



2018 Construction Conference
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Top 10 Amendments to the AIA A-201 General Conditions

I. Key Change Number 1: Insurance

New Insurance Exhibit

The most important change to the insurance requirement in the new AIA documents is the creation of a new insurance exhibit to use with the A101™–2017, A102™–2017, and A103™–2017, Owner-Contractor agreements. This new exhibit also resulted in substantial revision of A201's Article 11. The purpose of an exhibit was intended to facilitate the ability of review by insurance advisors. This means that instead of having to send the entire contract to your agent or broker, you can now send the section that they really need to review for compliance. This also means that if insurance policies change, the entire contract does not need to be rewritten. The Exhibit can be updated accordingly, leaving the rest of the A201 alone. It is hoped that this change will streamline insurance review and provide flexibility in an ever-changing insurance market. This does not mean that there are no insurance requirements in the A201 anymore. There are still some insurance provisions in Article 11, such as the requirement that both parties maintain insurance. (11.1.1 and 11.2.1)

Owner and Contractor

Another important change is that now the Owner and Contractor, and not the insurers, are required to provide each other with notice of cancellation/expiration within 3 business days. (Section 11.1.4 and 11.2.3) The party receiving notice can stop Work until the insurance lapse is cured. The reason for the notification change is that prior editions of the A201 required that the insurer notify the Owner of a pending lapse in insurance. That provision was ultimately removed from the Certificates of Insurance issued by most insurers, so it was eliminated as a requirement to codify what was happening on the ground between the parties.

Property Insurance Loses

There are also some changes to property insurance losses. The Owner must notify the Contractor of proposed settlements and allocations, and the Contractor has 14 days to object or he will be bound by the allocation (See 11.5.2).

II. Key Change Number 2: Digital Data

Building Information Modeling (BIM) is fast becoming common place on larger construction projects. However, there are multiple risks associated with using digital formats that can be manipulated by multiple parties. The 2017 Owner-Contractor and Owner-Architect agreements (except A105 and B105) expressly require the parties to agree upon protocols governing the transmission and use of digital documents and require the use of E203™–2013 to establish digital data protocols. Using BIM information without first having established and set forth the necessary protocols in E203™–2013 and G202™–2013, is at the party's own risk. Further, revised section 3.11 clarifies that the Contractor can keep contract documents, Change Orders, construction change directives, and other modifications at the site only in electronic format, if he so chooses.

III. Key Change Number 3: Termination for Convenience

History

The revised Termination for Convenience provision now encourages the parties to discuss and agree in advance upon a termination fee, in lieu of an automatic entitlement to lost overhead and profits. This provision (14.4.3) has an interesting history which explains why this small, but very specific, change was made. Termination for Convenience, an exclusive Owner right, was added to the AIA contracts in 1997. However, Contractors and Architects were losing the benefit of their bargains, including the fixed overhead and the fee or profit on the portion of Work which was terminated. To alleviate that problem, in 2007, the contracts were revised to allow the Contractor/Architect to get payment for work executed, costs of termination, and reasonable overhead and profit on the work not executed. Owners, in response, often completely struck through that provision, denying any overhead or profit for work not yet performed after a termination for convenience.

2017 Revision

In the 2017 revision, the A201 (as well as the related Owner-Architect agreements), the automatic entitlement is eliminated, in favor of a fill point to prompt the parties to discuss a fair fee before the project begins.

A negotiated amount also serves to liquidate the Owner's liability to the Contractor (lost business opportunity and overhead and profit on the Contractor's unperformed work). However, the fee is not necessarily designed to completely liquidate the Owner's liability to the Contractor's downstream parties. To protect the Owner from downstream claims, the A401 will need to be edited and coordinated, so that the Owner's entire liability to the Contractor, inclusive of subcontractors and suppliers, is established in the Termination fill point.

IV. Key Change Number 4: Dates of Commencement and Substantial Completion

The Owner-Contractor agreements now include a check box for the parties to establish the date of commencement as one of the followings:

- (1) The date of the Agreement, or
- (2) The issuance of a notice by the Owner to proceed, or
- (3) A different date as agreed by the parties.

If no box is checked, the default is the date of the Agreement. The check box format is meant to clarify any confusion between the parties before the contract is signed. A separate section has been added to address Substantial Completion of certain phases of the Project prior to the Substantial Completion for the entire Work.

V. Key Change Number 5: Liquidated Damages

In 2017, a specific fill point has been included in the Owner-Contractor agreements (except A105) to prompt the parties to consider including a liquidated damages provision. A separate fill point is also included related to incentive provisions. The details concerning calculation of the damages, and the limits (if any) to the damages are still left to the parties to negotiate. The intent of the fill point is to bring the discussion to the forefront, rather than have the provision buried within the Contractor Time section of the Contract.

VI. Key Change Number 6: Notice Provisions

Since 1976, the AIA Contract Documents have allowed the Contractor to require the Owner to provide evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. In other words, the Contractor had the unfettered right to request evidence indiscriminately throughout the Project.

The Contractor also had the unilateral right to Stop Work if the Owner failed to provide evidence that he was financially sound when requested. This process could lead to abuse where, for example, a Contractor demanded financial evidence as a ploy to get more time and avoid liquidated damages.

In the last contract revision, in 2007, the documents were changed to only allow the Contractor the right to request evidence of adequate financing prior to the start of Construction, and thereafter only if certain conditions were met. In the 2017 version, revisions were made for clarification, to establish deadlines for receipt of the information, and to restrict the right to stop work relating to a change in the Work. Now, the Contractor can request financial information before Construction (Section 2.2.1) and during Construction (Section 2.2.2): ONLY IF (1) the Owner doesn't make a payment when due; (2) the Contractor demonstrates a "reasonable concern" regarding the Owner's ability to make payment when due; or (3) there is a change in the work that materially changes the Contract Sum.

If the request is made prior to start of Work, the Contractor has no duty to commence work until the evidence is provided. If the request is made during Construction, the Owner has 14 days to provide the information or the Contractor can stop the Work, or if the request is because of a change in Work, he can stop work on that portion of the Work affected by the change. Of course, the Contract Time would need to be extended if the Work is delayed, and the Contract Sum would need to be increased by the amount of the Contractor's reasonable costs of shutdown, and re-mobilization.

A201-2017 allows Notices to be delivered electronically. Notices of Claims, however, still cannot be delivered electronically.

VII. Key Change Number 7: Contractor's Means and Methods

The Contractor has historically been solely responsible for, and had control over, Construction Means and Methods. Under A201-2007, when the Contract Documents gave specific instructions concerning Construction techniques, the Contractor was to give notification if those instructions were unsafe and then await written direction. Under the 2017 revision, the Contractor remains solely responsible for Construction Means and Methods. If the plans give specific instructions concerning techniques which are unsafe, the Contractor is to give notice and propose alternative techniques.

The Architect must evaluate the alternative for design intent and unless the Architect objects, the Contractor is to perform the Work using its alternative.

VIII. Key Change Number 8: Direct Communication Between the Owner and Contractor

Prior editions of the A201 provided that the Owner and Contractor communicate through the Architect. A201–2017 recognizes that the Owner and Contractor may need to communicate directly and authorizes this approach, if the Owner promptly notifies the Architect of the substance of any such direct communications.

IX. Key Change Number 9: Owner’s Right to Carry Out the Work

Prior versions of the text allowing an Owner to carry out the Work after Contractor’s default required a Change Order. Since a Change Order is a contract that requires an agreement by the Owner and the Contractor, Contractors were obviously reluctant to agree that they were in default and responsible for a deductive change.

Revised A201–2017 now provides that if the Owner may carry out the Work without a Change Order if the Architect approves. Further, the Architect may withhold or nullify a Certificate for Payment in whole or in part, to the extent reasonably necessary to reimburse the Owner. If the Contractor disagrees with the actions of the Owner or the Architect, or the amounts claimed as costs to the Owner, the Contractor can file a Claim.

X. Key Change Number 10: Differing Site Conditions

Prior editions of the A201 provided that upon encountering differing site conditions, the Contractor was to promptly provide notice to the Owner and Architect, before the conditions were disturbed, and in no event later than 21 days after the conditions were first observed. A201–2017 shortens the time for notice from 21 to 14 days. This notification is required prior to the conditions being disturbed to allow the design team the opportunity to evaluate the site and decide about any compensation for the differing site conditions.

While this change from 21 to 14 days may seem minor, it could prove to substantially impact a Contractor who fails to give timely notice and then disturbs the existing site conditions. This change could prove to be a significant financial mistake if the contractor does not make the Architect or Engineer aware of the problem.

In some instances, the client’s best interests are served by contesting liability by taking a case all the way to a trial. However, in most instances including construction litigation, getting to an early resolution regardless of liability as the indemnity costs are dwarfed by the expense of litigation. Their interests in 97% of these cases are best served by focusing on issues related to determining damages or simply achieving a settlement. In these cases, engaging in lengthy discovery and depositions on issues related to liability may be not only counterproductive, they may be needlessly expensive. The key is to determine with your clients what the “best” outcome is *for them* in a matter.