CONSTRUCTION LAWYER'S GUIDE TO THE 2007 AIA A201 "GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION"

Steven B. Lesser and Belinda A. Bacon

This article was originally developed for the Florida Bar Construction Law Institute in March 2008, was modified to appeal to a more national audience and published in two parts in the Construction Litigation Reporter *in April and May 2008, and has now been further revised and reconsolidated for publication in the* TIPS Law Journal.

INTRODUCTION

On November 5, 2007, the American Institute of Architects (AIA) issued its 2007 version of *A201 General Conditions of the Contract for Construction* (A201 2007).[1] A201 has been the most widely used document in the AIA family of contract documents dating back to 1911. This latest revision cycle introduces both significant and subtle changes that impact the rights and responsibilities of owners, contractors, design professionals, and subcontractors.[2]

AIA revises its documents every ten years to keep pace with a fast-moving, ever-changing industry while balancing the interests of participating parties.[3] Earlier versions of A201 offered little assistance to construction participants looking to make sense of various provisions, including the dispute-resolution process, mutual waiver of consequential damages, insurance, and the right of the contractor to obtain financial assurances from the owner during construction.

AIA solicited feedback from industry representatives such as the Associated General Contractors of America, the American College of Construction Lawyers, the American Bar Association Forum on the Construction Industry (ABA Forum), and others to address a wide range of concerns with this latest version.[4] Notwithstanding these efforts, A201 2007 has quickly become a focal point of controversy and criticism. Indeed, after fifty years of endorsing A201, the Associated General Contractors of America recently declined to do so.[5]

1. All references to "AIA A201" relate to *AIA Document A201™-2007*, published by AIA.

2. This article will also refer to other 2007 AIA documents. The 1997 version of the agreement between the owner and architect designated as the two-part B141 has now been revamped as a single document designated as B101, with a more detailed version for use on large-scale projects designated as B103. The 2007 revisions include the creation or modification of nearly forty contract documents. *See* 14 AIArchitect (Nov. 2, 2007).

3. Industry comments were solicited from more than a dozen owner, engineer, attorney, and contractor groups. *See* Suzanne Harness, *Overview* to Charles M. Sink, A. Holt Gwyn, James Duffy O'Connor & Dean B. Thomson, The 2007 A201 Deskbook 2 (ABA 2008).

4. The coauthor of this paper, Steven B. Lesser, in his capacity as chair of the Division 12, Owners and Lenders Steering Committee of the ABA Forum, met with the A201 AIA Documents Committee along with Division 12 members Stanley J. Dobrowski of Columbus, Ohio, and Christopher S. Dunn and L. Wearen Hughes of Nashville, Tennessee, to provide the perspective of owners and lenders relative to proposed changes to AIA A201.

5. In a letter dated October 9, 2007, the Associated General Contractors of America declined to endorse the use of AIA A201 2007. *See* Associated General Contractors of America,

This paper will address many new controversial issues in AIA A201 2007, including the shift to litigation serving as the default mechanism to resolve disputes as opposed to arbitration, the role of a new participant, the "initial decision maker," insurance provisions, hazardous waste, and the ten-year statute of repose.[6]

Throughout this paper, a "Practice Tip" section is included to provide the construction practitioner with some practical drafting suggestions and advice.

ARTICLE 1—GENERAL PROVISIONS

1.1.7 *Instruments of Service & 1.5.1 & 1.5.2 Ownership and Use of Drawings, Specifications and Other Instruments of Service*

This new provision eliminates the "project manual." Instead, "instruments of service" now include ". . . without limitation, studies, surveys, models, sketches, drawings, specifications, *and other similar materials.*"[7] Deletion of the project manual coupled with this sweeping definition of *instruments of service* suggests that the conventional dog-eared project manual replete with forms, specifications, and other hard-copy design documents has become obsolete.[8]

Overall, the 2007 AIA documents acknowledge an industry trend moving toward achieving a paperless exchange of data among various participants in the design and construction process.[9] As building information

AGC Members Unanimously Vote Against A201 Endorsement, Constr. News (Oct. 12, 2007), *at* www.agc.org/cs/news_media/press_room/press_release?pressrelease.id=72.

6. This paper is not intended to include an exhaustive discussion of all changes. Only the most controversial changes will be addressed. For a complete table-style listing with AIA's comments on every change, see *AIA Document A201™–2007 Commentary* © 2007, a free paper available at www.aia.org/SiteObjects/files/Condocs_A201Comm.pdf; *see also* Sink et al., *supra* note 3. Various controversial holdover provisions from 1997 remain, such as the mutual waiver of consequential damages, and will not be discussed. For a thorough discussion of holdover provisions from A201 1997, *see* Mark J. Heley, John Markert, Shannon J. Briglia & Daniel J. Wierzba, *Lessons Learned: How the 1997 Revisions to A201 Have Fared After 10 Years. Litigation Experience and Negotiation Tips*, *in* The 2007 AIA Documents: New Forms, New Issues, New Strategies (ABA 2008) (distributed at ABA Forum Midwinter Meeting, Jan. 2008).

7. A201 § 1.1.7 (2007).

8. James Duffy O'Connor, *The Demise of the Project Manual; Early Bird Financial Disclosures: Hazardous Haz-Mat Revisions & Insuring the Uninsurable*, *in* The 2007 AIA Documents: New Forms, New Issues, New Strategies (ABA 2008) (distributed at ABA Forum Midwinter Meeting, Jan. 2008). It is important for the practitioner to avoid reviewing these changes in a vacuum. Although the project manual reference is deleted in A201, § 3.4.3 of B101 2007 requires the architect to "compile a project manual that includes the Conditions of the Contract for Construction and Specifications and may include bidding requirements and sample forms."

9. *Id.*

modeling (BIM)[10] is introduced to the construction industry, assorted provisions of A201 and other AIA documents, including the Digital Data Licensing Agreement,[11] further evidence the popularity of this approach. Now that digital sharing of information has become commonplace, participants must confront issues associated with copyright ownership as they assess liability for contributing design details that may ultimately result in a building defect. Owners and contractors agree that copyright protection over instruments of service in both tangible and intangible form provides design professionals with powerful leverage over a construction project.[12]

In A201 2007, new §§ 1.5.1 and 1.5.2, under the paragraph 1.5 heading of "Ownership and Use of Drawings, Specifications and Other Instruments of Service," were created to replace the former § 1.6.1 of A201 1997. Section 1.5.1 covers copyright ownership, and § 1.5.2 covers usage rights and restrictions. These provisions need to be read in conjunction (and coordination) with AIA's owner/architect agreements, which set out the respective rights of those two parties. Prior versions of AIA documents revoked license agreements if an owner terminated the architect for any reason.[13] B141 1997 required all documents be returned to the architect in the wake of termination.[14] Use of a project's instruments of service could be reinstated but only after the architect was adjudged liable for a breach, which might occur many years later.[15] Without use of these documents, construction would be brought to a sudden halt, exposing the project's owner to delay damages claims from the contractor. Although an

10. *See* Benton T. Wheatley & Travis W. Brown, *An Introduction to Building Information Modeling*, 27 Constr. Law. 33 (Fall 2007); *Preparing for Building Information Modeling*, AIA Prac. Mgmt. Dig. (Summer 2007).

11. Digital Data Licensing Agreement, AIA C106 (2007); Digital Data Protocol Exhibit E201 (2007).

12. Section 1.1.7 does not limit the definition of *instruments of service* to tangible materials. The Associated General Contractors of America recognize that the digital transfer of data is at the forefront of today's project delivery approaches to integrated design and construction. *See* Charles M. Sink, Mark D. Petersen & Howard Goldberg, *Lessons Learned: The Evolution of AIA Document A201 from 1963 to 2006, and a Look into the Future*, *in* Lessons Learned: Benefiting Your Project from Others' Experiences—Good and Bad (Apr. 2007) (distributed at ABA Forum Annual Meeting, Carolina, Puerto Rico). Other industry groups have contemplated the use of digital data as found in the EJCDC C-700 *Standard General Conditions* § 3.6 (2007) (only hard copy may be relied upon; conclusions or information derived from electronic files at user's risk) and *Guideline on Exchanging Documents and Data in Electronic Form* (AGC 2005), as well as the recently published ConsensusDOCS 200.2 *The Electronic Communications Protocol Addendum* (2007) (accuracy of data conveyed electronically is responsibility of transmitting party).

13. B141 § 1.3.2.2 (1997).

14. *Id.* B101 2007 and B103 2007 do not require the owner to return the documents to the architect.

15. *Id.*

improvement to earlier versions, B101 2007 still allows the architect to terminate the nonexclusive license because of nonpayment.[16]

One new feature of B101 2007 provides greater flexibility to use instruments of service without participation of the architect.[17] However, in that scenario, the owner must release, indemnify, and hold harmless the architect and its consultants for any damages resulting or arising from the owner's continued use.[18] A fair reading of this provision also suggests that the original architect and its consultants would be released from any liability for defects or errors and omissions in the plans should they be used to complete the project without participation of the architect.[19] Note that the license is restricted to the present project and does not extend to other projects or future additions.[20]

One shortcoming of this provision is a failure to provide copyright protection to others that provide input into the ultimate creation of instruments of service.[21] As documents become more collaborative through the electronic exchange process, others may supply details and contribute to the design, such as trade contractors who likewise should be entitled to copyright protection.[22] Notwithstanding this reality, AIA provides only that the architect and its consultants own the documents.[23]

PRACTICE TIP: First, in representing an owner, negotiate with the architect the owner's right to use these documents in the event of termination or suspension, along with refining the scope of the indemnity to the architect. The provisions of § 1.5.2 should then be modified to match the owner/architect agreement, which should (after negotiation) provide an owner with rights to renovate or add to the existing project. Owners should hold the architect liable for design errors or omissions in the original and unaltered instruments of service when reused on future

16. B101 § 7.2 (2007).

17. *Id.* A new provision exists to compensate the architect that is terminated for convenience and without cause. In accordance with B101 § 11.9.1 (2007), a stipulated licensing fee will be due as compensation for use of the instruments of service to complete, use, and maintain the project.

18. B101 § 7.3.1 (2007).

19. *Id.*

20. A201 § 1.5.2 (2007); B101 § 7.3 (2007).

21. This is evidenced by language in § 1.5.1 providing that only the "architect and the architect's consultants shall be deemed the authors and owners of their respective Instruments of Service."

22. Value engineering is commonplace on construction projects and so are details generated in the field along with structural connections and similar details, which appear to have been ignored by this provision.

23. *See* A201 § 1.5.1 (2007), *supra* note 21. This also could prove problematic because by signing and sealing the documents, the architect could be liable for faulty connections and details supplied by others that provided input into the design.

projects.[24] Termination of the license for nonpayment should be modified to allow the owner to withhold payment as justified in B101, and B101 and A201 should both allow for continued use of the license. Likewise, nonpayment of a small portion of the fees to the architect should not bar the parties from continued use of the instruments of services. For example, modify the respective provisions as follows: "Once the architect has been paid in full for the completion of the plans, a failure to pay for contract administration services will not deprive the owner of its license to use them."[25] Architects must also be wary that the right of indemnification may be meaningless when dealing with the owner of a single-purpose, single-asset entity.[26] Finally, the owner should consider negotiating with the architect to acquire a more extensive ownership interest beyond a nonexclusive license if the project is unique, such as a museum, and if future renovation and expansion are contemplated.

1.1.8 *Initial Decision Maker (IDM)*

Traditionally, the architect determined a variety of issues involving claims, extensions of time, contract sum adjustment, and interpretation of contract documents.[27] The crucial role of the architect's initial decision on many matters served as a condition precedent before a party could demand mediation or arbitration.[28] In addition, A201 1997 required the architect to certify termination of the contractor.[29] This approach changes with A201 2007 because a new party, the initial decision maker (IDM), is introduced to resolve disputes and issues previously reserved to the architect.[30] One

24. Design professionals have liability for plans and specifications that they sign and seal. *See*, *e.g.*, Moransais v. Heathman, 744 So. 2d 973 (Fla. 1999). Note that design professionals cannot absolve themselves from liability. *See* Kerry, Inc. v. Angus-Young Assocs., Inc., 280 Wis. 2d 418, 426, 694 N.W.2d 407, 411 (Ct. App.), *rev. denied*, 286 Wis. 2d 98, 705 N.W.2d 659 (Wis. 2005); Florida Power & Light Co. v. Mid-Valley, Inc., 763 F.2d 1316 (11th Cir. 1985).

25. Most architect agreements encompass both design and contract administration services for a project. If the owner pays for the design services, a license to use the documents should not be interrupted because of a dispute and nonpayment during the contract administration phase. If such a dispute occurs, in Florida, for example, the architect has grounds to secure payment by recording a claim of lien pursuant to Fla. Stat. § 713.04 (4) (2007).

26. Many participating entities in the design and construction process form limited liability companies to shield assets and avoid liabilities. This is very commonplace among owner groups seeking to develop residential and commercial projects. Although the indemnification feature appears to be meaningful, it may be worthless if the owner is a shell corporation or single-purpose, single-asset entity.

27. A201 § 4.4 (1997).

28. *Id.* § 4.4.1. Note that claims relating to hazardous materials were excluded from this procedure as provided in §§ 10.3–.5 of A201 1997.

29. A201 § 14.2.2 (1997).

30. A201 § 14.2.2 (2007).

goal of this provision is to allow the project to continue without disruption in accordance with the initial decision, subject to later appeal through the mediation, arbitration, or litigation process.[31]

Drafters of A201 2007 endorsed the IDM process based on contractor feedback.[32] Historically, contractors viewed the architect as biased given that the owner selected and paid for design and contract administration services.[33] Moreover, many believed that architects could not be impartial when faced with deciding disputes arising from allegations of negligence over improper design documents or a failure to timely respond to various requests during the project.[34] In this instance, the architect would likely be reluctant to render an initial decision blaming itself for delays and/or defective work.[35]

Despite its critical role in deciding claims and as a prerequisite to mediation, arbitration, or litigation, the IDM process is fraught with controversy and confusion. Although the architect still prepares change orders and issues certificates of payment, A201 2007 requires that these documents must be "in accordance with decisions of the Initial Decision Maker."[36] Yet, the document fails to guide the IDM on what, if any, deference must be given to decisions made by the architect. To illustrate, assume that the architect refuses to certify a payment because the contractor failed to install an expansion joint feature, which caused the pool deck to leak. In the event of a dispute, what if the IDM decides that the leak resulted from the architect's error in failing to properly detail the expansion joint? Now, the architect and IDM have reached inconsistent opinions, and no mechanism exists in A201 to resolve the conflict.

Appointment of an IDM may require additional expense, but the document fails to specify the party responsible to pay for the IDM's services, except in one instance. To the extent that the IDM requires assistance from others to make a decision, the owner must pay this expense as an additional service.[37]

31. *See* Sink et al., *supra* note 3.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. A201 § 15.1.3 (2007).
37. A201 § 15.2.3 (2007); B101 § 4.3.1.11 (2007). This B101 section specifies that providing "[a]ssistance to the Initial Decision Maker, if other than the Architect," will be an additional service to be paid by the owner. One could reasonably infer that because the owner pays for additional assistance needed by the IDM, the owner would also pay for all other IDM services unless an agreement exists to the contrary. A201 General Conditions refers to "the" IDM as contrasted with § 3.6.2.5 of B101, which refers to "an" IDM. The approach in B101 seems to imply that parties would have the option to designate IDMs who have expertise in the specific subject matter of each disputed issue. Thus, B101 implies that there may be more

Focusing on the objective surrounding the IDM process, this payment structure seems silly for two reasons. First, one objective in creating the IDM was to remove any financial bias of the party making the initial decision, so payment by the owner defeats this objective. Second, this process requires the owner to conceivably pay two parties to decide issues, compared to A201 1997, where the authority rested solely in the architect.

As many questions arise from this arrangement, the lack of guidance in A201 2007 will likely foster disputes. For example, what document exists to detail the nature and scope of the IDM's undertaking? What standard of care applies to the IDM?[38] Is the IDM required to be a design professional, general contractor, lawyer, or scientist? What guidelines exist to provide parties with comfort that the process will be productive and unbiased and not generate confusion? What if the parties agree on an IDM and that person becomes unavailable or a conflict of interest exists when a dispute arises?

Absent an agreement to address these issues, the IDM process may fail. The IDM may be reluctant to participate without first acquiring liability protection for decisions made in good faith. After all, A201 has always applied this "safe harbour" to the architect,[39] but no similar provision exists in A201 2007 to protect the IDM from liability exposure. Likewise, although the architect is specifically required to be insured,[40] no similar requirements apply to the IDM.

PRACTICE TIP: The IDM process is inherently complicated, so a written exhibit to the contract should be generated to deal with controversial and/or disputed issues. To overcome bias based on payment, the owner and contractor should share responsibility for payment, or, alternatively, payment should be made by the nonprevailing party to a dispute referred to the IDM. Designate a secondary party to serve as a substitute IDM or specify certain qualifications in case the selected IDM becomes unavailable. An IDM should be called upon sparingly and only when the size of

than one IDM for multiple decisions, whereas there is no such implication in A201. The approach in B101 seems preferable because it would permit the parties to designate IDMs who have expertise in the specific subject matter of each disputed issue.

38. B101 now includes for the first time a standard of care provision. *See* B101 § 2.2 (2007). The standard of care applies in any professional activity that an architect undertakes, regardless of whether the standard of care is stated in the contract for services. *See generally* Steven G. M. Stein, Construction Law § 5A.04 (2006).

39. A201 § 4.2.12 (2007).

40. B101 § 2.5 (2007). The parties should be mindful that if the IDM is not a design professional, professional liability insurance would not be available. Nevertheless, general liability and workers' compensation insurance should be acquired if the IDM will be physically present at the project.

the project warrants the expense. Absent a detailed plan and agreement governing the IDM process, the parties would be wise to avoid the process altogether and rely on the architect to serve in this capacity. Alternatively, nothing limits either party from delegating responsibility to a third party for resolution on certain issues.

1.6 *Digital Data Transmission*

This new provision requires a separate agreement to outline a protocol for transmitting instruments of service in digital format. By generating forms entitled "Digital Data Licensing Agreement" and "Digital Protocol Exhibit," AIA allows transfer of intellectual property among several participating parties that provide input on a given project.[41] Exchange of digital documents reflects an industry motivated to speed up construction, reduce conflicts, and produce an integrated product comprised of input from the project team. Recognizing that live computer-aided design and drafting (CAD or CADD) files can be altered, responsibility and liability issues multiply when determining where the revision originated and whether it was properly coordinated. Written protocols must be established to assess responsibility for improper revisions that ultimately cause damage. Not much guidance is offered by this new provision, as highlighted by the language suggesting that the parties "endeavor to establish necessary protocols governing such transmissions."[42]

PRACTICE TIP: A written agreement and protocol must be generated to deal with the transfer of digital data to track revisions made by each party in the circulation chain. The protocol should outline the qualifications of each party authorized to modify these documents. In addition, the parties should reach a consensus as to professional liability coverage for team members and address treatment of blanket disclaimers and limitations of liability. Team building should be emphasized and efforts undertaken to foster collaboration among team members so that input is not introduced in a vacuum. Design professionals should be mindful that the Digital Data Licensing Agreement describes the representation of ownership as a warranty that may fall outside the professional errors and omissions insurance maintained by the architect.[43]

41. Commentators note that these AIA forms were created to "establish all of the required protocols to serve our present and future data transmission needs" and "to facilitate the transfer and use of such information, while at the same time, protecting each party's property rights in the intellectual property created by that party." *See* Sink et al., *supra* note 12.

42. A201 § 1.6 (2007).

43. Digital Data Licensing Agreement § 2.1, AIA C106 (2007).

ARTICLE 2 — OWNER

2.2.1 *Disclosure of Owner Financial Arrangements*

The 1997 version of A201 allowed the contractor to refuse to commence or continue work until the owner produced reasonable evidence that financial arrangements had been made to satisfy the owner's payment obligation to the contractor.[44] Historically, owners complained that contractors routinely abused this provision by repeatedly requesting financial information knowing that the owner could not quickly assemble this information. The language of the 1997 version proved helpful to a contractor seeking to employ an overly expansive interpretation of the phrase *reasonable evidence that financial arrangements have been made to fulfill the owner's obligations under the Contract* to include a full-scale audit.[45] Sufficient mischief under the 1997 version motivated AIA to impose new restrictions upon a contractor's ability to gain financial information after work commences.[46] A201 2007 entitles a contractor to acquire financial assurances prior to commencement of the work except if one of three potential circumstances exists: (1) owner's failure to pay "as the Contract Documents require," (2) change in the work that "materially changes" the contract sum, or (3) contractor has a reasonable concern that is reduced to writing regarding the owner's ability to pay when payment is due.[47]

1) Owner's failure to pay as the contract documents require. It is difficult to require disclosure of financial arrangements following commencement of the work under A201 2007 unless a complete lack of justification exists for nonpayment. A201 offers a wide variety of justifications for nonpayment, such as deficiencies in the work and claims of third parties, including failure to pay subcontractors, the likelihood of liens, or other claims that may be asserted.[48]

---

44. A210 § 2.2.1 (1997).

45. *Id*. *But see* Fluor Daniel Caribbean, Inc. v. Humphreys (Cayman) Ltd., No. 04 Civ. 686 (DC), 2005 WL 1214278 (S.D.N.Y. May 23, 2005) (letter from CFO stating balance of project financing available from lender exceeds contract amount, and other correspondence constituted "reasonable evidence" of owner's ability to meet payment obligations under the contract).

46. *See* Sink et al., *supra* note 12. The owner's position has improved since 1987, where § 2.2.1 of A201 required disclosure of financial assurances even before the parties executed the contract. By issuing such a request to hassle the owner, a contractor could justify stopping work pending production of this information and create a concurrent delay attributed to the owner. In the wake of delays attributed to the contractor, relief from liquidated damages could be realized.

47. A201 § 2.2.1 (2007). Interestingly, the reasonable evidence of financial arrangements required to be produced relates to the owner's obligations under the entire contract as opposed to, perhaps, the one payment that the owner failed to pay.

48. A201 § 9.5.1.1–.7 (2007).

2) Change in the work that materially changes the contract sum. The term *materially changes the Contract sum* raises a question of degree without definition or certainty. Disputes will likely arise as a result of the ambiguity. It is unclear whether a "material change"[49] must be monetary to trigger the right to financial assurances. For example, an owner may think that by extending the contract time from 60 to 120 days, he is merely authorizing a "no cost change order," but the contractor may seek reasonable evidence of financial arrangements to enable the contractor to evaluate whether the owner has the financial ability to pay for the additional overhead and other delay costs associated with this sixty-day extension of time. If evidence is lacking, the contractor would be justified in stopping work.[50]

3) Contractor has a reasonable concern that is reduced to writing regarding the owner's ability to pay when payment is due. In contrast to the obstacles inherent in using the first two of the three provisions, the third provides the contractor with great latitude. Utilizing this option, a contractor must only demonstrate that a "reasonable concern"[51] exists to justify a request for financial information. A request could even be based upon a newspaper article suggesting that the owner is having financial difficulty or a bankruptcy filing is contemplated. A simple printout of public record lien claims against the property by separate contractors hired directly by the owner could be sufficient. This provision is likely to prompt litigation because it offers no guidance as to who decides what constitutes a "reasonable basis."[52] Most importantly, the provision fails to require the contractor to continue to perform its work pending resolution of a dispute over the sufficiency of the financial evidence produced by the owner.[53]

PRACTICE TIP: This provision is riddled in controversy, especially when a contractor feels uneasy about its new relationship with an owner who has formed a single-purpose, single-asset limited liability company

49. *Material* is defined as "being both relevant and consequential." Ocean Harbor Cas. Ins. Co. v. Aleman, 765 So. 2d 754, 756 (Fla. Dist. Ct. App. 2000) (quoting American Heritage Dictionary of the English Language 1109 (3d ed. 1996)). Surety law also provides insight as to what may be deemed a material change. A material change in the underlying contract made without a surety's consent operates as a discharge if the modification materially increases the surety's risk. John T. Callahan & Sons, Inc. v. Dykeman Elec. Co., Inc., 266 F. Supp. 2d 208, 235–36 (D. Mass. 2003) (citing Nat'l Sur. Corp. v. United States, 118 F.3d 1542, 1544 (Fed. Cir. 1997)); Leila Hosp. & Health Ctr. v. Xonics Med. Sys., Inc., 948 F.2d 271, 275 (6th Cir. 1991); United States v. Reliance Ins. Co., 799 F.2d 1382, 1385 (9th Cir. 1986); Reliance Ins. Co. of Phila. v. Colbert, 365 F.2d 530, 534 (D.C. Cir. 1966).

50. A201 § 2.2.1 (2007).

51. *Id.*

52. *Id.*

53. A201 § 15.1.3 (2007) provides that pending final resolution of a claim, "Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents."

for the project. In this regard, the contractor would be justified in seeking financial assurances every step of the way. At the outset of any project, the contractor should request financial assurances before commencement of work. If a specific date for commencement of the work is not defined, care should be taken to make the request as early as possible to qualify to receive this information.[54]

A simple letter requesting the information is all that would be required. As the term *reasonable basis* is not defined, certain guidelines should be incorporated into the contract to describe those instances when financial assurances will be required. Generally, financial assurances would be required when (i) a monetary threshold for change orders has been exceeded; (ii) delays result in the contract time being exceeded by a certain percentage of the original days specified in the contract; (iii) a bankruptcy proceeding has actually been filed, as opposed to hearsay reporting such as a newspaper account. The contractor should also consider requiring periodic production of financial statements and other related information at milestone dates during the project without the necessity of sending written requests to the owner during the project.

ARTICLE 3 — CONTRACTOR

3.7.3 *Knowingly Performing Work Contrary to Applicable Law*

This provision eliminates the 1997 language *without such notice to the Architect and Owner* when a contractor knowingly performs work contrary to applicable law.[55] In these circumstances, the contractor is responsible. Should the contractor be responsible if notice is provided to the architect and owner and, notwithstanding that notice, the contractor is instructed to proceed? Additionally, why should a contractor only be liable when it knowingly performs the work contrary to the building codes, ordinances, and applicable law? Why not impose some other standard of care, such as negligence?

PRACTICE TIP: The original language should be reinserted to protect the contractor if the contractor advises the architect or owner that work contrary to applicable law is being performed, but instructions are given to proceed anyway. In that circumstance, the contractor should be relieved of liability. From the owner's standpoint, the word *knowingly* should be eliminated to hold the contractor liable for damages that result from work performed contrary to applicable codes and ordinances.

54. A201 § 3.1 (2007) provides thus: "The date of commencement of the Work shall be the date of this Agreement unless a different date is stated below or a provision is made for the dates to be fixed in a notice to proceed issued by the Owner."

55. *See* A201 § 3.7.4 (1997). A201 § 3.7.3 (2007) eliminates the referenced language.

3.7.5 *Human Remains, Archaeological Sites and Wetlands*

When a contractor encounters human remains, archaeological sites, or wetlands not identified in the contract documents, guidance from others must be acquired relative to proceeding.[56] Unlike concealed or unknown conditions, which require no less than a twenty-one-day written notice[57] after discovery, this condition allows the contractor to immediately cease operations and notify the owner.[58] This provision further requires the owner to "promptly take any action necessary to obtain governmental authorization required to resume the operations."[59] To the extent that adjustments of the contract sum or contract time arise, the twenty-one-day notice of claim provisions apply under Article 15.

PRACTICE TIP: One shortcoming of this provision relates to confusion surrounding when a claim must be submitted. Under Article 15, does the time period to submit a claim begin twenty-one days from discovery of the condition (when the owner is first notified) or at some other time? By virtue of this ambiguity, the contractor should provide a written notice immediately and assert any claim within twenty-one days from first recognition of the condition in order to comply with Article 15. The failure to comply with the twenty-one-day notice period may enable the architect or IDM to ultimately deny the claim based upon a lack of timeliness.[60]

3.9.2 *Superintendent*

The owner now has the right to object to appointment of a candidate to serve as superintendent.[61] Although applauded for its efforts, AIA has built

56. A201 § 3.7.5 (2007).

57. A201 § 3.7.4 (2007). This provision also creates confusion because there are no time parameters for the architect to complete its investigation once the concealed or unknown condition is reported by the contractor.

58. A201 § 3.7.5 (2007). There is no time stated for giving the notice nor is there a specified procedure for the architect to recommend, investigate, or make a determination. Instead of proceeding through an equitable adjustment process under Article 7, the parties must proceed with the claims procedure described in Article 15.

59. *Id.* The goal is to promptly resolve the situation to enable construction to continue.

60. *See, e.g.*, Am. Nat'l Elec. Corp. v. Poythress Commercial Contractors, Inc., 167 N.C. App. 97, 604 S.E.2d 315 (2004) (subcontractor's claims barred for not meeting A201 notice of claim requirement); Standard Elec. Serv. Corp. v. Gahanna-Jefferson Pub. Sch., No. 97APA12-1566, 1998 WL 542697 (Ohio Ct. App. Aug. 25, 1998) (contractor's claim not timely filed as contractor failed to establish it had submitted claim within required twenty-one days); Tuttle/White Constructors, Inc. v. State, 371 So. 2d 1096 (Fla. Dist. Ct. App. 1979) (contractor's claims dismissed for not meeting A201 notice of claim requirement).

61. A201 § 3.9.2 (2007). The owner will also be provided with an opportunity to approve a change in superintendent during the project, but approval will not be unreasonably withheld or delayed under A201 § 3.9.3 (2007).

in opportunities for delay by providing an inordinate amount of time, fourteen days, to object. To make matters worse, the provision even allows the architect to request additional time to review the appointment.[62]

PRACTICE TIP: In representing the contractor, reduce to five days the time to review and object to the appointment of the superintendent. Depending on the location of the project, the parties should require that the superintendent be qualified to speak English or Spanish.

3.10.2 *Submittal Schedule*

The contractor's failure to provide a submittal schedule will result in monetary consequences. Specifically, this failure will result in loss of the contractor's ability to recover additional time or money based upon the time it may take the architect to review the submittals.[63] Be mindful that the obligation applies to the original and other schedule.[64] Additionally, with respect to green building projects, as there is yet no uniformly reliable industry consensus in certifying many green products,[65] the reasonable time for the architect to review green-related submittals will likely need to be extended and should include time for multiple submittals on the same item. When a project has a goal of a particular level of Leadership in Energy and Environmental Design (LEED) certification, the submittal process takes on even more significance as the use of certain environmentally friendly products and systems can count toward LEED points.[66]

PRACTICE TIP: Recognizing that the contractor may lose its right to claim additional time and money for delay in the review of the submittals by the architect, the construction practitioner should modify the section to establish an outer limit for the architect's review. Otherwise, the architect would have unlimited time to review the submittal without any consequences. Once the specified time period has been exhausted, the contractor's right to recover additional time and money for delay could be reinstated.

---

62. *Id.* If the architect requests additional time for review, no outside time limit has been specified.

63. A201 § 3.10.2 (2007). It is unclear if this provision only applies to a complete failure to provide a schedule or, alternatively, if it apples to a schedule or updates that are not timely submitted.

64. *Id.*

65. *See (Mis)Understanding Green Products*, ENR (Nov. 19, 2007).

66. Under the U.S. Green Building Council (USGBC) LEED rating system (vol. 2.2) (2005), certified requires 26–32 points; silver, 33–38 points; gold, 39–51 points; and platinum, 52–69 points. The materials and resources chosen can add thirteen possible points, and choices made for certain products and systems that improve the indoor environmental quality can add fifteen possible points.

3.18.1 *Indemnification*

Project management protective liability insurance purchased by the contractor, as an alternative to indemnity, has been eliminated.[67] Questions remain, however, whether the AIA language conforms to various state laws governing indemnity.[68] In addition, it appears that the lead sentence *To the fullest extent permitted by law* conflicts with the later provision limiting indemnification to "the extent caused by the negligent acts or omissions of the Contractor."[69]

PRACTICE TIP: Owners may elect to expand indemnity to instances beyond the stated limitation for bodily injury, sickness, disease, or death or damage to personal property to include lien claims, infringement, stop-work notices, governmental actions created by the contractor, or contractor's failure to perform an obligation under the contract documents. It is also recommended that owners consider adding the duty to defend as an obligation associated with the indemnification provision.[70]

ARTICLE 4—ARCHITECT

4.1.1 *Owner's Obligation to Retain Licensed Architect*

This provision places an affirmative obligation on the owner to retain a lawfully licensed architect in the jurisdiction where the project is located.[71] This requirement makes sense, but there are some instances where states may not require a license. For example, Florida does not require a license to design a single-family home.[72] Does this provision take into account these

67. A201 § 3.18.1 (2007). Project management protective liability insurance was included in the 1997 version of A201 for the first time.

68. For a survey of various state laws, *see* Jeffrey M. Hummel & Z. Taylor Shultz, *Indemnification Principles and Restrictions on Construction Projects*, Constr. Briefings (Aug. 2005).

69. *See*, *e.g.*, Cabo Constr. Inc. v. R.S. Clark Constr., Inc., 227 S.W.3d 314 (Tex. App. 2007) (ambiguous indemnity provisions are unenforceable). For a more in-depth discussion of indemnities, *see* Steven G. M. Stein & Shorge K. Sato, *Advanced Analysis of Contract Risk-Shifting Provisions: Is Indemnity Still Relevant?* 27 Constr. Law. 5 (Fall 2007). Additionally, most jurisdictions impose strict construction in favor of indemnitors, even where the underlying actions sound purely in contract. *See*, *e.g.*, Cordis Corp. v. Baxter Healthcare Corp., 678 So. 2d 847, 848 (Fla Dist. Ct. App. 1996); Playskool, Inc. v. Elsa Benson, Inc., 147 Ill. App. 3d 292, 100 Ill. Dec. 837, 497 N.E.2d 1199 (Ill. App. Ct. 1986).

70. *See* Stein & Sato, *supra* note 69. The duty to defend is a specific obligation to assume, upon tender, the defense obligations and costs of another. This duty to defend is broader than a duty to indemnify; and if covered and uncovered claims exist, the duty to defend will apply to the entire lawsuit. Otherwise, the indemnification absent a duty to defend would not create any obligation until the case is concluded and the indemnitee prevails. *See*, *e.g.*, Metro Dade County v. CBM Indus. of Minn. Inc., 776 So. 2d 937, 939 (Fla. Dist. Ct. App.), *review dismissed*, 797 So. 2d 585 (Fla. 2001) (holding that the duty to defend extends to the entire lawsuit).

71. A201 § 4.1.1 (2007).

72. Florida recognizes an exemption for buildings erected on farms as well as single- or two-family homes that qualify for an exemption pursuant to Fla. Stat. § 481.229(1) (2007), entitled "Exceptions: Exemptions from Licensure."

types of exceptions? Without modification, the obligation is continuous so the owner must perform due diligence and make sure that the architect's license does not lapse. If so, what recourse does the contractor have should the license lapse during the performance of the work? Certainly, the owner should be able to rely on public record information to satisfy these requirements. Otherwise, a burden will be placed on the owner to drill down and investigate the nature and extent of the license not only for the original architect, but also for any successor architect.[73]

Additionally, on green building projects involving the LEED Green Building Rating System,™ if the project is being implemented by a LEED Accredited Professional (LEED-AP) architect, the owner may have an added layer of needing to perform a LEED-AP credential verification on that architect. At this stage, the inquiry can stop there as the continuing education and other periodic reporting requirements for LEED-AP credential holders is still in the process of being established.[74]

PRACTICE TIP: To avoid being overburdened, owners should modify B101 to place an affirmative duty on the architect to provide the owner with periodic proof of the active status of its license and its LEED-AP credentials, if applicable, which the owner may reasonably rely upon during the course of the project. The provision should require the architect to notify the owner at least thirty days in advance of any expiration or termination of its license or credentials.

4.2.1 *Duration of Contract Administration Services*

Issuance of the final certificate for payment now establishes the termination of contract administration services.

PRACTICE TIP: One concern arises if the contractor defaults and a final certificate for payment is never issued or delayed. In that event, § 4.2.5 of B101 2007 may provide an outside time limit before such services are deemed additional services. Consider extending these services until final payment has been made to the contractor. The architect's assistance also could be needed for other issues, such as opining on the propriety of deliverables to be exchanged at the time of final payment. Although "related documents" are referenced,[75] it should be specified that this review

73. A201 § 4.1.3 (2007).

74. The Green Building Certification Institute (GBCI), a separately incorporated entity established with the support of the USGBC, is in the process of "[e]stablishing maintenance requirements for LEED Accredited Professionals [to] ensure that the credential continues to distinguish those building professionals who maintain current knowledge and skills to successfully steward the LEED Certification Process with their thorough understanding of green building principles and practices and of the LEED Rating System." *See* www.gbci.org/DisplayPage.aspx?CMSPageID=19.

75. A201 § 4.2.9 (2007).

be accomplished before the certificate is issued. In addition, the owner may elect to include some later inspection after final payment but before expiration of the one-year warranty period.[76]

4.2.2 *Site Visits*

The phrase "endeavor to guard the Owner against defects and deficiencies" that was included in 1997 has now been eliminated.[77] Although an obligation exists to report defects and deficiencies observed in the work, this change raises a question about whether the obligations to the owner have been diluted. This change is also included in § 3.6.2.1 of B101.[78] The phrase regarding site visits "as otherwise agreed with the owner" is new and perhaps contemplates a written agreement outlining when specific site visits will be performed.[79]

PRACTICE TIP: All specific site visits requested by the owner should be incorporated into A201 or be the subject of a separate written exhibit.

4.2.3 *Architect's Reporting Obligation*

The architect has an obligation to report to the owner any defects and deficiencies in the work, deviations from the contract documents and the construction schedule. The architect, however, is not required to document these observations in writing. New is the provision obligating the architect to report on known deviations from the "most recent construction schedule submitted by the Contractor."

PRACTICE TIP: This new obligation will prompt the owner to ascertain whether the architect has the necessary skill and resources to review and monitor the schedule. Frequently, architects may not be qualified to review schedules and detect changes in logic or schedule manipulation. It may be advisable for this review to be deleted from the architect's responsibility and be delegated to an outside scheduling consultant. All reports should be in writing. A major flaw in the AIA documents is the failure to specify the type of schedule to be used for a project, such as critical path methodology (CPM), acceptable to the parties in sufficient detail to demonstrate the timing, duration, and sequence of events consistent with time limits under the contract documents.[80]

76. A201 § 12.2.2.1 (2007).
77. A201 § 4.2.2 (1997).
78. A201 §§ 4.2.2–.3 (2007). Does the elimination of *endeavor to guard* suggest the elimination of a proactive approach to discover deficiencies in the work?
79. *Id.*
80. Use of CPM to plan, schedule, and manage construction projects has become an accepted standard in the construction industry. *See, e.g.*, Johnson Constr. Co. v. United States, 854 F.2d 467 (Fed. Cir. 1998); *see also* John S. Vento & Michael F. D'Onofrio, *Counsel's Role*

4.2.8 *Contractor Requests for Equitable Adjustments*

The added provision requires that the "Architect will investigate and make determinations and recommendations regarding concealed and unknown conditions as provided in Section 3.7.4."[81] However, this provision, like § 3.7.4, fails to specify when the investigation will occur and what timing is associated with an issuing recommendation.[82]

PRACTICE TIP: There should be some timing requirement associated with § 3.7.4 for those activities not governed by the claims procedure described in Article 15.

4.2.11 *Architect as Interpreter*

The architect should not resolve disputes over matters as to whether the owner or contractor is in default of its respective contractual obligations.[83] The architect is not in a position to interpret matters other than those that relate to technical architectural and engineering requirements set forth in the contract documents.

PRACTICE TIP: This provision should be modified to define and limit the architect's authority to decide issues related to technical, architectural, and engineering matters.

4.2.14 *Requests for Information*

The architect is now obligated to respond to requests for information (RFI) about the contract documents with "reasonable promptness," although no other time limit has been specified.[84]

PRACTICE TIP: As RFI and the architect's failure to timely respond often serve as a basis for a contractor's delay claim, the words *so as to avoid delay to the construction of the Project* should be inserted into this provision. Best practices require that an RFI log be generated and maintained by the architect.[85]

When Dealing with Mid-Course Adjustments in Project Planning and Scheduling and Resultant Claims, *in* Another Perfect Storm (Oct. 25–26, 2007) (distributed at ABA Forum Fall Meeting, Newport, R.I.).

81. A201 § 4.2.8 (2007).

82. A201 § 3.7.4 (2007).

83. A201 § 4.2.11 (2007).

84. A201 § 4.2.14 (2007). This new provision expands on the A201 § 3.2.2 (1997) provision, which required the contractor to notify the architect of any errors, omissions, or inconsistencies discovered. Now, under § 3.2.3 of A201 2007, the duty extends to any "nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require."

85. AIA has published *The RFI's Role in the Construction Process* (Mar. 2006) to outline best practices to be followed when dealing with RFI. The paper highlights the potential for abuse of the RFI process and ways to improve the process and prevent RFI on construction projects. In addition, this document recommends that certain specified fields be included in project

Other LEED / Green Building Considerations

B101 2007 includes new provisions for the design of projects that have a goal of obtaining LEED certification or otherwise contemplate some green elements, including § 4.1.1 Programming, § 4.1.6 Building Information Modelling (BIM), § 4.1.22 Commissioning (referencing a new document, B211™-2007), § 4.1.23 Extensive Environmentally Responsible Design, and § 4.1.24 LEED® Certification (referencing a new document, B214™-2007). Although there are not yet any such specific elements in A201 2007, most of the concepts presented through green design are reliant upon the cooperation of the contractor to properly implement them. Moreover, for these sustainability initiatives to become commonplace in the construction industry, construction contracts, along with the design contracts, have to specifically incorporate new duties, including a paradigm shift from the well-established linear relationships to more of a shared project model that is akin to a spoke-and-wheel approach, as has been advocated for the use of BIM, with the project itself being the hub and each party a spoke feeding into it.[86]

However viewed, green concepts require a greater level of interaction among contractor, designer, and owner than tradition has previously dictated. This shift necessarily translates to greater up-front costs for the project, no matter what eventual long-term benefits offset the investment. To create a truly green project, owners must recognize and accept the need for this greater capital investment, not only for more costly green products, but also for the longer time involved and higher level of skill required to achieve most green goals.

For example, up to two LEED points can be gained if the contractor recycles a good portion of the construction waste. Owners and designers may be quick to assume these are fairly easily obtainable points: just recycle instead of trashing everything. But, to actually gain these particular LEED points on a project, a contractor needs to first determine what waste can be diverted, set up the means and methods for it to be separated from the rest of the waste and subsequently handled, and then carefully document what percentage of the total waste materials actually gets diverted.[87] All of those new tasks provide a basis for a contractor to reasonably seek extra time and

RFI forms, including the impact of costs, schedules, drawings, and other pertinent information. *See also* Buckner Hinkle Jr. & Michael I. Less, *Dealing with the Cumulative Effects of RFI's Change Order Requests and Change Directives, in* Another Perfect Storm (Oct. 25–26, 2007) (distributed at ABA Forum Fall Meeting, Newport, R.I.).

86. *See* Howard W. Ashcraft, Bruce R. Gerhardt & Timothy M. O'Brien, *Successfully Navigating Your Way Through the Electronically-Managed Project, in* Another Perfect Storm (Oct. 25–26, 2007) (distributed at ABA Forum Fall Meeting, Newport, R.I.).

87. LEED for New Construction and Major Renovations (ver. 2.2 Oct. 2005): MR Credit 2.1: Construction Waste Management: Divert 50% from Disposal; MR Credit 2.2

money, especially when, otherwise, the contractor would not have needed to do anything but have a basic dumpster service on-site.

ARTICLE 5 — SUBCONTRACTORS

5.4.1 & 5.4.3 *Contingent Assignment of Subcontracts*

When an assignment occurs, the owner becomes responsible to subcontractors for all obligations of the contractor who has been terminated for default.[88] Inequities could flow from this provision, especially when the owner paid the defaulted contractor for the work but these funds were never transmitted to the party that actually performed it, putting an obligation on the owner to pay twice for the same work. Additional problems arise by creating privity of contract between the subcontractors and the owner.

PRACTICE TIP: The provision will only produce meaningful results if clear assignment language is included in each subcontract setting forth the rights and obligations of the affected parties. Otherwise, it will be difficult for the owner to convince a noncooperative subcontractor to perform under this arrangement, especially for a new (successor contractor) that may not work well with a particular subcontractor.

ARTICLE 8 — TIME

8.2 *Progress and Completion*

The 1997 version allowed the contract time to begin once the contractor provided written notice. A201 2007 eliminates that option and clarifies that a precise date in the contract or issuance of a notice to proceed will commence running of the "ContractTime."[89] With a defined start date

Construction Waste Management: Divert 75% from Disposal; LEED Credit: 1 point for 50% and an additional point for 75%. "Intent: Divert construction, demolition and land-clearing debris from disposal in landfills and incinerators. Redirect recyclable recovered resources back to the manufacturing process. Redirect reusable materials to appropriate sites. Requirements: Recycle and/or salvage at least 50%[/75%] of non-hazardous construction and demolition debris. Develop and implement a construction waste management plan that, at a minimum, identifies the materials to be diverted from disposal and whether the materials will be sorted on-site or co-mingled. Excavated soil and land-clearing debris do not contribute to this credit. Calculation can be done by weight or volume, but must be consistent throughout." *Id.* at MR Credit 2.1.

88. A201 § 5.4.1 (2007). The same considerations would apply to instances where the owner assigns the subcontract to a successor contractor or other entity as outlined in A201 § 5.4.3 (2007).

89. At A201 § 8.2.2 (2007), the last sentence has been removed. Paragraph 8.2.2 of A201 1997 previously provided thus: "Unless the date of commencement is established by the Contract Documents or a notice to proceed given by the Owner, the Contractor shall notify the Owner in writing not less than five days or other agreed period before commencing the Work, to permit the timely filing of mortgages, mechanic's liens and other security interests."

and a contract time expressed in terms of days, this approach helps reduce some of the ambiguity that may otherwise accompany the application of daily bonus amounts for early completion or daily liquidated damages for late completion.[90]

PRACTICE TIP: State a specific date of commencement in the contract documents. If the start date is contingent upon building permit issuance, then use a phrase such as *"The Date of Commencement shall be 5 days after contractor obtains the building permit for the project."* Another option is to provide for the date of commencement to be the date stated in a written notice to proceed to be issued by the owner.

ARTICLE 9 — PAYMENTS AND COMPLETION

9.2 *Schedule of Values*

The contractor must now show the owner how the entire stipulated sum or guaranteed maximum price (GMP) of a contract breaks down among individual line items. Most typically, a schedule of values follows construction specification institute (CSI)[91] divisions, but no requirement exists to use those divisions for allocation; nor is there any requirement or guidance offered regarding the level of detail required when preparing the schedule of values. For example, a table showing prices for three line items—labor, material, and equipment—would be a schedule of values that allocates the entire contract sum, but it still must be "prepared in such form and supported by such data to substantiate its accuracy as the Architect may require." Consequently, a schedule of values with limited detail would likely not conform to this standard.

A schedule of values may be ambiguous when incorporating a line item for general conditions. Many times owners and contractors stipulate that general conditions will be a fixed percentage of the contract sum based upon the "cost of the work" component of the contract. This approach requires the owner to specify those categories of items, such as telephone and computer Internet service, dumpsters, and similar items that would be included within the general conditions. An itemization of general conditions components will prevent a contractor from including other individual line

90. *See, e.g.*, Technip Offshore Contractors v. Williams Field Servs., No. CIV.A. H-04-0096, 2007 WL 869534 (S.D. Tex. Mar. 21, 2007) (bench trial needed to determine precise date when liquidated damages began to accrue).

91. The CSI format for scheduling values includes a sixteen-division structure. CSI has recently updated its format to include fifty divisions in its 2004 edition of *MasterFormat*. For more detailed information, *see* Charles E. Gulledge III et al., MasterFormat 2004 Edition: 2007 Implementation Assessment (Sept. 4, 2007), *available at* www.csinet.org/s_csi/docs/14900/14844.pdf.

items in a schedule of values that cover the same type of costs. This will avoid double payments by the owner for the same costs already covered under the general conditions line item. For internal auditing and accounting purposes, contractors often use very detailed schedules of values but are reluctant to share those details with owners or architects, especially when there is no basis to require such a disclosure in a stipulated sum contract. However, for a cost-plus contract with a GMP, a more detailed schedule of values will enable the owner and its construction lender to track all costs.

PRACTICE TIP: For owners to make best use of this provision, reference a particular format and level of detail for the schedule of values, whether CSI or another, so that any schedule of values submitted contains sufficient detail to provide the owner and architect a reasonable way to track the progress of the project. Contractors will be best served by deleting the remainder of text in this provision after the words *various portions of the Work*, enabling them to reallocate scheduled values at will over the course of the project.

9.5 *Decisions to Withhold Certification*

At § 9.5.1.7, *persistent* is replaced by *repeated*, modifying the phrase *failure to carry out the work in accordance with the Contract Documents*.[92] *Persistent* means "insistently repetitive or continuous,"[93] whereas *repeated* means "said, done or occurring again and again"[94] and allows for some passage of time between repeated instances. This change provides the architect with more flexibility to withhold certification for payment, and the owner potentially gets greater protection as a result.

PRACTICE TIP: A contractor should modify the provision by inserting the word *substantially* so that it reads "repeated failure to carry out the work substantially in accordance with the contract documents." In this instance, the architect must point to more than one significant deviation from the contract documents before withholding payment that is otherwise due.

9.5.3 *Joint Checks*

New language provides the owner with a right, under certain circumstances, to issue joint checks.[95] Some protection already exists based upon state lien laws that provide statutory mechanisms to guard against lien claims by third-party subcontractors and material suppliers.[96] Under many

92. A201 § 9.5.1.7 (1997); A201 § 9.5.1.7 (2007).
93. American Heritage College Dictionary 1019 (3d ed. 2000).
94. *Id*. at 1157.
95. A201 § 9.5.3 (2007).
96. *See*, *e.g.*, Fla. Stat. §§ 713.001–.37 (2007).

circumstances, however, an owner may be well served to issue joint checks to potential lienors and the contractor.[97]

Note, however, that under A201 2007 joint checks can be "forced" by the architect unilaterally determining under § 9.5.1.3 that the contractor has failed to make payments properly to a subcontractor, without any duty to discuss or verify the owner's concerns with the contractor.[98] A forced joint check may portray the contractor in an unflattering light as one who cannot be trusted with the owner's money. The owner may find that it has undermined the authority of the very entity it needs to rely on to marshal all of the subcontractors to properly complete the work.

Alternatively, a joint check issued as an interpleader is a potentially effective way to remove an owner and potential liens on the owner's property from a dispute that is solely between the contractor and subcontractor or supplier, unrelated to the quality of the work. In that instance, it is very likely that the joint check could be issued with the contractor's consent and still should be exchanged for a waiver and release of lien from the subcontractor or supplier.

PRACTICE TIP: Contractors should delete this provision. A compromise, to make the provision more objective, would be to remove *at its sole option* and replace the phrase with *after Contractor fails to furnish written evidence in accordance with § 9.6.4.*

9.6 *Progress Payments*

At § 9.6.2, the provision has been revised to replace *promptly* with a seven-day turnaround time from the time a contractor is paid to the time subcontractors must be paid. For certain contractors, this may present a problem, particularly if their accounting department only cuts checks twice a month.

PRACTICE TIP: Consider changing seven days to fourteen or more, depending on the circumstances of the contractor's accounting system.

9.6.4 *Owner's Right to Contact Subcontractors Regarding Proper Payment*

This new "right to contact Subcontractors" may become burdensome on owners as it removes the single point of responsibility and other benefits

97. The California *Post* rule, based on *Post Bros. Constr. Co. v. Yoder*, 20 Cal. 3d 1, 141 Cal. Rptr. 28, 569 P.2d 133 (1977), provides that a materialman, by endorsing a joint payee check, is deemed to have received the money due him. *See also* Sidney R. Barrett Jr., *Joint Check Arrangements: A Release for the General Contractor and Its Surety*, 8 Constr. Law. 7 (Apr. 1988).

98. Although § 9.6.4 of A201 2007 gives an owner the right to request written evidence that the contractor has "properly" paid subcontractors, there is no duty for an owner to do so. For example, a subcontractor could represent that it has not been paid on this particular

that an owner derives from hiring a general contractor, as opposed to multiple prime contractors.

PRACTICE TIP: Contractors should revise this provision, limiting the owner's right to contact subcontractors only for specific purposes, for example, prior to the owner issuing joint checks under § 9.5.3 or as a prerequisite for the architect to decide whether to withhold payment under § 9.5.1.3.

9.10 *Final Completion and Final Payment*

The contractor must prepare a written notice to specify that the work is ready for final inspection.[99] This change provides clarification of earlier versions to prevent confusion among participants as to when all punch list items have been completed.

PRACTICE TIP: Prior to making final payment, an owner should ensure that it receives as-built plans and other items such as manufacturers' warranties.

ARTICLE 10 — PROTECTION OF PERSONS AND PROPERTY

10.3 *Hazardous Materials*

10.3.1

The standard A201 1997 language of § 10.3.1 requires a contractor to immediately stop work and report, in writing, to the owner and architect upon the discovery of a hazardous material on the site "[i]f reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from [that] material or substance . . . encountered on the site by the Contractor."[100] In A201 2007, the parties find a new introductory catchall that "[t]he Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials."[101] A201 2007 goes on to provide, as a new conjunctive prerequisite before a contractor is entitled to stop work and report the condition to the owner, that the contractor must first encounter a hazardous material or substance not addressed in the contract documents.[102] The catchall phrase and its application as a new prerequisite before the contractor can

project when, although a sufficient payment was made by the contractor to cover the portion of the subcontractor's work on the project, it was applied by the subcontractor to a past-due bill for another project with this contractor.

99. A201 § 9.10.1 (2007).
100. *See* A201 § 10.3.1 (1997).
101. A201 § 10.3.1 (2007).
102. *Id.*

stop work provide a setting ripe for abuse by a dictatorial-type owner. Such an owner could bury—within the supplemental conditions, a general note on the drawings, or elsewhere in the project-defined contract documents that were prepared by the owner in advance of bidding or negotiating with potential contractors—provisions that mention or implicate atypical duties of the contractor with respect to hazardous materials. The danger for the contractor is that with the new § 10.3.1 phrase, little opportunity exists to argue that the specific procedure outlined within the specific hazardous materials section of the general conditions creates an exception to, or at least an ambiguity in, other more general phrasing that may be included within other portions of the contract documents. Instead, now the diligent contractor will need to carefully explore all of the proposed project's contract documents to see what may or may not be deemed the contractor's responsibility with respect to a discovered hazardous material, and then price such risk accordingly.

PRACTICE TIP: Add an exhibit that lists those portions of the contract documents that address hazardous materials. This approach will clarify the division of responsibility for hazardous materials between the owner and contractor. The contractor also needs to be sure that the contract documents appropriately address the procedures to be followed regarding not only known or likely-to-be-encountered hazardous conditions on the site but also the discovery of hazardous conditions unknown at the time of contracting. Without clarification, it is quite plausible that the new contract language, by the catchall phrasing of "any requirements included in the Contract Documents regarding hazardous materials,"[103] could attribute full responsibility to the unsuspecting contractor, who simply encounters a completely unanticipated hazardous material on the site.[104]

10.3.3

The owner's broad indemnity provision in 1997 has been limited to remove responsibility in instances where a contractor, subcontractor, the architect, or architect's consultant, who is seeking indemnity, is at fault or negligent.

10.3.4

This provision establishes the contractor's fault or negligence in handling hazardous materials or substances, even as to such materials or substances that the owner required the contractor to bring to the site.

103. *Id.*

104. Alternatively, it is not likely that either of the parties, by any attempted contractual risk-shifting provision, would be able to exempt itself from the strict liability standard of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9600 (CERCLA).

10.3.5

The contractor indemnifies the owner under this provision (except to the extent of the owner's negligence), yet, potentially for the same occurrence, § 10.3.3 requires the owner to indemnify the contractor (except to the extent of the contractor's negligence). The separated clauses and the dual-indemnity obligations raise questions of efficiency and inconsistency, such as duplication of trials and varying burdens of proof.[105]

10.3.6

This provision could be read to limit an owner's need to indemnify a contractor to the particular case when a government agency, and not any other entity, finds the contractor liable for what was actually the owner's responsibility.

PRACTICE TIP: Delete § 10.3.5 and *delete by a government agency* from § 10.3.6.

ARTICLE 11 — INSURANCE AND BONDS

11.1 *Contractor's Liability Insurance*

Completed operations is now explicitly referenced in A201 as part of the insurance that a contractor must acquire for the project.[106] The AIA language requires continued coverage of a contractor's commercial general liability (CGL) policy through any applicable warranty period for corrective work. This is problematic because a CGL policy is not purchased to cover particular projects but typically follows a twelve-month policy period. After each period, the renewal notice may come with a new set of exclusions and endorsements, or the policy may not be renewed and a new one may be issued by a different insurer. Moreover, the availability of completed operations coverage depends on when an injury occurs[107] and what policy, if any, is in effect at the time the injury occurs.[108] Frequently, completed

105. For a more in-depth review, *see generally* 3 Bruner & O'Connor on Construction Law § 10.35 (Thomson West 2007); 2 Bruner & O'Connor on Construction Law § 5:205 (Thomson West 2007).

106. A201 §§ 11.1.1–.1.4 (2007).

107. As to when an injury occurs, there are four commonly accepted triggers of coverage theories: (1) exposure, (2) manifestation, (3) continuous trigger, and (4) injury in fact. Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co., 227 F. Supp. 2d 1248, 1266 (M.D. Fla. 2002). Florida has adopted a manifestation trigger, holding that property damage occurs at the time damage manifests itself or is discovered; to illustrate, in *Auto Owners*, coverage was triggered February 1991 for work completed in 1984 because the damage did not manifest itself until February 1991. *Id.* at 1266. The CGL policy that the court decided should be looked to for completed operations coverage is the one that the contractor had in effect in February 1991. *Id.* at 1268.

108. *Completed operations* cannot be read to provide coverage for an injury that occurs outside the effective dates of the policy. 9A Couch on Insurance § 129:23 (3d ed. 2007).

operations claims are filed well beyond the expiration of the warranty period. In fact, it has been reported that these claims are filed on an average of six and one-half years after completion.[109] Requiring an additional year or so of completed operations coverage on a project-by-project basis does not address the owner's potential need for insurance coverage many years after completion of a project. This lengthy time frame, on the other hand, motivates insurers to reduce their exposure. Some new limitations in CGL policies include elimination of the subcontractor exception by endorsement, habitational exclusionary endorsements, restrictive additional insured endorsements, exterior insulated finish system (EIFS) endorsements, mold endorsements, and silica endorsements.[110]

PRACTICE TIP: Given the potential for exclusions and endorsements to preclude insurance coverage for the very risk the owner and contractor intend to insure against, an owner should, on every project, insist on being provided with a copy of the contractor's policy itself, including all endorsements and exclusions. The owner may then wish to seek the advice of an insurance consultant to help bridge the gap between the specific risks sought to be covered, particularly after the project is completed, and the availability of a cost-effective insurance product that will provide that coverage.

11.1.4 *Additional Insureds*

The owner is now required to be an additional insured for claims caused in whole or in part by the contractor's negligent acts or omissions during completed operations. This additional coverage requirement may not be helpful in certain states such as Florida unless the injury actually manifests itself within the warranty period for corrective work.

PRACTICE TIP: Section 11.1.4 should be restated to simply provide thus: "The Contractor shall cause the commercial liability coverage required by the Contract Documents to include the Owner (and the Architect and the Architect's Consultants) as [an] additional insured[s]," with the architect and the architect's consultants being optional additional insureds depending on the availability and price for adding them.

ARTICLE 13 — MISCELLANEOUS PROVISIONS

13.1 *Governing Law*

This modified provision states that the Federal Arbitration Act (FAA) will govern when arbitration is selected as the method of binding dispute

109. Patrick J. Wielinski, *Challenges to Insurance Coverage for Defective Construction*, *in* Construction Law (Dispute Resolution Institute (DRI) 2005).

110. *Id.*

resolution. Although the U.S. Supreme Court has declared that the FAA preempts state law[111] for those disputes involving interstate commerce,[112] under the FAA the choice of substantive law to be applied is still largely dependent on the arbitration agreement between the parties.[113] Although § 13.1 seems to suggest that the FAA will govern, both substantively and procedurally, all arbitration disputes, regardless of the realities, that is simply not the case. For example, when interstate commerce is not involved and both contracting parties are Florida corporations involved in Florida construction projects, the Florida Arbitration Code will continue to apply.[114]

PRACTICE TIP: When interstate commerce is not involved, the provision relating to the FAA should be deleted. In that case, the parties should rely on the general choice of law provision in the agreement or otherwise specify what law applies to any dispute arising out of this agreement. Leaving the reference as written will create confusion.

13.7 *Time Limit on Claims*

AIA has established its own ten-year statute of limitations for all claims running from the date of substantial completion of the work.[115] Although generally in line with the majority of states and recently Florida, the statutes of limitations and repose are calculated differently in terms of the date that each is triggered.[116]

PRACTICE TIP: The variation for trigger dates for asserting causes of action differs in a variety of circumstances. The best practice would be to provide that the statute of limitations be based on applicable state law.

---

111. *See* Southland Corp. v. Keating, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

112. *See* Musnick v. King Motor Co., 325 F.3d 1255, 1258 n.2 (11th Cir. 2003) ("[T]he FAA applies to all arbitration agreements involving interstate commerce.") (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001)); Wachovia Sec., LLC v. Vogel, 918 So. 2d 1004, 1007 (Fla. Dist. Ct. App. 2006) ("Where . . . interstate commerce is involved, federal law governs the analysis of the arbitration proceeding.").

113. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474–75, 109 S. Ct. 1248, 1253, 103 L. Ed. 2d 488 (1989) (Section 4 of the FAA does not confer the right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that "arbitration proceed in the manner provided for in [the parties'] agreement." 9 U.S.C. § 4.).

114. *See*, *e.g.*, O'Keefe Architects, Inc. v. CED Constr. Partners, Ltd., 944 So. 2d 181, 184 (Fla. 2006) ("Both parties agree that the Florida Arbitration Code . . ., rather than the Federal Arbitration Act . . ., applies in this case. Because both parties are Florida corporations involved in Florida construction projects, interstate commerce is not involved and, thus, the provisions of the FAC control.").

115. A207 § 13.7.1 (2007).

116. Effective July 1, 2006, the Florida legislature reduced the fifteen-year statute of repose for latent defects to ten years. Fla. Stat. § 95.11(3)(c) (2007).

ARTICLE 14 — TERMINATION OR SUSPENSION OF THE CONTRACT

14.2.2 *Termination by the Owner for Cause*

This provision empowers the IDM to be substituted for the architect when the owner elects to terminate the contractor.[117] Under this scenario, the IDM is now required to certify that sufficient cause exists for termination.[118] However, parties should be mindful that the architect is likely to be the party with firsthand knowledge of the circumstances and history of performance. Consequently, it may be the architect that is best equipped to certify termination as opposed to the IDM that enters the project at a critical but late stage. Most importantly, it is questionable how quickly an IDM can learn the history of a project to make a swift decision, assuming no prior involvement in the project. Parties should be reluctant to use the IDM to fulfill this role as lack of information may result in a wrong or inequitable decision. There is a great deal at stake, including remedies such as excluding the contractor from the site, finishing the work with others, and suspending further payment to the contractor.[119] Cost is also a consideration as discussed relative to § 1.18 above, especially if a termination is uncontested. It is wasteful for the IDM to participate to certify termination if a challenge to it is being waived by the contractor.

PRACTICE TIP: Substitute the architect for the IDM to certify termination. For the reasons stated above, the architect is most knowledgeable as to the history and grounds for termination. All decisions of the architect would be subject to review in accordance with Article 15.

ARTICLE 15 — CLAIMS AND DISPUTES

15.1.1 *Definition of Claims*

The most overriding change in A201 2007 relates to the claims procedure, which has been moved from Article 4 of the 1997 version to newly drafted Article 15. As addressed in the discussion of § 1.1.8 above, the interplay between the architect and the IDM serves as a fertile ground for dispute during the claims process. Although the IDM decides claims, it remains

117. A201 § 14.2.2 (2007).

118. *Id.* It appears that this substitution was conceived because contractors generally complained that the architect acted as a pawn or a rubber stamp for the owner in certifying termination simply because the owner made the request.

119. *See* A201 §§ 14.2.2–.4 (2007).

the architect's responsibility to"interpret and decide matters concerning performance under, and requirements of the Contract Documents."[120]

For example, if an owner seeks damages because of a contractor's deficiencies or a contractor seeks an extension of time due to vague plan details, it is the architect who interprets what the contract documents require. However, if the owner desires to terminate the contractor, it is the IDM that must decide whether such a breach justifies termination.[121] A201 2007 is devoid of guidance about how the IDM and architect should coordinate their respective efforts. Considering that interpretation of the contract documents is expressly reserved to the architect, how does the IDM arrive at a decision on a claim without considering the architect's interpretation? What if the IDM believes the architect's decision is wholly without merit and elects to ignore it? How should the parties proceed? If the objective of using an IDM is to create a neutral party to decide disputes because of owner bias associated with the architect, how is this objective satisfied when the architect must often decide the foundation of a delay claim based upon a failure to build in accordance with the contract documents? What if a claim arises out of the aesthetics of a building façade? Considering that the architect's decision on aesthetics is final, must the IDM adopt this decision when deciding a claim?[122]

PRACTICE TIP: During contract negotiations, the parties should decide whether the architect's interpretation of contract documents will bind the IDM's decision on a claim unless it is "clearly erroneous"[123] or in accordance with some other similar standard. Otherwise, the decision on a claim may be contrary to a prior decision of the architect regarding an interpretation of the contract documents.

15.1.2 *Notice of Claim*

Written notice of a claim must be provided within twenty-one days "after occurrence of the event giving rise to such Claim."[124] This provision is clear except when considering the processing of requests for time and money arising from concealed or unknown conditions in § 3.7.4.[125] Although

120. This provision was previously located at § 4.3.1 of A201 1997 and is now found at § 15.1.1 of A201 2007. The former phrase *adjustment or interpretation of Contract terms* has been deleted from this definition as it remains the architect's responsibility under § 4.2.11 of A201 2007.

121. A201 § 14.2.2 (2007).

122. A201 § 4.2.13 (2007).

123. This is the standard introduced in *Edward J. Seibert, A.I.A., Architect & Planner, P.A. v. Bayport Beach & Tennis Club Ass'n, Inc.*, 573 So. 2d 889 (Fla. Dist. Ct. App. 1990).

124. A201 § 15.1.2 (2007).

125. This provision fails to specify when such a differing site condition claim should be filed, *i.e.*, whether it be twenty-one days from discovery of the condition or when the architect issues a decision that is later challenged.

notice of a concealed or unknown condition must be furnished in twenty-one days, this requirement appears to be solely a notice requirement and not a notice of claim requirement. Under § 3.7.4, the architect investigates and decides whether the condition warrants additional time and money for the contractor. However, after the architect decides the issue of time and money, it appears that decision is then subject to review by the claims procedure in Article 15.[126] In this situation, it is not completely clear under the text of § 15.1.2 requiring notice "within 21 days after occurrence of the event giving rise to such Claim" that the occurrence is no longer discovery of the concealed or unknown condition but is instead the architect's decision as referenced in § 3.7.4.

PRACTICE TIP: Modify § 3.7.4 to require that a claim be submitted within twenty-one days following the architect's decision on a concealed or unknown condition instead of proceeding "as provided in Article 15."

15.2 *Initial Decision*

15.2.1 *Claims Decided by the Initial Decision Maker*

Issuance of an initial decision is a condition precedent to mediation unless thirty days have passed after referral of a dispute to the IDM without a decision being rendered. It is significant to note that the IDM's authority is limited to claims that arise prior to the date of final payment.[127] Following final payment, the parties are not obliged to follow the IDM procedure before proceeding to mediation and/or binding dispute resolution. This provision excludes the IDM from deciding disputes arising from the owner's property insurance as well as claims relating to hazardous materials.[128] As the mutual waiver of consequential damages is now part of Article 15, is it the IDM that decides whether consequential damages will be barred or recoverable?[129] Section 15.1.6 refers to a waiver of a claim for consequential damages, suggesting that because it is not excluded under § 15.2.1, it would fall within the scope of the IDM' s authority.[130]

PRACTICE TIP: During negotiations, parties must decide the role of the IDM relative to deciding disputes before and/or after final payment. Frequently, mediation occurs following final payment when disputes arise relating to defects, delay, and liquidated damages. There would be benefits to proceeding to mediation with an initial decision of the IDM to assist the parties in reaching a decision. If the role of the IDM benefits the parties

126. A201 § 3.7.4 (2007).
127. A201 § 15.2.1 (2007).
128. *Id.* This section excludes those referenced in A201 §§ 10.3, 10.4, 11.3.9, 11.3.10 (2007).
129. A201 § 15.1.6 (2007).
130. *Id.*

before final payment, why not after final payment occurs as a condition precedent to mediation?

15.2.2–15.2.5 *The IDM's Initial Decision*

The IDM must render an initial written decision as a condition precedent to mediation.[131] The IDM has ten days to take the following action: (1) request materials from the claimant or a response with supporting data from the other party; (2) reject the claim in whole or in part; (3) approve the claim; (4) suggest a compromise; or (5) advise the parties that the IDM is unable to resolve the claim if the IDM lacks sufficient information to evaluate the merits of the claim or if the IDM concludes, in the IDM's sole discretion, that it would be inappropriate for the IDM to resolve the claim.[132] Allowing the IDM to avoid rendering a decision as outlined in (5) is arbitrary and would negate the object and purpose of appointing an IDM.

Several flaws exist in this process. First, what recourse do the parties have if the IDM decides it would be "inappropriate for the IDM to resolve the claim?" Second, upon notifying the parties of this decision, may they proceed to mediation? Has the condition precedent been satisfied by the decision to simply punt? Third, what if the owner refuses to pay for additional expertise that may be requested by the IDM so that the IDM has sufficient information to evaluate the merits of the claim? Is this an opportunity for the owner to thwart a decision of the IDM by refusing to pay for certain expertise to enable the IDM to reach a decision? The other options available to the IDM create similar issues relating to timing and rendering of a decision as a prerequisite to mediation. If certain information is requested or a compromise is pursued, the process may stall, resulting in delay that exceeds thirty days. At that point, absent a decision, the parties may proceed to mediation.

PRACTICE TIP: As written, this provision allows the IDM, without consequences, to arbitrarily shirk its responsibility to make a decision and defeats the objective of this process. This portion should be deleted, or, at a minimum, grounds to justify this action should be specified, such as conflict of interest. Section 15.2.2(2) provides the IDM with authority to "reject the Claim in whole or in part."[133] Likewise, similar authority in § 15.2.2(3) should be provided to approve the claim "in whole or in part" with the initial decision then being subject to mediation.[134]

131. A201 § 15.2.1 (2007).
132. A201 § 15.2.2 (2007). This provision also allows the IDM to rely upon the expertise of others for assistance at the owner's expense. *See* B101 § 4.2.1.11 (2007).
133. A201 § 15.2.2(2) (2007).
134. A201 § 15.2.2(3) (2007).

15.2.6 & 15.2.6.1 *Demand for Mediation*

Within thirty days from an initial decision, either party may file a written request with the other party for mediation within sixty days of the date of the initial decision.[135] If the recipient of the request fails to file for mediation, then the parties waive their right to mediate or pursue binding dispute resolution proceedings.[136] This is a significant change to the prior version of A201 where the architect could force the owner and contractor to either promptly demand mediation or waive that right.[137]

PRACTICE TIP: It may be advisable to promptly seek a stipulation for mediation rather than wait potentially thirty days from the date of the initial decision for the other party to file. During negotiations, consider reducing the time period to fifteen days to file for mediation so as not to delay the process. If a party refuses to participate, only mediation should be waived, as opposed to waiving binding dispute resolution such as litigation or arbitration.

15.3.1–15.3.3 *Mediation*

With the exception of excluding certain claims in §§ 9.10.4, 9.10.5, and 15.1.6, all claims and disputes related to the contract become subject to mediation prior to binding dispute resolution proceedings.[138] The language is broadly written to encompass virtually any dispute or claim relating to the contract.

PRACTICE TIP: Consider specifying a process for mediation outside the American Arbitration Association (AAA). When drafting a mediation provision, specify that mediation be conducted before a mediator knowl-

135. A201 § 15.2.6.1 (2007).

136. *Id.*

137. This provision suggests that the process could continue forever until a party makes such a request for mediation. Once a request is made, the thirty-day period would run. If the IDM fails to issue a decision within thirty days after submission of the claim, then a party may demand mediation without waiting for a decision. A201 § 1.5.1.3 (2007).

138. The prior version of A201 § 4.5.1 (1997) provided that "[a]ny Claim . . . shall . . after initial decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party." This change arose from criticism as to why the architect should be allowed to force an early resolution when neither party desired one, particularly given the costs of pursuing this dispute-resolution process. *See* Sink et al., *supra* note 3, at 2–3. The authors specifically note thus: "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 60 days of the date of the initial decision. Regarding 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." *Id.* at 3. However, the provision is silent as to the consequences if neither party makes a demand for mediation within thirty days of the date of the initial decision.

edgeable about construction and certified, if and as required by state law. In addition, provide that mediation be conducted in accordance with the mediation rules, if and as provided by state law.[139] Based upon the nature of the dispute, it may be advisable to require the parties to exchange specified information concerning the claim and defenses to it and enlarge or shorten the time for the stay of proceedings pending the outcome of mediation. In many instances, a sixty-day stay while the parties seek to resolve a dispute during the project is simply too long.

15.4.1–15.4.6 *Arbitration*

Arbitration as a dispute resolution process has been the favored child of the AIA form documents since 1888.[140] With the introduction of the 2007 A201, the AIA has departed from tradition by no longer specifying arbitration as the default method for resolving disputes. This turnaround first found its place in the 2004 A141 documents for the design-build-delivery process, which gave participants a choice with the check box option to select litigation, arbitration, or some other method of resolving disputes.[141] This feature is now incorporated in the owner/contractor as well as owner/architect AIA form documents for 2007.[142] Based upon input from various industry participants, AIA elected to provide participants with a choice of forums as opposed to mandating one.[143]

To the extent the parties select arbitration, the revised documents specify that the proceedings will be governed by the AAA rules and procedures in effect on the date of the agreement as opposed to those currently in effect.[144] Parties now must check a box, and the failure to do so will default

139. For example, in Florida, Fla. Stat. ch. 44 (2007) governs mediations. In particular, § 44.405 provides that, subject to certain statutorily enumerated exceptions, all mediation communications shall be confidential.

140. *See* Sink et al., *supra* note 3.

141. A141 § 6.2 (2004).

142. A101 2007, Agreement Between Owner and Contractor (stipulated sum); A111 2007, Agreement Between Owner and Contractor (cost of the work plus the fee with a negotiated guaranteed maximum price); A114 2007, Agreement Between Owner and Contractor (costs of the work plus the fees); B101 2007; B103 2007.

143. *See* Sink et al., *supra* note 3. In an interesting twist, although AIA provides a choice by using the check box method, the software for AIA A101 and other documents automatically opens and a check appears in the box designated for arbitration.

144. A201 § 15.3.2 (2007) (providing for the administration of mediation by the AAA in accordance with the construction industry mediation procedures in effect on the date of the agreement); A201 § 15.4.1 (2007) (providing for construction industry arbitration rules in effect on the date of the agreement); *see also* B101 §§ 8.2.2, 8.3.1 (2007). As noted in the text, this is a departure from 1997 versions (A201 §§ 4.5.2, 4.6.2 (1997); B141 §§ 1.351, 1.352 (1997); B151 § 2.1 (1997)). This change was made to eliminate uncertainty: rules may change between the date that the parties enter into a contract and agree upon a dispute-resolution process and the date that a dispute occurs.

to litigation as the method of binding resolution. Yet what if the other box is checked but nothing more is specified? In that situation, how will this issue be resolved?

The drafters have clarified that a written demand for arbitration satisfies the commencement of legal proceedings for statute of limitation purposes.[145]

PRACTICE TIP: Make sure a box is checked! Participants to these 2007 agreements must be educated on the consequences of failing to check the proper box. This is especially true because even the most sophisticated participants are guilty of not thoroughly reviewing the documents. In the course of executing agreements, the failure to make an election will result in litigation being the forum to resolve disputes. There could be a variety of reasons for seeking arbitration, which frequently rest with a desire for the proceedings to be private with limited rights of appeal. Most importantly, creating consistency about the dispute-resolution process with the contractor, architect, and subcontractors should be a primary objective. Toward that end, participants should carefully consider the disruption and cost associated with these parties resolving disputes in different forums. Most commonly, this issue often arises when the owner faces design-related claims asserted by the contractor in litigation but the owner-elected arbitration to resolve design claims against the architect. The failure to require consistency by litigation forces pass-through claims to be resolved in a separate proceeding. In the event that litigation is selected, the parties should further consider waiver of jury trial, selecting the exclusive venue and jurisdiction to resolve disputes.

15.4.4 *Consolidation or Joinder*

This new section provides for consolidation with other related arbitration matters and joinder of necessary people or entities. Additionally, the 2007 owner/architect agreements (B101 and B103) have identical provisions. One potential drawback is that three conditions must first be met before consolidation can be considered. Under this scenario, many opportunities exist to object to and defeat consolidation.[146] For example, consolidation is only appropriate if both arbitrations employ "materially similar" procedural rules and methods for selecting arbitrators. Consequently, if one procedural variation exists, such as the way arbitrators are selected, a party could prevent consolidation.[147] This would be the case even when

145. A201 § 15.4.1.1 (2007).
146. A201 § 15.4.4.1 (2007).
147. Both agreements could provide for a three-member arbitration panel, but one could allow the parties to jointly choose all three and the other could allow each party to choose

the other two prerequisites have been satisfied, namely, (1) that both agreements permit consolidation and (2) that they substantially involve common questions of law or fact.

At § 15.4.4.2, the party seeking joinder must first obtain written consent from the person or entity sought to be joined. However, that person may limit its consent to a particular claim, dispute, or other matter to be arbitrated.[148] Although there is arguably a need for a person or entity to be protected from overbearing parties seeking inappropriate joinder, this type of broad caveat allows a person or entity to easily defeat joinder.

PRACTICE TIP: Delete the requirement for consolidation that the procedural rules need to be materially similar. Consolidation should be achieved if both involve substantially common questions of law or fact and should not be required to have what could be construed to mean nearly identical procedural rules, depending on a party's interpretation of the term *materially similar*. Also, ending § 15.4.4.2 after the word *arbitration* in the second line will help ensure the inclusion of a party whose presence is required for complete relief to be accorded in arbitration.

CONCLUSION

A201 2007 eliminates time-honored provisions, such as arbitration as a default mechanism to resolve disputes, and introduces new concepts, such as the IDM. As construction practitioners modify A201, they must be mindful of the impact of new changes in this document as well as those incorporated into other AIA forms, such as the agreement between the owner and architect. Recognizing that AIA revises these documents at ten-year intervals to keep pace with the construction industry, future refinements are certain based on practical experience with many new provisions, including transfer of digital rights, insurance and the success of the new dispute-resolution process.

one panel member, with the two to then pick the third between them. Are these methods for selecting arbitrator(s) sufficiently similar to be deemed "materially" similar or not?

148. A201 § 15.4.4.2 (2007).