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**Associated General Contractors of America (AGC)
AIA A201 Audio Conference**

**The New A201
What Every Contractor Needs to Know**

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Presented live on December 4, 2007

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Speakers



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- The Process of Negotiations
- Genesis of Endorsement Decision
 - AGC's A201 Taskforce
 - 21 Chapter's Recommendation
 - PIAC Recommendation
 - 600-Member AGC Board



§ 1.1.1 The Contract Documents

- Contract documents do not include “other information” *i.e.* soils, reports, maps, drilling logs, reports regarding tidal behaviors, water table, rainfall data. So Contractors may not rely upon them to explain why it performs the way it does.
- But 3.2.1-3.2.3 requires Contractor to study and compare this “other information” for purposes of locating errors and omissions in the P&S.



§ 1.1.7 Instruments of Service

- Project manual is gone
- Digital transfer of information
- Protocols regarding
 - Ownership §1.5
 - Use §1.6
 - Liability
- Where to find protocols



§ 1.1.8 Initial Decision Maker (IDM)

- Replaces A/E for some, but not all decisions
- May or may not review A/E errors
- No contract for hiring an IDM
- Cottage industry in the works



§ 2.2 Owner Disclosure of Financial Information

- Waters Down Contractor's Right to Know
- Early-bird Requests Are Essential
- Limited Disclosure Obligation After Work Starts
 - Three Conditions
 - Owner Failure to Pay
 - Material Change in Contract Sum
 - "Reasonable Concern" for Additional Knowledge
- What to Ask For



§ 2.2.5 Owner's Contract Documents

- No longer multiple copies
- No longer free of charge



§ 2.3 Owner's Right to Stop Work

- Persistent v. repeated
 - Willful failure to perform no longer the standard
 - Now it is a matter of numbers
 - Is twice enough?



§ 2.4 Owner's Right to Perform Work

- Eliminates second notice letter
 - Therefore complicates matters where there has been a potential accord and satisfaction
- A/E may approve Owner takeover
 - IDM not involved in this decision
 - Why?



§ 3.2 Study and Compare Provision

- § 3.2.1
 - Study more than contract documents
 - Not just discovered errors, but also those “made known” - whatever that means
 - Purpose was for “facilitating construction” but now includes “coordination.” *i.e.* for scheduling purposes?



§ 3.2.4 Reporting Errors in P&S

- Contractor failure to report bars claims relating to errors in documents.
OLD Rule = “willful failure”
- Deletion on § 3.7.3 Confirms Intent



§ 3.3.1 Owner Directed Means and Methods

- OLD Rule = Owner responsible
- NEW Rule = Contactor responsible for “shared liability”
- Owner liable only if 100% at fault



§ 3.7.4 Concealed Conditions

- OLD Rule = mutual obligation for all parties to observe and report to others
- NEW Rule = only Contractor obligation
A/E and Owner may remain silent



§ 3.7.5 Human Remains & Wet Lands

- Duty to discover = Contractor
- If Contractor does, then Owner's duty to obtain governmental authority to go forward
- If Contractor breaches duty, then what?
 - Liable for delays and damages?
 - Not entitled to time extension?



§ 3.9.3 Superintendent Cannot Change Without Approval

- Hamstringing Contractor
- Not Owner Representative!
- Not A/E Representative!



§ 3.10.2 Contractor's Submittal Schedule

- ✦ Contractor Must Submit for A/E's Approval
 - ✦ A/E May Order Multiple Revisions
 - ✦ A/E May Ignore Entirely
- ✦ Old Rule Required Submission of Submittals, not a Schedule
- ✦ New Rule Bars Contractor Claim for REA's Unless Schedule Submitted
- ✦ Mechanism for A/E Mischief is Obvious



§ 4.2 Administration of Contract

- “Architect” Removed from Title
- Significance of Architect Further Diminished
 - A/E walks after Certification of Final Pay Application
 - No more “endeavor to protect” Owner from defects and deficiencies in the work
 - A/E responsible for advising Owner of “known deviations, defects and deficiencies”
 - Contractor’s obligation to find errors is now greater than A/E’s
 - A/E not liable for delays in submittal evaluation
 - Can IDM review this claim?



§ 6.1.3 Separate Contractor

- Owner not liable for coordination
- Presumption is Contractor must coordinate the Separate Contractors



§ 6.2.2 Errors of Separate Contractors

- No change . . . but . . .

Will it be construed as §3.2.1?



§ 7.3.7 Construction Change Directives (CCD's)

- OLD Rule = Reasonable profit and overhead?
- NEW Rule = maybe YES or NO!
- Depends on Contract Documents
 - Percentage of fee
 - Unit pricing
 - Contractor may not argue presumptively greater than Contract percent!
- Payment of “Undisputed Amounts” has been strengthened for Contractor in § 7.3.9



§ 9.4 Certificates for Payment

- A/E no longer “certifies” Work and Schedule of Values correspond



§ 9.5.3 Owner Joint Check Option

- If A/E withholds certification for Contractor nonpayment of Sub, Owner may joint check payment
 - Owner may contact Subs directly to coordinate payment
 - Owner may subvert GC's legitimate right to withhold under Subcontract



§ 9.7 Owner Failure to Pay

- Contractor may still stop work for nonpayment



§ 10 Hazardous Materials

- General Loosening of the Scope of the Old Provisions
- Radical Change of Haz-Mat Provisions
 - Old Rule: Whoever was responsible for its presence was singularly liable for its consequence
 - New Rule: Owner may order Contractor to determine how to safely use and hold it jointly liable for consequences



§ 10 What Should the Contractor Do?

- Refuse the new contract language where possible
- If the new language is used:
 - Scour the Contract Documents for unwanted delegation of responsibility for Haz-Mat
 - Use § 10.3.3 protection
 - Report to Owner & A/E before delivery of specified materials that they may be hazardous and insist upon Owner to “render harmless.”
 - Do not work with the materials without direction from Owner’s professional advisor
 - Demand time extension and damages if delays ensue



§ 11 Insurance

- Property Insurance Changes Minor
- CGL Changes Remarkable
 - Completed Operations
 - Additional Insured Protection



§ 11 Insurance

■ Golden Rule

- A promise to procure should be drafted so that the party promising may keep it.
- Does § 11 violate the Golden Rule?
 - For the most part it is just fine
 - Perils v. Policies
 - AIA opts for perils and all are insurable
 - Completed Op's & AI is the exception



§ 11.1.3 Certificates of Insurance

- Purpose to Certify Coverage “In-Place” During Project
- But Coverage Period & Project Period Rarely Coincide Exactly
- Renewals Bring New Insurers & Coverage Differences
 - Old Form Recognized Changes in Market Must Allow Flexibility in Certifying Coverage
 - New Form Knowingly Encourages False Certifications



§ 11.1.4 Additional Insured

- The Debate is All About Shifting Risks
- How the Document Resolves Matters:
 - Contractor Must Procure AI Protection for O & Others
 - But the Scope of Coverage Is Limited
 - Expressly limited to damages “caused by” Contractor’s negligence
 - Owners want more protection
 - GC’s want more protection
 - The provision is a “contribution” model—vicarious liability



§ 12.1.1 Uncovering Work

- A/E no longer “requires” it but instead “requests” it?
 - Why?
 - To Distance Itself From Liability When Uncovering Work Was Unnecessary



§ 13.1.1 Governing Law

- Federal Arbitration Act for §15.4 processes
- The Selection of the FAA is Intended to Protect the Integrity of the Arbitrator's Decision
 - Some states resist the independence of the arbitration panel
 - 12 states have adopted the Revised Uniform Arbitration Act that may be even more progressive than the FAA



§ 13.7 Statute of Repose

- Old “Accrual of Action” Provision is Deleted
- New Ten year Statute of Repose regarding claims between Owner and Contractor
 - Consistent with the majority of state’s rules on barring claims arising out of improvements to real property



§ 14 Termination of Contract

- § 14.1 Contractor Terminates:
 - Clarifies Contractor's right to recover "damages" after terminating the Contract
 - Recoverable "costs" should mean attorneys' fees
 - Damages are still recoverable
 - Presumably directly arising from the Contractor's Performance, and not indirect consequential damages
- § 14.2 Owner Terminates:
 - IDM decides



§ 15 Claims and Disputes

- § 15.1 Definition is broad
 - But broad enough to encompass claims v. A/E?
 - Adjustments to Contract price *and time*?
 - Concealed conditions?
- § 15.1.2 Notice within 21 days!
 - Of what?
 - To whom?
- § 15.1.3 Work Through Dispute
 - IDM's decision may circumvent A/E's CCD's and force payment when A/E and Owner dispute claim



§ 15.1.6 Consequential Damages

- “Direct v. indirect damages”
- Consequential Damages may include calculated consequential damages
 - Reflects a Current Practice



§ 15.2 Initial Decision

- By IDM
 - Except claims relating to:
 - Hazardous substances (§ 10.3)
 - Emergencies (§ 10.4)
 - Property Insurance Claims (§§ 11.3.9 & 11.3.10)
- Can it render decision v. A/E?
 - Claim definition = yes
 - This language = no



§ 15.2.6.1 Appeal of IDM Decision

- Either Party May Demand that “the Other” file for Mediation of IDM’s Decision
 - 30 Days runs from date of decision, not receipt
 - What if Unhappy party Demands that the Other file for Mediation but the Other Party Does not?
 - Do §§ 15.2.5 or 15.2.6.1 allow the unhappy party to file for Mediation?
- Mediation Shall Occur Within 60 Days of IDM’s Decision?
- Appeals After Unsuccessful Mediation Are Not Necessarily Arbitrated



§ 15.4 Arbitration

- This is No Longer the Primary Process of Dispute Resolution
 - Default is to Litigation
 - Contractor Must “check the box” for it
- §15.4.4 Now Allows Consolidation of Arbitrations and Joinder of Other Parties
 - All Participants Have Arbitration Rights
 - Common Issues of Law or Fact
 - Similar Procedural Rules



QUESTIONS/DISCUSSION

