

## **A201 2007: Exploring the Changes**

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By now, everyone has heard that the American Institute of Architects ("AIA") revised its industry leading contract documents for 2007. The upgraded family of documents were released on November 5, 2007. The document revisions included several changes to the A201 (General Conditions to the Contract for Construction.) The A201 is generally considered the benchmark for all contract documents because it contains the terms and conditions for the entire construction project. For 2007, the AIA claims to have improved this form that made its debut more than 90 years ago.

Some construction industry players believe the AIA documents are biased in favor of architects. After all, they are drafted by the American Institute of Architects. However, according to the 2007 drafting committee, the goal of the revisions was to provide "balanced contract documents" and "promote equitable distribution of risk." Input was invited and received from an assortment of interest groups including the American College of Construction Lawyers, Associated Specialty Contractors, Associated General Contractors, Commercial Owners Association of America, Council of American Structural Engineers, and the American Subcontractors Association, to name a few. Considering the diversity of these influences, it appears a fair cross section of the construction industry was represented during drafting. While the AIA claims its revised form documents do not tend to favor any specific party, many industry groups remain skeptical.

The 2007 A201 is a culmination of ten years of feedback from users of the 1997 A201. Many issues with the 1997 A201 were brought to light by the above-mentioned groups, and the AIA sought to resolve them with the release of the 2007 documents. Largely, the issues tended to spawn from the ubiquitous construction dispute. Examples include identifying a neutral decision maker, mandatory arbitration, time limits for claims, consolidation and joinder, consequential damages, and insurance. This article will explore some of the issues common with the 1997 A201, and shed light on the notable changes found in the 2007 A201, but it is not a comprehensive examination of every change.

### **Initial Decision Maker**

Since 1911, the A201 has assigned the architect the task of deciding disputes between the owner and contractor. However, conflicts arose because owners do not want their architects deciding against them in disputes. Further, there is a popular belief among contractors that architects cannot be impartial. Additionally, architects, to the surprise of many, do not like getting caught in the middle. As a result, the 2007 documents introduced the "Initial Decision Maker" ("IDM"). The IDM is a third party decision maker selected at the option of the parties. The IDM decides any dispute not related to aesthetic effect, presumably leaving those decisions with the architect. Presentment of a dispute to the IDM is required as condition precedent to mediation, arbitration, or litigation, although

the IDM's final and binding decision can be appealed through one of these dispute resolution methods. It is important to note the AIA currently does not plan to publish an IDM agreement, so parties must procure their own form of agreement. If an IDM is not identified in the contract documents, the architect will be the default IDM.

According to the drafters, the purpose of this change was to maintain fast and impartial solutions to common problems, to allow contractors and owners to choose a third party IDM with whom they feel comfortable, and give freedom to select an appropriate IDM based on the particular project. However, no mechanism was provided to designate an IDM after execution of the contract.

### **Arbitration**

Another change, which could prove beneficial to users of the documents, is the removal of mandatory arbitration from the A201. Mandatory arbitration has been included in the AIA documents since 1888. In 1997, mediation was added as a condition precedent to arbitration. With the advent of increasingly complex projects and delivery methods, the number and frequency of disputes has soared. As a result, many parties have found some mandatory dispute resolution methods to be cost prohibitive. No longer mandating mediation or arbitration, the 2007 AIA documents now contain a checkbox, wherein contracting parties can choose a method of dispute resolution, custom tailored to their own circumstances. If the parties fail to select a method, litigation is the default. However, mediation remains a condition precedent to arbitration or litigation. The American Arbitration Association (“AAA”) rules remain the default for arbitration, but the parties may designate an alternative by mutual agreement.

### **Time Limits for Claims**

The 1997 A201 contained an internal limitations period for bringing claims. The limitations period began to run upon one of three triggering events; substantial completion, final completion, or the date of warranty work in the contractor-owner agreements. This provision caused confusion regarding when the limitations periods began to run. Additionally, some claims were barred before the event occurred, there was perceived unfairness to owners in states following the discovery rule, and in certain situations, it allowed architects to avoid the discovery rule. Although it provided structured risk management for architects and contractors, owners claimed it was unfair. The internal limitations period for bringing claims was deleted in the 2007 form and the documents will default to applicable state statutes of limitations. Furthermore, the A201 now acknowledges the discovery rule for determining when limitations begin to run. However, it is also important to recognize the new documents include a "statute of repose" to bar any claims 10 years after substantial completion.

Although Texas employs a 10 year statute of repose for most construction claims, at least one court has found a way around it. In *Pochucha v. Galbraith Eng'g Consultants, Inc.*, No. 04-07-00119-CV, 2007 WL 2608367 (Tex. App.-San Antonio Sept. 12, 2007, pet. filed), the court of appeals held that the statute of repose was not applicable to a claim against an engineer more than 10 years after final completion. In that case, the defendant contractor sought to designate Galbraith,

the engineer, as a responsible third party pursuant to CPRC §33.004. Shortly thereafter, the plaintiff joined Galbraith as a defendant. The court held designation as a responsible third party effectively avoided a limitations defense because the joinder was timely filed pursuant to §33.004. The court went on to hold the statutory avoidance of a limitations defense was sufficient to avoid the 10 year statute of repose. This case is currently being appealed to the Supreme Court of Texas. In the meantime, it is not uncommon to find defendants designating responsible third parties solely to allow another party to join the responsible third party as a defendant where limitations or repose would otherwise bar its joinder. As a result, uncertainty in Texas limitations law could render the 2007 A201, without limitations, useless for parties who may have been protected by the 1997 A201.

### **Consolidation and Joinder**

In the past, the A201 prohibited joinder of owner claims against the architect with claims against the contractor. Owners do not like that arrangement because it prevents having the contractor and design professional in the same arbitration, unless all parties consent. This results in multiple arbitrations which can be costly, and lead to inconsistent outcomes. This prohibition was routinely modified by owners and their lawyers when negotiating the 1997 A201. For 2007, the clause prohibiting joinder has been deleted, allowing the owner to join all involved parties into a single arbitration claim. Section 15.4.4.1 now gives the owner and contractor the option to consolidate. Section 15.4.4.2 allows joinder of parties substantially involved in a common question of fact or law, whose presence is required.

### **Consequential Damages**

The 1997 A201 introduced a new feature allowing the owner and contractor to waive consequential damages against each other. Consequential damages includes indirect costs such as lost revenue, lost sales, or extended home office staff time. Of course, this did not bar direct damages such as physical damage or change order costs. The AIA Documents Committee hotly debated this topic when drafting the 2007 A201. Ultimately, they decided to retain the consequential damages waiver. At least one change regarding liquidated damages was made that could prove significant. The 1997 A201 waiver contained a clause that stated “Nothing contained in this Section 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.” The word “direct” has been deleted for 2007 because it was believed to be awkward and confusing. The new waiver provision has been renumbered and inserted in Article 15 along with the other claims provisions.

### **Insurance**

The 1997 A201 introduced a new type of insurance policy called “Projected Management Protective Liability Insurance.” This requirement would bring all participants under a single policy which would encompass claims arising during the work. According to the AIA, this approach failed and few of these policies were purchased. It turned out that a primary reason for the failure was the industry development of the “additional insured” endorsement. The 2007 A201 has eliminated the

Projected Management Protective Liability Insurance and replaced it with the industry developed solution. It requires the contractor to add the owner, the 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 during the contractor's operations, and that the owner be added as an additional insured for liability arising out of the contractor's negligent acts or omissions during the contractor's completed operations. The endorsement does not require the contractor or its insurer to cover claims arising solely out of the acts or omissions of the owner or architect. Without modification, this new provision could cause indemnity provisions to become irrelevant to claims covered by the contractor's liability insurance.

### **Financial Information**

Since the 1997 A201 was released, owners have expressed concern for the contractor's right to request financial information from the owner, and to stop work upon making that request. The owners believe the right was too broad and potentially allowed misuse. In response, the 2007 A201 places restrictions on the contractor's right to make a request for financial information, allowing the request only upon: (1) the owner's failure to make payments as required; (2) a change in the work materially changing the contract sum; or (3) the contractor identifying in writing reasonable concerns regarding the owner's ability to pay. The owner's response with reasonable evidence of its ability to pay, remains a condition precedent to commencement or continuation of the work.

Similarly, the 2007 A201 allows the owner to request from the contractor evidence of payment to its subcontractors, and to address the contractor's failure to pay its subcontractors. If the contractor fails to respond with such evidence, the owner may contact the subcontractors directly to ascertain whether they have been paid. Additionally, if the contractor has failed to pay its subcontractors, the owner may now issue joint checks to the contractor and subcontractor, or material or equipment supplier.

It is also important to note the new contingent pay statute in Texas requires the contractor to make a good faith effort in obtaining financial information from the owner.

### **Digital Practice**

Today's practice of architecture is dominated by the use of digital documents. Specifically, most design professionals utilize some form of computer aided drafting to generate their construction drawings. Ultimately, the drawings are printed into hard copies for distribution to contractors and subcontractors. However, many firms are learning it is more efficient to distribute these files in an electronic format. This saves time and printing costs. Naturally, distribution of these files involves risk borne by the author of the files. As a result, for 2007 the AIA has released digital documents licensing agreements, including the E201 and C106 which can be used as exhibits to the A201. Inevitably, the use of these documents will become widespread so it will be necessary to monitor these exhibits when reviewing the A201.

## **Additional Changes**

The 2007 A201 contains several additional changes worthy of recognition. The first deals with the owner's right to stop the work. Previously, the 1997 A201 allowed the owner to stop the work if the contractor has demonstrated a willful failure to perform. For 2007, the owner may stop the work for the contractor's "repeated" failure to carry out the work per the contract. The number of failures constituting repeated failure is unknown at this time.

Another change included in the 2007 A201 allows the owner to carry out the work after only one written notice allowing the contractor ten days to comply. Previously, the owner was required to issue a second notice before performing the work.

## **AGC vs. AIA**

For the first time in 2007, the AGC has not endorsed the AIA Contract Documents. Several reasons have been published by the AGC, among them is the concern of bias in the documents favoring architects or owners, and disfavoring contractors. Additionally, the ABC has not endorsed the AIA Contract Documents, citing the AGC's position. Incidentally, the AGC has launched its own contract documents called ConsensusDocs. This introduction will surely increase the number of forms used by industry players, and as a result, the A201 will face competition, especially in instances where it may disfavor contractors.

## **Conclusion**

Although the 2007 A201 attempts to rectify the inequities that appeared to exist in its predecessor, there are several potential circumstances under the new document that could adversely affect certain parties. Additionally, as before, the new A201 is subject to modification. Thus, each A201 should be thoroughly reviewed, and areas of concern modified by a construction law practitioner prior to execution.