Major Changes in the 2007 AIA Documents

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Introduction

For over 100 years the American Institute of Architects (AIA) has published standard forms of agreement to be used in the design and construction of projects in which architectural design plays a prominent role. The concepts, if not the actual documents, are widely used around the world.

The forms are revised around every 10 years. This involves a lengthy process in which the AIA attempts to gather opinions from all facets of the industry concerning current best contractual practices. Previously, the Associated General Contractors of America has endorsed the use of the forms by its large general contractor members. However, the Associated General Contractors of America has decided not to endorse the 2007 AIA documents, as it plans to renew efforts to have its own forms used more widely.

The two most important documents in the series are the owner-architect (formerly B141 and now B101) and owner-contractor agreements, particularly A201, General Conditions of the Contract for Construction. The key changes to these two documents, which are due to be released on November 5, 2007, are as follows:

- The architect may not be the initial decision-maker;
- Mandatory arbitration is not required;
- Consolidation and joinder have been loosened;
- The time limit on claims is 10 years or less under state law;
- The consequential damages waiver remains;
- There are improved payment terms for subcontractors;
- The architect no longer guards the owner against deficiencies in the contractor's work; and
- The waiver of subrogation for architects is not limited to the construction period.

Initial Decision-Making Concerning Claims

Historically, under the AIA documents the architect was viewed as a trusted source for independent decision-making on claims for time or money by either the owner or the contractor that arose during the construction phase. Under the AIA model, these interim decisions were subject to appeal through arbitration. In the 2007 documents the person making those interim decisions may be someone other than the architect. The rationale for the change is that in the current environment, the parties may want to use someone who is perceived as being more neutral than the modern architect on large construction projects. Under Article 15 of the documents, the appointment of an independent decision-maker other than the architect opens up the possibility that U.S. practice may become more akin to the U.K. practice of adjudication prior to arbitration or litigation. However, using the architect as the initial decision-maker on smaller projects may be appropriate. Some contractors insist on the architect playing such a role to avoid unilateral decision-making by inexperienced and overreaching owners.

The concept of interim decision-making was established as part of a system where a reasonably expeditious arbitration would be available to provide more due process than is available in the initial decision-making process. Under the new forms arbitration must be affirmatively selected as the default dispute resolution remedy. If arbitration is not chosen, interim decisions by initial decision-makers may have far more important economic consequences for the parties than under the previous system. A201 provides as follows:

"Section 15.2.1: Claims, excluding those arising under Sections 10.3, 10.4, 11.3.9 and 11.3.10, shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, an initial decision shall be required as a condition precedent to mediation . . .

Section 15.2.2: The Initial Decision Maker will review Claims and within ten days of a Claim take one or more of the following actions . . .

Section 15.2.3: In evaluating Claims, the Initial Decision Maker may . . . consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Initial Decision Maker in rendering a decision. The Initial Decision Maker may request the Owner to authorize retention of such persons at the Owner's expense.

Section 15.2.5: The Initial Decision Maker will render an initial decision approving or rejecting the claim . . .

Section 15.2.6: Either party may file for mediation of an initial decision at any time, subject to the terms of Section 15.2.6.1."

Optional Arbitration

Mandatory arbitration has been included in the AIA documents since 1888, and the Construction Rules of the American Arbitration Association have been specifically referenced since 1966. These rules are the product of the National Construction Disputes Resolution Committee, which comprises representatives from most of the industry trade associations, including the AIA and the Associated General Contractors of America. However, as a result of one of its more controversial decisions, the AIA now requires an affirmative tick-box in the front-end agreement to make arbitration the method of binding dispute resolution. If the box is not ticked, the dispute reverts to the court system. There is no change to the requirement for non-binding mediation as a condition to either arbitration or mediation.

The AIA rationale for this arbitration change is that arbitration is often removed from the AIA agreements, and the AIA believes that the parties, especially on large projects, should be given a clearer choice. However, many are concerned that an unintended consequence of the change will cause owners of smaller projects and smaller contractors to be required to use the expensive and time-consuming court process to adjudicate disputes. In 2006 the American Arbitration Association reported that of 4,024 monetary cases closed, 51 percent of filed claims were for less than $75,000 and 84 percent involved claims for less than $500,000. Many participants in the process sign AIA contracts without the benefit of legal counsel. The new system may make the economics and fairness of resolving construction disputes significantly worse.

The Owner Contractor Agreements, of which A101–2007 is an example, now provide:

"Section 6.2 Binding Dispute Resolution: For any Claim subject to, but not resolved by, mediation pursuant to Section 15.3 of AIA Document A201–2007, 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 to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.)

- *Arbitration pursuant to Section 15.4 of AIA Document A201–2007*
- *Litigation in a court of competent jurisdiction*
- *Other (Specify)"*

Time Limit on Claims

Article 13 of A201 and Section 8.1.1 of B101 establish a 10-year limitation period from substantial completion for claims unless the applicable state law establishes an earlier deadline. These terms now acknowledge the discovery rule to the extent that it exists by operation of state law. If arbitration is the specified method, commencement of the arbitration will mark the limitations period. The new language will require drafters to pay more attention to the 'choice of law' term which, under the AIA documents, is the place of the project:

"Section 13.7 Time Limit on Claims: The Owner and the Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement within the time period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and the Contractor waive all claims and causes of action not commenced in accordance with the Section 13.7."

Consolidation of Arbitrations

Section 15.4.4 of A201 provides that an arbitration between the owner and the contractor may be consolidated at the election of the owner or the contractor (unless prohibited by contract) if it involves common issues of law or fact, but it must employ the same procedural rules and method of selection of arbitrator(s). Perhaps just as important, in Section 8.3.4.2 of B101 the architect agrees to remove the prohibition against joining the architect to disputes with the contractor with similar joinder terms as the A201. Owners have objected to this restriction.

Applicability of the Federal Arbitration Act

Where arbitration has been selected, Section 13.1 of the new 2007 edition of the A201 provides:

"The Contract shall be governed by the law of the place where the Project is located except that, if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern . . ."

This term was most likely included in the new documents because it attempts to incorporate the pro-arbitrability case law under the FAA. Of course, even without the clause, the FAA is likely to

be applicable to the arbitration of most construction disputes because of the involvement of interstate commerce.

However many of us believe that the Revised Uniform Arbitration Act is more progressive in the way it handles discovery and also incorporates much of the pro-arbitration decisional law under the FAA. Therefore this AIA term may not always create the best result, especially in smaller disputes where the FAA may not be applicable.

At last count the RUAA has been adopted in 12 states and could be incorporated in a contractual choice of law term.

Consequential Damages Waiver

The waiver of consequential damages remains. A similar clause is included in design professional agreements B101 and C401. The only amendment to the language is that the word 'direct' has been deleted from the liquidated damages provision. Costs incurred by either party as a result of termination may still be recoverable, even if the waiver of consequential damages is in place.

Improved Terms for Subcontractors

Section 9.6 of A201 now requires payment by the contractor to the subcontractor no later than seven days after receipt of payment. Under Section 9.6.4 the owner has the right to request from the contractor evidence that the subcontractor has been paid. If the owner has doubts about how the subcontractor monies are being used, the owner may issue a joint check to the contractor and the subcontractor (Section 9.5.3).

Deletion of Guard Requirement

A longstanding duty of architects in owner-architect agreements has been for the architect to "endeavor to guard the Owner against defects and deficiencies" in the work of the contractor. The language in Section 3.6.2.1 of B101 has now been considerably softened to provide that the architect promises only to report observed construction defects (Section 3.6.2.1). Legally this change modifies the architect's duty to be based on actual knowledge rather than a contractual-type warranty. Whether this duty to report will be further limited by a negligence standard of care is to be determined by courts and arbitrators.

Waiver of Subrogation for Architect Not Limited to Construction Period

Under B141, the waiver of subrogation applied only to the extent that damages were covered by property insurance during construction. This meant that architects could be sued by the owner's property insurer after the builder's risk insurance was no longer involved (e.g., a leaking roof claim). This limitation was not present in the construction agreements. Section 8.1.2 of B101 now puts the architect on equal footing with the contractor with regard to subrogation.

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