

Woods & Aitken

A number of Nebraska school districts have been utilizing a construction contract that specifies the AIA A201 for the general conditions. As most contractors know, the AIA A201 provides the general conditions for most of the AIA standard form construction contracts. However, after all of the owner modifications, this particular A201 barely resembles itself. And while the AIA A201 was already considered an owner friendly document, the modified A201 being used by these schools take it to another level.

Alterations to AIA documents, including the A201, are tracked through an additions and deletions report that is automatically generated by the software used to draft the AIA documents. The additions and deletions report for this particular A201 pushes 75 pages in length, which is in stark contrast to the unaltered AIA A201's approximate 35 pages. Due to the increasing use of this document by Nebraska schools, contractors have cause to be concerned. While it is impossible to mention all of the changes in this article, several key changes that contractors should be aware of are discussed.

Waiver of Design Liability

Generally, under what is known as the *Spearin* Doctrine, an owner that supplies design specifications is generally deemed to have warranted that the design is free from defects. If the contractor follows defective plans and specifications provided by the owner, the contractor will not be liable for the consequences of those plans and specifications. In addition, the contractor will generally be entitled to recover any additional costs that it incurs in following those plans. The modified A201 contains additional language that is intended to limit a school's exposure for liability under the *Spearin* Doctrine. The language that has been added to the A201 states:

The Contractor stipulates and agrees that the Owner has no duty to discover any design errors or omissions in the Drawings, Plans, Specifications, and other Construction Documents, and has no duty to notify the Contractor of the same. By entering into the Contract Documents or any Agreement with any Architect, the Owner does not warrant the adequacy and accuracy

of any Drawings, Plans, Specifications or other Construction Documents.

If a court enforced this provision, the *Spearin Doctrine* may be disregarded and the contractor arguably could not recover any extra costs from the owner that stem from an incomplete or erroneous design. Typically, contractors cannot recover against an architect for extra costs associated with design defects since the contractor does not have a contract with the architect. As a result, a contractor faced with extra costs resulting from incomplete or inaccurate design could be stuck holding the bag.

Indemnification

The standard A201 indemnification provisions are so heavily altered that it is not possible to describe all of the changes. For contractors it is especially important to alert their insurance brokers to this kind of change. In that regard, a new provision added to this section states the indemnification requirements continue beyond the termination or expiration of the contract. One example of how this could be troublesome is that a contractor could be asked to indemnify the owner for a personal injury claim years down the road if the claim can somehow be said to arise from the work performed by the contractor. Whether the contractor's CGL policy provides coverage for this type of contingency is a question that should be answered by the contractor's insurance broker.

Differing Site Conditions

Differing site conditions, like design defects, are largely outside of a contractor's control. The standard A201 takes this into account and provides a contractor with the ability to recover damages stemming from differing site conditions. For example, section 3.7.4 of an unaltered A201 is titled "Concealed or Unknown Conditions." In the modified A201 at issue, section 3.7.4 retained by the title is removed and the time for reporting such conditions is decreased from 21 days to 3 days. However, additional language is added to section 3, which increases the contractor's obligations for site investigation and inspection requirements. These additional requirements, along with the modifications to section 3.7.4 are likely intended to limit or impede contractors' ability to assert a claim for differing site conditions.

Coordination of Work

The modified A201 attempts to transfer coordination of work from the owner to the contractor. For example, the modified A201 contains a clause stating that the “contractor shall be responsible for coordinating and providing all construction administration necessary for the work and the work of any of the owner’s separate contractors.”

It is doubtful that the contractor would have any authority over another contractor for whom there is no privity of contract. Further, to the extent that the owner hires other contractors, why would the contractor be willing to sign up for managing that contractor and coordinating its work unless there was compensation? The net result, and the likely intent of this change, is the limitation of the contractor’s right to recover from the owner and the owner’s failure to properly coordinate its separate contractors.

Delay Caused by the Owner or Architect

One of the more egregious examples of the unbalanced modification of this A201 is the change to the provisions regarding owner-caused delay. A standard AIA A201 contains section 8.3, which is titled, “Delays and Extensions of Time.” Section 8.3, in turn, has three subsections: 8.3.1, 8.3.2 and 8.3.3. The sections allow for extensions of time for owner-caused delay and include the possibility that delay damages may be recoverable. In stark contrast, the modified A201 changes section 8.3 from three subsections to eleven subsections and sub-sub-sections. And, the end result is an unfair and unworkable delay provision that makes it nearly impossible to get additional time, but also precludes any chance of compensation for delay.

Retainage

New language has been added to the altered A201 that affects the retainage held on the project. According to the revised A201, the project owner can withhold 10% retainage for the first 50% of the work and 5% of the remaining work. Such a high retainage is unusual given when the contract is intended for use on a public project that requires the contractor to obtain performance and payment bonds. In short, the owner is essentially requiring the contractor and its subcontractors to carry what could be a million dollar plus balance until final completion.

Consequential Damages

One of the redeeming characteristics of the standard AIA A201 is that it contains a mutual waiver of consequential damages. However, the modified A201 that is the focus of this article does away with that mutual waiver and requires the contractor to waive its right to consequential damages.

Here is a side-by-side comparison of the original A201 language with the altered A201.

Standard A201

The contractor and owner waive claims against each other for consequential damages arising out of or relating to this contract. This mutual waiver includes:

1. Damages incurred by the owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
2. Damages incurred by the contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

Altered A201

The contractor waives all claims against the owner for consequential damages arising out of or relating to this contract including, but not limited to, any amount owed as compensation for the increased cost to perform the work as a direct result of owner caused delays or acceleration. The owner expressly retains and reserves all claims against the contractor for consequential damages arising out of or relating to this contract.

As one can see, these provisions are vastly different. Under the altered version, the contractor

is exposed to consequential damages, while the owner has no risk of consequential or delay damages.

Conclusion

The heavily modified A201 discussed above has been recently used on a number of school construction projects. Schools contemplating or planning construction often rely upon the same consultants and representatives for contract advising. Accordingly, this contract or some version of it is likely to increase in use on school projects. Prior to bidding on a project using this contract, you should recognize these unusual risk-sifting provisions, confer with your legal counsel on how to minimize the risks posed by this contract, and meet with the owner's representative to discuss amending the contract to make it less one-sided.

Woods & Aitken White Paper School A201 Modified 1-24-2011.