Landlord vs. Buildout Contractor (The "New" AIA Forms)©

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A. THE AIA "STANDARD FORMS

The AIA documents are divided into groups or series of forms to address different relationships between different parties. They may briefly be summarized as follows:

The "A" Series: Agreements between Owners and Contractors.

The "B" Series: Agreements between Owners and Architects.

The "C" Series: Agreements between Architects and Consultants

The "D" Series: Architect-Industry documents

The "F" Series: Financial Management forms

For purposes of this article, we will only be dealing with Series "A", though it touches on series "B" as well. The use of "standard" forms gives commercial landlords and contractors a degree of assurance in that everyone uses them and everyone knows what the forms say; or do they? A contractor getting ready to build out a lease space may send over a standard AIA form and expect the landlord to just sign it. It may have been done that way before, or it may always have been done that way, but, the protection landlords expect is not easily supplied in the standard form.

In 1997, the AIA issued several newly revised documents. Have these new AIA documents truly made the forms so comprehensive and so fair that no changes are needed? By posing this question, and from the mere existence of this article, you can deduce that the answer is in the negative. Even in smaller or ordinary construction projects, each transaction gives rise to at least a few provisions that if you should ask "Will you or your lender agree to no retainage?" or "What happens if the store isn't turned over to the tenant by December 1?" The landlord invariably wants to be protected from that. In fact, if you raise almost any potential issue, the landlord will usually ask for specific protection against that risk. Then, when you explain how to effect that protection, changes to the form document will have to be made.

Amended forms are important to one or the other of the parties in a way the printed forms do not (and could not) anticipate. This article will examine several common lease construction situations and describe typical issues that you may want to consider. Invariably, raising these issues will culminate in changes to the form. We will consider a typical buildout construction situation, provide the relevant AIA form document provisions, and consider possible resolutions to these issues. The situations that we will discuss are:

• Construction in occupied facilities;
• Deadlines—liquidated damages and shared savings;
• When the contract exceeds the budget;
• Litigation—do you want the architect and contractor in the room at the same time?
• Disputes—litigation, arbitration, or mediation?
• Phased or piecemeal completion.

Generally, examples will come from the printed form "General Conditions," contained in AIA Document A201. Frequently a construction contract is sent for signature on an AIA Owner-Contractor Agreement (AIA Document A101 or A111) without any accompanying General Conditions. Neither the contractor nor the landlord focuses on the fact that the A101 and A111 incorporate the most recent version of the General Conditions. Therefore, whether or not the General Conditions are actually submitted for your review, the General Conditions apply. This article will focus on the 1997 version of the A201 and other enumerated AIA forms.

B. CONSTRUCTION AT OCCUPIED FACILITIES

If the contract for construction involves electric power work, the contractor might feel justified in turning off the power to get the work done. In other projects, a contractor might want to limit access to the site, operation of the HVAC equipment, use of bathroom facilities, and so on. All of these adverse actions will drastically affect space, your business or tenants. When a contractor must do work while an occupant is in possession, there are issues which would not be present if the job were new construction. A contractor may be doing a floor in an office building, a section of an office building, one or two vacant spaces in a strip shopping center or the condominium unit in the corner of the sixth floor. Many of the same concerns apply, and AIA form provisions are only tangentially relevant. Both the landlord and the contractor benefit from a more concerted review of the applicable issues.

1. AIA Provisions (That Almost Apply)

Section 3.3.1 - AIA Document A201-General Conditions: "The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. …" *(Does this mean the contractor can turn off the electricity in your office at any time?) Section 3.13.1 - AIA Document A201 - General Conditions:* "The Contractor shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents and shall not unreasonably encumber the site with materials or equipment." *(Where does it say that the contractor will leave some parking spaces in the strip center for customers?) Section 3.15.1 - AIA Document A201 - General Conditions:* "The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction

equipment, machinery and surplus materials." *(Where does the contractor store materials that will be used in construction?)*

2. Minimizing Disruption

There are several strategies to deal with disruption to the Tenant. One is to require work after hours, with restoration of space to working condition by the next morning. But after hours work involves a premium, and not all construction contracts warrant this kind of expense. Other techniques are to work on one portion at a time, so some parts are always useable, or to schedule work during vacation periods. Without specific scheduling requirements in the agreement, the schedule will be up to the contractor. If the contractor is going to be working when the adjacent space is being used, what is the minimum acceptable standard of interference? Will there be noise involved in the construction? Will there be dust and dirt permeating the larger area involved? Will there be localized power interruptions? Will the lavatories work? Will tenants be able to get in and out of nearby offices? Advance notice of interruptions of power, access, plumbing, and so forth,
becomes crucial to minimize the effect of the interruption of service. After determining what interruptions and problems are likely, decide whether parts of the work have to be moved to nights or weekends, or to the one week when the plant or warehouse is closed or the tenant is on vacation. At the same time, decide whether additional expense must be budgeted to use methods that minimize the disruptions or whether additional precautions are needed so that business can continue and customers/tenants/visitors may come through the front door. Those disruptions that cannot be avoided are then scheduled so occupants can be notified (and permission obtained?).

3. Staging Areas

Contractors require storage and staging areas to work efficiently. Will their use of storage and staging areas tie up parking space? If so, where? The farther that space is from the front door, the more the job will cost and the longer it will take. Agreeing in advance to the location of the storage or staging area avoids Monday morning parking distress.

4. Problem Avoidance

The contractor and the landlord wants the same issues resolved. If the contract does not provide for the inconveniences to be avoided (or to be acknowledged if they can't be avoided), then the work will cause difficulties that the landlord or tenants of adjacent spaces feel are surprises. Surprises strain the relationship between the landlord, tenant and the contractor. Surprises may cost even more money to address than if the problem had been addressed and planned for "up front." Therefore, the contractor wants ground rules laid down at the beginning, if for no other reason than to be able to price the project properly based on the interruptions and limitations that will be imposed on the work.

C. DEADLINES: LIQUIDATED DAMAGES AND SHARED SAVINGS

Landlords usually have a date set for when they want to take possession of, or use, a facility that the contractor is working on. The landlord will likely be counting on renting the facility to tenants. In either event, there is an expectation that the work will be done by a certain date. In fact, the tenant may have signed a lease that imposes penalties on the landlord for late delivery. Whether the needs are as critical as set forth above, or the landlord simply wants the job done, the AIA forms do provide for a fixed interval during which the work is to be completed. What happens if the work is not done in time? The 1997 version documents waive consequential damages. In the situation where the landlord intends to lease the newly built space, one of the damages waived is loss of income (e.g., rent). Is that what you intended? Landlords have heard that liquidated damages for late delivery is the way to make a contractor perform on time. There is no liquidated damages provision in the AIA forms.

1. AIA Provisions:

Section 4.3.10 - AIA Document A201 - General Conditions: "The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes: 1) damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and 2) damages incurred by the Contractor for principal office expenses including the compensation of personnel there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Subparagraph 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents." *(In this paragraph 4.3.10, what are direct damages that may be awarded?)*

2. The New AIA Provision—Delete It?

One of the new and controversial issues in the 1997 AIA documents is the foregoing limitation of what the contractor might be responsible for if the work is not done in time, or what the landlord might be responsible for if it delays the work. It is the rare landlord that wants to keep the AIA paragraph 4.3.10 at all. The simplest solution is to go back to the pre-1997 solution by deleting the whole paragraph.

3. Liquidated Damages

The knee-jerk reaction of the landlord to "ensure" delivery by the substantial completion date is to propose a liquidated damage clause. Contractors resist the imposition of liquidated damages. Frequently the response of the contractor is for a reciprocal benefit (i.e., a bonus payment) if the contractor finishes the work before the date set for substantial completion. When there is a request

for an early completion bonus, the schedule may be a factor. A loose schedule is an argument against the bonus. Also, if there is no advantage to the landlord for early completion, the economics may not support the bonus. Some architects believe liquidated damages complicate a job by resulting in excessive letter writing, nit-picking, and covering-your-be-hind delay claims. Landlords must understand that force majeure delays both the substantial completion date and the onset of liquidated damages. Landlords of leased space with a tight construction schedule should try to insert a force majeure provision in the construction provisions of the lease to match what will be in the construction documents. If there is no liquidated damage clause, the quoted AIA language may preclude any real recovery for late completion of the work.

4. Formula for Liquidated Damages

Liquidated damages, when applicable, are usually stated as a fixed dollar amount per day. Sometimes there is a "grace" period after substantial completion is scheduled. The grace period may depend on how aggressive the schedule is; a "comfortable" schedule would not support the grace period. In other cases liquidated damages may be tiered, at a lower amount right after the scheduled substantial completion date, and higher after that.

5. Shared Savings

Contractors are also asking for shared savings clauses. These apply only to guaranteed maximum price ("GMP") contracts. The concept is that to give incentives to the contractor to come in below the GMP, the contractor will get a percentage of the difference between the GMP and the actual cost..When such a provision is agreed upon, the accounting becomes complicated. Change orders, which increase or decrease the GMP, affect the starting point for computation. On the other hand, if there is a line item in the GMP for a contingency, how is that treated in computing the savings? Usually, unspent contingency is subtracted from the GMP starting point before savings are computed. Then the question becomes who controls application of the contingency line item. Is contingency there to be dipped into at will, or is the contingency dedicated to a particular matter? Another potential problem is knowing what corners are being cut by the contractor and determining whether that risk is worth it.

D. WHAT IF THE CONTRACT BID EXCEEDS THE BUDGET?

On occasion architects have designed projects that come in at a bid price for construction in excess of what the landlord is willing to pay (that is a joke to see if you are really paying attention). However, in the AIA form Architect Agreements, it will be an additional service (i.e., extra cost) if the architect is required to make revisions (to bring down the cost) that are inconsistent with approvals or instructions previously given by the landlord. Therefore, if the bid comes in too high, the landlord, seemingly, must ask the architect to revise the documents and the landlord must pay an additional sum. The AIA Architect agreement forms seem to provide a proper answer—but magic language must be separately drafted.

AIA Provisions: *Section 5.2.2 - AIA Document B151 - Architect Agreement (Smaller Scope*): "No fixed limit of Construction Cost shall be established as a condition of this Agreement by the furnishing, proposal or establishment of a Project budget, *unless such fixed limit has been agreed upon in writing and signed by the parties hereto. ..." (emphasis added)*

The potential solution to the additional expense issues appears to be found in Section 5.2.2. However, merely entering into the Architect Agreement with this language in it does not set a fixed limit of construction cost. As quoted above, the contract requires that there must be an explicit construction cost limit. Even though there may be all sorts of "understandings" on what the budget is, and despite the fact that written budgets may have been circulated, reviewed, modified, and approved, the contract requires the parties to agree in writing that some budget number is a "fixed limit of Construction Cost" to qualify for this treatment. A Landlord's easy solution is to insert a simple sentence that "the fixed limit of Construction cost is $_____." Without such a written agreement the language of 5.2.2 alone has not set the fixed limit.

E. IF YOU LITIGATE, DO YOU WANT THE ARCHITECT AND THE CONTRACTOR TO BE IN THE COURTROOM AT THE SAME TIME?

The AIA documents contain a limitation on consolidation or joinder of parties to an arbitration, and all disputes are resolved by arbitration. As a contractor or architect, it is beneficial to have that provision; as an landlord, it is not beneficial. If the forms are left as they are printed, the landlord is obligated to pursue the architect and contractor in separate actions. The contractor and architect can each blame the other for any problem. The landlord would wind up having to hire the architect to testify in an action against the contractor. If the contractor should happen to win, then the landlord must pursue the architect, having already burned its bridge with the contractor. It will be difficult to get expertise in the action against the architect, and with or without expertise, the architect could argue (consistently with the architect's testimony in the first action) that the default was that of the contractor. In front of a different judge, arbitration panel, or jury, there is no guarantee of an answer in the second case consistent with that of the first case. It is conceivable, therefore, that the landlord could lose both actions.

1. AIA Provisions:

*Section 4.6.4 - AIA Document A201 - General Condition*s: "No arbitration arising out of or relating to the Contract shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined…" (Notice how the architect is kept out of the arbitration of a construction contract issue.)

Section 7.2.4 - AIA Document B151 - Architect Agreement (Smaller Scope): "No arbitration arising out of or relating to this Agreement shall include, by consolidation or joinder or in any other manner, an additional person or entity not a party to this Agreement, except by written consent containing a

specific reference to this Agreement and signed by the Owner, Architect, and any other person or entity sought to be joined…" (Notice how the Architect can keep the contractor out of an architect agreement issue.)

The landlord is better served to have the architect and the contractor in the same proceedings. This correction to the AIA documents is a simple one. Delete the paragraph; state, affirmatively, that joinder is permitted.

F. LITIGATE, ARBITRATE, OR MEDIATE?

Alternative dispute resolution ("ADR") is an expanding field. Large corporations are in favor of it. Litigators are split on whether the benefits outweigh the detriments to any particular party to a dispute. There have been arbitrations that drag on as long as court cases and there have been arbitration injustices equivalent to that handed out by any jury or judge. Expenses may be cut down, but not always. Nobody argues that decisions are better; and many fear that arbitration justice is Solomonic, splitting the difference in each case. Rightly or wrongly, however, the perception generally is that ADR is cheaper and faster, and on the whole is not worse than litigation.

1. AIA Provisions:

The 1997 documents provide for mediation first, and then arbitration. All disputes end at arbitration; no litigation is permitted.

2. *Landlord Preference*

Do you want to insist on arbitration? Some landlords prefer to stick with litigation. If so, delete the arbitration paragraphs.

3. Mediation First

The 1997 AIA form documents provide for mediation before anything else. If mediation does not work, the documents require arbitration, in both the A201 General Conditions, at Section 4.6, and in the B151 Architect Agreement, at Section 7.2. If arbitration is not desired, these sections must be deleted or amended. Most landlords are willing to agree to mediation first..

4. Arbitration Procedures

If arbitration is to be used, the contract can specify:
• An arbitrating body other than AIA;
• Discovery rules;
• Deadlines;
• Award of attorneys' fees;
• Venue; or

• Anything else.

G. PHASED OR PIECEMEAL COMPLETION

If the contract is for work that need not all be completed at the same time, modifications to the contract may be necessary. Consider the small strip center that the landlord can only finance and lease up if the largest space lease (whether it is the convenience store or the drug store) is executed. When that lease is in place, there is likely to be a short time frame for the completion of the landlord's work; that space may have to be enclosed and ready for the tenant improvements before the rest of the space is enclosed. It is not uncommon to adjust the construction contract to provide for substantial completion of that portion earlier than substantial completion of the rest of the strip. Theoretically, every unit can have its own completion date but this may require more micro managing of the work than the landlord is prepared to undertake. An alternate manifestation of this problem is the "power center," where every tenant is a major tenant and has its own schedule for opening. Each of the leased units may have separate substantial completion dates and differing liquidated damage provisions imposed on the landlord/owner. The leases may even get into the detail of when work on each of the units must be started.

1. AIA Provisions:

Section 9.9.1 - AIA Document A201 - General Conditions: "The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by *separate agreement with the Contracto*r, provided such occupancy or use is *consented to by the insurer* as required under Clause 11.4.1.5 and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and *Contractor have accepted in writing* the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have *agreed in writing* concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. *When the Contractor considers a portion* substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Subparagraph 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written *agreement between the Owner and Contractor* or, if no agreement is reached, by decision of the Architect." (Emphasis added.)

Further clarification is needed: the General Conditions contemplate phased construction, but only suggest that additional issues need to be dealt with; the document does not resolve those issues. A further agreement is required of the contractor, and even the insurer has input into whether the landlord may use a portion of the job. If the landlord requires assurance of the ability to use portions of the work, the assurance must be provided (drafted) by the lawyer. The contractor's right not to enter into the referenced agreements must be circumscribed, and there should be an agreement in advance about how to determine when the landlord can take possession of the various parts.

H. CONCLUSIONS

Other examples of necessary changes to the AIA forms exist. Architect Agreements call for additional payment for models and renderings when those costs may have been waived in discussions between landlord and architect. If your contractor calls itself a "construction manager," does the architect deserve additional payment for coordinating with this entity? The B151 Architect Agreement makes coordination with a construction manager an extra cost item. Will your lender allow payment for materials stored, but not yet incorporated into the work? If not, this must be deleted from the A201 General Conditions. These and other provisions frequently require resolution other than, or in addition to, provisions in the printed form documents. While this article is intended to cover the most significant changes in the common AIA documents used between landlords and contractors, there are other considerations and possible necessary changes outside the scope of this article.

1. Negotiated Contracts Minimize Disputes

Construction has been undertaken with the unchanged form contracts, and even without any contracts, for many years. During the same time, however, there has been a tremendous volume of litigation, and some landlords and lawyers feel that a construction contract is simply the front end of a litigation (or arbitration) matter. Such a matter is universally acknowledged to be expensive just in lawyering costs. Disputes in the construction field can be minimized by dealing with the differences that arise from project to project. Construction projects are inordinately complex. Any set of AIA documents, even when marked up in detail, will not cover all of the details. However, expectations of each party should be brought to everyone's attention so the landlord, architect, and contractor are thinking the same way. Then, when the unexpected happens, it does not result in a disaster because either that issue or a similar issue has already been negotiated by the parties and resolved or the negotiations themselves gave the parties an opportunity to resolve problems and establish trust. Having already resolved the prior issues, the parties are less likely to litigate, if for no other reason than because they have established a better working rapport during the contract drafting process. Construction litigation can be a disaster. Resolving these issues up front, to avoid litigation, is disaster insurance.

2. Succinct Summary

No; we cannot yet use the AIA documents without amendment.