

# **SIGNIFICANT CHANGES TO STANDARD AIA DOCUMENTS A201-2017**

## **Florida Bar Construction Law Committee Presentation October 9, 2017 – Claramargaret H. Groover – Becker & Poliakoff**

The participants in drafting the AIA 2017 Documents consider the most significant changes in A201 to be:

- Insurance (Article 11 and Insurance Exhibit)
- Building information modeling (1.8)
- Termination (14.4)
- Notice (1.6)
- Liquidated damages
- Payment
- Cost of the work
- Sustainable construction
- Project communication
- Owner financial disclosures

Other changes deserve comment, as well, such as the owner's obligation to provide the contractor reasonable evidence of adequate financing on the project (2.2.1); the fact that the architect, as Independent Decision Maker, no longer must certify the owner's termination of the contractor and thus show partiality to owner or contractor (1.1.8); a severability clause is now included to protect enforceability of the agreement if any one provision is deemed invalid (1.2.1.1);

Additionally, other documents were updated for 2017, specifically between owner and contractor (A101-2017, A102-2017, and A103-2017), between contractor and subcontractor (A401-2017), between owner and architect (B101-2017 and B103-2017). For those with access to the AIA licensed software, the AIA Instruction Sheet also provides a summary of changes. For a thorough review of history, research, and analysis on the 2017 changes to AIA Document A201-2017, see the American Bar Association Forum on Construction Law publication: [The 2017 A201 Deskbook](#) edited by Peter Hahn, Joseph Kovars, and Amanda McVey.

### **Insurance**

A separate Insurance Exhibit A now exists to help the drafter stay current with the insurance industry updates and the newest endorsements. Article 11-Insurance remains in the text of A201 but the separate exhibit, a previously initiated custom feature for transactional lawyers, is now a standard feature for the documents. Parties to the agreement often find that the separate exhibit is more convenient and efficient to negotiate, to provide to the party's insurance broker for review, and to distribute to subcontractors and suppliers who must provide adequate coverage before mobilizing on the project. The AIA made this an exhibit in order to increase the flexibility in an ever-changing insurance market in order to remain current with new endorsements which can affect coverage.

## **Building information modeling**

The BIM and Digital Data Transmission exhibit establish protocols for the parties to follow. Assigning liability between and among users and model managers remains the concern. Still, each party utilizing the BIM relies upon the model at its own risk. (1.8)

## **Termination**

A termination fee, rather than costs of overhead and profit, is identified to be negotiated between the parties. The provision includes the ability of the contractor to include subcontractors' costs of termination for convenience. (14.4)

## **Notice**

General notices are allowed in electronic format. However, written notice of a claim is still required by written notice, served personally or by certified mail/overnight delivery and written receipt confirming delivery. (1.6)

## **Liquidated damages**

The parties can now list the amount of liquidated damages in the Agreement. (8.3.3 and A101/A102 5.1.6) However, the rationale and calculation of such damages is left to the individual drafter to protect the provision from being interpreted as a penalty under the law of the jurisdiction. Provisions such as early completion bonuses, shared savings, and other measures are left to the individual drafter.

## **Payment**

Unit prices may now be adjusted if they become "inequitable" in application for the contractor. (9.1.2)

Changes to the Schedule of Values must be submitted to the architect and serve as the basis for payment application certification. (9.2)

The architect's options regarding certifying payments are clarified to include certifying for the full amount; certify for a portion of the amount; withhold certification and advise the contractor and owner for the basis of withholding certification. (9.4.1)

Lien indemnity is conditioned upon the owner's compliance with its payment obligations under the Agreement. NOTE: The owner has a right to withhold payment for certain justified bases. (9.6.8)

Final payment does not waive the owner's right to audit after final payment (9.10.4).

The owner's right to carry out the work and to be reimbursed for the costs no longer depends upon the owner and contractor agreeing to a change order. The architect may withhold or nullify certification of the contractor's payment application to cover such costs of the owner when the contractor defaults. (2.5)

### **Cost of the work**

For those using A201 with A102 on GMP projects, more clarity is now provided to discrete costs for project workers on offsite locations, negotiated labor rates on the parties' modification to the Agreement, and to address the cost of insurance for the contractor-supplied coverage. (Article 7-A102)

Costs not to be reimbursed now include bonuses and other employee benefits unless the owner approves.

### **Sustainable design and construction**

The drafters have now consolidated the prior exhibits and Guide of Sustainable Projects to a single exhibit which sets forth the owner's LEED goal and describes the comprehensive process to assign responsibility of the parties for the design and construction elements. First, the Architect and owner meet to conduct the Sustainability Workshop to develop the Sustainability Plan and identify Sustainability Measures to achieve the Sustainable Objective. The Sustainability Plan approved by the Owner is then used to develop the design to be incorporated into the Construction Documents.

The contractor is not required to guarantee that the owner's Sustainable Objective will be met but the contractor is responsible to perform the Sustainable Measures.

### **Project communication**

The owner and contractor have more direct communications without the architect being required to be present. However, the owner has to keep the architect up to date on the information exchanged. The contractor must still require that the architect be involved in discussions which affect design. (4.2.4)

The contractor must now provide safer means and methods if the contractor is directed by the owner to perform the work in a manner that the contractor considers unsafe. The architect could overrule the contractor if the means and methods do not meet the design intent. (3.3.1)

The owner may contact subcontractors to confirm that they are being paid. (9.6.4)

### **Owner's financial disclosures**

The contractor can refuse to proceed or can suspend work unless the owner provides timely reasonable evidence of its ability to pay for the work. The AIA commentary suggests that “reasonable evidence” would be a letter from the lender. (2.2)

### **Other provisions worth mentioning**

Performance specifications, used to delegate design liability to design-build contractors and subcontractors, allow the contractor to rely on the performance criteria in the delegation. (3.10.1) Curtain walls and fire protection scopes of work are the most typical areas for delegation of design liability.

Claims must be made within ten (10) years after Substantial Completion. (15.1.2). The period of repose here may not perfectly comply with Florida law (95.11(c)(3), *Florida Statutes*. However, if deemed to be a provision which improperly shortens a statute of limitation it may be challenged under Section 95.03, *Florida Statutes*.

The Initial Decision Maker must be impartial to the parties and is not liable for decisions made in good faith (1.1.8)

The owner must replace the terminated architect with another to whom the contractor has no reasonable objection. (2.3.3)

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