



The New AIA Design-Build Documents

March 2005

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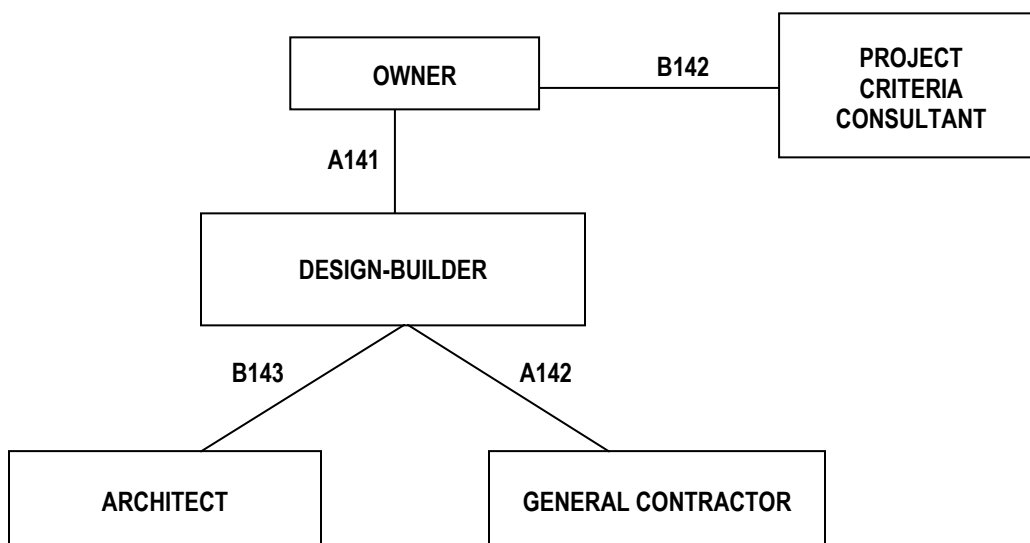
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In March, 2005, the new AIA Design-Build documents become available. They are a complex and closely interrelated set of documents consisting of four separate contracts and thirteen exhibits or related documents.

Unlike the prior version of the Design-Build agreement (A191), which was not often used because its terms did not reflect the reality of most marketplaces, the new AIA Design-Build documents are very practical and usable. Of all of the standard form Design-Build documents that are available, the AIA documents are the most protective of the owner. The documents adapt the A201 General Conditions to design-build projects, in most instances giving the owner the rights and responsibilities that either the owner or architect has in the A201 General Conditions.

The new documents contemplate the design-build structure to be similar to the diagram below.



But the documents are flexible. If the design-builder acts as its own general contractor, then the design-builder would contract directly with the trades. If the design-builder is an architect and performs the architectural services in-house, then the design-builder would contract directly with the engineering or other subconsultants.

The structure contemplated by the documents works for projects delivered by “bridging” as well as for those delivered by a more “conceptual” design-build approach. Design-build projects using the “bridging” method have the owner’s consultant develop the design to approximately one-third completion, and the design-builder’s role is primarily to detail and build. More “conceptual” design-build occurs when the project criteria are at a very early stage of development when the design-builder takes over. The new AIA documents make no assumptions regarding the degree of completion of project criteria and are usable with both methods, as well as the spectrum of approaches between them.

The Individual Contracts

The new documents include the four contracts identified in the chart above as well as numerous exhibits and related documents.

- **A141.** This is the contract between the owner and the design-builder. It has numerous blanks which must be filled in with project-specific information, including one of three check-boxes to specify whether the compensation will be lump sum, time and materials, or cost-plus-fee to a guaranteed maximum price. The contract has an Exhibit A, “Terms and Conditions,” that is an adaptation of the A201 General Conditions to design-build. It also has an Exhibit B, which defines the Cost of the

Work, and an Exhibit C for Insurance and Surety Bonds. A new, related document is G704/DB, which is a certificate that the owner and design-builder sign to acknowledge substantial completion of the design-build project.

- **A142.** This is the subcontract between the design-builder and the general contractor. It is similar to A141, including the same three payment options. Unlike traditional subcontracts, it does not incorporate the prime agreement (A141) by reference and instead relies on the design-builder to insert specific project-related requirements that are identical to (or at least consistent with) the design-builder's obligations to the owner. This contract includes five Exhibits, three of which are similar to the Exhibits to A141, plus an Exhibit B for preconstruction services (if applicable) and an Exhibit C that defines the contractor's scope of work.
- **B142.** This is the contract between the owner and its architect who is serving as the project criteria consultant. With some exceptions noted below, the contract and its exhibits are similar to the standard B141 agreement. The contract contains the business terms similar to Part 1 of B141, and Exhibit A consists of blanks to be filled in to describe the parameters of the project, similar to Section 1.1 of B141. Exhibit B is a fairly comprehensive menu of all of the potential services that the project criteria consultant might perform for the project, with a check-box next to each service so that the parties can clearly identify which services are being provided for the fee.
- **B143.** This is the subcontract between the design-builder and its architect. It is structured very similarly to B142 except that the menu of services that is Exhibit B contains a different list of services appropriate to the design-build architect rather than to the project criteria consultant.

New Legal Issues

Most of the legal and business issues in the new design-build documents are resolved similarly to comparable issues in the A201 General Conditions and B141 Owner-Architect Agreement. However, the issues described below involve unique or different resolutions.

1. The Architect's Certification.

In the B143 agreement between the design-builder and architect, section 2.3.11 allows the design-builder to have the architect execute certificates regarding the acceptability of the architect's work. The relevant portion of this provision states:

"With respect to such certifications, the Architect and the Architect's consultants shall certify that to the best of their knowledge, information and belief the documents or services to which such certifications pertain (a) are consistent with the Project Criteria provided to the Architect by the Design-Builder except to the extent specifically identified in such certificate, (b) comply with applicable professional practice standards, and (c) comply with applicable laws, ordinances, codes, rules and regulations governing the design of the Project."

The unusual aspect of this provision is that the architect's certification is limited to its "knowledge, information and belief" despite the fact that all of the certified facts concern the architect's own work product, not the quality of construction work or other issues of which the architect may not have firsthand knowledge. This limitation is echoed in paragraph A.3.2.9 of the A141 agreement between the owner and design-builder.

The traditional approach in the B141 document is that the architect is not required to execute certificates that would require information beyond what the architect personally knows to be true (B141, §1.3.7.8). The B141 agreement allows the architect's certification to be limited "to the best of the Architect's knowledge, information and belief" for aspects of the construction work about which the architect does not have firsthand knowledge, but not as to matters which the architect can readily observe or knows to be true (B141, §2.6.3.1)

It is doubtful whether the design-build marketplace will accept this new limitation on architectural certificates. Since the architect is supposed to have firsthand knowledge of its own work product and the standards with which it complies, there is no good reason (other than over-protectiveness or doubtful concerns about insurability) for the architect's certification in section 2.3.11 of B143 to be limited to the best of its knowledge, information and belief.

2. Fulfilling Project Criteria.

One of an owner's primary concerns in a design-build project is whether the completed project will fulfill the original programming criteria. Most standard form design-build contracts state that the design-builder's formal proposal supercedes any previously agreed project criteria and that the design-builder is subsequently obligated to build in accordance with its proposal, but not necessarily the superceded project criteria. Owners are concerned that they might improperly approve the design-builder's formal proposal, inadvertently failing to realize that it fails to achieve earlier agreed project criteria, which legally results in the project criteria being superceded.

The A141 agreement between owner and design-builder offers significant assurances to the owner that the project criteria will not be superceded. Section 1.1 includes the project criteria and any proposed changes in the definition of the design-build documents. Section A.3.2.6 includes a promise by the design-builder that the construction documents "shall be consistent with the approved design documents" that the design-builder had previously submitted for the owner's approval. The same provision requires the design-builder to notify the owner of any deviations between the construction documents and the design-build documents, including the project criteria. Section A.3.2.5 requires the design-builder to disclose to the owner in writing any deviations by which the design documents differ from the design-build documents, which include the project criteria. In addition, the design-builder provides the owner with a certificate from the architect, although limited to the best of the architect's knowledge, information and belief, that the documents "are consistent with the Project Criteria set forth in the Design-Build Documents, except to the extent specifically identified in such certificate". (A141, §A.3.2.9)

The contract has gone to significant lengths to reassure owners that their approval of a design document or construction document does not relieve the design-builder from having to comply with the project criteria. Although several provisions in Sections A.2.3 and A.3.2 require the owner when appropriate to issue written approvals of the design-builder's submittals, Section A.2.3.4 explicitly states that notwithstanding the owner's responsibility to review and approve the submittals,

"the Owner's review and approval of the Design-Builder's documents or submittals shall not relieve the Design-Builder of responsibility for compliance with the Design-Build Documents unless (a) the Design-Builder has notified the Owner in writing of the deviation prior to approval by the Owner or, (b) the Owner has approved a Change in the Work reflecting any deviations from the requirements of the Design-Build Documents."

Similarly, Section A.2.3.7 permits the owner to reject any work that does not conform to the design-build documents, which include the project criteria.

3. Ownership of Design.

The B143 agreement between design-builder and architect states that the architect and its consultants own the intellectual property in the drawings and specifications (B143, §3.2.1). Somewhat differently, the A141 agreement between owner and design-builder provides that the design-builder, in addition to the above design professionals, owns the intellectual property and the drawings and specifications (A141, §A.6.1). This distinction presumably contemplates that some of the professional services may be provided directly by the design-builder.

Most of the issues involving these ownership rights are resolved similarly to the comparable provisions in B141. The architect gives to the design-builder, who gives to the owner, a non-exclusive license to use the documents, which is replaced by a different non-exclusive license if the agreement is terminated. The license is predicated on the owner complying with the agreement, including making appropriate payments. (B143, §3.2)

One difference between the approach in B141 and in the design-build documents is the elimination of the (arguably unfair) requirement that the post-termination license is not effective until the "date the Architect is adjudged in default of this Agreement" (B141, §1.3.2.2). The approach in the design-build documents is that if terminated for cause, the architect automatically assigns the license to the design-builder (B143, §3.2.3.2). And if the agreement is terminated other than for cause, the architect may condition assignment of the license upon the owner's written notice of its intent to assume the design-builder's duties and obligations or the owner's written agreement to indemnify the architect (B143, §3.2.4; A141, §A.1.6.4).

4. Dispute Resolution.

For many years, the AIA documents have championed mandatory arbitration. All of the AIA contracts contained mandatory arbitration clauses. Not any longer.

All of the AIA design-build contracts (and presumably future editions of other AIA contracts) offer the parties a choice of dispute resolution mechanisms. All four of the contracts feature a check-box system. Although mandatory mediation remains in the contracts (see for example, A141, §A4.3), the parties must check a box to indicate their preference for arbitration versus litigation. For example, Section 6.2 of the A141 agreement between owner and design-builder states:

"If the parties do not resolve their dispute through mediation pursuant to Section A.4.3 of Exhibit A, Terms and Conditions, the method of binding dispute resolution shall be the following:

(If the parties do not select a method of binding dispute resolution, then the method of binding dispute resolution shall be litigation in a court of competent jurisdiction.)

(Check one.)

- Arbitration pursuant to Section A.4.4 of Exhibit A, Terms and Conditions
- Litigation in a court of competent jurisdiction
- Other (specify)"

Importantly, note that the default method of dispute resolution if no box is checked would be litigation in court.

Another significant change in the dispute resolution process in the AIA Design-Build documents is the addition of provisions allowing the parties to designate a "Project Neutral" who would be the initial advisor/decision-maker on the disputed issues. Section 6.1 of A141 provides a space for the parties to name the Project Neutral, and paragraph A.4.2.1 calls for the Project Neutral to make an "initial decision on all disputed issues" except those involving hazardous materials "as a condition precedent to mediation" of any claims arising prior to final payment. The Project Neutral's decision may be appealed to mediation or further dispute processes (A141, §A.4.2.3), and if no Project Neutral has been appointed, then the owner fills the role of the initial decision-maker (A141, §A.4.2.2).

This new approach to dispute resolution is a major change in AIA policy. It reflects a growing dissatisfaction with the costs and duration of the traditional binding dispute resolution processes, including arbitration and litigation. In the documents, the AIA appears to endorse the growing trend in the construction industry towards mediation and other forms of early, non-binding dispute intervention by experienced neutrals, such as dispute review boards and factfinding by project neutrals.

Conclusion

The new AIA Design-Build documents are detailed, consistent and well-written. Their substantive terms are based closely on the A201 General Conditions, adapted for the different procedures of design-build project delivery. The documents will probably prove to be quite popular with owners because of the strong protections afforded them, which will likely ensure them a place as the leading standard form design-build documents in the marketplace.

About the Author

Mark C. Friedlander is the Chair of the Construction Law Group of the law firm of Schiff Hardin LLP. He obtained his B.A. from the University of Michigan in 1978 and his J.D. from Harvard Law School in 1981. Since 1985 he has been an adjunct professor at the University of Illinois at Chicago School of Architecture and since 1995 a lecturer at Northwestern University's Engineering School. Mr. Friedlander is a member of the Design Build Institute of America and the former Chairman of its Professional Practices and Contracts Committee. He is on the Board of Governors of the American College of Construction Lawyers and the Chair of its Project Delivery Systems Committee from 2000-2005, and is currently President-Elect of the Society of Illinois Construction Attorneys.

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