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## Standard Construction Contracts: Some Advice to Construction Lawyers

Justin Sweet  
*University of California, Berkeley*

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## **CONSTRUCTION CONTRACT ISSUES**

### **STANDARD CONSTRUCTION CONTRACTS: SOME ADVICE TO CONSTRUCTION LAWYERS**

JUSTIN SWEET\*

#### **I. UTILITY OF STANDARD CONTRACTS**

Prototype contracts for design and construction services published by professional associations, which I shall refer to as “standard contracts,” are vital to the construction industry for several reasons. First, they provide a consensus as to allocating risks and responsibilities, remedies, and administrative practices. Second, they make the negotiation process more efficient and less costly. Finally, they can provide useful connectors between the different entities that must act together to accomplish the objectives of the parties to a construction project.

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\* John H. Boalt Professor of Law, University of California (Berkeley) Law School. B.A., 1951; L.L.B., 1953, University of Wisconsin.

Of course standard contracts do not eliminate the need for individual bargaining over variable terms, such as scope of services, time, and compensation. Nevertheless, the complexity of the construction project requires many additional terms, which a good standard contract provides. All parties should be grateful that many details have been worked out in advance and need not be negotiated. Also, a standardized contract that is accepted in the industry makes performance more efficient. Familiarity makes compliance easier. Clearly, those who plan construction transactions benefit greatly from standardized contracts.

To those litigating construction disputes, however, standardized contracts are a mixed blessing. On the positive side, contractual terms at issue may have been interpreted in prior cases. These precedents should make the litigation outcome more predictable. Standard contracts also provide evidence of industry custom.<sup>1</sup> On the negative side, however, parties commonly fail to follow the procedures specified in a standardized contract. Failure to follow these procedures creates difficult questions of waiver, estoppel, and abandonment.<sup>2</sup>

Additionally, contract interpretation problems are more difficult when the language is prepared by a third party, such as the American Institute of Architects (AIA). Usually a court seeks the intention of the parties, but intent may be difficult to ascertain when the parties, in many instances, had no particular input regarding particular language. If so, do we look to the intention of the drafters, the third parties? Who are they? How does a court find their intention?<sup>3</sup> A standard contract can create another litigation difficulty: untangling the terms when an ill-suited standard contract is selected.

Finally, standard contracts often appear to be adhesion con-

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1. See *Meltzer v. Zoller*, 520 F. Supp. 847, 856 (D.N.J. 1981) (standard contract between architectural firm and construction company was held to demonstrate that construction company, not ultimate consumer, was the commissioning party for architectural drawings).

2. See J. SWEET, *LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING, AND THE CONSTRUCTION PROCESS* § 25.04(G) (4th ed. 1989) (analyzing difficulties involved in change order mechanisms, including problems of apparent authority to make a change, constructive changes, and waiver of requirements that change orders be in writing).

3. See *Harris v. Dyer*, 292 Or. 233, 637 P.2d 918 (1981) (in dispute involving whether attorney fees are recoverable in action under standard contract, court held that contract's reference to "applicable law" allowed application of Oregon statute providing reasonable attorney fees).

tracts. The law has not yet developed skillful tools for refining the adhesion contract classification. Arguably, except for simple home-improvement contracts like those for a house-painting job, most standard contracts for design and construction should not be looked upon as adhesion contracts. Perhaps an unsophisticated and inexperienced client who retains an architect on an AIA standard contract should be given adhesion protection so that any ambiguity will be resolved against the architect. Nevertheless, most standard design and construction contracts, whose parties are more knowledgeable and have more equal bargaining power, generally are not adhesion contracts despite the fact that a printed, prepared contract is supplied by one party, which the other simply accepts.<sup>4</sup>

Standard contracts also may be considered from the perspective of those associations that publish them. If the form is widely marketed and widely sold, such as those of the AIA, it generates profit. Even if profit is not the principal objective of the association, publishing standardized contracts advances the interests of the association members and keeps them paying their dues. While forms often are trumpeted as reflecting the best thinking of the entire construction industry, those involved must be realistic enough to recognize that the associations do look after their own members.

## II. THE STANDARD CONTRACT MARKET

Those who draft, advise upon, or negotiate contracts for design and construction must know the standard contract market. While most people in the construction community are familiar with contracts published by the AIA,<sup>5</sup> other standard contracts published for private transactions are often ignored. For example, the Engineers' Joint Contract Documents Committee (EJCDC),<sup>6</sup> a consortium of engineering associations, publishes

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4. See J. SWEET, SWEET ON CONSTRUCTION INDUSTRY CONTRACTS: MAJOR AIA DOCUMENTS § 3.4 (4th ed. 1989) (contrasting typical adhesion contract with the more party-neutral standard contract).

5. The American Institute of Architects, 1735 New York Ave. N.W., Washington, D.C. 20006.

AIA documents also can be purchased at its chapter offices. See also *infra* notes 48-68 and accompanying text.

6. National Society of Professional Engineers, 1420 King Street, Alexandria, VA

standard contracts generally known as National Society of Professional Engineers (NSPE) standard contracts. The Associated General Contractors (AGC)<sup>7</sup> also has begun to publish standard contracts. Additionally, the American Specialty Subcontractors (ASA)<sup>8</sup> has published standard subcontract forms. A newer association, the Construction Managers Association (CMA),<sup>9</sup> has entered the standard contract market. While such standard contracts are drafted with the private contract in mind, AIA forms sometimes are used by public entities when they have the power to do so or they do not have the infrastructure to draft their own contracts.

In addition to the standard contracts published nationally, similar prototype forms are published locally, such as those made in Chicago, Pittsburgh, and California. Local contracts, although often reflecting local practices, generally are not as well crafted as the national forms. Frequently, local lawyers who draft contract forms do not have the resources available to the national groups, nor are they subject to the careful monitoring accorded the creation of forms by national groups.

An attorney also should be familiar with contracts used by public entities. Most construction lawyers are aware of, although often unfamiliar with, the forms used by federal agencies that currently are found in the Federal Acquisitions Regulations.<sup>10</sup> They also are likely to be familiar with standard contracts used by large-scale contracting agencies within their state. Further, if the city is large enough, lawyers may be aware of the standardized contracts that must be used if one deals with municipal entities.

Why should a lawyer who works in the *private* construction sector be aware of public contracts? Why should an attorney who represents a client in a *public* transaction want to be aware of what is going on in the private construction sector? Aside from the occasional use public entities make of standard con-

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7. Associated General Contractors of America, 1957 E. St. N.W., Washington, D.C. 20006.

8. Associated Specialty Contractors, 7315 Wisconsin Avenue, Bethesda, MD 20814.

9. Construction Management Association of America, 12355 Sunrise Valley Dr., Suite 640, Reston, VA 22091.

10. 48 C.F.R. §§ 53.301 to -303-WH-347 (1987).

tracts drafted primarily for private projects, construction transactions — public or private — share many common characteristics, such as progress payments, changes, and time extensions. As a result, a manual of all standard contracts can be valuable in drafting and negotiating. Even if the standard contract cannot be used as a prototype, it can be used to create a drafting check list for a customized form, for revisions in a prototype form, or for use in negotiation advocacy. That a well-regarded contract maker, such as the AIA or the Army Corps of Engineers, has employed a particular provision can be a powerful argument for including it in another contract.

### III. DRAFTING STRATEGIES

#### A. *General v. Supplementary Conditions*

Initially, one must differentiate general from supplementary conditions. Standard contracts, as that term is used in this article, include both basic agreement forms and what are known as “general conditions.” Basic agreement forms, such as AIA Document A101,<sup>11</sup> have blanks for the parties, price, and time. Other provisions measure the time commitment and structure the progress payments. On the other hand, “general conditions,” such as those found in AIA Document A201,<sup>12</sup> are a complex set of rules that cover problems — such as claims, disputes, subcontracting, changes, time, warranties, protection of property, insurance, remedies, and termination — that routinely arise in construction contracts. “General conditions” are “general” in the sense that they provide rules for a variety of transactions. They, however, are not “conditions” in a technical legal sense at all. Even experienced owners who do not use national standard contracts will develop their own general conditions for use in repeated transactions.

Even if a standard contract is used, some general conditions must be supplemented. For example, the *details* of insurance

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11. THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT A101, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR (1987) [hereinafter AIA Doc. A101].

12. THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION (1987) [hereinafter AIA Doc. A201].

provisions are not sufficiently standardized to be included in general conditions drafted for nationwide use. These are handled in supplementary conditions. Similarly, local statutes may make it essential to modify or eliminate certain provisions in a standard contract, such as those that deal with indemnification or arbitration. If a national standard contract is not used, the drafter of a customized contract still may borrow provisions from a standardized contract. Alternatively, such a drafter might use a standard contract, but modify it where needed by a lengthy set of supplementary conditions.

### *B. Choices: Customized or Standard Contract?*

Suppose, as is common, that the owner is structuring the contractual aspects of the transaction. His attorney must be prepared to recommend and implement either a customized contract, a specially prepared contract, or a standard contract.<sup>13</sup> The choice depends upon whether the attributes of the transaction fit into the basic assumptions of the standardized contract. Put briefly, the most frequently used AIA documents, such as A101 and A201, assume the following in a transaction: the design is prepared by an independent architect; the design then is put out for competitive bidding; the lowest responsible bidder is awarded the contract on a fixed-price basis; the successful bidder is given access to the site and the power to determine how to execute the design; and the architect plays a central role in administering the contract. If the transaction does not fit all these contours, unless the contract will be made by negotiation instead of bidding, a customized contract should be used; drastically modifying a standard contract is difficult and hazardous. Therefore, any recommendation to use a standardized contract — because it is quicker and cheaper — must be a tentative one. Standardized contracts have characteristics that may not fit the needs of a particular transaction. The attorney ultimately may recommend that the owner select a customized contract after *tentatively* deciding to use a standardized contract. The following discussion shall emphasize criteria that an attorney should consider prior to making the tentative decision to recommend

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13. Conflict of interest is a possible problem here. One choice generates a fee; the other generates a much lower fee, for advice and perhaps modification.

use of a standardized contract.

### C. *Tight or Flexible Contract?*

The lawyer must determine how important it is to protect the fixed-price contract and whether the client will pay the "cost" of such protection. If a client wishes to protect the fixed price by using a tight contract, all or *most* risks must be placed on the contractor. A tight contract, one protecting the contract price and precluding claims, seeks to prevent claims that may arise if things do not go as the contractor plans. Therefore, this type contract should generate a higher bid or negotiated price. A prudent contractor should anticipate unforeseen costs and build them into the contract price. Even so, the fiercely competitive construction industry or particular market conditions may generate a "gambler" — a contractor who will *not* build risks into the contract price. A gambler wants to win out over the others at all costs and may plan to "beat" the fixed price by claims. Nevertheless, the owner may accept a higher contract price if he can be sure that the price will stick or he will get a reliable, competent contract.

Alternatively, the owner may prefer a flexible contract, one that does not protect his fixed price but allows and even invites claims if unexpected events such as a change in site conditions, occur. This *should* generate a lower contract price. If the owner prefers a flexible contract, however, he must set aside a reserve or have other resources to pay for any "equitable adjustments" in price.

### D. *Passive or Active Owner?*

What role will the owner (or his representative, such as the architect or engineer) play during construction? Some owners wish to play an active role in construction with the hope that his activity will ensure a successful project. An active owner may force the prime contractor to use designated subcontractors and may even insist on approving the subcontract himself. He may give himself broad interventionary powers, such as the power to stop or suspend the work, the power to correct defective work, and the power to conduct careful inspections throughout the project. Other owners, however, take a more passive role. For



various reasons, they choose to give the contractor the maximum control over how the work is to be performed, particularly the management of subcontractors.

Clearly, as with the choice to use a tight contract, the choice to take an active role entails certain risks. The active owner must know when and how to intervene and also may face a higher price if the contractor foresees excessive interference. Furthermore, with control comes responsibility. An active owner may not be able to assert that the contractor is an independent contractor, and the owner may find himself vicariously liable for the contractor's negligence.<sup>14</sup> Similarly, if the owner intervenes too much in the contractor's sphere of expertise, he will find it difficult to hold the contractor accountable when things do not work out as planned.<sup>15</sup>

### *E. Architect/Engineer: An Interpreter and Judge?*

Traditionally, in addition to creating the design, American architects and engineers have played an important administrative role during performance. They may be given authority to make interpretations, stop the work, reject work, order corrections in the work, and resolve disputes — to name some of the more important powers. They also may be given power to change the work under certain circumstances and may be given a role in determining whether the power to terminate can be exercised. This issue will be explored more fully during a discussion of the documents. If the architect or engineer is not given these responsibilities, the duties may be performed by a construction manager or an owner's representative, such as an employee of the owner.

The construction management system does not merit further consideration in this context. If a construction management system is used, the planners likely will use a customized contract and borrow heavily from AIA or AGC construction management

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14. See, e.g., *City of Miami v. Perez*, 509 So.2d 343 (Fla. Dist. Ct. App.) (retention of right to inspect construction progress not a usurpation of control so as to make owner liable to contractor's injured employees), *reh'g denied*, 519 So. 2d 987 (Fla. Dist. Ct. App. 1987).

15. See, e.g., *City of Miami v. Perez*, 509 So. 2d 343 (Fla. Dist. Ct. App. 1987) (retention of right to inspect construction progress not a usurpation of control so as to make owner liable to contractor's injured employees).

standard contracts.<sup>16</sup>

*F. Administration: "By the Book" or Casual?*

Will the project be administered "according to the book" or casually? Administering a project "according to the book" generates costs, requires a good deal of paperwork, and can slow the work progress. On the other hand, a casually administered contract can encourage disputes and make those disputes which do arise more difficult to resolve.

*G. Is the Standard Contract Accepted in the Industry?*

Often it is assumed that the owner can dictate the contract language and choose any form he wishes. By the same token, the choice of a form with which the contractor is unfamiliar or one that has a poor reputation can generate a price increase by the carefully pricing contractor and can create additional administrative burdens. These are some of the reasons AIA contracts have been so successful. Despite the fact that many complain about AIA documents, one reason that the AIA is able to market 300,000 to 400,000 of its AIA Document A201 forms<sup>17</sup> each year is that construction process participants accept them. In addition, the alternatives — contracts drafted by local lawyers — may be worse since the costs would be formidable and the terms unfamiliar to most parties. Acceptance and familiarity are important aspects that have to be considered when determining whether to use a customized or a particular standardized contract.

*H. Adaptability to Change?*

AIA forms are not easy to modify. Although there are blanks in A101,<sup>18</sup> the form of agreement, there are no blanks in A201,<sup>19</sup> which contains the bulk of the contractual provisions. In contrast, the NSPE standard contracts published by the EJCDC

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16. See *Construction Management and Design-Build/Fast Track Constructing*, 46 LAW & CONTEMP. PROBS. 1 (1983).

17. See AIA Doc. A201, *supra* note 13.

18. See AIA Doc. A101, *supra* note 12.

19. See AIA Doc. A201, *supra* note 13.

make alternate fee arrangements and the choice to arbitrate easier to implement.<sup>20</sup>

### *I. Full-Sized or Abbreviated Standard Contracts?*

Contracting parties often are averse to the complex standardized contracts such as A101 and A201. As a result, the publishing associations are under pressure to develop shorter contracts that look less “legalistic.” As an illustration, the AIA publishes B151,<sup>21</sup> a shrunk version of B141,<sup>22</sup> and A107,<sup>23</sup> a shortened, combined version of A101 and A201. When lawyers are involved, however, those abbreviated forms are less likely to be used.

### *J. Summation*

The construction attorney must know enough about the standardized contracts available in order to decide whether to use one and, if a standardized contract is to be used, which one should be used. That question will be addressed next.

## IV. OBSERVATIONS ON SOME STANDARD CONTRACTS

### *A. Federal Procurement Standard Contracts*

Although the emphasis in this article is upon standard contracts for *private* projects, a look at the standard Federal Procurement construction contracts is warranted. The leading stan-

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20. Compare ENGINEERS JOINT CONTRACTS DOCUMENTS COMMITTEE, EJCDC No. 1910-1, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ENGINEER FOR PROFESSIONAL SERVICES (1984) [hereinafter EJCDC No. 1910-1] with ENGINEERS JOINT CONTRACTS DOCUMENTS COMMITTEE, EJCDC No. 1910-8, STANDARD GENERAL CONDITIONS OF THE CONSTRUCTION CONTRACT (1983) [hereinafter EJCDC No. 1910-8]. While this factor may be along the margins, I point to it because I would like those who publish standardized contracts to facilitate customizing the transaction to meet the parties’ particular needs.

21. THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT B151, ABBREVIATED FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT (1987).

22. THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT B141, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT (1987) [hereinafter AIA Doc. B141].

23. THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT A107, ABBREVIATED FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR (1987).

standard Federal Procurement construction contracts are those created for the Army Corps of Engineers and General Services Administration. Such contracts are heavily regulated by statute and regulation, and they fit into an administrative bureaucratic structure designed to ensure accountability for public funds.

Federal procurement is used to further national social and economic objectives. In these projects the government will be represented by contracting officers, usually people experienced in construction, who can call upon an experienced technical and legal staff. The contracting officers will be held accountable if public funds are misused. Initially, they also will resolve disputes; however, if a party is not satisfied, he can appeal to the United States Claims Court or an agency board of appeals. Standard Federal Procurement contracts reflect the importance of avoiding corruption in awarding such public contracts and accomplishing the social, political, and economic goals of the federal government.

With this background, the article will focus briefly on some characteristics of the standard federal procurement construction contract. These contracts contain provisions dealing with affirmative action hiring policies,<sup>24</sup> as well as subcontractor set-asides for minorities, women, and small businesses.<sup>25</sup> Other provisions require that wages must be equivalent to those prevailing in the area,<sup>26</sup> that certain equipment must be made in United States,<sup>27</sup> that the United States Comptroller General can examine the contractor's records,<sup>28</sup> and that defective pricing supplied by contractors will invoke certain remedies.<sup>29</sup> Many provisions deal with the accountability of public funds.<sup>30</sup>

These provisions would not be included in most private contracts. Nevertheless, the experienced construction lawyer should be aware of them because they may be useful if a private owner wishes to implement similar objectives. For example, a church may decide to require affirmative action hiring policies or subcontractor set-asides for a church construction project.

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24. See 48 C.F.R. §§ 52.222-26, -27, -35, -36 (1987).

25. See *id.* §§ 52.219-8, -9.

26. See 40 U.S.C. § 276a to a-7 (1982).

27. See 48 C.F.R. § 52.225-5 (1987).

28. See *id.* § 52.215-1.

29. See *id.* § 52.214-27.

30. See, e.g., *id.* § 52-217-1 (limitation of price and contractor obligations).

There are, of course, many provisions that deal with the ordinary routine aspects of all construction, such as scheduling,<sup>31</sup> inspection,<sup>32</sup> changes,<sup>33</sup> and termination.<sup>34</sup> The federal procurement contracts are flexible rather than tight. The contractor can recover delay damages under the suspension of work clause<sup>35</sup> and equitable adjustments under the differing site conditions clause.<sup>36</sup> Additionally, the federal procurement disputes process at least in the view of some tends to award something to contractor claimants.<sup>37</sup> Some provisions, however, such as those regulating inspections<sup>38</sup> and schedules,<sup>39</sup> reflect a strictness and rigor that goes beyond what is found in private standard contracts such as those of AIA. Finally, the sovereign's need for flexibility in such contracts is reflected in convenience termination power<sup>40</sup> and the power to suspend.<sup>41</sup>

While lawyers who deal with private transactions are not likely to incorporate most of these provisions, one can learn from almost any construction contract. For example, the owner under AIA Document A201 does not know for sure if he can order a change that simply accelerates the work,<sup>42</sup> yet this power clearly is found in federal procurement contracts.<sup>43</sup> This may be an indication to lawyers that the power to make schedule and time commitment changes is useful for private owners as well, and the language used in federal procurement forms may be used in private contracts.

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31. *See id.* § 52.236-15.

32. *See id.* § 52.246-12.

33. *See id.* § 52.243-4.

34. *See id.* §§ 52.249-1, -2.

35. *See id.* § 52.212-12.

36. *See id.* § 52.236-2. This provision allows a price adjustment if physical conditions are materially different than represented or expected.

37. *See id.* § 52.233-1.

38. *See id.* § 52.246-12.

39. *See id.* § 52.236-15.

40. *See id.* § 52.249-1, -2.

41. *See id.* § 52.212-12.

42. AIA Doc. A201, *supra* note 12, is unclear. *See id.* § 4.3.1.

43. *See* Federal Acquisition Regulations, 48 C.F.R. § 52.243-4 (1987).

## *B. Standard Contracts for Private Projects*

### *1. General Characteristics: Compared to Owner-Prepared Contracts*

Any group that publishes nationally used standard contracts hopes to advance its own interests and those of its members. When these concerns do not control the drafting decision, the publishers generally seek a solution that reflects industry practices on a national basis and does not put one party at the mercy of the other. If a national practice cannot be determined, such as in precedence of documents,<sup>44</sup> the matter is not covered; it is a "localism" left to supplementary conditions.

Contracts drafted by one of the parties to the contract, typically the owner, demonstrate an attempt to take every edge for this owner. In such contracts, owners retain complete control over the construction process. Such an owner will reserve to himself important control devices: the right to terminate the work at his own convenience, to suspend the work if he so wishes, to have an unrestrained power to change the work, to have a power to stop the work, and to correct any defective work.

Similarly, such owners take for themselves the power to resolve disputes and, subject to limited judicial control, the power to make their decisions final and binding. Further, they may give themselves the power to interpret the contract, to determine how far the work has proceeded, whether the work meets the requirements of the contract, whether and to what extent amounts may be withheld from any progress payments, whether the contractor is entitled to a time extension, and whether the contractor has completed the contract.

In contrast, forms drafted by the national associations tend to moderate these control devices and seek to avoid giving arbitrary powers to either party. This is true even in contracts such as AIA Document B141, AIA's standard contract for design services. Provisions in these contracts rarely allow one party in its own discretion and judgment to determine disputed questions.

This does not mean that construction contracts drafted by

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44. Such a clause prefers one contract document over another, such as specification over drawings. See Federal Acquisition Regulations, 48 C.F.R. § 52.236-21 (1987).

the professional associations do not reserve some of the traditional controls that owners always have taken for themselves in their contracts. But if owner control is reserved, the control provisions are likely to be cast in objective terms and often are balanced by making some concessions to the other party. For example, the AIA gives the owner the power to order changes unilaterally; this power, however, is limited to the general scope of the work and gives the contractor cost plus overhead and profit if the parties do not agree.<sup>45</sup> Also, the AIA gives the owner the power to suspend the work at his own convenience, but provides the contractor a generous price adjustment if the suspension power is exercised.<sup>46</sup>

For these reasons, contractors generally prefer a form drafted by a professional association to one drafted by the owner. Similarly, subcontractors prefer a form drafted by either AIA or AGC to one drafted by a prime contractor. Finally, it goes without saying that architects prefer a contract drafted by the AIA to one drafted by a private or a public owner.

## 2. AIA

AIA documents are flexible and not tight contracts. One example of these contracts is the B141 Document.<sup>47</sup> Suppose the owner engages an architect on the basis of B141 with an estimated construction cost of \$1,000,000 and a stipulated fee of six percent of construction costs. Clearly, the owner should not assume that the architectural services will be limited to \$60,000. Only if everything went unbelievably well would the basic fee stick. But if *anything* did not go in accordance with the ideal, the owner would pay more than \$60,000. Certain events spelled out in B141 grant the architect equitable adjustments.<sup>48</sup> Most importantly, B141 provides very basic services and lists many other services that, if performed, earn the architect compensation in addition to the basic fee.<sup>49</sup> While this extra protection for the architect may be justified, since owners vary greatly in the

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45. See AIA Doc. A201, *supra* note 13, ¶¶ 7.3.1, 7.3.6.

46. See *id.* ¶¶ 14.3.1 to -3.3.

47. See AIA Doc. B141, *supra* note 23.

48. Cf. *id.* ¶ 8.2 (when owner suspends work for more than 30 consecutive days, and then resumes work, architect given equitable adjustment).

49. See *id.* Art. 3.

scope of services they want performed, clearly the contract does not protect any "contract price."

Although the architects' role will be discussed more fully later in this article, it is important to note at this point that B141 gives architects a relatively passive role during the construction process. Architects are expected to visit the construction site and check the work at various intervals to determine how far it has proceeded, but they are *not* expected to conduct intense inspections until the contractor asserts that the work has been substantially completed.<sup>50</sup> Also, B141 seeks to protect the architects' fees even if the project is abandoned, usually for excess costs or failure to get money or permits. Under AIA contracts, architects do not risk going unpaid for their services.<sup>51</sup>

Despite the protectiveness of B141, the AIA has not reserved the types of arbitrary control that would be taken by a strong owner retaining an architect; it has not even reserved the type of control that a strong architect would provide in his contracts with weaker clients. The prestige of the association precludes heavy-handed provisions.

A second category of AIA documents is the construction contract, exemplified by the A101 and A201. Again, these are flexible contracts, not ones that seek to put all risks on the contractor, thereby protecting price and time provisions. Time extensions, except those for weather, can be granted liberally.<sup>52</sup> Delay damages claims are not barred<sup>53</sup> and contractors can recover if subsurface conditions turn out to be different from those represented or those usually found at the site.<sup>54</sup> Additionally, the change order pricing mechanism is favorable to the contractor.<sup>55</sup> Again, like B141, the owner who has a fixed-price contract and uses an A101 and A201 should assume that the ultimate payout to the contractor will substantially exceed the original fixed price, mainly due to changes and delay and disruption claims. To be sure, some of the increase may be related to design changes that may be the architect's fault or ordered by the

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50. See *id.* ¶¶ 2.6.5, 2.6.6.

51. See *id.* ¶¶ 5.2.1 to -2.5 (cost overruns), 8.3 (abandonment of project).

52. See AIA Doc. A201, *supra* note 13, ¶¶ 4.3.8.2, 8.3.1.

53. See *id.* ¶ 8.3.3.

54. See *id.* ¶ 4.3.6.

55. See *id.* ¶ 7.3.6 (in absence of agreement, contractor receives cost plus overhead and profit).



owner. A101 and A201, however, are not tight contracts, particularly if compared to those used by state public entities. In that sense, they are closer to the flexible contracts used by the federal procurement agencies. Therefore, an owner who uses an AIA standard construction contract should put aside funds for contingencies.

Another area of concern is the owner's intervention powers under an A101 and A201 contract. To be sure, the owner has the traditional powers: the right to stop the work;<sup>56</sup> to reject defective work;<sup>57</sup> and to terminate the contract under certain circumstances.<sup>58</sup> Existing intervention powers usually, although not exclusively, are exercised through the architect.<sup>59</sup> On the whole, however, the contract creates a passive owner. The owner turns over the site and control to the contractor, who is solely responsible for supervising and directing the construction.<sup>60</sup>

This contractual design is quite different from those created by contracts drafted by experienced owners. To illustrate, the AIA documents do not place serious pace requirements on the contractor.<sup>61</sup> The owner need not approve the contractor's schedule.<sup>62</sup> The contractor need not list subcontractors in advance.<sup>63</sup> The owner cannot remove the contractor's superintendent.<sup>64</sup> Conversely, in contracts drafted by experienced owners, such owners take greater control over scheduling and subcontracting, and they usually reserve the power to remove contractor's superintendent.

Great controversy has arisen over the complex dispute procedures required under the current A101 and A201. Good or bad, (most do not approve them) then since they contain quite long and detailed procedural rules, these forms clearly are com-

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56. *See id.* ¶ 2.3.1.

57. *See id.* ¶ 4.2.6 (architect has right to reject defective work).

58. *See id.* ¶¶ 14.2.1 to -2.4.

59. *See id.* ¶¶ 4.2.1 to -1.3. For example, the architect shall advise and consult with owner, observe the work, provide communication channel between owner and contractor, have authority to reject the work, authorize minor changes, inspect the work, and handle requests from owner or contractor regarding work performance.

60. *See id.* ¶¶ 3.3.1 to -3.4 (construction schedule shall be revised as conditions require and need only provide "expeditious and practicable execution" of the work).

61. *See id.* ¶ 3.10.1.

62. *See id.*

63. *See id.* ¶ 5.3.1.

64. *See id.* ¶ 3.9.1.

plex. These documents give the architect specific time deadlines and instructions.<sup>65</sup> The architect must make recommendations or decide important matters at various stages before there is even a formal claim or dispute.<sup>66</sup> AIA documents may not be suitable for smaller- or medium-sized construction projects if the participants do not have the patience or infrastructure either to comply with these provisions or to do the needed paperwork. For such transactions, A101 and A201 contracts simply are unworkable.

The AIA gives the architect the power to resolve disputes initially; either party has the power to demand arbitration.<sup>67</sup> The AIA always has taken the position that arbitration is a part of the construction process. Many of its provisions that use an abstract standard, such as "general scope of the work," are justified by the assumption that an arbitrator will make them concrete when the parties cannot agree.

Despite the universal recognition that the AIA's documents protect architects, its documents are commonly used in the industry. AIA contracts are relatively clear and complete. Moreover, few viable alternative documents exist judged from the perspective of cost or acceptability. To sum up, AIA documents are flexible, postulate a passive owner, grant the architect broad power but little responsibility, and create a byzantine administrative system.

### 3. *EJCDC (NSPE)*

The Engineers Joint Construction Document Committee is another professional group that drafts standard construction contracts, which are commonly known as National Society of Professional Engineers (NSPE) contracts. In many ways, NSPE contracts are similar to AIA documents. Both groups use the same insurance counsel, who has significant power over liability-sensitive language. Both seek to relieve the design professional

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65. See *id.* ¶¶ 4.3.1 to -4.4. Within ten days of receipt of a claim, the architect must request more evidence, inform the parties when a decision will be reached, recommend approval of the claim by the other party, or suggest a compromise. He also makes a tentative decision before he makes a final one.

66. See *id.* ¶¶ 4.3.6 (unforeseen subsurface conditions); 7.3.6 (pricing changes); 14.2.2 (termination).

67. See *id.* ¶¶ 4.5.1 to -5.7.

from liability by making the role of architect or engineer passive. Finally, both groups publish flexible, rather than tight, contracts.

Despite these similarities, important differences should be noted. The AIA allows the owner to step into the subcontracting process more vigorously than does the NSPE.<sup>68</sup> The NSPE has a clearer and sharper method of dealing with time measurements.<sup>69</sup> The NSPE gives the owner the power to terminate at its own convenience, while the AIA does not.<sup>70</sup> The NSPE agreement tends to hammer exculpations home, obviously intending to influence judge, jury, or arbitrator.<sup>71</sup>

The NSPE makes arbitration easier to delete than does the AIA, by providing a separate sheet that can be detached if arbitration is not to be used.<sup>72</sup> Similarly, NSPE documents insert an assortment of compensation schemes in separate pages that can be removed if inappropriate. (The AIA tried and abandoned this system.) In NSPE contracts for design, greater emphasis is placed on time commitments in the design process than we see in AIA documents.<sup>73</sup>

Construction lawyers should collect NSPE documents and study them carefully. In some instances, these forms provide better solutions than do AIA documents. Nevertheless, NSPE documents should be used only in engineering projects. Although they do not have the wide-spread acceptance of AIA documents, the approach and language of NSPE contract forms can be incorporated into any customized contract or even a contract made principally on the basis of AIA standard contracts.

#### 4. AGC

While the Associated General Contractors (AGC) is relatively new to standard contract-making, it has begun to take contractmaking more seriously. This group believes that the new methods of construction delivery services, such as the injection

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68. See EJCDC 1910-8, *supra* note 20, ¶ 6.8.2 (need not list unless required by supplementary conditions).

69. See *id.* ¶ 2.3.

70. See *id.* ¶ 15.4.

71. See *id.* ¶ 9.13 - 16.

72. See *id.* Art. 16.

73. See EJCDC No. 1910-1, *supra* note 21, ¶¶ 4.10, 4.11.

of the Construction Manager (CM) and the use of design-build,<sup>74</sup> will bring contractors into the process before the architect. If so, contractors can suggest the use of an AGC standard contract.

AGC contracts do not have the stature of AIA contracts. Owners, who control contract selection, usually will be suspicious of anything done by a contractor association. Even though owners are not happy with the minimal responsibility given architects by the AIA, they would rather trust a group of architects than a group of contractors. This fact notwithstanding, AGC's construction management contracts reflect the needs of the industry — for example, when a project depends on finding an entrepreneurial CM who will guarantee a price — the CM contracts made by AGC will be used more frequently than those of AIA. If the reputation of AGC documents grows and the contractor becomes involved in the planning phase of a project before the architect, AGC standard contracts likewise may grow in importance. Currently, AGC contracts compete with AIA contract forms only in construction management,<sup>75</sup> subcontract,<sup>76</sup> and design-build (standard contracts).<sup>77</sup> Note, however, that the

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74. Design-build is the construction method in which the contractor both designs and builds the structure.

75. Compare THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT 101/CM, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTORS, CONSTRUCTION MANAGEMENT EDITION (1980) and

THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT 201/CM, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, CONSTRUCTION MANAGEMENT EDITION (1980) and

THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT 141/CM, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT, CONSTRUCTION MANAGEMENT EDITION (1980) and

THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT 801/CM, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONSTRUCTION MANAGER (1980) with

THE ASSOCIATED GENERAL CONTRACTORS, AGC DOCUMENT No. 500, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONSTRUCTION MANAGER (GUARANTEED MAXIMUM PRICE OPTION) (1980) and

THE ASSOCIATED GENERAL CONTRACTORS, AGC DOCUMENT No. 510, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONSTRUCTION MANAGER (OWNER AWARDS ALL TRADE CONTRACTS) (1979).

76. Compare THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT A401, STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND SUBCONTRACTOR (1987) with

THE ASSOCIATED GENERAL CONTRACTORS, AGC DOCUMENT No. 600, SUBCONTRACT FOR BUILDING CONSTRUCTION (1984).

77. Compare THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT A191, STANDARD FORM OF AGREEMENTS BETWEEN OWNER AND DESIGN/BUILDER (1985) and

AGC is limited by its belief it must go to AIA for permission if wishes to use AIA language.

As expected in a contract drafted by a group of prime contractors, AGC Number 600,<sup>78</sup> its subcontract, is less attractive to a subcontractor than is AIA Document A401.<sup>79</sup> Another difference is that the AGC forms suggest using a construction manager who may do some of the work and guarantees a price, while AIA suggests a CM professional advisor.<sup>80</sup>

## V. SOME ADVICE

### A. *Customized or Standardized?*

The construction lawyer who wishes to do a good job for his client first should assemble as many of the standard forms as he can, organize them by contract type, and analyze them. Next he must make a tentative recommendation for the particular transaction for which he has been asked to draft a contract. Prior to making this recommendation, the lawyer should consider whether the owner is best served by a customized contract or by a standard contract. A customized contract should be used if the owner wishes to take a more interventional role, if the architect or engineer is not to perform in the way that design professionals usually perform, and if the contract is to be one with a tight fixed price. Also, if the owner does not prefer arbitration, as built into the standard contracts, a customized contract should

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THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT A491, STANDARD FORM OF AGREEMENTS BETWEEN DESIGN/BUILDER AND CONTRACTORS (1985) *and*

THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT B901, STANDARD FORM OF AGREEMENTS BETWEEN DESIGN/BUILDER AND ARCHITECT (1985) *with*

THE ASSOCIATED GENERAL CONTRACTORS, AGC DOCUMENT NO. 400 PRELIMINARY DESIGN-BUILD AGREEMENT *and*

THE ASSOCIATED GENERAL CONTRACTORS, AGC DOCUMENT 410, STANDARD FORM OF DESIGN-BUILD AGREEMENT AND GENERAL CONDITIONS BETWEEN OWNER AND CONTRACTOR (1982) *and*

THE ASSOCIATED GENERAL CONTRACTORS, AGC DOCUMENT NO. 415, STANDARD FORM OF DESIGN-BUILD AGREEMENT AND GENERAL CONDITIONS BETWEEN OWNER AND CONTRACTOR (WHERE THE BASIS OF COMPENSATION IS A LUMP SUM) (1986) *and*

THE ASSOCIATED GENERAL CONTRACTORS, AGC DOCUMENT 420, STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND ARCHITECT (1979).

78. *See supra* note 76.

79. *See supra* note 76.

80. *See supra* note 75.

be considered seriously. On the other hand, a customized contract is more expensive to prepare and requires great skill. If an attorney does not have the skill and cannot justify the time needed to develop or procure a customized contract, he should suggest a standard contract. If no standard contract fits his client's needs, he should recommend that the client retain an attorney with the skill to draft a good customized contract.

### *B. Which Standard Contract?*

The standard contract that the lawyer selects, of course, depends upon the client and his bargaining situation. Generally, an architect will prefer a contract prepared by the AIA and an engineer would prefer to use one prepared by the NSPE. The choice as to construction management documents generally depends on whether the construction manager is going to perform services with his own forces and particularly on whether he is going to give a guaranteed maximum price. If he plans to do these things, the AGC standard contract should be used. If the construction manager is to be purely a professional advisor, AIA contracts should be used.

Because of the many different methods of construction management, almost any form selected likely will be insufficient. The owners who use construction management often are experienced and have their own ideas of what they wish the construction manager to do. Also, construction managers often are experienced and in the position to negotiate. Nonetheless, the attorney's most advisable course is to select an association form based on the needs of that particular transaction.

An owner who engages an architect or an engineer should not use an *unchanged* AIA or NSPE form. The best solution, however, is to start with these contracts and modify them to suit the needs of the owner, principally to scale down additional services or to cap the fee.

An owner who is going to make a construction contract for which any of the standard forms would be appropriate should select the forms published by the AIA. AIA forms have greater acceptability, and the parties probably will be familiar with these forms. While AIA forms sometimes are ponderous and in places unworkable, the parties may tailor the forms by deleting inapplicable provisions. If representing a contractor, an attorney

should prefer the forms published by the AIA. They are certainly much better than anything that an owner might supply.

Subcontractors usually prefer AIA Document A401, its standard subcontract, since the alternative is a contract drafted by the prime contractor's attorney, which gives the prime every possible advantage. (They also prefer that A201 be used as the prime contract general conditions but have little control over the choice of a prime contract form.) The next best choice for a subcontractor is AGC's standard subcontract. Any of these is better than a subcontract prepared by a prime contractor.

### *C. Conform to Law?*

Once a standard contract has been selected, the lawyer must check carefully to see whether statutes in his state make changes necessary. This is particularly true in the area of indemnification, but increasingly state laws affect payment.

Common-law indemnity rules as to specificity also must be checked and followed. If prime contractors wish to create a payment condition, in order to condition payment to the subcontractor upon payment to the prime contractor, they must check the applicable common law for specificity requirements. It always helps to be *very* specific here.

### *D. Short Forms?*

Should the full-scale forms or the short forms be used? For large transactions, the full contract form is usually a better choice than any of the abbreviated versions. Short forms principally are employed when parties are hesitant to use contracts that appear too complex or legalistic. If complex contracts are proposed, attorneys probably will have to be brought into the negotiations. Assuming that attorneys are already there, there is no reason to use the shorter forms. While brevity is admirable, the full standard contracts are still preferred for construction.

### *E. Educating Contract Users*

The next step in contract making is to educate the parties who must administer the contract, including lawyers. One of the great advantages to AIA documents is that the parties are likely to have dealt with them before and need no re-education. This

familiarity is one reason to make changes in AIA documents only where clearly needed. In addition, making changes to a tightly constructed contract, such as those of an association published nationally, requires more technical skill than the average attorney can muster.

Those who administer the contract must be ordered to follow the rules. Sloppiness and hostility to paperwork pervade construction work. The parties to the contract will find it helpful to set up a mechanism that periodically ensures that the formal rules are being followed.

## VI. SUMMATION

The construction project is a complex enterprise with many entities participating in a venture designed to obtain a complex objective. These entities are connected to one another by sets of contracts detailing what each party must perform and the outcome if either or both fails to perform. Because of the complexity of the venture, sets of rules between the contracting parties are essential. Standard construction contracts provide generally accepted rules that facilitate performance and do so with minimal expense. To be sure, standardized contracts can be used improperly, but this does not deny their undoubted utility as invaluable “connectors” between participants. Lawyers interested in an efficient construction industry should welcome their existence but use them wisely.



