Hot Topics and Staying on the Leading Edge
HOT TOPIC #1:

Changes to the 2017 Versions of the AIA A Series Documents

AIA A201-2017 Changes

• Article 11’s Insurance Provisions
  • Now a separate Exhibit B to allow for easier review.
  • More options to be tailored for each project.

• Termination for Convenience
  • Replaces contractor’s right to reasonable overhead and profit on work not performed with requirement that parties negotiate a termination fee.

• Date of Commencement and Substantial Completion
  • Check boxes in place of write in space with default provisions

• Owner’s Right to Perform Work if Contractor Defaults
  • Owner no longer permitted to unilaterally issue deduct CO.
  • But Architect may certify withholding or nullifying prior payment

• Differing Site Conditions
  • Shortens notice provision from 21 to 14 days

• Liquidated Damages / Early Completion Bonus
  • More prompts to facilitate discussion on these terms

• Notice provision
  • Moved to Article 1 and must be written
  • 2017 version permits notice by email except for notice of claims
• Contractor’s Means and Methods
  • Requires contractor to give notice and propose alternative. Absent objection, contractor is authorized to proceed with alternative.
  • Direct communication between owner and contractor permitted.
    • Owner responsible to notify architect.

AIA A101-2017 Changes

• Date of commencement change to check-the-box system, with options:
  • 1) Date of Agreement,
  • 2) Date in Notice to Proceed, or
  • 3) fill-in-the-blank

• Date of substantial completion changed to check-the-box:
  • 1) X days from date of commencement, or
  • 2) By X date

• Liquidated damages – in §3.3.3 – “if you don’t achieve substantial completion, see 4.5 for LDs”; and §4.5: (insert your own LDs amounts and conditions)

• 5.4.1: schedule of values is the basis for reviewing the pay apps

• Change to calculation of what should be included in pay apps/progress payments

• New fee due to the Contractor if the Owner terminates the contract for convenience

• New Exhibit A insurance exhibit
AIA A102-2017 Changes

- Also changes date of commencement to check-the-box system, with options:
  - 1) Date of Agreement,
  - 2) Date in Notice to Proceed, or
  - 3) fill-in-the-blank

- And changes of substantial completion to check-the-box as well:
  - 1) X days from date of commencement, or
  - 2) By X date
  
  Same LDs provisions – in §4.3.3 – “if you don’t achieve substantial completion, see 4.5 for LDs”; and §5.1.6: (insert your own LDs amounts and conditions)

- 5.2.6: The Owner is to make sure the contract documents are revised to incorporate the listed assumptions in 5.2.4

- Article 12: The schedule of values has to allocate the entire GMP amount among
  - 1) the portions of the work,
  - 2) the contingency, and
  - 3) the contractor’s fee

- Article 12 continued

  - The schedule of values is the basis for reviewing the pay apps
  - The schedule of values does not set a separate GMP for the cost of the work for each individual line item
• When the Contractor allocates costs from the contingency to another line item in the schedule of values, he has to submit supporting documentation to the Architect
• Change to calculation of what should be included in pay apps/progress payments and retainage
• New fee due to the Contractor if the Owner terminates the contract for convenience
• New Exhibit A insurance exhibit

AIA A401-2017 Changes
• Contractor has to make decisions in a timely manner and in accordance with the Contractor’s construction schedule, and has to promptly notify the Subcontractor of any fault or defect in the Work or nonconformity with the Subcontract Documents
• LDs against the subcontractor if called for in the prime contract, and due to Sub’s fault
• Subcontractor’s representations related to shop drawings 4.2.3.2
• Subcontractor not to provide professional services unless specifically required by subcontract documents
• Default location of arbitration is the location of the project
• Consequential damages waiver added
• Date of commencement and date of substantial completion are changed to check-the-box, like the A101 and A102
• Progress payment calculations changed similar to the A101 and A102
• 11.1.10: Subcontractor indemnify owner and contractor, if the contractor has paid it under the subcontract
• Revised insurance requirements

HOT TOPIC #2:

Current issues in OSHA Regulations and Enforcement

Status of OSHA under the Trump Administration

• OSHA Administrator David Michaels resigned
• Loren Sweatt became acting administrator
• Trump nominated Scott Mugno, VP of Safety for FedEx Ground
  • Senate hearing on December 5, 2017,
  • Resubmitted nomination on January 18, 2018
  • Senate has not voted on his nomination.
  • Enforcement actions continue under Trump
  • With fewer inspectors
  • But more inspections
  • Average penalty for a serious violation is now $3,645
  • Fewer regulations expected under Trump and Mugno.
  • Fewer press releases expected.
President Trump’s Deregulation Plan

- Per executive order, OSHA must finalize three deregulatory actions for every new regulatory action in 2018.
- The administration’s first regulatory agenda removed 16 of 30 OSHA regulations listed in the fall 2016 agenda.
- Per the Spring 2018 agenda issued by OSHA, there were less than 20 regulations in active stages.
- Mugno supports deregulation.

Penalties Recently Increased

- Serious – increased from $12,675 to $12,934;
- Other than serious – increased from $12,675 to $12,934;
- Failure to post - increased from $12,675 to $12,934;
- Failure to abate a violation - increased from $12,675 to $12,934;
- Willful - increased from $126,749 to $129,336; and
- Repeat - increased from $126,749 to $129,336.

Recent and Pending Regulations

- Crane Operator Qualification
  - Rule released in 2010.
  - Certification requirement delayed until 2017, now November 2018.
- Silica Standard
• Set limits for silica dust exposure at 50 micrograms per cubic meter of air as an 8-hour time-weighted average.

Enforcement

• OSHA using the General Duty Clause to target:
  • Combustible dust hazards;
  • Ergonomics injuries and hazards;
  • Workplace violence;
  • Heat related illness;
  • Arc flash or blast injuries.

HOT TOPIC #3:

Additional Insured Status – Privity of Contract

• Blanket Additional Insured Endorsements – Is Contractual Privity required to trigger coverage?

• Recent Case Law
    • “any person or organization with whom [the general contractor has] agreed to add as an additional insured by written contract . . . .”

• Ways to Avoid the Privity of Contract dilemma
  – ISO Forms (CG 2010, CG 2037, CG 2038)
  – Read all manuscript endorsements and be on the lookout for the “with whom” language
HOT TOPIC #4:
Right to Repair: Definition & Benefits

What is it?

- A process to aid states in addressing the explosion in residential construction defect.

Why do we need Right to Repair statutes?

Claims/litigation provide:

- Pre-litigation dispute resolution process
- Defined time periods with which each party must operate
- Involve all subcontractors
- Allows for both parties to achieve resolution of their disputes

HOT TOPIC #5:

Why Should My Client/Prospect Care and How Does This Impact My Client/Prospect?

- Residential property owners cannot file a lawsuit without complying with the requirements of this statute.
- Should minimize the number of litigated claims and reduce the overall cost associated with defect claims.
• Contractors have strict time requirements with which to comply in order to prevent litigation.

• Failure to comply permits the residential property owner to abandon the §558 alternative dispute process and file a lawsuit.

• Absent a large SIR, contractors can have their insurance company pay for their defense if the definition of suit includes alternative dispute resolutions.

• It depends on their insurance carrier. Standard lines carriers (Zurich, Liberty Mutual, Travelers, etc.) have been participating in the §558 process but surplus lines carriers often do not.

• Residential property owners’ failure to allow necessary destructive testing bars any claim for damages which could have been avoided or mitigated had testing been permitted and repairs been made.

• Reduces the overall amount that the contractor may have to pay as damages.
HOT TOPIC #6:

Construction Contracting – Can You Lose for Winning

Fair Is Better

- The Construction Contract – What is the Goal?
  - The Unintended Consequences of an Inequitable Contract
  - A Fair Contract Properly Allocates Risks To The Party That Is In Best Position to Control The Risk

Examples of Risk Allocation

- Unforeseen Site Conditions and Environmental Liability
- Errors in Provided Information
- No Damage for Delay
- Indemnity Provisions
- Notice Provisions
- Force Majeure
- Insurance
HOT TOPIC #7:

Building Information Modeling (BIM) and Digital Practice Documents

What Is BIM and Digital Data

- Digital Data is anything stored in digital form
  - Emails
  - Meeting Minutes
  - Daily Reports
  - Schedules
  - Plans and Specifications
  - BIM

Why Is This Important

- Form Contract Providers Are Integrating and Mandating Use of Digital Practice Documents Into Their Standard Forms
- Digital Data is not new but the ways in which parties use and rely in such data continues to evolve
- Contracts have lagged behind in this area – particularly with respect to modeling where it was agreed parties could not rely on the model

What Do Protocols Do?

- Protocols for Managing Digital Data
  - Document Management Systems
  - User Access/Security Rules
  - Training, Startup Support Requirements
  - Storage Requirements and Procedures
  - Archives and Preservation
HOT TOPIC #8:

Which States Have the Best/Worst Legal Climates

1. S. Dakota 26. Ohio
2. Vermont 27. Montana
5. New Hampshire 30. Tennessee
6. Alaska 31. Oklahoma
7. Nebraska 32. New Mexico
8. Wyoming 33. North Carolina
9. Maine 34. South Carolina
10. Virginia 35. Colorado
11. Delaware 36. Arkansas
12. Utah 37. Nevada
13. Iowa 38. Pennsylvania
14. Massachusetts 39. Texas
15. Indiana 40. Georgia
17. North Dakota 42. Kentucky
18. Kansas 43. Alabama
19. Maryland 44. Mississippi
20. Wisconsin 45. West Virginia
21. Oregon 46. Florida
22. Michigan 47. California
23. Hawaii 48. Illinois
24. Rhode Island 49. Missouri
25. Arizona 50. Louisiana

Key Factors for Rankings

- Overall Treatment of Tort & Contract Litigation
- Enforcing Meaningful Venue Requirements
- Treatment of Class Actions Suits
- Damages
• Proportional Discovery
• Scientific & Technical Evidence
• Trial Judges’ Impartiality / Expertise
• Juries’ Fairness
• Quality of Appellate Review

What Makes the Best/Worst States for Litigation?

• Common factors in the top five states
• Common factors in the bottom five states
• Biggest Movers in the Past 5 years

HOT TOPIC #9:

Recent Key Court Decisions

• Epic Systems Corp. v. Lewis, 584 U.S.______ (2018)
*On May 21, 2008, The U.S. Supreme Court upheld the enforceability of employee arbitration agreements containing class and collective action waivers of wage and hire disputes. The decision has settled the enforceability of the employer/mandated-arbitration programs once and for all.

• Walsh Construction v. Zurich Am. Inc. [72 N.E. 3rd 917 In.Ct.App 2017]
*In a case of first impression, the Indiana Court of Appeals held that the obligation of an insurer to defend and indemnify an additional insured begins only after the primary insured’s self-insured retention (SIR) amount is satisfied.
On November 17, 2017, the Tennessee Supreme Court resolved the question of whether collateral estoppel is still viable in Tennessee. The Supreme Court had earlier held in *West v. Shelby County Healthcare* that the discounted amounts that a hospital accepts as full payment from a patient, as opposed to the gross amount of the bill, was deemed to be “reasonable charges” that could be shown to the jury. Previously, the full amount of medical bills, prior to any discount, could be black-boarded by plaintiffs at trial. Since the holding in *West*, defense attorneys across the State urged trial courts to apply this holding to all other tort cases and several trial judges did so, allowing defense attorneys to show the jury the actual discounted amount of those medical bills. The Tennessee Supreme Court declined to alter the existing collateral source rule, holding that in personal injury cases, the plaintiffs may submit evidence of the injured parties full, undiscounted medical bills as proof of reasonable medical expenses. The Court further held the defendants are precluded from submitting evidence of discounted rates accepted by medical providers to rebut the plaintiff’s proof that the full, undiscounted charges are reasonable. The Court held, however, that defendants are free to submit any other competent evidence to rebut the plaintiff’s proof on the reasonableness of medical expenses so long as that evidence does not contravene the collateral source rule.