SEYFARTH SHAW LLP
ATTORNEYS

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Special Edition

AIA's New Form A201™-2007 General Conditions

November 2007

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A Special Edition for a Special Event

On November 5, 2007, for the first time in a decade, The American Institute of Architects ("AIA") released a revised edition of its popular series of project forms for the construction industry, including standard form agreements between Owner and Contractor, and Owner and Architect, and the widely utilized A201™*-1997 General Conditions of the Contract for Construction. In doing so, AIA expressly acknowledged considerable industry concern about terms in the A201-1997 form with respect to financial matters and dispute resolution, among other items. AIA believes that its revised form "fairly balance(s) divergent interests, and accurately reflects(s) the modern construction industry."

And, for the first time ever, extending over a fifty year period, the Associated General Contractors of America ("AGC") has declined to endorse the AIA General Conditions. In its October 9, 2007 letter to AIA explaining its decision, AGC expressed the "grave concerns" of its membership that the 2007 edition of A201 "significantly shifts risks to General Contractors and other parties outside of the design profession" and voices "philosophical disagreement regarding an architect's authoritative role and mandated linear process."

The AIA documents come about six weeks after the publication of a competing new series of documents, under the brand ConsensusDOCS™**, by a consortium of owner, contractor and trade groups, including The Construction Users Roundtable, Construction Owners Association of America, Construction Industry Round Table, Associated Builders and Contractor, Inc., Lean Construction Institute, and the National Subcontractors Alliance, among others, in addition to AGC. This consortium touts itself as a "new voice of the industry" and claims that its new family of documents are more innovative and collaborative. Among other things, for instance, the owner/contractor agreement for a lump sum project and related general conditions are joined in a single, integrated document designated the ConsensusDOCS 200.

Volumes have been written about the 1997 General Conditions and, undoubtedly, volumes more will be written about the 2007 edition. AIA has made changes to every article, some more extensively than others, and over one-hundred (100) sections of the A201-1997 document. Our purpose here is relatively modest: to highlight some of the more important changes in the new A201-2007 edition. We caution all readers who truly wish to understand the new General Conditions form, and its implications, to review it fully and carefully, and to consult with counsel of their choice.

To achieve our purpose, rather than begin with those changes that we think are most important, a value judgment that may well vary from project to project (and company to company), we have proceeded in the order of the A201-2007 document itself and commented on those provisions that contain substantive revisions. We have set forth the new language in quotations, in a neutral context, and offered commentary separately.

Roger L. Price/Mark L. Johnson
November 6, 2007

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**ConsensusDOCS is a trademark of ConsensusDOCS LLC.

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ARTICLE 1 GENERAL PROVISIONS

Section 1.1 Basic Definitions

Section 1.1.8 "The Initial Decision Maker is the person identified in the Agreement to render initial decisions on Claims in accordance with Section 15.2 and certify termination of the Agreement under Section 14.2.2."

COMMENTARY: This new section introduces, upon election of the parties, a new person into the construction process. This person, known as the Initial Decision Maker, is intended to act as a non-party neutral and provide certain functions traditionally performed in the past by the Architect.

Section 1.6 Transmission of Data in Digital Form

Section 1.6.1 This new section provides that if parties are going to transmit documents in electronic format, "they shall endeavor to establish necessary protocols governing such transmissions . . . ."

COMMENTARY: The recognition of the increasing usage of electronic documents and their transmission is admirable, but the provision is incomplete. Any protocol should be established and understood before the agreement is signed.

ARTICLE 2 OWNER

Section 2.2 Information and Services Required of the Owner

Section 2.2.1 Contractor may request financial information from Owner after the Work has commenced "only . . . if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due."

COMMENTARY: A201-1997 had increased Owner's obligation to furnish certain information. The A201-2007 revision, however, attempts to rebalance the relationships and to reduce Contractor's previous unfettered right to obtain financial information from Owner at any time during the project. While Contractor may still gain access to the Owner's financial information prior to commencement of the Work, its ability to do so after the Work commences is now much more restricted.

ARTICLE 3 CONTRACTOR

Section 3.1 General

Section 3.1.1 "The Contractor shall be lawfully licensed, if required in the jurisdiction where the Project is located. The Contractor shall designate in writing a representative who shall have express authority to bind the Contractor with respect to all matters under this Contract."

COMMENTARY: Here A201 adds two requirements for Contractor, neither one of which is in the least onerous. The requirement for licensing is incomplete, however, in that this section does not contain an express representation by Contractor that it has secured all appropriate licenses. The designation of a representative who can bind Contractor recognizes that lines of communication are often multiple and conflicting. Having a designated representative with authority can help avoid or resolve numerous disputes.

Section 3.2 Review of Contract Documents and Field Conditions by Contractor

Section 3.2.2 Contractor is required to report promptly to the Architect not just any errors, inconsistencies or omissions that Contractor discovers, but those "made known" to it.

Section 3.2.3 Contractor shall report nonconformities promptly to Architect "as a request for information in such form as the Architect may require."

Section 3.2.4 "If the Contractor performs those obligations," it shall not be liable for damages to Owner or Architect for errors, inconsistencies and omissions in the Contract Documents or "for nonconformities of the Contract Documents . . . ."

COMMENTARY: Section 3.2 of A201-1997 was criticized for reducing Contractor's obligations because Contractor was liable only for errors and omissions it "recognized" and "knowingly" failed to report. The revised text imposes on Contractor new obligations both in the kinds of information it must report to the Architect and the format for reporting that information.

Section 3.3 Supervision and Construction Procedures

Section 3.3.1 If any loss or damage occurs because Contractor proceeded with means and methods imposed by Owner or Architect with which it did not agree, Owner shall be solely responsible for such loss or damage if it arises "solely from those Owner-required means, methods, techniques sequences or procedures."

COMMENTARY: The A201-1997 text protected a Contractor who was given specific instructions as to means and methods and directed to proceed. The additional phrase appears to put a considerable new burden of proof on Contractor to exclude all possible causes of damage other than Owner's directions. Moreover, the text does not literally invite a proportionate sharing of liability.

Section 3.7 Permits, Fees, Notices, and Compliance with Applicable Laws

Section 3.7.2 Contractor is to comply with and give notices required by "applicable" "statutes" and "codes" and a well as laws, rules, regulations and lawful orders of public authorities applicable to performance of the Work.

COMMENTARY: The new provision adds to Contractor's express obligations by imposing duties as to all "statutes," though how they may differ from laws is not clear, and all "codes," presumably meaning more than just building codes, as the word "building" was deleted. The new language also modifies those official expressions with which Contractor must comply with the word "applicable," but that insertion seems to duplicate the final phrase of the provision. If the language is not just redundant, then its meaning is unclear.

Section 3.7.3 "If the Contractor performs Work knowing it to be contrary to applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction."

COMMENTARY: Former Section 3.7.3 has been deleted and former Section 3.7.4 has been modified and renumbered. New Section 3.7.3 now mimics the scope of governmental obligations set forth in Section 3.7.2 with which Contractor must comply. But it also eliminates an implied safe harbor for Contractor. Under A201-1997, Contractor was expressly immunized from ascertaining compliance of the Contract Documents with applicable laws, but obligated to promptly notify both Architect and Owner of any variances Contractor "observes." Any Contractor that performed Work knowingly contrary to applicable law, without giving such notice, assumed responsibility for such Work. While this formulation impliedly permitted Contractor to proceed once notice was provided to Architect and Owner, what it really intended was to keep the responsibility for determining compliance with laws with the design professional. With the deletion of old Section 3.7.3 and the modification to the language in old Section 3.7.4, however, the requirement to notify Architect and Owner has been eliminated, along with any implied protection that Contractor may have had by issuing the notice of variance and then proceeding with its Work.

Section 3.7.4 If "the Contractor encounters" conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, "the Contractor shall promptly provide notice to the Owner and the Architect . . . ."

COMMENTARY: Former Section 4.3.4, regarding concealed or unknown conditions, has been modified and moved to become Section 3.7.4. The significant change here is the shift in burden to Contractor. Previously, the requirement to report such conditions applied equally to any "observing party" who was to notify "the other party" promptly. Now the only party required to provide prompt notification is Contractor.

Section 3.7.5 Contractor must immediately suspend operations in the event it encounters "human remains . . . . burial markers, archaeological sites or wetlands not indicated on the Contract Documents."

COMMENTARY: This new language imposes new obligations on Contractor, but the text does not provide any definitions of such conditions.

Section 3.8 Allowances

Section 3.8.3 Owner has an obligation to select materials and equipment under an allowance "with reasonable promptness."

COMMENTARY: Former Section 3.8.3 required Owner to make its selection "in sufficient time to avoid delay in Work." The new standard makes Owner's obligation more ambiguous.

Section 3.9 Superintendent

Section 3.9.2 "The Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the name and qualifications of a proposed superintendent. The Architect may reply within fourteen (14) days to the Contractor in writing stating 1) whether the Owner or the Architect has reasonable objection to the proposed superintendent or 2) that the Architect requires additional time to review. Failure of the Architect to reply within the 14-day period shall constitute notice of no reasonable objection."

Section 3.9.3 "The Contractor shall not employ a proposed superintendent to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not change the superintendent without the Owner's consent, which shall not unreasonably be withheld or delayed."

COMMENTARY: Sections 3.9.2 and 3.9.3 are new and recognize both the importance of a superintendent to a project and the importance of a positive relationship between the superintendent and Owner and Architect. The new sections provide a procedure by which either Owner or Architect may reject Contractor's designated choice, though any such rejection must be "reasonable."

Section 3.10 Contractor's Construction Schedules

Section 3.10.2 Contractor shall prepare a "submittal schedule promptly after being awarded the Contract and thereafter as necessary to maintain a current schedule and shall submit the schedule(s) for the Architect's approval," which shall not be unreasonably withheld. "If the Contractor fails to submit a submittal schedule, Contractor shall not be entitled to any increase in the Contract Sum or extension of Contract Time based on the time required for review of submittals."

COMMENTARY: Previously, Contractor was just required to submit a schedule that was coordinated with its construction and allowed Architect reasonable time to review submittals. Now the timing and maintenance of submittal schedules are more stringent, the Architect's approval role is more intrusive, and the penalties for failing to comply are more severe.

Section 3.12 Shop Drawings, Product Data and Samples

Section 3.12.5 Contractor's review of drawings and other materials must be "in accordance with the submittal schedule approved by the Architect . . . ."

Section 3.12.6 By submitting the shop drawings and other material, Contractor expressly represents "to the Owner and Architect" that it has "reviewed and approved" those items.

COMMENTARY: The A201-1997 text added to Contractor's obligations with respect to submittals. The new language reinforces the additional burden on Contractor to undertake the required review and to do so pursuant to a reasonably defined schedule.

ARTICLE 4 ARCHITECT

Section 4.1 General

Section 4.1.1 "The Owner shall retain an architect lawfully licensed to practice architecture or an entity lawfully practicing architecture in the jurisdiction where the Project is located."

COMMENTARY: As in Section 3.1.1 concerning Contractor, A201-2007 contains a new provision concerning licensure. The language is curiously not parallel in the two sections, however, and seems to put a burden on Owner to make sure that the Architect it retains is licensed.

Section 4.2 Administration of the Contract

Section 4.2.1 The Architect's administration of the Contract and its role as Owner's representative extends during construction and "until the date the Architect issues the final Certificate for Payment."

Section 4.2.2 The role of the Architect is now to become generally familiar with the Work performed and determine generally if the Work "observed" is being performed in accordance with the Contract Documents.

Section 4.2.3 The Architect's obligation to inform Owner "about the quality and progress of the portion of the Work completed" is with respect to "known deviations" from the Contract Documents and defects and deficiencies "observed" in the Work.

COMMENTARY: Article 4 was previously titled "Administration of the Contract" and Section 4.2 was titled "Architect's Administration of the Contract." While the Architect retains the role as Contract administrator, the new language reduces the Architect's duties (and exposure), directly and inferentially. Language in A201-1997 involving the Architect "until final payment is due" and "during the one year period for correction of Work" has been deleted. Similarly, the Architect's obligation in prior Section 4.2.2 "to endeavor to guard the Owner against defects and deficiencies in the Work" has been deleted, with the obligation now being limited to problems "observed." On the other hand, the 1997 version of this Article did give rise to suggestions that Architect was only obligated to object to Work that was completed. New Section 4.2.3 clarifies that Architect must keep Owner informed as to any "portion of Work completed." Because all contracts contain an obligation of good faith performance, issues may still arise about whether an Architect knew or should have known about any deviations from the Contract Documents and observed or should have observed any defects and deficiencies in the Work performed. There was no requirement in Section 4.2.3 of A201-1997 that the Architect report its objection promptly, and there is none in the revised section in A201-2007.

Section 4.2.7 The Architect's review and approval of or other appropriate action on Contractor's submittals is to be taken "in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule" with reasonable promptness allowing for adequate review.

COMMENTARY: Previously, Section 4.2.7 called for Architect's review to be sufficiently timely "as to cause no delay in the Work or in the activities of the Owner, Contractor or separate contractors . . . ." The revised text may serve to lighten another burden on the Architect, in the event there is no approved submittal schedule.

Section 4.2.14 "The Architect will review and respond to requests for information about the Contract Documents. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If appropriate, the Architect will prepare and issue supplemental Drawings and Specifications in response to the requests for information."

COMMENTARY: This new section formalizes an RFI process, making clear that this is one of Architect's duties. The time periods for the anticipated communications, however, are not express.

ARTICLE 5 SUBCONTRACTORS

Section 5.2 Award of Subcontracts and Other Contracts for Portions of the Work

Section 5.2.1 Once Contractor submits the names of intended subcontractors, Architect "may" reply within fourteen (14) days that Owner or the Architect has an objection or that "the Architect requires additional time to review." Architect's failure to reply within fourteen days constitutes notice of no reasonable objection.

COMMENTARY: Previously, A201-1997 required that the Architect respond and respond "promptly" stating whether "after due investigation" it or Owner had any reasonable objection to the subcontractor. Now the burden on the Architect has been reduced.

ARTICLE 9 PAYMENTS AND COMPLETION

Section 9.5 Decisions to Withhold Certification

Section 9.5.3 When the Architect withholds certification for payment under Section 9.5.1.3 because Contractor has failed to properly pay Subcontractors, "the Owner may . . . issue joint checks to the Contractor and any Subcontractor or material or equipment suppliers . . . ."

COMMENTARY: New language allows Owner to pay Contractor and Subcontractors in order to keep the project moving forward, yet protect itself by issuing joint checks for Work that has been properly installed, so that Contractor cannot withhold payment for such Work from Subcontractor. Contractor may view Owner's conduct as an unwarranted intrusion into its contractual relationships with its Subcontractors, especially where it believes there are valid legal and business reasons to withhold payment.

Section 9.6 Progress Payments

Section 9.6.1 The A201-1997 text remains the same, and requires Owner to make payment to Contractor upon issuance of Architect's certification for payment within whatever time is provided in the Contract Documents.

Section 9.6.2 Contractor shall pay Subcontractor "no later than seven (7) days after" receipt of payment from Owner for Subcontractor's portion of the completed work.

COMMENTARY: The new language imposes upon Contractor a short period within which Contractor must pay its Subcontractors, a change that ultimately benefits Owner. Further, both of these provisions address payment terms that are covered by many states' prompt pay acts. Those acts require payment of funds by Owner to Contractor and by Contractor to Subcontractor within a specific period of time from when Owner receives Architect's certificate and Contractor receives funds from Owner, respectively. That period of time may exceed seven (7) days.

Section 9.6.4 "The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and material and equipment suppliers amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors to ascertain whether they have been properly paid."

COMMENTARY: Under the new language, Owner has the right to insert itself in the Contractor-Subcontractor relationship, which Contractor may view as an unwarranted intrusion into its contractual relationships with its Subcontractors, especially where it believes there are valid legal and business reasons to withhold payment.

ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

Section 10.3 Hazardous Materials

Section 10.3.1 "The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials."

COMMENTARY: The A201-1997 text limited Contractor's liability to conditions "encountered on the site by the Contractor." The new AIA language expands that liability by making Contractor directly responsible to comply with all contractual hazardous materials requirements even if Contractor has not specifically encountered such conditions on the site.

Section 10.3.3 Owner must indemnify Contractor, Subcontractor and Architect for damages relating to the presence of hazardous materials "except to the extent such damage, loss, or expense is due to the fault or negligence of the party seeking indemnity."

COMMENTARY: The A201-1997 text had broadened the scope of Owner's indemnification obligations for environmental matters. Specifically, the 1997 version permitted Owner to avoid indemnity only where the damage, loss, or expense was due to the "sole negligence" of the party seeking indemnity. That language entitled a party to seek indemnification from Owner even if that party shared in the blame for the loss. The 2007 language, however, limits Owner's indemnity obligation proportionally to the (1) degree of "fault" or (2) degree of "negligence" of the other party seeking indemnity.

Section 10.3.4 "The Owner shall be responsible for materials or substances required by the Contract Documents, except to the extent of the Contractor's fault or negligence in the use and handling of such materials or substances."

COMMENTARY: Previously, Owner was responsible for hazardous materials brought to the site by Contractor that were required by the Contract Documents. The new language narrows Owner's responsibility for losses sustained from such hazardous materials, to the extent that they are due to Contractor's fault or negligence in using or handling the materials.

Section 10.3.5 "The Contractor shall indemnify the Owner for the cost and expense the Owner incurs (1) for remediation of a material or substance the Contractor brings to the site and negligently handles or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence."

COMMENTARY: Consistent with other changes intended to benefit Owner for hazardous materials responsibility (see §§ 10.3.1, 10.3.3. and 10.3.4), this new language imposes indemnity obligations on Contractor for Owner's benefit where they did not previously exist.

ARTICLE 11 INSURANCE AND BONDS

Section 11.1 Contractor's Liability Insurance

Section 11.1.2 Contractor shall obtain completed operations coverage for "until the expiration of the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Contract Documents."

Section 11.1.3 Insurance certificates for Contractor shall be provided "upon renewal or replacement of each required policy of insurance" and for "liability coverage, including coverage for completed operations [per Section 11.1.2]."

Section 11.1.4 "The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) the Owner, the Architect, and the Architect's Consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's completed operations."

COMMENTARY: The new A201-2007 language provides further benefit to Owner and Architect by extending Contractor's completed operations coverage and issuance of certificates. Also, the new additional insured requirement, which AIA contends is consistent with current industry trends, provides additional protection for the Owner, Architect, as well as the Architect's consultants. AIA believes that the required endorsement does not require Contractor's insurer to cover claims arising solely out of the acts or omissions of Owner or Architect, but would seemingly require coverage where Owner or Architect share in the blame for the loss. With respect to the impact of a dispute that involves professional liability exposure, AIA believes that the typical "professional liability exclusion" contained in most general liability policies should be applicable to claims against design professionals. Finally, while Section 11.1.3 requires Contractor to provide notice of reduction of coverage, missing from Section 11.1.4 is the requirement that the insurance policy impose on the insurer the responsibility to issue a notice of cancellation to all additional insureds in the event the Contractor's policy is cancelled.

[Former Section 11.3] Project Management Protective Liability Insurance

COMMENTARY: The requirements in A201-1997 for Project Management Protective Liability Insurance (§§ 11.3.1-11.3.3.) have been deleted in view of the requirement that Contractor add Owner, Architect, and Architect's consultants as additional insureds under Contractor's general liability policy, pursuant to new Section 11.1.4.

ARTICLE 13 MISCELLANEOUS PROVISIONS

Section 13.7 Time Limits On Claims

Section 13.7 "The Owner and Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all claims and cause of action not commenced in accordance with this Section 13.7."

COMMENTARY: The prior A201-1997 Section 13.7.1 set forth a contractual statute of limitation, which provided for the limitation period to begin running upon one of three events: substantial completion, final completion, or the date of warranty work corrected. Contractors and Architects favored these limitation periods, as they provided a definite, cut-off date for liability. Owners, however, complained that these limitation periods could be deemed to shorten applicable state-law limitations periods by eliminating the "discovery rule" for bringing claims, even claims for latent defects against Contractors. The new change links the right of the parties to bring claims with the requirements established by governing law, so that any applicable discovery rule will still apply, but also provides a cut-off date for all claims ten (10) years from the date of substantial completion. This contractual period may be less than allowed in some states.

ARTICLE 15 CLAIMS AND DISPUTES

COMMENTARY: A201-1997 Section 4.3 (Claims And Disputes), Section 4.4 (Resolution Of Claims And Disputes), Section 4.5 (Mediation), and Section 4.6 (Arbitration) have all been moved to and comprise newly created Article 15, with pertinent additional textual changes as noted below.

Section 15.1 Claims

Section 15.1.6 [Claims for Consequential Damages, former Section 4.3.10] Contractor and Owner waive claims against each other for consequential damage. Nothing in the consequential damages waiver "shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents."

COMMENTARY: The A201-1997 version stated that nothing should be deemed to preclude an award of "liquidated direct damages." The A201-2007 version eliminates the reference to "direct," reportedly because the word "direct" was confusing. On the other hand, arguably, inclusion of that word did protect against loading consequential-type damages into a subsequent liquidated damages claim. Whether that safeguard actually existed and, if so, whether it is eliminated with the deletion of the word "direct" remains to be seen.

Section 15.2 Initial Decision (Former Section 4.4)

In Sections 15.2.1 to 15.2.5, the text of former A201-1997 Sections 4.4.1 to 4.4.5, which outlined procedures for evaluating, presenting, and resolving claims by the Architect, was revised by changing references from "Architect" to "Initial Decision Maker."

COMMENTARY: The utilization of an Initial Decision Maker was reportedly made by AIA in response to Owners' and Contractors' complaints that they did not always prefer to have the Architect serve in the role of the initial decision maker. Now, through the revised AIA 2007 Owner-Contractor Agreements, the parties have the opportunity to select an independent third-party neutral to serve as the initial decision maker, instead of the Architect. In the event that the parties do not make that selection, the default choice is for the Architect to serve as the initial decision maker, consistent with prior practice.

Section 15.2.6 Either Owner or Contractor may "file for mediation of an initial decision at any time, subject to the terms of Section 15.2.6.1."

Section 15.2.6.1 Either Owner or Contractor "may, within 30 days for the date of an initial decision, demand in writing that the other party file for mediation within 60 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision."

COMMENTARY: The new language reflects a change from A201-1997 Section 4.4.6 (which has been replaced by Sections 15.2.6 and 15.2.6.1) in which the Architect had the ability to force an early binding resolution to the dispute by declaring that its initial decision would become final and binding on Owner and Contractor, and not subject to subsequent mediation or arbitration, if no demand for arbitration was filed within 30 days. Now, that power is vested with Owner and Contractor, as the parties who would be directly impacted by the decision to force an early resolution of the issue, and who, for a variety of business and legal reasons, may choose to invoke or to forego this provision.

Section 15.3 Mediation (Former Section 4.5)

Section 15.3.2 Unless the parties agree otherwise, mediation shall be "administered by the American Arbitration Association in accordance with its Construction Industry mediation procedures in effect on the date of the Agreement."

COMMENTARY: A201-1997 had provided that the mediation rules in effect as of the date that the mediation was initiated, rather than when the Agreement was entered into between Owner and Contractor, governed the parties' dispute.

Section 15.4 Arbitration (Former Section 4.6)

Section 15.4.1 "If the parties have selected arbitration as the method for binding dispute resolution in the Agreement," any claim not otherwise resolved by mediation "unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement."

COMMENTARY: Here, AIA has responded to Owners' and Contractors' complaints that they did not always prefer to have arbitration as the binding dispute resolution process. Now, through the revised AIA 2007 contract forms, the parties may select their preferred choice of dispute resolution. In the event that the parties do not select any process, the default choice is for litigation to serve as the operative dispute resolution process. New Section 15.4.1, therefore, only applies "if" arbitration has been selected. In such a circumstance, the default arbitration administrator is the AAA, as it was in the A201-1997 version.

Section 15.4.4.1 "Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s)."

Section 15.4.4.2 Any party to an arbitration "may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder."

COMMENTARY: Previously, A201 expressly barred consolidation. Now, in response to suggestions by Owners and Contractors, A201-2007 allows for consolidation of arbitration proceedings. The practical effect of new Section 15.4.4.1 is that now an Owner may consolidate into one proceeding separate pending arbitrations between it and Contractor and between it and Architect. Section 15.4.4.2 allows for additional joinder of persons, but subject to the consent of the person sought to be joined.

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