# AIA's 2007 Edition of A201: What Changes Are Ahead?

G. William Quatman, FAIA, Esq.
Ryan M. Manies, AIA, Esq.
Shughart Thomson & Kilroy, P.C.
120 W. 12th Street, Suite 1500
Kansas City, MO 64105
(816) 421-3355
bquatman@stklaw.com

**Introduction.** After a decade of research, surveys, focus groups and court cases, the AIA Documents Committee is set to release its 2007 edition of its Family of Documents in October of this year. The AIA Documents Committee is comprised only of architects, in fact of its 28 members only two are also lawyers. AIA seeks diversity on its Documents Committee in terms of geography, size of firm and practice areas, so that they get all perspectives. In addition to the committee of architects, the AIA solicits input from the industry to gain some consensus and acceptance of the AIA forms. AIA seeks to preserve and enhance its leadership in the industry by keeping up with the times and trying to gain consensus from user groups. This latest 2007 edition includes input from ASA, AGC, ASC, Commercial Owners Association of America, American College of Construction Lawyers, Council of American Structural Engineers, ABA, National Association of State Facilities Administrators as well as AIA staff legal counsel, outside counsel and other outside organizations. AIA's Documents Committee tries to create more balanced contracts with each new edition. Their goal is to allocate the risk to those best able to handle it.

**History of the A201.** First, a bit of history on the AIA documents and the A201 General Conditions. When the construction trade associations first started publishing form contracts, it was a joint effort between architects and builders. The early contracts published by the AIA in the late 1800's were the joint work of the American Institute of Architects (AIA) and the National Association of Builders.[1] Up through the 1997 edition of A201, the AIA and the Associated General Contractors (AGC) closely collaborated on the AIA's widely used A201 General Conditions of the Contract for Construction, which are published by the AIA but were endorsed by the AGC for use by their members. You will note the comment on the cover of the 1997 edition of A201 which reads, *"This document has been approved and endorsed by The Associated General Contractors of America."* During the 2007 revision process, the AGC provided extensive comments to the AIA on the current A201-1997 and on early drafts of the new A201-2007. The AIA met with the AGC several times in day-long meetings to personally review and discuss the AGC's comments, but the AIA and the AGC did not negotiate actual text changes to A201.

Why the change in collaboration? Over time, the various associations have realized that there is money to be made in the form contract business and, as a result, all of the major industry associations now publish their own contract forms. In 1997, AGC begun publishing its own

[1] *Form of Contract,* adopted by the Joint Committee of the American Institute of Architects, the Western Association of Architects, and the National Association of Builders (Aug. 1888).

General Conditions and did not seek AIA's endorsement.[2] Instead, AGC formed a "private industry advisory council" made up of forty Fortune 500 owners, bankers, insurers and others to review and comment on their form. AGC's goal is to become the owner's preferred contract form of choice. Therefore, AGC is not likely to endorse the 2007 version of AIA's A201. The AIA, AGC and at least three other professional or trade associations are now going head-to-head in the form publishing business, each trying to secure a portion of the form contract market. The result is that today there is a wide variety of contracts from which to choose when doing a construction project today. Still, the AIA is the industry leader in sales and in terms of language copied and used in "custom contracts."

In 1888 the first AIA standard form agreements were published. In 1911, the first set of "General Conditions" was released, followed in 1917 by the AIA's first Owner-Architect Agreement. The forms are revised on a 10-year cycle, with the last editions being 1976, 1987 and 1997. Why wait 10 years? Four main reasons: 1) Reaction to industry trends over the past decade, e.g. electronic documents, LEED/sustainable design; 2) Establish reliable documents, which people can rely on for a decade without worrying over which edition is current; 3) React to court cases on the past edition, which can take a decade to wind their way through the appellate process and produce any reliable opinions and interpretations; 4) Reinforce the AIA brand, by being reliable "off the rack" without reading it in detail each time for the latest changes.

AIA Documents are without a doubt, the leader in the industry, and have been court-tested for nearly a century, as opposed to "one-off" contracts which have no precedent. Custom contracts often favor the drafting party, are ambiguous and not court-tested. The AIA forms have the benefit of court cases, and even for those "rip off" forms that steal AIA language, there are court cases testing or interpreting the language if AIA-based.

Balancing interests is often a challenge for the AIA Documents Committee. Many AIA members feel that their association's documents should protect architects. But the AIA wants documents that Owners will use, not just architects. So they try to find a balance. If they go too far to protect architects, the forms won't be used by Owners – which would be fatal to the AIA's purpose of publishing standard form agreements.

The A201 General Conditions of the Contract for Construction forms the relationship between the Owner, Contractor and Architect. It is the "backbone" of the AIA Family of Documents. The "family of documents" are coordinated, and flow up and down the contract chain with consistency. Parallel language and definitions are found in all of the forms. One AIA Document Committee member said it best, "Most families work best when the family is not broken up." The point is that there are difficulties if an Owner mixes different forms on a project, which can lead to inconsistencies and ambiguities. Use extreme caution when mixing an AIA form with something else but better yet – don't do it. There are dozens of court cases dealing with these types of conflicts, which might have been prevented by using AIA's family of forms.

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[2] Standard Form of Agreement and General Conditions between Owner and Contractor, AGC Doc. No. 200 (1997 edition).

**The 2007 Edition.** The drafting process for the new forms began back in 2004, when AIA sought input from industry groups on the 1997 edition and investigated the feedback. In 2005, the Documents Committee completed the first draft of A201's newest version. In 2006 they completed pre-final drafts; in July 2007 the final version was approved; and in October 2007, the AIA plans to release the new edition. There are some radical changes from prior editions. Here are the highlights.

**Changes to Look For.**

A. Numbering Changes. The Owner-Contractor Agreements are renumbered as follows:

| **Old (1997)** | **New (2007)** | **Form** |
|---|---|---|
| A101 | A101 | Stipulated Sum |
| A111 | A102 | Cost Plus with GMP |
| A114 | A103 | Cost Plus w/o GMP |
| A107 | A107 | Abbreviated with General Conditions |

Not only the Owner-Contractor forms have changed. The AIA is retiring its standard B141 and B151 Owner-Architect Agreements in favor of a single form to be called simply the B101. The changes to the B141/B151 are not covered in this article.

B. Dispute resolution. All of the various "claims" topics are now collected and assembled in a new Article 15. That is a big improvement from past editions, ending the hunt for related clauses dealing with claims.

C. Mandatory Arbitration is Out. Arbitration is no longer mandatory, but is an option to be chosen by the parties. AIA kept in mediation, since most construction disputes are resolved in mediation. Arbitration has been in the AIA forms from 1888 to 2006. The first AIA contract form, published in August 1888, required arbitration before a 3-member panel, ". . . to be appointed as follows: one by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expenses of such reference."[3]

Over the years, AIA heard from Owners and others that arbitration is often struck from the contract forms, and that the parties should be given the freedom to choose the forum for dispute resolution. As a result, the 2007 Edition of A201 makes arbitration an option. If not specifically selected by the parties, the default procedure is litigation. Also, if the parties select arbitration, the AAA rules are not required but are the default "unless the parties mutually agree otherwise."

[3] Article 3d, p. 1, *Form of Contract,* adopted by the Joint Committee of the American Institute of Architects, the Western Association of Architects, and the National Association of Builders (Aug. 1888).

In the new forms of A101, A102 and A103 there is a place to check boxes (like the 2004 design-build documents). Here is what you will likely see in the new A201 (taken from the A142 Owner/Design-Builder Agreement, 2004 edition):

> **§ 6.2** If the parties do not resolve their dispute through mediation pursuant to Section A.4.3 of Exhibit A, Terms and Conditions, the method of binding dispute resolution shall be the following:
> *(If the parties do not select a method of binding dispute resolution, then the method of binding dispute resolution shall be by litigation in a court of competent jurisdiction.)*
> *(Check one.)*
>
> [ ] Arbitration pursuant to Section A.4.4 of Exhibit A, Terms and Conditions
>
> [ ] Litigation in a court of competent jurisdiction
>
> [ ] Other *(Specify)*

Note the italicized comment, in 10 point print, that, "If the parties do not select a method of binding dispute resolution, then the method of binding dispute resolution shall be ***by litigation*** in a court of competent jurisdiction." This is a drastic change for AIA after nearly 120 years of mandatory arbitration.

D. Consolidation and joinder. AIA has traditionally prohibited joining arbitration claims by the Owner against the Architect with claims against the Contractor. Owners do not like that arrangement since it prevents an Owner from getting its builder and designer into the same arbitration, unless they both consent. The result can be multiple, costly arbitrations and inconsistent outcomes. Owners and their lawyers routinely change that clause. In 2007, this was deleted and the Owner can now join everybody into one arbitration. Here is how the new concept was introduced in 2004 in the Owner/Design-Builder Agreement, A142 Exhibit A:

> **§ A.4.4.3** An arbitration pursuant to this Section A.4.4 may be joined with an arbitration between the Design-Builder or Contractor and any person or entity with whom the Design-Builder or Contractor has a contractual obligation to arbitrate disputes which does not prohibit consolidation or joinder if such arbitration involves common issues of law or fact relating to the performance of this Agreement.

New Sec. 15.4.4.1 of A201 gives the Owner and Contractor the option to consolidate as long as the procedures are the same and same method is used to select arbitrators. Under Sec. 15.4.4.2, any party to an arbitration may include by joinder persons or entities substantially involved in a common question of fact or law whose presence is required. This is similar to Federal and State court rules on joinder of third parties, in that there must be common issues of law or fact related to the disputes, which make it more efficient to join everyone into one lawsuit for judicial economy and to prevent inconsistent results.

E. Time limits on claims. In Section 13.7 of the 1997 edition of A201, the concept of an internal statute of limitations was introduced. This clause dictated when a statute of limitations would begin to run. The result was that some claims were barred before they ever even occurred. The clause was often deleted, especially by Owners who say the clause is unfair, and the parties should stick with State law. In some states it is illegal to shorten a statute of limitations by

contract.[4] So the new A201 deletes former Section 13.7 and revises it to state that the applicable State law governs. AIA's new clause says that the time limit for commencing claims is determined by State law, but in any case not more than 10 years after Substantial Completion. The last tag line is intended to reflect the length of time under Statutes of Repose, which range from 6 to 10 years in most states. The difference, however, is that many Statutes of Repose apply only to tort claims for personal injury or property damage – not to breach of contract. It will be interesting to see how the marketplace and the courts react to this new change.

F. Consequential damage waiver. In 1997, AIA introduced a new concept in A201 whereby the Owner and Contractor waived "consequential damages" against each other. This did not bar "direct" damages, e.g. a roof leak, change order costs, but only those "indirect" costs, such as lost revenue or lost sales, or extended home office staff time. According to members of the AIA Documents Committee, this topic was hotly debated during the drafting for the new edition. In the end, the AIA decided to retain this waiver in the 2007 edition. The clause requires a mutual waiver by the Owner and Contractor of claims for consequential damages. In the 1997 edition of A201, this was stated as follows:

> This mutual waiver includes:
>
> **.1** damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
>
> **.2** damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

Such waivers have been upheld as valid and enforceable by many courts. AIA Documents Committee members reported that Owners and Contractors often find the mutual waiver unfair, but for different reasons. The Contractor loses its "home office" delay claims (often called an *Eichleay* claim, named for a famous Federal Court case of that same name). Owners say they lose claims for lost income or profit from a late completion. AIA feels it is fair, however, and has retained it. The clause does not affect liquidated damages for late completion. The 1997 edition clarified that point and stated that, "Nothing contained in this Section 4.3.10 shall be deemed to preclude an award of liquidated *direct* damages, when applicable, in accordance with the requirements of the Contract Documents." In the 2007 edition, the word "direct," which was awkward and confusing, is deleted. Similar clauses are contained in the new Owner-Architect Agreement (B101) and Architect-Consultant Agreement (C401). The new waiver of consequential damages clause is renumbered as Sec. 15.1.6 and placed in with the other claims provisions in A201's new Article 15.

G. Initial Decision Maker ("IDM"). For decades, the Architect has served in the role of "neutral" to decide disputes between Owner and Contractor. This has now changed – sort of. New in 2007 is the introduction of an outside, third-party decision maker, at the option of the parties. Owners told the AIA that they don't want their Architects making decisions against

[4] For example in Missouri, R.S.Mo. § 431.030 states that: "All parts of any contract or agreement hereafter made or entered into which either directly or indirectly limit or tend to limit the time in which any suit or action may be instituted, shall be null and void."

them. Contractors alleged that Architects cannot be impartial when they are paid by and hired by the Owner. Architects said they don't like being caught in the middle. So the AIA has created new third-party "IDM" (initial decision maker) to be hired for dispute resolution. The Architect is still the default option, and will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. (2007's A201, Sec. 15.2.1). So unless an IDM is specifically designated in the contract, it remains the Architect. The IDM will not, however, resolve claims "relating to aesthetic effect" which will still remain within the Architect's authority.

The concept of a project neutral is not a new one, it is just new to the AIA. The international design-build forms, published by FIDIC use a "Dispute Adjudication Board" as a neutral, consisting of from one to three persons, to resolve disputes. See, e.g. Sec. 20.2, Conditions of Contract for EPC Turnkey Projects, Federation Internationale des Ingenieurs-Conseils (FIDIC) (1999 edition). In the design-build contracts published by the Canadian Construction Association (CCA), form 14 (2000 edition), Part 5, pay applications are submitted to a third party known as a "Payment Certifier," in order to eliminate any conflict of interest that an Architect might have when working as a subcontractor to a Design-Build Contractor.

The new A201 does not specify who the IDM will be, or how they will get paid and the AIA is not creating an Owner-IDM Agreement. The parties will have to add those provisions and create those contracts, similar to hiring and paying a mediator. Here is how this new concept was introduced in 2004 in the AIA's design-build documents:

> **§ 6.1** The parties appoint the following individual to serve as a Neutral pursuant to Section A.4.2.1 of Exhibit A, Terms and Conditions:
> *(Insert the name, address and other information of the individual to serve as a Neutral. If the parties do not select a Neutral, then the provisions of Section A.4.2.2 or A.4.2.3 of Exhibit A, Terms and Conditions shall apply.)*
>
> **§ A.4.2.2 Decision by Architect.** If the parties have not identified a Neutral in Section 6.1 of the Agreement or elsewhere in the Contract Documents, the Design-Builder may appoint the Architect to resolve disputes between the Design-Builder and the Contractor, and Claims, including those alleging an error or omission by the Architect but excluding those arising under Sections A.10.3 through A.10.5, shall be referred initially to the Architect for decision.

This may create a whole new industry of "neutrals" who are qualified to resolve disputes and who will serve in that role for a fee. Under A201, Sec. 15.2.2, the Initial Decision Maker will review Claims and make an initial decision within 10 days. Sec. 15.2.3 states that the IDM may consult with or seek information from either party; and may request the Owner to authorize retention of other persons, at the Owner's expense.

Many Architects at the AIA's 2007 Annual Convention voiced frustration over this change. They felt this is a mistake for the AIA, and that removing the Architect from this traditional position only further dilutes the Architect's leadership role. Architects have to make tough decisions, sometimes against the Contractor, sometimes against the Owner. But Architects have done this for 100 years and have gained respect as a licensed professional, to act as a neutral, within their ethical bounds. Courts have recognized that the Architect has immunity in that neutral role. Even claims alleging Architect error or omission are to be submitted to the Architect under the older AIA forms. This gave the Architect an early opportunity to resolve a

dispute before it matured into a full-blown "Claim." Now that opportunity may be lost, and a third-party will determine the Architect's fate before the Architect can head this off. The intent is a cooling off period, before suit is filed.

The Architect is not taken entirely out of the role as judge of performance, however. In Sec. 4.2.6 of A201, the Architect still has authority to reject Work that does not conform to the Contract Documents; and in Sec. 4.2.7, the Architect still reviews and approves Submittals and Shop Drawings, with authority to reject them. But if there is a disagreement over the Architect's actions, that may be referred to the third-party IDM. The IDM's decision is binding unless challenged by mediation. Under Sec. 15.2.6 of the new A201, either party may demand mediation following receipt of the initial decision by the IDM.

H. Digital practice. There is high demand for digital information today, and great confusion on how it can be used. With the rapid growth of digital technology, paper plans are fading in favor of electronic information. AIA has two new documents that deal with "digital documents protocol". These are the C106, Licensing Agreement, and E201, Protocols. These are new forms released in early 2007. The E201 states at the outset its purpose, "This Exhibit establishes the procedures the parties agree to follow with respect to the transmission or exchange of Digital Data for this Project. Where a provision in this Exhibit conflicts with a provision in the Agreement into which this Exhibit is incorporated, the provision in this Exhibit will prevail." This can be used as an exhibit to the A201 to deal with digital practice and the transmission of digital data.

**What's next for AIA?** The AIA Documents Committee is focusing next year (2008) on Integrated Practice (BIM) and forms to address that new technology.