Negotiating the New AIA – What Really Matters

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INTRODUCTION

The topic of this paper is supposed to be: Negotiating the New AIA – What Really Matters. What really matters for the purpose of this paper, however, is that the issuance of the new AIA documents has not occurred by the deadline for publication. The substance for this paper has been gleaned from drafts of the new AIA A201 and commentaries which the author was able to finagle from here and there. Thus, before any practitioner relies on the suggestions set forth, one would be well served to verify that the changes addressed actually made their way into the 2007 documents.

The AIA A201, [hopefully] revamped in 2007, and the contracts into which it is incorporated, contain dozens of pages of "boilerplate" – meaningless until the life of your project depends on the turn of a phrase or the interplay of seemingly irreconcilably conflicting provisions. Since the A201 is incorporated into many of the various AIA documents for project delivery (A101, A111, A114 and A131), it will be the focus of this discussion. This paper addresses the more significant changes from the 1997 edition of the same document, with emphasis on the practical impact (and need to modify its various provisions in order effectively to share the risk that is inherent in every project). It presumes that the reader is generally familiar with the 1997 version of the AIA A201.

Changes will be noted with the impact and suggestions for use, by section. The risk allocation will be from the point of view of a Project Owner/Developer, although the

author suggests that the best contract is also the fairest – one that allocates anticipated risk appropriately, creates a method for addressing unanticipated risk and does not force one party or the other to fight in order to avoid ruination.

CHANGES IN THE NEW (DRAFT) VERSION OF THE AIA A201 (2007)

§1.1.7 – Project Manual

Project Manual is eliminated as a defined term, in favor of Specifications. Make sure that reference to "The Specifications" in §1.1.6 is broad enough to cover both specs appearing on the sheets of drawings and any volumes of detail.

§1.6 – Ownership and Use of Drawings

Drawings remain the property of the design professionals as instruments of service. This should be addressed in the Owner/Architect Agreement so that should the relationship end, the Owner need not start over with new design professionals. Architects typically will agree to allow the Owner license to use their drawings limited to the particular project – unless arrangement for prototypes are made – and then only in the event architect does not claim that owner is in breach of the agreement for non-payment.

§2.2 – Information and Services Required of Owner

The 2007 version still requires the Owner to furnish the Contractor with evidence of financial arrangements, upon request, at the commencement of the project. However, it limits the obligation of the Owner to furnish that information during the project, to circumstances where "the Contract Sum is changed materially." The prohibition on the Owner varying financial arrangements is now limited to those which "affect materially the Owner's payments to the Contractor".

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§2.3 – Owner's Right to Stop the Work

The Contractor's "persistent" failure to carry out the work has been replaced by "repeated" repeated failure. This "clarification" still leaves open the question sought to be answered" how many failures constitute "repeated failure"? Two? Five? The same number as would constitute "persistent failure"? Not much help is afforded by this change. This problem carries over into §§14.2.1.1 and 14.2.1.3, when an Owner is trying to determine whether grounds to terminate the Contractor for cause exist.

§3 – Contractor

The Contractor is now defined to be "licensed as a contractor, if required in the jurisdiction where the Project is located…" in keeping with various state statutes rendering contracts by unlicensed contractors unenforceable by such unlicensed contractor. See: e.g. § 489.128, Fla.Stat.:

489.128 Contracts entered into by unlicensed contractors unenforceable.--

(1) As a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed contractor shall be unenforceable in law or in equity by the unlicensed contractor.

[1](a) For purposes of this section, an individual is unlicensed if the individual does not have a license required by this part concerning the scope of the work to be performed under the contract. A business organization is unlicensed if the business organization does not have a primary or secondary qualifying agent in accordance with this part concerning the scope of the work to be performed under the contract. For purposes of this section, if no state or local license is required for the scope of work to be performed under the contract, the individual performing that work shall not be considered unlicensed.

(c) For purposes of this section, a contractor shall be considered unlicensed only if the contractor was unlicensed on the effective date of the original contract for the work, if stated therein, or, if not stated, the date the last party to the contract executed it, if stated therein. If the contract does not establish such a date, the contractor shall be considered unlicensed only if the contractor was unlicensed on the first date upon which the contractor provided labor, services, or materials under the contract.

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§3.2 – Review of Contract Documents and Field Conditions

The new 201 recognizes the Contractor's desire not to be responsible for design issues. Thus, Contractor's review of the documents is expressly "as a contractor and not as a licensed design professional." This really is consolidating the old §3.2.2 into 3.2.1 rather than introducing any new concept.

§3.2.2

The Contractor's duty to discover and report errors and omissions in the Contract Documents based not just on actual knowledge, but constructive knowledge: "The Contractor shall not be liable…unless the Contractor recognized or *should have recognized*…" The introduction of a negligence standard raises many questions and may be ill-advised. Additionally, the liability of the Contractor for failing to report such errors or omissions in the plans no longer requires a "*knowing*" failure. See also: §6.2.2.

§3.7 – Permits, Fees and Notices

A new section, 3.7.5 is added, requiring suspension of operations and notice to the Owner and Architect whenever the Contractor encounters "wetlands, burial or archeological sites or other legally protected features not indicated on the Contract Documents". A claim for equitable adjustment to the Contract Sum and Contract Time is also authorized. See also §10.2.1.4.

§3.9 – Superintendent

The Contractor now is required, before commencing the Work, to submit for approval by the Owner, its superintendent's credentials and limits the Contractor's ability to change the superintendent during the Work.

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§3.11.1 – Documents and Samples at Site

The new AIA document recognizes the digital age in which we live and work. The requirement that records be maintained in digital format may be imposed and, if so, facilities for viewing such digital documents must be made available to the Owner and Architect at the site. See also: §3.12. Note, however, that the digital information may not be readable without proprietary software and the document is silent on the duty to furnish access to the software.

§3.12.6 – Shop Drawings, Product Data and Samples

The Contractor is now held to having reviewed and approved the submittals of itself and its subcontractors and suppliers when it submits them. It also represents, by the fact of submission, that it has verified materials and field measurements.

§3.18.1 – Indemnification

The 2007 A201 does away with Project Management Protective Liability Insurance entirely (See §11.3 in the 1997 edition, eliminated in the 2007 draft) and so eliminates it as a limitation on the obligation of the Contractor to indemnify the Owner and Design Professionals from claims arising out of its performance of the Work.

§4.2.1 – Architect's Administration of the Contract

The time when an Architect's role as administrator of the Contract now will end either when the final certificate for payment is issued or 60 days after Substantial Completion and, if agreed expressly between the Owner and Architect, during the one year warranty period.

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§4.3.1 – Claims and Dipsutes

An important change in the 2007 edition is the deletion of the requirement that "claims must be initiated by written notice." This could open the door to increased disputes over whether notice of a claim was given, since it now can be given verbally, at a job meeting, over the phone or in other ways hard to dispute or prove. It is suggested that the requirement of written initiation of a claim be reinstated.

§4.4 – Resolution of Claims and Disputes

This section has been renamed Dispute Resolution. All of what was Article 4.4, 4.5 and 4.6 (submission of dispute to architect, mediation and arbitration) has been moved to Article 15, logically after the termination and suspension provisions in Article 14. Changes to the dispute resolution provisions in the 201 will be discussed infra.

§5.4 – Contingent Assignment of Subcontracts

Under the new version of the A201, when an Owner exercises the right to receive assignment of the Contractor's subcontracts, only to assign them to a successor contractor, the Owner must, in addition to earlier requirements of terminating the Contractor for cause and taking subject to the prior rights of the Contractor's surety, now remain liable to the subcontractors for the successor contractor's obligations under the assumed subcontracts. The Owner retains the right to accept assignment of some, but not all of the subcontracts.

§7.3.7 – Construction Change Directives

The new version of the document codifies that a Contractor typically will not be obligated to reduce its overhead or profit in response to CCDs which decrease its scope of work.

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§8.3.2 – Delays and Extensions of Time

Although not new, the A201 does not limit a contractor to time extensions as its sole remedy for delay. It may (and still can) make claim for delay damages.

§9.2.1 – Schedule of Values

In 2007, the draft version of the A201 adds the requirement that the Contractor "update" the Schedule of Values on its Application for Payment to reflect adjustments by Change Order to the Contract Sum. The language does not make clear whether the adjustment is accomplished by additional line items for each change order or actually changing the initially specified scheduled value for a particular portion of the Work. The author assumes that the former, rather than the later is intended by the drafters.

§9.3.1 – Applications for Payment

The Contractor can now be required to support its Application with lien waivers from Subcontractors and suppliers. This recognizes what had become a standard modification of the old version.

§9.5.1.2 – Decisions to Withhold Certification

Third party claims or the probability of the filing of third party claims is no longer a valid basis to withhold payment certification where "an insurer or surety acknowledges its responsibility to pay the full amount of the payment that would otherwise be withheld." Thus, where an unconditional payment bond exists to protect the owner from claims of subcontractors, an acknowledgement (or consent) of surety that it will protect the owner from the potential or actual third party claim, will serve to defeat the ability to withhold payment.

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§9.5.3 – Joint Checks or Direct Payments to Subcontractors

This new section authorizes the Owner to make payment to Subcontractors either directly in their name alone, or, through checks payable jointly to the Contractor and Subcontractor where the Owner has withheld payment from Contractor for failure of the Contractor to make payments properly to Subcontractors or suppliers. Such failure is a ground (§9.5.1.3) to withhold payment. Where the Owner withholds payment for more than 30 days, then, upon 7 days' written notice by the Owner to the Subcontractor, the Owner is now authorized to make the direct payment. This is an important tool where the Subcontractor is vital to the project and a dispute between the Owner and the Contractor threatens to impact that Subcontractor's continued performance.

§9.6.2 – Progress Payments

The Contractor is now required to pay Subcontractors "no later than seven days after receipt of payment from the Owner…" and must "promptly inform the Owner, Architect and Subcontractor, upon request, of the reason for any non-payment…" The new edition put a specific deadline, in lieu of the vague "prompt" obligation on the Contractor to pay its subs. It also imposes a duty to explain reasons for non-payment to a subcontractor despite payment of the Contractor by the Owner. Since the Contractor must certify entitlement to payment, including that of the Subcontractor's work, situations where the Contractor will be entitled to withhold money from the Subcontractor will likely be limited to those where the Contractor is supplementing the Subcontractor's work or has other backcharges that it has not passed through to the Owner (Subcontractor delays that caused the Contractor to accelerate to stay on schedule, or the like).

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§9.6.4 – Progress Payments

This new section gives the Owner the express right (previously existing by statute in many states) to contact Subcontractors directly in order to determine whether they have properly been paid to date. That right is conditioned upon the Owner's first seeking to obtain the information from the Contractor. If the Contractor fails to provide it, within seven days of the Owner's request, the Owner may then contact the Subcontractors directly.

§9.6.5 – Progress Payments

This new section makes the provisions of Sections 9.6.2, 9.6.3 and 9.6.4 applicable with respect to a Contractor's material suppliers, as well as its Subcontractors.

§10.5 – Hazardous Materials

A new section now provides that the Contractor must indemnify the Owner for the cost of remediation of hazardous materials or substances brought to the site by the Contractor, where the need for remediation was not due to the Owner's negligence and the hazardous material or substance was not required at the site by the Contract Documents.

§11.1 – Contractor Liability Insurance

The Contractor's liability insurance must name the Owner, Architect and their respective consultants as additional insureds (§11.1.4). Additionally, the new version now expressly requires that the Contractor furnish completed operations coverage which will protect the Owner for claims for damage to the Work, including loss of use, caused by the Subcontractors and must be maintained for the duration of the warranty period (§11.1.1.9). Further, a certificate evidencing the continuation of the completed

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operations coverage during the warranty period must be submitted by the Contractor with its Final Application for Payment (§11.1.3).

§11.3 – Property Insurance

The 2007 draft switches the obligation to procure and maintain property insurance ("builder's risk" or "all-risk") from the Owner to the Contractor and requires the Contractor to pay the deductibles.

§11.4.2 – Boiler and Machinery Insurance

The new draft no longer requires this antiquated coverage.

§13.3 – Written Notice

In keeping with current business practice, the draft version of the A201 authorizes notice by facsimile and electronic mail, but requires proof of transmission to be demonstrated. While proof of fax transmission is common, it is presumed by the author that proof of an email transmission would be the print out of a sent mail message.

§13.7 – Time Limit on Claims

In the 1997 version, the AIA imposed a start date for the running of the period of limitations. This provision was roundly criticized and often found unenforceable. In the 2007 draft, the AIA has abandoned declaring the beginning of the period of limitation in favor of a period of repose:

> All claims and causes of action between the Owner and the Contractor, whether in contract, tort, breach of warranty or otherwise, arising out of or in connection with the Work or the parties respective rights, duties and obligations under the Contract Documents shall be commenced no later than 10 years after the date of Substantial Completion of the Work or by the date required by applicable law, whichever comes first. (§13.7.1).

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This provision must be modified where there is, for instance, a ten year roof warranty that is to run from the certificate of completion. If this provision is adopted into the final version of the 2007 A201, the time for suit would start and end earlier than the parties intend (or the specifications require).

§14.1 – Termination by the Contractor

The draft provides the Contractor with the right to recover "payment for the Work executed, including reasonable overhead, profit and damages…" The author is concerned by the inclusion of "damages" in this provision. Damages to a contractor where the Owner breaches the contract are normally payment for the work executed, overhead and profit. What new element of damage might a contractor claim by the inclusion of the word "damage" in this provision? Is it intended that the Contractor be entitled to tort damage (injury to reputation caused by the breach)? Perhaps the drafters of the new version will correct this before issuing the final version. If not, practitioners surely ought to strike it.

§14.2 – Termination by the Owner for Cause

When the Architect certifies that cause for termination of the employment of the Contractor, the draft A201 authorizes the exclusion of the Contractor from the site. While this was implicit in the 1997 version ("the Owner…may…take possession of the site…"), it is now expressed.

§15 – Dispute Resolution

In previous versions of the A201, the Architect served as the decision maker of first resort (before more formal dispute resolution). Now, although the Architect is still the default "Initial Decision Maker", the parties are free to name anyone upon whom they

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can mutually agree at the time of contract. The 2007 draft, seemingly paradoxically, states that the Initial Decision Maker's "initial decision" "shall be final and binding on the parties but subject to mediation and" should mediation fail, "to binding dispute resolution." How, then, is the Initial Decision binding? If the party that disagrees with the Initial Decision fails timely to invoke the next step in the process (mediation), the initial decision becomes binding upon the Owner and Contractor and is no longer subject to further dispute resolution. Similarly, even where the parties go to mediation, absent a timely demand for binding dispute resolution, the Initial Decision becomes binding. The parties have 30 days after the Initial Decision to invoke mediation and another 30 days after mediation to invoke binding dispute resolution.

§15.2.2

The default, absent modification, requires mediation to be administered by the American Arbitration Association in accordance with their Construction Industry Mediation Rules. The parties should consider, when negotiating the Contract, administering mediation privately, independent of any particular organization (or with organizations other than the AAA), under rules that the parties can adopt from such organizations or which they fashion themselves. The practice may result in a more efficient, economical mediation. The author has also been involved in successful pro-active dispute resolution where the parties named a mutually agreeable person or panel to adjudicate disputes during the project under a written set of rules, enforceable through judicial oversight of the contract. These suggestions, however, require substantial thought, planning and cooperation and are well beyond the scope of this presentation.

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§15.3 – Arbitration

Arbitration is no longer the default for formal dispute resolution. The parties can still choose it and, if they do, the A201 requires that it be administered by the AAA under its Construction Industry Arbitration Rules. As with mediation, the parties might consider other organizations, private arbitration. The present AAA Construction Industry Arbitration Rules invest the arbitrator(s) with the power to determine their own jurisdiction, do not require adherence to the substantive law of the jurisdiction where the project is located or guarantee a speedy, efficient and fair resolution of the dispute.

§15.3.3 – Consolidation or Joinder

The 2007 draft reverses the 1997 prohibition on consolidation or joinder of other project participants into the dispute resolution between the Owner and Contractor. Design professionals and subcontractors may now been joined where the parties to be joined themselves have agreed to arbitrate disputes, there are common issues of fact or law and the procedural rules and methods for selection of arbitrators are the same. This change is viewed by the author as a substantial improvement over the 1997 version, allowing for a single dispute resolution proceeding, the avoidance of inconsistent results and the efficiencies that would result from such streamlining. Owners need to be sure to have coordinated dispute resolution provisions in the Contractor and Design Professional Agreements as Contractors ought to coordinate such provisions in their Owner and Subcontractor Agreements.

CONCLUSION

Presuming that the draft A201 is substantially similar to the final version that is adopted and issued in the near future, the AIA has made significant strides in improving a

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workhorse document in our industry. With care and understanding and a little gentle massage, it can provide the basis for a fair allocation of risk in your next construction project.

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