

The New AIA A201-2007 General Conditions Form

The American Institute of Architects' new general conditions form raises a number of important new issues for CMs and contractors. As was true for its 10-year-old predecessor (the A201-1997), the new A201-2007 form will serve as the general conditions for a multitude of AIA form construction agreements. In addition, the new A107-2007, although it does not cross-reference the A201-2007, contains a number of general conditions provisions that mirror some of the new provisions of the A201-2007.

Although there are many provisions in the new A201 that will be of interest to CMs and GCs, this article focuses exclusively on some of the new rights and obligations of the parties and the new dispute resolution procedures.

New Rights and Obligations of the Parties

New requirements imposed on the CM/GC:

- **Review of contract documents and field conditions.** Previously, the CM/GC could only be held liable to the owner for failure to notify the owner or architect of a nonconformance of the contract documents if the Contractor "knowingly failed to report [such nonconformance] to the Architect" (emphasis added). Under the new A201, mere failure to report may give rise to liability.
- **Differing site conditions.** A new provision requires the CM/GC to notify the architect if it recognizes "burial markers, archeological sites or wetlands not indicated on the Contract Documents." Given that even experts disagree as to whether certain conditions can be so characterized, this provision may prove burdensome to the CM/GC.
- **Project superintendent.** New provisions have been added requiring the CM/GC to promptly notify the owner of the name and qualifications of the proposed project superintendent and not change superintendents without the owner's consent.
- **Submittals.** Under the new form, if the CM/GC fails to submit a submittal schedule, it will lose the right to claim any monetary increase or time extension required for review of submittals. In addition, the CM/GC's submission of shop drawings and the like now constitutes a representation that the CM/GC has reviewed and approved them.

Increased rights afforded the owner:

- **Owner's financing.** The CM/GC can no longer request information about the owner's ability to finance the project at any time. Instead, while the CM/GC may so request prior to commencement of the project, it may only do so thereafter if (1) the owner fails to make a payment required under the Contract Documents, (2) a change in the Work materially changes the Contract Sum, or (3) the CM/GC "identifies in writing a reasonable concern regard-

ing the owner's ability to pay. Clearly this is an area where problems are likely to arise.

- **Owner ability to issue joint checks or contact subcontractors directly.** A new provision permits the owner to issue joint checks to the CM/GC and its subcontractor if the architect has withheld a payment certification due to a failure of the CM/GC to pay its subcontractor(s). In addition, the owner now has the right to request that the CM/GC provide written evidence of proper payment to its subcontractors and suppliers and, if the CM/GC fails to provide such evidence within seven days, the owner may contact them directly.

Reduced obligations of the architect:

- **Architect's reporting duties.** The architect's site visits are no longer "as a representative of the Owner" and he/she will no longer "keep the Owner informed" and "endeavor to guard the Owner against defects and deficiencies in the Work." Instead, the architect will merely visit the site "to determine in general if the Work observed ... when fully complete ... will be in accordance with the Contract Documents" (emphasis added). In addition, the architect is only required to report "(1) known deviations from the Contract Documents and (2) defects and deficiencies observed in the Work" (emphasis added).

Dispute Resolution Procedures

The new A201's dispute resolution procedures are far more complex than the prior version, but also more flexible. First, the aggrieved party presents its claim to the "Initial Decision Maker." In the past, that person was always the architect, but now the parties can designate someone else in the Contract Documents.

If one party is not satisfied with the Initial Decision Maker's decision, that party may then request mediation, but the procedure is a strange one – the disgruntled party must demand that the other file for mediation and if not done, then that other party waives its rights to mediate or arbitrate/litigate the "initial decision," which allows the winner to avoid mediation.

After mediation, the parties may then pursue either arbitration or litigation, depending on what they had agreed upon in the Agreement. If arbitration is selected, the parties' arbitration may be consolidated with other arbitrations provided three specific criteria are met. These provisions are all new to the A201, as are many others related to dispute resolution.

Given the complexities and changes set forth in the new A201-2007, construction managers and contractors would be advised to be sure their attorneys are fully familiar with its terms. **CM**