



# The Use of AIA Form Contracts

Anticipated Changes to the  
A201 Family of Documents

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# Learning Objectives

- Become more comfortable and familiar with the content of the standard AIA contract documents.
- Review some common issues with the 1997 A201 documents
  - Review some of the anticipated changes in the 2007 A201 documents

# What should your contracts be accomplishing-the basics

- Accurately define the scope of work
- Accurately reflect the cost of work
- Specify the time for completion of various tasks (and anticipated events that may change time)
- Allocate responsibility among parties for necessary work (where there are multiple parties make sure that everything that needs to be done is done by someone)
- Provide mechanism for necessary coordination

# Risk Allocation/Management

- Identify mechanism for handling disputes
- Provide appropriate insurance coverage
- Identify potential problem areas and allocate risk
- Avoid assuming obligations which might lie outside of your coverage
- Provide consistency and clarity across contract documents (avoid, to the event possible, ambiguity or outright conflict)
- Limitation of Liability clause
- Receive compensation for risks assumed

# Positives of Form Documents Generally

- AIA devotes considerable resources to generate and update
- Familiarity within the industry
- Legal track record for interpretation of many provisions

# Negatives of Standard Form Documents

- They are not Project specific
- They are not state specific (do not take into account New York quirks)
- Sometimes they are a little too easy to use (plug in scope and price without review of other terms)

# A New York Example Design/Build

- The Court of Appeals, in *Charlebois v. J.M. Weller*, 72 NY2d 587, addresses the legality of design/build contracts and discusses the possible tension between allowing this method of project delivery and public health and safety:
  - “So strict has been the judicial construction of the statutory requirement through concern for the public health and welfare that the requirement may not be satisfied by employing or ‘subletting’ the work to an appropriately licensed person”
  - “Pursuant to that arrangement, [the engineer] was not acting in the capacity of an employee of the business corporation, but acted as a professional licensed engineer obligated by contract to exercise his professional judgment in the interests of the public health and welfare, **and independent** in that sense of unlicensed oversight. In fulfilling the independent professional role in this case, [the engineer] was also subject to the plenary regulation of the State Education Department. Indeed, insofar as the professional obligation owed by Weller, P.E. is derived from the contract itself, at issue here, **the professional services could not have been performed by [the contractor] and it was the independent professional judgment of [the engineer], which flowed directly to the [owner]**. This is sufficiently consistent with the public policy sought to be served by the statute and the cases, without the ultimate sanction of voiding an otherwise valid and fulfilled contract” (id at 584).

# AIA Design/Build Language

- Compare to some of the Basic Services language taken from the B901:
  - “The contractual obligations of the Architect are undertaken and performed in the interest of the Design/Builder. Nothing contained in this Part 1 Agreement shall create any contractual relationship between the Architect and the Owner....The Architect shall communicate with the Owner through the Design/Builder in writing to the Owner and the Architect” (see paragraph 1.1.1)

## Other Examples of Current Contract Language Areas of Dispute

- Site visitation- “The Architect, as a representative of the Owner, shall visit the site at intervals appropriate to the stage of the Contractor’s operations, or as otherwise agreed by the owner...” (see paragraph 2.6.2.1).
- Submittal review time frame from 2.6.4.1- “The architect’s action shall be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, while allowing sufficient time in the Architect’s professional judgment to permit adequate review”.

# Anticipated Changes

- While the AIA has not released any of the proposed documents, they have offered seminars/presentations of proposed changes
- Generally, proposed changes appear to have been influenced by additional input from owners/contractor groups
- Because of lack of consensus or practical alternatives, problems seem to be identified rather than resolved
- New numbering system to make documents easier to use

# The Initial Decision Maker

## ■ The existing system:

- The A-201-1997 requires owners/contractors to submit disputes to architect as condition precedent to mediation/arbitration

## ■ The perceived problems

- Contractors view architects as partial to those who pay them
- Owners don't want to give up control over their checkbooks
- Current language indicates that "Claims, including those alleging an error or omission by the Architect...shall be referred initially to the architect for decision" (See 4.4.1 of Article 4, A201-1997)

# What's the AIA's answer

- The new documents will allow for a potential third party as the initial decision maker
- The default will still be the architect

# Problems with the New Approach

- No one better to render fast decisions
- Who will pay to keep the 'Initial Decision Maker' up to speed?
- May encourage disputes where architect advises owner of change order
- Another party to be paid in the event of project delay
- Seems unlikely that contractor and owner can reach consensus on project
- If architect's opinion undermined early in project, may not be able to control project

# Benefits of IDM?

- If the parties can agree, both owner and contractor should be less likely to challenge IDM decisions
- If owners and contractors start to price out services of IDM, may be more appreciation for value of role

# Definition of Standard of Care

- New B101-2007 will add definition:
- **“the architect will perform services consistent with that level of skill and care ordinarily provided by architects practicing under the same or similar circumstances”**
- Reminder-Your contract is the law- Beware adding “highest” level of skill

# Advantages/Disadvantages

- Major advantage is that it is a pretty generic definition which does not appear to expand upon common law duty (which would increase exposure and possibly create coverage issue)
- Only significant potential disadvantage is possible court interpretation that parties were trying to define some other standard

# Insurance Requirements

- B101-2007 will add requirement that architect maintain types and limits of coverage to be specified
- B141-1997 and B151-1997 contained only requirement that owner reimburse the architect for the cost of obtaining excess insurance (also included in new agreement)

# Positives/Negatives of Insurance Requirement

- Change apparently made because most architects carry liability insurance
- May have to track project insurance requirements to make sure appropriate coverage carried for various projects for the appropriate time-ask your agent
- Limitation of Liability Clause