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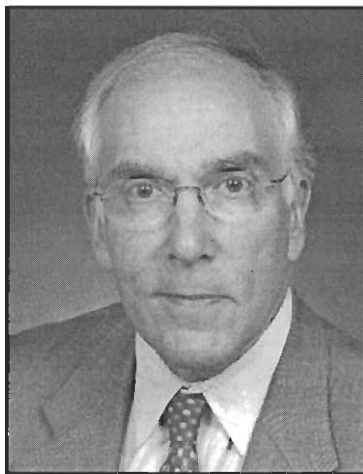
COVERING THE STATES OF NEW JERSEY AND PENNSYLVANIA

By Robert Korn, Kaplin Stewart Meloff Reiter & Stein, P.C.

“Owners, Seize the Opportunity: Take Charge of Drafting Construction Contracts”

As an owner/developer, you are in the enviable position of having the ability to control the drafting of construction contracts. Surprisingly, many public and private owners and developers give up this most important function to design professionals or others, relying on their presumed expertise in drafting construction documents. Design professionals or contractors eagerly accept this role, knowing that they can control project risk allocation and minimize their own exposure to liability.

Taking “off the shelf” “tried and true” American Institute of Architects (AIA) forms, the design professional or contractor will explain to an owner that the AIA Forms are “industry-accepted”, vetted by leading industry trade associations, and are fair to all parties in the construction chain. In fact, AIA forms, left unmodified, do not give owners important protections otherwise available to them. Some of the deficiencies in the AIA construction contracts, from an owner’s perspective, can be best il-



lustrated by the AIA A201 (General Conditions of the Contract of Construction). Some examples are:

- Disputes must be arbitrated under the aegis of the American Arbitration Association. Arbitration may be preferable in some cases but not in others, depending upon the unique facts and circumstances of the contractual undertaking between the parties. Therefore, an owner should consider modifying the arbitration clause by providing that if the amount in controversy exceeds a certain dollar amount, the dispute is referred to court and not to arbitration or better yet, reserve an option to arbitrate a dispute.

If the arbitration clause is retained in some form, the AIA A201 should be modified to address:

- a. The number of arbitrators;
- b. whether arbitration is through the American Arbitration Association or party-selected;
- c. the qualifications of the arbitrators;
- d. the number of arbitrators;
- e. the locale of hearings;
- f. whether federal or state rules of evidence apply; and
- g. what state’s law controls the dispute.

- The waiver of consequential damages clause should be stricken, as it bars the owner from recovering consequential damages such as lost profits, loss of rental income caused by delay in completion of construction, and additional debt service on the construction loan, etc.

- Consolidation and joinder language should be modified so that the owner has the absolute right to join as a party to any pending arbitration or litigation any or all parties in the contracting chain, as well as the architect. The owner

should also have the ability to consolidate related lawsuits or arbitrations, thus avoiding a piecemeal resolution of disputes.

- Limitations on damages for delay, allowed under the standard AIA contracts, can be inserted;

- An Owner’s right to terminate a project for convenience, in addition to termination for cause, can be used to allow greater flexibility for project termination;

- Notice periods and preconditions to termination can be eliminated or modified to allow an owner to better control a non-performing contractor.

There are more examples of the failure of AIA construction contracts, or other standard contracts, to provide owners adequate protection. Construction contract drafting should be part of an owner’s planning process. Poorly drafted construction contracts can have serious and costly effects on a project.

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