Changes to American Institute of Architects’ Standard Forms Reflect Industry Practice

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The American Institute of Architects’ (AIA) standard form construction contracts are among the most widely used form agreements in the construction industry. Given their ubiquity, the AIA's forms are instrumental in defining the standard relationships between and among owners, contractors, construction managers and architects. As a result, changes to the AIA's forms are of significant importance to the commercial construction industry. In 2017, the AIA rolled out new updates to its 2007 form contracts, including the familiar A101, A102 and A201 contract documents. After an 18-month phase-in period,
the 2007 forms will be retired effective Oct. 31. It is important for the industry and counsel to understand the implications of the changes reflected in the AIA's 2017 updates.

According to the AIA, these once-a-decade updates reflect collaboration among architects, contractors, subcontractors and owners and are intended to reflect changes and current trends in the industry. These revisions range from significant to merely stylistic. In all cases, however, the revisions captured in the 2017 updates require careful attention so that parties fully understand the implications of the updates as they relate to schedule, warranty and other obligations.

Among the most important of the AIA's forms is the A201-2017 General Condition of the Contract for Construction. The A201 form is incorporated by reference into many of the AIA's A-Series construction agreements, including the A101 (Stipulated Sum Contract), A102 (Cost of the Work Plus Fee With a Guaranteed Maximum Price) and A401 (Standard Form Subcontract), among others. As a result, revisions to the A201 are perhaps the most impactful and likely to affect the greatest number of users. This article discusses some of the more notable changes to the AIA A201-2017.

**Section 1.8: BIM/Digital Data**

Section 1.8 recognizes the increasing prevalence of building information models (BIM), and requires parties to establish protocols for using BIM. Use of BIM outside of these protocols will be at the party's sole risk. Given this change, it is important for contracting parties that intend to use BIM to have protocols in place to avoid unintended consequences. Notably, the default requirement of this section is that the parties must use AIA's BIM and digital data exhibit (AIA E203-2013) to govern the development, use and transmission of digital data.

**Section 2.2: Evidence of the Owner’s Financial Arrangements**

The 2007 version of the A201 already provided contractors with the right to request evidence of an owner's financial arrangements. The 2017 changes place even more stringent requirements on owners and give greater leverage to contractors to require proof of an owner's financial arrangements. Specifically, the 2017 update more clearly provides that a contractor has no obligation to commence work until the owner provides such evidence and the contractor shall be entitled to concomitant time extensions until such evidence is provided. Further, if the owner fails to provide such evidence after the work commences, the contractor is again entitled to stop work and receive appropriate time extensions as well as costs for shutdown, delay and startup, plus interest. Of course, the contractor should evaluate all apparent risks before electing to stop work.
Section 3.3.1: Safety of Means and Methods
When the contract documents give specific instructions as to means and methods, the 2007 form allowed the contractor to stop work if it determined that those means and methods were unsafe. The responsibility then fell to the architect to provide further instruction. The 2017 updates change this dynamic. Now, when a contractor determines that required means and methods are unsafe, it bears responsibility to propose alternatives. The architect is charged only with “evaluating the proposed alternative solely for conformance with the design intent for the completed construction.” When negotiating contracts moving forward, it is important for contractors to understand the increased scope of responsibility that will fall to them under the AIA’s new default language.

Section 3.5.2: Warranties
A new Section 3.5.2 has been added to require a contractor to ensure that all warranties are issued in the name of the owner or transferrable to the owner. To the extent the work is performed by subcontractors, this change is likely to lessen the owner’s burdens in enforcing warranties as it relates to parties not in privity.

Section 3.10: Schedules
A contractor’s obligation to submit construction and submittal schedules has become more stringent in the 2017 update. Consistent with what many contractors already provide and what many owners already require, Section 3.10.1 now requires a contractor to specify interim schedule milestone dates, to apportion the work by construction activity, and to detail the time required for each portion of the work. Under Section 3.10.2, the A201 now clarifies that a contractor’s failure to provide submittals in accordance with an approved submittal schedule may preclude the contractor from recovering for any resulting delays.

Section 4.2.4: Direct Communications
Previously, the AIA’s contract documents required an owner and a contractor to “endeavor to communicate with each other through the Architect.” In the 2017 update, direct communication between the parties is now assumed, but the parties are required to include the architect in communications about matters affecting the architect’s performance.

Section 7.4: Minor Changes in the Work
While an architect has always had authority under the A201 to order minor changes in the work that do not affect schedule or cost, the 2017 revisions to Section 7.4 substantially alter the contractor’s rights as it relates to such changes. Under these revisions, it
is the responsibility of the contractor to determine if the minor changes ordered by the architect will have a schedule or cost impact and to provide notice to the architect before commencing with the changed work.

If the contractor proceeds with the changed work without prior notice to the architect of these impacts, the contractor now waives any right to make a claim relating to the changed work.

**Article 9: Progress Payments, Lien Waivers and Indemnification**

The 2017 updates include two changes in Article 9 to reflect what is already common practice regarding mechanics' liens. First, Section 9.3.1 regarding applications for payment has been revised to require the contractor to submit lien waivers and releases from its subcontractors and suppliers as a condition of payment. Under a new Section 9.6.8, if any subcontractors or suppliers do file liens, the contractor is required to indemnify the owner from resulting damages caused by a lien or claim filed by a subcontractor. However, the contractor’s indemnity obligation is conditioned upon the owner’s fulfilling its payment obligations under the contract.

**Section 14.4.3: Termination by Owner**

The 2017 updates have also changed the compensation that a contractor is entitled to recover in the event of a termination for convenience. Previously, a contractor was entitled to payment for work performed, for costs incurred by reason of the termination, and for overhead and profit on the work not executed. This section has been revised in two ways. First, the agreement clarifies that “costs incurred by reason of the termination” include “costs attributable to termination of subcontracts.” Second, a contractor is no longer entitled to overhead and profit on work not performed. Instead, this provision assumes the owner and contractor will agree on a termination fee. Notably, this change is also reflected in the new A101 and A102, each of which assumes that the contractor will be entitled to a termination fee in the event of termination for convenience. While this type of arrangement is not new to the industry, its inclusion as a standard term in the A201 may make it more common. This may require owners and contractors comfortable with the former “overhead and profit” approach to adopt a more forward-looking approach to these issues for purposes of negotiating an appropriate termination fee.

**Claims**

The AIA has made two important changes to its provisions regarding claims. First, throughout the A201, it is specified the matters that are subject to, and must be resolved
through, the claims process under Article 15, where the 2007 version left the matter somewhat ambiguous. By way of example, the A201-2017 now specifies that the following disputed issues must be resolved through the claims process: disputes regarding an owner’s right to carry out work under Section 2.5; disputes regarding adjustments to the contract time arising from construction change directives under Section 7.3.5; and disputes regarding an architect’s certification or withholding of certification of payment under Section 9.5.2.

Second, the AIA has included new timing provisions governing the resolution of disputes. After the initial decision maker decides a disputed issue, Section 15.2.6 allows either party, within 30 days, to require the other party to file for mediation within 30 days. Thereafter, new Section 15.3.3 provides that either party may demand that the other file for binding dispute resolution. If the other party fails to file its claim within 60 days, then both parties waive their rights and the initial decision becomes final.

**Article 11: Insurance**

Finally, the most substantial change to the A201 is Article 11, dealing with insurance. Much of Article 11 has been deleted and moved to a new standard Exhibit A to be attached to the agreement. Article 11, historically, has been among the most significantly modified by users of the AIA’s forms. Requiring input from counsel and insurance advisors, insurance requirements could often be among the most cumbersome terms to negotiate and tailor to the parties’ needs. Removing these terms from the body of the terms and conditions and inserting them into a standalone exhibit should simplify the process and facilitate this sort of review.

Throughout the last decade, many contracting parties (and their counsel) have revised and tailored the AIA’s standard terms to the needs of their businesses and projects. In many respects, the changes in the 2017 updates reflect some of the more common practices and contract terms within the industry. Many of these revisions, however, will have the effect of reallocating the parties’ risks and obligations in subtle, but important ways. When negotiating the contract terms for their next projects, it will therefore be important for users to understand the full scope of these changes to ensure that they can tailor the AIA’s new standard terms in a manner that continues to work for their businesses.