

# **RECENT CHANGES TO THE AIA CONTRACT DOCUMENTS**

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### I. INTRODUCTION

For years, the form contracts promulgated by the American Institute of Architects (AIA) have been the most widely used contract documents within the construction industry. However, with the 2007 changes, this may be changing. Whether the 2007 version of the AIA documents will be used as pervasively in the industry as the 1997 version remains to be seen. The AIA released its revised versions of its core group of contract documents on November 5, 2007.

### II. AIA FORM CONTRACT DOCUMENTS

The AIA's basic contract documents are intended to provide a balanced and standardized group of contracts for various parties on a construction project and are drafted with the intent of providing consistent contract documents. One of the ways the AIA attempts to accomplish this purpose is through their centerpiece document, the A201 General Conditions of the Construction Contract, which is incorporated by reference into most of their basic form agreements.

Additionally, the AIA forms employ standardized terms such as Owner to signify the owner of the project, Contractor to signify the general contractor, and Subcontractor to signify subcontractors. The AIA's basic contract agreements are the owner-contractor agreements, owner-architect agreements, and contractor-subcontractor agreements. Other documents include project administration related documents such as pay applications and change orders, contractor qualification forms, and joint venture agreements.

The AIA strives to keep its form contract documents current with industry practice and generally makes revisions to its core documents on a ten-year cycle. In connection with the 2007 revision process, the AIA drafting committee solicited significant input from a broad spectrum of industry groups including the Associated General Contractors of America (AGC), Associated Builders and Contractors (ABC), American Subcontractors Association (ASA), National Association of State Facilities Administrators, Commercial Owners Association of America, Associated Specialty Contractors, Counsel of American Structural Engineers, American Council of Construction Lawyers, the American Bar Association's Forum on the Construction Industry, American Insurance Association, and the American Arbitration Association (AAA).

### III. 2007 CHANGES

Some of the more notable changes made in the 2007 revisions include changes to the A201 General Conditions document, changes to the cost-plus owner-contractor agreements, and changes to owner-architect agreements, as well as introduction of digital data documents. The changes in the A201 include significant changes related to dispute resolution as well as changes related to insurance and Owner's disclosure of and right to financial information.

Some of the specific changes include changes related to the initial decision maker for project disputes, arbitration, mutual waivers of consequential damages, additional insured provisions, and disclosure of financial information. Other notable changes include revisions to the cost-plus owner-contractor agreements requiring disclosure requirements for "related party" transactions and changes in the format and insurance requirements of the owner-architect agreements. Another notable addition is the new digital data documents and the vision of digital/paperless projects.

#### A. A201 General Conditions

##### 1. Initial Decision Maker (IDM)

The architect no longer has to be the initial decision maker for all project disputes. The 2007 owner-contractor agreements now provide the option to the owner and contractor to appoint an independent third-party neutral as the initial decision maker (IDM) for most decisions. The architect will still be involved in an initial decision making role in the context of differing site conditions. However, the IDM will not be necessary on most projects and if one is not selected the architect is the default.

##### 2. Arbitration

Arbitration is no longer mandatory. Instead, there is a check-the-box procedure. If no box is checked, then litigation is now the default. Additionally consolidation of arbitrations is now allowed. Further, if arbitration is selected, the rules will be those in effect on the date of the agreement not the date of the dispute.

##### 3. Time limits on claims / Statute of limitations

No longer does A201 provide for a contractual statute of limitations, as did A201-1997. Rather, the statute of limitations is now defaulted to the applicable state law. There is also a statute of repose provision of 10 years running from the date of substantial completion.

The A201-2007 also provides for a mandatory 21 day time limit for giving notice applicable to all claims.

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This time period is probably in violation of Texas Civil Practice & Remedies Code § 16.071a.

### 4. Consequential damages

The mutual waiver of consequential damages remains despite owner complaints that their losses due to consequential damages (e.g. lost rents) was much larger than contractors' (e.g. home office overhead claims). The AIA's primary basis for keeping the provision was to avoid large complex claims that are generally uninsurable to both parties and if the parties know that consequential damages will not be available, they can plan ahead.

One other potentially notable change is the elimination of the word "direct." The applicable provisions now state that "[n]othing contained in this Section 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable..." Does this allow for liquidated "indirect" damages? If so, what would they be?

### 5. Additional Insured Provisions

The former version of A201-1997 created Project Management Protective Liability Insurance with the intent of bringing all participants in the construction project under one policy. However, in the interim between 1997 and 2007 the industry developed its own solution (additional insured endorsements). These are now reflected in A201-2007, recognizing the realities and course of practice in the industry. Specifically, the contractor is now required to add the owner, architect and the architect's consultants as additional insureds under its general liability policy for liability arising out of the contractor's negligent acts or omissions occurring during the contractor's operations. The contractor is further required to add the owner as an additional insured for liability arising out of the contractor's negligent acts or omissions during the contractor's completed operations.

### 6. Indemnity

The indemnity provision provided in the 2007 AIA forms is still not worth much under Texas law. The provision was altered slightly in the revised 2007 versions of AIA 201 (between architect and GC) and AIA 401 (between GC and subcontractor), but not in any way that really matters under Texas law. Loss of use as a type of loss that is covered by the indemnity provision, which requires in A201 that the GC indemnify the architect and in A401 that the subcontractor indemnify the GC, was deleted. However, the indemnity provision does not meet the express negligence rule and is therefore not enforceable under Texas law. See *Cabo Constr., Inc. v. RS Clark Constr., Inc.* 227 S.W.3d 311 (Tex.App.—Houston [1<sup>st</sup> Dist.] 2007, no pet.).

Further, Section 130.002 of the Texas Civil Practices and Remedies Code prohibits a contractor from indemnifying an architect if the claim is related to the plans and specifications. TRCP § 130.002 (Vernon 1997). The AIA documents are, of course, drafted for use nationally, but it is important to remember when handling claims in Texas that if the forms are not modified the indemnity provisions are not enforceable under Texas law.

### 7. Disclosure of financial information

Under the revised A201-2007, a contractor's right to request financial information from the owner, and to stop work upon request, is now limited. Once the work commences, the contractor can make such requests only if (1) the owner fails to make payments to contractor as required by contract documents, (2) a change in work that materially changes the contract sum, or (3) the contractor's written identification of reasonable concerns regarding the owner's ability to make payments when due.

Additionally, the owner can now request information from the contractor as to whether it has paid its subcontractors. If the contractor fails to provide such information, the owner can contact subcontractors to determine if they have been properly paid.

## **B. Cost-Plus Owner-Contractor Agreements**

### 1. "Related Party" transactions

The new cost-plus owner-contractor agreements now require in some circumstances 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.

## **C. Owner-Architect Agreements**

### 1. Document format

In 2007, the AIA combined its basic owner-architect form agreement back into one document. The primary 1997 owner-architect agreement (B141-1997) was broken down into two parts. Part one was the agreement terms and part two was the architect's scope of services. The purpose of this was to provide for specialization. However, the AIA found that the industry was primarily using B151-1997, a more traditional one-part agreement, instead. In response, in 2007, the AIA responded with B101-2007 which is

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based on the traditional format of B151-1997 but incorporates language from B141-1997.

### **2. Insurance**

The A201-2007 now contains a requirement that architects maintain insurance. In this regard, the B201-2007 contains a provision requiring the parties to specify the types and limits of insurance an architect must maintain.

### **D. Digital Data Documents**

Two additional documents worth note are the AIA's new Digital Data Documents, the C806 licensing agreement, and the E201 digital protocol exhibit. These two documents are designed to address the AIA's vision of a future of digital, paperless projects, and the related issues of protection of copyrighted material and liability for problems with digital data storage and transfer.

The C806 is a two-party agreement whereby the transferor of digital copyrighted material grants a limited non-exclusive license to use the drawings for particular project and promises only that it is the owner of the protected/copyrighted information. In return, the transferee agrees to limit use in accordance with any special conditions listed and agrees to indemnify the copyright owner from any claims arising out of its use.

The E201 contains a similar agreement whereby the transferor promises it owns information and the transferee agrees to specific project use/to indemnify for claims arising out of its use. The E201 also contains a place for the parties to fill-in whatever agreement they come to as to "usage rights" and digital information.

Of note, these documents do not take into account multiple owners of protected information and that the one-way indemnity obligation is uninsurable and, given the language, unenforceable in Texas. Further, these documents have been criticized for only addressing architects' ownership interests and are silent on many significant issues which are left to the parties to decide. Alternate industry groups have digital information transfer guidelines and protocol addendums that address the issue further and may be of some use (e.g., ConsensusDocs)

## **IV. IMPACT & FUTURE OUTLOOK**

### **A. Industry Response**

The 2007 versions of the A201 family of documents have not been as widely accepted as previous versions. Neither the Associated General Contractors of America (AGC), the American Subcontractors Association (ASA), nor the Associated

Builders and Contractors (ABC) have endorsed these documents. In fact, the AGC has introduced its own version of form documents (ConsensusDocs) which have provided some competition to the AIA's forms.

### **B. Future Outlook**

One issue that could present a problem is the interaction of versions of AIA documents from differing years, possibly in combination with the use of ConsensusDocs provisions and/or forms. Although the AIA forms are designed to be standardized and internally consistent, they are often modified, and sometimes used in conjunction with non-AIA form based contracts, creating problems in the reconciliation and interpretation of multiple contracts. This problem could very well be exacerbated should 1997 based forms be used in combination with 2007 based forms, which undoubtedly will occur.

Further, given our current digital world, parties to construction projects would be well advised to come up with standard methods of addressing digital document transfer issues and to train themselves on the relevant software and other technology being used in today's market.