AIA C-Series Agreements

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Introduction

The C Series of contains agreements between the architect and consultants as well as for design-build and integrated project delivery. The changes to the C series mirror in many respects the change throughout the American Institute of Architects (AIA) agreements from the 2007 re-writes. But this series has expanded over the last several years as AIA adapts to new project delivery methods - Integrated Project Delivery being the most recent.

As you review the C series you'll note the integration with the A and B series. Therefore, when using a C series document as a standalone, adjustments may need to be made.

Overall, some of the distinctions from previous versions of the C series include such changes as: incorporation of the expanded license to the owner for use of the instruments of service for maintenance, alteration and addition to the project; an express contractual definition of the applicable standard of care, based on the common law definition; insurance coverage requirements, including errors and omissions coverage; an option to select a dispute resolution proceeding other than arbitration; the ability to use C401-2007 as agreement between the architect and all consultants, including the consulting architect; flow-down provisions that incorporate the rights and responsibilities from the Prime Agreement; and cross indemnification provisions requiring the architect and consultant to indentify each other from claims made by third parties.

The Principally Used

The C401-2007 (formerly C141-1997) is the principal agreement between the architect and various consultants that will assist the architect in designing the project. This agreement is suitable for use with all of the various consultants the architect will use for the project, including a consulting architect. C401-2007 assumes the existence of a prime agreement in the form of one of the other AIA family member agreements, principally B101-2007, B103-2007, B105-2007 or B152-2007.

The current version is shorter and more flexible that the previous version. However, its brevity is masked by the flow-down provisions from the prime agreement. This requires the architect to fully understand the prime agreement and the consultant to review both the prime agreement and C401-2007 in order to understand the full contractual arrangement among them.

Keep in mind AIA has retired (as of May 2009) former C141-1997, meaning it is no longer available from AIA.

The Parties Responsibilities and Scope of Services

The first location where the responsibilities of the parties arise is in Article 1. This is where the description of services should set out in some detail the scope of services to be provided by the consultant; section 1.2 begins the process of delineating that scope. Architects and consultants will need to carefully review what is included and excluded or not mentioned. As with past versions of AIA documents, the prime agreement and here mention the scope in broad terms that may expand beyond the expectations of the consultant or not be sufficient in the eyes of the architect.

The consultant is bound to the architect to the same extent the architect is bound to the owner. As such, it is imperative to read the full version of the owner/architect agreement. And even though C401-2007 allows the architect to delete the fees the architect will be getting, prudence dictates the consultant ask and at a minimum review the fully executed prime agreement to get an understanding of the compensation scheme. Architects do not like to provide this information, but in order for a consultant to truly understand the constraints it may be working under, knowledge of the amount of compensation, at least as to the consultant, any reserve allocated to design and the scheme for additional compensation should be understood.

For the consultant, the responsibilities set out in Article 2 are not too different from the previous version. This is where the definition of the standard of care is located. The consultant will need to identify its representative for the project and this person cannot be replaced without approval of the architect. This type of provision is becoming more and more prevalent, and can hinder a consultant's ability to move personnel around as projects progress and the talent of a particular person is needed on another project. Though the idea of consistency make sense, the inability to have certain personnel on new projects can hamper a design firm's ability to secure further projects.

Section 2.4 requires the consultant to coordinate its services with that of the architect and other consultants, while section 1.5 requires the consultant to send all communication through the architect. These two sections are not entirely out of sync, but clarity should be provided as to the method of coordination a consultant is to use. Where no clarity is provided, a consultant should be sending all information through the architect and the failure of the architect to timely provide the information to the other consultants will most likely excuse any delays or missed deadlines that might otherwise be the responsibility of the consultant.

This article is where the insurance requirements are set out. Care should be taken to determine proper limits based on the services to be provided by the respective consultant and

the overall risks associated with the project. Establishing limits that are too high will limit the choices of consultant's the architect will be able to use. Limits that are too low will expose the architect to greater liability.

Article 3 sets out the limitations of the scope of the consultant, and provides an avenue for the architect and consultant to discuss what is needed to meet the objectives of the owner and the project. Typically, too little time is spent between the architect and consultant in developing the scope and the limitations. When the construction budget is not met and the design team tries to make adjustments, if the design team spent too little time discussing the owner's objectives and the architect's concepts on how to achieve those goals, it becomes difficult to make adjustments. The consultant may have used design concepts that will require an entire redesign, at a cost the consultant will expect someone else to absorb and the time delay of which may not be acceptable.

Consultants need to pay particular attention to section 3.1.5. The consultant is required to assist the architect to determine if the construction activity covering consultant's design should be accepted. Some consultants are not used to providing course of construction periodic reviews and reports. Others may not have budgeted for this service. And others may not want to provide this service, not wanting to be part of the construction acceptance/rejection issues that often arise.

One provision that is missing from this area of the agreement is a specific statement, similar to the one provided under section 5.8, that allows the consultant to rely upon the information provided by the architect.

The architect has the typical responsibilities under Article 5 of timely dissemination of project information and updates, rendering of decisions related to the overall design and design process, providing detailed layouts of the project and providing updates, provide a copy of the estimated construction budget and updates, as well as periodic consultation with the consultant on the final construction agreement and final construction documents.

Work Product Ownership

Under the current scheme, the owner of a project is now provided a non-exclusive license to use the various documents that have been prepared for the construction of the project and also its maintenance. This is prefaced with the requirement of actual payment by the owner.

Under C401-2007, the consultant grants to the architect the same license as the architect grants to the owner. To the extent the architect has granted something more than as set out in the B series agreements, modification to this section may be in order.

Many owners demand ownership of the construction documents. Depending on the actual wording of the owner's terms, it may or may not be acceptable. One issue is whether there has been a transfer of any intellectual property rights. Another issue is whether any license has been granted to the design team, and the extent of those licenses where ownership of intellectual property has transferred to the owner.

Indemnity and Liability Limitations

While the C401-2007 contains cross-indemnity provisions, there is no limitation of liability. This is, in part, a result of compromise through the drafting committee's deliberations, and in part because some jurisdictions do not enforce limitation of the design professional's liability.

The indemnity provisions are contained in sections 8.3 and 8.4. Each provides the party will indemnify and hold harmless the other party for "damages, losses and judgments arising from claims by third parties …, but only to the extent … caused by the negligent acts or omissions…."

The indemnity provisions in C401-2007 are cross-indemnification provisions. The law on indemnity is complicated, especially in California. Cross-indemnity simply adds to the complexity. Issues will arise when all of the design team is implicated in a problem.

Often counsel will send out demand letters for indemnity and defense without first truly understanding what the relevant agreements provide and without taking into consideration the global picture relative to the defense of the design.

Design firms, because of all of the news related to indemnity and because principals of design firms have seen the demand letters sent to them, will look to counsel to send out the same before discussions among the design team members and counsel have taken place.

The real danger is not having had a good discussion with the owner by the architect at the beginning and the imposition of a bad indemnity clause that will get passed on to the consultant under the flow down provisions set out in Article 1.

Owners typically want to be "defended, indemnified and held harmless from the actions and activities of the architect, its agents, employees, consultants." No mention of fault attributable to the design team, nor allocation of fault among the parties to the agreements is provided. Owners want no risk for their respective involvement in the project. In addition, everyone wants someone else to defend them. No one wants to be responsible for their respective attorney's fees.

These overly broad indemnity provisions cause insurance coverage issues for all of the parties, create additional difficulty for the design professionals given the claims made nature of professional liability policies, as well as "fees within limits" nature of most insurance programs.

Clear statements that the design professional is not defending any party to an agreement other than itself should be made. Limitation on the scope of the indemnity needs to be addressed.

Dispute Resolution

For disputes that involve the owner as well as the architect and consultant, the system set out in the prime agreement flows into the architect/consultant agreement.

For issues between the architect and consultant not involving the owner, the dispute resolution provisions of C401-2007 are the same as found in the 2007 version of the architect/owner agreements. Flexibility is now the order of the day with a "check the box" system to determine how disputes will be resolved. The selection is arbitration, litigation or "other." This is preceded by mediation as defined in sections 8.2.1, 8.2.2 and 8.2.3 of B101-2007.

Miscellaneous Provisions

The all too often overlooked miscellaneous provisions provide some new comfort for consultants and misses a couple of important items.

This section makes it clear the consultant has no responsibility for hazardous materials or toxic substances (10.5), but makes no mention of site safety responsibilities.

There is reference to the Federal Arbitration Act where arbitration is used. The parties may wish to make California's arbitration act the governing law, if possible. California's act is more flexible and provides for certain levels of discovery. But this may not be possible, depending on the jurisdiction's law that govern the prime agreement, and by reference, this agreement.

The Payments article may not be fully enforceable in certain jurisdictions; or it may not interpreted as the architect expects. Section 11.6.2 states that the consultant will be paid "in proportion to amounts received from the Owner…." In states such as California where "pay if paid" clauses are not enforceable, this provision may either be ignored or reinterpreted. If the meaning is to simply wait out the owner for final payment and eventually pay the consultant for the entire amount due the consultant under C401-2007, then the provision probably stands and the architect will need to pay consultant within a reasonable time, whether the architect gets paid in full or not.

If the thought is this provision (11.6.2) means the architect only needs to pay the consultant what the architect receives from the owner on behalf of the consultant's services, then the provision will not be enforced. The California Supreme Court has determined that "pay if paid" clauses violate the mechanics' lien provisions of the states constitution and the enabling legislation. The rationale was that the prime contractor/consultant cannot shift the risk of payment from the owner on to any sub-tier entities. Since California's mechanics' lien laws

provide for architects and engineers to utilize those statutes, risk shifting to consultants is not permitted.

Design-Build

C441-2008 Standard Form of Agreement Between Architect and Consultant for Design-Build Projects

This agreement is set out in similar fashion to C401-2007. It has similar language regarding the parties responsibilities and scope of services and the comments in the section above identifying issues is applicable to this agreement as well.

Likewise, the same comments apply regarding the licensing of the consultants work product as well as the comments about dispute resolution, indemnity and liability limitations and miscellaneous provisions.

Integrated Project Delivery

What is IPD

The concept behind Integrated Project Delivery (IPD) is leverage the knowledge of all of the participants of a construction project, from conception through completion and into the projects life cycle. Utilization of the latest technologies along with sharing resources is suppose to allow team members to better utilize their highest potentials and expand the value brought to the project.

From AIA and AIA California Council's *A Working Definition: Integrated Project Delivery*, published May 15, 2007, the definition of IPD is "a project delivery approach that integrates people, systems, business structures and practices into a process that collaboratively harnesses the talents and insights of all participants to reduce waste and optimize efficiency through the process of design, fabrication and construction."

The concept is built on collaboration among all of the players involved in a particular project. Because of this change in the delivery process for a project, AIA has crafted several agreements to help address the different structure the IPD process entails.

Who, How and Where is it being used

A number of projects have been built using the IPD method. The City of Hartford , Connecticut used the process to design and construct the Capital Preparatory Magnet School. Northern Westchester Hospital in Mount Kisco, New York had its latest expansion conceived and

constructed utilizing this method of delivery. Other health related projects, including the University of California, San Francisco, have utilized the process as well.

Many of the IPD projects are in the health field and educational institutions, two areas where cost containment has become a priority.

C191-2009 and its Progeny

C191-2009 is AIA's standard form agreement envisioning a multi-party arrangement through which the owner, architect, contractor and perhaps other key project participants execute a single agreement for the design, construction and commissioning of a project. This agreement provides the framework for a collaborative project environment where the parties operate in furtherance of cost and performance goals established by the collective parties. The non-owner participants are compensated on a cost-of-work basis. The compensation model is goal oriented and provides incentives for collaboration in design and construction.

Primary management of the project is the responsibility of the Project Executive Team which is comprised of one representative from each of the parties. The agreement also establishes a Project Management Team, also comprised of one representative from each of the parties. This group provides a second level of project oversight and issue resolution.

The Project Executive Team is responsible for establishing the goals for the project and making key decisions referred to it by the Project Management Team. The representatives on this team are from the party's executive or C-suite. Only the owner has the ability to give directives to this team.

The Project Management Team is responsible for executing the decisions of the executive team, as well as the day-to-day management of the project. This team establishes the processes and procedures necessary to meet the executive team's goals.

Compensation is meant to be flexible, allowing the structure to be tailored to the specific project and project members. To truly foster a collaborative environment, each party's success is directly tied to the success of the project as a whole. Specifically, parties do not earn profits from their direct services. Rather, direct services are delivered at cost and profit is derived in two ways, goal achievement and incentives based upon the achievement of the project goals and milestones.

This is one of the areas where the designers and the constructors will each need to change their current methods of business and delivery. Each will become dependent on the other, with the hopeful effect that efficiencies will be achieved and costs kept at or below the project budget. The design team will need to have better coordinated design drawings and specifications and

contractors will need to not only actually read the entire set of plans and specifications, but to the extent there truly are necessary requests for information or clarification, the RFI's and RFC's will themselves need to be specific, well crafted, timely and kept to a minimum.

Risk allocation will need to addressed as well. And the parties will once again need to change their respective positions on which entity(ies) should take on which risks. Rather risk is addressed by each party waiving liability against another member of the team. Cross-indemnification provisions are provided and vicarious liability is expressly disclaimed as is the creation of a joint venture. Rather, AIA envisions the team creating an entity for the purpose of designing and constructing the project. Each member of the team contracts with the entity and the entity also contracts with other consultants and suppliers, as necessary. The entity obtains its own insurance program and receives its funding solely from the owner.

The conflict resolution process envisioned within this agreement is intended to provide quick and effective resolutions and solutions to problems as they arise throughout the course of the projects development and construction. The concept is to provide an avenue for a truly collaborative process resulting in a high quality project with appropriate monetary rewards for the other participants.

The process for the project no longer utilizes the schematic design, design development or construction documents phases. Rather, the process is defined as Conceptualization, Criteria Design, Detailed Design, Implementation Documents, Construction and Closeout phases.

The agreement has a series of exhibits that assist the team members in moving through the process and documenting the various stages of the project's development.

The Rest of the C-Series

IPD Compendium

Though C191-2009 is the bulwark of the IPD agreements, AIA has several other agreements within the C series to aid in establishing the IPD arrangement.

C195-2008 is the *Standard Form Single Purpose Entity Agreement for Integrated Project Delivery*. This agreement establishes among the owner, architect and construction manager a limited liability company that will be the entity to move the project forward. It establishes a single purpose entity (SPE) to design and construct the project. This provides a framework for the various parties to collaborate as envisioned under the IPD process. The owner then enters into an agreement with the SPE to fund the project. The architect enters into a separate agreement for design and the construction manager its own agreement for construction.

As part of this arrangement, C195-2008 for many of the same procedures as set out in C191-2009. There are exhibits that guide the parties through the process, including a scope of services matrix and target cost amendment so the parties can establish the goals and objectives and determine the compensation for the members of the SPE.

To facilitate the concept set out in C195-2008, there are two follow on agreements. C196-2008 (*Standard Form of Agreement Between Single Purpose Entity and owner for Integrated Project Delivery*) and C197-2008 (*Standard Form of Agreement Between Single Purpose Entity and Non-Owner Entity for Integrated Project Delivery*).

C196-2008 set out the framework for the funding of the SPE to be used for the projects development. It is coordinated with C195-2008 and C1297-2008 to provide the complete set of agreements needed for a project to be designed and constructed utilizing IPD.

C197-2008 is the agreement the architect, construction manager and possibly other execute with the SPE for the project. Other consultants execute C401-2007 with the architect, and the construction side enters into agreements with the SPE under the A series.

Specialty Agreements in the C Series

Where planning services or feasibility studies are necessary, but the consultant to be used by the architect won't be performing other design services, C727-1992 remains available. This agreement sets out basic terms of agreement but leaves the scope of services to be wholly crafted by the parties and inserted into the agreement, or added as an exhibit.

The AIA's joint venture agreement, formerly C801-1993, has been renumbered C101-1993. It has as its basis the concept of two or more entities or individuals establishing a joint venture arrangement for the provision of services to the owner of a project. The members of the joint venture can be any part or the entire design team that will then act in concert through the joint venture to contract with the owner.

The compensation component has two alternatives: division of compensation or division of profit and loss. Under the division of compensation method, compensation received from the owner will be divided among the venture participants based upon the pre-determined schedule set out in the joint venture agreement. If the division of profit and loss method is used, the participants receive the ultimate profit or loss at the conclusion of the project. During the project cycle, each member bills the joint venture at cost plus a minimal amount for overhead.

C106-2007 (*Digital Data License Agreement*) serves as a licensing agreement among entities that have no existing license arrangement for the use and transmission of digital data. This agreement defines digital data broadly to include information, communications, drawings or

designs created or stored in digital format. The agreement provides for a limited mom-exclusive license for the digital data as well as procedures for transmitting the data.

C132-2009 (*Standard Form of Agreement Between Owner and Construction Manager as Adviser*) is designed to be used where the construction manager will be independent from the architect and contractor, and acts solely as an adviser to the owner. This agreement is coordinated with B132-2009 (*Standard Form of Agreement Between Owner and Architect, Construction Manager as Adviser Edition*). Both agreements are based on the concept the contractor will contract with the owner and the construction contract will be administered by the architect and construction manager under A322-2009. C132-2009 is not coordinated with the various agreements that have the construction manager also constructing the project, such as A133-2009 or A143-2009.