

Pros and Cons of an Architect as Initial Decision Maker in AIA Contracts, Sept. 9, 2021, NY Real Estate Journal, by Andrew Richards

The AIA form of owner-contractor contract utilizes an initial decision maker for disputes between the owner and contractor which may include scope of work disputes, delays and termination of the contract itself. The terms of the contract provide that the architect shall be the decision maker unless a different decision maker is identified in the contract. There are several pros and cons to having the architect be the initial decision maker which all parties to the contract should consider before agreeing to have the architect act as the initial decision maker. When the dispute is brought to the architect pursuant to the terms of the contract, the architect will either issue a decision, decline to issue a decision and state why no decision can be issued, or simply remain silent.

The benefit of having the architect as an initial decision maker is that the initial decision by the architect may very well prevent prolonged litigation. Almost acting as a mediator, the architect will review the information and documents which the architect believes are necessary to make a decision. This happens early on before litigation even commences and before the parties have incurred significant legal fees. If the architect renders a decision, the parties now have an in-dependent, early look at how a trier of fact may decide the issue in court. In addition, the parties will know where the architect stands in the event the architect testifies at the trial or arbitration. With the initial decision, the parties have insight as to whether they should settle early on before incurring significant legal fees and avoid the risk of an adverse decision down the road. The architect's decision may also be considered by the trier of fact in litigation or by the arbitrators in an arbitration...

With all of this in mind, it is my experience to delete all references in the owner-contractor agreement to an initial decision maker. Since the initial decision maker's decision is not binding and is reviewable in a court of law, the negatives outweigh the positives in having an initial decision maker. Requesting an initial decision only slows down the construction of the project and/or the resolution of a dispute. More often than not the architect, as initial decision maker, is reluctant to issue a report since he/she has nothing to gain and does not want to get involved in the dispute. Hence, delete it from the contract. The negatives outweigh the positives.

Subscribers can read the article in full at the link.