

2007 Revisions to AIA Owner/Contractor Agreements

For the first time since 1997, the American Institute of Architects (AIA) is revising many of its key contract documents, including the Conventional (A201) Family of documents, for publication in the fall of 2007. The AIA's goal in revising these documents every ten years is to maintain state-of-the-art legal documents that reflect current industry trends and practices and balance the interests of all parties on the construction project. To further that goal, the AIA solicited industry feedback on the 1997 documents; prepared drafts based on the feedback; circulated the drafts to more than a dozen owner, engineer, attorney and contractor groups; and distilled the hundreds of comments it received to produce final documents. Though no 2007 document is truly "final" yet, the AIA is getting the word out about the types of changes the industry is likely to see.

The proposed changes will be of interest to all project participants. For example, key revisions change the way owners, architects and contractors resolve disputes. The revised documents allow for the optional addition of a neutral third-party decision maker, and eliminate mandatory arbitration, something AIA documents have required since 1888. Proposed revisions to A201-1997 expressly allow the owner to obtain information about contractor's payments to subcontractors and to take action to remedy improper non-payment. Other revisions restrict the current right of the contractor to obtain financial assurances from the owner. In cost-plus agreements, proposed changes require disclosure of "related party" transactions, add some items to the Cost of the Work, and clarify the calculation of some reimbursements.

The AIA received many comments about the traditional role of the architect in making initial decisions on claims between the owner and contractor as a condition precedent to mediation, arbitration or litigation. An initial decision on claims can help keep the project moving, and can circumvent protracted negotiations leading nowhere. Despite its merits, owner groups noted that owners don't particularly like it when architects make decisions against them—though they are perfectly content when the decision goes the other way. Contractors voiced the opinion (not shared by architects) that architects cannot be impartial. Architects, though believing that an architect's initial decision is in the best interest of the project, admitted they do not like being caught in the middle. In order to address these concerns, the AIA brought into the A201 family a concept it initially developed for the 2004 Design-Build family, the appointment of a third-party neutral. Starting in 2007, owner/contractor agreements utilizing the A201 general conditions will ask the owner and contractor to identify a neutral third-party Initial Decision Maker (IDM). The architect will act as the IDM if the owner and contractor do not identify someone else.

In the 2007 proposed revisions, as in the A201-1997, an initial decision is a condition precedent to mediation, and mediation is a condition precedent to any other form of dispute resolution. However, for the first time in an AIA owner/contractor agreement, 2007 AIA agreements will require the owner and contractor to select among arbitration, litigation or some other method of binding dispute resolution for any dispute they cannot settle in mediation. Both mediation and arbitration, unless the parties agree otherwise, will be administered by the American Arbitration Association. The owner and

contractor will be asked to select the binding dispute resolution procedure through the use of a checkbox similar to the following:

2007: Dispute Resolution Checkbox

§ 6.2 BINDING DISPUTE RESOLUTION If the parties do not resolve their dispute through mediation pursuant to Section 15.2 of AIA Document A201-2007, General Conditions of the Contract for Construction, the method of binding dispute resolution shall be as follows:

(Check the appropriate box. If the Owner and Contractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing ... the dispute will be resolved in a court of competent jurisdiction.)

- Arbitration pursuant to Section 15.3 of AIA Document A201-2007, General Conditions of the Contract for Construction
- Litigation in a court of competent jurisdiction
- Other *(Specify)*



The revised A201-2007 also provides for more liberal consolidation of related arbitration proceedings. This includes the ability of the owner, at its election, to consolidate an arbitration involving itself and the contractor with an arbitration involving itself and the architect or some other person or entity. Similarly, the contractor, at its election, can consolidate an arbitration involving itself and the owner with an arbitration involving itself and a subcontractor or supplier. Parties to arbitrations consolidated in this manner may also consolidate other arbitrations to which they are a party, so the potential exists for all disputes sharing the same common issues to be resolved in one arbitration. Parties may also agree to voluntary joinder, and the AIA has removed the prohibition on the joinder of the architect.

Other proposed revisions to A201-1997 expressly provide the owner greater opportunity to learn of contractor/subcontractor payment problems, and to address a contractor's failure to pay a subcontractor. The current draft allows the owner to request

written evidence from the contractor that the contractor has properly paid subcontractors. If the contractor fails to furnish such evidence, the owner can contact subcontractors to ascertain whether they have been properly paid. The same is true for payments made to material and equipment suppliers. Moreover, if the contractor improperly fails to pay the subcontractor for work performed or materials suitably delivered, A201-2007 will allow the owner to issue joint checks to the contractor and to any subcontractor or material or equipment supplier.

Owner groups expressed serious concerns that the contractor's right in the A201-1997 to request financial information from the owner, and to stop the work upon making such a request, was too broad and contained the potential for mis-use. To address that concern, the current A201 draft places some restrictions on the contractor's rights. Importantly, the owner will still be required to provide reasonable evidence that it has made financial arrangements to fulfill its obligations under the contract, and providing such information will remain a condition precedent to commencement or continuation of the work. However, under the current draft of A201-2007, the contractor can make such requests after the work commences only if (1) the owner has failed to make payments to the contractor as the contract documents require, (2) a change in the work materially changes the contract sum, or (3) the contractor identifies in writing reasonable concerns regarding the owner's ability to make payments when due.

Proposed revisions to the A111TM-1997, Standard Form of Agreement Between Owner and Contractor where the basis for payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price, and A114TM-1997, Standard Form of Agreement Between Owner and Contractor where the basis of payment is the Cost of the Work Plus

a Fee without a Guaranteed Maximum Price, will require disclosure of “related party transactions.” A “related party” includes a parent, subsidiary, affiliate or other entity having common ownership or management with the contractor; entities in which stockholders in, or management employees of, the contractor own an interest; any person or entity with the right to control the business or affairs of the contractor; and any member of the immediate family of any such person. If any of the costs to be reimbursed under the cost-plus contracts arise from a transaction between the contractor and a related party, the contractor must notify the owner of the specific nature of the contemplated transaction before the transaction is consummated or the costs are incurred. The owner then has the right to authorize the transaction. If the owner fails to authorize the transaction, the contractor must competitively procure the work, equipment, goods or services from some person or entity other than the related party.

Other proposed revisions to the cost-plus agreements add new items to the Cost of the Work including reimbursement of bonuses, profit sharing, incentive compensation, discretionary payments, and self-insurance costs, all with prior approval of the owner. Other revisions clarify how to calculate the costs of rental equipment and items not fully consumed performing the work, and grant the owner audit rights in any cost-plus subcontract. Also, the agreements prompt the contractor and owner to insert any limitations on subcontractors’ overhead and profit for changes in the work.

The proposed revisions to the 2007 AIA Owner/Contractor agreements reflect a synthesis of the input received from numerous construction industry representatives. While it is not always possible to completely satisfy the competing interests of the

various construction project participants, AIA documents strive to represent an equitable distribution of the risks, rewards and responsibilities.

If you have any questions about this article or any AIA Contract Document, write to docinfo@aia.org, or call 202-626-7526.