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Summary of Changes to AIA-2007 Documents

The most widely used forms for major building projects

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The American Institute of Architects has released the latest versions of many of its most widely used form documents, including the owner/contractor agreement forms and related general conditions and the owner/architect agreement forms. The AIA periodically revises its form documents, generally on a 10-year cycle. The revisions are significant because the AIA documents are the most widely used forms for major building projects in the United States. Although the new AIA documents were designed to fairly balance diversity interests and accurately reflect the modern construction industry, this is the first time the Association of General Contracts has declined to endorse the new forms. The reason given for this is that they have "grave concerns that the A201 significantly shifts the risks to general contractors and other parities outside the design provisions." This article provides a summary of the key provisions that have been revised.

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Disputes

The 1997 edition of the A201 General Conditions of the Contract for Construction provided that claims shall be referred initially to the project architect for decision and that an initial decision by the architect shall be required as a condition precedent to mediation, arbitration or litigation. The 2007 edition introduces a new person into the construction process, known as the Initial Decision Maker ("IDM"). The IDM is intended to act as a nonparty neutral and provide certain functions traditionally performed by the project architect, including the initial resolution of disputes. Under the new edition, claims shall be referred to the IDM for initial decision. However, in most cases, this new provision will not effectuate change since the new form provides that the architect will serve as the IDM unless otherwise indicated in the agreement. The requirement that the initial decision will act as a condition precedent to mediation continues to exist.

Pursuant to 15.2.1 of the A201-2007, the parties can choose a third party to serve as the IDM. The decision of the IDM becomes binding if the party adversely affected by a decision does not appeal it within 30 days. The prevailing party may force the issue by giving notice within the same 30 days that the architect's decision will be deemed final unless the aggrieved party files a demand for arbitration within 60 days after the decision.

Arbitration

Since 1888, the AIA General Conditions have included a requirement that disputes between owners and contractors and those between owners and architects be decided by binding arbitration. Traditionally, that clause has specified the American Arbitration Association as the arbitration tribunal of disputes. In response to widely varying opinions regarding the relative advantages and disadvantages of arbitration, the new versions of the owner/contractor and owner/architect agreements offer the choice of dispute resolution formats in a "check-the-box" format. The choices are arbitration, litigation or any other mutually agreed upon format to be described in the agreement. If no box is checked, litigation, rather than arbitration, is the default form of dispute resolution. If, however, binding arbitra-

tion is selected, the form provides that the arbitration shall be conducted by the American Arbitration Association, through its Construction Industry Arbitration Rules, unless the parties agree otherwise.

Although arbitration can offer the advantages of relative speed, efficiency and confidentiality, those features do not equally benefit owners and contractors or owners and architects. Either party may value the availability of full discovery while others may value the faster resolution of disputes in a given case.

Many feel that prior versions of the AIA documents did not adequately address situations where the claim involves, as necessary parties, those who are not bound to arbitrate. This resulted in multiple legal actions regarding the same disputes and transactional facts. An example might be a case in which an injured worker sues the owner, but the owner is required to arbitrate its indemnification claim against the contractor. This problem is now avoided if the parties do not select arbitration. Additionally, the 2007 forms permit the consolidation of multiple arbitrations so long as: (1) consolidation is permitted under the respective arbitration agreements; (2) they substantially involve common issues of law or fact; and (3) the respective agreements to arbitrate employ substantially the same procedural rules and methods for selecting arbitrators.

Digital Protocol

The AIA has introduced Document E201, Digital Data Protocol Exhibit, which may be incorporated by reference in owner/architect and owner/contractor agreements. Most documents now are exchanged in electronic form, and the E201 document establishes the procedures that the parties will follow in transmitting or exchanging digital data for a project. The document includes representations by the parties regarding their respective rights to transmit the date and indemnification for claims arising out of unauthorized use of the data. The document uses a checklist format to identify who will be the receiving and transmitting parties, the data format, the transmission method and the permitted use of the data. An alternative document is C106, the Digital Data Licensing Agreement, which includes the provisions of the E201 form, the Digital Data Protocol Exhibit, together with a provision for a licensing fee.

Time Limits on Claims

The A201-1997 had a Time Limit on Claims provision which stated that "[a]s between the Owner and Contractor":

> (1) Before Substantial Completion. As to acts…occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run …not later than such date of Substantial Completion;
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> (2) Between Substantial Completion and Final Certificate for Payment. As to acts …occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run…not later than the date of issuance of the final Certificate for Payment; and
>
> (3) After Final Certificate for Payment. As to acts …occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run …not later than the date of any act or failure to act by the Contractor pursuant to any Warranty,…the date of any correction of the Work or failure to correct the Work,… or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.

Traditional statutes of limitations do not begin to run until the actual cause for the claim is discovered. Under the A201-1997, the statute of limitations began to run when the cause of the claim occurred, even if the cause of the claim had not been discovered. Under the A201-1997, claims were sometimes barred by the statute of limitations before the actual injury ever occurred. These clauses were often viewed as unfair and were frequently stricken from the contract.

In the 2007 revision, Section 13.7, states that "[t]he Owner and the Contractor shall commence all claims…within the time period specified by the applicable law, but in any case not more than 10 (ten) years after Substantial Completion of the work." The applicable state statute of limitations will now control the time limits on claims, except for the bar on any claim brought more than 10 years after substantial completion of the work. The A201-2007 does not dictate when the statute of limitations will begin to run, but instead prohibits any claim that arises beyond 10 years after substantial completion, regardless of when the injury occurs.

Additional Duties Upon Contractor To Review Field Conditions and Contract Documents

The 1997 edition of the A201 was sometimes criticized because the contractor was only liable for errors and omissions it "recognized" and "knowingly" failed to report. Many argued that this let the contractor "off the hook" on far too many occasions, and that the documents did not impose a great enough obligation on the contractor to review the field conditions and the contract documents to determine — as he or she only could — whether the execution of the design at the job-site was feasible as contemplated.

The 2007 edition, however, does heighten the obligation of the contractor. Now the contractor must "promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor..."

Owner Ambiguity Regarding Allowances Selections

The 1997 documents required that the owner make material and equipment selections under an allowance "in sufficient time to avoid delay in Work." The new A201 language is changed to require the Owner to select these items "with reasonable promptness."

This change seems to be more ambiguous than the 1997 language, and begs the question of whether the owner has the duty to "avoid delay in the Work," and whether the contractor has a claim against an owner who does delay the work by its lack of selections when the owner arguably acted "with reasonable promptness"?

Prompt Payment

A201-2007 now requires contractors to pay subcontractors "no later than seven days after receipt of payment from owner." Under the 1997 version, contractors were required to "promptly pay," but that was never defined. An additional benefit to subcontractors is that owners can request written confirmation from the contractor evidencing payment to the subcontractors. If a contractor fails to reply within seven days, the owner can contact the subcontractors directly. The new version also states that when certification of payment is withheld by the architect, owners may contact subcontractors to ask about the payment status and can issue joint check payments.

Conclusion

It remains to be seen which parties will perceive the changes made in the AIA A201-2007 to be favorable. Considering the multitude of changes, the new A201-2007 will cause discussions about who benefits from these revisions and exactly whose final interests may be negatively affected. ■