

## UPDATES TO MAJOR AIA DOCUMENTS AND INSURANCE IMPLICATIONS

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1

## MAJOR DOCUMENTS UPDATE

- A101/A102 (Review today)
- A201 (Review today)
- A401
- B101
- Timing of usage on AIA system



2

## 2017 AIA A101 CHANGES



### ARTICLE 3

- 2007: Date of Commencement provision
- § 3.1 The date of commencement of the Work shall be the date of this Agreement unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner



## ARTICLE 3

- 2017: Date of Commencement now uses check-the-box option:

**ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION**  
§ 3.1 The date of commencement of the Work shall be:  
*(Check one of the following boxes.)*

- The date of this Agreement.
- A date set forth in a notice to proceed issued by the Owner.
- Established as follows:  
*(Insert a date or a means to determine the date of commencement of the Work.)*

If a date of commencement of the Work is not selected, then the date of commencement shall be the date of this Agreement.

## ARTICLE 3

- 2017: Substantial Completion check-box as well:

**§ 3.3 Substantial Completion**  
§ 3.3.1 Subject to adjustments of the Contract Time as provided in the Contract Documents, the Contractor shall achieve Substantial Completion of the entire Work:  
*(Check one of the following boxes and complete the necessary information.)*

- By the following date:

## ARTICLE 3

- 2017:
  - ◉ Liquidated Damages are specifically anticipated by adding Section 3.3.3:
  - ◉ §3.3.3 If the Contractor fails to achieve Substantial Completion as provided in this Section 3.3, liquidated damages, if any, shall be assessed as set forth in Section 4.5

## ARTICLE 4: CONTRACT SUM

- Adds Section 4.5:
  - §4.5 Liquidated damages, if any: *(Insert terms and conditions for liquidated damages, if any.)*
- Adds Section 4.6:
  - §4.6 Other: *(Insert provisions for bonus or other incentives, if any, that might result in a change to the Contract Sum.)*

## ARTICLE 5: PAYMENTS

- Section 5.1.4 revised to state “This schedule of values shall be used as a basis for reviewing the Contractor’s Applications for Payment.”
- § 5.1.6.1 added: The amount of each progress payment shall first include:
  - .1 That portion of the Contract Sum properly allocable to completed Work;
  - .2 That portion of the Contract Sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the completed construction, or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing; and
  - .3 That portion of Construction Change Directives that the Architect determines, in the Architect’s professional judgment, to be reasonably justified.

## ARTICLE 5: PAYMENTS

- § 5.1.6.2 added: The amount of each progress payment shall then be reduced by:
  - .1 The aggregate of any amounts previously paid by the Owner;
  - .2 The amount, if any, for Work that remains uncorrected and for which the Architect has previously withheld a Certificate for Payment as provided in Article 9 of AIA Document A201–2017;
  - .3 Any amount for which the Contractor does not intend to pay a Subcontractor or material supplier, unless the Work has been performed by others the Contractor intends to pay;
  - .4 For Work performed or defects discovered since the last payment application, any amount for which the Architect may withhold payment, or nullify a Certificate of Payment in whole or in part, as provided in Article 9 of AIA Document A201–2017; and
  - .5 Retainage withheld pursuant to Section 5.1.7

## ARTICLE 7: TERMINATION OR SUSPENSION

- Termination for convenience fee added:
- §7.1.1 If the Contract is terminated for the Owner’s convenience in accordance with Article 14 of AIA Document A201–2017, then the Owner shall pay the Contractor a termination fee as follows:
  - *(Insert the amount of, or method for determining, the fee, if any, payable to the Contractor following a termination for the Owner’s convenience.)*

## EXHIBIT A

- New Exhibit A, Insurance and Bonds added
  - Seven pages long
  - A check-the-box menu of insurance products and coverage the parties can select from
  - The Owner is the default provider of Builder’s Risk insurance
  - The Contractor is required to carry commercial general liability insurance with eleven types of claims that cannot be excluded, such as residential (if applicable), roofing and exterior insulation finish systems (“EIFS”).

## 2017 AIA A102 CHANGES



## ARTICLE 5: CONTRACT SUM

- After pre-existing §5.2.4, Assumptions, if any, upon which the Guaranteed Maximum Price is based: *(Identify each assumption.)*
- The 2017 version adds:
- §5.2.6 The Owner shall authorize preparation of revisions to the Contract Documents that incorporate the agreed-upon assumptions contained in Section 5.2.4. The Owner shall promptly furnish such revised Contract Documents to the Contractor. The Contractor shall notify the Owner and Architect of any inconsistencies between the agreed-upon assumptions contained in Section 5.2.4 and the revised Contract Documents



## ARTICLE 12: PAYMENTS

- Clarifies payments:
- § 12.1.5 Each Application for Payment shall be based on the most recent schedule of values submitted by the Contractor in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among: (1) the various portions of the Work; (2) any contingency for costs that are included in the Guaranteed Maximum Price but not otherwise allocated to another line item or included in a Change Order; and (3) the Contractor's Fee

## ARTICLE 12: PAYMENTS

- § 12.1.5.1 The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. The schedule of values shall be used as a basis for reviewing the Contractor's Applications for Payment
- § 12.1.5.2 The allocation of the Guaranteed Maximum Price under this Section 12.1.5 shall not constitute a separate guaranteed maximum price for the Cost of the Work of each individual line item in the schedule of values
- § 12.1.5.3 When the Contractor allocates costs from a contingency to another line item in the schedule of values, the Contractor shall submit supporting documentation to the Architect



## ARTICLE 12: PAYMENTS

- § 12.1.7.1 The amount of each progress payment shall first include:
  - .1 That portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the most recent schedule of values;
  - .2 That portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the completed construction or, if approved in writing in advance by the Owner, suitably stored off the site at a location agreed upon in writing;
  - .3 That portion of Construction Change Directives that the Architect determines, in the Architect’s professional judgment, to be reasonably justified; and
  - .4 The Contractor’s Fee, computed upon the Cost of the Work described in the preceding Sections 12.1.7.1.1 and 12.1.7.1.2 at the rate stated in Section 5.1.1 or, if the Contractor’s Fee is stated as a fixed sum in that Section, an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work included in Sections 12.1.7.1.1 and 12.1.7.1.2 bears to a reasonable estimate of the probable Cost of the Work upon its completion

## ARTICLE 12: PAYMENTS

- §12.1.7.2 The amount of each progress payment shall then be reduced by:
  - .1 The aggregate of any amounts previously paid by the Owner;
  - .2 The amount, if any, for Work that remains uncorrected and for which the Architect has previously withheld a Certificate for Payment as provided in Article 9 of AIA Document A201–2017;
  - .3 Any amount for which the Contractor does not intend to pay a Subcontractor or material supplier, unless the Work has been performed by others the Contractor intends to pay;
  - .4 For Work performed or defects discovered since the last payment application, any amount for which the Architect may withhold payment, or nullify a Certificate of Payment in whole or in part, as provided in Article 9 of AIA Document A201–2017;
  - .5 The shortfall, if any, indicated by the Contractor in the documentation required by Section 12.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner’s auditors in such documentation; and
  - .6 Retainage withheld pursuant to Section 12.1.8

## AIA A201 – 2017 REVISIONS



19

## OVERVIEW OF MAJOR CHANGES

- Article 11's Insurance Provisions
  - Now a separate Exhibit B to allow for easier review
  - More options to be tailored for each project
- Termination for Convenience
  - Replaces Contractor's right to reasonable overhead and profit on work not performed with requirement that parties negotiate a termination fee



## OVERVIEW OF MAJOR CHANGES

- Date of Commencement and Substantial Completion
  - Check boxes in place of write-in space with default provisions
- Owner's Right to Perform Work if Contractor Defaults
  - Owner no longer permitted to unilaterally issue deduct CO
  - But Architect may certify withholding or nullifying prior payment

## OVERVIEW OF MAJOR CHANGES

- Differing Site Conditions
  - Shortens notice provision from 21 to 14 days
- Liquidated Damages / Early Completion Bonus
  - More prompts to facilitate discussion on these terms
- Notice provision
  - Moved to Article 1 and must be written
  - 2017 version permits notice by email except for notice of claims

## OVERVIEW OF MAJOR CHANGES

- Contractor's Means and Methods
  - Requires contractor to give notice and propose alternative. Absent objection, contractor is authorized to proceed with alternative
- Direct communication between owner and contractor permitted
  - Owner responsible to notify architect

## ARTICLE 1 – GENERAL PROVISIONS

- 1.1.8 – Added “Initial Decision Maker shall not show partiality to the Owner or Contractor and shall not be liable for results of interruptions or decisions rendered in good faith.”
- 1.2.1.1 – New severability clause

## ARTICLE 1 – GENERAL PROVISIONS

- 1.6.1 – Notice
  - “Notice” is now defined as being in writing
  - Permitted by email except for notice of claim under 1.6.2
- 1.7 and 1.8 – Digital data and BIM
  - Defaults to parties agreeing to use AIA Form E203, BIM and Digital Data exhibit unless another agreement is included
  - New provision 1.8 states that using BIM will be at the user’s sole risk and will not create liability in the author

## ARTICLE 2 – THE OWNER

- 2.2.1 – Owner Financial Information
  - Now requires Owner to provide “reasonable evidence” that Owner can fulfill its financial obligations (if Contractor requests it)
  - Contractor has no obligation to commence work until Owner provides evidence, and Contract Time must be extended for any delays

## ARTICLE 2 – THE OWNER

- 2.2.2 – Owner Financial Information
  - After Contractor commences work, it can only request evidence of financing in 1 of 3 conditions:
    1. Owner fails to make payments
    2. Contractor identifies a reasonable concern regarding Owner’s ability to make payment; or
    3. Changes in work materially change the Contract Sum
  - If Owner fails to provide info within 14 days, Contractor can stop work with Contract Time extended and Contract Sum adjusted for reasonable cost of shutdown

## ARTICLE 2 – THE OWNER

- 2.2.4 – New confidentiality provision
  - If Owner provides financial information and marks it “confidential” Contractor can only disclose:
    - If required by law (after 7 days written notice to owner); or
    - To employees, consultants, sureties, or subcontractors who need to know for the Project and who agree to be bound by confidentiality

## ARTICLE 2 – THE OWNER

- 2.5 – Owner’s right to perform Contractor’s work in the event of default or neglect
  - Contractor still has 7 days from notice to commence and continue correction
  - If Contractor fails within 7 days, Owner can correct and charge amounts to Contractor, but only with Architect approval

## ARTICLE 3 – THE CONTRACTOR

- 3.3 – Supervision and Construction Procedures
  - Previously, if Contract Documents directed certain means and methods, Owner could direct Contractor to proceed over objections, but Owner assumed responsibility for any resulting damages
  - Now, Contractor must propose alternative means and methods, which the Architect evaluates for solely for conformance with design. Unless the Architect objects, Contractor can proceed with alternative

## ARTICLE 3 – THE CONTRACTOR

- 3.5.2 – New Provision
  - Requires all warranties to be issued in name of Owner or transferable to Owner and commencing “in accordance with Section 9.8.4” (i.e. on the date of substantial completion as certified by the Architect or otherwise stated in the Certificate of Substantial Completion)
- 3.7.4 – Concealed or Unknown Conditions
  - Contractor required to provide notice in 14 days instead of 21 days of observing the condition

## ARTICLE 3 – THE CONTRACTOR

- 3.10.1 – Project Schedule
  - Now requires Contractor to include a date of commencement, interim milestone date, and date of substantial completion
  - Now requires Contractor to include a breakdown by activity and durations for each portion of work
- 3.12.10.1 – Contractor design responsibilities
  - When Contractor is required to provide design services or certifications for systems, material, or equipment, new language states that Contractor shall be entitled to rely on the accuracy and adequacy of design criteria



## ARTICLE 4 – THE ARCHITECT

- 4.2.4 – Communications
  - In 2007 version, Owner and Contractor were to communicate through the Architect
  - Now, Owner and Contractor communicate with each other, but are required to include the Architect on all communications that relate to the Architect’s services or professional responsibilities. And Owner has duty to promptly notify the Architect of any other communications relating to the Project

## ARTICLE 5 - SUBCONTRACTORS

- 5.3 – Subcontracts
  - 2007 version did not require the Contractor to have a written contract with its subcontractors that binds subcontractors to all obligations of Contractor relating to specific scope of work
  - 2017 version requires all subcontracts to be in writing

## ARTICLE 6 – SEPARATE CONTRACTORS

- 6.1 – New addition defines term
  - Defined as “other contractors retained by the Owner under separate agreements.”
  - 2017 version requires the Owner to use a contract with substantially similar terms and conditions with any Separate Contractor, specifically identifying provisions relating to insurance and subrogation

## ARTICLE 6 – SEPARATE CONTRACTORS

- 6.2.2
  - Relates to predecessor work by Separate Contractors and Contractor’s obligation to notify of apparent discrepancies or defects in construction or operations
  - Adds language that Contractor is not responsible for discrepancies or defects if not “apparent”

## ARTICLE 7 – CHANGES IN THE WORK

- 7.4 – Minor Changes
  - New language was added to state that if the Architect orders the Contractor to proceed with a minor change (i.e. defined as one that doesn't affect Contract Time and Contract Sum) and the Contractor believes it is entitled to additional time or money as a result of the change, the Contractor is required to notify the Architect and not proceed with the work
  - As with other changes, if the Contractor proceeds with the work without notice, it waives any right to additional time or money

## ARTICLE 8 - TIME

- 8.3.1 – Delays and Extensions of Time
  - Adverse weather conditions specifically identified as allowable reason for extension of time in 2017 version (although generally considered included in “other causes beyond Contractor’s control” in 2007 version)
  - Adds language that the “other delays” can include those asserted by the Contractor, although the Architect will still need to determine it is a valid reason

## ARTICLE 9 – PAYMENTS AND COMPLETION

- 9.2 – Schedule of Values
  - 2017 version provides mechanism for the Contractor to adjust the schedule of values by submitting changes to the Architect with appropriate support. If Architect doesn't object, it will be used for subsequent pay applications

## ARTICLE 9 – PAYMENTS AND COMPLETION

- 9.5.2 – New provision stating that if either the Owner or Contractor disagrees with the Architect's decision regarding a Certificate for Payment, it can proceed with a claim under Article 15
- 9.6.8 – New provision requiring the Contractor to defend and indemnify the Owner from any lien or payment claim provided Owner "has fulfilled its payment obligations"

## **ARTICLE 10 – PROTECTION OF PERSONS AND PROPERTY**

- 10.2.5
  - Minor change to clarify that Contractor must remedy any damage or loss if caused in any part by Contractor even if others may also be liable. Contractor's recourse is to pursue a claim under Article 15.

## **ARTICLE 11 – INSURANCE AND BONDS**

- Article 11 is left with a general description of the kinds of insurance both the Contractor and Owner are required to maintain plus details of the waiver of subrogation, all else moved to Exhibit A
- Waiver of subrogation was revised to clarify that it applies to any insurance in place that covers a loss instead of just Builder's Risk specific to the project (addressing a split in courts)

## **EXHIBIT A – INSURANCE AND BONDS**

- New sections:
  - A.2.4 – Optional extended Owner’s insurance (e.g. business interruption, soft cost insurance)
  - A.3.2.2.2 – adds a provision that the Contractor’s CGL policy must not contain exclusions or restrictions on coverage for 11 specifically identified claims
  - A.3.2.8 – adds a provision that Contractor is required to have PL insurance if required to furnish professional services



## **ARTICLE 12 – UNCOVERING AND CORRECTION OF WORK**

- 12.1.2
  - Clarifies that if work is uncovered and determined to be correct, Contractor is not only entitled to an adjustment in Contract Sum, but also in Contract Time if the investigations caused a delay



## ARTICLE 13 – MISC. PROVISIONS

- 13.1
  - Added provision to confirm that the contract is governed by the law where the project is located and the provision is binding regardless of the application of any state’s choice of law provisions

## ARTICLE 14 – TERMINATION OR SUSPENSION

- 14.1.3 – Revised to allow the Contractor to recover for overhead and profit on work not executed if Contractor properly terminates (including for reasons beyond Owner’s control, such as act of government)
- 14.4.3 – Ironically, this section was revised to remove Contractor’s entitled to overhead and profit on work not executed when the Owner terminates for convenience, but does allow the Contractor to recover a termination fee if agreed by the parties

## ARTICLE 15 – CLAIMS AND DISPUTES

- 15.1.1 – New language was added to the definition of claim to clarify that the Owner’s right to LDs is unilateral and does not require the Owner to file a claim
- 15.1.3.2 – New section stating that if a claim is discovered after Project completion and expiration of warranty period, the parties do not need to go through the Initial Decision Maker

## ARTICLE 15 – CLAIMS AND DISPUTES

- 15.4.4.1 and .2
  - Revised to state that consolidation and joinder in arbitration must be made in accordance with the rules of the governing arbitration administrator and is no longer in the sole discretion of either of the parties



## CONCLUSION

- No earth-shattering changes, but some significant changes that should be reviewed and discussed with attorneys and insurance agents
- No longer able to finalize the 2007 version of the A201 after October 31, 2018 of this year

## Questions?

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