

Contracts and Riders



Werner Sabo, Esq., CSI, FAIA, and James K. Zahn, Esq., CSI, FAIA, are architects, attorneys, and partners in the Chicago, Illinois law firm of Sabo & Zahn. Both are Resource Members of AIA's National Documents Committee, and can be reached via e-mail at wsabo@sabozahn.com or jzahn@sabozahn.com.

Whenever we begin work on a new case, we ask our client for the relevant contract. On several recent occasions, these contracts revealed potentially serious problems that might have been prevented by the architect at the outset of the project.

Years ago, architects would begin with a standard paper American Institute of Architects (AIA) contract and make changes. If a revision was minor, it could be made directly on the paper by crossing out certain words and/or adding words in the margin. The only real requirement was the change be legible and easily understood. (Perhaps an asterisk would be inserted in the text with a footnote on that page identifying the inserted text.) If the change was more significant or lengthy, a separate document—a rider—was often used.

Some law firms developed a 'standard' rider for use every time they prepared a contract. They would have a B141 rider (Owner/Architect Agreement) or one for A201 (General Conditions of the Contract for Construction). They might even have one B141 rider if the client was the architect and a completely different B141 rider if the client was the owner.

In the pre-computer days, this system was state of the art. Of course, it was not so clean if there were many revised versions of that same contract. Ambiguities often resulted if the parties were not careful. On many occasions, changes to the AIA document were made in the margins and riders were also used. Sometimes, there was inconsistent language between these changes and the riders. This could lead to court battles over the intent of the parties—an expensive and avoidable process.

Discrepancies with digital documents
Several years ago, when most offices had personal computers, AIA began offering the contracts in electronic form. The intention was to make contract drafting—particularly the revision part of this process—easier on the parties. A side benefit was to lessen ambiguities created with multiple documents. This could be accomplished because there would be a single document, with any particular provision (hopefully) only being addressed once. Changes and modifications once placed in riders could now be incorporated directly into the contract.

In architectural terms, imagine a set of drawings and specifications where information about a particular piece of equipment is called out in both. The potential for inconsistencies is obvious, particularly as design changes. The same is true if the contract covers the same issues in two different places, such as the form contract and a separate rider.

Despite AIA's efforts, it appears many architects and owners are not using the contract documents software properly. In the authors' recent examples, we have seen these contracts drafted with changes incorporated directly into the documents (as is proper), along with the use of riders. Riders should almost never be used with these electronic documents to modify the form contracts. Instead, the changes in these riders should be placed directly into the electronic documents. This applies to the 'standard' modifications often used by law firms. By going through the exercise of cutting and pasting each change into the AIA form document, it becomes easy to spot inconsistencies between different revisions, leading to a clear meeting of the minds among parties.

Court case in point

A recent case demonstrates the results of such inconsistencies. In *Atlantic City Associates v. Carter & Burgess*, the architect submitted a proposal to the owner for architectural services. This proposal contained a limitation of liabilities clause whereby the design firm capped its potential liability to the owner to the amount of its compensation. Later, the parties executed an AIA form contract that contained a waiver of consequential damages provision as well as an indemnification provision. The proposal was incorporated into the contract as a rider.

When delays to the project occurred, litigation resulted wherein each party blamed the other for the wait. One of the issues in the litigation was the overlapping provisions in the proposal and contract. The parties spent considerable time and expense in litigation over which provision in each document actually governed. For instance, the owner argued the limitations provision in the proposal conflicted with the indemnity provision of the form contract and, therefore, there was no cap on damages.

For our purposes, the court's rulings on these issues is not important because the ruling depended on the specific language used in these documents. The thing to consider is that some of these costs could have been avoided altogether

by having a clear and consistent contract. Using a single document, instead of a contract plus a separate rider, would probably have greatly helped. In cases where a rider is unavoidable, such as where there is an important pre-existing document, the parties must take extra care to carefully check for possible inconsistencies and ambiguities. A little extra time taken in drafting the contract can pay huge dividends later.

In the Atlantic City case, the parties had a proposal that was later incorporated into the final contract. It is understandable (although perhaps not desirable) that the prior document would be attached as a rider. When there is no prior document (as was the case with the contracts mentioned at the outset), there is little reason to have a rider. Everything that needs to be said can be done in a single contract.

Of course, other types of documents might still be attached as exhibits or riders. Site surveys, programs, and schematic design drawings do not modify the contract language—the key difference between what should be in a rider and what should be in the main contract.

A good contract is clear and unambiguous and covers the issues on which the parties to the contract have agreed. Simple is better. ♡