

**AIA
CONSTRUCTION
CONTRACTS: WHAT
DO THEY ACTUALLY
COVER?**
MARCH 2024

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AGENDA

1. How the AIA documents are generally structured
2. The role of the "General Conditions"
3. Role of the Architect
4. Pricing
5. Payments and Retainage
6. Schedule, Substantial Completion, and Final Completion
7. Changes in the Work
8. Correction of Work
9. Insurance and Bonds
10. Delays and Extension of Time
11. Termination
12. Claims and Disputes

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PRESENTER



Blake Nelson
Attorney & Construction Law Group Chair
HELLMUTH & JOHNSON

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HOW THE AIA DOCUMENTS ARE GENERALLY STRUCTURED

- **Owner - General Contractor Agreements**
 - **Commercial** (A101 and A102 most common):
 - A101: fixed price
 - A102: price is cost of the work plus a fee with a guaranteed maximum price (GMP)
 - A103: price is cost of the work plus fee with no maximum (Cost-Plus)
 - A104: projects of limited scope/complexity (fixed price or cost plus)
 - A105: smaller, less complex commercial or residential projects
 - **Residential** (not commonly used):
 - A111: single family
 - A112: single family, design-build
 - A113: single family, remodel

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HOW THE AIA DOCUMENTS ARE GENERALLY STRUCTURED

- **Construction Manager Agreements** (newer trend)
 - A132: CM as advisor. Can be any price method.
 - A133: CM as advisor and also has financial responsibility (at risk)
 - A134: CM has responsibility for means and methods of construction
- **Subcontractor Agreements**
 - A401: single project agreement
 - A441: master agreement

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HOW THE AIA DOCUMENTS ARE GENERALLY STRUCTURED

- AIA documents can be heavily edited
- Essentially every word can be changed
- Ask for an Additions and Deletions report.

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ROLE OF THE GENERAL CONDITIONS

- **A201 – General Conditions of the Contract for Construction**
 - An additional “umbrella” document that is incorporated in and attached to the various Owner/General Contractor agreements.
 - States the additional rights, responsibilities, and relationships of the owner, contractor, and architect.
 - Very long.
 - Routinely referred to in the A101 and A102
 - Sometimes overlooked.
 - Can be completely edited.

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ROLE OF THE ARCHITECT

- AIA forms are created by architects, and the architect has a prominent role unless the documents are revised.
- **Administration of Contract**
 - Owner's representative
 - Inspections
 - Payment applications
 - Plan revisions
- **Communications**
 - Change Orders
 - RFIs
 - Work Directives
- **Dispute Resolution**
 - Initial Decision Maker
 - Interpretations of Contract Documents
 - Withholding payment
 - Pricing for changes

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PRICING - FIXED PRICE

- **Fixed Price (Stipulated Sum) (A101)**
 - Traditional pricing method
 - Change orders required to increase the price
 - Nominal accounting by Contractor to Owner other than lien waivers
 - Can include allowances and alternates

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PRICING - GMP

- **Cost-Plus with Guaranteed Maximum Price (GMP) (A102)**
 - Owner pays the actual construction costs and a fee to the Contractor, usually a percentage of the costs.
 - Price cannot exceed the GMP without a change order.
 - Detailed accounting by Contractor regarding costs of the work.
 - Many other variables:
 - General Conditions/ General Requirements
 - Contingencies (Contractor; Owner; Buy-Out)
 - Shared Savings

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PAYMENTS AND RETAINAGE

- **Applications for Payment** - submitted to Architect
- **Fixed Price (A101)**
 - Based on Schedule of Values and percentage of completion of work
- **GMP (A102) / Cost Plus (A103)**
 - Still requires Schedule of Values
 - Also based on costs incurred for the work since last Pay App
 - Requires submission of detailed accounting and records
 - Must also account for any general conditions/requirements, contingencies and the contractor's fee
- **Final Payment:** Often customized to account for punch list and 150% holdback.
- **Retainage:** No set amount in AIA forms.
 - 5% maximum in Minnesota. Other states vary.

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SCHEDULE, SUBSTANTIAL COMPLETION, AND FINAL COMPLETION

- **Schedule:** few references to a construction schedule
 - Main contract states time to reach Substantial Completion:
 - Specific completion date; or
 - Number of days
 - Up to Contractor how to schedule and sequence the work.
 - The AIA Subcontractor Agreement (A401) refers to the schedule.
 - Option to substantially complete the work in phases

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SCHEDULE, SUBSTANTIAL COMPLETION, AND FINAL COMPLETION

- **Substantial Completion**
 - Defined in the General Conditions (A201), **not the main contracts**
 - "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."
 - Often customized to define "Substantial Completion" as when a certificate of occupancy is issued.
- **Final Completion** - also defined in the A201
 - All work is complete and final pay app may be submitted, including retainage

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CHANGES IN THE WORK

- Covered in the General Conditions (A201), not main contracts
- Change Orders - AIA forms state the Architect will:
 - Prepare all change orders
 - Sign all change orders
 - Almost never actually happens that way
- Construction Change Directives
 - "Written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both"
 - "If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the Architect shall determine the adjustment."

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CORRECTION OF WORK

- Architect inspects and accepts or rejects work
- Before Substantial Completion:
 - Contractor must "promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents"
- After Substantial Completion:
 - For one year after Substantial Completion Contractor must correct work promptly after receipt of notice from Owner.
- If Contractor fails to correct work, it is a breach of contract and Owner may correct it and back charge for it.

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INSURANCE AND BONDS

- **2017 Exhibit A - Insurance and Bonds**
 - AIA created an Exhibit A attached to the contract documents containing the insurance and bond requirements.
 - Seven pages long and very detailed
 - Essentially another agreement about insurance matters.
 - Many contractors find it cumbersome and not always applicable
 - I usually do not use the AIA Exhibit A and instead attach a more standard insurance exhibit stating the coverages and limits.

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DELAYS AND EXTENSION OF TIME

- Covered in General Conditions (A201), **not the main contracts.**
- **§ 8.3 Delays and Extensions of Time**
 - **§ 8.3.1** If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.
- **§ 15.1.6 Claims for Additional Time**
 - **§ 15.1.6.1** If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section 15.1.3 shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.
 - **§ 15.1.6.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the scheduled construction.

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TERMINATION

- Covered in General Conditions (A201), **not the main contracts**
- **Termination By Owner for Cause - if Contractor:**
 - repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
 - fails to make payment to Subcontractors or suppliers in accordance with the respective agreements between the Contractor and the Subcontractors or suppliers;
 - repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
 - otherwise is guilty of substantial breach of a provision of the Contract Documents

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TERMINATION

- **Termination By Owner for Convenience**
 - Allows the Owner to terminate at any time at its convenience, without any fault by Contractor
 - No on failed to perform
 - Contractor is paid for its actual labor and material through the termination date
 - Contractor waives any claims for breach of contract or future lost profit

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CLAIMS AND DISPUTES

- Covered in General Conditions (A201), **not the main contracts**
 - Except main contract states whether parties will use arbitration or litigation.
- Generally, must give notice of a "Claim" within a certain time period or else the Claim is waived.
- Usually the Contractor must keep working, and the Claim is processed later.
- Claims for additional cost or additional time
- Waiver of consequential damages
- Default designates Architect as Initial Decision Maker

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CLAIMS AND DISPUTES

- **Architect as Initial Decision Maker**
- **15.2.6.1** Either party may, within 30 days from the date of receipt of an initial decision, demand in writing that the other party file for mediation. If such a demand is made and the party receiving the demand fails to file for mediation within 30 days after receipt thereof, **then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.**
- **15.3.3** Either party may, within 30 days from the date that mediation has been concluded without resolution of the dispute or 60 days after mediation has been demanded without resolution of the dispute, demand in writing that the other party file for binding dispute resolution. If such a demand is made and the party receiving the demand fails to file for binding dispute resolution within 60 days after receipt thereof, **then both parties waive their rights to binding dispute resolution proceedings with respect to the initial decision.**

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QUESTIONS?

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