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IDENTIFYING INCONSISTENCIES IN CONTRACT DOCUMENTS— PRESERVING YOUR RIGHTS

As the construction industry becomes more competitive and clients look to protect themselves from unforeseen costs, contractors must be careful in contract negotiations and performance procedures. You need to be wary of construction contract general conditions that impose significant obligations and risks for discovering errors and inconsistencies in the contract documents.

Fulfilling Your Responsibilities

AIA Document A201-1997, *General Conditions of the Contract for Construction*, is usually recognized as the “standard” for contractor performance. In the 1987 edition of A201, the contractor was obligated to study and compare the contract documents and to report errors and inconsistencies to the architect. There was no liability unless the contractor both recognized an error or inconsistency and knowingly failed to report it. In A201-1997, this responsibility changed.

Now the failure to study and compare the drawings, specifications, and other contract documents carefully, to take field measurements of existing conditions, to observe conditions at the site, and to report errors and omissions can have serious consequences for the contractor. The contractor can be liable for such costs and damages as the client would have avoided if the contractor had performed such obligations.

Working With the Client

In the current economic climate, it is likely that clients will be paying less for design services and more errors and inconsistencies will result. Clients that start the project delivery system by not paying adequate design fees can be expected to promote cost recovery efforts that shift risks to contractors. The obligation to discover errors and inconsistencies not only places a significant burden on the contractor, it can preclude the contractor from recovering for delays and extra services. It also can target the contractor for litigation. If the project design team fails to coordinate the contract documents properly and there are conflicts that could be discovered by a careful comparison of the contract documents, the contractor could be liable to the client for resultant damages.

Documenting Your Work

It is vital that you develop procedures not only to fulfill these contractual obligations, but also to document that you have done so. Contractors should have procedures for estimating and field personnel to carefully study and compare the contract documents. For example, when estimating the work, the contract documents should be compared and any design errors or omissions reported. In any dispute, a construction estimator should be able to testify about the procedures used during the estimating process to show that a careful study was conducted.

Additionally, before work in the field begins, the contractor’s superintendent or foreman should carefully study and compare the contract documents relative to each portion of the work. If any design errors or omissions are discovered, they need to be reported. The process used to take field measurements of any existing conditions related to any portion of the work also should be carefully recorded. This documentation should include the observations of conditions at the site affecting that portion of the work.

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If during the construction process other design errors or omissions are discovered that would result in additional costs or time, the contractor should submit a claim for such costs and time in accordance with the provisions of the contract documents. Again, proper documentation is vital to show that care was taken to evaluate the plans and specifications.

No client or contractor should expect that design documentation will be error-free. It is critical to the financial viability of contractors, however, that problems with the plans and specifications, other documents, and site conditions be properly examined and reported. By doing so, the contractor will meet its obligations and prevent the client from shifting the risks of design deficiencies or inaccurate site information to the contractor.