Changes to the A201 - The Architect's Perspective
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1. GENERAL COMMENTS

Other than the Owner-Architect agreement (generally the B141), the A201 (General Conditions of the Contract for Construction) is probably the most critical document in the AIA document system. The 1997 revised edition of the A201 culminates more than six years of study, comment, debate, and ultimately decision-making by the American Institute of Architects (AIA) on how this crucial document fits in the current construction climate and what changes they felt were appropriate for this "standard" document until the next revision cycle.

From the architect's perspective, two initial matters must be considered. First, the changes made and the language chosen represent the best-reasoned judgment of the AIA as well as representatives of the professional liability insurance carriers for design professionals. Therefore, one assumes that the document is drafted in a way that addresses and satisfies the concerns of the majority of the profession. Second, an architect who suggests modifications opens a "Pandora's box" for owners or contractors to make changes that could substantially alter the architect's role in a construction project. If the architect is fortunate enough to have successfully negotiated an Owner-Architect agreement following the format of the B141, then such incorporates the A201 without revision and obligates the owner to utilize those general conditions and gives the architect veto power over any changes thereto. These two factors alone warrant careful consideration before the architect proposes any changes. Matters of administrative detail can be dealt with in the general section of the project manual and such is generally the "safer place" to address detail matters.

2. SPECIFIC CHANGES TO THE A201 HAVING DIRECT IMPACT ON ARCHITECT

2.1 Dispute Resolution Provisions. The focus of the AIA Task Force centered on the problems of disputes, considering that to be the most persistent problem in the construction process. The first major change is in the Claims and Disputes paragraph (Paragraph 4.3). New clause 4.3.10 provides that the owner and contractor mutually waive claims for consequential damages. The mutual waiver includes from the owner's standpoint damages incurred for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or the service of such persons. Clause 4.3.10.1. On the contractor's side, damages are waived for principal office expenses including the compensation of personnel stationed there, for loss of financing, business and reputation, and for loss

of profit other than anticipated profits arriving from the work. Clause 4.3.10.2. The mutual waiver also applies to any consequential damages otherwise due to either party's termination in accordance with Article 14 (termination for cause or termination for convenience). One area of some confusion is that the mutual waiver **does not** include an award of "liquidated **direct** damages" when provided for in the Contract Documents. Liquidated damages have long been enforced in construction contracts. No guidance is really provided what is meant by liquidated **direct** damages.

Revisions were also made in the architect's role in the resolution of claims and disputes (see Paragraph 4.4). The time period within which an architect is to render a decision on claims submitted to him has been reduced from 45 to 30 days. Clause 4.4.1. In addition, within ten days of the receipt of the claim the architect shall (1) request additional supporting data from the claimant; (2) reject the claim in whole or in part; (3) approve the claim; (4) suggest a compromise; or (5) advise the parties that the architect is unable to resolve the claim if the architect lacks sufficient information to evaluate the merits of the claim or if the architect concludes that it would be inappropriate for the architect to resolve the claim. Clause 4.4.2. A new provision is added that in evaluating claims, the architect may consult or seek information from persons with special knowledge or expertise that could assist the architect in rendering a decision and request the owner authorize retention of such person at the owner's expense. Clause 4.4.3. Another new provision provides that the architect will approve or reject claims by written decision, which shall state the reasons therefor and which shall notify the parties of any change in the contract sum or the contract time, or both. The approval or rejection of a claim by the architect shall be final and binding of the parties subject to mediation or arbitration. Clause 4.4.5.

Mandatory mediation is now made a condition precedent to arbitration or the institution of legal or equitable proceedings by either party under new paragraph 4.5. The Construction Industry Mediation Rules of the American Arbitration Association are to be utilized unless otherwise agreed (see Clause 4.5.2). The request for mediation can be made concurrently with the filing of a demand for arbitration, but in such event mediation proceeds in advance of the arbitration or equitable proceeding which should be stayed pending mediation for a period of 60 days from the date of the filing of the mediation demand. Clause 4.5.2. The mediator's fee is split equally and held at the place where the project is located. Clause 4.5.3. If mediation is unsuccessful, the A201 maintained the requirement of mandatory arbitration (see Paragraph 4.6) and further preserved the limitation on consolidation or joinder, meaning the architect cannot be brought in as a party in an arbitration proceeding between the owner and contractor. Clause 4.6.4.

From the architect's standpoint, these changes are beneficial in (1) clarifying the architect's role in the process and better defining the time frame within which he is to act and courses of action he is to take; (2) requiring mediation as a proven technique of resolving disputes at an early stage which avoids dragging the architect into a dispute; and (3) the mutual waiver of consequential damages between the owner and contractor lessens the reward and "high stakes" of taking the dispute through the legal system (though the ability to recover punitive damages appear to remain as well as "liquidated direct damages").

2.2 Changes to the Payment Provisions. Disputes in the payment process can quickly lead to hard feelings. Provisions in Clause 7.3.8 now provide for payment of amounts not in dispute for changes in the work even if the total cost of a construction change directive has not yet been agreed to by the parties. In other words, the contractor may now include in his payment request portions of work completed under a construction change directive that has not yet been signed off by the owner when such costs are not in dispute. The clause further provides that the architect should change the contract sum based on such submittal. In addition, once the architect issues the Certificate of Substantial Completion, then upon acceptance and consent of the surety, if any, the owner must make payment of the retainage applying to such work or designated portion thereof, though such payment can be adjusted for work that is incomplete or not in accordance with the requirements of the Contract Documents. Clause 9.8.5. Finally a new Clause 9.6.7 provides that except where a payment bond has been provided, payments received by the contractor for work properly performed by subcontractors and suppliers that are included in a payment request "shall be held by the contractor for those subcontractors or suppliers who actually performed the work and for which payment was made the owner." This theory that the contractor holds such payments in trust for the ultimate benefit of the subcontractor or suppliers has been a target objective of the subcontractors industry for years.

The architect is again a direct beneficiary of all three changes under the central theme of diffusing disputes. Allowing the contractor to draw money against work performed and not in dispute (before the paperwork is completed) and getting his retainage once substantial completion is reached (while providing the owner the protection of adjusting the final draw for incomplete or defective work) helps the contractor maintain his cash flow and improves his overall financial condition. The owner is not harmed as he still has adequate protections for defective or incomplete work. Adding contract provisions that the contractor will pay his suppliers and subcontractors when he is paid (or holds funds received for their benefit in trust) reduces somewhat the likelihood that the contractor diverts funds from one job to another and address the cash flow needs of suppliers/subcontractors. All of these factors should lessen the likelihood of disputes or claims that the architect otherwise has to involve himself with.

2.3 Design Delegation or Incidental Design. Clause 3.12.10 addresses the sticky situation where the Contracts Documents (either in the project manual or in the specifications) obligates a contractor to perform (or have performed) professional design services. The clause obligates the owner and the architect to specify for the contractor all performance and design criteria that such services must satisfy. The contractor is expressly relieved of responsibility for the adequacy of the performance or design criteria required by the Contract Documents. If such incidental services are required by the Contract Documents for a portion of the Work or needed to provide such services in order to carry out the contractor's responsibility for construction means, methods, techniques, sequences and procedures, then such services or certifications will be provided by a properly licensed design professional whose signature and seal shall appear on all drawings, etc. Though some may argue that this is a shift of design responsibility, others will point out that it is simply a reflection of realty in the construction process at this time. The bottom line from the architect's perspective is that the licensed design professionals retained by the contractor are "on the hook" for such design issues while not eliminating the architect's overall responsibility for the adequacy of the performance and design criteria required by the Contract Documents.

2.4 Provision for the Expanded Use of Project Insurance. Project Management Protective Liability insurance is an insurance product that covers the project as a "team" approach and provides coverage under a single umbrella with primary protection for the owner, architect and contractor concerning third-party liability for the contractor's operations. The changes in Paragraph 11.3 allow the owner to require the contractor to purchase and maintain such insurance as part of the contractor's obligations. From the architect's perspective, this coverage, which would make the "team" a single insured, benefits the architect in the vicarious liability situations. Changes were further made to the indemnification obligations under Paragraph 3.18 to exclude from the scope of those indemnification obligations claims, damages, losses, or expenses that are covered by the Project Management Protective Liability insurance purchased by the contractor in accordance with Paragraph 11.3.

2.5 Substitutions. Clause 3.4.2 in the 1997 edition of the A201 provides that a contractor may make substitutions only with the consent of the owner, after evaluation by the architect and in accordance with a Change Order. The objective of this new provision is to eliminate disputes resulting from the alleged approval or denial of substitutions by requiring them to be addressed and approved in written Change Orders.

2.6 Correction of Work After Substantial Completion. In addition to the contractor's warranty obligations under Paragraph 3.5, modifications were made to the provisions concerning the "correction of work" responsibilities of the contractor. Under Clause 12.2.2.1 if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under subparagraph 9.9.1 or by terms of an applicable special warranty required by the Contract Documents, Work that is not in accordance with requirements of the Contract Documents must be corrected promptly by the contractor after receipt of written notice from the owner to do so unless the owner has previously given the contractor a written acceptance of such condition. Clause 12.2.2.1 now obligates the owner to give such notice "promptly after discovery of the condition". It further provides that during the one year period for correction of the Work, if the owner fails to notify the contractor and give the contractor an opportunity to make the correction, then the owner **waives** the right to require correction by the contractor or to make a claim for breach of warranty. This modification should again help the architect in the long-run by forcing the owner to identify in writing to the contractor problems found after Substantial Completion (or risk losing the right to require the contractor to correct the same) and having the contractor address those problems sooner and not later thereby avoiding a small problem becoming a big problem.

2.7 Hazardous Materials and Other Environmental Concerns. The 1987 edition of the A201 introduced the concept of addressing environmental concerns in the Contract Documents, particularly in the area of remodeling projects. The 1997 edition to the A201 expands the provisions concerning hazard materials that may be encountered on the project (or brought on to the project by the contractor). Of particular note are the following:

Once the contractor observes or recognizes a condition where reasonable precautions would be inadequate to prevent foreseeable injury to persons resulting from encountering a hazardous material on a project site, then the contractor must

immediately stop Work in the area affected and report the condition to the owner and architect in writing. Clause 10.3.1.

The owner is then obligated to retain the services of a licensed laboratory to verify the presence or absence of hazardous material and, if hazardous material is found to be present, to verify that it has been rendered harmless. It is only when the hazardous material or substance has been rendered harmless that Work in the area shall resume and then only upon written agreement of the owner and contractor. Clause 10.3.2 further provides that the Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the contractor's reasonable additional costs caused by the shut down, delay, and start-up, which adjustments are to be accomplished as provided in the change order provisions of Article 7.

The owner is not liable for environmental liability to the contractor for materials or substances brought to the site by the contractor unless such materials or substances were required by the Contract Documents. Paragraph 10.4. Issues may arise between the owner and architect if the architect specified materials that were later showed to be hazardous materials when preparing the specifications.

Unless due to negligence on the part of the contractor, if the contractor is held liable for the cost of environmental remediation of a hazardous material or substance solely by reason of performing the Work is required by the Contract Documents, then the owner is obligated to indemnify the contractor for all costs and expense related thereto. Paragraph 10.5.

The objective of these expanded provisions is clearly to address the responsibilities and liabilities of the parties for hazardous materials encountered on the site. It should encourage owners to perform Phase I or Phase II environmental investigation on existing buildings that would address the potential for encountering hazardous materials before commencement of the project, thereby lessening the likelihood that projects will be delayed or stopped by reason of such hazardous materials. Any time work stoppage occurs, disputes and claims are not far behind.

2.8 Owner's Responsibilities and Owner's Financial Capabilities. One area of frequent controversy involves who is specifically authorized to act on behalf of the owner. Some confusion existed in prior editions of the A201 as to the scope of the architect's authority to make decisions and commitments on behalf of the owner. Clause 2.1.1 was modified to obligate the owner to designate in writing a representative who shall have expressed authority to bind the owner with respect to all matters requiring the owner's approval or authorization.

Another frequent cause of disputes, claims, and litigation in the construction process is the owner's inability or lack of planning to perform his financial obligations on the project. Though previous editions of the A201 encouraged the contractor to obtain evidence of the owner's financial capability and financial arrangements (and the 1997 edition still only requires the information to be furnished "at the written request of the contractor") Clause 2.2.1 now provides that if such a written request is made prior to the commencement of the Work, the owner is then obligated to furnish the contractor reasonable evidence that financial arrangements have been made to fulfill the owner's obligations under the contract. The furnishing of such evidence is a condition precedent to contractor's obligations to commence or continue the Work.

The Clause further provides that after such evidence has been furnished, the owner may not materially vary such financial arrangements without prior notice to the contractor. It will be interesting to see how these provisions play out in reality. If the contractor gets wind that the owner is having financial difficulties, can he demand evidence that there has not been a material variance from the evidence of adequate financial arrangements originally provided to the contractor? If the owner fails or refuses to provide such verification in writing within a reasonable time, does such trigger a default or breach of the contract justifying the contractor to terminate for cause?

2.9 Termination of the Agreement by the Owner for Convenience. The ability of the owner to terminate a contract for convenience has been a contract objective frequently sought by owner's counsel. Paragraph 14.4 now recognizes that right, subject to the contractor's ability to obtain reasonable direct and indirect termination costs. Combined with the waiver of consequential damages, this new provision addresses the reality in the construction process while fairly addressing the needs of both the contractor and owner in such a situation.

2.10 Review of Contract Documents and Field Conditions by Contractor. Significant modifications were made to Paragraph 3.2 which clearly represent areas of compromise between the architectural profession and contractor groups. On balance, the changes seem to reflect the recognition that while the architect isn't relieved from his responsibility to prepare Contract Documents that are complete, understandable, and in compliance with applicable code (as well as eliminating errors and inconsistencies), everyone benefits if the contractor reports in writing any observations during his review of the Contract Documents and field conditions any areas of concern or problems that if not addressed promptly will likely lead to delays in construction or claims for compensation. These modifications represent another effort to get the parties to focus in areas that in the long-run will avoid claims and disputes.

2.11 Job Safety. New language contained in Paragraph 3.3 (supervision and construction procedures) tried to reenforce the continuing obligation of the contractor for job safety. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the contractor must evaluate the job safety thereof and, except as stated in Clause 3.3.1, shall remain fully and solely responsible for the job site safety of such means, methods, techniques, sequences or procedures. If the contractor determines that such means, methods, techniques, sequences or procedures may not be safe, then the contractor is obligated to give timely written notice to the owner and architect and shall not proceed with that portion of the Work without further written instructions from the architect. If the contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of the changes proposed by the contractor, then note that the owner (and not the architect) is solely responsible for any resulting loss or damage. Clause 3.1.

Note that Clause 5.3.1 also includes new language that specifically makes the contractor responsible for the safety of the subcontractor's work.

3. **CONCLUSION:**

The above examples demonstrate that the key goal of the changes in A201 is to reduce or eliminate disputes by various mechanisms and insure that if disputes do arise, that means other than litigation are exhausted to resolve the same and that financial incentives to prolong or expand litigation are reduced. Since the architect is a frequent target in such disputes, any steps taken in the contract provisions to lessen or eliminate disputes are clearly to the benefit of the architect.

Please note that this article is an overview of the changes in the A201-1997 edition from the architect's perspective. It is not an exhaustive listing of all the revisions or changes made in the A201-1997 edition. The AIA has published a document expressly comparing the 1987 and 1997 editions of the A201 and such should be obtained to review and analyze all the changes. In addition, the AIA Professional Education Division publishes helpful materials analyzing the various changes made in the A201 and the intended results of those changes. To obtain these materials contact should be made through the American Institute of Architects, 1735 New York Avenue N.W., Washington, D.C., 20006-5292.