

# An Assault on the *Spearin* Doctrine: How AIA A201-2007 Shifts the Risks for Design Defects to the Contractor

by Nancy W. Greenwald

Who should pay when extra costs result from defects or inconsistencies in plans and specifications—the architect who prepares them, the contractor whose job it is to construct the project properly, or the owner for whose benefit the work is required? In the most widely used system of form contracts created by the American Institute of Architects (AIA), allocating the risks in construction projects, including the risk of design defects, is typically accomplished through a disconnected series of inflexible contracts. The owner has one contract with the architect and a separate contract with the contractor. There is no direct contract between the contractor and the architect. The potential for ambiguity and gaps in responsibility between the parties is obvious. Consequently, allocating risks among the parties in design and construction contracts sometimes resembles a game of hot potato.

The AIA has published standard contract forms for participants in the construction industry since 1888. AIA A201, “General Conditions of the Contract for Construction,” is the keystone of the AIA Contract Documents<sup>1</sup> and it is incorporated by reference into many of its other contract forms.<sup>2</sup> Among its primary functions is the allocation of risks and responsibilities between the owner and the contractor.<sup>3</sup> Even though the architect is not a party to A201, certain of the architect’s rights and obligations, and therefore his or her exposures to risk, are embedded in A201, which is now incorporated by reference into the standard AIA contract agreement between the architect and the owner.<sup>4</sup>

The latest revision to AIA A201 was published in 2007,<sup>5</sup> and for the first time in fifty years, the Associated General Contractors of America (AGC) refused to endorse the AIA General Conditions, AIA A201-2007. This rejection was fueled by concern that the changes greatly increase contractors’ potential liability for costs resulting from defects in plans and specifications and, in so doing, deviate from established common law principles.<sup>6</sup>

## ***Spearin* Doctrine: Owner’s Implied Warranty**

For almost a hundred years, the *Spearin*<sup>7</sup> doctrine has given contractors some measure of comfort that they would not be held responsible for costs resulting from defects in plans and specifications. In *Spearin*, the U.S. Supreme Court held that when the federal government provides a contractor with design specifications and the contractor is contractually bound to build according to the specifications, the contract carries an implied warranty that the specifications are free from design defects. The Court held that general disclaimers requiring the contractor to check plans do not shift the risk of design flaws to contractors who follow the specifications.<sup>8</sup>

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While it is not without limitations,<sup>9</sup> the *Spearin* doctrine is very much alive today. It has been consistently applied to construction contracts with the federal government,<sup>10</sup> as well as to other government contracts for procurement of goods or services.<sup>11</sup> Both federal and state courts have applied the *Spearin* doctrine to private as well as public construction contracts. *Spearin* has

been the basis of the common law in Virginia since the 1919 case of *Adams v. Tri-City Amusement Co.*<sup>12</sup>

### Mind the Gap

There is gap between the duty of care the architect owes to the owner and the duty of care the owner owes to the contractor. The gap is related to the accuracy of plans and specifications. Under the prevailing case law in Virginia, the architect “must possess and exercise the care of those ordinarily skilled in the business, and in the absence of a special agreement, he is not liable for fault in

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construction resulting from defects in the plans because he does not imply or guaranty a perfect plan or a satisfactory result.”<sup>13</sup> A similar standard is now incorporated in the AIA’s standard owner/architect agreement.<sup>14</sup> So, on the one hand, the architect *does not* warrant the accuracy of her plans to the owner. On the other hand, under the *Spearin* doctrine, the owner *does* warrant to the contractor that the plans and specifications are accurate, correct, and suited for their intended purpose. The result is that the owner, rather than the architect who prepared the plans, is liable to the contractor for extra costs resulting from errors in the plans and specifications. Owners, caught between architect and contractor, understandably object to paying for these extra costs.

### How the 2007 AIA General Conditions Shift Liability to the Contractor

The 2007 version of AIA A201 tries to close the gap by shifting significant liability for the costs of correcting design defects from the owner to the contractor and by further insulating the architect from potential liability for design defects. This shift is not the result of a change in any single provision. It is the result of the combined effect of existing and new language. The changes effect this shift of responsibility most powerfully in clauses that describe the purpose of and the relationship

between the contract documents that broaden the contractor’s duty to review and compare the contract documents and to take field measurements before proceeding with any portion of the work, that expand the contractor’s duty to report errors, and that increase the contractor’s liability for extra costs ascribed to the failure to perform any of these design review functions.

The description of the AIA Contract Documents is significant because it sets the standards for their interpretation. The AIA language is notable for what it does not say. It does not say that the contract documents “include all items necessary for the proper execution and completion of the work by the contractor”; the language merely recites that this is the “intent” of the contract documents. The contractor is required to perform work specified in the contract documents and any work “reasonably inferable from them as being necessary to produce the indicated results.”<sup>15</sup> Subsequent contract sections require the contractor to conduct an independent review. For example, “before starting each portion of the Work,” the contractor is to “carefully study and compare the various Contract Documents” as well as information provided by the owner relating to a particular portion of the work, “to take field measurements of any existing conditions related to that portion of the Work,” and to “observe any conditions at the site affecting it.”<sup>16</sup> While acknowledging that the contractor is not a design professional and reciting that the contractor’s review is “for the purpose of facilitating coordination and construction” by the contractor and not for the purpose of discovering errors and omissions, the General Conditions impose on the contractor a continuing obligation to report promptly errors or deficiencies discovered — or (in newly added language) “made known to” the contractor.<sup>17</sup>

The heightened obligation to measure, check, and report design defects gains added significance because it is accompanied by an increase in the consequences if a contractor fails to report errors. If the contractor fails to carefully review the documents, to take proper field measurements, or to report errors, then “the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations.”<sup>18</sup> Deleted portions of the 1997 version assigned liability to the contractor only when he “knowingly” failed to report a recognized error to the architect. In the 2007 version, if a design problem comes to light after construction is under-

way, the stage is set for argument about what the contractor should have known and when he should have known it.

The contract documents are deemed to be “complementary.” Accordingly, the General Conditions do not contain a provision establishing precedence for resolving conflicts between the plans, specifications, and other design documents. Any defects or inconsistencies “discovered” or “made known” to the contractor are to be reported to and resolved by the architect (rather than the owner).<sup>19</sup> In fact, the owner and the contractor are not supposed to communicate directly; they are required to communicate with each other through the architect.<sup>20</sup> However, the contractor cannot rely even on the architect’s written resolution of problems as a shield against liability. For example, an architect’s response to a request for information to resolve a specific design issue does not by itself authorize deviations from the plans: “the Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect’s administration of the Contract,”<sup>21</sup> and the architect shall “not be liable for results of interpretations or decisions rendered in good faith.”<sup>22</sup>

Finally, the very broad indemnification provisions contained in § 3.18 require the contractor to “indemnify and hold harmless the Owner, Architect, Architect’s consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself).” While the language goes on to limit the indemnification “only to the extent caused by the negligent acts or omissions of the Contractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable,” the indemnification applies “*regardless* of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder” (emphasis added.) This arguably imposes a separate liability on the contractor for injuries and other subsequent claims resulting from design defects.

The AIA contract language is dramatically different where the contractor provides design information, such as shop drawings. In such instances, being “the Owner and the Architect shall be entitled to rely upon the adequacy,

accuracy and completeness of the services, certifications and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy.”<sup>23</sup> So, while the contractor has to check, measure, and report any discrepancies he finds in the architect’s and owner’s plans and specifications, and fails to do so at his peril, the architect and the owner have the protection of a provision that sounds a lot like the *Spearin* doctrine.

### **Contractors Beware: Virginia Courts Enforce the Contract as Written**

Strict enforcement of contract language is a long-standing principle of Virginia law. “In a breach of contract claim, the parties’ contract becomes the law governing the case unless it is repugnant to some rule of law or public policy. . . . The Court must enforce the contract as written.”<sup>24</sup> Even indemnification provisions calling for one party to indemnify the second against the second party’s own negligence have recently been enforced in Virginia courts under this principle, even though a number of other states have held such provisions unenforceable as against public policy.<sup>25</sup>

A 2006 Fairfax County Circuit Court decision should give pause to any contractor asked to incorporate AIA A201-2007 as a contract document. In *Modern Cont’l South v. Fairfax County Water Auth.*<sup>26</sup> the court dismissed a contractor’s claim against the Fairfax County Water Authority (FCWA), despite the contractor’s argument that the *Spearin* doctrine protected it from liability for consequences arising from defects in plans and specifications provided by the FCWA. Citing contract provisions requiring the contractor to verify details shown on the drawings received from the engineer and to notify him of all errors, omissions, conflicts, and discrepancies, the court held that the contractor breached the contract by failing to properly notify the FCWA about alleged errors and conflicts in the contract documents and drawings prior to proceeding with the work.

To protect themselves, contractors and their attorneys should negotiate changes to the language of AIA A201-2007, should consider using their own contract forms, or should consider using alternative form contracts—for example ConsensusDOCS.<sup>27</sup>

### IPD, BIM and Transactional Mediation

The game of shifting risk for design defects between parties has serious negative consequences. The typical inflexible contract approach to risk allocation creates an adversarial relationship from the beginning of the project, decreasing efficiency, setting the stage for disputes, and effectively raising the costs to all concerned.

A number of approaches have emerged that address in novel ways the issue of risk allocation for design defects. For example, design-build agreements are, as the name implies, agreements in which the project owner enters into a contract for design and construction services with a single entity.<sup>28</sup> The interests of the design and construction professionals are realigned and the owner can look to a single entity for the proper design and construction of the project. Integrated Project Delivery (IPD) takes this concept a step further and involves all of the major participants — owner, architect, and contractor, in a collaborative process, beginning with the design phase.<sup>29</sup> Technical innovations have appeared that by their nature combine the parties' efforts early in the life of a project. Building Information Modeling (BIM) is a computer-based three-dimensional modeling technology that improves communication, integrates information, and operates to reduce design errors.<sup>30</sup> Each of these approaches has the capability to identify design flaws much earlier in the process, before changes to design become expensive to fix.

Greater agreement among professional organizations on appropriate methods of risk allocation may seem like a pipe dream, but there is a history of such cooperation in Virginia. In 1991, a Joint Cooperative Committee of the Virginia Society of the American Institute of Architects, Associated General Contractors of Virginia Inc., American Council of Engineering Companies Virginia Inc., and Virginia Society of Professional Engineers worked together to produce the *Virginia Construction Industry Guidelines*, which was designed to provide "tested guidelines to avoiding common industry related problems." They are also designed to acquaint the owner, the design professional, and the construction contractor with what are considered to be "fair and equitable practices in the construction process."<sup>31</sup>

Finally, nascent areas of dispute systems design, such as transactional mediation, hold promise for addressing risk allocation in construction projects. The role of a transactional mediator is to assist the parties to identify, analyze, shape, treat, and price risks for a specific project, and to help them agree in advance on a formula for allocating the possible extra costs. Transactional mediation also is an approach to handling disputes for identifiable risks. The goal is to increase the cooperation of the parties from the beginning of the project and reduce costly disputes.

The severe recession of the last few years has shifted the balance of power away from the contractor and toward the owner and the owner's architect. But it is not in society's interest to shift responsibility for design defects away from licensed professionals either to owners or to contractors. Confronting

risk factors, increasing communication, raising the parties' level of security, and clarifying agreements ahead of time appear to be a much more fruitful approach than the old game of hot potato embodied in the AIA contract forms. ♪

#### Endnotes:

- 1 American Institute of Architects, AIA Document Synopses: Conventional (A201) Family, available at <http://www.aia.org/contractdocs/AIAS076694> (last visited July 5, 2010).
- 2 AIA Document A201-2007 is adopted by reference in owner/contractor and contractor/subcontractor agreements in the Conventional (A201) Family of documents.
- 3 "The AIA designed the latest iteration of the A201 Family to define and control the responsibilities of the various parties involved in a typical design-bid-build construction project." James C. Jankowski, FAIA; Suzanne H. Harness, Esq., AIA; and Michael B. Bomba, Esq., *AIA 2007 Update: How Does it Affect Architects?* American Institute of Architects, Articles About AIA Documents, available at <http://www.aia.org/contractdocs/aia081437> (last accessed July 2, 2010). According to the website, the articles were authored by members of the AIA Documents Committee, staff of the AIA and industry experts.
- 4 AIA B101-2007 "Standard Form of Agreement Between Owner and Architect," § 3.6.1.1.
- 5 The AIA publishes revisions in its forms about every ten years. The prior version was published in 1997.
- 6 "The 600-member AGC Board of Directors unanimously voted not to endorse the new A201 on October 6, 2007. AGC's decision was based upon the substantial shift of risk to contractors and other parties outside the design profession as well as a fundamental disagreement with the authoritative role of architect and mandated linear process." Association of General Contractors, AGC of America Preliminary A201 Commentary — November 12, 2007; Revised July 8, 2009, available at [http://www.agc.org/galleries/contracts/Preliminary\\_a201\\_guide\\_finalrevised\\_072009.pdf](http://www.agc.org/galleries/contracts/Preliminary_a201_guide_finalrevised_072009.pdf) (last accessed June 30, 2010).
- 7 *United States v. Spearin*, 248 U.S. 132 (1918). Spearin was a construction contractor who entered into a fixed-price contract with the government to build a dry dock according to plans and specifications prepared by the government. The plans contained a provision requiring relocation of a section of sewer. After relocation of the sewer, a storm caused build up in internal pressure in the relocated sewer section and flooding of the dry dock excavation site. The Court held that the provision requiring relocation of the sewer created an implied warranty by the government that if the specifications were complied with, the sewer would be adequate. Because the sewer was inadequate, the Court held that the government had breached its implied warranty. *Spearin*, at 138.
- 8 *Id.* at 137; see also *Al Johnson Constr. Co. v. United States*, 854 F.2d 467, 468 (Fed.Cir.1988) ("The implied warranty is not overcome by the customary self-protective clauses the government inserts in its contracts.").
- 9 The implied warranty does not apply to performance specifications that establish an objective without specifying the method of achieving the objective. *Spearin*, 248 U.S. at 136. It does not eliminate the contractor's duty to investigate, inquire about, or report a patent ambiguity, inconsistency, or mistake. *Blount Bros. Constr. Co. v. United States*, 348 F.2d 471, 172 Ct. Cl. 1 (1965). It does not protect one who materially deviates from the specifications. *Al Johnson Constr. Co. v. United States*, 854 F.2d 467, 468 (Fed.Cir.1988). It does not shield the contractor from third party claims. *Hercules, Inc. v. United States*, 516 U.S. 417 (1996); *Rick's Mushroom Serv., Inc. v. U.S.*, 521 F.3d 1338 (Fed. Cir. 2008).

*Spearin* continued on page 48

- 10 *E.g., White v. Edsall Constr. Co. Inc.* 296 F.3d 1081, 1086 (Fed. Cir. 2002); *Poorvu v. United States*, 420 F.2d 993, 999, 190 Ct. Cl. 640 (1970); *Luria Bros. & Co. v. United States*, 369 F.2d 701, 708, 177 Ct. Cl. 676 (1966).
- 11 *E.g., USA Petroleum Corp. v. United States*, 821 F.2d 622 (Fed. Cir.1987), *Essex Electro Eng'rs v. Danzig*, 224 F.3d 1283, 1289-90 (Fed. Cir. 2000).
- 12 *Adams v. Tri-City Amusement Co.*, 124 Va. 473, 476, 98 S.E. 647, 648 (1919); *accord, Southgate v. Sanford & Brooks Co.*, 147 Va. 554, 561, 137 S.E. 485, 487 (1927); *See also, Chantilly Const. Corp. v. Com. Dept. of Highways and Transp.*, 6 Va. App. 282, 369 S.E.2d 438 (1988); *Worley Bros. Co. v. Marus Marble & Tile Co.*, 209 Va. 136,161 S.E. 2d 796 (1968); *Greater Richmond Civic Recreation, Inc. v. A.H. Ewings's Sons Inc.*, 200 Va. 593, 106 S.E.2d 595 (1959).
- 13 *Surf Realty Corp. v. Standing*, 195 Va. 431, 442-443, 78 S.E.2d 901, 907 (1953).
- 14 This language appeared for the first time in the 2007 version of AIA B101-2007, § 2.2.
- 15 AIA A201-2007 § 1.2.
- 16 *Id.* § 3.2.2.
- 17 *Id.*
- 18 *Id.* § 3.2.4.
- 19 *Id.* § 3.2.3.
- 20 *Id.* § 4.2.4
- 21 *Id.* § 3.1.3
- 22 *Id.* § 4.2.12. By contrast, the general conditions grant the architect a right to enforce its rights against the contractor. *Id.*, § 1.1.2.
- 23 *Id.* § 3.1.2.
- 24 *Palmer & Palmer Company LLC v. Waterfront Marine Const.*, 276 Va. 285, 289, 662 S.E.2d 77, 80 (2008); *see also, L. White & Co. v. Culpeper Mem'l Hosp.* (Berry, J.) No. 2008-L-50, April 28, 2010; *Culpeper County Cir. Ct.*; VLW 010-8-079, 5 pp. (sustaining plea in bar, ruling that the submission of a dispute to the architect and informal mediation under AIA contract terms was condition precedent to filing); *W.O. Grubb Steel Erection Inc. v. 515 Granby LLC* (Martin, J.) No. CL08-3278, Oct. 16, 2009; *Norfolk Cir. Ct.*; VLW 009-8-233, 5 pp. (enforcing a “pay-when-paid” clause); *Comer v. Goudie*, (Thacher, J.) CL 2008-2110; December 11, 2008; *Fairfax Cir. Ct.*; VLW 009-8-007; (holding that nonsignatory defendants were entitled to enforce an arbitration clause where plaintiff sought to enforce contract terms against the defendants).
- 25 *Estes Exp. Lines v. Chopper Exp.*, 273 Va. 358, 641 S.E.2d 476 (2007); *W.R. Hall & Hampton Roads Sanitation Dist.*, 273 Va. 350, 641 S.E.2d 472 (2007).
- 26 *Modern Cont'l South v. Fairfax County Water Auth.*, 72Va. Cir. 268, 2006 WL 3775938 (Fairfax Cir. Ct 2006).
- 27 ConsensusDOCS were created and endorsed by twenty-four member organizations, including, for example, the Associated General Contractors of America (AGC); the Construction Owner's Association of America (COAA); the National Association of State Facilities Administrators (NASFA); the National Association of Surety Bond Producers (NASBP) and the Surety and Fidelity Association of America (SFAA). ConsensusDOCS, Endorsing Organizations, available from <http://consensusdocs.org/about/endorsing-organizations/> (last accessed July 5, 2010).
- 28 According to the Design-Build Institute of America, design-build agreements have increased their market share for non-residential construction in the United States from about 5 percent in 1985 to about 40 percent in 2005. Design-Build Institute of America, Graph of Non-Residential Design and Construction in the United States, available at <http://www.dbia.org/about/designbuild/> (last accessed July 9, 2010).
- 29 Both the AIA and ConsensusDOCS have developed specialized contracts for the IPD approach. ConsensusDOC 300: Tri-Party Agreement for Collaborative Project Delivery); A195–2008, Standard Form of Agreement Between Owner and Contractor for Integrated Project Delivery, which has its own set of general conditions, A295–2008, General Conditions of the Contract for Integrated Project Delivery.
- 30 AGC has embraced BIM; however, some have expressed concern that BIM may increase architects' liability for design defects. “With the electronic sharing of information, the ability of contractors to claim detrimental reliance on the design has increased.” The AIA Trust: Insurance and Financial Programs for AIA Members and Components: Building Information Modeling and the Transition to Integrated Project Delivery, available at <http://www.theaiatrust.com/newsletter/2009/07/bim-and-transition-to-ipd/> (Last accessed July 11, 2010).
- 31 Sheldon J. Leavitt, AIA, P.E., editor and co-author, “Virginia Construction Industry Guidelines” published by the Joint Cooperative Committee of the Virginia Society, American Institute of Architects, Associated General Contractors of Virginia Inc., American Council of Engineering Companies Virginia Inc., and Virginia Society of Professional Engineers (1991), p. 3, available at <http://www.vspe.org/PDFs/VA%20Construction%20Industry%20Guidelines.pdf> (last accessed July 12, 2010).

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