

Promoting Clarity in Contracts for Construction

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1. *Introduction*

While it is universally understood that a complete, thorough, and well-negotiated contract can avoid misunderstandings and expensive litigation, parties to a contract often do not extrapolate or reflect carefully on the contract terms and provisions. Precisely defining what constitutes a high-quality contract is particularly important for owner-architect contracts where the transactions are as complex as the building projects they reference. To this end, a former Deputy General Counsel for The American Institute of Architects has cited five characteristics of a successful contract; namely, a contract which 1) makes progress of the project predictable, 2) reflects the parties’ objectives and helps achieve them, 3) sets realistic expectations, 4) provides a framework for future negotiation, and 5) sets a cooperative tone for the working relationship by promoting candor and understanding.¹ In sum, a successful contract sets forth a thorough and mutually understood agenda whereby the goals of the parties are both well-defined and attainable.

In order to reach these goals, it is critical that the language of the contract is clear and is subject, as much as possible, to only one interpretation. A number of techniques exist for ensuring clear and fair contract language: 1) carefully read contracts to comprehend the meaning and implications of the contract language, 2) get a second opinion for ambiguous language, 3) avoid ambiguous language in the first place, 4) use objectively-measured terms, 5) de-personalize the negotiation process in both the asking and receiving of contract demands, and 6) observe *quid quo pro*, i.e. ask for concessions when asked to give them. These practices, which promote openness and unity of meaning, go a long way towards promoting viable and stable contract language.

2. *Competing Forms*

Pre-existing contract forms are a primary vehicle for achieving a solid contractual footing. A number of entities produce forms which are used for construction contracts, including The American Institute of Architects (AIA), Associated General Contractors (AGC), and firms themselves create “in-house” forms. The AIA, a national architect trade group, designs its documents through ongoing consensus of a document committee, in cooperation with contractor trade groups, the decision and product of which is then reviewed by AIA’s legal counsel. The AIA forms are revised every ten (10) years, and are designated as a series from that decade. Forms from one series are not to be mixed with forms from another decades series. AIA Document B141 (see Appendix) is the principal form used for architectural contracts, having

¹ Abramowitz, *Architect’s Essentials of Contract Negotiation*, Wiley 2002

become the industry standard. It is used in conjunction with the other AIA forms in series, including A201, General Conditions of the Contract for Construction (see Appendix). Similarly, the Contract Documents Committee of the AGC, made up of 100 contractors, attorneys, insurers, architects, and engineers designs its own contract forms in consultation with senior design professionals. In contrast to AIA documents, however, AGC documents reflect more input from contractors. Owners and lenders are typically the least knowledgeable participants in the construction process, and have less influence over the content of the standard forms. Whichever “pre-made” forms an owner may be working with, however, it is important for owners to assert their viewpoints and have their voice reflected in the language of the contract.

The size of the project will often have a large impact on the readiness of the parties to accept certain forms of documents. Owners of smaller projects will often sign off on AIA documents without much protest. With large projects parties to the contract typically have representation by lawyers, negotiators, and others who will work toward a consensus on which forms to use and how to modify them. The contract choices will most often prove a sticking point for projects of a medium size, where the stakes are higher, but there is still not enough perceived financial incentive to engage in detailed contract negotiations.

3. Contractual Conflicts between Owners and Architects

Even with a well-drafted contract, architects and owners often find themselves at odds over the terms or implementation of the agreement, especially when circumstances arise for which the contract fails to provide guidance. Anticipating the most commonly contentious issues and understanding the positions of both owners and architects in a contract dispute can greatly minimize costs when the unexpected happens. Below are some common points of conflict between parties to a architectural construction contract.

a. Identifying the “contract documents” by which the parties are bound.

AIA forms specifically include the agreement, conditions of the contract, drawings, specifications and addenda issued before the execution of the contract and exclude pre-contract correspondence, contractor proposals, shop drawings, and product data. AIA Document B141, Contract between Owner and Architect, includes the use of AIA A201, General Conditions of the Contract for Construction. The AIA B141 contain all of the project specific terms as between the architect and owner, and the AIA A201 contains the majority of the terms of the agreement that do not specifically relate to a given project.

Defining what constitutes the “contract documents” is not as simple as it might appear. Owners should be mindful that the AIA forms set forth all of the documents and materials that are to be included in the terminology “contract documents” in the AIA forms. Conflict may arise where an inattentive party may try to bind the other to specifications of a document to which the party is not contractually bound, or, in a worse case, try to bind the other party to a document whose status as a contract document is ambiguous. The nature and requirements of any modifications to be made to the contract describing specifications,

drawings and documents should also be outlined in detail. To avoid confusion, amendment of the AIA forms is best accomplished by separate amendment, unless the newer computerized format is available to make changes directly in the document. See Section 2.9 of AIA B141-1997. Also, owners will want to consider the obligations to provide financial information to the contractor required of the owner in Article 2.2.1 of the A201-1997 General Conditions. The making of these disclosures may reassure the contractor of his source of payment, but may appear to the owner as an unwarranted intrusion.

It is also important to note that parties may be bound even when there is no signed contract. In two cases, *Willis v. Russell*, 68 N.C.App. 424 (1984) and *Matthews v. Neale, Green, & Clark*, 177 Ga.App. 26 (1985), owners were found to be bound to AIA contract terms that were offered but never signed, and suffered enforcement of those contract terms despite the absence of a signed agreement.

b. Termination of convenience.

The A201 General Conditions of the Contract for Construction allow an owner to terminate the contractor without cause (for convenience) where performance is substandard. Many projects, especially those who construct structures for the public, often require the contractual right of terminating the contract. Termination may create a number of other issues such as calculating payments for uncompleted work or reimbursement for costs associated with the termination. The A201-1997 gives the terminated contractor reasonable overhead and profit on work not performed (Article 14.4.3) making the owner pay for the balance of the work without any of the benefit, an potentially unappealing prospect from the owners perspective.

c. Terms of payment are unclear.

Payment touches on a multitude of issues where either the architect or contractor may be looking to take an advantage from any contractual ambiguity based on their bargaining power. Conflicts often arise from ambiguous language involving the methods of calculation of payment, methods of pay adjustment, methods of payment itself, the scope of the project, or whether the architect should be compensated for “reimbursable” out-of-pocket expenses. Early termination, change orders, and contractually deficient work naturally complicate payment issues.

d. Arbitration.

AIA contract form A201 General Conditions designates the architect as initial arbiter of any initial disagreements arising from the contract, including disputes involving the architect’s own performance. Following the architect’s decision, the parties must mediate, then arbitrate, before having a right to litigate. The decisions of the architects, in matters of “aesthetic effect” are even made final and

unappealable. The role of the architect as arbiter can become a legitimate issue in contract negotiation.

e. Who will design which parts of the building.

Because architects themselves often hire consultants to design certain parts of the building, this may create conflict with the owner who may be asked to relieve the architect of any liability stemming from the consultants work. There are also issues of control where the design professional, hired by the architect, may want more control over the project than the owner is willing to concede.

f. Lenders.

The rights and obligations of lenders may also become a contentious issue, particularly in situations where costs are readjusted due to change orders or the construction contract is assigned to the lender. In AIA documents, for example, architects are given interim authority to approve change orders which may raise costs and squeeze both owners and lenders financially. Article 7.3.8 of the A201 General Conditions provides that the architect makes interim determinations as to amounts due the contractor in certain change order situations. The parties may appeal the decision, but the owner (and owners' lender) must pay the amount while the dispute is arbitrated, which again is not an attractive result from the owners perspective. Both owners and lenders may seek contract provisions which will give them power to approve changes. Also, owners and architects may be at odds over the power of the owner to assign the contract to the lender, where the lender may be ill-prepared to take over the reigns of the project or is simply ill-informed as to its progress.

g. Indemnification for liens, fees, and economic loss.

In an effort to avoid contractual liability for work which they deem is not in their own area of expertise, owners, architects, and contractors will often require indemnification from each other in the contract. Obtaining special insurance which covers contractual liability and passing or splitting the cost with the other parties may defuse the issue. However, when deductibles are high, the indemnitor may be reluctant to grant indemnity. There are many types of clauses which may allow indemnification based on whether the injury was the result of the indemnitor's comparative fault, the indemnitor's majority fault, or even if injury was within scope of the indemnitor's contractual performance.

There are a number of common sense tips for minimizing exposure to risk including: 1) rejecting projects when they should be rejected, 2) assessing abilities

to produce the work required, 3) becoming knowledgeable on contractual liability avoidance, 4) transferring risk to others, including insurance carriers, where feasible, 5) allocating risk to those capable of managing it.²

A well-negotiated contract, by and in itself, cannot avoid misunderstandings. But the existence of such a contract offers a path to better understanding of the relationships and expectations of the parties to a construction project, which is frequently more complex and challenging than what anyone would anticipate.

² *See* Abramowitz.

APPENDIX

American Institute of Architects, Document B141-1997, Standard Form of Agreement between Owner and Architect, 11 pp.

American Institute of Architects, Document A201-1997, General Conditions of the Contract for Construction, 30 pp.