

Preparing for the Changes in the New AIA 2017 Forms

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After a decade, the AIA released new design and construction contract forms in April 2017. Some of the more notable changes to the AIA construction contract documents are summarized below.

Probably as a reflection of advancements in the use of technology in the design and construction industry, the construction forms now default to the E203-2013 Document titled Building Information Modeling and Digital Data Exhibit. The E203-2013, which is identified in the AIA construction agreement forms as a Contract Document, requires the parties to create a digital data protocol and, if building information modeling (“BIM”) is to be used, to create a BIM modeling protocol. The A-201 requires the parties to agree on the Protocols set forth in the E203-2013 for the use, transmission and exchange of digital data. The E203-2013 references two protocol forms, the G-201-2013 Project Digital Data Protocol Form and the G-202-2013 Project Building Information Modeling Protocol Form. Any reliance by the Owner or Contractor upon digital data or a building information model without the completion and incorporation of the E203-2013 is at the relying party’s sole risk.

Another new Exhibit, which may be referenced in the construction contract, is the E204 -2017, the Sustainable Projects Exhibit. This E-204 – 2017 sets forth the obligations and terms between the Owner, Architect, and Contractor for a project that seeks a sustainable objective or third-party certification of a sustainable objective or energy or environmental performance such as LEED®.

The A-201 now provides for direct communications between the Owner and the Contractor. While with the past forms all communications with the Contractor were supposed to go through the Architect, under the A201-2017, the Owner and Contractor can communicate directly, although the Architect is to be included in all communications that relate to or affect the Architect’s services or responsibilities.

The method of calculation for progress payments has been revised. For example, the calculation of progress payments on the AIA A-102 Cost Plus with a GMP contract now incorporates the allocation of contingencies under the GMP requiring any contingency for costs to be allocated in the schedule of values. The progress payment calculation under the AIA A-102 is as follows: the Contractor first provides evidence that the costs it has incurred exceed the progress payments previously received plus the current payroll minus the Contractor’s fee. Assuming the costs plus Contractor’s Fee exceed the progress payments and payroll, the actual amount approved is calculated as: a) the percentage of work completed under the GMP; b) with the addition of amounts from any equipment delivered and suitably stored at the site; plus c) the portion of Construction Change Directives that

the Architect believes to be reasonably justified; and d) the Contractor's Fee. The amount calculated is then reduced by: a) the previously paid amounts; b) any amounts for uncorrected defective work; c) any amounts that a Contractor does not intend to pay a subcontractor or supplier; and d) any amounts that the Architect is authorized to refuse to certify under the General Conditions.

The list of amounts that the Architect is authorized to refuse to certify under the General Conditions remains unchanged and includes: 1) defective work; 2) third-party claims; 3) failure to pay subcontractors or suppliers; 4) reasonable evidence that the contract cannot be completed for the unpaid contract balance; 5) damage to the Owner; 6) reasonable evidence that the Contractor will not finish on time and that the remaining unpaid balance is not sufficient to pay the actual and liquidated damages; and 7) evidence of repeated failure to carry out the Work in accordance with the Contract documents. Of course, the final listed item of reduction for progress payments in the A-102 is retainage.

A major change to the construction forms includes removal of a number of insurance provisions in the A-201 and the placement of most of the insurance requirements into a new A101 – 2017 Exhibit A Insurance and Bonds form. Exhibit A is incorporated into the A101-2017, A102-2017, and A103-2017 construction contract forms. The new insurance exhibit incorporates many of the insurance provisions previously included in the A201-2007, although the A101-2017 Exhibit A also has new insurance requirements including specifically identified additional ISO insurance forms.

The Insurance Exhibit A now specifically requires additional insurance endorsement ISO forms CG 20 10 07 04, CG 20 37 07 04, and with respect to the Architect CG 20 32 07 04. It should be noted, that unlike the previous CG 20 10 11 85 endorsement, which covered ongoing and completed operations in a single form “for liability arising out of ‘your work’ for that insured by or for you,” the CG 20 10 07 04 form only covers liability “caused in whole or part by: 1. Your acts or omissions; or 2. The acts or omissions of those acting on your behalf in the performance of your ongoing operations for the additional insured(s). . . .” The CG 20 37 07 04 form only covers liability “caused in whole or part by “your work” . . . “performed for that additional insured and included in the products completed operations hazard.” Given the limitations stated in the specified forms as compared to forms such as the CG 20 10 11 85 form, or the more recent CG 20 10 10 01 and CG 20 37 10 01 forms, parties that are beginning to use the newly required forms for the first time should consult with their attorneys and brokers to determine whether they are in compliance with these new insurance requirements. The parties should also consult with their attorneys to determine whether under the laws applicable to the project, the required forms have minimized exposure to any potential uncovered indemnity claims and are not precluded by any statutory restrictions.

The Insurance Exhibit A requires the Owner to obtain the Builders Risk Insurance but allows the obligation to be shifted to the Contractor. The Insurance Exhibit A also provides for the parties to elect from a menu of coverages including, for example, pollution coverage, professional liability coverage, manned and unmanned aircraft coverage, and cyber security insurance.

Instead of the former requirement for the payment of unearned profits in the event of a termination for convenience, the new AIA Construction forms have a fee to be negotiated in the event of a termination for convenience.

The right to request financial information during the project has been supplemented to allow the Contractor to request financial information if the Owner fails to make payments, or if the Contractor identifies a reasonable concern regarding the Owners ability to make payment. The Owner can now also identify any such information provided as confidential and require the Contractor to maintain the

confidentiality of the designated information.

Under the cost plus forms, the method in which subcontractors are selected has been changed. Rather than the Owner with the advice of the Contractor and Architect determining which subcontractors are selected after submitting bids, the Contractor now selects the subcontractors subject to the Owner's right to object.

An additional obligation now placed upon the Contractor under the A-201 requires the Contractor to defend and indemnify the Owner from subcontractor and supplier lien claims as long as the Owner has fulfilled its payment obligations to the Contractor.

If the Contractor terminates the Contract for cause it is now entitled to reasonable overhead and profit on Work not executed. If the Owner terminates the Contract for convenience, the Contractor is now entitled to a termination fee to be set forth in the Agreement, rather than reasonable overhead and profit on Work not executed.

In conclusion, given the amount of time that has passed since 2007 when the former AIA construction forms were updated, the extent of revisions in 2017 cannot be described as sweeping changes from the prior versions. However, as noted in the summary above, there have been some significant modifications in the new forms that contractors and owners need to consider when negotiating projects in the future with the new 2017 AIA construction forms.

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