



United States Copyright Office

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November 29, 2017

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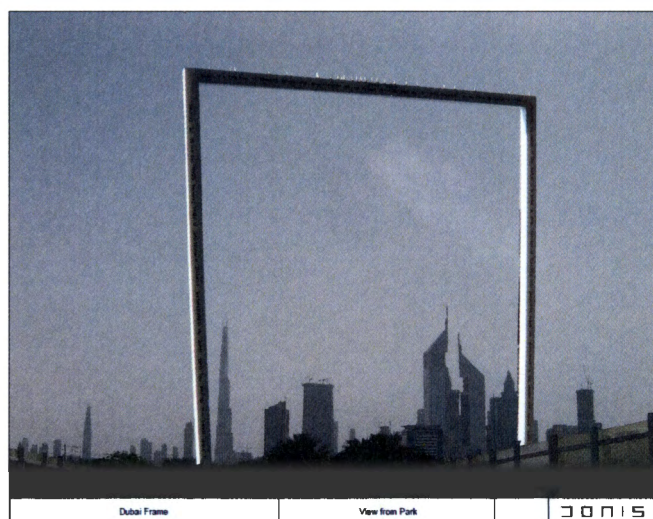
**Re: Second Request for Reconsideration for Refusal to Register “Dubai Frame”;
Correspondence ID: 1-1XAC44W, SR# 1-4188848236**

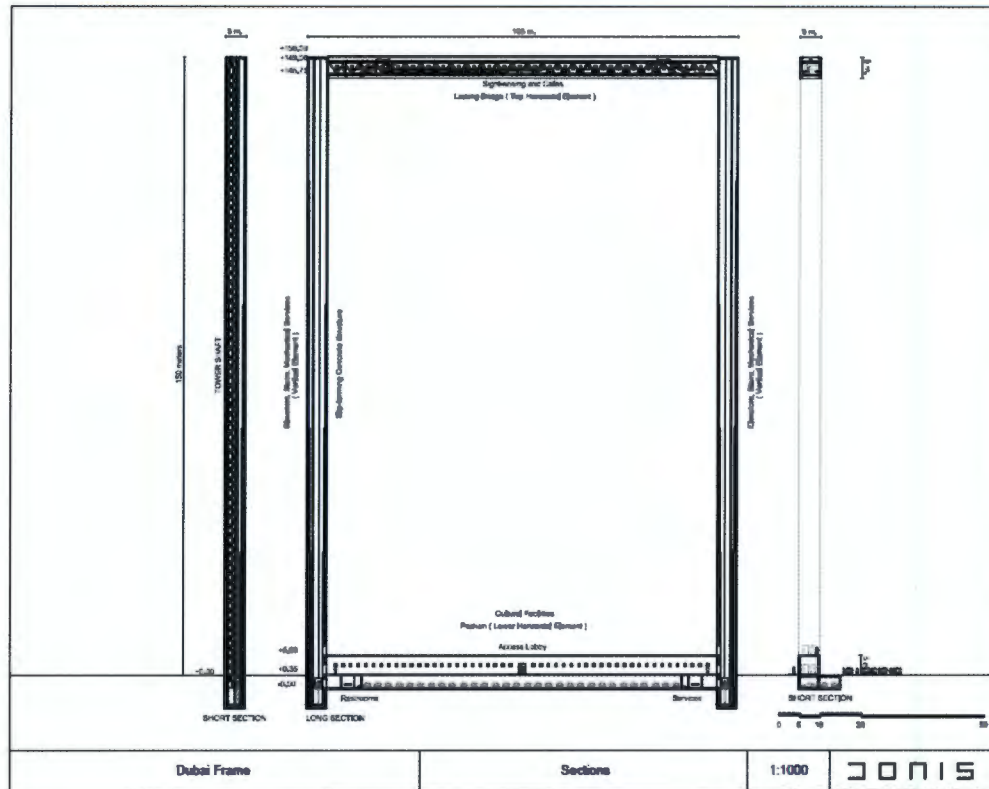
Dear Mr. Klaris:

The Review Board of the United States Copyright Office (“Board”) has considered Fernando Donis’s (“Donis’s”) second request for reconsideration of the Registration Program’s refusal to register an architectural work claim in the work titled “Dubai Frame” (“Work”). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration for Dubai Frame.

I. DESCRIPTION OF THE WORKS

The Work is a rectangular-framed permanent building. The design consists of two longer vertical sides and two shorter horizontal sides or bridges, with a void or hollow in the middle. The vertical sides include elevator shafts, and the horizontal sides contain plans for areas including an observation deck, café, and cultural facilities, though the deposit does not indicate that there are specific fixed interior architectural elements within the horizontal sides. The Work is primarily constructed from glass, steel, and a concrete mix. The deposit for the Work includes various perspectives and drawings, all included as Appendix A. For ease of reference, two representative images are set forth below:





II. ADMINISTRATIVE RECORD

On November 21, 2016, Donis applied to register a copyright claim for architectural work in the Work. In a November 21, 2016 letter, a Copyright Office registration specialist refused to register the claim, finding that it “does not appear to be an architectural work,” and “even if it could be considered an architectural work, there are no original design elements present that are not functionally required or that are more than standard features.” Letter from Ivan Proctor, Registration Specialist, to Edward Klaris (Nov. 21, 2016).

Donis then requested that the Office reconsider its initial refusal to register the Work. Letter from Edward Klaris to U.S. Copyright Office (Dec. 6, 2016) (“First Request”). Donis argued that the Work is an “architectural work” under the Copyright Act because it was “designed for human occupancy,” as shown by the inclusion of spaces such as “cultural and conference facilities, a children’s library, a café[,] and a library.” *Id.* at 2. Additionally, Donis argued that the Work is copyrightable under the originality standard since, in “serv[ing] as a viewing point for other landmarks in Dubai,” it includes original design elements (such as form, height, and location), which are creative and not functionally required. *Id.* at 5. Relatedly, Donis asserted that the Work is a “concrete manifestation[] of the abstract concept of a frame.” *Id.* at 6.

After reviewing the Work in light of the points raised in the First Request letter, the Office re-evaluated the claims. The Office reversed its initial finding that the Work does not constitute an architectural work, but concluded that the Work remains unprotectable “because it does not contain sufficient original and creative authorship to support a claim in copyright.”

Letter from Stephanie Mason, Attorney-Advisor, to Edward Klaris, at 1 (May 3, 2017) (“Second Refusal”). The Office reasoned that “the features [of the Work] are not expressed in any way that differentiates them from their basic shape and functional design components, and so they cannot rise to the level of creativity necessary for copyright registration.” *Id.* at 3. Instead, the Office noted, the form of the Work is a “simple shape[, which] . . . does not reflect a sufficient amount of original and creative authorship to support a copyright registration. It is simply a very large rectangle,” which is “a common and familiar shape . . . not protected by copyright.” *Id.* Additionally, the Office stated that Donis cannot rely on his inspiration, a visitor’s impression, or the theory of the work in arguing that the work is original, since those factors are not evaluated in a registrability determination. *Id.* at 3-4. Thus, the Office concluded that the Work “lacks the copyrightable authorship necessary to support a registration.” *Id.* at 4.

In a letter dated August 1, 2017, Donis requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusals to register the Work. Letter from Edward Klaris to U.S. Copyright Office (Aug. 1, 2017) (“Second Request”). Donis claimed that the Work met the standard for originality. Specifically, Donis claimed that the Work is not a “simple shape”—rather, Donis asserted, the Office had failed to consider the work in its entirety, since that includes considering the “openness” as part of the “distinctively original expression of authorship in terms of architecture,” instead of only considering the structure in terms of creating a frame. *Id.* at 3. According to Donis, the Work is an architectural accomplishment since “Donis figured out a practical, efficient[,] and attractive structural design for a frame-like structure.” *Id.* Thus, Donis argued, the Work “can be appreciated as a singular harmonious composition only because deliberate and creative architectural design lies at its foundation.” *Id.* Moreover, Donis asserted that the Work’s design elements, “individually and collectively, constitute an original work of protectable authorship,” since features such as the design of the columns, use of light and windows, and emphasis on exposing the structure of the Work were all aesthetic, not functional, choices. *Id.* at 3-4. Therefore, Donis concluded, the Work “possesses a significant degree of creativity, not only meeting but also exceeding the requisite modicum of creativity” required for a copyright registration. *Id.* at 9.

III. DISCUSSION

A. *The Legal Framework*

1. *Originality Generally*

A work may be registered if it qualifies as an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). In this context, the term “original” consists of two components: independent creation and sufficient creativity. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. *Id.* Second, the work must possess sufficient creativity. *Id.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works (such as the alphabetized telephone directory at issue in *Feist*) fail to meet even this low threshold. *Id.* The Court observed that “[a] constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity.” *Id.* at 363. It further found that there can be no copyright in a

work in which “the creative spark is utterly lacking or so trivial as to be virtually nonexistent.” *Id.* at 359.

The Office’s regulations implement the longstanding requirement of originality set forth in the Copyright Act and described in the *Feist* decision. *See, e.g.*, 37 C.F.R. § 202.1(a) (prohibiting registration of “[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring”); *id.* § 202.10(a) (stating “to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form”). Some combinations of common or standard design elements may contain sufficient creativity with respect to how they are juxtaposed or arranged to support a copyright. Nevertheless, not every combination or arrangement will be sufficient to meet this test. *See Feist*, 499 U.S. at 358 (finding the Copyright Act “implies that some ‘ways’ [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not”). A determination of copyrightability in the combination of standard design elements depends on whether the selection, coordination, or arrangement is done in such a way as to result in copyrightable authorship. *Id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989).

Relatedly, there are certain elements to which the Copyright Act does not extend protection, including common geometric shapes such as squares, rectangles, and circles. COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2017) (“COMPENDIUM (THIRD)”); *see also* 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 2A.08 (2017); *DBC of N.Y., Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414, 416 (S.D.N.Y. 1991) (“Insofar as a shape is in the public domain, (circles, squares, rectangles and ellipses) no copyright may be claimed”). While a work that consists of *only* a common geometric shape will ultimately be refused registration, the Office may register a work that consists of geometric shapes where the “author’s use of those shapes results in a work that, as a whole, is sufficiently creative.” COMPENDIUM (THIRD) § 906.1; *see also Atari Games Corp.*, 888 F.2d at 883 (“[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court.”). Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but it would not register a picture consisting merely of a purple background and evenly-spaced white circles. COMPENDIUM (THIRD) § 906.1.

Lastly, Copyright Office registration specialists (and the Board) do not make aesthetic judgments or consider symbolism or intent in evaluating the copyrightability of particular works. *See* COMPENDIUM (THIRD) §§ 310.2-.3. The attractiveness of a design, the espoused intentions of the author, the design’s visual effect, the time and effort it took to create, or the design’s commercial success in the marketplace are not factors in determining whether a design is copyrightable. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). And the originality determination is not influenced by any “creative thought” a creator or viewer of a work may have in their own mind. COMPENDIUM (THIRD) § 310.5.

2. *Originality and Architectural Designs*

General principles of originality apply to architectural works,¹ but copyright law also includes requirements regarding functional and standard features that are specific to architectural works. The Copyright Act does not protect “individual standard features” (such as standard spatial configurations, windows, doors, and other staple building components). 17 U.S.C. §§ 101, 102(a); 37 C.F.R. § 202.11(d)(2); COMPENDIUM (THIRD) §§ 102.7, 923.2. And copyright law does not protect functional aspects of architectural works. The Board thus must undertake “[a] two-step analysis,” including “whether there are original design elements present, including overall shape and interior architecture” and, “[i]f such design elements are present, whether the design elements are functionally required.” H.R. REP. NO. 101–735, at 20–21 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6935, 6950. “If the design elements are not functionally required, the work is protectable without regard to physical or conceptual separability.” *Id.*; *see also* COMPENDIUM (THIRD) § 923.2(B) (“The U.S. Copyright Office will not register purely functional elements of an architectural work, such as innovations in architectural engineering or construction techniques.”). Courts repeatedly have endorsed this analysis, holding that copyright law does not protect the placement of functional elements in architectural works. *See, e.g., Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1100–01 (7th Cir. 2017) (stating that “opportunities for originality are tightly constrained by functional requirements” in the affordable home design market); *Zaleski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 105–06 (2d Cir. 2014) (reasoning that copyright protection did not extend to elements of home designs that “are a function of . . . standard house design generally”); *Attia v. Soc’y of New York Hosp.*, 201 F.3d 50, 55 (2d Cir. 1999). Relatedly, courts have concluded that “[a]ny design elements attributable to building codes, topography, structures that already exist on the construction site, or engineering necessity should . . . get no protection” and that “[a]rchitects cannot claim that good engineering is original to them—or at least can get no copyright protection for it.” *Zaleski*, 754 F.3d at 105–06; *see also Fortgang v. Pereiras Architects Ubiquitous LLC*, 230 F. Supp. 3d 77, 84–85 (E.D.N.Y. 2017) (stating that the placement of functional elements, standard configurations and building designs, elements attributable to necessary engineering are not copyrightable).

B. *Analysis of the Work*

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work as a whole does not contain the requisite authorship necessary to sustain a claim to copyright.

The Work essentially is a giant rectangular outline, a common geometric shape. It is constructed of the four sides necessary to a rectangle and contains standard configurations such as evenly-spaced windows. Simply put, the Work, externally, is exactly the kind of geometric shape that belongs squarely within the public domain. *See* COMPENDIUM (THIRD) § 906.1; *see also Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 545 (2d Cir. 1959) (finding cake packaging in circular, rectangular, and octagonal shapes not protectable); *DIBC of N.Y., Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414, 416 (S.D.N.Y. 1991) (discussing marquise stones

¹ In the First Refusal, the Office previously agreed that the Work qualifies as an architectural work under the Copyright Act, and thus the Board need not analyze whether the Work is an architectural work here.

and trillion-cut stones as shapes in the public domain in reference to jewelry design and not protectable); 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 2A.08 (2017) (quoting language that basic shapes, including rectangles, are not protectable). The internal elements similarly are not protectable—for example, there are general areas that could house an observation deck, café, and cultural facilities. The elements of the elevator shaft and footings do not add anything beyond the standard rectangular outline in the overall Work. The Work as a whole, both external and internal, thus does not satisfy even the low threshold for creativity set forth in *Feist*.

Donis's arguments to the contrary are unpersuasive. *First*, Donis urges the Board to consider the void in the center of the Work (essentially, what makes the Work an outline as opposed to a solid rectangle) as part of Donis's "distinctively original expression of authorship in terms of architecture." Second Request at 3. Donis asserts that the Work's "reliance on 'openness' eliminates the necessity for extensive structural support usually needed by tall buildings" and that Donis's particular measurements for the building gave the structure a "practical, efficient[,] and attractive . . . design." *Id.* The Board, however, does not evaluate registrability based on the variety of choices available to the creator. COMPENDIUM (THIRD) § 310.8. Donis's implied argument is that his particular choices contributed to an inventive or ingenious form. While that may be true, "[t]he fact that a work may be novel, distinctive, innovative, or even unique is irrelevant to" satisfying the originality requirement. *Id.* § 310.1. Therefore, the Board is not persuaded that the use of void space in this instance contributes to the originality of the Work.

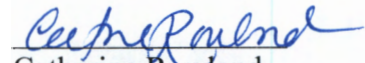
Second, Donis's conceptual argument that the Work is a "frame" for Dubai does not rescue the Work from uncopyrightability. The intangible attributes that Donis has ascribed to the Work are not evident in the deposit itself and therefore cannot be examined in an objective manner. Even if these attributes were present in the deposit, the Board does not assess the espoused intentions of a design's author or a design's visual symbolism, effect, or appearance in determining whether a design contains the requisite minimal amount of original authorship necessary for registration. *See* 17 U.S.C. § 102(b); COMPENDIUM (THIRD) § 310.3 ("the Office will focus only on the actual appearance or sound of the work that has been submitted for registration, but will not consider any meaning or significance that the work may evoke. The fact that creative thought may take place in the mind of the person who encounters a work has no bearing on the issue of originality."), § 310.5 (stating that the Board "will not consider the author's inspiration for the work, creative intent, or intended meaning"); *see also Bleistein*, 188 U.S. at 251. While "[a]rchitecture is not unlike poetry," and "the architectural world is an endless source of symbols with unique ramifications in time and space," H.R. REP. NO. 101-735 (internal citation omitted), symbolism is not copyrightable. Thus, even if accurate, the mere fact that the Work was the fruit of involved deliberation and is symbolic in nature would not qualify the Work for copyright protection.

Because the Board finds that the work lack sufficient originality, it does not reach the separate question of whether specific elements of the structure are functional, although by necessity it incorporates some reasoning related to this issue above.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claim in the Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY:



Catherine Rowland
Copyright Office Review Board

APPENDIX A

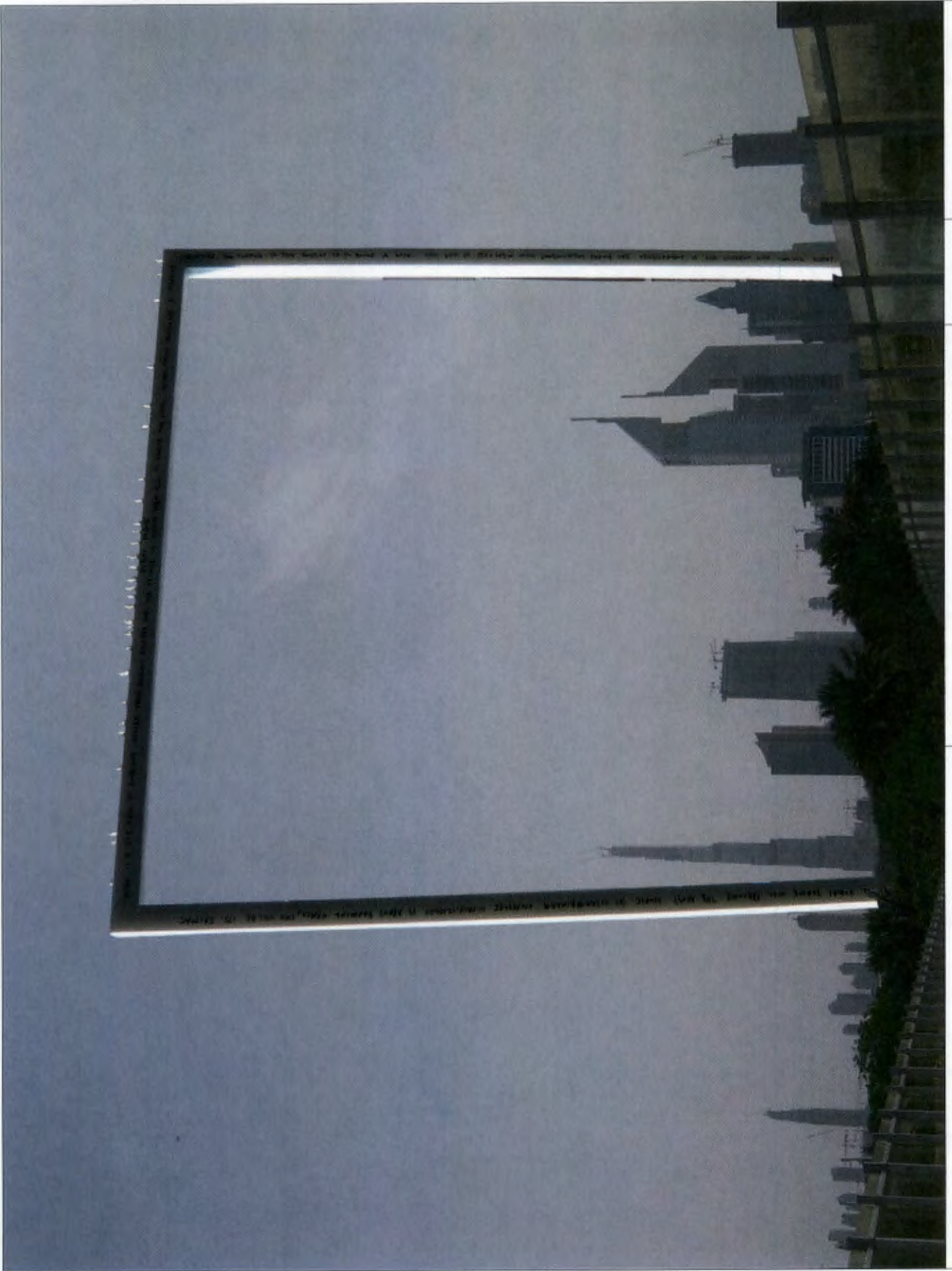
Dubai Frame

Dubai is a city full of emblems. Rather than adding another one, we proposed to frame them all: to frame the city. Rather than building a massive structure, the purpose of this project is to build a void. This void of 150 by 105 meters will continuously frame the development of the past, current and future Dubai. The project is both a tool to celebrate and assess the city; a monument consciously acknowledging the development of the city of the twenty-first century.

Opposed to the contemporary complexity in architecture, the Dubai Frame will become the most simple yet extraordinary archetype; a maximization and modern reinvention of the antique post-and-lintel principle. As architecture is about framing space, this will be its epitome. Despite of being an anti-icon, the Dubai Frame will have an incomparable presence in the city.

The project is located amidst the old and new Dubai, becoming a "time-frame" of the city in development, linking its past. The lower part of the project would include cultural facilities and its top cafés and sight-seeing areas towards the new and old city.

On Wednesday, May 6, 2009, the Dubai Municipality and ThyssenKrupp Elevator, under the auspices of the International Union of Architects empowered by UNESCO's regulations on international competitions, announced the 'Dubai Frame', as the winner of the ThyssenKrupp International Award. For the competition, a total of 926 design proposals were presented and evaluated for the Award by an experienced panel of judges. Participants from all over the world were required to propose an emblem that would promote the new face for Dubai.

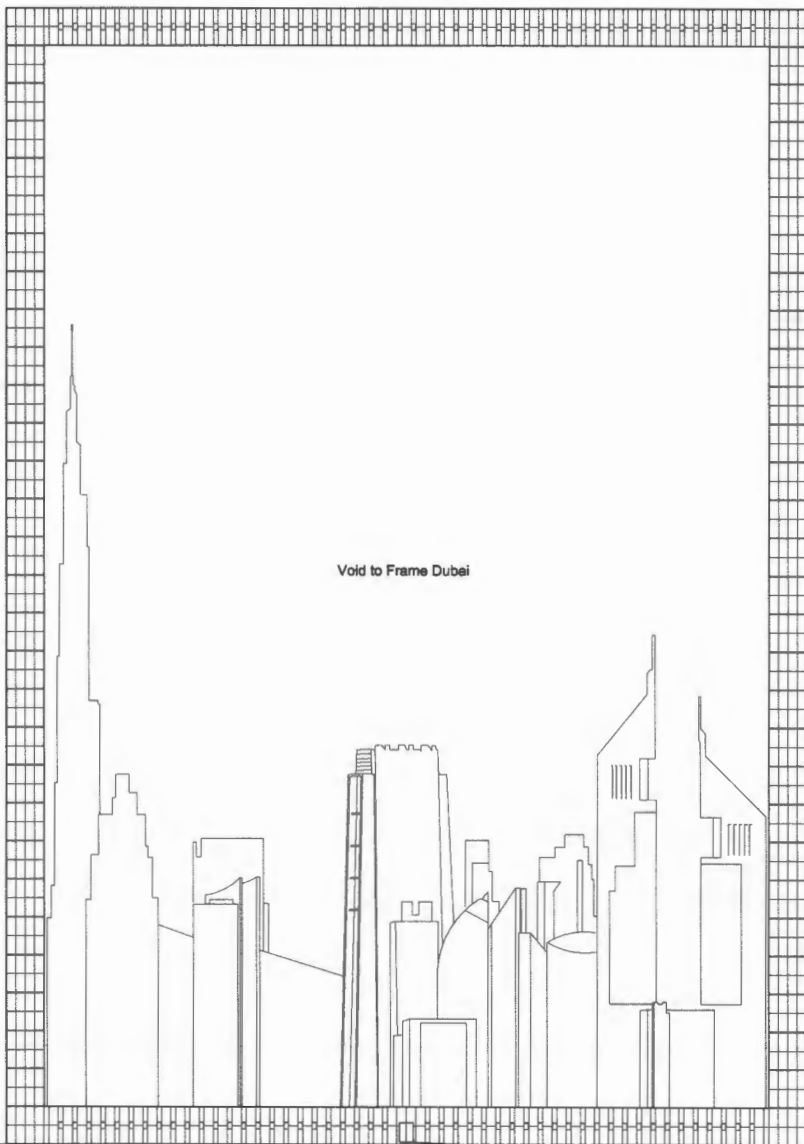
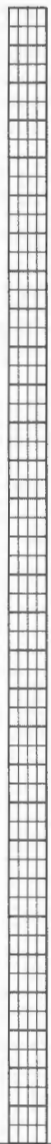


Dubai Frame

View from Park

5 m.

106 m.



Void to Frame Dubai

5 m.

150 meters

SIDE ELEVATION

FRONT ELEVATION

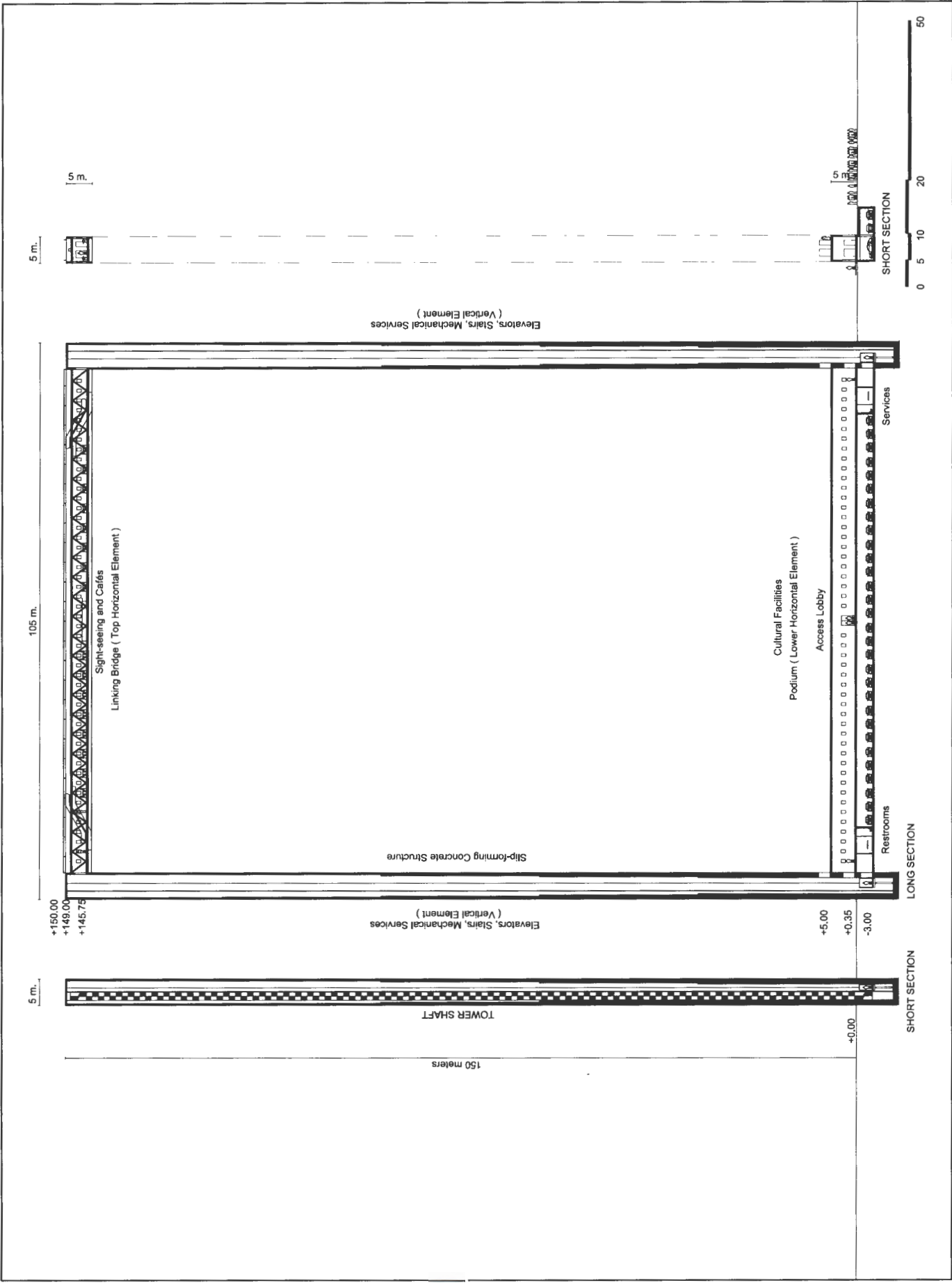


Dubai Frame

Elevations

1:1000

JONIS



5 m.

105 m.

5 m.

+150.00
+149.00
+145.75

Sight-seeing and Cafés
Linking Bridge (Top Horizontal Element)

Elevators, Stairs, Mechanical Services
(Vertical Element)

Elevators, Stairs, Mechanical Services
(Vertical Element)

Slip-forming Concrete Structure

TOWER SHAFT

150 meters

Cultural Facilities
Podium (Lower Horizontal Element)

Access Lobby

Restrooms

Services

SHORT SECTION

LONG SECTION

SHORT SECTION

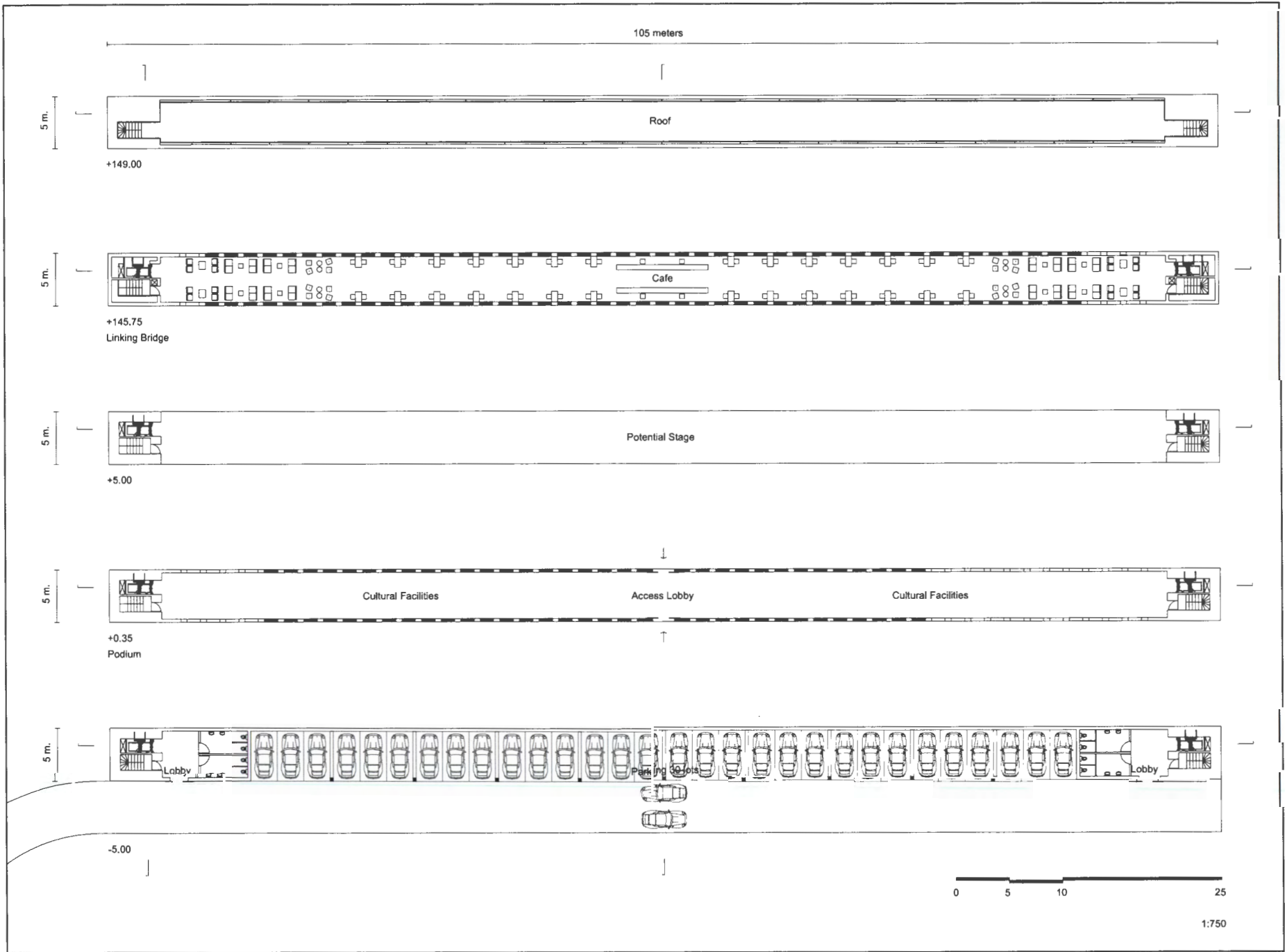
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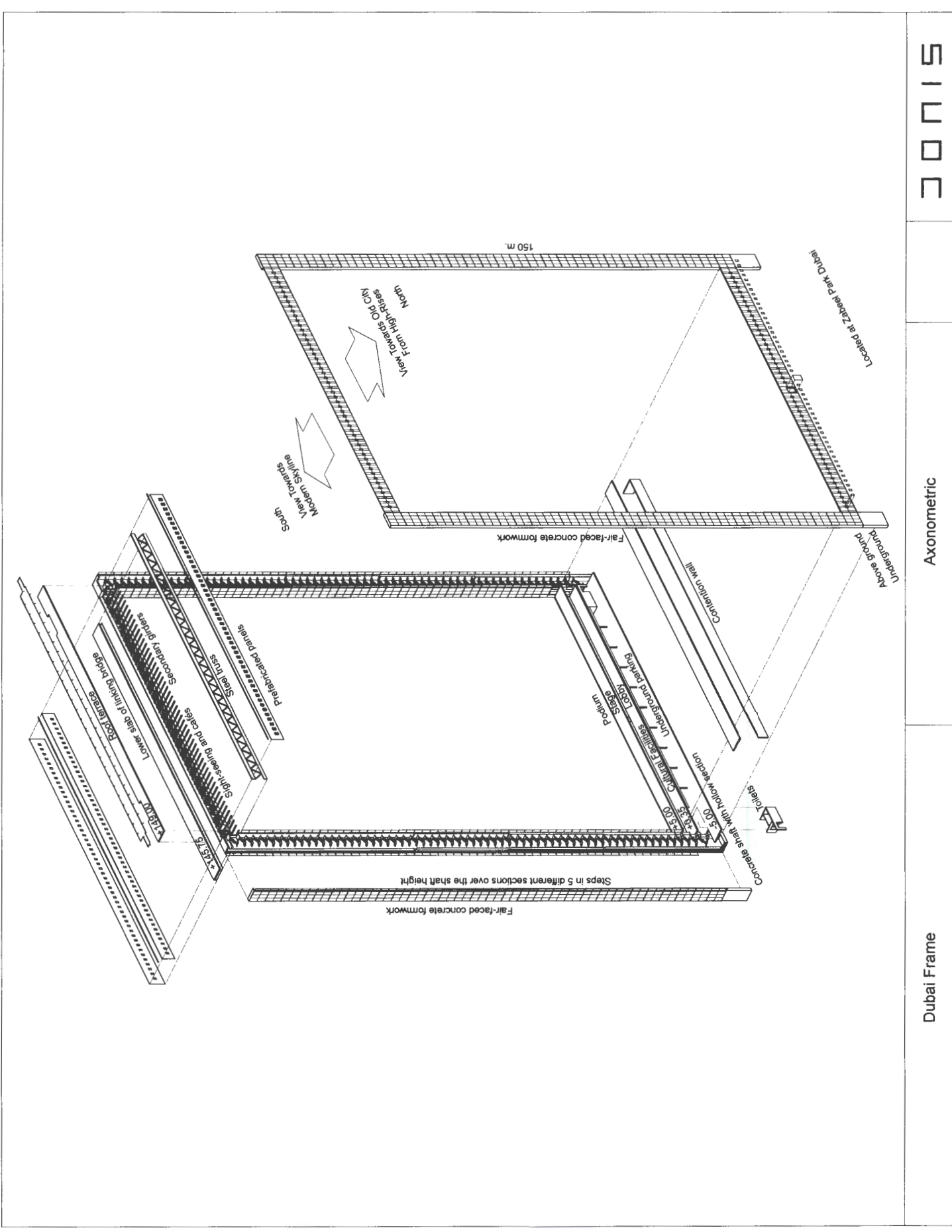
Dubai Frame

Sections

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CONIS







Dubai Frame

Top View

CONIS



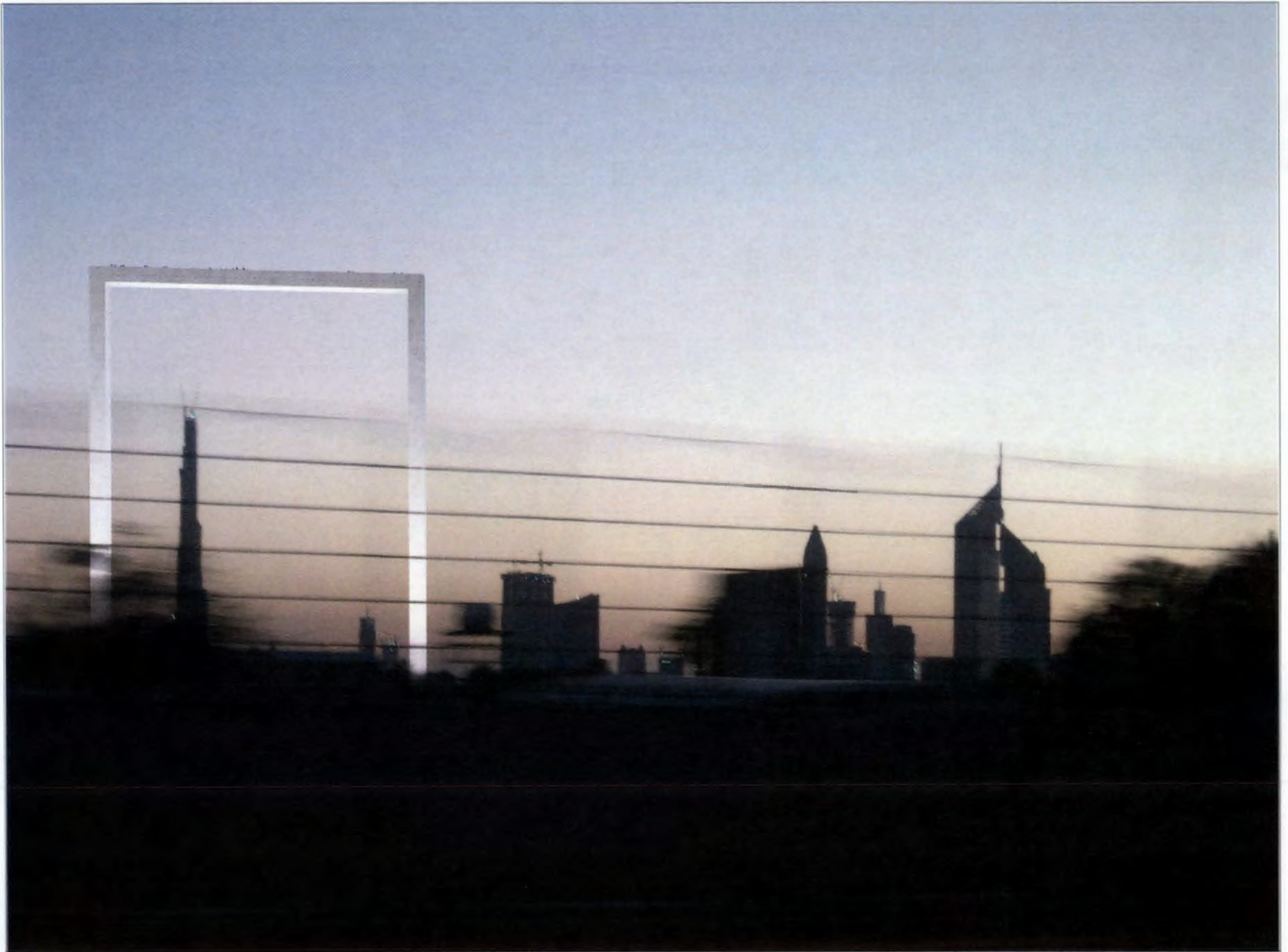
Dubai Frame

Aerial view of Zabeel Park



Dubai Frame

View from West



Dubai Frame

View from freeway

30715



Dubai Frame

Night view skyline

The outside dimension of all four frame elements - the two tower shafts, the linking bridge and the visible podium above ground - have the same constant square section and the same surface quality giving the frame appearance. Only the wall thickness and the building material of all four frame elements varies. The two tower shafts arise of the so called podium structure. The towers are essentially two elevator cores for the vertical transportation and access to the top.

There is a café and an observation deck in the linking bridge between the two towers. The podium includes the parking garage below ground as well as a library in a low rise building above ground in between the towers. The roof of the podium structure is also used as a grand stage for cultural and public activities.

The next design stage requires an optimization process of the tower shaft section based on wind tunnel testing. The allowable tip acceleration of this special structure has to be defined according to the client's requirement for "Dubai Frame". Also a detailed soil investigation is recommended and should be provided in the next design stage.



Structural system



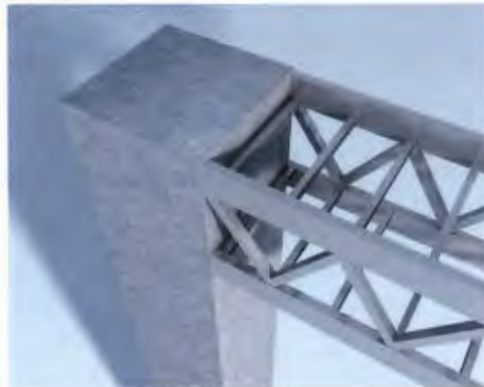
Deflection due to dead load (amplified)



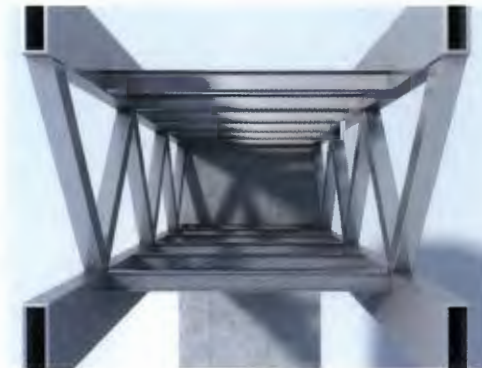
Deflection due to wind in y-direction (amplified)



Deflection due to wind in x-direction (amplified)



Concrete tower with linking steel bridge



Linking steel bridge

Both tower shafts consist of a hollow square section made of high strength concrete. The square section of the shaft is stepped in 5 different sections over the building height. The wall thickness tapers from 1.2 m at the base to 0.3 m at the top. Due to the slenderness of the shafts, the concrete section will be prestressed to minimize the horizontal deflection and the tip acceleration.

The two concrete tower shafts are linked with a steel structure, the so called linking bridge. The top and bottom chords of the 105 m long steel truss are made of hollow rectangular sections. In between diagonals are arranged in a way to allow the placing of windows for the café.

The plate thickness of the steel members will be optimized according to the utilisation of the structural members. The slab and the roof of the linking bridge will be a steel decking system on secondary steel beams to minimize the weight of the linking bridge. The steel structure of the linking bridge will be cambered for dead load.

The lateral and vertical loads are transferred via the concrete walls of the towers to the foundation. The towers are founded on a pyramidal raft with bored piles. Restraining forces in the linking bridge structure are avoided by appropriate support conditions and hinges.

The podium structure below ground as well as the library above with stage on top will be a concrete structure braced with shear walls. The podium is founded on a raft only as the dead load of the podium is minor and also counteracts the uplift forces due to the groundwater table.

The linking bridge would be clad with prefabricated panels giving its facade a similar appearance as the concrete towers and the podium.

The following construction sequence allows a fast and economical realization of the Dubai Frame project:



Step 1: Foundation and piling of "Dubai Frame". Erection of tower with climbing formwork.



Step 2: Tower shafts and assembling of linking bridge on ground level.



Step 3: Lifting of linking bridge



Step 4: Finishing linking bridge at top of towers



Step 5: Building the podium above ground level



Step 6: Façade installation of "Dubai Frame" finished

The bored piles for both towers are fabricated after finishing the construction pit. The pyramidal raft and the foundation of the podium are built in the next step. The two concrete tower shafts arise of the pyramidal raft using climbing formwork. Climbing formwork is an effective solution for buildings that are either very repetitive in form or that require a seamless wall structure, both applies for the shafts of the frame. The shafts are essentially a core with elevator and staircase.

During the very fast construction of the tower shafts, the linking steel bridge will be assembled on ground level. The two 105 m long trusses are safely assembled on top of the slab above the parking garage of the podium. The two assembled truss elements are lifted to the top of the finished concrete shafts using jacks. The secondary girders, decking system and the façade elements of the linking bridge are installed afterwards.

After finishing the linking bridge the podium structure above ground level is built. Finally all surfaces and sections of the four frame elements the two tower shafts, the linking bridge and the visible podium above ground – have a similar appearance and create a visible frame – the "Dubai Frame".