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contents

Message from the Editor:

This quarter, we are pleased to bring you another packed edition of *Under Construction*! Our first article highlights certain things to do and not to do when bidding on public work. Next, we discuss right to repair statutes which attempt to minimize construction defect litigation. With our third article, we tackle the issues and considerations that may arise when terminating a construction contract. Our fourth article, co-authored by one of the Arizona chapter of the U.S. Green Building Council's founding members, Marcelo Reyna, is designed to help in your efforts to go green with construction projects. We have also included helpful information about the American Institute of Architects (AIA) new 2009 form documents. Finally, we have two construciton law updates, one from Utah and the other from Arizona that should be of interest to you.

These topics can serve as a reference to provide awareness of updates in the construction industry throughout our regional practice areas. *Under Construction* is provided as a service to highlight legal trends and issues commonly faced. Please contact us if you have any questions or suggestions on how we can improve this publication to provide added value to you.

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Dos and Don'ts for Public Bidding and Bid Protests

By Josh Grabel and Jim Sienicki[1]

Public procurement brings with it a number of unique issues for potential bidders. In the current economy, it is important for any company involved in bidding public work to do all they can to place themselves in the best possible position to obtain work. This means not only complying with the bid requirements, but knowing when other bidders have not done so. This article is designed to point out some of the "Dos and Don'ts" of public bidding and bid protests. It highlights a number of issues that reoccur and how a bidder may avoid them and/or take advantage of them.

In Arizona, the purpose of public procurement laws is to "promote competition, guard against favoritism, fraud & corruption, and secure the best work at the lowest possible price." *Achen Gardner v. Superior Court In and For County of Maricopa*, 173 Ariz. 48, 52, 839 P.2d 1093, 1097 (1992). Thus, while obtaining the lowest price is one of the goals for public bidding, it is not the only one, and to be awarded a contract, a bidder must be both responsive (bid complies with the solicitation in all material respects) and responsible (capable of performing the work properly).

Parties bidding on public work need to understand some basic issues about bid protests to ensure they protect their rights. Although the rules for bid protests are not uniform, and although different rules apply depending on which agency is seeking to enter into the contract, there are a few things that apply across the board. This article is designed to highlight possible ways to prevail in bid protests, whether you are bringing the protest or defending an award to your company. While there is no magic formula, there are certain basic principles, or "dos and don'ts" that apply. To be successful in a bid protest, you must act decisively and quickly as the deadlines for submitting and responding to protests are usually very short and strictly applied by the governmental agencies. This is on purpose, since government agencies want to limit protests, and proceed with the issuance of a contract and performance of the work.

Bid protests are quasi-judicial proceedings through which federal, state and local government entities determine which party will be awarded the contract and enter into the contract for the project. Usually a particular bid is challenged (almost always by one of the entities not awarded the contract) as being non-responsive, or the bidder is challenged as being non-responsible (or both). In filing a bid protest, a party must usually state with some degree of particularity the factual and legal basis for the protest, even though it only has a few days to review documents and research the legal issues raised. Moreover, in most cases, an important question is whether the issue being raised relates to re-

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sponsiveness (which is judged at the time the bid is submitted) or responsibility (information that can be supplemented after bid opening)

Bid protests are time and cost intensive. Thus, it is important you are committed to moving forward with the protest before it is filed. The following list of "dos and don'ts" regarding bid protests generally applies across the board. This list is not exhaustive, but highlights many of the issues that arise time and again:

Bid Protest Dos	Bid Protest Don'ts
DO Review Plans and Specifications Far Enough in Advance to Ensure Your Bid Fully Complies with the Bid Documents.	**DON'T** Bid on a Project Unless Your Company is Properly Licensed to Perform the Work.
DO Request Written Clarification on Any Issue that is Ambiguous or Incorrect in the Bid Documents Before You Submit a Bid.	**DON'T** Submit a Bid that Does Not Conform to the Bid Requirements Because You Think You Can Build It a Better Way and Intend to Explain Later.
DO Contact your Attorney ASAP if you May Want to Protest and You are the Number Two Bidder.	**DON'T** Ignore Communications Regarding Bid Protests.
DO Request all Relevant Documents via a Formal Public Records Request if you are the Second Low Bidder and May Want to Protest.	**DON'T** Forget to Apply Common Business Sense to Any Potential Protest.

DO Review Plans and Specifications Far Enough in Advance to Ensure Your Bid Fully Complies with the Bid Documents

Companies, particularly construction companies, are constantly monitoring public databases for potential projects that they may be eligible to perform and evaluating what projects are out there that they may be interested in bidding upon. To that end, it is important the people in your company who are preparing bids and determining what you bid upon are fully aware of the obligations set forth in the plans, specifications, and bid documents. For example, if a particular set of specifications has an accelerated schedule that will require your company to perform work on an expedited basis, are you taking that into account in preparing your bid? Or, if the particular set of plans and specifications set forth certain minimum DBE/MBE/SBE participation, can you comply? Are your unit prices properly listed, regardless of what your total bid amount

is? Have you properly addressed all addenda? Have you provided an appropriate bid bond? Is your bid materially unbalanced in some way? Is your company properly calculating tax for the state and local area, and properly applying it to your bid amount?

While all of this may seem straight forward, there are multiple recent protests in which the parties decided they were going to bid a project, but failed to consider these types of issues early. Then, in the rush to get their bids submitted, the parties submitted an arguably non-responsive bid. Contractors should spend sufficient time on these issues and seek legal advice from a knowledgeable construction attorney early when appropriate. In other words, completely avoidable errors can cost you a substantial contract if you do not comply with the plans, specifications and bid documents.

DON'T Bid on a Project Unless You Have Confirmed Your Company is Properly Licensed to Perform the Work.

As a corollary, DON'T bid on projects if you are not properly licensed to perform the work. If you are bidding to perform work in a jurisdiction you have not worked in previously, make sure that you analyze what licenses are required, and when you need to have those licenses, before you submit a bid. You (and your knowledgeable construction attorney) should independently analyze this issue. Do not rely solely on the contracting entity to know the correct answer.[2]

As an example, in Arizona, it is a misdemeanor to bid for work that requires a contractor's license if you do not already have the license. Thus, if you are a Colorado company looking to perform work in Arizona, you need to have the proper Arizona license to bid. Obtaining a license can take between 10 and 20 days in Arizona, and longer in other jurisdictions, so if you need a License to bid a particular job, the sooner you start working on it, the better.[3] If you are interested in bidding upon work but unsure if you meet the eligibility requirements, consult with a knowledgeable construction attorney as early as possible.

DO Request Written Clarification on Any Issue that is Ambiguous or Incorrect in the Bid Documents Before You Submit a Bid.

Frequently, public entities put out plans, specifications and bid documents that have certain requirements that are ambiguous, incorrect or both. In this circumstance, there is a burden on the potential bidders to submit a written request to the public entity pointing out the ambiguity or error and seeking clarification on the issue before submitting bids. Failure to do so may later be deemed a waiver of your right to object to the issue. Additionally, if you find an ambiguity that you choose not to clarify before bid opening, and if you interpret the ambiguity one way, and the state interprets it another, you may have waived this issue for bid protest purposes. The reason is two-fold: (1) procurement laws favor finality, and thus favor having all issues with ambiguous bid documents resolved before bid

[2] In one recent case, an out-of-state contractor asked the procuring agency if they needed a Contractors' License to bid for the work. The procurement officer told them, in writing, that they did not. Nonetheless, the company in question was later cited by the Registrar for contracting without a license.

[3] Snell & Wilmer has helped clients become licensed on an expedited basis in Arizona, California, Colorado, Nevada, New Mexico and Utah. Similarly, if you need to be "pre-qualified" as an MBE or DBE with a particular agency to be used as a MBE/DBE subcontractor on a particular job, make sure that your certification is current and consult with your attorney if necessary.

opening; and (2) procurement laws also disfavor rewarding people for knowing about ambiguities or errors in bid documents, but failing to raise it until everyone's bids have been disclosed and the numbers are known, and they are not the low bidder.

With that said, it is important to note that when you seek clarification, if the State[4] responds, it will generally notify all bidders of the question and the answer through an Addendum to ensure everyone has the same information when bidding on a project. If in doubt, a company should consider seeking legal counsel to assist in determining whether clarification is warranted.

DON'T Submit a Bid that Does Not Conform to the Bid Requirements Because You Think You Can Build It a Better Way and Intend to Explain Later.

Occasionally, bidders will submit bids that purposely do not comply with the plans, specifications and bid documents, because the bidder believes the bid documents fail to take into account certain things that should be considered. These bidders erroneously hope they will nevertheless be successful because they intend, after bid opening, to be given an opportunity to explain why they deviated from the bid documents. This is almost never a successful approach, and most bidders fail to obtain the contract, either because their bid is rejected outright as non-responsive or because their suggestions about how a bid "should have been handled" are rejected.

The reason is simple — the procuring agency has wide discretion to determine how to put together a proposal and how to evaluate it. They may, for reasons totally outside the control of the bidders, want the information provided in a particular way. They are permitted to do so. Moreover, even if you think your company can provide a substantially similar project in a better way, if you choose not to seek clarification on this issue in advance, the State can reject any non-conforming bids, even if common sense indicates that it should not because the bid you submitted turns out to be more advantageous to the State. Thus, making sure your bid conforms with the plans, specifications and bid documents, even if you do not agree with what is requested, is crucial in successfully bidding projects.

DO Understand the Bid Protest Rules of the Particular Jurisdiction You are In.

The rules for protesting a particular award vary substantially among different contracting agencies, both in sophistication and technical requirements. The easiest place to see this distinction is by reviewing the deadline to file a bid protest. The City of Phoenix requires a protest be filed within three business days of bid opening or when a bidder reasonably has notice of the basis for a protest. Maricopa County, Scottsdale, Tempe and Tucson's Codes all allow 10 days for filing a protest, and apply the same standard as to when that begins to run. Other municipalities do not have a standard guideline, have more strict interpretations of when the deadline to file a protest begins to run, or may or may not place the requirements in particular bid solicitations.

Additionally, depending on the specifics of the project at issue, the administrative procedures may differ greatly. For instance, the City of

[4] In this article, the phrases "state", "government" and "agency" are all intended as generic phrases to refer to the agency procuring the goods or services, unless there is a specific reference to a particular governmental agency.

Phoenix generally has a "hearing officer" hold a hearing after a protest is made and render a "recommendation" to the City Engineer, who then forwards it to the City Council for approval. Most state agencies have their procurement officer make a decision, and that decision is then appealable to the state Department of Administration, and then to Court. Regardless, when you have a bid protest, one of the first things that you should do is contact a knowledgeable construction attorney and determine the deadline for filing your bid protest; and become familiar with the specific administrative proceeding that will take place. Bid protests are initially not like trials, since there is little if any discovery of the other side and procurement officials generally do not apply rules of evidence. Thus, while there are some procedures in place, you should be prepared for a bit of a free-for-all, since there are not generally hard and fast rules at these initial protest hearings.

DON'T Ignore Communications Regarding Bid Protests.

After receiving a bid protest, a procurement officer may informally tell the low bidder that it "does not have to" worry or respond. However, the procurement officer may later decide that the protest has merit and require a response within 24 hours or may even issue an adverse ruling before you respond. It is important for bidders to remember that ultimately, the procurement officer's loyalty and obligation is to the agency he or she works for, and ultimately his or her decision, regardless of what they may say to you on day one, may be dictated by forces outside of his or her control.

Thus, if you receive a letter protesting an award to you, or protesting your bid in any context, it is important to not only talk with the procurement officials, but to take it seriously. Upon receipt, you should contact a knowledgeable attorney. Counsel should be able to give you a more thorough overview of the process, and better evaluate your prospects for success on any protest. Generally, the earlier that your attorney is involved and provided with the documents related to the bid protest, the better it is for you. It may mean that you spend some money to be told that you have nothing to worry about or that you should take a couple of minor steps to improve your position. Alternatively, it may highlight the importance of responding aggressively and affirmatively. Either way, take these things seriously, as you can be sure that the other side is doing so.

DO Request all Documents from the Agency via a Formal Public Records Request if you are the Second Low Bidder and Contact your Attorney ASAP.

If, after the bids are opened, you are the second low bidder, or the third or fourth bidder and believe all bidders in front of you submitted non-responsive bids, then you should contact your attorney and file a public records request pursuant to the appropriate public records laws immediately. There are four reasons for doing so: (1) if there is a basis for protesting, it will likely be supported by the documents; (2) compiling documents will take the state time, and you need as long as possible to review the documents and prepare your protest; (3) it is not expensive to make the request; and (4) it places the state entity on notice of a potential issue on the procurement, which may cause them independently to take a second look at their initial determination.

Public records requests consist of a letter requesting specific documents from a public entity by a certain time. In Arizona, these requests are made pursuant to A.R.S. § 39-121, but that citation will differ based upon your jurisdiction.

DON'T Forget to Apply Common Business Sense to Any Protest.

Finally, a natural human response from someone who has put together a bid on a project that they should have been awarded, but are not, is to feel wronged, and to want to right that wrong. This is a completely reasonable response, and you should want to fight for your rights. However, you also must be reasonable in deciding how and/or when you want to proceed with a protest, because they are not, by their nature, cheap or easy. Having read this article, you have noted the very condensed time frames for bid protests. While that has certain advantages (they tend not to drag on like litigation can), it also means they are going to be time intensive for both you and your counsel, and thus will require substantial time and money to be successful. Also, because bid protests are less formal than other proceedings, often you have to respond to various assertions on the fly, adding to the cost.

Given this, it is important to recognize in deciding how and where you want to protest, that you are prepared to make the necessary commitment, and it is worth it for your company. Make sure you and your counsel discuss the positives and negatives of various options in proceeding. Review your bid numbers carefully, because sometimes being awarded a particular job is worse than not being awarded the contract.

Conclusion

We have not, and cannot, outline all bid protest issues for you in this brief article, but this article provides a framework for evaluating protests. Through all the Dos and Don'ts, the most important issue is, quite frankly, to ensure you have as much information as possible as early in the process, so you can make educated decisions going forward. For that reason, and that reason alone, you should, in any situation where you have a question about public procurement, consult with your attorney early, since an ounce of prevention can be worth pounds of bid protest cure!

Construction Defects — Right To Repair Statutes

By Scott Sandberg

In response to a rising tide of construction defect litigation, numerous states have enacted legislation to protect the construction industry, including statutes of repose, notice of claim requirements, and damage limitations. One such protection are statutes requiring construction defect claimants to provide construction professionals with notice and an opportunity to repair construction defects before bringing legal action. Since 2000, more than two dozen states have adopted such statutes. Most of these statutes apply only to residential property but some states — including Colorado — apply the right to repair requirement to both residential and commercial property.

In many states — including Arizona and Colorado — right to repair statutes establish a procedure through which claimants provide construction professionals with notice of a construction defect

and an opportunity to cure it before the claimant files legal action. Under these statutes, the claimant must file a written notice with the construction professionals within a specified number of days before legal action can be filed and, if a lawsuit is filed before such notice is given, the lawsuit is dismissed or stayed. The construction professional may then respond within a specified number of days by offering to inspect the alleged defect, offering a monetary settlement, or disputing the claim. If the claimant permits an inspection, the construction professional has a specified time period after the inspection to offer to repair the defect, offer a monetary settlement, or indicate that the construction professional will not further remedy the defect. If the claimant accepts the construction professional's offer, the matter is presumably resolved. But, if the construction professional fails to respond to the notice, the claimant can proceed with a lawsuit.

In other states, right to repair statutes are not part of construction defect limitation statutes, but instead the right to repair requirements are imposed in statutes providing warranties on new homes. Still other states incorporate right to repair provisions within the statutes governing complaints against licensed construction professionals.

In states with high volumes of construction defect litigation — like California and Nevada — right to repair statutes are often included within intricate state-specific regulatory schemes governing construction litigation. California's right to repair statute is combined with multifaceted procedural requirements, statutory warranties, building standards, mediation requirements, and damage limitations. Nevada has a similarly intricate right to repair process that includes an option to submit construction defect claims to the state contractor board.

While right to repair statutes have been criticized as an ineffective means of addressing construction defect claims, the statutes provide, at a minimum, an opportunity to explore alternative means of resolving construction defects before litigation commences. In any event, in many states, compliance with right to repair procedures is statutorily mandated. Accordingly, construction defect claimants and defendants should evaluate right to repair requirements before proceeding with litigation.

Terminating a Construction Contract: More Issues and Considerations

By Rick Erickson

In our January 2009 issue of Under Construction, we focused on contract termination issues that increasingly arise during an economic recession. Since then, the Federal Deposit Insurance Corporation has reported that about 110 banks have failed this year.[1] Many banks that have survived FDIC scrutiny, including banks holding funds meant for infrastructure and other construction projects, are very slowly receiving stimulus funds after significant delays. These delays have caused contractors to endure hardships like escalation of costs for materials and layoffs of key players formerly managing their projects.[2] Despite these difficult economic times, we are seeing clients improvising their approach to project management, job costing and payment to avoid the last resort of contract termination.

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[1] http://www.fdic.gov/bank/individual/failed/banklist.html.

[2] See C. Conkey and L. Radnofsky, *Stimulus Slow to Flow to Infrastructure*, Wall Street Journal, August 5, 2009.

In considering termination, it is important to recognize that each construction project has its own "culture." Each project includes diverse personalities in management and administration, different approaches to project contingencies and divergent solutions to the economic crisis. Knowing and understanding your project's culture — personalities, economic security, contingency plans — helps to avoid the difficult decision of contract termination.

Before signing a construction contract, owners and contractors alike should consider the past track records of the parties involved in the entire project. Also consider the solvency and financial capabilities of the owner/developer, contractors and the lender. Research and understand the backgrounds and experience of the people making the major decisions affecting the project's outcome. Evaluating the project's culture before signing a contract is prudent since it may raise enough indicators of risk that you want to avoid the project altogether.

Before the contract is signed, review the contract with a knowledgeable construction attorney so you know your rights, obligations and risks under the contract. Termination for convenience provisions are showing up more often in private contracts, having been more extensively used in government contracts in the past. Termination for convenience provisions are usually fairly definite in their terms, and usually provide for recovery and payment for all work and materials incorporated through the date of termination, along with certain termination costs, and sometimes even a specified amount for overhead and profit in addition to costs incurred to date. Termination for convenience clauses usually require notice to all of the project participants so that the affected trades can react accordingly. Remember that termination for convenience generally must be done on good faith.

Commonly used form contracts published by AIA and ConsensusDOCS both have termination for convenience clauses but have different notice requirements and allow for different amounts of recovery in the event of termination for convenience. AIA and ConsensusDOCS forms allow for recovery of work performed. However, the AIA form allows for recovery of "reasonable" overhead and profit, while ConsensusDOCS allows a contractor to recover a premium that is determined before the contract's execution.

In the event of termination for default (also known as termination for cause), the AIA and ConsensusDOCS likewise provide different notice requirements. For example, AIA Form A201, Section 14.2.2, requires the owner to provide seven days written notice and the architect's certification before a party can terminate a contract for another party's default. ConsensusDOCS Form 200, paragraph 11.3.1, requires the owner to provide the contractor with a seven day opportunity to cure before issuing a termination notice.

Also remember that, without a specific contractual provision allowing for termination for default under certain specified conditions, you still may be able to terminate for default under the common law. However, under the common law, you must be able to prove that a material breach by the other party exists before the non-breaching party may terminate the contract. Materiality is variably defined and is generally a breach that substantially defeats the purpose of the contract, a breach causing a party to be completely unable to perform a substantial part of the contract, or a breach causing an essential term or condition of the contract to fail. Some

examples of matters that the courts have considered to be material breaches are: (1) a contractor that only completes one percent of the project halfway through the term of the contract;[3] (2) a contractor that persistently fails to timely pay change-order invoices;[4] or (3) a contractor that builds a kidney-shaped pool instead of the intended peanut-shaped pool.[5]

Finally, you should consider the effects of terminating your contract on your arbitration rights. In one Florida case, an owner terminated its AIA contract before the contractor completed work. The contractor filed suit against the owner for damages, and the owner demanded arbitration under the contract. The Florida court found that the owner had forfeited its rights to arbitration by terminating its contract with the contractor.[6] Two years later, however, the same Florida court found, under similar circumstances, that the non-terminating party (the contractor in that case) could still demand arbitration after the owner had terminated the contract.[7] The court in the more recent case deferred to the broadly interpreted policy favoring arbitration of disputes and also deferred to the parties' assent to that policy in their contract.

In summary, try to determine a project's culture before you enter into a construction contract. It will help you anticipate predicaments that may give rise to grounds for termination. It is otherwise important to document (with photos, video, emails, meeting minutes, daily reports) instances constituting material breaches of the contract so that any decision to terminate for material breach is soundly made. You should always consult with a knowledgeable construction attorney before terminating a construction contract. In addition to consulting with your construction law attorney ahead of time, consider also consulting with your lender, your subcontractors, your surety and others that may be affected by the termination. They may have valuable feedback contributing to your decision whether or not to terminate a construction contract.

[3] *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 SW F3d. 195, 199 (Tex. 2004).

[4] *Manganaro Corp. v. HITT & Contracting, Inc.*, 193 F. Supp. 2d 88, 89 (D.D.C. 2002).

[5] *Strouth v. Pools By Murphy & Sons*, 79 Conn. App. 55, 60-61 (2003).

[6] *Aberdeen Golf & Country Club v. Bliss Construction, Inc.*, 932 So. 2d. 235 (Fla. App. 2005).

[7] *Auchter Co. v. Zagloul*, 949 So.2d 1189 (Fla. App. 2007).

Allocation of Responsibility in Green Building

By Joseph Viola and Marcelo Reyna[1]

1. Allocation of Responsibilities

The necessity for project team collaboration cannot be overstated where certification under Leadership in Energy and Environmental Design

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("LEED") is a project goal. Project participants include owners, operators, architects, engineers, contractors, and consultants, all with an incentive to push liability to the other parties. An owner may rely on the professional services and construction work of others, but will often direct changes based on scheduling and cost. The architect may prepare the construction documents and specifications, but may not control construction administration or review of change orders. Mechanical, plumbing, and electrical designs may be subject to equipment availability and actual performance of building systems is unlikely to be guaranteed by the project engineers. Contractors may complete work in accordance with plans and specifications without undertaking to audit the construction documents for the probability of obtaining desired LEED rating points. A LEED Accredited Professional ("LEED-AP") may be part of the project team, but may not have the final say as to design, construction or budget. Most importantly, no single project participant has the ability to guarantee the results of the certification process because it will necessarily involve third party review by the U.S. Green Building Council (the "USGBC") and some subjective judgments.

Involving individuals with LEED-AP certification should be considered for any project seeking LEED certification. The LEED-AP certification indicates that an individual has experience in green building and LEED certification. With this experience brought to the project team, if you are representing the owner, the project contracts should provide that the appropriate standard of care expressly includes the standard of one with relevant LEED experience. That standard of care should not be assumed simply because project participants mention their desire to develop a LEED certified building.

Maximizing points toward LEED certification will necessarily involve input from a variety of project participants, and the project contracts should include LEED certification as a project goal of which all project participants are to be made aware. Making LEED certification a contract requirement, as opposed to a goal, is difficult given the variety of participant contributions that must occur to obtain LEED rating points. While an owner could greatly benefit from an architect, contractor or consultant committing to a specified LEED certification level, the owner should not be insulated from her own decisions to limit or change project elements intended to obtain rating points. Parties familiar with the LEED project checklists should be reluctant to guarantee specific certification levels as the accumulation of checklist items requires cooperation from project participants outside any party's control. The updating of LEED Standards over time will also impact the ability to guarantee certification. At best, project participants should only commit to those items within their control. For example, the architect may commit to produce an initial design capable of earning specified LEED points; the mechanical consultant may agree to specify equipment meeting performance standards necessary for other LEED points; and the contractor may be obligated to implement construction packages required for yet other LEED points. Specifying these types of obligations, however, will require contract specific language and a good understanding of specific LEED requirements by each of the project participants.

(a) Project Administration

A useful set of project contracts should contain the process by which the project team will collaborate toward project completion and submittal to the USGBC for LEED certification review. The starting point is the designation of a project participant as the LEED project administrator. Best practices should require that the project administrator be a LEED-AP, and the project administrator's contract should specify an appropriate standard of care where the participant providing LEED administrator services is held to a standard of care of one familiar with the LEED certification process. While the administrator may be the architect, the contractor, or a third party consultant, an important qualification is that the administrator be identified early in the process to maximize LEED expertise. The project administrator should go on to register the project online with the USGBC and oversee the process of delegating project checklist responsibilities to the appropriate project participants. The LEED project checklist, together with projections as to which LEED rating points are project goals, should be circulated to the project team.

Easy and early integration of the LEED project team may be unrealistic due to project scheduling or project contracting arrangements. With project participants often added at different times (i.e., the design team retained prior to identification of the contractor), the project administrator will need to budget time to update subsequent project participants of LEED project goals and status. As new team members join the project, the project administrator should update the team registry with LEED-Online and assign appropriate checklist items to the new member.

As the project progresses, the project administrator and project participants will continue to update their areas of responsibility on the project checklist. Just as construction progress meetings are held to coordinate work at the site, the LEED project team should conduct periodic meetings to review the status of the project checklist. Because the project owner may have its own delegated duties for obtaining LEED rating points, the owner should be included in the periodic meetings. Best practices will include taking meeting minutes and distributing them to the project participants. Project participants receiving the meeting minutes should be sure to review and correct any errors. Periodic project status meetings should be held throughout the project, not just during construction. Certain LEED points require documentation early in the project timeline. Of additional concern is the potential scarcity of building materials, systems and equipment that convey green building advantages. Projects will benefit from early identification of documentation requirements and long lead time items.

A common instance where project team integration will be tested is in response to changes in the work. The LEED project administrator will need to be made aware of changes and relay the changes to the appropriate project participants for evaluation of the proposed change on the anticipated LEED rating points. Communicating the potential impacts to the project participants should be made part of the scope of services to be provided by the LEED project administrator. The authors anticipate that many future disputes related to LEED certification will relate to failure to communicate the impact of changes in the work on the desired LEED certification level. Changes in the work as simple as substitution of a higher VOC paint may impact available LEED

points for indoor environmental quality. Failure of the project team to recognize and communicate consequences for changes in the work can lead to disputes when the project is eventually submitted for USGBC review.

While proper documentation and communication will not guarantee success or avoid all disputes, the documented sharing of information related to the project will be the best way to resolve conflicts before they escalate. Accurate documentation may also be the only way for project participants to protect their legal rights. In many instances the critical decisions will be made well before a project is submitted for USGBC review. As memories fade, inconsistent recollections of the project team can escalate into full blown disputes where accurate documentation is absent.

The need for project team collaboration and communications related to LEED rating points will add administrative time for each of the project participants. A failure to prospectively recognize and account for administrative responsibilities can be a common complaint in design services and construction work, and LEED projects are no exception. Project participants must guard against the temptation to cut costs by avoiding administrative duties since the consequences for the failure of projects to obtain a desired LEED certification level can be quite serious. While the authors do not mean to imply that all green projects will be more expensive and time consuming, unrealistic expectations for costs and schedule for projects seeking LEED certification should be avoided.[2]

[2] Davis Langdon, The Cost of Green Revisited: Reexamining the Feasibility and Cost Impact of Sustainable Design in the Light of Increased Market Adoption (2007), available at http://www.davislangdon.com/USA/Research/ResearchFinder/2007-The-Cost-of-Green-Revisited/.

(b) Mitigation of Risks

Best practices for appropriate risk allocation will require drafting specific contract provisions documenting LEED goals and obligations. Clearly defining project goals can minimize exposure to unanticipated liabilities. For example, qualifying for property tax abatement or other tax credits conditioned on LEED certification may be an important financial requirement for project viability. Failure to include reference to that goal in the project contract will lead to potential unanticipated liability and uncertainty as to responsibility. As recommended in this article, a blanket guaranty of a specific LEED certification rating by a project participant is not realistic. Responsibility for specific LEED rating points should be allocated to project participants only if such responsibilities are reasonably within the participant's control. Clearly defining the scope of services or work and the standard of care in project contracts will allow the project participants to more accurately take ownership of their areas of responsibility.

Quantifying project risk related to LEED certification goals is an important factor in risk management. Project contracts will continue to incorporate familiar incentive concepts. Bonuses for attaining project goals and liquidated damages for failure to attain goals will remain valid risk mitigation strategies. Risk management must take into account if consequential damages have been waived. The risk mitigation strategies will not be entirely new, but the project participants must review existing strategies with an understanding of how green building goals affect potential liability. Consulting with an attorney knowledgeable in the risks of Green Building is strongly encouraged.

Ongoing project documentation remains one of the best ways for parties to preserve their rights under the project contracts. Although not a magic bullet, project documentation may resolve conflicts before they escalate. Documentation of the work combined with a clearly defined scope of work will assist the project participants in allocating responsibility as agreed to in the project contracts. Periodic project meetings related to LEED certification goals and dissemination of meeting minutes provide a paper trail in the event of a project dispute.

2. Project Responsibility Checklist

- Project contracts should expressly note that LEED certification is a project goal.

- Owner should contract for LEED administration services to be supplied by a LEED-AP. Contract should be entered early in the process to realize benefits of LEED-AP in development process.

- From the owner's perspective, the LEED administration service provider should be held to a standard of care of one familiar with the LEED rating system as well as the registration and certification process. Where appropriate, other project contracts may also supplement their typical standard of care with a standard of care of one familiar with LEED criteria.

- LEED administrator should register project with USGBC.

- LEED administrator should designate project team's checklist and credit template responsibilities. Project contracts should require participants to accept responsibility related to their scope of services or work.

- Periodic meetings held for project participants to go over project checklist and status of desired rating points. Responsibility for keeping, distributing and reviewing minutes of meetings should be incorporated into project contracts.

- As new project participants are added, LEED administrator should update new participants as to the desired LEED certification items.

- LEED administrator should evaluate/report on impact of changes in the work.

- LEED administrator should review credit templates for compliance with LEED requirements.

- LEED administrator should submit application for LEED certification to USGBC.

3. Conclusion

Even in today's economy, public and private interest in green building continues to accelerate, with LEED certification becoming a commonly accepted standard for branding projects as green. Project developers will continue to bring green projects online and should consider how best to allocate responsibility for attaining desired LEED certification levels. Those interested in maximizing LEED points should familiarize themselves with the USGBC's certification process and engage a LEED-AP to navigate the process. Project contracts should clearly define project goals, scope of services and work, and related standard of care. Ongoing project team collaboration and documentation should be made a requirement to best avoid unanticipated liabilities and uncertainty in the LEED certification process.

American Institute of Architects (AIA) Rolls Out 2009 Form Documents

By Jason Ebe

By now, those of you familiar with the AIA library of design and construction contracts and ancillary construction industry form documents know that the 2007 AIA documents have supplanted the 1997 forms. Indeed, the AIA no longer supports the 1997 forms through its licensed software. We have, in previous articles and seminars, described the more significant 2007 AIA documents, including the substantive changes from the 1997 versions, and considerations regarding the use and modification of those documents.

Earlier this year, AIA released 10 revisions to some of its other documents that were not included in the 2007 roll-out. This article summarizes these new forms, all of which are available for purchase through AIA and, for those current users of the AIA software, the AIA Contract Documents Software Updated – Version 4.1.26.0.

Revised Construction Manager as Constructor Forms

AIA has updated two of its Construction Manager as Constructor forms. The two new forms are A133–2009 and A134–2009. The A133–2009 form, formerly A121 CMc – 2003, is essentially the same as the A102–2007 contract, whereby the Construction Manager (as Constructor) is compensated on the basis of Cost of the Work plus a Contractor's Fee with a Guaranteed Maximum Price. In this A133–2009 form, as in the former A121 CMc – 2003, the contract incorporates preconstruction services. In other words, the Construction Manager contracts with the owner during the design phase, provides services to the Owner towards the development of a GMP, proposes a GMP and, upon agreement of the Owner through an amendment to the contract, becomes the "at-risk" constructor of the project. The A133–2009 Exhibit A is the proposed Guaranteed Maximum Price Amendment.

Document A134–2009, formerly A131 CMc – 2003, is the same as A133–2009 but without a GMP. Instead, the Construction Manager provides the Owner with a Control Estimate and updates this as the project proceeds. The Control Estimate is a tracking tool but does not provide any contractual limitation on the Owner's obligation to pay for Cost of the Work and/or the Construction Manager's Fee. Both the current A121 CMc – 2003 and A131 CMc – 2003 are still available through AIA and the software, but only through May 31, 2010. Both of the new forms are intended for use with the A201–2007 General Conditions (not the A232–2009 General Conditions, described below).

Revised Construction Manager as Adviser Forms

AIA has updated seven of its forms for use on projects in which the Owner hires, in addition to an Architect and a Contractor, a Construction Manager as an advisor to the Owner. The Construction Manager is in direct contractual privity with the Owner, but not with the Architect or the Contractor. Using these forms, the Construction Manager provides certain roles as an Owner's representative, in some cases as an intermediary between the Contractor, Owner and Architect, and, in some in-

stances, an entirely new level of bureaucracy (e.g., with respect to pay application review).

The four new contract forms are the A132–2009 (Owner – Contractor contract); A232–2009 (General Conditions); B132–2009 (Owner – Architect contract); and C132–2009 (Owner – Construction Manager Contract). These four are intended to be used in conjunction with one another, and are not meant to be mixed and matches with the A201–2007 General Conditions or any of the other 2007 forms.

The A132–2009 contract is between the Owner and the Contractor and allows the parties to choose the basis of payment from three options: Stipulated Sum; Cost of the Work plus a Contractor's Fee without a Guaranteed Maximum Price; and Cost of the Work plus a Contractor's Fee with a Guaranteed Maximum Price. Because the form addresses all three possible bases of payment, there will be, in the absence of good editing, quite a bit of inapplicable language. Contrast this form with the three construction contracts that do not involve a Construction Manager as Adviser – A101–2007 (Stipulated Sum); A102–2007 (Cost of the Work plus a Contractor's Fee with a Guaranteed Maximum Price); and A103–2007 (Cost of the Work plus a Contractor's Fee without a Guaranteed Maximum Price). The AIA attempts to offer here in a single form what it offered in three separate forms in 2007 for contracts that did not involve a fourth party, the Construction Manager as Adviser.

Substantively, the A132–2009 is similar to the A101–2007, A102–2007, and A103–2007 forms. The most significant differences are the inclusion of the Construction Manager as Adviser as a fourth party, and the menu selection of payment bases. In the event the parties choose Cost of the Work (without or without a GMP), AIA provided A132–2009 Exhibit A, Determination of the Cost of the Work. This Exhibit mirrors the Cost of the Work descriptions found in A102–2007 and A103–2007, but appears to have been moved to an Exhibit to shorten the length of the A132–2009 form, particularly for users interested only in payment based upon a Stipulated Sum.

The A232–2009 General Conditions document now incorporates the substantive modifications of the A201–2007 form, for example, introduction of the Initial Decision Maker (who is still by default the Architect, not the Construction Manager as Adviser). The Construction Manager as Adviser is described in more detail in Article 4 along side the Architect. The Construction Manager, in some instances, acts as an intermediary; in others, a second set of eyes and ears. For example, as described in Section 9.4.1, Certificates for Payment, the Contractor now submits its Application for Payment to the Construction Manager; the Construction Manager has seven days to review it and certify the payment, and then forwards the Application and the Certificate to the Architect; the Architect then has seven days to repeat that process. This provision in particular will be interesting to see in practice, especially in my home state of Arizona, where the statutory prompt pay laws require payment within seven days of approval by the Owner or its designated representative, but do not spell out whether that "approval" can be split into two separate approvals by two separate representatives. Moreover, it will be interesting to see how the Contractor reacts when the construction manager certifies payment, but the Architect does not, or vice-versa. This is but one of the many issues in these documents that should be addressed based on a client-specific,

project-specific, state-specific evaluation of the facts and circumstances.

B132–2009 is an Owner – Architect contract that follows the 2007 updates to the B Series forms while incorporating the fourth party Construction Manager. C132–2009 is a contract between Owner and Construction Manager as adviser.

In addition to the contract forms, AIA revised the pay application forms and continuation sheets, forms G732–2009, G736–2009, and G737–2009. These forms are the same as the prior versions, but reflect the additional Construction Manager.

Conclusion

AIA form documents have been in use since 1888. The 2009 AIA documents provide updates to some of AIA's previous forms that were not updated in 2007, to provide consistency with the substantive changes in the 2007 forms. Those who are fans of the 2007 revisions may likely appreciate the 2009 forms as well, as they provide bases for contracts involving Construction Managers either as Constructors or Advisers. Those who have not embraced the 2007 forms based upon, for example, different views on substantive issues such as insurance, indemnity and dispute resolution, will have the same difficulties with these forms.

The AIA documents, from both the 2007 roll out and 2009 roll out, provide good base documents from which to make modifications that suit both the project and the parties' interests. These forms are rarely used "off the shelf" without at least some project-specific (e.g., neither the 2007 forms nor the 2009 forms incorporate BIM), state-specific (e.g., prompt pay) and other commercially reasonable modifications. A party should review these new forms to determine whether they are of use to particular projects and, if so, what modifications should be made to best suit the contracts for its business and project. If you have any questions about this article, please contact Jason Ebe at 602.382.6240.

Utah Construction Law Update

By Mark Morris

Utah saw a return to reason in *Iron Head Construction, Inc. v. Gurney*, 2009 UT 25. We previously reported in February 2008 on the Utah Court of Appeals decision holding that pre-judgment interest was awardable on the amount of a settlement agreement if the parties did not expressly exclude such interest from the settlement. The settling party sought and obtained review of that decision from the Utah Supreme Court. In its decision reversing the Court of Appeals and trial court, the Utah Supreme Court made clear that while the settlement agreement allowed for the payment of monies, it did not amount to an admission of liability. Further, the amount of the settlement could not be equated to an amount of damages that could be calculated to a mathematical certainty. Finally, the Utah Supreme Court affirmed its support for the strong public policy of encouraging settlements, which policy would be frustrated by adding a prejudgment interest element to settlements that did not expressly contemplate them. "When parties agree to settle their claims, they move their dispute outside the realm of the judicial process. In doing so, they effectively agree to forego the assistance of the court in exchange for the immediacy and certainty of a settlement." This was clearly the right result and should give settling parties in

Utah confidence they will not be penalized beyond their settlement commitments.

In *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, the Utah Supreme Court affirmed a trial court's award of damages to a subcontractor when the owner-general contractor contract was terminated. Somewhat unique in this case was that the subcontract contained termination for convenience language allowing for greater damages to the subcontractor than were awardable to the general contractor under the prime contract. The subcontract incorporated the prime contract into the subcontract through a flow down clause. The issue was whether the termination for convenience provisions in the subcontract or in the prime contract would control. The prime contract contained a relatively standard termination for convenience clause allowing the owner to terminate the contract and providing limited compensation to the general contractor. While the subcontract contained similar language allowing the general contractor to, in turn, terminate the subcontract, there was subcontract language allowing the subcontractor to recover certain amounts that the prime contract did not permit the general contractor to obtain from the owner. The court parsed the language of the two contracts, and found that the subcontract's termination for convenience damages language survived and trumped any inconsistency with the terms of the incorporated prime contract. The lesson here is that a general contractor must sync up the termination for convenience (and other important) provisions in the prime contract with such provisions in its subcontracts and should have a knowledgeable construction attorney review these contracts before execution of the agreements to avoid the risks caused by not coordinating these agreements.

Finally, in *Victor Plastering, Inc. v. Swanson Building Materials, Inc.*, 2008 UT 474, the Utah Court of Appeals affirmed summary judgment in favor of a defendant attacking the validity of the plaintiff's lien. The Court invalidated the mechanics' lien, holding that Utah's lien statutes requiring the recording of a lis pendens are jurisdictional, and not merely fodder for an affirmative defense. In this case, a lien claimant had named another mechanics' lien holder in a suit seeking to establish the priority of its lien over others. The defendant lien holder had failed to perfect his lien by timely filing an action to foreclose upon it, and conceded it could not recover on its own lien. In spite of this, the Court held that a party named as a defendant is nevertheless entitled to raise any defenses available to it once it has been named in a lawsuit, and the admitted invalidity of its own lien had no effect on its standing to assert defects in the plaintiff's lien (plaintiff's failure to record a lis pendens). The lesson in Utah (and probably most other states) is that when filing an action to perfect a mechanics lien, make sure that the filing is done within the statutory required period.

Arizona Construction Law Update

By Jim Sienicki and Mike Yates


Keystone Floor & More, LLC v. Arizona Registrar of Contractors, 2009 WL 2044422 (App.2009)

(No Attorneys' Fees Regarding Appeal of Registrar of Contractor's Decision)

Keystone Floor and More, LLC ("Contractor") performed tile installation work in a private residence pursuant to an oral contract. The tile began to crack after Keystone completed the work and received payment from the owner. The owner filed a complaint with the Arizona Registrar of Contractors ("ROC") and the ROC issued a corrective work order to Keystone regarding the cracked tile. After Keystone failed to complete all work in accordance with the corrective work order, the ROC issued a citation and complaint recommending that Keystone's license be revoked. The issue was referred to an administrative law judge, who determined that Keystone violated Arizona statutes by failing to complete its work in a professional and workmanlike manner and recommended that Keystone's license be revoked. The ROC adopted the judge's decision and revoked Keystone's license.

Keystone subsequently filed a complaint against the ROC and the owner in superior court seeking judicial review of the ROC's revocation of Keystone's license. In his answer, the owner alleged that the matter arose out of contract and requested an award of attorneys' fees pursuant to A.R.S. § 12-341.01(A). After hearing oral argument and reviewing briefs, the superior court issued a ruling affirming the ROC decision. The owner then applied for an award of attorneys' fees in accordance with §12-341.01(A). The superior court granted the owner's application for attorneys' fees. Keystone timely appealed the decision.

In reversing the superior court's award of attorneys' fees, the Arizona Court of Appeals held that Keystone's appeal of the ROC's decision did not arise out of contract but instead arose out of statute. The Court reasoned that despite the fact that the appeal to the superior court involved a contract, it was not the "cause or origin" of the appeal. Instead, the contract was "peripheral" to the primary issue of whether the ROC erred in finding Keystone had violated its statutory duties as a licensed contractor, and thus the owner was not entitled to fees pursuant to A.R.S. § 12-341.01.

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