Owner’s Guide to Surviving the AIA’s A201

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- Introduction of the Speakers
- Goals for the Program**

**ULTERIOR MOTIVE:

Program to kick-off IMLA’s Construction Contract Drafting Initiative (“CCDI”)!
Goals of the CCDI

- Create Form Construction Documents for use by IMLA Members
- Draft Revisions to Certain Families of Construction Documents for use by IMLA Members
- Who should participate in the CCDI?
Generous Assistance with CCDI

- Waller Lansden – Nashville, TN
- Ford Nassen & Baldwin – Austin, TX
- ARCADIS International U.S., Inc.
A Brief History of Standardized Form Construction Documents

• 1857-The American Institute of Architects (AIA) was founded

• 1878-American Bar Association was founded

• 1888- AIA and National Association of Builders (predecessor to Associated General Contractors of America) drafted “Uniform Contract” – the first standard form construction contract

• Since 1911 to present – AIA published sixteen editions of standard form construction documents

• Other special interest groups have followed
What are the Leading Families of Construction Documents?

1911
American Institute of Architects (AIA)

1993
Design Build Institute of America (DBIA)

1975
Engineers Joint Contract Documents Committee (EJCDC)

2007
Associated General Contractors of America (AGC) - ConsensusDocs
What group is conspicuously missing?

- OWNERS!
Modern Construction Contracts

• AIA family of construction documents

• Other families of construction documents

• All created with specific agendas

• Each family of documents have a different approach to risk allocation between the owner, general contractor, and architect/engineer
AIA Document A201 -2007
General Conditions of the Contract for Construction

• Used with AIA A101-2007 Standard Form of Agreement Between Owner and Contractor Where the Basis of Payment is a Stipulated Sum

• Topics to be covered during the program
  • Payment, Compensation for Changes in the Work (including related site conditions), and Disputes (Markovs)
  • Scope of Work and Scheduling (Chapman)
  • Risk, Insurance and Bonding (Dunn)
PAYMENT, COMPENSATION FOR CHANGES IN THE WORK (INCLUDING SITE CONDITIONS), AND DISPUTES
Payment

- Revise Article 9 Payments and Completion:
  - Section 9.3 Applications for Payment
  - Section 9.7 Failure of Payment
  - Section 9.8 Substantial Completion
  - Section 9.9 Partial Occupancy or Use
  - Section 9.10 Final Completion and Final Payment
Compensation for Changes in the Work (including related site conditions)

- Revise Article 7 Changes In Work
  - Section 7.2 Change Orders
  - Section 7.3 Construction Change Directives (7.3.7 and 7.3.10)

- Revise Article 8 Time
  - Section 8.2 Progress And Completion
  - Section 8.3 Delays And Extension Of Time

- Revise Article 3.7 Permits, Fees, Notices and Compliance with Laws
  - Section 3.7.4 (Site Conditions)
Disputes

• Revise Article 14 Termination or Suspension of the Contract
  • Section 14.1 Termination By The Contractor
  • Section 14.2 Termination By The Owner For Cause
  • Section 14.3 Suspension By The Owner For Convenience
  • Section 14.4 Termination By The Owner for Convenience
Disputes (cont’d)

• Revise Article 15 Claims and Disputes
  • Section 15.1 Claims
  • Section 15.2 Initial Decision
  • Section 15.3 Mediation
  • Section 15.4 Arbitration
SCOPE OF WORK AND SCHEDULING

Jeff Chapman

- Scope of Work
- Compliance with Laws
- Scheduling
- Warranty
- Suspension and Termination
Scope of Work

- §3.2 review of contract documents and field conditions
  - Opportunity to define Contractor’s scope
  - Require Contractor to verify field conditions
  - Identify conflicts between contract documents and site
Scope of Work (cont’d)

- Revise A201 to require frequent verification of conditions
  - Contractor to provide notice of conflicts to owner and architect
  - Remove language describing Contractor’s “capacity as a contractor”
  - Require Contractor to study plans, verify field conditions and report discrepancies
Compliance with Laws

- Building codes, local ordinances, statutory obligations
- Controlling law based on location of project
- Rights and remedies
Compliance with Laws (cont’d)

- Strike language making Contractor “not responsible for ascertaining that contract documents comply with applicable building codes, etc.”

- Require contract be governed by state law where project located

- Require venue in locality /county of project
Scheduling

- Hungrily important aspect of project management for owner
  - Require frequent schedule updates
  - Work from required baseline prepared at inception
  - Require submittal schedule
  - Update to monitor material selections and delivery
Scheduling (cont’d)

- Require Contractor to maintain updated construction schedule at project site
- Provide mechanism for Owner-ordered acceleration
- No cost increase if due to Contractor delay
- Do not exempt supply or delivery from Contractor responsibility
Scheduling (cont’d)

• §2.4 Provide Owner Right to Carry Out Work
  • Include provision to allow supplementation to correct delay

Practice tip:
Be aware of surety defenses on performance bond!

• Require notice by contractor of all delays
  • In writing and separate from schedule updates
  • Failure to provide waives contractor right to recover or triggers owner’s right to delay damages offset
Warranty

- General provision at §3.5 provide basic protection
- Implied warranties vary by jurisdiction
  - Best to modify A201 to avoid jurisdictional differences
  - Make all warranties express and contractual
- Provide separate warranty provisions
  - Contractual warranty
  - Material, systems and manufacturers’ warranties
Warranty (cont’d)

• Specify minimum of one (1) year warranty

• Require additional time for some systems (optional)
  • MEP – 2 year
  • Structural – 5 year

• Obligate Contractor to repair after written notice by Owner

• Require transfer of all materials, systems and manufacturers’ warranties
  • Express obligation prior to final payment
  • Deliver after substantial completion, but prior to final completion
Suspension and Termination

Consider both Convenience and Cause provisions

Suspension for convenience by Owner

• Absolute right of owner

• Will expose owner to delay damages (if allowed by contract)

• Compensate for equipment costs, mobilization, extended general conditions, etc.

• Grant additional time to contract

• Exclude profit and home office overhead
Suspension and Termination (cont’d)

Termination For Cause If Contractor Default

• Will trigger obligations by Surety

• Delineate events of default as grounds for termination

• Provide written notice to cure to Contractor and Surety

  • After cure period without correction -
    • Free to terminate or suspend at any time
    • Non-exclusive election by Owner
Suspension and Termination (cont’d)

Termination For Convenience

• Provides owner way out of contract
  • Can be useful to overcome impasse or claim
  • Particularly if fault not easily assigned

• Most include provision for compensation owed to contractor
  • Payment for all work completed to date
  • Exclude profit and overhead or unperformed work
  • Pay for costs associated with termination
Suspension and Termination (cont’d)

Termination For Convenience

• Require written notice with immediate suspension
  • Reasonable time for demobilization and
  • Provision of necessary documentation
    • Such as warranty as final pay request
Claims for Consequential Damages

- The Perini case
- The AIA’s historic policy shift in 1997...
- What are consequential damages?
Waiver of Consequential Damages

• What is the impact on the Owner?

• Is the Waiver “mutual”?

• Which party is best positioned to control project risk?
Waiver of Consequential Damages

- Are consequential damages insurable?
- Are you authorized to agree to the waiver?
Waiver of Consequential Damages

• Revising § 15.1.6.
  • Liquidated damages clauses
  • Insurance exceptions
  • Caps on classes of damage
A201 Article 11: Insurance and Bonds

• Houses Contractor & Owner Requirements

• Detail light

• Trap for the unwary
A201 Article 11: Insurance and Bonds

• CGL Insurance
  • Specify ISO form, duration, limits
  • Additional Insureds
  • Completed Operations
  • Unacceptable Exclusions
  • Excess Coverage
A201: Builder’s Risk Insurance

• “Final Frontier” of American Construction Insurance

• What it covers and what it doesn’t
A201: Builder’s Risk Insurance

• § 11.3 of A201, “All Risk”
• Revise significantly
• Dated formulation antiquated concepts
A201: Builder’s Risk Insurance

§ 11.3 Revised regarding:

- Duration of coverage
- Coverage scope
- Named Insureds included
- Exclusions permitted and not
A201: Builder’s Risk Insurance

- **Liberty Mutual/Wietz**
  - (Arizona Court of Appeals)

- **Fourth Street Place v. Travelers**
  - (Nevada Supreme Court)
A201: Indemnity

• § 3.18.1
  • “Narrow form”
  • State-specific requirements and modifications
A201: Bonding

• § 11.4 Performance and Payment Bonds
  • Light on detail
  • Revision needed, sometimes state-specific features to incorporate
  • Debatable value of bonding
Questions?
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