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Does Better & Faster = Smarter?

By Barry B. LePatner, Esq.

During the course of this year's annual three-day summer program, which celebrated its 10th anniversary at Harvard's Graduate School of Design, A. Eugene Kohn, FAIA, the prominent architect and founding principal of Kohn Pedersen Fox Associates P.C., and I engaged in a spirited debate over the increasing effect of technology upon the design/construction world. My presentation focused on how three controlling factors – advances in technology, the global economy and the increased speed of connectivity – were radically re-shaping the way that real estate and design professionals are managing the design/build process. Gene Kohn's response was that, "while I am very aware of the many advantages that technology brings to the profession of architecture - in particular speed with which we can communicate, send and receive information on our projects, I am also aware that speed does not necessarily bring the best results in terms of design." Gene argued, "[t]he computer does not provide answers without input from the architect. The human mind has not become any faster in making decisions just because the computer has gained speed."

The attendees, who ranged from principals of major architectural and engineering firms, to marketing directors, to leaders of firms from across the country and several nations abroad, had come to Harvard to hear brilliant presentations from marketing experts such as Roslyn Brandt of Brandt Resources in New York City, Kevin Kelly and Ginger Riley of Shook Design Group from Charlotte, N.C., Donatella Giacometti of Ten Second World, Inc. and Faye Manker of Sprint Communications as well as the silver-haired and silver-tongued Kohn.

The highly interactive program teaches marketing and presentation skills through a range of group discussions, skills training, branding exercises and performance critiques that have, for the past ten years, made this program one of the most highly-rated of Harvard's

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summer series. Inherent in all aspects of what is taught is that there is no one way to market your services; finding what is comfortable for you and your firm is what truly works.

The roundtable that was held by program leaders and attendees at the end of the first day, included Gene Kohn's comment on my earlier presentation's reference to the growing effect of the latest technology on professional services today. Gene expressed his concern that the design professional should beware of blind acceptance of and reliance upon tools that speed up the process and jeopardize the thinking that is an integral part of the design process. Without the requisite experience, he argued, the human factor that architects and other design professionals need to develop, cannot substitute for the speed that the new technology offers. Gene illustrated this cautionary concern for technology and the workplace by considering, "Would you want a doctor who never diag-

nosed a type of cancer or performed a surgery to advise you? Would you want a lawyer who never tried a case to defend your life in court? Experience allows a professional to perform at his or her best. An architect who has designed and built buildings - who has experience in a building type can more readily see - arrive at - the best solution and achieve outstanding architecture."

Gene was responding to the trend I had described earlier in my speech: the forecast of a serious threat to established design firms from younger, smaller firms who were becoming savvy users of technology that more closely matched the technology being used by today's corporations and institutions to meet their own project objectives. This new generation of professionals is closely attuned to the myriad advantages of marrying quality design with the wonderful new tools that can make the process of designing and constructing a facility exciting and more effective. Gene cautioned that, while this generation of professionals may be closely in tune with technological advances and are enormously energetic and facile with the computer, they still need experience to serve their client well. Speed in decision-making can lead to excessive costs. Costs will be incurred due to lease expiration or escalation, but speed for speed's sake can lead to serious errors or oversight. Not every project needs to be done at breakneck speed even when technology permits." We both agreed that if the technological revolution continues, as it most surely will, it will be difficult for today's mainstream design professionals to resist the need to "walk the walk" and "talk the talk" of staying in lockstep with their clients' need for faster, better, smarter.

While acknowledging that this trend was inevitable, however, Gene cautioned that there was danger whenever we envisioned a blind commitment to a fast-evolving technology. "We can't afford to have individuals spending the better part of their day in front of a computer." Gene spoke to the imperative that "the human

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The Performance Bond

By: Ronald B. Feingold, Esq.

In many owner/contractor agreements involving large-scale projects, the owner requires a contractor to furnish a performance bond as well as a labor and material payment bond. A performance bond is for the benefit of the owner. It is used on a construction project to shift the risk of loss incurred as a result of a contractor's non-performance and breach from the owner to the surety. The payment bond is designed to protect subcontractors who provide labor and material to a project against non-payment by the general contractor. The payment bond also protects the owner against the filing of mechanic's liens by subcontractors against the project.

This article will discuss the surety's rights and obligations under the performance bond, the kinds of coverage provided under the performance bond, and the surety's defenses that may be asserted against an owner's claim under the bond.

The performance bond covers the cost of completion of the project. If the contractor (principal on the bond) completes the project in accordance with the terms of its contract, the surety is discharged from its obligations under the bond.

The amount of the performance bond is generally equal to the amount of the construction contract. If the contractor performs in accordance with its contractual obligations, then the owner has no claim against the bond. However, if the contractor defaults under the contract, the owner is usually required to notify the surety under the bond, and the surety's duties are activated. The surety's liability under the bond is conditioned upon the following: the default by the contractor (principal); the owner's timely delivery of a notice of such default; and the owner's compliance with the terms of the contract. Under the AIA owner/contractor agreement, in order to justify a declaration of default, the contractor's breach must be material. Non-material breaches do not justify a default of the contractor.

After the notice of default, the surety generally undertakes an investigation of the contractor's alleged default. The investigation includes inquiring into the claims by the owner as well as any claims of the contractor/principal.

The purpose of the surety's investigation is to determine whether the owner's declaration of default was proper and to determine the surety's options on whether to cure the default.

In most, if not all instances, after the surety pays out on the bond, it may seek full indemnification from its principal, i.e. the contractor. The bond ordinarily provides for a full indemnification of the surety for all costs and expenses incurred by the surety. If the principal's claim of bad faith is sustained, the surety is required to pay on the bond without obtaining indemnity from the principal. For example, a valid defense to the surety's claim for indemnification against the principal may arise if the surety did not settle with the owner in good faith.

Once a default has been declared, the surety has a number of options. The surety may settle with the owner and pay the owner an amount up to the face amount of the bond, and dispose of the claim in total. The advantage, here, is that the surety may be able to settle for less than the face amount. The surety risks having to deal with a claim by the contractor that the surety's payment was excessive or inappropriate, and if sustained, the surety will lose its

indemnification claim against the contractor/principal.

Another option is for the surety to enter into a completion agreement with the owner. The surety engages another contractor to complete the project. The surety and the owner may enter into a settlement agreement at the same time, thereby capping the surety's liability. The owner and the surety may agree upon the penal sum or an amount less than the penal sum. If the owner and the surety do not enter such agreement, then the surety may face the risk of having to expend money to complete the project and the completion costs may exceed the amount of the bond.

A third option is for the surety is to offer a new contractor and a new surety. The surety also pays the owner the difference between the new contract price and the balance due under the original contract. Under this option, the surety obtains a full release under its bond.

A fourth option is to provide financing to the contractor so as to permit the contractor to complete the project. This is advisable when the project is almost complete and the surety feels comfortable that the contractor can complete the project with the financing. The surety takes the risk that the contractor can complete the project. But, the surety does not reduce the bond's penal sum. The surety's exposure is not reduced. Thus, the amount injected into the project to help the contractor and the amount of the claim under the bond may exceed the penal sum.

A final option is to await the owner's completion of the project on its own and then pay the owner its extra costs in completing the project up to the penal sum. The disadvantage is that the owner controls the costs in completion. However, the surety should first ascertain that the bond permits this approach and that by doing nothing, it does not breach the bond.

Once a claim is made against the bond, the owner is faced with potential defenses that may be raised by the surety. The surety has the same defenses that the principal has. Thus the surety may allege that the owner is in default under its contract. There are also several defenses based on the surety's status. The owner's improper payment to the contractor is a defense. The owner may have paid the contractor before the funds are due. A surety may also assert that there is a material alteration in the owner/contractor agreement that imposes risks on the surety that are fundamentally different such that the scope of the underlying obligation was materially changed, i.e., if there is a material change in the scope of the work of which the surety was never notified, the surety may be released from its obligations.

A third defense is the statutes of limitations. Most bonds provide for a two-year period to provide notices of a default from the day payment is due.

These defenses notwithstanding, owners on large scale projects should always keep in mind the availability of the performance bond which affords extra protection to an owner against the contractor's default by providing assurance that the cost of the completion of the project will be covered by a surety up to the face amount of the bond. ■

The performance bond covers the cost of completion of the project.

Facilitating the Rehabilitation of Older Buildings

By: Robert M. Boder, Esq.

As the United States population grows and the availability of property for new construction becomes more scarce, many builders and developers have begun to explore the option of renovating existing, older buildings. This is especially true when it comes to the many urban centers throughout the country.

Until recently, modern building codes existing throughout the country have been an inhibitor to the rehabilitation and renovation of older structures. Building codes address health, welfare and safety of the general public in addition to occupants of the buildings. However, because most state and federal building codes were enacted for new construction, most older, vacant buildings fail to meet the thresholds of these codes.

Because of this, builders and developers have, for the most part, shied away from the renovation of older buildings. Those few with the will to renovate older buildings routinely had to absorb enormous costs attributable to code-related upgrades, in addition to the already expensive prospect of repairing, renovating and updating the buildings.

In 1980, the U.S. Department of Housing and Urban Development (HUD), began to recognize the necessity of easing certain building code requirements in order to encourage the rehabilitation of the increasing number of older buildings. In response, HUD created

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Rehabilitation Guidelines for the simplification of building code regulations. The Rehabilitation Guidelines were designed for voluntary adoption by the states and cities and were the federal government's attempt to reach a semblance of equality between risk and cost in construction. However, until recently, major cities had failed to adopt a Rehabilitation Code such as that set forth by HUD.

Rehabilitation, rather than new construction has many economical, environmental, cultural and aesthetic benefits. For example, rehabilitation enables cities to commit fewer financial resources to the development of infrastructure, reduces the need for new construction, reduces the need to raze properties (entailing the removal of sometimes hazardous building materials) and assists in preserving the historical sense of city and community.

Locally, New Jersey realized that the older property in its urban centers were decaying for too long. In order to stimulate investment in its aging infrastructure, New Jersey enacted a rehabilitation code which has been referred to as revolutionary in facilitating urban renewal. Since its promulgation in January, 1998, investment in rehabilitation projects has flourished in New Jersey urban centers such as Newark, Jersey City and Trenton. Spending on rehabilitation projects in these areas has grown exponentially since the New Jersey code's inception.

Reaching into America's history is proving to be profitable as our country's core building stock ages and rehabilitation becomes less of an encumbrance.

Other states such as New York, Connecticut and Pennsylvania are currently debating the issue of adopting a version of their own code. Earlier this year, Maryland became the first state to follow New Jersey's lead and has adopted what it has termed the "smart code" which it hopes will induce growth in cities such as Baltimore and Annapolis.

The rehabilitation codes which are being enacted and implemented provide lenders and developers with more assurance as to their investments by introducing a predictability which was not apparent under the modern building codes. For example, the New Jersey code provides clear and practical instructions for all types of rehabilitation projects, thereby removing much of the discretion that building inspectors currently possess under the modern building code.

It seems obvious that the State of New York should enact a Rehabilitation Code similar to that recommended by HUD and enacted by New Jersey. As new construction continues to overpopulate urban centers such as New York City, it is time for the legislature to encourage the rehabilitation of the hundreds of unused, older buildings that can, once again, begin to beautify the fabric of the City. ■

Notes

1. [Rehabilitation Guidelines](#), 1980, U.S. Department of Housing and Urban Development, Office of Policy Development and Research under Cooperative Agreement H-5003, Washington, D.C.

2. [See] [National Survey of Rehabilitation Enforcement Practices](#), Office of Policy Development & Research, U.S. Department of Housing and Urban Development, Washington, D.C., June 1988.

Research assistance by Roy Pachecano, AIA

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relationship" must remain at the heart of all client-professional interaction. He noted that the age old quote of "Haste makes waste" is still valid.

As a humanist and people person, I wholeheartedly endorse the critical importance of invoking the trusting, personal side of maintaining a relationship with clients. There cannot be, as Gene opines, an excellent solution to design problems that does not embrace one's breadth of experience as part of the solution. But as Bob Dylan penned thirty years ago, "the times they are a-changin." We are seeing a new young generation of professionals who are totally comfortable with a computer screen in front of them as they instant message with ten friends across the country, research their high school papers, download their favorite songs from Napster, "read" news off CNN.com, book their concert tickets off the Internet, and, yes, at the same time, design new projects totally on CADD.

These young professionals, masters of multi-tasking, will in a short decade or so be leaders in their respective fields, and have a decade or more of high speed connectivity expertise behind them. Equally important, is the fact that gen X-ers and their ilk are rapidly filling the ranks of corporate, governmental and institutional leadership where they will be comfortable relating to their equally computer-savvy design compatriots.

Will all of this lead to a radical way in which buildings and interiors are designed and constructed in the years ahead? Will there be a backlash by the design professionals who will resist the imposition of technology into the process, insisting all the while on the sanctity and value of handwritten drawings and sketches to carry on work? Gene believes that "[w]hile virtual reality is quite amazing it still does not

replace reality. I believe that the creative contributions from the hand of people will become even more valuable as technology advances and that it is this balance of human contribution and technology that will truly improve the quality of our lives." Will today's architectural schools see this trend for what it is and respond to the call for more of a balance in design education?

Mr. Kohn isn't arguing the importance of technology, nor is he arguing for a backlash by design professionals who resist the imposition of technology into the process. What he is arguing is that less time, i.e., the rush to design, may adversely affect the outcome of a building. He states: "It is a fact that almost all new buildings are a prototype but do not have an advantage of testing the product before it is complete and turned over to the owner as compared to the manufacture of cars, TV sets etc. Sufficient time, therefore, is required to consider all the details of a building because all buildings have very long lives compared to TV sets and cars."

While I agree with Gene Kohn on the importance of what time and experience bring to the "right solution" for every project, I believe we are entering an era when there will be new definitions of what the "right solution" will be for tomorrow's clients. We will always need quality thinking and the benefit of design professionals who have been there before. But if that thinking becomes accelerated by a generation of experience that has been trained to do it "better, faster and smarter", will we be the worse off for it? Knowing the caliber of the young professionals I have met around the country, as well as those in our own office, I think we will be just fine. ■

BBL&A has been retained to draft a commercial parking garage lease for the new parking facility for which we had drafted the design and construction contracts. BBL&A will also be providing advisory services in the selection of and final negotiations with the lessee.

BBL&A is pleased to have been retained to draft and assist in negotiations for the design and construction of a high-tech 'telecom hotel.' The new facility will be leased by a telecommunication company with highly specialized needs to house elaborate equipment that will be the back-bone and nerve-center of its growing electronic commerce.

BBL&A's design consultant Roy R. Pachecano, AIA has been invited by the Dean of the College of Architecture at Texas A&M to lecture on professional practice issues this fall to the school's undergraduate and graduate classes.

IN LUMINAE
The Quiz

- 1 True or False: It is a surety's duty to cause the performance and completion the project under the terms of a performance bond.
2 What is a Performance Bond?
3 What is the Rehabilitation Code?

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BBL&A is looking forward to its gala 20th anniversary celebration which will take place November 9, 2000. Invitations to this joyous and entertaining event are being sent as this issue goes to press.

BBL&A is proud to have been retained by the United Nations Mission in Kosovo to draft and negotiate an agreement with Morrison Knudsen Corporation and several European construction firms to prepare a Financial Viability, Environmental Assessment and Asset Preservation study of the TREPCA Mining and Metallurgical Complex in Kosovo for the clean-up of Kosovo from the devastation of its civil disorder.

BBL&A recently represented the Council of Fashion Designers of America in its negotiations for the recently held Fall Fashion weeks. Negotiations involved the CFDA, Bryant Park Resotration Corporation, City Parks Department officials and Deputy Mayor Rudy Washington.

Answers to In Luminæ Questions:
1. False - It is a surety's duty to complete the construction project under the terms of a performance bond, but only in instances of default by the contractor.
2. A Performance Bond is an insurance instrument purchased by the Owner that covers the cost of completion of a construction project.
3. The Rehabilitation Code, or the Rehabilitation Guidelines, are HUD created guidelines for the simplification and easing of certain building code requirements in order to encourage the rehabilitation of existing, older buildings. These guidelines were designed for voluntary adoption by states and cities, and is the federal government's attempt to reach a semblance of equality between risk and cost in construction.

Quote of the Quarter

Imagination is more important than knowledge.
- Albert Einstein