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## The 2007 Version Of The AIA A 101 And A 201: Basic Construction Agreements

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Many condos and co-ops use standard construction documents offered by the American Institute of Architects (AIA) for Local Law 11, other roof and façade repairs, and interior decorating. Customarily, the forms for construction used for these jobs are the A101 Standard Agreement and the A 201 General Conditions. These documents were revised and new versions termed the A101-2007 and A201-2007 were released. Many commentators consider these documents to be 'pro' owner, and that was certainly the intent of the drafters. From my perspective, these documents are not necessarily good for owners. The changes in the documents signal an increase in contentiousness in the relationship between contractors on the one hand and owners and architects on the other hand. More practically, the documents are so one-sided, contentiousness cannot be the primary concern: owners should beware of contractor pricing under these documents.

Construction pricing is governed by four factors: labor costs and availability, commodity and fuel availability and prices, competition, and risk. Of these, the least quantifiable is risk. Risk is also the factor that will cause prices to seem high relative to the quantity of work. Under the 2007 AIA documents, risk is assigned to the contractor to such an extent that pricing will be increased.

To illustrate the point that the contractor is assuming significant risk under the AIA A 101-2007 and A 201-2007, three provisions of the new agreement to illustrate my point: changes to the hazardous material risk allocation; the recognition that the design will be 'intent' only; and responses to 'Requests for Information' (RFI). The first change, the hazardous material risk is perhaps the change that most illustrates my point of the attempted pro-owner bias in the new documents. In the AIA A 101-1997 and AIA A 201-1997, the owner assumed all risk associated with hazardous materials specified for the project. Risks of contamination and clean up of specified hazardous materials have been transferred to the contractor under the AIA A101-2007 and A201-2007. Obviously, if a design includes such materials, the contractor will increase the price accordingly.

The second change to the AIA A101-2007 and A201-2007 is the shift of responsibility for the design detail to the contractor. Previously, the AIA documents called for the architect to provide a complete design and for the contractor to provide shop drawings to show execution of the design. Under the AIA 2007 documents, the architect provides only an 'intent' design. As a result, the role of the shop drawing has been elevated to part of the primary design process. This will impact plumbers, electricians, HVAC, and fire protection subcontractors more than most other subcontractors. As a result, projects that include plumbing, electrical, HVAC, or fire protection will likely see prices increase.

The third change concerns responses to RFIs and relates closely to the intent design features of 2007 documents. Since the architect is no longer obligated to respond to these inquiries from contractors, the contractors do not have a right to design information from the owner's architect. This will leave the contractor to guess, and only after shop drawings or installation will the contractor learn if the guess was right or wrong. The cost implication of this risk on the contractor will be passed back to the owner in the form of increased costs.

There is a fourth change to the AIA 2007 construction documents that deserves mention: the introduction of the 'Independent Decision Maker' (IDM) to resolve disputes between the owner and the contractor. The role of the IDM is to make decisions respecting the design and construction of the project so as to promote timely completion of the project. The IDM concept then allows the parties to arbitrate disputes. In theory, the IDM is intended to promote cooperation. However, there are many questions about the IDM. For example, who will pay the IDM? If the owner pays the IDM, is the IDM really independent? If the contractor pays half the cost of the IDM, what are the cost implications for the project?

Unless the parties name an IDM, the architect fills this role. Since the architect is not 'independent' of the owner, for most projects, this IDM is merely window dressing to allow the architect, acting at the owner's behest, to force the contractor to complete the project. A cynic would question whether the IDM is intended to allow the architect to act as the owner's agent, making decisions for the owner's benefit to completion and then testifying on the owner's behalf at arbitration. Owners may find contractors view the architect-as-IDM with suspicion, and contractors are likely to insist on changes to the basic agreements to prevent the architect from having a free hand as IDM.

Overall, construction under the AIA A101-2007 and A201-2007 is likely to be more expensive and contentious than under the AIA 1997 agreements. Condo and co-op boards should carefully evaluate the risk components of their respective projects and tailor architectural and construction agreements to realistically allocate risk and manage the project sensibly. Also, have direct and frank communications with prospective contractors so that you are able to understand the needs and concerns of the contractor. Probing existing conditions so that the contractor knows what to expect may be critical to controlling prices. If you manage the contractor's concerns and expectations and ask your design professionals to provide a complete design, you should be able to achieve a fair contract at a fair price. ■

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