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What To Know About Architect Group's New Contract Forms

By **John Kennedy**

Law360 (May 30, 2018, 11:00 AM EDT) -- With the American Institute of Architects set to phase out a number of old contract documents and require attorneys to use a new set unveiled last year, those who use the contracts need to familiarize themselves with what experts have called evolutionary, but not revolutionary, changes.

Since 1888, when the AIA published its first standardized contract form, the association's documents have been widely used by construction industry professionals as they draw up agreements for their projects. Recently, custom contracts and forms developed by competitor groups such as ConsensusDocs have taken a bite out of the AIA's market share, but most lawyers say the group's documents comprise the majority of the contracts they see each year.

The most recent update focuses on the design-bid-build delivery model, in which a project owner hires separate parties to complete the design and construction aspects of the job.

The most significant difference between the 2017 and 2007 versions of the documents is how they handle insurance, but the newest iterations also include a number of changes aimed at keeping up with the construction industry and making the documents themselves easier to use. They've been generally well-received, but there are still certain aspects that users think could've been handled better.

There's More Flexibility for Insurance

The AIA's decision to delete three-fifths of the insurance section in its A201 document and incorporate much of it into a seven-page exhibit that can be attached to several of its contract forms was widely acknowledged as the biggest change. Now, the insurance requirements, which were once scattered throughout the documents, can be easily separated and sent to insurance brokers for review, said Gentry Locke partner K. Brett Marston.

"Across the board, one of the things they tried to do is clean up how the insurance is going to work in all of the AIA contracts," said Marston, who chairs his firm's construction practice group. "That's not very sexy, but it's kind of important and practical when you get down to doing this kind of work."

It may not be flashy, but it's critical, especially for contractors and owners, to understand what kind of insurance coverage is available for a given project. Communication with insurers is key because a selected type of coverage may not work well for every project, said Frantz Ward LLP partner Nora E. Loftus.

"Insurance is complicated and it's something that changes constantly," Loftus said, explaining that insurers constantly change their policies to address case law and other changes in the industry, so it's important to keep insurance agents in the loop.

Time will tell whether the shift to an insurance exhibit was a worthwhile move, especially since most people are still using the 2007 forms, but it seems to have received positive reviews. Peckar & Abramson PC partner Sean P. Ryan, for one, said he's a fan of the exhibit because it grants the parties some flexibility on their insurance choices.

That type of adaptability and ease of use is exactly what the AIA was going for, according to Kenneth W. Cobleigh, a construction law attorney who oversees the development and publication of the association's contract documents.

He said intense thought went into the decision to put all the insurance information in one place and that the 35 men and women who created the 2017 forms wanted something that could be easily edited and shared among parties.

Given the fluid nature of the insurance industry, it's also possible that the exhibit will need to be updated before 2027, when the next version of the documents is set to be released. Instead of issuing a revised 30-page form to account for new developments, it will be easier and faster to simply tweak the exhibit, Cobleigh said.

Updates to Termination for Convenience Provisions

Previously, the AIA documents said that if an owner ended the project for convenience — literally any reason — the contractor or architect would be paid their anticipated fee as if the contract was completed. That was mostly cut out of contracts by owners and those representing them, said Ryan, who generally works with owners and contractors, not architects.

The new documents would allow parties to specify how much should be paid to a contractor if such a termination occurs. While they typically get paid for costs incurred, this would clarify whether or not they make any profit, and if so, how much, he explained.

Marston anticipates "interesting" discussions centered on termination for convenience fees and is curious to see how people apply them. He said in his experience, few people want to spend time at the beginning of a job talking about possible failure.

Despite the unsavory feeling of discussing disaster when things are looking sunny, Loftus said it was a good idea for the AIA to at least prompt such dialogue.

"If you wait until the termination happens, even if it's for convenience, something's gone wrong," she said. "So to address it upfront when you're negotiating and everything is well and good is a smart way to go."

The Forms Adapt to the Modern Market

Although the same basic premises apply — buildings are still going up — the current construction market is noticeably different from the one that existed during George W. Bush's last year as president. So it's only natural that many of the changes to the AIA's contract documents aim to reflect the direction in which the industry has moved since then, experts said.

For one, sustainability, which was briefly mentioned in the 2007 series, now commands a more prominent position. What was once a few lines is now a separate, optional, exhibit that was made to be used on a variety of environmentally friendly projects and can be attached to any contract that includes a sustainability goal.

The AIA also focused on building information modeling, or BIM, a decision Ryan said “brings us into the 21st century.” The 3D models provided by BIM can help avoid conflicts between parties and issues such as mistakenly running a pipe through an elevator shaft, he explained.

“Thirty years ago they would build scale models of a project, but that’s passé today,” Ryan said.

Cobleigh confirmed that the AIA sought to encourage the industry to decide if they wanted to use BIM on projects and if so, how it would be used. If a 3D model is to be exchanged, those sharing it are required to sort out all the details for doing so, and if anyone uses the model before a contract is signed, it’s at their own risk, he said.

Parties can also now be notified of any important project information electronically — a welcome change given that email use has “exploded” since 2007, Loftus said.

Notices of legal claims, however, must still be physically mailed or hand-delivered.

“Many people can have thirty, forty, fifty thousand emails in their inbox and you don’t want something important and serious to be lost among perhaps hundreds of emails you may get each day,” Ryan said of the decision to require a hard copy of any notices of claims.

There’s Still Some Room For Improvement

Both the new and old versions of the documents include liquidated damages clauses and Ryan described the new iteration as “bare bones.”

“It doesn’t contain sufficient language, in my view, to make it enforceable,” he said. “Under the law there’s certain ‘magic words’ that need to be included to make a liquidated damages clause enforceable and they’re omitted.”

Those words should establish that the liquidated damages set out in a contract are a reasonable estimate of damages, not a penalty, because U.S. law doesn’t allow contracts to include penalties.

“If you say it a certain way, it won’t be deemed a penalty provision,” Marston said. “If you use the wrong language, there’s a chance a court could knock out the liquidated damages provision as a penalty.”

But the attorneys’ approximation of “abracadabra” wasn’t present in the 2007 series either, and while it would have been nice to see in the newest documents, it didn’t happen, said Paul Georgeson, a partner at McDonald Carano.

Overall, Georgeson described the update as “a big nonevent” in terms of how he handles his work. He said he has a standard set of changes he makes to AIA forms and that the 2017 versions aren’t likely to affect the way he and his clients do business or the way he reviews and negotiates contracts.

But that’s exactly in line with the evolutionary nature of the newest set of documents, Cobleigh said.

“The vast majority of what we do is to make sure that the documents align to current practices,” he said. “Most of the time we want to see what the industry itself has been able to do in terms of establishing a practice that works for all the participants, and then we memorialize that.”

--Editing by Rebecca Flanagan.

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