

- Avoid involvement in the direction, control, or management of the license applicant.
- Avoid profit-sharing or any other revenue-share model in which payment of rent is based on a percentage of cannabis-related sales.

## New AIA Documents May Require Parties to Remodel Their Procedures

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### Introduction

The standard form contracts drafted by the American Institute of Architects (AIA) are the most widely used contracts in the construction industry. See *College of Notre Dame of Md., Inc. v Morabito Consultants, Inc.* (Md App 2000) 752 A2d 265, 273. AIA form agreements are revised every 10 years.

In April 2017, the AIA released the 2017 edition of the A201<sup>TM</sup>-2017 “General Conditions of the Contract for Construction” form, which sets forth the rights, responsibilities, and relationships of the Owner, Contractor, and Architect, and its “family” of documents for Owner-Contractor and Contractor-Subcontractor agreements. The AIA also released a new Insurance and Bonds Exhibit (2017 Exhibit A), and a new Sustainable Projects Exhibit (E204<sup>TM</sup>-2017).

In October 2017, AIA released new editions of the Architect Scope documents and several other frequently used AIA forms. The B200 Series “scope” documents are designed to define additional services an architect may provide.

This article discusses the key changes in the A201, General Conditions form. A second article will discuss key changes in the Owner-Architect agreements (A101, A102, A103, B101, B102, B103, and B104), and the scope of service agreements (B201, B203, B205, B207, and B210). A third article will discuss the Insurance Exhibit, which is to be used in conjunction with many of the standard form agreements, and the Sustainable Project Exhibit (E204<sup>TM</sup>-2017).

### Initial Decision Maker

The 2007 edition of the A201 form provided that the Initial Decision Maker (IDM) would be the Architect unless otherwise specified, would render initial decisions on Claims before the parties could proceed to mediation or arbitration, and would certify termination of the Agreement by the Owner for cause under §14.2.2. A201<sup>TM</sup>-2007, §§1.1.8, 15.2.1, 15.2.5. Although the 2017 edition continues to make the IDM responsible for rendering initial decisions on Claims, revised §14.2.2 now states that the Architect (notwithstanding who the IDM is) will certify whether sufficient cause exists to terminate the Agreement. In addition, revised §1.1.8 states the IDM “shall not show partiality to the Owner or Contractor, and shall not be liable for the results of interpretations or decisions rendered in good faith.”

Although there are not yet any reported cases interpreting this provision, courts have construed similar contractual language to permit the overturning of a decision only for fraud or gross mistake. See *Walnut Creek Elec. v Reynolds Const. Co.* (1968) 263 CA2d 511, 514. Thus, the parties may wish to negotiate for a more objective standard. Further, Contractors may fear that the Architect will not be “impartial” because he or she was selected, hired, and paid by the Owner. The American Arbitration Association has developed “Construction Industry Initial Decision Maker (IDM) Procedures” and maintains a panel of professionals who can serve as the IDM.

### Notice

In addition to allowing written notice to be served by personal delivery, by registered or certified mail, or by courier providing proof of delivery, as permitted in former §13.3, new §1.6.1 permits service by electronic transmission, but only if a method for electronic transmission is set forth in the Agreement. See also A101<sup>TM</sup>-2017, §8.6; A102<sup>TM</sup>-2017, §15.6; A103<sup>TM</sup>-2017, §15.6; A104<sup>TM</sup>-2017, §7.9.1; A105<sup>TM</sup>-2017, §6.5; A401<sup>TM</sup>-2017, §§14.4.1, 14.4.3; and E203<sup>TM</sup>-2013, §1.4.10 (each permitting electronic notice). When listing the contract information for each party’s representative for notice purposes, the parties should be sure to list the representative’s e-mail address to preserve the right to send notices by e-mail.

However, a Notice of Claim cannot be sent electronically. A201<sup>TM</sup>-2017, §1.6.2. Contractors who are accustomed to hand-delivering the Notice of Claim at the project site may no longer do so unless they modify §1.6.2, which permits delivery of the Notice of Claim only by certified mail, by registered mail, or by courier providing proof of service.

### BIM and Other Digital Data

The 2007 edition of §1.6 stated that the parties “shall endeavor” to establish protocols governing transmission of documents in digital form. New §§1.7 and 1.8 address the widespread use of Building Information Modeling (BIM). For instance, new §1.7 requires the use of the AIA E203<sup>TM</sup>-2013 “Building Information Modeling And Digital Data Exhibit” and AIA G202<sup>TM</sup>-2013 “Project Building Information Modeling Protocol Form” to establish protocols for the development, use, transmission, and exchange of digital data. Similarly, new §1.8 provides that any use of or reliance on BIM information without first having established such protocols is at the relying party’s own risk and without liability to any other project participant.

A Contractor may have to rely on BIM information provided by the Architect before these protocols are established, e.g., when calculating its bid. Further, the AIA protocols do not address data security, a significant risk when parties use laptops, smart phones, or other devices to access information from the Site. Therefore, Contractors should consider seeking to modify these provisions. If the parties wish to use