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## OUTSOURCING DESIGN SERVICES OFFSHORE: OPPORTUNITY, NECESSITY, OR BLIND GAMBLE?

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“Outsourcing” and “off-shoring” have become two of the most contentious and politically and socially charged terms in American society over the last decade. The very first result of a Google search for “outsourcing in America” is for [www.outsourceoutrage.com](http://www.outsourceoutrage.com), “Where corporate workers take a stand against corporate greed.” CNN business guru Lou Dobbs made a name for himself for much of this decade by railing against the “exporting of America.” In a 2005 “USA Today” article, he was quoted as saying, “The ultimate message in outsourcing is this: America be damned. It’s all about the lowest cost. I can’t accept that statement. Nor will I, whether it comes from a lawmaker, a politician or a businessman or woman. The pain that’s being exacted on our middle class from so many quarters is intolerable.”<sup>1</sup> More recently, it was an oft-repeated topic and rallying cry of the 2008 election campaigns.

With this as a backdrop, it is really not surprising that there are few resources which provide any real analysis or advice as to the potential pitfalls of outsourcing offshore and strategic tools to address those concerns. Such forced ignorance and silence is unfortunate, unrealistic, and even dangerous. The world around us changes and evolves. Outsourcing is clearly one of those phenomena, and will certainly change business and society as a whole. Nevertheless, it is here and should be confronted pragmatically and strategically. This is absolutely true within the American design professional community. As of 2006, an American Institute of Architects-endorsed survey determined that 28% of United States design firms with 100 or more employees have participated in some form of outsourcing.<sup>2</sup> Those percentages have almost certainly increased since that time. The only uncertainty is whether the economic turmoil of 2008 will provide even more impetus to accelerate the process.

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<sup>1</sup> “Dobbs Fires Away Against Outsourcing”, USA Today, May 22, 2005.

<sup>2</sup> “The Business of Architecture: 2006 Firm Survey”, AIA, 2007.

*Outsourcing Design Services Offshore*  
May 2009  
Page 2

The design professional community move toward offshore outsourcing is a product of both opportunity and necessity. The most widely recognized “opportunity” has been economic, in that certain drafting and documentation services have been available on a far lesser hourly cost in places such as India, China, and the Philippines. At the same time, technological innovations in telephone service, the internet, and electronic design have made distances and time differences appear much more manageable. On the necessity side, U.S.-based design firms have struggled through much of this decade to find adequate educated and trained staff to service their needs as much of that traditional architectural and engineering base has been redirected to other fields such as the dot com and bio-tech worlds. Other countries at least appear to have a far deeper and untapped pool of human design resources. Utilizing overseas design support has also been identified by many as a necessary tool to meet accelerated project schedules and demands.

Regardless of whether as a function of opportunity or necessity, many design professionals must consider the potential and implications of overseas design support services as a part of the potential strategies to remain viable and succeed. Outsourcing can succeed. However, it is not traditional “business as usual”, and it can fail badly and with devastating financial impacts. Therefore, it is critical for any design professional considering the opportunity or necessity to do so with a strategic evaluation and plan of action. The key elements to any such evaluation and plan should include and consider at least the following:

- Professional Licensing Compliance.
- Quality Control of Professional Services.
- Contingency Management.
- Financial Support & Assurances.
- Intellectual Property Rights & Controls.
- Dispute Resolution Processes & Rights.
- Contracting.

Each will be discussed in detail below.

## **LICENSING**

Although commonly taken for granted after it is received, the professional license or registration represents the professional right to practice and make a living. Accordingly, it should always be guarded and protected zealously. Outsourcing of drafting services or any component of the design may implicate and threaten the license. Specifically, most State licensing and registration laws require a certain level of personal involvement with and responsibility for any document which will ultimately receive the design professional’s stamp.

For example, in California, the Professional Practice Act covering architects requires that if any portion of the documents to be stamped and signed is not prepared by a licensed architect, the documents must be prepared under the “immediate and responsible direction” of the stamping architect. The Act then goes on to defined “immediate and responsible direction” as requiring the architect to:

1. Instruct the person in the preparation of the instrument of service; and
2. Exercise the same judgment and responsibility in reviewing all stages of the design documents and other phases of the work as required by law and which would normally be exercised if he/she personally performed the required tasks. (California Code of Regulations.)

While this standard has traditionally been relatively easily attained where the draftsman and the responsible professional share the same office space and location, it has been implicated as a potential shortcoming where portions of the design have been prepared in a different country by persons who the professional may never have even spoken to or met. This can have implications for professional licensing discipline as well as implicating professional liability exposure.

Fortunately, modern technology is such that these concerns may be demonstrably managed through two steps. The first is to actually and actively instruct the service provider in its responsibilities and performance. This can be done by e-mail, internet, telephone, video conference, or any combination of the foregoing. The key is to both be specific and to document the details of those directions. Not only is this an important process from a licensing compliance standpoint, it is also critical to the deliver of a quality product. Miscommunication and misassumptions have been two of the greatest stumbling blocks in failed outsourcing efforts. The second step is to actively and progressively review or provide for review of the work product. The keys here are to make it part of a formal quality control process, adapt that process to the particular project, follow the process through to the resolution of identified issues, and document the process. Again, this process and documentation will both protect against licensing issues and typically lead to a more efficient and better quality project.

### **QUALITY CONTROL OF PROFESSIONAL SERVICES**

Even though already addressed as part of the licensing compliance concerns, quality control of the professional services clearly warrants its own consideration and focus. Outsourced services present an even greater business and liability concern than a subconsultant in that outsourced services most often become a seamless component of the design professional's own work product, as opposed to work clearly associated with and the responsibility of a third party. As a result, it can have implications for professional reputation, liability, and economic disruptions and losses. While there can and should be many project-specific concerns with respect to outsourcing, two quality control issues rise above all others and apply to virtually any project. Those issues are:

- ***Partner Selection & Relationship.*** Realistically, outsourcing cannot be treated on an *ad hoc*, sporadic, fungible basis. For all practical purposes and economic success, the working relationship must function as seamlessly as possible and almost as if the services were actually being provided within a single, geographically concentrated entity. It can and should be an ongoing relationship with common understandings of standards, culture, and processes. Accordingly, outsourcing partners should be selected very carefully based on discussions, investigations, and other outside resources. It is also imperative that there be a significant upfront effort to establish the working knowledge, familiarity, and understanding.
- ***Communication & Documentation.*** Communication is without a peer as a challenge to the most outsourcing relationships. Language, time zones, culture, and operating systems can all undermine this component. Fortunately, technology can solve many of these problems. Unfortunately, the alternate technology solutions are varied. It is critical to establish upfront how communications will be handled and what technology will be used to support that communication. It also must be agreed how and by who the supporting technology will be maintained, updated, and recorded.

### **CONTINGENCY MANAGEMENT**

Outsourcing presents a number of new potential failure points and challenges than traditional projects (*e.g.*, unstable societies, currency markets, and cultures), regardless of whether or not a traditional risk or an outsourcing specific risk, time, space, and geo-political boundaries make responses and solutions more difficult and cumbersome, if not impossible. Accordingly, more extensive vigilance and contingency planning is even more critical in order to successfully manage an outsourced project. Simply stated, outsourced projects must have much tighter schedules and rigid deadlines which also incorporate adequate float or lead times for alternate solutions. Where schedules and deadlines are not met, there must be a realistic and reliable recovery plan combined with a greater willingness to “pull the plug” on the outsourcing model in order to move to a contingent plan and to recover on the project. For this reason, frequent communication and monitoring is critical to project success.

### **FINANCIAL SUPPORT & ASSURANCES**

As indicated above, economic savings has been one of the single greatest drivers toward the outsourcing of design services overseas. However, those participating in this arena must be very cautious to heed the traditional warning that sometimes “you get what you pay for.” Such relationships present a number of financial challenges which should be anticipated and managed:

- ***Currency.*** Although it may seem obvious, the terms of the relationship should be clearly tied to one form of currency or some reliable

international standard of equalization. Deflation, inflation, and currency fluctuations have become so dramatic and fast that such issues can have dramatic economic impacts. If not U.S. currency, the default should be the currency in which the firm controlling the project will receive its compensation.

- ***Payments for Services/Products Received.*** Similarly, payments should be linked to and contingent upon payments received from the project owner. It is also critical, given the boundaries between the parties, that payments not proceed ahead of the services and product received because there may well be little recourse once funds have been paid. For this reason, significant retentions are often appropriate for outsourcing projects. Such retentions should not be released too quickly, but only over time as possible points of concern dissipate.
- ***Solvency, Stability, and Insurance.*** Obviously, one key in selecting an outsourcing partner is their historic and prospective solvency and stability. In addition to the knowledge base and relationship, this concern has financial implications as well. Insurance vehicles can often be a valuable tool for addressing such concerns. Such relevant and appropriate insurance tools include completion/performance bonds and professional liability insurance specifically written to respond to and recognize U.S. based claims.

## **INTELLECTUAL PROPERTY RIGHTS & CONTROLS**

While nearly every country likely involved in an outsourcing relationship has subscribed to international laws and treaties recognizing and adopting international intellectual property rights in copyrights, patents, and trademarks, the media has also made it clear that there is often a lack of actual compliance with and enforcement of these rights in countries which are frequent regions of design outsourcing supply. As a result, design professionals can and should be concerned that their designs may be replicated and distributed elsewhere without their participation, and that elements of their design may be shared with and conveyed to others (even competitors) without their knowledge. Contractual protections are a good and useful starting point for these issues. Such provisions would include retention of intellectual property rights, restrictions on reuse or transfer, confidentiality, exclusivity, and indemnity and other remedies for recourse. However, all of these provisions are only as valuable as the available forum in which to pursue and enforce them. As discussed below, those avenues may be limited. As a result, the single greatest tool to the successful protection on intellectual property is the proper selection and cultivation of an outsourcing partner. It is ultimately a matter of trust.

## **DISPUTE RESOLUTION PROCESSES & RIGHTS**

Outsourcing relationships can lead to two forms of disputes. The first relates to the parties. The second relates to the project itself. Ultimately, the second is the far greater concern. As a result, the parties should agree that both will participate in any project related dispute as it relates to their services and will do so in the venue and forum required for the project. Such a commitment must be supported by some form of financial resource and assurance such as insurance vehicles, escrow accounts, or international monetary resources. As for disputes between the parties themselves, U.S. based firms outsourcing overseas should see themselves as in control of the arrangements and require a U.S. venue and forum. Failing that, they should require some form of international arbitration using a forum recognized by both the U.S. and the country of the outsourcing supplier. Such a provision should also provide a choice of law selecting U.S. law or its equivalent.

### **CONTRACTING**

Finally, it is important and critical that as much as possible of the foregoing considerations be reduced to a formal written Agreement. Such an Agreement is important both legally as well as representing a significant component of confirming project delivery understandings and commitments. The most important elements of such an Agreement include:

- Scope of Services, including standards and deliverables.
- Schedule.
- Technology and Communication Formats and Responsibilities.
- Intellectual Property Rights.
- Financial Assurances & Insurance.
- Dispute Resolution & Choice of Law.
- Confidentiality.
- Termination.