L'Abbate, Balkan, Colavita & Contini, L.L.P.

# LEGAL COUNSEL

*for the Design Professional*

*Summer 2007*

## Offshore Outsourcing By American Design

***By: Douglas L. Pintauro, Esq.***

The internet shrunk the world. Products, talent and resources that were once unknown or inaccessible because of their remoteness are now discoverable and available to the world wide market. This new accessibility to foreign markets opens the door to the prospect of economically outsourcing certain tasks. In fact, it is no longer necessary, or financially practical, for businesses to have their employees in close proximity to one another. They can be spread across the globe and still be as integrated as if they were across the street or down the hall.

Offshore outsourcing has infiltrated every business, including the Design Profession. Just Google "outsourcing engineering architecture" and you will receive over three million responses. Or peruse the website www.Outsource2india.com ("O2I").

In 2004, the AIA reported that 11% of architectural firms which responded to an economic survey reported using offshore outsourcing services, primarily to balance workloads. As of January 2006, the AIA had not taken a formal position on offshore outsourcing, although in an editorial published in the January 2006 edition of the *Forward*, Jess Wendover, Assoc. AIA, expressed concern over the practice. In Ms. Wendover's opinion "global capitalism makes offshoring a race to the bottom in terms of which workforce can do the work most cheaply with the fewest benefits or workers protections." Other than the opinion voiced by Ms. Wendover, however, the AIA has not expressed a definitive position on the practice.

What kind of services are being offered on an outsourcing basis? O2I offers the following mechanical and industrial engineering services:

- Product engineering
- Reverse engineering
- Cost estimation services
- FEA services
- 2D drafting
- 3D modeling

As for architectural and civil engineering services, O2I offers the following:

- Structural design
- Architectural design
- Construction drawings
- Building cost estimation
- CAD services
- CAD conversion
- 3D rendering
- 3D walkthroughs
- Interior and landscape design
- Electrical, plumbing and HVAC drawings

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## LBC&C's FYI CORNER

# LBC&C is Selected as Counsel to AIA Peconic

LBC&C is proud to announce that it was selected as Counsel to AIA Peconic, the newly formed New York State AIA Chapter encompassing Long Island's East End. As with other chapters and organizations to whom LBC&C is counsel, in addition to providing the Chapter legal counsel, LBC&C affords chapter members with seminars, lectures and round table discussions on such topics as risk management, copyright, contracts and other topics which may be unique to the Chapter members' practice. The Chapter members are also provided access to LBC&C's A/E Legal Hotline which affords its members immediate access to experienced legal counsel on issues that may arise in the field or during their daily practice which can be addressed and disposed of quickly in a phone call, thereby preventing or minimizing the risk of a claim. &

## *Did You Know?*

As a result of LBC&C's expertise in representing architects and engineers, all of the leading professional liability insurers and many of the smaller ones, have approved LBC&C as defense counsel for their insureds. Accordingly, should the unfortunate situation arise when you need to place your insurance carrier on notice of a claim or potential claim, you may request that LBC&C be retained as your counsel. In order to insure that such matters receive immediate attention, we suggest that you contact us, as well as your insurer, when you receive notice of a claim. &

### In This Issue...



# Veteran Lawyer Richard Metli Joins LBC&C

On February 8, 2006, Richard Metli joined LBC&C as "Of Counsel" to its Design Professionals Practice Group. Richard brings to LBC&C more than 30 years of trial and litigation experience. A multi-skilled attorney with an engineering background, Richard specializes in construction, architecture and engineering professional liability. In addition, he has broad-based experience in real estate transactions, litigation, secured transactions, insurance and corporate matters.

Prior to joining LBC&C, Richard was a partner with Meyer, Meyer, Metli & Keneally for more than 13 years. Before that, he was a partner at Albanese, Albanese & Fiore, specializing in litigation and trials for a range of issues including malpractice, liability and defamation.

Richard began his legal career at Hart & Hume Associates (New York, New York), specializing in litigating matters involving labor law, products liability, construction defects, delay claims and architect and engineer malpractice.

Richard's experience in professional liability makes him a valuable asset to the LBC&C team. His legal knowledge and experience will further our efforts to provide total client satisfaction.

Richard Metli holds a juris doctorate degree from St. John's University School of Law, where he served on Law Review, and a Bachelor of Science degree in Mechanical Engineering from Purdue University.

# The Erosion of Your Right to Arbitrate

***By: Douglas R. Halstrom, Esq.***

LBC&C recently represented an architect in a lawsuit that attacked the enforceability of the arbitration provision contained in an AIA Standard Form of Agreement Between Owner and Architect. In *Ragucci v. Professional Construction Services, et al.,* the homeowners brought suit against various contractors and the project architect for alleged design and construction defects associated with the renovation of their house in Brooklyn, New York.

Since the Owner-Architect Agreement contained the standard arbitration provision requiring all disputes between the owner and architect to be resolved through binding arbitration, LBC&C moved to stay the homeowners' lawsuit against the architect and to compel arbitration to resolve the owner's claims against the architect. The Court, however, denied the motion and accepted the homeowners' argument that the arbitration provision violated a consumer protection statute. In so doing, the Court found that this statute, General Business Law §399-c, which renders certain mandatory arbitration provisions to be null and void, nullified the arbitration provision contained in the Standard Form AIA Owner-Architect Agreement. The Court's decision was subsequently affirmed on appeal. Given its impact on the industry, permission to appeal to the New York Court of Appeals is being sought.

The impact of the Court's decision in this case is significant because architects have relied upon the AIA form contract terms and conditions, and in particular, the mandatory arbitration provision, for many years. Before today, a design professional utilizing the standard form agreement could take comfort in knowing that any disputes with the homeowner could be resolved by an arbitrator familiar with the industry (or at least more familiar than most judges), resulting in a presumably fairer, more cost effective and expedient resolution of the dispute. The Court, however, was moved by the purpose of the consumer protection statute and the perception that homeowners and architects operate on a different economic footing. As such, the Court was concerned that homeowners may be at a significant economic disadvantage relative to architects, not only in negotiating agreements that contain such provisions, but also in being forced to arbitrate disputes with the architect.

Notwithstanding the rationale for the Court's decision in Ragucci, the Federal Arbitration Act ("FAA") which codifies, at the federal level, the enforcement of arbitration clauses contained in many construction industry contracts, may compel New York Courts to enforce these arbitration clauses. In this regard, the FAA does not refer specifically to owner-architect service agreements, the AIA form agreements, or any other type of agreement, but simply states that when parties agree to resolve potential disputes through arbitration, such contractual clauses are to be enforced.

In order to apply the FAA, to a particular set of facts, the construction project in issue must impact interstate commerce. Since most construction projects involving private homes are local, however, it may be difficult to establish any connection with interstate commerce. To these ends, the contents of the contractor's or owner's project file will likely be needed to establish that certain labor or materials were purchased in other states and used in the project.

In the effort to secure this information, some discovery may be necessary. However, once a party to a lawsuit requests this information in discovery that party essentially waives its right to arbitration. The policy behind this is that arbitration does not typically permit the exchange of discovery. Accordingly, a request for discovery is inconsistent with arbitration and, pursuant to New York law, constitutes a waiver of that party's right to demand arbitration. As a result, counsel for the design professional desiring to compel arbitration, is generally placed in a Catch-22 situation, being precluded from requesting the very information which would entitle the design professional to proceed to arbitration under the FAA. *Continued on Page 8*

# Offshore Outsourcing

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India is not the only country vying for outsourced engineering and architectural work. For example, H-K Resources Pte Ltd., located in Singapore, claims to provide state of the art architectural, civil, structural, mechanical and electrical plan drafting, transmitting plans electronically using high bandwidth internet connections.

There are many reasons why outsourcing may be considered an attractive resource for many firms. Chief among them are the economic considerations. For example, some companies claim that they can produce state of the art drawings using the latest software programs while affording their clients significant benefits such as:

*Outsourcing also allows small firms to compete with larger firms...*

- Avoiding the cost of expensive computers and software
- Avoiding the cost of staff recruitment and training
- Requiring less office space
- Becoming less effected by project work fluctuations
- Reducing the risk of unforeseen circumstances, such as employee absences

These are clearly some of the more attractive and common economic incentives to consider when evaluating the benefits to outsourcing.

There are, however, other non-economic reasons for considering outsourcing. In many instances, the availability and quality of talent each play a role in the decision to outsource. In the event of a shortage of engineering talent in this country, outsourcing presents one solution to the problem. However, beyond the issue of supply of workers available in the design field in this country, the issue of their productivity and work ethic looms large. Does outsourcing offer a more productive (or responsive) work force?

Outsourcing to India or other Asian countries also brings a timing advantage into the equation. At the end of the day in the eastern United States, it is the beginning of the day in Asia. Work sent electronically at closing time here, arrives in Asia in the morning. Work sent from Asia electronically at closing time there, arrives here in the morning. Around the clock work speeds the process and makes meeting schedules simpler. By the same token, however, the ability to discuss an issue person to person, is diminished due to that same time-zone differential.

Outsourcing also allows small firms to compete with larger firms by offering clients traditionally large firm services without incurring the high investment costs associated with those services. For example, a small firm can offer sophisticated presentation services without incurring the cost of expensive software and hardware, by simply outsourcing those services. In issue #33 of the AIA Small Project Practitioners Journal, Kurt Lavenson, explains the advantages a small firm can achieve from collaboration and outsourcing. While Mr. Lavenson does not discuss offshore outsourcing, the advantages offered by offshore outsourcing may even be greater than those afforded by local collaboration and local outsourcing.

There is no doubt that globalization, the internet and the pressure to produce everything more cost effectively and quickly, will bring changes to business practices, and by extension, to professional practices. Foreseeing those changes and adapting to them quickly, rather than after the fact, is the key to survival. It is also the path to opportunity.

If offshore outsourcing and the globalized economy change the face of the practice, your practice needs to be prepared. If the size of your practice is going to decrease over the next decade because of outsourcing, you should take that into consideration when you renew your lease. Your contracts should be updated, and new provisions included, to address outsourcing issues. You will also need to develop protocols for outsourcing in the same way you developed protocols for the use of CAD.

As with anything new, offshore outsourcing is not without practical, legal and insurance considerations. The list below provides examples of just some of these issues:

- While the outsourced designs may be prepared by skilled professionals, they may not necessarily be prepared by New York licensed professionals. Accordingly, the designs will need to be carefully reviewed before you sign and seal the drawings. With this in mind, there is always the temptation to "rubber stamp".
- Should the outsourcing company fail to deliver the design documents on time, or in accordance with the established design parameters, etc., you may incur liability for the delay, or the errors contained in them. What is your recourse against the offshore company?
- While many outsource companies represent that they will honor the laws of the retaining design professionals' country or state, how will you enforce that representation to hold the outsourcing company accountable (and at what expense)?

As with any innovation, the advantages and disadvantages of outsourcing should be carefully considered before you employ these offshore services. &


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# "Pay if Paid"... It Never Means Never in New York

***By: Paula M. Gart, Esq.***

Design professionals often seek our advice regarding the obligation to pay their subconsultants if the client has failed to pay, or is slow in paying. Sometimes their subconsultant agreements contain a contingent payment clause but, more likely, they have no written agreement at all with their subconsultant.

Contingent payment clauses, known also as "pay-when-paid" or "pay-if-paid" clauses, are one of the few exceptions to the general rule that parties are free to make their own agreements which will be enforced by the courts. New York courts favor this "freedom of contract rule", permitting parties to negotiate, bargain and ultimately make their own business deals. For the most part, the courts will enforce parties' agreements if they are written clearly and are not in violation of any specific law or any established public policy. In line with this philosophy, many design professionals feel free to allocate time, money and other risk factors in their agreements, and include a contingent payment clause providing that payment by the designer to its subconsultant is subject to the condition that the designer receive payment from its client, typically the owner. It is the receipt of these funds that is the "contingency" in the contingent payment concept.

*...design professionals are presently unable to legally shift the risk of the owner's... non-payment to its subconsultants through contingent payment clauses.*

Contingent payment clauses were generally enforced by New York courts before the early 1990's and designers could be fairly certain that they had shifted the risk of the owner's slow payment, default, or insolvency to their subconsultants. It was in the arena of construction contracting that the freedom of contract doctrine and the contingent payment clause came under scrutiny and ultimate revamping, when a payment contingency clause was found to violate public policy by New York's highest court since it circumvented New York's Lien Law. The owner of a private shopping mall project became insolvent, rendering the general contractor unable to pay its subcontractors for their labor and equipment. The subcontracts contained express contingent payment clauses making the general contractor's obligation to pay its subcontractors subject to the condition that the general contractor received payment from the owner. In this case, the general contractor never got paid and relied upon the contingent payment clause in not paying its subcontractors.

Understandably distressed by this, the subcontractors commenced an action against the general contractor for payment of their outstanding balances. The general contractor argued that it had no obligation to pay, due to the expressed condition that it had to pay its subcontractors only when and if it received payment from the owner. However, the subcontractors' argument that this clause only fixed a time for payment, and was not a condition to payment, was successful. As an expressed condition precedent, the pay-if-paid clause was found to violate the public policy expressed in New York's Lien Law which gives a subcontractor the right to file a mechanic's lien against an owner's real property (land and buildings) that was improved by that subcontractor's work to secure its right to payment to the extent that the subcontractor had not been paid, and to the extent that the owner owed money to the general contractor. The Court reasoned that if the subcontractor could give up its right to be paid by the general contractor unless and until the owner pays the general contractor through a pay-if-paid clause, the subcontractor would have effectively waived its right to enforce its lien, which waiver would be against the public policy embodied in New York's Lien Law, and wholly unenforceable. The Court therefore interpreted pay-if-paid provisions as establishing a reasonable time for payment, taking into consideration all of the surrounding facts and circumstances. *Continued on page 7*

# LBC&C Quick Notes On Contracts

• Make certain your contract is dated and signed by both you and your client. Even the most carefully worded and favorable contract can be rendered worthless if it is not signed. An unsigned contract welcomes your client to claim that he never agreed to what took you weeks to negotiate.

• Clearly identify the scope of services you have been retained to perform, as well as those services you are NOT going to provide (e.g., if you are not retained to perform controlled inspections, site safety, contract administration, or to determine the means and methods of construction, it should be clearly indicated in the contract).

• Site/construction phase services: Be clear about how often you are going to visit the site and the purpose of your site visits (e.g., once a week to determine if the work performed is in general conformance with the plans and specifications, or twice a week to determine if the work, when completed, will conform with the Contract Documents).

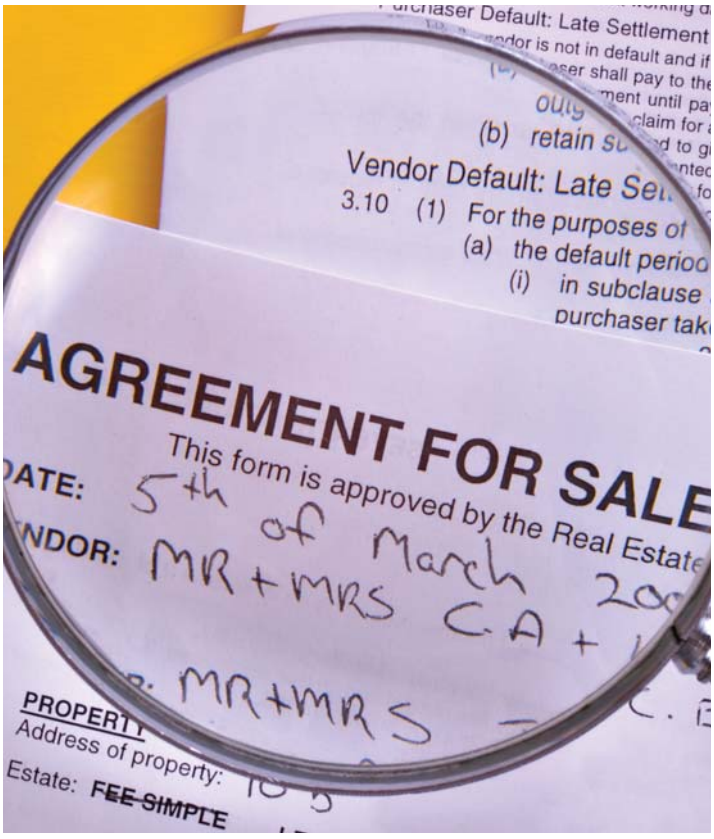
• Fees: Be clear about WHEN you are to be paid and the AMOUNT you are to be paid.

• Termination: Empower yourself with the ability to suspend/terminate your services if your client breaches the contract. In doing so, generically identify the types of breaches that empower you to terminate/suspend your services (e.g., the owner's failure to pay fees within the time frame specified in the contract).

• Limitation of liability and indemnity clauses: New York law allows you, under certain circumstances, to limit your liability or to require others to indemnify you. A limitation of liability clause, whether it limits your liability to a specific dollar amount, such as your available professional liability insurance limits, or the amount of your fees, is only enforceable against the person with whom you have contracted. Indemnity provisions, on the other hand, while effective, cannot protect you from your own negligence, but could, if drafted properly, protect you from the owner's errors, as well as the errors of the contractors.

• Make sure your contract allows you to retain the copyright over all drawings and specifications you prepare.

• Be aware of the responsibilities and obligations you assume when signing local building department forms. For example, if you specifically omit controlled inspection responsibility in your contract, signing a TR-1 indicating that you will perform certain specified controlled inspections may impute liability to you for failing to perform these inspections. &




# Still Going Strong After 25 Years

LBC&C recently celebrated its 25th anniversary commemorating two and half decades of service to professionals and businesses. From its humble beginning in 1981, the Firm, originally named L'Abbate & Balkan, has grown from just two lawyers to more than fifty who now practice throughout the New York and New Jersey Metropolitan area. Still headquartered in Garden City, New York, the Firm also has a fully staffed office in Livingston, New Jersey. Over the course of its rich twenty-five year history, the Firm has expanded its servicing capability, growing into a full service law firm handling all of the legal needs of professionals, businesses and lending institutions in the New York and New Jersey area. In addition to representing design professionals, the Firm has a recognized practice in other areas of professional liability, as well as business planning/transactions, real estate, environmental, product liability and insurance law. The Firm prides itself on providing legal counsel, along with litigation services, on matters affecting its clients from business issues to employment and labor practices. LBC&C remains committed to offering experienced, dedicated and knowledgeable service. We invite you to meet with us and discuss how our services can enhance and improve your practice. . . *because you really matter.* &

## Pay If Paid... *Continued from page 5*

The extension of this reasoning to design professionals makes sense since New York's Lien Law has been extended to design professionals to secure payment for improvements to an owner's real property that they designed. Accordingly, a contingent payment clause in a design professional's agreement with its subconsultant would likewise be unenforceable, as in the construction context.

There have been attempts to avoid the application of the Court's ruling by developing a condition precedent clause that would withstand scrutiny. In so doing, the courts reviewing these newer provisions have expressed what has been termed as "judicial hostility" toward these efforts to avoid the public policy considerations against such pay-if-paid clauses. These attempted provisions have included designating the prime contractor as only the agent for the owner for the purposes of payment, as well as provisions requiring the subcontractors to acknowledge that they are relying solely on the credit of the owner and not the credit of the construction contractor for payment of the work performed. The subcontracts have also provided that the subcontractor's rights to file mechanic's liens against the owner's interests in the project were expressly preserved.

Since design professionals are presently unable to legally shift the risk of the owner's insolvency or non-payment to its subconsultants through contingent payment clauses, other protective mechanisms should be utilized at the outset of any project. In this regard, the status and type of legal entity the owner takes should be carefully scrutinized. Entering into an agreement with an asset-free entity which serves as nothing more than a conduit for funding may not be advisable – know the entity and its assets and try to deal with the real owner. Do not let your accounts receivables outpace the performance of your services since staying current while addressing the owner's needs, problems and issues is the most efficient way to assure payment to the entire design team.

The subconsultant's lien enforcement rights may not be disregarded, so the designer should acknowledge that payment will be due and payable to its subconsultant at a point in time measured by a certain number of days after the designer receives payment. However, the use of additional contractual provisions could actually liquidate and establish the extent of the designer's ultimate liability to its subconsultant in circumstances where the subconsultant has not been paid by the designer because the designer has not been paid by the owner as a consequence of the owner's financial straits, or unwillingness to pay. These provisions may attempt to limit the designer's exposure to essentially what it could have recovered on the subconsultant's behalf from the owner, while requiring the subconsultant to carry the burden of pursuing that debt.

A design professional cannot shift the risk of non-payment entirely to its subconsultants, nor should a subconsultant assume that it must bear the entire risk of the owner's non-payment. The design professional and subconsultant should work together to craft reasonable, enforceable payment provisions as part of their proper, and hopefully fruitful, continued business relations. &

## LBC&C Celebrates Long Island

On May 24, 2007, LBC&C hosted "A Celebration of Long Island" featuring Long Island's premier artists from the b.j. spoke gallery in Huntington, New York. The event, which was organized by Gail Contini, wife of Partner Peter Contini, and Marilyn Lavi of the b.j. spoke gallery, presented a collection of the finest works from Long Island's artists. Their paintings, photographs and sculptures were displayed throughout the Firm's reception area, conference rooms and conference center.

LBC&C's newly designed offices provided a unique venue to showcase the work of these accomplished artists, many of whom have shown their work internationally and are known for their diversity of styles.

b.j. spoke gallery is a membership of cooperative, well-established, Long Island artists. As such, it is no surprise that many of the works in the displayed collection were inspired by Long Island's innate natural beauty.

The celebration attracted a high degree of interest and was well attended by Long Island's major businesses and organizations. It also received great support from the Albanese Organization, Castagna Realty, the Garden City Chamber of Commerce and Long Island's education community.

The artwork will remain on display at LBC&C for several more months. We invite you to enjoy these fine artworks next time you visit the Firm.

# LBC&C One of the Best Places to Work on Long Island

Long Island Business News recently selected LBC&C as one of the top 10 "Best Places to Work on Long Island". This distinction was in recognition of LBC&C's dedication to its employees, their work place and commitment to excellence in business. Having celebated its 25th anniversary, these hallmark values have allowed LBC&C to provide its clients with sound advice and skilled counsel.


# The Erosion of Your Right to Arbitrate

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With the above in mind, the design professional who intends to enforce the arbitration provision in its agreement with the homeowner, must consider the project's impact on interstate commerce. In this regard, establishing the nexus between the project and its impact on interstate commerce is essential and may be the only way to enforce the arbitration provision. Accordingly, documenting the purchase of out of state labor and materials during the course of the project can be critical. For example, invoices from out of state steel manufacturers providing steel for the project should be maintained.

At least for now, the decision in Ragucci does not affect commercial projects. In fact, the Court was careful to highlight policy considerations which are unique to a homeowner and which do not apply to a commercial developer. If you are a design professional with a large homeowner client base, this decision may have a significant effect on you and your practice.

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# About the Firm

LBC&C, founded in 1981, has offices in Garden City, New York and Livingston, New Jersey. From these two locations, the Firm provides a wide array of legal services to design professionals throughout the New York Metropolitan area, Long Island, upstate New York and central and northern New Jersey. In addition to representing design professionals, the Firm has a recognized practice in other areas of professional liability, as well as environmental, product liability and insurance law. As a full service law firm, LBC&C provides legal counseling, as well as litigation services, on matters affecting its clients from business issues to employment and labor practices. Always on the alert for new trends in business and changes in the law, LBC&C is continuously striving to keep its clients ahead of their competitors. Working in conjunction with each other, the practice groups at LBC&C provide a network of legal experience that can meet today's design professional's needs. For additional information visit our website at www.lbcclaw.com.

# About Our Newsletter

Legal Counsel for the Design Professional addresses current legal developments affecting architects and engineers. The articles contained in this publication are for your information. You are advised to consult with legal counsel to address whatever specific issues you may have. Your questions, comments and suggestions are appreciated and should be directed to Douglas L. Pintauro, Esq., L'Abbate, Balkan, Colavita & Contini, L.L.P., 1001 Franklin Avenue, Garden City, New York 11530, telephone no. 516.294.8844, email: dpintauro@lbcclaw.com

If you would like to receive our newsletter via email, please email your address to: mmorabito@lbcclaw.com.

The Law Firm For Design Professionals
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when it really matters

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