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## Introduction

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The American Institute of Architects (AIA) first published standardized general conditions—the precursor to the A201—in 1888. Since then, the AIA Document A201, *General Conditions of the Contract for Construction*, has become uniformly regarded as the industry standard for balancing risks and responsibilities and managing the relationship between the owner and contractor and between the owner and architect. It is perhaps the most widely-used single form of contract for commercial construction projects in the United States. By virtue of the A201's longevity and ubiquity, the expectations of the contracting parties, and the perceived fair allocation of risk, the parties' rights and obligations as embodied in the A201 reflect current industry standards. Often, courts and practitioners will impute these standards into contractual relationships even in the absence of the parties' adoption of the A201 for their project. Indeed, even other publishers of competing contract families have borrowed the spirit if not the letter of many of the A201's provisions. Love it or hate it, the A201 is a foundational document for the construction industry.

As with any major document, the creation and modification of the A201 has not been immune to pressures from both inside and outside the industry. In order to adapt to changes in industry practices, the AIA reviews and modifies its project delivery “families” of documents on a ten-year cycle. In 2017, the AIA released updated versions of the A201 family of documents, which apply to the design-bid-build delivery model.<sup>1</sup> The 2017 revisions to the A201 family of documents were the result of a multi-year review process by the AIA Documents Committee, aided by AIA staff attorneys and outside legal counsel. While the document has always been drafted and published by the AIA, the evolution of the A201 terms are a result of the cooperative input and experience of the AIA Documents Committee with input from other industry experts and stakeholders, including a variety of construction industry associations and attorney groups representing the interests of all construction project participants. Obviously, not all voices and positions can prevail in the final draft of the document, but the AIA Documents Committee carefully considers all comments submitted. Accordingly, despite its longstanding use and influence in the industry, it remains an often-modified document by project participants savvy enough to hire competent construction counsel. There are many reasons why standard construction contracts may be revised, including project- or party-specific considerations, changes in the economy, jurisdiction-specific court interpretations, specific technology use on projects, improved efficiencies or preferences in project management, and so on.

While the rest of this Deskbook contains a comprehensive discussion of all of the changes in the A201, we highlight the following major 2017 changes to the A201:

- **Insurance.** Most of Article 11's insurance provisions have been moved into a separate exhibit, allowing the parties greater flexibility over provisions that are frequently tailored for specific projects. The new exhibit is more complex with multiple check boxes, which require more choices to be made than before. The change in location of these terms to an exhibit will facilitate communication with insurance advisors or brokers. Additionally, it

1. The AIA publishes coordinated sets of agreements for the following delivery methods: design-bid-build; design-build; construction manager as constructor (also referred to as CM at risk); construction manager as advisor; and integrated project delivery.

will make it easier to update insurance requirements, as necessary, based on industry or market changes.

- *Terminations for Convenience.* Historically, owners were free to terminate the contract for convenience but in doing so owed the contractor for costs incurred through the date of termination plus reasonable overhead and profit on unperformed work. The 2017 version of the A201 eliminates the contractor's automatic entitlement to profit for unperformed work and instead requires the parties to negotiate a reasonable termination fee.
- *Dates of Commencement and Substantial Completion.* The date of commencement of the work is now a check-box format with options of (1) the date of the Agreement, (2) the issuance of a notice to proceed by the owner, or (3) a different date as agreed by the parties. The default date is the date of the Agreement. A check box also has been added so the parties can select whether substantial completion occurs as of a specified calendar date or within a certain number of days from the date of commencement.
- *Owner's right to carry out the Work.* Prior versions of the A201 provided that the owner, upon the contractor's default, could correct the contractor's default and issue an appropriate change order deducting the owner's reasonable costs from payments then or thereafter due the contractor. A change order, however, requires an "agreement" by both the owner and contractor with respect to its terms. Because complete consensus might not be reached when an owner undertakes part of the contractor's work, the A201–2017 now provides that if the owner cures, the Architect may, pursuant to section 9.5.1 (Decision to Withhold Certification), withhold or nullify a certificate for payment in whole or in part, to the extent reasonably necessary to reimburse the owner. If the contractor disagrees with the actions of the owner or the architect, or the amounts claimed as costs to the owner, the contractor can pursue a claim.
- *Differing Site Conditions.* Prior editions of the A201 provided that upon encountering differing site conditions, the contractor was to promptly provide notice to the owner and architect, before the conditions are disturbed, and in no event later than 21 days after the conditions were first observed. A201–2017 shortens the time for notice from 21 to 14 days.
- *Digital Data.* Digital practice and the use of building information modeling (BIM) is an expanding and evolving area of the construction industry. While discussion of the AIA standard forms governing the roles and responsibilities of the project participants when exchanging information in digital format is beyond the scope of this book, the A201 has been modified to clarify that the contractor may maintain project documentation at the site in electronic format.
- *Liquidated Damages.* Both the 1997 and 2007 versions of the AIA contract documents included a mutual waiver of consequential damages. Prior versions of the A201 contemplated that the parties might include liquidated damages, early completion bonuses, cost savings, or other incentives by including a parenthetical fill point within the Contract Time article. The 2017 revision adds a specific fill point to prompt discussion and negotiation of these terms.
- *Notice Provisions.* The A201–2017 requires that all notice be written, but it also permits electronic transmission of the notice, with the exception of notice of claims, which may be served only by certified or registered mail, or by courier providing proof of delivery. The default terms for the

electronic format of notice is the use of the AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, which is now a Contract Document. The parties are free to specify alternate terms regarding electronic notice.

- *Contractor's Means and Methods.* The A201–2017 changes the approach from the 2007 documents. The A201–2007 provided that if the owner or architect ultimately directed the contractor to proceed with work in spite of the contractor's safety concerns, the owner was responsible for any loss or damage. The 2017 version provides that the contractor remains solely responsible for, and in control over, construction means and methods. If a contractor has a safety concern with any instructions or procedure in the Contract Documents, the contractor is required to give notice and propose an alternative. The architect's review is limited to conformance with the design intent. Absent an objection, the contractor is to perform the work using the alternative it proposed.
- *Direct Communication Between the Owner and Contractor.* Prior editions of the A201 provided that the owner and contractor should communicate with each other through the architect. The 2017 version recognizes that sometimes it is appropriate for the owner and contractor to communicate without the involvement of the architect. The A201–2017 now provides that the owner and contractor are required to include the architect only in communications that relate to or affect the architect's responsibilities and services. For all other communications between the owner and the contractor, it is the owner's responsibility to promptly notify the architect of the substance of such communications.

This Deskbook identifies and analyzes all of these changes and more. What are some key terms whose substance has not changed in the 2017 version? The use of arbitration as optional to litigation for dispute resolution remains in a check box. So does the opportunity to designate an Initial Decision Maker (IDM), who is different than the architect, although many report that most still choose the architect as the IDM. Also the A201 once again does not require that a CPM be used for scheduling the project. Finally, the disclosure of the owner's financial arrangements during the project continues to be required only when there is a material change in the contract sum, a payment failure, or reasonable evidence of a material concern over the ability to pay. The clause has been tinkered with to provide that, when a duty to disclose arises, the data must be provided within 10 days.

Previous editions of this Deskbook have focused almost exclusively on the changes to the newly published A201. This time, however, the editors decided to go a step beyond just a description of the changes to the new A201, which we cover in detail. For this edition, our goal was to create a single comprehensive point of reference for all sections of the A201. This book delivers a section-by-section analysis of how courts and commentators around the country have interpreted the A201 over the years and attempts to give a current state of the law on the most significant sections. Obviously, a lot of the commentary and court decisions will relate to previous editions of the A201, and we include in our analysis the effect, if any, the 2017 changes might have on the interpretation of modified sections. In undertaking this project, the editors and authors have been careful not to take sides favoring the owner, contractor, or architect. And while we recognize the standard the A201 has set in the industry, we have not assumed that the AIA's language is right or wrong, fair or unfair, balanced or tilted in favor of any party. Our goal was to identify the changes in the 2017 edition of the A201 and to analyze how the A201's

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individual sections have been interpreted over the years. We hope this is the first place you will look when negotiating or litigating a disputed term in the A201. While the editors and authors have tried to be as thorough as possible, it was not possible to include every court decision that has ever considered the A201, nor is it possible to adequately represent the nuances of every viewpoint. Practitioners are cautioned to conduct their own research within the relevant jurisdiction and not to rely solely on the analysis in this Deskbook. This book is not intended to, nor does it, provide legal advice with respect to any specific project or particular jurisdiction. The list of those individuals who provided invaluable assistance in the re-imagined form of the popular Deskbook is too long to print. The editors and authors specifically thank Sarah Forbes Orwig with ABA Book Publishing and Susan Van Bell with the AIA for their review, comments, and suggestions. The opinions expressed in this book are solely those of the respective authors and do necessarily reflect the opinions or reviews of the American Bar Association, the American Bar Association Forum on Construction Law, or the American Institute of Architects.

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