

CONSTRUCTION LAW

A NOTE FROM PARKER McCAY

Parker McCay is pleased to introduce to you the first edition of *Parker McCay Commentary: Construction Law*. We hope that this, the first in a series, provides interesting and informative articles for use by all parties involved in the construction industry. We invite you to submit topics of interest for future issues via e-mail to Dana B. Ostrovsky, Esquire, at dostrovsky@parkermccay.com.

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2007 AIA Document Changes

by Dana B. Ostrovsky, Esquire

The American Institute of Architects' (AIA) contract documents are the most widely-used standard contracts in the construction industry. Periodically, the AIA releases updated contract documents, which reflect changes and developments within the industry. This can greatly impact the industry. Even companies that do not use AIA documents are affected as the new concepts and provisions find their way into many non-AIA construction contracts. Effective March 31, 2008, it is mandatory for users to employ the 2007 updates, which include nearly 40 revised documents. Some of the most significant changes are set forth below.

Claims

All of the various claims topics are now collected and assembled in newly added Article 15 to A201. This is a vast improvement from prior versions, ending the confusing search for claims provisions that were previously scattered throughout.

Litigation v. Arbitration

Arbitration was mandatory in AIA forms from 1888 to 2006. It is no longer mandatory, but rather, it is an option to be chosen by the parties. Mediation remains since most construction disputes are resolved in

this manner. In addition, where owners were previously prohibited from joining arbitration claims against the architect with claims against the contractor, they now may join all parties in one arbitration provided there are related questions of law or fact. The procedure for arbitrator selection has not changed. Many owners favor this revision because it is cost effective and ensures uniform results.

Time Limits on Claims

In Article 13.7 of the 1997 edition of A201, the concept of an internal statute of limitations was introduced. This clause dictated that a statute of limitations would begin when the actual cause of the claim occurred, even if it had not been discovered. Thus, claims were sometimes barred before an injury occurred or was discovered, and therefore this provision was often stricken from the contract. Under the 2007 version, the time limit for commencing claims is now determined by state law, but is in any case not more than 10 years after substantial completion.

Initial Decision Maker (IDM)

In previous versions of the AIA documents, the architect had initial decision-making authority in most disputes and was typi-

cally decisive in resolving them. As expected, there were doubts relative to an architect's objectivity, especially when a given dispute involved the architect's conduct. B101-2007 provides the parties with the opportunity to formally appoint an independent IDM. If they fail to do so, the architect serves as the IDM by default.

Insurance

Subcontractors are now required to maintain both operations hazard coverage for third-party claims of injury and property damage that occur during construction, as well as completed operations coverage for a period of time after the project is complete, for a period specified in the contract documents. Additionally, the 2007 version significantly increases the project participants who the subcontractor must name as additional insureds. For completed operations hazard coverage, the general contractor must be named, and for operations coverage, the subcontractor must name the general contractor, the owner, the architect and the architect's consultants.

Consequential Damage Waiver

In 1997, the AIA introduced a new concept in A201 whereby the owner and con-

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The Importance of Proper Project Documentation

by Dana B. Ostrovsky, Esquire

Contractors hope that every project they undertake is free from problems, and that each is done on time and under budget. In reality, most projects present one challenge or another.

Proper project documentation is the best method to effectively deal with problems that may cause project delays and raise costs. Documentation is not only invaluable in minimizing exposure to or the impact of certain problems, it is also necessary to justify any additional expenses. In simple terms, documentation is necessary to hold responsible parties accountable for problems, and to secure payment for any extra work that is needed.

Companies may already maintain the appropriate records, but it is essential that the records are organized and reviewed regularly. Following is a summary of many of the documents that should be maintained on a project.

Original Project Estimate and Cost Reports

The original estimate or take-off sheet should be preserved until payment is received and a project is ready to close out. The estimate should be detailed and include each anticipated cost. This will become important if additional costs are incurred on a project, and a contractor is required to establish how the work at issue was originally budgeted to justify the added expense. It is also important to track project costs by category in order to easily identify any cost overruns that occur as well as their cause.

Log Books

Complete log books should be maintained for requests for information, shop drawings, submittals, change order requests and payment requisitions. Compiling a log after a project is well under way, or sorting out a delay caused by late submittal approvals with a log book can be difficult. A quick log book review will highlight most significant outstanding items.

Daily Project Reports

Daily project reports are typically kept by an owner's representative, such as the architect or construction manager, and may include weather conditions, trades on site, number of workers for each trade, equipment on site, and the work being performed each day. While contractors generally do not have control over what goes into these reports, they may be able to meet with the owner's representative regularly to request that any significant issues be noted in the reports.

Daily Foreman/ Superintendent Reports

Contractors' on-site representatives should be required to maintain daily foreman/superintendent reports. These reports should contain a record of site conditions, conversations, problems, field directives and other relevant information. Daily reports are likely the most important records to maintain, as they are generally made at the time an event occurs and therefore carry great credibility in identifying what happened with respect to a particular problem.

Transmittal Letters

These documents are extremely important records that reflect when documents were sent and to whom. Consequently, there can be no claim that a particular submittal or request for information was late. Many contractors find themselves unable to determine when documents were sent to another owner or contractor, as no documentation was created.

Project Correspondence

Correspondence should be used to notify affected parties of any problems on a project that were caused by others that may affect the work. A short letter may be all that is required to document the fact that another party was advised of a situation. The correspondence may also motivate another party to resolve the situation, preventing a problem from becoming unmanageable.

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tractor waived "consequential damages" against each other. This did not bar "direct" damages such as a roof leak or change order costs, but only "indirect" costs, such as lost revenue or sales, or extended home office staff time. According to members of the AIA Documents Committee, this topic was hotly debated during the drafting of the new edition. Ultimately, the AIA retained this waiver in the 2007 edition. The clause requires a mutual waiver of claims for consequential damages by the owner and contractor.

Prompt Payment

A201-2007 now requires contractors to pay subcontractors "no later than seven days after receipt of payment from owner." Under the 1997 version, contractors were required to "promptly pay," but that was never defined. An additional benefit to subcontractors is that owners can request written confirmation from the contractor evidencing payment to the subcontractors. If a contractor fails to reply within seven days, the owner can contact the subcontractors directly. The new version also states that when certification of payment is withheld by the architect, owners may contact subcontractors to ask about the payment status and can issue joint check payments.

The 2007 AIA revisions contain many new concepts and provisions. Some changes benefit subcontractors at the contractors' expense, and some benefit contractors at the owners' expense. Therefore, it is important to be familiar with the changes before contracts are signed, to avoid surprises down the line.

For more information on how the 2007 AIA changes may affect you, contact the author at 856-810-5844. ■

CASE LAW CORNER

New Jersey Case Law Update

Damages May Be Limited Even Without Signature

North Brunswick Township Board of Education v. French & Parrello Associates, Docket No. A-5413-06T15413-06T1 (February 26, 2008). Not for Publication.

In this recent decision, the Appellate Division of New Jersey affirmed a lower court's ruling that bound the North Brunswick Township Board of Education to a limitation of damages provision in a contract even though the Board had never signed the written contract.

The Board contracted with MRM Architecture to design an addition for its high school. In connection therewith, MRM issued a request for bids for preparation of a geotechnical evaluation of the site. French & Parrello was the accepted low bidder, and notably, its scope proposal did not include an environmental assessment or investigation and limited its liability to \$50,000. MRM reviewed the proposal and, based upon its recommendation to the Board, the Board issued a purchase order to French & Parrello.

French & Parrello issued its report finding that there was fill on the site, but that the proposed addition could be built on shallow foundations. It closed its report with a reminder that no environmental assessment had been performed. One year later, the Board discovered that the fill referred to in the report was actually pharmaceutical waste, which delayed the project for more than a year. The Board sued French & Parrello for more than \$6 million in delay damages, claiming that it never signed the proposal and was therefore not bound by its terms, which were void as against public policy.

On the Board's motion for summary judgment, the Court found that the Board was indeed bound to the terms of the French

& Parrello proposal since MRM reviewed the proposal as the Board's agent and had full knowledge of its terms, which were thus imputed to the Board in the absence of a signature. Additionally, the Court rejected the Board's assertions that the liability cap was void as against public policy. The Court referenced the well-settled principle that a court will not rewrite a contract to provide a party with a better bargain. (*Kampf v. Franklin Life Ins. Co.* 33 N.J. 36 (1960)).

There are two very important lessons to be learned from this case. First, you must be fully aware of your rights and obligations prior to entering into any contract. Otherwise, you could be bound to unfavorable terms, such as a limitation of damages, from which a court will not excuse you. In addition, remember that even in the absence of signatures, a binding contract can exist based on the parties' course of conduct.

Ambiguous Bid Specifications

The Landtek Group, Inc. v. Somerset County Park Commission, Docket No. A-5648-06T15648-06T1 (March 4, 2008). Not for Publication without the approval of the Appellate Division.

This case arose from public bidding for the construction and installation of a synthetic turf field at an athletic complex in Somerset County. Landtek was a disappointed bidder and challenged the initial award on the basis that the successful bidder, Bob Viersma & Sons, Inc., did not submit a conforming bid. The project was then ordered to be re-bid with clear, unambiguous bid specifications and instructions. Viersma appealed the order, arguing that Landtek lacked standing because its challenge was actually a challenge to the specifications that should have been asserted prior to the award.

The Court agreed with the trial court's finding that, in fact, it could not determine whether Viersma's bid was conforming because the language of the bid specifications requiring submission of an insured manufacturer's warranty did not clearly state whether the warranty had to be submitted with the bid, or upon completion of the project. Upon examining compliance with the specifications by the successful bidder, the trial judge found:

"[I]t is not stated anywhere in Section 627.02A(4) that multiple synthetic turf fields completed during the same project may be counted as individual installations ... Both the Park Commission and Viersma argued that one project listed in Viersma's bid included three or four synthetic turf fields, which the Park Commission counted as individual installations in order to reach the requisite number of five similar installations. This Court cannot allow the unclear language of the bid specifications to stand nor condone the Park Commission adjusting the specifications after the bids were opened in order to make the lowest bid responsive and conforming. To do so would fail to protect the public good by securing the benefits of fair and open competition ... It would ignore the fact that the requirement of five similar projects in the recent past deterred other contractors from bidding for the project."

Landtek was able to secure a rebid based on an ambiguous specification. However, if the Court had found Viersma's argument persuasive, Landtek would have lost the case for failing to assert a challenge to the specifications prior to bid opening.

Based on the Court's decision, it is this author's recommendation that any questions as to the meaning or specificity of bid documents are best investigated immediately to avoid the time and headache associated with a bid protest. ■

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PROJECT DOCUMENTATION

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Meeting Minutes

Meeting minutes should be reviewed on a weekly basis for accuracy. If something inaccurate appears in the minutes, a letter should immediately be written to the individual who prepared the minutes, or the original records will be deemed accurate. The minutes are typically circulated

among the meeting attendees for this purpose. Thus, creating a company policy on the review and revision of minutes is extremely important.

Photographs

A photograph is worth more than 1,000 words. Photos should be used to document

the progress of the work as often as necessary, and to detail specific events. For example, if construction on a project with a tight deadline and significant liquidated damages for late completion is delayed for a considerable amount of time due to unusually heavy snow, there is nothing more convincing than a photo of the site covered in snow.

In conclusion, there is no full-proof way to anticipate what documents a company will need to establish or defend against a claim. Therefore, the best thing a contractor can do is ensure that their company accurately maintains complete job documentation on each and every project. This will go a long way toward minimizing exposure to claims and maximizing the potential of any favorable claims. ■

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