New York Law Journal
Real Estate Trends
WWW.NYLJ.COM
An ALM Publication
VOLUME 255—NO.114
WEDNESDAY, JUNE 15, 2016

CONSTRUCTION LAW

Recommended Owner Modifications to Standard AIA Documents

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Despite widespread owner dissatisfaction with American Institute of Architects (AIA) forms, they are commonly used, particularly on small repair and renovation projects. Because of this, we are often asked what are our basic objections to the frequently used B101 (Standard Form of Agreement Between Owner and Architect) and A107 (Standard Form of Agreement Between Owner and Contractor for a Project of Limited Scope) forms. What follows are simplified bullet point lists of our objections to these forms and our suggestions for modification.

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The B101 Standard Form

The B101 agreement is a standard form of agreement between owner and architect that covers both building design and construction administration. Services are divided into basic services (schematic design, design development, construction documents, bidding or negotiation, and construction) and additional services. The agreement may be used with a variety of compensation methods, including percentage of construction cost and stipulated sums. Nevertheless, this form of agreement is architect-friendly and should be revised with the following considerations:

> As is, the A107 agreement lacks certain protections to the owner, lacks certain obligations on the part of the contractor and provides too much authority to the project architect.

• Section 2.5 requires the architect to maintain certain insurance policies at certain defined limits. This section should be deleted and instead should refer to an insurance rider (approved by the owner's insurance consultant or broker) that more extensively details the coverages, limits and exclusions of such policies. The rider should also include an indemnity provision which is notably absent from the agreement.

• Section 3.1.3 requires the architect to submit a schedule that includes anticipated dates for the commencement of construction and for substantial completion. This section should be revised to require the architect's schedule to also include dates for delivery of

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documents during the schematic design, design development and construction documents phases and the anticipated dates for construction administration services.

• Section 3.6.2.2 provides that the architect has the authority to reject work that does not conform to the contract documents. Since this provision provides the architect with more authority than the owner is typically willing to concede, the provision should be revised so that the architect's role is merely to recommend to the owner that certain work be rejected.

• Similarly, Section 3.6.2.3 allows the architect to interpret and decide matters concerning the contractor's performance under the contract documents. Instead, the provision should allow the architect to make written recommendations to the owner concerning the contractor's performance and allow the owner to make any final decisions regarding actions that should be taken in response.

• The B101 does not require the architect to prepare a punch list of completion items at substantial completion. Instead, Section 3.6.6.3 requires the architect to inform the owner about the balance of the contract sum that remains to be paid to the contractor. This section should be revised to require the architect to prepare a punch list of outstanding items of work and to inform the owner of the amount to be retained until final completion.

• The standard B101 does not require the architect to prepare "record drawings" at the end of the project, which are invaluable to the project owner. A requirement that the architect prepare record drawings, in CADD (computer-aided design and drafting) or other electronic format, should be added to Section 3.6.6 (Project Completion).

• Article 4, titled "Additional Services," covers the compensation of the architect for services that fall outside the architect's basis services. This section should be reworked as follows to more clearly establish that the architect is not entitled to additional compensation for additional services unless expressly approved in writing by the owner:

Section 4.1, which delineates the responsibilities of the architect and owner, should be deleted in its entirety since no additional services should be authorized in advance of contract execution.

Section 4.3 should be revised to clarify that additional services may be provided after execution of the agreement only with the owner's express written approval.

Section 4.3.2 identifies certain services that can be performed by the architect as an additional service without first obtaining owner's approval. This section should be deleted, and the list of services enumerated thereunder should be combined with the preceding list of additional services that require the owner's approval. In addition, the owner should review the list of additional services in this section and revise the list to be consistent with the parties' expectations.

Section 4.3.3 provides that after a set number of visits to or inspections of the site, or after a set number of reviews of submittals, the architect will be compensated for such visits, inspections, and reviews as an additional service. Instead, the agreement should provide that the architect is to perform these services as a basic service on an as-needed basis.

• Article 7 provides that the architect maintain ownership of the documents (the "instruments of services") but grants the owner a nonexclusive license to use the instruments of service for the project. This section should be revised to ensure that the license is exclusive, royalty-free, irrevocable and transferrable.

• Article 8, titled, "Claims and Disputes," provides that any claims, disputes or other matters in question are subject to mediation as a condition precedent to binding dispute resolution. The article also contemplates that the parties elect arbitration as the means of binding dispute resolution. It is recommended that Article 8 be deleted in its entirety so that the parties are afforded an opportunity to determine the appropriate forum for dispute resolution at the time of such dispute.

• Section 9.4 allows either party to terminate the agreement for cause upon seven days' notice. This section should be revised so that only the owner has the contractual right to terminate upon seven days' notice (the architect maintains the right to terminate for a material breach under common law).

• Section 9.6 and 9.7 require the owner to pay the architect all termination expenses, including anticipated profit on the value of the services not performed, in the event the owner terminates the agreement for its convenience. This concept should be removed from the agreement.

• Section 11.9 requires the owner to pay the architect a "licensing fee" as compensation for the owner's continued use of the instruments of service if the owner terminates for convenience. This section should be removed. The better practice is to clarify, either in this section or in Article 7, that the owner has the right to use the instruments of service if owner has properly compensated the architect for such work.

• Section 11.10.3 prohibits the owner from withholding compensation from the architect to offset sums paid to contractors for the cost of changes in the work that arise due to a flaw in the instruments of service unless there is a final adjudication of the architect's liability. This section should be deleted in its entirety.

The A107 Form

The A107 is a stand-alone agreement that contains an abbreviated from of general conditions and is intended for use on medium-to-large sized construction projects where payment is based on either a stipulated sum or the cost of the work plus a fee. The agreement lacks certain protections to the owner, lacks certain obligations on the part of the contractor and provides too much authority to the project architect. The following provisions should therefore be reconsidered:

• In the first provision of the agreement, the term "work" should be defined as "the work required by the contract documents and all work that is reasonably inferable therefrom" and s hould clarify that the work includes all labor, material, equipment, tools, supplies, scaffolding and other facilities and services necessary for the proper execution and completion of the project.

The B101 agreement may be used with a variety of compensation methods, including percentage of construction cost and stipulated sums. Nevertheless, this form of agreement is architect-friendly and should be revised.

• A provision should be added that requires the contractor to advise the owner of any inconsistencies in the contract documents and to clarify the order of precedence in the event of a conflict or inconsistency between the contract documents.

• The standard A107 document does not include a time-of-the-essence clause. A statement indicating that the substantial completion date established by the agreement is deemed of the essence should be added.

• An acceleration clause, which allows the owner to require the contractor to work overtime hours or increase the manpower levels in order to capture delays to the project schedule, is notably absent from the agreement. An acceleration clause should be added that requires the contractor to accelerate the work when the project is not on schedule and such acceleration should be at the contractor's expense unless it results from acts or omissions on the part of the owner.

• The agreement fails to properly establish a procedure for the discharge of mechanics' liens. The agreement should be revised to include a requirement that all mechanics' liens be discharged, at the contractor's expense, within 10 days of notice, so long as the contractor has been paid in full for the work performed. Failure by the contractor to discharge or bond the lien should be deemed a breach of contract, and the owner should reserve the right to discharge the lien and deduct the costs thereof from the contract sum.

• Section 6.1.6 provides a placeholder for the documents that comprise the "contract documents." This section should incorporate as contract documents, among other things, a list of the project drawings and specifications, the project schedule, an exhibit for insurance and indemnity, and the form of lien waivers required to be submitted by the contractor with each payment requisition.

• In many cases the owner wants a particular individual employed by

the contractor to act as the project full-time construction supervisor. If so, the agreement should be revised to incorporate such a provision, and require that the construction supervisor not be replaced in order to ensure continuity throughout the project. If desired, the agreement can require the contractor to pay a fee if it replaces the construction supervisor.

• Section 8.1 provides that the contractor must submit a construction schedule to the owner and architect. This section should be modified to indicate that the construction schedule is subject to approval by the owner (and/or the architect) and updated on a monthly basis. Furthermore, a provision should be added that requires the contractor to submit progress reports during the course of the project indicating whether the work is on schedule and providing a two-week "look ahead."

• Both the indemnity provision in Section 9.15.1 and the insurance provision in Section 17.1 are inadequate to properly protect the owner. Both of these provisions should be stricken from the agreement and proper provisions for both should be included as an exhibit.

• Article 13 provides the procedures for compensating the contractor if there are changes in the work. To properly control costs, the agreement should be revised to clarify that the contractor is not entitled to any additional compensation unless a change in the work is approved and signed by the owner. In addition, any entitlements to a mark-up on changes should be identified in Article 13.

• Section 15.3.2 provides that neither the owner nor the architect have an obligation to ensure payment is properly made to a subcontractor. This paragraph should include an additional provision that allows the owner to make payments directly to a subcontractor if required to satisfy the contractor's obligation, and that any payment made to the subcontractor can be deducted from the amount owed to the contractor.

• Section 15.5.3, which deems the making of the final payment a waiver of certain claims by the owner, should be deleted in its entirety.

• Section 19.1 prohibits both parties from assigning the agreement without written consent of the other. This provision should be revised so that the owner can freely assign the agreement.

• Section 20.2.2 requires the architect to certify that the owner has sufficient cause to terminate the agreement for default. This condition precedent should be deleted from the agreement.

• Section 20.3 requires the owner to pay the contractor overhead and profit on work that has not yet been performed in the event that the owner terminates the contractor for convenience. The right to overhead and profit on unexecuted work should be deleted from the agreement.

• Article 21, titled, "Claims and Disputes," should be revised significantly. For instance, this section requires all disputes to be referred to the architect for an initial decision, which both delays resolution and provides the architect with unreasonable authority. It is recommended that the owner revise this section to ensure it is consistent with the owner's preferred method of dispute resolution.

• In addition, Article 21 does not require the contractor to continue performing its services during a dispute, a provision that is essential to ensure that the owner is not pressured into an unfavorable resolution.

• Section 21.8 requires the owner and the contractor to waive their rights to consequential damages. Although such a waiver is not uncommon in construction contracts, it is recommended that the waiver be limited to only claims made for delay and that the waiver not apply if the consequential damages are covered by the injuring party's insurance. If the owner agrees to waive consequential damages, a liquidated damages clause should be added to provide the owner with a remedy in the event the project is delayed.

Conclusion

While we generally advise against the use of these AIA forms, we recognize that the market may require their use; the changes discussed above will make the use of these forms more valuable for the owner and we recommend their consideration.