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An Architect's Guide to P3s

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What are P3s

Federal, state, and local governments in the United States have discovered Public-Private Partnerships, also known as P3s, and love them. They see them as solutions to the problem of needing critical infrastructure improvements, such as improved public roads, highways, and bridges and new and innovative water/wastewater facilities, with having no immediate way to fund them. P3s are also moving, albeit more slowly, towards vertical projects, including higher education residential facilities, airports, courthouses, and prisons, among other municipal buildings. In theory, the system works. Historically, a public entity desiring such improvements relied upon increases in taxes, traditional debt financing (including TIFs), or a (much less likely) budget surplus to fund the improvement. The public entity then proceeded with construction through a design-bid-build or, more recently, a design-build, delivery method. With a P3, the public entity partners with a private entity. The private partner (or developer) designs, builds, and finances the design and construction of the improvement with a combination of private equity and borrowed funds. In some cases, the private partner (or concessionaire) also operates, or operates and maintains, the improvement for a stipulated period of time after completion.

Benefits abound for the public entity under a P3. The public entity obtains much needed financing, without burdening itself or the taxpayers with the tremendous cost of the improvement; it receives an accelerated project delivery; and it transfers risks typically associated with the construction (which often includes existing environmental conditions and differing site conditions, among others), financing, facility management, and lifecycle of the improvement, to the private partner.

P3s also offer architects a variety of exciting opportunities for participation. The architect may serve as a consultant to the public owner or developer/concessionaire, in a like manner to an owner's consultant on a more "traditional" project. In this capacity, the architect's potential services range from feasibility studies and environmental assessments, to the development of criteria for the project and bridging designs, to the selection of the contractor and its team, to review and advising on the design to construction administration services. Alternatively, the architect may furnish design services to a contractor, who has contracted with the developer/concessionaire to design and construct the project. In doing so, the architect becomes no more than a "regular" subcontractor to the contractor, rather than an advocate of the owner.

P3s, however, are not right for every project and are fraught with traps for the unwary participant. Perhaps the most unwary of all is the architect. On a successful project, an architect participating in a P3 may have a tremendous upside, as he or she may earn high fees and gain valuable professional exposure and recognition. However, on a "problem project," the architect may face significant – practice threatening – risks if he or she failed to adequately evaluate, manage, and price the risks before taking the plunge into the P3. While it may be natural to think that the architect works hand in hand with, and as a partner of, the contractor – not only in furnishing a design to bid, and ultimately construct, the project, but to identify areas of concern in the proposed construction agreement and to negotiate terms that reasonably protect all parties – this is not typically how the process works.

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

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

The Teaming Agreement

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

Although contractors and architects may enter into a teaming agreement at any time, they often do so before the private partner issues the RFQ or RFP. At this juncture of the P3, the agreement between the public entity and developer/concessionaire, the arrangements for the developer/concessionaire's financing for the project, and/or a draft agreement for the design and construction (which would be included in the RFP) likely have not been finalized. As such, the contractor's obligations *vis a vis* the project are completely unknown, and this makes the teaming process that much more risky for the architect. The following chart identifies some of the biggest areas of concern and recommendations for modifying the teaming agreement to address those concerns:

AN ARCHITECT'S GUIDE TO P3S – Teaming Agreement Risks

Issue	What the Teaming Agreement May Say	How the Architect Should Respond
Responsibilities of the Architect	The architect will perform its services in accordance – or even sometimes in "full and strict compliance" - with the requirements of the solicitation. The architect shall prepare "accurate quantity and cost estimates" and submit an "accurate, low, risk, high quality, responsive cost-efficient proposal."	Clearly define its scope of preliminary design services, including any qualifications and assumptions upon which those services are based. Tie its performance solely to the appropriate (insurable) standard of care, while specifically disclaiming any express or implied warranties or guarantees in the RFP or any future higher-tier agreement.
Architect's Compensation for Proposal Design Services	The architect will not receive compensation for preliminary design services unless the private partner awards the project to the contractor.	Negotiate compensation for proposal services that includes: • applying a stipulated multiplier to direct labor costs of those performing pre-bid services; • payment for certain pre-approved direct costs incurred by the architect; and/or • payment of third-party expenses that are produced as final services.

Ownership of Instruments of Service	The architect must transfer all intellectual property interests in its instruments of service to the contractor and the developer/concessionaire.	Retain intellectual property rights in its instruments of service, except to the extent they must be transferred to the developer/concessionaire. Obtain an indemnification for liabilities, losses, and damages that result from the modification or reuse of the instruments of service without the architect's express authorization. Negotiate payment of a success fee sufficient to fully compensate the architect for pre-bid services if the contractor wins the project and terminates the architect.
Termination	The contractor can terminate the architect if the parties can't agree on the final terms of the design agreement following "good faith negotiations."	Negotiate a "nuclear option" to terminate the Teaming Agreement if the Owner's solicitation contains terms that the architect cannot live with.

The Design Agreement

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

While the law requires architects to pre-negotiate the design agreement in order to protect its rights to perform services, if the contractor wins the project, there are significant risks in doing so. As previously indicated, virtually every agreement furnished by a contractor to an architect will seek to protect the contractor from any risk associated with the design. The following chart identifies some of the biggest areas of risk, from both an insurance coverage and business standpoint, and recommendations for modifying the design agreement to address those concerns:

AN ARCHITECT'S GUIDE TO P3S – Design Agreement Risks

Issue	What the Design Agreement May Say	How the Architect Should Respond
Standard of Care	The architect's services will be performed in accordance with the highest standard of care. The project will be "defect free" or "fit for its intended purposes." The contractor's obligations in the Agreement for design and construction flow down to the architect.	Tie its performance solely to the appropriate (insurable) standard of care, while specifically disclaiming any express or implied warranties or guarantees in the Design Agreement or higher tier agreements.

Indemnification Provisions	The architect agrees to indemnify, hold harmless, and defend the contractor and every person or entity connected with the project for all claims, losses, or judgments arising from or connected with the architect's performance of the project or breach of contract. The architect must assume all indemnity obligations to the contractor that the contractor assumes to the developer per the design-build contract.	Delete the "day 1" defense obligation. Limit the field of indemnified parties to the architect's client and its officers, directors, employees. Limit the scope of the indemnity to the architect's negligent acts or omissions only.
Timing of Performance	Time is of the essence. The architect is liable for all delays in its performance, regardless of fault.	Delete 'time of the essence' provisions. Clarify that the architect will not be liable for delays unless (1) it caused the delay and/or (2) the delay was within its reasonable control.
Liquidated Damages	The architect is liable for all liquidated damages associated with delays to performance of the design services.	Strike any liability for liquidated damages or, at a minimum, limit the architect's responsibility for such damages to the extent caused by the negligent performance of its professional services.
Waiver of Consequential Damages	Nothing – there may be no waiver of consequential damages at all; or The architect (only) is required to waive all claims for consequential damages; or The contractor and architect waive all claims for consequential damages, except that there are a number of exceptions to the waiver (as it applies to claims against the architect) that would usually be viewed as consequential.	Negotiate an unconditional, mutual waiver of consequential damages.
Limitation of Liability	Seldom, if ever, is one included.	Include an unconditional limitation of liability.
Guarantee or Warranty Periods	The architect's services and work product will be "complete" and "free from any and all defects, errors, and omissions" The architect furnishes its guarantees/ warranties for the length of time that the contractor is obligated to the developer.	Disclaim all performance guarantees or warranty periods.
Third Party Beneficiaries	The developer/concessionaire and/or others are third-party beneficiaries of the design agreement and have the same rights against the architect as the contractor under the agreement.	Strike all provisions in the agreement that allow anyone other than the contractor to have a direct action against the architect.
Ownership of Instruments of Service	See Teaming Agreement table above.	See Teaming Agreement table above.
Assumption of All Risks, Costs, and Expenses	The architect is entirely and exclusively responsible for all risks, costs, and expenses relating to the performance of its obligations.	Modify the provision so the architect is only liable to the extent that such risks, costs, and expenses result from the architect's negligent acts or omissions.

Issuance of the RFP

Once the contractor and architect agree upon the terms of, and execute, the teaming agreement, they must await and/or evaluate the RFP and attendant procurement documents. While the procurement documents often include a sample contract for design and construction of the project, the developer/concessionaire may revise that contract even during the procurement process. At this juncture, the architect should:

- take an active part in reviewing not only all iterations of the contract for design and construction, but all of the other required submittal documents, to provide input into, and take exceptions to, the practice-jeopardizing terms in the contract that will inevitably flow down to the architect;
- work closely with the contractor to prepare the proposal response to, ideally, include an insurable standard of care and indemnity for design services;
- furnish the contractor - for inclusion in the proposal - a narrative that: (1) addresses the basis for design (including, but not limited to, any assumptions made by the architect based upon representations from the public owner and/or developer/concessionaire that the architect relied upon); (2) clarifies that the design is a work in progress (i.e., incomplete); and (3) advises the contractor to anticipate and account for further design development and changes to the design and account for those changes; and
- line up all (or most) of his or her subconsultants for the project to ensure coverage of the full design scope, to ensure that the subconsultants have sufficient insurance coverage and meet any insurance requirements contained in the RFP, and to obtain input on the contract for design and construction and submittal documents

Acceptance of the Contractor's Proposal

Assuming the developer/concessionaire accepts the contractor's proposal, the contractor and developer/concessionaire then proceed to negotiate the final terms of the design-build contract. Again, the architect should seek an active role in those contract negotiations by:

- reviewing higher tier project documents;
- amending its design proposal to reflect differing risks and responsibilities from its initial proposal;
- ranking its "must have" provisions; and
- knowing when to "cut bait" and not pursue the opportunity if the risk is too great.

Conclusion

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

[i] For a more detailed discussion of the effect of this change on, and policy challenges and implications of, the Architect's role under a P3, see The American Institute of Architects, Public-Private Partnerships: What Architects Need to Know.

[ii] For a more detailed discussion about considerations for whether a P3 is "right" for a particular project, see The American Institute of Architects, Public-Private Partnerships: What Architects Need to Know.