

ESSAY

THE AMERICAN INSTITUTE OF ARCHITECTS: DOMINANT ACTOR IN THE CONSTRUCTION DOCUMENTS MARKET

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The excitement and controversy¹ generated in 1987 by the American Institute of Architects' (AIA) issuance of new "documents" for design and construction services demonstrated the dominant role the AIA plays in creating prototypical contracts.² All participants in the construction process recognize the value and importance of AIA documents. Yet the issuance of new documents, unlike the issuance of predecessor documents, has highlighted the power wielded by the AIA. As I see it, the promulgation of these standard documents amounts to private legislation.³ While parties cannot be coerced into using them, for all practical purposes, the use of AIA documents in one form or another is almost unavoidable in private projects and even in some public ones. Given the market dominance of the AIA in prototype contracts for design and construction, it is imperative that the role and effectiveness of the AIA documents be examined.⁴ The construction

* Professor of Law, University of California, Berkeley. A personal note: The wheel has turned full circle. Just 40 years ago I published my first piece of legal writing, a deservedly forgotten student comment on the right of privacy. I would like to dedicate this essay to my first-year teachers, but especially to the late Gordon Sinykin, my torts teacher; Frank Remington, who taught me criminal law and helped me get my current position at Berkeley; and Willard Hurst, whose brilliant teaching and scholarship made law school an inspiring experience. I wish also to acknowledge the valuable counsel of the late Professor Jacob Beuscher early in my teaching career at Berkeley, as well as the influence his "law in action" approach had on my legal writing.

1. The Table of References for the forthcoming second edition of *Sweet on Construction Industry Contracts* includes 32 references ranging from newsletter comments to extended journal articles that dealt with the 1987 AIA documents between 1987 and 1991. Also, innumerable seminars, conferences and workshops were convened after the documents were published.

2. The term "documents" is derived from the AIA; while many practitioners refer to prototypes as "forms," I shall use the AIA terminology. A collection of critiques of the 1987 AIA Documents can be found in the preface to J. SWEET, *SWEET ON CONSTRUCTION INDUSTRY CONTRACTS* (1987) [hereinafter J. SWEET, *CONSTRUCTION CONTRACTS*], particularly in the pocket supplement. See also *id.* at § 11.17.

3. For the first recognition of this, see Note, *Private Law Making By Trade Associations*, 62 HARV. L. REV. 1346, 1350 (1949). Unfortunately, most scholarly literature ignored this path-breaking analysis. But see *infra* note 4.

4. Aside from their obvious importance as a source of "de facto" law, the AIA's documents are of considerable academic interest because examination of them provides a tool to refine the meaning of "adhesion" contracts. Professor Lon Fuller in his seminal

industry needs prototype contracts. Transactions regarding design and construction create a web of complex relationships. The owner (the individual furnishing land and money) contracts with a design professional (an architect, engineer or sometimes a construction manager) for design and management services. The owner also contracts with a contractor, may contract with consultants and tenants, and almost certainly will contract with lenders. The prime design professional, the individual contracting directly with the owner, contracts with consultants such as consulting engineers. Contractors contract with subcontractors, suppliers and sureties. Most parties contract with insurers. Contracts made by these independent entities occupy links within the various contract chains.

Construction, a complex process that can span a lengthy period of time and encounter many disruptions and unexpected conditions, needs extensive rules. Such rules must inform the parties of their performance and remedial obligations, create an administrative framework to advance the process, deal with contingencies, handle disputes and provide clear solutions when events occur that frustrate planning of the parties. Absent standardized forms, the negotiation of a substantial number of terms would be necessary. This creates the potential not only for disharmonious outcomes but also for increased costs and inefficiencies, particularly regarding those terms rarely applied. At one extreme, standard contracts can provide *all* the rules, except the individualized terms concerning parties, price, time and scope of services. At the other extreme, such contracts may provide "model" provisions used to help prepare a wholly customized contract. Between these extremes, the parties may modify standard contracts or supplement them with specially prepared supplementary conditions.

Prototype contracts, however, can cause problems. No matter how well-devised, such contracts can pose problems of "fit." An ill-fitting standard contract, one which does not fulfill the objectives of the parties, or one which goes beyond infrastructure capacity of the parties, creates administrative and legal difficulties. AIA documents create a vast network of required notices, a complex system dealing with price and time adjustments, changes, claims and disputes—to name only the most significant ones. To perform "by the book" would take careful

contract law casebook referred to the role of the various trade associations in the development of standardized contracts. L. FULLER, *BASIC CONTRACT LAW* 180, 684, 807, 925 (1947). This was done both to suggest a means to avoid the "battle of the forms" and to demonstrate surrogate bargaining. Such contracts, prepared or approved by associations representing both sides of a transaction, can be looked upon as being made by surrogate bargainers. As Fuller's casebook proceeded through various editions, however, trade associations were deemphasized, being reduced to the vanishing point in the 1990 edition. The role of the AIA is also emphasized by Professor Ian Macneil. See I. MACNEIL, *CONTRACTS* 282-83, 591-94 (1971).

planning and monitoring. This would require trained personnel and significant administrative costs. Fit and lack of capacity for customization of current AIA documents may determine whether this domination will continue.

This Essay has a number of objectives. First, it will sketch the process used by the AIA to formulate its documents and speculate as to the reasons for the AIA's domination of the market for standard contracts for design and construction services. Next, the Essay will consider the effect market domination has on the construction industry and examine the criticisms commonly made of AIA documents. Finally, finding many of these criticisms justified, the Essay will consider some possible changes in the AIA document formulation process and the documents themselves, and will suggest the possible emergence of a more competitive market in prototype contracts for design and construction.

I. THE PROCESS

The AIA Documents Committee plays the most significant role in the document creation process. The committee, consisting of practicing architects, has from twelve to seventeen members—selected for their experience in construction administration, their willingness to do hard work and their geographical diversity. The committee usually meets four times a year for two to three day periods and is divided into task forces responsible for drafting specified documents. Between meetings, members review the voluminous material they are provided by the AIA professional staff in Washington, D.C. The committee is assisted by the AIA's legal counsel and its insurance counsel. Although final decisions are made by the AIA Board of Directors, and the influence of its advisors, particularly its insurance counsel, is very strong, the Documents Committee generally makes its drafting decisions on an independent basis through a consensus process.

The AIA publishes "its documents to give guidance on both accepted industry practices and on legal matters related to construction relationships."⁵ Further, the AIA seeks to "provide services" to its members and the industry by means of an "industry consensus," "uni-

5. DOCUMENTS FUTURES TASK FORCE, REPORT ON THE FINDINGS AND RECOMMENDATIONS REGARDING THE FUTURE OF THE AIA DOCUMENTS PROGRAM app. (1990) [hereinafter FUTURES TASK FORCE]. The principles can also be found in Ellickson, *Contracting Principles for Construction Contracts*, reprinted in *Construction Contract Documents*, ABA Section on Public Contract Law, Feb. 9, 1990.

form legal interpretations," "comprehensibility," a clear and equitable distribution of rights and duties and reflection of national industry customs and practices.⁶ More specifically, the AIA seeks to: (1) "[e]nhance . . . stability and order"; (2) assist users who cannot get or cannot afford "knowledgeable legal counsel"; (3) provide "an alternative to expensive, custom-drafted documents"; (4) promote "flexibility" through "supplemental guides"; (5) provide a "balanced and fair" document; and (6) conform to "common law and statutory precepts adopted in the majority of jurisdictions."⁷ As to risks, the AIA's drafting principles allocates them: (1) to the party best able to control them, (2) to the party best able to protect against unexpected cost (i.e., provide insurance) or (3) to the owner when no other party can control the risk or prevent the loss.⁸

Such lofty general principles may be of little assistance when dealing with specific problems. From 1974-1976, with the assistance of a grant from the National Science Foundation, I witnessed the document-making process. Since then, I have kept in contact with AIA officials and participants in the process. During my observations and discussions, I cannot recall reference to any *basic* drafting principles.⁹ What I heard were occasional references to AIA "policy." Let me illustrate some specific policies I noted, and note a few other drafting criteria.

Although not explicitly stated, one goal motivating the committee is the desire to help architects operate on a firm financial basis. For example, the 1987 change in B141 (under which additional services can be "contingent" or "optional") was made to help architects collect for additional services for which they cannot supply the needed paperwork, such as written client requests.¹⁰ Language is also selected to facilitate architect cash flow¹¹ and protect the architect's fee.¹²

Another factor motivating the AIA in its documents creation process was its obvious desire to please important organizations in the construction industry. For example, the AIA prefers the Single Contract System under which the contract for construction is made with a *single* prime contractor.¹³ This, in my view, was done in part to accommodate the views of the Associated General Contractors (AGC) who generally

6. *Contracting Principles for Construction Contracts*, *supra* note 5, at Tab L.

7. *Id.*

8. *Id.*

9. They were codified in May 1989.

10. See AIA Doc. B141 art. 3, *reprinted in* J. SWEET, *CONSTRUCTION CONTRACTS*, *supra* note 2, at 570.

11. See AIA Doc. B141 ¶¶ 8.5, 11.5.2, *reprinted in* J. SWEET, *CONSTRUCTION CONTRACTS*, *supra* note 2, at 573, 575.

12. See AIA Doc. B141 ¶¶ 5.2.2, 8.3, *reprinted in* J. SWEET, *CONSTRUCTION CONTRACTS*, *supra* note 2, at 572, 573.

13. See the brief article 6 in AIA Doc. A201, *reprinted in* J. SWEET, *CONSTRUCTION CONTRACTS*, *supra* note 2, at 544.

endorse A101 and A201. Similarly, the AIA's traditional negative attitude toward liquidated damages, though now somewhat abated,¹⁴ was based, I believe, upon the desire to please the AGC.¹⁵ Further, the AIA's long-standing preference for arbitration may have originated in its belief in the value of arbitration but now, in my view, principally accommodates the American Arbitration Association (AAA).¹⁶ Without the AIA's inclusion of arbitration in its documents under the auspices of the AAA, the latter would lose the bulk of its construction arbitration docket. Finally, provisions increasingly favor subcontractors, a result influenced by the input of the Associated Specialty Contractors (ASC) and the American Subcontractor Association (ASA).¹⁷

I do not suggest that pleasing such groups is the *sole* factor in drafting decisions. Clearly, sound arguments can be made for the choices made by the AIA. But the process includes associations that must work together on many programs of common interest. This creates a powerful force that can influence drafting choices.

Rough reciprocity also plays a role. For instance, in 1976 the AIA gave contractors the right to demand financial information from owners.¹⁸ Owners, when uncertain about the performance capability or financial capacity of the contractor, can require that the latter furnish surety bonds usually at the time the contract is made or in many contracts at any time during the contractor's performance. One reason for granting the contractor the power to request financial information from the owner was to balance out the owner's power to demand a surety bond.

The AIA documents are designed for national use. As such, they seek to reflect national practices. Consequently, practices thought to be local are not included in AIA documents. One illustration is the unwillingness of the AIA to require that the contractor accompany any requests for progress payments with evidence that no liens will be filed by subcontractors or suppliers, a requirement only imposed when requests are made for final payment.¹⁹ Though the AIA rarely expends

14. See AIA Doc. A101a (instruction sheet to A101), A511 notes to ¶¶ 9.11, 9.12, reprinted in 3 THE ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE (1987). Earlier material was much more negative.

15. Another possible reason was a desire to reduce the administrative burden on the architect created by the need to process requests for time extensions.

16. See AIA Doc. A201 ¶ 4.5.5, AIA Doc. B141 art. 7, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 542, 572. However, B511 seems less favorable to arbitration. See AIA Doc. B511 Guide for Amendments to AIA Doc. B141, reprinted 4 THE ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE (Supp. 1990).

17. See AIA Doc. A 201 ¶¶ 5.3.1., 9.3.1.2., 9.6.2, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 544, 546, 547.

18. See AIA Doc. A 201 ¶ 2.2.1, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 537. In 1976 it was ¶ 3.2.1.

19. See AIA Doc. A201 ¶ 9.3.1, 9.10.2 reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 546, 548.

the resources to conduct surveys, a practice such as this is thought to be local.

Finally, the AIA can select language to avoid an undesirable legal outcome despite its stated policy of conforming to the common law or statutory provisions. For instance, in A201 the AIA seeks to control the commencement of the statutory limitations period to limit exposure to claims made long after performance has been completed.²⁰

Despite its avowed intent to reflect industry standards (the Associated General Contractors (AGC) does endorse A101 and A201 dealing with construction services), the AIA Documents Committee operates with great institutional independence. Although the AIA sales literature does not draw attention to this, the AIA does not seek the endorsement of any other organization for its B-series documents, those which deal with architectural services.²¹ Its prototype subcontract, A401, receives the endorsements of the American Subcontractors Association (ASA) and the Associated Specialty Contractors (ASC), but not the endorsement of the Associated General Contractors. However, the AIA sits at the controls even for those documents for which it seeks endorsement and approval.

Finally, the AIA document creation process is notable for the conspicuous absence of owners or groups with the owner's interests in mind. While professional and trade associations speak of advancing industry goals, they seek primarily to advance the interests of their respective constituencies—the AIA for architects, the AGC for prime contractors and the subcontractor associations for subcontractors. However, no group participated in any meaningful way in the 1987 document creation process that could be said to represent the interests of owners who engage architects or contractors. The AIA has always sought "input" from owners. But owner groups vary widely as to their needs and their willingness to participate. Most importantly, many are not neatly gathered together in easy-to-reach associations. In addition, such groups that can be found may not always agree on language. Where the architect's liability concerns are not directly involved, such as in AIA documents published *until* 1961, the AIA could have been viewed as a surrogate for owners. However, owners basically have been unrepresented in the AIA drafting process.²² Likewise, the document creation process does not include input from lender associations, other important participants in the construction process.

20. See AIA Doc. A201 ¶ 13.7, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 553. See also AIA Doc. B141 ¶ 9.3, reprinted in *id.* at 573.

21. AMERICAN INSTITUTE OF ARCHITECTS, STANDARD FORM CONTRACTS: A SIMPLE WAY TO REDUCE THE RISK OF CONSTRUCTION (1990).

22. As I note in Part IV, this may change.

II. MARKET DOMINATION

The AIA has made standard contracts for close to a century and now sells two million documents a year.²³ Documents can range from G-series documents, such as the one page form change order, G701, to the complex construction and design documents, such as A101/201 and B141. Its most complex and popular document, A201, sells from 300,000 to 400,000 copies each year.²⁴ The extent of the AIA's domination of the construction forms market is evident from a comparison with the volume sold by the Engineers' Joint Contracts Document Committee (EJCDC). The Committee is made up of representatives of four associations. Some components of the Committee publish documents themselves, yet they join together to publish EJCDC documents. All of the components together and the EJCDC consortium sell about 100,000 documents annually. The EJCDC General Conditions, No. 1910-8, its most complex document, sells about 55,000 copies annually.²⁵

What accounts for the AIA's domination? The AIA entered the field first. In 1888, in cooperation with the Western Association of Architects and the National Association of Builders, the AIA published a Uniform Owner-Contractor Contract. In 1911, the AIA issued its first General Conditions of the Contract, the predecessor of A201.²⁶ Moreover, the professional status of individual architects and the general prestige of the architectural profession also contribute to the domination. Indeed, evidence of similar market domination is also manifest in other countries where standardized contracts are published by architectural or engineering associations.²⁷

The dominance of the AIA also stems from the dynamic of the construction process itself. Typically, an owner *first* engages a design professional and *then* retains a prime contractor to execute the design

23. Conversation with Dale Ellickson, Senior Director of Documents, AIA.

24. FUTURES TASK FORCE, *supra* note 5, at 8. Sales are going down, something the AIA attributes to nine out of ten documents being "reproduced illegally."

25. Conversation with Arthur Schwartz, General Counsel, NSPE. EJCDC documents are designed for engineering projects rather than for building projects, such as condominiums, office buildings, commercial developments, schools, houses and apartments, for which AIA documents are most commonly used. This comparison may not reflect dollar volume, as engineering projects on the average involve greater amounts of money. However, many such projects employ a customized contract, or one prepared by a high volume public entity.

26. EVOLUTION AND ACHIEVEMENT: THE ARCHITECT AT MID-CENTURY 29 (T. Bannister 1954).

27. Until the establishment of the Joint Contracts Tribunal in England, the English standard building contracts were known as the R.I.B.A. contracts (Royal Institute of British Architects). English Engineering Contracts forms are dominated by the Institution of Civil Engineers. The FIDIC forms dominate international engineering contracts. They are published by the International Federation of Consulting Engineers.

prepared by the design professional. The prime contractor performs some of the work and hires subcontractors to do the rest.²⁸ Because the design professional is the first player on board, she has been in the position to suggest the form of not only the prototype contract for construction but also for her own services. Undoubtedly this has also contributed to the domination of standard contracts published by associations of design professionals. This is true even in countries where liability control, a principal objective in American standard construction contracts, is not a prime factor.²⁹

Another reason for AIA domination is the commonly held belief that the documents reflect a consensus as to the needs of construction industry participants and that the documents follow the customary practices of that industry. As I have noted, however, the claim of industry consensus is increasingly being questioned, the principal challenge being based upon the lack of owner participation.

The AIA's claim that its documents are "court-tested" also plays a role in its market domination. Court-testedness can signify established judicial interpretations of particular language or rebuffs to any challenge to their validity. To be sure, a large number of reported appellate cases dealing with contracts for design or construction involve AIA documents. Yet the expense of litigating a dispute involving construction is so high that most disputes are resolved by negotiation or non-judicial forums such as arbitration. This means that relatively few reported appellate decisions can be said to provide guides as to how AIA selected language will be interpreted. Also, the great variety of factual situations involving clauses, and the frequency with which AIA documents are changed or language is modified, make the claims of court-testedness unpersuasive. Clearly, however, there is a perception that they are court-tested.

"Time-testedness," rather than "court-testedness," arguably is another factor in the AIA's domination. Except for a frantic period in the 1960s, documents have been revised only at relatively extended intervals—from seven to fifteen years. Currently, the AIA plans new documents about every ten years.³⁰

Perhaps the most significant reason that the AIA dominates the field is that parties have become familiar with its documents and trust them despite the many complaints about them. For example, the Associated Builders and Contractors (ABC) has offered only a few sug-

28. Alternatives to this method are being used increasingly. See *infra* note 58. This may lead to the use of forms published by associations other than the AIA. J. SWEET, *LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS* § 21.04 (4th ed. 1989) [hereinafter J. SWEET, *LEGAL ASPECTS*].

29. In Switzerland the dominant forms are published by the Swiss Engineers and Architects Association. SIA Norm 118. See Meroni, *infra* note 89.

30. Preparation is beginning *now* for new documents to be published in *six* years.

gestions to modify document A201—partly because it recognizes the limited ability of contractors to control contract language, but also because the AIA's provisions “represent a fair compromise.”³¹ Contracting parties can usually adjust to almost any contract term despite their grumbling that terms are unfair, overreaching or vague. Indeed, in my experience, contracts published by the AIA are much more even-handed and less one-sided than those drafted by owners or, in the case of subcontracts, by prime contractors. In any event, many construction contract clauses are used rarely. Often it is not worth challenging them or, for that matter, spending the time to draft them. A contracting party, familiar with the terms of a standard contract, will usually accept the terms in principle (it actually may have no choice), seek to modify terms that can be changed and are likely to do *real* damage, adjust its operations to the contract, and “get to work.”

Finally, and perhaps most significantly, other alternatives are much less attractive and often much more expensive. For example, one alternative to an AIA document is a customized contract prepared by the dominant party or, even rarer, a contract negotiated by both parties. Customized contracts can be made by parties who routinely make such contracts or even by owners who are doing a “one shot” project. Public owners are often controlled by regulations or statutes, and need prototypes for a large number of similar transactions. Those with sufficient resources will draft their own standard contracts. A private owner with similar resources, or where the stakes are high enough, may draft a customized contract for repeated transactions or even for one particular transaction. But a person for whom this is a “one shot” transaction cannot amortize the costs of preparation over many transactions. This means such a party will customize a contract only if the benefits appear to outweigh the costs. The preparation of a customized construction contract takes professional skill, substantial expense and much time. The AIA has developed such skill over the years, skill often lacking in attorneys who draft customized contracts. Customized contracts are much more expensive than standardized contracts, such as those of the AIA. In addition to the attorneys fees for the drafter, at least in private projects, a party presented with a customized contract may believe it must use legal counsel to review it or make suggestions. If both parties are represented by counsel, there can be very expensive negotiation costs. Finally, it is certainly faster to use an AIA document than a customized construction contract.

In sum, the AIA dominates the standardized design and construction documents market because: (1) it entered first; (2) it capitalized on the position of the architect in the traditional process, the stature

31. Grant, *Modifying A201*, BUILDER & CONTRACTOR, Feb. 1990, at 43.

of the architectural profession, and the AIA; (3) it put out a cheaper and usually better product than did competitors; and (4) it marketed its product in a way that made it familiar and acceptable to the construction industry.

III. AN EVALUATION OF AIA DOCUMENTS

Any entity that dominates its market may become insensitive to the needs of its customers, assuming that they have no other place to go. Has the AIA produced a quality product? A *good* contract should be *clear*, *workable* and reasonably *complete*. It should also serve as a helpful management tool. How do AIA contracts fare? Has the AIA satisfied its "customers"?

A. Completeness

AIA documents provide solutions for most problems likely to arise. The principal AIA construction document, A201, provides comprehensive coverage of the crucial areas of performance commitments (Articles 2 and 3), administration, including disputes (Article 4), subcontracting (Article 5), separate contracts (Article 6), changes (Article 7), time (Article 8), payment (Article 9), protection of property and safety (Article 10), insurance (Article 11), correction of work (Article 12), termination (Article 14) and miscellaneous provisions (in Article 13).

The principal coverage weakness in A201 is the failure of paragraphs 10.1.2–10.1.4, which deal with the effect of discovering asbestos and polychlorinated biphenyl, to recognize a number of important matters including: the role of public officials in determining how such material will be handled and whether work can resume, that only licensed asbestos abatement contractors may be used for corrective work in many states and cities, and the effect on price and time commitments of encountering such material.³² In addition, A201 does not deal with substitution requests. Many other standard form contracts include a mechanism that allows the contractor to propose substitute material and equipment for approval by the architect or engineer.³³ Finally, the AIA fails to include a clause empowering the owner to terminate for convenience, a provision found in many public contracts and increasingly in private contracts.³⁴ Yet despite these omissions, and some may be justifiable, the AIA has done a commendable job of providing for most situations likely to arise in the construction contract.

32. See J. SWEET, CONSTRUCTION CONTRACTS *supra* note 2, at § 15.12.

33. EJCDC No. 1910-8 ¶ 6.7.

34. *Id.* at ¶ 15.4.

B. Clarity

As discussed, the principal AIA contract for construction services consists of two documents, A101 (the Standard Form of Agreement Between Owner and Contractor) and, incorporated by reference, A201 (the General Conditions of the Contract). This system, however, can generate clarity problems. For example, A101 contains the individualized items such as parties, architect, price, retention and time. Increasingly, it includes more detail as to time (Article 3) and progress payments (Articles 5). These topics are covered in greater detail (time in Article 8 and payments in Article 9) in A201. This has the potential for creating conflict.³⁵ On the whole, however, AIA documents are relatively easy to understand. Comparison with the contracts published by the Joint Contracts Tribunal (JCT) for use in the United Kingdom, for example, demonstrates how very clear they are relative to how complex they could be.³⁶

To be sure, pockets of unneeded complexity do exist in A201, such as provisions dealing with the obligation of the contractor to pass certain commitments and benefits to subcontractors (paragraph 5.3.1), waivers of subrogation (paragraph 11.3.7), and material concerning defect claims discovered after completion (paragraph 13.7.1.1). The consensus method of making drafting decisions by the Documents Committee has led on occasion to prolixity and over drafting. One need only try to make sense out of the AIA indemnity clause in A201 (paragraph 3.18), the inferences drawn from the issuance of progress payment certificates (paragraph 9.4.2) or provisions that deal with substantial completion (paragraph 9.8.2) to recognize that over drafting does occur. But lapses such as these are common in detailed construction contracts, whether made by an association or by attorneys for the parties. Also, in some areas, such as indemnification, complex drafting may be required because of judicial and legislative controls.

C. Workability

“Workability” refers to whether the provisions in a contract can be or will be followed by most users. This outcome depends upon the administrative capability of the parties, their belief that compliance is important and their perceptions as to the cost of compliance. Workability also recognizes that users who may wish to accomplish management objectives may wish to customize an AIA contract to accomplish their particular objectives.

35. J. SWEET, *CONSTRUCTION CONTRACTS*, *supra* note 2, at ¶ 11.5.

36. I.A.N. WALLACE, *BUILDING AND ENGINEERING STANDARD FORMS PREFACE* (1969). Any of Wallace's other texts will make similar complaints about incomprehensibility.

The main workability problem centers around the multi-faceted architect's role in AIA documents. The variety of architect functions can be demonstrated by the New Engineering Contract (NEC) published in 1991 by the Institution of Civil Engineers (ICE) in England. The ICE describes the need for and features of the NEC.³⁷ It notes that the traditional role of the engineer can be divided into four constituent parts. These are the engineer as project manager—in the U.S. he would be called construction manager—designer, supervisor of construction or adjudicator of disputes. It notes that while the project manager can also be the designer, this is not always the case. Some engineers, it states, are appointed for their managerial abilities, not for their design abilities. It also notes that if the project manager has not created the design, it can put pressure on the designer to correct shortcomings of content or timeliness. The ICE notes that, in engineering projects, the engineer who manages the project may be on the staff of the owner, but the design may have been carried out by consultants. The ICE describes the supervisor as the person who must "monitor the Contractor's performance."³⁸ Finally, the ICE notes that the engineer may be the adjudicator whose function is to decide disputes that arise in the course of carrying on a contract.³⁹ Under the principal AIA contract for construction (A101/201), the architect has created the design. She also will monitor the contractor's work. She also acts as a manager in the sense that she has a role, for example, in reviewing schedules, approving submittals and interpreting the documents. Finally, she is also given the residual role of resolving disputes. This multi-facet role creates complexity.⁴⁰

Three illustrations demonstrate the complexity created by placing the architect in these various roles. The first is the power given the architect under A201 paragraph 8.3.1 to grant a time extension. She is to do so if certain specified events occur or if she determines that other causes justify the delay. The contractor who wishes to receive a time extension for adverse weather conditions, must comply with paragraph 4.3.8. Paragraph 4.3.8.1 requires the contractor to give a written notice and paragraph 4.3.8.2 sets forth standards for determining whether a time extension should be granted. Obviously, the decision regarding whether to grant such a time extension and the amount of any such extension is determined by interpreting paragraphs 8.3.1 and 4.3.8.2. This can invoke the architect's power under paragraph 4.2.11 to "interpret and decide matters concerning performance under and require-

37. INSTITUTION OF CIVIL ENGINEERS, *THE NEW ENGINEERING CONTRACT: THE NEED FOR AND FEATURES OF THE NEC* (1991).

38. *Id.* at 6.

39. *Id.* at 5-7.

40. J. SWEET, *CONSTRUCTION CONTRACTS*, *supra* note 2, at ch. 5.

ments of the Contract Documents.” That paragraph has specified time limits for interpreting the documents, something not found in paragraph 8.3.1. But suppose the architect’s decision to grant or not to grant a time extension is not satisfactory to the owner or the contractor. This can create a dispute that will again be given to the architect under paragraph 4.3.2, his decision being a condition precedent to arbitration or litigation. The process under which he makes his decision under paragraph 4.3.2 is governed by detailed rules set forth in paragraph 4.4. Following these provisions requires that the architect take another look at what he has decided under paragraphs 8.3.1 and 4.3.8.2 and possibly paragraph 4.2.11. This alone can create confusion because of the different formal requirements in paragraphs 8.3.1 and 4.2.11.

A second illustration relates to the power given the architect under paragraph 4.3.6. If either party (usually the contractor) claims it has discovered concealed or unknown conditions, the architect investigates such conditions and can recommend an equitable adjustment in contract price or time. Yet paragraph 4.3.6 states that, if owner and contractor do not agree, the dispute shall be referred to the architect for proceedings under paragraph 4.4. Again, we see the architect having to take a second look.

Finally, if the contractor and owner cannot agree on a price for a change ordered by the owner, the architect, who very likely has advised the owner as to whether she should accept any contractor’s proposal, decides price adjustment under paragraph 7.3.6 and time adjustment under paragraph 7.3.8. Again if either party is dissatisfied, a dispute can occur. If this happens, the architect is given a second and perhaps even a third look under paragraphs 4.3 and 4.4.

It is possible to justify such second and even third looks by concluding that the architect will be able to take a “fresh look” in his role as resolver of disputes. On the other hand, it can be contended that the unlikelihood that the architect will change his mind in these second and even third looks makes these appeals a waste of time. This procedure has generated doubts as to the “workability” of AIA documents for small and even mid-sized projects. In my view, many users will simply ignore the process or follow it haphazardly in small projects and even mid-sized ones. In this sense, current AIA documents, particularly A101/201, are not “workable.”

D. AIA Documents As Management Tools

Planners should see a contract as a management tool. The contract must instruct participants as to what they are to do, place risk upon the participant who can most easily prevent harm or transfer risk to others, determine who is responsible if things go wrong and what it

will cost the responsible party. While not specifically adverted to in the Basic Drafting Principles, the AIA doubtless would like to think of itself as seeking to accomplish this objective. However, B141 paragraph 2.6.10 employs "the best I can" standard for assessing the role of the architect in observing the progress of the work and in certifying payments. Similarly, A201 paragraph 3.2.1 can be interpreted to create shared responsibility. While these policies can be supported as ways to avoid "strict" liability, management goals of proper performance of signalling who will be responsible and placing that responsibility on the proper party, may not be advanced by these fuzzy outcomes. Other incentives for proper performance may be present, such as professional pride, desire for repeat business, a fear of adverse insurance underwriting decisions, or worry about licensing sanctions. While other incentives may make the need for the contract to promote management goals less significant, drafting principles of the AIA do not, in my view, sufficiently stress management goals of efficiency and harm avoidance.

While I cannot offer a thorough analysis of the major AIA documents to determine whether they can be said to implement management goals, let us look at one uncontroversial though revealing illustration. Document B141 (a prototype for transactions between the owner and the architect), paragraph 4.6, requires the *owner* to supply geotechnical information. Paragraph 4.9 makes the owner responsible for the accuracy of the information. Yet B141, paragraph 2.1.1, requires the *architect* to furnish normal structural, mechanical and electrical engineering services.

A number of reasons have been given for this differentiation. The AIA Commentary to document B141 states that architects do not "customarily have geotechnical engineers on their staff."⁴¹ This, however, is also true of the other engineering specialties. Additionally, the Commentary relates that the architect does not have the independent capability to evaluate the accuracy of geotechnical services. But while the architect *may* know more about the quality of services provided by the other consulting engineers with whom the architect contracts, I doubt the difference, if any, is sufficient to justify the differentiation. According to one AIA official with whom I spoke, the geotechnical engineer is usually retained before the architect is engaged and the client comes to the architect with geotechnical information.⁴² My informal conversations with architects indicate that practices vary greatly.

The AIA recognizes that the architect will be held liable contractually and perhaps in tort as well for the negligence of her consultants.

41. AMERICAN INSTITUTE OF ARCHITECTS, 4 ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE ¶ B141 Commentary, ¶ 4.6 (1987).

42. Conversation with Dale Ellickson, AIA Senior Director of Documents. Again, surveys would be useful.

Because the risk of errors by a geotechnical engineer may be significant, the AIA has chosen to treat geotechnical services differently and *requires* that the owner furnish such information. In addition, the architect may not be able to insure herself against a claim based upon errors in supplying geotechnical information or to place ultimate liability through indemnification upon the geotechnical engineer. The latter may insist upon his liability being limited by contract to his fee or a portion of it, or he may not carry professional liability insurance. (Of course, the owner faces this problem too.)

If efficiency or harm avoidance were a *primary* factor in deciding who engages whom, the geotechnical engineer would be retained by the architect. The architect is likely to have better information on the quality of those who supply geotechnical information, at least as good information as she has about other consultants. However limited the information may be, and however difficult it is to verify its accuracy, the architect has more information and greater ability to verify it than the owner. If in a particular project the services *are* supplied before the architect is retained, an alternative clause could recognize this as an exception or a modification made.

If liability avoidance and proper risk distribution were the *sole* or even primary factors, the AIA would have required the owner to engage *all* consultants. But drafting decisions include other, often intangible, considerations. For example, the architect generally wants to be known as the *prime* design professional, as the "captain of the team." She wants to engage the other technical persons and be the conduit for all communications. Superior professional status can overcome even liability avoidance, usually a dominant factor. Yet the latter controls who retains the geotechnical engineer.

E. User Reactions

Another management concern is the ability of planners, usually owners, to obtain a contract that meets their special design and construction needs. Some, particularly private owners on a limited budget or public owners more generally, want a *tight* contract. Such a contract seeks to minimize claims by the contractor and protect any fixed contract price or time commitment. Others may prefer a *flexible* contract for design or construction, one directing the architect or contractor to set a fixed price for performance based upon the events *likely* to occur. If the unexpected does occur, the contractor will receive a price adjustment. This protection should generate a lower bid or negotiated price.

To examine user reaction it might be useful to classify the AIA's most commonly used documents, B141 and A101/201 (the latter two

are often used together). The documents are flexible, not tight contracts, that do not seek to protect any fixed price and are not designed to use the contract to avoid claims that can significantly increase the ultimate payout by the owner.

First let us look at B141, the AIA's principal contract for design services. It provides a long list of additional services,⁴³ for which the architect is compensated in addition to the basic fee. The list includes services some owners would expect to be incorporated in the *basic* fee, and not treated as an "extra."⁴⁴ Also, if there are drastic changes in the scope of the project or delays in the performance of design or construction, compensation is added to the basic services fee.⁴⁵ Clearly, any client believing that the basic fee will be all she will pay will be disappointed. The flexible nature of B141 offers much opportunity for adjustment. However, most adjustments will result in higher fees than the basic fee specified.⁴⁶

More important, A201, the AIA's general condition for construction services performed for a fixed price, does not make a strong effort to protect price and time commitments. For example, the contractor receives additional compensation and a time extension for any of a number of reasons. If the contractor encounters conditions different than those represented or expected, he receives an equitable price adjustment and time extension.⁴⁷ The contractor has the advantage of a generous (except for weather) time extension provision.⁴⁸ She has the benefit of an architect determined cost-type method of compensation for changes plus overhead and profit, if the parties cannot agree on the price adjustment.⁴⁹ Also, because arbitration is built into all AIA documents,⁵⁰ the claimant, usually the contractor, gets *some* money. Fi-

43. See AIA Doc. B141 art. 3, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 570.

44. See, e.g., AIA Doc. B141 ¶¶ 3.2.3 (providing documentation for preparing a change order); 3.2.4 (evaluating proposed contractor substitutions for material or equipment specified); 3.4.1 (programming or outlining the owner's needs); 3.4.7 (verifying accuracy of drawings or information furnished by the owner); 3.4.10 (furnishing detailed cost estimates), reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 570-71. For more examples, see J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at § 6.6.

45. See AIA Doc. B141 ¶ 3.3.2, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 570.

46. As discussed later, B511, which provides alternative language for some topics, was published in 1990. See *infra* note 53.

47. This provision is usually referred to as a "differing site condition clause." See AIA Doc. A201 ¶ 4.3.6, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 542.

48. See AIA Doc. ¶¶ 8.3.1, 4.3.8, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 546, 542.

49. See AIA Doc. ¶ 7.3.6, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 545.

50. See AIA Doc. B141 ¶ 7.1, AIA Doc. A201 ¶ 4.5, AIA Doc. A401 ¶ 6.1, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 572-73, 542-43, Supp. 1990 at 151.

nally, the contractor's acceptance of a time extension does not bar her from asserting a claim for delay or disruption,⁵¹ the type of claim which has the potential for a large owner payout.

Certainly, cogent arguments can be made for the flexible approach. However, *some* owners would prefer a tight contract. If they can afford it, experienced private owners or public entities will draft their own contracts. They want a "tight" contract that will protect the contract price and time commitment. In contracts for architectural services, their contracts are likely to limit the architect's fee to prevent added compensation for additional services. Such owners will "tighten" their contracts for construction services by making the contractor bear the risk of unforeseen subsurface conditions, disclaiming responsibility for the accuracy of information furnished and requiring the contractor to rely on her own investigation, making time extensions difficult to obtain, and barring the contractor from recovering damages for delay caused by the owner or entities for which she is responsible. Such owners want a "tight" contract that will protect the contract price and time commitment and minimize the likelihood of claims. AIA documents will not do this.

I do not suggest that the AIA's decision to publish flexible contracts is wrong. Yet the use by some owners—particularly experienced private or public entities—of tight contracts suggests that the market consists of a variety of customers, some of whom may wish a tight contract. While the AIA does recognize the value of fixed-price versus cost-type pricing,⁵² it does not publish a document that will meet the needs of an owner who wishes a *tight* fixed price contract for design or construction services.⁵³

How do AIA documents resolve the differing needs of owners regarding involvement in the construction process? Some owners wish to be active. Others prefer a passive role. Some owners, usually public owners or experienced private owners, wish to dominate the construction process by taking near total control over the contractor's operations. Such an owner decides *how* the design will be executed, a decision AIA documents usually reserve for the contractor. This may be done because the owner feels that she or her advisors know more about the process of design or construction than the architect or the contractor engaged. Such an owner may reserve for herself the power to dictate

51. See AIA Doc. A201 ¶ 8.3.3, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 546.

52. For cost-type construction services, see AIA Doc. A111 and AIA Doc. A117. Prior to the publication of B141 in 1974, AIA published a set of forms for design services which included fixed fee and cost-type compensation arrangements.

53. While A511 does provide alternative language for the latter and now B511 can be used to make modifications in documents B141 or B151 (AIA's short-form B141), neither document A511 nor B511 will help an owner who wants tight contracts.

means, methods and sequences of performance. The owner will realize or should realize that her dominance may make any transfer of costs of any failures to the architect or contractor difficult. Also, such control may expose her to more successful third party claims. But she takes control because she believes control will be more likely to generate a successful project.

On the other hand, an owner may prefer a relatively passive role for herself and her architect. Such an owner may give plans and specifications to a contractor and allow the latter to decide how the objectives should be accomplished. To be sure, such an owner may want to review performance periodically to measure contractor progress and to keep an eye, though a casual eye, on how things are proceeding. But such an owner is likely to allow the contractor the right to select his subcontractors, to manage his subcontractors, to determine how the project should be executed and to deal with safety requirements.

The AIA's format is designed for a passive owner operating through a relatively passive architect. While the owner still retains the power to stop the work⁵⁴ and, through the architect, to reject defective work,⁵⁵ to withhold payments under certain circumstances,⁵⁶ and to veto designated subcontractors before the project has commenced,⁵⁷ generally owner and architect take much less control than do public entities or experienced owners (such as developers or owners influenced by their lenders). Again, I emphasize that opinions can differ as to whether prototype contracts should be designed for active or passive involvement. My point is merely that the AIA has not given its customers a choice.

To be fair, the AIA to some extent has produced documents that meet the needs of different customers to some extent.⁵⁸ However, while

54. See AIA Doc. A 201 ¶ 2.3.1, *reprinted in J. SWEET, CONSTRUCTION CONTRACTS, supra* note 2, at 520.

55. See AIA Doc. ¶ 4.2.6, *reprinted in J. SWEET, CONSTRUCTION CONTRACTS, supra* note 2, at 541.

56. See AIA Doc. ¶ 9.5.1, *reprinted in J. SWEET, CONSTRUCTION CONTRACTS, supra* note 2, at 547.

57. See AIA Doc. ¶ 5.2.2, *reprinted in J. SWEET, CONSTRUCTION CONTRACTS, supra* note 2, at 543.

58. In addition to B141, the AIA has published numerous other documents that lend themselves to customization: B151 (shortened version of B141); B161 (the "fill in the blanks" form for defining the scope of the services as an alternative to using or modifying the services set forth in B141 or B151); B171 (for interior work); B181 (for housing projects); and B191 (a contract between an architect and a designer-builder (D/B)). It also publishes document B162, a check-list of services to help complete document B161. As regards construction services, in addition to A101/201, the AIA publishes document A107 (a shortened, one-document version of A101/201, A111 (a cost-type contract) and A117 (a shortened A111). Finally, the AIA has published a family of documents where a construction manager (CM) is used: B141 CM; B801; A101 CM; and A201 CM. The CM provides expert information as to cost, time, and construction techniques during design, manages the work with special

the variety of standard forms recognizes some variant user needs and aids customization, there are important factors not recognized—such as the varying needs for tight versus flexible contracts and the needs of passive versus active owners and dominant versus passive architects.

AIA documents are difficult to customize. Clearly, the AIA could make customization easier. At present, the AIA does provide ways to customize within a particular form. For example, in agreement forms, such as B141 and A101, it provides blanks that can be filled in by the contracting parties.⁵⁹ But “fill in the blanks” documents are rare. For instance, A201 does not contain any blanks where they might be appropriate—for time deadlines, the review by the architect of submittals by the contractor or the handling of claims and disputes. Clearly, too many blanks and too many items to be filled in, perhaps the case with B161, may be a disincentive to users because of contract negotiation costs. Yet the total absence of blanks in A201 clearly limits the ability to customize, even when A511 provides a system to add supplementary conditions.⁶⁰ While the number of blanks in A101 is increasing, there will never be enough blanks to facilitate careful customization. In addition, because A101 is used in conjunction with A201, and because the latter continues to be “blankless,” there will always be customization problems.⁶¹

Another way to customize a transaction is to provide alternative clauses. For example, an owner may prefer to place the risk of sub-surface conditions upon the contractor rather than absorb it herself as dictated by A201.⁶² Language that could accomplish *either* risk allo-

emphasis on coordination, scheduling and safety during construction, and may perform some construction with its own employees. The AIA also publishes A191, A491 and B901, a series of documents under which the Design Build (DB) system is used. (The D/B documents are recent additions to the AIA documents.)

59. AIA provides some blanks in B141 in addition to the blanks necessary in any contract, such as those for the names of the parties and the price. See AIA Doc. B141 ¶¶ 11.4 (showing mark-up on expenditures by architect that are reimbursed by the owner); 11.5.1 (showing effect of delay in performing design services); 11.5.2 (providing schedule for time payments and amount of interest for late payments), reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 575. In 1990, it published B511 which provides blanks under which a user can specify the number of site visits (¶ 2.6.5.1), a dollar limit on arbitration, (¶ 7.1), the amount of professional liability insurance as a reimbursable, (¶ 10.2.1.7) and a limit on the architect's liability (¶ 12.2). (Note these are possible changes a user can make, not blanks nor alternate clauses in B141.) Similarly, A101 contains blanks for the obviously individualized terms as well as blanks for completion date, schedule of payments and retention. See AIA Doc. A101, ¶¶ 3.2, 5.3, 5.8, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 524, 526.

60. The AIA has long-term plans to provide software that would allow supplementary conditions to be integrated into the general conditions. See *supra* note 93 and accompanying text.

61. British, Canadian and Australian standard contracts use a *single* form with an appendix to fill in the blanks.

62. AIA Doc. A201 ¶ 4.3.6.

cation could be included, and the owner could choose. The British JCT contracts, although maligned for their clumsy style, use this technique. Although alternative language is given in Document A511 and the newly issued B511, the AIA currently does not provide alternative clauses in its documents.⁶³ Clearly, the AIA can do more to facilitate customization.⁶⁴

The new series of AIA documents, issued in 1987, has generated numerous complaints. Contractors, for their part, contend that A201 places too much design responsibility on the contractor and relieves the architect from design responsibility.⁶⁵ Another common criticism is that A201 unduly interferes with the management of subcontractors. For example, A201 bars contractors from applying for payments that they do not intend to pay subcontractors,⁶⁶ makes contractors attach subcontractor requisitions to any application for payment,⁶⁷ requires the contractors pay subcontractors when they are paid,⁶⁸ and seeks to give benefits to the subcontractors equivalent to the benefits owners give prime contractors.⁶⁹

Contractors also complain that the expiration of the work correction (warranty) period does not mark an end to their performance obligations under the contract.⁷⁰ Contractors state that they are willing to stand behind the quality of their work for a designated period, such as one year, and take care of whatever goes wrong for which they are responsible. They are fearful, however, of claims made long after they have completed the work. Such claims may be difficult to defend and may be attempts to make them responsible for defects that are not

63. Recognizing this shortcoming, the Documents Futures Task Force has suggested that a computer-based system can allow the user to select from alternate clauses rather than delete undesirable language. *FUTURES TASK FORCE*, *supra* note 5, at 13.

64. In earlier editions of B141 the AIA provided different documents for different compensation arrangements. They were replaced by one document that contained tear-out sheets for the compensation system selected by the parties. Four sheets were included, with the user removing the three that did not reflect the compensation method used in that particular transaction. But this was abandoned because the AIA thought it too cumbersome. The Engineers Joint Contract Documents Committee (EJCDC) still uses such a system and also provides pages that can be torn out if arbitration is not to be used.

65. See AIA Doc. A201 ¶¶ 3.2.1, 3.2.2, *reprinted in* J. SWEET, *CONSTRUCTION CONTRACTS*, *supra* note 2, at 538. See also J. SWEET, *CONSTRUCTION CONTRACTS* §§ 15.12, 24.14 (Supp. 1990).

66. See AIA Doc. A201 ¶ 9.3.1.1, *reprinted in* J. SWEET, *CONSTRUCTION CONTRACTS*, *supra* note 2, at 546.

67. See AIA Doc. A201 ¶ 9.3.1, *reprinted in* J. SWEET, *CONSTRUCTION CONTRACTS*, *supra* note 2, at 546.

68. See AIA Doc. A201 ¶ 9.6.2, *reprinted in* J. SWEET, *CONSTRUCTION CONTRACTS*, *supra* note 2, at 547.

69. See AIA Doc. A201 ¶ 5.3.1, *reprinted in* J. SWEET, *CONSTRUCTION CONTRACTS*, *supra* note 2, at 544.

70. See AIA Doc. A201 ¶ 12.2.6, *reprinted in* J. SWEET, *CONSTRUCTION CONTRACTS*, *supra* note 2, at 552.

properly chargeable to them but rather are the result of improper use. In exchange for a strict obligation during the correction of work period, they feel they should be relieved from further liability after the period has expired. But the AIA has not cut off their liability at the expiration of the "correction of work" one-year period set forth in A201 paragraph 12.2.2.

Owners have voiced displeasure over AIA documents. Some want careful inspection at each payment stage and a warranty by the architect that work in progress complies with contract requirements. They criticize AIA documents for their failure to require that an architect *inspect*, not simply observe, the ongoing work when he visits to determine progress for the purpose of issuing progress payment certificates.⁷¹ Many owners also resent the long list of additional services in B141, particularly the contingent additional services found in paragraph 3.2. The latter are services that can be performed by the architect unless she receives prompt written notice from the owner that she does not wish these services to be performed.⁷² Other owners are surprised at the "flexibility" of B141, which increases the likelihood that final compensation will substantially exceed any fixed compensation amount. Most owners (and almost everyone else) are unhappy that they cannot consolidate arbitrations they have with their architect and their contractor unless the architect agrees.⁷³ They point to the added costs of separate arbitrations and the possibility they could lose both. (Here the AIA can hardly claim that its choice reflects industry consensus. It clearly does not!) Strong owners, such as developers or those who wish to take an active role during construction, resent the architect's "buffer" role. They would prefer head-to-head negotiations with the contractor. They also complain that the AIA documents do not give owners enough power to intervene, do not treat time seriously and can generate a total payout in excess of that anticipated.

Even architects voice some complaints. There have always been architects, even those close to the AIA, who feel that the documents are too protective, overly legalistic and will simply drive business elsewhere. Some are concerned that the often complex and lengthy AIA documents will invite lawyers into the process. This will not only increase negotiation costs but take away contractual protection for architects. Some architects (or more commonly their attorneys) complain that there is no provision under which they will recover their attorneys

71. See AIA Doc. B141 ¶ 2.6.5, AIA Doc. A201 ¶¶ 4.2.2., 9.4.2, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 569, 540, 547. See also J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at § 5.12.

72. See AIA Doc. B 141 ¶ 3.3, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 570. See also J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at § 6.

73. See AIA Doc. A201 ¶ 4.5.5, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 543. See also J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at § 22.20.

fees if they must sue for unpaid compensation. Others complain that the AIA has not included language under which they limit their obligation to the owner to a certain amount, to a portion of the fee, or to their insurance coverage.⁷⁴

Almost all participants complain of the cumbersome provisions dealing with disputes,⁷⁵ changes⁷⁶ and concealed conditions.⁷⁷ Similarly, many complain that the AIA has not adequately recognized the role of public authorities in dealing with environmental matters.⁷⁸

Such complaints must be looked at realistically. There are those who always complain if anything in a standard form, particularly a new one, appears to harm their interests. But when uniform complaints are registered by all elements of the industry, it is time to take notice.⁷⁹ Of course, the AIA can defend and has defended its choices, often with legitimate arguments. But the current degree and nature of complaints show a high level of customer dissatisfaction. In October, 1988, a detailed analysis of the complaints received was presented to the AIA Board of Directors. After a lengthy meeting, the Board decided not to revise the documents.⁸⁰ This response, in my view, reflects more than pride of authorship, an unwillingness to incur the costs of reworking the document, or a spirited defense of its activities. It reflects the intransigence often characteristic of an entity that dominates its market.

IV. WHAT LIES AHEAD?

Will the AIA continue to dominate the market for standard construction contracts? The answer to this question derives from numerous factors: the intensity of the discontent with current AIA documents, whether this discontent will generate pressures on the AIA and, if so, what form they will take. Also relevant is the possible emergence of competitors.

74. Such language is included in AIA Doc. B511. See J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 67 (Supp. 1990).

75. See AIA Doc. A201 ¶¶ 4.3, 4.4, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 541-42. See also J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 1, at § 11.17.

76. See AIA Doc. A201 art. 7, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 545-46.

77. See AIA Doc. A 201 ¶ 4.3.6, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 542.

78. See AIA Doc. A201 ¶ 10.1.2, reprinted in J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2, at 549. The latter has been dealt with to some degree in AIA Doc. A512. See generally J. SWEET, LEGAL ASPECTS, *supra* note 28, at §§ 15.09, 27.05(J).

79. See *supra* notes 56-69.

80. Despite the rash of complaints, the AIA claims that sales are at historically high levels. However, the Documents Futures Task Force itself has noted a decline in sales, attributing this to unlawful copying. FUTURES TASK FORCE, *supra* note 5, at 8.

In my view, the current level of discontent exceeds the grumbling routinely made by lawyers and others in the construction industry when a new important AIA document is published. The almost universal criticism of the AIA's handling of arbitration consolidation and the disputes process currently contained in A201 has and will generate increasing pressure on the AIA. In addition, the exposure of the AIA process and its power will generate a closer look at the process and power wielded by the AIA.

One form of pressure will be the *possibility* that legislatures may take action to bar or mandate certain clauses. Historically, legislatures have not involved themselves with private construction contracts. During 1966–1967, however, the AIA tangled with the AGC over the indemnity clause the AIA had included in its A201 published in 1966. The AGC fought the proposed indemnity clause in two arenas, over the negotiation table and in the legislatures. Ultimately, contractor groups were successful in persuading legislatures to limit indemnity clauses in construction contracts. This willingness of legislatures to enter into the private construction contract arena has not abated, with various legislatures having recently enacted new limitations on such clauses.⁸¹ Similarly, legislatures in a few states have responded to contractor complaints that public owners have forced them to agree to “no damage” or “no pay for delay” clauses⁸² or have made them wait lengthy periods for their payments.⁸³ While most legislative activity has centered around public contracts, once legislative interest can be attracted, this can spill over into private contracts, particularly in areas that relate to the payment process.⁸⁴

There is, however, another much more drastic form of legislative intervention. An aroused legislature could create a statutory contract that would apply unless displaced by a valid contract, much as Article Two of the Uniform Commercial Code can be said to create a statutory contract for the sale of goods, if the parties do not choose otherwise. Indeed, some legislatures have already done this in consumer-sensitive contracts.⁸⁵

81. See J. SWEET, LEGAL ASPECTS, *supra* note 28, at § 36.05(D).

82. *Id.* at § 30.10(A). See also COLO. REV. STAT. § 24–91–103.5(1)(a)(1990) (barring such clauses in public contracts effective July 1, 1989).

83. See J. SWEET, LEGAL ASPECTS, *supra* note 28, at § 26.03.

84. California's S.B. 274 proposed in 1989 would have regulated retention clauses in some private contracts. The associations representing the interested parties—owners, contractors and subcontractors—all had agreed on the final bill. It sailed through the 1989 legislature. However, one association of owners reconsidered its position and subsequently persuaded the governor to veto the bill. However, in 1990, California enacted Civil Code § 3260, which does regulate retention in private contracts, but not to the extent S.B. 274 would have.

85. See, e.g., CAL. BUS. & PROF. CODE § 7159 (West 1975) prescribes the terms for home improvement contracts.

Another potential source of pressure relates to the Code itself. At present, Article Two applies only to transactions in goods. Whether a contract involves goods or services is often a difficult question. This has led an American Bar Association Services Task Force Report to suggest in 1982 that definitions be modified to bring more mixed transactions into the goods category, thereby making them subject to Article Two. Also, that committee suggested that consideration be given to a new article for service contracts one perhaps even having special legislation for particular types.

I do not believe that either legislative forays into private construction contracts or attempts to revise the Uniform Code will have much chance of success. Would increased involvement of state legislatures affect the AIA's domination of the market? Such involvement can, depending on its extent, Balkanize construction contract law, thereby minimizing the utility of "national" documents, such as those issued by the AIA.⁸⁶ Yet while local contracts do reflect local practices, they do not approach the level of drafting competence exhibited by the AIA. Finally, like the current AIA process, the document creation process employed by state and local entities rarely involves owners, thereby excluding a significant voice in the construction process. Thus, increased legislative intervention would not affect AIA domination.

Notwithstanding their low likelihood of success, I believe the specter of such developments will induce the AIA to rethink its process. For instance, although local and state forms do not compete directly with AIA documents, their popularity can affect AIA sales. This may ultimately generate the emergence of AIA local or state forms, more supplementary language to deal with local laws or customs, or the opening up of the AIA process to other groups. Also, any opening up of the process would dilute AIA power, even if it does not rise to the level of approval and endorsement. Other owner-oriented groups, if identifiable, may be asked to participate and might do so.⁸⁷ The increased exposure of the AIA's role may generate pressure to bring public representatives into the process to reflect owner or public interest. However, just as I believe legislative intervention to be unlikely, I do not believe that enough discontent will surface to persuade public officials

86. Compliance with state law may make it cheaper for a competitor to provide a "state" document. Local-oriented versions from Chicago and Pittsburgh have come to my attention. Such documents usually are developed by a committee of attorneys who represent architects and contractors. Similarly, the California AGC has published forms oriented toward California users.

87. The AIA Documents Future Task Force has recommended "working relationships" with other industry associations that include owners and that represent lawyers. FUTURE TASK FORCE, *supra* note 5, at 9-10. The AIA Board of Directors, to whom the report was submitted, has asked that outside input be based upon a consensus of allied groups. This can slow down the process and weaken outside input.

to press for a public representative. But again, if such a move is discussed or proposed, the AIA may accelerate its current efforts to bring in someone to represent small owners or "the public interest."

If the AIA makes its process more open, as I believe it will, what will the process look like? At the very least, the AIA will invite comments, submit drafts to groups invited to participate and even extend invitations to appear before the Documents Committee. (The American College of Real Estate Lawyers and the National Association of Attorneys General are or will be "involved" in the process under which the next set of AIA documents will be prepared.) The AIA will take written comments and appearances seriously, as it has always sought this type of participation. However, it has had difficulty in involving underrepresented interests, and when located, such groups often lack the time to participate efficiently. The appeal of such an inclusive approach is borne out by reference to the standardized contracts published by Great Britain's Joint Contracts Tribunal (JCT) and the Swiss Engineers and Architects Association (SIA). The JCT involves a wide range of interested parties in its process, including representatives from local authorities and public entities.⁸⁸ Similarly, one commentator has concluded that the contracts of the SIA are "widely accepted" because those who participate in the drafting not only include representatives of the architects and engineers associations but also representatives of contractor associations and public authorities.⁸⁹

The more difficult question will be whether the AIA will really share its power. Although perhaps willing to seek the input of more owner-oriented groups regarding AIA drafts, the AIA would strenuously resist giving up any real power. This resistance is reflected in the recent Futures Task Force Report concerning AIA Policy on Documents Preparation and Review where the AIA notes that participation must be "responsible."⁹⁰ More importantly, the report notes that the AIA must

88. An influential commentator downgraded the influence of the latter representatives in the process and complained that their presence lends the appearance of "industry" legitimacy to the tribunal. I.A.N. WALLACE, *BUILDING AND CIVIL ENGINEERING STANDARD FORMS* xii, xiii (1969). Also, its decisions are consensus-based—one reason why its documents are cumbersome and, at times, almost unintelligible. One deceptive example of a possible umbrella industry group is found here in the United States. It is the National Construction Disputes Resolution Committee, formerly the National Construction Arbitration Committee of the American Arbitration Association. The committee, which contains representatives from 14 associations, formulates the Construction Industry Arbitration Rules. While 2 of the 14, the National Association of Home Builders, and Business Round Table, are groups which can be said to represent a specialized type of owner, this is not a true "industry" group. (I have been informed by a Roundtable official that its participation is more symbolic than significant.)

89. Meroni, *Sub-Surfaced Ground Conditions—Risks and Pitfalls for Project Participants: Civil Law Projects—Legal and Contractual Approach in Switzerland*, 7 INT'L CONSTR. L. REV. Part 2, 198, 208 (1990).

90. FUTURES TASK FORCE, *supra* note 5, at 23.

exercise *control* to insure full and fair consideration of all interests, document-making must be expeditious and orderly and AIA policy or the public interest must not be compromised. In short, the AIA must have "full and final authority."⁹¹

The only way this reluctant attitude might change would be by heavy pressure brought by public officials, such as the National Association of Attorneys General, a group that was dissatisfied with AIA documents and for a time planned to publish model contracts.⁹² Such a group could threaten to push for a statutory contract in a particular state or states. But I do not believe such pressure will induce the AIA to cede any real power in the near future.

I do believe, however, that, in response to complaints that its documents make customization difficult, the AIA will make customization easier. This will be done through the provision of more documents, more flexible formats such as increased blanks, and more alternate clauses, as well as by the use of computer-generated AIA documents.⁹³ These goals were highlighted in the Documents Futures Task Force Report. Perhaps, though this is less likely, the AIA will combine documents A101 and A201 into one document to avoid some of the inefficiencies connected with the two-document system. Even if this is done, however, the AIA will still retain the option of separate "general conditions," which can be attached to a basic form of agreement other than an AIA document.

Groups invited to respond but not given decisionmaking power can consider issuing competing forms or encouraging others to do so. But competition is a step that most associations, whether involving owners or contractors, will not take precipitously. The American College of Real Estate Lawyers, an owner-oriented group, at one time considered providing a competing document but chose instead to make suggested changes to existing AIA documents. It did not feel that its documents would be able to compete successfully against AIA documents. Similarly, the organization of Associated Building Contractors, a contractor group, felt the best it could do was to suggest a few modest modifications.⁹⁴

91. *Id.* at 24.

92. Model Design and Construction Documents (National Association of Attorneys General Dec. 1988). After sharp industry opposition it was withdrawn in 1990. Conversation with Lisa Wells, staff counsel of the National Association of Attorneys General. This is amplified in the preface to J. SWEET, CONSTRUCTION CONTRACTS, *supra* note 2 (2d Supp. 1990).

93. FUTURES TASK FORCE, *supra* note 5, at 13.

94. See Grant, *supra* note 32, at 43. See also King & Epstein, *Owner's Counsel Reviews (And Suggests Changes to) the New (1987) AIA General Conditions of the Contract for Construction*, PRAC. REAL EST. LAW., Mar. 1989, at 9, May 1989, at 51, July 1989, at 45 (presenting owner-oriented critiques of A 201). King and Epstein suggested drastic changes but stopped short of proposing a different form or a customized contract. Again, this demonstrates AIA dominance in the field.

More importantly, yet more difficult to predict, is the possibility that commercial competitors will enter the field. Producing standard contracts is a profitable operation for the AIA, most work being performed by unpaid volunteers. I believe that the burgeoning construction publications market or large national law firms with clients from all "sides" of the industry will develop contracts that could compete with those used by the AIA. As noted earlier, however, head-to-head competition would be difficult. Entrepreneurs would need assurances that they could profit from such an investment. To make profits their products must be selected over AIA documents—not an easy task.

Competitors must do something different or better to penetrate the market. In Great Britain, for instance, the Institution of Civil Engineers has published its "New Engineering Contract."⁹⁵ The Institute plans to avoid lawyer-like jargon, preserve flexibility and use the contract as a management tool. Similarly, competitors may introduce new products such as *triangular* contracts among owner, architect and contractor; develop contracts which connect architect and contractor; or generate Defect Response Agreements, contracts connecting not only those entities but also major subcontractors and suppliers to a plan that will thereby set up a mechanism to deal with defects.⁹⁶

While such predictions are treacherous, I believe the availability of high technology and the speed and efficiency with which customization can be accomplished will induce competitors or even the AIA⁹⁷ to create a "high tech" product consisting of expert systems.⁹⁸ Taking an illustration from another field, the *Economist* recently reported that "tax software is selling as fast as the mail-order houses can ship it out." It noted that these programs guide users "through the maze of questions that the tax man asks." Users simply type in the facts and figures; the users can also receive help and advice "from an expert system." The more sophisticated programs warn taxpayers when their deductions "are likely to arouse the close attention of the tax man." These programs do the calculations and print out the completed forms.⁹⁹

There is no reason why similar software programs with expert systems cannot be developed to help those who prepare construction contracts. For example, an owner structuring a transaction may be able to purchase software that will explain and take account of numerous

95. A New Style Contract for Engineering Contracts, Sept. 1987, was prepared by Martin Barnes Project Management for the Institution of Civil Engineers in England. For a summary, see 4 INT'L CONSTR. L. REV. 295 (Oct. 1987) published by Lloyd's of London Press in London.

96. See Sweet, *Defect Response Agreements—A Formula to Reduce Claim Overhead*, 13 REAL EST. L.J. 373 (1985).

97. See FUTURES TASK FORCE, *supra* note 5, at 12–13.

98. Use of AIA language by competitors would raise sticky copyright problems.

99. ECONOMIST, Mar. 9, 1991, at 82.

considerations, including the advantages and disadvantages of a tight versus a flexible contract, the needs of an active versus a passive owner, the varied roles of design professionals, the management of subcontractors, insurance needs, the level of time sensitivity and a method for dealing with disputes. Once these issues are brought to the attention of such an owner, and the advantages and disadvantages communicated by the computer, the owner can instruct the computer as to her needs. A computer program can generate all the documents necessary to accomplish these particular objectives, as well as provide ancillary documents such as payment certificates, change order forms and notices. Competitors who demonstrate that they can create a system that will reduce negotiation costs, claims overhead and administrative costs—and yet produce a system that parties will accept—will penetrate the market currently dominated by the AIA. The technology exists, and I believe it will be used.

V. CONCLUSION

At this time, the AIA dominates the construction industry standard contract market. The AIA performs a crucial role and generally does it well. While the market seems generally satisfied—perhaps “resigned” would be more accurate—the AIA’s dominance has generated inefficiencies, unresponsiveness and unwillingness to satisfy customer needs. When this is exposed, I predict the AIA will make its document formulation process more open, although it will not cede real decision-making power. In particular, the AIA will recognize the need for more user customization and seek to make its process more efficient. I also see the distinct possibility that competitors will produce a better product, through sophisticated technology, one more amenable to customization. If so, such developments may spell the end of the AIA’s historical dominance of the construction industry’s standardized contract market.