



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

*PRACTICAL CONTRACT MODIFICATIONS TO CONSIDER WHEN
USING THE STANDARD AIA A201-2017*

Presented By:

Kenneth E. Rubinstein

Boston Direct Dial: (617) 226-3868

Concord Direct Dial: (603) 233-2545

krubinstein@preti.com

PretiFlaherty

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INTRODUCTION

The AIA A201-2017 is generally a well understood contract document used in a significant volume of construction each year. While the A201-2017 covers most risks, there are a number of areas in which it exposes contractors to significant risk.

This guide includes specific potential changes to the AIA A201-2017 that contractors should consider when trying to ensure that their contract fits their desired level of risk.

Importantly, we do not recommend that all of the changes should be incorporated into every contract. Rather, this guide is intended as a tool for contractors to identify risks in order to make an informed decision as to what risks the contractor is - and is not - willing to accept.

PLEASE NOTE: This guide was first created before the emergence of the coronavirus known as COVID-19. Accordingly, the document does not include edits addressing the risks that are specifically created by the coronavirus. For a list of recommended edits to address COVID-19 related risks, please see our [Contractor's Guide to Mitigating COVID-19 Risks in the AIA A201-2017 General Conditions](#).

Recommended Modifications to the AIA A201

Section	Issue	Change	Purpose
§1.1	Order of Precedence	At the end of the section, add an order of precedence, stating, "In the event of any conflict between or among any of the Contract Documents, the conflict shall be resolved in accordance with the following order, with the first listed document taking priority: (a) change orders, (b) qualifications and assumptions, (c) the A201, (d) the A101, (e) drawings (with detailed drawings taking precedence over large scale drawings)."	If there is conflict, you want to know what will take higher priority. There is no magic as to which document comes first, as long as you know so that you resolve conflicts correctly.
§1.1.2	Architect's Rights	Remove the last sentence of this paragraph.	This change removes language that makes the architect the beneficiary of the contract and entitled to enforce the contract. Neither the Owner nor the Contractor have a vested interest in the Architect having the right to enforce the agreement – this likely results from the form being created by the AIA.

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Section	Issue	Change	Purpose
Add §3.2.5	Change in Laws	Create a new subsection §3.2.5 to read as follows , "Contractor shall be entitled to a Change Order for any costs and damages, and impact to schedule, arising from any change to, or enactment or revocation of, any applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities occurring after the date the parties entered into this Agreement."	If the law changes after the Contractor enters into the contract, the Contractor will still do the work in accordance with the new law, but the Contractor should be compensated for the additional work required. This is similar in concept to an unforeseen condition.
§3.5.1	Termination of Warranty	Add "All warranties furnished under the Contract Documents shall survive for __months following Substantial Completion, and shall thereupon immediately expire. Owner's right to require Contractor to repair or replace any damaged or defective work shall be Owner's sole and exclusive remedy for any breach of warranty under this Agreement."	This addition sets an end date for the warranty. It should match the defect liability period. It also limits Owner's remedies for breach of warranty.
§3.15.2	Clean Up	After the phrase, "provided in the Contract Documents," add the phrase, "after 5 days."	The addition requires the Owner must provide notice and an opportunity to cure.
§4.2.7	Review of Submittals	In the second sentence, after the phrase, in the Architect's professional judgment, insert "provided that such duration does not exceed seven (7) days, and does not affect Contractor's planned schedule for completion of the Work."	The addition imposes a time limit so that the Architect does not have an unlimited time to review submittals, which could slow down the Contractors ability to meet the schedule.

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Section	Issue	Change	Purpose
§6.3	Clean Up	After the phrase, "the Owner may," add the words, "upon reasonable notice and an opportunity to cure."	The Owner must tell the Contractor before cleaning up so that we have the opportunity to fix the problem ourselves.
Add §7.1.4	Percentage Markup for Change Orders	Add language setting a percentage for overhead and profit for additive change orders, but noting no such reduction for deductive change orders. For example, "For additive Change Orders or Construction Change Directives, Subcontractors shall be entitled to a mark up of [%] for overhead and 5% for profit. For deductive Change Orders or Construction Change Directives, Subcontractor shall not be required to credit overhead or profit. Contractor shall be entitled to overhead and profit on the total cost of the changed work, including any insurance, bond premium, and labor burden percentages as stated in the Owner-Contractor Agreement.	Many changes, such as choosing a less costly material, will not reduce our burden or cost at all. Accordingly, reducing our overhead and profit would not be fair.
§8.3.1	Additional Category of Force Majeure	After the phrase "adverse weather conditions documented in accordance with Section 15.1.6.2," add "vandalism, criminal activity, or civil unrest,"	In the event construction is impacted by misdeeds of third parties, the Contractor should not have to bear the impact.
§8.3.	Time and Cost for Force Majeure	After the phrase, "then the Contract Time shall be extended for such reasonable time" add the phrase "and "Contract Sum,"	In the event of a force majeure event, the Contractor may want the right to seek additional cost as well

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§9.3.1.2	Payment for Subcontracted Work	At the end of this sentence, add the phrase, "or where Contractor has a good faith basis for withholding part or all of any payment from its Subcontractor for such work."	This section, if not changed would prohibit the Contractor from invoicing the Owner for subcontracted work if the Contractor is withholding from the subcontractor. There are many situations where Contractor should be entitled to get paid, while withholding from subcontractors, such as where Contractor has a valid backcharge and has absorbed costs caused by subcontractor.
§9.5.3	Owner Joint Checks	Replace this section with "Intentionally omitted."	This section, if not changed would allow the Owner to pay subcontractors directly with joint checks. Contractor may have many reasons for withholding payment on a subcontractor. We do not need the Owner meddling into our relationship with our subcontractors.
§9.6.2	Contractor's Duty to Pay Subcontractors	Replace this section with "Intentionally omitted."	This section if not changed, would require the Contractor to pay all subcontractors within 7 days. We do not need the Owner to be meddling into our relationship with our subcontractors.
§9.6.3	Owner Right to Share Information with Subcontractors	Replace this section with "Intentionally omitted."	This section if not changed, would allow the Owner to share information with subcontractors. We do not need the Owner to be meddling into our relationship with our subcontractors.

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Section	Issue	Change	Purpose
Add §9.8.5.1	Release of Retainage	Insert language consistent with the Massachusetts Retainage Act. Alternatively, insert language stating, "Within fourteen days following the date fixed for Substantial Completion, Owner shall prepare a list of items for correction and remaining items of Work required for Final Completion, and shall provide such list to Contractor together with such amount as necessary to reduce the retainage to an amount equal to 150% of (a) the reasonable cost to complete or correct incomplete or defective work; (b) the reasonable value of Claims; (c) the reasonable value of any deliverables that have not yet been provided. As such Work is corrected, Claims resolved, or deliverables provided, Owner shall immediately release all withheld amounts associated with such issue.	This addition prevents the Owner from withholding excessive retainage or withholding it for an excessive amount of time. The Massachusetts Retainage Act lays out a very detailed process, but the general concept is captured here.
§11.3.1	Contractor's Status as Additional Insured	At the end of this paragraph, please add, "The insurance provided by Owner shall include the Contractor and Subcontractors (including lower tier subcontractors) as additional insureds."	This addition gives the Contractor greater control over the insurance being purchased for its behalf.

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Section	Issue	Change	Purpose
§11.3.1	Clarification of Bond Requirement	Following the new language referenced immediately above, please add, "Where Owner requests such bonds, Contractor shall be entitled to a Change Order to the Contract Price in the amount of Contractor's cost of procuring such required bonds. In such event, the Contractor may satisfy its obligations by providing bonds in the then current version of the AIA Payment and Performance Bond forms.	If the Owner requests a bond that will involve a cost, which must be reimbursed. The additional language addresses the bond form to be used.
§13.3.1	Accrual of Actions	At the end of this paragraph, please add the following: "To the extent permitted by law, any cause of action arising from Work performed prior to Substantial Completion shall be deemed to have accrued no later than the date of Substantial Completion. Any cause of action arising from Work performed after Substantial Completion shall be deemed to have accrued no later than the date such Work was performed."	Many jurisdictions have held that this language removes the discovery rule, so that the statute of limitations essentially starts running on the date of Substantial Completion. This is a shorter period than the statute of repose.

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Section	Issue	Change	Purpose
§14.2.2	Obligation to Pay Subcontractors	Replace this section with "Intentionally omitted."	We may have a legitimate basis for not paying a subcontractor, and should not be at risk of default to Owner for exercising such rights. If the subcontractor places a lien, we should have to protect the owner from such lien, but that should be the extent of Contractor's risk/liability arising from such nonpayment. [NOTE: Nonpayment of subcontractors can create a more meaningful risk in New Hampshire than Massachusetts as liens cannot be bonded in New Hampshire.]
§15.1.2	Initial Decision Maker/Waiver of Claims	Replace this section with "Intentionally omitted."	This section, if not removed essentially requires that if either party learns of a basis for dispute with the other, they have to initiate a Claim within 21 days by sending notice to the Initial Decision Maker. It is easy for the parties to inadvertently miss this deadline while attempting to converse with the other party.
§15.1.4.1	Shared Risk During Disputes	Add the following language at the end of the paragraph, "Notwithstanding anything to the contrary in this Agreement, where Contractor and Owner disagree over Contractor's entitlement to compensation or additional compensation for work to be provided for Work performed, Owner shall pay to the Contractor 50% of the amount of dispute, and may withhold the remaining 50% of such amount pending resolution through Agreement's dispute resolution procedure."	If the parties disagree as to whether liquidated damages should be withheld or whether an additional cost change order is required due to some unforeseen condition, this prevents the Contractor from bearing all the risk as the Owner withholds 100% of the amount in dispute.

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Section	Issue	Change	Purpose
§15.2.1	Initial Decision Maker/Grant of Authority	Replace this section with "Intentionally omitted." At the start of section 15.2.2, please add "Upon receipt of notice of a Claim,"	This section, if not removed would require that claims must be presented to the initial decision maker (usually the architect) as a condition precedent to more formal dispute resolution. In my experience, many owners and contractors do not like giving the Architect this authority.
§15.2.6.1	Initial Decision Maker/Waiver of Claims	Replace this section with "Intentionally omitted."	This section, if not removed would require the parties to escalate a dispute within 30 days from the IDM's decision, or the claim is waived. This may force parties to litigate sooner rather than kicking the can down the road and hoping to avoid dispute.

CONCLUSION

There is no one-size-fits-all solution. 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 on risk in entering into new projects.