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COMPARISON OF AIA AND EJCDC CONTRACT PROVISIONS ON RHODE ISLAND AND MASSACHUSETTS CONSTRUCTION PROJECTS

The following discussion is an attempt to identify some of the significant clauses in the owner/contractor agreement. This analysis will compare the language contained in the American Institute of Architects ("AIA") documents with the Engineers Joint Contract Documents Committee ("EJCDC") documents, especially the general conditions from each format in regard to time related issues and claims (dispute resolution procedures will be discussed in a subsequent issue). The AIA documents are the most widely used forms in vertical (building) construction. The EJCDC forms are widely used in horizontal (sewer, water/heavy construction).

I. PRECEDENT CLAUSES

A construction contract usually consists of many documents including but not limited to the following:

- contract
- general conditions
- supplementary conditions
- drawings
- specifications

The contract should therefore have a provision stating which document will control when there is a conflict among the documents.

The AIA General Conditions deal with the problem by not indicating which document takes precedence but by stating that the parties should try to read the provisions in a complementary manner.

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1.2 CORRELATION AND INTENT OF THE CONTRACT DOCUMENTS

1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

The EJCDC General Conditions take a similar approach:

3.01 Intent

A. The Contract Documents are complementary; what is called for by one is as binding as if called for by all.

B. It is the intent of the Contract Documents to describe a functionally complete Project (or part thereof) to be constructed in accordance with the Contract Documents. Any labor, documentation, services, materials, or equipment that may reasonably be inferred from the Contract Documents or from prevailing custom or trade usage as being required to produce the intended result will be provided whether or not specifically called for at no additional cost to OWNER.

The EJCDC General Conditions go on to indicate that the contract documents "shall take precedence in resolving any conflict, error, ambiguity, or discrepancy between the provisions of the" contract documents and any standard, code, law or regulation unless such an interpretation would result in a violation of the law or regulation.

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II. NO DAMAGE FOR DELAY CLAUSES

The “no damage for delay clause” is used in private and public construction contracts. It is frequently contained in public construction contracts. The frequency of its appearance in public contracts is enhanced by the fact that public entities usually can dictate the terms of their contracts by making them part of the bid package. The “no damages for delay” clause is an attempt by the owner to protect itself from paying additional monies to the contractor for costs incurred as a result of delays caused by the owner or its architect/engineer. In ruling on the enforceability of such clauses the courts have rendered varying decisions. Some have ruled them to be enforceable, while others have held them to be against public policy and therefore not enforceable or have found exceptions to get around the barrier they seek to create. The Rhode Island courts have not addressed the issue. The Massachusetts courts have found them enforceable. *Reynolds Bros., Inc. v. Commonwealth*, 412 Mass. 1, 586 NE 2d 977 (1992).

The AIA General Conditions do not contain a “no damages for delay” clause. In fact, the AIA document specifically acknowledges the right to recover damages for delay:

8.3.3 This paragraph 8.3 does not preclude recovery of damages for delay by either party under other provisions of The Contract Documents.

At the same time, the 1997 version of the AIA General Conditions does contain a waiver of consequential damages provision under section 4.3.10 Claims For Consequential Damages. It reads as follows:

4.3.10 Claims for Consequential Damages. 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 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 stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the work. . .

This provision appears to waive, among other things, a so called Eichleay claim for home office overhead.

The EJCDC General Conditions are less generous. Although it does not contain a true “no damages for delay” clause, there is an attempt to partially restrict such claims:

12.03 Delay. . .

C. If Contractor is delayed in the performance or progress of the Work by fire, flood epidemic, abnormal weather conditions, acts of God, acts or failures to act of utility owners not under the control of Owner and Contractor, then Contractor shall be entitled to an equitable adjustment in Contract Times, if such adjustment is essential to Contractor’s ability to complete the Work within the Contract Times. Such an adjustment shall be Contractor’s sole and exclusive remedy for the delays described in this Paragraph 12.03.C.

III. LIQUIDATED DAMAGES

A liquidated damage clause provides for a per diem charge (\$1,000 for example) for each day of delay beyond the scheduled completion date that it takes the contractor to complete its work. They are frequently contained in public construction contracts because the awarding authority has the power to impose them during the bidding process. Liquidated damages clauses are upheld by the courts if reasonable and they do not constitute a penalty. *Kelly v. Marx*, 428 Mass. 877, 705 NE 2d 1114 (1999).

There is also what is known as a bonus payment provision which awards the contractor an additional per diem amount for early completion of the project.

The AIA documents provide for liquidated damages or bonus payments if the parties so elect. The initial reference is contained in Article 3 of the AIA 101 Standard Form of Agreement, which has a blank space for the parties to insert liquidated damage or bonus payment provisions:

3.3 The Contractor shall achieve Substantial Completion of the entire Work not later than _____ days from the date of commencement, or as follows:

(Insert number of calendar days. Alternatively, a calendar date may be used when coordinated with the date of commencement. Unless stated elsewhere in the Contract Documents, insert any requirements for earlier Substantial Completion of certain portions of the Work.), subject to adjustments of this Contract Time as provided in the Contract Documents. (Insert provisions, if any, for liquidated damages relating to failure to complete on time or for bonus payments for early completion of the Work.)

The assessment of liquidated damages is also acknowledged in the AIA 201 General Conditions in the waiver of consequential damages section (4.3.10) noted above where it states:

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.

The EJCDC documents clearly encourage the use of liquidated damages as a mechanism to achieve timely project completion. The Standard Form of Agreement (1910-8-A-1) contains a liquidated damages clause. All that has to be filled in is the daily amount.

4.03 Liquidated Damages

A. CONTRACTOR and OWNER recognize that time is of the essence of this Agreement and that OWNER will suffer financial loss if the Work is not completed within the times specified in Paragraph 4.02 above, plus any extensions thereof allowed in accordance with Article 12 of the General Conditions. The parties

also recognize the delays, expense, and difficulties involved in proving in a legal or arbitration proceeding the actual loss suffered by OWNER if the Work is not completed on time. Accordingly, instead of requiring any such proof, OWNER and CONTRACTOR agree that as liquidated damages for delay (but not as a penalty), CONTRACTOR shall pay OWNER \$ for each day that expires after the time specified in paragraph 4.02 for Substantial Completion until the Work is substantially complete. After Substantial Completion, if CONTRACTOR shall neglect, refuse, or fail to complete the remaining Work within the Contract Time or any proper extension thereof granted by OWNER, CONTRACTOR shall pay OWNER \$ for each day that expires after the time specified in paragraph 4.02 for completion and readiness for final payment until the Work is completed and ready for final payment.

IV. TIME EXTENSION CLAUSE

Closely linked to the “no damage for delay” and liquidated damages clauses is the time extension clause. It defines what events will entitle the contractor to a time extension. A careful reading is important, as the language of this clause may provide the basis for the contractor to avoid an assessment of liquidated damages and to seek to recover delay damages.

The AIA General Conditions contain the following language:

8.3 DELAYS AND EXTENSIONS OF TIME

8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending mediation and arbitration, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Paragraph 4.3.

8.3.3 This Paragraph 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

The EJCDC documents take a different approach. The EJCDC General Conditions break the time extension issue down into three categories: (1) delays beyond the contractor's control (2) delays within the contractor's control and (3) delays beyond the owner's and contractor's control:

12.03 Delays Beyond CONTRACTOR's Control

A. Where Contractor is prevented from completing any part of the Work within the Contract Times due to delay beyond the control of Contractor, the Contract Times will be extended in an amount equal to the time lost due to such delay if a Claim is made therefore as provided in paragraph 12.02.A. Delays beyond the control of Contractor shall include, but not be limited to, acts or neglect by Owner, acts or neglect of utility owners or other contractors performing other work

as contemplated by Article 7, fires, floods, epidemics, abnormal weather conditions, or acts of God.

B. If Owner, Engineer, or other contractors or utility owners performing other work for Owner as contemplated by Article 7, or anyone for whom Owner is responsible, delays, disrupts, or interferes with the performance or progress of the Work, then Contractor shall be entitled to an equitable adjustment in the Contract Price or the Contract Times, or both . . .

C. If Contractor is delayed in the performance or progress of the Work by fire, flood, epidemic, abnormal weather conditions, acts of God, acts or failures to act of utility owners not under the control of Owner, or other causes not the fault of and beyond control of Owner and Contractor, then Contractor shall be entitled to an equitable adjustment in Contract Times, if such adjustment is essential to Contractor's ability to complete the Work within the Contract Times. Such an adjustment shall be Contractor's sole and exclusive remedy for the delays described in this Paragraph 12.03.C. . .

E. Contractor shall not be entitled to an adjustment in Contract Price or Contract Times for delays within the control of Contractor. Delays attributable to and within the control of a Subcontractor or Supplier shall be deemed to be delays within the control of Contractor.

V. CLAIM NOTICE PROVISIONS

Both the AIA documents and the EJCDC documents have very specific requirements in regard to the notification of claims. Although most claims are generated by the contractor these provisions also apply to the owner. Claims typically seek an adjustment to the Contract Price or the Time of the contract.

The notice provisions in the AIA documents are quite different than those contained in the EJCDC documents and are much simpler. The AIA A201 General Conditions contains the following provisions:

4.3 CLAIMS AND DISPUTES

4.3.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term “Claim” also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

4.3.2 Time Limits on Claims. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party.

The EJCDC General Conditions contain a two step procedure. A notice of the claim must be given within 30 days of "the start of the event giving rise thereto." A notice of the amount or extent of the claim must be given within 60 days of the start unless extended. The notice section also requires reference to the adjustment of Contract Price and adjustment of Contract Time sections of the contract.

10.05 CLAIMS . . .

B. Notice: Written notice stating the general nature of each Claim, dispute, or other matter shall be delivered by the claimant to ENGINEER and the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. Notice of the amount or extent of the Claim, dispute, or other matter with supporting data shall be delivered to the ENGINEER and the other party to the Contract within 60 days after the start of such event (unless ENGINEER allows additional time for claimant to submit additional or more accurate data in support of such Claim, dispute, or other matter). A Claim for an adjustment in Contract Price shall be prepared in accordance with the provisions of paragraph 12.01.B. A Claim for an adjustment in Contract Time shall be prepared in accordance with the

provisions of paragraph 12.02.B. Each Claim shall be accompanied by claimant's written statement that the adjustment claimed is the entire adjustment to which the claimant believes it is entitled as a result of said event. The opposing party shall submit any response to ENGINEER and the claimant within 30 days after receipt of the claimant's last submittal (unless ENGINEER allows additional time).

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Please contact Thomas W. Heald, Esq. with any Questions with respect to this newsletter.

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The Rhode Island Supreme Court may consider this material advertising.

MECHANICS' LIEN & BOND CLAIM DEADLINE SUMMARY

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RHODE ISLAND

- Mechanics' Lien – Must mail Notice of Intention to owner within 120 days of first unpaid day of work – i.e. a Notice of Intention mailed today only covers labor and materials provided to job in last 120 days. Cannot lien public works jobs (some exceptions). Must record Notice of Intention.
- Bond Claims
 - Private Jobs
 - Direct Sub/Supplier – Must act according to conditions in bond – usually give notice to general contractor, bonding company and owner and file suit within one year of your or the general contractor's last day of work.
 - Second/Third Tier Sub/Supplier – Must act according to conditions in bond – usually give notice to owner and general contractor within ninety (90) days of your last day of work and file suit within one year of your or the general contractor's last day of work.
 - Public Jobs (State, City, Town)
 - Direct Sub/Supplier – Must file suit within two years of your last day of work.
 - Second/Third Tier Sub/Supplier – Must give notice to general contractor within ninety (90) days of your last day of work (not mandatory in many cases) and file suit within two years of your last day of work.
 - Public Jobs (Federal)
 - Direct Sub/Supplier – Must file suit within one year of your last day of work.
 - Second/Third Tier Sub/Supplier – Must give notice to general contractor within ninety (90) days of your last day of work and file suit within one year of your last day of work.

MASSACHUSETTS

- Mechanics' Lien
 - General Contractor/Direct Sub/Supplier – Must record Notice of Contract within ninety (90) days of general contractor's last day of work (some exceptions). Sub/Supplier must serve owner with copy of Notice of Contract.
 - Second/Third Tier Subs/Supplier – Must serve general contractor with Notice of Identification within thirty (30) days of commencement of work on project (failure to serve Notice of Identification may not be fatal) and must record Notice of Contract within ninety (90) days of general contractor's last day of work (some exceptions) and must serve owner with copy of Notice of Contract. Cannot lien public works jobs.
- Bond Claims
 - Private Jobs
 - Direct Sub/Supplier – Must act according to conditions in bond – usually give notice to general contractor, bonding company and owner and file suit within one year of your or the general contractor's last day of work.
 - Second/Third Tier Sub/Supplier – Must act according to conditions in bond – usually give notice to owner and general contractor within ninety (90) days of your last day of work and file suit within one year of your or the general contractor's last day of work.
 - Public Jobs (State, City, Town)
 - Direct Subs/Supplier – Must file suit on bond within one year of your last day of work.
 - Second Tier Subs/Supplier – Must give notice to general contractor within sixty five (65) days of your last day of work and must file suit within one year of your last day of work.
 - Public Jobs (Federal)
 - See Rhode Island above.

Notes: All notices to be served or given by certified mail return receipt requested. The purpose of this summary is to provide general information to clients and other persons in determining the validity of lien or bond claims and calendaring when they should seek legal assistance. It is not intended to be a comprehensive outline of the legal process related to mechanics' liens and bond claims. It is not intended to provide specific legal advice or address fact specific issues or circumstances.

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