

New AIA 2017 Construction Contracts Part I: Owner General Contractor Forms

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[This is Part I of a four-part series discussing the new AIA 2017 forms. Part II will discuss the general conditions to the construction contract (A201-2017); Part III will discuss the Owner—Architect forms (B101-2017, B102-2017 and B103-2017); Part IV will discuss miscellaneous new forms, including the new insurance exhibits and consultant forms]

The American Institute of Architects (AIA) form construction contracts are the predominant family of forms in the construction industry. AIA recently issued its decennial updates to some of its forms. This article discusses changes to the 2017 versions of two of the form contracts between the Owner and Contractor, namely the AIA form A101-2017 (agreement where the basis of payment is a stipulated sum) and the AIA form A102-2017 (agreement where the basis of payment is the cost of the work plus a fee).

Changes Common to Both Forms

Many substantive changes common to both 2017 A101 and A102 versions include the following (all capitalized words in this article refer to capitalized and defined terms in the contracts; all references to contract sections refer to the 2017 versions unless otherwise noted):

- The Contract Time starts upon the commencement of the Work, not from the ‘date of commencement’ as in the prior version (A101 § 3.2; A102 § 4.2). If the construction schedule and the Contract Time are dependent upon timely performance of preconstruction or value engineering services by the Contractor prior to the actual start of Work, this language will require revision.
- Both 2017 versions include a change to the language regarding payments that the Owner shall pay for delays, namely:

...If final completion of the Work is materially delayed through no fault of the Contractor, the Owner shall pay the Contractor...in accordance with Article 9 [of the A201] (A101 § 5.1.8; A102 § 12.1.9).

The 2007 version’s language for both forms states

...[i]f final completion of the Work is thereafter materially delayed through no fault of the Contractor, any additional amounts payable in accordance with Section 9.10.3 of AIA Document A201-2007. [emphasis added]

While the revision is minor, by removing both the “thereafter” language and the reference to Section 9.10.3 of the A201 (which only addresses matters after Substantial Completion), the change in meaning is noteworthy. The Contractor could argue that this new language allows recovery for any material delays at any time in the project—and not limited to those after Substantial Completion—which is presumably the intent. In the 2007 version, including the “thereafter” language and referencing only the section in the A201 that addresses matters after Substantial Completion, the intent of the parties is clearer. An owner should consider the potential ramifications of this new change to the 2017 forms when negotiating the contract terms.

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- Both forms now allow for notice via electronic transmission per the new notice provisions of § 1.6 of the A201-2017. Claims must still be made in writing via certified mail or courier with proof of delivery (A201 § 1.6.2).
- If the parties intend to include any pre-contract bids, proposals, invitations to bid, etc., the new forms expressly state that those documents are not a part of the Contract Documents unless specifically enumerated in the Agreement (A101 § 9.1.7; A102 § 16.1.7).

Changes to the A101

- In the computation of payment section, the 2017 version of the A101 removes references to calculating the portion of the contract amount allocated to the completed work as a percentage of the total work and removes some references to the schedule of values. The Owner is required to pay the contract amount '*allocable to completed work*' without further detail (A101 § 5.1.6.1). The de-emphasis on the schedule of values and removal of the percentage computation implies that the drafters believe most lump sum contracts are closed book—which may not necessarily be the case. The A102-2017 keeps the prior percentage language and references to the schedule of values (A102 § 12.1.7.1.1).

Changes to the A102

- In determining what is included in the Guaranteed Maximum Price (GMP), Section 5.2.5 of the 2007 version provides that the GMP includes matters reasonably inferable from the Contract Documents, but does not include such matters as changes in scope, changes in quality of materials, etc. The 2017 version deletes the '*such things as*' language included in the 2007 version, thereby implying that the list of matters is exhaustive and that any other matters not included in the list are thereby excluded from the GMP. This change could be a benefit to owners and troublesome for contractors (A102 § 5.2.5).
- Owner's approval to any costs comprising the Cost of the Work must now be in writing prior to incurring the costs (A102 § 7.1.2).
- Labor rates now shall remain unchanged throughout the duration of the Agreement unless changed through a Modification of the Agreement (A102 § 7.2.5).
- Instead of describing site office expenses (copying, postage, telephone service, etc.), the 2017 version provides '*...costs for the Contractor's site office, including general office equipment and supplies...*' as a Cost of the Work and then specifically includes document reproduction, delivery charges, etc. in a subsequent section (A102 § 7.5.4; § 7.6.7). This revision could expand the Contractor's rights to recover costs for the site office that were previously excluded in the 2007 version.
- Bonuses, profit sharing and other discretionary payments that were once included as the Cost of the Work are now excluded unless approved by Owner (A102 § 8.1.2).
- The schedule of values must separately allocate the entire GMP to the various portions of the Work, any contingency and the Contractor's Fee—but cannot provide for a separate guaranteed maximum price for each individual item in the schedule of values (A102 § 12.1.5; A102 § 12.1.5.2). This change addresses varying interpretations of the 2007 version.

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- The 2017 version specifically addresses contingency for costs, including allocating the schedule of values for contingency costs and requiring the Contractor to submit supporting documentation when transferring contingency to other cost items (A102 § 12.1.5; A102 § 12.1.5.3).

Stylistic Changes

Many of the stylistic changes to the forms include:

- A 'check the box' choice of the determination of the Commencement of the Work and the Substantial Completion dates.
- A space to include milestone dates for particular phases of the Work.
- Specific sections to specify liquidated damages and bonus incentives for the Contractor.
- A section to include a termination fee if the Owner terminates for convenience.
- Areas to describe any items that are not subject to withholding of retainage, such as general conditions or insurance.
- Insurance and bonds are now addressed in a new Exhibit A (which we will discuss in Part IV of this series).

In total, the 2017 comments to the A102 and A103 are relatively minor. However, those minor adjustments to the language could have a major and perhaps unintended impact on the agreement's interpretation. Regardless if an owner or contractor, all who use the AIA forms should note the changes to ensure that each party's intent is accurately reflected in the agreement.