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So the 2007 AIA Contract Documents Grant You a Choice on Dispute Resolution Procedures: *So now what?*

By Robert Alfert, Jr.



The American Institute of Architects (AIA), at the close of 2007, updated its universal contract forms, including the owner-contractor and owner-architect agreements and the general conditions of contract. While the various revisions address a myriad of subjects, one notable revision involves the dispute resolution processes previously employed by those agreements. Using the 2007 AIA A101 as a vehicle for this discussion, the notable changes are as follows:

2007 AIA Contract Documents continued on page 2

Construction Attorneys Lead Educational Seminars Across The State

Lorman Education Services, a leading provider of continuing education programs, hosts dozens of construction-related seminars in Florida each year, designed for attorneys, construction and project managers, presidents, vice presidents, engineers, architects, contractors, subcontractors and contract managers. In 2008, three Broad and Cassel Construction Law and Litigation attorneys served as featured speakers at Lorman construction seminars.

Mike Wilson, Construction attorney in our Orlando office and Chair of the Construction Law and Litigation practice group, spoke at three Lorman seminars in 2008. Most recently, he presented "The Fundamentals

Educational Seminars continued on page 6

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ARTICLE 6: DISPUTE RESOLUTION

§ 6.1 INITIAL DECISION MAKER

The Architect will serve as Initial Decision Maker pursuant to Section 15.2 of AIA Document A201-2007, unless the parties appoint below another individual, not a party to this Agreement, to serve as Initial Decision Maker. (If the parties mutually agree, insert the name, address, and other contact information of the Initial Decision Maker, if other than the Architect.)

§ 6.2 BINDING DISPUTE RESOLUTION

For any Claim subject to, but not resolved by, mediation pursuant to Section 15.3 of AIA Document A201-2007, the method of binding dispute resolution shall be as follows: (Check the appropriate box. If the Owner and Contractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.)

- Arbitration pursuant to Section 15.4 of AIA Document A201-2007
- Litigation in court of competent jurisdiction
- Other (Specify)

This article, in addition to pointing out the substantive changes on the dispute resolution processes, will discuss Contractors' options under the 2007 documents and the factors that should be considered in determining which option(s) to select.

Binding Dispute Resolution

The AIA documents have mandated arbitration as the exclusive form of binding dispute resolution for more than 100 years. The genesis of this mandate arose from a handful of reasons, the two primary being the belief that seasoned construction arbitrators are better suited to rule on complex construction disputes rather than layperson judges and juries and that arbitration was a faster dispute resolution process. While the proponents of arbitration remain, a loud voice favoring litigation or an option between the two processes grew over the past decade.

Ultimately the AIA determined that freedom of choice was a more measured approach for its contract forms. The 2007 forms, therefore, provide a "check box" approach where contracting parties can affirmatively choose their dispute resolution method for the project. The check box options include:

- Arbitration pursuant to Section 15.4 of AIA A201
- Litigation in a court of competent jurisdiction
- Other (with a blank for specifying the other method)

An important revision in these forms is that litigation is now the default option. In the event that the parties do not check the box for any dispute resolution option, "Claims will be resolved by litigation in a

Orlando Attorneys, Robert Alfert and Trey Tate Earn Construction Law Certification

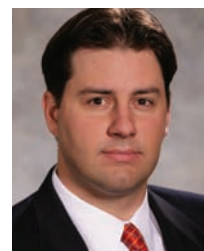
Orlando Partner Robert Alfert, Jr. and Associate George W. "Trey" Tate recently became Florida Bar Certified in Construction Law. To achieve certification, their competency and experience within construction law was tested, along with their professionalism and ethics in practice.

Established in 1982 by the Supreme Court of Florida, board certification helps consumers identify specialists in various areas of law, and it recognizes attorneys' knowledge, skill and proficiency in their area of practice. Certification is the highest level of evaluation of the competency, experience, professionalism and ethics of attorneys within an area of law.

Robert Alfert, Jr., a member of the Firm's Construction Law and Litigation, Commercial Litigation and Appellate Practice Groups, is a Construction Arbitrator for the American Arbitration Association. With more than 15 years of experience in construction law and litigation and a degree in architecture, Mr. Alfert has worked in both private and public sectors, providing counsel and handling issues such as contract and change order negotiations and drafting, bid protests, arbitration and trial.



Also a member of the Construction Law and Litigation and Commercial Litigation Practice Groups, George W. "Trey" Tate was designated in 2008 as a "Florida Legal Elite Up & Comer" by *Florida Trend* magazine. Prior to joining Broad and Cassel, he spent four years serving as Deputy District Attorney for the County of Los Angeles. Concentrating his practice in the area of complex construction litigation with an emphasis on lien and bond claims, Mr. Tate also handles delay claims, construction defect claims and payment disputes for his clients. ■



1 Do identify your company's intellectual assets

Without first identifying an asset, a business cannot properly exploit that asset. Still, many businesses completely overlook intellectual assets. At best, overlooked intellectual assets lie fallow. At worst, they are abandoned to competitors. In addition, early identification offers the best opportunity to protect intellectual assets against disclosure before the necessary protection is implemented.



By Alejandro ("Alex") J. Fernandez

3 Do's For Every Business Executive

2 Do protect your company's intellectual assets

Your competitors are navigating in the same market(s) as your company. You should take all prudent steps to prevent them from raiding your company's valuable intellectual assets and claiming them. It is also critical that the proper internal controls are in place to ensure that ownership of intellectual assets is in the company, and not with individual employees.

3 Do avoid infringing the intellectual property of others

Companies typically lose stock market value upon being sued for patent infringement. That is in addition to legal fees, which frequently exceed half a million dollars for defending a patent suit. There are simple steps that a business can take to reduce the risk of an expensive patent suit. ■

Mr. Alejandro "Alex" J. Fernandez is Of Counsel in the Tampa office of Broad and Cassel. He leads the Intellectual Property Practice Group. He can be reached by calling 813.225.3057 or by email at afernandez@broadandcassel.com.



A W A R D S A N D R E C O G N I T I O N

Construction Group Honors



Broad and Cassel's Construction group was once again recognized by renowned legal guide *Chambers USA: A Guide to America's Leading Business Lawyers 2009*, the only legal directory to rank law firms and individual attorneys. Highly regarded for its "expert management of delay and defect claims," the group is led by Michael K. Wilson, who was regarded as "a first-class lawyer with deep industry experience."

Law & Politics magazine has recognized Michael K. Wilson, Chair of the Firm's Construction Law and Litigation Practice Group, Orlando Partner Robert Alfert, Jr., and Destin Of Counsel Bruce Anderson as 2009 "Florida Super Lawyers." Mr. Wilson was also included as one of the Top 100 Attorneys in Florida and one of the Top 50 in North Florida. In addition, Orlando Associate George "Trey" Tate was named a "Rising Star" in *Law & Politics's* list of 2009 Florida Super Lawyers. ■

Welcome Kent Koch



The Construction group is pleased to welcome Kent Koch to the Orlando office of *Broad and Cassel*. In 2004, Mr. Koch joined the Firm's Boca Raton office as an Associate in the Real Estate practice group. In

February 2009, he transferred to the Orlando office to focus his practice on construction law and litigation. ■

court of competent jurisdiction.” This is a notable revision as, absent the parties paying close attention to the changes to the new forms, parties may unwittingly end up with litigation as the default option.

So What Do You Do?

In making a determination regarding what dispute resolution option to use, the Contractor should make a conscious decision on which option is best suited for the project at issue after a careful weighing of all pros and cons. There are clear circumstances where one form of dispute resolution may be more appropriate than another, depending on the nature of the project and the parties involved.

There are various ways of ameliorating the cons of whatever dispute resolution process the parties select, but such a discussion is well outside of the scope of this article. One example will suffice: One of the cons of each process, whether it be arbitration or litigation, involves discovery. The common complaint about arbitration is that there is no absolute right to discovery (such as depositions), whereas the common complaint in litigation is that discovery rights are far too expansive, causing litigation to be invasive, costly and drawn out.

Regardless of which option, parties should consider supplementing their contract to map out basic discovery limitations and rights. The parties could expressly identify in their contract such matters as the number of depositions that will be permitted (including duration); the scope of document exchange; document management; expert report requirements; and other related matters. The “other” check box set forth in the 2007 AIA contracts is a perfect place to set forth these matters.

Creative parties can also construct a dispute resolution process that is neither traditional arbitration nor litigation. The “other” check box in the 2007 AIA documents accords the parties total freedom of choice in this regard. Some options include:

- Dispute Review Boards
- Non-Binding early arbitration followed by binding litigation
- Arbitration under different rules (AIA specifies AAA rules)
- Binding independent decision-makers
- Fast-Track Arbitration for disputes under \$75,000

The options are unlimited, and the new AIA structure forces the parties to deliberate on what dispute resolution process best suits the parties and the project. Choice is a good thing.



of any claim, dispute or other matter in question not described in the written consent.

§ 15.4.4.3 The Owner and Contractor grant to any person or entity made a party to an arbitration conducted under this Section 15.4, whether by joined or consolidation, the same rights of joined and consolidation as the Owner and Contractor under this Agreement.

This reversal on the issue of consolidation is a positive development. The inefficiencies related to the prior inability to consolidate related proceedings have been ameliorated. This change dramatically enhances the value of arbitration as a dispute resolution option.

Initial Decision Maker

The AIA documents, for close to 100 years, have automatically appointed the architect of record as the individual charged with responsibility for rendering the initial decision on disputes

between the parties. Before either party could proceed to arbitration on any disputes arising from the project, the dispute had to be submitted to the architect for consideration. The architect then had the authority to reject

the claim in whole or in part, approve the claim or suggest a compromise. The contract documents required the parties to honor the architect’s decision and proceed with the project, subject to a right of appeal.

The criticisms of this approach have been varied. The common complaint from the contractor community is that the architect is potentially biased as he or she is paid by the owner. The larger concern, however, is that the architect’s role as the initial decider carries an appearance of impartiality when the issue in dispute potentially involves architect negligence. On the other side, owners have a tendency to view architects as their “hired guns,” and therefore expect them to serve as an advocate for them rather than an independent neutral. All of these concerns are valid.

In addressing these concerns, the 2007 AIA revisions grant the parties a choice. Section 6.1 of the 2007 AIA A101 provides the parties an opportunity to designate an “Initial Decision Maker (IDM)” to render initial decisions on claims. The IDM can be any individual or entity that the parties choose to serve as a neutral. The architect of record will only

Arbitration (Pros)

- Expert decision makers
- Opportunity for faster resolution
- Opportunity for lower cost
- Better management of process (select your own arbitrators, ability to manage discovery scope & limitations, selecting form of award, etc.)
- Finality (appeals difficult)
- Privacy

Arbitration (Cons)

- Quality of rulings on purely legal issues
- Definitiveness of arbitrators (concern regarding splitting results, evidentiary rulings, sanctions)
- Erroneous awards, limited appeals
- Limited discovery rights
- Limited rights to preliminary relief (injunctions, garnishment)
- Upfront cost of filing fees

Litigation (Pros)

- Expansive discovery rights
- Opportunity for preliminary relief
- Opportunity for pretrial rulings on key issues (including summary judgments or dismissals)
- Expansive cross-examination rights
- Expansive appeal rights

Litigation (Cons)

- Less control over process
- Generally more costly (money and time)
- Parties lose control over final result
- Generally takes longer to reach final adjudication
- Appeal rights can extend finality
- Public process (no privacy)

Miscellaneous Related Changes

In the event that the parties affirmatively select arbitration, the AIA also made complementary modifications to the operative rules of arbitration and the rules related to consolidation of proceedings.

Both the 1997 and 2007 AIA documents specify the use of the Construction Industry Arbitration Rules of the American Arbitration Association for mediation and arbitration. The 1997 version specified that the rules currently in effect would be applied. The 2007 version now specifies that the rules in effect at the time the agreement is executed shall be followed. The purpose of this amendment was to eliminate the uncertainty of rule changes during the period of contracting, as the parties have no control over such changes, and such changes could impact substantive rights.

As it pertains to consolidating related proceedings, such as parallel disputes between an owner-architect and owner-contractor, the 1997 version of the AIA documents did not permit consolidation. The rationale was that the consolidation of proceedings elongated the process — therefore undercutting some of the advantages of arbitration — and different standards of care existed in these types of disputes. This stated

rationale, however, was outweighed by the practical reality that unconsolidated, related proceedings were costly, inefficient and could lead to inconsistent results.

The AIA documents, specifically Section 15.4.4 of 2007 A201, now provide as follows:

§ 15.4.4 CONSOLIDATION OR JOINDER

§ 15.4.4.1 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 15.4.4.2 Either party, at its sole discretion, may include by joined persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joined. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration



Educational Seminars continued

of Construction Contracts: Understanding the Issues,” on October 30, at the Embassy Suites Orlando Downtown in Orlando, Fla. The seminar gave attendees practical insight needed to understand the legal and administrative issues associated with construction contracts.

In June, Mr. Wilson spoke at the Lorman seminar “Managing Construction Projects in Florida,” at the Holiday Inn Express Speedway in Daytona Beach, Fla., addressing the legal issues associated with strategies to maintain control and minimize the risks inherent in the construction process.

He also presented the seminar titled, “Condominium Construction Issues in Florida,” which took place August 3 at the Downtown Sheraton in Orlando, Fla. Mr. Wilson, along with three additional construction attorneys, tackled issues including risk management, claims avoidance and recent legal developments related to condominium construction.

Orlando Partner Robert Alfert Jr. and Orlando Associate Jeremy T. Springhart presented on “Solving Water Intrusion and Mold Problems in Florida,” on August 21, at the Sarasota Cay Club Resort and Marina in Sarasota, Fla. The seminar educated industry professionals on the legal process related to leaks, mold, bacterial contamination and water and property damage.

Mr. Alfert and Mr. Springhart also spoke at an April seminar titled, “Legal Issues Facing the Construction Professional: The Most Common Pitfalls and How to Avoid Them.” ■

Why Contractors Need To Pay Attention To Notices Of Commencement

By George “Trey” Tate

The Notice of Commencement is one of the most important documents on a construction project and is the first document filed for the lien process, but its importance is often overlooked by contractors. The failure to pay attention to the Notice of Commencement can have serious consequences and dramatically affect a contractor’s ability to recover for the work it performs on a project.

There are three main issues contractors need to pay attention to regarding their project’s Notice of Commencement.

When does it expire?

Pursuant to Florida’s Construction Lien Statute, the Notice of Commencement expires one year after it is filed unless the Notice designates a different time, which can be shorter or longer than one year. Having a Notice of Commencement expire during a project can severely impact a contractor’s lien rights. If a lien is filed during the period stated on the Notice of Commencement, then it relates back to the date the Notice of Commencement was filed. Put simply, if the Notice of Commencement was filed on June 1, 2008, any lien filed before the Notice of Commencement expires is also deemed to have been filed on June 1, 2008. Any lien recorded after the Notice of Commencement expires is deemed filed at the date and time it was filed. Therefore, once the Notice of Commencement expires any contractors who have not recorded their liens will be in a situation where they need to race to the courthouse to record their liens before other project contractors, subcontractors and suppliers whose liens have not yet been recorded or before the owner further encumbers the property. In that situation, the first lienor to record will have priority over any later-recording lienors and a better chance of recovering whatever equity exists in the property at foreclosure.

A more significant problem for a contractor when the Notice of Commencement expires occurs if the Owner sells the property or a portion of the property. In addition to giving potential lienors information on the property and how to preserve their lien rights, the Notice of Commencement also lets third-party purchasers know that work is proceeding on the property and that lien claims may be forthcoming. If the Notice of Commencement expires, however, a third party who purchases after the expiration of the Notice of Commencement and before any liens are recorded takes the property free and clear of all liens and cuts off the ability of all potential lienors to lien the property. This situation most commonly arises in the context of multi-residential unit complexes such as condominiums where unit transfers may take place before construction is completed on the entire project. A prudent contractor will make sure to track the Notice of Commencement expiration date to ensure that it files its lien in advance of that date. In the event that it does not appear that construction will be completed prior to the expiration of the Notice of Commencement, the Contractor should request that the owner amend the Notice of Commencement to extend the expiration date.

Was the bond attached?

As the general contractor, it is important for you to have your payment bond attached to the lien. In the event that the bond is a standard payment bond issued pursuant to § 713.23, Florida Statutes, having the bond attached means that any lienors with whom you do not have a direct contract must give you a notice of contractor within forty-five (45) days of starting work in order to have a claim against your bond. If the bond is not attached, they do not have to file the notice to contractor until forty-five (45) days after they receive notice of the bond. If the general contractor is not paying attention to the Notice of Commencement and fails to recognize that the bond was not attached, he may give subcontractors and suppliers who were otherwise too late to make a bond claim a second chance.

While the failure to attach a standard § 713.23 payment bond to a Notice of Commencement can be troublesome, the failure to attach a conditional payment bond issued under § 713.245 is even more so. As a contractor, a conditional payment bond provides you with two main benefits. First, if you are required to bond the project, any pay-when-paid clauses that you have in your subcontracts will be meaningless unless you have a conditional payment bond. Second, if the owner does not pay you, you are not left in the difficult position of having to pay all of your subcontractors before the owner pays you. In the event you managed to negotiate with the project’s owner to allow for the use of a conditional payment bond rather than a standard payment bond, the failure to attach the conditional payment bond to the Notice of Commencement prior to the start of construction converts your conditional payment bond into a regular payment bond and deprives you of those benefits.

When was the Notice of Commencement recorded?

The date the Notice of Commencement was recorded is important for two reasons. First, as stated above, the date of recordation often sets the date of expiration, particularly when the standard language that sets the expiration at one year from the date of recordation is not modified. The second issue is that construction must actually commence within ninety days of the date the Notice of Commencement is recorded, or the Notice of Commencement is void. In the event that a project suffers an early delay and a substantial amount of time passes between the date the Notice of Commencement is recorded and the start of construction, the contractor should check to see if it is still within the ninety day period or if a new Notice of Commencement needs to be recorded.

Conclusion

In summary, it would be prudent for contractors to ask the owner to allow them review all Notices of Commencement before they are recorded and to institute procedures to track the expiration dates. Simply adding the expiration date to the contractor’s critical path schedule could help ensure that the contractor’s lien rights are not adversely affected. ■

Mr. George W. “Trey” Tate, III, is an Associate in the Orlando office of Broad and Cassel. He is a member of the Construction Law and Litigation and Commercial Litigation practice groups. He can be reached by calling 407.839.4200 or by email at gtate@broadandcassel.com.

serve as the IDM if the parties do not separately designate a neutral. While the 2007 revisions have some subtle process changes, the process for initial decisions remains relatively similar to the 1997 AIA documents.

Granting the parties greater choice, and forcing parties to actually think about what dispute resolution mechanism is appropriate for them and the specific project, is a positive development. While the architect of record may still be the most appropriate IDM for many projects, the parties can now balance some of the advantages of bringing in a true neutral. Some of the factors that may weigh into that equation are cost, time and expertise. No doubt that appointing an independent neutral will add cost and potentially time to the project. The architect is already familiar with the project. An IDM will have to come up to speed; that task is more onerous as the project size or complexity grows. There may also be circumstances where a greater level of expertise would be helpful in the dispute resolution context. Most architects are “generalists.” Some projects may justify an independent expert to serve as the IDM.

Conclusion

Many of the 2007 AIA revisions should be commended. Granting the parties an affirmative choice on how disputes will be evaluated and resolved accords the parties greater control over their own destiny. The choice requirement forces parties to deliberate on what process melds best with the project requirements and the composition of the project participants. There is no “one size fits all” in this complex construction arena. Customizing the dispute resolution processes to fit the needs of the parties and the project will enhance the likelihood that parties can resolve differences amicably, and keep projects on track for timely completion. ■

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Government Contracts Could Mean Big Business: Are You Prepared?

By Robert Alfert, Jr.

More and more contractors are now shifting their focus from the private sector to the governmental contracts, where many hundreds of millions of federal dollars have already been allocated towards federally-funded construction projects in Florida.

Unlike commercial contracting, government contracting is regulated by special procurement statutes and regulations on contract formation, bidding, negotiations, accounting, labor relations and many other issues not typically addressed in commercial construction contracts. Robert Alfert, Jr., who was recently quoted in the *Orlando Business Journal* on the --competitive bidding process, identifies ten common mistakes many bidders typically make when preparing their submissions:

Top 10 Bidder Errors

1. DBE/MWBE compliance (minority programs)
2. Qualifications or conditions in bids
3. No bid bond or wrong amount
4. Submitting an unsealed proposal or submitting a proposal by facsimile

5. Late submissions
6. Calculation errors
7. Submitting a proposal without the proper signatures
8. Incomplete forms
9. Information missing (qualifications, references, resumes, insurance, bonding capacity, licenses)
10. Information in wrong order/format

Unquestionably, the number one reason for bid rejections or downgrades continues to be compliance with the governmental entities' minority participation programs. As each governmental entity has distinct requirements, including differing percentage goals and unique forms, it is imperative that bidders fully educate themselves on these matters before the bid deadline. Most governmental entities have compliance officers that are usually very eager to assist bidders not only with the particulars of their process, but also in identifying available DBE or MWBE firms. ■

Mr. Alfert recently conducted a statewide seminar entitled "How to Bid For Stimulus Package Construction Projects." A copy of the program can be obtained by contacting Mr. Alfert at ralfert@broadandcassel.com.

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