



Owner's Guide to Surviving the AIA's A201

John Markovs

Deputy County Attorney
Montgomery County, MD

Jeff Chapman

Ford Nassen & Baldwin
Austin, TX

Chris Dunn

Waller Lansden
Nashville, TN

Panel Moderator: Roy Cooper

Arcadis International U.S., Inc.

IMLA 77th Annual Conference – Austin, TX
October 21-24, 2012

Owner's Guide to Surviving the AIA A201

- 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

- Waller Lansden –
Nashville, TN



- Ford Nassen & Baldwin –
Austin, TX

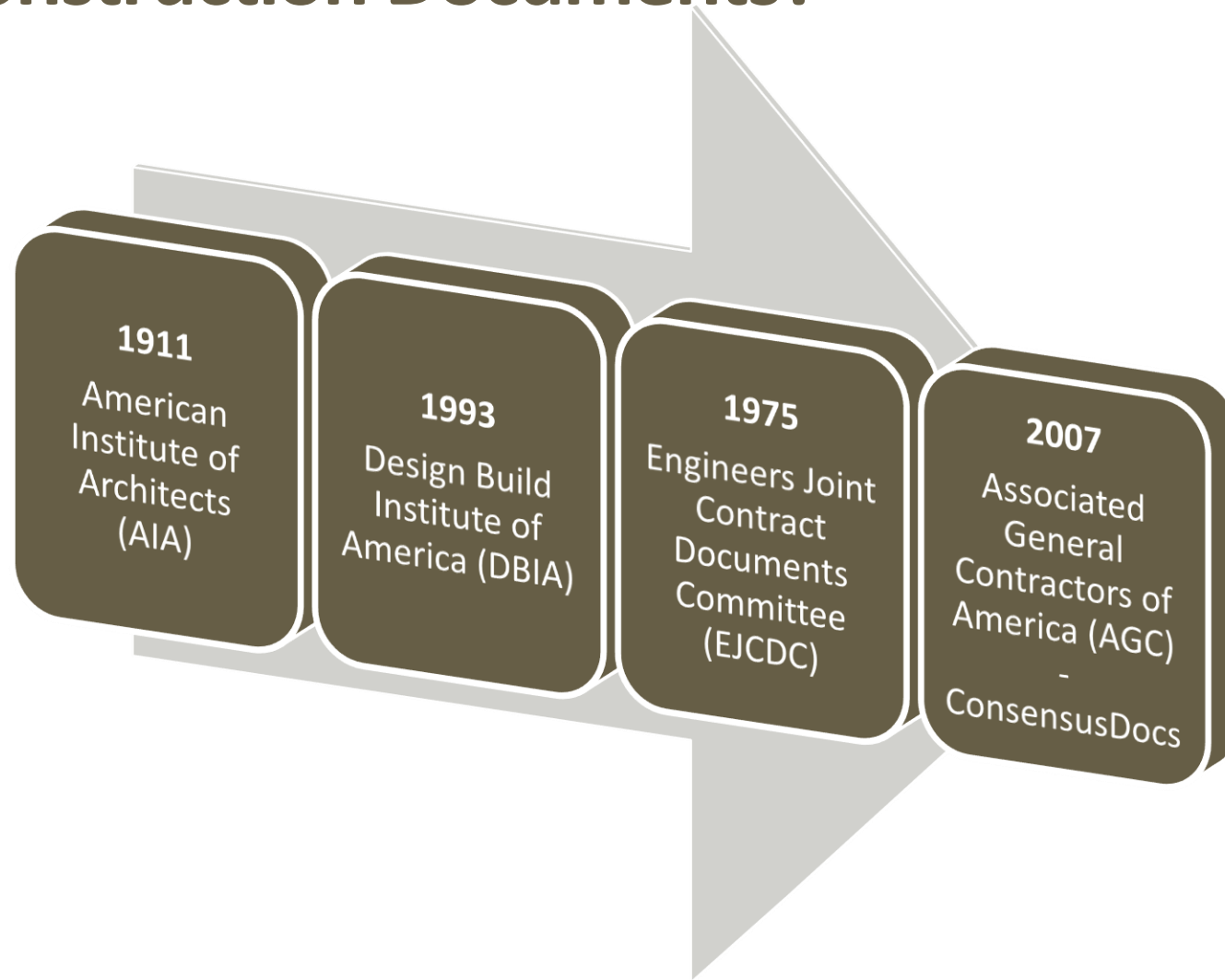


- ARCADIS International
U.S., Inc.

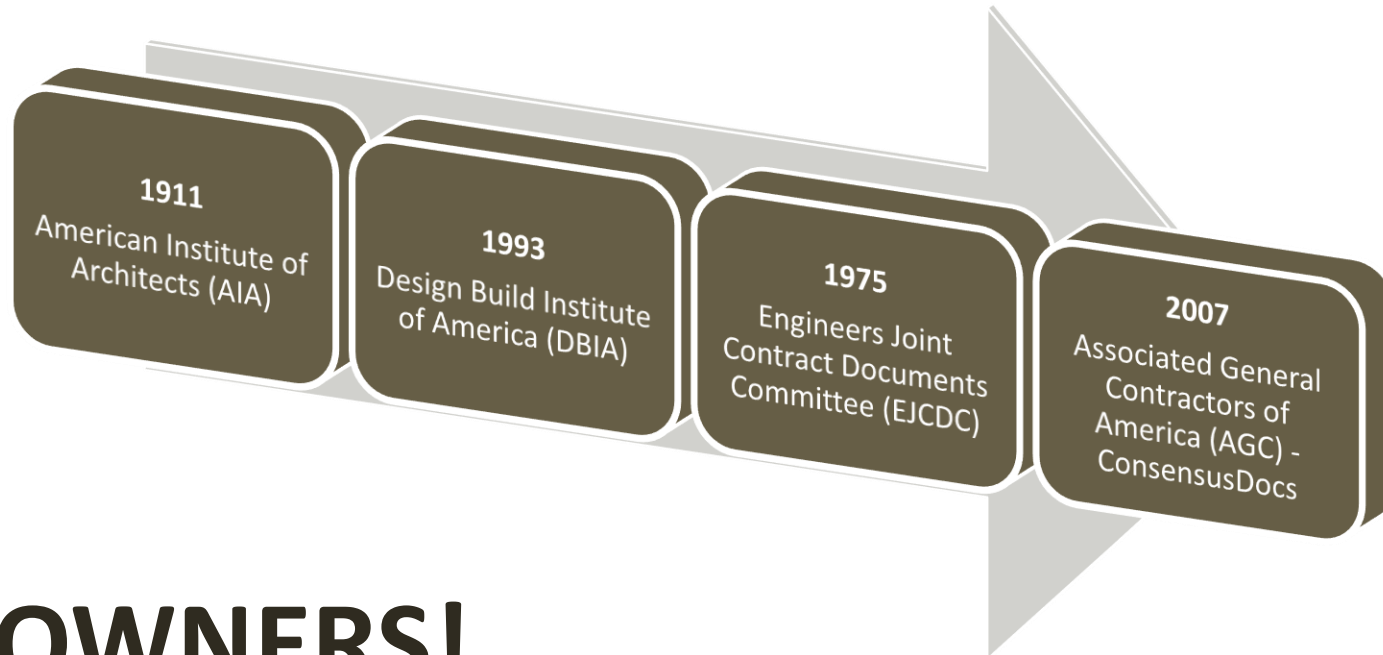
A Brief History of Standardized Form Construction Documents

- 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?



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)

John Markovs

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

Jeff Chapman

SCOPE OF WORK AND SCHEDULING

Contract Performance Provisions

- 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

- Hugely 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

Chris Dunn

RISK, INSURANCE AND BONDING

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

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

Questions?



Owner's Guide to Surviving the AIA's A201

John Markovs

Deputy County Attorney
Montgomery County, MD

Jeff Chapman

Ford Nassen & Baldwin
Austin, TX

Chris Dunn

Waller Lansden
Nashville, TN

Panel Moderator: Roy Cooper

Arcadis International U.S., Inc.

IMLA 77th Annual Conference – Austin, TX
October 21-24, 2012