

## New AIA 2017 Construction Contracts, Part II: General Conditions of the Contract

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*[This is Part II of a four-part series discussing the new AIA 2017 forms. Part I discussed the agreements between the Owner and Contractor (A101-2017 and A102-2017); 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 version of the AIA form A201, the General Conditions of the Contract for Construction that is incorporated into many of its family of forms. The A201 is probably the most important form in the family of documents as its terms can be incorporated into multiple agreements.

AIA's most significant change to the A201 involves the parties' insurance obligations. As will be discussed in Part IV of this series, insurance is a separate exhibit to the contract with much more detail and many more options in coverage than in any prior iteration of the AIA forms. Other than the insurance provisions, many of the substantive changes to the 2017 A201 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 version unless otherwise noted):

- **Decision Maker:** The updated version includes an exculpation clause stating that the Initial Decision Maker shall not be liable for decisions made in good faith (A201 § 1.1.8). In negotiating this clause, the language implies a standard of the Initial Decision Maker's good faith and parties may desire a more objective standard for rendering decisions.
- **Building Information Models:** The increasing use of BIM has produced a new section specifically addressing BIM. Section 1.8 provides that if the parties fail to establish protocols for the use of BIM or fail to abide by those protocols, then the use of the BIM shall be at that party's sole risk, without liability of any other party who may have contributed to the BIM (A201 § 1.8).
- **Owner Financing:** Some of the 2017 changes emphasize ramifications for the Owner's failure to provide proof of Project financing. If at the onset of the Project, the Owner fails to provide proof of financing within 14 days after the Contractor's written request, the Contractor is not obligated to start the Work and Contract Time is ratably extended. If the Owner delays in providing financial information during the Project construction, the Contractor may stop work and recover its costs for shutdown, delay and restart (A201 § 2.2).
- **Alternate Means and Methods:** In the 2007 version, if the Contractor found that the proposed construction means and methods were unsafe, the Contractor was required to provide written notice and stop that portion of the Work,

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and the Architect was to provide written instructions to address the issue. In the 2017 version, the Contractor shall provide notice but is not allowed or required to stop Work. The Architect's responsibility for review of the alternative means and methods is now reduced to "*conformance with the design intent*" (A201 § 3.3.1).

- Shop Drawings: The nuanced changes to the interplay between the Project's design criteria and Shop Drawings may be significant. The 2017 changes add language regarding the Contractor's right to rely on the accuracy of the Contract Documents, but removes the language regarding the Contractor not being "*...responsible for the adequacy or...design criteria specified in the Contract Documents.*" By removing this absolution of the Contractor, the Contractor may have a role (and attendant liability) in the design criteria of the Contract Documents through submittals of Shop Drawings or other acts (A201 § 3.12.10.1; § 4.2.7).
- Work by Separate Contractors: The 2017 A201 changes the Contractor's responsibility for providing notice of discrepancies or defects in Separate Contractors' work to those defects or discrepancies that are apparent, instead of the 2007 language that required notice of "*reasonably discoverable*" defects. (A201 § 6.2.2).
- Changes: If a Contractor performs minor changes to the Work without prior notice to the Architect that such changes will affect the Contract Sum or Contract Time, the Contractor now waives any right to adjustment in cost or time in performing the minor work (A201 § 7.4). The calculation in the adjustment in contract price for Construction Change Directives revises the list of costs associated with labor to include only "*...applicable payroll taxes...*" and deletes "*...Social Security, old age and unemployment insurance...*" (A201 § 7.3.4). This change raises the question of whether costs for social security or unemployment insurance are included in "*applicable payroll taxes.*"
- Time: Delays for adverse weather conditions must be "documented" as a Claim. Also, all delays outside of the control of the Contractor result in an extension of the Contract Time only as determined by the Architect, and not through a Change Order (A201 § 8.3.1). The latter change implies that the Contractor now cannot contest the Architect's determination or request a Change Order to extend the Contract Time for delays not related to the actions of the Contractor.
- Lien Waivers: Lien waivers and releases are required for Applications for Payment (A201 § 9.3.1).
- Indemnity for Liens: In addition to the Contractor's requirements to obtain a bond and to indemnify the Owner against subcontractor and supplier liens resulting from the final payment, the 2017 version adds a general defense

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and indemnity requirement by the Contractor for any subcontractor or supplier lien (A201 § 9.6.8; § 9.10.2). The Contractor's new indemnity obligation is conditioned upon the Owner fulfilling its payment obligations under the Contract. However, there may be instances in which the Owner is allowed to withhold payment under the Contract and liens may nevertheless be asserted as a result of the nonpayment that trigger the Contractor's indemnity obligations.

- Hazardous Substances: For any hazardous substances that the Contractor negligently handles, the Contractor now must reimburse the Owner for remediation costs but is no longer required to indemnify the Owner (A201 § 10.3.5).
- Termination by Contractor: In prior versions, the Contractor could terminate the Contract if work was suspended or delayed for a certain period due to enumerated reasons—and that such delay was not as a result of the Contractor, a Subcontractor or any party “...under direct or indirect contract with the Contractor.” In the 2017 version, this language was deleted, implying that the Contractor cannot terminate if any party performing Work caused the delay—regardless of whether the Contractor has control over that party (A201 § 14.1.1; § 14.1.4).
- Termination by Owner: If the Owner terminates for convenience, the 2017 version deletes the language regarding the Contractor's recovery for overhead and profit, allowing the Contractor to recover costs incurred by reason of the termination, costs to terminate the Subcontracts and any termination fee in the Agreement (A201 § 14.4.3). With this change, Contractors will need to include overhead and profit in the termination fee section as it is no longer expressly included.
- Claims: While previous versions implied that matters are subject to a Claim, the 2017 version enumerates the instances in which a Contractor may submit a claim: § 2.5 (Owner's right to carry out work); § 3.7.4 (concealed conditions); § 7.3.5 (adjustment of Contract Time for Construction Change Directive); § 8.3.2 (certain delays); § 9.5.2 (withholding payment); and, § 10.2.5 (damage, injury or loss due to parties not under the control of the Contractor). The Owner does not need to file a Claim in order to assert liquidated damages (A201 § 15.1.1). Claims asserted after the correction of Work period do not require a decision by the Initial Decision Maker (A201 § 15.1.3.2).

Many substantive revisions to the A201 are procedural in nature. For the 2017 changes that shift risk of the parties, these revisions, while nuanced, could impact the liability of the Owner, the Contractor and their subcontractors and suppliers.