Building A Better Construction Contract:
2018 Updates to Recommended AIA Contract Revisions

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Building A Better Construction Contract: 2018 Updates to Recommended AIA Contract Revisions

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I. **Introduction: Some Suggested Best Practices**

For many of us, our memories of “school” are associated with the school buildings that we attended. The traditions and the activities of “school” are determined, or certainly influenced, by our school buildings. Whether your district is large or small, urban or rural, rich or poor, your school district will need to build or renovate a school building at some point. With this in mind, we offer, based on our own experiences, some suggestions for best practices.

In Texas, the Texas Association of School Boards Council of School Attorneys put on a workshop on school construction in April 2004. As an outgrowth of that seminar, and the discussions which occurred at that time between attorneys, school administrators, and school construction professionals, it was felt that the state and its districts would benefit greatly by working to prepare contract forms more tailored to the needs of public school districts. Although all of the participants agreed such forms would be useful and beneficial, many attorneys were understandably reluctant to contribute their knowledge and expertise (and even more importantly, forms) to a collaboration of other school attorneys. In addition, because of the complexity and length of the standard American Institute of Architects (“AIA”) forms, the process of developing standardized amendments would be a time-consuming task. The analysis and coordination that would be needed was intimidating, to say the least. Perhaps of even greater concern was the possibility that even these revised forms would become another “standard form” that would be blindly used by school districts without careful thought or tailoring to fit the needs of each project. Despite such difficulties, the Texas Council of School Attorneys was able to compile standardized amendments for use by Texas school districts. Those forms, now available through the National School Board Association, provide a valuable resource for all school attorneys who are involved with the drafting or revising of construction contracts for their school districts.

Every ten years the AIA releases new revisions to its suite of form contracts and documents. Revised forms were issued in 2017, replacing some of AIA’s 2007 forms. In this paper we present some recommended revisions to AIA forms, some best practices, and information about the 2017 document revisions.

A. **Understand the Roles of the Parties in the Construction Project**

With the exception of fast-growth districts that are constantly erecting new buildings, administrators of a school district are seldom experts in the construction industry. Most districts cannot afford to retain a construction professional to work in-house and guide the district through the construction process. Most districts will rely upon their Architects and Contractors to guide them through the construction process. Unfortunately, many districts fail to realize their own lack of expertise, and the sometimes-conflicting roles played by Architects and Contractors, until problems have arisen. At that point, it is often too late to resolve the problems that have been built into the construction process through the Architect’s and Contractor’s contracts with the district.
Although most attorneys, including school attorneys, realize that the first and most important professional to hire is the attorney, school districts often fail to use an attorney at all or, if they hire an attorney, wait until the contracts have already been prepared and submitted by Architects or Contractors. As school attorneys, we need to remind our clients and emphasize to them the importance of letting the attorney be the first “design professional” hired by the school district. Just as the school district does not hire an attorney to design its buildings, neither should the district hire its Architect and expect the Architect to draft its contracts.

Many, if not most, Architects are quite comfortable in the role and responsibility of drafting the construction contract for their clients. The American Institute of Architects (AIA), through its preparation of standard contract forms, has made it easy for Architects to assume that role. These AIA forms are carefully constructed and have been prepared in an effort to resolve many of the most commonly anticipated problems which can arise in the construction process. They are, however, more suitable for use in commercial construction projects that do not involve governmental entities such as school districts.

In our home state of Texas, we have found numerous provisions in the contracts that are illegal, unconstitutional, or unsuitable for school districts. An effective school attorney must amend or revise a standard AIA contract in order to comply with his or her state laws and to protect the school district. Although every party to the construction process may feel that the AIA form is most unfavorable to it, it is clear that owners do not receive the most favorable treatment in these contracts and attorneys for school districts must make substantial efforts to level the playing field.

B. Proper Use of Form Contracts: Revise, Sign, Review

Our experience is that some school districts use the AIA documents as written with minimal changes. Districts should never use a form contract that has not been revised or, even worse, sign the contract first and then send it to their attorney for review.

Many attorneys, including school attorneys, have had the unpleasant experience of receiving a phone call from a client who has already signed a contract and now wants an attorney to review it. Any attorney who has received such a call remembers the sick feeling of worrying about what unconscionable provisions the client has just agreed to by doing that. However, school districts frequently take a form contract from their Architect or Contractor and agree to it without any review, or at least adequate review, from their school attorney.

No form contract fits every transaction perfectly. That is especially true for construction contracts, where the nature of the project, the parties to the contract, and the financial aspects of the project vary so much. However, unmodified AIA contracts are almost always suggested as being the “standard contract”. Then, even if a contract is properly modified and designed to fit a particular school construction project, it is not uncommon for a school district to think that every school project will be the same and that the same form can be used for the next project without further modification. Every construction
project needs to have a construction contract document specifically tailored for that project.

It is important to remember that when using AIA form contracts, even with revisions, all terms of the Contract Documents must be conformed. Revisions in one document without corresponding revisions in the other documents could create disaster. Two Texas cases illustrate this point. In In Re D. Wilson Const. Co., 196 S.W. 3d 774 (Tex. 2006), the Brownsville ISD had contracted two general contractors to build two schools. Both contracts incorporated the AIA Document A201 General Conditions. The unmodified A201 contained a mandatory arbitration clause. However, the parties also entered into supplementary conditions which stated that any dispute concerning questions of fact under the contract would be finally decided by the district’s Board of Trustees. When the inevitable litigation ensured, the contractors moved to compel arbitration. The district intended for the language in the supplementary conditions to supersede the mandatory arbitration clause of the A201. However, the Texas Supreme Court found that the strong presumption favoring arbitration generally requires that any doubts be resolved in favor of arbitration. Because the language in the two documents did not expressly waive arbitration, the court found that mandatory arbitration revisions in the A201 were controlling.

That holding should be contrasted with the holding of In Re Premont Independent School District, 225 S.W. 3d 329 (Tex. App.—San Antonio 2007). In that case, Premont ISD and its contractor entered into a standard Construction Manager-At-Risk contract, the AIA Document A121. That contract expressly incorporated the A201 General Conditions and additional supplementary conditions. The supplementary conditions expressly deleted the arbitration clause from the A201 document. Because the deletion language contained in the supplementary conditions was unambiguous and express, the district convinced the Court of Appeals that the mandatory arbitration clause in the A201 General Conditions had been deleted and that arbitration was not mandatory.

Because use of AIA form contracts involves at least three distinct AIA documents (an Architect’s contract, a Contractor or Construction Manager’s contract, and the general conditions), it is imperative that the district conform all documents and that ambiguities not be created by leaving conflicting language in any of these component documents. If a school district has signed its contract with the Architect without giving any consideration to the terms of the contracts it will use with its Contractor or the general conditions to those contracts, it could lose the ability to make significant modifications to those later documents that will affect the entire project. If, instead, the district hires its attorney to draft all documents in advance of the hiring of the Architect or the Contractor, conforming revisions can be made to all documents which will be used on the project prior to the hiring of any of the construction team. Having the school district pre-authorize the contract forms will improve the likelihood that the parties will use the documents without insisting on additional revisions.
C. **Decide in Advance Who Will Decide; Board Authority**

Independent school district boards of trustees have their own personalities, and, consequently, their own visions of the appropriate level of their involvement in construction projects. As every school attorney knows, a board’s personality can change, at least to some degree, at each annual election of board members. Therefore, the school lawyer should sit down with the board and the superintendent of schools and determine the level of involvement desired before drafting any construction contract amendments. Some boards want the ability to review all phases of design and all phases of construction. Other boards want to delegate those responsibilities to the superintendent of schools or to an in-house construction professional. Construction documents should reflect those desires.

For example, if board members want to maintain oversight control of the design process, then the Architect’s contract could require school board approval of the plans at each design phase and can prohibit the Architect from proceeding to the next design phase without the board of trustees’ approval. Regular reports to the board can prevent Architect missteps like the Architect who designed a bowling alley for the high school at the principal’s request, even though the board never intended to build a bowling alley and students could not take bowling as a physical education credit.

As another example, the Contractor’s contract can require the Contractor to give periodic construction status reports to the board. The contract can also require the Contractor to be present before the board to defend any requested change order. These types of added provisions may give the board some much-desired control during construction, and may make the Contractor think twice before demanding excessive change orders.

If the board of trustees can only meet and make decisions as a body corporate at a duly-called and properly-noticed board meeting, then the contract should provide that information to the Contractor and the Architect, so that they understand that board-level decisions may not be as timely as desired. The Architect and the Contractor should be informed regarding when the board meets and how much notice is required to get something on an agenda, so that they can submit their requests in a timely manner.

We recommend that the contract specify that the Owner’s Board of Trustees, or a named designee, is the only representative for the district that can approve, sign, or modify a construction contract.

II. **Reviewing and Revising the AIA Documents: Some Critical Issues**

A. **Who is Responsible for Defects in the Construction Documents or Supporting Documents?**

If a construction defect occurs, what common excuse might be expected from a Contractor? Certainly, one of the most common responses would be, “I just built it the way the plans said to build it.” If indeed the construction documents contained errors and
defects, who should be responsible for the resulting damages, delays, or costs of correction? In an ultimate sense, the Architect that produced defective plans and specifications should have liability to the Owner. However, the Contractor does not have a contract with the Architect. He has a contract with the Owner. Thus, between the Owner and the Contractor, who will be responsible for defects in the construction documents?

Although each state may have variations on it, the so-called “national rule” places that liability on the Owner. In United States v. Spearin, 248 U.S. 132, 39 S. Ct. 59 (1918), the United States Supreme Court held that if a contractor is bound to build according to the Owner’s plans and specifications, the Owner will be responsible for the consequences of defects in the plans and specifications. The Standard AIA Document A201™-2017 incorporates this standard and creates, in effect, a warranty of the plans by owners.

These provisions can be found in a number of places in the documents. In the context of construction documents, Sections 3.2.2 requires the Contractor to carefully study and compare the various drawings and Contract Documents, but then adds:

“These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents …”

Section 3.2.3 goes on to state that:

“The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations, …”.

Section 3.2.4 provides that:

“The Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents …”.

The 2017 revisions split the prior Section 3.12.10 into two sections. The new Section 3.12.10 deletes:

“The Contractor shall not be responsible for the adequacy of the performance and design criteria specified in the Contract Documents.”
The new Section 3.12.10.1 adds:

“The Contractor shall be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents.”

From these provisions, an attorney for the school district can readily determine that the school district will have responsibility to the Contractor for damages should defects in the construction documents require additional costs or time in order for the Contractor to correct those defects. If an unmodified AIA document is used containing the provisions referenced above, the Owner will find itself responsible for those defects.

How can a school district protect itself from such liability? One method would be to reject the new language in 3.12.10.1. The district’s attorney should be certain to modify the AIA documents to disclaim any warranty of the construction documents by the Owner. For example, inclusion of language such as the following in the standard AIA Document A201™-2017 at Section 2.2.4 can help reverse that presumption:

“Other than the metes and bounds noted in the survey, if any, Owner does not guaranty the accuracy of surveys provided, including the locations of utility lines, cables, pipes or pipelines, or the presence or absence of easements.”

Section 3.2.2 might be modified to state the following:

“Neither the Owner nor the Contractor is required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rule and regulations, but any nonconformity discovered by or made known to the Contractor shall be reported promptly to the Architect.”

We recommend additional protection be given by adding our Section 2.1.5, a completely new section:

“§ 2.1.5 The Contractor stipulates and agrees that the Owner has no duty to discover any design errors or omissions in the Drawings, Plans, Specifications and other Construction Documents and has no duty to notify Contractor of same. By entering into the Contract Documents or any agreement with any Architect, Owner does not warrant the adequacy and accuracy of any Drawings, Plans, Specifications or other Construction Documents.”
It is believed that the current trend among many courts is to uphold the clear terms of an unambiguous construction contract between the Owner and Contractor. Inclusion of such an unambiguous statement that the Owner does not warrant or guaranty the plans, should provide Owner additional legal protection in the event of construction defects.

Again, the holdings of two cases from Texas illustrate the dangers of using unmodified AIA documents that follow the so called “national rule”. Texas courts have gone against the “national rule”. In *Lonergan v. San Antonio Trust Co.*, 101 Tex. 63, 104 S.W. 1061 (1907), the Texas Supreme Court held that:

“We are of the opinion that [Contractor] having failed to comply with their agreement to construct and complete the building in accordance with the contract and specifications, must be held responsible for the loss, notwithstanding the fact that the house fell by reason of its weakness arising out of defects in the specifications and without any fault on the part of the builder.”

Use of unmodified AIA documents in Texas would contract away the protections afforded owners in Texas by the *Lonergan* decision.

Compare the *Lonergan* holding with the decision of the San Antonio Court of Appeals in *Alamo Community College District v. Browning Construction Co.*, 131 S.W. 3d 146 (Tex. App.—San Antonio, 2004, review denied). In that case, Alamo Community College District entered into a contract which contained the following provision:

“Contractor shall carefully study and compare the Contract Documents with each other and with information furnished by the Owner pursuant to subparagraph 2.2.2 and shall at once report to the Architect errors, inconsistencies, or omissions discovered. The Contractor shall not be liable to the Owner or Architect for damage resulting from errors, inconsistencies or omissions discovered.”

The court held that the paragraph, substantially similar to unmodified A201 language cited above from Section 3.2.2, indicated that the district was to be responsible for design errors. In the face of such an unambiguous provision, the district was held responsible for the damages incurred by the contractor for the increased cost of construction.

Contrast the result in the *Browning Construction Co.* case with the decision of the Texas Supreme Court, *El Paso Field Services, L.P. v. MasTec North America, Inc.*, 389 S.W.3d 802 (Tex. 2012). In that case, the contract contained a provision that the contractor represented and warranted, among other things, that it had visited the site of the Work and was familiar with the local and special conditions under which the Work was to be performed. *Id.* at 806. Relying on *Lonergan*, the court held that the contractor had
contractually assumed the risk for undiscovered foreign crossings. *Id.* at 812. As these cases and others suggest, it is important that the contract between the Owner and the Contractor allocate the risk of defective plans and specifications to the Contractor.

Another Texas Supreme Court case, *LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234 (Tex. 2014), underscores this importance. In that case, the owner contracted with an architect to prepare plans and specifications for the construction of a light rail. As would typically be the case, the architect had no contract with the contractor. The plans were full of errors, which increased the contractor’s costs of performing the Work. The contractor sued the architect for negligent misrepresentations – the plans and specifications. The Court ruled that the contractor’s tort lawsuit was barred by the economic loss rule. Although the Court engaged in lengthy analysis of the economic loss rule and the role of the parties in a construction contract, see *id.* at 246-248, it did not mention the *Lonergan* rule. It did note that, “We think it more probable that a contractor will assume it must look to its agreement with the owner for damages.” *Id.* at 248. If your contract allocates the risk to the Contractor, the Contractor – and a court – should not assess liability against the school district for plan defects.

The continued vitality of the *Lonergan* decision is reflected in two cases from the United States Court of Appeals for the Fifth Circuit. In *Interstate Contracting Corp. v. City of Dallas*, 407 F.3d 708 (Fifth Circuit – 2005), the court noted that Texas law recognizes the liability of an owner for inaccurate or defective plans and specifications. “Texas courts have analyzed this issue as a breach of contract claim and as an independent cause of action.” *Id.* at 716. The court continued: “… [U]nder *Lonergan*, in order for an owner to be liable to a contractor for breach of contract based on faulty plans, the contract must contain express or implied language that justifies finding the owner liable.” *Id.* at 717. The court summarized and analyzed various Texas cases, concluding that “In order for an owner to breach a contract by supplying inadequate plans to a contractor, *Lonergan* and its progeny require that the contract evidence an intent to shift the burden of risk of inadequate plans to the owner.” *Id.* at 720-721.

In *DFW Int’l Airport Board v. INet Airport Systems, Inc.*, 819 F.3d 245 (5th Circuit 2016), the court cited the decision in *Interstate Contracting Corp. v. City of Dallas*, supra. The court stated: “Texas law allows contracting parties to allocate the risk of defective designs, plans, and specifications to an owner … rather than the contractor…. but this ‘require[s] contractual language indicating an intent to shift the burden of risk to the owner.’ *Id.* at 250 (citation omitted). The court found that the contract ‘contained a mixture of provisions that place the risk of defects on both [the owner] and [the contractor],’ thus precluding summary judgment. *Id.* at 252

School districts can protect themselves by modifying their contracts to disclaim any warranty or guarantee of the accuracy of the Architect’s plans. Failure to do so could result in unforeseen liability.
B. **Payment Process**

State laws sometimes dictate how political subdivisions of the State must pay Contractors. Texas is very specific on these issues, and has a highly detailed statute. In response to complaints by Contractors that they were not always promptly paid by governmental entities, the Texas Legislature passed an appropriately titled statute called the “Texas Prompt Payment Act”. Tex. Gov’t Code § 2251.021. (In our forms and this paper, if a Texas statute applies, it is cited. Otherwise, referenced changes to the AIA forms are our suggested modifications.)

To ensure that Texas public school districts as well as contractors are aware of the Texas Prompt Payment Act, it is included as a part of the amendments to the A101. The school district must pay undisputed amounts to the Contractor within 30 days from the date the entity receives an invoice if the Board of Trustees meets twice a month, or within 45 days if the Board meets only once a month. Tex. Gov’t Code § 2251.021.

The issues of disputed amounts and the Architect’s oversight in the payment process can be troubling and may require explicit contractual language. See *Pelco Construction Co. v. Chambers County, Texas*, 495 S.W.3d 515, 522 (Tex. App. – Houston [1st] 2016. In that case, a suit against a county for breach of contract and violation of the Prompt Payment Act, the court discussed the architect’s responsibilities to certify applications for payment or give proper notice of objections as part of architect’s administration of its contract with the owner. The court stated: “…[W]hile the presence of a bona fide dispute can suspend the deadline to make a timely payment under the [Prompt Payment Act], the governmental entity is required to notify the party about the claimed error within 21 days of the invoice.” *Id.* at 526-27 (citation omitted).

The Architect is the gatekeeper for payment to the Contractor under the General Conditions of the Contract. A Contractor’s monthly “application” for payment must be approved by the Architect which then submits a “certificate” for payment to the Owner. The Owner must withhold the agreed retainage percentage from each payment, typically in the amount of 5%, the majority of which is paid at Substantial Completion under a standard AIA contract. If more than 5% is retained, under Texas law, the retainage must be placed in an interest-bearing account with interest earned paid to the Contractor. Tex. Gov’t Code § 2252.032.

In a very significant change, our amended General Conditions provide that Final Completion shall occur not more than 30 days after the date of Substantial Completion and retainage shall not be paid until Final Completion. Failure to complete the Work by the Date of Substantial Completion or the Date of Final Completion subjects the Contractor to liquidated damages as specified in the Agreement.
Also in our amendments, the Final Payment is due when the following items are completed and received:

- All written certifications required by the contract.
- The final list of subcontractors
- The Contractor’s certification in Texas Education Agency’s Certification of Project Compliance
- The Contractor’s warranties, organized as required elsewhere in the Contract Documents Maintenance and Instruction Manuals
- Owner’s Final Completion certificate, if any
- Record drawings and “as built” drawings, in sepia or electronic form as required by the Owner.
- The Owner only pays what the Architect certifies is due. The Owner may withhold the payment if the Owner knows of reasons to withhold.

C. Changes in the Work

After agreeing to a contract, Owners are sometimes flooded with Change Orders that can in some instances become larger than the original contract. To prevent this unpleasant occurrence, the modified General Conditions provide that a single change, or the aggregate of all changes, shall not result in costs exceeding the contract sum, unless agreed to in writing by Owner prior to commencement of such work. The TASB Amended A101™-2017 also requires a majority of the Board of Trustees to approve a Change Order.

“The Board of Trustees, by majority vote, is the only representative of the Owner, an independent school district, having the power to enter into a contract, to approve changes in the scope of the Work, to approve and execute a Change Order or Construction Change Directive modifying the Contract Sum, or to agree to an extension to the date of Substantial or Final Completion.”

The recent case of *Denco CS Corp. v. Body Bar, LLC*, 445 S.W. 3d 864, 873-74 (Tex. App. – Texarkana 2014) emphasized the importance of including contractual provisions that owner has no liability for extra work unless owner provides a signed change order before work begins.
D. **Dispute Resolution Process and Litigation Issues**

With the Architects as the gatekeeper, any claims must first be referred to the Architect who makes a written recommendation and decision. This is a condition precedent to mediation. Mediation may be requested by either party and is a further condition precedent to the initiation of any litigation arising out of such claims. Mandatory arbitration is prohibited. (TASB Amendments to A201™-2017, §15.4.)

Several Texas cases deal with issues relating to the dispute resolution process:

- In *El Paso County v. Sunlight Enterprises*, 504 S.W.3d 922 (Tex. App.--El Paso 2016), the court considered the interplay between contractual and statutory notice. The court held that a seven-day notice of claim pursuant to the construction contract as a condition precedent to a right to sue for claims for additional compensation and extension did not violate Tex. Civ. Prac. & Rem. Code sec. 16.071(a). According to the court, the contractual language did not require “notice of claim for damages” within the statutory requirement. The court drew a distinction between a notice of claim for additional compensation (which is notice of happening of an event and may or may not give rise to a breach of contract) and a “claim for damages.”

- *Cajun Constructors v. Velasco Drainage District*, 380 S.W.3d 820 (Tex. App. – Houston [14th] 2012) involved the contractor’s failure to comply with contractual notice provisions relating to notification of owner and engineer of contractor’s intent to appeal the engineer’s decision on contractor’s claim, inter alia. The court held that this failure constituted failure to satisfy conditions precedent to suing owner. The court did not reach the issue whether contractual notice provisions were void pursuant to section 16.071 of Texas Civil Practice and Remedies Code.

In the event of litigation, choice of law and choice of venue are specified in the amendment. Finally, rules for interpreting the Contract Documents are included in the amendments to the A201™-2017. It is specified that the Owner and Contractor Agreement prevails over General Conditions, and the General Conditions prevail over other conflicting Contract Documents.

E. **Bonds, Insurance and Indemnity**

Every time a school district contracts for a construction project, it faces certain risks. These risks range from the risks that the Contractor will fail to complete the project or pay its subcontractors, to risks that the general contractor will damage the school district’s property or the property of third parties, or cause injuries to workers on the project or the school district employees or other third parties.
A school district has three options to handle these risks. First, and dangerously, it may do nothing. Or it may simply try to avoid doing business with risky vendors. That option should always be at the top of the list in any event. Or, the district may try to mitigate the risks through the use of three critical tools, bonds, insurance, and indemnity agreements.

Notice should be taken that the A201™-2017 has moved most of the provisions of Article 11, “Insurance and Bonds,” to a new Insurance and Bonds Exhibit, AIA A101™-2017 Exhibit A, as well as to other AIA contract forms.

1. Payment and Performance Bonds

The payment bond is typically used to deal with the risk that the general contractor does not pay its subcontractors. An example of a statutory provision relating to payment bonds is the following provided by Texas law for public works contracts in excess of $25,000: “such bonds are solely for the protection and use of payment bond beneficiaries who have a direct contractual relationship with the prime contractor or a subcontractor to supply public work labor or material.” Tex. Gov’t Code § 2253.021(c)(1). The beneficiaries of a payment bond are those identified by statute. If a Texas school district fails to get a payment bond, it is subject to the claims of subcontractors. Tex. Gov’t Code § 2253.022(f).

Performance bonds are used to mitigate the risk that the general contractor fails to perform the contracted work or performs it incorrectly. An example is offered by the Texas statute, which applies to public works contracts in excess of $100,000, and is conditioned on the faithful performance of the Work in accordance with the plans, specifications and Contract Documents. Tex. Gov’t Code § 2253.021(b)(3).

The question is sometimes asked - should these bonds be waived? Some statutes, for example the Texas statute, require payment and performance bonds. Whether required or not by law, the construction contract should always require both types of bonds and the requirement to provide these bonds should not be waived. Failure to provide a payment bond may make the school district liable to any subcontractors or others who do not get paid by the general contractor to whom the District has made payment. Failure to obtain a performance bond effectively means that the district will have to look only to the general contractor’s own assets to recover for any damages caused should the Contractor fail to render satisfactory performance of the contract.

The issue of who should review the bonds provided by the general contractor is an important one. Under our amendment documents the Architect receives the bonds and the district and Architect then review the bonds. The review should cover whatever specific requirements have been imposed by state law as well as any specific requirements included in the contract. These requirements might include whether the surety that issued the bond is qualified to do business as a surety in the state. Another example is this requirement under Texas law:
“If the amount of the bond exceeds $100,000, the surety company must also: (1) hold a certificate of authority from the United States secretary of the treasury to qualify as a surety on obligations permitted or required under federal law; or (2) have obtained reinsurance for any liability in excess of $100,000 from a reinsurer that: (A) is an authorized reinsurer in this state; and (B) holds a certificate of authority from the United States secretary of the treasury to qualify as a surety or reinsurer on obligations permitted or required under federal law.”

Tex. Ins. Code § 3503.005(a).

Our amendment documents include this proposed revision to the A201™-2017 on bonds:

“Should the bond amount be in excess of ten percent (10%) of the surety company’s capital and surplus, then the surety company issuing the bond shall certify that the surety company has acquired reinsurance, in a form and amount acceptable to the Owner, to reinsure the portion of the risk that exceeds ten percent (10%) of the surety company’s capital and surplus with one or more reinsurers who are duly authorized and admitted to do business in Texas …”

Other issues relating to possible conflicts between the language of the bond and a relevant statute may also require review, for example the deadline for filing a suit on the bond. See Commercial Union Ins. Co. v. La Villa ISD, 779 S.W.2d 103, 105 (Tex. App. – Corpus Christi 1989).

2. Insurance

The second important tool for the school district in mitigating against risks inherent in any construction project is insurance required of the general contractor. In general, it will be up to the district to set the insurance requirements in its contract and this has typically been done in the A201. (However, the A101™-2017 Exhibit A will change that, as discussed herein.) States may have specific insurance requirements; for example, Texas law contains specific statutory requirements and language for worker’s compensation insurance.

AIA forms and our form revision documents contain requirements for other types of insurance to cover particular foreseeable risks. These include commercial general liability (injuries to third parties), automobile liability, builders risk (injury to property), boiler and machinery, pollution, and excess or umbrella coverage. Our documents also contain other specific requirements for the insurance, such as
the rating of the insurer, waivers of subrogation, naming the district as an additional insured, and which policies should be on a claims-made basis if available. Length of coverage is also specified in some cases, for example in completed operations coverage.

An important element of the required coverage is the amount of coverage to be provided. Neither AIA documents or our documents include specific amounts as those must be based on each specific contract and advice of risk managers and counsel.

The requirements regarding insurance to be provided obviously raise the question of who should review the insurance provided by the general contractor for compliance with the requirements. The Architect might be selected to assist in the task, but it would be in a district’s best interests to have a risk manager or someone with experience in the review of insurance policies assigned or contracted to do the Work.

Another important question addressed in our documents is when the Contractor should provide the proof that it has procured the required bonds and insurance. Failure to procure bonds or insurance in a timely manner may impact the coverage provided. Sample language from the A201 amendments includes the following:

“§ 8.1.2 The Notice to Proceed shall not be issued until the Agreement has been signed by the Contractor, approved by Owner’s Board of Trustees, signed by the Owner’s authorized representative, and Owner and Architect have received, and approved as to form, all required payment and performance bonds and insurance.”

3. **Indemnity Agreements**

The third tool available to districts to mitigate the risks inherent in any construction contract is the indemnity agreement. An indemnity agreement requires one party to pay someone else’s loss. *See, e.g., Dresser Indus. Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993)

Examples of indemnity agreements could include the following types:

- Contractor agrees to pay school district for district’s loss based on Contractor’s fault;
- Contractor agrees to pay school district for district’s loss based on district’s fault; or
School district agrees to pay Contractor for Contractor’s losses based on district’s fault.

The first type of indemnity agreement should always be included, and the following sample quoted in part is included in our amendments:


The language is placed in capital letters and may also be high-lighted as needed, in order to make the provisions satisfy state law requirements regarding fair notice and conspicuousness, a requirement in many states for an indemnity agreement to be enforceable.

In the Dresser case the Texas Supreme Court held “that the fair notice requirements apply to both indemnity agreements and releases, and that the contractual provisions in this case were not conspicuous as a matter of law.” Id. at 507. The court noted that its holding was limited to “those types of releases that relieve a party in advance for its own negligence.” Id. at 507. According to the court, the conspicuous requirement mandates “that something must appear on the face [of the contract] to attract the attention of a reasonable person when he looks at it.” Id. at 508. As illustrations, the court suggested: “Printed heading in capitals” or “in larger or other contrasting type or color.” Id. at 511.

The second type of indemnity agreement is less common and to be enforceable may have specific requirements under state law. The third type of indemnity agreement is to be avoided. Indeed, it may be unenforceable as a matter of state law. For example, under Texas law an indemnity agreement is invalid if it requires an illegal payment by a school district.

Note that in addition to a broad indemnity agreement, there may be a need for some more specifically tailored indemnity provisions. A sample from our amendments is included here:
“IF CONTRACTOR IMPORTS HAZARDOUS MATERIALS ONTO THE PROJECT SITE, THEN CONTRACTOR HEREBY INDEMNIFIES AND HOLDS HARMLESS THE OWNER, ITS CONSULTANTS, TRUSTEES, OFFICERS, AGENTS AND EMPLOYEES AGAINST ANY CLAIMS … RELATED TO SUCH IMPORTATION…” (Section 10.3.3 TASB form amendments to AIA document A201™-2017).

As demonstrated in a Texas Supreme Court case involving indemnity under an insured contract, the language of the contract regarding the duties of the Contractor must be analyzed carefully. Ewing Construction Co. v. Amerisure Ins. Co., 420 S.W.3d 30 (Tex. 2014). In that case the owner (a school district) and the Contractor entered a standard AIA contract. The contractor included in its insurance package a Commercial General Liability insurance policy (CGL). The contractor was sued by the owner for claims based on alleged faulty construction of tennis courts. The contractor made a demand on the insurer pursuant to its CGL insurance policy. Based on various policy exceptions, including the contractual liability exclusion, the insurer denied coverage district. The Court held that the contractor’s express agreement to perform the construction in a good and workmanlike manner did not enlarge its obligation and was not an assumption of liability within the meaning of the policy’s contractual liability exclusion. Id. at 36.

4. Results

If these tools to mitigate risks are used correctly, the school district may avoid the worst risk of all—that the district may have in effect written a blank check when it entered its construction contract.

F. Aesthetic Issues

One of the issues that often arises during the design and construction process is determining who decides aesthetic issues. Should that canopy cover be expensive copper or is much less-expensive painted metal more appropriate? While the copper roof may be more attractive, and therefore, the Architect’s choice, the painted metal may be more appropriate if the district has just been through a contentious construction bond issue election. Is the multi-colored design using four different colors of brick worth the extra $50,000 price tag from the bricklayer? If the board is trying to be fiscally-responsible, then the answer may be no. If, on the other hand, the board promised the community that the new school’s architecture would match the planned development in which it is being built, then that answer may be yes. The standard AIA contracts give all aesthetic discretion to the Architect. Because aesthetic issues often carry a hefty price tag, that discretion should belong to the school districts.
G. **Construction Oversight**

The next question that should be addressed in both the Architect’s and the Contractor’s contracts is the role of the Architect in overseeing the construction project. The AIA contracts give the Architect very limited responsibility to oversee construction. The Architect, on the other hand, should be the school district agent most familiar with the construction plans and specifications. The Architect is therefore most capable of determining whether construction complies with the Architect’s plans and specifications. Further, school district personnel, while certainly well-meaning, are typically educators, not construction professionals. Recognizing this, many school districts choose to employ their own construction professionals to act on their behalf, who can oversee the construction on a daily basis. Other school districts leave that responsibility with the Architect, and trust the Architect to guard them against construction defects.

If the school district decides that the Architect will be the professional responsible for construction oversight, then the standard AIA contract must be substantially revised. The contract should be amended to reflect that the Architect will visit the site a certain number of times each week to inspect the Work and to guard the Owner against defects. The contract should state that the Architect must visit the site during any concrete pours that contribute to structural integrity and any time that work is being covered up, if the covering-up would conceal problems with structural integrity. The contract should give the Architect the right to stop the Work, to reject work if a construction defect occurs, and to recommend testing. Should a construction defect occur, the contract can also be amended to direct the Architect to require the Contractor to tear out the defective work and redo the construction rather than the Architect going back to the drawing board to design around a defect.

If the school district decides that it will hire its own construction professional to oversee construction, then there is less that needs to be revised in the standard AIA contracts regarding the Architect’s responsibility. However, the standard AIA contract should then be revised to reflect the authority of the school district’s construction professional, who should have the right to visit all sites at all times, to view construction in process, to reject non-conforming work on-site, to order work to be redone, to stop the Work if his/her instructions are not followed, and to reject payment applications for nonconforming work. The contract can also specify a dollar amount limit for which the district’s construction professional or the superintendent of schools can authorize changes in the Work without prior board approval, to keep the construction process moving in between board meetings.

An interesting case regarding an Architect’s construction oversight is *Black + Vernoy Architects v. Smith*, 346 S.W.3d 877 (Tex. App. – Austin 2011) (petition for review denied). That case involved serious injuries to guests incurred when the balcony off the master bedroom in a vacation home collapsed due to various defects caused by the contractor’s failure to follow design plans and specs. The two plaintiffs settled with the contractor and the owners. The owners and architect had entered a standard AIA contract. Pursuant to this contract the Architect had duties to make periodic visits to construction site, to report observed deviations from the design plans to owner, and to guard owner...
against defects in construction of home and to reject work that does not conform to the Contract Documents. *Id.* at 883. The dissent noted that the contract provided: “the Architect shall not be responsible for the Contractor’s failure to perform the Work in accordance with the requirements of the Contract Documents.” *Id.* at 897. The Architect had no contract with the Contractor. Notwithstanding the failure of the Architect to follow the contract, the court held that there was no duty on the part of Architect to third parties under the contract or common law.

H. **Payment Oversight**

Another area of contention and necessary revision to the standard AIA contract is the oversight of the payment process. First, it is essential that whoever is delegated the responsibility to authorize payments must be very familiar with the contract and its requirements. It does no good for the contract to require the Contractor to submit certain information in order to receive payment, if the person authorizing payments is not aware of the Contractor’s responsibilities or does not hold the Contractor to the contract responsibilities.

Second, payments may be subject to board of trustees’ approval. If that is the case, then the Architect and the Contractor should be made aware of the deadlines for submission of payment applications so that there is sufficient time for review and revision prior to payment.

Third, Architects often take a Contractor’s word for the progress of the Work, the expenses incurred, and the validity of the various documents submitted by the Contractor. If the district desires that the Architect investigate the validity of the statements made by the Architect, or the validity of submitted documents, then that should be specified in the Architect’s and the Contractor’s contracts.

Fourth, if the school district wants the authority to withhold money from the Contractor or the Architect due to disputes regarding the amount of money owed, then this should be specified in the Contractor’s or Architect’s contract. Similarly, if the school district wants the authority to withhold liquidated damages from payment applications throughout the construction process, then this authority should be given to the school district in the contract.

Finally, the General Conditions or the Contractor’s contract should specify every document that must be submitted by the Contractor before receiving payment for Final Completion. At Final Completion these should include, at a minimum, all affidavits of debt payments, all proofs of insurance, all consents of surety, all lien releases, all necessary certifications and permits, a subcontractor contact list, all warranties, all maintenance and instruction manuals, all record drawings and “as built”, and, in Texas, a “Certification of Project Completion” required by the Texas Education Agency. The person responsible for authorizing payment should not do so until all documentation is properly submitted.
I. **Substantial and Final Completion**

Finally, a big issue for Contractors is the date of Substantial Completion, because, under the standard AIA contract, the construction retainage is paid to the Contractor and all warranties start on that date. Further, if the contract is amended to include liquidated damages, then that is typically the Contractor’s completion deadline to avoid liquidated damages assessments. The problem with using the date of Substantial Completion as the trigger date for retainage payments and the cessation of liquidated damages assessments is that the Contractor may very well lose any financial motivation to then finish the project. Final completion can then take months or years from Substantial Completion, or it may never occur if it would cost the Contractor more to finish the project than the Contractor will be paid by the school district at Final Completion.

This issue can be addressed with a number of revisions to the standard construction contract. The first and most obvious is to revise the contract so that the retainage is not paid until Final Completion, so that the Contractor still has a financial incentive to reach Final Completion. Similarly, the school district may want warranties to start at Final Completion, so that the warranties last longer after the building is completely operational. Also, a provision can be added that gives the school district the authority to assess liquidated damages for delays in reaching Final Completion, as it can do for construction delays in reaching Substantial Completion, to provide a financial incentive for the Contractor to finish the Work. Delaying payment of retainage to Final Completion not only incentivizes the Contractor to finish quickly, but it gives the school district more bargaining leverage in disputes and/or funds to complete the Work, if the Contractor fails or refuses to do so.

Most important, however, is obtaining a written contractual agreement regarding the definitions of substantial and Final Completion. The AIA standard contract language definition for Substantial Completion is usually interpreted as meaning that Substantial Completion occurs as soon as the Owner has beneficial use of the facility. Contractors often argue that, for a public school district, Substantial Completion occurs when students can be seated in classrooms. That can mean that the library is incomplete, gymnasium floors are not yet installed, the cafeteria is not yet operational, and the principal has no office. Obviously, in order to properly operate as a school, more than classrooms must be complete. Therefore, the AIA definition of Substantial Completion should be amended to include such things as requiring all systems to be operational, all systems to be tested and passed inspection, all facility inspections to be conducted and passed, and all certifications to be posted. Further, the definition can be expanded to require that all personnel instruction be complete, all required finishes be in place, and the remaining work will not hamper school operations. The definition can also be expanded to prohibit determinations of Substantial Completion on a piece-meal basis. In other words, Substantial Completion can only occur when the entire work is sufficiently complete so that the school district can use and occupy the entire building and grounds for their intended purpose. A final recommended revision to the definition of Substantial Completion is the Contractor certifying that the construction can achieve Final Completion within 30 days. Absent some extenuating circumstance, if the Contractor cannot agree that the anticipated amount of
time between substantial and Final Completion will be 30 days or less, then the reality is that the construction has not really achieved Substantial Completion.

The definition of Final Completion then becomes fairly simple: the contract and the Work is fully performed, the Work is ready for final inspection, a final certificate for payment is submitted with all necessary documentation, and in Texas, the Architect, the Contractor, and the Owner stipulate, in writing, that the construction is complete on the “Certification of Project Completion” required by the Texas Education Agency.

III. Other Contract Issues

Other contract issues which are recommended to be included as amendments to the standard AIA contracts can be characterized as those required under Texas or other state laws, and those that are just really good ideas.

A. Required under Texas Law

In Texas, according to a Texas Education Agency (“TEA”) rule, the Architect must certify that the design meets the TEA requirements for school facilities. The Architect must also certify that he/she has conducted a building code search and the design meets the applicable building codes. A definition of “certify” is also included in the rule. It means the Architect used the “best professional judgment and reasonable care” in executing the construction documents. The rule itself requires the inclusion of the language in Architect contracts. 19 Texas Administrative Code (TAC) § 61.1036.

In Texas, a school board may only act as a corporate body at a duly-called meeting after 72-hour agenda notice. Tex. Educ. Code § 11.151(a); Tex. Gov’t Code Ch. 551. Therefore, if the contract requires board approvals during the process, the contract should explain the statutory limits on the board’s authority.

Texas law requires that an Architect contract provide information regarding the proper body to receive complaints about Architects. Tex. Occ. Code Ch. 1051. Therefore, that language should be provided as required by law.

In Texas, there are specific procurement requirements for Contractors and Construction Managers-At-Risk. Tex. Gov’t. Code Ch. 2269. Depending on the construction procurement method the board decides to use, the proper language should be inserted in the contract.

As also stated previously, in Texas, Contractors and Architects must sign a completion certificate required by the Texas Education Agency. 19 TAC § 61.1036(c)(3)(C) and (F). That requirement should be explained in both contracts.

Under Texas law, a Contractor must pay all subcontractors within a certain number of days after receipt of payment. Tex. Gov’t Code § 2251.021 et seq. That notice of the Prompt Pay Act should be included in the contract.
Texas law requires a Contractor who receives payment with state funds to assert that the Contractor is not in arrears on child support payments. Tex. Fam. Code § 231.006.

Under the Texas Constitution, a public school district may not incur certain unfunded debts and may not promise public money without receipt of a public benefit. Tex. Const. Art. III, §§ 51, 52, 53. Therefore, a Texas public school district may not indemnify Architects or Contractors. Therefore, any indemnifications from the Owner must be deleted from the standard contracts.

Under Texas law, insurance companies that insure work related to public entities must meet certain minimum qualifications. Those qualifications should be included in the contract. Tex. Ins. Code § 3503.001.

Retainages on Contractor payments are not limited under Texas law. However, if an Owner withholds more than five per cent, then the Owner must place the retainage in an interest-bearing account and must pay the interest to the Contractor at the time of payment of the retainage. Tex. Gov’t Code § 2252.031.

There may be statutory restrictions on the wording of indemnification agreements from Architects or Contractors. If so, they should be carefully crafted to comply with the law. See Tex. Loc. Gov’t Code § 271.904.

In Texas, mechanics and materials liens are not available against a public school district that obtains payment and performance bonds on a project. Texas Constitution, Art. 11, § 9. Therefore, language regarding the required bonds, and the unavailability of liens against a public entity should be included in the contract. Texas Constitution, Art. 11, § 9; Tex. Ins. Code § 3503.001; Tex. Gov’t Code Ch. 2253.

Construction contracts with public entities in Texas must specify prevailing wage rates for construction workers. Penalties are assessed against Contractors who pay less than the District’s published prevailing wages. Tex. Gov’t Code Ch. 2258; Tex. Lab. Code § 62.051 et seq.

Texas public school districts are exempt from sales taxes. Tex. Tax Code § 151.309. Requiring Contractors to abide by the sales tax exemption requirements can save a lot of money on construction and should be incorporated into the contracts.

Texas law requires specific contract language when certain trenching and shoring is required in the construction. Tex. Health & Safety Code § 756.023. Therefore, that language should be incorporated into the contract.

A Texas regulation also requires specific contract language in public works contracts regarding requirements to provide workers’ compensation insurance for workers on construction projects. At this time, because of the vague definitions in the rules, it appears that the language should be put in the Architect’s contract and the Contractor’s contract. 28 TAC. § 110.110(i).

B. **Good Ideas**

The contracts should address the issue of delay damages which may arise in construction disputes. “The common law permits a contractor to recover damages for construction delays caused by the owner, but the parties are free to contract differently. A contractor may agree to excuse the owner from liability for delay damages, even when the owner is at fault” *Zachary Constr. Corp. v. Port of Houston Authority*, 449 S.W.3d 98, 101 (Tex. 2014).

However, in *Zachary* the contract contained a no-damages-for-delay provision. The court noted that a majority of American jurisdictions, including all but one jurisdiction to consider the issue and five state legislatures, had said that a no-damages-for-delay provision could not “shield the owner from liability for deliberately and wrongfully interfering with the contractor’s work.” *Id.* at 101. Joining the weight of authority, the Court held the provision unenforceable. *Id.* at 118, 119. The Court did not directly address whether the holding would have been the same if the Port Authority had not deliberately and intentionally interfered with the Contractor’s performance, but had only caused minor, unintentional delays. A “no damages for delay” clause may be enforceable under those circumstances. Thus, there is little harm in including it in your contract – at worst, it will not be enforceable; at best, it may help knock out some damage claims.

The contracts should also address the issue of liquidated damages, typically by stating amounts in the A-101. A liquidated damages provision in a contract will be enforced when the court finds “(1) the harm caused by the breach is incapable or difficult of estimation; and (2) that the amount of liquidated damages called for is a reasonable forecast of just compensation.” The liquidated damages must be declared a penalty and unenforceable if the liquidated damages are shown to be disproportionate to the actual damages. *Commercial Union Ins. Co. v. La Villa ISD*, 779 S.W.2d 102, 106-07 (Tex. App. – Corpus Christi 1989).

It is recommended that arbitration be deleted from the contracts. Rather a mandatory mediation can be added, with specific instructions regarding timing, method, and exhaustion of administrative remedies prior to a lawsuit.

Likewise, requiring insurance from Architects and Contractors is recommended. Remarkably, there is no required insurance coverage or amounts in the standard AIA Architect contract. Clearly, workers’ compensation, general liability, automobile, and professional liability errors and omissions insurance should be required.

The Architect’s standard of care should be addressed. It is recommended that, when possible, the standard of care be increased beyond that stated in the Architect’s standard contract. This can most properly be done by being more specific about the Architect’s responsibilities to the Owner.
Texas law requires an Engineer or Architect’s standard of care to perform with the skill and care provided by a competent Engineer or Architect practicing under the same or similar circumstances and professional license, and as expeditiously as is prudent, considering the ordinary professional skill and care of a competent Engineer or Architect. Texas Loc. Gov’t. Code § 271.904(d). (However, the Texas Administrative Code, in 19 TAC. § 61.1036, requires Architects to certify they used “the best professional judgement and reasonable care consistent with the practice of architecture or engineering in the State of Texas in executing the construction documents.” How those different standards of care can be reconciled is unknown at this time, but Texas school lawyers should always use the same stringent language in the contracts.)

The Contractor agreement should detail what constitutes a proper clean-up of the job-site. This can include much more than a sweep of a broom, and can include cleaning all surfaces, polishing all finishes, removing all adhesives and stickers, removing all trash and debris, replacing air filters, removing obstructions from drains and repairing all damage that occurred during cleanup.

The Contractor agreement can be modified to provide more specific warranties. These can include a warranty that the Contractor will perform the Work in a good and workmanlike manner, continuously and diligently in accordance with generally-accepted construction practices. It can also include requiring that all material be installed in a true and straight alignment, level and plumb, with uniform patterns, and flush and level jointing of materials.

The issue of specific warranties was addressed in Gonzales v. Southwest Olshan Foundation Repair Co., 400 S.W.3d 53 (Tex. – 2013). An express warranty (requiring work required to adjust the foundation due to settling and that necessary work would be performed in a good and workmanlike manner) superseded the implied warranty of good and workmanlike repair, when the express warranty specifically describes the manner, performance or quality of the services (applied to home construction).

The standard AIA Construction Manager-At-Risk agreement is vague on what constitutes the Construction Manager’s fee. In addition, many Construction Managers add what they call a “general conditions” payment entitlement, which is to be distinguished from the AIA A201 “General Conditions”. Often, this general conditions fee is not even specified in the contract. Yet, it constitutes a large amount of the payments made to Construction Managers. It is recommended that the definition and amount of any “general conditions” fee and all the components of and the amount of the Construction Manager’s fee be fully explained in the contract.

The Architect’s contract and the Contractor’s contract should explain that the Owner does not warrant the accuracy or completeness of the Architect’s plans or specifications. Likewise, every contract should state that no third party may acquire any rights under the contract.
The ownership of the Architect’s instruments of service should be fully explained. The Owner’s rights to re-use the documents for repair and remodeling should be fully articulated. Our amendments provide an option for the school district to own the plans.

If the school district wants to require the Architect or the Contractor to retain the construction documents for a certain period of time, usually the longest statute of limitations period, or if there is a specific statute that requires that public documents be maintained for a certain period of time, then that requirement should be included in the contract.

If the school district wants to set meeting times between the district representatives, the Architect and the Contractor for status reports and to work through details and problems, then that should be specified in the contract so that all parties know in advance that their attendance is required at specified times.

If the school district must comply with certain local ordinances, such as tree ordinances, parking ordinances, sign ordinances, zoning ordinances, or other local requirements, then the parties should be made aware of the expectation that the Architect and the Contractor will also follow them.

Mandatory and exclusive venue for any lawsuit against a public school district should be specified. Typically, that would be state district court in the county in which the school district’s main administrative office is located. It is generally a good idea to keep construction matters out of federal court. Further, given that many construction firms may be organized out of state, it is a good idea to mandate a local venue.

Given the emphasis on student and staff safety, it is a good idea to require criminal history checks of workers who will be working on campuses on which students and employees are in attendance. That is required in Texas. Tex. Educ. Code § 22.08341. Likewise, a theft deterrence program should be required to be implemented by the Contractor, which would hold the Contractor responsible to the victims for thefts committed by the Contractor’s forces. Requiring specific identification badges for construction workers, with names in large print, also aids in safety issues. Construction workers can be contractually prohibited from using certain facilities, including student and staff restrooms and locker rooms, for example.

Similarly, construction worker conduct can be a big issue on a public school campus. The contract should hold workers to the employee standards of conduct, including the prohibitions against fraternization, harassment, smoking, drugs, alcohol, and weapons. The school district can contractually obtain the right to remove any worker who violates the provisions, and can retain the right to terminate the contract if there are repeated violations.
IV. **2017 AIA Contract Document Updates and Revisions**

Since the first issuance of AIA Contract Documents in 1888, the number of available AIA forms has grown to almost 200 agreements and forms. In years ending with “7”, such as 2017, AIA typically issues revisions on some of their most widely used forms. The 2017 revisions were prepared by a committee of 30 to 35 volunteer AIA members, outside legal counsel, and industry advisors. Only a handful of those were owners, and as far as can be determined, none of those owners were necessarily governmental entities. And, to add insult to injury, no members from Texas were included on the committee!

The 2017 revisions were issued in two groupings. The first 14 documents were issued in April of 2017. The remaining 18 revised documents were issued in the fall of 2017. AIA’s 2007 documents will remain in effect, and be supported by AIA’s software, for 18 months following the issuance of the forms. While that extended availability is useful as owners and attorneys make revisions of their own to these new documents, the delay also calls for extra vigilance to be certain that the documents used conform with each other. For example, the AIA A201™ form has been frequently used with the AIA A133™-2007 Construction Manager at Risk documents. Since the A133 was not amended this year, if the new AIA A201™-2017 is used with it, careful review and modification will be needed to ensure that the documents conform with each other and do not create ambiguities or conflicts.

The 1997 and 2007 contract revisions prepared by our Committee focused on the most widely used forms which we had encountered in our work for Texas school districts. In 1997 and 2007, those documents would have been the A101, the A201, and the A133 for construction providers, and the B102/B201 for Architects. Although the Committee will continue to use the AIA A101™-2017 and AIA A201™-2017 documents for the 2017 revisions, most of our school districts now prefer to use the one-piece AIA B101™ architect contract document instead of the two-part B102/B201 documents previously amended by the Committee. Therefore, beginning with our 2017 revisions, the one-piece AIA B101™-2017 will be the only architect contract being revised by the Committee. In the meantime, the 2007 revisions are being updated and kept current until those documents are no longer available for use or are not supported any more by AIA.

For any of you who have used prior standard revisions issued by our Committee, you are aware that the prior documents had been heavily modified, and changes were made to the original documents regardless of whether or not AIA revised the terms in those documents in 1997 or 2007. Many of those revisions, but certainly not all because of limitations in time and paper, have been addressed above. In this section, we will now focus on those 2017 AIA revisions to their documents which are of the most significance.
A. **AIA B101™ - 2017**

1. **BIM and Other Digital Data**

   The 2017 documents require parties to agree on protocols governing the use and transmission of digital data and require the use of the AIA E203™, G201™, and G202™ forms to establish those protocols. BIM (Building Information Modeling) protocols are also governed by the AIA E203™ document. See §§ 1.3 and 13.2, AIA B101™-2017. While these concepts may have relevance to many Owners, Architects, and Contractors, our experience in Texas has been that most of our school clients, particularly smaller, more rural districts, do not enter into such agreements or have any interest in Digital Data and BIM. Accordingly, the Committee has proposed making such usages optional. If your school clients wish to use the BIM and Digital Data documents, we would caution that you pay very close attention to how those documents are filled out by the parties. Our Committee previously did a proposed revision to an old electronic data protocol form. However, because different districts, Contractors, and Architects vary greatly in their usages and protocols, there was no practical way to make a revision which was of much use. If the Architect wishes to use these forms, we would recommend that your carefully consult your client as to their understanding of the document, the protocols in the document, and risks to the school district in such usage and transmission.

2. **Termination Fee Provisions**

   In prior documents, if an Owner terminated the Architect’s contract for convenience, the Contractor and subcontractors were entitled to “reasonable overhead and profit on work not executed” and the Architect was entitled to “anticipated profit on the value of services not performed.” The 2017 documents eliminate automatic entitlement to overhead and profit (which is good), but encourage the parties to negotiate a termination fee (which we believe is bad). Our revisions to the documents require the Owner to pay for the Work already executed and actual proven unrecoverable losses incurred up to the date of termination with respect to materials, equipment, tools, and any construction equipment and machinery. However, we have always barred any recovery for lost overhead or profits. Government entities must wisely use public funds. Further, paying an Architect or Contractor for work which was not done would seem to us to violate prohibitions on making gifts of public funds. We also include non-appropriation clauses where appropriate.

3. **Sustainable Project Exhibits**

   § 3.2.5.1 requires Architects to consider sustainable design alternatives. If a school wants more advanced sustainable design services (at an additional cost, of course), the AIA E204™ -2017 Exhibit must be entered into as part of the contract. Again, our experience has been that very few of our school clients have had an interest in
paying the additional costs of a Sustainable Project. We therefore recommend that requirements for Sustainable Projects be deleted from the modified agreements. Again, if your school wishes to have a Sustainable Project, great care needs to be taken in filling out these new Exhibits so that the Owner’s and Architect’s responsibilities and intentions are made clear.

4. **Exhibit A**

The new B101™-2017 does not include an optional Exhibit A for Initial Information. Instead, that information is now included in the body of the B101.

5. **Project Communications**

Section 5.12, as modified by AIA, provides that the Owner will include the Architect in all communications with the Contractor that relate to or affect the Architect’s services and will promptly notify the Architect of the substance of any other direct communications. This liberalization of communications between the Owner and the Contractor is, overall, a good concept. Likewise, it is wise for the Owner to notify the Architect of most, if not all, direct communications that the Owner has with the Contractor. However, our Committee feels that perfect communication and perfect notification are unlikely. We have modified the language to say that the Owner will “endeavor to” include the Architect in significant communications and will “endeavor to” notify the Architect of any direct communications.

6. **Nonconforming Work**

The AIA documents are beginning to adopt what our Committee has called “the Haglund Rule” which requires getting as much in writing as possible, so there can be little or no doubt what agreements are reached between the parties. § 3.1.4 provides that an Architect is not responsible for an Owner’s directive or substitution, or for the Owner’s acceptance of nonconforming work, made or given without the Architect’s written approval. (As is discussed below, this is not a consistent action in the 2017 revisions - many sections delete the requirement of written communications.)

7. **Shop Drawings and Submittals**

§§ 3.6.4.2 and 3.6.4.3 further emphasize that an Architect’s review of shop drawings and submittals is for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents, and that the Architect is entitled to rely upon and will not be responsible for the adequacy and accuracy of such documents. Our Committee has somewhat softened its views about this review process. Our former revisions required an Architect to take a more detailed review and approval of such documents.
8. **Redesign by the Architect**

§ 6.7 now provides that if an Owner requires an Architect to modify his construction documents because the lowest bid or negotiated proposal exceeds the Owner’s budget due to market conditions that the Architect cannot reasonably anticipate, the Architect’s obligation to redesign requires payment for additional services by the Owner. Our Committee has generally revised this and similar paragraphs to require an Architect to redesign in order to lower costs and come within the Owner’s budget. This requirement for additional payment if the Architect “could not reasonably anticipate a change in market conditions” potentially leaves the Owner on the hook for all redesign costs despite its efforts to stay within its budget. The Committee does not approve of that modification.

9. **THE BIG ONE – ADDITIONAL AND SUPPLEMENTAL SERVICES**

The most significant change which AIA has made in the AIA B101™-2017 architect contract is a new layer of possible payments to the Architects under Article 4. Article 4 has always contained a table which purports to separate “Basic Services” from “Additional Services” – “Basic Services” being those that are included in the Architect’s base fee and “Additional Services” being optional services which the Owner may elect to pay the Architect to perform, either in optional work or required work due to unforeseen circumstances. AIA has now determined that many of the services which were previously designated as “Additional Services” are actually required services which can be foreseen on a project. However, an Architect may not wish to perform those services without additional compensation. AIA has thus created a new category of “Supplemental Services” to describe such required, but not “basic”, services. “Additional Services” are now services which are necessitated by circumstances as the project progresses and which are first deemed to be necessary after the contract is entered.

This change in nomenclature could drastically increase an Owner’s costs. If the Architect is particularly limited in its “Basic Services” and wants to be paid extra to perform “Supplemental Services” which will be necessary and even mandatory for some projects, the price will increase and schools will be paying a higher fee for the required services on the project. Our Committee has chosen to address this issues by designating the “Supplemental Services” in the Table of Services found in Section 4.1.1 as being included in the Architect’s “basic services.”

We believe it is important to require Architects to perform all of the required services and not find additional ways to take money from Owners. In some cases, the Architect’s fee may increase if it is necessary to perform all of those “Supplemental Services.” However, at least an Owner will be better able to evaluate Architects by seeing what is and what is not included in an Architect’s basic services and decide whether or not they are getting the best value by using a given Architect. In this regard, “Additional Services” are very comparable to what they were under the former AIA contract nomenclature. Even though an Owner
may wish to limit the need for Additional Services, it is not unusual for some additional services to be deemed necessary as a project progresses. However, we contend an Owner should not be charged extra over and above the Basic Services fee for services which the Architect and the Owner both know will be needed in order to complete the project. This change in nomenclature, and the possible differences in prices which it creates, will likely be a significant point for negotiation with Architects. The Committee’s revised documents will require some Architects to rethink their pricing, but the pricing received by the school district will be more realistic and, if the Architect is serious about getting a school’s business, may well help the school district obtain a better price in its negotiations with the Architect.

B. **AIA A101™ - 2017**

1. Although there are no drastic changes to it from the 2007 document, Article 1 still includes a definition of the “Contract Documents.” The Committee has again added a definition beneath that of “Construction Documents.” This additional definition has been included to standardize the use of the phrase in all documents to indicate the design documents, specifications, and drawings issued by the Architect for the project. The change in terminology becomes significant in the event that the Owner elects to be the Owner of the design documents under the B101 document. The phrase “Instruments of Service” is not necessarily accurate in a such a circumstance. Instead, the definition of “Construction Documents” is used to clarify the purpose of the documents, rather than the Ownership of them. In the event that the Owner will own the Construction Documents, the phrase “Work For Hire” is being used in our B101™ revisions.

2. Several sections in the new A101 contain “check boxes” which can be selected for purposes of noting the Date of Commencement, the date of Substantial Completion, or other significant dates in the contract. We recommend using the 3rd box in Section 3.1 concerning the Commencement Date. That box is labeled “Established As Follows:” – after that, the Owner needs to specify how the Commencement Date will be determined. The Committee recommends that it always be the first business day after the Contractor’s receipt and approval of the required insurance documents, so that the Contractor does not begin work without having the proper insurance in place.

3. Section 4.2.2 allows the approval of specific alternates after execution of the documents and, in that circumstance, the Owner is required to issue a modification to the Agreement. The Committee has deleted this paragraph in order to require approval of the alternates before construction when possible. This will not prevent a Change Order or other modification later; however, we recommend making final choices, if at all possible, prior to entry of the Agreement.
4. Section 4.5 provides a new standardized paragraph for inclusion of liquidated damages by agreement of the parties. The Committee has always recommended including such paragraphs in the contracts. The Committee’s revision to this paragraph is to more specifically define the possible damages which might be caused to the Owner in the event that a Contractor fails to timely reach Substantial Completion OR Final Completion. We believe the damages are different between those two circumstances and need to be carefully delineated to support the parties’ agreement that substantial damages will occur to the Owner in the event that the Contractor fails to timely complete the project. We further recommend that different amounts and types of damages be included in the paragraph regarding Substantial Completion and Final Completion, since the building will be usable in many circumstances, even though additional work remains and additional damages may be caused.

5. Article 5 has supposedly been revised to clarify the calculation of the amounts to be paid monthly on the project. The Committee has made minor modifications to these paragraphs to further clarify the amounts of payment.

6. Section 7.1.1 has been added to the new document to provide payment of an agreed termination fee. As discussed elsewhere, the Committee believes that termination fees should not be voluntarily paid and may amount to a gift of public funds. Instead, incurred expenses may be appropriately paid as better defined in the A201™-2017.

7. **THE BIG ONE – EXHIBIT A**

   Section 8.5 of the AIA A101™-2017 makes reference to the new insurance exhibit which is created in the 2017 revisions. This Exhibit A will be a marked change from prior contract forms since it attempts to include most, but not all, of the insurance terms applicable to the project. Despite the creation of this exhibit, the A201 document will still have additional paragraphs concerning insurance. The new Exhibit A will be discussed later in this paper.

8. As noted above, AIA is emphasizing the use of additional documents for sustainable projects or digital data protocols. References to these documents are also made in the AIA A101™-2017.

C. **AIA A201™-2017**

   1. Section 1.6 has been modified to provide for notice to be given to parties in person, by mail, by courier, or by electronic transmission if a method for that transmission has been agreed to in the agreement. However, notice of claims under Section 15 is deemed to have been duly served only if delivered by certified or registered mail, or by courier providing proof of delivery.
2. Consistent with the other 2017 revisions, A201 contains new sections 1.7 and 1.8 requiring parties to develop protocols for the use of, and reliance on, BIM or Digital Data Protocols.

3. Section 2.2 has been revised to provide additional requirements concerning the Owner’s financial arrangements to fulfill its obligations under the contract. In Texas, state law requires that school districts have adequate funds and financing as provided by law prior to awarding or executing a construction contract. If your state has similar provisions, much of Section 2.2 will either need to be deleted or modified accordingly.

4. Section 3.5.1 has not been substantively revised in the new contract. However, it is worth pointing out that this section provides an unlimited warranty of materials and equipment furnished under the contract to be of good quality and new, unless the contract requires or permits otherwise, and that the Work will conform to the requirements of the Contract Documents and be free from defects, except those inherent in the quality of the Work the Contract Documents require or permit. Note that this is a different and distinct warranty from the standard one-year warranty to make repairs following Substantial Completion found in § 12.2.2.1. We often see Contractors that want to limit all warranties to one year. However, do not modify Section 3.5 to provide a limited-time warranty when there is no other limitation in the AIA document language.

5. Section 3.7.4 has been modified to shorten the time period from 21 days to 14 days for a Contractor who encounters concealed or unknown conditions to report those conditions to the Owner and the Architect. It is arguable that length of time is still too long. Our standard amendments reduce this to 3 business days. There is simply no reason for a Contractor to delay notifying the Owner of any concealed or unknown condition that could materially affect the project.

6. Section 3.10 has been revised to require more detail in the Contractor’s construction schedule for the Work.

7. Section 3.11 clarifies that Contractor can maintain Contract Documents, change orders, construction change directives, modifications, and other project records at the site in electronic format.

8. Section 3.12.10.1 contains new language which states that the Contractor shall be entitled to rely upon adequacy and accuracy of the performance and design criteria provided in the Contract Documents. As noted in the sections above, such language places liability for defective plans and design on the Owner. This language must be modified to change that allocation of blame.

9. Unfortunately, Section 4.2.2 has not been materially revised and will require specific frequencies and times of the Architect’s inspection (or observation, as the Architect will want) of the Work progress. Such revisions should always be made
to ensure that the Architect is adequately aware of the status and quality of the project, and keeps the Owner notified of defects and deficiencies in the Work. Such revisions are seriously contested by the Architect, who generally has less interest in administering the contract and in having to be involved in the day-to-day construction. School districts should require the Architect’s involvement in that process, unless they have other adequate supervision available from their own staff. That is obviously impossible for many districts. (Architects often claim that the AIA A201™ does not use the word “inspection,” and that asking them to do inspections requires them to do work that increases their standard of care and for which they cannot get insured. However, §§ 9.8.3 and 9.10.1. of the AIA A201™-2007 and 2017 AIA forms do require inspections to be done by the Architect.)

10. Section 4.2.4 parallels language in other documents to broaden the Owner’s right to communicate with the Contractor.

11. Section 4.2.1.2 revisions are minor, but it should be noted that this section requires the Architect to be a neutral party, instead of representing the Owner’s interests. Although most Architects are used to acting as a neutral party, they also recognize that the Owner is paying for their services and expects the Architect to look out for the Owner’s best interests. Although some Architects are harder to persuade than others, most Architects end up having little problem in abandoning this neutrality in acting as the Owner’s representative on issues of construction quality, intent, and defects.

12. Section 5.3 is another revision which has been made in the 2017 amendments to emphasize the necessity for written agreement. Modifications can obviously lead to future problems with parties disputing what was said, what was approved, or what differences may exist in their interpretation of what was agreed upon. In almost all cases, getting the agreement in writing will result in clearer directives, less question, and more certainty in the conduct of the contract. (Paradoxically, see below at ¶¶ 17, 20, and 21, for the opposite).

13. Article 7 generally discusses changes in the Work, whether by change order, construction change directive, or order for a minor change in the Work. The A201 does not provide limits on the maximum amount of such changes. If your state has dollar limitations on the amount of such changes without the necessity for rebidding the project, note those limitations in Article 7, so that the Contractor is on notice of what will happen if it proposes an excessive change in the cost of the Work. Texas Education Code § 44.0411 sets that limit at 25% of the original contract price.

14. Section 9.1.2 has been added to mandate that unit pricing be equitably adjusted in the event that quantities contemplated are materially changed so that the original unit prices cause inequity to the Owner or Contractor.
15. Section 9.4.1 requires that if the Architect withholds certification of an application for payment, the Architect must notify the Contractor and Owner of the Architect’s reason for withholding certification. Such notice is required by Texas law and probably the laws of many states.

16. Section 9.6.8 limits a Contractor’s right to defend and indemnify the Owner against subcontractor lien claims to only if the Owner meets its payment obligations in the Contract Documents.

17. Section 9.7, unlike other revisions noted above, removes the requirement of written notice to the Owner and Architect before a Contractor may stop work due to lack of payment. We recommend revision of the document to always require written notice from the Contractor.

18. Section 9.10.1 also removes the requirement of written notice from the Contractor that the Work be approved for final inspection.

19. Section 9.10.4 has been revised to state that the making of final payment does not constitute a waiver of claims arising from the Owner’s audit, if the audit is permitted by the Contract Documents, after final payment. We recommend that this paragraph be further altered to state that the making of final payment does not constitute a waiver of any claims by the Owner. However, the modification has broadened the list of claims that are not waived.

20. Section 10.2.8 again removes the requirement of written notice of an injury or damage to a person or property because of an act or omission of the Owner or Contractor. Again, written notice should be required.

21. Sections 10.3, 10.3.1, and 10.3.2 again remove a requirement of written notice concerning hazardous materials and substances encountered on the job by the Contractor. Although expeditious notice is recommended of encounters with hazardous materials, written notice is still advisable.

22. Sections 10.3.3 and 10.3.5 revisions illustrate the failure of the AIA revisions to provide equal treatment to the Owner and the Contractor. Section 10.3.3 continues to require the Owner to indemnify and hold harmless the Contractor for claims and damages from the presence of hazardous material. However, Section 10.3.5 has been amended to delete indemnification by the Contractor and only require the Contractor “reimburse” the Owner for damages caused by the Contractor. Owner indemnification should always be deleted.
23. **ARTICLE 11 - THE BIG ONE**

As noted previously, most of Article 11 of the A201™-2017 has been deleted and most of the insurance provisions have been moved to the new AIA A201™ Exhibit A which will accompany the AIA A101™-2017 contract. However, the key word is “most” – not all of the language has been moved to the Exhibit A. This will require school district attorneys to be certain that all of the necessary insurance language is found either in the A201 or the A101 Exhibit A, or perhaps, move all of the language to one document and delete from the other document.

At the time of this drafting, the Committee is continuing to study and determine the best way to resolve the potential harm that comes from splitting the insurance requirements into various places. Although many of the terms remain identical to the prior A201-2007 language, locating the provisions in separate documents certainly makes it more difficult to ensure that all insurance requirements are properly addressed and the contracts conformed to work together.

Further, the language in Article 11 and the language in the A101™-2017 Exhibit A will require more detail and more information to be provided by the Contractor to the Owner about the Contractor’s insurance policies. We have learned from past experience that most Contractors and Architects may sign amended contract revisions which promise to provide certain required coverages, but then fail to actually procure the right type or amount of insurance. It is critical that someone, whether it is the district’s attorney, insurance agent, risk manager, or other trained personnel review the certificates of insurance, the insurance policies, the endorsements, payment and performance bonds, and any other documents, to ensure that the requirements of the contract are actually provided in the insurance and bonds procured by the Contractor.

24. Section 12.2.1 has been revised to separate the Contractor’s duties for correction of work before and after Substantial Completion. This section had formerly contained both obligations in the same paragraph.

25. Because of the movement of other paragraphs, Section 13.5 in the 2007 contract has been renumbered as Section 13.4 in the 2017 contract form. Section 13.4.1 has been added to clarify that the Owner is responsible for arranging and paying for tests, inspections, or approvals where building codes are applicable, and laws and regulations so require.

26. Section 14.1.3, which concerns termination of the contract by the Contractor, would allow the Contractor to recover reasonable overhead and profit on work not executed. We recommend that provision be deleted, and the profit and overhead on work which is not actually done by the Contractor not be paid. Again, such a payment by a governmental entity may be an illegal payment constituting in a gift of public funds.
27. Section 14.2.4 was not revised. However, this is another example of the contract requiring a school district to make a gift of public funds. This section provides that if the unpaid balance of the contract sum exceeds the cost of finishing the Work after the Contractor’s termination, any excess is to be paid to the Contractor. We fail to see any reason for paying a Contractor who has been fired for work that it did not do. We believe that this provision should be deleted.

28. Sections 14.4.2 and 14.4.3, concerning termination by the Owner for convenience, have been revised to delete the requirement of written notice from the Owner of such termination and to provide for payment of an agreed termination fee. As noted above, we do not recommend an agreed termination fee be paid.

29. Section 15.1.1 concerns the definition of “Claims” under the contract. It has been amended to provide that an Owner is not required to file a claim in order to impose liquidated damages in accordance with the Contract Documents.

30. Section 15.1.2 was formerly located in Section 13.7 in the A201-2007 form. This paragraph concerns time limits on claims. We would urge school attorneys to carefully check out the language in this paragraph to see if it conforms with their state laws. For example, the language provides that any claim must be brought not more than 10 years after the day of Substantial Completion of the Work. However, some states allow an extension of that time in the event of discovery of a defect late in that 10-year period. This language will therefore need modification to comply with your state law. The time should also run from Final Completion.

31. Sections 15.1.3.1 and 15.1.3.2 have been modified to change the notice procedure when the condition giving rise to the claim is discovered after the expiration of the one-year period for correction of the Work. This is a new requirement and seems to require using a contractual process after the contract has ended. It also only requires “Notice” although it still seems to imply a written notice is required since a copy has to be sent to the Initial Decision Maker. That process may be different under your claims procedures in your contracts.

32. Section 15.1.4.2 is a new section which requires adjustments to be made to the Contract Sum and Contract Time in accordance with decisions by the Initial Decision Maker, subject to the parties’ right to proceed with the Article 15 process. At least, the “shall” should be changed to “may.” Complete deletion may be more appropriate.

33. Section 15.1.5, again, deletes the requirement for written notice from the Contractor.

34. Section 15.1.6 deals with claims for additional time, particularly including weather delays in 15.1.6.2. We recommend inclusion in these sections of the estimated weather days during each month of the year, so that the Contractor is put on notice...
for the number of likely weather days that must be accounted for in his construction schedule. Then, only if the requested days exceed those average days can the Contractor seek additional time. We also suggest that the request be made monthly on the Monthly Pay Application to prevent the Contractor from seeking a large of number of days at the end of the Work without ever documenting the need for additional time prior to the approaching deadline.

35. Sections 15.2 – 15.4 make relatively minor revisions to the claims process when an Initial Decision Maker is used. The only significant new addition is in Section 15.3.3, which provides that either party may demand in writing that the other party file for binding dispute resolution within 30 days from the date a mediation has been concluded without resolution of a dispute, or 60 days after mediation has been demanded without resolution of the dispute. If such a demand is made and the receiving party fails to file for binding dispute resolution within 60 days after receipt, both parties will waive their rights to binding dispute resolution proceedings with respect to the initial decision.

As part of this claim process, Section 15.4 and its subparts, provides for arbitration. The Committee always opposes inclusion of arbitration clauses and recommends removal or deletion of the clause. It is our opinion that school districts are much more likely to receive an unfair arbitration proceeding, where the arbitrator or arbitrators are generally construction professionals and not owners, than from a jury trial, where the jury panel is frequently drawn from the citizens within your school district. Such a jury panel is likely to be much more favorable to a district’s claims than an arbitrator or arbitration panel.

D. AIA A101™-2017 Exhibit A – Insurance and Bonds

As has been noted in the sections above, creation of the A101 – Exhibit A document is one of the biggest changes made by AIA for the 2017 documents. In some of the information released by AIA to explain the 2017 changes, it has been stated that the Exhibit is needed because of the changes in range and types of coverage, flexibility in developing insurance requirements, facilitating transmission to insurance advisors/brokers, and the need to allow for adaptation to changes in the insurance market without edits to the A201™-2017. Needless to say, the Committee is not worried about needing to make changes to the A201™-2017 because of insurance! In addition, AIA has stated that if parties simply want the standard coverages historically required by the A201 contract, they can ignore the optional sections and fill in the amounts. While it may be tempting for the Owner to take such an easy route, we do not recommend that “standard coverage” be agreed to on every construction project. We believe that the differences in each project, each Contractor, and each district require more careful attention to such an important detail.

The Exhibit also lists a large number of insurance options which the Owner or Contractor may want to purchase for their projects. While it may be nice to have a list of possible additional coverages provided, it appears to the Committee that many of the possible
insurance options listed are unlikely to be needed on most, if not all, school projects. As in the old A201-2007 language, there is very little information provided regarding the rating of the insurance companies, specific endorsements which will be required for the necessary insurance, inclusion of mandated state language (such as the Texas requirements for statutory language regarding workers’ compensation insurance, or detailed information about payment and performance bonds.) In that connection, Section A.3.4 of the A201™-2017 Exhibit A form requires that if a payment or performance bond is obtained for the project, the payment and performance bonds shall be the forms included in AIA A312™. Such a requirement may require change if state law requires a specific form for such bonds.

It should also be noted that another document may be required to supplement the standard ACORD Certificates of Insurance for the project. AIA G715™-1991 may be required if additional information or options are needed regarding the insurance certificate. At least in Texas, if not in most states, the insurance certificate does nothing to guarantee that the Contractor or Architect has obtained insurance that complies with the specifications of the contract. Under Texas law, the only way to know for sure what coverage was obtained is to actually get a copy of the insurance policy and endorsements. *Via Net, et. al. v. Tig Insurance Company, Inc., et. al. 211 S.W.3d 310 (Tex. 2006).* Contractors and Architects frequently object to or refuse to actually produce the required policies and endorsement for the school district’s inspection. However, as noted previously, it is imperative that school districts actually examine the policies and endorsements to ensure that the proper insurance has been provided. In those occasions where a school district has requested the Committee members to actually examine the policies and endorsements obtained by a Contractor or Architect and confirm they are correct, no examination has ever revealed that the correct documents were fully obtained. Not all of the errors or omissions in policies were material, but many of them were. School districts therefore need to be certain that they are getting what they contractually asked for regarding insurance.

**Generally speaking,** the AIA A101™-2017 Exhibit A deals with the details about amounts and types of coverage, while the language which remains in AIA A201™-2017 deals with general requirements applicable to all types of insurance, such as waivers of subrogation, notices of the expiration of policies to be sent to the Owner by the Contractor, the delays which may stem from the Contractor’s failure to timely produce the required property insurance, and reallocations of costs and time because of that.

It is highly debatable whether separating the insurance information multiple documents simplifies the contract process. It clearly requires more attention to detail by the parties to be sure that the insurance information provided in all documents is the same and does not omit significant aspects of the insurance program. The Committee is continuing to examine exactly how best to deal with this aspect of the 2017 AIA documents. Whether the Exhibit will be used at all, or whether additional information will need to be added to each of the proposed pieces, will be decided in the near future.
V. Conclusion

The intent of this paper is to advise school attorneys how to help school districts by writing more balanced construction contracts. These suggestions will hopefully allow local school districts to build better and more cost-effective school buildings. While the American Institute of Architects standard construction forms are the deserved industry standard, they can and should be improved upon by local counsel for each district. The suggestions in this paper are a place to start, as are the suggested amendments available through the National School Boards Association. When advising school districts on construction, local counsel should be involved from the beginning of the process and should ensure that the construction documents are all amended in a similar fashion to help ensure a successful Final Completion.
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