



TO: WESTERN PENNSYLVANIA CONSTRUCTION INDUSTRY

FROM: AIA/MBA JOINT COMMITTEE

DATE: OCTOBER 15, 2103

SUBJECT: AIA A-201 2007 VERSION RECOMMENDED AMENDMENTS

The release of the AIA A-201 2007 version marked the first time in over 50 years that the Associated General Contractors of America (AGC) did not endorse an AIA contract revision. As a result of this controversy, the AIA-MBA Joint Committee devoted a large portion of its meetings to discuss the top items that the AGC disagreed with in the 2007 version. From this discussion, the Joint Committee, with legal counsel from both the AIA and the MBA, mutually agreed to deal with four provisions.

Enclosed is a Joint Committee document which details recommended amendments and commentary on the four selected provisions. To explain the enclosure, the **RED TYPE** indicates suggested amendments on particular provisions. When an A-201 2007 version is used it is recommended that this language be utilized. The **BLUE TYPE** indicates commentary, which should be discussed and understood by project stakeholders at the onset of a construction project.

If you have questions please contact Jon O'Brien at 412-922-3912 or jobrien@mbawpa.org.

AIA MBA Joint Committee A-201 – 2007 General Conditions Recommended Contract Amendments and Commentary

Article 2 – Owner

§ 2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER

§ 2.2.1 Prior to commencement of the Work, and thereafter the Contractor may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. Thereafter, the Contractor may only request such evidence if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payments when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

AIA MBA Joint Committee Recommended Amendment:

§ 2.2.1 The Owner shall, upon written request of the Contractor, furnish the Contractor with reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. After the Owner furnishes such evidence, which may be evidenced by continuing timely payments to the Contractor, the Contractor may request and the Owner shall provide such information if (1) there is a change in the Work that materially changes the Contract Sum; (2) the Owner has failed to make timely payments to the Contractor as provided in the Contract; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make timely payments. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

Article 3 – Contractor

§ 3.10 CONTRACTOR’S CONSTRUCTION SCHEDULES

§3.10.2 The Contractor shall prepare a submittal schedule, promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, and shall submit the schedule(s) for the Architect's approval. The Architect's approval shall not unreasonably be delayed or withheld. The submittal schedule shall (1) be coordinated with the Contractor's construction schedule, and (2) allow the Architect reasonable time to review submittals. If the Contractor fails to submit a submittal schedule, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.

AIA MBA Joint Committee Recommended Amendment:

§3.10.2 The Contractor shall prepare a submittal schedule for all work falling on the Project's critical path, promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, and shall submit the schedule(s) for the Architect's approval. The Architect's approval shall not unreasonably be delayed or withheld. The submittal schedule shall (1) be coordinated with the Contractor's construction schedule, and (2) allow the Architect reasonable time to review submittals. The Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals that are not identified on the Contractor's submittal schedule.

Article 4 – Architect

§ 4.2 ADMINISTRATION OF THE CONTRACT

Section 4.2.4: Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate with each other through the Architect about matters arising out of or relating to the Contract. Communications by and with the Architect’s consultation shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

AIA MBA Joint Committee Section Commentary:

No change to this paragraph is recommended. The AIA-MBA Joint Committee recommends a collaborative approach to a project while following established lines of communications. Direct communications between industry stakeholders produce better construction project results. As the industry moves towards more collaborative delivery methods, open communications are important, but just as important is adhering to communication protocols so that the proper decision makers are in the process. There are real risks when an uneducated stakeholder does not adhere to the lines of communication and directs an entity to do work.

Article 9 – Payments and Completion

§ 9.5 DECISIONS TO WITHHOLD CERTIFICATION

9.5.3 If the Architect withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or material or equipment suppliers to whom the Contractor failed to make payment for Work properly performed or material or equipment suitably delivered. If the Owner makes payments by joint check, the Owner shall notify the Architect and the Architect will reflect such payment on the next Certificate for Payment.

AIA MBA Joint Committee Section Commentary:

Section 9.5.3 was added in the 2007 revisions to the A201 to address the situation where the Contractor has failed to properly make payments to Subcontractors or for labor, materials or equipment. This is intended to give the Owner an alternative to withholding payment of an entire Payment Application. This is viewed by the AIA as adding flexibility for the Owner and as avoiding the need to withhold an entire Payment. This allows some work to be paid for and enables the Owner to issue a joint check to the Subcontractor or Supplier that is not being paid. This still requires the signature of the Contractor. According to the AIA, “The Owner effectively transfers back to the Contractor the risk, responsibility, and ability to resolve the dispute underlying a failure to pay a Subcontractor or supplier.” This is said to bring the A201 in line with industry practice.

There needs to be a higher standard for the Owner to begin issuing joint checks. The Contractor may be withholding payment to a Subcontractor due to faulty work, non-payment of a Supplier, back charges, etc. Issuing a joint check prevents the Contractor from adjusting the amount to be paid to that Subcontractor. It can take away the Contractor’s leverage and make payment of the Subcontractor an all or nothing situation. The Contractor is faced with the choice of either signing the joint check over to the Subcontractor or to not pay him.

Issuing joint checks can serve a good purpose but there are less intrusive ways to address this situation. The Architect can certify as much as possible of a Payment Application and deny the offending part. . This would be more appropriate than having the Owner issue joint checks on a Payment Application that has not been certified by the Architect. This would allow the Contractor to be paid the money that is due and still remain in control of the money. The Owner can be given authority to issue joint checks but it should be reserved for situations where there is evidence of both non-payment of Subcontractors or Suppliers and that there is a problem with the financial stability of the Contractor. One option is to require the Contractor to provide the Owner with a written explanation of why the Subcontractor or Supplier is not being paid. There is no recommended change to this provision. It needs to be discussed between the project participants and any agreed change should be shown as an amendment to Section 9.5.3

§ 9.6 PROGRESS PAYMENTS

§ 9.6.4 The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and material and equipment suppliers amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law.

9.6.4 The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and material and equipment suppliers amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to make written contact with Subcontractors to ascertain whether they have been properly paid. All communication shall be in writing with a copy sent to the contractor. Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law.

AIA MBA Joint Committee Section Commentary:

Except for the last sentence, 9.6.4 was added in the 2007 revisions to the A201. This modification is to allow the Owner to seek assurance of payment from the Contractor's suppliers and Subcontractors if the Owner does not get written evidence of it from the Contractor. This is designed to provide added protection from liens to the Owner and protect the Subcontractor from delayed or inadequate payment.

This intrudes into the Contractor Subcontractor relationship. The Owner is able to go around the Contractor and talk directly to the Subcontractor. This is dangerous because the Owner does not have a contact with the Subcontractor. The Subcontractor may receive information or direction from the Owner that the Contractor is not aware occurred. If the Owner is to communicate with the Subcontractor it should be in writing with a copy sent to the Contractor. This limits the interference, controls what is said and keeps the Contractor informed.