Are You Ready For The New AIA Contract Documents?

By Robert V. Dell'Osa, John F. Mullen, and Jared Loos, P.E.

From 1997 to 2007, AIA Document C141-1997, titled *Standard Form of Agreement Between Architect and Consultant*, was the contract form most commonly presented to structural engineers. In 2007, the AIA issued a new set of contract documents, including C401-2007, the new *Standard Form of Agreement between Architect and Consultant*. Thus, it is likely that structural engineers have begun encountering, or will very soon encounter, new contract forms. It is important to note the differences in the agreements, some of which appear to favor the architect over the engineer.

The first thing that stands out about the 2007 AIA Agreement is its length. At just eight pages, the agreement is much shorter than the previous 15 pages. However, this shortened length is not really the result of the 2007 Agreement being more concise or streamlined than its predecessor. Rather, the primary reason the new document is shorter is that many of its paragraphs simply incorporate by reference various parts of the architect's agreement with the owner (known as the "prime agreement"). It is therefore more important than ever for the engineer to obtain, review, and understand the prime agreement before signing the 2007 AIA Agreement.

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Both the 1997 and 2007 AIA Agreements require the engineer to "designate a representative authorized to act on behalf of the [engineer]" with respect to the project. However, the 2007 agreement adds that: (i) the engineer must also identify the "key personnel" who will work on the project, and (ii) requires the architect's approval before the engineer can replace its designated representative or key personnel. While the architect's approval cannot be "unreasonably withheld," the engineer now must get the architect's consent before the engineer can change the key personnel assigned to a project.

The 2007 AIA agreement imposes on the engineer the obligation to "provide prompt written notice to the architect if the [engineer] becomes aware of any errors, omissions or inconsistencies in the services or information provided by the architect or other consultants." The 1997 agreement did not include such an obligation. On its face, the new contract term does not require the engineer to review and evaluate the work of the architect or other consultants. It is inevitable, however, that there will be lawsuits seeking to hold the engineer liable for an alleged failure to detect or report deficiencies in the work of an architect or other consultant. Unless they are expressly hired to review and evaluate the work of an architect or other consultant, engineers subject to the 2007 AIA agreement may want to insert language making it clear that they have no affirmative duty to evaluate such work and are obligated only to coordinate their portion of the project and report deficiencies if they actually learn of them.

The 1997 AIA agreement specified the date on which the statute of limitations applicable to claims between the architect and the engineer begins to run. Specifically, the 1997 agreement provided that the statute begins to run "not later than either the date of Substantial Completion for acts or failures occurring prior to Substantial Completion or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion." The 1997 Agreement further stated that "[i]n no event shall such statutes of limitation commence to run any later than the date when the services are substantially complete." This provision is very valuable to the engineer, as it serves to protect the engineer from a lawsuit filed years after the engineer's work is completed. However, this provision has been eliminated from the 2007 AIA agreement. Consequently, an engineer presented with the 2007 AIA Agreement should take steps at the contract negotiation stage to specify the date on which the statute of limitations begins to run on claims under the contract. It is important that the timing of the commencement of the statute of limitations is consistent among the prime agreement, architect, and all consultants – otherwise insurance coverage and liability issues applicable to claims involving more than one party may be problematic.

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The 2007 agreement addresses Digital Data Protocol handling between architects and consultants through Document E201: this document is entirely new. Like the prime agreement, E201 is part of the governing document set. Overall this seems to be a balanced document when viewed by either side to the agreement. Highlights include:

- use of electronic signatures (which demand tight internal controls over review and access);
- a broad definition of "digital data" (which demands that all involved individuals be aware of the designation);

- a duty on recipient of digital data to indemnify and defend against all claims arising from recipient's modification or unlicensed use of such data (which could be a big expense as litigation could get costly); and
- use of a pre-agreed project protocol table to clarify data formats, transmission methods and permitted uses. While this table is intended to clarify the protocols, it may prove cumbersome especially when considering that it will likely be different from project to project. Training both professional and support personnel to follow these protocols across multiple projects may prove challenging.

Both the 1997 and 2007 AIA agreements address the situation in which the engineer must perform extra work. However, the 2007 version is considerably less favorable to the engineer. The 1997 agreement specifies 13 circumstances in which the engineer "shall be entitled to an appropriate adjustment in the …schedule and compensation." The 2007 agreement eliminates these specified instances and provides that the engineer must notify the architect of the need for extra work but shall not perform the work until the engineer receives written authorization from the architect. This new approach could result in obstacles for the engineer when seeking to justify the need for additional work.

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An engineer presented with the 2007 AIA agreement may therefore want to supplement the extra work language by incorporating section 5.1.2 of the 1997 agreement.

The 1997 AIA agreement mandated mediation followed by arbitration. The 2007 version incorporates the dispute resolution mechanism of the prime agreement, with two exceptions. If the dispute is unrelated to a dispute between the architect and owner, or if the engineer is legally precluded from being a party to the dispute resolution procedure set forth in the prime agreement, then the 2007 AIA agreement mandates mediation and gives the parties the option of selecting arbitration or litigation in court if the mediation does not resolve all issues in dispute. If no selection is made, then the "default" is litigation in court. As a result, engineers presented with the 2007 agreement should give thought to how they would prefer to resolve any dispute not covered by the prime agreement and then make the appropriate designation in the contract document.

The above are just some of the differences between the 1997 AIA Agreement and the updated 2007 version. In general, the differences appear to favor the architect at the expense of the engineer. When presented with any written form, however, keep in mind that the form can be just a starting point from which to negotiate and arrive at a contract that is fair and equitable to all. In the case of the AIA contract forms, some combination of the 2007 and 1997 AIA agreements may be the engineer's best bet.▪

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