



ConsensusDocs Construction Law Newsletter

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Older Newsletters

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Old Dog, New Tricks: What You Need to Know About the 2017 AIA A201 General Conditions

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This past April marked the once-a-decade release of the American Institute of Architects' (AIA) A201 General Conditions document. Although the scope of the 2017 revision was not nearly as significant as the sweeping re-write that occurred in 2007, there are notable changes worthy of special consideration by Contractors and Owners alike. With that in mind, we have assembled our top-five changes to the AIA A201-2017.

1) Notice Provisions

Notice provisions play an important role in any construction project, so the updates to this language are especially noteworthy. One major change includes the addition of a bright-line distinction between a "Notice of Claim" and a "notice." Notices of Claim must be provided in writing and will only be deemed served if delivered by certified mail, registered mail or by a courier providing proof of delivery. Accordingly, a Notice of Claim should not be sent by email. Other forms of notice (aside from Notices of Claim) may be submitted electronically, including via email, but *only if* the parties specify in their agreement that such a delivery method is an acceptable form of notice. See AIA A201-2017, Sections 1.6.1 and 1.6.2.

2) Liquidated Damages

While the definition of a Claim remains largely the same, the Owner is now expressly *not required* to file a Claim for Liquidated Damages. This could permit an Owner to unilaterally assess (or withhold) Liquidated Damages – shifting the burden to the Contractor to initiate the dispute resolution process when it believes the assessment is improper. See AIA A201-2017, Sections 9.5.1, 15.1.1 and 15.1.7.

3) Supervision and Construction Procedures

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Under the A201-2007, a Contractor concerned with the safety of means and methods specified in the Contract Documents was required to stop that portion of the Work, give notice, and await direction from the Architect. If the Contractor was instructed to proceed with the specified means and methods, the Owner would be solely responsible for loss or damage arising from the means and methods. The A201-2017, however, requires that the Contractor suggest alternative means and methods, which the Architect must evaluate “solely” for their conformance with the design intent. Unless the Architect objects, the Contractor must perform the Work in accordance with its alternative means and methods, thereby assuming liability for the safety of its suggested means and methods. Significantly, it is unclear who will bear responsibility if the Contractor’s proposed alternative does not comply with the Contract Documents. See AIA A201-2017, Section 3.3.1.

4) Lien Indemnity

If the Owner has fulfilled its obligations under the Contract Documents, the Contractor is required to defend and indemnify the Owner from all losses “arising out of” any lien claim or other claim for payment by any subcontractor. Notably, this obligation to indemnify is broader than a duty to simply cover the underlying lien claim, and could require the Contractor to pay costs more remotely related to the lien, including, financing premiums. See AIA A201-2017, Section 9.6.8.

5) Payment for Overhead and Profit on Unexecuted Work

One Contractor-friendly change includes a provision permitting a Contractor, in certain circumstances, to recover profit and overhead on unexecuted Work. Where the Contractor terminates the Agreement (See A201-2017, Sections 14.1.1-14.1.3), the Contractor may receive, in addition to payment for executed Work, its reasonable overhead and profit on Work not yet executed. The Contractor remains entitled to costs incurred by virtue of the termination; however, language entitling the Contractor to broader damages has been deleted. By contrast, the newly revised Owner’s termination for convenience provision (Section 14.4.3) removes certain 2007 language which allowed for recovery of profit and overhead on unexecuted work. In its place, the 2017 version allows for payment for Work properly executed, plus recovery of “costs incurred by reason of the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.” Because this provision allows the parties to establish a termination fee in the agreement, it would be prudent to negotiate such a “break-up” fee before starting work, either as a lump sum, or by expressly addressing whether profit and overhead on unexecuted work are among the costs attributable to termination.

Despite the release of the 2017 General Conditions, the A201-2007 will remain in circulation for a period of 18 months. There are additional revisions to the A201-2017 which warrant consideration and we recommend a thorough review of the document itself and the AGC’s forthcoming commentary on the A201-2017 General Conditions. It should also be noted that the AIA has revised its AIA A101 (Lump Sum), A102 (Cost Plus with a GMP), A103 (Cost Plus without a GMP), A104 (Short Form, formerly the A107), A105 (Short Form) and A401 (Contractor/Subcontractor Agreement) forms, which should be examined.

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A detailed examination of the full scope of the A201-2017 changes is available by contacting the authors.

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***Spearin* Doctrine Immunity Includes Contractor's Failure to Warn Owner About Design Defects**

LaShip, LLC v. Hayward Baker, Inc., 2017 U.S. App. LEXIS 3694 (5th Cir. Mar. 1, 2017)
[Alex Corey](#), Associate, [Pepper Hamilton LLP](#)

The legal doctrine of implied fitness of design warranty, recognized by the U.S. Supreme Court, provides that a contractor bound to build according to plans and specifications prepared by an owner will not be responsible for the consequences of defects in the plans and specifications. *United States v. Spearin*, 248 U.S. 132 (1918). Responsibility will remain with the owner, even when contractual provisions require the contractor to visit the site, check the plans and inform themselves of the requirements of the work. *Id.* Recently, the U.S. Court of Appeals for the Fifth Circuit ruled that a contractor's immunity created by the doctrine of implied fitness of design warranty, as codified in Louisiana law, can include immunity for failure to warn an owner of defects or errors in the owner's design. *LaShip, LLC v. Hayward Baker, Inc.*, 2017 U.S. App. LEXIS 3694 (5th Cir. Mar. 1, 2017). Consequently, a contractor may not be responsible for damages resulting from its implementation of an owner's design, even if the contractor could have discovered the defects therein.

Background

Beginning in 2007, LaShip, LLC undertook the construction of a large shipbuilding facility in Houma, Louisiana. In July 2008, LaShip retained Hayward Baker, Inc. (HBI) to complete the soil mixing and drill shaft work on the project.

The contract between LaShip and HBI provided for HBI to install subterranean soil-mix columns to form the foundation of the shipbuilding facility. Pursuant to the contract, HBI obtained soil samples to ascertain the columns' strength. Laboratory testing revealed that, in general, the soil possessed the requisite compressive strength provided for in the contract. Nevertheless, as the work progressed, the columns exhibited spiraling, and HBI experienced several cave-ins during its installation of the drill shafts and unwanted settlement of the foundation columns.

On January 21, 2011, LaShip filed suit against HBI in the Louisiana federal district court, alleging that HBI was liable for not warning LaShip about alleged defects in the design of the columns. The district court, after a 10-day bench trial, ruled that LaShip failed to prove by a

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preponderance of the evidence its negligent failure to warn and breach of contract claims against HBI. *LaShip v. Hayward Baker*, 2015 U.S. Dist. LEXIS 186946 (E.D. La. Aug. 13, 2015). The district court found that HBI did not breach its duty to construct the columns in accordance with the express provisions of the performance specifications or that any deficiencies with respect to the construction of the columns caused the settlement of any phase of the project. *Id.* at *61.

Fifth Circuit Evaluates LaShip's Claims Under *Spearin*-Like State Law

The Fifth Circuit reviewed the district court's ruling *de novo* and fully affirmed the decision. In regard to LaShip's arguments that HBI was liable for its failure to warn of the column defects, the Fifth Circuit found that HBI was "statutorily immune" from this claim under Louisiana Revised Statute 9:2771 (LRS 9:2711), which provides that:

No contractor . . . shall be liable for destruction or deterioration of or defects in any work constructed, or under construction, by him if he constructed, or is constructing, the work according to plans or specifications furnished to him which he did not make or cause to be made and if the destruction, deterioration, or defect was due to any fault or insufficiency of the plans or specifications.

Both LRS 9:2711 and the doctrine of implied fitness of design warranty, recognized by the U.S. Supreme Court in *Spearin*, provide that a contractor is not liable for defects in the owner's design. The Fifth Circuit reaffirmed this principle, ruling that a contractor is "shield[ed] from liability for any defects that may arise as a result of the contractor's adherence to plans and specifications that were provided to it." *Id.* at *4.

However, the Fifth Circuit noted that a contractor will be liable "if he has a justifiable reason to believe that adherence to plans and specifications would create a hazardous condition." *Id.* LaShip, however, failed to point to any specific evidence indicating that such an exception was applicable. *Id.* As an example of a "hazardous condition," the Fifth Circuit cited to *Oxley v. Sabine River Authority*, 663 So. 2d 497 (La. App. 3d Cir. 1995), where a contractor was found responsible for defects in an owner's electrical plans when following the plans would expose handlers or workers to electrical voltage hazards.

HBI Had No Duty to Warn

HBI was given performance specifications by LaShip that it did not make. In reviewing those specifications, the Fifth Circuit found that the problematic settlement of the structure in the project stemmed from a design defect in the length of the columns. As such, HBI was afforded statutory immunity, pursuant to LRS 9:2711, based on its installation of the columns according to specifications in the contract.

Significantly, the Fifth Circuit rejected LaShip's argument that, based on HBI's geotechnical expertise, HBI knew or should have known that the design was allegedly defective and thus had an affirmative duty to warn LaShip. The Fifth Circuit opined that such an argument would unduly broaden the affirmative tort duty of contractors. In affirming the district court's decision, the Fifth Circuit distinguished prior case law where a contractor was found to have breached a

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duty to warn the owner of a potential defect in the construction of a grain storage tank, noting that, in that situation, the liable contractor “both designed and constructed” the storage tank. *Bunge Corp. v. GATX Corp.*, 557 So. 2d 1376 (La. 1990). HBI did not design the soil-mix column specifications.

The court also affirmed the dismissal of LaShip’s breach of contract claim, finding that HBI fulfilled its contractual requirement in confirming that the soil tested met the minimum threshold for unconfined compressive strength.

A Broader Scope of the *Spearin* Doctrine?

While the Fifth Circuit’s decision rested on Louisiana law, the similarity of the language of LRS 9:2771 and the *Spearin* Doctrine create important implications for contractors nationwide. In general, courts will be hesitant to impose liability on contractors when the underlying problems stem from an alleged design flaw. Not surprisingly, courts will be reluctant to absolve a contractor of liability if adherence to a defect in the owner’s plans would create a “hazardous condition.”

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Use Performance and Payment Bonds to Protect Against Downside Risk

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By nature, most contractors are risk takers. To a contractor, calculated risk can be fortune’s accomplice. Failure to recognize, calculate and properly manage the risk inherent in any construction project can, however, lead to financial disaster for any one or all of the participants in a construction project. Once project risks are recognized, carefully drafted contract documents can help to allocate project risks between or among the various contracting parties. For example, common strategies for allocating project risks include the use of contractual indemnification provisions, requirements for builder’s risk and commercial general liability insurance policies, and requirements for performance bonds and payment bonds. Requiring performance and payment bonds on a project can provide significant protection against the downside risk of a failure to perform the work or failure to pay subcontractors and suppliers. Examples of form contract language that may be used to address whether performance and payment bonds shall be required on a construction project can be found in ConsensusDocs 200, Standard Agreement and General Conditions Between Owner and Constructor; ConsensusDocs 750, Standard Agreement Between Constructor and

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Subcontractor; and in ConsensusDocs 751, Short Form Agreement Between Constructor and Subcontractor. A seasoned construction lawyer will be able to assist you in tailoring the ConsensusDocs form language to fit your particular needs.

It is important to understand two types of bonds that you are likely to encounter on a construction project—performance and payment bonds—and to understand the relationship among the parties. There are three parties in the construction surety bond relationship: the surety, the principal and the obligee. The principal is the party obtaining the bond, typically the contractor or subcontractor. The obligee is the party to whom an obligation is owed under the bond, typically the owner or contractor. The surety is the party issuing the bond. The surety is bound to perform in accordance with the contract and the terms of the surety bond if the principal fails to perform. Performance bonds are obtained to ensure the contractor's faithful performance of its contract with the owner or to ensure the subcontractor's faithful performance of its subcontract with the contractor. Payment bonds are obtained to ensure payment to third party "claimants" who furnish labor, material or equipment on a project.

A performance bond is a project specific contractual agreement between a contractor and a surety by which the surety guarantees to arrange for the completion of a contract if the contractor runs into trouble and fails to complete the project. A performance bond is intended for the protection of the owner (or of the contractor, if dealing with a performance bond provided by a subcontractor). A performance bond is different from a payment bond in that a performance bond is not intended to protect unpaid subcontractors or suppliers.

A payment bond is a project specific contractual agreement between a contractor and a surety by which the surety guarantees payment for the labor and materials contracted for and used by the contractor on the project. It is a guarantee of payment that is intended to benefit and protect subcontractors and suppliers if the contractor (bond principal) fails to pay for the labor or materials furnished on the project. A payment bond differs from a performance bond in that the payment bond does not directly protect the owner. While the owner may make a claim against a prime contractor's performance bond, an owner does not typically furnish labor, material or equipment on a project with the expectation of payment under the prime contract and thus would not be a claimant under the prime contractor's payment bond.

Given the important protection provided by a payment bond, subcontractors and suppliers who may be potential claimants under a payment bond should request and obtain a copy of the payment bond at the outset of the project—well before there are payment problems. Potential claimants should carefully review and become familiar with the terms of the payment bond and the requirements for asserting a claim against the bond if it becomes necessary.

You should be aware that both performance and payment bonds involve various notice and timing requirements relating to asserting claims and initiating mediation, arbitration or litigation. It is critical to identify all timing and notice requirements and to then strictly follow these requirements. Failure to comply with notice and timing requirements may bar an otherwise valid claim.

You should familiarize yourself with any state and federal bond statutes that are applicable to your project and determine whether the applicable state or federal statute requires posting of a performance and payment bond. Importantly, the applicable state or federal statute involved,

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together with court decisions interpreting the respective statutes, will dictate which project participants may recover under the bonds and what procedures must be followed to perfect your claim against the bond. It may be helpful to seek the advice of competent construction law counsel at the outset of a project and, certainly, upon the first hint of trouble on the project.

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Correction to 2016/17 ConsensusDocs Edition Made

[Brian Perlberg](#), Executive Director, [ConsensusDocs](#)

A correction has been made to the 2016/17 editions of the ConsensusDocs agreements, 200, 205, 235, and 500. Language in the Owner's responsibilities section had language that stated, "which Constructor may rely upon for its accuracy and completeness". This language has been deleted. The original 2007 editions of ConsensusDocs deemed all owner-provided information reliable by the Contractor. Starting in 2011 only Owner-provided information designated as contract documents may be relied upon for accuracy by the Contractor. However, owner-provided information concerning testing of hazardous materials may be relied upon automatically.

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