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A School Construction Contract Education

Projects require understanding of reimbursement requirements

By ARNOLD K. SHIMELMAN and ELIEZER F. STRASSFELD

No one yet knows exactly how much, if any, of the stimulus package will trickle down to Connecticut's school construction projects. But regardless how much funding school districts receive, schools will likely hold the title, albeit in a depressingly uncompetitive contest, for the biggest game in building construction in 2009 and, it is becoming increasingly likely, 2010. It is, therefore, particularly opportune that the state Department of Education is now making available standard contracts it developed to assist school districts with contracting for design and construction services.

Most school construction projects receive some amount of state reimbursement. A condition of reimbursement is compliance with Chapter 173 of the Connecticut General Statutes (CGS) and the appurtenant Department of Education regulations and guidelines. To help districts navigate the process, CGS Section 10-290f was enacted. The statute required the Department of Education to develop the Standard Contracts for use by districts seeking state reimbursement.

The Standard Contracts are, essentially, heavily modified American Institute of Architects (AIA) documents. While districts are not required to use these Standard Contracts, and they may be subject to negotiation, the Standard Contracts, in addition to incorporating many of the changes owners typically make to AIA contracts, accomplish two things on districts' behalf. First, the Standard Contracts contain the provisions necessary for district projects to be eligible for state reimbursement. Second, the Standard Contracts include provisions that, while not required by statute, help meld the design and construction processes with the state reimbursement process.

Before describing the required and helpful provisions incorporated into the Standard Contracts, a few words about how to employ the Standard Contracts are in order. For each Standard Contract, the Department of Education makes three documents available: a redline, in PDF, showing the differences between the Standard Contract and the correlating baseline AIA; the final, clean version, also in PDF, of the Standard Contract; and a Word document with section-by-section instructions for modifying a baseline AIA document into the correlating Standard Contract. Revisable Word documents of the Standard Contracts cannot be made available due to AIA licensing restrictions. The Standard Contract can, nonetheless, be modified either by addendum or, for those with a license to use AIA software, by using the section-by-section instruction document to reconstitute the Standard Contract.

REQUIRED PROVISIONS

The most important modifications the Standard Contracts make to the baseline AIA documents are those required by

CONSTRUCTION LAW


Arnold Shimelman


Eli Strassfeld

Arnold Shimelman is counsel, and Eli Strassfeld is an associate, in Shipman & Goodwin's Hartford office. Both practice in the areas of Construction Law, Real Estate Law, Conveyancing, and related Development Matters. Arnold also practices Condemnation Law and Transportation Law. Arnold can be reached at ashimelman@goodwin.com and Eli reached at estrassfeld@goodwin.com.

Chapter 173. Although only three such provisions are highlighted below, the section-by-section instructions available from the Department of Education identify all required provisions.

One required provision is the "Architect's Standard of Care" described in the Standard Architect's Contract. Under Section 10-290e(a), a district's contract with its architect must require performance to "the highest prevailing applicable professional or industry standards." This standard, of course, clearly expands the common-law standard of care. Although some architects have argued that this standard also exceeds the scope of coverage most professional liability insurance carriers are willing to provide, districts must incorporate this statutory standard into their architectural services agreements. The Standard Contracts incorporate the statutory standard of care and leave it to architects to, if necessary, negotiate with their carriers over any required changes in coverage.

Another requirement imposed by Section 10-290e(a) is a bit more elusive. The statute prohibits a consultant's architectural services contract from attempting to "limit the liability of the consultant for errors or omissions related to the performance of the services." This provision would certainly necessitate the deletion of the waiver of consequential damages typical in AIA documents. It is at least somewhat unclear, however, whether the statute also requires a broad indemnification clause. Erring on the side of caution (and, admittedly, the owner), the Standard Contracts include a relatively broad indemnification clause. Because it may be statutorily required, districts should use caution (and, of course, the advice of an attorney) before opening the indemnification clause to negotiation.

A third provision incorporated into the Standard Contracts is the requirement imposed by CGS Section 10-290e(b) that the architect's work-product be owned by the district and the Department of Education. Many architects, understandably, resist this provision, often instead offering owners a broad license to use the architect's work-product. Accepting such a license in place of ownership may jeopardize a district's receipt of state reimbursement.

MELDING THE PROCESSES

A simple example of melding the design and construction processes with the reimbursement process is a provision in the Standard Contracts giving districts the option of requesting architects' services during the "pre-approval" stage. These services could include developing the educational specifications required by the Department of Education and working with the district to secure local funding. The Standard Contracts also contemplate a separate fee for pre-approval services, guaranteeing the architect compensation even if the community rejects the project.

The most talked about issue in construction these days is the rapidly developing, but still fluid, "green" revolution. Connecticut, with revisions to Section 16a-38k of the CGS, requires public facilities and school buildings to be built to certain "green" standards. Until the state's Office of Policy and Management regulations on the topic are approved, the statute requires projects to meet a standard equal to a LEED silver rating. Because the situation will be in flux at least until OPM's regulations are approved, and because the method of meeting the required standards will vary greatly from site to site, the Standard Contracts do not outline a precise process for meeting "green" standards. The Standard Contracts expand the scope of directives with which architects, construction managers, and contractors must comply. In addition to complying with the laws, codes, and regulations enumerated in the baseline AIA contracts, the Standard Contracts require compliance with rules, guidelines, and guidance of governmental or non-governmental entities overseeing the project's energy and environmental design.

A final example is worth noting. To receive the final installment of its state reimbursement, districts must file a final grant application with the Department of Education. The final grant application requires certification that the project has been "accepted" and is "complete." As was highlighted in an article by R. Michael Meo Jr. in the November 2008 Construction Law Supplement, districts may be hesitant to file final grant applications for fear of waiving claims against contractors for deficient work. The Standard Contracts address this quagmire by providing that the final grant application does not constitute acceptance of work not completed in accordance with the construction documents. Nevertheless, as is suggested in Mr. Meo's article, a district should take care to describe in the Application any aspect of the work the district is not ready to accept.

While the provisions designed to meld the design and construction processes with the state reimbursement process can be negotiated away, districts need to be aware that, when such provisions are deleted, the responsibility for melding the processes will often become their own. For this reason and others, attorneys familiar with the Standard Contracts can be of great assistance to school districts trying to navigate a project through the reimbursement process. ■