American Institute for Architects 2017 documents: Striking just the right balance for property owners? - by Virginia Trunkes

June 20, 2017 - Spotlights

Every year that ends with a “7” is an exciting time for those who follow trends in construction contracts! It is when the American Institute for Architects (AIA) issues an updated set of its famed standard-form agreements, which include the well-known A-101, A-201, B-101, etc. The AIA continues this tradition as a service to the industry in which architects play an integral role, along with the contractor and owner. After all, times change, economies change, and different business challenges arise, all of which must be incorporated into important commercial agreements.

Inasmuch as the AIA offers its agreements for sale, and because it competes with other organizations selling their own sets of agreements (e.g., ConsensusDOCS), it is economically incentivized to keep its agreements relevant. While the AIA remains the industry leader, it is no secret that its agreements tend to favor the architect in how they define service scopes and allocate risk. (Indeed, major contractor trade associations such as the Associated General Contractors of America have chosen to endorse only the ConsensusDOCS.) These considerations are crucial because every construction project contains certain inherent and unpredictable risks which need to be borne–somehow.

Should a property owner use the AIA agreements “as is?” Or should the owner modify them, or use other agreements with varying service-scope defining and risk allocation provisions? The answer depends on the owner’s objectives. How does the owner view the separate roles of the architect and contractor? Following the design phase, will the architect serve as a key project administrator and facilitator, or as more of a consultant? Note that it is not uncommon for a contractor to resist contract terms affording the architect the ultimate decision-making authority.

An owner’s preference for which type of agreement to use may depend on the size of the project or the owner’s development/renovation experience–or not. While all three players–owners, architects and contractors–share the goal of completing an intact project on time and on budget, under the traditional design-bid-build structure (versus design-build), the roles and the responsibilities differ. The contractor and its team of subcontractors implement the architect’s drawings and specifications. The architect must ensure that his or her vision is effectuated properly, while the contractor must be able to implement its means and methods to perform the work effectively.

A large, experienced developer may not want or need an architect to walk it through the process and confirm that the contractor is performing (and issuing requisitions) as anticipated. On the other

hand, a large, experienced developer working with a “hot” architect creating a cutting-edge exterior design may not want to shove the architect over to the sidelines.

Provisions in construction agreements reflecting the architect-contractor tension focus on which party, architect or contractor, communicates directly with the owner; prepares regular project progression reports; reviews and makes recommendations on applications for payment; prepares change orders and construction change directives; decides on whether work is non-conforming and should be rejected; chooses disputed monetary amounts; decides on payment withholding; and is the first-line negotiator and resolver of disputes. For the past decade, the A201-2007 (the A201 is the “keystone” document adopted by reference in owner/architect, owner/contractor, and contractor/subcontractor agreements) has essentially assigned all rights to the architect. In contrast, the ConsensusDOCS Owner-Contractor agreement, the CD 200, has provided for discussions directly between the owner and contractor, and a third-party “dispute mitigation procedure”–with no substantive reference to the architect.

The new A201-2017 addresses the architect-contractor tug-of-war with some more contractor-friendly terms, e.g., reducing the burden on the contractor to be aware of potential copyright or patent infringement (§ 3.17). Less contractor-friendly terms include one which clarifies that control over the means and methods is within the sole province of the contractor, with the unequivocal corresponding responsibility for jobsite safety, including an additional onus on the contractor, in the event the contract documents give specific instructions about means and methods that the contractor perceives as unsafe, to propose alternative means and methods, to be then evaluated by the architect “solely for conformance with the design intent for the completed construction (§ 3.3.1). Other less contractor-friendly terms include requiring (versus “endeavor to”) that the owner and contractor include the architect in their communications relating to the architect’s services (§ 4.2.4); eliminating the provision absolving the contractor from liability for “rely[ing] upon the adequacy and accuracy of the performance and design criteria specified in the contract documents” (§ 3.12.10.1); and outright permitting the architect to “order,” versus “authorize,” minor changes in the work without an upward adjustment to the contractor’s fee (§ 4.2.8).

The owner should strive for a comfortable balance preserving the resource of an independent, licensed design professional to offer assessments and support, while also providing an accommodating climate for its entrusted contractor.

Virginia Trunkes is a partner at Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York, N.Y.