

# 7 MAJOR REVISIONS

## TO STANDARD FORM AIA CONSTRUCTION CONTRACTS

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# The standard construction contract documents issued

by the American Institute of Architects (“AIA”) are widely used in the construction industry to delegate various obligations and rights leading up to, and during, a construction project. Every decade, the AIA issues revisions to the standard form contract documents to address changes and trends in the industry. This article will identify the major revisions, explain the purpose of the revisions and identify which party benefits and which party is burdened by the specific revision.

## 7 MAJOR REVISIONS TO STANDARD FORM AIA CONSTRUCTION CONTRACTS

### Insurance and Bond Exhibit

One of the most significant changes in the 2017 version of the AIA documents is the addition of the insurance and bond exhibit. Prior to the revision, all of the insurance and bond requirements for the owner and contractor were contained in Article 11 of the A201 General Conditions (“general conditions”). In the 2017 version, Article 11 still contains minimal insurance and bond requirements if the parties do not complete and attach the insurance and bond exhibit. However, the insurance and bond exhibit provides an extensive list of mandatory and optional insurance requirements for both parties. Clearly, the intent of the insurance and bond exhibit is to initiate discussion of potential insurance coverages and clarify what coverages each party should obtain for the project.

Notably, the insurance and bond exhibit requires the owner to obtain builder’s risk insurance written on an “all risks” basis. The insurance and bond exhibit also contains mandatory and conditional mandatory insurance requirements for the contractor. As required in previous versions, the contractor must obtain general liability, automobile, worker’s compensation, and employer’s liability insurance. The insurance and bond exhibit also mandates that the contractor obtain certain insurance coverage if performing particular types of work. The insurance and bond exhibit places an additional burden on owners for property insurance not contained in previous versions by requiring owners to maintain the property insurance beyond substantial completion through the corrective work period. While intended to facilitate the customization of insurance coverages for the particular project, it is foreseeable that owners will attempt to push additional insurance requirements onto contractors because of the insurance and bond exhibit.

### Sustainability Project Exhibit

The AIA has reworked its contract documents for sustainable projects. The 2017 revisions include the creation of Document E204-2017 (“E204”) to replace the previous sustainable project documents designed to accompany the general conditions. The E204 is a separate document that can be incorporated by reference to any AIA agreement. The E204 allows the parties to identify the project’s sustainable objective(s) and to develop a sustainability plan through an architect-led workshop.

The E204 sets forth the roles and responsibilities for each of the project participants on the sustainable project. A key byproduct of the E204 is the sustainability plan, which outlines the necessary measures to achieve the sustainable objectives. The sustainability plan is then incorporated as a contract document under the owner/contractor agreement. It is vital that the contractor review and be comfortable with the roles and responsibilities it has been allocated through the sustainability plan. E204 should benefit all parties, as it clarifies the sustainable objectives and identifies who is responsible for the measures to accomplish those objectives.



## Lien Indemnity by the Contractor

The 2017 revisions added Section 9.6.8 to the general conditions under the progress payment section. The new section requires the contractor to indemnify the owner for all losses and expenses, including attorney's fees and litigation expenses, arising out of a lien claim by any subcontractor or supplier, if the owner has satisfied its payment obligations. Some states already require contractors to indemnify owners for lien claims if the owner makes full payment. Clearly, this revision benefits the owner as it places contractual indemnification obligations on the contractor. The contractor is now burdened with seeking similar lien indemnifications from its subcontractors.

## Termination Fee

The 2017 revisions have added a new concept to various AIA contractual agreements. The parties can now agree on the front end to a "termination fee" to be paid to either the architect or contractor if the owner terminates the agreement for convenience. The "termination fee" is referenced in the B101 owner/architect agreement, the A101 owner/contractor agreement and A102 owner/contractor agreement. The "termination fee" replaces the ability to recover reasonable overhead and profit for work not yet performed after the owner's termination for convenience. If the parties do not include a "termination fee," the architect or contractor cannot recover these damages. Since parties can now stipulate the termination fee before executing the contract, it is presumed there will be fewer disputes on what a contractor or architect is owed when the owner terminates for convenience. However, the termination fee is just one item that an architect or contractor can recover upon termination for convenience. The architect and contractor can also recover the "costs incurred by reason of" or "costs attributable to" the termination, which are fertile grounds for disputes. Since the architect and contractor may have additional recovery beyond the termination fee, adding the fee benefits them. The benefit is only achieved if the owner agrees to the fee without striking the additional items that can be recovered under termination for convenience.

## Retainage

Previous versions of AIA owner/contractor agreements briefly mentioned retainage and did not provide guidance on how and when it should be paid. The 2017 revisions address the previous lack of guidance. An entire section was added to A101 to discuss retainage and allows for the parties to identify the retainage, the items that retainage does not apply to, reductions and limitations of retainage, and how and when it is to be paid. The retainage section allows for the parties to set the percentage and warns that such retainage may be limited by governing law, such as a prompt payment act. The new retainage section benefits the contractor since it specifies what items are not subject to retainage and provides clarity on when the retainage should be released.

## Minor Changes Ordered by the Architect

Section 7.4 of the general conditions was revised to address disputes that arise because of minor changes ordered by the architect. Under the 2017 revisions, if an architect orders a minor change and the contractor believes that the proposed minor change in the work will affect the contract sum or contract time, the contractor must notify the architect of its belief before proceeding with the work to complete the change. If the contractor performs the work required by the architect's minor change order without providing the prior notice, the contractor waives any adjustment to the contract sum or extension of the contract time. The revision appears aimed to reduce after-the-fact claims from the contractor for minor changes and burdens the contractor with providing notice each time a minor change is ordered which the contractor believes will affect the contract sum or contract time. This revision benefits the owner and, potentially, the architect depending on the cause of the minor change.

## Substantial Completion and Liquidated Damages

The 2017 revisions also added new sections under Article 3 of the A101 owner/contractor agreement. The new sections allow the owner and contractor to specify different substantial completion dates for different portions of the work. Also, a new section states liquidated damages, if added to the contract, are recoverable if the contractor misses the substantial completion dates. The A101-2017 leaves the liquidated damages section blank for the parties to add. The establishment of different substantial completion dates in the contract decreases the flexibility a contractor may have in completing the project. The option of substantial completion dates for various portions of the work benefits the owner as does the possibility of recovering liquidated damages for these dates being missed.



## The above discussed revisions are just a few

of the changes made to the AIA contract documents in 2017. This article is not intended to be an exhaustive list. When presented with the 2017 version of the AIA contract documents, or any contract, review it thoroughly to understand the agreement you are signing.



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