Owner/Contractor Relationship Revisions to A201 I 2017 AIA Document Series I Revisions to the Core Contract Documents (Part 3)

Article
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Part 3: Owner/Contractor Relationship Revisions to A201 General Conditions Document

This article is the third in a series that explores the 2017 modifications to the AIA's most commonly used construction contracting documents, including the A101, B101 and A201 documents. The purpose of the series is to explain some of the more significant changes in order to identify possible issues of concern, and to tee up ideas for potential negotiation options to address those issues. After focusing on the dispute resolution provisions in Part 1 and the notice provisions in Part 2, Part 3 addresses some of the more significant modifications to the A201 General Conditions document that go to the heart of the Owner/Contractor relationship.

Owner Ability to Pay. The Owner's obligations to provide evidence of its own ability to pay under Section 2.2 have been modified to provide greater protection to contractors. Prior to commencement of the Work, upon receipt of a written request, the Owner is required to provide "reasonable evidence" of its financial arrangements to satisfy its payment obligations. The Contractor has no obligation to commence the Work until the information is provided. To the extent the Owner delays in doing so, Contractor is entitled to an extension of the Contract Time. After commencement, certain limited circumstances (failure to pay, material change in scope, or existence of a "reasonable concern" about financial ability) trigger the Owner's obligation, again upon written request, to again provide reasonable evidence. If not provided within 14 days, the Contractor is expressly authorized to stop the Work (or in the case of certain changes, to stop that portion of the Work). If the Work is properly stopped, the Contractor is entitled to an extension of Contract Time and an increase in Contract Sum to the extent caused by the shutdown. Once the information is provided, Section 2.2.3 provides that the Owner "shall not materially vary such financial arrangements without prior notice to the Contractor." These changes are largely responsive to the financial crisis occurring since the 2007 revisions and appear to be fair

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attempts to provide additional protection.

Key Cautions:

Many owners will resist, and many contractors will not feel secure about the potentially-significant ambiguity inherent in the terms "reasonable evidence" or "reasonable concern." Parties should endeavor to provide further definitional guidance through negotiation so that the attempt to enhance Contractor protection does not simply breed dispute.

Means and Methods. The modifications to Section 3.3.1 seemingly shift to the Contractor at least some responsibilities for means and methods that are dictated through specifications by the Architect. It has long been understood that Construction means and methods, and the safety thereof, are the responsibility of the Contractor. In some circumstances, however, the Architect itself will specify a particular methodology. The modifications now provide that, when the Architect's specifications "give…specific instructions" regarding "construction means, methods, techniques, sequences, or procedures," the Contractor is nonetheless responsible for the execution, and the safety, of same. In effect, the Contractor now takes on an affirmative obligation to evaluate the safety of the process that has been decided upon and imposed by the Architect, to give timely notice if it deems the process to be unsafe, and to propose alternatives that the Contractor deems to be safe. The Architect then is required to evaluate the alternatives, and if no objection is raised, the Contractor is entitled to proceed under its proposed alternatives. If the Contractor does not give notice, it effectively "buys" responsibility for the safety of the Architect's specified process.

Key Cautions:

While the impact of these changes will not be known for some time, they appear to suggest a clear addition to the responsibility of the Contractor and a potential subtraction from that of the Architect. While these issues sort themselves out in practice, this author suspects that Section 3.3.1 will be one of the more heavily-edited provisions in contract negotiations.

Indemnity for Subcontractor Liens. The new Section 9.6.8 now requires the Contractor to defend and indemnify the Owner when a Subcontractor files a lien. While this mirrors the statutory requirements of many states, it adds a contractual lever to the Owner's arsenal. The trigger is when the Owner has made "proper payment" to the Contractor.

Key Cautions:

This is an unfortunate ambiguity in that "proper" can mean any number of things. What constitutes "proper payment" when a Subcontractor's work is defective? What if there is a legitimate dispute over an alleged scope change? Has an Owner made "proper payment" by only paying for nondefective work? Further clarification on these issues at the negotiation stage would be very

helpful here.

Warranties. Section 3.5.2 was added in the warranty section to require that all material, equipment, "or other special warranties" be issued in the name of the Owner, or be transferable to the Owner. This makes sense, in that it brings clarity to the warranty process, especially when dozens of warranties are often being provided under dozens of different subcontracts.

Key Cautions:

Parties need to be mindful, however, that under the separate provisions of Section 9.8.4, warranty periods commence when Substantial Completion for the work "or designated portion thereof" is certified by the Architect. As a result, there may be many different warranty periods on any given project.

Separate Contractors. One area of tension on a project often lies when a Contractor's Work interferes with the work of another Contractor that is separately retained by the Owner. Specifically, when does a Contractor become responsible for building upon that separate Contractor's work which may be substandard? The amendments to Section 6.2.2 now reference a new defined term – the Separate Contractor – and slightly change the standard which governs that question. The Contractor remains responsible for notifying the Architect "of apparent discrepancies or defects" in the Work of the Separate Contractor before proceeding with the Contractor's Work. Formerly, the Contractor had no responsibility for such discrepancies or defects that were "not then reasonable discoverable." Section 6.2.2 now changes that standard to only include discrepancies or defects that "are not apparent."

Key Cautions:

This could be a distinction without much of a difference, but some would suggest that the change is an attempt to clarify the standard. Parties ought to discuss what is really intended in practice and modify this provision accordingly to avoid problems later.

Payment Upon Termination for Convenience. Section 14.4.3 presents a significant change in how a Contractor is to be paid when the Owner terminates for convenience. In the past, the Contractor was entitled to recover payment for work executed and "reasonable overhead and profit on Work not executed." Section 14.4.3 now states that two items are recoverable: 1) costs attributable to the termination of Subcontracts; and 2) the "termination fee, if any, set forth in the Agreement."

Key Cautions:

This can be better or worse, depending upon the amount of the negotiated "termination fee," (which will be zero unless the parties specifically agree upon, and place, a number in the agreement). Yet, it serves the important purposes of

putting the parties in the position of knowing exactly where they stand, and being able to control what was formerly an ambiguous result.

Though this article generally addresses significant modifications to the A201 and a few negotiations considerations for dealing with same, many other variables may uniquely impact any given project.

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- **Part 2: 2017 AIA Contract Document Series Revisions to the AIA Core Contract Documents: Notice Requirements**
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