

## Pros and cons of an architect as initial decision maker in AIA contracts, article by Andrew Richards, New York Real Estate Journal, September 2021

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 independent, 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.

Notwithstanding the foregoing, there are negatives of having the architect (or anyone else) named as an initial decision maker. First, the architect must have agreed to act as the initial decision maker in the contract between the owner and architect. If the agreement between the owner and architect do not contain such a responsibility, a court may rule in favor of the contractor and direct the owner to get the architect to so decide which will be costly and take time.

While that is not what would probably happen, the more negative situation for the owner is if the owner and architect get into a dispute and the architect takes an adverse position to the owner in favor of the contractor in their dispute, or simply does not exercise its responsibilities. Now the owner is in a dispute with contractor and the architect and faces an adverse witness in the claim against the architect. Or, the architect simply does not respond to the owner's request for a decision on a dispute which creates a nightmare for the owner. The owner will be left with a headache in trying to move forward with the dispute. If the court will not allow the owner to move forward with its claim without the architect's decision, the owner may have to commence a special proceeding for an order compelling the architect to do so. Again, unnecessary legal fees will be incurred by the owner in trying to move forward against the contractor and additional time will be needed to resolve the dispute.

In addition, if the owner wants to terminate the contract for cause, the architect's reluctance to issue a justification certification for the termination may slow down the owner's process of hiring a new contractor to finish the project. Each day that goes by waiting to terminate the contract means another day of loan interest payments, lost rents or deposits, or other damages the owner may incur for the delay of the completion of the project. It is too risky for the owner to have to obtain a certification by the architect that the termination would be justified.

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 decisionmaker'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.

Andrew Richards is Kaufman Dolowich & Voluck LLP's Chair of the Construction Practice Group, and Long Island office co-managing partner.