

The New 2017 AIA Contract Documents: What You Need to Know

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CFMA MIDWEST REGIONAL CONFERENCE 2017

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Laurie & Brennan, LLP

- ✈️ Lawyers focused on construction law
- ✈️ 13 Attorneys-all construction attorneys
- ✈️ Chicago and National Practice
- ✈️ No big firm restrictions or conditions

AIA 2017 Construction Documents

 Revised every 10 years

 Changes made to: A101, A102, A103, A104, A105, A201, A401, B101, B102, B103, B104 and B105

Insurance and Bonds Exhibit

-  Separate document
-  Read in conjunction with Article 11
-  Menu of insurance coverages
-  Gives Owner more options to consider

Insurance and Bonds Exhibit

- ✚ Flexibility in developing project insurance requirements
- ✚ Easier to modify/adapt to changing market place without edits to A201
- ✚ Easier to transmit to brokers
- ✚ Same exhibit for A101, A102, and A103
- ✚ Incorporated into A104

Insurance and Bonds Exhibit

 Owner Responsible for:

 Property/Builders risk

 Owner's liability coverage

Insurance and Bonds Exhibit

-  Owner, Contractor, Subcontractors, Sub-subcontractors, and Mortgagees as loss payees
-  Owner assumes financial responsibility for any loss not covered because of deductibles or self-insured retainers

Insurance and Bonds Exhibit

- ✚ Optional Coverages for Owner to purchase:
 - ✚ Loss of Use, business interruption and delay in completion
 - ✚ Ordinance or law insurance
 - ✚ Expediting cost insurance
 - ✚ Extra expense insurance
 - ✚ Civil authority insurance
 - ✚ Ingress/egress insurance
 - ✚ Soft costs insurance
 - ✚ Cyber security insurance

Insurance and Bonds Exhibit

Contractor Standard Insurance:

 CGL

 Umbrella

 Auto

 Workers Compensation

 Employer's Liability

Insurance and Bonds Exhibit

Optional Contractor Coverage

 Jones Act and Longshore and Harbor W.C.

 Professional Liability

 Pollution Liability

 Maritime Liability

 Railroad Liability

 Asbestos Abatement Liability

 Physical damage to property while in storage or transit

 Property owned by Contractor and used on Project

Additional Insureds

- ✦ A201 A.3.2.1 & A401 §12.1.6 have the same requirement
- ✦ Ongoing and completed operations
- ✦ No less than ISO CG 20 10 07 04
CG 20 37 07 04
CG 20 32 07 04 (with respect to Architect)

Insurance and Bonds Exhibit

Key Points:

 Meet with broker and discuss optional coverages

 Create your own insurance exhibit

 Include similar insurance exhibit in all subcontracts – regardless of AIA contracts, to create uniformity

 Review Subcontractor's additional insured endorsements

Owner's Financing (A201 §2.2.2)

- ✚ Stronger – Pre-commencement
- ✚ Upon request from Contractor, Owner shall furnish reasonable evidence of financing
- ✚ No obligation to commence the Work until the information is provided
- ✚ If commencement is delayed, the Contract Time shall be extended
- ✚ Incorporated into A104 (formerly A107) as §8.1.1

Owner's Financing (A201 §2.2.2)

Post-commencement of Work

Owner shall provide reasonable evidence of financing, if:

- 1) Fails to make payment per terms;
- 2) Contractor identifies in writing a reasonable concern of ability to pay; or
- 3) A change materially modifies the Contract Sum.

Owner's Financing

 14 day notice

 Immediately stop Work – of entire job for **1** and **2** above, or, only changed portion of work for **3**

 Contract Time extended, Contract Sum increased by Contractor's reasonable costs of shutdown, delay and startup, plus interest as provided in Contract

Schedule Preparation (A201 §3.10.1)

 More robust/more detail required

 Useful schedule

 Certain details required – dependent on type and complexity of project

Termination for Convenience (A201 §14.4.3)

Damages allowed in 2017 documents:

Work properly executed – yes

Costs incurred by reason of termination – yes

Termination fee – yes, if in Contract. Consider including a negotiated fee: “If the Contract is terminated for convenience, Owner shall pay a termination fee as follows _____.”

Contractor no longer automatically entitled to OH and P on unperformed work.

Termination for Convenience

- ✚ A102, A103 and A104 all include placeholder for “termination fee” to be added.
- ✚ A401 still allows for Subcontractor to be paid reasonable overhead and profit for unperformed work (§7.2.2.2)
 - ✚ This provision sets up a potential problem for Contractor based on A201, A101, A102, A103 or A104
 - ✚ Contractor can be limited to termination fee but Subcontractor gets unearned OH and P

Retention

- ✚ More specific payment terms re: retention
- ✚ List of items **not** subject to retention
- ✚ Reduction of retention option
- ✚ At Substantial Completion, Contractor may submit payment application for retention, subject to stated limitations.

Schedule of Values Changes

-  Submitted to Architect and supported by data *as required* by Architect
-  Architect can object to schedule of values

Notices (A201 §§ 1.6, 3.7.4, 13.3)

- ✚ All notices required to be in writing
- ✚ Electronic transmission (a/k/a email) counts as “in writing” if a method for electronic transmission is set forth in Agreement
- ✚ Exception: Claims may not be submitted electronically (A401).

Indemnity for Liens (A201 §9.6.8)

- ✚ Applies to Contractors and Subcontractors:
- ✚ Must indemnify Owner/Contractor from all loss, liability, damage, attorney's fees and litigation expenses arising out of lien claims
- ✚ Provided that Owner/Contractor has fulfilled its payment obligations
- ✚ A104 includes similar lien indemnity obligation (§15.5.4)

Claims After Correction Period (A201 §15.1.3.2)

-  No decision by initial decision-maker is required for disputes arising after one/two year warranty correction period.

Liquidated Damages Not a Claim (A201 §15.1.1)

-  Owner need not file claim under contract claims process for liquidated damages.
-  A103 now includes a placeholder for liquidated damages to be calculated (§5.1.6)

Specified Means/Methods (A201 §3.3.1)

 If Architect specifies certain means and methods:

Contractor must evaluate jobsite safety in using these means and methods;

If Contractor determines, they may not be safe, it proposes alternative to Architect;

Contractor proceeds with alternate unless Architect objects.
Architect takes no responsibility for safety of alternate.

Design and Performance Criteria (A201 §3.12.10.1)

Language Change:

 Previous: “Contractor shall not be responsible for adequacy of the performance and design criteria specified in the Contract Documents”

 New: “Contractor shall be entitled to rely upon the accuracy and adequacy of the performance and design criterion in the Contract Documents”

Design-Build (§ 3.6.4.3)

- ✦ Architect's review of Shop Drawings and other submittals related to Work designed or certified by Contractor's design professionals is for limited purpose of checking conformance with information given and the design concept expressed in the Contract Documents

- ✦ Architect is not responsible for adequacy and accuracy of the services, certifications, and approvals performed or provided by such design professionals.

Key Revisions to A401

- ✚ Contractor now has affirmative obligation to obtain and provide to Subcontractor within 30 days of request information needed for Subcontractor to prepare a mechanics lien claim. Including obligation to request information from the Owner. (§3.36)
- ✚ Contractor now obligated to provide Subcontractor with copy of payment bond within 30 days of written request (§3.7)
- ✚ Mediation is now mandatory; no check-box option (§6.1)
- ✚ Subcontractor and Contractor must designate in writing representatives with binding authority (§3.1.1; 4.1)

Sub Warranties (§4.6.2)

 Materials, equipment or other special warranties shall be issued in name of Owner, or transferable to Owner

Sub Insurance (A401 §12.5)

 Shall not prohibit waiver of subrogation rights

Submittals (A401 §4.2.3.2)

 Representations by Subcontractors for all submittals:

 Reviewed and approved them;

 Determined and verified materials, field measurements and field construction criteria related thereto, or will do so; and,

 Checked and coordinated the information contained therein with the Subcontract Documents.

Sub Design-Build Services (A401 §4.9, 12.3)

- ✚ Provided by properly licensed design professional
- ✚ Must have Professional Liability Coverage (E & O)
- ✚ Signed and sealed
- ✚ Professional approval (written) of Shop Drawings
- ✚ Contractor can rely on adequacy, accuracy and completeness of services, certifications and approvals
- ✚ Subcontractor can rely on adequacy, accuracy and completeness of the performance and design criteria received from Contractor

Digital Data Protocol

-  A201 requires parties to agree to protocols governing the transmission and use of information (§1.7)
-  Promotes use of AIA Building Information Modeling and digital Data Exhibit (AIA Doc. E203-2013)
-  Contract Documents can be maintained electronically

BIM

 Use of building information model without agreement to protocols governing use and reliance on the information is done at party's own risk, without liability to others

Sustainable Projects Exhibit

 E204-2017

 Exhibit to Owner-Contractor and Owner-Architect Agreement

 Establishes allocation of responsibility among participants

Format Changes

 Commencement

 Progress Payments

 Retainage