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**Commercial Real Estate Transactions Group:
The New AIA Documents –
A201 Highlights and Headlines**

**Owners' and Contractors' Commentaries on Problem
Profusions**

Lynn R. Axelroth, Esquire
Ballard Spahr Andrews & Ingersoll, LLP
Philadelphia, Pennsylvania
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and

W. Alexander Moseley, Esquire
Hand Arendall, LLC
Mobile, Alabama
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INTRODUCTION

The authors of this paper agree on many things, some of which involve construction law, but they approach the new (and old) A201 from quite different perspectives. The sections of the text below numbered 1, 5 and 6 were prepared by Alec Moseley, writing from a Contractor's viewpoint, and sections 2, 3 and 4 were primarily written by Lynn Axelroth, from the point of view of Owners and lenders, whom she chiefly represents. At the end of some sections, the author not primarily responsible for them has appended certain comments which he or she felt were required to balance material produced by the primary author, or which for other reasons just had to be said.

This paper covers selected provisions of the A201. It does not address all of the significant issues that are important to Owners and Contractors.

1. FINANCING/LENDING ISSUES.

“KAY: Michael, is it true?

MICHAEL: Don't ask me about my business, Kay...

KAY: Is it true?

MICHAEL: Don't ask me about my business...

KAY: No.

MICHAEL: Enough!

All right. This one time -- this one time I'll let you ask me about my affairs...

KAY: Is it true? -- Is it?

MICHAEL: No.

KAY: I guess we both need a drink, huh?”

The Godfather.

When the AIA prepared to tout its new document series, it listed six “major changes” to A201; four of them related to dispute resolution and one to insurance. The sixth was described as follows:

— **Right to Financial Information** – The 2007 Update limits the contractor's right to request financial information from the owner after work commences and events occur that would lead to concern about the owner's ability to pay. The revisions also allow the

owner a greater opportunity to learn of contractor/subcontractor payment problems, and address a contractor's failure to pay a subcontractor by allowing the owner to write joint checks.¹

With this bland statement, and no further explanation, AIA announces a decision to substantially alter the financial balance between Owner and Contractor, in adopting which it knowingly rejected the Contractor position that the changes in question threatened Contractors' vital interests. To quote a Contractor group spokesman, the AIA's changes to the A201 provisions about financial assurances "go to the heart of a contractor's ability to receive timely payments and remain financially viable."²

One of the Owner's few invariable obligations in the construction process is to have, and to pay, the money earned by the Contractor. If the Owner is not prepared and able to perform this obligation there really can be no successful project. This is a problem which is perfectly obvious to all of us.

A tight budget – the amount of money the Owner expects to spend of its own and that of an outside funding source – creates performance risks. Such a budget may be too brittle to take the strains of the following:

1. Design adjustments, particularly those that involve corrective work.
2. Escalating labor or materials prices, principally during the design phase but even during construction.
3. Changed conditions during performance that increase the contract price.

¹ See Press Release, American Institute of Architects, *American Institute of Architects (AIA) Releases 2007 Update to AIA Contract Documents*, Nov. 5, 2007, available at http://www.aia.org/release_110507_condocs.

² Richard Korman, *AIA Forms Running Far Ahead of Rivals*, ENGINEERING NEWS-RECORD, Oct. 31, 2007, at 12, 13 (quoting Brian Perlberg of the Associated General Contractors of America).

4. Claims by participants.

Any of these events can adversely affect the relationships between the participants, lead to a breakdown, generate claims, or culminate in litigation.³

Not only does the Contractor have a legitimate concern about being paid for the services it has directly provided, but statutory lien rights, and, as a practical matter, agreements of indemnity with payment bond sureties, compel the Contractor to a considerable extent to serve as guarantor to other parties of the project financing. For these reasons, naturally Contractors have a keen interest in knowing whether the Owners for which they are asked to work are in a financial position to pay what they promise to pay for the construction services provided.

As has been pointed out by an eminent expert in the field,⁴ in most construction projects there is a construction lender providing “say, typically somewhere between fifty percent (50%) and ninety percent (90%) of the project’s ultimate value.” Lenders understandably, and notoriously, insist on being assured of a primary lien position to secure construction lending, and thus on having Contractor lien rights subordinated if not waived.

Given the effective lack of security for the Contractor’s payment rights, it is more essential than ever for the Contractor to know the Owner’s ability to pay what it promises to pay for the value to be delivered by the Contractor and its Subcontractors. Contractors know this, and are frequently reminded of it. “Credit worthiness is another important part of the contract process. You need to know if the customer can pay your requisitions up front. Make sure you

³ JUSTIN SWEET, *Financing the Project: The Lender’s Perspective*, in LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING, AND THE CONSTRUCTION PROCESS 196 (3d ed. 1985).

⁴ LYNN R. AXELROTH, *The Owner’s Perspective*, in FUNDAMENTALS OF CONSTRUCTION LAW 1, 3 (Carina Y. Enhada *et.al.*, eds.) (2001).

conduct your due diligence and research your customer's credit worthiness.”⁵ “Payment, although historically a point of contention between the Contractor and its subs, is a common concern of all parties associated with the project. If there is a failure on the part of our industry relative to payment, it is the lack of due diligence in prequalifying the owner and then holding it accountable for timely payment.”⁶

Yet prequalifying the Owner may be problematic when the Owner has no known history of performance and is, as often as not, something named “2600 Main Street Hospital Project 2008 LLC,” a recently formed, single-purpose and single-asset entity. In such circumstances, the Contractor's only possible way to prequalify the Owner as a solvent customer is to learn what arrangements the Owner has made to perform its payment obligations. In an ideal world, a Contractor would not execute a contract with an Owner without insisting in advance on whatever evidence it needed to receive comfort about the Owner's ability to make payments; yet, in the real world such may not be done, and even where it is, the Contractor's need for further assurances would remain crucial.

This natural business interest in getting paid led the AIA to develop, leading up to the 1997 edition of A201, language providing that upon the Contractor's written request, the Owner must furnish reasonable evidence of its arrangements to fulfill its obligations under the contract and, after furnishing such information, must not materially vary such financial arrangements without giving the Contractor prior written notice. In the 1997 A201, the Owner's performance

⁵ David S. Warshauer, *Strategies for Enhancing Contractor's Cash Flow*, Construction Business Owner, Aug. 2007, available at <http://www.constructionbusinessowner.com/topics/accounting-and-finance/strategies-for-enhancing-contractors-cash-flow.html>.

⁶ Mark H. Guetzko, *Hold Owners Accountable*, ENGINEERING NEWS-RECORD (Nov. 22, 2004), at 5, available at <http://www.enr.construction.com/opinions/lettersUpdates/archives/041122.asp>.

of this disclosure obligation was made a condition precedent to the obligation of the Contractor to commence and continue the Work. Prior to adoption of such language, the Contractor certainly had no common law right to such information.⁷

It is not clear, at least to the Contractor community, what problems this provision was believed to cause,⁸ but Owner interests have prevailed upon the AIA to substantially weaken its language in the new A201. “These changes were in response to many Owner complaints that they were being harassed during the course of the job to furnish financial information time and time again, at the whim of the Contractor.”⁹ AIA reports that Owner groups thought the 1997 version of the provision “contained the potential for misuse”¹⁰ (AIA does not report whether this “potential” ever developed into a meaningful actuality during the ten years of its existence).

⁷ SWEET, *supra* note 3, at 196.

⁸ Although the sentiments may be well reflected in the following comments:

Most owners and lenders do not want to provide extensive or detailed financial information to the contractor, and a contractor likely would not provide such to the lender or owner if the shoe were on the other foot. Although it may be reasonable to receive some assurance that it will be paid, it is inappropriate for the contractor to have intimate knowledge of the owner’s and lender’s business. Moreover, absent legal requirements to the contrary, a lender generally is not in privity with the contractor and does not owe any duty to the contractor. If the lender supplies information, it may subject itself to direct obligations to the contractor it otherwise would not have had. An owner should strike or substantially modify any provision requiring financial information and should require an acknowledgment that the contractor is not a third party beneficiary of the owner’s loan documents.

AXELROTH, *supra* note 4, at 44-45.

⁹ CHARLES SINK, MARK PETERSON & HOWARD GOLDBERG, *Lessons Learned: The Evolution of AIA Document A201 From 1963 to 2006, and a Look into the Future*, ABA Forum on the Construction Industry (Apr. 2007).

¹⁰ See AIA’s publication *2007 Revisions to AIA Contract Documents*, at 9.

On the other hand, AIA was unmoved -- or moved backwards -- by the caution, repeatedly expressed by the Contractor community at least since 2000, that “[t]he frequent occurrence of Owner under financing is serious enough to warrant Contractors having reasonable assurance that sufficient monies will be available as to justify additional Contractor jobsite expenditures.”¹¹

Under A201’s Section 2.2.1, in its current form, the Owner must provide reasonable evidence of its financial arrangements prior to commencement of the Work, and as a condition to the Contractor’s obligation to commence the Work; *however, the continuing responsibility to provide financing assurances has been essentially gutted.* Henceforth, Contractors bound by A201 will be permitted to request followup information about the Owner’s financing arrangements only where “(1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner’s ability to make payment when due.”

This new language is a recipe for disputes. It is inconceivable that – in a context where Owners collectively have shown a desire for greater secrecy – Owners and Contractors will often find agreement about whether a change “materially” changes the Contract Sum, or what constitutes a “reasonable concern” about payment. We all know how often the parties to a contract disagree about whether expensive work which the Contractor does not believe is within the contract scope, but which the Owner insists be performed, is a “change” or not. We should

¹¹ See REVISIONS RECOMMENDED BY THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA (AGC), THE AMERICAN SUBCONTRACTORS ASSOCIATION (ASA), AND THE ASSOCIATED SPECIALTY CONTRACTORS (ASC) TO AIA DOCUMENT A201 (1997 ed.) at 1 (June 2000).

wonder whether a lengthy suspension of the Work, or a delay in performance caused by a *force majeure* event, amounts to a qualifying “change.” Owners will likely argue it would not, although obviously these developments can threaten an Owner’s budget at least as predictably as a change in scope. For that matter, even an undisputed change in the Work does not produce a change in the Contract Sum until a Change Order is executed, under Section 7.3.10 of A201.

Under Section 15.1.3 of A201, the Contractor is obligated to continue performance of the Work pending resolution of a claim, and the Owner must continue to make payments. If the Contractor has submitted a claim that a “change” has occurred, which is disputed, and is obliged to continue the Work without the right to assurance of financing under Section 2.2.1 – perhaps until it has finished the original and the arguably changed Work – its theoretical right to financing information will have proved totally illusory. Where a Contractor is compelled to perform work which it believes to be outside its scope, without any assurance that it will be recognized as compensable, and furthermore without any indication that the Owner can pay for it if it is, the Contractor is forced to assume excessive risk.

Section 2.2.1’s language prohibiting “material” variance of the Owner’s financial arrangements without advance notice to the Contractor also presents problems in its essentially unchanged condition. One does not have to have a vivid imagination to foresee a disagreement between an Owner and its Contractor about whether a financing change the Owner wishes to make is “material.”¹² Even if the Owner is unquestionably making a material change in its financing arrangements, moreover, its only obligation is to notify the Contractor that it is doing

¹² Owner spokespersons, though arguing for a different result, have similarly criticized the use of terms such as “material” which are “fact driven and subject to differing opinions.” See ABA FORUM ON THE CONSTRUCTION INDUSTRY DIVISION, 12 STEERING COMMITTEE, DOCUMENTS REVIEW SUBCOMMITTEE, Summary of Comments to the 8/1/05 Draft-AIA Document A201-2007 (5/16/06).

so. The A201 does not prescribe how far in advance of the change this notice is required, or what detail is required, or even what the remedy might be if the Contractor learns to its sorrow, after the fact, that the Owner has simply violated this undertaking.

The weakening of the Contractor's rights to assurance of adequate financing in the 2007 A201 was accompanied by significant beefing up of the Owner's rights to inquire about and intervene in the Contractor's financial dealings with Subcontractors, by changes made to Sections 9.5.3 and 9.6.4.¹³ AIA's summary recounts these changes without any explanation of their cause. Perhaps AIA's actions with regard to issues of financial assurance simply represent an understandable, if unwarranted, reaction to ten years' complaining by "Owner groups" that AIA had been too fair to Contractors in 1997.

OWNER COUNTERPOINT:

As the reader undoubtedly recognizes, my colleague is extremely articulate and knowledgeable. I hold him in the highest regard despite disagreeing with much of what he has written. His commentary misses the point as well as the realities of modern day construction projects. For example, he neglects to mention the inequity of the Contractor having the right to stop work even when the increase in the project's cost that triggers the demand for information is caused by the Contractor's default. This is not necessarily an unlikely occurrence if, for example, the project experiences "changed conditions during performance."¹⁴ Apparently, the Contractor is permitted to hold the project hostage in order to force the Owner to budget and

¹³ And the Owner's rights to investigate are neither limited as to timing or frequency, nor required to be justified by a "reasonable concern" about nonpayment of subcontractors, or by anything else.

¹⁴ This is one of the circumstances identified by my co-author as creating a "tight budget." See SWEET, *supra* note 3, at 196.

provide evidence of its own funds to pay for the Contractor's mistakes. More importantly, and contrary to the statements made by my co-author, the 2007 A201 provides the Contractor with unlimited opportunities to examine the Owner's finances, to the Contractor's content, whenever the Contractor legitimately becomes concerned about the Owner's ability to pay the Contractor. The 2007 changes only remove the nuclear option from the Contractor's otherwise substantial arsenal by audaciously requiring the Contractor to have a reason before demanding evidence of the Owner's financial condition. This change was essential so that a Contractor engaged in an unrelated negotiation with an Owner could not blackmail the Owner by stopping Work or threatening to stop Work in the absence of financial information repeatedly requested without reason.

I am not suggesting that a Contractor could not have a legitimate interest in assuring itself that a project is sufficiently financed.¹⁵ Simply put, however, the Contractor is more than adequately protected by the comprehensive rights and remedies set forth in the 2007 version of the A201, as well as by numerous other statutory and common law remedies. Many of the remedies available to a Contractor cannot be exercised by parties in any other type of commercial transaction. For example, there are few circumstances outside of the construction industry in which a party is entitled to lien another's premises and to prime the mortgage securing the very funds being made available to pay that party.¹⁶ In addition to the many choices

¹⁵ The Owner also has a substantial interest in knowing that the Contractor is financially secure. The Owner takes a significant risk that the Contractor will fail during the Project, or while any of its obligations remain outstanding, which may be well beyond the Project's completion. Yet the Owner has no such protections.

¹⁶ Contractors in many jurisdictions also enjoy numerous benefits contained in so-called right to payment and prompt payment acts. Contractors enjoy these extraordinary remedies because of their excellent lobbying efforts, not because they inherently are more worthy than parties in other commercial contexts.

of remedies at law, the A201 continues to give the Contractor an absolute right to investigate the Owner's finances before starting work on the project and at material times, at the Contractor's election, throughout the project. If the Contractor's hands were any deeper in the Owner's pockets they would have to get married. Of course, that would mean the Contractors would have to be willing to assume the Owners' considerable risks and responsibilities, which is not about to happen. Rather, the Contractors are asking for exceptional assurances without contributing commensurate value in return.

My colleague expressed concern about Owners that do not have prior histories or significant assets because they are newly created single-purpose entities. However, no one is stopping the Contractors from prequalifying the Owners with whom they want to work by engaging in the due diligence that should be conducted in any business context. In fact, the Contractor is authorized to do so expressly. Before the Contractor starts work, it is entitled to receive "reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the contract" (Section 2.2.1). The evidence might include information on the principals, partners, members or officers of the entity, or be something else that the Contractor finds acceptable. The provision is flexible to accommodate the various situations with which a Contractor may be presented. But just because a little creativity or effort may be involved in obtaining suitable financial information does not mean one is precluded from doing so.

There are many reasons why it is inappropriate for the Contractor to have access to all of the Owner's financial information.¹⁷ The 2007 version of the A201 does not address these concerns. The changes are little more than window dressing, contrary to my co-author's

¹⁷ See, e.g., *supra* note 8.

assertion that the provision has been “essentially gutted.” Is the provision gutted if the Contractor may demand reassurance at any time a payment is delayed one minute past its due date? How about for every change in the Work causing a material modification (not just an increase!) of the Contract Sum? Does it constitute gutting if the Contractor may demand evidence whenever it has a reasonable concern about the Owner’s ability to pay? It is particularly this last item that worries Owners. It invites any hyper-nervous Contractor to make frequent requests and to threaten project-killing Work stoppages if the Contractor decides it has not received satisfactory evidence within a time frame the Contractor believes is sufficiently prompt.

The modest shield protecting the project against endless, unnecessary and time-consuming demands is the requirement that the Contractor’s concerns be reasonable. My colleague objects to that qualification. While I agree that people may differ as to what constitutes reasonable concern, apparently he wants the Contractor to have rights unfettered by the limitations of rational behavior. Whether rational or not, each request interrupts and adversely affects the project schedule while it is determined whether the request is warranted, and if it is, while evidence is assembled and reviewed. Every delay can result in increased project costs. Neither the Contractor nor the AIA has offered a solution to this added burden or volunteered to assume the impact of the overbroad options granted to the Contractor in Section 2.2.1.

Also glossed over is the significant obligation imposed on the Owner (which has been carried forward from the 1997 A201) to give the Contractor advance notice before materially varying any previously disclosed financial arrangements. Financing may change substantially throughout the life of a project, without such having any impact on the Contractor or the

Owner's ability to perform its duties. While I think this provision is unnecessary in its entirety, at the very least, the Owner should be required to disclose financing changes to the Contractor only if those changes would have a material adverse impact on the Owner's ability to meet its financial obligations to the Contractor. Any other variations in the Owner's financial arrangements should not matter. Moreover, this provision seems to require the Owner to divulge the potential financial changes to the Contractor before the Owner knows whether its deal is finalized. In most transactions, this would violate the confidentiality provisions routinely imposed by lenders and investors, not to mention exposing the Owner to the substantial risk of interference -- or worse -- with the outcome of always delicate negotiations. Section 2.2.1 simply ignores the realities of the business world and imposes unreasonable burdens on the project that may result in unintended, negative consequences for everyone.

Finally, my colleague complains of a "significant beefing up of the Owner's rights to inquire about and intervene in the Contractor's financial dealings with Subcontractors." These new rights in Sections 9.6.2 and 9.6.4 which he bemoans are (1) an obligation of the Contractor to pay its Subcontractors within seven days after receiving the Owner's money for such purposes, and (2) the right of the Owner to obtain written evidence from the Contractor and, failing that, from the Subcontractors, that payments have been made. There are numerous prompt payment acts in effect that already mandate requirements similar to these as a result of an active Subcontractors' lobby, such as the one that requested these provisions. Sections 9.6.2 and 9.6.4 hardly constitute a significant boon to the Owner or a noticeable hardship to the Contractor.

2. SCHEDULING.

Colonel Saito: Do you know what will happen to me if the bridge is not built on time?

Colonel Nicholson: I haven't the foggiest.

Colonel Saito: I'll have to kill myself. What would you do if you were me?

Colonel Nicholson: I suppose if I were you... I'd have to kill myself.

Colonel Nicholson: Cheers!

The Bridge on the River Kwai

It is axiomatic that the three primary concerns of the parties to a construction project are cost, scope and timing. Everything else is secondary, or falls within one or more of these three categories. If the project includes everything expected, for the agreed upon price, on or before the deadline for completion, it is a successful project indeed. Given the importance of the concept of time to a construction project, it is surprising that the fundamental provision describing the Contractor's obligations with respect to the construction schedule remains unchanged in the 2007 A201.

It is not that the provision properly addressed the parties' concerns and therefore did not need to be changed. To the contrary, Section 3.10.1 treats the construction schedule as if it is a minor component of the project, having only a limited impact on the project's success. To begin with, there is no precise time within which the schedule must be prepared and submitted. The Contractor is required only to prepare and submit the schedule to the Owner and the Architect "*promptly after*" the contract is awarded. (emphasis added) The lack of a specific time invites confusion and controversy. Moreover, the schedule is identified as the "Contractor's construction schedule," as if it is for the Contractor's private purposes and is of no importance to anyone else. This notion is further emphasized by Section 3.10.1's statement that the schedule's submission to the Owner and the Architect is for "information" only.

Perhaps because the schedule is not intended to govern the project, there are few guidelines or limitations concerning it. The only requirements are that: (1) the schedule not exceed time limits "current" under the Contract Documents, (2) it be revised at "appropriate intervals as required by the conditions of the Work and Project," (3) it provide for "expeditious

and practicable execution of the Work,” and finally, (4) it “relate to the entire Project to the extent required by the Contract Documents.” Let’s break down what these clauses mean.

We have already noted that there is no deadline for delivery of the schedule. “Promptly” is not a defined term. Arguably, in most instances it would make sense for the construction schedule to be an exhibit to the contract, delivered and approved no later than the execution of the agreement between the Owner and the Contractor.¹⁸ If that is not possible, at the very least there should be a precise, agreed upon time for its delivery. Given the importance of the construction schedule to the success of a project, the Contractor should not be entitled to its first payment unless and until a detailed construction schedule has been submitted to and approved by the Owner.

Contrary to the provisions of the A201, the significance of the schedule is far more than a collateral document supplied merely for the Owner’s or the Architect’s information. It governs the project as a whole. Otherwise, the participants cannot understand their respective obligations, nor gauge whether an activity or its impact should be considered a delay or an acceleration, or whether more time or dollars are required. Without a schedule, how is manpower allocated or how can equipment or materials be ordered in the proper sequence? “A well-planned and fully completed project schedule is necessary for efficient utilization of resources and timely completion of a project.”¹⁹

Since the failure to comply with the schedule generally has serious financial ramifications, the Owner and the Architect should review it very carefully. There should be

¹⁸ And this practice will almost invariably be required where a sophisticated lender is involved.

¹⁹ See RICHARD F. SMITH, *Scheduling for a Construction Project*, in FUNDAMENTALS OF CONSTRUCTION LAW 201, at 201-02 (2001).

sufficient time allowed for the Architect to provide the Owner with a thorough evaluation of the schedule and any recommendations of modifications.²⁰ Once the Owner has the benefit of the Architect's thoughts, the Owner should approve or reject the schedule, supplying the Contractor with the reasons for the decision, as appropriate. If the Contractor is concerned that the Owner will delay exercising its right to approve the schedule in order to defer its obligation to pay the Contractor, adequate protections can be added to the contract between the parties. For example, the Owner can be required to be reasonable when rendering any decision and to make its determination within a certain time after receiving the schedule and all necessary supporting information from the Contractor.

A project is measured against its schedule, not the other way around. The schedule does not (or, rather should not) change automatically because conditions change. Unfortunately, Section 3.10.1 treats the schedule as a moving target, allowing the deadlines to shift regardless of the reason or responsibility for the change. That defeats the purpose of the schedule. Nonetheless, Section 3.10.1 requires the construction schedule to be revised at "appropriate intervals required by the conditions of the Work and Project." Thus far, I have not found that concept in a calendar or on a clock. At best this provision is ambiguous. A better description of the requirement is that it is incomprehensible. The schedule should not be revised as and when it appears that it will not be met, but only for cause, after notification to the Owner and the Architect, and with the Owner's approval.

²⁰ If the A201 is modified to provide for the Owner's approval of the schedule, it is important to remember to add to the Owner's agreement with the Architect a requirement that the Architect review and make recommendations concerning the schedule to the Owner. The Architect must be required to give its comments to the Owner sufficiently before the Owner is required to render its approval to the Contractor.

To make it easier to evaluate whether there has been a delay or disruption to the project, the contract should require that the construction schedule be based on the critical path method (CPM).²¹ If the Contractor believes a scheduling method other than the CPM is best for the project, the burden would shift to the Contractor to recommend a different format and to demonstrate why it is preferable to the CPM.

A CPM schedule not only benefits the Owner, it also protects the Contractor. If a CPM schedule is not used, it can appear that every missed date will negatively affect the project, thereby entitling the Owner to damages. Of course, just as every missed date is not automatically a cause for concern, the fact that something is not identified on a CPM schedule as a critical milestone does not mean that the failure to meet that deadline will not be disruptive to the project. Therefore, the schedule should show the impact of all significant events, even those that may not be defined as “critical.” Wherever there may be increased costs or other fallout from a delay, these should be accounted for in the construction schedule.

If it appears that a critical path item will be affected or there otherwise could be a disruption that might be the basis of a claim for a change in cost or time, the Contractor should provide that information immediately to the parties. Notice of a potential change does not automatically mean approval of that change. The reason for any change must be justified. In addition to identifying changes as they occur, the Contractor also should be required to submit an

²¹ See STANLEY P. SKLAR, *Risk Factors and Contractual Risk Allocation*, in HANDLING CONSTRUCTION RISKS 2007: ALLOCATE NOW OR LITIGATE LATER 9, 15 (2007) (“[A] very specific schedule such as the Critical Path Method which incorporates all inside and outside dates for each operation should be made a part of the project contract.”) (available on Westlaw at 537 PLI/Real 9). See also ABA FORUM ON THE CONSTRUCTION INDUSTRY, DIVISION 12, DOCUMENTS REVIEW SUBCOMMITTEE, *supra* note 12 (“The Subcommittee suggests addition of requirements consistent with modern practice such as critical path method”)

annotated schedule to the parties monthly with its requests for progress payments. The schedule, as annotated, must be satisfactory to the Owner before payment will be authorized. Unlike the AIA provisions, these suggested provisions incentivize the Contractor to recognize the seriousness of the schedule and the scheduling process.

In order to be of substantial value to the parties, the construction schedule must include all of the components of the work.²² Section 3.10.2 assumes there will be more than one schedule because it requires the Contractor to prepare a separate submittal schedule. Like the construction schedule, the submittal schedule is not required to be delivered by a precise date but only “promptly” after the contract is awarded. Part 5 of this paper recognizes that one of the ways the Architect protects itself in the 2007 A201 is by retaining the right to approve the submittal schedule. While the Architect’s input on the schedule is helpful, and its assessment and recommendations should be required, as with all critical components of the project final approval should be left to the Owner. As previously noted, the submittal schedule should not be a separate item but should be part of an overall construction schedule, containing all of the elements necessary to complete the Work. Other items that should be included in the construction schedule, for example, are the times for selection of allowance items (rather than simply requiring that they be identified with “reasonable promptness,” as Section 3.8 currently provides), when the Contractor and various trade Contractors will have access to the project site, and when various approvals must be rendered by the Owner, the Architect and all other applicable entities and individuals. Unless all of the elements of the project are in one detailed

²² ABA FORUM ON THE CONSTRUCTION INDUSTRY, DIVISION 12, DOCUMENTS REVIEW SUBCOMMITTEE *supra* note 12, at 5 (“[The schedule shall] ... be in sufficient detail to demonstrate for each element of Work its timing, duration and sequence, all integrated in a logical order with a critical path consistent with time limits under the Contract Documents.”).

schedule, the participants cannot understand the interplay of their actions on the progress of the work.

While the 2007 version of Section 3.10.2 looks very different from the 1997 provision, there is only one significant change. The new document adds that the failure to submit the submittal schedule precludes the Contractor from claiming an increase in the Contract Sum or an extension of the Contract Time based on the timing of submittal reviews. This is one of the few commendable changes benefiting owners (and the project). Unfortunately, the A201 continues to require multiple schedules primarily for the use of the Contractor, without input from or approval by the Owner. If there were but one construction schedule, approved by the Owner, without which the Contractor could not receive progress payments or make claims for changes in the Contract Sum or the Contract Time, the AIA would be closer to meeting its present advertising claim: “When AIA Contract Documents are in force, everyone’s interests are in balance.”²³ Unfortunately, at the moment the AIA’s documents seem to be in desperate need of a level.

In one of the more casual understatement of the A201, the final provision in the construction schedule trilogy (Section 3.10.3) requires the Contractor to perform the Work “in general accordance” with the most recent schedules submitted to the Owner and the Architect. Sadly, this provision has not changed since the 1997 version. “In general accordance” should not be the standard for determining compliance with the construction schedule. The Contractor should be obligated to perform its work within the time periods set forth in the schedule, not as some vague, hard to define phrase suggests. How else can the various parties involved with the

²³ American Institute of Architects, AIA Contract Documents, available at <http://www.aia.org/csi2>.

project understand and comply with their respective obligations? There should be no opportunity for confusion. It is precisely the Contractor's job to meet the construction schedule without delay or interference with the progress of the Work.

Another concept missing from the A201 is who owns the float in the construction schedule. This is important because it affects the impact of concurrent delays and whether a request to increase the pace of the work in order to meet scheduled commitments constitutes a compensable acceleration. Compensation may not be appropriate if the Contractor is responsible for the delay, or if there is time available within the schedule, which the Owner is entitled to manage. Similarly, there is no provision governing the impact, if any, of a Contractor finishing all or a portion of the Work before a scheduled completion date. These are significant opportunities missed by the drafters of the AIA documents, exposing all parties to the increased likelihood of misunderstandings and disputes.

We can be grateful that the 2007 A201 did not delete or change two critical provisions concerning time. It maintains the requirement that time limits set forth in the Contract Documents are “of the essence of the Contract.”²⁴ (Section 8.2.1) Additionally, the Contractor continues to be required to “proceed expeditiously ... and to achieve Substantial Completion within the Contract Time.” (Section 8.2.3)

Unfortunately, what the contract giveth it also arguably taketh away (or at least confuseth). As noted previously, the Contractor is required only to perform the work “in general accordance” with the schedule. (Section 3.10.3) This concept seems to contradict to the implications of a “time is of the essence” mandate. The latter ordinarily means that strict

²⁴ “‘Time is of the essence’ language should be included in the contract to enable an owner to access damages for [the contractor] failing to complete the project as scheduled.” SKLAR, *supra* note 21, at 16.

compliance with all dates is required. Moreover, the Contractor is granted extensions of time for a virtually unlimited and often broadly defined array of reasons, again inviting uncertainty and litigation. For example, the Contractor is permitted to extend the Contract Time for delays resulting from labor disputes, even if the disputes were engendered by the Contractor, as well as from “unusual delay in deliveries,” despite the fact the obligation for ordering equipment and materials rests with the Contractor. (Section 8.3.1) There is no requirement that the Contractor demonstrate that it could not have anticipated or avoided the delay or that it has used all reasonable means to minimize the consequences of the delay. Nor must the delay have affected a critical activity before an extension of time is granted, nor must available float be used before the applicable date of completion can be changed.

For inexplicable reasons, if the Contractor wants an extension of time, it need only provide an “estimate of cost” and the “probable effect” of the delay on the project. (Section 15.1.5.1) Nothing more detailed is mandated, nor must the Contractor exert any effort to avoid or minimize the causes or impacts of the delay. In fact, the only time the Contractor expressly must demonstrate that it could not have anticipated a delay, and that the delay had an adverse effect on the schedule, is where weather conditions are the basis for the claim. (Section 15.2.5.2) Why only in that circumstance? Should not a demonstration of adverse impact and inability to anticipate the delay be part of every claim for an extension of time? The AIA claims that its documents are “balanced and fair.” Judging by these provisions, it fulfills that description much as Fox News conforms to its famous tag line.

Many custom documents mandate that an extension of time, if given, is the sole remedy of the Contractor for a delay except, perhaps, where an Owner-caused delay results in provable increased direct costs to the Contractor. Any permitted costs are defined and constitute the

Contractor's sole monetary relief. In contrast, the A201 appears to permit the Contractor to recover virtually unlimited damages for delay. (Section 8.3.3) The Owner ostensibly also is permitted to recover its delay damages according to the same Section. However, that provision is misleading. The Owner's waiver of consequential damages set forth in Section 15.1.6 of the 2007 A201 (Section 4.3.10 in the 1997 edition) precludes virtually any opportunity for the Owner to receive compensation despite the real losses it may incur.²⁵ This provision is being discussed in detail elsewhere in the program materials so we will not belabor it here.

Because others in this program are describing the changes flowing from the addition of the concept of the Initial Decision Maker, this paper will not address the increasing confusion that it undoubtedly will spawn. However, it should be noted that while the Initial Decision Maker appears to have authority with respect to claims for additional time made pursuant to Section 15.1.5 (Claims for Additional Time), under Section 8.3.1 it is the Architect (who may or may not be the Initial Decision Maker), who determines whether there are causes justifying a delay by the Contractor, and sets the length of time of any extension.

Once again, the AIA has missed a significant opportunity to reflect the practical realities of the construction project, and to allocate fairly responsibilities and rights. At the very least it would have been helpful if the AIA were willing to raise the issues so that the parties could make appropriate choices before the project begins and the basis for disputes occur.

CONTRACTOR COUNTERPOINT:

²⁵ The section providing the waiver of consequential damages was not changed in the 2007 document (except for its location). An article describing the reasons why it is an unfair and unequal provision is LYNN R. AXELROTH, "*Mutual Waiver of Consequential Damages - The Owner's Perspective*," 18:1 THE CONSTR. LAW. 11 (Jan. 1998).

Where to begin? Much of the foregoing discussion displays a sense of grievance wholly unjustified by the scheduling provisions of A201. Few Contractors' lawyers who deal with that document would recognize it as

- affording the Contractor “virtually unlimited damages for delay” or
- requiring multiple schedules for the Contractor’s use “without input from or approval by the Owner.”

As to the former claim, the referenced Section 8.3.3 merely provides that the time extension clause does not preclude delay damages allowed under other Contract Documents (which, as far as AIA is concerned, never mention the subject again). AIA rejected a suggestion from the Contractor community that damages caused by *force majeure* delays be allowed under A201.²⁶ I doubt most Owners' lawyers, unquestionably including my co-author under normal business circumstances, would concede that they are nonetheless provided for there.

The second complaint seems to me to distort A201's actual provisions. Granted the Owner's approval of the Contractor's schedule is not explicitly required, but the Owner has the power and means to require performance in accordance with the *completion schedule*, which is what it fundamentally needs.

Most Contractors would not, I believe, take great issue with the suggestion that CPM scheduling should be required on sizeable projects, or the requirement that the schedule be updated monthly, provided these requirements were known at the time the price was established. Providing the Owner and its Architect a detailed CPM schedule may enhance the Owner's understanding of the progress of the Work and enable it to schedule its own arrangements and

²⁶ See, e.g., REVISIONS RECOMMENDED BY THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, *et al.*, *supra* note 11, at 6 (recommending insertion into § 8.3.1 of additional language “and the Contract Sum increased.”).

obligations, including payments, more efficiently. The progress schedule should not be designed, however, as a weapon against the Contractor. I also share the view that ideally the initial performance schedule should be agreed to and attached to the parties' contract.

Where I particularly part company with the foregoing discussion of scheduling practice is in its denunciation of the requirement that the Work be performed in "general accordance with" the progress schedule. A requirement in the A201 that the Work be performed in *strict* accordance with a CPM schedule, including the precise sequence and duration of hundreds of tasks, intrudes deeply, and unnecessarily, into the Contractor's right to control, and sole responsibility for, "construction means, methods, techniques, *sequences* and procedures" under Section 3.3.1 of the A201.

Further, to make all the details of the schedule somehow "of the essence" would be unworkable. The sole purpose of such language is to identify a breach as material and permit its occurrence to justify a forfeiture. Should a Contractor really be held to have defaulted on its contract by exceeding a scheduled duration of a minor item early in performance? The Owner has the convenience termination right; grasping for the right to declare any of a series of technical defaults throughout performance seems rather egregious.

Owners who have legitimate concerns over "completion" dates other than substantial and final completion of the Work should negotiate at the outset for a limited number of interim milestone dates which may be "of the essence." So long as the Contractor meets such dates, and completes the Work as and when required, its meeting, missing, adjusting or juggling detailed schedule dates are essentially management issues for the Contractor.

3. SITE CONDITIONS.

"Walter: What happened?"

Curly: It was no picnic but those guys are work animals. Well everything looks pretty much under control.

Walter: It does?

Curly: Well not to the layman's eyes of course.

Walter: They completely ripped up my house!

Curly: They sure as hell did didn't they? They really ripped the guts out of it. They're work animals I tell you. Look at those holes huh? Then you've got your gravel piles, your sand piles, your scrap piles. Animals!

Walter: Animals.

Curly: Well I like a good conversation as much as any but I've got to run. Hasta Pronto if you know what I mean.

Walter: You're leaving?

Curly: Well I ain't moving in.”

The Money Pit.

While most of the changes in the 2007 A201 consist of minor grammatical revisions, such as the addition of commas, or formatting changes, such as rearranging the placement of sections, there are a few significant modifications. One of these is the addition of Section 3.7.5, which follows and is related to the provision concerning concealed or unknown conditions. With so many important changes that could have been made to the General Conditions on a wide variety of other topics, or even with respect to this one, it is difficult to understand why the drafting committee was compelled to add this new provision. It is restated in its entirety in order to appreciate it fully.

3.7.5 If, in the course of the Work, the Contractor encounters human remains or recognizes the existence of burial markers, archeological sites or wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Request for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 15.

We can surmise the reason for the addition of this provision, and, if true, it is a cautionary tale demonstrating why one person's bad experience should rarely be generalized.²⁷ We are guessing that some hapless architect or contractor was involved in a project where skeletons were found that were not in the closet or dangling from a porch roof on Halloween. Without intending to be flippant, the important question remains "so what"? There already are provisions addressing concealed or unknown conditions (Section 3.7.4), the Contractor's use of the site (Section 3.13), the Contractor's right to terminate the Contract in the event its work is suspended (Section 14.1.1) and, most importantly, the Owner's obligation to provide the physical characteristics of the site to the Contractor and to obtain all necessary approvals required for construction (Sections 2.2.2 and 2.2.3).

While as an Owner's lawyer, I find much objectionable in Section 3.7.4, it seems to cover the circumstances now described in new Section 3.7.5. The pre-existing terms protect the Contractor and provide a mechanism for the Contractor to get an increase in compensation and/or time if concealed physical conditions are encountered that differ materially from what is indicated in the Contract Documents or from those things inherent in construction projects such as the one being undertaken.²⁸ While the world of construction too often is adversarial when it needn't be, it is likely that most parties would not dispute that unforeseen and unforeseeable

²⁷ Cf. *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 610 A.2d 364 (N.J. 1992); AIA Document A201 – 1997, § 4.3.10.

²⁸ "One of the cardinal aspects of the A201 is its overt treatment of differing site conditions as entitling the Contractor to equitable adjustment. Over the last 40 years, the AIA's general conditions have clarified and detailed the Contractor's protections against 'concealed physical conditions which differ materially from those indicated in the Contract Documents [and] unknown physical conditions of an unusual nature....' Thus, the A201 has adjured the device of saddling the Contractor with unknown conditions and has (subject to notice requirements and substantiation of the changes impacts) not allowed Owners to use site inspection clauses to defeat the Contractor's extra costs or delays." SINK *et al.*, *supra* note 9.

burial markers, human remains and archeological sites fall within the categories already described and accommodated in Section 3.7.4.

When I was a very young girl, I read a periodical called “Highlights for Kids.” One of my favorite activities in this workbook was a picture puzzle called “one of these items does not belong with the others.” Not surprisingly, the object of the game was to pick out which one. Section 3.7.5 reminds me of a version of that puzzle. If you are playing along, the answer is “wetlands.” It is also the question. Just what are wetlands doing included among the litany of old structures and remains (both human and monumental)? Perhaps one answer is that the provisions dealing with environmental issues, found in Section 10.3, address only things constituting “hazardous materials” (an undefined term that is both overbroad and too narrow),²⁹ rather than focusing on all regulated substances and land use. But despite the clumsy and incomplete provisions governing environmental matters found in Section 10.3, elsewhere in the document the Owner is obligated to provide to the Contractor the physical characteristics and legal limitations of the site, and to obtain necessary approvals. (Sections 2.2.2 and 2.2.3) The Owner is responsible for obtaining any needed permits to build on wetlands. Moreover, wetlands not designated in the Contract Documents arguably also fall within Section 3.7.4 (concealed or unknown conditions), thereby entitling the Contractor to make a claim for time and money, if such is necessary.

²⁹ The term is overbroad because the fact that something may be defined under an environmental statute as a hazardous material does not mean that it must be a threat. The issue should be whether the questionable substance is found in quantities sufficient to be regulated and that requires remediation or some other action. The term also may be too narrow because not all jurisdictions consider something like lead paint, for example, a hazardous material *per se* (it is only when it is released from an encapsulated form that it becomes hazardous), yet an action or approval may be required regardless of that determination.

If wetlands were not adequately covered by the provisions in the 1997 A201, then neither are a number of other possible limitations on the use of the site. Most land is subject to zoning and numerous other subdivision and use regulations that will affect whether and how the land can be used. There is no express statement anywhere in the General Conditions that subdivision, zoning and other land use approvals must be obtained. Until the recent addition of wetlands in the 2007 version of the A201, I had thought that this was not an oversight by the AIA. More likely, I had assumed, the drafters intended that such requirements and approvals were covered by existing provisions in the document.

Among the protections in the 1997 A201 that have been carried forward into the 2007 version (thereby eliminating the need for new Section 3.7.5) are: the Contractor's right to rely on the accuracy of information furnished by the Owner (Section 2.2.3), the Contractor's relief from liability for differences between field conditions and the provisions in the Contract Documents (Section 3.2.4), and the fact that the Contractor is not required to ascertain that the Contract Documents comply with laws, codes and regulations, etc. (Section 3.2.3) or to discover errors, omissions or inconsistencies by virtue of its obligation to make field observations (Section 3.2.2). If the Contractor notices problems, its only obligation seems to be to report those observed nonconformities or inconsistencies (Sections 3.2.2, 3.2.3 and 3.2.4). If the Contractor believes it is entitled to more time or money as a result of these efforts, Section 3.2.4 expressly authorizes the Contractor to make a claim under Article 15.³⁰ This is in addition to the

³⁰ This is another example of the inconsistency in the AIA documents over the entity determining requests for adjustments in time or money. New Section 3.7.5 refers the Contractor to the procedures in Article 15, which means the adjudicator is the Initial Decision Maker. Claims relating to other concealed and unknown conditions, however, are subject to investigation by the Architect, who makes any determinations and recommendations. There is no explanation as to why one group of claims is referred to the Initial Decision Maker and other similar ones are under the purview of the Architect.

provisions of Sections 8.3.1 and 8.3.3, among others, authorizing an extension of the Contract Time and recovery of damages if the Contractor is delayed for causes beyond its control. The bottom line is that the Contractor already was protected as to time and price if it unexpectedly encountered human remains, burial markers, archaeological sites or wetlands before the addition of Section 3.7.5.

Both the pre-existing provisions and the new Section are very Contractor friendly and Owner adverse. It may be that the AIA thought Section 3.7.5's requirement that the Contractor suspend activities in the affected area and continue other work while waiting to hear from the Owner was an improvement for the Owner. However, the Owner was permitted to suspend the work for its convenience under the 1997 version (Section 14.3). More significantly, the Owner is faced with the Contractor's right to terminate the Contract if work is suspended for more than thirty (30) days (Section 14.1.2) under both editions of the A201, whether that is sufficient time for the Owner to obtain necessary governmental approvals or not. And it is likely that it is not.³¹

Both the 1997 and 2007 versions of the A201 are confusing in certain areas and require significant modifications to address the concerns of Owners and lenders.³² Proposing revisions

³¹ Perhaps the Owner is spared in the cases where only a portion of the Work is affected because Section 14.1.2 grants the Contractor the right to terminate only where a public authority "requires all Work to be stopped" (emphasis added). Projects cost far too much money to rely upon an arbitrator's or court's strict construction of this provision or on the possibility that only a portion of the work will be affected (particularly in the case of wetlands).

³² See, e.g., AMERICAN COLLEGE OF CONSTRUCTION LAWYERS, TASK FORCE ON THE 2007 AIA A201 DOCUMENT (July 13, 2006), at 4 ("The elimination of the language 'Claims for' in the section heading suggests that a 'Claim does not exist for purposes of Article 15 until one or another of the parties disputes the Architect's determination.' As a result, the 21-day time limitation contained in §15.1.2 ('21 days after occurrence of the event') would not be triggered until the Architect's determination, i.e., the 'event' is not the encountering of the concealed or unknown condition, but rather the Architect's determination relative to the condition. Is this correct?").

is outside the scope of this paper, the current purpose of which is to object to the addition of new Section 3.7.5 (and to provide support for that objection). Be aware, however, that simply striking the new language is insufficient protection for the Owner.

CONTRACTOR COUNTERPOINT:

From the tenor of the foregoing discussion (new language is “very Contractor friendly”) one might deduce that the addition of Section 3.7.5 was an example of the AIA’s response to some special pleading by Contractors. However, as far as I can tell, this provision was not suggested by Contractors, or motivated by their interests, but, like Athena, simply sprang fully formed from the forehead of Zeus.

A Contractor studying Section 3.7.5 will be well advised to wonder, and inquire, what it means to “encounter” some “human remains,” and given the conspicuous omission of any element of knowledge from this aspect of the clause, what the Contractor’s risk is if it encounters and disturbs human remains without “recognizing” them and thus fails to suspend operations and otherwise follow the specified procedure. Is the intent somehow to make the Contractor strictly responsible for certain (hopefully) subterranean conditions on the Owner’s site, not disclosed by the Owner’s design documents? More to the point, was the intent to spread around, or becloud, the responsibility which might plague a designer³³ whose omission of any indication of an ancient burial site may have caused the problem?

Even as to the balance of the clause, where the Contractor’s duties depend on “recognition,” one wonders what standard of care is meant to be imposed. Experts such as historians, hydrologists, archaeologists, and paleontologists make good money by “recognizing”

³³ I very much doubt this change was inspired by the plight of a “hapless contractor.”

archaeological and burial sites, and wetlands, and do so by exercising skills normally not possessed by operators of clearing, grubbing and excavating equipment.

The issue of site conditions is best dealt with by having the Owner and its consultants conduct their due diligence prior to contracting, and reveal the results to the Contractor in the Contract Documents, then deal with surprises under existing provisions for differing site conditions and hazardous materials. The process is not improved in any apparent way by peculiar new Section 3.7.5.

4. PAYMENT ISSUES.

“What good is money if it can't inspire terror in your fellow man?” C. Montgomery Burns

Despite the failure of the AIA to receive an endorsement by the AGC for the 2007 A201, this document continues to do a good job of protecting the Contractor's interests, particularly its right to payment, even when its entitlement is questionable. One of the most significant provisions relating to payment governs the Owner's right to withhold funds (Section 9.5.1). Only two minor, virtually irrelevant, modifications were made to that Section. It is fair to say that many of us were hoping for much more. One of the objectionable, but not surprising, continuations is that the authority to withhold payment is given to the Architect, rather than to the entity primarily responsible for financing the project, the Owner.³⁴ While the Architect's advice is welcome, and more than that should be required, it is unreasonable for the Architect to be the final arbiter of payment. Moreover, no matter what entity is making the decision, the reasons permitting the withholding of payment are too limited and in some cases ridiculous.

³⁴ While he undoubtedly intended this to apply to a different situation, Ambrose Bierce's definition of an architect, appearing in THE DEVIL'S DICTIONARY, has some application here. He said that an architect is “one who drafts a plan of your house and plans a draft of your money.” Ambrose Bierce, THE DEVIL'S DICTIONARY, available at <http://www.thedevilsdictionary.com/?A>.

Part 5 of this paper mentions the “thoroughly hedged representation” set forth in Section 9.4.2, providing the Architect with numerous ways to wheedle out of whatever it might have said.³⁵ To the contrary, however, if read literally, the vague generalities in the introductory portion of Section 9.4.2 seem to leave the Architect with little option but to certify payment to the Contractor if there is any basis, however limited, for suggesting that the work of the Contractor is at all passable. If the Architect cannot certify as to a portion of the amount demanded by the Contractor, even under these minimal standards, the revised amount is not determined by, or even with, the Owner. Instead, the A201 makes it the responsibility of the Architect and the Contractor to “agree on a revised amount,” thus encouraging a cozy relationship between the Architect and the Contractor. Perhaps Owners should heed Billy Rose’s admonition: “Never invest your money in anything that eats or needs repairing.”

The few reasons seemingly available to the Architect to refuse to certify payment are insufficient and often miss the realities of the construction practice. First of all, it is a pre-condition to withholding payment that the Contractor “*is*” responsible for a loss. (Section 9.5.1, emphasis added). One reading of the provision is that it does not permit a reasonable judgment that the Contractor *may* be, or is more likely than not, responsible for the loss. If the standard for withholding funds is absolute certainty, it is unlikely that the Architect will reach that conclusion. However, even if the Architect manages to determine that the Contractor has caused

³⁵ “ ... [W] hile the language [of 9.4.2] makes clear that the issuance of a certificate for payment is based on ‘evaluations of the work’ by the Architect, nothing here binds the Architect in any fashion. And the section has consistently removed any reference to the Architect ‘observing’ the Work. No longer is there any suggestion that the Architect was watching everything of significance during the Project. SINK *et al.*, *supra* note 9 at 44. With deference to Messrs. Sink, Petersen and Goldberg, I might suggest that the changes over the years have resulted in a document without a suggestion that the Architect is watching *anything* of significance. This certainly holds true in the 2007 version of the A201.

a loss, the balance of the provisions in Section 9.5.1 make it difficult to protect the project and the Owner any further.

The first clause of Section 9.5.1 should be a non-controversial reason for withholding payment. It allegedly protects the Owner from loss when there is “defective Work not remedied.” However, without a time frame associated with the requirement, there may be arguments about when and whether it is an appropriate point in time to withhold any funds. This could easily have been remedied by adding “within the time periods set forth in the Contract Documents” and then making sure that suitable time periods were included. A default time period also could be added to cover the circumstances not addressed elsewhere in the Contract Documents.

Section 9.5.1.2 graciously allows the withholding of funds if third-party claims have been filed or if there is a reasonable probability of claims being filed, unless the Contractor provides security acceptable to the Owner. This clause has the illusion of reasonableness. Unfortunately, the reality is something different. The inclusion of an option to provide security is likely to be interpreted to mean that some type of security must be acceptable to the Owner. However, unless 100% cash is being offered to the Owner by the Contractor (which somewhat defeats the Contractor’s purpose), I would argue that there is no security sufficient to protect the Owner. For example, insurance may have deductibles, may not cover the particular claim, may have other exceptions limiting its application, or may need litigation to be enforced. The same is true with bonds, letters of credit and other non-cash security. All may contain unacceptable risks or cause the Owner to incur additional costs, which is unfair to ask the Owner to assume when the Contractor has caused a loss.

The next reason allowing some portion of the payment to be held back is if the Contractor fails to make payments to “Subcontractors” (a defined term) or “for labor, materials or equipment.”³⁶ (Section 9.5.1.3). Unfortunately, because of the definition of Subcontractor, it is unclear whether this clause covers sub-subcontractors, in the rare circumstances where the Contractor may owe a payment obligation to them, or consultants and subcontractors not working at the project site. Why shouldn’t the Owner be protected against all of the Contractor’s payment responsibilities related to the project?

If payment is withheld pursuant to clause .3, the Owner has been provided one additional option to help assure that Subcontractors (and material and equipment suppliers) are being properly paid. New Section 9.5.3 grants the Owner the right to issue joint checks. Superficially, this appears to give the Owner a new way to protect itself. However, it is unclear whether this remedy also subjects the Owner to increased risks. While the decision to issue joint checks is at the Owner’s “sole option,” this may not be sufficient to protect the Owner from claims by disgruntled subcontractors arguing that a reasonable owner would have made a different determination. The provision should state unequivocally that the Owner’s decision to exercise or not exercise this right is for its sole benefit and that it is under no obligation whatsoever to do so. It may be helpful to include an indemnification of the Owner by the Contractor for any costs incurred by the Owner from claims that it should have issued joint checks. Further, if the Owner

³⁶ Section 9.6.7 seems to require that the Contractor pay its Subcontractors and suppliers the sums paid to it by the Owner for their work only if the Contractor has not provided a payment bond in the amount of the Contract Sum. While it is outside the scope of this paper to describe the many circumstances under which the payment bond’s funds may not be available or procuring the bond may not be desirable, there is another reason Owners should consider the impact of this provision. Whether or not a bond has been supplied, does the Owner want the Contractor to request and receive payments from the Owner for the work of Subcontractors if the Contractor has the discretion not to pay the sums it receives on their behalf?

issues joint checks it should be credited with all its costs associated with doing so, including any fees incurred consulting attorneys and the costs of administering the payment scheme.

There are additional problems facing Owners in Section 9.5.1. Clause .4 permits funds to be withheld if the Work cannot be completed for the unpaid balance of the Contract Sum. However, there is an argument that this may happen only if the high standard, which is skewed against the Owner, can be met. That is, the literal language provides that there must be evidence that the work *cannot* be completed for the unpaid balance. Since it is almost impossible to get money back once it is paid, a more reasonable and practical approach would be to withhold funds if the Owner believes it is more likely than not that the Work might not be completed for the remaining available amount.

Another problem, analogous to the one described with respect to clause .3, is generated by the language of clause .5. It allegedly protects the Owner if the Contractor damages “the Owner or a separate contractor.” Omitted from this clause are separate sub-subcontractors (of any tier), consultants, neighboring property owners and a long list of other potential individuals and entities, such as visitors to the project. The Owner should be protected from all losses relating to damage inflicted on anyone or arising out of the project, if such might have been caused by the Contractor, or by anyone for whom the Contractor may be responsible.

Section 9.5.1.6 allows the Architect to withhold certification if the Work “will not be completed within the Contract Time.” The standard seemingly continues to be “will not” instead of “may not.” There also is no protection for the Owner if the Contractor misses interim milestones that may damage the Owner. Thus, there is only a partial opportunity to make the Owner whole. (If the failure to meet interim dates does not trigger a right to withhold payments, at the very least the Contractor should be required to provide a suitable recovery plan for the lost

time.) Despite the AIA claiming to adhere to drafting principles stating that risks and responsibilities are allocated to the party best able to control them,³⁷ the Owner continues to be assigned risks that are within the Contractor's control.

My favorite of all of the provisions permitting funds to be withheld is the one that allows action in the event of the Contractor's "*repeated* failure to carry out the Work in accordance with the Contract Documents" (Section 9.5.1.6, emphasis added). The document does not specify the number to which "repeated" equates. And even if it did, the provision still would be ridiculous. One failure should be more than enough if it is substantial. Why should the Owner have to be subjected to multiple Contractor defaults before it can be protected? There is nothing sensible about this provision.³⁸

While it may seem that there is a long list of items for which payment may be withheld, there are other reasons omitted that should be included. For example, why isn't it a basis for withholding payment if the Contractor is in default of any of its agreements? In addition, the Owner should be permitted to respond to a circumstance where the Contractor claims that materials or equipment are at the project site or in another location, and that is found not to be the case. If the Contractor submits an incomplete certificate for payment or fails to provide all of the support required (the identity of which is another area in the A201 that requires modification to protect the Owner adequately), it should be crystal clear that the remedy includes withholding

³⁷ See American Institute of Architects, *Drafting Principles*, available at http://www.aia.org/docs_drafting_principles.

³⁸ It is one of those scratching one's head moments wondering "what were they trying to prove" when noting that one of the changes in the 2007 document is the substitution of the word "repeated" for "persistent" in clause 6. I doubt that any Owners are exhaling sighs of relief because of the impact of this modification. The use of either "persistent" or "repeated" is open to interpretation and, therefore, dispute, and neither provides adequate protection to the Owner.

funds until the proper documentation is provided. That result may be suggested by Section 9.3.1, but it is important enough to warrant clarification so there is no ambiguity about the Owner's rights.

Other examples of occurrences that justify protecting the Owner are: the Contractor's failure to correct nonconforming work, disagreements over the percentage of completion of the Work or application of the schedule of values, and failure to deliver required documents and submittals, such as releases of liens, as-built plans, warranty information and operating manuals. Similar objections should be raised with respect to the provisions concerning final payments and completion. Instead of seizing the opportunity to update the flimsy list of reasons for withholding payment, the AIA boldly changed only two words, neither of which was significant. (We already noted the substitution of "repeated" for "persistent". The other change was to refer to damage to a "separate" contractor rather than to "another" contractor).

Clarifications in other provisions of the A201 that could have been made were not. The contract requires that when any of the reasons for withholding certification are removed, certification must be made for those amounts (Section 9.5.2). While that may sound reasonable, there is no definition of what it means to "remove" any reasons. If the Contractor is repeatedly failing to carry out the work in accordance with the Contract Documents, when must a previously withheld payment be released? Absent H. G. Wells' time machine to turn back the clock, it seems unlikely that repeated failures can ever be "removed". And what about the administrative and other costs associated with the items justifying the withholding of funds? Does the Owner have to absorb these despite the fact that they were incurred because of the Contractor's improper acts? That result hardly seems fair. Finally, it bears repeating that under

no circumstances should any of these decisions be left to the Architect. The conclusion as to whether to make or withhold a payment must be left to the reasonable discretion of the Owner.

The parties to a construction project understand that the Owner often will be bound by limitations set by a lender. The Owner should not have to be whipsawed by inconsistent provisions in its respective agreements with its Contractor and lender. The Contractor should not argue that it is unfair to be subject to the restrictions set by the lender because, among other reasons, the Contractor has given itself the right to approve the Owner's financial arrangements before beginning work and at various times throughout the project. (See Section 2.2.1 and Alec Moseley's excellent commentary in part 1, *supra*). This result may be an example of the law of unintended consequences. Contractors, be careful what you wish for!

There are many other provisions dealing with payment peppered throughout the A201. They are not necessarily consistent and they frequently are not sensible. For example, Section 9.2 requires that the Contractor submit a schedule of values allocating the Contract Sum to various portions of the Work. The schedule of values is the basis for reviewing applications for payment, unless objected to by the Architect. Once again, the Architect has inappropriately inserted itself into the control of the Owner's purse strings. While it makes sense for the Architect to bring its expertise to the Owner in the form of recommendations, the Owner must be the ultimate decision-maker. In order for the Owner to make reasonable decisions and to assure that funds are allocated properly, the Contractor should warrant, to the best of its knowledge, that the schedule of values is accurate and, in particular, is not front end loaded.³⁹

³⁹ Additionally, changes made to Section 9.2 require that a schedule of values be submitted only if there is a stipulated sum or guaranteed maximum price contract. A schedule of values is a critical element of the agreement that should be eliminated "only where the parties have otherwise expressly agreed on a payment process that does not ... [rely upon or need] a schedule of values." AMERICAN COLLEGE OF CONSTRUCTION LAWYERS, TASK FORCE ON
(continued...)

Another provision that can cause confusion is Section 13.6, entitled “Interest.” It mandates that interest accrue from the time that payment is due but unpaid, at the “legal prevailing rate” in effect where the project is located (unless otherwise agreed to in writing). First, unless the Contract Documents are precise there will be disputes about the time from which interest first is calculated. Moreover, the agreement should establish notice and cure periods for payment obligations, during which time interest will not accrue. Unfortunately, the A201 does not provide for grace periods despite such being the norm in most commercial transactions. Also, open to interpretation is the concept of the “legal prevailing rate”. Many jurisdictions establish different interest rates depending upon the particular circumstance or type of claim. These rates may change over the life of the project, making it difficult to determine what rate should be applied at a particular time. The parties may need a full-time accountant just to track down the correct rate at any given moment. More sensible would be a fill-in-the-blank provision, allowing the parties to select one rate to be applied after a defined number of days from the time notice was given that a payment was due and remained unpaid.

Another provision that parties may not think of as affecting the Contract Sum, but which can be very significant, is the section concerning allowances (Section 3.8). As we know, generally allowances are used when it is not possible to determine the actual cost of an item because it cannot be or has not been specified at the time the Contract Sum is set or because anticipated price fluctuations would make assuming a particular cost unfair. It would help the

(...continued)

THE 2007 AIA A201 DOCUMENT, *supra* note 32, at 10. The schedule of values also should be prepared in advance of the Contract’s execution and, as suggested with respect to the construction schedule, should be attached as an exhibit to the agreement. See ABA FORUM ON THE CONSTRUCTION INDUSTRY, DOCUMENTS REVIEW SUBCOMMITTEE, *supra* note 12.

parties understand the impact of using allowances if the agreement stated the reasons that allowances were being used rather than simply including the allowance amounts within the Contract Sum. In addition, the Contractor should describe precisely the number of items and type of product that can be obtained for the allowance, and should certify that the quality of the items is consistent with the quality required for that aspect of the work. The Contractor should warrant, to the best of its knowledge, that there will be no or only limited costs to the Owner above the amount specified in the Contract associated with obtaining and completing installation of the allowance item, so long as the Owner's selection does not exceed the quality described in the agreement or unless there has been a price fluctuation (that could not have been anticipated and accounted for) with respect to the product itself. If there is a price increase, the Contractor should be required to provide evidence substantiating the need for the change, including a breakdown of all of the additional costs, and the reasons therefor. Otherwise, there will be a rude awakening for the Owner as it discovers that the allowance amount is but a tiny fraction of the real cost of the items needed to complete the work, and the Owner has no way to fund the added costs. How ironic if the Contractor could stop work pursuant to Section 2.2.1 because the Owner could not provide the Contractor with evidence of funding for increases in costs caused by the Contractor's misinformation.

CONTRACTOR COUNTERPOINT:

The complaint above about the Architect's control of the right to withhold payments suggests an obvious response: *Don't use AIA documents if you don't want an Architect in control of the entire payment process!*⁴⁰ Other industry consensus documents are available which avoid the ubiquity of the Architect in the payment process.

In my opinion, the A201 *more than adequately* protects the Owner's rights in the payment process. Owners, and their counsel, should rise from the fainting couch ("Mercy! I can't calculate simple interest without a full-time accountant!") and count their blessings.

The full range of Owner-oriented comments above does not permit detailed response, but suffice it to say that Contractors do not feel their right to payment, even of questionable amounts, is by any means secured by the A201. To deal with a few of the specific points:

With respect to Section 9.5.1:

- Why *should* an Owner be entitled to withhold funds already earned by its Contractor if the Contractor allegedly damages the property of a third party? Is the Owner liable for such damage? Or insufficiently indemnified under Section 3.18?
- Does any Contractor have any doubt what would happen to its cash flow if payment withholding were solely controlled by the Owner, and could be triggered any time the Owner developed a belief that completion on time or within budget was "unlikely"?

⁴⁰ See, e.g., AIA Documents A101-2007, §§ 5.1.1, 5.1.3, 5.1.4, 5.1.7.1, 5.2.1.2, 5.2.2; and A201-2007, §§ 9.2, 9.4, 9.6.1, 9.8.4, 9.10.2.

- If an Owner could, as suggested, withhold payments already earned whenever its Contractor was in default of “any of its agreements” – presumably to include agreements such as to keep the premises clean, not allow its superintendent to retire, etc. – many Owners might be tempted to do so notwithstanding the immateriality of such “defaults.” Yet the discussion above suggests that when an Owner delays payment it owes, *interest should not even accrue* absent a notice and cure requirement (notably lacking from Section 9.5). Why, under the logic displayed above, isn’t the Contractor instead entitled immediately to suspend performance of the Work for each “default” in the Owner’s performance of its obligations?
- Why is the Owner damaged, or threatened with damage, and thus entitled to withhold earned payments, when a claim is made for alleged third-party damage, or payment, even where the claim is covered by insurance or a payment bond? Contractor groups have repeatedly requested the AIA to modify Section 9.5.1, in the interest of fairness, to apply only where third party claims are made which are “not covered by Contractor’s insurance policy or by surety bond.”⁴¹ By 2006, AIA was being requested simply to insert language – fully responding to the Owner concerns expressed above – exempting from Section 9.5.1. third party claims “*where an insurer or surety acknowledges responsibility for the full claim amount.*”⁴² AIA did not agree to this perfectly reasonable suggestion. Whatever

⁴¹ See REVISIONS RECOMMENDED BY THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, *et al.*, *supra* note 11, at 7.

⁴² AGC/ASA/ASC JOINT TASK FORCE RECOMMENDATIONS TO AIA DOCUMENT A201 at 3 (July 2006).

its motivation, it surely was not to leave the Architect “little option but to certify payment” to the Contractor.

With respect to Section 9.5.3:

- This new provision, which Owner spokespersons – naturally – acknowledged was “appropriate and appreciated,”⁴³ hardly requires *additional* protection to the Owner such as the astonishing suggestion above that the Owner be indemnified by the Contractor against claims by third parties based on misinterpretation of the new language. If Owners consider that Section 9.5.3 is undesirable because it exposes Owners to this remote risk, one expects their counsel will avoid it by simply striking the provision from all their general conditions.
- A more appropriate change to Section 9.5.3 would be additional language protecting the Contractor against reckless or casual use of the Owner’s new powers. Contractors and their Subcontractors can disagree over payment issues, including issues about percentage of completion, timely performance, backcharges, and unpaid suppliers. Not every “unpaid” Subcontractor is entitled to payment of the amount it seeks. If the Owner, acting in its “sole discretion” and for its own purposes, elects to pay a Subcontractor to which it has no direct liability, it should do so only after advance notice to the Contractor and, if the Contractor objects, at the Owner’s sole risk. To allow the Owner casually to pay Subcontractor claims, with the Contractor’s money, without due regard to the

⁴³ See ABA FORUM ON THE CONSTRUCTION INDUSTRY, DOCUMENTS REVIEW SUBCOMMITTEE, *supra* note 12.

Contractor's defenses to such claims and without any responsibility for improper payment, encourages irresponsible Owner conduct.

Another useful change relating to payment could have been made to Section 7.1.3. To partially ameliorate the harm caused by Owners which push their Contractors for progress toward completion while deferring any reckoning for changes,⁴⁴ this section should have been augmented with a new last sentence to the general effect that the Contractor is not obligated to continue performance of changes in the Work unless payment of amounts not in dispute for all previous and current changes in the Work are being timely made as such changed or additional work is performed.

5. PROVISIONS DESIGNED FOR PROTECTION OF THE ARCHITECT.

“Weaseling out of things is important to learn. It's what separates us from the animals ... except the weasel.” Homer Simpson.

Although I was not alive and in practice when the first edition of an AIA standard Owner-Contractor Agreement was published, it is certainly the case that the last several versions of AIA's General Conditions have contained clauses whose only apparent purpose was to protect or benefit a non-party to the arrangement, the Architect. The sixteenth edition of A201 is no exception.

A hint of what is to come appears in Section 1.1.2, which provides that the Contract Documents do not create a contractual relationship between the Contractor and the Architect or its consultants, between the Owner and a Subcontractor or Sub-subcontractor, between the Owner and the Architect or the Architect's consultants, or between any persons or entities other than the Owner and the Contractor, followed by a peculiar qualification: “[T]he Architect

⁴⁴ See *It's Not What You Earn, It's What You Get Paid*, ENGINEERING NEWS-RECORD Sept. 11, 2000, at 100.

shall . . . be entitled to performance and enforcement of the obligations under the Contract intended to facilitate performance of the Architect’s duties.” Therefore, we see at the very outset of the document that the Architect is ostensibly vested with enforceable rights against a party – the Contractor – with which it enjoys no privity of contract and which, in the AIA scheme, certainly will have no right to enforce any of the Architect’s obligations.⁴⁵

The nuggets of Architect-favoring language to come, ostensibly designed to assist the Architect in performance of its obligations, range from the very plain to the very obscure. In the former category, one will find the requirement that the Contractor indemnify the Architect and the Architect’s consultants under Section 3.18 of A201; notably there is no counterpart in the Owner-Architect Agreement requiring the Architect to indemnify the Contractor or its Subcontractors (or for that matter the Owner) under any circumstances. Similarly, the Contractor is required to make the non-party Architect an additional insured under its liability insurance coverage under Section 11.1.4. Though the AIA has, for a change, included in its Owner-Architect Agreement an obligation for the Architect to carry liability insurance,⁴⁶ it predictably does not extend the benefit to the Contractor. Under Section 3.5.1 of A201, the Contractor’s warranty of its materials and equipment extends not only to the Owner, but also to the Architect. It is difficult to imagine a reason the Architect should have a warranty claim

⁴⁵ It comes as no shock that the B101-2007 omits any similar provision to “facilitate” the Contractor’s performance of the Work. The AIA predictably disregarded a serious suggestion that Section 1.1.2 of A201 be broadened to allow the Contractor to rely upon the Owner to require the Architect to perform all the functions assigned to the Architect in the A201. *See REVISIONS RECOMMENDED BY THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, et al., supra* note 11, at 1.

⁴⁶ *See* AIA Document B101-2007, § 2.5.

against the Contractor for performing defective work, except the sheer momentum of adding the Architect as a beneficiary of various Contractor obligations.

For that matter, it is difficult to appreciate a reason why the Contractor and the Owner should be expected to agree with one another in such detail on the Architect's plethora of rights to its own work product, as they are if Section 1.5.1 of the A201 remains a part of their agreement. From the Contractor's perspective, the deal between the Owner and the Architect about what rights the Owner buys in the Architect's documents when it pays the architectural fee is a matter that should be confined to the Owner-Architect Agreement.⁴⁷ Owners often assert that the fees they pay should entitle them to greater than AIA-approved rights in design; this issue should be negotiated between the Owners and the Architects and the results documented in their agreements. The Contractor is entitled to assume that it is entitled to use the design documents to build the Owner's project, and expects that the Owner will secure whatever rights from the Architect that use requires, but the Contractor is not concerned in my view with reuse or duplication of those documents. If the AIA is concerned that some Contractor may audaciously claim ownership or other rights in design documents (has any Contractor ever actually made such a claim?), the transfer of any such rights could be negated in the A201 by language far simpler than that in Section 1.5.1.

We are probably all familiar by now with the limitations on what the Architect actually commits to by approving submittals (see Section 4.2.7) and in responding to requests for information (see Section 4.2.14), and with the vagueness of the schedule upon which the Architect is required to do these things, as well as the thoroughly hedged representation the

⁴⁷ Where it is, after all, amply treated. *See* AIA Document B101-2007, §§ 7.1 – 7.4.

Architect makes when issuing a certificate for payment under Section 9.4.2. Those things have not changed in the new A201.

A couple of provisions have changed, however, to the further advantage of the Architects and disadvantage of the Contractors, and for reasons that are unexplained and difficult to justify.

For example, most of the following Section 3.10.2 is new:

The Contractor shall prepare a submittal schedule, promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule and shall submit the schedule(s) for the Architect's approval. The Architect's approval shall not be unreasonably delayed or withheld. The submittal schedule shall

- 1) be coordinated with the Contractor's construction schedule, and
- 2) allow the Architect reasonable time to review submittals.

If the Contractor fails to submit a submittal schedule, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.

One wonders about the reason for this requirement, and speculates that it relates to claims made by the Contractors for time extensions based upon architectural delay in acting upon submittals. The usual inconsistency in standards that prevails in the AIA documents appears in this Section, where the Contractor is required to act "promptly," whereas the Architect's duties are required to be performed in a "reasonable" time. It would be more useful to the progress of the project, assuming a submittal schedule is necessary, if the Architect were required to act (both in approving any submittal schedule and thereafter in responding to submittals) within a fixed period of time, as the Contractor is throughout the A201 (for example, in Sections 3.7.4 and 15.1.2, and in connection with the various steps in dispute resolution).

Owners should extract from their Architects, in their separate negotiations, a commitment on the timing of submittal reviews, which thereafter should be incorporated in a clear fashion

into the Owner-Contractor Agreement. At present, before the Contractor ever becomes obliged to seek the Architect's approval of a submittal schedule, the Owner bound to a B101-2007 agreement with the Architect will already have acquiesced in architectural review of submittals based on no practical standard of expedition, but merely requiring "reasonable promptness while allowing sufficient time in *the Architect's* professional judgment to permit adequate review."⁴⁸

Another new development in the 2007 A201 is found in the addition of the last clause of Section 3.3.1, which provides as follows:

The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the job site safety thereof and, except as stated below, shall be fully and solely responsible for the job site safety and such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any loss or damage arising *solely* from those Owner required means, methods, techniques, sequences or procedures (emphasis supplied).

One must again wonder what legitimate purpose is served by requiring the Contractor to assume any responsibility whatsoever for job site safety, or for means, methods, techniques, sequences or procedures, where it has been compelled to study the Contract Documents,

⁴⁸ See AIA Document B101-2007, § 3.6.4.1 (emphasis supplied).

determine to what extent those are interfering with its selection of means and methods, evaluate the safety of them, object in writing to the Owner and the Architect, and then receive written direction from the Architect to proceed over its own objection.⁴⁹

The Owner certainly is entitled to be protected against safety hazards caused by unsafe means and methods of construction. Where those are specified by the Architect, and in fact insisted upon by the Architect notwithstanding the Contractor's objection, the Owner or its agent, the Architect, should accept any adverse consequences, notwithstanding predictable efforts to blame the results on the negligence of the Contractor in carrying out the Architect's written instructions. How this responsibility is allocated between the Owner and the Architect is for them to decide; however, the Contractor should have no liability for complying with mandatory, prescriptive requirements of the Contract Documents.

Evidently, at least judging from an AIA "A201-1997 Issue Matrix," the language of Section 3.3.1 was changed due to Owner interests' complaint that responsibility for dictation of means and methods by the Architect should be the Architect's (not the Owner's) responsibility. The AIA received a comment objecting to then pending draft language, at the end of § 3.3.1, that "the Owner shall be solely responsible for any resulting loss or damage." The comment's point was the Owner should not be responsible for instructions given by the Architect – a debatable proposition – but note that the AIA's response was to create implied responsibility on the part of *the Contractor*. The Architect, author of the problem, remains untroubled by its consequences. So far as its contract with the Owner is concerned, the Architect evidently is exculpated from

⁴⁹ Even if its study of means and methods required by the Owner and Architect is diligently conducted but does not reveal hazards in these techniques of someone else's choosing, why should it be burdened with the liability flowing from someone else's decision to intervene in the Contractor's traditional domain?

“responsibility for the construction means, methods, techniques, sequences or procedures” unqualifiedly⁵⁰ – even where it insisted on them over the Contractor’s objection.

OWNER COUNTERPOINT:

I agree with much of my co-author’s comments and echo his concern at the Architect’s seemingly constant and continuing quest for avoidance of risk and liability in the 2007 version of the A201, whether warranted or not.⁵¹ I even support the notion of binding the Architect to perform the many obligations attributed to it in the A201, rather than simply allowing the Architect to rely on the activities of the other parties and to benefit from the disclaimers set forth in the document. However, rather than adding a provision requiring the Owner to demand the Architect’s performance and risking that the Owner’s agreement with the architect is inconsistent with the terms of the A201, I would suggest that the Architect execute a consent to the A201 for the limited purpose of agreeing to the provisions applicable to it. That way, all the parties are encouraged to understand and acknowledge their respective obligations, rather than to assign liability and blame to each other.

⁵⁰ See AIA Document B101-2007, § 3.6.1.2.

⁵¹ Whatever happened to the pronouncements of the AIA made as long ago as 1995 in its Summit on Expanding Architectural Services, where it acknowledged the need to take risks and collaborate in order to better serve clients, adapt for the 21st Century and ultimately achieve more financial success? There, even the insurance company representatives acknowledged that risk avoidance shouldn’t be the ultimate driver of the Architect’s decisions. “Insurance shouldn’t shape practice. Responsibility allocation is part of the process. You [architects] figure out how to do projects and assertively pursue practice and we will figure out how to insure it.” THE AMERICAN INSTITUTE OF ARCHITECTS, Summit Conclusions (Summary of the Day’s Wrap-up Session), Report to the AIA Board of Directors (1995) at 6, quoting Ava Abramowitz, [then] V.P., Victor O. Schinnerer & Co., Inc.

I also could not agree more that Section 1.5.1 is out of place in the document,⁵² and the majority of the substantive provisions are best left to the agreement between the Owner and the Architect (although significant modifications are necessary). However, several comments in Part 5 require a response other than simple assent. An example arises in connection with Section 3.10.2:

- The submittal schedule should be part of one, integrated and detailed construction schedule prepared by the Contractor and approved by the Owner, and should be attached as an exhibit to the Owner-Contractor Agreement, all as more explicitly described in Part 2 of this paper.
- The time period within which the Architect and the Owner may review and approve submittals should not be one fixed amount of time but should vary, depending upon the type of submittal and the nature and amount of information required to be assessed, and the construction schedule should account for those variations.
- I am hopeful that the absence of a direct complaint means acquiescence to the result flowing from the Contractor's failure to deliver the submittal schedule. That is, the Contractor should not be entitled to increases in the Contract Sum or an extension of the Contract Time based on the time taken by the Owner or the Architect to review submittals if there is no approved schedule including reasonable times for review.

⁵² Moreover, the definition of "Instruments of Service" is inappropriate and it may be inaccurate to limit it to "work performed by the Architect and the Architect's consultants." See AIA Document A201 – 2007, §1.1.7.

We likely diverge more significantly with respect to Section 3.3.1. While I agree that the Architect's self-serving language, including the word "solely" before the allocation of responsibility must go (the Architect should not be able to protect itself from its own errors and omissions), I cannot accept that the Contractor is absolved from liability simply because it objects to a certain activity and is required to proceed despite that objection. Responsibility should be assessed based upon accepted legal principles, not rigid responses. The question should be whether the Contractor's actions (or omissions) were negligent. That the Contractor raised some type of an objection and was directed to do something in spite of that objection are factors to be considered in determining responsibility.

6. SUPERINTENDENCE.

"The time has come for someone to put his foot down. And that foot is me." Dean Wormer, *Animal House*.

Perhaps a minor point, but one which is puzzling to many, concerns the AIA's interest in allowing the parties to the Owner-Contractor agreement to have a say in each other's engagement of their representatives. The A201 has provided, for some time, in Section 4.1.3 that the Contractor has some say in the Owner's decision about employment of the Architect. The 2007 language now provides as follows: "If the employment of the Architect is terminated, the Owner shall employ a successor architect as to whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the Architect."

Similarly, the Owner is given power to influence the Contractor's assignment of a superintendent, by new Sections 3.9.2 and 3.9.3:

- 3.9.2 The Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the name and qualifications of a proposed superintendent. The Architect may reply within 14 days to the Contractor in writing stating 1) whether the Owner or the Architect has reasonable objection to the proposed

superintendent or 2) that the Architect requires additional time to review. Failure of the Architect to reply in writing within the 14 day period shall constitute notice of no reasonable objection.

- 3.9.3 The Contractor shall not employ a proposed superintendent to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not change the superintendent without the Owner's consent which shall not unreasonably be withheld or delayed.

Even if, as many concede, some of this authority is useful, the A201 is unclear about the details of how it is to be used, or the effects of its use.

Obviously these provisions can be stricken in negotiation, and even if they are not, the parties need not exercise the powers they afford. They probably are not likely to be exercised on projects where the parties enjoy good relations. But, given the AIA's decision to retain the power of the Contractor to influence selection of an Architect, and to introduce brand new powers of the Owner (and naturally the Architect) to control assignment of a superintendent, one must wonder about a number of issues that arise upon review of these provisions:

- What is the need for them? Have Owners shown a history of engaging Simon Legree-type Architects whose involvement the Contractors should reasonably be permitted to preclude? Have Contractors' field superintendents caused such problems that the Owners (and the Architects) must be protected against their assignment? Bruner and O'Connor opine that it is debatable whether the Contractors in fact rely upon the Architects' skill and judgment in undertaking to construct a project (the apparent premise behind Section 4.1.3), and refer to a single relevant case arising out of replacement of an Architect, but that decision

involved replacement of a licensed Architect by an unlicensed Architect, a step which would be impossible under Section 4.1.1 of the 2007 A201 anyway.⁵³

- How does the Contractor’s involvement in the Architect’s engagement affect the Architect’s representative role as the Owner’s agent during construction, or its impartial role as a decision maker? In that vein, what will be the effect of an Architect’s discovery that its appointment was objected to, or for that matter desired, by the Contractor whose work it will be expected to judge?
- What is a reasonable basis for a Contractor’s objection to the engagement of an Architect? And if a “reasonable objection” – like “reasonable care” in operating a motor vehicle, for example – is a factual issue easily disputed, who will be the judge of the reasonableness of a Contractor’s objection? Is it a matter to be at least first submitted to the Initial Decision Maker? And what if the Initial Decision Maker is the Architect, who may at the relevant time have been fired, or retired or died? How far may such an issue be carried into the dispute process?
- What information, if any, must be furnished to the Contractor considering replacement of the project’s Architect?
- How much time may the Contractor consume in cogitating over the Owner’s choice of a successor Architect? If it is a meaningful amount of time, what effect does it have on the process of submittal approvals, payment certifications, and other items of timing significance? May the reasonable time spent by the Contractor in considering successor Architect appointments be regarded as “the

⁵³ See Philip L. Bruner & Patrick J. O’Connor, BRUNER & O’CONNOR ON CONSTRUCTION LAW §5:91 (2002), (discussing *E. B. Ludwig Steel Corp. v. C.J. Waddell Contractors, Inc.*, 534 So.2d 1364 (La. Ct. App. 1988), *writ denied*, 536 So.2d 1239 (La. 1989)).

act or neglect of the Owner or Architect” and thus the basis for a time extension if it slows down approvals of critical submittals?

- What is a “reasonable basis” for an Owner (or an Architect) to object to the assignment of a Contractor’s chosen field superintendent, given the superintendent’s crucial role as the Contractor’s “eyes and ears”⁵⁴ on the project? How does the power of the Owner or the Architect to control the Contractor’s decisions about management square with the firmly established and traditional reservation to the Contractor of sole responsibility for and control over construction means and methods?⁵⁵
- What happens if after 14 days the Architect replies that it requires additional time to consider the assignment of the superintendent? Is there any limit to the time that it can consume?
- If the superintendent dies, retires, or quits his job, is the Contractor still forbidden to replace him or her without the Owner’s consent? Should the Contractor be precluded from replacing a dishonest or incompetent superintendent without consent?
- Since all this considering of the superintendent is to occur after contract award, presumably the Contractor may not be able to comply with the requirement of Section 3.9.1, that a competent superintendent be in attendance at the Site during performance of the Work, until the selection is complete. Is the time consumed

⁵⁴ BRUNER & O’CONNOR, *supra* note 53, at § 5:65.

⁵⁵ This traditional allocation of responsibility, though diluted as discussed elsewhere, is still recognized in the 2007 A201 at Section 3.3.1.

by the Owner and the Architect in considering the appointment an excusable delay, or should the Contractor build a few extra weeks into its schedule to allow for this process?

It seems to me that there is little or no need for the parties to involve themselves in each other's decisions about project representation and supervision, and that the profusion of qualifications in these sections using the word "reasonable" nearly guarantees disagreements over any attempt to exercise these rights to interfere, followed by disputes which, as mentioned above, will be difficult to handle if the Architect is in the process of replacement. If the parties breach their obligations to one another, through their representatives or otherwise, the Contract Documents provide remedies. Managing one another's business in anticipation of difficulties, and thereby delaying progress of the Work, seems to be an unnecessary and likely disruptive process for which no sufficient justification exists.

OWNER COUNTERPOINT:

Once again, my co-author raises some valid points and misses others. Notably, he fails to consider that the Owner's selection of the Architect is not comparable to the Contractor's employment of a superintendent. Rather, engaging the Architect is akin to hiring the Contractor, both of which entities the Owner has an absolute right to select. Given that right, the Owner also should have the absolute right to terminate those parties and engage other entities (subject to whatever damages may be imposed by law or the terms of the relevant contract), without consultation or interference. Many of the practical reasons for eliminating the Contractor's role in the selection of the Architect are presented by my colleague. Ultimately, so long as there is an Architect rendering the material services that must be provided, the Contractor should not be concerned with the identity of the Architect.

The relationship of the Contractor's superintendent to the Contractor is not on a par with the relationship that the Architect and the Contractor have with the Owner. The superintendent, while very important to the Contractor, is not the top executive or sole decision maker in the Contractor's operation. He or she is not the top of the Contractor's organizational chart, but is one of a number of individuals and entities carrying out the Contractor's obligations in the specific manner determined by the Contractor, without direction from the Owner.⁵⁶ Even on relatively small projects, the Contractor will engage many individuals and entities to perform the Work and to provide services both on and off the project site. The Owner's request to know the identity of the superintendent and certain other project participants will not affect the Contractor's right and ability to control the Work.

The Owner is not interested in the identity of the majority of the project personnel selected by the Contractor. The Owner is concerned only with the results of their efforts, except in very limited circumstances. Critical players that may have a significant impact on the project such as the project superintendent, other senior management personnel directly interacting with the Owner, and trade contractors responsible for major components of the Work often are referred to as "key personnel". Although the Owner remains distant from the manner in which key personnel carry out their work, the Owner needs some degree of comfort as to their identity and qualifications because their impact on the project is so important. If key personnel are identified and included on an exhibit to the Owner-Contractor Agreement before the Contract is signed, this eliminates any potential unfairness to the Contractor. It allows the entity responsible for paying for the project to make sure that the top project professionals with whom the Owner must communicate on a day-to-day basis are individuals upon whom it can rely. Similarly, the

⁵⁶ See, e.g., AIA Document A201 §§ 3.3.1 and 3.4.1.

Owner can obtain assurances with respect to the major trades that will implement many of the Contractor's most significant obligations.

One of the key roles of a project superintendent is to interact with the Owner. His or her function is not just as "the Contractor's eyes and ears." Therefore, even without a key personnel provision, arguably it is an implied obligation of the Contractor to employ someone with whom the Owner easily can work. Moreover, if the Contractor cannot find individuals and entities on whom the Contractor and the Owner both can agree, that may indicate a problem between the parties far more significant than a contractual breach. It may mean that the Contractor and the Owner are unable to collaborate on the project.

The Contractor should not be subject to any penalty if key personnel that were identified prior to the Contract's execution are substituted promptly⁵⁷ and in a reasonable manner when the need arises. In order for this to occur, the present terms of Section 3.9.2 should be modified to require the Contractor to supply sufficient information to the Owner and the Architect so that they may make an informed determination (in the case of the Owner), and recommendation (in the case of the Architect).

In answer to my colleague's question, if the superintendent (or any other key personnel) dies, retires, or quits, the Contractor still must obtain the Owner's approval of the replacement. This should not be problematic so long as the Contractor promptly provides the Owner and the Architect with information about the suggested successor, and the Owner is required to render its decision within a limited period of time. For most of the reasons necessitating a replacement, the Contractor will have adequate warning in advance of the need to gather any requisite

⁵⁷ I agree that the requirement to render decisions within 14 days is excessive and unhelpful to both parties because of the potential to delay the project.

information. In an unanticipated case, such as the death of an individual, the Contractor will need to find a successor in any event, so acquiring information for the Owner should not be an additional burden.

I was tempted not to respond to the question posed above concerning the Contractor's right to fire dishonest or incompetent superintendents. Instead, I will answer it with a question of my own. Does anyone really think there will be a problem obtaining a quick consent from the Owner to relieve a superintendent charged with those behaviors?

Key personnel provisions requiring consultation with and approval by Owners are not new. They have been part of many types of contracts in a multitude of projects. Where reasonable terms were included in the agreement, I have yet to be aware of a negative outcome.