



OWNER'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*

Presented By:

Kenneth E. Rubinstein
Boston (617) 226-3868
Concord (603) 233-2545
krubinstein@preti.com

Jason G. Howe
Augusta (207) 623-5300
Portland (207) 791-3000
jhowe@preti.com

Kara N. Sweeney
Concord (603) 410-1500
ksweeney@preti.com

PretiFlaherty

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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, COVID-19 presents new logistical and economic risks that can leave owners at risk unless edits are made.

This guide is not intended as a substitute for competent legal advice, and does not seek to address every modification to the AIA A201 contract that owners 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.

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

RISK OF COSTS DUE TO FINANCING DELAYS

COVID-19 related complications could slow down an owner's funding or cause difficulties in obtaining appropriate confirmation. While the contract allows the contractor to protect itself by suspending work, the contractor should not receive additional compensation in such circumstances. Making this amendment is consistent with the language of §2.2.1, which allows the contractor time, but no compensation, for funding related delays in commencement.

PROPOSED LANGUAGE CHANGE

§ 2.2.2 Following 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 only if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due; or (3) a change in the Work materially changes the Contract Sum. If the Owner fails to provide such evidence, as required, within fourteen days of the Contractor's request, the Contractor may immediately stop the Work and, in that event, shall notify the Owner that the Work has stopped. However, if the request is made because a change in the Work materially changes the Contract Sum under (3) above, the Contractor may immediately stop only that portion of the Work affected by the change until reasonable evidence is provided. If the Work is stopped under this Section 2.2.2, the Contract Time shall be extended appropriately **and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start up, plus interest as provided in the Contract Documents.**

Require Contractor to Cooperate in Obtaining Authorization

In the event of an increase in COVID-19 cases, we may see shutdown or stay-at-home orders that affect construction, or that limit the circumstances in which construction can proceed. In such events, the owner may need the contractor's cooperation and assistance in applying for special permission to proceed, particularly where such permission may be conditioned upon the contractor's exercise of safe building practices.

PROPOSED LANGUAGE CHANGE

§ 2.3.1 Except for permits and fees that are the responsibility of the Contractor under the Contract Documents, including those required under Section 3.7.1, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities. **The Contractor shall provide reasonable assistance and cooperation to assist Owner in obtaining any necessary permissions or approvals required for construction to commence, proceed, or both.**

**MAINTAIN ABILITY TO
SUSPEND WORK TO
ENFORCE SAFE
PRACTICES**

Safe practices, including appropriate social distancing, use of proper PPE, and staggering of trades may be essential to maintaining a safe jobsite and avoiding outbreaks that may put worker health at risk and cause delays and challenges to the project. Accordingly, the contract should be amended to allow the owner to suspend work if the contractor is not acting prudently.

PROPOSED LANGUAGE CHANGE

§ 2.4 If the Contractor fails to correct Work that is not in accordance with the requirements of the Contract Documents as required by Section 12.2, **or**, repeatedly fails to carry out Work in accordance with the Contract Documents, **or fails to perform the Work in a safe manner and in compliance with [all applicable health and safety requirements] [or][Contractor's site specific health and safety plan]**, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Section 6.1.3.

ADD SAFETY TO CAUSES FOR WHICH OWNER MAY SUPPLEMENT

If the contractor fails to exercise safe practices (or commits other defaults), the project may be placed at risk as of an outbreak or infections could cause significant delays and other challenges. In such event, the owner needs to be able to easily step in and help ensure compliance.

PROPOSED LANGUAGE CHANGE

§ 2.5 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents (including but not limited to all applicable health and safety requirements) and fails within a ten-day period after receipt of notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, (a) correct such default or neglect and (b) deduct the resulting costs from payment then or thereafter due the Contractor, including without limitation, the costs for a Separate Contractor, costs for the Architect's services and any consulting or legal costs. ~~Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect and the Architect may, pursuant to Section 9.5.1 withhold or nullify a Certificate for Payment in whole or in part, to the extent reasonably necessary to reimburse the Owner for the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect, or failure.~~ If current and future payments are not sufficient to cover such amounts, the Contractor shall pay the difference to 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 may file a Claim pursuant to Article 15.

MAINTAIN ABILITY TO EXCLUDE HIGH RISK INDIVIDUALS

The contractor must be required to keep the project free of individuals who present heightened risk factors of infection with COVID-19. In addition, the owner needs the flexibility to require the removal of anyone whom the owner reasonably suspects could present a problem in this regard.

PROPOSED LANGUAGE CHANGE

§ 3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons, persons not properly skilled in tasks assigned to them, or persons who within the last two weeks have been (a) having been exposed to someone having been diagnosed with a COVID-19 infection; or (b) having had a persistent cough, shortness of breath, or a fever of 100.4 or higher. The Owner reserves the right to have any persons removed from the Project upon reasonable objection.

**REQUIRE THE
CONTRACTOR TO
MEET COVID-19
REQUIREMENTS**

The owner should have an enforceable right to ensure that the contractor will have adequate safety precautions to avoid unnecessary risk of infection, spread, or exposure.

PROPOSED ADDITIONAL SUBSECTION

§ 3.4.4 In addition to all other safety requirements, Contractor shall provide suitable and a sufficient number of safety related facilities and PPE at the site related to protection against the spread of COVID-19, including but not limited to handwashing stations, hand sanitizer, gloves, masks, faceshields, and other equipment as Owner may reasonably request. Notwithstanding the foregoing, nothing herein shall be construed to delegate or relieve Contractor from having sole and exclusive responsibility for all worksite safety.

REQUIRE CONTRACTOR TO COMPLY WITH ALL LEGAL REQUIREMENTS

It is essential that the contractor comply with all legal requirements. This requirement is even more significant where many states and municipalities have issued requirements concerning COVID-19 safety. Accordingly, the contractor must assume full responsibility for complying with the law, and should not be permitted to use ignorance as a defense.

PROPOSED LANGUAGE CHANGE

§ 3.7.3 If the Contractor performs Work ~~knowing it to be~~ contrary to applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

**CONSIDER
ESTABLISHING AN
ALLOWANCE FOR
COVID-19 COSTS**

The owner should consider establishing an allowance for COVID-19 related costs, such as PPE, increased handwashing stations, and costs associated with staggering of trades. Doing so allows the owner to define up front what costs will be compensable and sets a process for handling and managing such costs as the project progresses.

PROPOSED LANGUAGE CHANGE

§ 3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

[INCLUDE ALLOWANCE LANGUAGE IF APPROPRIATE]

OWNER DOES NOT ASSUME COVID-19 RISK TO CONTRACTOR'S EMPLOYEES

The contract should be clear that the owner is not undertaking responsibility to the contractor's subcontractors and employees, and should protect the owner's right to remove anyone who could place the owner at risk. This is particularly important if the owner observes someone who is not complying with COVID-19 safety precautions, but is also a useful right to have in any circumstance.

PROPOSED LANGUAGE CHANGE

§ 3.13 The Owner shall not be liable to the Contractor, subcontractors of any tier, their employees or anyone else with respect to the condition of the Project site. The Owner shall have the right to refuse admittance to the site to any agent or employee of the Contractor or any subcontractor of any tier whose presence the Owner deems hostile to the Owner's interests. The Contractor shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, lawful orders of public authorities, and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

**CONTRACTOR
MUST TAKE SAFETY
PRECAUTIONS
TO ENABLE
INSPECTIONS**

The contract should be amended to require the contractor to clean the premises before key inspections in order to protect owner safety.

PROPOSED LANGUAGE CHANGE

§ 3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials and rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove waste materials, rubbish, the Contractor's tools, construction equipment, machinery, and surplus materials from and about the Project. Immediately prior to any Owner's inspection for Substantial Completion and Final Completion, the Contractor shall cause the Project site to be completely and thoroughly cleaned and disinfected by professional cleaners or others as approved by the Owner. Without limiting the generality of the foregoing, all concrete and ceramic surfaces, resilient coverings, woodwork, fixtures and equipment, hardware, glass and plastic surfaces, and all metal surfaces shall be cleaned and disinfected, and buffed or polished, as appropriate.

INDEMNIFICATION SHOULD BE BROADENED TO ADDRESS HEIGHTENED RISK

Indemnification is always a significant issue, however, this issue is of greater importance in this dangerous period. We typically recommend that owners strengthen the AIA's indemnity language, but in this period, we recommend including express language to hold contractor's accountable for any health and safety violations that expose owner's to risk and liability.

PROPOSED LANGUAGE CHANGE

§ 3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify, **defend**, and hold harmless the Owner, Architect, Architect's consultants, and **the officers, directors, shareholders, members,** agents and employees of any of them from and against **any and all** claims, damages, losses, **fin**es and expenses, (including but not limited to attorneys' fees, **expert fees, arbitration fees, court costs, investigation and settlement costs**) arising out of or resulting from performance of the Work, **provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the failure to perform the Work in accordance with the Contract Documents (including but not limited to Article 10 or Article 13.6), any** negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder, **or any claim by any employee of Contractor, or its lower tier subcontractors or suppliers (and their employees) based upon a claim that the project should not have proceeded.** Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

LIMIT FORCE MAJEURE TO UNFORESEEABLE DEVELOPMENTS

While COVID-19 has caused unprecedented challenges, contractors entering into new contracts are aware of, and should take reasonable precautions to minimize, the impact of the virus. The contractor should not receive relief where any delay is due to contractor's failure to plan or to take reasonable precautions.

PROPOSED LANGUAGE CHANGE

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other unforeseeable causes beyond the Contractor's reasonable control; (4) by delay authorized by the Owner pending mediation and building dispute resolution; or (5) by other causes that the contractor asserts, and the **Architect Owner** determines, justify delay, then the Contract time shall be extended for such reasonable time as **Architect Owner** may determine. **A new outbreak or recurrence of COVID-19 may be deemed a force majeure event if and to the extent that it causes delays that could not have reasonably been anticipated or foreseen and where the resulting delays could not have been prevented through reasonable preparation. In such event, Contractor shall take all reasonable steps to mitigate any resulting delay. Notwithstanding the foregoing, no adjustments to the Contract Time shall be made: (a) unless the delayed Work is on the critical path indicated in the construction schedule, (b) if the cause of the delay was reasonably within the control of the Contractor or those for whom it is responsible, and (c) to the extent there is concurrent delay or a contributing cause for which the Contractor would not be entitled to an extension of time.**

**PROTECT THE RELEASE
OF RETAINAGE IN THE
EVENT OF COVID-19
RELATED DELAYS**

An outbreak, recurrence, or increase in the number of cases may cause delays that could entitle the contractor to receive a release of retainage before the project achieves Final Completion. Accordingly, owner's should consider amending the contract language to ensure that sufficient retainage will be withheld to protect the owner's interests until the Work is finally completed.

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 **or anyone for whose performance Contractor is responsible**, 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, **provided that in no event shall such payment reduce retainage to an amount below an amount equal to: (a) the reasonable value of deliverables; (b) 150% of the reasonable cost to complete the punchlist work; and (c) the reasonable value of claims for the contractor's breach of its contract and costs incurred as a result of those claims.** 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.

[NOTE: MANY STATES HAVE LEGAL REQUIREMENTS GOVERNING
THE AMOUNT OF RETAINAGE THAT MAY BE WITHHELD AND THE
PROCESS FOR RELEASE]

REQUIRE THE CONTRACTOR TO HAVE A COVID-19 SAFETY PLAN

Sections 10.1 and 10.2 discuss the contractor's responsibility with respect to job site safety. These sections should be amended to clarify that the contractor is responsible for implementing precautions to avoid the unnecessary spread of COVID-19.

PROPOSED LANGUAGE CHANGE

§ 10.1 The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract. **Contractor's safety precautions and programs shall include specific steps designed to minimize the risk of contracting or spread of COVID-19, including provision of all appropriate personal protective equipment, social distancing, avoiding stacking of trades, and other reasonable precautions.**

§ 10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury, **infection or exposure to COVID-19** or loss to

- .1 employees on the Work and other persons who may be affected thereby;
- .2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody, or control of the Contractor, a Subcontractor, or a Sub-subcontractor; and
- .3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities not designated for removal, relocation, or replacement in the course of construction.

**ADDRESS WHETHER
COVID-19 IS A
HAZARDOUS
COUNDITION**

Article 10.3 allocates risk between the owner and contractor for risks associated with Hazardous Conditions. It is unclear whether COVID-19 would constitute a Hazardous Condition as that term is defined in Article 10.3, and confusion on this issue may lead to conflict in the event of an outbreak. The safer, and clearer, practice is to be clear that COVID-19 is not a Hazardous Material, but to deal with COVID-19 strongly elsewhere in the document

PROPOSED LANGUAGE CHANGE

§ 10.3.7 For avoidance of doubt, COVID-19 shall not be considered a Hazardous Material for purposes of this Article 10.3.

**EXTEND THE
TIME BEFORE A
CONTRACTOR MAY
TERMINATE THE
CONTRACT**

Section 14.1.1 allows the contractor to terminate where the project is delayed through no fault of the contractor. Such a termination by the contractor will inevitably increase the owner's costs. While the exact number of days of delay needed to justify termination should depend on the actual duration of the project, extending the period required before termination will reduce the chances that contractors can terminate and walk away from the project.

PROPOSED LANGUAGE CHANGE

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of ~~30~~ 90 consecutive days 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, for any of the following reasons:

- .1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2 An act of government, such as a declaration of national emergency, that requires all Work to be stopped;
- .3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or
- .4 The Owner has failed to furnish to the Contractor reasonable evidence as required by Section 2.2.

DO NOT PERMIT OVERHEAD AND PROFIT ON WORK NOT PERFORMED

Allowing the contractor to receive overhead and profit on work not performed would be punitive to the owner and may incentivize the contractor to terminate the contract to receive the additional compensation without having to perform.

PROPOSED LANGUAGE CHANGE

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, ~~as well as reasonable overhead and profit on Work not executed~~, and costs incurred by reason of such termination.

**ALLOW TERMINATION
FOR COVID-19
RELATED HEALTH AND
SAFETY VIOLATIONS**

While the contract already allows the owner to terminate for “repeated” violations of laws, the owner may want to have stronger protections if the project proceeds in violation of COVID-19 related safety requirements, given that such violations could jeopardize the project, and cause significant reputational risk to the owner.

PROPOSED LANGUAGE CHANGE

§ 14.2.1 The Owner may terminate the Contract if the Contractor:

- .1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- .2 fails to make payment to Subcontractors or suppliers in accordance with the respective agreements between the Contractor and the Subcontractors or suppliers;
- .3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, **or** lawful orders of a public authority, **or its health and safety plan;**
- .4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

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.

ABOUT THE AUTHORS



DIRECTOR

Boston, MA
Concord, NH
(617) 226-3868 (Boston)
(603) 233-2545 (Concord)
krubinstein@preti.com

KENNETH E. RUBINSTEIN

Kenneth E. Rubinstein is a senior construction attorney and co-chair of the Preti Flaherty Construction Law Practice Group. Ken regularly represents all constituents of the construction industry, including contractors, construction managers, owners, architects, engineers, subcontractors, suppliers, sureties, land surveyors, and others involved in the construction process.

Ken has extensive experience assisting clients in all aspects of construction, including structuring project delivery methods, negotiating contracts and subcontracts, dispute avoidance and management, claims preparation and presentation, mechanics lien and bond claims, mediation, arbitration, and litigation. Ken has assisted clients in entering into contracts and resolving disputes regarding billions of dollars of construction.

Ken is a member of the American Arbitration Association's Panel of Construction Arbitrators and was one of the founding co-chairs of the Construction Law Committee of the Massachusetts Bar Association. Ken is currently the co-chair of the Boston Bar Association Construction Law Committee, and the chair of the Associated General Contractors of Massachusetts Programming Committee, and a member of the Associated Builders & Contractors of NH/VT Programming Committee. Ken is also a member of the adjunct faculty at the Boston University School of Law where he teaches a course entitled "Construction Law and Litigation."

Ken has chaired or presented programs at national and regional events, for organizations such as ENR, the Construction SuperConference, the American Council of Engineering Companies (Annual Conference and Fall Convention), Build Boston, Architecture Boston Expo, the Professional Liability Underwriting Society (Annual International Conference), the Associated General Contractors (National), the Association of General Contractors of Massachusetts, the Associated General Contractors of New Hampshire, Associated Builders and Contractor of NH/VT, Massachusetts Bar Association, Suffolk University Law School, National Business Institute, Sterling Educational Services, Half Moon Seminars, and Lorman Seminars. Ken has received recognition from Best Lawyers in America (including "Lawyer of the Year" in 2018), SuperLawyers, and other organizations.



PARTNER

Portland, ME
(207) 791-3000 (Portland)
jhowe@preti.com

JASON G. HOWE

Jason is a Partner in Preti Flaherty's Business Law and Real Estate practice groups, practicing primarily out of the firm's Portland office. He represents clients regionally, nationally, and internationally on matters relating to real estate development, corporate restructuring, business acquisitions, private equity investments, and complex commercial leasing. Jason also represents both lenders and private equity groups in financing commercial real estate development and various hospitality concerns. He provides full lifecycle guidance for businesses from strategic start-up structuring and initial investment, to credit facility, acquisition growth, and ultimate sale. Jason also serves as outside general counsel for several companies.

Jason is a graduate of the University of Maine School of Law, where he served as president of the Student Bar Association and as articles editor for the Maine Law Review. Prior to joining Preti Flaherty, Jason was an equity partner at a mid-sized firm in Kennebunk, Maine.



DIRECTOR

Concord, NH
(603) 410-1500 (Concord)
ksweeney@preti.com

KARA N. SWEENEY

Kara is Co-Chair of Preti Flaherty's Business Law Group and focuses on affordable housing, general business, commercial real estate and securities regulation from the firm's Concord, NH office. She works on a variety of matters in the areas of corporate finance and governance, general business counseling, and the finance and development of commercial real estate. In the affordable housing arena, Kara works with multi-family and senior housing project developers, state and federal financing agencies, commercial lenders and local housing authorities on the acquisition, development and financing of affordable housing facilities. Kara holds a certification from the National Development Council as a Rental Housing Development Finance Professional. She is also a member of the firm's Management Committee.

Prior to practicing law, Kara held management positions in resort operations at two Vermont ski resorts. She resides in Bow, NH with her husband and sons.