



Contractor's Guide to Mitigating COVID-19 Risks in the AIA A201-2017 General Conditions

*PRACTICAL STEPS FOR MODIFYING THE STANDARD AIA A201-2017
FOR USE IN THE COVID-19 ERA*

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INTRODUCTION

This guide includes specific recommended changes to the AIA A201-2017 to address new risks created by the novel coronavirus. While the AIA A201-2017 is generally a well-understood contract document, COVID-19 presents new logistical and economic risks that can leave contractors at a disadvantage unless edits are made.

This guide is not intended as a substitute for competent legal advice, and does not seek to address every suggested modification that contractors should consider. Instead, it focuses exclusively on changes implicated by the novel coronavirus to serve as a useful resource to help identify potential risks, and offer potential solutions, that should be carefully considered, related to the pandemic.

In each section that follows, we have included the relevant language of the A201-2017, with our proposed additions reflected in **bold/underlined** type, and proposed deletions reflected as **~~bold/stricken~~**.

ENSURE THAT THE OWNER HAS PROPER FINANCING

The increased risks and costs associated with COVID-19, as well as the heightened possibility of recession, make projects more precarious and increase the risk that owners may default on their contractual obligations. Accordingly, it is more important than ever that contractors verify that owners have sufficient financing to fund the project. The existing A201-2017 language allows contractors to delay commencement until the owner provides evidence of financing, but only affords an extension of time. A delay in starting the project may cause the contractor to incur extended general conditions and other project costs resulting from the extended duration. The contractor should be reimbursed for these additional costs. Notably, the proposed addition mirrors the language already existing within §2.2.2, which allows additional time and costs for delays resulting from financing-related-suspension.

PROPOSED LANGUAGE CHANGE

§ 2.2.1 Prior to commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. The Contractor shall have no obligation to commence the Work until the Owner provides such evidence. If commencement of the Work is delayed under this Section 2.2.1, the Contract Time shall be extended appropriately **and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of delay, plus interest as provided in the Contract Documents.**

SECURE PROTECTION FOR DELAYS RESULTING FROM DELAYED INSPECTIONS

Since the advent of COVID-19, different municipal officials have applied different timeframes and standards in conducting inspections. The proposed language protects contractors from exposure to additional costs and delay damages resulting from unexpected or unreasonable delays or positions by public authorities, whose approval is necessary to complete the contractor's obligations.

PROPOSED LANGUAGE CHANGE

§ 3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit as well as for other permits, fees, licenses, and inspections by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded. **The Contract Sum and Contract Time are based upon a mutual expectation that reasonable positions will be taken by federal, state, or local inspectors and officials ("Authorities"), and that such Authorities shall act with reasonable promptness and diligence regarding issuance of permits, approvals, certificates of occupancy, and in interpreting applicable codes and standards. Contractor shall be entitled to a change order adjusting the Contract Sum and Contract Time for any impact resulting from a deviation.**

ALLOW RELIEF FOR CHANGES IN LAWS AND REQUIREMENTS

A recurrence or increase in the number of COVID-19 cases could bring new rules and legal requirements, which may cause delays and additional costs. The proposed additional language protects contractors from the risk of these potential delay damages and additional costs outside of the contractor's control.

PROPOSED LANGUAGE CHANGE

§ 3.7.2 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit as well as for other permits, fees, licenses, and inspections by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded ("Legal Obligations"). **In the event that Contractor may be adversely impacted by any change to, or increase of, Legal Obligations (as well as any additional health and safety practices required in order to comply with existing Legal Obligations), the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs, plus reasonable overhead and profit thereon.**

USE ALLOWANCES FOR PPE AND OTHER COVID-19 RELATED COSTS

No one can predict what construction will look like in the future. Rules and safety precautions may relax if the pandemic starts to fade or a vaccine is discovered, or they may tighten if the number of new cases starts to rise. Any change in restrictions - whether tighter or looser - may have a significant impact on the cost and schedule. Including a COVID-19 allowance allows the contractor and owner to segregate, track, and address these costs, without sacrificing budget controls for the project.

PROPOSED LANGUAGE CHANGE

§ 3.8.2 Unless otherwise provided in the Contract Documents,... **.3** whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 3.8.2.1 and (2) changes in Contractor's costs under Section 3.8.2.2.

[CONSIDER INCLUDING AN ALLOWANCE FOR COVID-19 RELATED EXPENSES AND DELAYS. THE EXACT WORDING SHOULD BE CAREFULLY DRAFTED BASED ON THE SPECIFICS OF YOUR PROJECT.]

AMEND THE FORCE MAJEURE DEFINITION TO INCLUDE COVID-19 RELATED DELAYS AND COSTS (PART I)

The force majeure section of the A201-2017 (§8.3.1) does not include any specific reference to epidemics or pandemics and does not allow contractor to recover its costs. Instead, contractors seeking to utilize force majeure protections have to rely on the catch-all provision “by other causes that the Contractor asserts, and the Architect determines, justify delay.” While contractors who signed contracts prior to COVID-19 could reasonably claim that the pandemic was an unforeseeable event, the same cannot necessarily be said for new projects as COVID-19 is now a known risk that must be allocated.

To avoid any confusion, contractors should add a rider to be clear that the owner owns the risk of COVID-19 related delays.

PROPOSED RIDER LANGUAGE

In addition to all rights and remedies set forth in the Contract Documents, Owner and Contractor are aware of the ongoing pandemic known as COVID-19, and acknowledge that any delays, additional costs, or both may occur as a result. If Contractor is delayed at any time in the commencement, progress, or completion of the Work, or if Contractor's work is made more costly, by any cause or condition arising directly or indirectly from COVID-19, or any other epidemic, pandemic, or public health event, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs, plus reasonable overhead and profit thereon.

AMEND THE FORCE MAJEURE DEFINITION TO INCLUDE COVID-19 RELATED DELAYS AND COSTS (PART II)

The AIA language is unclear on whether delay damages are – or are not – recoverable in the event of a force majeure event. The primary force majeure clause (§8.3.1) is clear that contractors are entitled to time extensions but makes no mention of any entitlement to costs. A related section (§8.3.3) states that delay damages are not precluded, however, but it stops short of expressly authorizing such damages.

To avoid confusion, this section should be amended to allow contractors to recover for force majeure related costs. Alternatively, this section may be removed if that issue is addressed in an amendment to §8.3.1, or in an appropriate rider.

PROPOSED LANGUAGE CHANGE

§ 8.3.3 This Section 8.3.3 ~~does not preclude~~ **expressly permits** recovery of damages for delay by either party ~~under other provisions of the Contract Documents~~ **where delay is excused pursuant to §8.3.1.**

[NOTE: The proposed language makes costs recoverable for all force majeure events. This can be restricted to COVID-19 related costs as an alternative approach.]

ALLOW RELIEF FOR COVID-19 RELATED COST ESCALATION

Contractors should consider amending the contract to allow relief for significant and unanticipated cost escalation that may result from COVID-19.

Significant inflation resulting from the cost of the federal response, and impact to supply chains may cause material prices to rapidly increase. § 9.1.2 allows contractors to seek relief where the contract uses unit prices, but offers no relief for stipulated sum and guaranteed maximum price contracts based on current material prices. We typically recommend a threshold that allows for an adjustment when escalation on an item is 10% or higher. This allows owners to avoid feeling nickel and dimed, but provides reasonable protection for the contractor.

PROPOSED LANGUAGE CHANGE

§ 9.1.2 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed so that application of such unit prices to the actual quantities causes substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted. **Pricing is based upon reason costs in the industry existing as of the date of the contract. Should labor, equipment, or materials prices escalate on by more than 10% following execution of the contract, the Contract Sum shall be increased by the amount of the Contractor's reasonable costs, plus reasonable overhead and profit thereon.**

**CLARIFY DEFINITION
OF SUBSTANTIAL
COMPLETION TO
AVOID POTENTIAL
COVID-19 RELATED
COMPLICATIONS**

The A201-2017 definition of "Substantial Completion" is based upon the owner's ability to use the Work for its intended purpose. This definition could be rendered moot if the owner is unable to use the work for its intended purposes due to regulatory changes affecting the owner, or imposing additional requirements that are not included in the Contract Documents. To the extent possible, the definition should be clarified to avoid this issue.

PROPOSED LANGUAGE CHANGE

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that (a) the Owner can occupy or utilize the Work for its intended use, (b) the Work materially complies with the Contract Documents and where the remaining work does not prevent such occupancy or use, or (c) where the Work materially complies with the Contract Documents, but cannot be used for such purpose due to causes outside of Contractor's reasonable control.

LIMIT PARTIAL USE OR OCCUPANCY BY OWNER AND ALLOW RELIEF WHERE SUCH USE OR OCCUPANCY IMPACTS CONTRACTOR

The standard A201-2017 language allows the owner to occupy a portion of the Work while the balance of the construction is completed. Under the current circumstances, such use or occupancy may present additional challenges to contractors who are attempting to employ stringent safety protocols and social distancing. Accordingly, the contract should be amended to allow contractors to refuse permission, or to receive additional time and compensation for any resulting impact if permission is required.

PROPOSED LANGUAGE CHANGE

§ 9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Section 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld **provided if Contractor is delayed at any time in the progress or completion of the Work, or if Contractor's work is made more costly, by any cause or condition arising directly or indirectly from such partial occupancy or use, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs, plus reasonable overhead and profit thereon.**

The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

**PERMIT RELIEF FOR
COVID-19 IMPACTS
OCCURRING BETWEEN
SUBSTANTIAL
COMPLETION AND
FINAL COMPLETION**

The standard A201-2017 language allows contractors to obtain relief if Final Completion is delayed through no fault of the contractor. As noted above, it is unclear whether a COVID-19 related delay would satisfy this requirement as an owner could argue that COVID-19 was already a known risk at the time the parties execute the contract. Accordingly, this language should be amended to make clear that COVID-19 related delays will be included among those justifying post-Substantial Completion relief.

PROPOSED LANGUAGE CHANGE

§ 9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor **(including, but not limited to any cause identified in §8.3 above or otherwise for any cause arising from or relating to COVID-19)** or by issuance of Change Orders affecting final completion, ~~and the Architect so confirms~~, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed, corrected, and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of the surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of Claims.

**CLARIFY THAT
THE CONTRACTOR
WILL USE
REASONABLE SAFETY
PRECAUTIONS, BUT
CANNOT GUARANTY
THAT NO COVID-19
INFECTION WILL
OCCUR**

Sections 10.1, 10.2, 10.2.3, 10.2.5 make the contractor responsible for establishing reasonable protocols to ensure the protection of employees working on the project and to avoid and remedy any damage to the property. Contractors should take reasonable precautions, such as increased PPE, staggering and staging of work, and limitations of density, particularly in enclosed spaces, however, even with the strictest safety programs, contractors cannot guaranty that COVID-19 will not spread to workers, or be left to reside on surfaces in a manner that could be claimed as damage to the Work. Accordingly, additional language should be implemented to limit the contractor's exposure in these circumstances. To avoid this risk, we recommend adding an additional section, to clarify the contractor's responsibilities with respect to COVID-19.

PROPOSED LANGUAGE CHANGE

10.2.9 Notwithstanding anything to the contrary in this Section 10, Contractor's sole and exclusive responsibility with respect to health and safety of persons or property (including but not limited to Contractor's employees and the Work) related to COVID-19, shall be to employ [select either of the following] [reasonable safety measures consistent with industry standards] [or] [the COVID-19 safety protocol set forth in Exhibit ____].

**CLARIFY WHETHER
COVID-19
CONSTITUTES
A "HAZARDOUS
MATERIAL"**

Section 10.3 provides a lengthy allocation of rights and obligations for hazardous materials existing and brought on the jobsite. The language differentiates these responsibilities based upon whether the hazardous condition existed before construction commenced or was brought on site or otherwise released by the contractor. It is not clear from the definition whether COVID-19 would constitute a hazardous material under the A201-2017's language. The limited lifespan of the virus on substances, difficulty in proving the actual cause of infection, and various obligations upon the contractor with respect to safety would place contractors at a disadvantage in seeking to argue that the owner is responsible.

We recommend amending Section 10.3 to clarify that the term "hazardous material" does not include the novel coronavirus, as it is unclear whether the existence of the coronavirus would constitute a "hazardous material," but the contractor would likely face an uphill battle in a dispute on this issue, and the contractor is already regulated by other sections of the agreement.

PROPOSED LANGUAGE CHANGE

§ 10.3.1 The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials or substances. If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and notify the Owner and Architect of the condition. **For purposes of clarification, COVID-19 shall not be deemed a hazardous material or substance for purposes of this Section 10.3.**

ADDRESS THE IMPACT THAT CHANGES IN LAW OR STANDARDS OCCURRING AFTER SUBSTANTIAL COMPLETION MAY HAVE ON THE CONTRACTOR'S WARRANTY

The one-year warranty included in the A201-2017 requires the contractor to remedy any work found to be not in accordance with the contract's requirements. To the extent that the contract includes any design-build elements or other provision requiring the contractor to use discretion, the language should be amended to ensure that the contractor is not held to a rising standard that may emerge. By way of example, mechanical systems are often specified on a design-build basis and it is easy to envision that the standard of care may increase as more robust air handling systems are required. In such event, the contractor's warranty should not require the Contractor to bring the Work up to the higher standard.

PROPOSED LANGUAGE CHANGE

§ 12.2.2.1 In addition to the Contractor's obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of any applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of notice from the Owner to do so, unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.5. **Notwithstanding the foregoing, nothing herein shall be construed as to require Contractor to perform any upgrade or modification to comply with any Legal Requirement or other standard that was not in place as of the date of Substantial Completion.**

NOTE: If the owner insists that the contract require the contractor perform such upgrade or modification, the contract should specify that the contractor receive compensation (including reasonable overhead and profit) for such work.

ALLOW FOR TERMINATION FOR EXTENDED COVID-19 DELAYS

The contract allows the contractor to terminate the contract when work is stopped for 30 consecutive days due to a government order, or where the project is to be delayed by 120 days in a 365-day period due to delays caused by the owner.

Safety precautions such as social distancing, staging and staggering of trades, and delays in the supply chain may cause significant delays that change the very nature of a project. Contractors may wish to consider whether they want the right to terminate for such extensive delays. This may be particularly pertinent for contractors working on projects out of state, or where key personnel may reside elsewhere and may have relocated for the project.

PROPOSED LANGUAGE CHANGE

§ 14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, repeated suspensions, delays, or interruptions of the entire Work **(a) by the Owner as described in Section 14.3, or (b) attributable in whole or in part to any epidemic, pandemic, or public health event, including but not limited to COVID-19,** constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

**THE 21 DAY NOTICE
SHOULD BE CLARIFIED
TO ENSURE THAT ALL
COVID-19 RELATED
CLAIMS ARE NOT
DEEMED STALE**

The contract requires the contractor to provide notice of any claim “within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.” Under this language, an aggressive owner could argue that the condition at issue, COVID-19, was known to both parties in February or March of 2020 and is nothing new – even though the ramifications to the project may have been unknown until later. To avoid any dispute, the language should be amended to make clear that COVID-19 related claims will be deemed to arise when the specific impact is felt on the project.

PROPOSED LANGUAGE CHANGE

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party under this section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. **It is acknowledged and understood that Claims relating to COVID-19 shall be deemed to have occurred and the time for notice of Claims shall commence running upon the date that the impact to the Contractor is first observed.**

CONCLUSION

The impact of COVID-19 is not going away. While the number of cases and fatalities are likely to go down, increased precautions will be necessary for some time, and these precautions may become more severe if the number of new cases increases.

Not all changes included in this Guide are appropriate in all circumstances, and not all risks can be identified in advance. That said, contractors who consider these changes will be able to make a reasoned and informed decision in entering into new projects in this new era.

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