

The 2017 Revisions to AIA Standard Construction Contracts



The American Association of Architects (AIA) has published form construction documents since 1888. Approximately

every ten years, the AIA issues revisions to its form documents that comprise one of the most popular and commonly used sets of construction documents in the industry. Earlier this year, the AIA issued revisions to eleven of its forms and further anticipates that an additional eighteen forms and agreements will be released in the fall of 2017.

This article provides a general overview of the changes to the A201, A101, A102, and A103 documents. A201 contains the general conditions for owner-contractor agreements; A101 is the standard form agreement between owners and contractors on stipulated sum contracts; A102 is the standard form agreement between owners and contractors, where basis of payment is cost of work plus a fee *with* a guaranteed maximum price; and A103 is the standard form agreement between owners and contractors, where basis of payment is cost of work plus a fee *without* a guaranteed maximum price. This article also addresses two exhibits—the Insurance Exhibit and the Sustainable Project Exhibit. While the following article does not exhaustively cover all of the recent updates to the AIA contract documents, the article provides a general understanding of the major changes made to the AIA contracts so that you are mindful of these changes when using these contracts in your day-to-day operation.



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The Insurance Exhibit

One of the most significant changes to the AIA documents is the relocation of most, but not all, of the A201-2007, Article 11 Insurance Provisions from the General Conditions listed in A201 to an “Insurance Exhibit” that is to be attached as Exhibit A to most of the owner-contractor agreements. Article 11 of the General Conditions provides a minimal number of provisions regarding insurance and bonds in the event that the owner and contractor do not complete Exhibit A. These provisions include the parties’ obligations to obtain general liability insurance, the contractor’s obligation to obtain surety bonds, the owner’s general obligation to obtain property insurance and notify a contractor of any cancellation of the same, waivers of subrogation, and the method of adjusting and settling an insured loss.

The Insurance Exhibit allows parties to develop project specific owner and contractor insurance requirements in a conspicuous portion of the contract. If the parties simply want the standard coverages historically required by the former Article 11, the parties simply need to ignore the optional coverage sections and fill in the required policy limits/sub-limits and penal sums for bonds located in the Insurance Exhibit.

Owner’s Required and Optional Insurance

With respect to the owner’s required coverage, the Insurance Exhibit requires that the Builder’s Risk Insurance (BRI) policy be written on an “all risks” basis. The limits of coverage are to be sufficient to cover the total value of the entire project on a replacement cost basis, plus the value of subsequent modifications, materials supplied or installed by others, and furnishings, fixtures and materials located at, near, or in transit to the project site. The Insurance Exhibit places a new obligation on owners in that the owner’s BRI must be maintained until substantial completion, and upon substantial completion, the owner shall either continue the BRI or purchase other property insurance for the project until expiration of the period for correction of the work. Further, the owner’s property insurance must now extend to the existing structure if the work involves remodeling or construction of an addition.

The owner’s optional extended property insurance, listed in §A.2.4, includes: loss of use, business interruption, and delay in completion insurance; ordinance or law insurance; expediting cost insurance; extra expense insurance; civil authority insurance; ingress/egress insurance; and soft costs insurance.

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Another notable change is the encouragement of owners to obtain first-party cyber security insurance. Section A.2.5.1 of the Insurance Exhibit permits the parties to agree that the owner must obtain cyber security insurance “for loss to the Owner due to data security and privacy breach, including costs of investigating a potential or actual breach of confidential or private information.” This type of insurance is relatively new and still growing. However, with the increasing amount of information being digitally stored by contractors and owners, as well as the growing use of technology on construction projects, contractors and owners may find value in negotiating the requirement of cybersecurity insurance on projects in the event of a cyberattack. A prime example of a cyberattack on a construction project is the Target data breach in December 2013, which resulted in the theft of over 40 million credit cards and private data from approximately 70 million customers from nearly 2000 Target stores. The catalyst of that breach was an email opened on a computer of the HVAC subcontractor on a construction project at a single Target store.

Contractor’s Mandatory Insurance

Contractors are required to obtain commercial general liability insurance, automobile insurance, worker’s compensation insurance, and employer’s liability insurance.

Further, there are additional forms of coverage that a contractor *must* obtain depending on the nature of the work being performed. These types of insurance include: Jones Act and Longshore & Harbor worker’s compensation; professional liability; pollution liability coverage; maritime liability; and coverage for use or operation of manned or unmanned aircraft. These forms of insurance are not optional under the contract, but rather are mandatory if the scope of work includes the types of work specifically listed in those sections.

There are four other types of insurance coverage that are entirely optional, but may be required by the contract if agreed upon, which include: railroad protective liability insurance; asbestos abatement liability insurance; coverage for damage to property while in storage or transit; and property coverage for property owned by the contractor and used on the project.

E204-2017 Sustainable Project Exhibit

In the most recent round of document revisions, the AIA has taken many of the provisions of the former contracts related to sustainable projects and has created a single Sustainable Projects Exhibit housed in E204-2017. While the process, terminology, responsibilities, and material are all the same as the past Sustainable Projects language in the 2007 AIA documents, the consolidation of these terms and conditions within one exhibit is aimed to establish a clear and detailed process to achieve the sustainable objective, as well as provide clear and detailed descriptions of the various roles and responsibilities of the parties. The Sustainable Projects Exhibit has been expressly drafted for use with third-party certification on LEED, Green Globes and Energy Star projects, but it can be used on any project and can be added to most AIA contracts to address the risks and responsibilities associated with sustainable design and construction services.

A201: The General Conditions Evidence of Owner’s Financial Arrangements

Pursuant to the revised Section 3.3.1, the contractor has a duty both to spot unsafe procedures, and to specify a safe alternative to the unsafe procedure. The contractor is solely responsible for construction

means, methods, techniques, sequences and procedures, and for job site safety as such; the contractor is obligated to propose alternative means, methods, techniques, sequences, or procedures if it determines those specified may not be safe; the architect is required to evaluate the proposed alternatives for conformance with design intent; and, unless the architect objects, the contractor shall perform its work using its alternatives. This revision to Section 3.3.1 represents a major shift in the party bearing the risk from the architect to the contractor. The revision also poses an issue if the contractor's proposed alternative is contrary to the contract documents. As a result of these major concerns, the Association of General Contractors of America (AGC) has recommended that this revised language be strongly opposed.

Differing Site Conditions

Section 3.7.4 reduced the time requirements for a contractor to give notice for differing site conditions from 21 days to 14 days.

Evidence of Owner's Financial Arrangements

Section 2.2 now provides a mechanism for contractors to obtain information regarding the owner's ability to pay prior to the commencement of work. After the contractor submits a written request for such evidence, which must be made prior to the commencement of work, the contractor has no duty to commence work until the owner has provided proof of the ability to pay. Any delays in the commencement date as a result of the owner's failure to furnish such proof are excusable and the contract time shall be extended appropriately. A contractor may still obtain reasonable evidence of an owner's ability to pay after the commencement of work, but only under limited circumstances.

Electronic Delivery of Notices

The General Conditions now expressly permit for notices to be sent by electronic transmission (*e.g.*, email), *if* a method for electronic transmission is set forth in the agreement. When entering the contact information for each party's representative for notice purposes, the parties should be sure to list that person's email address to

preserve the right to use email as a means of providing notice under the contract. However, despite the AIA's expansion of acceptable methods of providing notice to include email, notice of claims must still be sent by personal delivery, certified/registered mail, or courier with return receipt.

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Digital Data Use and Transmission

The new 2017 documents now require that the parties agree on protocols governing the use of, reliance on, and transmission of digital data. The General Conditions further require the use of E203 (Building Information Modeling and Digital Data Exhibit), G201 (Project Digital Data Protocol), and G202 (Project BIM Protocol) to establish those protocols. In fact, the AIA owner-contractor agreements expressly incorporate by reference the E203 BIM and Digital Data Exhibit. If the parties reach an agreement as to the transmission of digital data, or if the parties do not negotiate or agree upon this item, then the AIA standard protocols govern.

Direct Communication Between Owner and Contractor

The revised General Conditions now also allow for direct contact between the owner and the contractor, as opposed to communicating solely through the architect.

Minor Changes in Work

Section 7.4 now permits a contractor to refuse to perform minor changes in work if the contractor believes that the minor changes in the work will affect the contract sum or contract time. If the contractor believes that either the contract

sum or contract time will be affected, then the contractor can refuse to perform the minor change in work until a change order is issued. If the contractor performs such minor work without notifying the architect that such change will affect the contract sum or contract time, the contractor waives any changes to the contract sum or contract time. The latter example can be viewed as a potential trap for contractors if they do not timely notify the architect of the increased cost of the changes in the scope of work.

Changes in Quantities That Affect Unit Price

Section 9.1.2 now provides for an equitable adjustment of unit prices if changes in quantity cause a substantial inequity to the owner or contractor. Specifically, if unit prices are stated in the contract documents or subsequently are agreed upon, and if the quantities originally contemplated are materially changed so that the application of such unit prices to the actual quantities cause a substantial inequity to the owner or contractor, the applicable unit prices shall be equitably adjusted.

Termination by Owner for Convenience

Another one of the most significant changes in the 2017 edition of the AIA contracts is the radical change to the contractor's compensation rights for an owner's termination for convenience located in Section 14.4. Previously, the contractor received payment for work performed (including reasonable overhead and profit), termination costs, and overhead and profit on the remaining unperformed work. Now, the revised General Conditions remove the contractor's right to recover reasonable overhead and cost on the unperformed work and substituted the right to recover a "termination fee" that is to be negotiated by the parties. The concern, however, is that if the parties do not complete this fill-in-the-blank section, the contractor will receive nothing to compensate it for being terminated at the owner's convenience. The AIA has indicated that this section was revised after the review committee received input that the former provision allowing for recovery of anticipated overhead and profit on unperformed work

was typically a provision stricken by owners. However, the AGC believes that the new language poses a significant threat to contractor recovery in the event of termination by an owner without cause.

A101-2017 Owner-Contractor Agreement: Stipulated Sum Retainage

In the 2007 version of the AIA documents, retainage was barely mentioned and there was no clear explanation of how retainage was to be paid and what payments are not considered “retainage” for purposes of payment of the any remaining balance of the contract sum. Section 5.1.7 of A101-2017 now provides an entire section on retainage, including the amount to be withheld from each progress payment, what pay items are not subject to retainage, reductions, or limitations of retainage, and how and when retainage is to be paid.

Substantial Completion and Liquidated Damages

In addition to setting a date for substantial completion of all work to be performed, Sections 3.3.1 and 3.3.2 now permit owners and contractors to divide portions of the work to be completed with different dates for substantial completion. Section 3.3.3 also now creates an explicit start of the clock for liquidated damages if the contractor fails to achieve substantial completion. However, the AIA documents do not provide a standard liquidated damages provision. Parties that provide for different dates of substantial completion for different portions of the work in Section 3.3.2 should be sure to address liquidated damages in a similar manner in Section 4.5.

A102-2017 Owner-Contractor Agreement: Cost Plus a Fee (with GWP)

Costs to Be Reimbursed

The 2017 revisions to the AIA documents consist of a fairly thorough redrafting of entire provisions regarding costs to be reimbursed with the same policy and intent as the 2007 documents. The AIA’s goal in redrafting Article 7 of A102 and A103 was to state more clearly the obligations of the parties and to clarify what is considered a cost of the work.

Off-Site Personnel Costs

Section 7.2.2.1 of A102-2017 clarifies what is to be included in the cost of off-site personnel working on a project. The language of the current version now clearly states that the wages or salaries of supervisory and administrative personnel when performing work off-site may be compensated, but only for that portion of time required for the work and limited to the personnel and activities that are agreed upon at the time of entering into the contract. The new version of the contract prompts owner and contractors to discuss what off-site work will be compensated. This clarification and creation of this negotiated term should help limit disputes between owners and contractors as to compensation for off-site work.

Storage Costs

Section 7.4.1 now excludes any costs associated with transportation and storage off site. As a result of limiting reimbursement for storage costs to only those that are incurred on site, contractors will want to obtain prior approval of all transportation and storage costs not specifically listed within the scope of work. Section 7.7.1 authorizes payment for all other costs incurred during the performance of the work provided that the contractor has obtained the prior approval.

Communications and Electronic Equipment

Section 7.6.6 now limits a contractor’s ability to recover as a cost of the work communication and electronic equipment to only such equipment that is “located at the site” and only with the owner’s prior approval.

Costs Not to Be Reimbursed

A102-2017 now expressly excludes from the cost of the work any bonuses, profit sharing, incentive compensation, and any other discretionary payments, paid to anyone hired by the contractor or paid to any subcontractor or vendor, unless the owner has provided prior approval.

Related Party Transactions

A102-2017 has revised the definition of a “related party” and has strengthened the definition to guarantee “arms-length” between contracting parties. The definition now includes any other entity having

“common ownership” or sharing “common management” with the contractor, as well as any person, or the immediate family member of any person, who has the right to control the business or affairs of the contractor. The revisions also now require that any approval of a related party transaction by an owner be in writing.

Subcontractor Agreements

Owner’s Right to Select Subcontractor

Section 10.1 of A102-2017 added the ability of the owner to object to the use of any subcontractor or supplier. However, when a specific subcontractor or supplier (1) is recommended to the owner by the contractor, (2) is qualified to perform that portion of the work; and (3) has submitted a bid that conforms to the requirements of the contract documents without reservations or exceptions, but the owner requires that another bid be accepted, then the contractor *may require that a change order be issued to adjust the guaranteed maximum price* by the difference between the bid of the person or entity recommended to the owner by the contractor and the amount of the subcontractor or other agreement actually signed with the person or entity designated by the owner.

Payments

Progress Payments

The process and calculation of progress payments has been completely rewritten. While the underlying principles are the same, the new provisions contained in Article 12 of A102-2017 paint a much clearer picture of what is and is not to be included in progress payments.

Retainage

Similar to the changes made in the A101-2017 owner-contractor agreement, Article 12 of A102-2017 now provides an entire section on retainage, including the amount to be withheld from each progress payment, what pay items are not subject to retainage, reductions or limitations of retainage, and how and when retainage is to be paid.

Interest on Balances Unpaid

Section 12.3 now provides that payments due and unpaid under the contract shall bear interest from the date the payment is

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due at a rate that is agreed upon by the parties. If the parties do not insert a rate into the contract, then statutory interest in the jurisdiction of the project shall be the rate at which any unpaid sums under the contract will accrue interest.

Termination Fees

Similar to the revisions to A102, the 2017 revisions to A103 eliminate the contractor's right to recover reasonable overhead and profit when an owner terminates for convenience. Rather, Article 14 now provides for a negotiated termination fee.

A103-2017 Owner-Contractor Agreement: Cost Plus a Fee (No GMP)

The 2017 updated A103 Owner-Contractor Agreement, where the basis of payment is the cost of the work plus a fee without a guaranteed maximum price, contains many of the same updates as were discussed above regarding the A102 agreement. Just as in the A102 update, the newly revised A103 now provides for the following: the inclusion of salaries and wages for off-site personnel; a strengthened definition of "related party"; a distinct retainage provision outlining what may and what may not be included as retainage for purposes of determining progress payments; a completely revised progress payment provision that creates a clearer picture of how progress payments are to be calculated; the creation of an owner's right to select a subcontractor; a termination fee rather than the entitlement of a contractor to recover overhead and profit in the event an owner terminates for convenience; and, among other changes, the automatic accrual of interest if balances due under the contract remain unpaid.

Conclusion

The information above outlines some of the major changes included in the first round of the 2017 updates to the AIA documents. The AIA has previously indicated that it intends to release an additional eighteen revised documents this fall. By no means does this article contain an exhaustive list of the changes. Anyone attempting to use the new 2017 forms should carefully review the new 2017 documents showing the red-lined changes from the former versions. 