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The 2017 Updates to the AIA Construction Contract Documents: More Fun Than Tax Law.

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I. Introduction

The American Institute of Architects ("AIA") was founded by architects in 1857 as an industry trade group, and the AIA has created construction contract forms since 1888. Over time, the AIA contracts have become the most commonly used set of construction contract forms on commercial projects in the United States. In 2017, AIA issued its once-in-a-decade updates to some of its primary contractor, architect and subcontractor forms. Because the forms are only updated every 10 years, the revisions are significant to the industry and are often seen as reflecting legal trends in contracting practices.

For owners/developers and construction counsel who routinely use contracts and form documents issued by the AIA, it is important to be aware that the 2007 edition of many key AIA construction documents *will no longer be available after October 31, 2018.* That means that many architects and construction companies will stop using the retired contract forms later this year as there are potential licensing issues using the old forms.

II. Major Forms Revised

The AIA's more relevant updates to its most used forms are as follows: Owner-Contractor forms including the following: the A101, A102, A104 and A105 base contract forms, and the A201 General Conditions of the Contract. The AIA's updates to the Owner-Architect forms include the following: the B101, B102, B103, B104 and B105 contract forms, as well as an update to the C401 Architect-Consultant contract form. The AIA released an update to its primary Contractor-Subcontractor agreement, the A401 subcontract form. Other relevant forms revised include: B201 Design and Construction Administration Services, B203 Site Evaluation and Project Feasibility, B205 Historic Preservation Services, B207 On-Site Project Representation Services, B210 Facility Support Services, C203 Commissioning Services, and C704 Certificate of Substantial Completion.[1]

[1] This presentation focuses on the "A201 Family" of contract forms for use on projects using the design-bid-build delivery models; the AIA also produces other families of construction contract forms, including the "Design-Build Family" of documents for projects on which the design-build delivery model is utilized as well as different families of documents for projects using a construction manager as advisor (CMa) or as contractor (CMc) (e.g., the A141, A142 and B143 design-build documents and A132, A133 and A134 construction manager documents). The AIA issued revised versions of these families of documents in 2014 and 2009 respectively. As these forms are not commonly used on public projects, they are beyond the scope of this presentation.

A comparison of the 2007 and 2017 AIA forms is available online at https://www.aiacontracts.org/contract-doc-pages/27091-aia-document-comparisons. (The AIA does not freely allow the use of its materials, including the red-lined sample contract forms, even for educational purposes.) There are substantial form revisions in the 2017 updates, many of which are meant to clarify existing basic construction contract assumptions. However, there are some major form changes that materially affect the rights of the parties. This presentation examines the most relevant of those.

III. Owner/Contractor Contract: Major A101 and A102 Form Revisions

The AIA A101 and A102 forms are the most commonly used AIA contract forms for construction contracts for use between Owners and Contractors. The 2017 changes for the A101 and A102 are very similar, though the different contract types (i.e., cost-plus vs. lump sum) lead to some slight differences. The important changes to both documents by topic are:

- **Insurance, see *new* Exhibit A to A101 and A102.** Insurance provisions for the A101 and A102 documents were previously comprised simply of a reference to the A201, which contained detailed insurance requirements in Article 11. The 2017 forms have a major shift from that model. All major insurance provisions have been combined into a single, comprehensive insurance and bonds exhibit, to be attached as Exhibit "A" to either the A101 or A102.[2] Parties can now forward this exhibit directly to their insurance brokers for advice on necessary coverages. Many of these revisions do, however, have the effect of reallocating the parties' risks and obligations in subtle, but important ways.

    - The new form uses a checkbox system with various insurance options from which the parties can select during the contract negotiation phase. This change reflects the common practice in the construction industry of creating separate insurance exhibits for each new construction contract.
    - The new insurance exhibit contains default insurance coverages to be maintained by the Owner and Contractor, and includes place holders for the parties to insert the respective policy limits.
    - It also includes optional coverages that may be industry standard for specific projects.
    - A significant new feature is the requirement for the Owner to identify sub-limits on its Builders Risk policy.

- **Contract Time Provisions, see A101 §§ 3.1 – 3.3; A102 §§ 4.1 – 4.3**. There are more options to designate the Commencement Date and the date for Substantial Completion. Parties can select from a variety of options for the start date of the work, including date of execution, upon receipt of a notice to proceed, or another date, and they can also select between a date-certain for completion of the work or a specified number of calendar days. An important added provision on larger projects is that if the parties have agreed upon interim dates for partial completion of certain aspects of the work, the forms also now include a provision for express milestone dates.

[2] However, the "short-form" AIA construction agreements, such as the A104 (formerly the A107) and the A105, continue to have the insurance requirement embedded into the body of the agreement form.

- **Liquidated Damages, see A101 §§ 3.33 and 4.5; A102 §§ 4.33 and 5.1.6.** Liquidated damages used to be somewhat hidden by a parenthetical reference in the 2007 forms, and parties had to draft custom liquidated damages provisions. Sometimes owners simply left out a liquidated damages reference, which could have disastrous consequences if the owner also agreed to standard consequential damages wavier for delay damages.

    - However, now the 2017 documents now include <u>two</u> express provisions addressing liquidated damages.
    - Article 5 Contract Sum of the A102-2017 now includes a stand-alone provision (Section 5.1.6) for the parties to determine whether the owner may be entitled to liquidated damages.
    - NOTE: In order to encourage cleaner contracts and efficient negotiations, Section 5.1.6 immediately precedes the new "cost savings" provision that incentivizes contractors to complete work under budget. With both provisions side-by-side, the parties can better negotiate the economic consequences of complying with the construction schedule and guaranteed maximum price.

- **Cost of the Work, see A102 §§ 7.2.5; 7.6.1.1.** Articles 7 and 8 of the A102 define what costs incurred by the Contractor will be reimbursable as a "Cost of the Work."

    - The AIA 2017 update has one important change with respect to certain types of Contractor-employee compensation (e.g., bonuses, incentives, etc.) that is moved from Article 7 to Article 8 to become Cost of the Work.
    - Beneficial to the Owner is a new presumption that labor costs will not increase during the course of the project (A102 § 7.2.5).
    - On the other hand, beneficial to the Contractor is that self-insurance and captive insurer costs are now included as reimbursable Costs of the Work (subject to Owner approval).

- **Payment Procedures and Retainage, see A101 § 5.1; A102 §§ 5.2.5, 5.2.6**. The payment procedures in both the A101 (lump-sum) and A102 (cost-plus) had significant payment procedure changes. The payment provisions now set forth a list of all items to be included in calculation of each payment, followed by a list of all items that should be deducted, which is much easier to understand. There are good clarifications to the cost-plus model. The other more significant changes are:

    - Retainage is now addressed in separate provisions for both the A101 and A102 (A101 § 5.1.7; A102 § 12.1.8), which makes is easier to understand.
    - For both the A102 (§5.1.7.3) and A102 (§12.1.8.3), retainage billing is now expressly stated to be upon substantial completion.
    - §12.1.8 of the A102 now includes specific provisions to identify retainage exclusions and the early release (or reduction) for retainage. Contractors often want early release of retainage for general conditions or direct material costs.

- A101 § 5.1.6.1 now requires the Owner to pay the contract price "allocable to the work," while references to percentages of completion and the schedule of values are eliminated from the calculation of payments.
- A101 § 5.1.6.2.3. Contractors are specifically instructed to omit or deduct from payment applications any amounts that the Contractor does not intend to pay to its subcontractors.
- A102 § 12.1.7.1.1 continues to use percentage of the work and schedule of values metrics for billing purposes.
- A102 § 12.1.5 states that all costs that must be approved by the Owner must now be approved in writing prior to incurring the cost (A102 § 7.1.2), and the GMP must now be separately allocated to each portion of the work, including the contingency and the Contractor's Fee.
- A102 § 12.1.5, states that the schedule of values must separately allocate the entire GMP to the various portions of the Work, including any contingency and the Contractor's Fee; however, each individual item in the GMP schedule of values is not treated as a separate cap.
- A102 § 10.2 has been added establishing a default approach discouraging cost-plus subcontracts, but requiring any such cost-plus subcontracts to be subject to full recordkeeping and audit rights.

- **Termination for Convenience Fee, see A101 § 7.1.1; A102 § 14.1.3**. Upon a termination for convenience by the Owner, the traditional standard provisions in the AIA forms and other construction documents permitted the Contractor to recover its lost overhead and profit for work not performed beyond the date of termination. This section has been revised in two ways.

  - The new forms replace that unperformed work compensation with an agreed "Termination Fee" whenever the Contractor is terminated for convenience. Parties will now need to agree in advance what this Termination Fee will be. Expect contractors to lean on these new provisions to justify a termination fee in the form of a lump sum amount or a percentage of the unperformed work.
  - § 14.1.3 of the A102-2017 (and Article 14 of the A201-2017, see *infra*,) includes distinct provisions to define the termination fee and require the Owner to reimburse the Contractor for the costs incurred when terminating subcontracts.

- **Electronic Data and Building Information Modeling, see A101 § 9.1.4; A102 § 16.1.4.** The 2017 forms for both contracts emphasize the AIA E203-2013 Building Information Modeling (BIM) and Electronic Data Exhibit and insert additional clauses pertaining to use of that Exhibit (also see A201 §§ 1.6 – 1.8).

  - Where notice is required by the Contract Documents, the notice will be sufficient if delivered in accordance with the Electronic Data Exhibit.
  - Email communication should be confirmed as either being considered or not being considered formal notice under the Exhibit.
  - NOTE: the 2017 A201 § 1.6.2 still requires claims for additional money or time to be in writing and delivered by certified mail or courier with proof of delivery;

however, in South Carolina, courts have held that actual notice is akin to written notice for construction contract claims in certain circumstances.

III. Major A201 General Conditions Form Revisions

Among the most important of the AIA's forms is the A201 General Condition of the Contract for Construction, which was also updated in 2017. The General Conditions set out the rights, responsibilities, and relationships of the owner, contractor or construction manager, and architect, with many terms being heavily negotiated between the contracting parties. The A201 form is incorporated by reference into many of the AIA's A-Series construction agreements, including the A101 (Stipulated Sum Contract), A102 (Cost of the Work Plus Fee with a Guaranteed Maximum Price) and A401 (Standard Form Subcontract), among others. As a result, 2017 revisions to the A201 have the greatest impact and will affect the largest number of users.

IMPORTANT PRACTICE NOTE: Because some of the other AIA contract series of documents are themselves not yet updated but reference the 2007 edition of the A201, the A201-2007 General Conditions will <u>not</u> be retired until May 31, 2021.

- **Owner's Financial Information, see A201 § 2.2.2.** The Contractor has substantially more rights to demand financial information from the Owner prior to contracting and during the performance of the Contract.
    - Contractor can now suspend performance if the Owner cannot show financial responsibility.
    - Owner may want to modify this section if Owner has concerns about the amount of knowledge a Contractor may be allowed to explore regarding an Owner's source of funds for a project.

- **Contractor's Means and Methods, see A201 § 3.3.1.** Contract Documents sometimes give specific instructions as to a Contractor's means and methods; that is, how the Contractor is to perform the Work. The 2007 A201 allowed the Contractor to stop work if it determined that any means and methods required by the Owner (usually through specifications prepared by the Architect) were unsafe. The responsibility then fell to the Architect to clarify the specifications. The 2017 updates change this. Contractors are now responsible for performing their own due diligence regarding the safety of construction means and methods dictated in the Contract Documents. Now, when a Contractor determines that required means and methods are unsafe, the Contractor, not the Architect, must propose alternatives. The Architect is responsible only with "evaluating the proposed alternative solely for conformance with the design intent for the completed construction."

- **Warranties, see A201 §§ 3.5.1; 3.5.2.** The prior AIA warranty provisions for warranties from manufactures, equipment suppliers, and other third party component providers was silent as to what entity the warranty should be issued. It was the customary and usual practice for contractors and subcontractors to assign warranties to the owner at the end of the job.

- New Section 3.5.2 added. This new provision now requires all material, equipment and other special warranties to be issued in the name of the owner directly. This means that the owner will no longer have to go through the contractor to enforce its warranty rights which commonly occurs now as contractors often forget to assign the warranties at the end of the project.
- With the new default language, owners can demand that contractors, subcontractors, and suppliers should expect the requirements that their warranties initially be in the owner's name (and not merely assignable) as these new terms essentially establish the industry standard.

- **Contractor's Schedules, A201 §3.10.1.** Prior A201 General Conditions only required the Contractor to provide a construction schedule that did not exceed the time limits contained within the Contract Documents.

  - The 2017 update now requires the Contractor's schedule to include: "(1) the date of commencement of the Work, interim schedule milestone dates, and the date of Substantial Completion; (2) an apportionment of the Work by construction activity; and (3) the time required for completion of each portion of the Work."
  - Contractor is also now required to include additional information in its schedule submittals, including schedule milestone dates, apportionment of the work by construction activity, and the time required for completion of each portion of the work.
  - NOTE: Owner should be diligent in enforcing this requirement or the Contractor can argue wavier of the requirement if the Owner unreasonably does not work with Contractor an approved schedule.

- **Direct Owner-Contractor Communication, see A201 § 4.2.4.** In the 2007 version, the Architect was supposed to the be conduit between direct communications between the Owner and Contractor. As could be expected, this was overly cumbersome and usually ignored in practice. Now, per the 2017 update, direct communication between the Owner and Contractor is now expressly authorized.

  - NOTE: The 2017 update to the A201 still requires that the Architect be kept informed of all project-related communications. This should be simply a matter of including the Architect on emails.

- **Minor Changes in the Work, see A201 § 7.4.** The Architect in the 2007 A201 could order the Contractor to make minor changes in the work, and the Contractor was required to perform them. A "minor change" was a change the Architect did not feel would affect the Contract Sum or Contract Time.

  - The new 2017 update allows the Contractor to refuse to perform the Architect ordered Work if its disagrees with whether a proposed change is a "minor change" and believes the change will affect the Contract Sum or Contract Time. The Owner can still make the Contractor perform the "minor" change through a Construction Change Directive.

- NOTE: If a Contractor fails to object and nonetheless proceeds with the minor change, it waives any claim for adjustment.

- **Liens, Lien Waivers, and Indemnification by Contractor for Liens, see A201 § 9.3.1; § 9.6.8.** Some of the more heavily amended sections of AIA contracts involve lien waivers. The reasons include that lenders, including underwriters, and becoming more and more stringent on requirements that contractors promptly pay their subcontractors on a job, as the failure to promptly pay subcontractors is often the first sign of financial trouble of a contractor. The updated AIA A201 has made some of these amendments as part of the form now:

    - Lien waivers and releases from subcontractors must now be submitted with each Application for Payment.
    - A new section (§ 9.6.8) provides that if the Owner pays all amounts due as obligated under the contract, the Contractor must indemnify and defend Owner against any lien claims or claims for payment by Subcontractors.
    - NOTE: The general indemnity provision in Section 3.18 of the A201 applies to claims made against the owner arising out of the contractor's work *only*. Thus, this new language may reduce modifications of the general indemnity section as well.
    - NOTE: The new lien indemnification language should substantively match the lien indemnity language contained in the owner's standard conditional and unconditional lien releases as well.

- **Termination by Contractor for Cause, see A201 § 14.1.3.** The 2017 revision to § 14.1.3 provides that upon the Contractor's election to terminate the Contract for cause, the Contractor can only recover from the Owner: (1) payment for the Work executed; (2) reasonable overhead and profit on Work not executed; and (3) costs incurred by reason of such termination.

    - NOTE: Owner may wish to limit its liability on a Termination for Cause to the same Termination Fee as the Contractor may bargain for if there is an Owner's Termination for Convenience. This can substantially limit the damages recoverable by a Contractor that accuses an Owner of breach.

- **Termination by Owner for Convenience, see A201 § 14.4.3.** This section follows the lead of the 2017 updates to the A101 and A102 (§ 14.1.3) by providing for a Termination Fee to the Contractor in the event of a termination by the Owner for convenience. The damages recoverable by the Contractor in such a case are limited to: (1) for Work properly executed; (2) costs incurred by reason of such termination, including costs attributable to termination of Subcontractors; and (3) the termination fee, if any, set forth in the Agreement.

- **Dispute Resolution and Mediation Timing, see A201 §§ 15.2.6; 15.3.3.** There is a new timing mechanism added in the dispute resolution process to encourage the parties to move things along expeditiously.

- After the Initial Decision Maker (usually the Architect) has decided a disputed matter, §15.2.6 allows either party, within 30 days, to require the other party to file for mediation within 30 days.
- Thereafter, new §15.3.3 provides that either party may demand that the other file for binding dispute resolution.
- If one or the other party does not file a claim within 60 days of the demand, then both parties waive their rights to arbitration or litigation, and the initial decision becomes final.
- NOTE: This may result in much re-drafting because of the severe consequences of failing to timely file a claim after mediation.
- NOTE: Also, as stated *supra*, pre-litigation mediation has a mixed track record of success, so the parties may wish to dispense with this requirement of mediation altogether.

- **Claims, see A201 Article 15.** While the A201 has a comprehensive claims provision in Article 15, because of the many potential areas of dispute within the framework of the AIA contract documents did not specify that Article 15 applied, the claim provision could be somewhat ambiguous. The 2017 update throughout the A201 specifies more matters that are subject to, and must be resolved through, the claims process under Article 15.

    - For example, the A201-2017 now specifies that disputes regarding an owner's right to carry out work under Section 2.5; disputes regarding adjustments to the contract time arising from construction change directives under Section 7.3.5; and disputes regarding an architect's certification or withholding of certification of payment under Section 9.5.2 must follow the Claims provisions of Article 15.

- **Insurance. See A101 discussion. Also see new: A201 11.2.3:** The new sections states:

    - "Notice of Cancellation or Expiration of Owner's Required Property Insurance. Within three (3) business days of the date the Owner becomes aware of an impending or actual cancellation or expiration of any property insurance required by the contract documents, the Owner shall provide notice to the Contractor of such impending or actual cancellation or expiration. Unless the lapse in coverage arises from an act or omission of the Contractor: (1) the Contractor, upon receipt of notice from the Owner, shall have the right to stop the work until the lapse in coverage has been cured by the procurement of replacement coverage by either the Owner or the Contractor; (2) the contract time and contract sum shall be equitably adjusted; and (3) the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent any loss to the Owner would have been covered by the insurance had it not expired or been cancelled. If the Contractor purchases replacement coverage, the cost of the insurance shall be charged to the Owner by an appropriate change order. The furnishing of notice by the Owner shall not relieve the Owner of any contractual obligation to provide required insurance."

        - This Section allows the Contractor to stop work if the Owner does not maintain the required insurance.

- This Section also includes a broad waiver provision of Owner's rights against the Contractor if the Owner does not obtain the required insurance.
- NOTE: It is very important that the Owner confirm with its insurance broker that is has the insurance mandated by the contract or the Owner may waive its right to recover against the Contractor for property damage.

- **Contractor's Reliance on Performance and Design Criteria, see A201 § 3.12.10.1.** In the 2017 update to this section, the Contractor is now entitled "to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents." On the other hand, the 2007 version of this section previously stated that "the Contractor shall not be responsible for the adequacy of the performance and design criteria specified in the Contract Documents" was removed.

    - NOTE: This seems to create an ambiguity. Is the Contractor responsible for confirming performance criteria or not? Where the Contractor has special expertise in performance criteria on a project, the Owner may want to revert to the 2007 language.

- **Subcontracts, see A201 § 5.3.** It is common practice that Contractors typically incorporate by reference the terms of the A102 and A201 into each subcontract. The 2007 version of § 5.3 would lead an Owner to expect that. However, there was no requirement that subcontracts be in writing. The 2017 update now requires that subcontracts must be in writing.

    - NOTE: This is a more important point than many owners realize, as many Contractors use "napkin" contracts and the like for trades.
    - NOTE: It is important that all subcontracts be in writing so that the contract price and scope of work is clearly defined. Failing to clearly define the price and scope could open the door to unexpected and illegitimate lien claims (e.g., a subcontractor could claim a lien for work that the contractor did not direct it to perform or at a price greater than what would have been provided in the written agreement).

- **Copyrights, see A201 § 3.17.** The 2007 §3.17 concerned infringement of copyrights and patent rights with respect to a particular design, process, or product and provided for a Contractor's threshold liability test as its "reason to believe" there could be an infringement. However, the new 2017 standard is a much higher standard: the Contractor is not liable to the Owner for infringement unless the Contractor "discovered by, or made known to." Stated differently, a Contractor is now only liable for infringement of copyrights and patent rights if the Contractor had actual, as opposed to constructive, knowledge of the infringement, and failed to notify the Owner or Architect.

- **Notice of Changed Conditions, see A201 §3.7.4.** The time frame for the Contractor to give notice of a changed condition has been lower from 21 days to 14 days.

    - NOTE: 14 days is still too long a timeline for an owner. A contractor can perform thousands of dollars of work due to changed conditions in a few days.

- NOTE: Three to seven days is recommended.

- **Safety of Construction procedures, see A201 § 3.3.1.** The 2017 A201 now requires contractors to perform their work using the safer of (i) the means and methods imposed by the contract documents or (ii) alternative means and methods proposed by the contractor.

    - NOTE: This imposes a heightened duty of care on the Contractor to the benefit of the Owner.

- **Savings Clause, see A201 § 1.2.1.1.** The updated AIA has a new savings clause, something that many attorneys take for granted but that has not appeared in standard construction forms for years. The new clause means that if a court finds a provision of the Contract Documents to be void or unenforceable, the court is requested to nevertheless enforce the balance of the terms and conditions of the Agreement. In addition, if a provision (such as a limitation of liability clause or an indemnification provision against one's own negligence) violates a state statute or common law, the court is to apply the clause to the maximum extent permitted by law instead of throwing out the entire clause.

    - NOTE: With all the limitations of liability in the AIA contract forms, certain generic terms for use in all states were running afoul of some state's statutes of public policy. This clause is meant to preserve all parts of a contract that are not unenforceable.
    - NOTE: Savings clauses do not always work; for example, South Carolina has a strict "blue pen" rule that it will not rewrite contracts for the parties. On the other hand, particularly with respect to indemnification clauses, South Carolina courts seem to have done just that.

IV. Owner/Architect Contract: Major B101 Form Revisions

The AIA 2017 changes resulted in substantial modifications to the standard B101 agreement form between the owner and architect. These changes for the most part carried forward into other owner-architect agreements, from the B102 to the B105. This presentation concentrates on the B101, the most commonly used form.

- **Initial Information, see B101 § 1.1.4; B103 § 1.1.4**. One of the most common problems owners run into with architects is that owners believe they are getting more services from the architect than they are actually paying for. To help alleviate this problems, in the 2017 B-Series, the AIA shifted the location of key information from an optional exhibit into the first article of the major Owner-Architect forms in order to facilitate discussion of potential issues—particularly added Architect charges- before those issues arise. The new Initial Information list is:

    - Owner's program for the project (§1.1.1)

    - Project's physical characteristics (§1.1.2)

    - Owner's budget (§1.1.3)

- Anticipated design and construction milestone dates (§1.1.4)
- Description of procurement and delivery method for the project (§1.1.5)
- Sustainable project objective, if any (§1.1.6)
- Names of Owner representatives (§1.1.7)
- Names of Consultants and Contractors retained by Owner (§1.1.9)
- Architect's representatives (§1.1.10)
- Subconsultants to be retained by Architect (§1.1.11)
- Acknowledgment that budget will be adjusted to accommodate material changes in initial information (§1.2)
- Protocols governing transmission and use of Instruments of Service -- including the use of BIM (§1.3)
- Disclaimer of liability if others rely on BIM without agreement to protocols (§1.3.1)

- **Supplemental and Additional Services, see B101 § 4.1; § 4.2.** As part of the effort for more transparency for the different services by the architect that are and are not included in the architect's basic fees, additional services identified at the time of agreement are now categorized by the AIA in the 2017 update as "Supplemental Services" of § 4.1 to avoid confusing them with "Additional Services" of § 4.2 that arise <u>after</u> the agreement is executed during the course of the project.
  - The table of "Supplemental Services" found in pre-2017 versions under "Additional Services," has been modified. Parties may designate which of these Supplemental Services the architect will provide for separate compensation beyond the agreed compensation for the architect's basic services.
  - "Additional Services" generally are those necessitated by circumstances arising as the project progresses.
  - Another 2017 change is that the AIA presumptively includes under "Additional Services" extra compensation to architects for services required to comply with changes in official interpretations of applicable codes, laws or regulations. See B101 § 4.2.1.3.

- **Cost of Work and Redesign, see B101 § 6.1 and § 6.7.** Related to the changes to "Supplemental" and "Additional" services in Article 4 above, the 2017 B101 also includes revised provisions designed to provide further compensation to architects in Article 6. The definition of "Cost of Work" was tweaked to include "the reasonable value of labor, materials, and equipment". Architects may now obtain additional compensation for redesign services <u>if</u> the redesign is due to market conditions the architect could not have

reasonably anticipated. This is a significant change as the prior version required the architect to redesign without this escape clause.

- **Compensation, see B101 §§ 11.1.1 through 11.1.3.** The 2007 B101 had a blank section reserved for the parties to insert the amount and basis for the architect's compensation. This has been changed.
    - The 2017 revised form now has separate potential compensation categories: "Stipulated Sum," "Percentage Basis" or through some "Other" method and requires that the parties insert the amount, percentage value, or describe the method of compensation.
    - If the architect's compensation is on a percentage basis, progress payments are based on the most recent budget and previous payments are not subsequently adjusted based on changes to the owner's overall budget, which is different from prior versions (§ 11.6 of B101).
- **Insurance, see B101 § 2.5**. The 2017 revisions have a more robust insurance requirement section.
    - Section 2.5 previously stated: "Identify types and limits of insurance coverage, and other insurance requirements applicable to the Agreement, if any." That statement has been replaced more detailed descriptions of the insurance that is required. Once the blanks are filled in with the desired coverage amounts, it could be deemed adequate by some firms without further addition of an insurance attachment.
    - The main substantive change is that architects are required to maintain insurance for one year <u>after</u> substantial completion.
    - The Commercial General Liability additional insured coverage is for claims caused in whole or in part by the Architect's negligence and it must include both ongoing and *completed operations* coverage. Note that many architects do not carry completed operations coverage.
    - Also see § 11.9 which provides for the listing of additional insurance that may not be mentioned in this section.
    - NOTE: Owners should consider requiring copies of policies and endorsements, and being required to be added for notices of cancellation in the body of the agreement.
- **Phased Services with Liability Limitations, see B101 § 3.1.** While the 2017 update still breaks down the basic services into five parts in Article 3, there are new limitations of liability of the architect.
    - B101 § 3.1.4. Architect is now not responsible for the owner's acceptance of non-conforming work without the architect's written approval. NOTE: This is a significant change and owners should consider striking it as this could be used by an architect to disclaim liability for failing to tell the owner about non-confirming

work, even when the architect had actual knowledge of the same, simply because the owner accepted the work.

- B101 § 3.1.2. Disclaimers limit the architect's liability relating to accuracy, completeness or timeliness of services or information from the owner or the owner's consultants.

- B101 § 3.6.4.3. Limits that the architect's submittal review responsibility is "for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents" and otherwise disclaims certain contractual responsibilities.

- **Copyrights and Licenses, see B101 § 7.5.** The new 2017 makes a couple of changes.

  - As modified, copyright ownership and the owner's license to use documents survives the termination of the agreement—except if the architect terminates the agreement for cause.

  - Also new, the license to the architect's design documents ("Instruments of Service") is no longer granted to the Owner immediately "upon execution of the Agreement," as stated in prior editions; it now only is granted after the Owner has paid the Architect.

  - NOTE: Owner should, if possible, bargain for ownership of the Instruments of Service so the Owner can reuse them if necessary. The architect may require an indemnification by the Owner for such use, however which is problematic with public owners.

- **Claims and Dispute Resolution Processes, see B101 § 8.4**. The 2017 update contains new language that the dispute resolution processes of Article 8 (whether mediation, arbitration or court proceedings) survive termination of the agreement. This can be important as it may mandate pre-litigation or pre-arbitration mediation.

  - NOTE: As a general rule, pre-litigation mediation clauses sound like a good idea, but in practice do not work well. The parties, if they are ready to try and settle a dispute, can always enter into mediation voluntarily at the appropriate time. Pre-litigation mediation is usually not successful because the parties have not developed their facts and arguments and they often cannot do so in a short contractually mandated time frame.

- **Termination and Termination Fees, see B101 § 9.6 through 9.8.** The defined term, "termination expenses" has been eliminated from the 2017 update. This is significant because the term "termination expenses" included "anticipated profit on the value of the services not performed by the Architect." Therefore, there is no longer automatically an anticipated profit award to the architect upon termination.

  - The phrase "Termination Expenses" is replaced with "Termination Fee." That "fee" is to be established when the parties enter into the contract and the parties are

certainly free to include anticipated profit and anything else they agree to in that "termination fee." Fees now continue for services, reimbursable expenses and costs attributable to termination.

- Payment of a "licensing fee" for use of the Instruments is added to the termination section of the Agreement. It has, therefore, been deleted where it used to appear in article 11.9 under Compensation.

- NOTE: The owner should always negotiate the Termination Fee and include it in the contract. If there is to be no fee, a 'zero' fee should be indicated. The custom and practice has been for the Owner not to pay anticipated lost profit on terminated architect contracts, particularly if the architect's profit is built into hourly rates.

- The revised Owner-Architect agreements also set an automatic termination date of one year from the date of substantial completion unless otherwise provided elsewhere in the agreement.

- **Confidentiality, see B101 §§ 10.8, 10.8.1.** The 2017 AIA B101 has a much needed improvement to provisions clarifying when "confidential" and "business proprietary" information may be shared by the architect with third parties.

- **Communications with Contractor, see B101 § 5.12**. Owner used to have to "endeavor to communicate" with the Architect when communicating with the Contractor. Per the 2017 update, however, the Architect must now be copied on all substantive communications between the Owner and Contractor.

    - NOTE: This greatly expands the Owner's duty to include the Architect in communications with the Contractor where the communication relates to or affects the Architect's services or responsibilities. Also, a new requirement is added that the Owner must notify the Architect of substance of its communications with the Contractor in any manner "relating to the project." Essentially, now the Owner cannot have a substantive communication with the Contractor concerning the project without advising the Architect.

    - Language was also added that the Owner may not have any direct communications with Sub-consultants, but instead always must communicate through the Architect.

    - NOTE: Owners may want to strike this provision, particularly on a large project, as this seems to be an excuse for an architect to bill more time to the project where the fees are not capped.

- **Disclaimer of Liability for Different Code Interpretation, see B101 § 4.3.2.1.2 and § 4.2.1.3.** Should an inspector for code compliance on a project disagree with an architect's interpretation of the code, the cost of redesign to comply with the inspector's interpretation will be paid by the owner as an "Additional Service" under the 2017 update.

    - For example, a local code official disagrees that a design feature either on the plans, or already constructed, meets the building code. Under this provision, not only

does the architect not have liability for that, but also the owner must pay the architect for redesign.

- NOTE: Owners should strike this section. Owners should be able to rely on architects to understand local codes, custom and practices and design accordingly.

IV. General AIA Contract Form Reminders for Owners

While there have been substantial changes in many of the AIA forms, the forms do not account for many of the special contract provisions required for contracts with public entities in South Carolina. While the AIA forms have become more "owner friendly" in the last two decades, there are still contract changes that should be considered by any owner. Some of the issues to consider are:

- Type of Standard Form Contract System: Pick just one and use it.
- Choice of Forum: Arbitration or Litigation?
- Or, Procurement Dispute Board?
- If Arbitration, distinguish between the forum and use of its Rules only.
- Should you include pre-litigation mediation clauses?
- Duty to provide contractor all known site information at pre-bid stage.
- Limitations on Overhead and Profit.
- South Carolina State Engineer's Form? (OSE?)
- The "Little Miller Act." S.C. Code Ann. § 29–6–250(1)
- The Subcontractors' and Suppliers' Payment Protection Act S.C. Code Ann. § 29–6–210