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## CONSTRUCTION LAW

# A New Decade Dawns for AIA Contracts

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*Special to the Legal*

For the construction law bar, the ubiquitous and widespread use of the American Institute of Architects' (AIA) contracts by public entities, developers, owners, contractors and architects all but assures their continued presence in construction litigation.

On April 27, the AIA issued revised versions of its flagship documents for the first time since 2007. Whether advising a client in advance of commencing work or reviewing for impending litigation, there are several key changes to the new contracts that are important to every practitioner. We address the most significant changes to the owner and contractor agreement, the subcontract and a new form of agreement for sustainable building.

### AGREEMENT BETWEEN OWNER AND CONTRACTOR

The A107-2007, the standard agreement between an owner and a contractor, is now the A104-2017. The incorporated A201—the General Conditions of the Contract for Construction—was also revised, but retains the same document number.

Under the new A104, contractors have additional rights to verify the sufficiency of a project's financing. In addition to requiring an owner provide evidence of adequate financing, the contractor is not required to commence work until the owner has provided such evidence. An owner who delays providing evidence must grant an



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extension of time to the contractor to complete its work.

The revisions also include more stringent and defined notice requirements. Although general notice may be effectuated in person, by mail, or an agreed-upon electronic transmission, notice of claims must be in writing and delivered by certified or registered mail, or by courier with proof of delivery. Because most project correspondence occurs by email or other electronic means, the requirement that claims be served by mail or courier will likely cause some contractors to overlook

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the notice requirements, and, as a result, inadvertently waive otherwise valid claims. During the claims process, a contractor must continue to perform work and an owner must continue to pay the contractor. Another change occurred because of complaints that the architect's role as an “initial decision maker” was unfair. The revised A201 requires that the initial decision maker “not show partiality” to either the owner or the contractor.

In the event a mechanic's lien is filed by a subcontractor, supplier, or vendor, and the owner has fulfilled its payment obligations, the contractor now owes a specific indemnification obligation to the owner including liability for attorneys' fees.

On the insurance front, the 2017 revisions introduce a new insurance exhibit that the parties may add to their contracts—the A101-2017 “Exhibit A.” The new document includes more options with

respect to types of coverage, lengths of coverage, and limitations on liability. However, the parties are only required to select liability limitations for three specific types of insurance: commercial general liability, employer's liability, and automobile insurance. The insurance exhibit will likely prompt the parties to be more thoughtful in determining the specific insurance requirements for their project, and should allow contractors to more easily ensure that subcontractors maintain adequate levels of insurance. The revised agreement also imposes additional obligations on both parties relating to insurance coverage. For example, contractors are required to disclose whether they maintain deductibles or self-insured retentions, and owners are responsible for losses that are not covered by deductibles or self-insured retentions on their builder's risk policies. Also, owners may suspend work on a project in the event of insurance coverage lapses.

Finally, the revised AIA agreement contains a new provision relating to construction change directives (CCDs)—that is, directives to contractors to perform extra work in the absence of agreement on the terms of a change order. This provision is long overdue, given the disputes over the force and effect of CCDs and the proper methods to determine compensation. Under the new provision, if a contractor signs a CCD, then its signature constitutes acceptance of the terms and conditions—including compensation, time, and the methods by which they are calculated. In the event of disagreement, the contractor must promptly proceed with the work, and notify the architect or engineer of its disagreement.

## **SUBCONTRACT BETWEEN CONTRACTOR AND SUBCONTRACTOR**

The A401—the agreement between a contractor and subcontractor—also underwent several significant revisions. Notably, both the contractor and subcontractor must now identify, in writing, the person who is authorized to make binding decisions for each of them on all project matters requiring approval or authorization. Contractors have a duty to timely make decisions and in accordance with the schedule.

With respect to claims or payment issues, a subcontractor now has the contractual right to receive a copy of a payment bond covering its work within 30 days of its written request, and must promptly provide a copy of its payment bond to any potential beneficiaries. Further, the revised A401 specifically explains that the mutual waiver of consequential damages does not include liquidated damages.

Many of the provisions added or modified in the A104 were carried into the A401, including the requirement to disclose insurance deductibles and self-insured retentions. Subcontractors must alert contractors of a lapse, or impending lapse, of insurance coverage within three days. In the event that a lien is filed, subcontractors will owe contractors similar indemnification obligations that contractors owe to owners. Finally, the notice provisions for claims from the new A104 were carried into the new A401 subcontract.

## **CONTRACT ADDENDUM FOR SUSTAINABLE CONSTRUCTION**

The E204-2017 is a new document meant to clarify responsibilities undertaken by the owner, architect, and contractor to achieve green building objectives. This document may be attached to most AIA agreements once an owner has decided the project must meet a “sustainable objective,” defined as “the owner's goal of incorporating sustainable measures into the design, construction, maintenance and operations of the project to achieve a sustainability certification or other benefit to the environment, enhance the health and well-being of the building occupants or improve energy efficiency.” This objective could include a goal as stringent as obtaining a specific LEED certification, or as simple as the use of more recycled materials.

The sustainable objective is defined in the sustainability plan, which the architect bears responsibility for preparing after meeting with the owner. This plan is a contract document that identifies and describes targeted sustainable measures; implementation strategies; the owner's, architect's and contractor's roles and responsibilities; specific details about design reviews, testing, or metrics to verify achievement of the goals; and the required sustainability documentation.

Two specific sections of the E204 are particularly notable. Section 4.1 requires the owner to ensure that “each of its contractors and consultants performs the contractor's or consultant's services in accordance with the sustainability plan.” Section 6.1 attempts to absolve the contractor and the architect from liability in the event that the project does not achieve the sustainability objective by stating that neither party guarantees that the project will meet the objective. Given these two competing interests, we expect that owners whose buildings do not obtain the desired objective will test this provision in the courts—especially if there is some evidence that the architect or the contractor failed to strictly follow their contractual obligations.

## **CONCLUDING THOUGHTS**

Although not discussed here, the AIA's 2017 overhaul included revisions to contract forms between owners and architects, construction contracts based on various fee arrangements, and the AIA's most simple form utilized for small or residential projects. We encourage the readers to review and familiarize themselves with all of the new contract forms.

As the 2017 versions of these agreements are put into use, contractors, owners, and architects will rely on the construction bar to ensure that they are in a position to best protect their rights when negotiating and litigating in this new landscape. Taking the time to read and understand these new provisions will best prepare attorneys for the inevitable conflicts that are certain to arise on increasingly complex construction projects. •

