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FEATURED ARTICLE

Julie Hamill

A Comprehensive Update on MAUCRSA: California Cannabis Regulation and Risks of Leasing Real Property to Cannabis Businesses

Julie Hamill

Much has happened in cannabis regulation so far in 2018, at all levels—federal, state, and local. Get the latest details from our expert Cannabis Law Editor, with updated advice.

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New AIA Documents May Require Parties to Remodel Their Procedures

Timothy R. Sullivan

Last year, the AIA made numerous substantive changes to the General Conditions for the Contract of Construction (Form A201™-2017). Here's what you need to know, with expert advice from our Insurance Law Editor.

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Our Picks for Top Recent Real Property Cases

We do the work for you: Here are the significant recent real property cases, with expert commentary on the most important ones.

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BERNHARDT'S TAKE

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- Avoid involvement in the direction, control, or management of the license applicant.
- Avoid profit-sharing or any other revenue-share model in which payment of rent is based on a percentage of cannabis-related sales.

New AIA Documents May Require Parties to Remodel Their Procedures

Timothy R. Sullivan

Introduction

The standard form contracts drafted by the American Institute of Architects (AIA) are the most widely used contracts in the construction industry. See *College of Notre Dame of Md., Inc. v Morabito Consultants, Inc.* (Md App 2000) 752 A2d 265, 273. AIA form agreements are revised every 10 years.

In April 2017, the AIA released the 2017 edition of the A201™–2017 "General Conditions of the Contract for Construction" form, which sets forth the rights, responsibilities, and relationships of the Owner, Contractor, and Architect, and its "family" of documents for Owner-Contractor and Contractor-Subcontractor agreements. The AIA also released a new Insurance and Bonds Exhibit (2017 Exhibit A), and a new Sustainable Projects Exhibit (E204™–2017).

In October 2017, AIA released new editions of the Architect Scope documents and several other frequently used AIA forms. The B200 Series "scope" documents are designed to define additional services an architect may provide.

This article discusses the key changes in the A201, General Conditions form. A second article will discuss key changes in the Owner-Architect agreements (A101, A102, A103, B101, B102, B103, and B104), and the scope of service agreements (B201, B203, B205, B207, and B210). A third article will discuss the Insurance Exhibit, which is to be used in conjunction with many of the standard form agreements, and the Sustainable Project Exhibit (E204™–2017).

Initial Decision Maker

The 2007 edition of the A201 form provided that the Initial Decision Maker (IDM) would be the Architect unless otherwise specified, would render initial decisions on Claims before the parties could proceed to mediation or arbitration, and would certify termination of the Agreement by the Owner for cause under §14.2.2. A201™–2007, §§1.1.8, 15.2.1, 15.2.5. Although the 2017 edition continues to make the IDM responsible for rendering initial decisions on Claims, revised §14.2.2 now states that the Architect (notwithstanding who the IDM is) will certify whether sufficient cause exists to terminate the Agreement. In addition, revised §1.1.8 states the IDM "shall not show partiality to the Owner or Contactor, and shall not be liable for the results of interpretations or decisions rendered in good faith."

Although there are not yet any reported cases interpreting this provision, courts have construed similar contractual language to permit the overturning of a decision only for fraud or gross mistake. See *Walnut Creek Elec. v Reynolds Const. Co.* (1968) 263 CA2d 511, 514. Thus, the parties may wish to negotiate for a more objective standard. Further, Contractors may fear that the Architect will not be "impartial" because he or she was selected, hired, and paid by the Owner. The American Arbitration Association has developed "Construction Industry Initial Decision Maker (IDM) Procedures" and maintains a panel of professionals who can serve as the IDM.

Notice

In addition to allowing written notice to be served by personal delivery, by registered or certified mail, or by courier providing proof of delivery, as permitted in former §13.3, new §1.6.1 permits service by electronic transmission, but only if a method for electronic transmission is set forth in the Agreement. See also A101™–2017, §8.6; A102™–2017, §15.6; A103™–2017, §15.6; A104™–2017, §7.9.1; A105™–2017, §6.5; A401™–2017, §§14.4.1, 14.4.3; and E203™–2013, §1.4.10 (each permitting electronic notice). When listing the contract information for each party's representative for notice purposes, the parties should be sure to list the representative's e-mail address to preserve the right to send notices by e-mail.

However, a Notice of Claim cannot be sent electronically. A201™–2017, §1.6.2. Contractors who are accustomed to hand-delivering the Notice of Claim at the project site may no longer do so unless they modify §1.6.2, which permits delivery of the Notice of Claim only by certified mail, by registered mail, or by courier providing proof of service.

BIM and Other Digital Data

The 2007 edition of §1.6 stated that the parties "shall endeavor" to establish protocols governing transmission of documents in digital form. New §§1.7 and 1.8 address the widespread use of Building Information Modeling (BIM). For instance, new §1.7 *requires* the use of the AIA E203™–2013 "Building Information Modeling And Digital Data Exhibit" and AIA G202™–2013 "Project Building Information Modeling Protocol Form" to establish protocols for the development, use, transmission, and exchange of digital data. Similarly, new §1.8 provides that any use of or reliance on BIM information without first having established such protocols is at the relying party's own risk and without liability to any other project participant.

A Contractor may have to rely on BIM information provided by the Architect before these protocols are established, *e.g.,* when calculating its bid. Further, the AIA protocols do not address data security, a significant risk when parties use laptops, smart phones, or other devices to access information from the Site. Therefore, Contractors should consider seeking to modify these provisions. If the parties wish to use

other digital transmission protocols, they should strike §1.7, add the term "or equivalent," or insert their own protocols.

Evidence of Owner's Financing

Proper financing may be an issue, particularly if the Owner is a single-purpose LLC with no assets other than the project site. Under revised §2.2.1, if the Owner fails to provide "reasonable evidence" of project financing on the Contractor's written request, the Contractor is not obligated to start the Work, and the Contract Time is extended. After commencement of the Work, revised §2.2.2 still obligates the Owner to provide reasonable evidence of financing only if

- The Owner fails to make payments to the Contractor as required;
- The Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due; or
- A change in the Work materially changes the Contract Sum.

Revised §2.2.2 provides that if the Owner fails to provide reasonable evidence of financing within 14 days, the Contractor may immediately stop the Work, or the portion of the Work affected by the change in the Contract Sum, until such reasonable evidence is provided. In such a case, the Contract Time shall be extended, and the Contract Sum increased by the amount of the Contractor's reasonable costs of shutdown, delay, and start-up, plus interest as provided in the Contract Documents. Revised §2.2.4 provides the Contractor cannot disclose the financial information received from the Owner to the Contractor's lenders.

The Contractor may stop Work only on the portion of the Work affected by the material change giving rise to the need for evidence of financing. A201™–2017, §2.2.2. It may be unclear what Work is affected by the material change, and thus what portion of the Work can be stopped. In addition, revised §2.2.4 poses the risk that a Contractor may be liable for inadvertently disclosing confidential information by sharing information with its own lender.

Alternative Means and Methods

Former §3.3.1 provided that if the Contractor determined that proposed construction means or methods were unsafe, the Contractor was to provide written notice and stop that portion of the Work and propose alternative means or methods. Revised §3.3.1 still requires the Contractor to give notice and propose alternative means or methods, but does not allow or require the Contractor to stop Work. The Architect is now required to evaluate the proposed alternative means or methods "solely for conformance with the design intent." Unless the Architect objects, the Contractor shall perform the Work using its alternative means and methods.

Many believe this shifts responsibility from the Architect to the Contractor. The revision also gives rise to an issue if the Contractor's proposed alternative is contrary to the Contract Documents. For these reasons, the Association of General Contractors of America (AGC) has recommended that Contractors seek to revise this provision.

Warranty

New §3.5.2 mandates that all "material, equipment, or other special warranties required by the Contract documents"

- Be issued in the Owner's name or be transferable to the Owner; and
- Start when substantial completion is issued for that work, which will be determined by the Architect's preparation of the Certificate of Substantial Completion for the "Work or designated portion thereof" under §9.8.4.

The requirement that warranties be issued or transferable to the Owner makes clear that the Contractor's warranties are for the benefit of the Owner. Because warranties start on substantial completion of the Work or portion of the Work, there may be different warranty periods for different portions of the Work. This may require revision of subcontract, purchase order, and warranty forms.

Differing Site Conditions

Revised §3.7.4 reduced the time requirement for a Contractor to give notice of differing site conditions from 21 to 14 days.

Contractor's Construction Schedule

Former §3.10.1 required the Contractor to provide a schedule "for expeditious and practicable execution of the Work" that did not exceed the time limits contained for the entire Project. Revised §3.10.1 requires the schedule to provide for the "orderly progression of the Work to completion" within the time limit for the entire Project, and also requires the schedule to include

- The date of commencement of the work, scheduled milestone dates, and the date of Substantial Completion;
- An apportionment of Work by construction activity; and
- The time required to complete each portion of Work.

Revised §3.10.1 further provides that the schedule shall be revised as required by the conditions of the Work and Project.

Contractors may wish to revise §3.10.1 to specify that the schedule may be revised at the Contractor's discretion and/or without prior notice.

Contractor's Reliance on Performance and Design Criteria

Former §3.12.10.1 provided that the Contractor was not responsible for the adequacy of the performance and design criteria specified in the Contract Documents. Revised §3.12.10.1 deletes that provision, but adds that the Contractor is entitled "to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents."

Although the addition appears to reduce the Contractor's liability for issues with criteria specified by the Owner and/or Architect, the deletion implies that the Contractor now is responsible for ensuring the criteria specified by others is accurate.

Subcontracts Must Be in Writing

Under former §5.3, agreements between the Contractor and its Subcontractors had to be in writing only "where legally required for validity." Revised §5.3 requires all agreements must be in writing. Lawyers trained about the Statute of Frauds in their first year of law school are often surprised to discover how often Contractors and Subcontractors operate without written agreements. Their counsel should welcome this change.

Work by Separate Contractors

The 2007 form required the Contractor to provide notice of "reasonably discoverable" discrepancies or defects in work performed by Separate Contractors. A201™–2007, §6.2.2. Section 6.2.2 of the 2017 form requires the Contractor to provide notice of discrepancies of defects that are "apparent." Failure to provide notice of discrepancies constitutes an acknowledgment that the Work of the Owner or Separate Contractors was proper. Revised §6.1.1 eliminates the Contractor's ability to make a Claim under Article 15 for delays and additional costs resulting from the Owner's action in performing work with its own employees or with Separate Contractors.

Requiring notice of "apparent" defects rather than those "reasonably discoverable" would seem to be a lower standard. However, a Contractor may wish to change "apparent" to "patent," a term more clearly defined by case law. In addition, the revision to §6.1.1 could have substantial impacts on the Contractor with regard to cost and scheduling. Contractors should seek to delete or modify this provision.

Calculation of Labor Costs

Regarding the calculation in the adjustment in Contract Price for Construction Change Directives, §7.3.7 of the 2007 edition included "Social Security, old age and unemployment insurance" in the list of labor costs. The 2017 edition deletes those costs, and includes only "applicable payroll taxes." A201™–2007, §7.3.7. This change leaves open the question of whether costs for Social Security or unemployment insurance may still be included in "applicable payroll taxes."

Minor Changes in the Work

Under former §7.4, the Architect had authority to bind the Owner and the Contractor, without their consent, to minor changes in the work as long as the changes did not contradict the Contract Documents, affect the Contract Price, or extend the Contract Time. Under revised §7.4, the Contractor now has an opportunity to reject the recommended changes if it believes the proposed change will, in fact, affect the Contract Price or Contract Time. A Contractor who fails to object and nonetheless proceeds, however, waives any claim for adjustment.

The AGC believes this change presents a potential trap for Contractors if they do not timely notify the Architect of the increased cost of changes in the Scope of Work, and suggests Contractors raise the potential impact on Contract Price or Contract Time as a "preventative" measure.

Delays

Revised §8.3.1 now states that delays for adverse weather conditions must be "documented" as a Claim, and that all delays outside the control of the Contractor extend the Contract Time only as determined by the Architect, and not through a Change Order. The latter change implies that the Contractor now cannot contest the Architect's determination or request a Change Order to extend the Contract Time for delays not related to the actions of the Contractor.

Indemnity for Liens

In addition to requiring the Contractor to obtain a bond and indemnify the Owner against subcontractor and supplier liens resulting from final payment, new §9.6.8 adds the express requirement that, if the Owner has satisfied its payment obligations, a Contractor must defend and indemnify the Owner against subcontractors and supplier liens.

Similar protection is included in the catch-all indemnification provision (§3.18.1). However, this modification emphasizes that all the Owner's costs connected with the lien claims are recoverable as long as the Owner has satisfied its payment obligations.

Termination by Contractor

Former §§14.1.1 and 14.1.4 stated that the Contractor could terminate the Contract if work was suspended or delayed for a certain period due to enumerated reasons, provided that such delay was not caused by the Contractor, a Subcontractor, or any other party "under direct or indirect contract with the Contractor." Revised §§14.1.1 and 14.1.4 delete the "under direct or indirect contract with the Contractor" language. This change implies that the Contractor cannot terminate if any party performing Work caused the delay, regardless of whether the Contractor has control over that party.

Termination Fee Provisions

In former §14.4.3, on termination for the Owner's convenience, Contractors were entitled to payment for work executed (including reasonable overhead and profit (RO&P)), costs incurred due to termination, and RO&P on Work not executed. Under revised §14.4.3, the automatic entitlement to RO&P on Work not executed has been deleted and has been replaced with entitlement to a "termination fee, if any, set forth in the Agreement."

The AIA has indicated the former provision was removed because Owners typically struck that language. It is now up to the parties to negotiate a termination fee in lieu of arguing

over who lost the RO&P calculation, and a blank is provided to fill in a termination fee. However, Owners typically refuse to include a termination fee. The absence of any termination fee poses a significant risk to the Contractor if the Owner terminates without cause.

Claims

The 2007 edition was unclear as to the types of matters subject to a Claim. The 2017 version specifies the circumstances in which a Contractor may submit a Claim in the following sections:

- §2.5 (Owner's right to carry out work);
- §3.7.4 (concealed conditions);
- §7.3.5 (adjustment of Contract Time for Construction Change Directive);
- §8.3.2 (certain delays);
- §9.5.2 (withholding payment); and
- §10.2.5 (damage, injury, or loss due to parties not under Contractor's control).

The Owner does not need to file a Claim in order to assert liquidated damages (see §15.1.1). Claims asserted after the correction of Work period do not require a decision by the Initial Decision Maker (IDM) (see §15.1.3.2).

Under the 2017 edition, the Architect is still the default IDM. The IDM's Decision is a condition precedent to mediation, arbitration, or litigation (unless 30 days expire without receiving the IDM's Decision). A201™–2017, §15.2.1. The time to demand mediation after the IDM's decision is reduced from 60 to 30 days. See A201™–2007, §§15.2.6, 15.2.6.1. Under revised §15.2.6.1, if a party fails to demand mediation within 30 days after receipt of the Decision, then mediation and the ability to challenge the Decision are waived. Under revised §15.3.3, after the IDM's Decision and mediation, either party may demand that the other file its claim in either arbitration or litigation; if they do not do so within 60 days, both parties waive their rights to binding dispute resolution (*i.e.,* arbitration or litigation) with respect to the Decision.

These new timing rules underscore the parties' need to be vigilant if they want to maintain their right to challenge a Decision.

Conclusion

With changes in technology and instant access to information, the construction industry is evolving faster than the AIA forms. Parties and their counsel should keep in mind that AIA forms can be, and usually are, modified. Our next article will discuss key changes in the Owner-Architect agreements (A101, A102, and A103; B101, B102, B103, and B104) and the scope of service agreements (B201, B203, B205, B207, and B210). The third article will discuss the Insurance Exhibit, which is to be used in conjunction with many of the standard form agreements, and the Sustainable Project Exhibit (E204™–2017).