



ActionLine

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Full Disclosure Act – Part I*

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(and Other Changes)*

*Florida Sustainable Development & Growth
Management in a Post-DCA Era*

Construction Contracts Are Greener Thanks to the AIA SP Series

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Submitted on behalf of the Development and Green Building Committee

Green buildings are the application of sustainable development in the construction industry. Buildings have a tremendous impact on the environment, and reducing the energy consumption of U.S. buildings is a major factor in reducing climate impact and reaching energy security. Accordingly, green building standards continue to be innovated particularly with regard to energy efficiency. The Energy Independence and Security Act of 2007 that went into effect on December 9, 2010, included green building requirements and provisions for residential, commercial, and federal buildings as well as schools. For example, the bill required that federal agencies lease space in buildings that have earned the Energy Star label in the most recent year with only a few, narrow exceptions. It also created an Office of Commercial High Performance Green Buildings in the Department of Energy to encourage energy-efficient building, as well as providing various grants for energy-efficient improvements to school buildings. In February 2011, President Obama launched the Better Buildings Initiative, which aims “to improve energy efficiency in commercial buildings across the country.”¹ The Initiative has three central objectives: (1) achieve a twenty percent improvement in energy efficiency by 2020, (2) reduce companies’ and business owners’ energy bills by about \$40 billion per year, and (3) save energy by reforming outdated incentives and challenging the private sector to act.²

The American Institute of Architects (“AIA”) is the producer of the oft-used construction contract forms. In May 2012, AIA released a new series of documents for use with a sustainable construction project (the “SP Series”).³ The SP Series is comprised of the following five forms that are each alternate versions of their “conventional family” counterparts: (1) A101–2007 SP, Standard Form of Agreement Between Owner and Contractor, for use on a Sustainable Project where the basis of payment is a Stipulated Sum (“Form A101 SP”); (2) A201–2007 SP, General Conditions of the Contract for Construction, for use on a Sustainable Project (“Form A201 SP”); (3) A401–2007 SP, Standard Form of Agreement Between Contractor and Subcontractor, for use on a Sustainable Project (“Form A401 SP”); (4) B101–2007 SP, Standard Form of Agreement Between Owner and Architect, for use on a Sustainable Project (“Form B101 SP”); and (5) C401–2007 SP, Standard Form of Agreement Between Architect and Consultant, for use on a Sustainable Project (“Form C401 SP”). The SP Series



of forms represent relationships between the owner and contractor (i.e., Forms A101 SP and A201 SP), contractor and subcontractor (i.e., Form A401 SP), owner and architect (i.e., Form B101 SP), and architect and consultant (i.e., Form C401 SP).

The new SP Series creates a concept of developing a “Sustainability Plan,”⁴ which is incorporated into the various contracts, as appropriate. That plan is intended to identify the following: (1) the “Sustainable Objective” which is “[t]he [o]wner’s goal of incorporating Sustainable Measures into the design, construction and operations of the [p]roject to achieve a Sustainable Certification or other benefit to the environment, to enhance the health and well-being of building occupants, or to improve energy efficiency”⁵; (2) the targeted Sustainable Measures, which are defined as “specific design or construction element[s], or post occupancy use, operation, maintenance or monitoring requirement[s] that must be completed in order to achieve the Sustainable Objective”⁶; (3) strategies that will be implemented to achieve the Sustainable Measures; (4) the parties’ respective obligations with respect to achieving the Sustainable Measures; (5) the manner in which achievement of each Sustainable Measure will be verified (e.g., through design reviews, testing, or other metrics); and (6) the required Sustainable Documentation, which “includes all documentation related to the Sustainable Objective or to a specific Sustainable Measure that [the parties are] required to prepare in accordance with [their respective contracts] ... which may also include “documentation required by the Certifying Authority.”⁷ The “Certifying Authority”⁸ is the entity that establishes the criteria for achieving the Sustainability Certification, which is defined as “the initial third-party certification of sustainable design, construction, or environmental or energy performance ... that may be designated as the Sustainable Objective.”⁹

In addition, each party now has various responsibilities and obligations with respect to these concepts under the SP Series forms. The owner is required to comply with the Sustainability Plan and the requirements of the Certifying Authority. The contractor, and any of its subcontractors (to the extent applicable to their work), are also required to comply with, and perform their work in accordance with, the Sustainability Plan. This includes notifying and meeting with the owner and the architect to discuss alternatives in the event conditions are identified or discovered that will

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adversely affect achievement of a Sustainable Measure. Additionally, the contractor and its subcontractors are required to prepare a waste management and disposal plan and to recycle, reuse, remove, or dispose of materials in accordance with that plan. The architect now has a "scope of sustainability services" that identifies the architect's specific responsibilities throughout the various phases of the project as they relate to the sustainability concepts. These new responsibilities include (1) providing the owner all forms required by the Certifying Authority to properly register the project; (2) conducting a sustainability workshop with the owner, architect, and their respective consultants to determine the criteria and elements to be included in the Sustainability Plan; (3) preparing the Sustainability Plan; (4) at various stages of the design process, incorporating into the design the Sustainable Measures identified in the Sustainability Plan; (5) during the construction phase, advising and consulting with the owner regarding the progress of the project toward achievement of the Sustainable Measures, and notifying the owner of known deviations from the Sustainability Plan based on the architect's visits to the project site; and (6) if the Sustainability Objectives include a Sustainability Certification, acting on behalf of the owner to ensure the project is properly registered, organizing and

managing the Sustainability Documentation, and submitting the Sustainability Documentation to the Certifying Authority as required for the Sustainability Certification process.

Notwithstanding the fact that the SP Series identifies all of these various obligations and creates a scheme to further achieve the Sustainable Objectives, the SP Series forms each contains language effectively limiting the liability of the contractor, the architect, and their respective subcontractors and consultants, if those objectives are not achieved for some reason. For example, Forms A201 SP and A401 SP each make it clear that the contractor or subcontractor, as applicable, does not guarantee or warrant that the project will achieve the Sustainable Objective. Similarly, Forms B101 SP and C401 SP contain disclaimers indicating that, because achieving the Sustainable Objective is dependent upon many factors beyond the control of the architect or consultant, as applicable, those entities do not warrant or guarantee that the project will achieve the Sustainable Objective. Further, Form A201 SP expressly states that achievement of the Sustainable Objective is not a condition precedent to the achievement of substantial or final completion of the contractor's work. Finally, Forms A201

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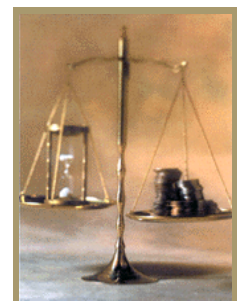
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SP and B101 SP also include damages resulting from the failure of the project to achieve a Sustainable Objective, such as unachieved savings or lost financial or tax incentives, to the list of consequential damages waived by the parties. In other words, if the project fails to achieve the Sustainable Objectives or the Sustainability Certification, the contractor and architect, and their respective subcontractors and consultants, will not be liable to the owner for such failure or for any damages incurred by the owner as a result of such failure.

Lawyers drafting design and construction contracts should inquire specifically about the nature of the sustainable design elements of a project so that risk is allocated properly for experimental elements and certification promises are clearly documented with responsibility for necessary data collection and reporting allocated up front. In addition, if a building will require special expertise – for example, a structural engineer to design the building to support a green roof – the contract should provide for that type of specialist to be required. You may even want to negotiate the penal-

ties for delays in the certification process, or for achieving lower certification levels than desired by the owner up front, so there is no protracted dispute later about the value of a silver LEED certification versus a platinum certification. 

Endnotes:

- 1 <http://www.whitehouse.gov/the-press-office/2011/02/03/president-obama-s-plan-win-future-making-american-businesses-more-energy>
- 2 *Ibid.*
- 3 See <http://www.aia.org/press/AIAB094809>
- 4 See § 1.1.9.3, AIA Document A201-2007 SP, General Conditions of the Contract for Construction.
- 5 § 1.1.9.1, AIA Document A201-2007 SP, General Conditions of the Contract for Construction.
- 6 § 1.1.9.2, AIA Document A201-2007 SP, General Conditions of the Contract for Construction.
- 7 § 1.1.9.5, AIA Document A201-2007 SP, General Conditions of the Contract for Construction.
- 8 See § 1.1.9.6, AIA Document A201-2007 SP, General Conditions of the Contract for Construction.
- 9 § 1.1.9.4, AIA Document A201-2007 SP, General Conditions of the Contract for Construction.

Save the date!

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