

### CONSTRUCTION LAW

## Importance of Construction Contract Coordination



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Imagine three months after completion of construction, your client finds a significant leak in the recently completed roof of its new building. Unable to resolve whether the leak is a result of a construction defect or a design flaw, you are told to commence an action against both the project contractor and the design architect. Unfortunately, your client's agreement with the contractor requires the owner to resolve all disputes in litigation; the agreement with the architect requires that all disputes be resolved through arbitration. Careless contract drafting now has your client facing the cost of two separate actions. What is more troubling, however, is that the money spent on the two actions could be wasted if the court finds that the leak is a result of a design flaw (and exonerates the contractor), but the arbitrator finds that the leak is a result of a construction defect (and exonerates the architect). The result of the inconsistent decisions is that your client is compelled to pay for the leaking roof.

The above scenario is not unlikely, inasmuch as the early stage of construction projects often encourages a compartmentalized approach to contract drafting and a myopic perspective of the individual contracts. Typically, in a general contract delivery method, a project owner first contracts with an architect to design the project and provide construction drawings by which the project owner can bid out the project to prospective contractors. Months later, the project owner will bid the

job and eventually award a contract to the general contractor. Also, at other point during the course of the project, the owner may contract with engineers, other design professionals and possibly other trade contractors. The staggered approach and the length of time between contracts lends itself to the potential for inconsistency among the various contracts.

This article identifies the more common overlapping provisions of the project owner's agreements with the architect and contractor in order to provide guidance for the contract drafter. For purposes of this article, the

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issues are divided into three categories: those overlapping contract provisions that deal with project scope; those provisions that relate to project timing; and those provisions that relate to the issue of liability.

### Overlapping Provisions

**Provisions Relating to Scope.** There is potential overlap between the services that can be performed by the architect and the services that can be performed by the contractor. Careful coordination is therefore required to ensure that there is no duplication of efforts and no gap in services. For instance, project owners typically want conformed or updated drawings prepared that depict the final actual conditions

of the project. While the responsibility for preparing "as-built" drawings generally falls to the contractor and its subcontractors, the architect may also have responsibility to update the architectural drawings to reflect changes in the work (referred to as "record" drawings). If the agreements with the contractor and the architect are both silent as to responsibility for providing updated drawings, the project owner could be left without either as-built or record drawings or may end up paying the architect for such drawings as an additional service.

Another subject that must be coordinated between the two contracts is the responsibility of the architect to sign or issue changes in the work, which are usually accomplished by an established process for change orders or construction change directives. The process for changes is frequently prescribed in the project owner's agreement with the contractor, but may be overlooked in the agreement with the architect. For instance, the project owner's agreement with the contractor may define a change order as a change in the work that requires approval from the architect.

However, if the architect's scope does not include the approval of change orders, such service would be considered an additional service for which the project owner must pay additional compensation. A similar problem arises with minor changes in the work that do not require a change order or construction change directive. The agreements with the architect and the contractor must unambiguously establish whether the architect has the right to order minor changes, by what process such changes must be directed and whether such changes

must also be approved by the project owner. Inconsistent provisions could lead to project delays and extra costs to the project owner.

When a project reaches the point of substantial completion, a punchlist of outstanding items is commonly prepared. However, the individual responsible for preparing the punchlist must be defined in the respective contracts. Often times, the base contract with the architect requires the architect to prepare the punchlist for the project owner's approval. However, the responsibility can also fall to the contractor, in which case the contractor prepares the punchlist for the architect's (and sometimes the owner's) approval. Both the contractor's and architect's agreements must consistently reflect the preferred method. If the contractor's agreement requires preparation of the punchlist by the architect, but the task is not included in the architect's scope of basic services, the project could be delayed and the project owner could be saddled with additional compensation to the architect for the additional service.

The contracts must also be consistent with regard to the role of the architect as communicator and as the initial decision maker. In some cases, contractors insist that all communications between the contractor and the owner be routed through the architect and that all disputes be initially decided by the architect, which the contractor may see as an unbiased third party that better understands the construction process and can more reasonably arbitrate a dispute. Such arrangements diminish the power of the project owner to control the project, but should the project owner agree to this arrangement, it must be provided for in both the agreement with the contractor and the agreement with the architect.

**Provisions Relating to Timing.** An obvious but critical topic that must be consistent throughout all of the project contracts relates to the project schedule. When the project owner negotiates the agreement with the architect early in the project, one item that is often negotiated is the amount of time that the architect will engage in the service of construction administration. Recognizing that construction projects are often delayed, the architect's agreement may contain a provision for an increase in compensation if construction administration extends past a certain date.

Subsequently, either during the bidding process or during contract negotiation with the contractor, the project owner may learn that the project cannot be completed in the time period initially allotted to the architect for construction administration, potentially costing the project owner additional compensation. The timing for the construction phase of the project must therefore be carefully considered when negotiating the terms of the architect's agreement.

Another issue that commonly arises is the time allotted for the architect to return requests for information (RFIs), shop drawings and other documents submitted by the contractor. Agreements with contractors regularly require that such submittals be returned to the contractor within a set period of time, the breach of which results in an excusable and compensable delay to the contractor. Architects similarly insist that their contracts include a provision that allows them a set amount of time by which to return submittals. These provisions must be consistent so that the time allotted to the architect does not run afoul of the time period set forth in the contractor's agreement.

Another significant provision that must be coordinated concerns the authority and timing for certifying payment applications submitted by the contractor. The procedure for certifying payment can vary—the responsibility can be delegated to the architect or it can fall to the project owner, typically through an entity acting as the owner's representative. If the scope of the architect's agreement does not include the certification of payment applications and the owner has not retained an owner's representative, the project owner will be burdened with additional costs for that service.

In addition, the time by which the architect is allotted to approve the payment applications must be consistent in both the architect's and the contractor's agreements. Since the architect typically requires a site visit in order to certify payment applications, the architect will want a more generous period of time to accomplish the certification process. Of course, the contractor will seek to shorten that time period in order to effectuate prompt payment. This tug-of-war must be reconciled and the provisions governing review and certification of payment applications must be consistent throughout the respective contracts.

**Provisions Relating to Liability.** The opening hypothetical of this article demonstrates the need for coordinating the dispute resolution process among the various contracts. This critical provision must be harmonized in all agreements with the project owner in order to ensure that disputes are not subject to inconsistent verdicts. Related provisions that must similarly be coordinated are the forum selection clauses. Project owners that are based in New York but own projects in other jurisdictions often want to litigate disputes in New York courts and want New York law applied. If one member of the project team insists that the forum or governing law be the place where the project is located, the project owner risks inconsistent decisions in the case of a dispute.

A final but important issue that must also be considered is the identification of additional insureds and indemnitees. It is not uncommon for an architect to require, in its agreement with the project owner, that the project owner require the contractor to name the architect as an indemnitee or additional insured on its general liability policy. Should the project owner agree to such a provision, it could potentially cause problems if the contractor eventually awarded the project declines. Since the contractor is typically not known at the time the agreement with the architect is negotiated, this issue is not easy to overcome if the architect insists on such a provision.

## Conclusion

Because construction projects require careful coordination among the various contractors and professionals, the provisions that govern the project must also be properly coordinated. This requires the contract preparer to look beyond the four corners of the contract and to consider the effects of each provision on the other parties involved in the project. Such coordination is necessary to protect the project owner, encourage timely completion of the project and minimize the potential for added project costs.