

CONSTRUCTION LAW

Addressing AIA Contract Document Pitfalls

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Lawyers are often asked to prepare and negotiate agreements with architects and contractors. When using standardized industry form agreements such as the American Institute of Architects Contract Documents (“AIA forms”), one should consider whether the one-size-fits-all forms fit the unique needs of the project and how the pitfalls in the forms should be addressed. Below are five pitfalls and practice tips on how they can be addressed.

Pitfall #1: A Poorly Defined Scope of Work Can Result in Additional Costs. AIA forms should be tailored to meet project requirements and party expectations, which requires an early understanding of the project scope, budget and schedule. Architectural agreements should identify basic services and what triggers additional services. Friction points in scope can include poorly defined deliverables, early bid packages and out of sequence work requirements, cost estimating and timing, and

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value engineering and re-design to budget requirements. Mutual agreement on scope will avoid unexpected fee creep.

Pitfall #2: License To Use v. Ownership of Drawings. In AIA forms, architects are the author and owner of the drawings prepared for the project, including copyrights, and owners are granted a non-exclusive license to use the drawings. If owners desire unrestricted use and ownership of the drawings and copyrights in lieu of the form-provided license, the agreement must be modified, subject to the architect’s consent, to allow this change in ownership.

Many owners will accept an exclusively licensed use of the drawings, provided the

license begins immediately (not at final completion) subject to—and to the extent of—payments made by owners for the services rendered.

Notably, in the event owners terminate the architectural services agreement for convenience, the AIA forms obligate owners to not only pay for services rendered through the termination, but to pay termination expenses (which can include architects' lost profit on unperformed services) and a license fee to

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use the drawings without the participation of architects. Owners typically resist paying both anticipated lost profits and license fees to use the drawings.

Pitfall #3: The Risk of Using an Initial Decision Maker. AIA forms contemplate an initial decision maker (the "IDM") who will effectively mediate disputes between the owners and contractors to keep a project moving forward. Owners are typically concerned about losing control when the IDM is involved. If architects serve as the IDM, architects are perceived as an extension of ownership and contractors are typically concerned that architects will favor their client instead of properly mediating the dispute.

If an IDM is contractually required, owners should be concerned if the contract requires owners to secure the IDM's consent prior

to terminating the construction contract for cause. This requirement would give too much control to the IDM and prevent owners from unilaterally determining whether to terminate. When the IDM is not required and an owner opts to terminate for cause, contractor's remedy for an alleged wrongful termination is to assert a claim challenging owner's termination, but the contract will already be terminated.

Owners should include a provision in their construction contracts that converts a termination for cause into termination for convenience in the event it is determined that an owner wrongfully terminated a contractor for cause. In the event of a wrongful termination for cause, this type of provision may avoid a breach of contract claim by contractors.

Pitfall #4: Is the Owner Properly Indemnified?

An indemnity provision is an important vehicle to transfer risk between parties arising from third-party claims. The indemnity provisions in AIA forms have several notable deficiencies:

1. There are no indemnity obligations from architects for third-party claims arising from negligent performance of the services under the agreement, violations of law, copyright infringement or bodily injury. Owners typically add more robust indemnity provisions into the AIA forms to address this deficiency;
2. The contractors' indemnity does not, but should, include claims arising from breach of contract, violations of law and subcontract claims;
3. The contractors' indemnity obligation is triggered to the extent caused by the

contractors' negligence (which requires an adjudication of negligence). The indemnity obligations should instead be triggered if the third-party claims *arise from* contractors' work. The indemnity should not be tied to fault because the contractors' insurance typically does not require fault (negligence) to respond to a claim;

4. Despite that it is common practice for contractors to hold harmless, defend and indemnify owner indemnitees, AIA forms do not include a contractor's duty to defend, which is often provided by the contractors' general liability insurer. This forces owners to incur defense costs and to later seek reimbursement from contractors through the indemnity. Note that architectural indemnity provisions can also include architects' duty to defend, but this defense obligation is typically limited to the extent architects' general liability (not professional liability) insurers afford such a defense;
5. AIA forms include payment of reasonable attorney fees of the owner indemnitees, but do not explicitly state that this includes legal fees incurred to enforce indemnity

obligations. In New York, if this is not explicitly stated, the "enforcement legal fees" will not be reimbursable; and

6. Last, the indemnity should survive termination and/or expiration of the agreement. Otherwise, there is a risk that indemnity obligations may sunset at the end of the agreement (and indemnity claims often ripen years after completion of the work).

Pitfall #5: No Damages for Delay. AIA forms contemplate that contractors may obtain damages for owner-caused delays. Delay damages could include lost profit, loss of efficiency and productivity, extended home office costs and other consequential damages. Owners should include provisions that explicitly state that contractors waive damages for delays.

Conclusion

When using AIA Forms, the parties should give careful consideration to the modifications required to these standardized forms to meet project specific needs and the expectations of the parties and to properly address the pitfalls in the forms. Otherwise, the parties could end up with an agreement that is not consistent with their intent.