

## CONSTRUCTION LAW

# Riskier Business

BIG DIG SETTLEMENT SHOWS HOW CHANGES TO CONSTRUCTION CONTRACTS HAVE UNEXPECTED CONSEQUENCES. BY KEVIN HUDSON & MATTHEW SPIVEY

**B**eginning with the 1987 set of construction documents, which were generally viewed as acceptable to most contractors, the American Institute of Architects (AIA) began a process of revising its construction documents every 10 years. Each revision has yielded more provisions that were unacceptable to contractors, and the 2007 set is no exception.

As part one of a two-part series, we will evaluate the 2007 AIA documents from the contractor's perspective. Concerns are divided into two main areas. Part one examines the responsibility shift in the 2007 documents from risk previously placed on the architect to risk that is now placed on the contractor. Part two will examine defects and pitfalls in the claims process, and the likely result that contractors will lose valid claims, including claims for concealed conditions, based on a failure to follow procedure.

AIA will allow the use of the 1997 version of the documents until May 2009, even though the 2007 documents are now available. It is important to have an understanding of the changes now because owners were entitled to begin using the 2007 documents as of January.

## Creating Consensus

The AIA initially created and touted consensus documents that sought to fairly balance unavoidable risks in projects. Generally speaking, the risk of design errors was historically borne by the owner on the basis that the owner hired the architect and the owner's remedies resided in the contractual relationship between both parties.

This allocation of risk was further supported by the well-known Spearin doctrine. This is the proposition that when an owner's contract prescribes specific design performance requirements, it carries with it the implied warranty that if the plans and specifications are followed, the construction will be adequate and the contractor does not bear the liability if it is not. (See *United States vs. Spearin*, 248 U.S. 132 (1918).

## Coordination and Design Issues

The revisions to the consensus documents, or coordination and design issues on the contractor and, most certainly, place a greater burden on the contractor when attempting to avoid liability for any damages. The recent settlement of claims on the Boston Central Artery/Tunnel project, or Big Dig, illustrates the problem.



The contractor contended that the collapse was a design error. The architect contended that the contractor, as a professional, was responsible for understanding whether the proposed construction would work. Ultimately, responsibility was split between both in varying degrees. The result would likely be very different under the 2007 revisions.

A201-1997 section 3.2.1 details various requirements related to a contractor's obligation to review contract documents and site conditions, and to report any "errors, inconsistencies or omissions discovered by contractor ... to the architect as a request for information." The stated purpose is to facilitate "construction by the contractor." Under Section 3.2.3 of the 1997 version, a contractor was not responsible for a design error unless the contractor "recognized such error, inconsistency, omission or difference and knowingly failed to report it to the architect."

A201-2007 Section 3.2.2 revises Sections 3.2.1 and 3.2.3 significantly. First, the stated purpose is changed to "coordination and construction by the contractor," which is a design concept and ordinarily the responsibility of the architect. Next, Section 3.2.2 imposes a "negligence standard on the contractor for failing to report any error, inconsistency or omission." Under the 2007 documents, the question will now become whether the contractor should have known that the design documents were insufficient for the task.

In the Big Dig example, the 2007 documents would have supported the exact contentions that were advanced, making the contractor's efforts to hold the architect responsible for design errors much more difficult. Instead of the issue being whether the contractor actually knew that the design documents would not support the work, the question will become whether a sophisticated contractor, who has built tunnels for years, should have known that the design documents were insufficient.

#### Negligence Standard

The impact of a failure to comply with the new negligence standard of the 2007 documents is brought home by the revisions made to Section 3.2.3, which makes the contractor liable for violating the standard of care imposed by the contract. It should be noted that a contract can alter the standard of care that would be imposed by case law, and that standard would generally hold the architect – not the contractor – responsible for design errors.

The 2007 documents, however, take one more step to exculpate the architect and impose liability on the contractor. A201-1997 Section 4.2.2 included an obligation on the architect "to endeavor to guard the owner against defects and deficiencies in the work." The purpose of this provision was to facilitate involvement by the architect during construction in ensuring that the design would produce non-defective work. Even if the architect was negligent in the design, he or she was given an opportunity to evaluate the work during construction and stop the work as necessary to correct the negligence. For example, if a light tower was designed inadequately, such that it was incapable of carrying a load, an architect would have the opportunity during the construction to observe the light tower and the fact that it was out of plumb, and then take corrective action.



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## THE ARCHITECT IS IN THE BEST POSITION TO CONTROL THE RISK OF AN ERROR IN DESIGN DOCUMENTS.

A201-2007 Section 4.2.3 removes the obligation to guard against defects and deficiencies, and makes the architect responsible only to report "known deviations" from the contract documents. The 2007 documents are precisely the opposite of a correct allocation of risk. Instead of the architect being responsible to coordinate work during actual construction and confirm during that process that his or her work was sufficient and accurate, the risk of defects and deficiencies from the architect's work during the construction now appears to be shifted to the contractor. Incredibly, the architect now receives the protection afforded by "actual knowledge," while the contractor is charged under penalty of negligence with evaluating the design of another.

#### Take Time to Evaluate

The architect is a licensed professional and is in the best position to control the risk of an error, inconsistency or omission in design documents relative to the actual site condition. The historical role of the contractor was meant to reflect the fact that as a professional, if the contractor actually knew of an issue with the design documents, then it was his or her responsibility to report that knowledge. The 2007 revisions arguably free the architect/owner from blame, and allow blame to be placed on the contractor for any error, inconsistency or omission that contractor should have discovered.

The practical implications are such that either the contractor will take on this responsibility with such zeal that constant and unnecessary communications pointing out possible errors and inconsistencies will ensue, or the contractor will instead risk being measured on a negligence standard by the owner if the project progresses with delay or other problems caused by design specifications. Further, the revisions, as well as recent case law, seem to imply a higher hurdle for the contractor who seeks compensation for delays or changes in work related to defective design in the plans and specifications. ■

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