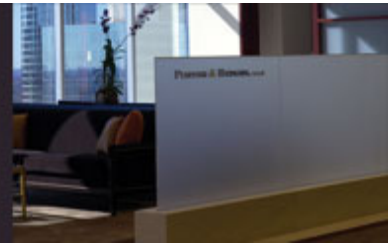


The New AIA A201 General Conditions 2007 Edition

Date: August 26, 2008

Allison J. Snyder

PORTER & HEDGES, L.L.P.
Reliant Energy Plaza
1000 Main Street, 36th Floor
Houston, Texas 77002
{713} 226.6000 Tel
{713} 228.1331 Fax
asnyder@porterhedges.com

New AIA A201 General Conditions 2007 Edition

- New Version of the A201 released in late 2007
- AIA generally revises on a 10-year cycle to provide state of the art documents reflecting new trends and practices
- Most recent revision driven by feedback AIA received in several significant areas

Most Significant Changes to the 2007 Edition

1. The Initial Decision Maker (IDM)
2. Arbitration
3. Consolidation of Arbitration
4. Time Limit on Claims/Statute of Limitations
5. Consequential Damages
6. Additional Insured
7. Financial Information

Initial Decision Maker (IDM)

- Since 1911, each version of A201 designated the Architect as the party to decide disputes between the Contractor and Owner
  - Generally, the Architect was allowed to make a decision subject to an appeal by either party through a dispute process
  - Enabled project to continue while dispute was resolved

Initial Decision Maker (IDM) (cont.)

- Complaints arose around Architect's role as initial decision maker
  - Contractors claimed Architect cannot be impartial because paid by Owner
  - Impartiality in question where claim involves allegation of Architect negligence
  - Owners did not want Architect as neutral, rather as advocate for Owner

Initial Decision Maker (IDM) (cont.)

- New A201 form allows appointment of third party neutral to make initial decisions
- As with prior versions, that decision is binding unless a party submits dispute to one of the dispute resolution processes
- If no neutral IDM is separately designated, Architect will serve the role as it has done traditionally

Initial Decision Maker (IDM) (cont.)

- New A201 form allows either party to force early binding resolution to a dispute by notifying the other party that the initial decision will become final and binding unless the other party demands mediation w/in 60 days
- By this provision, either party may force early resolution but neither may be forced to do so by the Architect or other IDM
- This provision will likely require modification by parties in most instances

Initial Decision Maker (IDM) (cont.)

- Issues likely requiring modifications:
  - ➢ Form language says decision of IDM is condition precedent to mediation, but condition is waived if IDM fails to issue decision w/in 30 days of referral of a dispute
  - ➢ IDM may refuse to issue a decision if it concludes that it would be inappropriate to resolve the particular claim
  - ➢ IDM's authority is limited to claims arising prior to final payment
  - ➢ IDM is required to certify that sufficient cause exists for Owner to terminate the Contractor for cause under Art. 14.2.2

Initial Decision Maker (IDM) (cont.)

- New IDM provision raises many questions:
  1. Who pays the IDM?
  2. What is IDM authority vs. Architect's authority?
  3. How do parties select an IDM?
  4. Do both parties participate in selection?
  5. Should the IDM be an Architect, Engineer, Consultant, Lawyer?
  6. Where does one find an IDM?
  7. How much to pay an IDM?
  8. What happens if a party is dissatisfied with the IDM; or if parties cannot agree on an IDM?
  9. Does the IDM visit the site?

Arbitration

- AIA documents have required mandatory arbitration since first Owner/Contractor agreement published
- Pressure from industry participants to give parties a choice
- 2007 Owner/Contractor and Owner/Architect agreements now provide choice of binding dispute resolution by use of checkbox system

Arbitration (cont.)

- Forms allow parties to select either:
  - ✓ Litigation
  - ✓ Arbitration
  - ✓ Other
- If no box checked, default will now be litigation (rather than binding arbitration)
- Not intended as a preference for litigation, rather concern about outcome if no box checked

Arbitration (cont.)

- Mediation remains condition precedent to selected method of dispute resolution
- If parties choose arbitration, AAA is default ADR provider, although parties may mutually agree otherwise

Consolidation of Arbitration

- Prior versions of A201 precluded consolidation of an arbitration between an Architect and an Owner with related arbitration between an Owner and a Contractor
- Policy has created inefficiencies and been perceived as too protective of Architect
- New A201 form does not preclude consolidation, rather permits consolidation if certain conditions are met

Consolidation of Arbitration (cont.)

- Conditions permitting consolidation of arbitrations between Owner and Contractor with other arbitrations:
  - Agreement from which other arbitration arises must not preclude consolidation
  - Arbitrations to be consolidated must involve common issue of law or fact
  - Arbitrations must employ similar procedural rules

Consolidation of Arbitration (cont.)

- AIA 2007 Owner/Architect Agreement contains parallel provision so theoretically, all parties in a multi-party dispute can end up in same arbitration

Time Limit on Claims/Statute of Limitations

- 1987 A201 contained contractual statute of limitations – commenced upon either substantial completion, final completion, or date warranty work corrected
- Provisions partially successful, but resulted in perceived unfairness to Owners who viewed provisions as substantial and unfair loss of rights in states following the discovery rule

Time Limit on Claims/Statute of Limitations (cont.)

- New A201 form states that causes of action must be commenced w/in the period specified by applicable law, but in no event more than 10 years after date of substantial completion of the project

Consequential Damages

- New A201 form *leaves intact* controversial waiver provision eliminating each parties' potential recovery of consequential damages
- Owners had argued that their losses due to this provision dwarfed the amounts of Contractors' potential damages given up, and the mutual waiver was not equitable

Consequential Damages (cont.)

- AIA left provision intact because it serves purpose of avoiding large, complex claims generally not covered by insurance
- If parties know they will not recover consequential damages, they can plan for that possibility before and during the project

Additional Insured

- Since early days of A201, documents required Contractor purchase liability insurance policy
- Insurance requirements under A201 coordinated with A201 indemnity provisions
- Over last decade, legislatures in many states have overhauled indemnity laws, resulting in nothing short of chaos and confusion regarding indemnity

Additional Insured (cont.)

- In an attempt to resolve indemnity issues, in 1997 AIA created an insurance called Project Management Protective Liability Insurance
- This approach was not successful and few policies were purchased:
  - Industry had developed Additional Insured Endorsements and AIA found most Owners were requiring Contractors to add Owner and Architect as additional insureds under the CGL policy, and Contractors were doing same with their subcontractors

Additional Insured (cont.)

- New AIA documents remove the Project Management Protective Liability Insurance and replace it with the additional insured solution
  - New A201 form requires Contractor to add Owner and Architect (and consultants), as additional insureds under the CGL for liability arising out of Contractor's acts or omissions during the Contractor's operations, and requires
  - Owner be added as additional insured for liability arising out of Contractor's negligent acts or omissions during its completed operations

Additional Insured (cont.)

- Endorsement does not require Contractor's insurance to cover claims arising solely out of the acts or omissions of the Owner or the Architect
- Ultimately, this approach may cause the indemnity provisions to become irrelevant to claims covered by Contractor's CGL policy

Financial Information

- Owners concerned about 1997 A201 provision giving Contractor right to request financial information from Owner and potentially stop work upon making such a request
- Owners claimed provision subject to misuse
- New A201 form places restrictions on Contractor's right to receive financial information after the work commences

Financial Information (cont.)

- Contractor can only make such requests after work commences if:
  1. Owner has failed to make payments to Contractor as contract documents require;
  2. Change in the work materially changes the contract sum; or
  3. Contractor identifies, in writing, reasonable concerns regarding Owner's ability to make payments when due

Financial Information (cont.)

- Upon request, Owner still required to provide reasonable evidence of financial arrangements to pay obligations under contract
- Owner providing that information is still condition precedent to commencement or continuation of work
- Once Owner provides the information, it cannot materially vary the information without prior notice to Contractor

Financial Information (cont.)

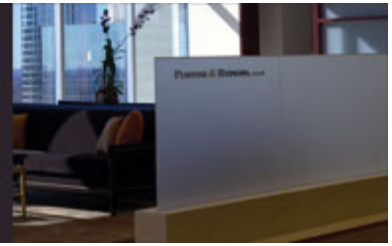
- Additional new provisions provide Owner greater opportunity to learn of Contractor/Subcontractor/Supplier payment disputes and address a Contractor's failure to pay a Subcontractor or Supplier
- New A201 form allows Owner to request written evidence that Contractor has paid Subcontractors or Suppliers; if Contractor fails to furnish evidence, Owner may contact Subcontractors or Suppliers directly

Financial Information (cont.)

- New A201 form also allows Owner to issue joint checks to Contractor and any Subcontractor or Supplier if Contractor has failed to pay for work performed or supplies delivered

Conclusion

- Numerous other revisions to new A201 form
- These seven represent the most significant changes
- AIA family of forms continues to strive to produce agreements that balance divergent interests and maintain their utilitarian value to the industry



The New AIA A201 General Conditions: How they Conflict with Texas Law and Other Problems

GETTING STARTED

- Summary of Today's Topic
  - Qualification: points raised in this presentation are not exhaustive, rather illustrative of some areas of conflict between 2007 Edition of AIA A201 General Conditions and applicable state and federal law – if used without modification in Texas at this time

New AIA A201 General Conditions – How they Conflict with Texas Law and Other Problems

- Selected problems and conflicts with the law in Texas
- References are to the paragraph numbers as they appear in the new A201 form

The Printed Provisions

- 1.1.1 and 1.1.2 The Contract Documents
  - Several contract documents are listed
  - Contract does not include the RFP or other documents issued by owner soliciting bids
  - Nor does it include Contractor's bid qualifications, unless specifically listed as contract document

The Printed Provisions (cont.)

- 1.1.2 – The Contract

"The Contract Documents form the Contract for Construction. The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Contractor and the Architect or the Architect's consultants, (2) between the Owner and a Subcontractor or a Sub-subcontractor, (3) between the Owner and the Architect or the Architect's consultants or (4) between any persons or entities other than the Owner and the Contractor. ***The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.***"

The Printed Provisions (cont.)

- 1.1.2
  - Last sentence appears to give Architect right to enforce A201 against Owner and/or Contractor
    - Lacks mutuality or direct consideration
    - Architect not a party to agreement, may not be enforceable in an action by Architect for affirmative relief; not clear if Architect is third party beneficiary
    - May be enforceable as point of defense for Architect where Owner or Contractor is asserting Architect failed to perform; Architect could assert Owner/Contractor should have performed first, and such lack of performance excuses Architect from further performance

The Printed Provisions (cont.)

- 1.1.7 - New Paragraph - Instruments of Service
  - Plans, specs and other work product of Architect and consultants

The Printed Provisions (cont.)

- 1.1.8 – Initial Decision Maker

  "The Initial Decision Maker is the person identified in the Agreement to render initial decisions on Claims in accordance with Section 15.2 and certify termination of the Agreement under Section 14.2.2."

- 1.1.8 - New Paragraph – Initial Decision Maker

  - Architect, unless someone else identified
  - Similar to Dispute Review Board

The Printed Provisions (cont.)

- 1.2.1
  - Paragraph makes all of the Contract Documents equal
  - Detailed conflicts resolution clause should be added to which this paragraph should be expressly made subservient
  - Contractor obligated to furnish everything reasonably inferable from Contract Documents, even if not shown on plan

The Printed Provisions (cont.)

- 1.6 Transmission of Data in Digital Form
  - Paragraph needs to be modified to fit the project
- 2.2.1 Can the Owner Pay?
  - Intended to allow Contractor to get useful information on Owner's ability to fund draws
  - Not worded specifically to overcome confidentiality rules of banks
  - Is there a need for the Architect to know as well? Contract for it

The Printed Provisions (cont.)

- 2.2.1 – Information and Other Services Required of the Owner

"Prior to commencement of the Work, 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 payment 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."

The Printed Provisions (cont.)

- 2.2.1 Can the Owner Pay?
  - Intended to allow Contractor to get useful information on Owner's ability to fund draws
  - Not worded specifically to overcome confidentiality rules of banks
  - Is there a need for the Architect to know as well? Contract for it
  - List funds set aside letter as a contract document

The Printed Provisions (cont.)

- 2.2.1 Can the Owner Pay? (cont.)
  - Does not address new Texas statute dealing with contingent payment clauses in the subcontracts (*see Tex. Bus. Comm. Code* § 35.521)
    - Owners have non-waivable obligation to furnish evidence of ability to fund the project
  - If subcontracts do not contain a contingent payment clause, statute is not applicable
  - Owners may not prohibit Contractor from using such clauses in their subcontracts

The Printed Provisions (cont.)

- 2.2.3 Did 2.2.3 reverse *Lonergan*?
  - Make Owner furnish an undergound survey and sufficient information to locate project on the site
  - Statutory requirement that Owner furnish sufficient information to file a lien (*see Tex. Prop. Code* § 53.159)
  - May also wish to require Owner to furnish all other information known about the site
  - Contractor may now rely on information furnished by Owner, but these documents are not Contract Documents

The Printed Provisions (cont.)

- 2.4 Will the Owner Start Driving the Bulldozer?

  - Provision gives Owner right to take over work after 10-day notice and can compel Contractor to commence and continue to cure defects

  - Owner may waive statutory remedies by ignoring certain statutory notice periods:

    - 60-day notice from claimant seeking relief from a contractor under Residential Construction Liability Act (*see* Tex. Prop. Code § 27.004)
    - 60-day notice before filing suit under DTPA (*see* Tex. Bus. & Com. Code § 17.505)
    - DTPA provides any waiver of DTPA is void unless it complies with stringent requirements (*see* Tex. Bus. & Com. Code § 17.42)
    - 30-day notice for recovery of attorneys' fees (*see* Tex. Civ. Prac. & Rem. Code § 38.001)
    - 30-day notice prior to filing claim under TRCCA (*see* Tex. Prop. Code § 401.001 et seq.)
    - If Contractor files bankruptcy, Owner should not take over project without permission from Bankruptcy Court or stay lifted

The Printed Provisions (cont.)

- 3.2.1 When does the Contractor Have to Study the Plans?
  - Paragraph contains representations by Contractor; Owner and Lender may wish to add to those listed
  - Contractor may wish to require Owner to make appropriate representations such as sufficiency and completeness of design documents and other information provided by Owner
  - Contractor has duty to study the plans before beginning of affected phase of work

The Printed Provisions (cont.)

- 3.2.1, 3.2.2, and 3.2.3
  - Most Texas courts would follow *Spearin* doctrine that Owner (and Architect?) impliedly warrants the sufficiency of the plans to the Contractor (*see Spearin v. United States*, 248 U.S. 132 (1918))
  - What about substitutions suggested by someone other than Contractor or Contractor's subs? An Architect has been held liable to Owner under DTPA for approval of tile substitution (*see The White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 798 S.W.2d 895 (Tex.App.—Beaumont 1990))

The Printed Provisions (cont.)

- 3.2.1, 3.2.2, and 3.2.3 (cont.)
  - Fifth Circuit has enforced risk shifting clauses in contracts and held Contractor is liable for extra costs incurred in dealing with differing site conditions – but requires clear contract language to shift risk to the Owner (*see Barnard Constr. Co. v. City of Lubbock*, 457 F.3d 425 (5th Cir. 2006))
  - If error or omission in Contract Documents:
    - Architect bears cost of new design work
    - Owner pays for new work not yet done
    - If Contractor does not discover error in time – unclear; should amend to assign responsibility

The Printed Provisions (cont.)

- 3.3.1 – Supervision and Construction Procedures

  "The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite
  safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, ***the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect***. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any loss or damage arising solely from those Owner-required means, methods, techniques, sequences or procedures."

The Printed Provisions (cont.)

- 3.3.1
  - New language may require Contractor to give written notice to Architect and Owner of unsafe procedures
  - Provision is a trap for all concerned

The Printed Provisions (cont.)

- 3.3.2 - No change
  - Contractor responsible to Owner for actions and omissions of subcontractors
  - What is effect of error in shop drawings?
    - If Architect saw them and did not correct error, Architect can be sued – even if disclaimer stamped on drawings
    - Contractor and subcontractor liable too

The Printed Provisions (cont.)

- 3.4.2
  - If approved by Architect, minor changes may be made without Owner's approval
  - Old language was clear that substitutions were approved only by Change Order – no approvals in field would be permitted

The Printed Provisions (cont.)

- 3.5 The Unlimited Warranty
  - As written, places no time limit on Contractor's warranty
    - Texas law provides 10-year statute of repose (*see* Tex. Civ. Prac. & Rem. Code §§ 16.008-.009)
    - DTPA has 2-year statute of limitation, subject to the discovery rule and statute of repose (*see* Tex. Bus. & Com. Code § 17.565)
    - Breach of contract is 4-years (*see* Tex. Civ. Prac. & Rem. Code §§ 16.004, 16.051)

The Printed Provisions (cont.)

- 3.5 The Unlimited Warranty (cont.)
  - Subsequent Owner who buys project has duty to inspect (*see Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168 (Tex. 1983))
  - Implied warranty of good and workmanlike repairs cannot be waived (*see Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987))
  - Developer, Architect, and Contractor are liable to the subsequent Owner only for latent defects, patent defects deemed accepted if not disclosed
  - No waivers of warranties written into the Agreement
  - No longer 1-year obligation of repair for Contractor

The Printed Provisions (cont.)

- 3.7.2 - .4 <u>What did the Contractor Know, When did it Know it?</u>
  - Common sense paragraphs are a minefield for Owner, Architect and Contractor
    - Not clear who is responsible for bringing project into compliance with code if there is error or omission in Contract Documents that results in failure to meet code requirement
    - Contractor excused if it did not know better and did notice the error
      - *See Tips v. Heartland Developers, Inc.*, 1998 WL 2546 (Tex.App.—San Antonio 1998) where Contractor has implied covenant to comply with building codes, but parties may contract around

The Printed Provisions (cont.)

- 3.7.4
  - Now that Contractor may rely upon information furnished by Owner, Contractor has better case for claim of concealed or unknown conditions
  - 21-day notice provision
  - Has Phase I environmental assessment been conducted? If not, who is responsible if something undesirable is found after soils disturbed?
    - Owner and Contractor – clearly yes
    - Architect – maybe yes

The Printed Provisions (cont.)

- 3.10.2 - .3
  - Requirement Contractor adhere to most recent project schedule softened – submittal schedule requirement added
- 3.12.1 - .9 Shop Drawings are Not Contract Documents
  - Shop drawings are not part of Contract; Submittals containing deviation from Contract documents must be noted and given to Architect for approval as minor change or Change Order

The Printed Provisions (cont.)

- 3.12.10

"The Contractor shall not be required to provide professional services that constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, (cont.)

The Printed Provisions (cont.)

- 3.12.10

" (cont.) Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance and design criteria specified in the Contract Documents."

The Printed Provisions (cont.)

- 3.12.10 Design Delegation
  - Significant change from the 1997 document
  - If Contract Documents expressly require Contractor to provide architectural or engineering design services, Contractor has to have design work sealed by appropriate professional
  - Likely to be disputes/misunderstandings
    - What about catch-all phrases?
    - Consider the application of this paragraph in context of competitively bid public work

The Printed Provisions (cont.)

- 3.18.1 - .3 Indemnity/Not Really
  - Contractor indemnifies Owner and Architect "to the fullest extent provided by law"
    - Series of paragraphs does not meet Texas Supreme Court's "express negligence" and "clear and conspicuous" rules to establish liability for indemnification against one's own negligence (*see Cabo Constr., Inc. v. R S Clark Constr., Inc.*, 227 S.W.3d 314 (Tex.App.—Houston [1st Dist.] 2007))

The Printed Provisions (cont.)

- 3.18.1 - .3 Indemnity/Not Really (cont.)
  - To comply with Texas law, this provision must be reworded and underlined or otherwise made conspicuous
    - Loss of use as a type of loss subject to indemnity has been deleted
    - Texas statute prohibits Contractor from indemnifying Architect for Architect's negligence if related to plans and spect (*see* Tex. Civ. Prac. & Rem. Code § 130.002)

The Printed Provisions (cont.)

- 4.1.1 -.3
  - Paragraphs require Owner to hire Architect
- 4.2.1 What did the Architect Know and When did it Know it?
  - As Owner's representative, Architect can create problems by instructing Contractor contrary to Owner's will
    - Prudent Owner/Architect will have Contractor sign off on everything
    - Needs to be dovetailed with Owner-Architect Agreement

The Printed Provisions (cont.)

- 4.2.2 When is the Next Site Visit by Architect?
  - Paragraph is vague as to frequency of required site visits by architect
- 4.2.3
  - New language added that Architect shall keep Owner informed as to progress of work and report defects and deficiencies observed in the work
    - See Rules and Regulations of the Board of Architecture – www.tbae.state.tx.us/documents/RulesArchitects2007.pdf

The Printed Provisions (cont.)

- 4.2.5 Does Architect have to Count Money?
  - The Architect's duty/liability for checking the accuracy of each draw is not clear
- 4.2.6 What Exactly is Non-Conforming Work?
  - Architect has authority to reject defective work
    - What if not timely rejected?
    - How soon must Architect discover it?
    - Is Architect required to reject all non-conforming work, no matter how minor, or just major parts?

The Printed Provisions (cont.)

- 4.2.14
  - New paragraph obligates Architect to respond to requests for information about Contract Documents
- 6.2.3
  - Revised language makes more clear and fair who is responsible for damage caused by or to Owner's separate Contractors and the work, in the case of multiple primes

The Printed Provisions (cont.)

- 7.3.9
  - New language requires payment of amounts not in dispute in connection with Construction Charge Directive; Architect determines additional interim amount if parties cannot agree
- 8.3.1
  - Delay paragraph recognizes Owner and Architect may be delaying Contractor from commencing work as well as during work; authorizes time extension for this and other stated reasons

The Printed Provisions (cont.)

- 8.3.3
  - Permits damages for delay. Note: consequential damages from delay have been waived under 15.1.6
- 9.4.2, 9.5.1 Withholding Payment
  - If Architect exercises right to withhold money, may put Owner in technical breach of new prompt pay statutes (*see* Tex. Prop. Code § 28 *et seq.*; 31 U.S.C.A. § 3905)
  - Penalty for such violation includes interest at 1.5% per month

The Printed Provisions (cont.)

- 9.4.2, 9.5.1 Withholding Payment (cont.)
  - If properly recorded payment bond and contract, liens from any tier beneath Contractor cannot attach to property, only to the bond (*see* Tex. Prop. Code § 53.201) (private work only)
  - On properly bonded public job, bond and contract do not need to be recorded
  - Current practice of withholding money is unliely to change much

The Printed Provisions (cont.)

- 9.5.3
  - New paragraph authorizes Owner to issue joint checks to subcontractors
- 9.6.2
  - New language requires Contractor to pay subs within 7 days from receiving payment from Owner
- 9.6.4
  - New language allows Owner to require proof from Contractor that subs are being paid; if not furnished in 7 days, Owner allowed to contact subs

The Printed Provisions (cont.)

- 9.6.7

"Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor for Work properly performed by Subcontractors and suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under

contract with the Contractor for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, shall create any fiduciary liability or tort liability on the part of the Contractor for breach of trust or shall entitle any person or entity

to an award of punitive damages against the Contractor for breach of the requirements of this provision."

The Printed Provisions (cont.)

- 9.6.7
  - In non-bonded job, payment from Owner in hands of Contractor shall be held for benefit of deserving subs and suppliers
    - Agreement does not go so far as to call these trust funds, but implied by language
    - Texas Trust Fund Statute requires Contractor who receives construction project funds is trustee of funds for sub (*see* Tex. Prop. Code § 162.001 *et seq.*)

The Printed Provisions (cont.)

- 9.6.7 (cont.)
  - Contractor has defense under statute if funds are used to pay actual expenses directly related to work and where "reasonable" dispute is involved over the amounts claimed or owed
  - Portion of paragraph that states, "Nothing contained herein shall require money to be placed in separate account," may be misleading – Texas Trust Fund Statute requires Contractor on residential homestead to maintain separate construction account (*see* Tex. Prop. Code § 162.005 *et seq.*)

The Printed Provisions (cont.)

- 9.6.7 (cont.)
  - Contractor will normally want to rework this paragraph
  - If intent of Owner is to make these trust funds in order to avoid problems with bankruptcy by Contractor, this may not be sufficient to keep out of bankrupt Contractor's estate
  - TRCCA subjects builder to commission's disciplinary power for misappropriation of trust funds in practice of residential construction

The Printed Provisions (cont.)

- 9.8.1 Substantial Completion Defined

"Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use."

The Printed Provisions (cont.)

- 9.8.1 Substantial Completion Defined
  - "when the work …is sufficiently complete…so the Owner can occupy or utilize the work for its intended purpose"
  - Architect, not Owner, makes determination
  - Subjective standard
  - Intended purpose no where defined
  - Not expressly tied to certificate of occupancy, although implied in jurisdictions where issued

The Printed Provisions (cont.)

- 9.8.1 Substantial Completion Defined (cont.)
  - Owner not required to sign off
    - Should Owner be required to sign?
    - Would you prefer more objective standard?
  - Secret Extra Warranty
    - Does the phrase “for its intended use” create an express warranty by Contractor to Owner that completed project will be fit for intended purpose?
    - If so, does that mean Contractor impliedly warranties the design is sufficient for intended use? (Potential trap)

The Printed Provisions (cont.)

- 9.8.2 The Punch List
  - Contractor prepares punch list
- 9.8.5
  - Owner and Contractor sign Certificate of Substantial Completion; does not determine date, but evidences written acceptance of responsibilities stated therein
    - New language requires Owner to make payment of retainage for accepted work
    - Conflicts with Tex. Prop. Code § 53.101 – 10% retainage required to be held by Owner for 30 days

The Printed Provisions (cont.)

- 9.9.1-

  "The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Section 11.3.1.5 and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Section 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect."

The Printed Provisions (cont.)

- 9.9.1
  - Owner moving in before Substantial Completion creates problems with builder's risk policy, etc.
  - Make sure policy defense is not inadvertently given an insurer when project destroyed right after Owner moves in
- 9.10.2
  - Contractor must furnish all bills paid affidavit (*see* Tex. Prop. Code § 53.085 and *T.A. Operating v. Solar Applications Engineering*, 191 S.W.3d 173 (Tex.App.—San Antonio 2005) (Contractor was denied retainage for failure to give affidavit))

The Printed Provisions (cont.)

- 9.10.4 - .5
  - Paragraphs contain waivers of certain claims by Owner and Contractor that occur upon making and acceptance of final payment
- 10.3.1 - .5 HAZMAT
  - Definition of hazardous substances expanded beyond asbestos and PCBs
    - Contractor has duty to report upon discovery of hazmat
    - Owner has duty to inspect with licensed professional and take appropriate action
    - Contractor gets extra time and money if appropriate

The Printed Provisions (cont.)

- 10.3.1 - .5 HAZMAT (cont.)
  - Contractor is liable for any hazmat brought to the site by Contractor
  - Owner indemnifies Contractor, Architect, subs for hazmat found on site (sole negligence of indemnitee is excluded) (note: does not meet conspicuous requirements and may not be enforceable)
  - Contractor may still be declared a PRP under CERCLA
- Pollution insurance should be considered, since courts are upholding pollution exclusions commonly found in CGL policies

The Printed Provisions (cont.)

- Article 11 Insurance
  - A full discussion of the problems with the insurance program, and commerically available alternatives, is beyond the scope of this presentation; Consider the following list none of which is adequately dealt with:
    - Deductibles
    - Limits
    - Umbrellas
    - Additional insureds
    - Products or completed operations, the exclusions, and exceptions to exclusions
    - Environmental or pollution insurance
    - Design and E&O for Contractor and Subs
    - Loss of use
    - Waiver of subrogation
    - Insurance tails vs. warranties, statues of limitation and the 10-year statute of repose

The Printed Provisions (cont.)

- 12.2.1 - .5 Correction of Defective Work
  - Expands warranty provisions; see 3.5 above
- 12.2.2.1
  - Owner has duty to notify Contractor of defective work during the one year correction period; if Owner fails, it waives right to require correction by the Contractor and waives right to make claim for breach of warranty

The Printed Provisions (cont.)

- 12.2.2.1 (cont.)
  - TRCCA warranty periods for claims alleging a residential construction defects are as follows:
    - 1-year for workmanship and materials;
    - 2-years for plumbing, electrical, heating and air-conditioning delivery systems; and
    - 10-years for major structural components of home
  - TRCCA also establishes a statutory warranty of habitability even after statutory warranty periods above are expired
    - No waiver of statutory warranty periods and habitability

The Printed Provisions (cont.)

- 12.2.2.3
  - New provision; correction work by Contractor in 1-year correction period does **not** restart clock
- 13.2.1 Non-assignability
  - Owner permitted to assign contract to the Construction Lender
  - Contractor assignment would violate this provision and provide technical breach on day one in virtually every contract

The Printed Provisions (cont.)

- 13.2.2
  - New provision; recognizes that owner may assign contract to Owner's Lender and makes Owner's Lender subject to Owner's obligations in contract
- 13.3 Written Notice
  - If faxes or email are permitted, make them not effective until the next business day after transmission – solves the 11:59 PM problem

The Printed Provisions (cont.)

- 13.6.1 Interest
  - If rate not stated, interest may be at 6, 10, or 18% (loan documents), depending on the facts – compound or simple interest must be stated
- 13.7.1 Time Limits on Claims
  - Provision completely rewritten – compares to Texas statute of repose (*see* Tex. Civ. Prac. & Rem. Code § 16.009)

The Printed Provisions (cont.)

- 14.4
  - New provision; permits termination by Owner for convenience; prudent Contractor will incorporate in all subcontractor and supply contracts
- 15.1.1
  - New language clarifies that all claims covered by Article 15

The Printed Provisions (cont.)

- 15.1.2 - Notice of Claims

"Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial
Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or
within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later."

The Printed Provisions (cont.)

- 15.1.2 Can You Ignore the 21-Day Requirement to Give Notice?
  - The time limits for giving written notice of a claim are mandatory; the time period is too short (*see* Tex. Civ. Prac. & Rem. Code § 16.071a); claim waived if timely notice not given
  - Various Texas statutes mandate longer time period:
    - DTPA and RCLA require notice 60-days before filing claim
    - TRCCA allows even greater amount of time

The Printed Provisions (cont.)

- 15.1.2 Can You Ignore the 21-Day Requirement to Give Notice? (cont.)
  - Various Texas statutes mandate longer time period (cont.):
    - TRCCA process:
      - Request an inspection by second anniversary of date of discovery of conditions claimed as defects, but no later than 30th day after date applicable warranty period expires
      - After inspection, claimant may file suit no later than:
        1. Later of Expiration of any applicable statute of limitations or 45th day after date the inspector issues recommendation; or
        2. If recommendation appealed, later of expiration of any applicable statute of limitations or by 45th day after date the commission issues its ruling on the appeal (*see* Tex. Prop. Code § 426.005)

The Printed Provisions (cont.)

- 15.1.2 Can You Ignore the 21-Day Requirement to Give Notice? (cont.)
  - Various Texas statutes mandate longer time period (cont.):
    - 30-day notice requirement for attorneys' fees (*see* Tex. Civ. Prac. & Rem. Code § 38.001)
    - 91-day notice under most insurance policies
    - Notice under various lien laws (*see* Tex. Prop. Code § 53 *et seq.*; Tex. Gov. Code § 2253 *et seq.*; 42 U.S.C.A. § 270)

The Printed Provisions (cont.)

- 15.1.6 – Claims for Consequential Damages

"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."

The Printed Provisions (cont.)

- 15.1.6 Consequential Damages Waived?
  - New provision; waives claims for consequential damages by either party
    - Contractor waives *Eichleay* damages and impact damages like loss of bonding
    - Owner waives damages for lose of use, rent, etc.
  - Owner may still include provision for "liquidated direct damages"
    - If no liquidated damages specified, and if 4.3.10 is not modified, Owner has no remedy for delay
  - Potential conflict with the DTPA

The Printed Provisions (cont.)

- 15.2.1
  - Drops prior requirement that claims against Architect shall be referred to Architect
  - Does not mention Texas statutes that now require filing of Certificate of Merit (*see* Tex. Civ. Prac. & Rem. Code § 150 et seq.)
- 15.2.6
  - Mediation can be waived

The Printed Provisions (cont.)

- 15.2.2 - .5
  - Architect is expected to take action if not being paid
- 15.2.7
  - Surety waives notice; sureties will want to modify and require they be given notice
  - Owner should give notice of claim to Contractor's surety

The Printed Provisions (cont.)

- 15.4 Arbitration
  - Arbitration no longer automatic; must be chosen by agreement
    - Question as to whether the FAA or TAA would apply (*see Volt Information Sciences, Inc. v. Bd. of Trustees of the Leonard Stanford Junior University*, 489 U.S. 468 (1989))
    - A201 selects FAA, yet also applies Texas law (*see Teal Constr. V. Darren Casey Interests*, 46 S.W.3d 417 (Tex.App.—Austin 2001))
    - Judicial review of arbitration awards limited to the grounds set forth in FAA §§ 10-11 exclusively, parties may not agree to expand judicial review (*see Hall St. Assoc. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008))

The Printed Provisions (cont.)

- 15.4.4 Will the Supplier Come to Arbitration?
  - Practical problems arise where parties are forced to arbitrate some claims and litigate other elements of the same dispute simultaneously
  - Add clause that if some, but not all necessary parties or issues cannot be joined in the arbitration, then all parties are excused from the arbitration

Omissions in the Printed Document

- Attorneys Need to Get Paid
  - No attorneys' fees provision
  - Need to add clause awarding attorneys, expert, architect, arbitration, litigation and other costs to winner, or split in some equitable, but express, manner
- Specific Arbitration Procedures
  - Contract for discovery, rules of procedure/evidence, DTPA, etc.
  - Can surety be compelled to arbitrate in dispute involving bonds?

Omissions in the Printed Document (cont.)

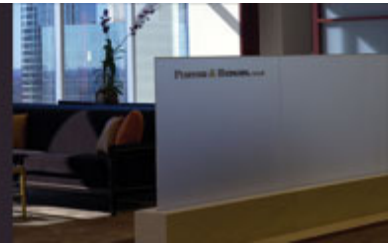
- The AIA recognizes, but does not directly deal with, specific state laws, such as Texas Property Code:
  - Liens (§ 53.001)
  - Affidavits of Commencement and Completion (§ 53.001)
  - Homestead homeowner signature requirements (§ 53.001)
  - Disclosures and procedures required for residential work (§ 53.001)
  - Architect's lien (§ 53.001)

Omissions in the Printed Document (cont.)

- Other statutes and issues not addressed:
  - Good faith and fair dealing
  - Anti-indemnity statutes (Tex. Civ. Prac. & Rem. Code § 127 *et seq.* and § 130 *et seq.*)
  - Statutes of Repose (Tex. Civ. Prac. & Rem. Code §§ 16.008 - .009)
  - Limitation of liability for accidents on construction sites (Tex. Civ. Prac. & Rem. Code § 95.001)
  - Texas Residential Construction Commission Act (Tex. Prop. Code § 401.001 *et seq.*)
  - Deed Restrictions
  - Attorneys' fees

Conclusion

- The foregoing is by no means comprehensive – but rather illustrative of the legal conflicts, compromises, and omissions to be considered when dealing with the new form documents



The End

Allison J. Snyder

PORTER & HEDGES, L.L.P.
Reliant Energy Plaza
1000 Main Street, 36th Floor
Houston, Texas 77002
{713} 226.6000 Tel
{713} 228.1331 Fax
asnyder@porterhedges.com