



Summer Conference

MIDWEST ASSOCIATION OF PUBLIC PROCUREMENT

New Laws and Perennial Disputes under Construction Contracts in Illinois

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Today's Discussion

- I. Introduction to construction contract forms
- II. Five key contract issues in negotiation / litigation
- III. Question & Answer

Today's Goal:

Introduce basics and demonstrate importance of key clauses

Use of Form Construction Contracts

- Similar provisions are a practical means to save time and increase the likelihood of covering the essential issues in the contract.
- Various organizations publish forms available for documenting agreements to perform construction work



Acronym	Organization
AIA	American Institute of Architects
AGC	Associated General Contractors
ConsensusDOCS	Coalition of industry groups
EJCDC	Engineers Joint Construction Documents Committee
AOD	Associated Owners & Developers

The Law of Contracts

- Common law tends to be more uniform than applicable statutory schemes
- Unique state laws to consider
- Parole evidence rule discussion of pre-contract negotiations
- Integration Clause –
What documents are included in the “contract?”


AIA Form Construction Contracts


- Clear and organized
- More familiarity by attorneys and clients
- Authoritative
- AIA is more “fair”
- Subcontractor Rider still helpful
- Sources to collect case law and construe contract provisions
- Use complimentary and current forms to decrease internal inconsistencies




Common Commercial Construction Forms

The most commonly used forms for commercial construction projects are:

- 1
AIA A201
General conditions of the Contract for Construction

- 2
AIA A101
Standard Form of Agreement Between Owner and Contractor

- 3
AIA A401
Standard Form of Agreement Between Contractor and Subcontractor

Key Contract Issues



**5 Key Issues
to Cover**

1

Changes under the contract

2

Differing site conditions

3

Delay and other timing issues

4

Payment issues

5

Contract termination

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Changes Under the Contract

- The description of the work the contractor or subcontractor is expected to perform is called the “scope of work”
- Many factors cause a change or perceived change in scope

Change Orders – When are they needed?

- A change order* is a written instrument signed by the Owner, Contractor and Architect stating:
 1. Scope change
 2. Adjustment in the Contract Sum
 3. Adjustment in the Contract Time

*Provisions from the AIA A201 that pertain to contract changes

Issuing Change Orders

- A written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment in the Contract Sum or Contract Time
- Within the general scope of the Contract
- Contract Sum and Contract Time to be adjusted accordingly

7.1.2* ...A Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

*Provisions from the AIA A201 that pertain to contract changes

Change Orders – Key Points for Consideration

- ✓ Changes to the contract must be in writing.
- ✓ Requirement of a writing may be waived by the conduct of the parties.
- ✓ Must show waiver by clear and convincing evidence.
- ✓ Risks to both sides if not in writing.
- ✓ In practice, changes are often oral.

Changes Under the Contract – Common Issues

Change issues often in dispute:

1. What are the contract terms?
2. Is it within original scope?
3. Were change order approval procedures followed or were they waived?
4. Calculation of damages

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Duty to Inspect

- In the bidding process, contractor must calculate expected costs, which includes a review of the site conditions.
- Section 3.2.1 of AIA A201, a contractor must either visit the site and observe surface conditions or take the risk that they are different than expected.

Concealed Conditions

What is below the surface or behind the old wall?

Section 2.2.3 of A201 - Owner to furnish basic information to contractor and contractor may rely on it.

- Another method - adjust the contract price for unknown site conditions and increased costs of performance.

Section 3.7.4 of A201 - Concealed or Unknown Conditions

- Permits a contractor to recover costs incurred due to unforeseen site conditions.
- Do not overlook notice requirements.

Site Conditions – Common Issues

Litigation Issues on Site Conditions :

1. Owner knew or should have known site conditions
2. Fraud
3. Condition was foreseeable
4. Contract's notice procedures followed or waived
5. Owner estopped from relying on the clause
6. Impossibility of performance
7. Calculation of monetary impact of changed condition

Key Contract Issues



5 Key Issues to Cover

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Delay and Other Timing Issues

- Section 8.2.1, time is of the essence
 - Contractor must expeditiously achieve Substantial Completion within the contract time.
 - Change orders may provide for an extension of the schedule.
 - Contractor must schedule the work of subcontractors and its own work force to assure timely performance.
 - Owner must provide site access under circumstances that permit the job to move forward efficiently and expeditiously.
 - Putting off controversy over scheduling or change orders keeps job moving forward at risk of nonpayment or litigation at end of job.



Delay – Owner / Contractor

Owner Perspective

If the work is not completed by the agreed completion date, the owner will be unable to use the building or other structure when he had intended to use it.

Contractor Perspective

If the work was bid with the understanding that it would be performed efficiently within a certain time frame, changing the schedule can be devastating to a project's profitability.



The owner and contractor each want to be compensated for damages caused by the other's delay, but they also both want protection from damage delay claims that might be brought by the other party.

In the Case of a Delay...

- If Owner delays, Contractor is entitled to an extension of time without liability for delay damages
- Claims not made within the time requirements of the contract may be denied on that basis, even though it would otherwise be allowed
- Under section 8.3.3 both the Owner and Contractor are also entitled to recover for any damages they incur due to a delay by the other party

“No Damage for Delay” Clause

- Strictly construed against the party attempting to enforce them. In Illinois and some other states, "no damages for delay" clauses will not be enforced when:
 1. A party is guilty of bad faith, fraud, concealment, misrepresentation or hindrance;
 2. Where the delay was not within the contemplation of the parties when the contract was entered into;
 3. Where the delay is unreasonable in duration; or
 4. Where the delay is attributable to the inexcusable ignorance or incompetence of another party.
- Liquidated damages - must be reasonable and not punitive
- Purpose is to avoid difficulty of proving amount of damages caused by delay

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Payment Procedures

- Payment – most important issue to client
- Payment procedures are fairly uniform - withdraw requests to be made once a month, followed by payments within some set number of days thereafter
- Contractors and subcontractors who happily follow requirements established by title companies to obtain interim and final payments



Key Pay Clauses

Pay when Paid

- A “pay when paid” clause controls the timing of when a general contractor must pay a subcontractor, typically requiring payment a number of days after the general receives payment from the owner.

Pay if Paid

- A “pay if paid” clause relieves a general contractor of obligation to pay a subcontractor if he is not paid by the owner. Most states enforce such provisions.
- In some states, the pay if paid clause will not be enforced if the sole reason for nonpayment is the contractor.
- They are viewed unfavorably. A party seeking to enforce such a clause will lose its protection by acting or failing to act in a manner that fails to bring about the condition.

Prompt Payment Acts

- All the states and the Federal government have some form of prompt payment law for public projects.
- Approximately half of the states have prompt payment laws for private projects.
- Most construction contracts provide for retention to be withheld by an owner of five to ten percent.
- A majority of states have some laws restricting retention that may be withheld on public contracts and some states have laws restricting retainage on private projects.

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Contract Termination

- Owner and the Contractor are permitted to terminate the Contract pursuant to Article 14 of the AIA A201.
- Contractor's Termination
 - Bases: Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification, and others.
 - If the contractor terminates for a permissible reason, upon seven days notice, he is entitled to "recover from the Owner payment for Work executed, including reasonable overhead and profit, costs incurred by reason of such termination, and damages. Section 14.1.3.



Owner's Termination

- An Owner may terminate contract for cause or for convenience.
- If the unpaid balance of the contract exceeds what it cost to finish the work, then the balance shall be paid to the contractor.
- Owner may also terminate for convenience, and he need not have any reason for doing so.
- The measure of damages includes the contractor's overhead and profit if termination was for convenience.

Conclusion

- The judicious use of AIA form contracts can be a practical means of documenting an agreement to perform construction work.
- Attention to key provisions discussed can reduce misunderstandings in the construction process or, at least, position your client for a more favorable outcome in the unwanted dispute.



Questions?

