

CONSTRUCTION LAW

Owner's Rider to the AIA Form of General Contract



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The Real Estate Construction Committee (the committee) of the New York State Bar Association Real Property Law Section recently published an owner-oriented form rider (the owner's rider) for use with The American Institute of Architects (AIA) Form A107-2007, titled Standard Form of Agreement Between Owner and Contractor for a Project of Limited Scope (the AIA Form A107). The owner's rider, together with commentary and relevant exhibits, is available to members of the New York State Bar Association through its website (www.nysba.org/construction).¹

The owner's rider was prepared in response to concerns expressed by many attorneys that AIA forms contain inherent biases in favor of architects and contractors. In view of this, the committee saw a need for the development of the owner's rider in order to lessen the bias in AIA Form A107 (commonly used in smaller construction projects) as well as to make the review process more efficient and cost effective, close some gaps in AIA Form A107, and address certain issues in a manner that more realistically reflects common practice. While the owner's rider addresses many aspects of AIA Form A107² we will discuss but a few in order to present some of the more significant modifications.

Issues of Cost

Perhaps the paramount issue facing an owner on a construction project is controlling cost and the owner's rider addresses

this issue in several aspects. First, in the case of an agreement involving a stipulated sum, the owner's rider adds representations that the work can be completed for the contract sum and that the contract sum can be increased only by a change order effected in accordance with provisions of the agreement. The owner's rider adds that "no claim may be made by Contractor for compensation in addition to the contract sum other than by a change order signed in advance by Owner and Contractor setting out the additional cost of a change in the work or a method of determining such cost." The owner's rider also establishes pre-agreed markups for change order profit and overhead.

Next, the owner's rider establishes a number of provisions relating to applications for payment and the release of liens. Owner's rider paragraph 14 supplements Articles 4 and 15 of AIA Form A107, which governs applications for payment. For a very small job there may be simply one or two payments; however, for most jobs payments are spread over time. Under AIA Form A107, the contractor proposes a schedule of values, which allocates the contract sum to various portions of the work. When submitted by the contractor, and if the architect does not object, the schedule of values establishes a payment schedule. If appropriate, the owner can incorporate a specific payment schedule into the owner's rider.

Additionally, paragraph 14 of the owner's rider provides that any contract deposit shall be applied against the first payment due under the agreement, which is typically

desired by owners. Conversely, contractors often ask for the deposit to be applied against their final requisitions for payment, but such an arrangement would, as a practical matter, vitiate the utility of the retainage requirement.

AIA Form A107 requires the contractor to submit applications for payment to the architect, who determines whether or not payment is due. The architect is permitted to withhold approval of the payment application under specified conditions. In this manner, AIA Form A107 effectively makes the architect the "arbiter" of whether or not

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payment is due. Owner's rider paragraph 14 alters that structure by giving the owner the right to refuse payment if the contractor has engaged in one of the enumerated "bad acts" (e.g., defective work, liens filed against the building although payment has been made, etc.) and expands the list of bad acts (to include, for example, failure to discharge a mechanic's lien filed with respect to work for which payment has been made).

As regards payment and releases of liens, the owner's rider requires the delivery of waivers and releases and proposes forms for use by the owner. As regards mechanic's liens, the owner's rider contains express provisions relating to improper or willfully

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exaggerated liens and imposes liability on the contractor for such filings.

Issues of Time

Closely related to cost is time, under the mantra: "time is money." Owner's rider paragraph 13 modifies Article 2 of AIA Form A107 relating to the contractor's time for performance. The owner's rider compels the contractor to take action when the owner or the architect finds that the contractor has fallen behind schedule by requiring the contractor to work additional shifts or add manpower as required to complete the work on time. This provision was added in response to often stated contractor objections to liquidated damages. Owner's rider paragraph 13, essentially an "acceleration clause," addresses the issue of delay during the course of the project and may prevent delay damages to the owner, thereby obviating the need for liquidated damages.

On the issue of delay damages, paragraph 13 of the owner's rider also includes a "no damages for delay" clause limiting the contractor's sole remedy for delays for which the owner may be responsible to an extension of time and the payment of a reasonable sum to compensate the contractor for increased project expenses actually incurred and directly attributable to the delay, "but not for any consequential damages, extended general conditions, lost opportunity costs, impact damages, or similar damages."

Quality of the Work

Concluding the triumvirate of major issues facing an owner is the quality of the work. The owner's rider expands relevant warranty provisions contained in AIA Form 107. Paragraph 7 of the owner's rider includes an additional warranty that the work will be free of materials prohibited by law (i.e., hazardous materials) and that the work will be performed in a good and workmanlike manner. Although AIA Form A107 requires the contractor to perform the work in accordance with contract requirements and to use its best efforts and skill in performing the work, the consensus of the committee was that the "good and workmanlike manner" standard was appropriate to assure a reasonable quality of performance.

The owner's rider also expands the warranty provision of AIA Form A107 by providing the

owner with the right to perform corrective work if the contractor's work has not been satisfactory. The owner's rider also extends the one-year warranty period if corrective work is performed after substantial completion, by restarting the warranty period after the warranty work is performed. The owner's rider also tightens up the requirement of the contractor to perform corrective work by requiring a 30-day period after notice is given by the owner or architect to the contractor of defective work, subject to a reasonable extension if such corrective work cannot be performed in that time period. Likewise, punchlist work must be performed within 30 days of the receipt of the punchlist.

Other Key Modifications

One of the major pitfalls of AIA Form A107 relates to termination for convenience (i.e., without cause). While AIA Form A107 contains a termination for convenience clause for the benefit of the owner, thereby eliminating the need to prove cause, it allows the contractor to recover unearned profit and overhead on work not executed. The owner's rider eliminates the reference to unearned profit and, upon the exercise of the termination for convenience, allows the contractor to recover for the work performed, the retainage allocable to that work and the contractor's demobilization costs. If the contractor is terminated for convenience, the owner waives the right to bring an action against the contractor for the damages it might incur if it is compelled to pay additional cost to finish the work.

A final significant modification contained in the owner's rider relates to indemnity. Section 9.15.1 of AIA Form A107 includes an indemnity in favor of the owner that essentially covers insurable claims (i.e., claims attributable to bodily injury, sickness, disease, death, and damage to tangible property), to the extent the claim arises from the negligent acts or omissions of the contractor. What the section does not cover is (a) losses incurred by the owner in connection with the contractor's breach of contract, which might include legal fees and bonding costs incurred in connection with unlawful mechanic's liens and fines and penalties for violations issued against the project, (b) misconduct of the contractor, and (c) claims by the contractor's employees against the owner where the contractor was not neg-

ligent. Owner's rider paragraph 10 expands the indemnity to cover such claims. While these claims are not covered by insurance, the committee felt that the expansion of the indemnity was justified in the event the owner incurs such claims as a result of non-insurable breaches by the contractor.

Conclusion

The owner's rider is intended to provide a more uniform approach to the review and negotiation of AIA Form A107. It was the expectation of the committee that the owner's rider will serve that function by making construction contracts easier and more efficient to negotiate. While the owner's rider can be modified to reflect the terms of a given project, it is the ethical responsibility of the drafter to note any modifications through track changes or other devices so as to eliminate any impression that the modified owner's rider was sanctioned by the committee.

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1. This article incorporates portions of the commentary found on the website which was prepared by Nancy Ann Connery, working in conjunction with Kenneth M. Block and Brian G. Lustbader, downstate co-chairs of the Committee.

2. The following terms used in this article are defined in AIA Form A107: Agreement; Applications for Payment; Architect; Change Order; Contract Sum; Contractor; Owner; Project; Schedule of Values; Substantial Completion; Work.