2007 Revisions to AIA Contract Documents

Overview

In the fourth quarter of 2007 the American Institute of Architects ("AIA") released a revised version of A201™–1997, General Conditions of the Contract for Construction and the owner/architect and owner/contractor agreements that rely on it ("A201 Family"). The AIA periodically revises AIA Contract Documents, generally on a ten-year cycle. The AIA's goal in revising documents every ten years is to maintain state-of-the-art legal documents that reflect industry trends and practices and balance the interests of the parties on the construction project.

To begin the document revision process, the AIA solicited initial industry feedback on the 1997 A201 Family from more than a dozen owner, engineer, attorney and contractor groups. The AIA Documents Committee[1] and AIA staff attorneys (hereinafter, "the AIA") with the assistance of outside counsel, thoroughly addressed the comments received and, in several cases, met in person with industry representatives to clarify their positions. First drafts of revised documents were sent out for review by the same organizations that provided initial feedback. After reviewing and discussing the comments received on the first drafts, the AIA sent out a second set of drafts and repeated the process. In early 2007, the Documents Committee approved final language for A201–2007. The approval of A201 paved the way for approval of the remainder of the owner/contractor, owner/architect, architect/consultant, and contractor/subcontractor agreements in the A201 Family.

Hundreds of industry comments revealed the following significant issues in A201–1997, all of them related to dispute resolution: the architect's initial decision on claims, arbitration, consolidation of arbitrations, time limit on claims, consequential damages, and additional insured provisions. Other issues concerned financial matters: the owner's right to obtain information about the contractor's payments to subcontractors and to remedy non-payment, and the right of the contractor to obtain financial assurances

[1] The AIA Documents Committee is comprised of twenty-eight architects who volunteer their time for the creation and revision of AIA Contract Documents.

from the owner. In cost-plus owner/contractor agreements,[2] issues concerned "related party" transactions, and cost-of-the-work reimbursements. For owner/architect agreements,[3] the industry shared the following concerns, in addition to A201 issues such as the architect's initial decision, arbitration and the time limit on claims: document format, insurance, the architect's standard of care, sustainable design, and ownership of the architect's instruments of service.

A201, General Conditions of the Contract for Construction

The Architect's Initial Decision (The IDM)

Since 1911, every edition of A201 has designated the architect as the initial decider of disputes between the owner and contractor. Having an "initial decision maker" resolve disputes as they arise on the project has long been a central theme and policy in AIA documents. As set forth in A201, this approach requires that both parties to the dispute proceed in accordance with the architect's initial decision, subject to each party's right to appeal it through the disputes process. This process assures that the project will continue without disruption, and each party benefits from an impartial appraisal of the dispute.

Over the decades, owners and contractors have each complained from time to time that they did not always prefer to have the architect serve in the role of initial decision maker. Some contractors were concerned that the architect could not be impartial since the architect was being paid by the owner. In other instances, the architect's impartiality came into question if the claim involved an allegation of negligence or other wrongful conduct on the part of the architect. Similarly, some project owners were concerned that they did not want the architect to approach the dispute as a "neutral" but rather, such owners wanted their architects to deal with disputes as an advocate for the owner.

To solve these concerns, the AIA brought into the A201 Family a concept it initially developed for the 2004 Design-Build documents, the appointment of a third-

[2] A111™–1997, Agreement Between Owner and Contractor (Cost of the Work plus a Fee with a Negotiated Guaranteed Maximum Price), and A114™–1997, Agreement Between Owner and Contractor (Cost of the Work plus a Fee).
[3] B141™–1997, Agreement Between Owner and Architect, and B151™–1997, Abbreviated Agreement Between Owner and Architect.

party neutral. In the owner/contractor agreements[4] the owner and contractor will have the opportunity to designate a third-party initial decision maker ("IDM") to make all initial decisions on claims. Potential differing site conditions will still require the architect's involvement, which will precede the occurrence of a dispute. For example, if the contractor observes a condition that the contractor claims to be a changed condition, the contractor must notify the architect who will make a determination. If either party wishes to challenge the determination, that party may submit the issue to the IDM for resolution. The IDM will make an initial decision and, just as in A201–1997, that decision will be binding unless reversed by the disputes process.

Obviously, not every project can justify the expense of retaining a separate third party to resolve disputes which may or may not arise on the project. In addition, educating the IDM regarding the design and continued construction effort will be time consuming and expensive. Thus, it is anticipated that for most projects, the owner and contractor will prefer to employ the architect in its traditional role of initial decision maker. To facilitate this approach, the standard form agreements will contain a provision that if no IDM is separately designated in the agreement, then the architect will serve in that role, as it has done traditionally. This approach balances flexibility and owner/contractor preferences with early and timely initial resolution of disputes in order to better serve the needs of the project participants.

In A201–1997 the architect had the opportunity to force the parties to move disputes from the initial decision to a final and binding decision by issuing the initial decision with the additional provision that it would become "final and binding" unless a demand for arbitration were filed within thirty days from the date of the initial decision.[5] The question arose as to why the architect, as opposed to the actual parties to the dispute, should make this tactical and very costly decision. It seemed clear that the party who felt aggrieved by the initial decision could proceed to demand mediation and/or arbitration whenever that party desired. If, however, neither party wanted to proceed immediately to court or arbitration, why should they be forced to do so by the architect?

[4] A101™–2007, Agreement Between Owner and Contractor (Fixed Price); A102™–2007, formerly A111–1997, (Cost-Plus w/GMP); and A103™–2007, formerly A114–1997, (Cost-Plus w/o GMP).
[5] *See* A201–1997, Section 4.4.6.

The AIA reacted directly to this criticism, by providing in A201–2007 that either party to the initial decision could force an early binding resolution of the dispute. The party aggrieved by the initial decision retains the right to proceed immediately. Now, the prevailing party can also force an early resolution of the dispute by notifying the other party that the initial decision will become final and binding unless the other party files for mediation within sixty days of the date of the initial decision. By this change, either party can force an early, final resolution of a dispute but neither party can be forced to do so by the project architect or other initial decision maker.

Arbitration

AIA documents have required mandatory arbitration since the AIA published the first owner/contractor agreement in 1888. For nearly 100 years, few in the design and construction industry questioned the wisdom of substituting arbitration for litigation. During the past decade, however, more and more industry participants have demanded a choice between arbitration and litigation, and every industry group that met with the AIA supported the idea of giving project participants a choice in the agreement form.

Those who favor arbitration pointed to the difficulties of presenting the facts of a design or construction dispute to a judge with a crowded docket or a jury of individuals unschooled in the ways of the industry. They also noted other favorable characteristics of arbitration including limited discovery and motions practice, lower expense, accelerated overall proceedings, the opportunity to have disputes heard by arbitrators experienced in the construction industry, and the relative finality of judgments. Others pointed to litigation as preferable and complained that, with few exceptions, arbitration appeals are rarely permitted or successful. Some complained that arbitration can now take nearly as long as litigation and meet or exceed the cost of litigation, especially in a large and document intensive arbitration with a three-member arbitration panel, because the parties incur fees not only for their own attorney's time in evaluating and digesting an extensive record, but also for the arbitration panel's time.

Given the strongly held differing opinions expressed to the AIA about the desirability of continuing to require arbitration, the AIA recognized that uniformly requiring arbitration would no longer be desirable. For this reason, the 2007 owner/contractor and owner/architect agreements provide a choice of binding dispute

resolution method by use of a check box, another idea pioneered in the 2004 Design-Build agreements. The forms allow the parties to select "litigation," "arbitration," or "other," with a fill point provided for specifying the other method.

With that decision made, a substantial debate ensued as to which method would be the "default" in the event that the parties left the check boxes empty. Many vocal proponents of arbitration suggested that "arbitration" be specified as the default. The AIA concluded that to do so could create an ambiguity in the agreement with the potential to cause more litigation than it would avoid. Since arbitration is a purely consensual method of dispute resolution, concerns arose as to whether a court would rule that the parties had agreed to arbitrate if they had failed to select "arbitration" in the check box, but the form document provided for arbitration as the default. The AIA resolved the issue by providing an instruction that "litigation" is the default. By writing the instruction, the AIA does not imply a preference for litigation, but simply provides education regarding the result that would occur by reason of the parties' failure not to choose arbitration in the check box.

As was the case in the 1997 agreements, mediation remains a condition precedent to the selected method of binding dispute resolution. If the parties choose arbitration, the American Arbitration Association ("AAA") will administer the proceedings by default, but the parties may mutually agree otherwise. While this is consistent with the 1997 documents, A201–2007 includes minor changes to clarify that the entity administering the arbitration is a choice for the parties to make.

One change in the provisions regarding arbitration and mediation involves the rules which are to govern the dispute. Traditionally, A201 specified that the arbitration or mediation dispute would be governed the rules then in effect. The A201–1997 Commentary[6] explained that this provision meant that the AAA rules at the time of the dispute would apply, not the version of the rules in effect on the date of the parties agreement. A201–2007 changes this selection and provides that the applicable rules will be those in effect on the date of the agreement. The AIA concluded that the parties should not be faced with the uncertainty that rule changes in the interim would affect their dispute, since the individual parties have no influence on or input in such rule changes.

[6] *See* http://www.aia.org/SiteObjects/files/A201-1997Commentary.pdf

Consolidation of Arbitrations

Traditionally, A201 specifically precluded the consolidation of an arbitration between an architect and owner with a related arbitration between an owner and contractor. Various reasons existed for this approach, such as the difference in the standard of care applicable to a design professional as opposed to the standard applicable to a contractor, or the fact that multiple arbitrations proceeding together destroyed some of the benefits of arbitration, such as speed in resolution and lack of complexity. Throughout the years, this dichotomy has resulted in a continuous stream of criticism by some commentators who considered the refusal of the AIA to countenance such consolidations as (1) inefficient, because it could require the owner to conduct multiple arbitration proceedings relating to the same facts and circumstances, and (2) overly protective of the architect.

A201–2007 does not preclude consolidation of arbitrations. In fact, it specifically permits consolidation of arbitrations between the owner and contractor with other arbitrations, so long as certain conditions are met. First, the agreement from which the other arbitration arises must not preclude consolidation. Second, the arbitration to be consolidated must involve common issue of law or fact; and third, the arbitrations must employ materially similar procedural rules. Once an arbitration is consolidated into an arbitration between the owner and the contractor, any party to the consolidated arbitration may then further consolidate the proceeding with another arbitration it is involved in, subject to the same three conditions set forth above. The AIA's 2007 owner/architect agreements contain parallel provisions. As a result, under the 2007 A201 Family, the potential exists for the architect and its consultants, the owner, the contractor, and the subcontractors to participate in one multi-party arbitration.

In making this significant change, the AIA took special note of the fact that the American Arbitration Association amended its Rules in 2003 to deal more equitably with consolidated parties. The revised rules provide a special "consolidation arbitrator" make decisions to ensure fairness to a subsequently consolidated party.[7]

[7] *See* Rule 7 of the American Arbitration Association Construction Industry Arbitration Rules, effective July 1, 2003.

Time Limit on Claims/Statute of Limitations

Beginning with the 1987 Edition, A201 contained a "contractual" statute of limitations. The provision provided for the statute to commence running upon one of three events: substantial completion, final completion, or the date of warranty work corrected.[8] AIA owner/architect agreements included a similar provision, differing in that the third triggering event was the date when the architect substantially completed its services.[9] By tying the running of the time period to a certain date, architects and contractors avoided the uncertainly surrounding the discovery rule, and had the security of knowing a date beyond which they would not be exposed to potential liability.

These contractual statutes were successful in those states where the issue was tested; however, they resulted in a perceived unfairness to owners, who viewed the provisions as a substantial and unfair loss of rights in states that follow the discovery rule. Owners groups urged that the AIA follow applicable state laws. Reacting to the perceived inequity to owners, but attempting to balance the interests of architects and contractors that could be exposed indefinitely to liability, the AIA replaced the 1997 text with a provision requiring that causes of action must be commenced within the period specified by applicable law, but in no event more than 10 years after the date of substantial completion of the project. Further, the parties waive all claims not commenced in accordance with the revised text.

Consequential Damages

A201–1997, as well as owner/architect and architect/consultant agreements in the 1997 A201 Family, added a controversial waiver provision that eliminated each party's potential recovery of consequential damages.[10] Though the waiver is mutual, owners groups urged the AIA to delete the provision. They argued that because their losses due to consequential damages, such as for lost rents, dwarfed the amounts of the contractor's home office overhead claims, the waiver was not equitable or truly mutual. In spite of these comments, the AIA has left the provisions intact because they serve the purpose of avoiding large, complex claims that are generally uninsurable to both parties. If the parties know that they will not be able to recover consequential damages, they can plan

[8] *See* A201–1997, Section 13.7.
[9] *See* B141–1997, Section 1.3.7.3; B151–1997, Section 9.3.
[10] *See* A201–1997, Section 4.3.

accordingly. The only change in the provision is to remove a word that had caused confusion, the word "direct," as follows: "Nothing contained in this Section 4.3.10 shall be deemed to preclude an award of liquidated ~~direct~~ damages, when applicable. . ."

Additional Insured Provisions

Every edition of A201 since 1911 has provided that the Contractor would be obligated to procure certain policies of insurance. In 1911, that insurance was referred to as "accident insurance;" today it is called "liability insurance." Regardless of the title, the insurance was, and is, intended to protect the contractor from claims for bodily injury, death and property damage resulting from the contractor's operations and completed operations at the site.

This requirement to procure insurance was in furtherance of the longstanding policy underlying AIA documents to place risks which are the subject of insurance on insurance carriers, rather than on the parties to the contract. The insurance requirements of A201 have always been coordinated with the A201 indemnity provisions relating to bodily injury and property damage claims arising from the work.[11] Unfortunately, over the decades, many state legislatures, often at the behest of subcontractor organizations, have created a crazy quilt of laws relating to the enforceability and interpretation of indemnity provisions.

In 1997, the AIA attempted to resolve these issues by requiring a newly created type of insurance policy, called "Project Management Protective Liability Insurance." This requirement would bring all participants under a single policy which would deal with claims arising during the work for risks insurable under liability coverages. Unfortunately, this approach failed and few such policies were purchased. In investigating the reason for the failure, the AIA discovered that the industry had developed an alternative approach in widespread use: the use of "additional insured" endorsements. The AIA found that most owners were requiring contractors to add the owner and architect as "an additional insured" under the contractor's liability policy and that most contractors were doing the same with regard to their subcontractors. The insurance industry had responded by freely providing such endorsements at little or no additional cost.

[11] *See* A201–1997, Section 3.18.1.

The AIA has removed the requirement to provide Project Management Protective Liability Insurance and has replaced it with the solution that the industry developed. A201–2007 requires that the contractor add the owner, the architect and the architect's consultants as additional insureds under the contractor's general liability policy for liability arising out of the contractor's negligent acts or omissions during the contractor's operations, and that the owner be added as an additional insured for liability arising out of the contractor's negligent acts or omissions during the contractor's completed operations. The required endorsement does *not* require the contractor's insurer to cover claims arising solely out the acts or omissions of the owner or architect. Also, the "professional liability exclusion" contained in virtually all general liability policies will be applicable to claims against design professionals, if the claims arise from the design professional's professional activities, including design. The AIA has considered that the practical effect of this approach may be to cause the indemnity provisions, with the confusing statutory overlays, to become irrelevant to claims covered by the contractor's liability insurance.

Financial Information

Owner groups expressed serious concerns that the contractor's right in A201–1997 to request financial information from the owner, and to stop the work upon making such a request [12] was too broad and contained the potential for misuse. To address that concern, A201–2007 places some restrictions on the contractor's rights to receive such information after the work commences. In A201–2007, the contractor can make such requests after the work commences only if (1) the owner has failed 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 reasonable concerns regarding the owner's ability to make payments when due. Importantly, upon receiving the contractor's written request, the owner will still be required to provide reasonable evidence that it has made financial arrangements to fulfill its obligations under the contract. Providing such information will remain a condition precedent to commencement or continuation of the work and, after providing the evidence, the owner may not materially vary the information without prior notice to the contractor.

[12] *See* A201–1997, Section 2.2.1.

Other revisions to A201–1997 expressly provide the owner greater opportunity to learn of contractor/subcontractor payment problems, and to address a contractor's failure to pay a subcontractor. A201–2007 allows the owner to request written evidence from the contractor that the contractor has properly paid subcontractors. If the contractor fails to furnish such evidence, the owner can contact subcontractors to ascertain whether they have been properly paid. The same is true for payments made to material and equipment suppliers. Moreover, if the contractor fails to pay the subcontractor for work performed or materials suitably delivered, A201–2007 allows the owner to issue joint checks to the contractor and to any subcontractor or material or equipment supplier.

2007 AIA Owner/Contractor Agreements

Related Party Transactions

Revisions to A111™–1997, Standard Form of Agreement Between Owner and Contractor where the basis for payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price, and A114™–1997, Standard Form of Agreement Between Owner and Contractor where the basis of payment is the Cost of the Work Plus a Fee without a Guaranteed Maximum Price, require disclosure of "related party transactions." A "related party" includes a parent, subsidiary, affiliate or other entity having common ownership or management with the contractor; entities in which stockholders in, or management employees of, the contractor own an interest; any person or entity with the right to control the business or affairs of the contractor; and any member of the immediate family of any such person. If any of the costs to be reimbursed under the cost-plus contracts arise from a transaction between the contractor and a related party, the contractor must notify the owner of the specific nature of the contemplated transaction before the transaction is consummated or the costs are incurred. The owner then has the right to authorize the transaction. If the owner fails to authorize the transaction, the contractor must competitively procure the work, equipment, goods or services from some person or entity other than the related party.

The Cost of the Work

Other revisions to the cost-plus agreements add new items to the Cost of the Work including reimbursement of bonuses, profit sharing, incentive compensation, discretionary payments, and self-insurance costs, all with owner's prior approval. Other

revisions clarify how to calculate the costs of rental equipment and items not fully consumed performing the work, and grant the owner audit rights in any cost-plus subcontract. Also, the agreements prompt the contractor and owner to insert any limitations on subcontractors' overhead and profit for changes in the work.

2007 AIA Owner/Architect Agreements

Document Format

In 1997, the AIA released its flagship owner/architect agreement B141™–1997 as a two-part document. The AIA revised the format of B141 by separating the agreement into two parts: B141–1997 Part 1, the agreement terms, and B141–1997 Part 2, the scope of the architect's services. The AIA made this change to recognize, in a very prominent way, the change that had been taking place in the architecture profession over the previous ten years. Many architects found they could practice more successfully by developing specialties, such as by providing historic preservation studies and reports. These architects seldom needed an agreement to provide services for the design and construction of buildings; instead, they needed a contract form that would allow for a specialized scope of services. By separating the agreement from the scope of services, the AIA allowed architects to achieve infinite flexibility in contracting for their services.

When revising B141–1997 for release in 2007, the AIA took a hard look at the success of the two-part agreement. They found that while it served the interests of the specialist architect, it created undue complexity for the architect providing traditional design and contract administration services. Those architects and their clients had gravitated toward using B151™–1997, a one-part agreement for traditional services, modeled after B141–1987. Recognizing the validity of that choice, the AIA developed B101™–2007, a one-part document that follows the format of B151–1997, but uses text copied and edited from both B141–1997 and B151–1997.

B101–2007 consolidates and replaces B141–1997 and B151–1997. B101–2007 sets forth the architect's services during five phases: schematic design, design development, construction documents, bidding/negotiation, and construction contract administration. B101–2007 returns to the concept of "basic" and "additional" services and explicitly sets forth basic services in Article 3. Additional services, listed in Article 4, may be simply thought of as any service that is not a basic service. As such, additional

services may be included in the agreement when it is executed, or added as the project proceeds.

To provide an agreement for the specialist architect, or the architect who may initially provide services for a special scope of work (e.g., a security evaluation) and then provide traditional design and contract administration services, the AIA divided the text of B101–2007 into two parts: the agreement portion (per B141–1997 Part 1), and the services portion (per B141–1997 Part 2). These two new documents are numbered B102–2007 and B201–2007, respectively.

Standard of Care

B101–2007 includes a statement of the standard of care pursuant to which the architect shall perform its services. In large part, this is an entirely new addition to the owner/architect agreements. B141–1997 and B151–1997 only contain a vague reference to a standard of care, noting that "[t]he Architect's services shall be performed as expeditiously as is consistent with professional skill and care and the orderly progress of the Project."[13] While the clear implication from this language is that the architect's services are subject to a standard of care, the 1997 documents do not contain any statement as to what that standard of care is.

Generally speaking, like all professionals, an architect must perform its duties consistent with the degree of care and competence generally expected of a reasonably skilled member of the profession.[14] This standard of care applies in any professional activity an architect undertakes, regardless of whether or not the standard of care is stated in the contract for services.[15] The AIA found, however, that parties often added standard of care language to contracts irrespective of this fact. The AIA also discovered that, in many cases, the general standard of care was misstated. The high occurrence of misstating the standard of care troubled the AIA because it could lead to a general misunderstanding as to the actual standard. More seriously, however, the AIA was

[13] *See* AIA Document B141–1997, Section 1.2.3.2; AIA Document B151–1997, Section 1.2.
[14] *See Barnett v. City of Yonkers*, 731 F. Supp. 594, 601 (S.D.N.Y. 1990).
[15] *See id; Kerry Inc. v. Angus-Young Associates, Inc.*, 694 N.W.2d 407, 411 (Wis.App. 2005). *See generally* Steven G.M. Stein, Construction Law, ¶ 5A.04 (2006).

concerned that the misstatements could lead to architects unknowingly agreeing to standards of care greater than the standard to which they would normally be held.[16]

Accordingly, the AIA saw fit to include a clear and explicit statement of the generally applicable standard of care in its 2007 revisions stating that the architect will perform its services consistent with that level of skill and care ordinarily provided by architects practicing under the same or similar circumstances. It is true that from state to state the applicable standard of care may be stated slightly differently, however, the above definition is generally accurate nationwide. Additionally, the definition is sufficiently flexible to adapt to each state's particular standard of care. It is the AIA's intent that B101–2007 will provide the owner with a better understanding of the common law standard of care for an architect. Practically speaking, however, the inclusion of this standard of care provision in the contract will have essentially no impact on the nature of the architect's services, as those services have always been subject to this standard of care.

Insurance Requirements

Another new addition to the A201 Family is the requirement in the owner/architect agreements that the architect maintain insurance. B101–2007 contains a provision requiring the parties to specify the types and limits of insurance the architect is required to maintain. Where those requirements exceed the types or levels of insurance the architect normally maintains, the owner is required to reimburse the architect for the costs of obtaining such excess insurance. B141–1997 and B151–1997 contained a similar requirement that excess insurance the owner required the architect to obtain was a reimbursable expense, however, those documents did not contain an explicit duty on the part of the architect to maintain any minimum levels or types of insurance.

The AIA added this provision after considering a number of factors. Owners groups were demanding that such a provision be added, and many architects had requested that a similar provision be added as well. Traditionally, the AIA has omitted a provision regarding insurance requirements based on the understanding that many architects did not carry insurance. In evaluating the status of the current design industry,

[16] *See Mississippi Meadows, Inc. v. Hodson*, 299 N.E.2d 359, 361 (Ill. App. 1973) (noting that an architect owes a duty to perform with reasonable skill and care absent a special agreement otherwise).

however, the AIA reconsidered its position. The AIA found that a vast and overwhelming majority of architects already maintained insurance as part of their regular practices. Additionally, the AIA recognized that it was commonplace in today's construction industry for owners to require such a provision in the owner/architect agreement, and for the most part, architects complied. As such, the inclusion of this requirement merely makes B101–2007 consistent with the current business climate, and promotes responsible practice on the part of architects.

Sustainable Design

> The AIA recognizes a growing body of evidence that demonstrates current planning, design, construction, and real estate practices contribute to patterns of resource consumption that seriously jeopardize the future of the Earth's population. Architects need to accept responsibility for their role in creating the built environment and, consequently, believe we must alter our profession's actions and encourage our clients and the entire design and construction industry to join with us to change the course of the planet's future.[17]

Such is the AIA's position in support of its stated public policy that architects must be environmentally responsible in performing their work and advocate for the sustainable use of Earth's resources in the creation and operation of the built environment in which we live.[18] In furtherance of this public policy, the AIA has undertaken a number of initiatives to promote sustainability and to shape the landscape of environmentally responsible design and construction. Pursuant to one such initiative, the AIA is promoting the adoption of design methods that will result in a 50 percent or greater reduction in the consumption of fossil fuels used to construct and operate new and renovated buildings by the year 2010. Additionally, the AIA has adopted a benchmark goal that by 2030 all new and renovated buildings will consume no fossil fuels, thus making them carbon neutral.

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[17] AIA Board of Directors, *Directory of Public Policies and Position Statements*, 2005 Am. Inst. of Architects 16, *at* http://www.aia.org/SiteObjects/files/Public_Policy_ Directory _revised_1205.pdf. *See also* U.S. Dep't of Energy, *2006 Buildings Energy Data Book*, Table 1.1.3, http://buildingsdatabook.eere.energy.gov/docs/1.1.3.pdf (noting that in 2004, buildings accounted for nearly 40% of the total energy consumption in the United States).

[18] *See id.* (the AIA's relevant public policy: "The creation and operation of the built environment require an investment of the earth's resources. Architects must be environmentally responsible and advocate for the sustainable use of those resources.").

In order to reach these goals, however, the construction industry, and those involved in it must change. As the most widely used standard form agreements in the industry, the AIA contract documents must also change. Accordingly, B101–2007 requires the architect, during the schematic design phase and as part of its basic services, to discuss with the owner the feasibility of incorporating environmentally responsible design approaches into the project. Through this discussion, the owner and the architect are to reach an understanding with regard to the project's overall requirements, and how environmentally responsible design will be incorporated into the design. The owner may require environmentally responsible design solutions that exceed the limit of the architect's basic services. That limit is set forth in Article 3 by requiring the architect to consider environmentally responsible design alternatives, such as building orientation and material choices, in preparing a schematic design to the extent the alternatives are appropriate to the project and consistent with the owner's stated program, schedule and budget. Therefore, if the owner requests extensive design alternatives such as unique system designs, in-depth materials research, energy modeling, or LEED® certification, the architect will provide those services as an additional service for additional compensation.

B101–2007, however, does not place the burden or duty of achieving environmentally responsible design solely on the architect—that burden falls upon the owner and the architect together. In the end, owners decide the ultimate level of environmentally responsible design that will be incorporated into their buildings. The B101–2007 provisions bring environmentally responsible design into the minds of the owner and the architect while the project's specific requirements are being developed. As such, B101–2007 provides a platform for the architect to fulfill the AIA's public policy without imposing open-ended design requirements on the architect to make all buildings they design environmentally responsible.

Intellectual Property Rights (Instruments of Service)

Owners groups criticized the AIA's 1997 owner/architect agreements for not allowing the owner more liberal use of the architect's intellectual property (the

instruments of service) in the event of a termination of the agreement.[19] The AIA recognized that provisions in AIA agreements written to protect the architect's ownership rights were confusing and rigid regarding the requirement that, following any termination of the agreement, the architect had to be adjudged in default before the owner could use the architect's instruments of service to complete the project. The AIA has overhauled these provisions for clarity and has added provisions for the owner to have more access to the architect's instruments of service to construct, use, maintain, alter, and add to the project, provided the owner has paid the architect all amounts due. Use of the architect's instruments of service where the architect is not involved, following the owner's termination for convenience or after the project is completed, will be without liability to the architect.

Conclusion

The revisions to the A201 Family are not limited to those addressed in this article, although the revisions presented here represent some of the more significant and most hotly debated changes. Regardless of the extent of the change, however, they all are products of the AIA's extensive efforts to seek, review, analyze, and discuss industry feedback from all parties whose interests may be significantly affected by individual agreements. As a result of this process, the AIA A201–2007 Family continues the AIA's tradition of striving to produce agreements that fairly balance divergent interests, and accurately reflect the modern construction industry.

Suzanne H. Harness, Esq., AIA, Managing Director and Counsel, AIA Contract Documents, The American Institute of Architects; with the contributions of Associate Counsels Kenneth W. Cobleigh, Esq. and Michael B. Bomba, Esq.; and of Howard G. Goldberg, Esq., Goldberg, Pike and Besche, P.C., Baltimore, MD.

[19] B141–1997, Section 1.3.2.2; B151–1997, Section 6.2.