[In 2000, members of the ABA Forum on the Construction Industry were asked to make comments on the revised ABA 2000 Model Procurement Code. Here are their comments, and reply from one of the Reporters for the 2000 MPC Revision Project.]

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The American Bar Association's House of Delegates adopted the 2000 ABA Model Procurement Code on July 11, 2000 in New York City. Article 5 of the revised code is now entitled Procurement of Infrastructure Facilities and Services. This article adds four new standard models for infrastructure delivery to the design-bid-build model that has been prevalent in public infrastructure delivery since the end of World War II. The new Code adds design-build, design-build-operate, design-build-finance-operate, and pure operations and maintenance to the menu of project delivery methods in a sweeping effort to expand the options available to owners and producers. The goal of these changes is to align the options with an infrastructure marketplace that is experiencing similar changes.

In this Point/Counterpoint, Anne Gorham and William Offutt offer comments for discussion. Many of these comments and issues were raised and debated during the draft stages of the Code revisions. Professor John B. Miller, who worked on the Code revision project since 1997 as one of two reporters, offers his "insider" counterpoints discussing how these issues were addressed by the authors of the Code revisions.

Introductory Comments from Professor Miller

While the 2000 ABA Model Procurement Code isn't perfect, the document goes a long way toward restoring badly needed flexibility in state and local procurement systems. It represents a neutral attempt to move beyond divisive and unproductive debates about which (often a surrogate for "whose") delivery method is the "best." The 2000 Code takes the entire industry to a much more rational environment where owners and producers can use the evolving infrastructure marketplace to exchange services, systems, materials, and equipment on predictable and fair terms. The new Code looks forward – away from hollow debates – and aligns itself with the emerging marketplace.

1. Comment: Does the Code Indicate a Preference for Competitive Sealed Proposals?

Section 5-502(4) of the Code states that design-build services shall be procured by competitive sealed proposals, as set forth in section 3-203. Section 3-203, however, only allows the use of competitive sealed proposals where the chief procurement officer, the head of the purchasing agency, or a designee of either officer above the level of procurement officer determines that the use of competitive sealed bidding is not practicable or not advantageous to the state.

Competitive sealed bidding, therefore, is given a clear preference over competitive sealed proposals in design-build procurement, despite the fact that section 5-202(4) reads as if design–build procurement may be conducted using other than competitive sealed proposals. In this respect, the revised Code is not in keeping with the procurement policy that the federal government has followed for the past sixteen years. Specifically, The Competition in Contracting Act of 1984 put competitive proposals and negotiated source selection on par with competitive sealed bidding. A revision that places competitive proposals and negotiated source selection on an even playing field with competitive bidding would provide procurement officers a greater degree of flexibility, and offer a consistent approach to that currently used in the federal procurement arena.

Reporter's Reply:

Fortunately for the 2000 Code, this comment is mistaken. Section 3-203, entitled, Competitive Sealed Proposals has three subsections that must be read together. Subsection (c) reads as follows:

> **(**c) Contracts for the design-build, design-build-operate-maintain, or design-build-finance-operate-maintain project delivery methods specified in Article 5 shall be entered into by competitive sealed proposals, except as otherwise provided in subsections (c), (d), (e), and (f) of Section 3-201 (Methods of Source Selection).

Subsections (c), (d), (e), and (f) of section 3-201 deal with narrow exceptions that are not relevant here, i.e., small purchases, sole source procurements, emergency procurements, and special procurements. Contrary to the point raised in the comment above, there is no preference for competitive sealed bidding in design-build, design-build-operate, or design-build-finance-operate. In fact, sealed bidding is forbidden. The first paragraph in the commentary to the Code confirms this interpretation, stating as follows:

> (1) The competitive sealed proposal method (similar to competitive negotiation) is available for use when competitive scaled bidding is either not practicable or not advantageous. <u>The competitive sealed proposal method is mandated for the project delivery methods described in Article 5: design-build, design-build-operate-maintain, and design-build-finance-operate-maintain.</u>

Article 3 applies to all procurements, not just infrastructure. Subsection (a) and (b), therefore, govern all contracts that are covered by the procurement code, including such items as pencils, supplies, and widgets that might be procured best by competitive bidding. Subsections (a) and (b) provide flexibility to procurement officials to use competitive sealed proposals in appropriate circumstances for these other procurements.

2. Comment: Does the Code Discourage the Use of QBS in Design-Build?

Section 5-202 (4) allows for an exception in a state's regulations that would not require the submission of proposal development documents in certain circumstances in a design-build

procurement. The commentary to this section suggests that the exception allows a qualifications-based selection ("QBS") in some design-build procurements. However, subordinating QBS to competitive sealed proposals is not in keeping with the modern trends in integrated delivery procurements.

The preference under the revised Code for submission of proposal design development documents in a competitive sealed bid format is antiquated, expensive for proposers, and not "true" design-build procurement. Such a requirement for proposal design development documents to allow for competitive bidding is a throwback to the traditional design-bid-build approach, but making it more expensive for a bidder to bid. A QBS approach would provide consistency with the federal procurement provisions and allow more flexibility for procurement officers. Moreover, QBS would eliminate the necessity for a very expensive step for bidders, i.e., developing design documents in order to competitively bid.

Reporter's Reply:

Whoa! Holy Premise Shift, Batman! This point focuses on what the commentator calls the "exception" in section 5-202(4). Let's begin with what sections 5-202 and 5-204 say about design-build procurements before the label "true design-builder" is given to a certain procedure. The new Code provisions are simple, straightforward, stable, and predictable. Section 5-204 is the key provision. It states as follows:

> (2) *Content of Request for Proposals***.** Each Request for Proposals for design build, design-build-operate-maintain, or design-build-finance-operate-maintain:
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> (a) shall include design requirements;
>
> (b) shall solicit proposal development documents; and
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> (c) may, when the [Purchasing Agency] determines that the cost of preparing proposals is high in view of the size, estimated price, and complexity of the procurement:
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> i. pre-qualify offerors by issuing a Request for Qualifications in advance of the Request For Proposals; and
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> ii. select a short list of responsible offerors prior to discussions and evaluations under subsection 3-203(6), provided that the number of proposals that will be short-listed is stated in the Request for Proposals and prompt public notice is given to all offerors as to which proposals have been short-listed; or
>
> iii. pay stipends to unsuccessful offerors, provided that the amount of such stipends and the terms under which stipends will be paid are stated in the Request for Proposals.

An important requirement in the Code is the inclusion of "design requirements" in the Request for Proposals ("RFP"), and the requirement that each RFP solicit "proposal development documents." The definitions of these terms are contained in section 5-101. The terms were developed after extensive comments from construction industry organizations, including the American Consulting Engineers Council ("ACEC"), the American Institute of Architects ("AIA"), the American Society of Civil Engineers ("ASCE"), The Associated General Contractors of America ("AGC"), the Associated Builders & Contractors ("ABC"), and the Design-Build Institute of America ("DBIA"). The new code establishes a clear starting gate and finish gate for design-build, design-build-operate, and design-build-finance-operate procurements and lowers transaction costs for owners and proposers because these gates are clearly defined. The new sections provide the owner with ample tools to mitigate the extraordinary cost of proposal preparation through pre-qualification, short lists, and even stipends.

The Code definitions of "design requirements" and "proposal development documents" are in section 5-101(6), which states as follows:

> ***Design requirements*** means the written description of the infrastructure facility or service to be procured under this Article, including:
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> (a) required features, functions, characteristics, qualities, and properties that are required by the [state];
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> (b) the anticipated schedule, including start, duration, and completion; and
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> (c) estimated budgets (as applicable to the specific procurement) for design, construction, operation and maintenance.

The design requirements may, but need not, include drawings and other documents illustrating the scale and relationship of the features, functions, and characteristics of the project. The commentary to the Code defines the process as follows:

> (2) The Code flexibly defines design requirements, because the specifics of each project vary. Government prepares a functional description that sets forth <u>only</u> the essential features of each project, including anticipated schedule, and estimated budget for design, construction, operation, and maintenance. The integrated procurement methods – design-build, design-build-operate-maintain, and design-build-finance-operate-maintain permit the government to use the competitive process to test for higher quality, lower price, and quicker delivery. If the design requirements go beyond functional description into particular design, construction, finance, or operational requirements, the scope and the intensity of this competition is compromised, to the detriment of both government and offerors. For example, "design-build" competitions in which major design decisions are already set forth in the design requirements – known in the industry as "detail-build" – are not likely to produce innovation in the integration of design and construction. "Detail-build" procurements split the professional design

> function between government and the contractor, an allocation that leads to confusion and disputes over liability for design, for construction results, and for performance problems. The Code encourages government: (1) to prepare design requirements for each project before a procurement method is selected; and (2) to procure the design function from a single entity.

Section 5-101(10) of the Code defines proposal development documents as "drawings and other design related documents that are sufficient to fix and describe the size and character of an infrastructure facility as to architectural, structural, mechanical and electrical systems, materials, and such other elements as may be appropriate to the applicable project delivery method."

The Code gives considerable discretion to owners to provide more information than the floor established by the definition of "design requirements." Nervous owners (more comfortable with the certainty of design-bid-build) can establish more detailed design requirements in the RFP. As the commentary points out, the closer design requirements look like design specifications, the closer the design-builder looks like a detail-builder or a builder.

The Code language does not make value judgments as to the appropriate level of detail in the design requirements. It just establishes the floor. The commentary to section 5-101(6) focuses on the most important factor in lowering transaction costs to proposers, and ultimately to owners. It notes that the "Code encourages government: (1) to prepare design requirements for each project before a procurement method is selected; and (2) to procure the design function from a single entity."

This sentence in the commentary raises a more substantial issue regarding the purpose of allowing multiple delivery options in a procurement system. The Code encourages public owners to establish design requirements for each project before a procurement method is selected. With design requirements in hand, the public agency is now in a position to select project delivery methods for all the projects in its portfolio. This is an important step for owners to take in managing not just one project, but the entire portfolio of projects against agency wide quality, budget, and schedule requirements. Before the 2000 Code, public owners could not use the selection of a delivery method as a tool in managing the budget and schedule performance of the entire collection. The 2000 Code repositions the various project delivery methods so that each begins at the same starting gate. This allows public owners (don't worry, this will be done with the help of smart private firms) to use project delivery methods as a key variable in managing the entire collection of infrastructure facilities and services. The 2000 Code, for the first time, promotes the establishment of a marketplace of project delivery and finance methods, and encourages public owners and private producers to creatively take advantage of this marketplace to improve entire collections of infrastructure.

This commentator appear to argue above that public owners should take the step of hiring a design-builder based on a QBS methodology before the owner has identified what it wants and before it has established even a general budget. Then, argues the commentator, a public owner can use the selected design-builder to establish its requirements, establish its budget, and

establish its schedule. Numerous questions quickly emerge, but the crucial one is this: How does the public owner determine that it has received fair value for its expenditure?

The reporters, steering committee, and the sections of the ABA that approved the 2000 Code did not accept the argument, primarily made by DBIA, that in a public setting, QBS could be extended to 100% of the design and construction price. Not only were numerous other construction organizations uncomfortable with this notion, procurement officials commenting on the Code draft were of the view that the concept of extending QBS to design-build is simply a non-starter in the public procurement setting. QBS is an important and valuable tool that is essential in implementing the design-bid-build delivery method, but there, the design portion represents only five to ten percent of the initial price. The notion that governments ought to establish initial scope through design requirements before conducting a competitive procurement using any of the delivery methods is a major step forward, not a throwback.

The federal design-build experiment cannot fairly be described as a single design-build procurement. Throughout the rest of the world, design-build means a single, integrated procurement for design and construction. The 2000 Code is consistent with worldwide definitions of the term.

Now, back to the exception referred to by the commentators**.** Section 5-202(4) provides as follows:

> Contracts for design-build shall be procured by competitive sealed proposals, as set forth in Section 3-203 (Competitive Sealed Proposals), [except that the regulations may describe the circumstances under which particular design-build procurements will not require the submission of proposal development documents as required in Section 5-204(2)(b)].

The commentary with this Code section explains the purpose of the bracketed language in section 5-202(4) as follows:

> (2) The bracketed language provides procurement officials with the authority to exempt, by regulation, one or more design-build procurements from the requirement in Section 5-204(2)(b) that Request For Proposals for design-build services solicit proposal development documents from each offeror. The effect of this language, if used, is to permit the selection of a design-builder based primarily on qualifications. This option has the effect of applying a Qualifications Based Selection system ("QBS") to the design-build process. Without proposal development documents, design is insufficiently developed to include a fixed price as one of the evaluation criteria at the time the design-builder is selected. This approach has been applied successfully on numerous design-build projects, and is ideal where a firm limit on available funds has already been established by the public owner**.**

The Code provides flexibility to authorize design-build procurements without the submission of proposal development documents. The commentary provides an example. If

price is fixed before the Design Build competition begins, the owner can very effectively compare different proposals on the basis of the scope and schedule offered. One public entity in Massachusetts, for example, has structured RFP's so that to be responsive, each proposer must meet all the design requirements of the "base building" described in the RFP. Each proposer may also promise to meet additional features above the base building in the order set forth on a list included in the RFP, for the pre-established price. The owner first fixes the price, and then competes on scope! The Code is drafted to allow for flexibility to meet different circumstances.

3. Comment: Does the Code Adequately Consider Other Types of Negotiated Source Selection Techniques?

Section 3-203 of the Code contemplates the use of competitive sealed proposals, but does not identify the possibility or merit of other types of negotiated source selection techniques in which open discussions must be available in order to facilitate the procurement. A more flexible approach would include a three-part concept in the Code including: (1) competitive sealed bidding; (2) competitive proposals; and (3) other procurements. This option concept would enable the procurement agency to enjoy the ability to use single-attribute (low bid) procurement and multi-attribute (qualifications-based, value based) procurement procedures, both of which are more commonly used in the industry and consistent with modern trends.

Reporter's Reply:

This comment raises a number of important issues, the answers to which involve historical choices made in 1979 by the ABA, by the 1979 advisory board to the original code project, and by the eighteen states and thousands of jurisdictions that have adopted the Code since 1979. The 2000 Code follows the competitive mechanisms established in the 1979 Code, which identified competitive sealed bidding and competitive sealed proposals as the two primary vehicles for competition in public purchasing. These mechanisms are flexibly defined and include the variations mentioned in the commentators' question.

Section 2-303(6) permits discussions with responsible offerors and revisions to proposals based on those discussions. Section 2-303(5) has always allowed the government to flexibly define its evaluation factors so multi-attribute procurement procedures have always been available and encouraged in the Code. Indeed, both the 1979 and 2000 editions of the Model Procurement Code reflect the most progressive thinking in the procurement field about best-value procurements. The 1979 Code contained extraordinarily sound language in this area, which the 2000 Code maintains.

4. Comment: Should the Code Separate Design Criteria Design-Build from Direct Design-Build?

As an alternative to the above, the Code could include a new subsection in section 5-202 delineating source selection methods in design-build procurements. Specifically, section 5-202(4) could be divided into a sub-section for design criteria design-build projects that would be procured via competitive sealed proposals utilizing a RFP, and a subsection on direct design-build that would be procured via a RFQ process.

The design criteria design-build RFP should consist of a sealed proposal comprised of two parts. The first part would provide for agency review of the technical and managerial proposal for the project. Next, the price portion of the proposal would be evaluated in light of the technical and managerial proposal. Award would be made to the responsible offeror whose proposal is deemed to be most advantageous to the state.

Direct design-build services procured via the RFQ process would be subjected to review by an established selection committee. The committee would then rank the contractors based on which it believed to be the most highly qualified to provide the service required. The procurement officer would then negotiate a contract with the design-build contractor with a fixed price contract to be established during the design development. The contractor would be responsible for delivering the project in accordance with the agreed upon design, schedule, and price. Additionally, agencies using the RFQ process to engage design-build entities should have a design professional act as its representative for the project.

This new text section would be more consistent with contemporary procurement practices for design-build variations. The ability to engage the top performing provider of services rather than the low first cost bidder is a compelling reason to use design-build. This text section would be based on the already existing section 5-204, which applies to architectural and engineering services.

Reporter's Reply:

The reporters understood this point of view before making recommendations to the Sections of Public Contract Law and State and Local Government Law. As a result, the 2000 Code incorporates what these commentators describe as "design criteria design-build." Indeed, many useful suggestions from the Construction Industry Roundtable, the COFPAES, the ACEC, and the DBIA were utilized in developing these sections of the Code. As discussed in response to comment 2 above the drafters of the new Code did not accept the argument that what the commentator calls a second form of design-build, i.e., design criteria design-build, makes sense in a public procurement setting. As described in the Commentator's point, the "Direct Design Builder" would be selected based on qualifications and would then work with the Owner to establish scope, schedule, and a fixed price. An industry group proposed to the Reporters that, if the Owner and the Direct Design Builder could not agree on such a scope, schedule, and fixed price, the Owner would simply pay the Direct Design Builder for its effort on a time and materials basis and then start the process over again by selecting another "Direct Design Builder." For many reasons, it makes little sense to put public officials and contractors into such situations, where contract obligations are unclear, rights to drawings are in dispute, reasons for termination are murky, and there are innumerable opportunities for misunderstandings.

Although such arrangements are often used in private settings, and work well, we just don't see how governments and contractors will find such a system to be stable, predictable, and, therefore, practical.

We note also that "design-build" and "design-bid-build" are both focused upon first costs, not on life cycle costs. This is why the Code's menu of delivery methods sweeps so broadly to

include DBO and DBFO. Design-build is an important tool in the arsenal that owners need to be able to use, but it does not focus competition at the procurement stage on life cycle costs.

5. Comment: Should the Code Provide More Guidance Regarding Pre-Qualification?

The 2000 Model Procurement Code does not provide guidance for procuring agencies to assist with pre-qualification and true qualification-based selection for direct design-build contractors. Because the Code does not provide adequate qualifications guidance, it effectively precludes the use of integrated delivery procurement.

Reporter's Reply:

The commentators are correct that the Code does not include language telling procuring agencies how to pre-qualify vendors. This is true across the board and is not specific to the construction sections of the Code. This type of guidance has never been thought to be appropriate for inclusion in the basic procurement statute, because the list of groups of contractors requiring special guidance would be inexhaustible. Further, the guidance would always be out of date as new technologies and systems become available for acquisition by governments. The logic underlying the Code is that the purchasing authority is in the best position to include appropriate pre-qualification requirements in the RFP. This process has built in checks and balances – since potential bidders and proposers are either encouraged or discouraged from participating in competitions by the requirements in the RFP/IFB.

6. Comment: Should the Code Highlight the Importance of Avoiding Prescriptive Specifications in Design-Build

The Code does not adequately address the importance of avoiding detailed prescriptive specifications in design-build procurements. Both the Federal Highway Administration and the General Services Administration have released reports underscoring the need to outline the design criteria, but not provide any major aspects of the design itself.

Section 5-101(6) allows the purchasing agency to include drawings and other illustrative documents. The more design information that an agency includes in the RFP package, the more it increases its own liability for the outcome of that design. Moreover, use of detailed prescriptive specifications, instead of performance specifications, is a reversion to design-bid-build rather than a true design-build delivery procurement.

Though the potential for confusion of responsibilities between the purchasing agency and contractor is addressed in the commentary to this section, the Code should go further in directing purchasing agencies not to provide a level of design that would effectively create a design-bid-detail-build rather than a true design-build procurement. Maximum benefit from integrated procurement techniques is only realized when agencies use performance or performance-oriented specifications to encourage innovation and creative solutions on the part of the contractor and avoid assuming liability for design.

Reporter's Reply:

This is a wonderfully written comment with which the reporters agree. The reporters agonized over the definition of "design requirements" in Code section 5-101(6) and considerable effort was made to address this concern. As a result, the title of this definition was changed from "schematic design requirements" to avoid the connotation that plans and drawings were required. The word "written" was added to the first line of the definition to encourage the idea that design requirements could merely consist of a written description of the facility or service. The words "plans" and "drawings" were not used in subsections a, b, and c for precisely this reason. In response to comments that it would be silly to exclude existing site plans, plot plans, or other drawings from design requirements, the last sentence was added to the definition, but the words "but need not" were included in order to send the signal that the term design requirements is intended only to establish a common starting point for the design-build competition. The commentary in paragraph 2 confirms these points in the strongest terms.

The drafters of the Code, however, concluded that it would be impossible to statutorily define the dividing line between prescriptive and performance specifications a priori, since an owner might choose to include prescriptive elements in a design-build competition for good reason. For example, a state might buy carpet on a wholesale basis for all of its buildings. There is nothing wrong with specifying this carpet in a design-build procurement. As a result, the course of action adopted by the Code was to clearly describe the tradeoffs and do what we could to encourage procurement officials to strike an appropriate balance. Section 5-101(6) states as follows:

> Design requirements means the written description of the infrastructure facility or service to be procured under this Article, including:
>
> (a) required features, functions, characteristics, qualities, and properties that are required by the [state];
>
> (b) the anticipated schedule, including start, duration, and completion; and
>
> (c) estimated budgets (as applicable to the specific procurement) for design, construction, operation and maintenance.
>
> The design requirements may, but need not, include drawings and other documents illustrating the scale and relationship of the features, functions, and characteristics of the project.

The commentary to this section provides as follows:

> (1) This definition is new to the Code. The revised code requires that design requirements be set forth in Requests for Proposals that solicit proposals using the design-build, design-build-operate-maintain, and design-build-finance-operate-maintain project delivery methods. See Section 5-201 (1) and 5-202.
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> (2) The Code flexibly defines design requirements, because the specifics of each project vary. Government prepares a functional description that sets forth

only the essential features of each project, including anticipated schedule, and estimated budget for design, construction, operation, and maintenance. The integrated procurement methods – design-build, design-build-operate-maintain, and design-build-finance-operate-maintain permit the government to use the competitive process to test for higher quality, lower price, and quicker delivery. If the design requirements go beyond functional description into particular design, construction, finance, or operational requirements, the scope and the intensity of this competition is compromised, to the detriment of both government and offerors. For example, "design-build" competitions in which major design decisions are already set forth in the design requirements – known in the industry as "detail-build" – are not likely to produce innovation in the integration of design and construction. "Detail-build" procurements split the professional design function between government and the contractor, an allocation that leads to confusion and disputes over liability for design, for construction results, and for performance problems. The Code encourages government: (1) to prepare design requirements for each project before a procurement method is selected; and (2) to procure the design function from a single entity.

7. Comment: Is the Code Provision Allowing Additional Security for Potential Reprocurement Costs Appropriate?

The last sentence of the commentary for section 5-305 includes a statement that corporate or parent corporation guarantee(s) may be required to secure the payment of re-procurement costs over and above the limits already secured by operations period bonds and letters of credit. This probably is not insurable and thus should not be included in the Code.

Reporter's Reply:

This is an interesting comment. Reprocurement costs are costs incurred by the government to find and contract with a replacement contractor to perform the remaining work of a defaulting contractor. Reprocurement costs have been a recognized element of contract damages for default for many years. The commentators are correct in stating that these costs are typically not insurable.

Section 5-305 attempts to deal with additional forms of security that may be appropriate for long-term design-build-maintain-operate or design-build-finance-maintain-operate contracts. There have been instances of long term contracts executed by joint ventures or corporations formed specifically for a single purpose. In many situations, the service cannot be interrupted, e.g., water treatment, wastewater treatment, and toll collection. The purpose of the language in section 5-305 is to provide a warning to public owners and contractor-operators that regulations are appropriate to establish the conditions under which additional forms of security might be appropriate. It is incumbent on the procurement officials to include sufficient additional security to cover reprocurement costs, if it is needed.

8. Comment: Is It Appropriate to Allow a Prior Participant in a Report or Study to Compete in a Design-Build Procurement?

Section 5-201(3) allows firms that have participated in a report or study used in the preparation of design requirements for a project to compete in the bidding process for that project. This has the potential for creating the appearance of a conflict of interest, which should be avoided in public procurement. This is particularly true if the project involves integrated delivery that was bid via the competitive sealed proposal process under section 3-203. The design firm used to prepare the design criteria should only be permitted to compete as a potential participant in the design-build entity when the source selection method is solely QBS rather than competitive sealed bidding. A design firm that has participated in preparing the design criteria has an arguable advantage in a setting other than qualifications based selection.

Reporter's Reply:

The pertinent provision is section 5-201(2), not 5-201(3). The pertinent section reads as follows:

> Participation in a report or study that is subsequently used in the preparation of design requirements for a project shall not disqualify a firm from participating as a member of a proposing team in a design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurement unless such participation would provide the firm with a substantial competitive advantage.

This is another provision of the Code that received substantial attention by the reporters, commentators, the steering committee, and numerous members of the Council of the Section of Public Contract Law. The final language is the product of this scrutiny.

The following is an example of the situation that this section is intended to address. Suppose that an engineering firm is asked in 1995 to perform a study of vehicles traveling on the interstate highways of a state and to project future traffic through 2005. In 2000, a RFP using design-build-operate-maintain procedures is issued for a new section of highway, which contains the 1995 traffic study. May the engineering firm that developed that study be a member of a joint venture competing for this project? The pertinent section of the Code is intended to provide procurement officials with the authority to make common sense judgments about whether a firm's participation in the 1995-traffic study provides any competitive advantage in the 2000 competition.

9. Comment: Does the Code Specified Independent Peer Reviewer Have to be a Design Professional?

Section 5-101(7) provides for an additional service in the form of an Independent Peer Reviewer ("IPR"). The revisions provide that the IPR will confirm that the engineering and architectural design provided by the design-build-operate or design-build-finance-operate contractor is in conformance with the appropriate standard of care. While appropriateness of the design is a major element of design-build-operate-maintain and design-build-finance-operate-

maintain, independent peer review may go well beyond design. An MBA graduate, an accountant, or a lawyer might just as well provide independent peer review for the build-finance-maintain and build-operate-maintain functions.

The commentary to this section indicates that the peer review should also address an owner's financing concerns, preservation of the government's investment in the project during the contract period, and the need for increased flexibility in the event of a termination for convenience or default. Thus, while architectural and engineering peer review may be appropriate, other professional peer review may be as important to insure that the owner's interests are protected under the ever-expanding forms of project delivery methods.

Reporter's Reply:

The concept of an independent peer reviewer is not new in design-build-operate-maintain ("DBOM") and design-build-finance-operate-maintain ("DBFOM") procurements around the world. The government of Hong Kong, for example, has used this vehicle frequently to provide additional assurance that the deliverables in long-term contracts for DBOM and DBFOM are appropriate given the state of engineering and construction knowledge at the time of contracting. The Seattle Water Board is essentially using this approach in the delivery of its Tolt Water Treatment Project, in which two prominent engineering firms are serving as IPR's to the City, while a third engineering firm is a member of the joint ventures producing the project. A similar approach will be used for the City Cedar River Project.

In long-term procurements where the "design" is produced by the contractor to meet design requirements generated by the owner, some level of peer review is appropriate and necessary to confirm that what is to be delivered matches what was requested. It is in the best interest of both the owner and the contractor to confirm this match.

The 2000 Code confirms that this routine piece of the design function is especially important in DBOM and DBFOM settings. The IPR is looking at appropriateness of design in the context of the specific DBOM or DBFOM procurement. Will the project be turned back to the government at the end of the contract for public operation with public funds, e.g., the Brooklyn Bridge, or will the project be dismantled and decommissioned by the contractor at the end of the operations period, e.g., a trash to energy project with a reasonable life of 25 years? In the former case, the government has an interest in the remaining life of the infrastructure asset.

The Code language narrowly defines the IPR's role. The IPR is to "confirm that the key elements of the professional engineering and architectural design provided by the contractor are in conformance with the applicable standard of care." Might the owner need the assistance of attorneys, accountants, and MBA graduates to properly structure a complex DBOM or DBFOM procurement? Definitely. Around the world, DBOM and DBFOM proposals receive rigorous review by a range of professionals, particularly, in DBFOM, where the financial institutions are asked to assume financing risk. Could the narrow role of reviewing "key elements of the professional engineering and architectural design" be assigned to attorneys, accountants, or MBA graduates? Probably not.

Conclusion

Up to now, the typical focus of interest groups within the construction industry has been to identify "ideal" processes for each delivery method. The 2000 MPC attacks the critical weakness of this approach: these "ideal" processes cannot be used simultaneously in an owner's portfolio of projects because the separate processes compete internally with one another and are often mutually exclusive. The Code takes the extraordinary step of flexibly structuring the continuum of project delivery methods to provide for simultaneous use, and to encourage a substantial expansion of the infrastructure marketplace, so that owners and producers can seamlessly package their needs and skills, as well as their respective organizations for mutual advantage.

There are numerous organizations and individuals with competing viewpoints and philosophies, which are still stirring the debate as to the "ideal" procedure to implement these methods. The drafters of the Code revisions have attempted to listen to these competing viewpoints, and even-handedly consider all views. Despite some dissent, the result of the drafters' work is viewed by most as a progressive and flexible document that will serve to improve infrastructure procurement in the public sector, and serve as a useful model for the private sector.