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I. INTRODUCTION

This article will review recent judicial decisions of significance in Virginia affecting owners, contractors, and design professionals in the construction context. It will also discuss the most significant changes to the American Institute of Architects ("AIA") standard owner/contractor and owner/architect contracts, as manifested by the issuance of new versions of these contracts in late 2007.

II. RECENT JUDICIAL DECISIONS

A. *Mechanic's Liens*

Over the course of the last several years a number of court decisions have addressed Virginia's mechanic's lien laws. One of the most significant is *Britt Construction, Inc. v. Magazzine Clean, L.L.C.*[1] In *Britt*, the Supreme Court of Virginia affirmed the trial court's decision invalidating twelve mechanic's liens filed by a general contractor against a construction project.[2] On its face, the ruling appears simple and straightforward. Prior to the lien filings, the General Assembly amended Virginia Code section 43-4 in 2003 to require the contractor to file, "along with the memorandum of lien," a "certification of mailing" stating that a copy of

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1. 271 Va. 58, 623 S.E.2d 886 (2006).

2. *Id.* at 61, 62, 64, 623 S.E.2d at 887, 889.

the memorandum had been sent to the owner's last known address.[3] The contractor in *Britt* did not file such certificate until over six months after his first lien filings and two months after his last.[4]

The Supreme Court of Virginia rejected the contractor's argument that the "certification" requirement was a mere notice provision and not part of the perfection process.[5] Instead, the court found that the General Assembly's choice of the words "file" and "along with" signaled a legislative intent for the certification and memorandum to be filed together in order to perfect the lien.[6] The court similarly rejected the contractor's argument that the General Assembly's failure to make the "certification" requirement an express condition of perfection, unlike the affirmative language to that effect in Virginia Code sections 43-7 and 43-9, signaled a legislative intent not to make filing the certification filing a perfection requirement.[7] The court reasoned that when a statute is clear on its face, looking to other statutes is unnecessary to interpret its meaning.[8]

It did not take long for an owner to attempt to use the legislative change to section 43-4 to nullify a subcontractor's lien claim. In *Capstone Contracting Co. v. American Eagle Self Storage, L.L.C.*, the owner contended that a subcontractor's failure to file its section 43-4 certificate at the time it filed its lien rendered the

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3. Act of Mar. 19, 2003, ch. 698, 2003 Va. Acts 931 (codified as amended at VA. CODE ANN. § 43-4 (Cum. Supp. 2008)).

4. *Britt*, 271 Va. at 61, 623 S.E.2d at 887.

5. *Id.* at 62, 623 S.E.2d at 887–88.

6. *Id.* at 63, 623 S.E.2d at 888–89. Apparently, the contractor in *Britt* did not argue that "along with" does not mean "at the same time." A credible argument could have been made that "along with" simply adds a notice requirement without specifying when it must be satisfied. The *Britt* decision, however, having interpreted "along with" temporally, has now foreclosed that argument.

7. *Id.* at 64, 623 S.E.2d at 889. Both Virginia Code sections 43-7 and 43-9 expressly state that in addition to complying with the requirements of section 43-4, subcontractors "in order to perfect the lien . . . shall . . . give notice in writing to the owner of the property." VA. CODE ANN. §§ 43-7, 43-9 (Repl. Vol. 2002 & Cum. Supp. 2008).

8. *Britt*, 271 Va. at 64, 623 S.E.2d at 889. The *Britt* decision does not address one argument that the contractor could have made to invite a different result. In *Mills v. Moore's Super Stores, Inc.*, the court held that a subcontractor's obligation to give notice to the owner, as set forth in Virginia Code sections 43-7 and 43-9, need not be given at the time the lien is filed, even though such notice is part of the perfection process. 217 Va. 276, 279–80, 227 S.E.2d 719, 722–23 (1976). Thus, the subcontractor who did not send the notice until after the six-month perfection period nevertheless possessed a valid claim. *Id.* at 282–83, 227 S.E.2d at 724. How can this decision and *Britt* be reconciled?

lien invalid.[9] The owner argued that a subcontractor's perfection statute, section 43-7, requires the subcontractor not only to give notice of the lien to the owner, but also to "comply with . . . 43-4."[10] Compliance, the owner contended, required the subcontractor to file the section 43-4 certification with its memorandum.[11]

The trial court in *Capstone* rejected the owner's argument, finding that the "certification" requirement is only imposed on the general contractor based on limiting language in the statute.[12] Subcontractors, therefore, only need to file their memorandum and give notice to the owner of the amount and character of the lien as mandated in their particular perfection statutes.[13]

In *T&M Electric, Inc. v. ProLogis Trust*, the trial court rejected efforts by a general contractor and various subcontractors to advance lien claims against an owner for tenant improvements to the owner's building.[14] The court rejected the contention that under Virginia Code section 43-20, tenant improvements could be the basis for liens affecting the owner's property rights.[15] The court observed there was no credible evidence that: (1) the owner had authorized the improvements (mere consent not being sufficient); (2) the owner was an agent of the tenant, or vice versa; (3) the claimants had notified the owner that they were looking to it for payment while performing their work; or (4) the lease required the tenant to make the improvements.[16] Consequently,

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9. 72 Va. Cir. 473, 474 (Cir. Ct. 2007) (Prince George County).

10. *Id.*

11. *Id.*

12. *Id.* at 474–75. By its own terms, the certificate requirement of section 43-4 applies only to "a lien claimant who is a general contractor." *See* VA. CODE ANN. § 43-4 (Cum. Supp. 2008).

13. *See Capstone*, 72 Va. Cir. at 475. The court in *Capstone* did add that the subcontractor must also send a copy of the memorandum to the owner. *Id.* In 2007, the General Assembly modified Virginia Code section 43-4 to make clear what the *Capstone* court inferred, adding "and not lien claimants under §§ 43-7 and 43-9" to the statute to exclude expressly any obligation for subcontractors to comply with the "certificate" requirement. Act of Mar. 19, 2007, ch. 505, 2007 Va. Acts 689 (codified as amended at VA. CODE ANN. § 43-4 (Cum. Supp. 2008)).

14. 70 Va. Cir. 403, 405 (Cir. Ct. 2006) (Loudoun County).

15. *Id.* at 404–05.

16. *Id.* The court in *ProLogis* cited three prior Supreme Court of Virginia decisions as providing the source of factors that could have led to a different result but were absent in the instant case. *Id.* at 405 (citing Feuchtenberge v. Williamson, Carroll & Saunders, 137 Va. 578, 120 S.E. 257 (1923); Carter v. Keeton & Coleman, 112 Va. 307, 71 S.E. 554 (1911); Atlas Portland Cement Co. v. Main Line Realty Corp., 112 Va. 7, 70 S.E. 536 (1911)).

the claimants were limited to lien claims against the tenant's leasehold interest only.[17]

A defective affidavit led to invalidation of a mechanic's lien in *Artitech, Inc. v. Naser*.[18] In that case, a corporation filed a lien in which the memorandum and the requisite affidavit identified the claimant as the corporation itself.[19] The person signing the affidavit, however, failed to confirm that he had any authority to execute the memorandum on behalf of the corporation.[20] The court refused to allow the plaintiff to amend the affidavit over a year later and dismissed the suit.[21]

Finally, the trial court in *DLB, Inc. v. United Golf, Inc.*, demonstrated a more tolerant view regarding the contractor's filing defects.[22] In *DLB*, the contractor had filed its lien on only 225 of the 252 subdivision lots being improved, which led the owner to seek dismissal of the liens.[23] The trial court revised the lien claims by dividing the total monetary amount sought by the actual number of lots, and then permitting that pro rata amount to be placed on the 225 lots identified in the memorandum.[24]

B. *Bond Claims*

The question before the Supreme Court of Virginia in *APAC-Atlantic, Inc. v. General Insurance Co. of America* was whether a subcontractor on a public project could advance a payment bond claim greater than one year after it last furnished construction services.[25] The payment bond in question did not include a limitation period nor did it refer to Virginia Code section 2.2-4341(C), which sets forth the one-year limitation in the context of projects

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17. *Id.*

18. No. CL07-5431, 2008 Va. Cir. LEXIS 11, *2–3 (Cir. Ct. Feb. 19, 2008) (Fairfax County).

19. *Id.* at *1–2.

20. *Id.* at *2.

21. *Id.* at *2–3.

22. No. CL07000099-00, 2008 Va. Cir. LEXIS 25 (Cir. Ct. Mar. 31, 2008) (Warren County).

23. *Id.* at *1–2.

24. *Id.* at *2. The court in *DLB* relied upon *West Alexandria Properties, Inc. v. First Virginia Mortgage & Real Estate Investment Trust*, 221 Va. 134, 141, 267 S.E.2d 149, 153 (1980), and *First National Bank of Martinsville & Henry County v. Roy N. Ford Co.*, 219 Va. 942, 945, 252 S.E.2d 354, 356 (1979), as authority permitting judicial correction of the lien.

25. 273 Va. 682, 684–85, 643 S.E.2d 483, 483–84 (2007).

controlled by Virginia's Public Procurement Act (the "Public Procurement Act").[26] The contractor argued that the proper statute of limitations, in the absence of an express limitation in the bond, was the five-year, written-contract limitation set forth in Virginia Code section 8.01-246(2).[27] The court rejected this argument and applied the shorter bond statute, set forth in the Public Procurement Act, on the ground that the more specific statute, when a statutory conflict exists, must govern.[28]

The untimely filing of a claim also doomed a second-tier subcontractor's Miller Act[29] action in *Datastaff Technology Group, Inc. v. Centex Construction Co.*[30] In *Datastaff,* the subcontractor also failed to file its claim within the one-year limitation period mandated by the Miller Act.[31] The subcontractor claimed that it should be excused for its untimely filing under the doctrine of equitable estoppel.[32] In particular, the subcontractor contended that the general contractor and its surety should be estopped from raising a statute-of-limitations defense because they had led the subcontractor to mistakenly believe it was a third-tier subcontractor, which under the Miller Act (and the payment bond procured by the general contractor in compliance therewith) is not afforded surety protection.[33] The district court rejected the subcontractor's argument because the subcontractor had failed to produce any credible evidence to show that it had been "lulled" into inaction by anything the general contractor or its surety had done.[34] In fact, the court observed that the evidence demonstrat-

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26. *Id.* at 686, 643 S.E.2d at 485 (citing VA. CODE ANN. § 2.2-4341(C) (Repl. Vol. 2008) ("Any action on a payment bond shall be brought within one year after the day on which the person bringing such action last performed labor or last furnished or supplied materials.")).

27. *Id.* at 685, 686 n.1, 643 S.E.2d at 484, 485 n.1.

28. *Id.* at 686 n.1, 643 S.E.2d at 485 n.1. Dicta in the *APAC-Atlantic* opinion, relying on *Reliance Insurance Co. v. Trane Co.*, 212 Va. 394, 395, 184 S.E.2d 817, 818 (1971), suggests that a payment bond with an express limitation period greater than the one-year statutory limit set forth in Virginia Code section 2.2-4341(C) would be enforceable. *APAC-Atlantic*, 273 Va. at 685–86, 643 S.E.2d at 484–85.

29. *See* 40 U.S.C. § 3131 (2000).

30. 528 F. Supp. 2d 587 (E.D. Va. 2007).

31. *Id.* at 593 (citing 40 U.S.C. § 3133(b)(4) (2000)).

32. *Id.*

33. *Id.* Miller Act protection only extends to subcontractors (tier one) and their subcontractors (tier two). *See* 40 U.S.C. § 3133(b)(2).

34. *Datastaff*, 528 F. Supp. 2d at 595–97.

ed the general contractor and its surety had done nothing to mislead the subcontractor regarding its second-tier status.[35]

The subcontractor in *Datastaff* fared better on its quantum meruit claim. The district court denied the general contractor summary judgment on that claim because the record was not sufficiently developed on the issue of whether the contractor had been unjustly enriched by the subcontractor's work.[36] A principal consideration on that issue would be whether the general contractor had paid the first-tier subcontractor for the second-tier subcontractor's services.[37] In reaching this result, the court rejected the general contractor's argument that the presence of an express contract between it and the first-tier subcontractor precluded the imposition of an implied obligation to pay the second-tier contractor.[38]

Finally, in *New Viasys Holdings, L.L.C. v. Hanover Insurance Co.*, a contractor's failure to give timely notice of default of its subcontractor, when the indemnity bond expressly demanded such notice, doomed the contractor's bond claim.[39] In *New Viasys*, a general contractor on a Virginia public project required its subcontractor to provide an indemnity bond guaranteeing its performance.[40] The procured bond included a provision requiring that, upon the principal's default, notice of the date and nature of the default must be immediately delivered by certified mail to the surety.[41] The general contractor, however, did not provide such no-

35. *Id.* at 595. The court in *Datastaff* cited numerous federal cases holding that for equitable estoppel to apply, the defendant must take some action upon which the plaintiff reasonably relied in not pursuing the claim within the time required by the applicable statute of limitations. *Id.* at 593–94 (citing Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128–29 (4th Cir. 1987); U.S. *ex rel.* Humble Oil & Ref. Co. v. Fid. and Deposit Co. of N.Y., 402 F.2d 893, 898 (4th Cir. 1968)). The court also rejected the subcontractor's alternative constructive fraud claim on the ground that the same "reasonable reliance" requirement applicable to equitable estoppel applied to constructive fraud. *Id.* at 597 (citing Prospect Dev. Co. v. Bershader, 258 Va. 75, 86, 515 S.E.2d 291, 297 (1999); Evaluation Research Corp. v. Alequin, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994)).

36. *Id.* at 599.

37. *Id.* at 598 (citing Kern v. Freed Co., 224 Va. 678, 681, 299 S.E.2d 363, 365 (1983)). Another recent Virginia case identified another obvious ground for denying quantum meruit recovery—the subcontractor's deficient performance precluded any obligation to pay. *See* Davis Bros. Constr. Co. v. City of Richmond, 70 Va. Cir. 409, 411 (Cir. Ct. 2006) (Richmond City).

38. *Datastaff*, 528 F. Supp. 2d at 598–99.

39. No. 2:06cv488, 2007 U.S. Dist. LEXIS 17924, at *13 (E.D. Va. Mar. 12, 2007).

40. *Id.* at *1–2.

41. *Id.* at *3.

tice for over a year after the initial default, instead permitting the subcontractor to attempt to cure before it ultimately filed for bankruptcy.[42] The district court held that notice was a "condition precedent" to the surety's obligation to honor the bond, that the requirement for "immediate" notice in the bond meant "reasonable" notice, and that the general contractor, who waited over a year to give such notice, could not recover under the bond because of its untimely notice.[43]

C. *Statute of Limitations and Repose*

The recent case of *Birdneck Villas Condominium Ass'n v. Birdneck Villas, L.L.C.*, dealt with a number of interesting statute of repose and limitations issues.[44] In *Birdneck*, a condominium association brought suit against the developer for a variety of building defects.[45] The developer brought a third-party claim against the contractor, which, in turn, brought fourth-party breach-of-contract claims against various subcontractors.[46] The subcontractor claims were filed more than five years after completion of the project.[47]

One of the fourth-party subcontractors filed a special plea to the general contractor's claim on the ground that the action was barred by Virginia's five-year statute of repose, Virginia Code section 8.01-250.[48] The court rejected the special plea on the ground that the statute of repose in Virginia only applies to tort claims and consequently has no application to contract actions.[49] In reaching this result, the court relied upon numerous federal and

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42. *Id.* at *3–4.

43. *Id.* at *9–10 (citing Fid. & Deposit Co. of Md. v. Courtney, 186 U.S. 342, 346–47 (1902)). The court in *New Viasys* also rejected the general contractor's equitable estoppel argument because it produced no evidence to suggest that it had relied to its detriment on any act by the surety. *Id.* at *16–17. The surety could not have so acted because it had no knowledge of the default until the "reasonable" notice time period had already passed. *Id.*

44. 73 Va. Cir. 175 (Cir. Ct. 2007) (Virginia Beach City).

45. *Id.* at 175–76.

46. *Id.*

47. *Id.* at 176.

48. *Id.* Virginia Code section 8.01-250 bars any claim for "injury to property . . . or for bodily injury or wrongful death, arising out of . . . construction . . . more than five years after the performance or furnishing of such services" giving rise to the claim. VA. CODE ANN. § 8.01-250 (Repl. Vol. 2007 & Supp. 2008).

49. *Birdneck*, 73 Va. Cir. at 177–78.

state cases that had similarly interpreted the repose statute.[50] In the process, the trial court rejected the fourth-party subcontractor's contention that the Supreme Court of Virginia's recent decision in *Baker v. Poolservice Co.*,[51] required a different result.[52] The court noted that the *Baker* case involved claims of negligence and breach of warranty under the Uniform Commercial Code arising out of the death of an infant in a swimming pool—claims that the court noted were essentially tort-based.[53] Given that *Baker* involved no contract claims, its holding was inapplicable to the general contractor's contract claims in *Birdneck*.[54]

The court in *Birdneck* then considered a novel "relation back" argument posed by the fourth-party subcontractor.[55] Though the opinion does not detail the subcontractor's relation-back contention, it does clearly hold that an amendment to a pleading involving the statute of repose will not "relate back" to the original pleading under Virginia Code section 8.01-6.1 because that provision by its express terms only applies to the "statute of limitations."[56]

D. *Contribution and Indemnity Claims*

The *Birdneck* case also addressed interesting issues of contribution and indemnity. In its claims against its subcontractors, the general contractor sought contribution and indemnity relative to the developer's third-party claim.[57] The court rejected the con-

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50. *Id.* at 177 (citing Delon Hampton & Assocs. v. Wash. Metro. Area Transit Auth., 943 F.2d 355, 362 (4th Cir. 1991); Fid. & Deposit Co. of Md. v. Bristol Steel & Iron Works, Inc., 722 F.2d 1160, 1162 (4th Cir. 1983); Beckner v. Twin City Fire Ins. Co., 58 Va. Cir. 544, 554 (Cir. Ct. 2002) (Roanoke)). For an argument that the statute of repose does apply to contract claims, which has yet to be accepted by Virginia courts, see D. Stan Barnhill, *Does the Statute of Repose Apply to Contract Claims?*, VA. LAW., Jan. 1993, at 29.

51. 272 Va. 677, 636 S.E.2d 360 (2006).

52. *Birdneck*, 73 Va. Cir. at 177.

53. *Id.* at 177–78.

54. *Id.*

55. *See id.* at 178.

56. *Id.* (citing VA. CODE ANN. § 8.01-6.1 (Repl. Vol. 2007 & Supp. 2008) ("[A]n amendment to a pleading changing or adding a claim or defense against a party relates back to the date of the original pleading for purposes of the statute of limitations.")). The court in *Birdneck* did grant another fourth-party defendant's statute of limitations plea because it had not been sued within three years of when it last provided services under an oral contract. *Id.* at 179. Oral contracts are governed by Virginia's three-year statute of limitations. *See* VA. CODE ANN. § 8.01-246(4) (Repl. Vol. 2007 & Supp. 2008).

57. *Birdneck*, 73 Va. Cir. at 175–76.

tribution claim because the contractor was seeking to pass all liability to its subcontractors instead of only a proportionate share of a "'common burden'" among other tortfeasors.[58]

The court also rejected the general contractor's indemnity claim, noting that there was no express indemnity provision to rely on because the general contractor did not have written agreements with any of its subcontractors.[59] The court refused to find an implied indemnity right arising out of the oral agreements.[60] Although the court observed that the Supreme Court of Virginia had not yet addressed the issue, it noted that other courts had refused to imply indemnity except where a "'special relationship'" existed, not merely where a contractual relationship existed between a contractor and subcontractor.[61]

Another interesting case raising questions about the reach of contribution in the construction context is the recent federal case of *St. Paul Guardian Insurance Co. v. Northside Electric Co.*[62] In *Northside*, the insurer for a property owner brought an action against the general contractor and electrical subcontractor for damages arising from an electrical fire occurring at the owner's facility.[63] The electrical subcontractor, in turn, brought a third-party action against the manufacturer of the electrical equipment involved in the fire.[64] The equipment manufacturer proceeded to file a fourth-party claim against the owner's building manager, who had contractual duties to inspect and maintain the facility's electrical system.[65]

Based on these facts, the court in *Northside* rejected the contribution claim.[66] It first cited to Virginia authority previously holding that "'a contribution plaintiff cannot recover from a contribu-

58. *Id.* at 179–80 (relying on Van Winckel v. Carter, 198 Va. 550, 555, 95 S.E.2d 148, 152 (1956)).

59. *Id.* at 180–81.

60. *Id.* at 181.

61. *Id.* at 180–81 (citing Transdulles Ctr., Inc. v. USX Corp., 976 F.2d 219, 228 (4th Cir. 1992); Hanover Ins. Co. v. Corrpro Cos., 312 F. Supp. 2d 816, 821 (E.D. Va. 2004); Dacotah Mktg. & Research, L.L.C. v. Versatility, Inc., 21 F. Supp. 2d 570, 580 (E.D. Va. 1998); Hanscome v. Perry, 542 A.2d 421, 426 (Md. Ct. Spec. App. 1988); Kaleel Builders, Inc. v. Ashby, 587 S.E.2d 470, 475 (N.C. Ct. App. 2003)).

62. No. 3:07CV153-HEH, slip op. (E.D. Va. July 2, 2007).

63. *Id.*, slip op. at 1–2.

64. *Id.*, slip op. at 2.

65. *Id.*, slip op. at 2–3.

66. *Id.*, slip op. at 6.

tion defendant unless the injured party could have recovered against the contribution defendant.'"[67] Applying this rule, the court noted that the electrical subcontractor, as the "injured party," could not assert a common-law claim against the management company upon which the electrical supplier could predicate a contribution claim.[68] The court, therefore, dismissed the claim.[69]

In *W.R. Hall, Inc. v. Hampton Roads Sanitation District*, the Supreme Court of Virginia addressed the question of whether a broad indemnification provision in a construction contract violated Virginia public policy.[70] The case arose when the public owner entered into an indemnity agreement with a railroad relative to the public owner's installation of a sewer line on railroad property.[71] The public owner then entered into a contract with a utility contractor to install the sewer line, and included broad indemnity provisions in the agreement requiring the contractor to hold the owner harmless from any claims brought against it as a result of the contractor's performance of the work.[72] During the project, one of the contractor's employees was injured when a train unexpectedly lunged forward and struck him.[73] The employee brought suit against the railroad and the public body promptly honored its indemnity obligation.[74] The public body subsequently demanded indemnity from the contractor.[75] The contractor refused, and the public owner brought a declaratory judgment action to determine if the indemnity provisions in question were enforceable.[76]

The contractor argued that the obligation to indemnify a party for personal injury arising out of negligence not caused by the indemnifying contractor or the party to be indemnified was against public policy.[77] The court disagreed.[78] The court found that an

67. *Id.*, slip. op. at 4 (quoting Pierce v. Martin, 230 Va. 94, 96, 334 S.E.2d 576, 578 (1985)).
68. *Id.*, slip op. at 4–6.
69. *Id.*, slip. op. at 6.
70. 273 Va. 350, 352, 641 S.E.2d 472, 472–73 (2007).
71. *Id.* at 352, 641 S.E.2d at 473.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 353, 641 S.E.2d at 473.
76. *Id.* at 354, 641 S.E.2d at 474.
77. *Id.*

owner can obtain broad indemnity from a contractor to protect it from future personal injury claims that were not caused by its negligence or the negligence of the indemnifying contractor.[79]

E. *Novel Tort Claims Arising out of the Construction Project*

The saga of *Britt Construction, Inc. v. Magazzine Clean L.L.C.*, discussed above, did not end with the contractor's loss in the Supreme Court of Virginia on its mechanic's lien claim. In a massive assault against everyone that had caused it economic pain, the contractor alleged various tort claims in a seven-count motion for judgment against the owner that terminated it, the replacement contractor, and the project architect.[80] First, the contractor brought actual and constructive fraud claims against the corporate owner and its principal for "misrepresent[ing] soils information in connection with the project."[81] These defendants demurred on the ground that all duties for the project were governed by a contract with an integration clause precluding consideration of extraneous prior oral representations.[82] The court, however, dismissed the defendants' demurrer, noting that an integration clause would not bar a claim for "fraud in the inducement."[83]

The contractor also asserted a claim of tortious interference with a contract against the project architect, both corporately and

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78. *Id.* at 356, 641 S.E.2d at 475. The court extended its holding in *Estes Express Lines, Inc. v. Chopper Express, Inc.*, which was decided the same day as *Hall*. *See id.* at 355, 641 S.E.2d at 475 (citing *Estes*, 273 Va. 358, 641 S.E.2d 476 (2007)). *Estes* established that a contracting party as indemnitee can obtain indemnity from a non-negligent contracting party for personal injuries caused by the imdemnitee's own negligence. *See Estes*, 273 Va. at 363–66, 641 S.E.2d at 478–79.

79. *See Hall*, 273 Va. at 356, 641 S.E.2d at 475. The court in *Hall* did not address the impact of Virginia Code section 11-4.1, which declares any indemnity provision in a construction contract seeking to shift liability from the sole negligent party to the contractor as violative of public policy. *See* VA. CODE ANN. § 11-4.1 (Repl. Vol. 2006). How can the indemnity provision in *Hall* be less offensive to public policy? Had the *Estes* case involved a construction contract, the statute would have required the opposite result. In *Hall*, a construction case, the court found that a provision shifting liability without regard to negligence is acceptable public policy, while under the statute, indemnity conferred to a solely negligent indemnitee (a narrower scope than the absolute indemnity in *Hall*) is not. What does this say about the logic of public policy in Virginia?

80. Britt Constr., Inc. v. Magazzine Clean, L.L.C., 69 Va. Cir. 478, 478 (Cir. Ct. 2006) (Loudoun County).

81. *Id.*

82. *Id.* at 478–79.

83. *Id.* (citing Colonial Ford Truck Sales, Inc. v. Schneider, 228 Va. 671, 325 S.E.2d 91 (1985) (explaining that a tort claim cannot be short circuited by reference to the contract)).

against the individual architect who worked on the project.[84] The trial court denied the project architect's demurrer, which contended that as an agent for the owner, an architect could not tortiously interfere with any contract.[85] In its ruling, the court emphasized that the construction contract required the architect to decide issues on the project without "partiality," and that the contractor claimed the architect failed to do so.[86]

The court in *Britt* then considered the replacement contractor's demurrer to the tortious interference claim.[87] The court rejected an asserted "economic loss" defense because such defense does not extend to intentional tort claims like tortious interference.[88] The court similarly rejected the replacement contractor's agency defense that an agent cannot interfere with the contract of its principal, emphasizing that an agent with a personal stake in the matter at issue can be held liable.[89] Finally, the court overruled the common-law and statutory conspiracy claims, noting that the alleged object of the conspiracy—to interfere with the contract between the owner and the plaintiff—was a cognizable claim "'even when one of the alleged conspirators is a party to the contract.'"[90]

F. *Design Professional Liability*

The federal case of *Wal-Mart Stores, Inc. v. J.A. Fielden Co.* breaks new ground in Virginia with respect to architect and engineer liability.[91] In *Wal-Mart*, a property owner sued its contractor, soils engineer, engineering firm, and its contractor's subcon-

84. *Id.* at 479.

85. *Id.* at 480.

86. *Id.* The court referenced a possible "privilege" argument the architect could have made on the tortious interference claims without expanding on the issue. *Id.* Presumably, the court is referring to case law recognizing an architect's qualified privilege that protects for decisions made in "good faith." For a discussion of such qualified privilege, see generally D. Stan Barnhill, *Intentional Tort Liability and the Economic Loss Rule: Novel Theories To Recover Damages Incurred on the Construction Project*, VA. LAW., Oct. 1995, at 22.

87. *Britt*, 69 Va. Cir. at 480.

88. *Id.*

89. *Id.* at 480–81 (citing Ashco Int'l, Inc. v. Westmore Shopping Ctr. Assocs., 42 Va. Cir. 427 (Cir. Ct. 1997) (Fairfax County)).

90. *Id.* at 481 (quoting CaterCorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 28, 431 S.E.2d 277, 281 (1993)).

91. *See* 440 F. Supp. 2d 523 (W.D. Va. 2006).

tractors on various claims arising out of a slope failure on the owner's commercial property.[92]

Among the claims asserted against the soils engineer and engineering firm were claims for breach of implied and express warranties.[93] In a truly remarkable holding, the district court first concluded that the owner had stated an express warranty claim against the project engineer.[94] As precedent, the court relied upon a recent case from the Supreme Court of Virginia involving the sale of equipment in which an equipment manufacturer expressly warranted that the equipment it was supplying to the owner would be "'free of defects in design, workmanship, and material.'"[95] According to the court, the engineer's assumption of the contractual obligation to provide certain prescribed civil engineering design services for the project "'as may be required'" constituted a warranty to provide an "appropriate" design, which promise constituted an express warranty.[96] The district court's decision, however, failed to note that, unlike the equipment supplier in the case it cited, the engineer did not expressly warrant anything. The Supreme Court of Virginia has made clear, in a case not cited by the Western District in *Wal-Mart*, that a professional's promise to provide design services is a promise only to do so consistent with the applicable standard of care, rather than a warranty of perfect performance.[97]

The district court adopted the same problematic approach in refusing to dismiss the owner's implied warranty claim against the soils engineer and project engineer. The court cited to established case law involving the implied warranty that contractors give owners in Virginia and inferred that professional engineers confer the same warranty.[98] Again, the district court failed to appreciate the different treatment under Virginia law for contrac-

92. *Id.* at 525.

93. *Id.*

94. *Id* at 525–26.

95. *Id.* (quoting Hubbard v. Dresser, Inc., 271 Va. 117, 123–24, 624 S.E.2d 1, 4 (2006)).

96. *Id.* at 526.

97. *See* Surf Realty Corp. v. Standing, 195 Va. 431, 442–43, 78 S.E.2d 901, 907 (1953) (holding that an architect is obligated to exercise reasonable care, not guarantee a perfect plan or a satisfactory result).

98. *Wal-Mart*, 440 F. Supp. 2d at 527 (citing Goddard v. Protective Life Corp., 82 F. Supp. 2d 545, 556 (E.D. Va. 2000); Willner v. Woodward, 201 Va. 104, 108, 109 S.E.2d 132, 134 (1959); Mann v. Clowser, 190 Va. 887, 901, 59 S.E.2d 78, 84 (1950)).

tors, who can be expected to follow the design documents without requiring the exercise of professional judgment, and design professionals, whose service is exclusively conveyed through the exercise of such judgment.[99] Contrary to the district court's holding, no Virginia appellate court has recognized that a design professional confers any implied warranty as part of its agreement to provide professional design services.[100]

Finally, the district court in *Wal-Mart* correctly rejected the owner's construction fraud claim on the ground that the promises made constituted promises about future performance and not statements of fact that were false when made.[101]

The design professional in *Green v. Highlander* fared better than the unfortunate design professionals in *Wal-Mart*.[102] In *Green*, the plaintiff, who had been injured in a parking lot, brought a negligence action against the parking lot designer, among others.[103] The trial court granted the design firm's demurrer, succinctly stating that the plaintiff had failed to produce a single case holding that "a design professional [owed] a duty to an invitee of a premises it designed to protect the invitee from injury caused by a third party".[104]

G. *Arbitration*

The Supreme Court of Virginia provided additional clarity on the authority of the arbitrator to decide important issues of law in *BBF, Inc. v. Alstom Power, Inc.*[105] In *BBF*, the arbitrator

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99. *Compare Mann*, 190 Va. at 901, 59 S.E.2d at 84 (articulating the role of a contractor), *with Surf Realty*, 195 Va. at 442–43, 78 S.E.2d at 907 (describing the service provided by an architect). The district court in *Wal-Mart* actually cited *Mann* as authority for imposing a warranty obligation on the design professionals. *See Wal-Mart*, 440 F. Supp. 2d at 527 (citing *Mann*, 190 Va. at 901, 59 S.E.2d at 84). *Mann*, however, dealt with contractor liability under an implied warranty of workmanship and not whether a design professional confers an implied warranty in the performance of its services. *See Mann*, 190 Va. at 901–02, 59 S.E.2d at 84–85.

100. For a circuit court decision finding that design professionals give implied warranties, also without discussing *Surf Realty Corp.* or any other controlling authority, see *Capital One v. CSI Engineering*, CL 01-728, slip op. at 3 (Cir. Ct. Mar. 8, 2004) (Henrico County).

101. *Wal-Mart*, 440 F. Supp. 2d at 528 (citing Lissmann v. Hartford Fire Ins. Co., 848 F.2d 50, 53 (4th Cir. 1988)).

102. No. CL06-5689, 2007 Va. Cir. LEXIS 190 (Cir. Ct. Oct. 23, 2007) (Richmond City).

103. *Id.* at *1.

104. *Id.* at *1–2.

105. 274 Va. 326, 645 S.E.2d 467 (2007).

awarded liquidated damages to the plaintiff, Alstom U.S., for the breach of its supplier, BBF.[106] BBF challenged the arbitration award on the ground that Alstom U.S. had not actually suffered damages and thus an award of liquidated damages would be violative of Virginia's public policy.[107]

The court rejected BBF's challenge.[108] It noted that Virginia's Arbitration Act provides only five grounds for judicial vacation of an arbitration award: (1) fraud, (2) evident partiality by the arbitrator, (3) exercise of powers by the arbitrator not conferred in the arbitration agreement, (4) prejudicial exclusion of evidence or refusal to postpone the hearing for good cause by the arbitrator, or (5) the absence of an arbitration agreement.[109] The court further observed that in the mid-1980s the General Assembly had deleted a provision of the Arbitration Act that preserved the power of the courts to exercise equity in evaluating arbitration awards.[110] As a result, Virginia's courts no longer possessed the power to apply equitable principles to arbitration awards.[111] Without such power, the trial court could not consider whether the arbitrator's award of liquidated damages to Alstom U.S., despite the fact that it suffered no actual damages, violated public policy.[112]

H. *Procedural Roadblocks to Contractor Claims on Public Projects*

This review of recent judicial decisions ends with a discussion of two nightmarish cases—at least from the contractor viewpoint—decided in the context of public projects.[113] First, in *Mod-*

106. *Id.* at 328, 645 S.E.2d at 468.

107. *Id.* at 329, 645 S.E.2d at 468–69.

108. *Id.* at 331, 645 S.E.2d at 470.

109. *Id.* at 330, 645 S.E.2d at 469 (citing VA. CODE ANN. § 8.01-581.010 (Repl. Vol. 2007 & Supp. 2008)).

110. *Id.* at 331, 645 S.E.2d at 469 (citing Lackman v. Long & Foster Real Estate, Inc., 266 Va. 20, 26, 580 S.E.2d 818, 822 (2003)).

111. *See id.*

112. *Id.* at 331, 645 S.E.2d at 470.

113. Brief mention should also be made of another public procurement case, *Davis Bros. Constr. Co. v. City of Richmond*, 70 Va. Cir. 409 (Cir. Ct. 2006) (Richmond City). In *Davis*, the trial court denied a contractor recovery on an extra work claim for which the contractor had received no prior written approval from the public body before performing the work, as required by both city ordinance and Virginia Code section 2.2-4309 of the Public Procurement Act. *Id.* at 409–11 (citing RICHMOND, VA., CODE § 74-63 (2004); VA. CODE ANN. § 2.2-4309 (Repl. Vol. 2008)). Compare this result with two recent cases involving private parties where the courts reached the opposite result based on the common law,

ern Continental South v. Fairfax County Water Authority, the Circuit Court of Fairfax County rejected a contractor's extra work claim against a public owner, a county water authority.[114] The core factual issue in the case was whether the contract documents called for a particular kind of valve to be installed in a water treatment plant.[115] The court recognized the conflict, as well as the fact that the project engineer had approved, without objection, four of the contractor's shop drawings, which included the valve that the contractor maintained was called for in the contract documents.[116] Nevertheless, the court swept aside these four approvals by reference to a contract provision denying any right to rely on shop drawing approvals that varied from the requirements of the plans and specifications.[117] The court further relied on the contract provision that required the contractor to review the design and report *any* errors or omissions set forth therein or otherwise be responsible for damages arising out of its failure to do so.[118] The contractor's failure to discover the project engineer's errors in the original plans, and its later reliance on the engineer's approval of its shop drawings based on its understanding of the design, thus required the contractor to absorb the entire cost of replacing the installed valve with the purportedly intended valve.[119]

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which continues to recognize that parties to a contract can, by their course of dealings, modify the "prior written consent" requirement to compensable extra work claims. *See* Ballou Justice Upton Architects v. T. C. Midatlantic Dev., Inc., No. CL06-6176 (Cir. Ct. Nov. 20, 2007) (Richmond City); Commonwealth Home Bldg. Corp. v. Lewis, No. CH05000145-00 (Cir. Ct. Apr. 12, 2007) (Hanover County).

114. 70 Va. Cir. 172, 202 (Cir. Ct. 2006) (Fairfax County).

115. *Id.* at 174.

116. *Id.*

117. *Id.* at 176–77.

118. *Id.* The contract provision in question stated:

> Contractor shall verify all dimensions, quantities, and details shown on the Drawings and Supplemental Drawings, equipment, material, finishes, and other such listings or other data received from the Engineer, and shall notify him of all errors, omissions, conflicts, and discrepancies. This shall not relieve the Contractor of full responsibility for unsatisfactory Work, faulty construction, or improper operation resulting therefrom, or from rectifying such conditions at his own expense. He shall not be allowed to take advantage of any errors or omissions . . . . The Contractor shall assume all responsibility for the making of estimates of the size, kind, and quality of materials and equipment included in work to be done under the contract.

Id. at 176.

119. *Id.* at 184–85. The court in *Modern Continental* relied on *D.C. McClain, Inc. v. Arlington County*, 249 Va. 131, 138–39, 452 S.E.2d 659, 663 (1995), for the proposition that "the ultimate responsibility" for the design errors rested with the contractor and that shop

In addition to its novel, design-shifting ground for denying the contractor's extra claim, the court in *Modern Continental* also denied the claim on more conventional notice grounds. The contract in question required the contractor to give at least a five-day written notice of any extra work claim.[120] In addition, the Public Procurement Act required notice of such claim to be given at the time the contractor begins the work upon which the claim will be based.[121] The contractor, however, did not give such notice for almost nine months after beginning the work for which it would later seek extra compensation.[122] Finding none of the contractor's explanations for failing to give notice persuasive, the court rejected the claim for notice defects as well.[123]

Although it was a pyrrhic victory, the contractor did fare better on the final argument advanced by the public body to deny its contract claim. The contract in question included a requirement that the contractor give the public owner a written notice of protest within five days of receiving the owner's final decision on its claim.[124] The contractor contended that this provision violated Virginia Code section 2.2-4363(E), which stipulates that the contractor must appeal a public owner's final decision on a claim within six months of that decision.[125] The court agreed with the contractor, finding that the protest provision impermissibly

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drawing approval did not absolve the contractor of that responsibility. *Modern Cont'l*, 70 Va. Cir. at 182–83. The difficulty, in relying on *McClain*, however, is that *McClain* involved a contractor's obligation to verify the dimensions shown on the plans in the field prior to undertaking its work. *See McClain*, 249 Va. at 138–39, 452 S.E.2d at 663. The contractor in *McClain* was not required to go beyond field measurement verification and conduct a complete review of the design to ensure it was error-free. *See id.* The *Modern Continental* case, in contrast, permitted the project designer and owner to shift the entire design responsibility to a contractor, not licensed or trained as a engineer. *See Modern Cont'l*, 70 Va. Cir. at 176. Neither the *McClain* case nor any other prior case in Virginia has permitted such a dramatic shift of professional responsibility to non-professionals. Are contractors in the wake of *Modern Continental* required to hire their own professional engineers to undertake a comprehensive design review before they initiate construction when they face similar onerous contract terms?

120. *Modern Cont'l*, 70 Va. Cir. at 187.

121. *Id.* at 186 (quoting VA. CODE ANN. § 2.2-4363 (Repl. Vol. 2008)).

122. *Id.* at 187.

123. *Id.* at 190. This article will not address the arguments the contractor unsuccessfully advanced to excuse its notice omission as they are unique to that case and largely ignored the mandate in Virginia Code section 2.2-4363.

124. *Id.* at 191.

125. *Id.* The provision in question states: "The decision of the public body shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the public body." VA. CODE ANN. § 2.2-4363(E) (Repl. Vol. 2008).

sought to abrogate the contractor's right to rely on the six-month statute of limitation imposed in the Public Procurement Act.[126] The court further found that even if the protest provision did not violate the Public Procurement Act, it ran afoul of the Dillon Rule which precludes counties from exercising powers not expressly conferred by statute.[127] Finally, the court found that Virginia Code section 2.2-4363(B), which grants public bodies the right to fashion their own administrative procedures for processing claims, did not grant the power to create "post-claim and pre-appeal" hurdles to a contractor's appeal rights under section 2.2-4363(E).[128]

The contractor in *Modern Continental* subsequently moved for rehearing on the design-shifting and notice decisions by the trial court.[129] The trial court refused to reconsider its prior notice decision, but did address its earlier design-shifting decision. It acknowledged that, according to the contractor, its prior decision effectively imposed an "'unlimited obligation'" upon the contractor to identify every design error in the contract documents.[130] It further acknowledged that substantial authority existed for the proposition that an owner who obligates a contractor to build a project according to plans and specifications cannot shift the burden to the contractor for design defects through contract clauses requiring the contractor to check the plans for accuracy.[131] The trial court, however, found an exception in Virginia law to this basic proposition where the general contractor provides an express warranty or guarantee that the plans and specifications are

126. *Modern Cont'l*, 70 Va. Cir. at 196 (citing VA. CODE ANN. § 2.2-4363(E) (Repl. Vol. 2008)).

127. *Id.* The Dillon Rule holds that counties, such as the plaintiff in *Modern Continental*, only possess the powers "'expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable.'" *Id.* (quoting Bd. of Supervisors v. Countryside Invest. Co., 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999)).

128. *Id.* at 198 (citing VA. CODE ANN. § 2.2-4363(B) (Repl. Vol. 2008)).

129. *See* Modern Cont'l South v. Fairfax County Water Auth. *(Modern Cont'l II)*, 72 Va. Cir. 268, 268 (Cir. Ct. 2006) (Fairfax County).

130. *Id.* at 268–69.

131. *Id.* at 269–70. The court discussed at length the Supreme Court of the United States watershed case *United States v. Spearin*, which held that "a contractor who is contractually bound to build according to plans and specifications proposed by the owner will not be responsible for consequences arising from defects in such plans and specifications." 248 U.S. 132, 136 (1918). The court recognized that this "*Spearin* Doctrine" had been approved by the Supreme Court of Virginia. *Modern Cont'l II*, 72 Va. Cir. at 271 (citing Southgate v. Sanford & Brooks Co., 147 Va. 554, 563–64, 137 S.E. 485, 487–88 (1927)).

without defect.[132] The trial court found the contractual duty imposed on the contractor to "verify all . . . details shown on the drawings" and to "notify [the engineer] of all errors, omissions, conflicts, and discrepancies" constituted an implied warranty that the design was free from error.[133] Based on this logic, the trial court reaffirmed its earlier decision holding the contractor liable for the costs incurred as a result of the design error.[134]

In *Dynasty Construction v. County Board of Arlington*, the contractor sought to advance wrongful termination claims under the public owner's "Purchasing Resolution," as incorporated into the contract documents.[135] That resolution required the contractor to submit its claim first to the county manager; if failing there, to submit the claim to the county board of supervisors; and if failing there, to appeal to the circuit court.[136] The resolution incorporated by reference the claim procedures set forth in Virginia Code sections 15.1-1246 through 15.1-1248.[137]

Consistent with the resolution, the contractor proceeded without success before the county manager and board of supervisors.[138] It then requested the county clerk, as called for in section 15.2-1246, to set the amount of the appeal bond, which the clerk incredibly set at $1 million, even though the county itself had no affirmative claim requiring a bond of such excessive amount.[139] The contractor wrote the clerk protesting such an absurd bond to cover the costs of the appeal, but the clerk did not respond.[140] The contractor then proceeded with the appeal without filing the

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132. *Modern Cont'l II*, 72 Va. Cir. at 271 (citing Worley Bros. Co. v. Marus Marble & Tile Co., 209 Va. 136, 142, 161 S.E.2d 796, 801 (1968); Greater Richmond Civic Rec., Inc. v. A.H. Ewing's Sons, Inc., 200 Va. 593, 595, 106 S.E.2d 595, 597 (1959)).

133. *Id.* at 272 (internal quotation omitted). The trial court concluded its opinion with a discussion of the differences between the facts before it and in *Spearin* that is difficult to discern. *See id.* It appears the court's position was that even under *Spearin* a contractor has a duty to deal with reasonably foreseeable errors in the plans, and the contractor in *Modern Continental* failed to meet this duty. *See id.* There is, however, no such reasonable foreseeability discussion in *Spearin* to support such interpretation.

134. *See id.*

135. 73 Va. Cir. 428, 428–29 (Cir. Ct. 2007) (Arlington County).

136. *Id.* at 432.

137. *Id.*; *see also* VA. CODE ANN. §§ 15.2-1246 to -1248 (Repl. Vol. 2008).

138. *Dynasty*, 73 Va. Cir. at 429.

139. *See id.* How could any clerk in the proper exercise of his or her powers set a one-million-dollar bond for an appeal where the claimant lost on its affirmative monetary claim, the defendant had no affirmative claim, and the bond's purpose was to secure mere payment of "costs"?

140. *Id.*

bond.[141] The county challenged the appeal on the ground that no appeal could proceed without the required bond.[142]

The trial court first considered the contractor's due process argument to the bond requirement. The court cited section 15.2-1246 which, as incorporated in the resolution, required the posting of the bond to maintain an appeal.[143] The court held that this requirement was jurisdictional and the contractor's failure to file the bond doomed the appeal.[144] In reaching this result, the court observed that the contractor had the option of filing the bond and thereafter seeking from the court a ruling that it was excessive.[145] Alternatively, the contractor could challenge the excessiveness of the bond in the trial court during the nine-day period that ran from when the clerk set the bond amount to when the appeal had to be filed according to the thirty-day limit in section 15.2-1246.[146] The contractor's failure to do either deprived the trial court of jurisdiction to hear its appeal.[147]

The trial court in *Dynasty* also rejected the contractor's due process challenge to the appellate process afforded under the resolution.[148] The contractor contended that it was denied an administrative appeal before a "disinterested person or panel" as required by Virginia Code section 2.2-4365,[149] and that the bond requirement violated the Public Procurement Act.[150] In response,

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141. *Id.* at 429–30.

142. *Id.* at 430.

143. *Id.* Virginia Code section 15.2-1246 states in pertinent part:

> [A final decision] may be appealed by serving written notice on the clerk of the governing body and executing a bond to the county, with sufficient surety to be approved by the clerk of the governing body, with condition for the faithful prosecution of such appeal, and the payment of all costs imposed on the appellant by the court.

VA. CODE ANN. § 15.2-1246 (Repl. Vol. 2008).

144. *Dynasty*, 73 Va. Cir. at 431.

145. *Id.*

146. *Id.*

147. *Id.*

148. *See id.* at 432.

149. *Id.* at 431. Virginia Code section 2.2-4365 permits a public body to establish in the contract "an administrative procedure" to permit claims to be heard by a "disinterested person or panel" not comprised of an employee of the public body, as opposed to being heard de novo in the circuit court. VA. CODE ANN. § 2.2-4365 (Repl. Vol. 2008). The losing party may then appeal to the circuit court, which then performs a limited review as to whether the findings of fact were "fraudulent, arbitrary or capricious," or "grossly erroneous." *Id.*

150. *Dynasty*, 73 Va. Cir. at 431. The Public Procurement Act, in contrast to Virginia Code section 15.2-1246, does not require a bond in order to prosecute an appeal of a final

the court found that the court itself could constitute the disinterested person for the administrative procedure for hearing appeals under the Public Procurement Act,[151] and that the county was exempt from the Public Procurement Act by virtue of Virginia Code section 2.2-4343(A)(10).[152]

The *Dynasty* case represents the low watermark for the fair treatment of claimants on public projects in Virginia. The panoply of rights, set forth in the Public Procurement Act, requiring disinterested fact-finders and an uninhibited right to appeal adverse decisions, were denied the *Dynasty* contractor.

III. SIGNIFICANT CHANGES REFLECTED IN THE NEW AIA CONTRACTS

For decades the AIA has been the source of the most commonly used construction contracts in America.[153] The two most popular contracts have been the A101 "Standard Form of Agreement Between Owner and Contractor (Stipulated Sum)" (the "A101"), and the B141 "Standard Form of Agreement Between Owner and Architect" (the "B141").[154] Both agreements have contemplated

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decision of a public body. *See* VA. CODE ANN. § 2.2-4363 (Repl. Vol. 2008).

151. *Dynasty*, 73 Va. Cir. at 432. In the judgment of the author, the court erred in equating itself with a "disinterested person or panel," as required by Virginia Code section 2.2-4365. Paragraph B of that very provision grants the party aggrieved by the final decision of the "administrative proceeding before a disinterested person or panel" the right to judicial review in the circuit court if an action is filed within thirty days of the decision. *See* VA. CODE ANN. § 2.2-4365(B) (Repl. Vol. 2008). How could the trial court in *Dynasty* be both the administrative "disinterested person or panel" and the reviewing court? It could not.

152. *Dynasty*, 73 Va. Cir. at 432. Virginia Code section 2.2-4343(A)(10) permits local governments to opt out of the Public Procurement Act and fashion their own procurement procedures as long as they comply with the requirements of Virginia Code section 2.2-4300. *See* VA. CODE ANN. § 2.2-4343(A)(10) (Repl. Vol. 2008). Section 2.2-4300 requires that "all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety." *Id.* § 2.2-4300 (Repl. Vol. 2008). How can a system that establishes an administrative hearing procedure decided only by county employees and board members be "fair and impartial" when it permits the county's clerk to fix prohibitive bond requirements? It cannot, and it is difficult to discern how the trial court could find that the county's procedures in *Dynasty* passed muster under these mandates.

153. The AIA first promulgated an owner/contractor agreement in 1888. *See* SUZANNE H. HARNESS, AM. INST. OF ARCHITECTS 2007 REVISIONS TO AIA CONTRACT DOCUMENTS 5 (2007) [hereinafter HARNESS], *available at* http://www.aiacv.org/aiacontractdocumentrevisions2007.pdf.

154. Until 1997, the B141 was a single document. In that year, the AIA divided it into a Part 1 and Part 2. *Compare* AIA B141(1)-1997, and AIA B141(2)-1997, *with* AIA B141-

their use in conjunction with a set of additional contract terms set forth in the AIA's A201 "General Conditions of the Contract for Construction" (the "A201").[155]

Every ten years, the AIA has issued a revised B141 and A101/A201. The AIA's refusal to continue issuing prior versions of its copyrighted contracts after the issuance of a revised set forces a reluctant construction industry to adopt immediately the revised versions.

In late 2007, the AIA published its most recent set of generic construction contracts. The AIA intends the standard Owner/Contractor Agreement and incorporated General Conditions to be the A101/A201. For the first time, however, the AIA is departing from treating the B141 as the primary Owner/Architect Agreement. In its place the AIA has issued the B101 "Standard Form of Agreement Between Owner and Architect" (the "B101").[156] This article will focus on some of the more significant

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1987. In this article, Part 1 of the 1997 B141 will be cited as B141(1) and Part 2 as B141(2).

155. The AIA published its first set of general conditions in 1911. The 2007 version constitutes the AIA's sixteenth revision of that document. *See* AM. INST. OF ARCHITECTS, AIA DOCUMENT COMMENTARY, A201 2007 GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION 1 (2007). The AIA also publishes a number of other form contracts such as the A102 and A103, which deal with "cost plus" payment schemes. These are used in situations that depart from the "design/bid/build" arrangement characterizing most construction projects. *See* AIA 102-2007; AIA 103-2007. Additionally, the AIA publishes numerous other contracts to govern a wide range of circumstances or relationships, including the A401 (Contractor/Subcontractor agreement) and the C401 (Architect/Consultant agreement). *See* AIA A401-1997; AIA C401-2007. This article will not address recent or anticipated changes to these less general agreements, although to the extent that they incorporate the A201 general conditions, which most do, the 2007 changes to the A201 will be reflected in changes to these other form contracts as well.

156. *See* AIA B101-2007. In this author's opinion, the AIA retired the B141 in 2007 because of the construction industry's overall dissatisfaction with the 1997 version. The 1997 B141, with its bifurcated structure, was unnecessarily complicated and unwieldy. In response, many architectural firms eschewed its use, selecting instead the 1997 version of the B151 "Abbreviated Standard Form of Agreement Between Owner and Architect" (the "B151") as a more satisfactory substitute. The AIA apparently got the message as the "platform" for the B101 in 2007 is the 1997 version of the B151. *See* AIA B151-1997. Not willing to abandon completely its mistake, the AIA in 2007 created separate successor documents for the B141—the B102 "Standard Form of Agreement Between Owner and Architect Without a Predefined Scope of Architect's Services" (the "B102") and the B201 "Standard Form of Architect's Services: Design and Construction Contract Administration" (the "B201"). *See* AIA B102-2007; AIA B201-2007. This author predicts that the 2007 B102/B201 will itself suffer a similar fate as the 1997 B141, and that the B101 will be the overwhelming contract of choice for architects and owners over the next decade. Nevertheless, this article will address not only the material differences between the 1997 B151 and 2007 B101, but also the differences between the 1997 B141(1) and (2) and the 2007 B102/201. Hopefully, in ten years the AIA will likewise abandon the B102/201 Agreement

changes likely to impact the construction industry following the AIA's issuance of the revised A101/A201 and the newly issued B101.[157]

A. *Dispute Resolution: The "Initial Decision Maker"*

The 1997 version of the A201, like multiple earlier versions, designated the Architect as the entity responsible for initially deciding the merits of disputes between the Owner and Contractor. Specifically, section 4.3.2 of the 1997 A201 required the Owner or Contractor to give the other party and the Architect written notice of any claim within twenty-one days of its occurrence.[158] Thereafter, the Architect would have ten days under section 4.4.2 to take action on the claim, which could include rejecting or accepting it, suggesting a compromise, asking for additional information, or informing the parties that no decision would be forthcoming.[159] Section 4.2.12 mandated that the Architect decide the claim in writing, in good faith, and without partiality.[160] Finally, section 4.4.6 conferred on the Architect the authority to designate its decision final, and to impose a thirty-day time limit on either party's right to initiate mediation (to be followed by arbitration, if unsuccessful).[161] The failure to invoke mediation within the specified time frame rendered the Architect's decision final and binding.[162]

The 2007 A101/A201 has created an alternative to the Architect's traditional decision-making responsibility. New section 15.1.2 of the A201 states that notice of claims must now be submitted to the "Initial Decision Maker" ("IDM") for an initial decision.[163] Section 15.2.1 further designates the Architect as the de-

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and continue forward with a single Owner/Architect Agreement, thereby reinstating a clarity that has been missing since 1997.

157. In keeping with the practice in the AIA form contracts themselves, and in disregard with what would be proper grammar otherwise, this article capitalizes certain terms including "Owner," "Contractor," "Subcontractor," "Architect," and "Agreement."

158. AIA A201-1997 § 4.3.2.

159. *Id.* § 4.4.2.

160. *Id.* § 4.2.12.

161. *Id.* § 4.4.6.

162. *Id.*

163. AIA A201-2007 § 15.1.2.

fault IDM if the Owner and Contractor do not decide in the contract to vest that authority elsewhere.[164]

The new IDM concept raises a number of significant issues. First, the provision requires the Contractor to agree affirmatively with the IDM,[165] whereas the previous form contract provided no options to the Architect fulfilling the initial decision maker role. Will the AIA's placement of the IDM issue squarely before the parties for decision during contract negotiations now eliminate a traditional argument that Contractors have made regarding the Architect's decision making activities—that the Architect cannot decide disputes fairly because of its natural allegiance to the Owner? With the 2007 IDM revision, Contractors who agree to use the Architect as the IDM during negotiations will now likely face the retort, when disputes later arise, that the person making the initial claim decisions is precisely the person they intentionally selected for that role in their pre-contract consultation with their Owners.

Second, the IDM change creates a conflict between the Architect and IDM when the IDM is someone other than the Architect. Sections 4.2.11 and 4.2.12 of both the 1997 and 2007 A201 vest the Architect with the authority to "interpret and decide matters concerning performance under, and requirements of, the Contract Documents."[166] How is this interpretation/decision making authority to mesh with the separate IDM's authority to decide claims? Is the IDM to defer to the Architect's prior "interpretations and decisions," promulgated pursuant to these sections, or can the IDM veto them? The 2007 A201 provides no answer.[167]

Third, the revised A201 fails to create a standard of care to govern the IDM's conduct and liability when the IDM is not the Architect. The obligation to show no partiality and the protection conferred on the Architect for decisions made in "good faith" remain in the 2007 A201.[168] The applicable provision, however, ap-

164. *Id.* § 15.2.1.

165. *See id.*

166. AIA A201-2007 §§ 4.2.11, 4.2.12; AIA A201-1997 §§ 4.2.11, 4.2.12.

167. Section 15.1.3 of the 2007 A201 does state that the "Architect will prepare Change Orders and issue Certificates for Payment in accordance with the *decisions* of the [IDM]." AIA A201-2007 § 15.1.3 (emphasis added). That statement, however, does not address the supremacy, or lack thereof, of the Architect's "interpretations and decisions."

168. AIA A201-2007 § 4.2.12.

plies only to the Architect's "interpretations and decisions."[169] There is no similar provision in the contract addressing these issues when the IDM is someone other than the Architect, an apparent oversight by the AIA. Will this omission lead courts to impose a different standard of care on non-Architect IDMs, or might the courts fashion some form of quasi-judicial immunity to deal with the AIA's omission? Only time will tell.

Fourth, it is unclear whether Owners and Contractors, who elect to utilize someone other than the Architect as the IDM, will get their money's worth. Under the 1997 A201, the Architect performed the IDM role as a basic service to the Owner.[170] Under the 2007 documents, the Architect, when designated as the IDM, still performs this role as a basic service to the Owner.[171] Thus, under either version, neither the Owner nor the Contractor is required to make any special payments for the IDM service. The 2007 A201, however, is silent on who is to pay for the non-Architect IDM service, a curious omission given that the document, like its predecessors, imposes an equal-share obligation on the Owner and Contractor to pay for any mediator that may later be designated.[172] Why did the AIA not expressly impose a similar cost-saving obligation to fund a non-Architect IDM?[173]

Finally, assuming that the payment issue is resolved, the non-Architect IDM provision still begs a crucial question: Why would the parties want to retain a third party, who has no ongoing involvement on the Project, to make important initial decisions regarding their claims? A non-Architect IDM would not possess the factual understanding of the often complicated issues giving rise to disputes on a construction project, which the Architect, owing

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169. *Id.*

170. *See* AIA A201-1997 §§ 4.2.11–.12; *see also* AIA B141(2)-1997 §§ 2.6.2.5–.6.1.9; AIA B151-2007 §§ 2.6.15–.17.

171. *See* AIA A201-2007 §§ 4.2.11–.12, 15.2.1; *see also* AIA B101-2007 §§ 3.6.2–.5; AIA B201-2007 §§ 2.6.2.3–.5.

172. *Compare* AIA A201-2007 §§ 15.3.2, 15.3.3, 15.3.7, *with* AIA A201-2007 § 4.5.2.

173. While the AIA is silent on the payment obligation for the non-Architect IDM, the 2007 B101 and B201 expressly state that the Architect is entitled to "Additional Service" compensation from the Owner for assisting the non-Architect IDM. *See* AIA B101-2007 § 4.3.1.11; AIA B201-2007 § 3.3.11. Thus, the Owner could find itself paying its Architect to assist the non-Architect IDM, and then being required to pay some portion of the IDM's fee as well. Further, if the parties do not specify terms of payment in a rider to the contract during negotiations, the very issue of IDM payment could become the first dispute to be decided by the non-Architect IDM if the parties are at odds in a bitter dispute and cannot agree to a shared payment scheme.

to the Architect's ongoing involvement, would already possess. A non-Architect IDM would often need considerable time to acquire the facts necessary to make knowledgeable, reasoned decisions. That effort would likely be expensive and invite rushed, erroneous decisions given the ten-day period set aside for such deliberation in section 15.2.2.[174]

Based on the foregoing questions, it is likely that the IDM changes to the 2007 A201 will result in the Architect's continued performance of the IDM role by virtue of its default status. One possible alternative is that by focusing the parties on the IDM issue, the AIA may have inadvertently pushed Owners and Contractors to strike all IDM provisions from their contracts, thereby permitting the parties to move their disputes directly into mediation (followed, if unsuccessful, by arbitration or litigation) without first satisfying any IDM condition precedent. In this author's opinion, this is an attractive alternative.

B. *Dispute Resolution: Finality of the IDM Decision*

As noted, the 1997 A201 specified that the Architect's decision on claims became final if the aggrieved party did not pursue mediation within thirty days of the Architect's written decision imposing that deadline.[175] The 2007 A201 has replaced this provision with two new sections: 15.2.6 and 15.2.6.1. These sections permit the invocation of mediation at any time after the IDM's decision (with no deadline other than the statute of limitations), unless one of the parties, within thirty days of the initial decision, demands that the other party initiate mediation.[176] Upon such demand, the other party has sixty days from the decision to invoke mediation, with failure to do so rendering the decision final and binding.[177]

These amendments are an improvement over the 1997 contract language, which had the effect of forcing the parties into media-

174. *See* AIA A201-2007 § 15.2.2. Section 15.2.2 of the 2007 A201 does include some "safety valves" which permit the IDM to extend the time of deliberation to gather additional facts and retain input from consultants. *See id.* That safety value would likely be invoked by a conscientious IDM, which will delay the initial decision and increase the transactional cost of securing such decision.

175. *See* AIA A201-1997 § 4.4.1.

176. *See* AIA A201-2007 §§ 15.2.6, 15.2.6.1.

177. *Id.*

tion because of a thirty-day deadline imposed by the Architect, even when they would have preferred to postpone such proceedings until later, possibly to the end of the Project.[178] The 2007 amendments now put that timing issue squarely within the control of the Owner and Contractor, where it belongs.

C. *Dispute Resolution: Consolidation/Joinder*

Section 4.6.4 of the 1997 A201, as well as section 1.3.5.4 of the 1997 B141(1) and section 7.2.4 of the 1997 B151, previously barred joinder of any additional party to an arbitration dispute between the Owner and Contractor or the Owner and Architect.[179] These provisions similarly barred consolidation of such proceedings with any other arbitration proceedings absent the consent of the contracting parties.[180] Thus, prior to 2007, an Owner with arbitrable claims against both the Architect and Contractor was forced to proceed in two separate arbitrations, even if the claims involved common questions of law and fact. This procedural bar to joinder not only increased the Owner's costs as it fought in two forums, it also created the distinct and unsatisfactory possibility of inconsistent arbitration awards.

The 2007 AIA documents have turned the prior non-consolidation/non-joinder rules on their head. Section 15.4.4.1 of the 2007 A201 permits either the Owner or the Contractor to effectuate the consolidation of their arbitration proceeding with any other such proceeding if both proceedings: (1) permit consolidation, (2) involve common questions of law or fact, and (3) have compatible procedural rules.[181] Section 15.4.4.2 similarly permits joinder of additional persons to the Owner/Contractor arbitration if (1) their presence is necessary to effectuate complete relief, (2) the joinder will involve common questions of law and fact, and (3) the non-party consents in writing.[182] Finally, section 15.4.4.3

178. *See* AIA A201-1997 § 4.4.6.
179. AIA A201-1997 § 4.6.4; AIA B141(1)-1997 § 1.3.5.4; AIA B151-1997 § 7.2.4.
180. AIA A201-1997 § 4.6.4; AIA B141(1)-1997 § 1.3.5.4; AIA B151-1997 § 7.2.4.
181. AIA A201-1997 § 15.4.4.1.
182. *Id.* § 15.4.4.2.

conveys to any entity made a party to the Owner/Contractor arbitration the same rights of consolidation and joinder enjoyed by the Owner and Contractor.[183]

These consolidation/joiner provisions are also made applicable to the Owner/Architect in sections 8.3.4.1 through 8.3.4.3 of the 2007 B101,[184] and sections 4.3.4.1 through 4.3.4.3 of the 2007 B102.[185]

The result of these consolidation/joinder changes should be a more efficient resolution of claims by bringing before a single arbitration panel all parties with an interest in common claims, whether they be the Owner, Architect, Contractor, or Subcontractors. It is praiseworthy, but surprising, that the AIA has moved away from a "divide and conquer" procedural bar that undoubtedly has worked to the advantage of its membership.

D. *Dispute Resolution: Statute of Limitations*

The 1997 A201, B141, and B151 all included provisions that addressed the statute of limitations for the assertion of claims. Section 13.7 of the A201, section 1.3.7.3 of the B141(1), and section 9.3 of the B151 stipulated that the length of the statute of limitations for asserting claims arising out of the contract was to be governed by the applicable law of the jurisdiction where the project was located.[186] The "accrual" of the statute, however, was not left to state law, but instead was established by contract. For acts or omissions prior to Substantial Completion, the 1997 documents stated that the applicable statute of limitations began to run at Substantial Completion.[187] For acts or omissions occurring thereafter, but before issuance of a Final Certificate of Payment, the statute began to run upon issuance of the Certificate.[188] And finally, for acts or omissions occurring after the issuance of the Final Certificate of Payment, the statute began to run when the act or omission occurred.[189]

183. *Id.* § 15.4.4.3.
184. AIA B101-2007 §§ 8.3.4.1–.3.
185. AIA B102-2007 §§ 4.3.4.1–.3.
186. AIA A201-1997 § 13.7; AIA B141(1)-1997 § 1.3.7.3; AIA B151-1997 § 9.3.
187. AIA A201-1997 § 13.7; AIA B141(1)-1997 § 1.3.7.3; AIA B151-1997 § 9.3.
188. AIA A201-1997 § 13.7; AIA B141(1)-1997 § 1.3.7.3; AIA B151-1997 § 9.3.
189. For Virginia architects, the accrual provisions in the 1997 B141 and B151 actually

The AIA has now abandoned the "three accrual" scheme it implemented only ten years earlier, returning to a full incorporation, both in terms of length and accrual, of the statute of limitations law of the jurisdiction where the project is located. There is one exception: The 2007 versions of the A201, B101, and B102 now include a special "repose" provision which deems all claims—whether sounding in tort or contract—brought more than ten years after Substantial Completion to be waived.[190] Given that both Virginia's "written contract" statute of limitations[191] and its statute of repose[192] are five years in length, it will be the unusual case where the ten-year waiver provision could come into play.[193]

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extended the statute of limitations for the benefit of Owners well beyond what the common law would have otherwise afforded. Under Virginia's common law, the statute of limitations accrues relative to errors in the Architect's plans when they are first delivered to and approved by the Owner. *See* Va. Military Inst. v. King, 217 Va. 751, 759–60, 232 S.E.2d 895, 900 (1977). Section 1.3.7.3 of the 1997 B141(1), and section 9.3 of the 1997 B151, however, as noted in the text, extended the accrual date for design errors to Substantial Completion, typically one or more years after the Owner's acceptance of the plans. *See supra* notes 186–88 and accompanying text. As discussed in the text below, the 2007 B101 and B102 amendments render the *King* case again governing law, to the substantial advantage of Virginia architects. *See infra* note 190 and accompanying text. But the AIA has added another provision to the 2007 B101 and B201, which arguably extends the Architect's liability for construction administration errors a year longer than before. Sections 3.6.6.5 of the 2007 B101 and 2.6.6.5 of the 2007 B201 include as a Basic Service the Architect's obligation to return to the project a year after Substantial Completion, should the Owner request, to "review the facility operations and performance." AIA B101-2007 § 3.6.6.5; AIA B201-2007 § 2.6.6.5. Relying on Virginia's "continuing services" accrual rules, see, e.g., *Harris v. K & K Ins. Agency*, 249 Va. 157, 161–62, 453 S.E.2d 284, 286–87 (1995), Virginia courts could find that under the 2007 B101 and B201, the accrual of the statute of limitations for construction administration defects will not occur at Substantial Completion, but instead will extend to a year later when the Architect performs its last obligated service under the Contract.

190. *See* AIA A201-2007 § 13.7; AIA B101-2007 § 8.1.1; AIA B102-2007 § 4.1.1.

191. *See* VA. CODE ANN. § 8.01-246(2) (Repl. Vol. 2007 & Supp. 2008).

192. *See id.* § 8.01-250 (Repl. Vol. 2007 & Supp. 2008).

193. There is one type of entity that could be adversely affected by the ten-year limitation included in the 2007 amendments—Virginia's public school boards. Like the Commonwealth of Virginia, statutes of limitations do not apply to them. *See* VA. CODE ANN. § 8.01-231 (Repl. Vol. 2007). The statute of repose, however, does. *See id.* § 8.01-250 (Repl. Vol. 2007 & Supp. 2008); School Bd. v. U.S. Gypsum Co., 234 Va. 32, 39, 360 S.E.2d 325, 328 (1987). As a result of these statutes and the language in the 2007 AIA documents, school boards that enter into these contracts, with their claim waiver provisions, could find themselves ten years after Substantial Completion unable to assert a breach of contract claim against their Architect or Contractor, which prior to the amendment they would still possess. The same would be true for the Commonwealth itself, except that, unlike many school boards, the Commonwealth and its agencies do not use AIA documents.

E. *Dispute Resolution: Arbitration vs. Litigation*

One of the most significant changes in the AIA's 2007 documents is the abandonment of mandatory claim arbitration pursuant to the rules of, and administration by, the American Arbitration Association ("AAA"). This is a dramatic departure for the AIA, which included mandatory arbitration clauses in its contracts for over 100 years.[194]

With the 2007 amendments, arbitration must be expressly selected by affirmatively checking a box in section 6.2 of the A101, section 8.2.4 of the B101, and section 4.2.4 of the B102.[195] Absent such an overt act, the default dispute resolution method under these contracts is now litigation. In this author's opinion, this change is long overdue. The right to access the courts for dispute resolution, including the right to a jury trial, should require an intentional waiver, as it now does.

Although arbitration is no longer the default forum, the 2007 documents do continue to require mediation, administered by the AAA according to its rules, as a condition precedent to the prosecution of claims by either arbitration or litigation.[196]

F. *Contractor's Right to Owner's Financial Arrangements*

Under the 1997 A201, the Contractor had an unfettered right to request information on the Owner's financial arrangements for the project at any time.[197] After such inquiry, the Owner had an affirmative duty to give the Contractor prior notice of any material changes in the financing.[198]

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194. HARNESS, *supra* note 153, at 5.

195. AIA A101-2007 § 6.2; AIA B101-2007 § 8.2.4; AIA B102-2007 § 4.2.4.

196. *Compare* AIA A201-1997 § 4.5, *with* AIA A201-2007 § 15.3; *compare* AIA B151-1997 § 7.1, *with* AIA B101-2007 § 8.2; *compare* AIA B141(1)-1997 § 1.3.4.2, *with* AIA B102-2007 § 4.2.2. If the parties select arbitration for dispute resolution, the new forms mandate that the arbitration be administered by the AAA under its rules (consistent with prior versions) and that the Federal Arbitration Act, 9 U.S.C. § 2 *et. seq.* (2006), should govern (a change from prior versions). *See* AIA A201-2007 § 13.1; AIA B101-2007 § 10.1; AIA B102-2007 § 7.1. It is clear that the AIA is incorporating federal arbitration law into its form contracts in order to render that law applicable to all arbitrable claims, even those involving local projects and intrastate parties without sufficient contact with interstate commerce to trigger the federal act.

197. AIA A201-1997 § 2.2.1.

198. *Id.*

The 2007 A201, in contrast, now grants the Contractor the absolute right to the Owner's financial arrangements only at the outset of the project.[199] The Contractor's right to request supplementation after the project has commenced is only available if (1) the Owner fails to make a timely payment, (2) changes in the work materially increase the contract price, or (3) the Contractor has a "reasonable concern" about the Owner's ability to pay.[200] The new version of the A201 does continue the Owner's obligation to give notice of any material changes in the financing following a prior disclosure.[201]

G. *Owner's Right To Correct Work Deficiencies*

The 1997 A201 required the Owner to give two written notices in the event that the Contractor's default required the Owner to step in with other forces to cure deficiencies in the Work.[202] An initial seven-day notice was required to permit the Contractor the opportunity to commence correction, and a second three-day notice was required if the Contractor failed to begin a cure with "diligence and promptness."[203] The AIA wisely eliminated the two-notice requirement, and now only requires the Owner to give a single notice, with the Owner free to proceed with correction after ten days if the Contractor does not initiate a cure.[204] If the Contractor fails to initiate effective correction within that period, the Owner is free, without more, to initiate its own cure.[205]

H. *Mandatory Stop Work for Burial or Archaeological Sites and Wetlands*

For the first time, the 2007 A201 includes a provision mandating that the Contractor stop Work in any Work area where it en-

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199. AIA A201-2007 § 2.2.1.

200. *Id.*

201. *Id.*

202. *See* AIA A201-1997 § 2.4.1.

203. *Id.*

204. *See* AIA A201-2007 § 2.4.

205. *Id.* Arguably, the AIA should have shortened the cure period to seven days. Why does the Contractor need ten days, as opposed to seven, to initiate a cure of defective work of such significance that it stimulated the Owner to put in motion its own curative solution, a drastic remedy that the Owner would not lightly pursue? Why should Owners be delayed the three extra days if the Contractor has done nothing in the first seven to initiate corrective work?

counters human remains, burial sites, archaeological sites, and wetlands not indicated in the Contract Documents.[206] The Contractor must immediately notify the Owner and Architect, and refrain from any additional Work in the affected area until it receives direction on how to proceed.[207] The Contractor may request a time extension and compensation for the adverse impact from such Work suspension.[208] These provisions, previously implicit in the A201 differing site condition clause,[209] are now explicit with the 2007 amendments.

I. *Payment of Subcontractors*

The 2007 A201 includes several new provisions dealing with subcontractor relations. First, section 9.6.2 requires the Contractor to pay Subcontractors within seven days of payment from the Owner.[210] In the event that the Contractor does not do so, section 9.5.3 permits the Owner to issue joint checks to the Contractor and unpaid Subcontractor to ensure proper payment.[211] Finally, section 9.6.4 grants to the Owner the right to demand written evidence from the Contractor that the Subcontractors have been paid, and further permits the Owner to contact the Subcontractors directly if the evidence is not provided within seven days.[212]

The effect of these three new payment provisions is to increase the power of the Subcontractor and Owner on payment issues at the expense of the Contractor. For instance, a Contractor who has a meritorious setoff right against a Subcontractor as a result of prior defective performance may now face contractual obstacles to its enforcement. Permitted direct communications between a sympathetic Owner and complaining Subcontractor will likely trigger the joint check arrangement. The disputed funds will, in turn, remain with the Owner until the Contractor compromises and secures the Subcontractor's endorsement to the joint check, or obtains a judgment establishing its sole ownership of the disputed funds. Sophisticated Contractors are likely to seek modifi-

206. *See* AIA A201-2007 § 3.7.5.
207. *Id.*
208. *Id.*
209. AIA A201-1997 § 4.3.4.
210. AIA A201-2007 § 9.6.2.
211. *Id.* § 9.5.3.
212. *Id.* § 9.6.4.

cation of these provisions to ensure they retain their traditional power to control how Owner payments are dispersed to problematic Subcontractors.[213]

J. *Insurance Obligations*

For the first time, the AIA imposed a duty on the Contractor in section 11.1.4 of the 2007 A201 to name the Owner and Architect as "additional insureds" on its commercial liability policy.[214] This change provides the Owner and Architect coverage under that policy for the Contractor's negligent acts or omissions during the project. Section 11.1.2 of the 2007 A201 also now requires the Contractor to include "completed operations" coverage as part of its policy, which will extend the additional insured protection to liability arising after completion of the project.[215] These provisions, although new to the A201, are consistent with modifications Owners have typically made to prior versions of the General Conditions during contract negotiations to effectuate these prudent changes.

Additionally, section 2.5 of the 2007 B101 and section 1.5 of the B102 for the first time impose insurance obligations on the Architect, requiring the maintenance of general liability, automobile liability, workers' compensation, and professional liability coverage during the project.[216] These provisions treat the Agreement's default coverage as the limits the Architect "normally maintains," with the Architect entitled to reimbursement for any additional coverage the Owner may require.[217] One benefit from these changes is that they compel the Owner and Architect to discuss

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213. For the first time in fifty years, the Associated General Contractors ("AGC"), one of the most prominent contractor trade organizations, did not endorse the 2007 changes to the A101/201. Press Release, Assoc. Gen. Contractors, AGC Members Unanimously Vote Against A201 Endorsement (Oct. 12, 2007), *available at* http://www.acg.org/cs/news_media/press_room/press_release?pressrelease.id=72. The new payment provisions addressed in the text are undoubtedly among the changes the AGC found to lack balance. But an alternative explanation for the AGC's refusal to endorse is its decision to join with other trade associations in 2007 to create a competing set of construction documents generically referred to as ConsensusDocs. *See* Consensus Docs—The New United Voice for Construction Contracts, http://www.consensusdocs.org/about.html (last visited Oct. 10, 2008).

214. AIA A201-2007 § 11.1.4.

215. AIA A201-2007 § 11.1.2.

216. AIA B101-2007 § 2.5; AIA B102-2007 § 1.5.

217. AIA B101-2007 § 2.5; AIA B102-2007 § 1.5. Presumably, if the Architect does not "normally maintain" any professional liability coverage, the Owner will be required to pay the cost for a policy as a permitted reimbursable expense if such coverage is desired.

the types of coverage the Architect normally maintains, particularly the professional liability coverage, and to negotiate whether the Owner is willing to pay for coverage the Architect does not normally carry.

K. *The Architect's Site-Visit Responsibility*

In 2007, the AIA made a dramatic change to the Architect's site-visit obligations. Previously, section 2.6.2.1 of the 1997 B141(2) and section 2.6.5 of the B151 imposed a duty on the Architect to "endeavor to guard the Owner against defects and deficiencies in the Work" while conducting periodic site visits.[218] This duty was consistent with what Owners have traditionally expected their Architects to perform while at the site. The duty was also consistent with the reasonable care obligation that traditionally applied to Architects' services at common law.[219] In 2007, however, the AIA deleted any reference to an "endeavor" duty, replacing it in sections 3.6.2.1 of the B101 and 2.6.2.1 of the B201 with the duty to report only "*known* deviations from the Contract Documents . . . and defects and deficiencies *observed* in the Work."[220]

Over the course of the next decade, it will be interesting to see if Owners will agree generally to a site-visit provision that only obligates the Architect to report observed deficiencies, but imposes no affirmative duty on the Architect to look for such deficiencies (which duty can be negligently breached). Another interesting question is whether courts will interpret the change as relieving the Architect from liability when negligent observation is the reason for the Architect's failure to "observe" and "report" defects. Virginia case law, at least by dictum, suggests that Owners can contract away the reasonable care standard that normally applies to the Architect's performance, and the 2007 amendments surely seek to do just that.[221]

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218. AIA B141(2)-1997 § 2.6.2.1; AIA B151-1997 § 2.6.5.

219. *See, e.g.*, Surf Realty Corp. v. Standing, 195 Va. 431, 443, 78 S.E.2d 901, 908 (1953).

220. AIA B101-2007 § 3.6.2.1 (emphasis added); AIA B201-2007 § 2.6.2.1 (emphasis added). To ensure consistency with the Owner/Contractor Agreement, the AIA made the same changes to sections 4.2.2 and 4.2.3 of the 2007 A201. *See* AIA A201-2007 §§ 4.2.2–.3.

221. *See, e.g.*, Nelson v. Commonwealth, 235 Va. 228, 235, 368 S.E.2d 239, 243 (1988) (noting that "[a]bsent a provision to the contrary," an Architect owes the Owner a duty to

Yet another question is how Virginia courts will reconcile Virginia Code section 54.1-411 with the AIA's efforts to remove by contract the issue of due care from the site-visit duty. Section 54.1-411 prevents any business entity from limiting the liability of any licensed architect for "damages arising from his acts," or otherwise limiting the liability of the entity itself for the "acts of its employees or agents."[222] This provision would appear on its face to render unenforceable any effort by contract to limit liability for acts or omissions occurring during the performance of architectural services.

L. *The Architect's Obligation To Design to Applicable Law*

Prior to 2007, the B151 did not impose an express obligation on the Architect to design to applicable law. The obligation had to be inferred within the Architect's duty to perform its design services reasonably. Section 3.2.1 of the 2007 B101, however, now includes a specific obligation on the Architect's part to "review laws, codes, and regulations" during the Schematic Design Phase.[223] The same provision exists in section 2.2.1 of the 2007 B201.[224]

These changes present an interesting question. Unlike the 1997 B151, the prior 1997 B141(1) did impose a general duty on the Architect to "review laws, codes, and regulations."[225] The absence of any limitation on this duty rendered the code review obligation applicable for the entire length of the project. Do the 2007 changes, which impose a code review obligation only in the earliest Schematic Design phase, manifest an intent to free Architects of any duty to design to code during the later Design Development and Construction Documents phases? Such an intent

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exercise professional care in performing construction administration). One way that courts may negate the AIA's effort to remove a "professional care" duty from the Architect's site visit obligations is to focus on section 2.2 of the B101 or section 1.2 of the B102. These sections stipulate that the Architect will perform its services "consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances." AIA B101-2007 § 2.2; AIA B102-2007 § 1.2. The courts could conclude that the AIA's elimination of the "endeavor to guard" language in favor of the more limited "report *known* deficiencies" language does not eliminate the duty to exercise reasonable care in performing site visits, the breach of which will give rise to liability for unreported and reasonably observable defects.

222. VA. CODE ANN. § 54.1-411 (Repl. Vol. 2005).

223. AIA B101-2007 § 3.2.1.

224. AIA B201-2007 § 2.2.1.

225. *See* AIA B141(1)-1997 § 1.2.3.6.

would not make sense, however, because most of the design for the project—particularly the design impacted by code issues—takes place during these later phases. Despite this, the placement of the code review obligation only in the Schematic Design Phase surely suggests the AIA's intent to so limit the obligation. Undoubtedly, sophisticated Owners will address this issue during contract negotiations.

M. *Abandonment of the "Fixed Cost of Construction" Scheme*

Under the 1997 B141 and 1997 B151, the Architect's participation in budget considerations during the design phase did not carry adverse impact unless the Architect had agreed in writing to design to a fixed cost.[226] If the Architect did accept "fixed cost" design obligations and Contractor bids or proposals came in above the "fixed cost" target, then section 2.1.7.6 of the 1997 B141(2) and section 5.2.5 of the 1997 B151 required the Architect, at the Owner's election, to redesign the project to bring it back within budget at no cost to the Owner.[227]

The 2007 B101 and B102/B201 have no "fixed cost" provision. Instead, these agreements simply obligate the Architect—without cost to the Owner—to redesign to the Owner's budget in the event of a bid bust.[228] In the author's opinion, these changes make sense and are consistent with Owner expectations.

N. *Termination and the Right To Use the Architect's Plans*

The 1997 B141(1) and B151 allowed the Owner to use the Architect's plans upon a termination of the Agreement only if the Architect was "adjudged" to have defaulted on the Agreement.[229] The 2007 versions of these Agreements dramatically change the

226. *See* AIA B141(1)-1997 §§ 1.3.1.1–.3; AIA B141(2)-1997 §§ 2.1.7.2–.6.; AIA B151-1997 §§ 5.2.1–.5.

227. AIA B141(2)-1997 § 2.1.7.6; AIA B151-1997 § 5.2.5.

228. AIA B101-2007 § 6.7; AIA B201-2007 § 5.7.

229. AIA B141(1)-2007 § 1.3.2.2.; AIA B151-1997 § 6.2. Given the time required for the Owner to adjudicate default, the "adjudged" provision served poorly performing Architects well. The risk of having no plans to finish an ongoing job either constrained the Owner from terminating an otherwise negligent Architect or forced negotiation of the right to use the plans to finish the project after termination. During such negotiations, the poorly performing Architect could leverage the Owner's need for the plans to secure a release from liability for whatever breach was the cause of the termination.

rules regarding use of the Architect's plans subsequent to a termination.

If the Architect terminates the Agreement for cause, the Owner still loses all rights to use the plans to complete the project, as was the case under the 1997 version of the B141(1) and B151.[230] But under the 2007 Agreements, if the Owner elects to terminate the Architect "for . . . convenience,"[231] the Owner is now permitted to use the Architect's plans to finish the project if (1) the Owner pays a licensing fee;[232] and (2) the Owner releases the Architect from all claims that may arise out of such subsequent use, and indemnifies the Architect from third-party claims that may arise out of such use.[233]

Finally, if the Owner terminates the Architect for cause, the Owner is now entitled to use the plans to finish the project without having to pay the licensing fee or provide the release/indemnity rights required in a termination for convenience.[234] Significantly, the AIA has abandoned the "adjudged" prerequisite set forth in the 1997 version. Under the 2007 B101 and B102/B201, the question of whether the Owner possessed the right to use the plans, after terminating the Architect for default, will not be known until there is a judicial determination of whether termination was justified, presumably months or years later.[235] The 2007 Agreements are silent on the Architect's remedy should the Owner proceed with the project to completion and then fail to prove that the "for cause" termination was justified. Most likely, the Architect's remedies would be confined to the monetary damages for copyright infringement pursuant to the Federal Copyright Act.[236]

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230. *Compare* AIA B141(1)-1997 § 1.3.2.2, *and* AIA B151-1997 § 6.2, *with* AIA B101-2007 B102 § 7.3, *and* AIA B102-2007 § 3.3.

231. *See* AIA B102-2007 § 9.5; AIA B102-2007 § 5.5.

232. *See* AIA B101-2007 § 11.9; AIA B102-2007 § 6.3.

233. *See* AIA B101-2007 § 7.3.1; AIA B102-2007 § 3.3.1. The same "continued use" rules apply if the Architect terminates the Agreement because of the Owner's decision to suspend the Agreement more than ninety cumulative days. *See* AIA B101-2007 §§ 9.3, 9.8, 11.9; AIA B102-2007 §§ 5.3, 5.8, 6.3.

234. *See* AIA B101-2007 § 7.3.1; AIA B102-2007 § 3.3.

235. The Architect theoretically could seek preliminary injunctive relief, but it is unlikely a court would act until it heard the default case on the merits, probably long after completion of the project.

236. *See* 17 U.S.C. § 501(a) (2006).

O. *Architect's "Green" Design Obligations*

For the first time, the AIA has included among the Architect's design obligations the requirement to confer with the Owner regarding "green" design alternatives. For instance, section 3.2.3 of the B101 and section 2.2.3 of the B201 require the Architect during the Schematic Design phase to discuss with the Owner "environmentally responsible design approaches."[237] Similarly, section 3.2.5.1 of the B101 and section 2.2.5.1 of the B201 obligate the Architect to "consider environmentally responsible design alternatives" involving materials and building orientation in preparing the Schematic Design.[238] If the Owner wants more intensive "green" design services, such as energy modeling, Leadership in Energy and Environmental Design (LEED) certification, or "unique system designs," it may pay for these as additional services.[239]

P. *The Request-for-Information Obligation*

Section 3.6.4.4 of the 2007 B101 and section 2.6.4.4 of the 2007 B201 include for the first time an express obligation on the Architect's part to review and respond to the Contractor's requests for information ("RFI").[240] These sections further require the Architect to include in the Contract Documents the requirements for the Contractor's proper RFI submittal.[241] Finally, the sections permit the Architect to seek compensation for additional services for RFI review where the conditions of sections 4.3.2 of the B101 or 3.3.2 of the B201 are met[242] (i.e., where the RFI is not submitted consistent with the Contract Documents or seeks information that the Contractor's "careful study" of various project documen-

237. AIA B101-2007 § 3.2.3; AIA B201-2007 § 2.2.3.

238. AIA B101-2007 § 3.2.5.1; AIA B201-2007 § 2.2.5.1.

239. *See* AIA B151-2007 §§ 3.2.5.1, 4.1.23–.24; AIA B201-2007 §§ 2.2.5.1, 3.1.23–.24.

240. *See* AIA B101-2007 § 3.6.4.4; AIA B201-2007 § 2.6.4.4.

241. AIA B101-2007 § 3.6.4.4; AIA B201-2007 § 2.6.4.4. Curiously, the 2007 A201 does not include a parallel RFI provision, an apparent oversight given that such parallelism exists regarding the other duties the Architect provides the Owner during Construction Administration. It may be that the AIA omitted this provision from the A201 because it intended for the Architect to include all requirements for RFI processing in a set of Supplemental Conditions to the Contract or the technical specifications.

242. AIA B101-2007 § 3.6.4.4; AIA B201-2007 § 2.6.4.4.

tation would have yielded).[243] In this author's opinion, sophisticated Owners are likely to strike the "additional service" right unless they include an amendment to the A201 requiring the Contractor to pay for the service.[244]

Q. *Additional Services*

The 2007 Owner/Architect Agreements have materially restructured the scope of additional services and the procedures by which the Architect provides such services. They have done so by creating four different types of additional services that could be performed on the project.

First, section 4.1 of the B101 and section 3.1 of the B201 list twenty-eight categories of "additional services" that the Owner may purchase by checking the appropriate boxes at the time of initial contracting.[245] Examples include civil engineering[246] and landscape design.[247] These services largely match what section 2.8 of the 1997 B141(2) and section 3.4 of the 1997 B151 classified as "optional additional services."[248]

Second, section 4.3.1 of the 2007 B101 and section 3.3.1 of the B201 delineate eleven categories of additional services that the Architect will provide during the project if the Owner authorizes the work in writing after receiving the Architect's written explanation for why the services are necessary.[249] Examples include preparing alternate bids[250] and attending public hearings.[251] These additional services largely parallel some, but not all, of the "contingent additional services" in the 1997 B151 and 1997 B141.

Third, section 4.3.2 of the 2007 B101 and section 3.3.2 of the B201 describe six types of additional services the Architect will

243. *See* AIA B101-2007 § 4.3.2.2; AIA B201-2007 § 3.3.2.2.

244. Why did the AIA not include a parallel provision in the A201 requiring the Contractor to reimburse the Owner for additional services the Owner must pay the Architect because of the Contractor's RFI-related errors? Symmetry and logic, if nothing else, would have suggested such a provision.

245. AIA B101-2007 § 4.1; AIA B201-2007 § 3.1.

246. *See* AIA B101-2007 § 4.1.7; AIA B201-2007 § 3.1.7.

247. *See* AIA B101-2007 § 4.1.8; AIA B201-2007 § 3.1.8.

248. AIA B141(2)-1997 § 2.8; AIA B151-1997 § 3.4.

249. AIA B101-2007 § 4.3.1; AIA B201-2007 § 3.3.1.

250. *See* AIA B101-2007 § 4.3.1.6; AIA B201-2007 § 3.3.1.6.

251. *See* AIA B101-2007 § 4.3.1.7; AIA B201-2007 § 3.3.1.7.

provide without first obtaining authorization from the Owner in order to "avoid delay in the Construction Phase."[252] Examples include preparing Change Orders that require evaluation of the Contractor's proposals and supporting data[253] and evaluating the Contractor's proposed Substitutions.[254] Most of these additional services are consistent with a number of "contingent additional services" in the 1997 B151 and B141 Agreements. Two significant additions to the 2007 Agreements are (1) reviewing out-of-sequence Contractor's submittals;[255] and (2) reviewing RFIs submitted by the Contractor that breach the Contractor's "careful study" obligation.[256] What is particularly mystifying about these 4.3.2/3.3.2 additional services is that the AIA language is unclear about whether the Owner is obligated to pay for them. Section 4.3.2 of the B101 and section 3.3.2 of the B201 state that after the Architect has provided any of the six categories of services described therein, it shall submit an explanation for their necessity to the Owner for consideration.[257] If the Owner then "determines" that the services were not "required," it shall so notify the Architect and "shall have no further obligation" to make payment for such services.[258] A strict reading of this provision would indicate that the obligation to pay is solely within the Owner's discretion, based on its own subjective evaluation of necessity.[259] There is no precedent in earlier versions of the AIA form agreements for an additional service that is paid for only if the Owner agrees that the additional service was necessary. It will be interesting to see how Owners react to an unbridled discretion permitting them to deny payment for what is clearly deemed an additional service under the Agreement.

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252. AIA B101-2007 § 4.3.2; AIA B201-2007 § 3.3.2.

253. *See* AIA B101-2007 § 4.3.2.3; AIA B201-2007 § 3.3.2.3.

254. *See* AIA B101-2007 § 4.3.2.5; AIA B201-2007 § 3.3.2.5.

255. *See* AIA B101-2007 § 4.3.2.1; AIA B201-2007 § 3.3.2.1.

256. *See* AIA B101-2007 § 4.3.2.2; AIA B201-2007 § 3.3.2.2.

257. AIA B101-2007 § 4.3.2; AIA B201-2007 § 3.3.2.

258. AIA B101-2007 § 4.3.2; AIA B201-2007 § 3.3.2.

259. There is a tension between the grant of discretion to the Owner in sections 4.3.2 of the 2007 B101 and 3.3.2 of the 2007 B201, and the preceding sections 4.3 and 3.3. These preceding sections state that additional services "provided in accordance with [section 4.3 or section 3.3] shall entitle the Architect to compensation." AIA B101-2007 § 4.3; AIA B201-2007 § 3.3. Do these earlier provisions, with their apparent mandatory "obligation to pay" language, restrict the absolute discretion to pay or not to pay later conferred on the Owner? The courts may well indeed be called on to deal with this question when Owners begin to veto Architect requests for compensation for the additional services set forth in section 4.3 of the 2007 B101 and section 3.3 of the 2007 B201.

Finally, section 4.3.3 of the 2007 B101 and section 3.3.3 of the B201 contemplate the parties filling in certain blanks to establish quantifiable limits for four Basic Services to be performed during Construction Administration (shop drawing review, site visits, Substantial Completion inspections, and Final Completion inspections).[260] Should events during the project require the Architect to exceed the specified number, it would be entitled to additional compensation for "overruns" upon notice to the Owner at the time the limit is reached.[261] There was no similar provision in the 1997 B151, although there was in the B141.[262]

R. *Concluding Comments*

The AIA's 2007 amendments to its most prominent construction contracts, while numerous, are overall incremental, except for four substantial changes: (1) the devolution of the Architect's site visit obligation; (2) the elimination of arbitration as the default dispute resolution mechanism; (3) the elimination of the anti-consolidation/joinder bars; and (4) the right to use the Architect's plans upon termination. The first of these major changes is unfortunate. It constitutes a transparent effort by the AIA to protect its membership at the expense of the Owner, whose contrary expectation is that its payments to the Architect to conduct site visits are to ensure that the Architect, through diligent observation, detects and reports deficiencies in the Work. That change is likely to create Owner backlash and amendments to the form contract that increase the Architect's site visit obligation beyond the minimally demanding "endeavor to guard" predecessor. The other three changes, in contrast, constitute improvements over past AIA versions.

It will be interesting to see if the AGC-inspired ConsensusDocs become a formidable challenge to one hundred years of AIA dominance. The author speculates that the Architect's prominent role early in the design process, long before there is a General Contractor involved to offer the ConsensusDocs alternative, will ensure that the AIA documents continue to dominate the construction industry. For another decade at least, it will be the AIA

260. AIA B101-2007 § 4.3.3; AIA B201-2007 § 3.3.3.

261. *See* AIA B101-2007 § 4.3.3; AIA B201-2007 § 3.3.3.

262. *Compare* AIA B141(2)-1997 § 2.8.1, *with* AIA B201-2007 § 3.3.3.

documents that serve as the platform upon which Owners', Architects', and General Contractors' counsel build as they formulate the contracts that will govern their projects.