially successful development.

C. GRIFFIN, *supra* note 22, at 15.

28. "The skills which may be required on a project include computer programming and analysis, . . . and an understanding of engineering, economics and accounting." Comment, *supra* note 26, at 453.



industry<sup>29</sup> the ever widening range of expertise which has become essential to progress has also contributed to the architect's surrender of authority.<sup>30</sup>

## II. THE DESIGN-BUILD MODEL

Under the design-build concept,<sup>31</sup> the owner has a contract with only one entity, either the architect or the contractor, as opposed to the triangular relationship under the traditional model.<sup>32</sup> Under the contract the entity agrees to design and build the desired structure and present the owner with the finished product. This design-build format is used currently in European countries as well as by larger American engineering firms.<sup>33</sup>

While the design-build format is not suited to every building project, it is well suited to the needs of institutional clients and the large-scale, highly specialized building projects they require.<sup>34</sup> As opposed to the traditional model, it offers a formal mechanism for monitoring and controlling costs at an early stage.<sup>35</sup> Under the design-build format, the owner develops a functional program for the building project.<sup>36</sup> The selected design-build entity then prepares a preliminary design concept and establishes a time and cost proposal. Upon acceptance by the owner the design phase proceeds. Thus cost and time parameters are set in the early stages of the project. In addition, this format provides a manner of delivery in which phased construction may be utilized. Known as "Fast-Tracking,"<sup>37</sup>

29. C. GRIFFIN, *supra* note 22, at 8. "[M]ost architectural offices do not have the expertise to handle large scale construction problems." Comment, *supra* note 26, at 457.

30. Davison, *supra* note 3, at 21.

31. Design-build refers to an agreement with one single entity who provides design and construction under one contract. The same definition is often given to what is called a "Turn-Key Contract." While the Turn-Key contract has the above mentioned dimension, it includes any number of additional services such as land acquisition, financing and leasing. "In industrial work, the term 'Turn-Key' also very often means that the contractor includes the installation of the entire manufacturing process, ready for startup and operation by the owner." ASSOCIATED GENERAL CONTRACTORS OF AMERICA, BUILDING CONSTRUCTION CONTRACTING METHODS: OWNERS GUIDE 9 (n.d.).

32. See notes 3-5 *supra* and accompanying text.

33. J. SWEET, *supra* note 20, at 699-700.

34. "D & B is best suited for large-scale, specialized work where the design skills are not diffused but centered in a few organizations. Also it is more appropriate for a sophisticated owner who has persons with design and administrative skills on its staff." *Id.* at 245.

35. C. GRIFFIN, *supra* note 22, at 20.

36. The functional program is a set of requirements which the building must meet. AMERICAN INSTITUTE OF ARCHITECTS, *supra* note 20.

37. "The advantages of this technique vary enormously with the size and type of project. The concept is most effective and efficient in the case of highly standardized and repetitive

construction may commence before the plans and specifications are complete,<sup>38</sup> thus producing time savings for the entire project.<sup>39</sup> Design is performed in phases, and construction commences upon the completion of a design phase. This procedure permits early ordering of long lead components such as steel,<sup>40</sup> which further reduces construction time. As the project proceeds the remaining portions of the design are formulated and completed within the cost parameters set at the beginning of the project. In this manner, the owners' high priority on cost control and quick construction are facilitated.

Another appealing aspect of this model is the "single-point responsibility." A single entity is responsible to the owner not only for design and construction quality but also for adherence to cost and time parameters.<sup>41</sup> One of the critical faults of the traditional model is the difficulty in ascertaining who is liable when the project fails.<sup>42</sup> The builder claims that faulty design is responsible. The architect claims either faulty construction is responsible or, where appropriate, a lack of proper supervision. In the design-build contract the lines of liability are more clearly drawn. The designer-builder is liable for (1) all injuries incurred at the work site; (2) any default which may cause a loss to the surety; (3) any failure in design or construction quality. This has the effect of increasing the scope of liability for the contractor if he is the contracting entity as he is now liable for all design faults.

On the other hand, this model is much more favorable to the architect when he is the contracting entity. The design-build model puts all persons working at the construction site under his employ. Any and all injuries will be compensated for under a workmen's compensation program, thus relieving the architect of the constant threat of suits by third party workers over whom he had no control.<sup>43</sup> Though the architect will un-

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buildings types such as office buildings and warehouses." McLaughlin and Ripley, *A Partial Guide to Painless Construction Management Projects*, 161 ARCHITECTURAL RECORD, 65 (1979).

38. See notes 18-21 and accompanying text for comparison with the traditional model.

39. See note 27 *supra*.

40. See note 22 *supra*.

41. AMERICAN INSTITUTE OF ARCHITECTS, *supra* note 20.

42. See notes 11-17 *supra* and accompanying text.

43. The employee no longer has a right to sue his employer for injuries incurred while on the job where the employer has made payment for such injuries according to the workmen's compensation statute. 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 1.10 (1972) as cited in Note, *Liability of Design Professionals - The Necessity of Fault*, 58 IOWA L. REV. 1221, 1239 (1973).

Part of the reason for the expansion of the architect's liability and supervisory duty has stemmed from the condition of the workmen's compensation programs.

doubtedly be liable in a larger number of cases, his liability will more accurately reflect his role, both administratively<sup>44</sup> and financially,<sup>45</sup> in the building project. Additionally, [i]f there were a default and the bonding company had to finish the job, "recourse against the architect-builder would no longer operate as a windfall recovery against [a] relatively blameless designer."<sup>46</sup>

### III. DESIGN-BUILD CONTRACTS AND VIRGINIA LAW

Presently in Virginia, there is much concern relating to the impact of design-build concepts on the state's regulatory framework.<sup>47</sup> A study of

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First, payments under such programs are limited to medical expenses incurred and to fixed amounts for disabling injuries which threaten income. . . . Second, the employee relinquishes his common law right to sue his employer for an injury where payment for damages has been provided by a workmen's compensation statute. However, the common law right to sue third persons whose negligence proximately caused the workman's injury [the architect] is retained.

. . . [W]here workmen's compensation . . . benefits are less than the total amount of damages suffered . . . , there will likely be a search for a reasonably close 'deep pocket' capable of sustaining the remaining loss.

*Id.* at 1239.

44. The architect would be more aware of construction supervision, as well as being in a better position to assure performance. "Since he would buy and assemble the materials himself, he would be able to guarantee that the right products were used, and that they were properly installed." Merritt, *supra* note 12, at 420-21.

45. There is no longer any "disincentive to design for inexpensive and efficient construction" as the architect's fee is not based upon a percentage of the final cost of the building. The architect is now able to derive compensation from the profit on labor and materials furnished in the building process. The strengthened financial position of the architect allows "[t]he owner, workers and users of the building [to] look to a person who is both in charge of the project and financially able to bear the burden of liability." *Id.* at 421, n.187 and accompanying text.

46. *Id.* at 421.

47. A public hearing was held on October 15, 1976 concerning "proposed changes in rules and regulations of the Virginia State Board of Architects, Professional Engineers and Land Surveyors as authorized by Chapters 1.1 and 3 of Title 54 of the Code of Virginia." DEPARTMENT OF COMMERCE, STATEMENT OF BASIS AND PURPOSE OF THE PROPOSED RULES AND REGULATIONS OF THE STATE BOARD OF ARCHITECTS, PROFESSIONAL ENGINEERS AND LAND SURVEYORS PURSUANT TO SECTION a-6.14.7 OF THE CODE OF VIRGINIA 22 (1977).

A major part of the substantive conflict in the testimony received . . . revolved around the implementation of section 1.1 entitled 'Who is Required to Obtain a License' and 2.9 'Professional Services Incidental to Other Work on Turn-Key Projects.' Due to the number of individuals addressing themselves to these two sections and the concern of the Board as to how these sections deleted from the rules approved, and tabled for further considerations. An ad hoc committee was appointed for further study and consideration of legal advice and will report back to the Board. . . . The Board specifically is concerned with being able to spell out the nature of a legal turn-key project and giving the Board some control and restriction over them. The Board

Virginia licensing statutes and regulations is now in progress.<sup>48</sup> This study is scheduled to be presented to the Virginia General Assembly during the 1981 session and is expected to have a great impact upon the present regulatory structure concerning architects and engineers.<sup>49</sup> The following analysis will attempt to outline some of the potential conflicts which need to be resolved if Virginia law is to outline clearly the legality of and the responsibilities under a design-build contract.<sup>50</sup>

The design-build model is flexible and allows for different forms of delivery of services. Each form presents various problems under present Virginia licensing statutes. The first format to be examined is one in which a contractor (builder) contracts to design and build with an owner. The issue to be resolved is whether a contractor, being a general business entity, is in violation of Virginia law<sup>51</sup> by contracting to provide professional services for which it has no license.

In addition to rendering the unlicensed practitioner susceptible to criminal prosecution,<sup>52</sup> the violation invalidates the contract and renders it unenforceable. In Virginia, *Massie v. Dudley*<sup>53</sup> firmly established that

The law refuses to enforce illegal contracts, as a rule, not out of regard for the party objecting, . . . but for reasons of public policy.<sup>54</sup> [W]here a licensing statute is a police regulation, having for its object the protection of the public, making it unlawful for a person to engage in a business without a

is concerned that a proper licensee should be in control of projects undertaken.

*Id.*

48. *Id.*

49. According to Robert A. Nebicker, Deputy Director, Department of Commerce, Commonwealth of Virginia.

50. In so doing, it should be noted that there are few cases dealing with this topic, none of which are Virginia cases. Analysis will therefore focus on the rationale behind those cases and the applicability of those rationales to Virginia law.

51. (1) It shall be unlawful for any person, partnership, corporation or other entity to engage in any of the following acts:

A. Practicing a profession or occupation, for the practice of which a license is required by law or rule of a regulatory board, without holding the requisite valid license.

Any person, partnership, corporation or other entity who engages in any unlawful act enumerated in this section shall be guilty of a Class 3 misdemeanor.

VA. CODE ANN. § 54-1.14 (Repl. Vol. 1977) (repealed and re-enacted as VA. CODE ANN. § 54-1.20 (Repl. Vol. 1979)). "It shall be unlawful for any person to practice or to offer to practice the profession of architecture [or] engineering . . . in this state . . . unless such person has been duly licensed." VIRGINIA STATE BOARD OF ARCHITECTS, PROFESSIONAL ENGINEERS AND LAND SURVEYORS, RULES AND REGULATIONS § 1.1 (1979).

52. VA. CODE ANN. § 54-1.20, *supra* note 51.

53. 173 Va. 42, 3 S.E.2d 176 (1939).

54. *Id.* at 52, 3 S.E.2d at 180.

license, . . . a contract made by an unlicensed person is void and unenforceable.<sup>55</sup>

The court applied this rationale in *Clark v. Moore*,<sup>56</sup> finding that Clark, the plaintiff, was unable to recover for services rendered in connection with Moore's successful bid on a construction project because Clark's services amounted to the practice of professional engineering, for which he had failed to obtain a license.<sup>57</sup>

While *Clark* establishes that an unlicensed individual may not contract to perform the services for which a license is required, the design-build contract presents for resolution the issue of whether a contract to provide those services for which a license is required, that is to arrange for those services to be performed by a duly licensed person, is likewise illegal.

Such was the issue presented in *Seaview Hospital, Inc. v. Medicenters of America, Inc.*<sup>58</sup> A general contractor sought to recover money allegedly due under a "Turn-Key contract."<sup>59</sup> While the owner alleged that the contract was illegal,<sup>60</sup> Texas law expressly provided that "a firm, partnership or a corporation may engage in the practice of architecture, . . . in this State, provided that such practice is actually carried on, conducted and performed only by persons to whom registration certificates have been duly issued . . ." <sup>61</sup> Based upon the statute and the policy behind the statute the court was persuaded that a contract to "perform" services is not the same as a contract to "furnish" those services.

The word "furnish" requires a person to provide what is needed and implies the provision of all essentials for performing a function; the word "perform" requires a person to carry out a function and implies action by the person in carrying out by him all essentials necessary to complete the action.

A general contractor, under the licensing statute here involved, is not precluded from entering into a contract: [sic] with the owner which provides that the contractor will engage or hire architects who are duly licensed . . . . The stated objective of both statutes is to protect public health, safety and the general welfare by insuring that architectural and engineering work in this State be *performed* only by qualified persons who are duly licensed.<sup>62</sup>

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55. *Id.* at 53, 3 S.E.2d at 181.

56. *Clark v. Moore*, 196 Va. 878, 86 S.E.2d 37 (1955).

57. *Id.* at 881-82, 86 S.E.2d at 39.

58. 570 S.W.2d 35 (Tex. Civ. App. 1978).

59. See ASSOCIATED GENERAL CONTRACTORS OF AMERICA, *supra* note 31.

60. 570 S.W.2d at 35, 37.

61. *Id.* at 38, quoting TEX. REV. CIV. STAT. ANN. art. 249a (Vernon).

62. 570 S.W.2d at 39-40.

The Louisiana Court of Appeals confronted similar circumstances in *West Baton Rouge Parish School Board v. T.R. Ray, Inc.*<sup>63</sup> T.R. Ray, Inc. contracted to perform architectural services for the school board. The architect who had prepared the plans and specifications left the employ of the corporation after construction had begun. Due to the loss of the architect the school board terminated the contract, and the corporation initiated arbitration proceedings to recover amounts it alleged were due. The school board sought to enjoin the arbitration, alleging the unenforceability of the contract based upon the corporation's practicing architecture without a license.<sup>64</sup> The court of appeals, adopting a rationale similar to *Seaview*, found the contract was valid, stating that:

[t]he general rule is that a corporation can perform any lawful business activity which has not been prohibited to it or is not governed by special laws.

. . . .  
 . . . Title 37 is primarily concerned with establishing certain minimum standards which various professionals must meet before they are licensed to practice in Louisiana, and not with whether those professions can incorporate.

. . . .  
 . . . There is no prohibition or specific law governing the providing of professional services of an architect, thus we find no bar to T.R. Ray, Inc., a duly incorporated entity, from providing those services. . . .<sup>65</sup>

On appeal, the Supreme Court of Louisiana rejected this rationale, reversed the court of appeals and reinstated the injunction granted by the district court.<sup>66</sup> In finding that Louisiana law does not provide for the delivery of professional architectural services by a non-professional corporation, the court stated:

Only a person who has been granted a certificate of registration and license . . . may practice architecture in the State of Louisiana.

[T]he corporation agreed to perform "professional services" as an architect . . . .

. . . [I]t was legally impossible for [the corporation to be licensed] . . . because a licensee must pass an examination and possess certain moral, legal and educational qualifications. Consequently, the agreement . . . was a contract to perform architectural services unlawfully without a certificate of

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63. 361 So. 2d 300 (La. App. 1978), *rev'd*, 367 So. 2d 332 (La. Sup. Ct. 1979).

64. 361 So. 2d at 300.

65. *Id.* at 302.

66. *West Baton Rouge Parish School Board v. T.R. Ray, Inc.*, 367 So. 2d 332, 333-34 (La. Sup. Ct. 1979) *rev'g* 361 So. 2d 300 (La. App. 1978).

registration and license.<sup>67</sup>

The Virginia courts have yet to examine whether, under the relevant statutes and regulations governing the construction industry, general business corporations may engage in design-build contracting.<sup>68</sup> The Virginia Department of Commerce has examined the question, based upon complaints logged alleging such activity, and has apparently decided that such activities are not a violation of the relevant statutes and regulations.<sup>69</sup> However, the basis for this decision has not been articulated by the Department, and there are indications that this is only an interim policy, based on anticipated adoption of regulations which are hoped to be forthcoming from the Department's current study.<sup>70</sup>

Examination of the traditional model reveals a pronounced reduction in the architect's supervisory function. This reduction, in conjunction with the general contractor's expertise in construction techniques and procedures, has resulted in the transfer of some supervisory responsibilities, traditionally within the architect's province, to the general contractor.<sup>71</sup> While some overlap may be inherent in the definition of the functions each is to perform,<sup>72</sup> without more precise definition of what is to constitute "architectural services" the controversy over the legality of the design-build contract is not eliminated but merely redefined.

Illustrative of this point is *Food Management, Inc. v. Blue Ribbon Beef Pack, Inc.*<sup>73</sup> In this case, the court ruled that where a general business corporation had contracted to design, build and initially manage a meat

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67. 367 So. 2d at 334. The court further rejected "as specious" the defendant's contention that the intent of the legislature was to prohibit only natural persons from practicing architecture without a license. *Id.* at 334 n.1.

68. It is well settled that professional corporations may offer only those services for which it has a license to practice. VA. CODE ANN. § 13.1-548 (Repl. Vol. 1978).

69. *E.g.*, Tidewater Construction Company, Stone and Webster Corporation, Brown and Root, Inc., Virginia State Board of Professional and Occupational Regulation, File No. 6705 (1975). (The Virginia State Board of Professional and Occupational Regulation is now the Department of Commerce.)

70. *See, id.* at 3, Exhibit 4.

71. *See*, Comment *supra* note 26.

72. Not only is the distinction between contractor and architect blurred, so is the distinction between architecture and engineering. *See*, Dahlem Constr. Co. v. State Bd. of Examiners and Registration of Architects, 459 S.W.2d 169 (Ky. Ct. App. 1970) (though there is overlap between the practice of architecture and engineering, the state did not intend to declare all architects to be engineers and vice versa; engineers who formulated aesthetic design and adapted it to the topography so as to obtain maximum aesthetic effect were not rendering services "incident to" the practice of engineering). *See* note 1 *supra*. *But see* Verich v. Florida State Bd. of Architecture, 239 So. 2d 29 (Fla. Dist. Ct. App. 1970).

73. 413 F.2d 716 (8th Cir. 1969).

packing plant it had engaged in the unlicensed practice of architecture and engineering.<sup>74</sup> The defendant contended that it was not engaging in the practice of architecture or engineering but that it had merely contracted to furnish such services and that all such services had been subcontracted to and performed by a partnership duly licensed to provide such services. The court rejected the defendant's contentions, basing its decision on the defendant's retention of control over the construction. The court stated that because the defendants were not merely executing the plans of the subcontractors but were themselves "in responsible charge" of the work, they were performing architectural and engineering services.<sup>75</sup>

Contrary to this position, a number of other courts have indicated that supervision of construction does not in and of itself constitute the practice of architecture.<sup>76</sup> Courts which take this position reason that what the contractor undertakes to do is to act as the agent of the owner and perform those services which an owner might properly perform on his own without a license. This position recognizes that at present there is a division of responsibility for construction supervision between the contractor and the architect and that the contractor's supervisory function varies greatly from that of the architect.<sup>77</sup> When in a position of supervision, the contractor can make his skill and knowledge of construction techniques, methods and materials available to the owner. In contrast to the contractor's supervision is the supervision provided by the architect which ordinarily consists of checking whether the materials being used conform to the plans and specifications in kind and quality.<sup>78</sup>

At least two states have recognized this distinction and have made statutory changes accordingly.<sup>79</sup> In New York and Massachusetts, licensing statutes now expressly provide that a builder is exempt from state licens-

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74. *Id.* at 718.

75. *Id.* at 723; *Eklund v. Elwell*, 116 Utah 521, 211 P.2d 849 (1949) (where licensed agent is not the responsible party, contractor is not relieved from the requirement of the licensing statute).

76. *See Vereingte Osterreichische Eisen und Stahlwerke, A.G. v. Modular Building and Development Corp.*, 64 Misc. 2d 1050, 316 N.Y.S.2d 812 (1970); *Wahlstrom v. Hill*, 213 Wis. 533, 252 N.W. 339 (1934).

77. 213 Wis. at —, 252 N.W. at 340.

78. *See* notes 12-14 *supra* and accompanying text.

79. N.Y. Educ. Law §§ 7306(g) (McKinney Supp. 1972) provides that "This article shall not be construed to . . . prevent . . . [c]ontractors or builders from engaging in construction management and administration of construction contracts."

MASS. ANN. LAWS ch. 112 § 60A (Supp. 1971) provides that "Nothing . . . shall be construed to prevent . . . the administration of construction contracts by persons customarily engaged in contracting work."



ing requirements when he is engaged in the administration of construction contracts. It is expected that other states will follow.

The final obstacle to the use of design-build contracts is the potential conflict of interest presented. The traditional model would, on the basis of this conflict, strongly militate against the use of design-build contracts as a means to protect the welfare and safety of both the owner and the public. However, examination of the construction industry in its present state dismisses this notion for two reasons. First, while protection of the public's welfare and safety is the basis upon which regulation of construction is based, that regulation should extend only to the point to insure that a licensed architect performed those services which the owner could not provide himself. Regulation should not deprive the contractor or architect of the opportunity to supply and derive a profit from those skills for which he is qualified. Second, if the regulation of construction based upon the police powers of the state was intended to prevent such activity and provide a system of checks and balances in order to protect the public welfare, such system has proven to be totally inadequate.<sup>80</sup> The reduced role of the architect, the increased skill and knowledge of the contractor, who should no longer be cast as the adversary of the owner, and the change in the character and needs of the modern clients all evidence this inadequacy.

Conflict of interest regulations<sup>81</sup> do not provide an effective protective device for the owner or the public. In Virginia, it requires only that there be disclosure to the owner of the conflict so that the owner is aware that the relationship between himself and the architect is not the traditional one.<sup>82</sup> The AIA has recognized the lack of foundation in the conflict of interest argument and has changed its code of ethics to expressly allow for member participation in design-build contracts.<sup>83</sup>

Arguably, the design-build contract offers a much more effective system of checks and balances which operate to protect the public safety and welfare. While courts have refused to apply no-fault theories of liability to architects and contractors under the traditional relationship,<sup>84</sup> the design-build contract puts the performing party in a situation closely analogous to that of the manufacturer. This position lends itself to the applica-

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80. See notes 41-43 *supra* and accompanying text.

81. See VIRGINIA STATE BOARD OF ARCHITECTS, PROFESSIONAL ENGINEERS AND LAND SURVEYORS, RULES AND REGULATIONS, § 23 (1979).

82. *Id.*

83. AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT J 330-STANDARDS OF ETHICAL PRACTICE, R.403-405 (1979).

84. *E.g.*, *La Rossa v. Scientific Design Co.*, 402 F.2d 937 (3d Cir. 1968).

tion of an implied warranty theory to the design-build contract.<sup>85</sup>

#### IV. CONCLUSION

The traditional model has proved to be an inadequate method of delivering construction services in an increasing number of situations. While owners have always been restricted by forces in the marketplace which affect the cost and availability of financing, labor and material, the increased prominence of institutional owners and their large scale projects coupled with skyrocketing construction costs has made the feasibility of a building project dependant more than ever on cost control and fast construction. Speed and efficiency have become as important as aesthetics.

The design-build contract, in many cases, can best supply the needs of owners because it recognizes the skill and knowledge of the contractor and utilizes it in the early stages of the building project while providing single point responsibility. This format allows the architect to partially return to his role as the "master builder" while simultaneously preventing a multiplicity of litigation.

The present policy of the Virginia Department of Professional and Occupational Regulation appears to allow for the use of design-build contracts. This appears only to be an interim policy, based upon anticipated changes in both statutes and regulations rather than upon interpretation of current state law. If confronted with the problem under present Virginia law, it is debatable whether design-build contracts would be declared legal.

Those cases which have allowed design-build contracts have done so after first finding that the state's statutory scheme allowed for the delivery of professional architectural services by a non-professional corporation.<sup>86</sup> Such statutes have either expressly stated that the general business corporation may engage in such activity<sup>87</sup> or they have stated that so long as a duly licensed architect is in a responsible management position in the corporation offering the contract, the contract is legal.<sup>88</sup> Neither of these statutes exists in the present statutory scheme of Virginia. The

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85. See *Robertson Lumber Co. v. Stephen Farmers Coop.*, 274 Minn. 17, 143 N.W.2d 622 (1966); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965).

86. See *Seaview Hospital, Inc. v. Medicenters of America, Inc.*, 470 S.W.2d 35 (Tex. Civ. App., 1978). See also *Golding v. Schubach Optical Co.*, 93 Utah 32, 70 P.2d 871 (1937) (an unlicensed person who hires a licensed professional to do work at his place of business at a salary is not thereby engaging in an illegal practice).

87. See note 60 *supra* and accompanying text.

88. See *Hattis Associates, Inc. v. Metro Sports Inc.*, 34 Ill. App. 3d 125, 339 N.E.2d 270 (1975); ILL. REV. STAT. ch. 10 ½ § 3 (1971).

court, therefore, would have to adopt a rationale similar to that adopted by the court of appeals in *West Baton Rouge*,<sup>89</sup> finding that the object of the statutes in question is only to insure that a licensed professional performs those services which an owner may not himself perform. This argument does not appear to be a strong one, as in *West Baton Rouge* the Supreme Court of Louisiana later expressly rejected it in reversing the court of appeals.

The problem, in terms of Virginia law, is to define more precisely the services for which a license to practice architecture is required and to cast those definitions in terms which recognize the existence of and the need for new systems of construction administration such as those provided under a design-build contract. At least two states<sup>90</sup> at present have done so, expressly providing that a builder is exempt from the architectural licensing statute when engaged in the administration of construction contracts. It appears that other states will soon follow. The Virginia legislature should recognize and follow this trend and make the appropriate statutory changes.

*Kevin B. Lynch*

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89. See notes 62-64 *supra* and accompanying text.

90. See note 78 *supra* and accompanying text.