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IN THIS ISSUE

George Talarico analyzes the recent revisions to AIA document A201 and discusses the possible implications the revisions could have regarding the parties' legal rights and obligations.

A Word to the Wise – The AIA Revised Contract Documents Could Lead to New and Unanticipated Risks

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The contract documents published by the American Institute of Architects (the "AIA") are widely utilized by the construction industry. As such, prudent participants in the construction process analyze these documents in order to appreciate their legal rights and obligations. This analysis is particularly important in light of the recently released decennial revisions to AIA documents A101, A201 and B101.¹ While it is still too soon to gauge the effect of these revisions, their impact could be far reaching. These revisions, among other things, could lead to a significant cost increase and shifting of liability amongst the parties. Anyone involved in the construction project as owner, contractor or architect must consider these changes and be cautious before utilizing the new contract forms. This article will explore some of the revisions to A201 and discuss possible implications.

GENERAL CONDITIONS

A201 addresses the General Conditions portion of construction contracts. A201 is the most crucial section of the AIA documents since the terms of A201 are often incorporated elsewhere in the construction contract and changes in A201 will ripple through the entire AIA contract. Moreover, the General Conditions portion of the AIA contract documents cover commonly litigated portions of a construction contract such as insurance, payment, change orders and claims and disputes.

¹ The AIA announced the release of its 2017 documents in April 2017.

REVISED INSURANCE TERMS

The most obvious change to A201 is that the insurance requirements of Article 11 have largely been relocated to a separate Exhibit A to the AIA contract documents. Article 11 still contains key insurance requirements such as: (i) the owner's builder's risk property policy which insures the property on the site during construction, including property of the contractor and its subcontractors and suppliers; (ii) the contractor's commercial general liability policy ("CGL") naming the owner and architect (including the architect's consultants) as additional insureds; and, (iii) the parties and their insurers subrogation waiver of rights against one another. Exhibit A, titled "Insurance and Bonds", however, includes more thorough descriptions and requirements for insurance. Some of the requirements go far beyond those of the 2007 version of A201 and are likely to increase insurance costs.

REVISIONS THAT AFFECT OWNER'S REQUIRED INSURANCE

Article 2 § 2.3.1 details the insurance which the owner must acquire. The owner is obligated to purchase builder's risk insurance that specifically covers losses from "error omission, or deficiency in construction methods, design, specification, workmanship, or materials."² Moreover, the builder's risk policy must insure the owner as well as contractors and subcontractors.

² A201-2017, Exhibit A § A.2.3.1.1.

Article A2.3 could dramatically affect the risks associated with construction defects – one of the most hotly litigated areas of construction law. Under the prior AIA contract documents, if a defect allegedly caused damage to the owner’s property, the owner would likely have made a claim against the CGL policies of the contractor, subcontractor or perhaps the architect. Whether or not CGL policies cover damage caused by construction defects is not a settled issue. CGL insurers have denied coverage contending, *inter alia*, that construction defects do not constitute an ‘occurrence’ under the policy. The specific policy terms and the law of the relevant jurisdiction will determine the success of the insurers’ denial of coverage.³ In any event, the new insurance requirements would offer clarity as to which policy covers construction defects and could avoid the problems presented by seeking coverage for construction defects under a CGL policy. Builder’s risk policies, however, will only provide a temporary and likely expensive solution and will not cover latent defects

discovered after the builder’s risk policy expires – usually about one year after substantial completion of the project.⁴ It remains to be seen if owners will actually purchase these expensive builder’s risk policies or if the insurers even will write them.⁵

REVISIONS THAT AFFECT CONTRACTOR’S REQUIRED INSURANCE

As in the 2007 version, the contractor is required to maintain CGL, automobile, workers’ compensation and employers’ liability insurance.⁶ The 2017 updates, however, now contain requirements that the contractor provide professional liability, pollution liability, maritime liability, and manned or unmanned aircraft liability insurance if applicable to the work being performed.⁷ Further, the new revisions specify that the contractor’s required insurance must be maintained through the “correction of work” period, rather than the date of final payment, as previously required.

³ See generally *Nautilus Ins. Co. v. Bd. of Dirs. of Regal Lofts Condo. Ass’n.*, 764 F.3d 726, 2014 U.S. App. LEXIS 16250 (“damages that are the natural and ordinary consequences of faulty workmanship do not constitute an ‘occurrence’ or ‘accident.’” (citations omitted)); *Exeter Bldg. Corp. v. Scottsdale Ins. Co.*, 913 N.Y.S.2d 733, 79 A.D.3d 927, 2010 N.Y. App. Div. LEXIS 9453, 2010 NY Slip Op 9361 (“CGL policies like the one in this case are not intended to provide indemnification to contractors for claims that their work product is defective”); but see, *Cypress Point Condo. Ass’n v. Adria Towers, L.L.C.*, 441 N.J. Super. 369, 118 A.3d 1080, 2015 N.J. Super. LEXIS 114 (App. Div. 2015) (“consequential water damage to the completed and nondefective portions” of Cypress Point -- was an “accident,” it is an “occurrence” under the policies and is therefore covered”), *aff’d*, 226 N.J.

403, 143 A.3d 273, 2016 N.J. LEXIS 847 (2016); *Ameron Int’l. Corp. v. Am. Home Assur. Co.*, 2011 U.S. Dist. LEXIS 61486, 2011 WL 2261195 (unintentional supplying of defective products constitutes occurrence, if contractor did not intentionally supply faulty product).

⁴ A201-2017, Exhibit A § A.2.3.1.3; A201-2017 §12.2.2.

⁵ The London Engineering Group (“LEG”), a consultative body comprised of insurers and reinsurers who underwrite risks involving engineering and construction, has created standard exclusion language that allows some coverage in builder’s risk policies for losses relating to defects. While the LEG endorsements are widely used in foreign construction projects, they are rarely used in the United States.

⁶ A201-2017, Exhibit A § A.3.

⁷ A201-2017, Exhibit A §§ A.3.2.3 – A 3.2.12

Consistent with the prior versions of the AIA documents, the 2017 revision requires the contractor to name the owner, architect and architect's consultants as additional insureds. The 2017 version, however, dictates the amount of coverage to be provided to these additional insureds. Exhibit A Section A.3.1.3 details: that the additional insured coverage "shall be primary and non-contributory . . . [and] "[t]o the extent commercially available, the additional insured coverage shall be no less than that provided by Insurance Services Office (ISO)" in three ISO three endorsements.⁸ This raises two significant questions: (i) if the contractor's liability policy fails to provide the required level of coverage, is the contractor liable for any shortfall?; and, (ii) since these policies are required to be "non-contributory" which party must pay the deductible or SIR under the additional insured coverage?

REVISIONS THAT AFFECT DISPUTE RESOLUTION

A seemingly minor but noteworthy change is to the definition of "Claim." Under Section 15.1 a "Claim" is defined to (i) include a request for a modification of contract time; and, (ii) exclude any requirement that an owner must file a claim to impose liquidated damages ("LDs"). Notably, any request

relating to contract time must be brought within the specified time period for Notice of Claim⁹ and in the prescribed manner.¹⁰ There are at least two traps for the unwary. First, even though e-mail is regularly used for communications amongst the parties, the revised contract documents do not recognize e-mail as an acceptable form of delivery of a Notice of Claim. Second, an unwary contractor may wrongly assume that an owner's failure to assert a claim for LDs means that LDs will not be imposed. This may lull the contractor into failing to timely assert its own claim for a time extension and thereby waiving its ability to do so.

There have not been any major revisions to the arbitration provisions of Section 15.4. Other changes, however, will influence dispute resolution. As before, a condition precedent to commencing Mediation and thereafter a possible arbitration or litigation, Claims must first be submitted to the Initial Decision Maker ("IDM").¹¹ The IDM is normally the architect as the architect is designated as the default IDM.¹² The 2017 revisions, however, now include strong exculpatory language protecting the IDM from liability "for results of interpretations or decisions rendered in good faith."¹³ This broad protection from liability could place the architect (acting as IDM) in an uncomfortable

⁸ CG 20 10 07 04, CG 20 37 07 04 and CG 20 32 07 04.

⁹ "Claims by either party under Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to the Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later." A201-2017 § 15.1.3.1.

¹⁰ Pursuant to A201-2017 § 1.6.2 Notice of Claims must be delivered by registered or certified mail or by courier.

¹¹ Note that there is no requirement that Claims submitted after the correction of work period be submitted to the IDM. A201-2017 § 15.1.3.2.

¹² A201-2017 § 1.1.8.

¹³ *Id.*

and possible conflicted position if, for example, the Claim infers liability on the part of the architect (such as improper or defective design). Moreover, it raises possible struggles to ascertain the meaning of 'good faith' in the context of the architect's actions.¹⁴

REVISIONS THAT AFFECT SUPERVISION AND CONSTRUCTION PROCEDURE

In circumstances where the specifications do not prescribe construction means and methods, these remain the responsibility of the contractor. It appears, however, that the contractor is now being burdened with some of the architect's design responsibilities, in circumstances where the specifications and/or drawings "give specific instructions concerning construction means, methods, techniques, sequences, or procedures."¹⁵ Previously, if the contractor determined that the specified means, methods, techniques, sequences, or procedures were unsafe, the contractor was required to provide the architect with timely notice and then stop the work it deemed to be unsafe, while awaiting further written instructions.¹⁶ Now the contractor does not have the right to stop work and it is incumbent upon the contractor and not the architect to propose alternate means, methods, techniques, sequences, or procedures.¹⁷ The architect's role has been diminished and is only required to review the

contractor's proposal, solely for "conformance with the design intent for the completed construction."¹⁸

REVISIONS THAT AFFECT SHOP DRAWINGS

Another change which could shift some design responsibility from the architect to the contractor is contained in the section on Shop Drawings. On one hand this section adds an assurance that in preparing Shop Drawings the contractor is "entitled to rely upon the adequacy" of the architect's design criteria, yet on the other hand it removes the language stating that "[t]he contractor shall not be responsible for the adequacy of the" design criteria contained in the Contract Documents.¹⁹ This modification could be interpreted to mean that through submittal of Shop Drawings, the contractor is taking on responsibility for design criteria.

REVISIONS THAT AFFECT CONTRACT TERMINATION

Another deletion that could prove troubling for the contractor involves contract termination by the contractor. Both the prior and current versions are consistent in each allows the contractor to terminate the contract if work is stopped for 30 consecutive days, for certain specified reasons (i.e. court order). The difference is that the prior version

¹⁴ See, e.g., *MECO Systems, Inc. v Dancing Bear Entertainment, Inc., et al.*, 948 SW2d 185, 1997 Mo. App. LEXIS 1191 (the architect's "actions raise genuine issues of fact regarding the architect's partiality and good faith." where the architect failed to demonstrate its compliance with contract provisions on timeliness

and the contractor raised claims that construction delays were caused by the architect).

¹⁵ A201-2017 § 3.3.1.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ A201-2017 § 3.12.10.1.

limited this option only to circumstance where the delay was not caused by the contractor, a Subcontractor or “entities performing portions of the Work under direct or indirect contract with the contractor.”²⁰

The latest version deletes the underlined words and therefore implies that the contractor has no right to terminate if the delay is caused by any party performing work on the project regardless of whether or not the contractor has any control over that party. In instances where the owner terminates ‘for convenience’ the contractor will no longer be permitted to receive payment for overhead and profit on work that the contractor performed as a result of the termination unless the contract otherwise provides. Since the contractor is entitled to a termination fee included the contract,²¹ it is important that a contractor negotiate for inclusion of overhead and profit in its calculation for a termination fee.

CONCLUSION

While many of the 2017 revisions to A201 appear to be stylistic in nature, there are some changes which could affect the liability of the architect, owner and the contractor (including its subcontractors). In order to prevent unpleasant surprises, the parties

need to recognize those revisions that: effect the Claims process; increase and/or limit costs; shift liability; and, change deadlines. This will allow them to negotiate around the revisions (i.e. included overhead and profit in termination fee) and/or perform the contract in a manner that anticipates the impact of the revisions (i.e. filing a Claim for contract time extension without awaiting the owners Claim for LDs).

²⁰ A201-2007 § 14.1.1 (emphasis added).

²¹ A201-2017 § 14.4.3.

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