

A Decade in the Making: The 2017 Revamp of the AIA's Construction Contract Documents

by Stephen K. Pudner

The screenshot shows the AIA Contract Documents website interface. At the top is a red navigation bar with the text "AIA Contract Documents" and links for "Renew" and "AGDS Login". Below this is a secondary navigation bar with "Documents", "Purchase", "Learn", and "Support". The main content area is titled "Most used documents" and includes a link to "Browse all documents >". It features a grid of eight document cards, each with a title, a brief description, and a "Revised" badge. The cards are: 1. G702-1992 Application and Certificate for Payment; 2. G703-1992 Continuation Sheet; 3. Revised A401-2017 Contractor-Subcontractor Agreement; 4. Revised A101-2017 Standard Form of Agreement Between Owner and Contractor; 5. Revised A201-2017 General Conditions of the Contract for Construction; 6. G704-2000 Certificate of Substantial Completion; 7. Revised C401-2017 Architect-Consultant Agreement; 8. Revised A104-2017 (formerly A107-2007) Owner-Contractor Agreement.

Reproduced with the permission of The American Institute of Architects, 1735 New York Avenue, NW, Washington, DC, 20006.

Every 10 years, the American Institute of Architects (the AIA) issues revamped versions of its industry leading construction contract documents. Like political scientists attempting to understand the impact of a new census on congressional representation, once a decade, construction lawyers and their clients analyze the AIA's overhauled documents and attempt to understand the impact on their businesses.

In 2017, the AIA revamped many of its construction contract documents for the

first time since 2007, and this article seeks to provide a baseline understanding of the most important changes. Although most clients and attorneys likely view a thorough reading of the AIA contract documents primarily as a remedy for insomnia, an understanding of their terms is critical for protecting against risks and ensuring that construction and development projects run smoothly.

Background on the AIA and Construction Contract Form Documents

Before delving into the 2017 revisions, it is necessary to provide some background on the AIA itself and to address which construction contract forms are covered in this article. In 1857, architects founded the AIA as an industry trade group, and the AIA has created construction contract forms since 1888. While

other groups have developed alternative forms in attempts to compete with the AIA (e.g., the Design-Build Institute of America documents and ConsensusDocs), the AIA forms are still the industry standard for construction projects throughout the United States. This article will focus on the AIA's contract forms, but construction law practitioners and their clients should be aware that non-AIA contract forms exist.

Similarly, while this article focuses on the "A201 Family" of contract forms for use on projects using the design-bid-build delivery model, attorneys and their clients should be aware that the AIA also produces other families of construction contract forms. Specifically, the AIA also produces the "Design-Build Family" of documents for projects on which the design-build delivery model is utilized as well as different families of documents for projects using a construction manager as advisor (CMa) or as contractor (CMc) (e.g., the A141, A142 and B143 design-build documents and A132, A133 and A134 construction manager documents). The AIA issued revised versions of these families of documents in 2014 and 2009 respectively, but these are not the focus of this article.

Instead, this article focuses on the A201 Family of design-bid-build contract documents, which were revised in 2017. These include the A101 (used when an owner and general contractor have agreed to a fixed-sum payment for a project); the A102 (used when an owner and general contractor have agreed that the owner will pay for the general contractor's costs, plus a set fee, subject to a Guaranteed Maximum Price); the A201 (which provides the general conditions to be used in conjunction with the A101 or A102 on a given project); and the B101 (contract between owner and architect). Although contracting parties often negotiate substantial changes to these forms for particular projects, it is critical for construction law practitioners to understand the contents and purpose of the form AIA contract documents when advising their clients in the construction, design, and real estate development fields.

What Changed in 2017?

A comparison of the 2007 and 2017 versions of the A201 Family of contract documents shows extensive revisions throughout those documents. Many of these changes were made to clean up and modernize the documents,

while others implement what the AIA determined to match best or common practices. Further, some of the changes seem intended to protect architects. The following sections summarize some notable examples of these changes. It is important to note that after a phase-in period, any new AIA contract documents will have to be created using the 2017 versions as the 2007 versions will no longer be available on the AIA software program.

1. Changes to insurance requirements.

One of the biggest changes in the 2017 forms is that insurance requirements have been moved from the body of these documents to a new Exhibit A, which includes significantly more detail than did the prior insurance provisions. A short summary remains in Article 11 of the A201, but the parties must now negotiate the new Exhibit A insurance exhibit for each project. Specific revisions to the insurance language relate to the waiver of subrogation, cancellation notice requirements, coverage duration, as well as a new "checkbox" list of additional types of insurance policies for the parties to select.

One change in the 2017 documents that attempts to keep pace with changing times is a new provision relating to insurance for the ever more common use of drones and other unmanned aircrafts. Insurance companies have argued that drones are not covered by standard commercial general liability (CGL) policies by citing the standard CGL policy language excluding coverage for the use of "Aircraft, Auto or Watercraft." While the insured have valid arguments to challenge any such denial of coverage based on this exclusion, they are well advised to consider purchasing endorsements explicitly covering drones (e.g., the CG 24 50 06 15 endorsement). Doing so will buy peace of mind and avoid potentially large and uninsured liability resulting from the use of drones and/or long coverage battles with insurance companies regarding whether their use is covered.

2. Changes to electronic document delivery requirements.

Sections 1.7 and 1.8 of the 2017 version of the A201 contain important revisions to the requirements governing delivery of Building Information Modeling (BIM) and other electronic documents. Specifically, the revised language requires the parties to negotiate and enter into an E203 BIM and Digital Data

Exhibit to establish the requirements for digital data use and delivery, including the specific Level of Development detail called for in those documents. This is an attempt to minimize disputes at the end of the project where one party to a contract demands a higher level of detail in a BIM model than the other party understood it had agreed to provide. *See also* A101 §9.1 and A102 §16.

Importantly, under the 2017 documents, if the parties do not enter into an E203 setting forth the requirements for electronic documents, the party that uses the other's BIM and other electronic documents does so at its own risk. Accordingly, parties to a construction contract negotiation should thoroughly consider and negotiate the requirements regarding delivery of BIM and other electronic documents prior to contract execution.

3. Changes to damages calculation.

The 2017 AIA contract documents also contain a number of important revisions regarding damages calculations. Specifically, A101 §4.5 and A102 §§4.3.3 and 5.1.6 explicitly provide for liquidated damages (LDs) when a contractor does not complete a project within the timeframe required by the contract. Importantly, under the 2017 revisions, if the conditions for LDs are met, the owner is automatically entitled to recover LDs, and per A201 §15.1.2, the owner does not have to assert a "claim" to do so.

One change in the 2017 documents that attempts to keep pace with changing times is a new provision relating to insurance for the ever more common use of drones and other unmanned aircrafts.

Another important change to the 2017 documents relates to an owner's termination of a contract for convenience. Specifically, A201 §14.4 envisions the parties agreeing ahead of time to a set fee that will be paid to the contractor if the owner terminates the contract for convenience. *Compare* 2007 and 2017 versions of A201 §14.4 (replacing "reasonable overhead and profit on the Work not executed" with "the termination fee, if any"); *see also* A101 §7.1.1 and A102 §14.1.3. This is

a fundamental change to the AIA documents that seeks to establish at the contract negotiation phase a reasonable amount of damages the contractor will suffer if an owner terminates for convenience. In light of this change, contractual parties will need to think through what a fair amount for any such fee may be and if that amount should change depending on when during the project the owner terminates for convenience.

4. Changes relating to proof of owner's financing.

Another important change is in A201 §§2.2.1 and 2.2.2, which together revise when the contractor may demand proof of finances and what steps it may take in response. Specifically, under the 2017 revisions, a contractor now is specifically authorized to stop work on the project until the owner gives it "reasonable evidence" that it has adequate financing whenever the contractor identifies in writing a "reasonable concern" about the owner's ability to make required payments. Critically, neither "reasonable evidence" nor "reasonable concern" are defined in these sections, and it is likely that these provisions will lead to litigation as the new contract forms are put into practice.

5. Changes to lessen architect's responsibilities and liability.

Some of the 2017 changes seem intended to lessen architects' potential liability and responsibilities, perhaps reflecting the nature of the AIA as a trade group created by and for architects. This is true even though that the AIA body overseeing the 2017 revisions consulted with and solicited input from representatives from a variety of construction project participants, attorneys, and other trade groups when drafting the revised documents.

The 2017 version of the B101 form contract between an owner and architect contains several revisions that may be beneficial to architects. Although some of these changes are not major, many seem to reflect a shift of responsibility away from the architect (e.g., B101 §§3.5.2.2 and 3.5.3.3 under which the architect previously was responsible for "procuring" bid and proposal documents but now is responsible only for "facilitating" distribution of those documents). Other changes seem to reflect an attempt to provide additional compensation to the architect (e.g., B101 §3.5.3.3 providing that the architect's

work relating to a contractor's substitutions are now treated as an "Additional Service" that requires additional compensation; B101 §6.7 requiring additional compensation relating to revising construction documents because bids exceed the owner's budget).

Additionally, the 2017 versions of the A101, A102 and A201 documents reflect similar architect-oriented changes, even though the architect is not a party to those documents. An example of such a change is A201 §1.1.8, which now explicitly disclaims any liability for the architect based upon the initial decisions that it makes on a project. Other changes seem, at least in part, aimed at lessening an architect's responsibilities on a project. Specifically, A201 §4.2.4 now calls for more direct communication between the contractor and owner instead of through the architect, but explicitly requires the owner and contractor to include the architect in communications that relate to the "Architect's services or professional responsibilities." See also B101 §5.12. Finally, A201 §7.4 establishes that the architect now "may" order minor changes as opposed to the 2007 version when the architect had the "authority to" order minor changes. See also B101 §3.6.5.1.

What Remains the Same in 2017?

While the AIA substantially revamped many provisions in the A201 family of documents in 2017, the general layout and section-by-section flow of these documents remains largely the same (the most notable exception being the new Exhibit A for Insurance and Bonds). Other sections were rearranged and reworded, but not fundamentally altered (e.g., moving interest calculations to A101 §5.3, moving treatment of bonuses and profit sharing to A102 §8.1.2, and moving notice provisions to A201 §1.6).

Accordingly, clients and construction law practitioners familiar with the 2007 versions of the A201 Family of docu-

ments will still largely recognize the 2017 versions. However, they should be careful when navigating the revised documents as some of the changes are not readily apparent, and they may be lulled into a false sense that the provisions they are used to from the 2007 versions remain in place in the 2017 versions.

Conclusion

Without attempting a comprehensive review of all changes, this article provides a primer regarding the AIA construction contract form documents generally and an overview of some notable 2017 revisions to the A201 Family of documents. Attorneys and their clients are well advised to invest the time needed to closely review the 2017 revisions to make sure their interests are protected in future contract negotiations, or to ask an experienced construction attorney to do so on their behalf.



Stephen K. Pudner is a construction and real estate attorney licensed in Virginia, Alabama, and Washington, DC. He is a shareholder in the Birmingham office of the Baker Donelson law firm, and has a dual transactional and litigation focus. Pudner represents owner-developers and contractors in negotiating and drafting complex construction contracts and navigating contractor licensing laws, and represents real estate developers in the acquisition, sale, and leasing of commercial and multi-family real estate developments. He has extensive experience protecting the rights of owners, lenders, design professionals, and contractors in state and federal lawsuits.

Join the Construction Law and Public Contracts Section

The Construction Law and Public Contracts Section provides a forum for its members to share research and ideas related to construction contracting and litigation. It conducts yearly seminars, including its autumn seminar in Charlottesville, which fulfills the complete annual requirement for Virginia continuing legal education credit. Section members receive a discounted registration fee for the fall seminar, the section's *Construction Law Newsletter*, and the *Construction Law and Public Contracts Reference Manual* containing case summaries, statutes, and ALR annotations.

Visit www.vsb.org/site/sections/construction