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Last Call… On October 31 the AIA Retires the A201-2007 General Conditions – What Does This Mean to You?

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In April 2017 the American Institute of Architects released its new A201-2017 General Conditions document. Despite its introduction, the 2007 version has remained in circulation and continues to be used alongside the AIA's suite of agreements. However, on October 31, 2018, the AIA will retire the 2007 General Conditions. After that date, you will no longer be able to create or finalize the 2007 version of the form.

While the AIA will be discontinuing all of its 2007 forms on October 31, including the A101 (Lump Sum Agreement), A102 (Cost Plus with Guaranteed Maximum Price Agreement), A103 (Cost Plus Agreement), A107 (Abbreviated Form Agreement, currently the A104), and the A105 (Short Form Agreement), the General Conditions are of particular concern. In addition to pairing with certain new 2017 agreements, such as the A101, A102 and A103, the new General Conditions will need to link up with certain older AIA documents, including the A133-2009 Cost Plus a Fee with a Guaranteed Maximum Price Agreement.

As the AIA generally revises its forms every ten years, it is likely that the A133-2009 Agreement will be receiving its overhaul in 2019 – but in the meantime, parties using the A133-2009 Agreement form will be pairing it with the new A201-2017. In mating old-to-new, there are bound to be some gaps. Beyond changing the references in the A133-2009 to the A201-2017 (from the A201-2007), one particular concern exists in the insurance provisions of the A133-2009 and the A201-2017. A major change to the 2017 AIA documents was the addition of an insurance exhibit to the A101, A102, and A103 agreements. Accordingly, many important insurance provisions were removed from the A201 and added to the insurance exhibits.

The removal of insurance language from the A201, creates a void when paired with the A133-2009 Agreement. The A133-2009 Agreement directs the parties to the insurance provisions contained in the A201 General Conditions, many of which have been removed in the 2017 update. Currently there is no standard insurance exhibit for the A133-2009 Agreement.

Thus, pairing an "off-the-rack" version of the A133-2009 Agreement with an A201-2017 could mean an absence of important insurance terms. In order to fill-the-gap, a custom insurance exhibit, or an exhibit constructed from one of the other 2017 AIA agreement forms should be used in conjunction with the A133 Agreement. If the parties choose to borrow an insurance exhibit from one of the other 2017 AIA agreements, there are several issues in these form documents that should be carefully examined by Contractors, including:

- If the Contractor provides the Builder's Risk Insurance, it must provide the Owner with a copy of the policy. The Owner does not have a reciprocal obligation in the event it provides the Builder's Risk Insurance. (Sections A.2.3.1 and A.3.3.2.1).
- The Owner Builder's Risk section does not specify that the Owner's policy must provide protection against terrorism. (Section A.2.3.1.1).
- The Owner is given the power to adjust a claim with the Contractor's Builder's Risk carrier. (Section A.3.3.2.1).
- The expanded Contractor Commercial General Liability sections include 11 different prohibitions against exclusions in the Contractor's policy. (Section A.3.2.2.2).
- Architect/consultants are still additional insureds on the Contractor's Commercial General Liability policy (carry over from the A201-2007, Article 11). (Section A.3.1.3).

With October 31 looming, we recommend that Contractors begin familiarizing themselves with the AIA's 2017 forms and prepare modified versions of these documents before the 2007 forms expire. For additional guidance we recommend consulting the AGC's Commentary on the AIA A201. Alternatively, consider switching to ConsensusDocs which AGC endorses.

*After publication of this article, a staff member of AIA privately provided information that to account for the very issue raised in this article, the announced October 31st deadline of AIA A201, will not be followed for the electronic version. The paper version of the A201 2007 edition is already out of stock with AIA national, and AIA national will not print additional runs of the paper copies.

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Shedding Light on the AAA's Streamlined Three-Arbitrator Panel Option

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On May 1, 2017, the American Arbitration Association (**AAA**) announced a new procedure under the AAA's Arbitration Rules[i] aimed at lowering the administrative cost of arbitrations involving three-arbitrator panels.[ii] The new procedure, referred to as the "Streamlined Three-Arbitrator Panel Option," allows parties to reduce

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arbitrators' fees by allowing a single arbitrator to manage the arbitration through the preliminary procedural and discovery stages, while calling on the complete three-arbitrator panel for the evidentiary hearing and final award. According to the AAA, "a three-arbitrator panel can actually cost five times as much as a single arbitrator" and "[b]y maximizing the use of single arbitrator, parties can capitalize on the cost savings, while still preserving their right to have the case ultimately decided by a panel of three arbitrators."[iii]

This article sheds light on the new procedure and explains how parties can better assess whether the Three-Arbitrator Panel Option is a good fit for their dispute. Indeed, the Three-Arbitrator Panel Option is not explicitly incorporated into the AAA's Arbitration Rules, and, therefore, parties may not necessarily consider the Three-Arbitrator Panel Option when initially proceeding to arbitration.

The Three-Arbitrator Panel Option is a novel attempt by the AAA to limit the costs of arbitration and make arbitration a more attractive method of dispute resolution. However, before parties opt into the Three-Arbitrator Panel Option, there are a few points worth considering. As explained below, while there is no reason to necessarily doubt that the Three-Arbitrator Panel Option would improve efficiencies in an arbitration, in some cases, those efficiencies may only be seen at the margins and could raise certain risks that, if not addressed at the outset of a case, may create problems down the road.

I. **Streamlined Three-Arbitrator Panel Option**

The Three-Arbitrator Panel Option is not explicitly included in the AAA's Arbitration Rules and, therefore, is not triggered by a specific filing or form. Instead, the parties are typically given an opportunity to opt into the Three-Arbitrator Panel Option during the initial administrative conference. Specifically, during the initial administrative conference, the AAA's representative overseeing the administrative conference may raise the Three-Arbitrator Panel Option for the parties' consideration if the AAA's representative believes that the dispute could benefit from the procedure.

If the parties opt into the Three-Arbitrator Panel Option, the AAA will seek to determine what form of the procedure the parties will utilize. Specifically, the Three-Arbitrator Panel Option comes in two flavors, which the AAA refers to as "Option 1" and "Option 2."

Under "Option 1," the parties will, during the arbitrator selection phase, appoint the entire three-arbitrator panel pursuant to the applicable rules or the parties' agreement. In most cases, this involves the appointment of the panel through a roster of potential arbitrators (see, e.g., Commercial Rule R-12; Construction Rule R-14) or through direct party appointment (see, e.g., Commercial Rules R-13, R-14; Construction Rule R-15). Once the panel is formally appointed, the two party-appointed or "wing" arbitrators (i.e., the arbitrators who are not chair) are placed on inactive status, with the expectation that they will only become active and participate in the arbitration during the evidentiary hearing and while preparing the final award. As a result, the chair will manage all preliminary stages of the case and may decide any dispositive motions before the hearing. However, if either party believes that a dispositive motion requires the full panel, the full panel can be made available to hear and decide the motion.

Under "Option 2," at the outset of the case, the parties skip the initial panel selection process and only appoint a single arbitrator to manage the pre-hearing stages of the case. Like Option 1, the sole arbitrator is permitted to hear and decide any dispositive motions filed before the hearing. After the arbitration has proceeded for some time, but no less than 60 days before the scheduled evidentiary hearings, the parties will work with the AAA to appoint the two remaining arbitrators, with the initial arbitrator serving as chair.[iv]

Lastly, the AAA provides that if the parties elect to use the Three-Arbitrator Panel Option, under either Option 1 or Option 2, but one party decides to withdraw from the procedure later on, that party is entitled to do so. If a party elects to withdraw from Option 1, the wing arbitrators are made active and will participate in all future proceedings. In an Option 2 scenario, the AAA will immediately work with the parties to select the two party-appointed arbitrators. However, if a party elects to withdraw from Option 2 before the formal appointment of the panel, the sole arbitrator will continue to manage the case; if a dispositive motion was argued or briefed before the sole arbitrator, the sole arbitrator will decide the issue before the full panel is appointed.

II. Considerations

As the AAA is likely to admit, the Three-Arbitrator Panel Option may not be well-suited for all disputes. Critically, parties must consider and actively manage the effects of the Three-Arbitrator Panel Option to ensure it produces the best results. Below are some issues that parties may wish to consider when deciding whether to opt into the procedure.

A. Dramatic cost savings or benefits at the margins?

First, parties should consider whether this procedure is fundamentally different from the practices they would otherwise experience during the course of any other arbitration. Specifically, it is commonly the case that, following the appointment of the panel, the chair takes the lead and makes determinations/decisions on procedural issues and other disputes leading up to the hearing without much, if any, input from the party-appointed arbitrators. Often, the parties will expressly agree to this delegation of authority, and their agreement will be recorded in an initial procedural order following the first procedural conference.[v] However, arbitration management practices vary between chairs and wings and, without the Three-Arbitrator Panel Option in place (or some other clear directive), the wing arbitrators could be more engaged in the proceedings than the parties would otherwise prefer. The point is this: Although the Three-Arbitrator Panel Option may offer parties some comfort that arbitrator fees will be kept down during the pre-hearing phases of the arbitration, whether the procedure will produce a dramatically different result in the overall efficiencies, as compared to customary arbitration management practices, may be debatable.

B. Is the cost of keeping party-appointed arbitrators engaged worth the expense?

Second, to the extent the parties decide that they will utilize the Three-Arbitrator Panel Option, the parties must carefully consider how much benefit they perceive will be lost by keeping the wing arbitrators on the sidelines. This is a cost-benefit analysis between ensuring that the panel members understand the intricacies of the dispute and minimizing unnecessary costs (especially considering the amount in dispute).

Wing arbitrators who remain engaged in the proceedings will no doubt better appreciate the nuances of a dispute and thus, will be better able to appreciate the points at issue during an evidentiary hearing. By contrast, declining to keep the wings apprised of the proceedings until the weeks before the hearing may cause those arbitrators to be less familiar with the issues in dispute, potentially leading to a sub-optimal result. This is particularly significant for complex arbitrations involving a large number of contested issues, highly technical facts, and bifurcated evidentiary hearings.

On the other hand, the more the wing arbitrators are involved in the proceedings, the more expensive the arbitration becomes. If the issues in dispute are relatively straightforward or the amount in controversy is relatively small, little may ultimately be gained by asking the wings to remain intricately involved in the arbitration.

C. The added importance of controlling the chair selection process.

Third, under either Option 1 or Option 2, the Three-Arbitrator Panel Option makes the chair selection process all the more significant. Specifically, the Three-Arbitrator Panel Option amplifies the effect of an ill-qualified chair by leaving an individual who might lack the requisite background, personality or arbitration experience with the sole authority to decide substantive issues in the arbitration. By contrast, if the wings are more involved in the procedural elements of the case, the impact of an ill-qualified chair could be better contained. This is a problem that parties' counsel should seek to manage during the initial phases of the arbitration. For the construction industry, this issue is critical, as arbitrators serving in construction-related arbitrations are frequently appointed because of their expertise in the field. If the parties intend to utilize the Three-Arbitrator Panel Option, they would be well-advised to ensure they can exert significant control over the selection of the chair to avoid the compounding the problems generated by an unqualified chair.

D. Option 1 or Option 2: Which do I choose?

Fourth, and lastly, if the parties opt into the Three-Arbitrator Panel Option, the choice between Option 1 or Option 2 will require another cost-benefit analysis. While Option 2 will likely generate more cost savings than Option 1, Option 2 may present unique challenges during the arbitration. Specifically, under Option 2, the parties will begin to work with the AAA to appoint the remaining two arbitrators at least 60 days before the evidentiary hearing. If, during the course of the arbitration, one party concludes that its likelihood of success in the case has diminished, that party could engage in tactics aimed at stalling the proceedings and disadvantaging the other party in the lead up to the hearing. Indeed, even if each of the two remaining arbitrators were to be independently appointed by the parties, a dissatisfied party could stall its appointment process to create leverage over its opponent. Relatedly, if a party concludes that the sole arbitrator has a favorable view of its case, it could take advantage of Option 2 by briefing/arguing a dispositive motion and having the motion decided by the sole arbitrator, without allowing of the opposing party to first engage the full panel. As a result, if the parties are interested in the cost savings generated by Option 2, they must ensure that there are adequate procedures in place to limit gamesmanship by a dissatisfied party later in the proceedings.

III. **Conclusion**

Without a doubt, the Three-Arbitrator Panel Option reflects the AAA's ongoing efforts to develop and adapt arbitration rules to suit the needs of its users. For that, the AAA deserves to be commended. When the disputes are relatively simple and the amounts in controversy are low, the Three-Arbitrator Panel may be an option worth considering. However, as would be true for any procedural decision in an arbitration, if the parties elect to structure the arbitration using the Three-Arbitrator Panel Option, they must carefully consider and manage the effects of the procedure to ensure it generates the best results.

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Managing Subcontractors: How to Avoid a Two-Front War

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Being stuck between a rock and a hard place is no fun. Yet, that is the scenario general contractors face on a daily basis; almost every issue has either a direct or indirect impact on its relationship with both the owner and its subcontractors. While it is impossible to avoid a two-front war, this article will address ways to sidestep the risks that inherently come with being the middle man.

Every general contractor decision impacts both the owner and subcontractors. These decisions could one day be used against it by either its subcontractor or its owner should a dispute arise. Therefore, general contractors should avoid loading the owner's gun and/or loading the subcontractor's gun when making these decisions. So for example, while that email you want to write to your subcontractor for missing a submittal deadline may give you a sense of satisfaction that you are holding your subcontractor accountable, it may boomerang later if you find yourself asserting a delay claim against the owner. That email will very likely be discoverable and that email will be front and center in the owner's defense as to why you're not entitled to any time extension. Conversely, if you send an email to the owner complaining that you're not receiving timely responses to RFIs which are impacting your subcontractor's submittal process, the subcontractor will likewise use that email as its primary reason why it is entitled to a time extension and any related cost from you, the general contractor. Again, you want to be careful not to load the owner's gun or the subcontractor's gun.

This dilemma requires constant attention and effort by the general contractor. One piece of advice is to be cautious about shielding the owner or subcontractors from bad news on the project. If there is, for example, a delay from the subcontractor providing its submittals, you do need to inform the owner of that delay. Likewise, you also need to notice the subcontractor that there is a delay in its submittals. You must disclose that type of project information, but how you do it is the key. Rather than sending a knee-jerk email accusing the subcontractor of being late and breaching the subcontract requirements, a more craftily worded email simply alerting the subcontractor to its delayed submittal is all that is required. The general contractor does not need to assess blame in that notice email, but simply put the subcontractor on contractual notice of the delay. Otherwise, an email beating up the subcontractor for missing a submittal deadline without knowing all the facts—again while it may be therapeutic—will likely be used against the general contractor if and when a delay claim is asserted against the owner by the general contractor. So while it is uncomfortable sitting on the fence, the general contractor would be best served in many instances of doing just that; not taking a side between the owner or the subcontractor until all the facts are known.

Another practical and often used technique to avoid a two-front war is to flow down your obligations with the owner to your subcontractor. This is easier said than done. It is important to make sure that the flow down provisions include not only your legal obligations that you owe to the owner, but also your scope obligations.

First, let's address the legal flow down obligations. The general contractor should be sure to have the subcontractor tied to the same liquidated damages provision. Notably, there are recent cases, wherein the general contractor was held to have waived its claims against the subcontractor for delay damages the general contractor had to pay to the owner because the general contractor failed to include the subcontractor's claims for delay in the general contractor's negotiations with the owner.[vi] There, the general contractor was left holding the bag and unable to assess the subcontractor for delay claims because it did not allow for the proper free flow of information. Other provisions to be aware of are the change order and claim process provisions. You must be careful to ensure that the subcontractor is working to the same change order process and is subject to the same claims dispute resolution process. Otherwise, you may find yourself in an arbitration with the owner trying to resolve your claims, while at the same time fending off the very same claims from your subcontractor in a different forum (i.e., federal or state court). The point is to have all the claims wrapped up into one dispute resolution process and, theoretically, have the subcontractor claims align with your claims against the owner. That is, presuming that the owner was the root cause of the subcontractor's problems. Again, having a flow down provision is important, but the devil is in the details if you want to avoid a two-front war.

Second, it's important to flow down the appropriate scope of work to your subcontractors. This is generally a technical, not legal, analysis that needs to be performed by your project team. It's important that the project team be intimately involved in the contract drafting for both the prime contract and the subcontractor agreements. And one note of caution, simply incorporating by reference the specifications in the prime contract may not be an effective flow down provision. Specifically, there will be gaps in trades if you take that general, broad approach. So by incorporating by reference the specifications, a mechanical contractor may now be required to perform electrical work; something completely outside its intended scope. This will cause confusion and uncertainty and very likely could result in disputes with your subcontractor. And ultimately, these disputes could bubble up to the owner if that work is not being performed, or being performed late due to your failure to properly flow down the scope to a particular contractor.

To avoid this problem, it's important that you take care when defining the subcontractor's scope of work. Be sure to cross reference the specific specification that you would like to have that subcontractor perform. Include language to describe the type of scope a particular subcontractor will perform. And again, have your technical team review the scopes of your subcontract as well as the prime contract to constantly be aware of gaps between trades.

The final issue to help you avoid a two-front war relates to the payment provisions. You have to be aware of whether or not your particular jurisdiction has any prompt payment statutes, what are the specific waiver of lien provisions, what bond rights that jurisdiction may offer, and whether or not that jurisdiction enforces a paid-if-paid or a paid-when-paid provision. Obviously, you want to ensure that the subcontractor understands the risk of payment and expressly acknowledges and represents that it is assuming that risk of non-payment from the owner. Once you have this final payment issue aligned with your prime contractor, many of the disputes can be avoided.

In conclusion, general contractors operate in that precarious space between a rock and a hard place. That is the value a general contractor brings to a project. Successful general contractors are able to navigate these tight spaces and on the one hand ensure that the flow of information remains transparent and free flowing, but on the other hand, ensure that the general contractor is not necessarily taking a side on a particular issue; especially an issue that can flare up into a dispute. How that message is communicated, however, is critically important and requires some vigilance.

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Does the Miller Act Trump Subcontract Dispute Provisions?
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The Miller Act

All general contractors performing public building or public works contracts with the federal government must be familiar with the Miller Act. It is a requirement for doing business with the federal government. Pursuant to the Miller Act, a general contractor entering into a public building or public works contract with the federal government must furnish a payment bond in an amount equal to the contract price, unless the contracting officer determines that it is impractical to obtain a bond in that amount and specifies an alternative bond amount.

Miller Act payment bonds guarantee payment to certain subcontractors and suppliers supplying labor and materials to contractors or subcontractors engaged in the construction. As a result, subcontractors have an avenue of relief should they not get paid for work done on the project. Specifically, subcontractors have a right to bring an action against the surety within 90-days after the date on which the person did or performed the last labor or furnished or supplied the last of material for which the claim is made. Any such action must be brought no later than one year after the date on which the person did or performed the last labor or furnished or supplied the last of material. 40 United States Code § 3133.

Limiting Subcontractor Claims

General contractors handling federal work routinely include provisions in their subcontracts that require their subcontractors to exhaust certain dispute procedures prior to filing suit for non-payment or for additional compensation and damages based on alleged extra work, changed conditions, or other grounds. By employing these provisions, general contractors attempt to control the process by which their subcontractors seek recovery for additional compensation or damages. Generally, these provisions require subcontractors to submit their claims through the general contractor against the government, in accordance with the Contract Disputes Act, rather than bringing suit directly against the general contractor under the Miller Act.

For general contractors, these provisions offer a way to avoid costly litigation that may have only arisen because of the government's denial of a change order or other government action affecting the cost of the project. For subcontractors, however, these provisions limit their rights to recovery and may increase costs associated with recovery. Most importantly, participation in a contract mandated dispute resolution procedure will not toll or extend the Miller Act's one-year deadline for filing. The one-year deadline is, for the most part, absolute.

Are Miller Act Limitations Enforceable?

General contractors cannot avoid Miller Act lawsuits unless their subcontractors have executed waivers expressly releasing their rights under the Miller Act after the subcontractors have furnished labor or material for use in the performance of the contract. This provision of the Miller Act was added in 1999 to prevent general contractors from requiring that their subcontractors waive Miller

Act rights as a precondition to obtaining work on federal projects. It is also directly relevant to the validity of contract provisions requiring exhaustion of dispute procedures prior to initiating Miller Act lawsuits. While some courts interpret these provisions as a *de facto* waiver of rights under the Miller Act, other courts differ on whether these provisions are enforceable.

Court Decisions Concerning Dispute Remedy Exhaustion Provisions

A number of federal courts have determined that subcontract terms conflicting with the provisions of the Miller Act are unenforceable. Based on this determination, courts have considered whether subcontract provisions requiring exhaustion of dispute procedures prior to initiating a Miller Act suit conflicts with the waiver provisions of the Miller Act. Only a few federal courts have addressed this issue. The majority of courts that have (D.C., Maryland, Nebraska, New Jersey, Pennsylvania, Virginia), have found that such provisions are unenforceable and do not require dismissal or stay of a Miller Action lawsuit. These courts have focused on the language of the provisions at issue. In these cases, the provisions set forth in the subcontract have conditioned the subcontractor's right to recovery under the payment bond on the completion of the dispute procedures. By requiring that a subcontractor exhaust other procedures first, the courts have determined that the provision conflicts with the waiver requirements set forth in the Miller Act. The provisions at issue in these decisions also fail to expressly cite to the Miller Act.

A minority of courts (Louisiana, California, and Hawaii) have upheld dispute exhaustion provisions and entered dismissals or stays of Miller Act. Contrary to the decisions referenced above, the courts rendering these decisions based their rulings upon the fact that the provisions at issue included express language that required a stay for Miller Act claims pending exhaustion of the dispute procedures. The courts also found that the provisions were not so extreme as to constitute a waiver. The subcontractor's Miller Act remedies remained intact pending exhaustion of the contractual dispute procedures.

"Best Practices" for General Contractors and Subcontractors

As is discussed above, only a few states have considered whether dispute provisions requiring exhaustion of remedies are enforceable. The majority of states that have considered the issue have refused to enforce the stays or dismissals required by such provisions. But it is fair to say that the law is still evolving on this issue. General contractors and their counsel should consider the following when drafting these types of provisions: (1) whether the Miller Act is expressly referenced; (2) whether the provision includes a disclaimer that the provision does not serve as a waiver of any Miller Act rights; and (3) whether enforcement of the provision is in furtherance of ongoing dispute procedures contemplated by the provision. The last item is great import because it will always be difficult to convince a court to dismiss or stay a claim if the parties are not in the process of moving forward with the dispute procedures referenced within the applicable provision.

On the other hand, subcontractors should consider whether such provisions should be stricken from their subcontracts when negotiating the terms. If not, subcontractors and their counsel should fully consider whether it is better to proceed with the dispute procedures prior to filing a Miller Act lawsuit or whether filing and later challenging the provision in court is a better option. If the one-year deadline is approaching, subcontractors must either file a Miller Act suit or lose their Miller Act rights.

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AGC's Non-Endorsement of the AIA A201

The heart of a construction project is the contract. Everything flows from it. Recently, the American Institute of Architects (AIA) released the latest version of their set of standard contract documents, covering a wide range of agreements necessary to construction. It includes the General Conditions of the Contract for Construction (AIA A201), which governs the relationship between owner and contractor, and is incorporated into its architect agreement. AGC did not endorse this contract.

Instead, AGC does endorse ConsensusDocs 200, a contract document covering a very similar scope as the AIA document, but with some significant differences in how it treats the relationships, rights and responsibilities of the three main parties.

Since member GCs are very likely to encounter this new AIA contract (if they haven't already), it is valuable to know the differences and which aspects may be problematic for contractors. Constructor talked to experts from AGC and ConsensusDocs to find out.

How We Got Here

Once upon a time, there was a profession called master builder, an august personage who designed buildings (and other structures) and then constructed them. He contracted with the owner to produce the entire project from thought to finish. One responsible party, one point of contact.

This profession eventually split into an architect who designed and a contractor who constructed. Then, engineers split off. The complex relationships between the three professions and the owner created a need for clearly defined responsibilities.

In 1911, AIA "consulted with builders and attorneys to publish our first set of integrated standardized contract documents, which defined the relationship and terms in construction projects," states AIA's website. These documents are updated every 10 years, with recent revisions in 1997, 2007 and 2017.

According to Brian Perlberg, AGC senior counsel for construction law and contracts, the 1997 version was controversial at AGC, with about one third of the board voting against endorsing it. AGC had a much more unified response to AIA's 2007 revision: It was rejected unanimously. AGC felt the revisions had significantly diminished the contractor's substantive rights.

"They made this shift," recalls Perlberg, "From it being an industry-standard document to more of an advocate's document. The AIA documents are perceived to be protective of the architectural professional."

The AIA's 2017 version marked the first time AIA did not consult with AGC while drafting the revision, nor did it send an advance copy to AGC for comment. AGC did not endorse the 2017 revision, either. The problems are similar to 2007, and some of them have gotten more egregious.

The AIA documents perpetuate a longstanding relationship between the parties. "AIA places the architect as the fulcrum for all decision-making," observes Perlberg, as well as all communication between contractor and owner. "The industry has changed, and I would say the AIA docs haven't moved fast enough to reflect the changes. Contractors and owners have all realized that a true win/win solution is to collaborate and communicate to get better project results."

Ron Ciotti, a private practice attorney in New England and partner at Hinckley Allen, is the immediate past president of AGC of New Hampshire and the current vice chair of the AGC Contract Documents Forum. Ciotti sums up the AIA problem succinctly: "They're excellent documents if you're a design professional. They are not owner-friendly and not contractor-friendly. I do not believe they serve the project."

The Alternative

By 2007, AGC had already joined ConsensusDocs, a coalition of 20 organizations and companies representing a broad range of industry interests, dedicated to producing a more equitable and forward-looking set of contract documents. The coalition has since grown to 40 members. ConsensusDocs issued its first set of contract documents in 2007, and updates them every five years, or more often if necessary.

"In ConsensusDocs, the parties are encouraged to communicate directly in order to solve problems, not necessarily going through the architect," comments Perlberg. "That's a pivot point: Do you want to have a passive owner who relies on the architect to protect them from the big, bad contractor? That's the old way to build things."

From AGC's point of view, many of the problem-areas in the AIA documents are handled much better in ConsensusDocs.

The IDM

One of AGC's biggest objections to the AIA A201 is the concept of the Initial Decision Maker (IDM), introduced in 2007. A201 designates an IDM who, in the event of a claim or other dispute between owner and GC, is the first recourse for resolution. Each party submits their side and the IDM decides who wins. Either party has 60 days to object the IDM's ruling or it becomes final. If there's objection, it goes to mediation and, if that fails, either to arbitration or to court, depending on the terms of the contract.

Unless AIA A201 is modified, the default IDM is the architect.

"Selecting an architect as the IDM is voluntary," explains Bob Majerus, general counsel and VP of Hensel Phelps, and chair of the AGC Contract Documents Committee. "You can opt out of it, but the contracts that I see almost always opt in. The parties would all have to select someone else, and that doesn't happen very often."

The IDM is supposedly a neutral party, but the architect has a contractual relationship with the owner, a seemingly conflict of interest. "Contractors do not believe architects should be involved in deciding disputes because they do not play a neutral role," says Majerus. He points out that the architect may be making decisions about construction costs that have nothing to do with his expertise.

"ConsensusDocs requires the parties to get together almost immediately to see if they can resolve the dispute," Ciotti explains. "If they are unsuccessful, the project executives are required to meet and again try to resolve it. Over $1 billion of projects have been built using ConsensusDocs contracts in the past 10 years, and there is still not one reported case."

If the AIA contract is used, Majerus suggests getting a neutral third party appointed as IDM. Majerus uses a list of construction experts he has dealt with previously, or successfully used as arbitrators (although the IDM would be acting outside the role of an official arbitrator).

Notice

The new provision in AIA A201 on the method of giving notice for changes could severely impact contractors' rights. For claims (essentially any change in costs or schedule), formal notice must be given in writing and delivered by certified or registered mail, or by a courier providing proof of delivery. Personal hand-delivery by the contractor will not do, because he's not a courier who provides a receipt. For issues other than claims (a change directive as opposed to a change order), written notice may be served by regular mail, certified or registered mail or courier. Electronic transmission (for example, email) can only be used if a provision is added setting forth the method.

Most importantly, failure to serve notice in the required manner can cost a contractor his rights, and a legitimate claim can go uncompensated.

Ciotti thinks the AIA notice requirements simply don't acknowledge the reality of current business practices. "We live by email. In ConsensusDocs, we accept regular mail and email for those processes. The only thing that requires certification is termination," says Ciotti.

Ciotti also observes a significant inequity in the way AIA A201 treats notices: It does not require written notice for liquidated damages, which is a claim by an owner against a contractor.

Financial Information

Before 2007, AIA A201 had a provision that a contractor could get assurance of the owner's financing at various times during the project. As of 2007, a contractor can ask for financial information only at the beginning of a job. "If an event takes place," says Majerus, "Or a rumor that makes the contractor worried that the owner may not be able to pay, there is no way to ask for an update, or to ask the owner for the first time if you didn't ask at the beginning."

In 2017, this was improved, slightly. "In 2017, they realized they made a mistake," explains Perlberg. "But, they also made it more technical. You still have to make a showing to get a response to requested information. But, they made it clear that if the contractor doesn't get reasonably requested information, then a contractor may stop work, but only on the part impacted by the concern. And you can't share information received with a contractor's lender because the information is now deemed confidential. It's marginally better, but it's still not acceptable."

"In ConsensusDocs, we look at the parties to a contract as partners to get the construction done," continues Perlberg. "If financial information is requested, the owner provides it, and if they don't, the contractor can stop work on the project. That's the way it was in AIA's 1997 contracts."

Termination for Convenience

Another problematic provision in AIA's 2017 revision concerns Termination for Convenience, changing the method by which the GC is compensated if the project is terminated by the owner. Previously, a contractor could recover overhead and profit on work not yet executed. That has been changed to a termination fee, similar to ConsensusDocs' approach. "I'm not fully against what AIA has done," says Ciotti. "But, they have not updated their subcontractor document, A401, to be consistent with A201. The subcontractor can, under the A401, still collect from a GC for overhead and profit."

"In ConsensusDocs, we look at the parties to a contract as partners to get the construction done. If financial information is requested, the owner provides it, and if they don't, the contractor can stop work on the project."

~ Brian Perlberg, AGC senior counsel for construction law and contracts

"It puts the contractor in the middle between owner and subcontractor," says Perlberg. AIA A201 does allow the contractor to receive 'Costs attributed to termination of subcontract,' but it's unclear whether that includes lost profit and overhead of the subcontract.

"It is an argument that will have to be made," believes Ciotti.

Insurance

Majerus is concerned about several aspects of AIA's new approach to insurance. "Most of the insurance clauses were taken out of general conditions and added to an insurance exhibit that gets attached to the contract," says Majerus. He worries if the parties don't put in an insurance exhibit, "they're going to rely on the provisions in the contract, and they're virtually nonexistent."

"Moreover, in the exhibit, some of the mandatory insurance products and insurance certificates are no longer commercially available. Some of those products haven't been available for 10 years. The contract has to be modified to make it workable. If you don't modify it, the contractor signs onto something that's no longer available," says Majerus.

The most recent revision of ConsensusDocs was written in consultation with the insurance and surety industries, and with brokers. Majerus, who was closely involved in writing the ConsensusDocs provisions, boasts wryly, "We came up with a set of clauses for required insurance which you can actually buy."

What to Do

How should a contractor approach these problems?

Perlberg suggests, if possible, using ConsensusDocs. "AGC recommends members condition their bids contingent on an unmodified ConsensusDocs contract. They need to engage the owner and say, 'Fairer contracts lead to better projects and better pricing.' Try to use your relationship before the contract is let," says Perlberg.

If it has been let using AIA A201, try to modify the contract terms. "I don't think the AIA A201 is a horrible document," states Ciotti. "It can be revised properly, but you're going to have to heavily revise it. Any party using an AIA contract will need to have their lawyer modify it."

Both Ciotti and Majerus stress the need for a real construction lawyer, at various phases from contracting through arbitration. "I think one of the biggest mistakes made is not having a construction-specific attorney," suggests Ciotti. "When I'm representing a contractor, and the attorney on the other side is somebody who doesn't specifically get involved with construction, it doesn't go as smoothly. A lot of non-construction lawyers don't understand that risk is a part of this process, and they will find a way to kill a deal. A construction attorney understands how to protect their client's interests while still ensuring the project proceeds smoothly, not shifting or mitigating risk to the point of stalling the project."

AGC issued a detailed commentary on AIA 201-2017, laying out these pitfalls and more. It is available at https://bit.ly/2FGJJZx.

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[i] The term “AAA Arbitration Rules” refers to the various arbitration rules offered by the AAA, including, for example, the Construction Industry Arbitration Rules, the Commercial Arbitration Rules, and the Employment Arbitration Rules.
[ii] *See* Press Release, Am. Arbitration Ass’n, American Arbitration Association Offers New Streamlined Three-Arbitrator Panel Option (May 1, 2017), https://www.adr.org/sites/default/files/document_repository/AAA_ICDR_Press_Release_2017_AAA%20Offers%20New%20Streamlined%20Three-Arbitrator%20Panel%20Option.pdf.
[iii] *See* Am. Arbitration Ass’n, Streamlined Three-Arbitrator Panel Option for Large Complex Cases, http://go.adr.org/Streamlined_Panel_Option.html.
[iv] Under either Option 1 or Option 2, the AAA makes clear that if the parties want to proceed with the sole arbitrator during the evidentiary hearing and award phases, they will be permitted to do so.
[v] In fact, one of the AAA’s reasons for adopting the Three-Arbitrator Panel Option was to effectively codify this practice as an option of which users should be aware.
[vi] *Miller Construction Co. vs. PC Construction*, 791 S.E.2d 321(S.C. Ct. App. 2016).